>>FEMALE SPEAKER

Good morning, everyone. Welcome to Washington D.C. and to the ICN's unilateral conduct workshop. I'm Cynthia with the council for International Antitrust at FTC Office of International Affairs. My official duty this morning is to cover a few housekeeping matters. Unofficially I wanted to say how delighted we are to have you all join us in person and over the Internet for this event. We put together what I think is a really terrific program and I hope you get out of it as much as the unilateral conduct working group put into planning it. To be sure we have an evaluation form on your seat when you walked in this morning. The questions follow the agenda so please consider completing it as we go along. We do have a lot to cover today and tomorrow. You can help us stay on track by returning from breaks on time. So if you leave the building to go to the Starbucks on the corner or to have a smoke because smoking is prohibited inside the building you should know you'll need to go through security again including the metal detectors. Each of you should have received a nametag when you registered. We ask that you wear that nametag while you're in the building and that you bring it back with you tomorrow. And if you see anything suspicious please let the guards know -- guards know. One last point on security. If the alarms go off in the building proceed quickly and calmly as instructed. If we need to leave the building just exit where you came in at the New Jersey Avenue entrance near the guard's desk follow the crowd of FTC employees across the Street to a gathering point and await further instructions. On to the more mundane, please turn off cell phones and pagers or at least keep them on vibrate. Also we will be serving coffee so I should mention that the restrooms are across the lobby behind the elevator bank. They're not easy to find but there are signs and you can ask the security or any of the FTC staff. Regarding questions more generally. Our intention is this be an interactive workshop and your questions and comments are welcome and encouraged. Those of us in the room can likely hear one another without amplification but we are webcasting the plenary portions of the workshop so we will have two microphones manned by DoJ and FTC staff. So if you have a question just raise your hand and this they'll bring it to you. We only ask when you have the microphone please know shout-outs. That would be hi, mom. No karaoke, no heckling. And please keep your comments or questions concise so that we have time to get to as many as possible. We have arranged to dine around for this evening. If you have see a restaurant that looks interest organize a group that you want to join, sign your name, show up at the restaurant at that time, reservations are under the same sacks. With that out of the way it is my great privilege to introduce you to the Chairman of the Federal Trade Commission, John Leibowitz. [Applause]

>>JON LEIBOWITZ

Thank you for the kind introduction and opening remarks. I came here this morning because I was looking forward to watching all of you do karaoke. You can perhaps wait until you're at dinner this evening. Good morning, I'm John Leibowitz and I on behalf of the Federal Trade Commission and antitrust division of the United States Department of Justice welcome all of you here. We are honored to have more than 100 delegates here today from more than 35 countries. Some of you have traveled great distances to join us for the international competition networks workshop on unilateral conduct. Thanks also to Germany's -- which co-chair it is unilateral working group along with the FTC as well for their efforts in planning this workshop. We value the commitment that you and your agencies have made to fostering understanding and promote convergence in this very, very important but challenging area of the law. And we look forward to working together to strengthen these efforts over the next two days and beyond. Let me also thank Randy Tritell and Liz Krause and their team for their terrific efforts. Superb work putting this workshop together. Now, this is my first time speaking at an international competition network event as Chairman of the Federal Trade Commission.

But I want to emphasize that I intend to continue my predecessor spore of the ICN, which has become the pre-eminent forum, Rob Davis for competition to working to on issues of mutual concern. Bill Kovacic have been very involved and Debbie Majoras the first Chairman I worked with was -- she was as proud of being here at the beginning or present at the creation of the ICN as anything else she's done in the world of antitrust. At the FTC we are about continuity of as much as change and perhaps more than change -- perhaps more than change and we'll continue the continuity with respect to ICN. I see Jim whose report led to the founding of the I CN so thank you so much, Jim. Over the past eight years ICN has grown to more than 100 members. It's played a critical role in improving knowledge and understanding of competition law throughout the world. And the ICN's work has resulted in recommended practices and practical guidance in key areas competition. From mergers to cartels from unilateral conduct to advocacy and really well beyond. Though reaching consensus has been challenging this work has led to important convergence in many areas to the benefit of our agencies and ultimately to the benefit of the consumers we all serve. The unilateral conduct working group was established three years ago to examine changes and challenges involved in addressing dominant firms and promote greater conversions and sound enforcement. After studying how agencies assess single firm conduct and practice in the special issues raised by state created monopolies the working group drafted recommended practices to assist agencies with assessment of substantial market power an application of unilateral conduct rules to stay monopolies the ICN adopted the practices at this year's conference. The working group began a second phase of its work last year analyzing specific types of unilateral conduct, beginning with predatory pricing and exclusive dealing. As a result the working group issued two papers that summarize agency approaches in over 30 jurisdictions with respect to these two types of conduct and the criteria used to distinguish pro from anti-competitive conduct in these areas. Let me assure you, we here in the United States at the FTC and the Justice Department can learn something from the ICNs cooperative approach. Today and tomorrow this workshop will further explore the various approaches to use the agencies used to assess dominance and analyze conduct and determine whether it's anticompetitive. This is very important work but it is not easy. Over the past two years the FTC spent many hours working with the antitrust division attempting to reach consensus on the principles that we guide our agencies enforcement of our unilateral conduct provision at Section 2 of the Sherman act. In some respects the process has been productive. But as all of you know it was also a daunting one because assessing unilateral conduct is one of the most difficult areas in competition law. Now, that's not the say we should give up hope domestically or internationally of achieving greater harmony how to apply unilateral conduct laws. The FTC will continue to work with the antitrust division to determine whether we can reach a common vision of Section 2 issues and in fact with the appointment of my good friend Christine at the head of the antitrust division, I'm very optimistic we can and will succeed. I think Christine is going to be like Jim, a great head of the antitrust division. On the international front, the EC issued a guidance paper and Canada issued draft guidelines explaining enforcement policies in the dominance area. We maintain a constructive dialogue with colleagues on these matters as they participated in our Section 2 hearings. I hope these kinds of interchanges will continue to expand alongside the work done by the ICN's working group as other agencies consider policies in this area. As our economies have grown increasingly interrelated it's more important to ensure we understand the approaches various nations take to assessing the same conduct. Individual agencies sometimes investigate conduct that also raises issues under other country's competition laws. Now, everyone is familiar with Microsoft and various investigations of the company around the world. Other important investigations cross border single official conduct at the FTC in parallel with some of your jurisdictions. I would tell you which companies are involved but I like my job I have had three weeks and I wouldn't have it much long if I did. I know it's early in the morning. But that was actually a joke. When agencies employ -- as you know, when agencies employ conflicting approaches to assessing the lawfulness of unilateral conduct not only does it limit effective enforcement or undermine certainty for companies that want to comply with the law but it also impedes economies and benefits of competition that should otherwise consumers the unilateral conduct working groups conduct on an exclusive dealing revealed while differences remain there's substantial convergence toward basic principles. The large majority of respondents use the cost base test to determine when pricing maybe predatory. If pricing is above that measure, cost is almost always considered lawful and pro competitive. While different countries use different cost standards focusing on the fundamental convergence highlights the value of the working group's approach and moreover by sharing a -- moreover, by assessing various conduct worldwide the group provides a fair basis for understanding and complying with the world's competition laws. Here at the FTC we have long believed in the importance of consensus building. Each of the commissioners only has one vote but we try to find common ground. The workshop seems to me presents another opportunity for consensus. Among the critical functions of the ICN is to bring together officials from many countries to discuss and debate questions, competition law raises. Through continuing dialogue we can narrow those differences and perhaps reach consensus sense on some of these issues. Today panels will discuss the assessment of dominance and durability of market power with further courses involving all the delegates. All of you. Tomorrow the discussion continue with panels discussing anti-competitive effects, exclusive dealing and predatory pricing. Given if t fact we ail have national economies we will probably never achieve a common set of standards and probably nor should we. As all of you know, as Greg and I and Randy know we don't quite have it yet here in the United States. We don't have it here in this room among the officials from the United States. But these sessions should allow for an open exchange of differing ideas with the hope of narrowing differences where possible and understanding the differences that are in those instances where we done have agreement. Seems to me that's the right approach to take. I want to thank you again for attending. We look forward to having an interesting and informative and collaborative next two days. Thank you so much. I'll sit down. We can move on to our first excellent panel. [Applause]

