>>STANLEY WONG
Ladies and gentlemen, it's my pleasure -- I'm Stan Wong from the Irish Competition Authority. It's my pleasure to welcome you to this afternoon's plenary session on predatory pricing. We're very fortunate this afternoon to have a number of speakers, which have very, very diverse backgrounds. Starting on my immediate left, Olavo Chinaglia, a recently minted Commissioner of TAGI, which is the adjudicative tribunal in Brazil. Olavo is a lawyer with three degrees, being a doctorate in law; he's been in private practice. He was recently appointed as part of the Youth Wave in Brazil. Immediately next to him is Katja Viertio. Like all good Commission staffers, her bio never mentions her nationality. She is Finnish. She has been in Brussels for about 16 years working in a variety of different Commission offices recruiting working in the cabinet of the Finnish Commissioner. And she has been with what is called INSOL. This is the group that deals with telecommunications and other things. She has been with the DG Comp since 2004, working on a variety of things including the very famous Telefonica case. She is now part of the unit that deals with antitrust and merger policy, and specifically her relevance to what we're doing today is that she's been intimately involved with the so-called Article 82 guidance issue, which was released officially in February 2009. Next to Katja is Alden Abbott, who is well known to certainly the American audiences. He is an Associate Director of the Federal Trade Commission's Bureau of Competition. This is part of the home team. Alden of course is -- has a very impressive background. He's both trained as a lawyer at Harvard Law School; as well, he has a master's degree in economics from Georgetown. His resume speaks of somebody who probably should be working for the Commission, because among other things he speaks French, Spanish and Italian and no doubt a few other languages, as well. And on the extreme left is Terry Calvani who is well-known to everybody around the world. Terry has had an impressive record of both being an academic, principally at Vanderbilt University as a professor of law. He has been, of course, a Commissioner of the FTC, including spending time as acting chair. He's been in private practice with Pillsbury and now with Freshreil (ph) Brookhiser, Derringer, and of course, Terry and I are part of the Irish wave, in the sense that Terry was a former member of the Irish Competition Authority. His vacancy, I don't know if I should thank him now or not, created the vacancy for which I applied and got the job. He left behind big shoes; I'm still trying to find the second shoe. But the topic today is very, very interesting in the sense that although there are very, very few cases that are ever brought to successful prosecution, in fact the ICN report released in 2008 identified 24. And it's also noted that five times as many cases have

been considered and dismissed. Those of you including myself who have been in private practice of law know that one of the steady things you always ask for is opinions about predatory pricing. So it's a very active business not only for private practitioners but also for government enforcement agencies, yet there are very few cases. So it's a very kind of a puzzlement, why are we spending so much time doing it? The answer I think lies in the fact that the basis for dealing with predatory pricing is quite complex. Even though you say there are very few cases, but of course as an enforcement agency, you have to decide why are you rejecting the case? Just because you say, well, we don't have a good record of success, that's certainly not enough as responsible government officials. Of course, what is challenging about predatory pricing is that rarely is the complaint ever made by consumers. And this is why, you know, you have this wave of academic and judicial commentary about, after all, predatory pricing is not -- predatory pricing law is not designed to protect competitors, but of course, you only want to intervene when there is harm to the consumer. But rarely do you get consumers complaining about predatory pricing. Another conundrum of course is that for all of us who have to explain to people what we do; we say what is antitrust and competition? You first start with price-fixing. That's very easy; everybody understands that, oh, yeah, secret meetings, sometimes in very nice places around the world, but everybody understands the price fixing. And then you go on to the next, and you say well, how do I explain what I'm going to do? And you can't talk about the abuse of dominance, in a kind of big sense, and you say, well, sort of -- then somebody says, well, it's unfair competition. Then you sort of say yes, because then people said, ah, must be, because you don't mean people driving people out of business. Then everybody collects, oh, well, that's what you really do. In fact, that's not what you really do, but it's sort of good enough. So it is I say an activity that we're all engaged in, and the -- what the ICN report has done is identified that everybody agrees that -- some measure of cost is important for predatory pricing. The question is, what more? The object of today's plenary is really not to provide for you at the end of the hour and a half with a package of, say, well here are the elements to prove. One has to recognize that we're all from different jurisdictions, and in some instances several agencies in the same jurisdiction. The object of the exercise is to really identify the various issues that come up across jurisdictions. What are the issues and challenges in dealing with any one of these factors: Recoupment, intent, competitive effects, price benchmarks. And so my view about this kind of a session, you'll leave the room this afternoon in an hour and a half from now with one or two thoughts to provoke you, that I think we've achieved our purpose.

So the program is going to work in the following way. We have prepared the panel, myself have prepared a whole series of questions. And we're not going to try to cover all of them. We're hoping this will be dynamic. What we've done to make sure there isn't blanks in the webcast is that I'll ask the question of one person, one person will lead, others are invited to join in, pile on if they wish. If there's not enough provocation, then my job, as the moderator -- and I think the better is the French word, animateur -- I'm going to provoke somebody to challenge the remark. And we'll see how it goes. We're not designed to take questions from the audience, but we'll see how it goes. It's very bright. I can see everybody. You can all see me. So it may be that it will work. I don't know. Let's just see how it goes. Now, it wasn't drawn by lots. I exercise my authority to pick somebody to ask to deal with the first question. Everybody knows there's a price-cost benchmark. But of course, we know there are other factors, such as predatory intent, recoupment of losses, defenses, and other justifications, competitive effects. Terry has agreed to sort of talk about why these other factors are necessary or appropriate to consider in addition to a price cost benchmark. Terry.

>>TERRY CALVANI

Well, that's what I originally agreed to do. But you know we've been here for two days talking about law and economics, and I'd like to change things. I'd like for us to pretend like we're all doctors, that we're all wearing white coats, and we're doing grand rounds at a big teaching hospital. And we're confronting a new, very serious disease that we've encountered, but one that affects only a very small number of people. And this disease is caused by exercise and a healthy diet. Now, I would suggest that all of us would be very, very concerned about misdiagnoses with this particular kind of disease before we prescribe the routine of a sedentary life and a diet of alcohol, cigarettes and fat. Now, I begin with this, and it's a bit of a silly hypothetical. But to remind all of us as competition law enforcers or as former competition enforcers, that we, like doctors, ought to have some kind of Hippocratic Oath to do no harm. I can think of no other area in which we work that presents opportunities for affirmative harm by competition enforcers than the general area of predatory pricing. In a lot of areas where we make mistakes, the cost of a mistake is borne by a competitor, where we do injury, we've done the wrong thing, we've made the wrong decision, we've prosecuted the wrong person, and we injure a competitor. But here where we make mistakes, we have a real opportunity to ourselves injure competition. And I begin there. Now, having said that, don't get me wrong. I don't think there's any question but that a profit-maximizing firm might sometimes find it rational to engage in price predation if it can cut

