>>CHARLES WEBB

If we could have everyone find their seats, please. I'm told if it gets too crowded in this room, there is another room with a screen where across the hall where you can stretch your legs if you can't find a seat here. Anyway, without further adu I would like to welcome everyone to Panel 2. We're going to discuss the durability of dominance and how you assess durability and factors like entry barriers and competitive effects in practice. My name is Chuck Webb. I'm the executive director of JCRA and before you ask me which exit and turnpike, I have to give a disclaimer, I'm not talking about the "new version of Jersey," which is located 300 miles northeast. I come from the Channel Islands between Great Britain and France. I have an ulterior motive. I want to introduce the durability of dominance -- I also want to play up a bit of our tourism industry in Jersey because we need your help and visitors every summer so I'm going to address this topic briefly through a not so scenic tour of Jersey and the channel islands. So let's start with Jersey. There we go. Now, let's just assume for the purpose of this panel that there is a dominant firm making monopoly profits. It doesn't matter what market but to use Greg's terminology that a dominant firm is earning super competitive return all over the island. Classic economy theory would assume entry would restore competition. The question for the hypothetical and the panel, is that going to happen in practice?  To use a term used in panel one let's look at the impediments for the firms to enter the market. Let's look at first the cost of entry depending on the market. You may want to have office space or retail space. In Jersey we have plenty of that available. Actually, in the past six to 8 months we've had plenty more to come online. We have, you may need office facility, access to capital, financing, access to labor. All of these are issues for new incumbents -- sorry, new competitor, and it can potentially be barriers to investment. Let's move on to other costs of entry. Depending on what market you're active in, you may want to import or export raw materials and finished goods. If you're in a Jersey context 100% of your imports or exports have to come through that harbor or that airport and be delivered on those small roads. Now, Jersey being a very small island, perhaps these bottlenecks are a little more pronounced than in your jurisdiction but this is just a matter of degree. I think impediments to entry potentially are supply change issues, potential bottlenecks, et cetera. Let's talk about other considerations. Jersey like your jurisdictions, we have a parliament. It's actually pictured right there. We also have in certain markets sectorial regulations. Being a smaller jurisdiction, my role, I'm also the telecommunication and postal regulator. This leads to a host of potential issues for new entrants. Least of which are -- well, it didn't come up but we have potential intellectual property legislation, planning legislation, and past legislation. The names of the laws didn't come up unfortunately. Incumbents. One thing about a small economy, there is no lack of -- markets. Depending on the market you're interested in, this can have a whole host of considerations that a new entrant would need to consider. Incumbents network effect, legacy of state ownership, vertical integration or is there a reputation for (inaudible). Finally, consumer, customers. You make witchets, who are you going to sell them to? Jersey, we have consumers like your jurisdiction. One potential limitation is we only have 90,000 but this creates a whole host of issues on the demand side that a new entrant would need to consider. Barriers to switching, search costs, consumer preferences. Which leads us ultimately, new competition restores competitive market. In this case, it's the 55th question. I would say that really leads to the potential entrant. It leads to another question, is there a profitable business case? For the antitrust enforcement agency it leads to a series of questions. Will entry be timely, likely and sufficient. Are other market factors or competitive effects relevant to the question? Or potentially is dominance entrenched? These are the questions panel 2 will be considering, and luckily we have a very distinguished group of speakers to consider them. We'll introduce starting here, close to me is Jacques Steenbergen. Next to Jacques is Simon Roberts, the chief economist and manager of the policy and research division of the competition commission of South Africa. And next assignment is Ron Stern, who is the Vice President and senior competition counsel for General Electric. Let's start with Jacques. You now have the floor.