>>RANDOLPH TRITELL

I would like to welcome everyone to Washington and to this workshop. I'm Randy Tritell, Director of the FTC's office of international affairs. I have the privilege of chairing this panel so let's get right into our work for the day. In this panel we're going to explore concepts of dominance or as we say in the U.S. and some other jurisdictions, substantial market power. We'll use those terms, they're in the recommended practices but we want to go deeper into what they mean. What we mean by these word and how we as enforcers as certain whether it exists. The next panel will talk to those issues today. I'll introduce them beginning on my immediate left John Fingleton is Chief Executive Officer of the United Kingdom office of fair trading. To his left Markus Lange head of international cartel. To his left Shlomi Parizat is the chief economist of the Israel antitrust authority. The far left for purposes of this table, Greg Werden from the U.S. Department of Justice. Let's start by considering how does dominance or substantial market power difference from ordinary market power? The recommending practices is the ability to price above the -- dominance or substantial market power is defined as a high degree of market power with respect to the level to which price can be profitably raised and duration that price can be maintained at that level. So to get us

started my first question is going to be how is the degree of market power gauged and what is the threshold for dominance substantial market power? To lead us off I'm going to have Greg Werden to start us on the discussion.
>>GREGORY WERDEN
Thank you, Randy. A defining characteristic of perfect competition is that no seller can affect the price it receives by changing how much it sells. A seller that can affect the market price is said to possess market power. Mark power is defined in the RP and elsewhere as the ability to profitably price more than the competitive level. In this context economists typically identify the competitive price level with short run marginal cost. A quick review of the model of perfect competition explains why. A firm short run marginal cost is the incremental cost of producing the last unit of output.
If the market price exceeds this cost producing more increasing profit. If the market price lessen this price producing less increases profit. Thus in a perfectly competitive market the short run marginal cost each producer equals the equilibrium price. Like in economists I think of market power as the ability to profitably price above short run marginal cost and consequently the measure of a firm's market power is the degree to which its short term profit maximization lead to price of short run marginal cost. The RP correctly states dominance is high degree of market power. Comparing Reece with short run marginal cost is not the way to assess dominance. Like many economists I believe market power does not rise to the level of dominance when a firm is unable to urn a competitive return on its investment. When short run marginal cost is measured using available accounting data prices well above short run marginal costs typically are necessary just to cover fixed cost and earn a competitive return on investment. If the competitive price Benchmark for assessing dominance is to be identified with a cost measure, then all costs uniquely attributable to the product must be included. Including fixed costs and sum costs. An appropriate measure for this purpose would be long

run average incremental cost or LRAIC. My view is that a firm should be considered dominant only if it can profitably price above LRAIC and do so persistently. It follows that one way to establish dominance is to measure LRAIC and compare it to prices over a period of years. Sometimes that might prove useful but typically it's not very practical. Nevertheless, keeping in mind the LRAIC Benchmark can avoid wrongly labeling a firm as dominant. The European commission has stated that it considers the firm dominant if the firm profitably prices above the competitive level for a significant period of time. That's in the recent guidance paper. I take the same position but it's crucial that the competitive level of price is not identified with short run marginal cost. Nearly all firms will be found dominant if the test applied with whether the firm could profitably price above short run marginal cost. In all my years in the antitrust division I think the closest I have ever seen prices short run marginal cost is 15% above. I have never countered that wasn't dominant if that was the test. That's not the test. In assessing dominance the European Commission guidance paper focuses on a firm's discretion. That is the focus but keep in mind dominant firms face constraints. No firm is found dominant the test is whether it could act entirely independently of its customers and consumers. Demand curves constrain monopolists. While looking at constraint is the way to evaluate whether a firm is dominant, the question isn't whether the firm is constrained, all firms are. The question is whether the firm is significantly constrained by competitors that you would treat as incumbents in the marketplace. If so, then it's not dominant. The primary constraints are demand and enter and things like that, then much more likely the firm is document demand. Thank you.

>>RANDOLPH TRITELL

Other panelists want to comment on Greg's remarks?

>>MALE SPEAKER

I agree with that conceptually. With measuring some of these cost con sets in practice is quite considerable so I think conceptually it's a useful framework. But I think we very often lack the type of data and information needed to apply that test. The question to Greg would be how does one operationalize that early morning?

>>RANDOLPH TRITELL

Did you want to respond?

>>GREGORY WERDEN

As I suggested once in a while it might be useful to measure cost but not typically. Typically the best thing to do is to look at what the constraints are, how tightly they bind and whether they're should be construed primarily coming from incumbent competitors or from outside the market. If they're primarily from outside the market dominance is the likely conclusion. Certainly constraint from the demand curve does -- demand curve doesn't prevent a firm from being dominant. Constraint from entry doesn't prevent the firm from being dominant. If the firm is constrained by pricing by competitors it's not dominant. If priced significantly above short run competitive costs but not above long run incremental costs, it's not dominant. That's cases that aren't so easy. There's a lot of cases that are easy. We'll get into later reliance on market share at which point I will say that I think that's very useful. Both as a positive indicator of dominance and a negative indicator of a lack of dominance.

>>RANDOLPH TRITELL

Markus.

>>MARKUS LANGE

I would like follow that up shortly as well. Just I agree that the paradigm that Greg has laid out is a very helpful tool in this context but just for the sake of completeness I would like to broaden the scope a little bit by pointing out that Greg defines power as the ability to profitably charge more than a competitive price and that's actually the definition for dominance that we've taken into the preamble of the dominance RPs of the unilateral conduct group. I would just like to point out that there is this other concept of the relative freedom that the concept definition of dominance according to which a dominant firm has relative freedom from competitive pressures and constraints expressed by independence from constraints set by competition competitors. It's a different concept which is established in quit a number of jurisdictions. Now John Fingleton has asked a question how to operationalize things and there of course one has to say that the price criterion, the price criterion Greg has highlighted throws up this question and the other concept of freedom from constraints does in fact throw up a lot of practical issues as well. So a lot has to be done on a case by case approach looking at each individual case and make qualitative assessments so I think we haven't really found necessarily the definite answer in this context. Thank you.

>>RANDOLPH TRITELL

Not yet but it's early in the day and we're going to get into those in great detail. At the end of the two days we'll know exactly how to do that. Any comments on this point?

>>MALE SPEAKER

Let me say I don't think this relative freedom from constraint is a different concept. I think it's the same concept and it's just a different way of looking at exactly the same thing.

>>GREGORY WERDEN

How free does the firm have to be of the constraints? One way to think about that in the concrete is to compare price with long run average incremental cost over the long term. The concept of relative freedom from constraints is useless unless you know how much freedom is enough. That's a serious problem. Thinking about the relationship between the prices actually being charged or able to be charged in the competitive level is defined by an appropriate long run cost concept gives specific meaning to this relative freedom concept.

>>RANDOLPH TRITELL

There maybe comments and questions that occur to you as this discussion goes on. We're going to try to stay on schedule which means leaving time at the end for your comments and questions so think about them as we go on and just hold on to them a bit. Now let's turn to the next question, the concept of

durability. I will like to turn first to Markus and ask what is durability? And why does that matter? What is the relevant time period determining whether market power is sufficiently durable?
>>MARKUS LANGE
Thank you, Randy. In a general context durability is the ability to exist for a long time without significant deterioration. That's at least definition that Miriam Webster gives. A competition concept context durability is a criterion used when analyzing market power and dominance is generally considered to be a competition problem only if this dominance is durable, that is to say if it persists for a significantly long period of time. So in assessing dominance durability is generally one of the central criteria used as are also market share and barriers to entry or exit or expansion. Typically market share is taken as the starting point of analysis and it's taking as the initial indicator for possible market power. In the further analysis barriers to entry and durability of market power play an important role. So this poses the question, what's the nexus between durability, entry barriers and market share? The issue of barriers to entry and durability of market power are very closely linked. Sufficiently high barriers to entry are practically a pre-requisite for durability of market power. Or to put it the other way around, if barriers to entry for a new comer are low, there can be practically no durable market power. Even at very high market share in the absence of barriers to entry is not a compelling indicator for dominance. So since the question of durability then takes us to the question of barriers to entry, what are barriers to entry? In abstract and general terms, entry barriers -- an entry barrier is an impediment that makes it more difficult for a firm to enter a market. I think it's easier to give examples and categories for entry barriers rather than attempt a generally acceptable definition. And the typical categories for entry barriers are structural barriers, which maybe characteristics of the industry under review. For instance, cost advantage of the incumbent costs, legal barriers set up by the

State, strategic barriers set up by the incumbent like long term supply contracts, exclusivity contracts or proprietary interfaces. And it is effectively such barriers to entry that confer durability to the market position of the incumbent firm. That takes me to the second part of the question. What's an adequate period of time for which market power would have to persist in order to be sufficiently durable? Actually it's very difficult to give a clear answer to this question. And so I won't try it. I just want to point out that most jurisdictions refrain from giving a specific time period. There are a number of exceptions. For instance, at the Canadian competition bureau in its guidelines mention it is period of one year but in general jurisdictions are very careful about being too specific, which perhaps one argument for being rather reluctant and careful in that respect is that the adequate period to assume dominance may vary according to markets under review.

>>RANDOLPH TRITELL

Thanks, Markus. Invite other panelists to come in on this point.

>>GREGORY WERDEN

The question of what the threshold should be for durability is a difficult one. It certainly hasn't been answered by the U.S. agencies or our courts. Economics does provide a little bit of insight I think. If competition prevent as firm from earning a competitive return most economists agree it can't be dominant so seems to me market power isn't sufficiently durable to constitute dominance if it can't be exercised long enough to recover all of the costs including the up front development costs of a product and to earn a competitive return on the invested capital. Not clear exactly where that leaves us but means we're talking about a signature cab period of time for at least some products. There's also pragmatic insight that I have heard a number of times, which bears on when market power is durable enough to constitute dominance. Administrative or judicial process likely to take some years in order to produce meaningful remedy.

