

2007]

879

REMARKS ON MERGERS, CARTELS, AND SINGLE FIRM CONDUCT

Panel Discussion

*George Mason Law Review Antitrust Symposium, Washington, D.C.,
September 13, 2006*

I. PROVE IT: NEW EVIDENTIARY HURDLES FOR MERGING PARTIES AND GOVERNMENT REGULATORS

MODERATOR:

Sean Boland, Partner, Howrey LLP

SPEAKERS:

Susan Creighton, Partner, Wilson Sonsini Goodrich & Rosati

Götz Drauz, Partner, Howrey LLP, Brussels, Former Deputy Director-General, Directorate-General for Competition, European Commission

DISCUSSANTS:

Mark J. Botti, Chief of the Litigation I Section, Antitrust Division, U.S. Department of Justice

Tasneem Chipty, Vice President, CRA International

Ilene Knable Gotts, Partner, Wachtell, Lipton, Rosen & Katz

Keith Hennessee, Assistant General Counsel, Halliburton

John Taladay, Partner, Howrey LLP

Proceedings

Götz Drauz: Good morning everyone. This is the first time I am speaking here at the George Mason Symposium as a private practitioner, as a free man so to say—not that I haven't said in the past what I will say today. The move to private practice is nevertheless a significant change. I am very happy to be invited here this morning. In these ten minutes, I shall try to shed some light on some aspects of some very important issues—namely, the evidentiary hurdles in the merger control procedure in Europe. The merger control process is still very much evolving in Europe.

The European system is still a rather young one as compared to that of the United States. The jurisprudence of the European courts since 2002 has had a significant impact on its development. First, let us look at where we come from in Europe. The so-called “structural approach” initially dominated the merger control procedure used in by the European Commission. This approach focuses on the market share based on the size and number of

competitors in a particular market. European merger control focused on preventing a firm from creating or strengthening a dominant position in the market, because that would create the risk that a dominant firm could exploit its market position. This standard did not require a showing of likely concrete negative effects on the consumer as required in some other jurisdictions.

With the economization of merger control in Europe in the mid-1990's, this started to change. The emphasis slowly but surely moved to the question: Does the merged firm have the ability and incentive to use its market power to harm the competitive process and, therefore, the consumer? The European approach started to move away from its traditional restraints based on procedural and general legal grounds, towards looking for convincing evidence. This analysis is based on whether a thorough market investigation unearthed a solid and coherent body of evidence that market dominance would harm consumers.

This change towards an effects-based approach profoundly affected the review process. While the market structure is still an important starting point, the real focus is now on facts and data, which suggest the future action of the merged firm. This has led to changes in the tools used in the analysis and to changes in the fact finding process as well. On the procedural side, the Chief Economist's office became involved and a Devil's Advocate panel was introduced. These additional layers in the administrative process added further complexities to the merger review process as all this internal vetting has to happen within the time constraints of the merger regulation.

As if this were not enough, we were also hit by the Sony/BMG judgment of the Court of First Instance last July. I say "we" because this decision affects parties, practitioners, and the Commission alike. In this case, the parties were very late in replying to the Commission's Statement of Objections. Their response relied on a large economic study to show that the market was too transparent to allow tacit collusion on prices. The study was focused on campaign rebates offered by Sony/BMG to the trade to clear stocks of slow-selling records. Faced with this very late and voluminous study, the Commission somehow lost confidence in its case and cleared the merger without making its own investigation into the methods of the study or the stated market effects of the campaign rebates. The Court, brought in by an unhappy third party complainant, slapped the Commission for not discharging its duty to correctly establish the facts and articulate the arguments in the clearest position. The Court was especially critical of the Commission's failure to explain its final decision in light of its argument in its initial Statement of Objections. This judgment has led to much soul searching on the side of the Commission, but also on the side of the notifying parties, which now have to restart the merger approval process.

I would love to further expound on the significance of this judgment, but there is no time at the moment. I just want to say we should probably not overestimate it either. It was a very specific case. It was a very late u-turn by the Commission and this u-turn simply was not well-explained, well-argued or based on facts verified by the Commission. I do not think we should draw too many conclusions from the outcome of this case and conclude that now the standard of proof is exactly the same for clearance and prohibition decisions.