>>JACQUES STEENBERGEN

Thank you. I come from a large and open economy, but that's only when you compare to it Jersey. In order to fit in better with panel one I've changed a bit the order of my presentation. This is a panel on the durability of dominance. Technically not on durability as a condition for dominance. But when we talk about a two to five-year time scale, I don't think there is much of a difference between them. So I will not really be able, I think, to distinguish usefully the assessment of durability as an element of dominance and as an aggravating circumstance once it's been established. This is a panel working group, not market control. When we think about dominance and durability, that does make a difference. Thirdly, at least in my jurisdiction, unilateral conduct is an issue of private enforcement as much as public enforcement, if not more private enforcement than public enforcement, and that has a massive impact on how you establish it in practice. Because being a judge driven out of competition law, economics tend to take the back seat. Judges simply do not make it yet. I hope that the yet is justified. But this is the key issue, I think, from a competition authority point of view, that you have to build up a set of precedents where you do give proper consideration to economics before you can expect to have a set of precedents, in the end, for the stakeholders who will make the most useful decisions, because while competition authorities, and mine is not better than others, do not have such an excellent track record on the time period to take decisions on unilateral conduct cases, you talk indeed about two to 4 years, if not more, in court, you can get a decision usually within two to 3 months, and in cases of extreme urgency in one to 3 weeks. So that is something we will never be able to match, I guess, as a competition authority, and that has a significant impact on what you can reasonably expect to work in court. Now, on durability of dominance and dominance itself, I would like to stress from the perspective of jurisdiction, it's a very ambiguous issue. There is nothing wrong with being dominant in our set of rules. So there is nothing wrong with being dominant. It's only an issue when you abuse it. That means that we cannot exclude dominance and durability of dominance may simply be a sign of a consistent competitive success, rather than of any competitive problem. We will assess dominance and durability of dominance only in the framework of assessment of abuse. That you assess dominance in the context of abuse is, in my opinion, not in contradiction with what was said. We also fully agree that you should not assess dominance primarily in the light of the assessment of conduct. You should not infer it from conduct that might be abusive. But you will only start looking at it if you have the impression that dominance has been abused. So that means that durability and dominance is a specific concern in case it increases the risk of abuse. Abuse, exclusionary practices, exploitive abuse and discrimination. In each of these abuses, durability is a significant issue. But if you do not have the impression that it makes these types of abuse either more likely or more serious, we would simply stop looking at the issue before we really start looking at concrete evidence of durability. In other words, durability of dominance can make abuses more serious, and, in turn, abusers are likely to enhance durability. Assessment of dominance, again, should not be inferred from conduct. It's only assessed in cases where you have an issue with the conduct. For assessment of conduct and durability, I refer to the best practices, and I refer to what's been said before, in practice, market share will be the fastest, and I would welcome, and I think the guidelines of the European Commission do bring an improvement, if that could be made more predictable. If I look at my own authority, in assessing the track record, we have sometimes not seen dominance at 95% market share and seen dominance at 28% market share. There is some middle ground that can be clarified. And that has a lot to do with market definition. As far as this dominance and durability goes, apart from market share, I think the key issue, as Chuck also pointed out, is barriers to entry. That is what we would look at. That is also what you can expect a judge to understand. But then, the likelihood of entry within a time frame, if I have to present an argument, for instance, something they increasingly ask us to judge, I don't think they will be impressed by seeing there might be an entry in 2 years, 4 years time. It will have to be an entry in the time period, which they think, which is within a year or so. You don't expect a new supplier of nuclear power plants within year or so but when you stay close to the products and services that are likely to arrive, that means consumer goods, 2 years is, in their perspective, simply not relevant. And they may be wrong, but they will never decide the way they think they should decide. So on this panel we focus on the practicalities. I have to put it like that even though it may not be the way I as an authority would like to organize the evidence. So concrete and short, market shares first, if you're above 50%, you have an easy case to prove. If you're below, you have a difficult case to prove. If we could center on more or less below or above 40%, that would make life a lot easier and predictable. Apart from market share, one would focus on, one, barriers to entry, but that only in the specific case of opening of a market initial, which was also touched upon in the previous panel, where you have a regulatory environment that has reserve to market but one or a few participants, and simply opened, then you would enter into a more sophisticated reasoning and also a far more confusing one, because if you have -- only lose, losing means basically that it is a sign of non-dominance. Acceptable. At the same time, of course, the market does not accept that reasoning, so you have to come up with specific issues, and the issue of written off investments would certainly in our reasoning refer to always being a very significant issue. Sometimes offset by some costs but not always. The technology timeline is an issue. One goal here, into the -- an issue about the policy of liberalization. But unilateral conduct may, in these cases, be somewhat of an equivalent to sticky pricing in markets. In general, sometimes the issue in the specific context of liberalization, is not the ability to raise prices, but the ability to resist reduction of prices.

>>CHARLES WEBB

Thank you.

>>MALE SPEAKER

The question I had for you, in your slides, you said quite rightly durability of dominance could reflect competitive success of the company or could be also the product of abuse. As we know in markets out there, the line between abuse and showing income is very thin especially with pricing practices. From your experience what actual evidence are you looking for to distinguish between what could be a pro-competitive -- efficiency of a company or abuse of a company?

>>JACQUES STEENBERGEN

We're working hard together with some authorities on improving the analytical framework for excessive pricing, but up till now excessive pricing is what stakeholders are most worried about, and competition authorities usually fail to deliver. So given the fact that the pricing abusers, where you actually see both courts and authority acting, is more like predatory pricing. And then the issue is definitely, in principle, on the table, that's leading into the discussions of tomorrow. If you limit predatory pricing cases to what is in the present framework, I think there is little risk that you would sanction efficiency.

>>CHARLES WEBB

Before we move on, Ron, do you have any comments?

>>RONALD STERN

I don't have any at this time.

>>CHARLES WEBB

In that case, let's move on. The recommended practices, beyond entry barriers, agencies should consider other market criteria, "as appropriate," in the assessment of dominance. Clearly, what is a case as appropriate. What cases do you look beyond entry barriers to look at more dynamic features of competition or competitive effects? Ron Stern will address this topic.