prices sufficiently to discipline a competitor, and secondly, thereafter raise prices high enough to recoup the loss before competition arises, to make the exercise, if you will, worth the candle. Let's go back to Stan's question, why do we need other factors? What are these other factors? Why are they important? And I would suggest that additional screens are necessary because it is often very difficult to infer or, for that matter, refute predatory conduct on the basis of the price cost analysis alone. Let's think about it for a moment. I went to the grocery store the other day, and they were giving four-packs of hand sanitizers -- I never bought one before, but they weren't giving them away, they were selling them for about, you know, a dime for a pack of four. I can't imagine that anybody was recouping any cost on that kind of a sale. But I suspect everybody in the room, when they would think about it for a moment, would say, well, whatever the price cost test there, obviously what that vendor is doing is trying to introduce a new product into the marketplace to establish a presence in the marketplace by acquainting consumers with the product that they otherwise might not purchase. That's one example. You could move to the complete other end of the life cycle of a good, not a new product, but a product that's becoming obsolescent, where you have a firm that's planning to leave the market, who's really not concerned at all about its fully allocated cost. Or you could move to the middle, where you might have a firm that simply concluded that it simply wants to lower its prices temporarily in order to try to increase the acceptance of the product in the marketplace, where there'd be sufficient volume later to justify a price lower than that that it's currently charging. All of these are examples of where you might have a vendor who is selling a product for whatever you think is the appropriate cost measure, clearly below that cost, and where, when we think about it for a moment or two, we say, you know, really not bothered by that. So it seems to me that if you think about it for a moment, the focus on the price-cost test, whatever the price-cost test is myopic, and these other factors become very important. Now, I'm an -- as you can tell from my voice, I'm an old dog, and I guess I'm a product a bit of my history. When I first came to the Bar, predatory pricing cases in the United States were everywhere. I mean, kids went to bed, and they wanted mommy and daddy to make sure the closet doors were locked or shut, the light was on, and you checked under the bed to make sure there wasn't any price predators hiding under the bed. It was that they were that common. And when I came to the Bar, my first five cases were predatory pricing cases. My first five predatory pricing cases. And one of them involved predatory pricing cases, and one of them involved predatory pricing case against a company called the Theodore Hamm Company, which doesn't exist

anymore. And the focus was on a brand of beer called Buckhorn, which I promise you probably nobody, maybe Greg -- Greg has had a lot of experiences -- but nobody in the room has ever seen. And every time that Theodore Hamm Company would try to garner some additional market share by putting this product on deal, it was confronted with a predatory pricing investigation. I remember going with a partner in an early meeting and sitting around a boardroom where the CEO or the vice president for marketing or vice president for sales said, you know, we have learned our lesson, the antitrust laws have taught us, we are not going to put this beer on discount. We're going to follow the competition's lead. Whatever the competition's charging, that's what we're going to charge. And it brought home to me that while competition law enforcement can be a very positive thing, it can also be in some instances a very dangerous thing. Because in this instance not only was an anticompetitive design not checked, but it really brought about and fostered tacit coercion in an industry all in the name of competition policy. In the U.S, we had a fascination with an average total cost standard following Utah Pie. We were fascinated by documents that evidenced to some people's minds anticompetitive intent, and we had absolutely no concern about recoupment. So I would suggest that all of these other factors which we're going to get into now are really important, and that while the price-cost test is an interesting place to start, and I'm not going to say it's not important, I think it is. But it's not the whole ballgame.

>>STANLEY WONG

Thank you. Any one of you want to intervene? Although I guess what Terry said is not controversial, let's move into the substance. Let's start with the price-cost benchmark. As all of you know that virtually every jurisdiction uses a price-cost measure. And there are five them. You all know what the five are: Marginal cost, average variable cost, average avoidable cost, long run average incremental cost, and average toll cost. Katja, tell us, there are many jurisdictions that use more than one measure of cost, such as the European Commission. Why is that so? What's the purpose behind? And then I'm going to come up to -- Alden will pick up as to why people have focused on one measure cause as being more attractive than others. Katja, please.

>>KATJA VIERTIO

Stan, if you would like, I would like to say something in reaction to what was said before.

>>STANLEY WONG

Absolutely.

>>KATJA VIERTIO

Because he said that, there was no predetermined plan for this discussion. Actually, it relates to what I'm going to say afterwards. I

think that I can agree to much that has just been said by Terry, though maybe not on all of the details. We were discussing that all of these elements are very important. But I think that there's one that was missing, and it's the concept of sacrifice. And it's that concept of sacrifice that makes predatory pricing so special. And actually, that I think that defines predatory pricing, because predatory pricing is -- is deliberately in fact incurring losses or foregoing profits in the short term. And if, for example, we take the average avoidable cost measure, there is -- you would think that there's something suspicious in the fact that they are incurring costs that they could avoid, the company's incurring costs that it could avoid by simply not producing the costs. So I think that's reason enough to look into predatory pricing situations and ask yourself the question, what's going on here? There's something -- something going on here that we need to look into. The -- indeed in the EU we have two cost measures. We have, since 1985, we have constant case law, since the case called Axso, which was a predatory pricing case, indeed. And the Court ruled that when you have -- when the price of the dominant undertaking is below average variable cost, then we are in such a situation where it's been very difficult to do anything but infer that the conduct is predatory. But then, like in this case, there was a situation whereby all the products concerned except one were actually above average variable cost, but that the price did not cover average total cost. And the court viewed this as a situation whereby there might have been some return on the capital, but there was a risk that the prices charged by the dominant undertaking were capable of affecting the long-term viability of competitors. And I stress viability, and I stress the word longer-term viability of competitors. And it's been mentioned here that we have issued guidance at the end of last year, which are about our enforcement priorities. They're not about interpretation of the law. And in that guidance, also for other conducts than predatory pricing, we retain two cost measures. And we considered that prices which are -- which are below average avoidable cost, usually are a clear indication of a sacrifice and could point to a serious situation. The difference between average avoidable cost, it's the same as average variable cost if you invested -- if you had some fixed cost that you invested in for the purposes of the predation, for opportunity of increased output. And then we have, as Per Hellstrom said to you this morning, we have a safe harbor if the pricing is above long run average incremental cost. And so you -- at one side you have a safe harbor, then the other side you have a situation where there's a clear indication of sacrifice. And in between, you would need then to look into your story of harm in a lot of detail. But coming back, and to finish on this one, we do not look at our price-cost data only. Not at

all. Even in case where the prices are below average avoidable cost, there maybe a reason for which the dominant undertaking is engaging in such pricing behavior. So the price-cost test is an indicative test only and needs to be integrated in a more sophisticated and comprehensive analysis of anticompetitive foreclosure.

>>STANLEY WONG

Anybody else want to comment, or shall we -- let me just move on to Alden. Alden, as we know that average avoidable cost is the one who's considered most attractive, because it takes into account not only the variable component, but any fixed component of costs associated with the variable component. Can you sort of tell us what is in there and what isn't in there?