If the market would erode a firm's market share before the legal system could act it seems sensible for the legal system to stand down and decide that the market power doesn't rise to the level of dominance. Both of these insights on the relevant time period suggestions it might vary from case to case. As a general rule I'm inclined to say probably at least two years in most cases. And I believe that the Europeans commission guidance paper suggestions two year time frame. So perhaps the longer, perhaps shorter in some cases but somewhere in that neighborhood maybe.
>>MALE SPEAKER
I think we would be unlikely even with two years to do this -- as Greg says if anything were to happen within a two year or five year period given the length of time to bring the cases and get a judgment from the court, you just love entry to sort out the problem and see the market working. I think a relevant factor though is the size of the market and the extent of the harm arising from the practice if this was a market that was incredibly important for the economy, something like banking or something like that. You might think even in the short run it could be significant harm so you might think about prioritizing around consumer welfare. But I would have thought it's very cautious to say two years but one should act. I do think one can go a bit further than Markus in terms of trying to define barrier to entry. Also it is necessary for there to be some identifiable asymmetry between the incumbent and entrance. I think it's a sufficient condition to use a definition; a cost that must be borne by the entrant, the incumbent doesn't have to bear. For example, if the government regulates entry and is only allowed one firm, that's -- somebody else would have to bear, that cost of symmetry is fairly clearly a barrier to entry. It needs to be a sufficient standard. There's a great debate about strategic entry barriers whether first mover advantage and pre-commitment can constitute that asymmetry and that probably requires more analysis to as certain. But I think one can set out that type of framework for thinking about barriers to

entry in the context of asymmetry. That's helpful in terms of durability. But I don't think we should think about just entry costs. All firms have entry costs. It would be a mistake to go down the road thinking just the set-up costs of an entrant does a barrier to entry.
>>GREGORY WERDEN
I agree with a lot of what John said but I'm very nervous about adopting Stigler's definition of barrier to entry. It can produce disastrous results because there's situations in which one can reasonably argue as Stigler did in some cases. The reason isn't something we would call a barrier to entry. So seems to me if you use that definition then you also have to look for other things that are going to keep entry from happening. Which is fine. If you want to look for two different things you can do that. There's some FTC decisions from the '80s which explicitly do that. They look at barrier to entry and then obstacles to entry because they adopt the STIGLER definition. I prefer a more broad definition that includes all obstacles to entry under one umbrella.
>>RANDOLPH TRITELL
Other comments on durability, entry barriers? We have talked about assessment of dominance and durability but what about competitive effects? What role do they play in the overall analysis? Start us off with thoughts on that. We turn to John.
>>JOHN FINGLETON
This is essentially about whether we can infer dominance from conduct on the market. It's very tempting to infer dominance and conduct in the sense if you observe conduct that Greg referred as the textbook models of monopoly and competition there's lots of conduct we're toll in the textbooks that are not really behavior. If you observe that behavior it's tempting to say the firm must have market power. And I would contend that's a fall friend in the sense that certain words that look the same across languages actually mean different things. So think of it as price discrimination. In this textbook price discrimination is thought in the context of monopoly pricing. There's no good simple

model of competitive price discrimination. Yes, we look at firms who charge different prices for men and women and you ask the question why somebody doesn't set up a woman's only hair dressing that cuts price for women and sort of arbitrages that and they don't do that. Because there's an equilibrium in the market for yield management in lots of markets. We see it in hotel, airline, competitive markets where the equilibrium is one that involves price discrimination as a form of yield management. There's some good papers Armstrong and Vicars and others that are complicated trying to explain how they exist. I'm reminded of a comment by a former Irish Prime Minister Fitzgerald who had at a cabinet meeting said it works in practice but how does it work in theory? About a government proposal. Price discrimination seems to work in practice in lots of competitive markets but yet in theory we look at it primarily in the context of market power. So I think it's wrong for example to infer when we see price discrimination that a firm is dominant. Otherwise we'd go running after hairdressers and other things. So we need to have a better filter than that. So a simple example that shows the risk of over-enforcement and deterrents of efficient behavior or efficient business. The -- another area where there's risk of this inference is on the buyer side of the market. Very often buyers particularly this happens in retail markets and agricultural product markets. Buyers by products that are difficult to transport in local markets where the buyer is very big relative to the seller. The buyer which is then becomes the food processing company or a supermarket operates in quite a competitive downstream market. It's very easy to infer that that buyer has market power over the people it's buying from by virtue of the conduct. For example, if it can take it or leave the offer and say produce at this price or we won't buy from you but from another farmer locally, that looks like market power. I think it would be very long wrong to infer power without analysis of market power in the downstream market because part of the responsibility of retailers and other aggregators is to drive cost reduction upstream. The way they do that is playing off one supplier against another. That whole process of playing off one supplier or another is not analogous to the way in which competitive businesses should treat consumers, the opposite. So we want that competitive to drive efficiency in the economy. So we need to be very cautious about any inference of buyer power without there being power on the seller side as well. There are cases however where -- so both are examples of type 2 error of over-enforcement where I think you need a full analysis of whether the firm has a dominant position in the market. As described through barriers to entry, market share, other things. There can be cases where conduct can increase dominance. Think of cases like ever greening in pharmaceuticals where patients get extended through behavior two cases in UK were Genzyme. The firm may extend dominance through the conduct. We have also cases where the firm may not be dominant until the impact of the conduct has taken place. So the conduct is one that generates dominance. So we should be alert to those possibilities. But I don't think that negates my earlier comments, the big risk here is with over-enforcement, not under-enforcement, using conduct to infer dominance is a false frame that leads to circumstance lady in logic rather than inferring it through conduct.

>>RANDOLPH TRITELL

A lot of stimulating thoughts on the table. Others would like to react to those?

>>GREGORY WERDEN

Okay. I endorse pretty much everything had to say. I think it is theoretically possible but very dangerous in practice to infer dominance from conduct. Anti-competitive conduct plainly isn't responsible every time the market doesn't perform as well as it might. Yet it's not easy to know when reason is anti-competitive conduct. The result of intense competition on the merits tends to look just like the result of anti-competitive exclusionary conduct. And real world markets often don't work perfectly even when some competitor is dominant. There are some situations in which it might be clear that a competitor is sacrificing current profit to embark on a campaign that is expected to pay off only because it destroys competition. Sometimes you can clearly identify that. And I wouldn't hesitate to label it anti-competitive and might even infer dominance in that situation. But that's very much the exception rather than the rule. There are lots of situations in which the strategy is to lose money even when the reason isn't exclusionary. Legitimate investments rarely pay off right away. A lot of them don't pay off at all. And strategies aren't suspicious just because they only pay off because they succeed in taking your rival's customers away. That's competition. So it is very tricky to distinguish dominance from looking at conduct. While I'm open to the possibility of maybe some day doing it, by and large I think it's way too dangerous.

>>RANDOLPH TRITELL

Anybody else on the panel want to offer thoughts on this? Let's ask -- we have been talking about dominance. Is it the case that there can be only one firm that's dominant in a market or is it possible that a market can have several dominant companies? And to lead us off on that discussion, let me ask Shlomi.

>>SHLOMI PARIZAT

Thank you, Randy. Seems to me that my first instinct was to say no. A single market cannot have more than one dominant firm otherwise you have a market definition that's too broad. If you define -- if the whole prospect or goal of defining markets is to be able to identify those -- the set of products that market power can be exerted on then you completely miss this goal if you have, say, 3 dominant firms in the same market. But this was only my initial thought and taken to the extreme, this could be or this could mean over-fragmentizing markets. Say a case of land to mobile call in England and several countries markets were defined by the network that -- and the call, the network on the receiving side. So you had market for each and every phone -- mobile phone company. Now, the question is, is -- aren't we over-fragmentizing markets in this context? Then I got to think maybe we can find several examples of markets with several dominant firms in them. And I'll try to give two examples to see how this goes. If you think about music, take time for example, these are hypothetical examples, Sony and Time Warner each has a portfolio of records that they own or produce, and the downstream sellers, the record companies, need variety in order to account for heterogeneity because we all have different preferences and you want to go into a shop and have all the variety on the shelf. Wouldn't be the case that both Sony, for example and Time Warner could exert significant market power with respect to the whole seller segment? Because if each and every one of them is needed to be on the shelf -- I think some -- an example would be the Solomon case, called the Markline case in Australia where a firm with a rather small market share, 20% was found to be dominant because it had to be on the shelf. It was a skiing brand case. If you think about this example in the context of what we have been just been discussing there would be no new entry because you can't reproduce the beetles for example. There is no expansion. IP rights will make the producer rights durable because it will take a very long time to say. So this is one example. Another way -- another one would be media buying. If you take, let's say a market with four channels broadcasting channels and four media buying firms, and if you think of the cost structure of a commercial channel that relies solely on selling ad time, you would see that in most cases they can't afford to lose say 25% of their advertisements. Because the fixed costs are very high and the margin are not so high. So if each and every agency could turn to each of the other channels and if you assume away or don't account for audience differentiation in this case, then you could have a case where each agency only holding 25% of the market will be able to exert market power regarding each of the channels. I think in fact this is the mirror image of why we cannot use or we should use market shares only as starting points and not as definitive proof of dominance. The easier cases when a firm has a large market share, a starting point. But I think the trick was here to try to think of an example where even a small market share would not be indicative of a firm not being dominant. Thank you.