>>RONALD STERN

Thank you very much. As Chuck mentioned, one of the issues, and the recommended practices is to go beyond looking just at market shares, go beyond just looking at entry, to assess other market factors, and here I want to go beyond, as Jacques did, just talking about durability to look at assessment and durability together because I think they are part of the same kind of issue. As Chuck mentioned, the general framework of the recommended practices indicates, in recommended practice one, that agencies should use a sound, analytical framework firmly grounded in economic principles in determining whether dominance, substantial market power exists and recommended practice. It says a firm should not be found to possess dominant market power -- competitive conditions in the market under consideration and under comment one, recommended practice 2, it notes that agencies should assess dominance by directly investigating how the particular relevant market operates and the competitive situation in the market. So what I want to do is use an illustration to talk about other factors and their significance. And the illustration that I want to use comes from an actual case. It's the market for engines for large regional jets. It was examined by the European Commission in its 2001 decision involving GE and Honeywell. Something I'm very familiar with and maybe some of you in the audience would be familiar with it, too. Although this was a merger case, the particular fact pattern here is one that relates to dominance because it was one in which the Commission found dominance. So let me just start with the market shares, because that's essentially where the recommended practice tells to you start. Here, the market shares are laid out on the chart. And what they show is, for engines for large regional jets, there is an overall installed base. That's the oldest, broadest set of criteria, and that showed GE with a 40% to 50% share. The numbers are on the chart. The installed base of aircraft in production drop out the oldest. It gives you a more current look and that shows GE getting a larger share, going up to 60% to 70%. And then there is an order backlog on aircraft not yet in production.

Aircraft are announced, they are launched. Orders are taken many years before the aircraft are delivered. That's the most recent competitive snapshot. That showed GE going up to 90% to 100%, and the Commission reached the conclusion that prior to the transaction, based on this market data, GE was already dominant in the market. So what other criteria might be relevant?  Here the other criteria come from how the market operates. Some of these were discussed very briefly in the prior panel. Here there is a powerful buyer. The aircraft manufacturer selects the engine to go on the aircraft. Usually this is done through a winner take all bidding or bidding and negotiation scenario for large regional jets, only one engine is selected. Unlike larger corporate -- larger commercial aircraft, where two engines may be selected and customers may get a choice of engines, this is a winner take all bidding situation, and it's one in which there are large and frequent competitions, or lumpy types of competition. The third key point is, price is locked in by contract for the life of the aircraft program. In other words, you've got a smart, powerful customer. The customer knows, they hope to sell this aircraft over 15 to 20 to 25 or 30 years. They don't want, once they have picked their engine, to have the engine manufacturer to turn around and say, fine, I will increase the price on you 25% or 30%. They lock it in by contract and by formula. So if you look at all of these factors, and look at how the market operates, you've got to, I think, a key issue, which is, were there credible bidders when the engine supplier was selected?  Because if there were credible bidders at that time, there would be sufficient competition to generate competitive pricing at terms, and those terms would be locked in and essentially, the market would operate competitively. In the prior panel there was discussion of credible bidders being a key part of the assessment as well as winner take all bidding competition. So how do you assess whether there are credible bidders?  Well, you look at the marketplace facts. What I've done on this slide is just portray the five significant competitions for different aircraft. And what this slide shows is, initially GE was the first winner, and, indeed, it wasn't -- it didn't face any competition to get on the first aircraft. But thereafter, there were four other competitions. Three of them actually resulted in selections of engine manufacturers. One of them, another party, won the other two GE won. The one that the other party won, you can read the footnotes, the program was canceled. So when you looked at orders for engines not yet in production, those orders didn't show up on the market share data despite the win. What does this criteria show? Does this show that there is credible competition?  Just because there are bidders doesn't mean that the bidders actually constrained General Electric's pricing or resulted in competitive pricing and terms. But the presence of competition is at least a starting point. And the fact that there are a number of other rivals out there is one of the other factors to look at. Then you have to look at the credibility of the other bidders. So one way of doing that is to look at their track record. Are these companies that had never won before?  Had never been successful in the aircraft engine business in general?  When you look at that you find that two of the bidders, Rolls-Royce and Pratt and Whitney, had a track record of being very successful in commercial aircraft engines in adjacent markets. So the way the Commission defined the markets, there was a separate market for small, regional aircraft, just below the market we're talking about, and a market for narrow bodied large commercial aircraft like the Boeing 737 or the airbus A-320, that people are familiar with. The work horses of the commercial aviation business, and these manufacturers had been successful in these two categories, suggesting that they were credible. And then finally, of course, you have the fact that one of the other suppliers, one of the other competitors, actually won, showing that one of the sophisticated customers here, an aircraft manufacturer, brought their offering on price and quality was better than the GE offering. So this shows dominance or substantial market power appears to be unlikely, but what more could you look at?  You could look at documents of the parties to see how they viewed General Electric's documents. Documents of the air framers. You could look at each competition and see whether there were responses in pricing and terms, in terms of the bidding or negotiations that may have taken place after the bidding. You could interview aircraft manufacturers and industry experts to understand whether there were credible competitors. And most importantly, since competition assessments are focused on the future, this is relevant to even if there was dominance, would there be dominance in the future and would it be durable. Would you look at whether people thought there would be credible bidders going forward. Remember, the impact in this particular marketplace, with its unusual facts, was the prices were already determined. The old competitions were over. If there was going to be any impact of dominance it would be in future competitions. I'll take an example that's a number of years old, we get the benefits that most competition authorities don't get when they are looking at dominance. You get to see what happens since 2001. And since 2001, what's happened?  Well, Pratt and Whitney has continued to invest in an innovative geared fan technology that they had announced prior to 2001, part of the record, but it was new. Nobody knew if it would be successful. Since then they spent money on their own to demonstrate. SNECMA, Pratt Whitney's partner, that won one of the competitions, continued to be interested in pursuing regional jets and separate from Pratt and Whitney it went on to compete in this area. And the outcomes were that there have been three new regional jets announced, and the engines chosen for those three new regional jets, one won the Russian regional jet and Pratt and Whitney was successful with its geared fan engine for the Mitsubishi regional jet being produced in Japan. So what does one conclude, at least from this example?  That growing market shares approaching 100% may not equal dominance or substantial market power. It's important, as was noted in the first panel, that one go beyond just looking at the market shares, even going beyond looking at whether the market shares are growing, even looking at whether the market shares appear to be durable, because they are on orders for aircraft to be delivered over a number of years. And assess these other factors. And the other factors in this particular example were powerful buyers. The nature of the competition, which was winner take all bidding. It involved the rivals' success in adjacent markets and this may work into the notion of entry. How do you assess if entry is likely?  You can view this not as, was GE dominant in the first place, because it faced credible bidders. You might also say whether its dominance is likely to be durable in the future when new opportunities arose if, in fact, there were successful competitors in adjacent markets, that might make it possible for them to bid and bid successfully in the future in the particular market that was at interest. And then obviously, if you have a market situation in which technological innovation is important, it's quite possible that firms who were not successful, if you can show that they have continued to invest, and bring new technologies forward, that are likely to be viewed as attractive, that might, again, affect your assessment of whether a particular firm is dominant. So in conclusion, the key point is not just to look at market shares, but to go beyond. Look at how the market operates, look at the other relevant factors in the marketplace, look to see whether or not there is evidence of a high degree of sustained pricing power which is the key to the recommended practices' definition of dominance and substantial market power.