>> ALDEN ABBOTT

Oh, sure, Stan. Average avoidable cost considers -- consists of all the costs, fixed and variable, that can be avoided by not producing an incremental number of units, okay, divided by that number of units. Now, why is that superior to alternative measures of cost? First of all, I think any measure of cost is imperfect and is very hard to measure. There are measurement problems. But I think in the section 2 hearings, there were a number of -- that the Justice Department and FTC held, there were a number of commentators that suggested there was a growing consensus in support of average avoidable cost. Why, because it's easier for business people to understand and to measure. You basically ask the business person if you are going to, or to produce an extra number, increment of units, what additional cost would you incur due to that, and that -- and you don't have to worry then about whether the costs are available, technically variable or not. You know, if you're going to add something to a production line, that can have fixed cost quality, but it's something you need to add because you're producing the extra units. Obviously, the extra cost of electricity and labor to produce the extra units, that can be added in. It's a measure, albeit not perfect, that's probably easier to measure than average variable cost. There are average variable costs which doesn't include those elements of fixed costs, is -- there are arguments as to whether certain types of depreciation are variable or fixed. Of course, in the long term everything is variable. But in generally speaking, average variable cost may be a little bit harder to measure, and you may price at average variable cost, not below it, and yet not be covering certain additional incremental fixed cost. And that's a real sacrifice. And that's a problem you may have if you use average variable cost. Now, marginal cost is the cost of producing the last unit. Well, I think there was lots of discussion in the section 2 hearings we held that marginal cost, first of all, is very hard to measure, and second of all, ignores the fact that even if you could

measure the incremental unit, what if you have 100 extra units, the 99 units you're pricing well below the cost. At the incremental 100th unit, you've added in these incremental sales and production, you're pricing at marginal cost. You still may have sustained a substantial loss, and there may be a substantial sacrifice. So that's imperfect compared to average avoidable cost. Now, there's a long run average incremental cost which includes fixed costs that were already sunk on -- prior to the additional incremental production, unlike average avoidable cost. So you could end up pricing at or just below average, just below average, long-run average incremental cost, and yet still be better off than if you had just shut down production. In that sense, it might not really be sort of sacrifice that you'd want to look at to determine predation. So I think the consensus seems to be that's not as good as average avoidable cost. Even more so, pricing below average total cost, there's no reason to use, since Utah Pie, an old 1960s Robinson-Pattman case that is discredited today, you might price just below average total costs, and yet you may get -- you're much more than covering fixed costs, you may be covering a lot of costs, and maybe be profitable to keep producing. So I guess it's sort of by process of elimination, not that it's maybe perfectly measured all the time; it's not. But it's probably overall the best sort of cost measure to use, and there seems to be a lot of support for that notion, not just in theory, but practitioners such as Douglas Mellamet, for one, who said this is something that I think is easier for clients to be asked and to be able to answer reasonably than alternative cost measures.

>>STANLEY WONG

Any additional from any one of you? Let me ask you this question, Alden, then. I'll just give you a simple example of what you and I have discussed before, about one thing to say we will use avoidable cost. The question is how do you really apply this? Does that mean we can just shut up and we will go outside and enjoy the sunshine? Take for example, I'm an airline, I've been flying between here and Philadelphia. I realize that nobody flies anymore, takes the train. So I have all these planes that are sort of mothballed. But I've been operating in the D.C.-Chicago route, and I decided that I want to start bringing planes on, because I want to blow up the competitor, right? One way of looking at these planes is saying, well, these planes are mothballs, already paid for, it's just sitting there. Yes, I have to play for fuel, maybe not even the crew, because the crew could be under fixed contracts that, again, almost paid for. So does that mean that the plane is basically free, and I'm just paying for the running cost? What's missing?

>> ALDEN ABBOTT

Well, certainly there's an opportunity cost notion. I mean, presumably the plane could be used, could be leased to someone, if there's no contractual or other constraint on that. And that's a real, you know, forgone opportunity that you want to measure, presumably.

>>STANLEY WONG

That of course depends, of course, on the operator, because it may well be that I have these planes in the moth ball in the corner because, you know, maybe I'll need these planes, these extra planes for some other route. So I want to maintain the flexibility. Should I be forced to say you got to value those planes sitting in the hangar at the opportunity costs of leasing it out to another third party?

>> ALDEN ABBOTT

Well, it's an interesting question. I think certainly properly measured, you know, a cost includes not just accounting costs but opportunity cost. So sort of basic economics. And particularly, I think in this sort of industry, where you have assets that can be -- that can be readily deployed through short term alternative uses, for particular periods of time. But --

>>STANLEY WONG

All right, let me -- I think the example illustrates that the actual application of these price-cost measures are very, very difficult in practice, as to make these decisions as to what is to include and not to include. Katja, you earlier spoke about safe harbors. Of course, the discussion about cost naturally leads there. You know because at least 16 agency reports have certain presumptions, priced below average variable cost is one that is presumptively predatory, 13 agencies say it's rebuttable. Other agencies have presumptions that you price above average total cost, there's no issue at all. Tell us what role does these price-cost measures play in terms of safe harbors?

>>KATJA VIERTIO

Maybe in relation to what was said about the emerging consensus around average avoidable costs, yes, I'd say that I fully agree, it's observable and it is indeed understandable. I mean, the guidance, we say the first step here when you look at whether there's predation is that you look at the factors as to whether the dominant undertaking is pricing below average avoidable cost. But the thing is that we think that there may still be a predatory situation when you are pricing above average avoidable cost. I said that the court earlier on was concerned with the longer term viability of competitors, and yesterday we had a discussion on the definition of dominance. And it would seem unlikely that a dominant firm would price below its long term average incremental cost, because it's not really constrained, and because it can afford to price above that level. And I also remember

if -- sorry if I quote him wrongly, but I think that Ron Stern at some moment said that -- and I think he was talking you know in the place of a dominant company, that if you can only cover your average avoidable cost, you would not be in the business at all, especially when you have a big front cost like aircraft engines. So this is the -- and that's what I admitted to saying in my reply earlier on, that this is the reason for which like case we keep on having two types of cost measures. So we have AAC and we have LRAIC. And of course, then the -- you have to of course have a more comprehensive analysis when you apply the strict and higher cost standards.

>>STANLEY WONG

Anybody wish to intervene? This is getting very polite.

>> ALDEN ABBOTT

Right, well, I guess, you know, I think Katja's point is an interesting one, well taken. Why, I think, was the U.S. not really concerned about pricing above at least enforcement agency, above average avoidable cost. I think to use the term cost, error cost, and that was raised again this morning, is something we want to seriously be concerned about. Because whenever you find sort of a discounting pattern, you know, we have to -- we have to be concerned if there are immediate benefits to consumers that are being realized from a pattern of lower pricing, even if it is below LRAIC, you have to say, well, gee, we don't trust that, these short-term benefits to consumers, because we are afraid this is part of a scheme that in the future is going to lead to prices higher than otherwise to consumers, higher than we would have had in the alternative. And discounting those higher prices for future uncertainty, and for the time value of money, we still think that the world, consumers would be best off if we blocked this kind of discounting. And so I think that's a concern, really, that if we're wrong about the ability to recoup and to create incremental extra harm to consumer, that would not -- consumerism would not have been realized but for the pricing above average avoidable cost, but between this long run average incremental cost, then you want to be very sure that you're really make consumers better off. And the further you go into the future, the tougher it gets to make prediction. And antitrust inherently is not a policy aimed at sort of shorter to medium-term effects on markets. Trying to -- you want to be very, very sure that the market -- that in the future you're going to have harm to consumers, and a big enough harm to warrant taking action. And so I think that is one of the reasons certainly why perhaps in the U.S., there would be less concern about that kind of pricing.