>>RANDOLPH TRITELL

Thank you. Let's see if we can get some reactions to the idea of multiple dominance and whether it makes sense in the media markets or in a unique or how far do you take I, is a single hit song enough to infer dominance?

>>MALE SPEAKER

Can I attempt an example, the (indiscernible) case in the European court of justice involves three different television companies supplying listings to magazine, weekly television listings magazine. And the market was really only useful if you can cover all the television channels. So in some sense you could argue although the market for television viewing each of them had market share according to viewers on the advertising side not all advertised in fact. There was an argument that the -- very strong complimentarity which gave each of the three of them residual market power. But these type of cases are unusual. The case was originally brought under Article 81 and they switched the argument to 82 later in the day.

>>JOHN FINGLETON

Where there is market power it is primarily an artifice of the fact that we have the calling party pays and not the receiving party pays, as in the United States. If you have that type of incentive misalignment in the design of call charges you can get -- the other way I think this becomes a problem is with after markets in cases like Kodak and even cases like Aspen skiing with you get narrow market definition. I think we should think carefully about the use of consumer powers to deal with some of the worse side effects of after market problems, adopted in the UK rather than taking that very narrow market definitions to deal with those. You can see how you could define every printer company to have market power vis-à-vis its own toner. But I'm not sure that's a happy path to go down.

>>RANDOLPH TRITELL
Markus.
>>MARKUS LANGE
I would agree with that view that there maybe very, very specific and special cases where these dilemmas of several -- having possibly several dominant companies in one market may come up. But I would agree that this concept would have to be limited to very, very select scenarios and I guess for the most part what we're looking at is bilateral power in these cases, bilateral power between in a horizontal arrangement which is better captured conceptually by the idea of just looking not at market power and dominance as such but at a superior power position in the bilateral bargaining situation. Which in some jurisdictions is captured by a specific provision that kind of is separate from the general dominance construction.
>>GREGORY WERDEN
I want to primarily disagree here. Seems to me a market can have several competitors each with a significant degree of market power or bargaining power. But I'm -- despite the examples offered up I find it difficult to see how several competitors can be dominant at the same time. Some of the examples described are examples of bargaining power but why does it rise to the level of dominance? It wasn't explained. I doubt it does. John Fingleton gave an example of complimentarity. That's curious example because that means the products aren't substitutes, they're compliments which means they really done trade in the same market. They serve some difference function. I think that's a different story altogether. In after markets case he was reluctant to find a separate after-market for each brand. So am I but that's because I'm reluctant to point they're dominant. But I don't rule out the possibility. There maybe a second market for each brand F. there is then each brand can be dominant in its after market, not terribly likely but it's theoretically possible. If so, that's the way the market should be defined. The tradition at least in the United States is to have this argument in the market delineation context. That's -- delineation

context. That's a good context to have it. You look at constraints on dominance are almost the same as the constraints that define the market. If the constraints are sufficient to define the market, then you would say okay you have a distinct market with a dominant competitor in it. I'm not able to conceive a situation where I want to say a market with three dominant firms in it. Not willing to go there.
>>MALE SPEAKER
I presented the following argument. When there's complimentarity, I leave complimentarity even aside and say when variety matters on the demand side of the market and several suppliers have distinct, maybe not distinct paths that make up this variety, take for example Sony music and Time Warner music, would you be willing to solve this through a market delineation process? There's a market for Sony music or market for Time Warner music. It doesn't seem to way to go. It may be better to say there's a market for pop music. For example. And then again you have to say two dominant firms in that market. That was the argue. I was presenting.
>>GREGORY WERDEN
But you can have ten dominant artists in that market because they don't compete with each other so much. Their music is different. Somebody might like one and not another one and I might not like any of them. But copyrighted material is a little odd, it's hard to talk usefully about dominance of market definition on copyrighted material. A novel can be a market unto itself as can a piece of music. Antitrust has no tradition of defining those markets but that might in some cases be the best way to think about it. We almost never have competition problems so we never need to think about it. Where we have a competition problem is in a different level of the industry. It maybe in distribution, it maybe in publication. And there the market isn't defined around title, it's defined around something else. I don't think you can have a lot of dominant firms.
>>RANDOLPH TRITELL
Before we move on in our panel discussion, it

occurred to me some of you might have some thoughts or questions and we can take a short interlude and take a comment or question or two from you. Okay. I think we have a microphone so we have a question here. If you would identify yourself.
>>MALE SPEAKER
I am (indiscernible) from Brazil. Taking opportunity to participate in the discussion on more than one dominant firm in the single market. A question just occurred while the panelists were discussing. We may assume that there are certain markets where the leader or the -- or there is a firm with notorious dominant position. Followed by -- I know a number of competitors. If you are to admit that there maybe another dominant firm on the same market what would be our first impression in case this notorious dominant firm filed a complaint against a competitor? Would it be -- what would be our first reaction?
>>RANDOLPH TRITELL
Anybody want to take a try at that?
>>MALE SPEAKER
The way I understand the question it's a similar argument to having buying power? Just imagine there is a market where there is a notorious dominant firm. And imagine that on the same market someone argued that there are other dominant firms that may for this reason adopt antitrust practices. What would be our reaction if the notorious dominant firm filed a complaint against a rival claiming that they are also dominant?
>>MALE SPEAKER
I would say fight it out in the courts and Lee the agencies -- leave the agencies alone because we have better things to be doing. That's the pragmatic answer.
>>GREGORY WERDEN
We certainly give that answer in the United States because we're primarily a system of enforcement but I'm not sure that works everywhere.
>>MALE SPEAKER
What I would think is in the case you're describing it is less likely that competition will be severely damaged by this action and therefore I'll go with

what John Fingleton said. If they can fight it out in court I don't think that the country has to do their work for them, in this particular case.

>>MALE SPEAKER

In the case that you describe I don't know whether it's particularly realistic that the supposed dominance of this one company really comes out in its conduct against this notoriously document company. I can't imagine a situation where that would be. And so I couldn't quite imagine that this notoriously dominant firm really has a grievance and ground to raise complaints. The more realistic situation I think would be that the conduct comes out negatively vis-à-vis the other market side, vis-à-vis the customers or suppliers, which then takes us again to the question of superior bargaining power in the vertical relationship where I would argue there are other concepts that are more useful to capture that than the general idea of dominance.

>>MALE SPEAKER

The reason I raise this question, bottom line they're discussing here is why does antitrust -- what is the objective of antitrust? Are we supposed to settle litigation among firms or are we supposed to look at the other side of the markets? Like demand, for instance or suppliers? I think Markus's answer leads us to this -- to the conclusion that let firms litigate among themselves on another place. For us it affects on the other part of the prediction chain are more relevant.

>>RANDOLPH TRITELL

That's a great question and this I think is shows the great discussion we're going have in the break-out sessions. I have half the room signaling they would like to come in now which is a great sign of a lively discussion but some of that I'm afraid is going to have to hold for later. Let's get two more comments on, now. One over here, please.

>>FEMALE SPEAKER

I'm (indiscernible). I want to ask a question about something you said about durability. You mentioned the fact that if the time to calculate the time your legal system is going to take to process your case and you think oh, well, at the end of that time there's bound to be more players in the market so this isn't a case we're going to take. I can see that might be an element in a decision for a competition authority as to whether or not to take a case. I can see the fact that it's not desirable to intervene quick in dynamic markets. But I would have a problem with the idea that you say our legal system is slow and therefore the company isn't dominant? That's maybe cutting a few corners there. If you look at a situation where you could have a market where a firm is saying gosh, we have another three years before the neighboring incumbent next door is big enough to come into the international market. We have three years and we can do X, Y and Z to maintain our market position or to achieve particular financial goals within that time. That doesn't mean they're not dominant. The fact there's a realistic time element to me doesn't mean they're not going to cause particular discharge for consumer witness that time period.

>>MALE SPEAKER

The legal system takes a long time therefore we shouldn't intervene. I think we're ail faced with the prioritization issue of what cases should we focus on. I think those cases of -- that look like dominance where the market is going to resolve the problem, I think they won't get into a philosophical debate whether that is dominance, what's the duration but I think it's more easily resolved through a prioritization thought exercise. I also think there's another side which is deterrents. So for example, with something like the Microsoft litigation, though the market may move on you think of other markets where the issue arises and where you want to establish a standard for behavior and clarify the law is different. In that type of situation, I made the point if the market share is very big or very important market then you would look at it. We use prioritization principles to try to distinguish these cases and we ask what's the strategic significance. And the strategic significance we think of factors like is this a practice of behavior that could arise in other markets? If you thought there was money markets in the economy where there's likely market power that could rise for a period of years you might want to establish a standard around that so you can more easily deal wit in the future. I think one needs to be cautious if you think entry is going to solve the problem to just use that to let the market work. I don't go all the way with the U.S. Supreme Court in thinking that monopoly is the best stimulus to competition. But I do think that if somebody raises price above cost, that induces entry within a matter of two, three, four years, that looks as though it's probably on the edge of the market working rather than the market not working.