>>CHARLES WEBB

Thanks, Ron. Let's have a little fun. Let's assume that you're in part of my agency and somehow Jersey has become the global epicenter of the manufacturing and sale of engines for large, regional jets. I see, the staff brings me the case, the market share data is what it is on your slide. I mean, you're way above the 50% threshold. There is a soft presumption of dominance. Market share is approaching 90% to 100% under some jurisprudence. You could be labeled a "super dominant firm." What kind of evidence are you going to put before the agency to explain and show that this market is, in fact, contestable?

>>RONALD STERN

A number of the points that I went over in the presentation are points that clearly we would present to the agency. But in addition to those, I think it would be quite important for a company to go and show how they evaluated the particular competitions. What they did in terms of their pricing and reaction to the other competitors. This is a situation which, to go to the first panel again, short run marginal costs will be pretty irrelevant because you've got huge front costs and fixed costs that you hope to cover over a significant period of time. If you could only price at your short run marginal cost to produce the next engine you would never be in the engine manufacturing business. So partly, you would explain that the actual competition that existed in the marketplace was something that constrained your price. I think you point to another factor that I didn't include in my slides for time and simplicity, is, it would also point to another dynamic. That dynamic is, it doesn't do you a lot of good to impose an exorbitantly expensive engine, which is an important part of the cost of the plan on your aircraft manufacturer, who then has to compete with all the other aircraft manufacturers. If the plane isn't sold, you don't sell any engines and you don't make any money. So there is an additional constraint on the pricing of the engine. Obviously, you would like, as an engine manufacturer, to get more of the margin and a larger proportion but you still want to have a viable product in the marketplace.

>>JACQUES STEENBERGEN

The large argument seems to be circular, because it's only true to the extent that the manufacturers of other airplanes have installed other engines.

>>RONALD STERN

Absolutely correct.

>>CHARLES WEBB

To play the hypo out a little bit more, I'm going to assume some facts. Using our information gathering powers, back to the chart that you show GE had actually -- the contestable bids, the one where an engine manufacturer was selected, GE, had actually won 75% of those, which, in a way, may reflect the marketplace, what if, in our information gathering process, we found out actually, in the bids they won, GE was priced let's say, 10% above competitive bid, would that be something that we could reflect as, well, maybe, in fact, it's dominant position is maintained despite the presence of other bidders?

>>RONALD STERN

I think you would have to understand what the 10% reflected. You have differentiated products here, and you've got a marketplace that, you know, operates in the way that this marketplace operates. Part of the reason, I believe, that GE happened to have been successful was the first win, which was a slightly larger plane than one that GE was already on. They didn't hold the competition for. GE was the first to commit to build an engine of this type, and therefore, its engine, manufacturers knew would be in the marketplace, there will be a price value trade-off. The other competitors were competing engines that might have been a newer design but had not yet been built and proven and therefore offered some greater risks. So certainly from a company standpoint, I would say the 10% price difference may simply reflect a difference in the value and the certainty of the proven nature of the engine and not reflect some sort of ongoing dominance and durable dominance.

>>JACQUES STEENBERGEN

The case in question was a merger control case.

>>RONALD STERN

Absolutely.

>>JACQUES STEENBERGEN

That makes it significantly more difficult because you prejudge how the market may work after the transaction has been completed. I can very well imagine that, in a case where you might see a reason to block a merger, that you would not necessarily see dominance when the market is functioning afterwards. And that's one of the things we're struggling with, and I agree with you, that that should make us quite humble when assessing mergers.