>>TERRY CALVANI

I'd just like to focus on eight words that Katja used that I'd like to amplify or focus on for a moment. "We may still think there might be injury" are the words that caught my attention, because I think that all of us probably agree that there are many instances where there still might be injury. I'd like to recommend -- we won't talk about it today, but if you're at all interested in the subject, there was a judicial opinion written by a guy named Steve Breyer, who is a justice on the U.S. Supreme Court. I don't think anybody would say he's a Chicago school person. He, on the U.S. Supreme Court, would fall on the liberal side. And in this opinion he focuses on those eight words: "We still think there might be injury." And he tells an anticompetitive story, not unlike the one that Katja posed, but then raises two points. And that is, the fact that we may be able to tell an antitrust -- an anticompetitive story doesn't necessarily mean that we ought to be concerned about it. And he focuses on the point that Alden raised, and that's the type 1-type 2 error thing, about which everybody's probably very conversant, but to which I want to return in a moment again, but also, on the ability of the customers, if you will, the business people who have to exist within the legal regime, to be able to guide their conduct in a way that they can predict that I'm doing something on this side of the line or on that side of the line. And to the extent that it becomes overly complicated, and to the extent that you're worried about we might be able to tell an antitrust story, you've got to also bear in mind, change your roles, and ask yourself, what kind of guidance would I give to somebody who clearly wants to be law-abiding? Am I going to be able to tell them how they can avoid problems? And that was essentially the guts of this decision by Mr.-- by Justice Breyer in a case called Barry Wright Corporation, where he talks about how the fact that there might be an anticompetitive story is interesting, but may not be much more than just interesting, because you've got to think about the error factor by the agencies. But even more importantly, you've got to put yourself in the situation of the person who's trying to be on the right side of the fence. Judge Posener the other day wrote an interesting piece where he talked about the new work in empirical economics that casts some doubt on the traditional or traditional -- the modern way that many U.S. courts have approached price predation and said this work has pointed out to us ways in which it might be profit maximizing to engage in price predation that we may not have appreciated before. But you don't want to be in a situation where you've got to have a John Bates Clark medalist running the case as a case officer in order to figure out the right result. Moreover, you've also got to think about the guidance of the person in the street, the businessman or the businesswoman that's trying to drive on the right speed limit. And I just make that point.

The fact that there might be an anticompetitive story to be told is, I think, overblown.

>>STANLEY WONG

All right. For those of you who don't know about the John Bates Clark medal, that's the medal awarded by the American Economic Association to top economists under 40.

>>TERRY CALVANI

And it's always been the best predictor of the Nobel laureate. If you're looking for a best predictor.

>>STANLEY WONG

All right, I think Katja wants to come back in and defend the honors of the Commission. So Katja.

>>KATJA VIERTIO

No, that's not at all the purpose. No, I think that just to maybe restate something which I think most of us will agree upon, is that indeed I think that we have issued a guidance where we clearly state that we will prioritize cases that will result in consumer harm. But we have not taken the step to saying that will result in immediate consumer harm. We still think that by affecting the competitive structure of the market, there can be consumer harm later on. And I agree that then your analogy, you introduce more variables into your analysis. But I think this is an important point to be made to understand the guidance. And also, when discussing the immediateness or not of the harm to consumers, I'd also see a parallel on the effect to the consumers. Because if the benchmark is average avoidable cost, then we draw the conclusion that either they don't enter, or those that are in the market, they better shut down the business. But often predatory pricing is aimed at disciplining your competitors. You keep them in a niche position, in a small position, and you don't get a big threat out of them, and you maintain or even increase your market power, and that's the objective of the conduct.

>>STANLEY WONG

All right, before we turn to the next question, I want to commend to you a number of the papers that have been mentioned. First of all, of course, the Commission paper, the guidance paper which was released in end of last year but actually officially published, as Katja's boss reminded me, in February of 2009, in the official journal. The numbering is different. That's why you want to deal with the February issue, and not the December 2008. The section 2 report notwithstanding controversy, including comments made by commissioners of this house about the Section 2 report, it is very valuable to read Chapter 4 of the Section 2 report for the references and the discussion of the concepts. Whether you agree with the

ultimate conclusion about when you should intervene, so don't lose sight, that for those of us who are not in the U.S., you want to learn from Clyde Daukman (ph) because a lot of learning went into it, and a lot of references which would allow you to pursue any of these references that we talked about. The third thing that I commend to you read is the OECD prepared a round table, a little old now, but 2004 called Predatory Foreclosure, which you can get off the -- if you search predatory foreclosure on OCD, you'll get that. Then of course our own ICN Unilateral Conduct Group report last year, which is more a cataloging of which jurisdictions did what. Now, to change things up a bit, I'm going to jump around in the questions, now that I followed order for a while. This is the controversial area of intent. If we're focusing on effects, why are we concerned about intent? Who cares whether you intend to eliminate somebody? After all, it's the effects that count, right? But of course 24 of the 35 jurisdictions that reported in last year's report said they consider intent. Now, a lot of those have been here quietly sort of absorbing the environment. I'm going to ask Olavo here to tell us why we should be concerned about intent, notwithstanding we're supposed to be focused on effects. Olavo.

>>OLAVO CHINAGLIA

Oh, absorbing is the exact word, because since yesterday plenty of information dealing to compare to what we think of antitrust in Brazil. As you know, we are young in this field. Our agency is 16 years old, and we trying to -- we are trying to -- let's use a word, I don't know if it really exists in English, but to tropicalize the understanding of the -- the general understanding of antitrust values and applicable provision.

>>STANLEY WONG

It's like putting Samba into antitrust enforcement.