>>GREGORY WERDEN

The Supreme Court said no such thing.

>>RANDOLPH TRITELL

I want to take one more comment before we move on. Alan indicated an interest -- I know some of the discussion pertained to a case that was taking place dug your -- (off mic)

>>MALE SPEAKER

If there is a prolonged economic downturn will that affect in theory the assessment of dominance and in practice will there be fewer cases of dominance found? The Australian case quite a few years ago involved record companies refusing to supply small retailers who were bringing in so-called parallel imports. And although the record companies had a market share down at 20%, they were nevertheless found to have market power because any record shop that did not carry their label, for example say they didn't carry Michael Jackson then no consumer would go to that record company. It was therefore concluded if one or two record companies -- stores they had market power -- a much contested case with the top economic experts around the world giving evidence and the court went that way.

>>RANDOLPH TRITELL

We're going to have more time for discussion a little later on. At this point I want to talk -- turn to the next phase of our panel discussion which is going to be on role of market share in analyzing dominance. On this topic I want to start by asking should there be a Safe Harbor market share by which a company would not be found dominant? If so, what level should the Safe Harbor be an should the Safe Harbor be entirely safe? To lead us off on that discussion John Fingleton.

>>JOHN FINGLETON

I think in a very bad storm no harbor is safe. One sees both severely damaged in storms even when tightly moored. If you take the logic of the last discussion, can we have more than one dominant firm in the market. If the answer to that question were no, then that might lead you to conclude that you have to have at least 50% market share to be dominant because you think that establishes a standard that only one company could meet. I don't think it's quite that simple but I think Safe Harbors can be very useful and can be useful for business because they -- I don't think they necessarily give more legal certainty because the case law is already there and so forth. But they simplify the expression of accumulated case law and practice and statement of intent by the agency. So I think in terms of codifying rules that are perhaps more complicated, boiling them down to something simple can be very good. That can lower costs for firm, lower compliance costs and make it easier for them to implement efficient decisions. It can also be good for the agency because one problem for the agency that must investigate complaints made against them, it may give the agency a good basis for setting aside matters it doesn't want to look at and filter out what I would describe slightly less interesting or useful cases. So it could be good for both the agency and for the business. Now, if used in the European Union perhaps more successfully, the 30% threshold introduced for vertical restraints in 1999 has been hugely successful for DJ and the national competition authorities in terms of not focusing resources on things they previously had done but also for where there's a good deal of clarity about what's acceptable up to that market share. The recently publicized guidance on enforcement of Article 82 says that dominance is unlikely before 40% and I think that's a reasonably clear signal from DG comp.

In mergers there's below 25% for horizontal mergers and 30% for vertical measures. We use a -- mergers. OFC has a draft guidance, we're waiting for the DG comp to finish before we finalize, I'm not sure if we're ever going to finalize it. Anyway, it says 40%. There should be some caughts. These Safe Harbors are as safe as they go and you're still going to look sometimes at the facts of the case. We already had the discussion I'm not going to repeat about whether more than one firm could have a dominant position in the example and so on where something is seen as an essential input but the inputs also compete with each other separately is a case in point. Another example might be in energy markets for other markets where there's very tight capacity constraints where each firm faces a -- has a vertical supply curve so each firm faces residual demand in the market. And you can see examples. There's a good deal written by David new bury in the UK about that market power by the residual person in the market. Another example could arise, you can pick peculiar examples that come from government regulation around entry barriers where firms might be dominant below 30% say in the market. I think conversely it's then not the case that everybody above that is dominant. If you think about bidding markets where there's a competitive bidding market but one firm ends winning the contract so it's a competition for consideration. We shouldn't necessarily include that's absolutely evidence of dominance. So market share Safe Harbors are useful but we need to be careful of the 5% of things the extremities that might -- extremities that might need more detail looking at. One other thing is market definition is a risk because if you have a sort of continuum of substitution so the next product is slightly substitutive then there's another one -- it's quite difficult where to draw the line, that could be a risk factor for market share based Safe Harbors or markets where you have a number of different dimensions in which manage is a substitute. You might have a number of difference possible technologies that are at the margin creeping in against this product. But not clear how to treat them but taken together as a whole they might offer quite a bit of competitive constraint but no one of them does. Those type of situations can lead to some uncertainty about the robustness of the market definition. So clearly any Safe Harbor has to be read with how robust is the market definition look in this case. And if the market definition looks a bit ambiguous then the Safe Harbor is that much less safe.

>>RANDOLPH TRITELL

Other comments on Safe Harbors?

>>GREGORY WERDEN

I think competition law should decree dominance requires high market share. John explained quite well doing so can enhance business certainty and importantly make life easier for the competition agency. But I don't think you get either of these benefits unless the threshold is both fairly high and reasonably safe. If exceptions are common then the market share threshold doesn't provide uncertainty to business and doesn't make the agency's job any easier because you have to be investigating for those exceptions. Court decisions and legal commentary in the United States both support a market share threshold of 50%. John seemed to prefer the lower one. I kind of like 50% myself. He explained in energy markets there's situations, he's absolutely right about this where supply constraints can work in various ways that allow firms that may not appear to have large market shares to be able to exercise significant market power. That's true but if the constraints are likely to be short lived they don't give rise to dominance. On the other hand if they persist or recur, then maybe they support the definition of a narrow market in which the competitor is dominant. That doesn't cover all the cases in which the scenario can occur but in a case we almost brought a couple of years ago we were prepared to define an electricity market based on recurring constraints to the transmission grid. There's no reason not to do that. I'm intrigued by the argument that John made about government entry barriers. In some cases giving rise to dominance shares below 40% because I

simply don't know what he means by that.
>>JOHN FINGLETON
If government gives license capacity constraint licenses to 20 players at 3% of the market each and one firm has unconstrained, even though it might have 30, 40% it could raise the price and the others couldn't respond. You get very, very funny regulatory barriers to entry. The planning system can be a particularly interesting source of barriers to entry that institutionalizes incumbent market shares. You do need to look at that. But I don't think that negates the principal growth to the business. These exceptions I want to clarify. Should be manifested. There's a characteristic to something very odd about this market that we just need to be aware of. And I think that the -- it's not that everything is possibly an exception but rather than if you have some funny features about capacity. For example in the UK, and I think many European countries it can be almost impossible to establish new entry into energy markets. Nobody wants electricity generation in their own backyard. There's a new airport opened in the UK, a new air -- no new airfield built since 1945. So any entry that's hooped has been the congregation of military airports to civilian use and there's been some of that entry. So in some of those markets you might have in London a market share below 40% in the airport market. There might be other feels around and you might save market power. So I think you have to be careful about markets where these type of regulatory constraints are an over hang in the market.
>> MALE SPEAKER
Randy, if I may. I would listening to the conversation here. I was thinking maybe we're kidding ourselves in the sense of asking for a very high Safe Harbor threshold for dominance while allowing ourselves to have market definition the way it fits our Safe Harbor threshold. Because if the argument goes you can't be dominant if you don't have enough -- more than 50% market share. But we can define markets low -- as narrow as we like them. So you can have 100% market share in matter of

minutes really. There's no certainty in that that you give to the business community. It's not making our lives as regulators very easy. 's just shifts the argument to the market definition process really. This is my feeling.
>>GREGORY WERDEN
Of course you have to maintain rigorous principles in delineating the regular market. But it's -- relevant market. It's true that the business market is an illusion because you done know how the business community seems to be very happy with their delusion. So seems like a good thing.
>>RANDOLPH TRITELL
Let's turn to the flip side of Safe Harbor and look at presumptions. John mentioned just because you're above the Safe Harbor doesn't mean you're dominant but at some levels should there be presumption of document innocence? If so what market share and should it be based only on market share? Let me ask Markus to start us on that.
>>MARKUS LANGE
Randy has characterized the issue of presumption as the flip side of the Safe Harbor and there's a lot to that view. This the issue of presumption of dominance pose it is question should there be a space in terms of market share where the company under review may be presumed to be dominant until further in depth scrutiny. So to get closer to that question, let me contrast Safe Harbors and presumptions for a minute. I think ultimately a rebuttable presumption, just as a soft Safe Harbor, is a tool for adjusting the burden of proof in the investigation and procedures. The question is, how much evidence is there for the competition authority or for a plaintiff to put on the table and when is the owners on the dominant firm to give rebutting arguments to what is presented against them? So Safe Harbors tend to be in the interest of possibly or arguably dominant firms. In the sense as we have just discussed that they offer a certain degree of safety from inquiry and certain degree of legal certainty. Where as presumptions tend to be in the interest of the competition authority or other non-dominant firms in the market by alleviating the