>>RONALD STERN

Fair enough. Just to be clear, I picked the example, because it was something I knew and it was easy. It was not an attempt -- the statute of limitations is passed on reorganizing GE Honeywell and I certainly wasn't attempting to do that here.

>>CHARLES WEBB

Have we got a comment?

>>AUDIENCE

Yes. I would like to comment here. I thought about 5 seconds about whether to get into the case. I decided not to spend a whole week or month rereading all of the documents. I think there are other questions that we're -- that are raised by the presentation, by Ron's presentation here, which I think we need to look at a little more. And maybe a little more -- in a sense. I think it raises questions about if we're measuring market shares, what are we measuring? Are we measuring sales or capacities? Capacity is the ability to compete in some way. I don't see these issues as big other criteria, if we're looking at understanding market shares in terms of the capacities to -- capacity to supply the market, which is what I believe we should be looking at. On those various points, in addition to being made about capacity constraints, to get to it consumers or markets that were made earlier. I would like to ask whether we shouldn't be looking at market shares, in any event, in terms of their capacity to be able to compete. The second point is that I think we still -- I still feel a little confused about whether we're all on the same page in terms of the dominant stage itself, in the sense that, the way we would approach it is very much the same as, if I understood correctly, the way Jacques was putting it, which is a dominance as an initial screening stage. There is nothing wrong with being dominant. There is nothing wrong with being dominant. But it's a screening process in effect. And in practice, certainly we would look at market shares, calculations, and also the possible conduct at that screening stage. In any case. So I wanted to ask Ron, what do you think is the other, and to what extent these are just part of the same essential exercise that we're going through. A third question, if there really are these other characteristics, if they are so important, then does this not suggest against having a safe harbor at a high share, because the other factors need to be taken into account and we shouldn't provide safe harbor at a high share, but not necessarily at the 70% level, for example.

>>RONALD STERN

Okay. Lots of questions. Let me see if I can try a couple of answers. I do believe that a number of the points that I used as other factors can also be told in terms of market definition and assignment of shares. Certainly all of us who are familiar with working through mergers know that when there was more emphasis placed on structure and structural presumptions, it was more time spent discussing and telling one's competitive effect story through how you define the market and how you assign shares. When, at least in the U.S., it was more of a switch to look less at structure and more competitive effects. Less emphasis was spent on the first part, more on the second. The same can be true here. Certainly part of the discussion that I had could have been told in terms of was the market reality for engines for large regional jets or could you have defined the market more broadly in terms of capability of making engines of a certain size and performance, and looking, then, across what I call adjacent markets, and assigning shares across those markets, and then perhaps the share would have been significantly lower. I simply took the example as given in the market as defined. So, yes, I think part of this could go into market shares. But I do think that you do miss something if you just look at the numbers. Because regardless of how you looked at it, in a winner take all market, with sophisticated buyers with credible competitors, as I think was pointed out in the other panel, you're not going to be dominant even if you end up with these large shares. You're not going to have pricing power even if you end up with these large shares. I've forgotten your third question, I'm sorry.

>>MALE SPEAKER

If there are really -- there are these other factors, don't they mitigate having a safe harbor at a high share?

>>RONALD STERN

I don't think it does. It does mitigate against perhaps having rock hard safe harbors, because I think in most cases, the other factors, other factors that suggest that the market shares don't tell the whole story and firms aren't dominant. It's true that you could look at how the market operates and look at some other factors, and those other factors might suggest that the credible bidder today will give it up tomorrow, and the firm, in fact, was likely to be dominant in the future, you could pick different facts, and they might be relevant. But there is one other point, I believe, that I think is important from the standpoint of parties, companies. Which is, this idea of using this as just all part of the assessment, and it's just a screen, and we can kind of get to it when we get to abuse, and there is nothing wrong with being dominant. All of that I accept as true, but I think in the real world, in practicality, just as we've been talking about agency practicality, in terms of burden of proof and other issues, I think for the company it's very important in this area of section 2, article 82. However, abuse of dominance or monopolization is referred to in the jurisdictions represented in this room, the threshold notion of when you're dominant is important because if you're safely not dominant because you can do the assessment and you understand the criteria, whether they are safe harbors or criteria that you can apply, I don't think it makes a lot of difference. Then you don't have to worry about all the ambiguities and different definitions of abuse that would cause you to pull your conduct back, particularly in situations in which you have a lot of private enforcement. So Jacques pointed out Belgium or certainly in the U.S., even if you believe that the agencies will mostly get it right, you want to avoid the cost of the agency investigation. You particularly want to avoid the cost of dealing with a private litigation and with courts, and that will cost people to trim back some of their competitive behavior, so I think this threshold, determination of dominance, is actually quite important.

>>CHARLES WEBB

Thank you, Ron. I would like to move on. Another big segment of this working group has been dealing with state-created monopolies. It's an interesting kind of mesh between our two strains of work. Are there special considerations for state created monopolies or maybe entrenched dominant firms in the assessment of dominance?   This is something Simon is going to explore in his presentation.