However, this judgment is a very powerful reminder that the deadline in the German/European review process gives the Commission very little time for fact-finding and economic analysis. There are only two months in Phase Two. You may ask: Where are the other three months of the five? They are essentially consumed by traveling to hearings for consultation with member states, by drafting the Commission decision, by internal coordination, and by decision-making by the college.

The laudable system of pre-notification allows firms to clarify many issues up-front, but they are rarely the real complex substantive issues. There are obvious limits to pre-notification. In addition, procedural requirements allow the parties the right to defend against any new legal and economic issues that come up during the procedure.

My last comments are directed at my former Director General. As I know him well, he will not be offended by this recommendation. The Commission has very limited resources and it must use them in the most efficient way. For example, if a case raised competition concerns in product markets A, B, and C and in countries X, Y, and Z, but the only real problem seems to be in market B in country Y, this is the only set of facts that should be sufficient or likely to prevent merger approval.

Why not drop investigations of the other concerns earlier than is now the case? For example, Sony/BMG shows that it is very difficult for the Commission to deal with any significant new facts and complex market studies submitted in response to the Statement of Objections. It is, therefore, vital to create opportunities for the parties to learn more about the Commission's concerns earlier in the process. I've presented these as recommendations addressed to the Commission. However, they also implicate the parties. Parties and their advisors must act proactively and with as much forward planning as possible. It can be more effective to volunteer more facts earlier and prepare complex economic studies in advance instead of putting the most effort into destroying the Commission's case to avoid the unhappy Sony/BMG scenario. I hope I have been within the ten minutes, and thank you for your attention.

Susan Creighton: Thank you very much. Like Götz, I was reflecting earlier that it was maybe the first time I was going to have the opportunity to speak without having to give a disclaimer about not representing the position of my government employer, which I usually forgot to give anyway. What I hope to do today in my ten minutes is to reflect on my four and half

years of my experience with mergers at the FTC. My experience was the mirror image of what Götz was talking about in terms of the tension between analyzing a merger using a competitive-effects analysis versus a more traditional market-structure approach. The dilemma for agencies, parties, and courts in the United States is how to begin and in which order to proceed in the analysis of a merger.

One of the reasons I wanted to talk about this topic today was because of a repeated and almost pervasive experience that I had in reviewing mergers at the FTC. The focus of our investigation would be directly on the question of whether this merger is going to cause competitive effects. We would be looking straight at that question. In cases where we had decided that the merger would be anti-competitive and where we could establish competitive effects; very late in the day, we would step back and say, yeah, but what is the market. How would we go about proving the market? And could we persuade a court that this is the market?

I think *Oracle* is a great example of this dilemma. I was not at the Division when they analyzed this merger so I do not know how they went about analyzing that merger pre-complaint. I can tell you that if it had been the Commission, we would have looked directly at whether the merger was going to be anticompetitive.

If we had decided, based on the kind of analysis that shows up around page 45 of the judge's decision, that there would be a price increase as result of the merger, we would then have done a gut check and seen if that conclusion was consistent with more qualitative evidence. For example, can we find an identifiable set of customers that say, yeah, I think this will cause my prices to increase? That is why we would have talked to competitors. We try to understand why various competitors wouldn't be sufficient alternatives and why entry was unlikely.

By comparison, the judge's analysis was completely backward from how I think we would have investigated the merger at the FTC. He spent 29 pages of his decision going through the question of: What is the market definition? Only after those 29 pages of market definition does he devote five pages at the end to a discussion of the competitive effects. He analyzes the issues in the exact opposite order of how we approached them based on my experience at the FTC. The judge essentially concludes that the competitive effects evidence is not persuasive because it is not consistent with his definition of the market.

What I thought might be helpful, without trying to resolve the question today, is for all of us to walk through and think about a hypothetical. You could argue that *Oracle Software* is not very tangible—it is hard for people to get their arms around how they should go about analyzing that case. I will use a composite with the kind of fact pattern that we saw at the FTC. It is not exactly hypothetical but not a real case either—it is several cases combined into one.

Let us suppose there is a merger of two boutique retail chains. It does not really matter whether the chains sell books or women's shoes, but something tangible and concrete. I thought it might be interesting to walk through how I think the agencies would analyze this merger and how the FTC looked at that kind of merger, based on my experience. What do the parties do, in light of how the agencies are going about looking at it? And how do we think the courts might analyze it?