burden on these entities of proving dominance against the firm under review. Let me just turn for a minute to the example of Germany where this specific arrangement of presumptions and placing the burden of proof is mitigated by what I would call the principle of ex-officio investigation. That means the significance of any presumption is limited because the competition authority still has to examine all aspects of the case including attenuating factors in favor of the company under review. And the competition agency has to underscore its case with further evidence and has to weigh all the evidence that is presented by the allegedly dominant firm. So effectively in Germany the presumption of dominance tends to work in that way that de facto below the presumption threshold of market share prosecuting a firm for alleged abuse of dominance is highly unlikely in that sense the presumption of dominance actually sets something like a soft Safe Harbor below this threshold of presumption. In a somewhat generalizing manner one can say that Safe Harbor tends to pose the risk of false negatives whereas a presumption of dominance tends to pose the risk of -- sorry. The Safe Harbor tends to pose the risk of false negatives and these approach may hint to different underlying outlooks on competition policy and certain -- in certain jurisdictions so the question is, are we more concerned about protecting the competitive process and competition as an institution? Or are we more focused on efficiency of market processes and that context on firm space where they are safe from prosecution. Furthermore our perspective on Safe Harbors and presumptions is influenced by other factors. For instance, the significance of private litigation versus agency litigation in a jurisdiction. And the repercussion that these two strands of prosecution by agency or by private litigation may have on each other. And this is actually point that Bill Kovacic has made on the DoJ Section 2 report. Let me now turn to the last question that was put to me. What should the threshold of presumption be? So when I'm asked to name concrete figure, I'm going to dodge this question again, just as earlier with the time period for durability. Economics cannot give us a clear numerical answer since dominance is not an economic concept. And also the adequate threshold may depend on specific economic and policy conditions in the jurisdiction I'm looking at. Now, John Fingleton has said that gee, maybe 50% would be a good threshold for Safe Harbor because it eliminates our conundrum with having more than one dominant firm in the market. Now I don't quite see that as quite self-evident but looking at the situation in Germany I would say if one were to draft a competition law in Germany from scratch today one would possibly aim for threshold for the presumption of dominance that is quite a bit higher than the one-third of market share that we have had on the books in Germany since our law was enacted years ago. Thank you.

>>MALE SPEAKER

Just a small comment. I think the presumptions rebuttal presumptions -- rebuttable presumptions is a good way to go in the sense you could have a fairly high market share that would imply dominance, although you have to -- you can bring evidence to the contrary. And a very or rather spacious Safe Harbor for firms to be presumed non-dominant. And in those particular cases when the authority thinks that even though somebody has 20% market share, they're still dominant, we have to work and we have to show it. It would be a rebuttable presumption rebuttable presumption and a good way to go in efficiency

>>GREGORY WERDEN

Seems you have to start with what an alternative of dominance is, that's to make somebody prove it. That's a really hard thing to do. Particular any in an adversarial system like we have in the United States. So it just seems to me to make competition law administrable you have to have a method of inferring dominance. Given the tools we currently have, market share has to play a significant -- currently have, market share plays a significant role in that and that leads to market based presumption of dominance. There maybe more than market share but market share is pretty important.

Of course not a very high share proof dominance, I think we were agreed on that. But still, it maybe very likely with a high market share. How high? Markus said he's going to dodge the question, true to his word he did. I'll say something. I'll start with what the leading treatise in the United States advocates. That is that a presumption should attach when the company maintained a share in excess of 70% for at least five years. I would set the bar maybe a tad lower than that but I think it should be pretty high. There's still a possibility of establishing dominance even if the presumption doesn't attach. It's not an effective Safe Harbor. And I think the threshold should be pretty high. I didn't understand some of Markus's comments on choice of Safe Harbor depends on philosophy of competition policy. I think it's really all about making administrable. I think the choice for a particular number might depend on your philosophy of competition policy. And certainly if you believe that competition tends to work and that we should leave firms alone to work out the competitive process and that we shouldn't jump in every time a firm succeeds and gets a big market share, you might set the bar for dominance higher than if you have difference beliefs. So I think that's correct and that would be a reason why different jurisdictions would set the bar different places because they have different prior beliefs about these things. I don't think we have hard evidence on a lot of them so we have to make competition policy judges based on our beliefs. And it may depend on actual distinctions and the way the dynamics of different economies work. I think a fairly high threshold for dominance for a presumption of dominance is probably a useful attribute in competition law.

>>MALE SPEAKER

I think, Greg, you pretty much answered the part where you said you didn't quite understand my distinction.

>>MARKUS LANGE

It's basically just that point whether in the jurisdiction or -- yeah, in the environment that the competition authority operates. There is the presumption, there is -- not the word presumption. There is the idea that business usually be basically sort it out for themselves and interference is not needed. It's the point that I made about are we more focused on avoiding false negatives or are we more focused on avoiding false positives?

>>MALE SPEAKER

I think a presumption above a high market share for example, 70% for a period of time is useful because a lot of problems we face with competition agencies are inherited dominant position where is the firm had 100% of the market -- the market was then opened up. And competition was expected to drive great change in the market. And the firm is able to that wart that through its behavior. This those situations will typically be ones in which the firm's market share is 70% or higher, I think is very useful to establish a presumption in that space so that those cases can be appropriately gone after. I don't think they'll chill competition in the vast majority of other cases. So I think there's for a lot of countries, particularly countries that have had a lot of history of steady involvement in markets or liberalized markets but the competitive process is still a very new thing in that market. These type of assumptions maybe extremely useful.

>>RANDOLPH TRITELL

We're going to move from accordance of market shares to non-market share factors. Back to Greg to ask what role should they play. Are conditions of reentry the only factor. If not, what else as much should the burden be on the agency or the company?

>>GREGORY WERDEN

First let me make it clear because I didn't before because I was waiting for this question, that the presumption that I favor based on a high market share requires some evidence of obstacles to entry as well. The high market share without any evidence of obstacles to entry shouldn't be enough. In that respect the burden should be with respect to market delineation and with respect to make share. But I don't favor making the burden exceptionally heavy, especially with respect to entry. There was ooh time in the United States, not that recently but I remember it well, when the attitude of the courts was that entry will fix any market power problems pretty quick so we didn't have to use antitrust. It's true that entry is a powerful competitive force but it is not true that it fixes all the competitive problems. And it's not true that going head to head with a dominant incumbent is an appealing prospect for many entrants. As a practical matter, I think the required demonstration with respect to entry does depend on market share. The company has had a really high market share for a really long time. Then I think you can inferring something about conditions for reentry on that. You may need more information but it's very suggestive. So I think certainly that's how it's going to work out. Once the agency has discharged its burden and the presumption of dominance attaches, then the company has an opportunity to show it's not dominant. Of course the agency will have considered these other factors in advance but at this point the burden is placed on the accused company. I don't favor any artificial limits on what the company might do to show it's not dominant. Maybe it's going to get creative and think of something I never thought of. So I don't fore close any possibility. On the other hand I expect is whether the market is properly defined and properly measured and whether the agency adequately assessed the conditions of retry. These are the important arguments we hear all the type and it should be the ones we hear all the time. Direct evidence is always welcome but I don't expect it to be very helpful in many cases. I don't expect it to undermine the presumption of dominance. Microsoft contended in the United States litigation that direct evidence to prove it didn't have monopoly power, we were not convinced neither the court of appeal. Neither monopolies, innovate, you sell more operating systems if you keep putting out new ones. Even monopolists cater to desires of your customers. If you don't sell what people want you can't make a lot of money. Based on experience to add one final point, I don't expect buyer power arguments to be persuasive ever. Large buyers generally aren't final consumers and simply would pass on any price

increases. So most cases right off the bat the large buyers really don't have a compelling interest. Secondly, in a lot of cases where there are large buyer where is they wouldn't negotiate good terms for themselves, there's small buyer, they wouldn't be protected. We have a couple of cases saying that buyer power is inadequate in a situation where there are weak buyers out there, it will be hurt. Finally, buyer power simply cannot be a complete substitute for seller competition. So a monopoly seller confronted with a single buyer simply isn't going to produce the optimal outcome. It may produce the efficient quantity and the price as a determinant we don't care much but we're still not going to have competition and we still care. Situations where this has been an issue in our cases have frequently been deference mergers. Where the competition we were worried about was the competition to develop new innovative products. Having a single buyer for these products is no substitute at all for having multiple companies engaged in research programs to develop them.
>>MALE SPEAKER
Greg can I ask you on this that, if the buyers have -- face intense competition in the downstream market, do you still say that bilateral monopoly upstream is a problem? You're talking about as a single buyer like the government doesn't face any competition, that's a big problem.
>>GREGORY WERDEN
Certainly you can't replace competition in innovation with buyer power. So that point is already made. That's my starting point. In terms of producing an efficient pricing quantity, it's possible that you can do that. Although it's certainly not guaranteed. And it's very possible in some situations for the buyers and sellers kind of in your scenario to work together contrary to the interest of the ultimate downstream consumer. How it's actually going to work out in a particular case is hard to predict. You need to look at them case by case which I'm sure you agree with.
>>RANDOLPH TRITELL
Others on non-market share factors or reactions to