>>SIMON ROBERTS

Thanks very much. Just, before I start off with the 3 points, my presentation is based very much on the real world. Africa, another small, isolated economy. But also, real world, I think, which I can relate very much to in terms of the remarks that John Fingleton made earlier, where you have a history of extensive interactions between business class, government class, et cetera, in Africa, you have extensive state involvement in the economy and involvement in terms of regulations, and legal cartels, for example, the cement cartel in 1996 in South Africa. And there was regulations in many agricultural markets, et cetera. This is the background we're working with. And the big game in town who achieved this position is about how to slow down entry. So you've got single firms that had regional positions within the country or positions in the country as a whole. And that's where we're starting from. And we want those firms to think about what they are doing in actual fact. Because their aim is to slow down entry to attain the ability to earn amounts that they had in the past because of their relationship with the state. And there is also some theoretical work, looking at the incentives and abilities of firms to protect and defend their monopoly position in order to earn the monopoly profit. I think the danger, if we're looking at state -- created monopoly, focus on ownership. It's an important role in countries that have had a similar experience in history to Africa. There are many countries that are like it in varying degrees that have gone through deregulation. State support and creation is much wider than ownership. It's much wider than ownership and therefore privatizing -- it goes to the subsidies and access to finance, which firms had in the past. It goes to rise in infrastructure, inputs, logistics, distribution, and it goes to all the regulator provisions which may have allowed firms to end up in this position. I'm not talking about firms that continue to -- there are natural monopolies. I'm talking about private firms and liberalized markets, where firms have retained or deprived their position. An advantage which is not transitory. Clearly this relates to other issues such as entry barriers, economies of scale/scope. Incumbent is sitting in a very nice position.

You have to look at it in terms it might come from entry position that the firm has. So I want to just go through a few examples. How widespread this may be in countries like South Africa. To show, potentially, our world is a bit of an outlier in actual fact. And we're very interested in learning from the experiences of countries such as Turkey, who was talking before the break, about abuse of dominance. I've been struck by -- actually how the characteristics and the features that we see in some of these industries are seen elsewhere. Grain silos is one example that we've had, they weren't state-owned by corporates. They were privatized but built by the states. In the African context, they were related to the farming industry. Another political point of view, entry is about challenging incumbent interest. In South Africa, derived under Apartheid. We have cases looking at the abilities or actions by firms, silos integrated in trading. Linking to positions, maybe national market. In airlines, another case we've heard recently, where the national carrier, which was privatized to Swissair, now renationalized again. In other words, it may not be very profitable. On the airline it certainly wouldn't be dominant. It's a very good illustration of potentially, satisfying behavior, the board being captured by senior management, all the central agent problems. But something to, at least in terms of viewing the case, maintaining position through -- arrangements of travel agents and market definition questions about entry of low cost airline, entry, it's affected full service market, markets, et cetera. In chemicals, a particular case or set of cases where the incumbent's firm -- [Inaudible]Long periods of time. Particularly here, a very interesting set of questions arising around. What's the ceiling to the market power?  And therefore, what are the costs of under-enforcement?  We had that debate a little earlier, but in the sense that it may not be about giving entrants altogether but the ceilings to the power -- the ability of independence to import at cheaper costs and potentially raising those costs through issues such as access to the logistics of the ports, et cetera. These types of things are explicit in the documents of the firm.[Inaudible]this has been going on for a long period of time. And then the fourth case is the case -- 95% of the European market. Incumbent Brewer with 95% of market. No regulation up front in terms of it but a whole set of regulations around the abilities and licenses to distribute, to market, and get product to customers. Taking that into account one would look at it quite differently in the sense that its position is being bequeathed by a whole history of interaction with government and with regulators around distributing liquor. So clearly we want to avoid over-enforcement, but I'm putting our experience -- we want to avoid under-enforcement as well to continue to allow companies in this type of position, to entrench their position. The other point I want to make is something, we're missing so far, it doesn't just depend on the dominance issue. It often depends on how clear the standards are and how they are applied. There are 2 points I want to make there. If you have quite high standards and clear standards for the abuse, for example, our pricing abuses, very high and clear standards for what constitutes predation, as well as a whole range of explicit -- dominance is less important because you don't, there is not the same risk of chilling pricing by dominant firms. There are very clear understandings. And secondly on the application, if you have a separate specialist tribunal rather than courts, then they will look at the entry barriers and say, 1 year, if it can't happen in 1 year, that's a problem. So that's something we've got to take into account. If we don't, then we're having a debate on the dominance thresholds in a very partial way. I said already, under-enforcement is more likely in countries with characteristics such as South Africa. That's --

>>MALE SPEAKER

What is policy implication?  I think we all agree, simply the fact being a state-created monopoly does not equal a violation of article 82 or section 82, just the fact that a dominant firm does not equal abuse of dominance. Is the policy implication, if, to use European speak, if you're a state-created monopoly, certain advantages granted by the state, your special responsibility as a dominant firm is potentially broader or easier to find liability for abuse compared to a firm whose dominant position is the result of their ability to build a better mousetrap?