>>OLAVO CHINAGLIA

That's a good idea, I didn't think of it. And maybe soccer, as well. But the thing is that we have historical background that still affects the understanding and interpretation of antitrust provisions. A simple example that for you to understand what I'm talking about. During the '80s there were at least three cases of cartels organized by the government, in the name -- under the pretext of organizing the sectors. So the mentality in Brazil is still affected by this kind of excessively protectionist approach from the government to the companies, and to change that is our major challenge. I think we have been reaching a few results, especially in the last six or seven years. Well, in this context, we simply -- our law simply does not determine whether important thing to investigate in an antitrust behavior is intention or the effect. Actually, the law refers to both. But in our short experience, we are learning that intention is not --

cannot be predicted or guessed out of telepathy or any other esoteric method. Actually, intention must arise out from actual behavior. And then analogies of effects and intention basically arise out from the same -- from the same perspective. It's reasonable to assume that the intention of certain actions is to produce the reasonable expected effects. Of course, sometimes we find the documents from the company stating goals and then revealing their intention towards the market. But even if it's anticompetitive intention, it is not punishable only because of this. If there is actually no behavior in terms of implementing such intention, it's really -- doesn't matter for -- not only for antitrust law but doesn't matter at all. I could say that many of us may have already think or thought of punching someone in the nose. But if we didn't do that, and even if we announced that we would do that, it would be irrelevant in terms of law. Then, well, getting down to earth, and speaking of predatory pricing, the analysis of intention may assist authorities to understand how the companies see themselves among the market. The understanding of the companies among -- about the market structure, about their ability to induce behavior to their competitors, or about the existence or not of a dominant position. But for the point of view of the authorities, I don't think it's necessary to prove intention. Actually, intention will be relevant when the company -- the accused company have the opportunity of explaining why specific action has been taken. And then, plenty of explanations may be provided and may justify that behavior that, at first sight, looked like an antitrust infraction.

>>STANLEY WONG

You seem to be saying in the last remark there that what is relative intention is the intent not to predate, not that evidence of predatory intent is not necessary, in Brazil, but that if you have -- if somebody wants to explain why what they did was not predatory, they will try to bring in, if they could, among other things, demonstrate that their intention was not to predate; did I get it right?

>>OLAVO CHINAGLIA

Yes. Intention was not to predate, and more than that, that there is a different rationale involving that action, that conduct. And then, the prediction of effects may change or the feasibility of possible effect may change. Sometimes, we simply do not see the market the way the businessmen will do. Like let's think of an example. We have been facing some troubles in the civil aviation sector. There was a specific case in which the second larger company in Brazil, not the second at the time the announcement was made, was accused of predating the market by charging too little from the air tickets. And in fact, regardless of the measure of cost that was used, the price was really too low. What the -- the case was presented by the Civil Aviation

Agency, so -- which was supposedly aware of market conditions and the cost, the structure of cost of each company. But what the company demonstrated later on was that they were applying a concept of EUD management to their activities so that they could address different sections of the market or different profiles of consumers. So the length of the promotions, the number of seats available at very low prices, and the times of the flights in which the promotions were applicable, was applicable, demonstrated that it was -- there wasn't any predatory intent. It was -- a concept of management that where they were trying to introduce in Brazil. And it actually -- they succeeded and became the second larger company and changed the structure of the sector in Brazil.

>>STANLEY WONG

Now, Terry, intent in many jurisdictions regarded a separate and independent factor. What are the problems in proving predatory intent?

>>TERRY CALVANI

Well, I think we've touched on one, and that is, we don't have a predatory intent machine that we can hook up to people and get the right answer. But let me go further. I'd say that if you own stock in a company, you ought to fire any manager who doesn't intend to become a monopolist. I'd fire them immediately, I'd take away their corporate jets, I'd cancel their country club memberships, and I'd show them the door with no golden parachute. I think we want corporate executives who intend to monopolize and who intend to do evil to their competitors. And so I would suggest that intent has absolutely no role to play anywhere. Well-managed firms should intend to do all the business that they can do, and frankly, they ought to intend to crush their rivals. We as consumers ought to want to live in marketplaces where rivalry is harsh. Consumers, you know, they gain the most when firms slash their costs to the bone and where prices are cheap. So I think almost all evidence on intent is going to show two things: A desire to succeed, greed-driven desire to concede, and glee as a rival's bad predicament. And I think that's the world where we as competition enforcers or former competition enforcers ought to want, as nasty as the comments might be. Focusing on intent, though, diverts our attention. Because what it does, it creates an incentive to do lawyer-games. I remember when -- again, when I was a young lawyer, when the United States courts were just fascinated with intent. Where lawyers would go through files trying to find somebody saying, "Let's crush them." And I, in thinking about the get-together this afternoon, I went back through some old documents where I had been assigned to go through with drafts and clean up the drafts. And we want to put their market share in the toilet, I came

across that one. I of course changed it to, we want to dramatically increase our sales and market share. Another one, we're going to eat them for lunch, and I changed that to, we must strive harder to garner new sales by focusing on opportunities that the competition fails to address. Then another one -- I'll bore you with one more -- let's get more aggressive with pricing. We'll make them bleed. I erased that and said, their high prices give us an opportunity to garner additional sales with attractive pricing to our customers. So what we do is, we create a world where we give a benefit to those companies that have high priced lawyers that go through and clean up, take the greed driven nasty comments and turn them into saccharin kind of, we're going to succeed 'cause we're wonderful, kinds of things, all to the neglect of the underlying economics and what it is that we ought to be about. I would cancel the chapter on intent, and forget about it.

>>STANLEY WONG

All right. Katja was very smart. She preemptively indicated she wanted to respond, because intent is still part of your key law. And tell us whether in your corporate priorities, intent still plays a role.

>>KATJA VIERTIO

Okay. First of all I'd like to say, I need to have somebody design a compliance program, I know to what door I should be knocking. That's great.

>>TERRY CALVANI

I've got a card.

>>KATJA VIERTIO

That's good. And then, with all due respect, I have a question. I want to say, I have a question to Alden, because I also saw that in the responses of the United States to the OCN questionnaire, there was a box, is the intent relevant or not, and it said no. I was wondering whether the reason for that is mostly, or basically the one given by Terry, or was there something else that was behind it. Because I wonder, about the Commission, now you'll be very happy with me, Stan, because I will be the cautious Commission official. We always say, and the court has said that abuse is an objective concept, and that intent to learn is not determinative. And that's fine. But on the other hand, I wonder whether we are entirely truthful. Because as I said to you that in case law, there is a situation whereby the prices below average variable cost, and then there is a presumption under case law that there is predation. But then there's the situation of when the prices are between average variable cost and average total cost, and there the court asked us to prove that there's a predatory strategy. I think that in both situations the notion of intent somewhere is embedded in there. Because if there's a predatory strategy, it will be a strategy with the intention of excluding rivals with

predatory pricing. In the same way, when you use the average avoidable cost benchmark, that on which there's growing consensus, it's because intuitively, I think that most of us think that they're deliberately incurring losses. I think that intent is embedded in these discussions, even though we diplomatically say that we only look at intent because it's informative of the effects. But in reality I think that is embedded in the whole discussion.

>>STANLEY WONG

All right, let's go on to another controversial topic, recoupment, which on the surface, and those people who read the sort of transatlantic commentary on recoupment would think of course in the U.S. law, there are two requirements in the Brook Group, the U.S. Supreme court decision from 15, 20 years old, controlled pricing below administrative cost, plus the dangerous probability of recoupment. Now, Terry, tell us why recoupment is a requirement, or why it should be a relevant factor, and then I'm going to come to Olavo to further explain how recoupment relates to other issues. So you can go first, Terry.