Greg's comments?
>>MALE SPEAKER
I'm puzzled about Greg's answer to my question. I don't want to raise Weyerhaeuser specifically but if you imagine a situation where you have five false in a particular economy, each of them are 20% of the trees and you have a number of forestry companies competing vigorously downstream, five of them as well buying from them, it's not clear to me that you would infer that each of the individual owners of the trees had market power simply because they had 100% of the supply going into the lumber company that was processing the wood and selling it on the competitive downstream market.
>>GREGORY WERDEN
Yes. I think that's right. It's complicated to figure out whether there can be enough market power in one of those narrow markets to worry about in many situations the answer would be no. On the other hand there can be buyer power that we would worry about as we were worried in the Weyerhaeuser case the buyer power of Weyerhaeuser if it succeeded in excluding other competing buyers of the logs. The peculiar facts of that case, the downstream end users of furniture an kitchen cabinets and guitars made out of the red alder were protected by the fact that you can make them out of the other hardwoods as well. The only people at risk were the people who made a living growing red arbor trees and in our view antitrust laws protect them.
>>RANDOLPH TRITELL
Thanks for helping us see the forest for the trees. The last question of the analysis of dominance should be the same no matter the circumstances of the jurisdiction. In particular should it be different in the case of small or isolated economies? And to get us started on that I would like to turn to Shlomi whose agency is chairing the special ICN project on competition analysis in small economies.
>>SHLOMI PARIZAT
Thank you. To start with, I think the analysis, the framework of dominance should be the same everywhere. We should agree on what the analysis

is, what are the relevant facts in order to show dominance and once in place dominance should be inferred, the same way. I think the divergence if at all should be found with respect to two main aspects. First, the level of proof required and the other one is what is the appropriate response to views? I will make a couple of statements. Isolated economies rely heavily on internal market processes in determining prices, quality and technological process. And but hen you think of isolation, you should think more than geographic isolation, Lange barrier, cultural barriers coming from Israel where a non-negligible part of the population eats kosher food. That's an entry barrier F you take infant formula not all major players of infant formula are present in Israel due to kosher consideration. This means Israel rely more heavily on its own manufacturing capabilities and competition in order to give better food for babies, it's a good example for both babies and food and so on. Everybody feels for that. Small economies are prudent to highly concentrated markets in the sense that given technology economies of scale and scope may dictate a small number of efficient firms will operate in each market. Market size in itself maybe -- I don't know if a barrier or obstacle to entry, but some markets are just not big enough to enter because it's not profitable enough. You're more prone to have essential facilities in the sense that some things are not economic -- it's not economical to replicate everything. On a larger scale it maybe but small scale it wouldn't. Also I would like to for all those who agree abuse of dominance is a bad thing in terms of welfare. I think we'll have no problem going there. Combined I think this means small isolated economies would suffer more from dominant firms abusing their position or attempting to monopolize the market. In that sense false negatives meaning determining that something does not constitute an abuse of dominance where in effect it does is most costly in small isolated economies than in other parts or other jurisdictions. This may suggest that small isolated economies should apply less strict level of proof in determining abuse. The analysis should be the same but the level of proof because false negatives are more costly, you might think it should be a little lighter. This should not be taken to mean anything goes really but in the cases where the borderline rule of reason cases then I think this has the argument has some merit. On the part of what we should be doing, I think several tests or several practices assuming a small or isolated economy should be taken with a grain of salt in the sense that how strongly should we apply the sufficient standard in accreditation cases? Even if we believe due to scale and scope of economies there would never be another sufficient ad firm. Should we use the incumbent’s costs to be used hypothetical cost measure, it's a question. We should also recall that efficient monopolies are only -- sorry. What about divestiture? Are we willing to say okay, let's break up this firm even if we pay for this in efficiency terms? Because you have scale economics and you break up a firm into two, for example. Would you be willing to trade competition for efficiency? We usually think that they're the same. And in this sense I think we should keep in mind that an efficient monopoly is only efficient given current technology. We have seen examples of say computer printers hard drives made of flash memory are on the rise. Technologies do change. So I for one and what Greg said earlier for innovation would almost always vote for competition over efficiency in that particular case. In small and isolated economies. So I would say yes if you have to break up a firm you pay with efficiency in the short term but you get the innovation and technology doing in the longer run you maybe better off. I think as a last advice to all of us here, be a large open economy if you can. It's better to be a large and open economy. If you have to be small then try to be open. Because this is so you can rely on -- you actually importing competition from other places in the world. Embedded in the process, embedded in the product that you buy. But acknowledge the fact, acknowledge the implication this would have on competition policy because you -- you have the acknowledge the fact you rely more on domestic competition, especially localized goods such as transportation, electricity, and so on, so forth. If you're going to be both isolated and small, then just know that you're going to have to reinvent many, many wheels. In doing so, keep in mine that dominant firms are not so good at doing that. Thank you.

>>RANDOLPH TRITELL

Panel reactions to Shlomi?

>>JOHN FINGLETON

There's two things. There's two myths about small open economies or small economies. One is I think that opening markets to trade imports competition. Most goods come from the domestic distribution system. If it's not highly competitive you don't import much competition. And increasingly as we moving from a culture to manufactured goods to services economy, many non-traded services are important inputs for the success of the economy and one doesn't see competition in them. So my experience in Ireland was a highly open economy was that it was riddled with examples of dominant firms and problems of monopoly. The second problem one has myths in a small economy is the myth of scale, that you need a minute myth of scale to compete. It's a variation of the national champion argument to be able to dismiss champion argument whence government makes them because very often the argument put forward we can only afford one market in this firm an economy. In that context I think it's worth pointing out that two firms that might be slightly less efficient in terms of scale but more efficient in terms of getting closer to their cost curve are far better for welfare than one firm that's a highly inefficient rent seeking monopoly. So we're faced with that choice, it might be better not to worry about the scale myth. I think two other problems in small economies.

One can't underestimates the problems associated with the fact that in small economies everybody knows everybody. So the -- is closer to the journalist is closer to the business class. Consequently you get a very subtle form of protectionism of a dominant firm through informal networks that are just not that transparent. It's much more difficult to do that in a large economy with a vibrant independent investigative media and where politicians are not to individual business people. As one I think rather remarkable difference between Ireland and the UK in my experience is the extent to which that is different. A final observation is that -- can be much more difficult in small economies. When we looked at the IBM merger in Ireland, my colleague at that time Terry, one of the features was that there was a competitor called sun guard which existed many other markets but sun guard had no intention of entering the Irish market so suddenly this merger everywhere else was a two to one merger in Ireland. This is the case that smaller markets would be less attractive to large international players so you may not have that remedy of entry. So there are specific challenges that can arise. It would not surprise me, therefore. Contrary to the expectation that in a small open economy you should have less dominance actually the fact you have a higher rate of dominance in small open economies than you do in very large economies that are more closed to international trade.

>>RANDOLPH TRITELL

Other comments from the panel on this point? What I would suggest I promised our panelists a closing comment and also some question period. Why done we take some questions and comments now. Rather than back and forth with the panel on each of them. We'll aggregate them and panelists may have a chance to address them in their closing remarks or else we're going to hold a lot of this discussion for the break-out sessions this afternoon. Because our panel exists entirely of officials, I have asked a couple of our NGAs to open our discussion with a couple of very brief observations on the discussion. So let me first ask Marsella to lead us off with a comment from the NGA community followed by Paul cramp ton and wrap it up.

>>MALE SPEAKER

I'm from Switzerland, a small economy obviously. I have some thoughts on some of the questions posed. One starts with the market share presumption and market share threshold. Switzerland being -- having a young regulator I think it's very important to have Safe Harbors or at least presumptions in terms of market shares. And this is particularly true because you need to have security and I don't agree with John because (indiscernible) so you need at least some presumptions to have some security. And the level of that -- of the size or the level of the market share presumption, that I think in Switzerland could if you follow Shlomi could have it be lower than other large economies, and I prefer that approach than the one you suggested having less strict burden of proof. Because being a lawyer I think it's more important to have a strict proof that there is actually abuse but I think make take more cases on and look at them more closer and not as I said lessen the burden of proof.

>>RANDOLPH TRITELL

Thanks. Paul from Canada.

(off mic)

-- trying to make inferences from --

>>RANDOLPH TRITELL

Microphone, Paul.

>>MALE SPEAKER

Trying to make any inferences from short run marginal cost. I think conceptually long run average incremental cost is a much better place to start but as Greg pointed out cost comparisons can be very difficult to make in practice. So where does that leave us? I'm personally leery about making too much out of this inside the market versus outside the market distinction that Greg made because I think other panelists recognize that you can't have substantial market power if barriers to entry are low. Where does this leave us? Back where the cases in many jurisdictions have tended to come out. As you look at indirect measures of market power, so high persistent share, barriers to entry, other factors such as ability of other firms in the market to expand, to access inputs they need to do that. Perhaps buyer power, et cetera. On market shares themselves I was very pleased to hear

John and Greg state that having Safe Harbors is a best practice. I tend to come out where Greg comes out which is the shares themselves should be fairly high and the Safe Harbor should be fairly safe. That doesn't mean airtight but I certainly come out where Greg comes out, the Safe Harbor should be above 50%. But I wouldn't agree and I think most NGAs that participated in the development of the best practices would have some significant difficulty with the idea that there ought to be rebuttable presumptions to market power. That was very clear through the whole process that's in part why the best practices were very soft on that whole issue. Perhaps an initial -- the Lange was initial preliminary or first indication to market power that's as far as the NGAs would be prepared to go. In terms of durability and how long a practice or the exercise of market power needs to last in order to be substantial, I applaud Markus for pointing out the role of barriers to entry here. I would tend to come out in favor of the at least two years formulation but I also like John's suggestion that we should be guided by consumer welfare considerations. So if there's an enormous adverse impact on consumer welfare in a shorter period of time, that's relevant and seem it is make intuitive sense. But I think the other comment is that John either you or Greg made that really you shall not have a hard and fast rule of thumb that it should vary from case to case is the take away here. On joint dominance the take away is we really need to be extremely cautious in this area. Everybody is struggling with it around the world. I don't think anybody is really got it right or got it close to coming right. So caution really is the take away there. Extreme caution I think. On competitive effects, personally --

>>RANDOLPH TRITELL

If you make this the last point so we have time for others.