>>SIMON ROBERTS

I think we should take it into account in terms of initial screening, which I see dominance as the first stage. If you've derived your position not from risking taking or varying, et cetera, we'll overcome that hurdle. We want to overcome that initial hurdle much more quickly. The beer Brewer, for example, I mean, they have --[inaudible]

>>SIMON ROBERTS

We have to get into that effect space. It's relevant in terms of understanding what we're engaged in, in terms of that assessment of dominance.

>>MALE SPEAKER

Can I jump in?  I guess I would like to ask Simon whether this approach really mixes two different concerns. One concern may be a public policy concern about structure of the market, a desire that either state-created monopolies or state-advantaged private businesses, have less of a presence and other businesses that are smaller have a greater presence, so that you have more equally balanced players in the marketplace, that strikes me as a public policy issue, but one that is really, and should be distinct and separate from assessing whether that former state monopoly or that state advantage business is dominant. Take the beer company, for an example. It may be that the beer company still has a significant share. But only because it has to price its beer competitively against the other beers that are now available in the marketplace. In that kind of situation, if you look at the recommended practices, it wouldn't meet the high degree of market power which talks about the level to which price can profitably be raised and the duration that price can be maintained at such a level. So is that part of your assessment or is this more of a public policy notion that we're going to have a lower burden of proof because we don't think it's healthy to have the vestiges of state assistance in our economy?

>>SIMON ROBERTS

It's not about public policy. We're not trying to -- we don't see our role as trying to bring in small players. Really, it's about getting over that first stage of whether we get into the effect space, test, and whether we would move more quickly into that. I want to say quickly, I should say, this case, we're still looking at, in many areas. Cases are starting to come through now. In the public sections, but it's not very quick at all. We still have to do the full effect space test. We have to assess whether, you know, it's a very contestable market and new entrants could come in any day and their pricing against that issue. It's not and the pricing so much. I'm talking much more here about conduct to protect and defend the position and protect and defend their ability to earn super competitive rates. So it's about vertical arrangements. Exclusionary arrangements, et cetera. The question for us is whether we should be getting more quickly into that effect space analysis of those types of arrangements or whether we should be burdening it in an earlier stage with the dominance assessment. Our view is, if you've had 95% for, you know, a century, then, or 98% for a century, 95%, premium beer market, you can buy imported beer, then we should be getting into looking at the types of vertical arrangements, distribution arrangements, et cetera, which we understand actually the firm, the firm behaving rationally should be doing these things. The firm behaving rationally should be engaged in anything which it can do to raise the cost of entry. If it's not doing that, given how long it takes us to bring a case, then, you know, it's not serving it's shareholders.

>>RONALD STERN

It might be discounting.

>>SIMON ROBERTS

We've got a very clear and high standard for it and the point about also predation would be, you're discounting so you can recoup in the future so we wouldn't be going -- we would be looking at it in the context to recoup in the future, develop a reputation, et cetera.

>>RONALD STERN

My last comment, it's just, very quickly, very quickly to say, I took comfort from the notion that you talked about defending super competitive prices, so, in fact, it wasn't simply the fact of a large historical market share, but the pricing that went with it, which seems to tie back to the recommended prices.

>>MALE SPEAKER

Strictly within the complex of dominance, if not monopoly, that was the result of state action. And then in reaction to -- you could go discounting. But would that not move you immediately into the next generation of issues, which would be about pricing?  What we see in the areas which have been liberalized is that there are new entrants, and the new entrants exercise a very genuine and very significant, in fact, on the behavior of the incumbents. Quality of service, pricing the whole range of behavior. However, they do not succeed in getting a significant market share. Not in our markets but various markets, such as, just to give one example. And then we're asked to support, not the liberalization as such but the competitive position of the new entrants against price competition by the incumbent. And you see that within a year or two, if you look at your portfolio of complaints, they move from lack of access to the market to predatory pricing by the incumbent, and with an arbitration, you're constantly required to make between the medium, short to medium term consumer interest in having these lower prices, and the medium to longer term generally interest, in keeping the new entrants on the market, which is something you can definitely not take for granted. Not even in a small and open economy. How do you see that from the South African perspective?

>>SIMON ROBERTS

It sounds like a very good comment. We've seen this in certain areas such as telecommunications. The kinds of cases I'm talking about here, actually, one place we haven't seen this gradation -- in telecommunications, we've been closely drawing from the learning of international cases, but actually, some of the critical assessments of the international cases, to understand whether it's the appropriate time for us to intervene, because do we have remedies.  We also have regulators, that's another issue there, so we've seen that evolution. We've actually thought that, in many of those areas, we've been quite cautious about intervening in actual fact.

>>MALE SPEAKER

I think it's a very interesting question you raise, Jacques. In the guidance papers, they say in pricing-based abuse, they will view it as the efficient competitor test. A footnote, there could be a section -- we'll depart from that. You wonder if, in a liberalizing market this could be one of the exceptions. It goes whether you judge the interest in the short-term, I.E., the incumbent is giving lower prices verse long-term, if this continues, we may not have any competition in the future. Anyway with that comment, I would like to open the panel up for questions from the audience. I think we've raised some very interesting issues here in terms of monopolies and competitive effects. I would like to see if there are any questions that other people have. Like panel one, just a quick Q&A. It can be address to the panel in general or a specific panelist. Yes, in the back there. If you could identify yourself and where you're from, please.