>>TERRY CALVANI

Okay, well, put yourself, let's say you're a bad actor, and you want to predate and put your competition out of thinking about how you're going to go about doing it and why you want to do it. It seems to me you have to look at it, it's an investment, I'm going to do a little bleeding right now.

>>STANLEY WONG

That's the sacrifice that Katja was talking about.

>>TERRY CALVANI

Because it's going to make me better off in the end, it's like an investment, in other words. But if a monopoly price is later impossible, then the sequence is unprofitable, and I think it's appropriate for antitrust enforcers and antitrust courts to conclude that the price is not predatory. In other words, if there's no later-later, then the consumer is the unambiguous beneficiary of this product. Price less than cost today followed by the competitive price tomorrow does, in the words of one recent court, bestow a gift on consumers. And I think -- I think we're all probably in agreement that recoupment is a relevant factor, at least because of that reason. The problem is that unsuccessful predation, while benefiting consumers, does injure competitors. And that's the rub. Because many of us, myself included in this room, come from jurisdictions where historically competition law had much to do with the protection of competitors. And those histories are hard to shake. All of us I think find it hard to shake. But I think shake them we must. There's another reason why I think recoupment is important, and that is that its placement in the

analysts, at least in the United States, is first. And that's because the price-cost test, the application of whatever price-cost test you want to employ, is difficult. In my personal view, it is mind-numbingly dull or worse. It is a pretty horrible exercise to go through, if you actually have to go through it, and maybe it's something that only a cost accountant could conceivably find interesting. And so by putting it first in the analysis, the agency, the court is saved the laborious price-cost test. Now, I want to make one concluding point, and I don't want to make too much of it, because literally, I don't think it's completely true. But I think a lot of the to-ing and fro-ing between the Anglo-American view towards price predation and that in the Continent is a bit overstretched. Because in the United States, there is no requirement, or in Canada, as I understand it, no requirement for dominance in order to state a claim for price predation. Whereas under the treaty, these cases arise in situations where there is alleged abuse of dominance. And I think if you properly define and employ the definition of dominance and take into account entry conditions, then I think it makes the divide between the two continents much less stark than it might seem when you say, well, we have predation and you don't have predation. Because I think when you take a look at both of them together, at least in those jurisdictions where you correctly employ a definition of dominance, the difference is less than it would appear at first blush.

>>STANLEY WONG

Does anyone want to come in on this? Alden.

>>ALDEN ABBOTT

Well, I think -- I just wanted to add, I think we really have an integrated analysis. When we look at an allegation of predatory pricing, it's not as if separate analysis, okay, let's first do the price calculations. We've done that, okay, next, next box, now start thinking about recoupment. You'd think, look at the industry as a whole, you've studied the industry, and early on you're going to want to look at entry barriers, how easy is it -- would it be to enter. Would reentry by anybody who had been excluded, to the price reductions, be such that would defeat a scheme to recoup through supercompetitive prices? Are there additional factors that suggest recoupment would not be successful? For example, if the volume sacrificed is sufficiently large in relation to the size of the market, recoupment would be likely infeasible under any circumstances. I'm thinking of the U.S.'s, you know, Matsushida case. But more generally, so you look at all the market factors that tell you a story. You don't look at any one element in isolation. Now, I think Terry is quite right. You might be able to tell early on, gee, this is a market where entry is easy, it's not -- firms would reenter quickly, you

couldn't have supercompetitive pricing through recoupment. Therefore, we're not going to worry about it. However, if reentry is difficult, if there are serious problems, if, for whatever reason, it appears that this firm is going to be dominant for a long period, and may be able to indeed profit from the short term price cuts and they don't -- they're not so extensive that recoupment scheme isn't realistic, then we would look at it seriously. So I think that the thing is, not to isolate any individual element. You're -- just as in merger cases, we're I think simultaneously looking at all aspects of the proposed transaction. I think we're looking at all aspects of a particular market when we're looking at a price predation allegation. But I certainly agree with Terry, I think it's in some courts also, some U.S. courts have been able to dismiss cases just by saying, you know, likelihood of there's no dangerously high probability of recoupment, therefore you can end it, and that avoids obviously all the potential errors and complications of doing a cost analysis.

>>STANLEY WONG

Olavo, tell us how do you go about finding evidence for competition?

>>OLAVO CHINAGLIA

Well, I'll borrow for a while Terry's analogy among antitrust law and medicine and say that by analyzing the probability of recoupment is understanding how the -- understanding the physiology of the market rather than its anatomy or its structure. Traditional antitrust analysis, especially the analysis of the existence of barriers to entry, may provide, they normally do provide, sufficient information so one can verify if recompense is possible, probable, or simply dischargeable. The thing is that considering among other circumstances that every agency has limited resources and has to prioritize which cases to follow, starting the analysis of predatory pricing by recoupment may be a smart way to prioritize. Because if recoupment is absolutely unlikely, the only possible anticompetitive effect that may arise out of the practice will affect other competitors, not the consumers. Because the moment the dominant company starts trying to recoup, other agents may enter the market and avoid profits in excess. Then it may be an intelligent approach to refer damages to competitors, to private litigation in court, and focus on that -- those conducts that will affect the general interests of the consumers. As a result of all this consideration, I think two conclusions must be -- may arise. On the one hand, if we are to dismiss up front cases in which the interest of the consumers cannot be affected, although competitors may be harmed, we must, on the other hand, admit that possibility of recoupment may be verified in different markets than that of the original practice. Even because the intention or the effect of this very practice may be the conquest of substantial market power in a

different market than that in which the company originally acted. Besides, the ability of recruitment can not be seen as a cause of anticompetitive effects; rather, the opposite. The anticompetitive effects are consequences of the practice in a market characterized by conditions that allow later recoupment. The bottom line of the discussion is, what are actually the objectives of antitrust law? If we understand that we should focus on consumers, the analysis of predatory pricing must start by the analysis of the structural conditions of the market and how it works so that the possibility of recoupment can be assessed. And if this possibility is discharged up front, then there shouldn't be any further analysis, not even comparison between prices and any standard of cost.

>>STANLEY WONG

Alden, let's turn over to competitive effects. Because I think you've been I think advocating kind of a unified approach, and one shouldn't start putting labels on things. I think what you seem to be saying, at least I read what you're saying is that let's do and figure out how the market operates and let's put the labels on afterwards because of legal requirements or analytical requirements. We know that from the survey that was done and reported in this working group's report last year, 13 agencies said they required recoupment. Another 13 just roughly said it was a relevant factor. When we look at the competitive effects which was listed as a separate item we had 21 agencies say competitive effects is an important if not the most important consideration. Listening to this debate or this discussion, it sounds like recoupment is really another variant, a way of describing competitive effects. If it is, is there anything else when you look at competitive effects other than recoupment?