>>MALE SPEAKER

Okay.

>>RANDOLPH TRITELL

Thanks very much. I'm sorry, everybody has a lot to say and we have two days to say it. Just a couple of other points out on the table now, very brief interventions then we'll go to closing comments. We have a comment over here.

>>MALE SPEAKER

My name is (indiscernible) from competition division in Singapore. We're very small and open export and import is 350% of GDP so that's how small and open we are. I certainly agree that when it comes to unilateral conduct we face a lot of problem of off-shore upstream market power. A lot of times it's a blessing to be exploited, put it this way. The panelists talk about difficulty of imposing remedies, some is certainly very true. If you penalize the offshore monopolists then they pass on the penalty back to the consumers or just exit the market. So sometimes you have to live with the fact there are offshore market power that you can't deal with. In relation to the point about bilateral monopoly, certainly when you have the bilateral monopoly is not efficient, not perfect. But when it comes to a situation where there is some offshore market power that you can't practically deal with, then you might have to consider the second best solution. If you destroy the balance and have intense competition at the domestic downstream it actually happened to us that the downstream players would aggressively source supply from the upstream monopolies and pass on the extra costs to the domestic consumers. With the problems that we actually face, consumer expenses shown up by modern -- from a practical experience point of view is something we might have to live with.

>>RANDOLPH TRITELL

Thanks very much. If you can pass the microphone.

>>MALE SPEAKER

Very fast. My name is (indiscernible) I'm an NGA from Brazil. I want to learn something about market power coming from technology and patents.

>>MALE SPEAKER

Long answer. Maybe later. If you can give the microphone over --

>>MALE SPEAKER

Thank you for a great opening panel. I'm

(indiscernible) Brussels here as an NGA. We talked about the difficulties in devising remedies in these cases. There are some differences between larger economies and small economies. My question for you is: How do you -- how does the possibility to impose a sensible effective remedy impact on case selection? How much should we think about the likely or desirable outcome when deciding whether to start the process in the first place?
>>RANDOLPH TRITELL
I think we're going to stop the questions there. There's a lot on the table. Don't forget Al listen's before about should the standards be difference in an economic downturn. Interesting question. I think what we'll do now is go down the table for brief final comments from our panelists. Why done we start with Greg and then come back up this way.
>>GREGORY WERDEN
Okay. Thank you. In response to the questions, Paul cram ton mentioned ability to expand as an important factor assessing dominance. Isle take that one up because it's overdone. Microsoft argued every other supplier of operating systems could crank out millions of copies, therefore it wasn't document. Facts were right, the conclusion was wrong. The ability to crank out more copies doesn't disprove dominance. You have to get consumers to buy them. That's the trick. In answer to the question just posed by NGA, how does remedy possibility affect case selection? We learned a lesson at least once a generation that it has a profound effect because it's all about remedy in our system, there aren't going to be any fines in a dominance case. You done impose a meaningful remedy, then the only other possibility is meaningful press den so it's really about the remedy. The remedy is hard. The lesson learned is figure out the remedy before you file the case an figure it out as you go along in the investigation. And if you can't come up with a remedy you shouldn't by the case normally. But doesn't make it easy to do. In response to Alan's question, if anything I expect a prolonged downturn to make more likely to

find someone dominant because entry is going to be unattractive. This maybe one of those circumstances that economists tend to rule out where actually raising capital to enter a market is not feasible. We generally assume the market will take care of this but maybe not always. So maybe dominance is little more likely in a downturn. General summing up. Two points. Dominance requires a lot more than just market power. It's a very high threshold. Second, to elaborate, there are a lot of firms able to charge way more than shore run marginal costs and to do so for a very long period of time. Hardly any of them are dominant. You have to be able to earn a super competitive return over a significant period of time to be dominant. That's a very high there shall hold. And we need to make sure that we examine these issues carefully and don't fine too many firms dominant.
>>MALE SPEAKER
I would like to address several questions posed. I think in the analysis of dominance is both detailed and complicated in the -- in its purely theoretical form. Most of the time we would be using indirect evidence and let's say -- let's stick with indirect evidence for the meantime. This means that proving the theoretically proving that a firm is dominant is both difficult and it's hard to explain really when you stand in court. It's easier when you have two guys in the room and they're discussing something but when you're out there in the court you have to explain it and there's a strict level of proof then it may not be as easy as it seems. Therefore, I'm reverting to the presumption rather than the level of proof. I think that in small economies you'd rather have a lesson level of rather than a large Safe Harbor because this is something I thought about and I decided not to say it but now that you have mentioned it I will say it. Rules may be tricky in the sense that you operate in a legal system and the legal system has this precedence principle. This is just my personal impression. Lawyers tend to like rules that are strict rules. And apply everywhere. Any time. It may be not what we want in the sense this may blur the specifics of

certain cases and certain times. I agree rules are good but in that sense when there is so much debatable on the table, maybe a strict rule that applies everywhere is not the best way to go. About the remedy. If you have to know the remedy before you decide specifically or to proceed with the case, I'm more concerned with the dynamics in the sense that if there is a good remedy out there and you as an agency know what it is then no problem. But there are many times where the players themselves, the dominant firms themselves know something that you don't in the sense they know the market better, they have an insight of what may and what may not work, what maybe a good remedy and what may not be. And it takes a certain time for you to close that gap. I think that even if at first you don't see the remedy, it's not on itself an argument to dismiss a case. Because it takes time I would say halfway or two-thirds into the investigation in order to get a real good understanding of the dynamics of the minute differences and aspects of each and every certain market. That's it. Thank you.

>>MALE SPEAKER

Thank you. I would like to turn to the question of Safe Harbors and presumptions. Paul argued or pointed out from an NGA perspective it's nice and useful to have a Safe Harbor and in that context he's pointed to the recommended practices. And he said that from an NGA perspective there's not so much to gain from presumptions. As pointed to the recommended practices as well. Now, I think as Randy said, the one is the flip side of the other. I think there maybe good argument for having both Safe Harbor and presumptions. If not by statute on the books then at least de facto. I think -- I was glad to see that in that point we had certain agreement I think on the panel that both concepts have merits and good use. I think the point where we do disagree is what the relevant thresholds may be or should be and that of course in practice is a very important question. But Cynthia will remind me my time is up so I won't be able to solve that question in the remaining seconds on the panel.

>>MALE SPEAKER
I'm going address two questions. One, Alan's question about is this difference in a downturn, are standards different? I don't think standard should change. We should be applying the same standards. However, the facts will change in a downturn. A particular example there is firms that were capacity constrained in commodities markets have industries agriculture produce markets, are now desperately seeing to sell stuff at any price because they're not capacity constrained but they have a lot of spare capacity. We're seeing a lot of shut down of capacity and we could see big price spikes in year or two year's time. How will we apply the consistent standard to a situation in markets where firms are -- have vertical supply curves then horizontal supply curves, the vertical supply curves the year after is a challenge. We're going to meet political expectations that we are supposed to be influencing competition to keep price stability when the fact I think we should fear really awful price instability globally over the next three to four years which is always difficult to anticipate but certainly a possible outcome. On the question about remedies. I didn't want the get into a discussion about remedies but the remedies an definition of dominance is when the remedy undermine -- will the remedy undermine or remove the source of dominance, that is the source of the problem in the market or is there a type of remedy in this market a remedy that will regulate in some sense a dominant position that's not going to be got rid of? So I think it is relevant in that context. There I would say that in -- if you think by intervening in the market you're going send a signal to entrants in that market or other markets that will help them get finance to challenge incumbent firms then that could be a reason for wanting to intervene. I also point out that even entry by a less efficient rival in a market where there's a monopolist can improve overall welfare so it importantly signals that agency send particularly to entrants looking for finance. I think in economies where there's not a kosher of competition and where there's not been

institution of banks financing entrants other incumbents and agencies may want to look on the side of intervening in order to stimulate that, may want to do in developed markets where those capital markets work incredibly well.

>>RANDOLPH TRITELL

You have been a patient audience well deserving of a coffee break which we'll take for 15 minutes so go out and enjoy the break and start filing back around 11:20. But if you would first join me in expressing appreciation to our wonderful panel to lead off the workshop.[Applause] [Captions performed by Caption IT, LLC, www.captionit.net]