>>AUDIENCE

Sean, formerly World Bank, now with Micro. In the host of countries that I've worked in, I have found in the case of dominant firms, especially those that are formerly state owned, two things happen. One is that you may privatize the firm itself, be it a fertilizer firm, but you haven't privatized state banks or access to land. So when you do have privatization, you find that there is still preferential relationships between the formerly state-owned entity and with the state-owned banks, and access to land and other facilities continues. So to what extent that prevails in South Africa, I was wondering if that's the case. The other also observation I have is in many of the markets described, like fertilizers and beer, it seems that barriers to entry are not just at one stage of manufacturing but also downstream, and so when we're assessing barriers to entry you have to consider that entry has to take place at multi stages. Not just at the manufacturing or processing, but also at the distribution level. Thank you.

>>JACQUES STEENBERGEN

Yeah, I think, I agree, I mean, I think the preferential relationships may not be around with currently state-owned enterprises. It may be that they have developed particular rights that are entrenched as well so it goes even further. We don't have preferential relations with state-owned banks, for example. We don't really have state-owned banks in South Africa. But a large -- the company I was talking about was the New York Stock Exchange , not a company. Barrier to entry, yes, I think it's very important that multi-level entry may be required and that's certainly the case.

>>MALE SPEAKERI think to get it back into the framework of government practices, if there are government practices,

those practices can directly go to entry barriers. Does the incumbent have -- preferential access capital, for instance, compared to new entrants and that can be seen, in my opinion, as entry barriers. That makes entries harder for the new entrant than it does for the incumbent.

>>CHARLES WEBB

Anyone else with a question or comment?  Last chance. Yes, Vladimir.

>>AUDIENCE

I would like to go a little bit back to the issue of durability, of dominance. In this context, my question, actually, to all the panel, is whether the terms durability of dominance can be used interchangeably with the terms sustainability of dominance?  I'll try to exemplify my question a little bit. When we're talking about durability, we have a certain notion of timing. And this notion is actually somewhat retroactive because we use it in light of market share and the --[inaudible] we try to assess a vision of market, or the market position of the firm. We've also got to know whether we can predict that its dominance will continue. In this sense, we should relate this potential durability of dominance. And in this context, my question is, whether the term sustainability can be considered as more all embracing than just durability, because it also includes, not only -- long-term components but other components to assessing the sustainability of dominance. So would you like to comment along those lines. Thank you.

>>MALE SPEAKER

I would have a certain preference for the term sustainability.

>>MALE SPEAKER

I would think that regardless of which term is used, it's very important, as I tried to note in my discussion, that you not just look backward that look forward since obviously the competition concerns are primarily concerned with what happens, predicting what will happen in the future.

>>MALE SPEAKER

I think putting forward and understanding entrenched, looking at going to the future but also understanding that the reasons why a firm may be entrenched goes to the kind of points about asymmetry between incumbents and new entrants. That would also come into understanding whether it's -- I would go further than sustained. On what grounds. The terms are not neutral.

>>MALE SPEAKER

Sustainable sounds nice, entrenched sounds bad. So we must make sure that we not are prejudging the outcome.

>>CHARLES WEBB

We're getting up upon our lunch time here. Before I break, I have some administrative announcements. Before I do so I would like to give each panelist a quick chance to wrap up and give any final thoughts. Starting with Ron. Do you want --

>>RONALD STERN

Just a few thoughts. I think we had a good exchange. It seems to me that the recommended practices do a good job of highlighting the need to look comprehensively at all the different factors and not simply looking at market power and entry, which are the two that get the most time and space. So I would simply encourage that facts are important, looking at the market context is important. Looking at the other factors are important.

>>SIMON ROBERTS

I would echo that certainly. The evolution of the markets, the relationship of the different markets, is important, and this is all a detailed assessment but that's an important component.

>>JACQUES STEENBERGEN

The key issue remains there is nothing wrong with durable dominance at such.

>>CHARLES WEBB

I would like to change the competition briefly, we all care about lunch. I'm told it's being served outside in the Plenary Hall. There are two identical buffet lines so if you get in one line, don't feel like you're missing out because the other lane is the same and there are -- A and B. Lunch will go on till 2:00 P.M.. Then we go to our breakout session. They are to discuss three very interesting topics. The first topic is kind of reconsider in more detail some of the policy considerations that we talked about in panel one. The second topic is, we'll explore the unique issues in defining relevant markets in conduct cases that may not arise in the appraisal of merger cases. We're talking about the fallacy and kind of sniff test and what we're used to in murder cases. Does it correctly apply in our conduct cases or it can read the essentially false negatives in some instances?   And also in the breakout sessions, we're going to break out the breakout session into smaller groups to discuss what hopefully are some fun hypo-s for dominance, and to see if these, in these kind of case scenarios, whether a firm has a dominant position or not or do we need more information to give that out. We're going to use, again, breakout sessions at 2:00 P.M. we're going to use rooms A, B, and the Plenary Hall for the breakout sessions, and the room -- your room assignment is on the roster attendees, which is in the folder that everyone has received. With that, I would like to thank my fellow panelists and also thank you for listening to us so patiently. Thank you. [Applause]