>>ALDEN ABBOTT

Well, I think looking at the guidance we've gotten from our U.S. Supreme Court, that the entire focus should be on recoupment. Because if recoupment by definition is not likely, then consumers have got an bonus from the price -- from the price drop, and if prices go up to competitive levels, but are not going to go up to super -- to levels that would have been higher, but for the price cut, there are no -- there are no real harms. And again, in talking about competitive effects, we're really concerned about consumer welfare. And I think we want to avoid the confusion that particular rivals may be driven out. Now, obviously if it's such that reentry is very difficult, and rivals are driven out, then there might be a competitive effect. But that ties in again to recoupment. As you suggested, the competitive effect would be that, well, firms aren't going to be able to reenter, and that means that the dominant firm is going to be able to price higher than it would have been able to price otherwise. So I think it's -- it's really

competitive effects is sort of one in the same with recoupment, and I think that's the guidance we have been given by the U.S. Supreme Court. You know, I notice, in some sense, you know, we're not all that far away. I know the European Commission, in its response to the ICN survey, said that the test for predation requires an assessment of whether the conduct is likely to enable the dominant firm to maintain or increase its market power, thus harming consumers and recoup its sacrifice. Amen to that. I think we certainly are in full agreement. Certainly there are nuances. I guess I can't speak -- Katja can speak better for European Commission. I know there is some sophisticated discussion about direct evidence of a strategy or plan of foreclose. Then there might be assumption foreclosure would be likely and consumer harm would follow. I guess that's not quite -- would we put it more simply? We would say, you know, are there conditions such that recoupment is possible? If not, end of the story.

>>STANLEY WONG

Katja, much ink has been spilled on this issue whether recoupment is required in European law or not. But it's certainly one reading of the guidance document, in the section on predatory foreclosure, which is paragraph 67 onwards in the guidance document, seems to imply without using the forbidden word, recoupment, that in fact there is no fundamental difference between the view of the U.S. that says recoupment is required following the case law and the Europeans, saying let's look at anticompetitive foreclosure. Am I stating -- overstating it?

>>KATJA VIERTIO

I won't say amen, because you speak so quickly, I'd say that yes, recruitment is a relevant factor. We think that recoupment is part of the analysis of lucky effects. There will be recoupment -- you were discussing the issues of entry barriers and reentry barriers. These are the kinds of issues we also look at for likely effects. So I'm not so sure indeed that there is any huge difference in there, because we'd be looking at the structural features of the market. There's been lots of discussion about it being a separate requirement in the U.S., and an integral part of the analysis in the EU. Frankly speaking, I don't know how important that distinction is. Maybe it is. But I'd say yes, recoupment is important, and we'll come to it when we do the analysis of the likely effects. Now, this is the -- what the guidance says. We also have a rather interesting situation with our most recent predatory pricing case, which is about a Wanadoo price squeezing in the French broadband market where in that particular case, the Commission said that quoting old case law, said that there was no necessity of proving recoupment in that case. And the court at first instance followed the Commission, but then it's been appealed to the USN Court of Justice

where an advocate-general has said that the Commission made a general rule out of a particular case, and in the opinion of that one advocate-general, the Commission should have showed there was a possibility of recoupment. So that's interesting, it shows you that there is ongoing debate in Europe of what this means. I think in that case they showed that the elements were there in the structure of the markets, analysis of entry barriers, reentry barriers, of obstacles to switching. I think that -- I hope -- I think we're quite safe on the facts of that case, but it shows the ongoing debates.

>>STANLEY WONG

That case that Katja is referring to, everybody calls it the Wanadoo case, is actually there's a style called Fostellica (ph) and that decision by the European Court of Justice which will maybe settle this issue coming out on April the 2nd. You can go on the Website. It will be coming out in all the 21 languages one day, but French for sure, and then of course it may well -- certainly have come out in English at the same time. So April 2nd, on the website, 9:30 or 10:00 o'clock Central European time, right?

>>OLAVO CHINAGLIA

Football ballgame.

>>STANLEY WONG

You know what I'm going to be doing, right? Now, we come to the final area of discussion, which is quite controversial, it's really about justification. Many jurisdiction talk about meeting the competition as a defense to otherwise predatory behavior. Obviously, Olavo's illustration of saying it looks like it, it smells like predatory behavior, but in fact it isn't the way to explain it, it is new management, price discrimination, managing -- because a seat is like sort of, you know, fresh vegetables. It deteriorates over time until the time that you pop, when, you know, you could sell yesterday's flight but nobody would buy it, you may still be able to sell yesterday's bread. But -- so the question is that here, should or should not, what is the problem with having justifications? I know we have identified here Olavo, Katja, and Alden's comments. I'm going to ask Katja first, do you think, not you, but does the Commission, and your analysis of this issue say that, you know, meeting justification has some role to play, again justification with what would otherwise be predatory behavior, sort of a defense, if you will?

>>KATJA VIERTIO

Yes, I think that if you want to apply an effects-based approach on your international conduct rules, it is only normal that you should be open, and I mean genuinely open to hear the defense arguments from the dominant undertaking that there was justification, whether objective necessity. Though I have a question mark, that if you have

established sacrifice, what could be that objective necessity, and of course efficiencies, efficiency arguments. The guidance for all of the international conducts analyzed therein gives examples of efficiency, possible efficiencies that could be quoted by dominant undertakings. And the truth is that on the chapter on predatory pricing you won't find an example, because putting aside exceptional circumstances like sudden changes in market or perishable goods, we were not really able to find a very successful examples in the light of the criteria that Per Hellstrom outlined this morning about when efficiency defenses would be acceptable. The guidance does not talk about meeting competition defense, but I'd say that we would be very, very skeptical about that. I understand that, from the report of the Department of Justice, that they also have a rather reluctant view on that, but I don't want to put words in their mouths if I've misunderstood. And also, the OECD has had a round table on predatory pricing, it is question of whether this is a legitimate form of competition. And indeed, if you do this analysis very sophisticated where you have these price cost tests, at entry, you get strategies available to others, to competitors. You look at the coverage. You look at the duration. You've come to a situation where you've established that there is consumer harm, and then the dominant undertaking comes back and says yes, but I'm only aligning my prices on those of competitors. I doubt whether that matters to the extent that we have established consumer harm and they have not been able to rebut that. And it's not just because they're meeting -- that the prices of their competitors, suddenly they can price below cost even in circumstances where there is likely recoupment.

>>STANLEY WONG

So that means you're not going to find much favor with the kind of argument like the following, to say well, the new entrant has deep pockets from another market, and they're coming in, they say, look, I have a portfolio of products, I'm missing this product. So I'm going to come into the market where the dominant undertaking is, I'm going to come in, I'm going to price below average variable cost, average avoidable cost, whatever, because I want to fill my entire portfolio. Are you saying that the Commission is unlikely to be, find receptive that story?

>>KATJA VIERTIO

Well, the guidance doesn't say anything about it, so speaking in my personal name, I think that we would be very skeptical about that, because it might be a rational behavior for that company, but it's not necessarily in the benefit of consumers. So that's always the -- you know, the end line we have, we must have at this -- in sight.

>>STANLEY WONG

Before I turn to Alden, I know that Olavo wants to make a comment about justification.

>>OLAVO CHINAGLIA

Yes, I'd just like to add that apart from economic reasons to accept justifications, I must remind that we are dealing at least in the Brazilian legal system with application of antitrust law, and not a series of industrial organization, and any other applicable to antitrust. So we have to admit defenses merely because of the necessity of due process. So the right to a wide defense must be observed even in antitrust cases. So the economic justification, business justification will serve to analyze the merits of the case. But the opportunity of presenting them, I don't think we could even imagine the idea that we would not give the opportunity for a company to explain self.

>>STANLEY WONG

Alden.

>>ALDEN ABBOTT

Okay, well, thanks, Stan. I think certainly on meeting competition, I don't think -- of course it was the Justice Department sections report, showed no enthusiasm for meeting competition, said it could justify below cost predatory pricing and would be hard to administer. It doesn't make sense really to say that if you're the dominant firm in a particular line, and you price below average avoidable cost just to meet the pricing of a new firm, that may well be a recipe for knocking out that new entrant. I'm thinking perhaps of a dominant airline and a new entrant comes in on a particular regional airline on a particular line and you've got a hub and spoke system, dominant firm, prices below average avoidable cost, knocks out that entrant and raises prices again. So in this, I think, there's agreement there is not a lot of enthusiasm at all for meeting competition defense. More generally about defenses, once you've reached a point of saying there's pricing below AAC, and we believe recoupment is highly likely, there's not a huge room for defenses. Having said that, however, I think the DOJ not speaking for the FTC officially, the DOJ report certainly recognized that efficiency claims supported by the evidence would be weighed, but again, supported by the evidence and the circumstances. For example, if you're already a monopolist saying, we've trying to establish noted network externalities, well, if you already haven't achieved those efficiencies, what additional gain are you getting, learning by doing, you're introducing -- you're dominant in product A and you're introducing a new product B, and you say, well, this new product B we're going to lower the cost curve by its introduction, and temporary below-cost pricing, really will be above-cost pricing, that's certainly theoretically possible, but again I think you'd have to look at the hard facts. So -- and as always, certainly justifications that

wouldn't -- that we wouldn't worry about justifications for pricing if a firm that had no market power was doing the discounts. But if a firm does have market power, is pricing below cost, and there seems to be a solid recoupment story, I think there would be a major burden in -- once those two points had been made in trying to establish efficiencies.

>>STANLEY WONG

We have some minutes, so I'm going to ask each of you to sum up in about one minute or so any additional observations. And if you want to pass, you can pass. And then a couple of housekeeping things I have to announce. Terry.

>>TERRY CALVANI

I want to move to the point I made at the beginning, how misguided predatory pricing can be the cartelist's best friend. When I first assumed my duties in Ireland, shortly there afterwards, there was a prosecution of Tesco, a large grocery store company for selling nappies too cheaply. Now, John Evans going to remind me seated over on the side that it wasn't the Competition Authority who brought that case, it was brought by another government agency. But the case was brought, nonetheless, under a special predatory pricing law in Ireland, that permitted cases to be brought with price above average total cost. And the staff this morning, when I was getting ready to come down here, I went to the library and pulled the book on Irish competition law, and tried to find out why that law came into effect. It was very interesting, there was a chapter on it. And it talked about how the grocery industry was concerned about these very difficult price wars that grocery stores were having with sales and specials, and how this was necessary to have a more comfortable environment. Not for Irish consumers, but for Irish sellers. And I had just -- it brings back how it's -- I think it's without regard to whether you're in mergers or you're in unilateral effects, to talk to your friends on the cartel side of your agency periodically and remind yourselves of some of the real evils that exist out there and how you don't want to team up with the bad guys.

>>STANLEY WONG

Alden.

>>ALDEN ABBOTT

Just to underscore, I think single product price discounting, we know the general story is, it will bring great benefit to consumers in the short run, and discounting is ubiquitous. You see discounts all the time. And before, and you want to be very careful about bringing cases in this area, so as not to chill beneficial price reductions to consumers. And we have to be very aware, I think as Terry already point out, both having a policy that businesses can understand, and

also, recognizing that if we misdiagnose a story of future harm, that is, if we cut off price discounting, and we're not certain of recoupment, then you're going to establish sort of an atmosphere where discounting is less frequent, and consumers have fewer opportunities to enjoy that important benefit of competition.

>>STANLEY WONG

Katja.

>>KATJA VIERTIO

I'd maybe say that I hear and I agree with those risks associated with killing competition. On the other side, you know, I would not pronounce on whether it is always competitive or always anticompetitive. It really boils down to the facts and the matters of each individual case, and predatory pricing can be a means of substantially harming competition, in some cases.

>>STANLEY WONG

So what you're saying is that notwithstanding the concerns expressed by Terry and Alden, we still have jobs to do, we have to take complaints and examine them and make decisions on them, and you need guidance how to make those decisions.

>>KATJA VIERTIO

Thank you for the translation. That's exactly what I meant.

>>STANLEY WONG

I knew I'd be finished somehow. Olavo.

>>OLAVO CHINAGLIA

By the way, one of the reasons for us to continue these kind of practices is that the potential anticompetitive effect maybe very subtle. The predatory pricing may be used also as a way to turn credible threat to -- threats to potential entrants in the market. Let's again use the example of the airline company which is offering promotions, in the very same times and days in which a new entrant in this market offers their flights. In this case, the message is, do not enter into the market, because if you do, you won't be able to profit. Notice that in such case, there may be the collection of a price below a measure of cost, but without -- but very briefly, very shortly, and it wouldn't fit the traditional framework of predatory pricing in which the land of the practice is important. But as demonstrated in this case, in this example which is a hypothetical, it may serve as a way to maintain competitors out of the market. Then let's pay attention to leave them.

>>STANLEY WONG

Sorry, Alden, we're ceding time. Let's --

>>ALDEN ABBOTT

Sure, just had one comment that -- to point out, the U.S. does not ignore predatory pricing. I won't give a suggestion we wouldn't bring

the case, of course Justice Department has worked in the airlines case. It ultimately didn't succeed on appeals, but brought the American Airlines case. There's another -- Spirit Airlines, a private predatory pricing case, and I take Olavo's point, that in certain industries, you know like such as airlines, there may be predatory stories may be quite credible.

>>STANLEY WONG

Thank you. Two housekeeping points. As you know there's a breakout group at 3:45. There's a very, very short hypothetical I think reflects the simplicity and elegance of the telling style. It was prepared by Jean-Luc Caseppi (ph) and you can see it is elegant and simple because all the issues we raised by the panel and other issues are open to be discussed. And the second thing is that you have your full 15-minute coffee break, starting now, until 3:45. I think on behalf of all of you please join me in thanking the panels for a very stimulating discussion.

[applause]