Suppose this is a national merger, and these are brick-and-mortar stores. The very first thing the agency is going to do is recognize that these retailers have a lot of stores out there. Can I immediately look and see whether I can find direct proof of competitive effects? Then the agency will decide whether they can immediately identify direct proof of competitive effects. At the FTC, there is going to be a lot of focus on what are called "natural experiments" evidence. When one of these stores enters a new locality or repositions a store closer to one of the competitor, what kind of price effects or other kinds of competitive reaction do we see? What do we see if Wal-Mart or some other big box department store somewhat outside of that line is selling nearby? Do we see the same kind of reaction? What about other boutiques—things that look a little different but arguably sell very similar products?

In my experience, this is where the agency starts. If that's where agencies start, where would the parties start? Something that parties with astute counsel would often do is come in with what you could view as a "silver bullet" that would pretty much kill an investigation from the agency's perspective. For example, if you have evidence of these two boutique chains merging nationally but they are in different geographies or there is uniform price across geographies, whether or not that competitor is present, it is very hard for the agency to show there is going to be any price effect as a result of a merger. You might also have evidence that shows these two competitors are not the closest competitors.

Now, let us suppose that the agency finds that when a store from one chain enters or exits a particular geography, you see a distinct price effect. In the case of retail stores, you can have dozens or hundreds of such observations. Suppose you also have evidence of a strong proximity effect. If the stores are two blocks apart, the prices are measurably and statistically different from and lower than if they are five miles apart. These days, parties do keep data sufficient to have this kind of evidence.

Suppose that you could say Wal-Mart also carries women's shoes and that there is some effect when Wal-Mart is present in the market. It is not the same kind of effect as when the two chains are competing with each other, but you certainly could not say that Wal-Mart's presence is irrelevant. You really do not have any way of measuring whether or not other boutique stores have an effect, and you do not really know what kind of effect online stores have because it is ubiquitous. You do not really know whether online stores have any kind of effect, but its effect does not seem to

be so strong that it eliminates the strong geographic effect present when the two stores are physically close to each other. At this point the agency is likely to say that the merger is going to be anticompetitive, supposing that other evidence is consistent with that.

From an agency perspective, it doesn't really matter what market it is. Whatever the market, whether Wal-Mart or online retail is in it or not, the one thing I know is that their presence is not enough to eliminate that price effect of the two competitors on each other. If the price effect is sufficiently substantial, we would seem to have direct evidence that a merger would harm consumers.

Now let us step back. We have got women's shoes, and we do a *Brown Shoe* market analysis. Where is the break in the chain of substitutes between high-end women's shoes and the top of the line women's shoes at Wal-Mart, or the women's shoes you can order online? This is a brick wall that the agencies directly experience. I can attest to it.

Now let us draft a complaint. Is online retailer X or Y in the market or not? How do we go about defining the market? It can turn out that, if you are looking at reasonable interchangeability from a subjective perspective, it can sound very conceited to say these two boutiques are so high-end or distinctive that even though other alternatives may be available they are not in the same market. It may be that all of a sudden the price effect goes down sufficiently if you throw in a Wal-Mart or a Best Buy so that you never get to the competitive effects question.

As of six months ago, this is sort of where we were in terms of U.S. analysis and the dilemma it poses for the agencies, the parties, and the courts. From the agency's perspective, what would you do in that case? Would you say that you are going to prove competitive effects and it does not matter what the market definition is? Do you say you are going to try to prove a structural market even though the judge may decide that the market definition is wrong and never reach the competitive effects evidence? From the division's perspective that may be what happened in *Oracle*. Without regard to the merits of that case, I think it is a possibility.

From the court's perspective, what do you do? You have all this case law saying market definition has to precede competitive effects. There are presumptions about concentration. Do you ignore all that stuff and just say you will look at competitive effects? Or do you ignore the competitive effects evidence? Do you do what the judge in the *Staples/Office Depot* arguably did, and trying to shove them together and say they are the same thing?

Finally and most importantly for a lot of people here, what do you do if you are the party advising your client or trying to figure out which argument to advance? As I mentioned earlier, there can be silver bullet solutions. If you have that, it is the obvious thing to go with. You can terminate an investigation quickly that way in my experience. If you don't have a silver bullet and the question about the chain of substitutes is not very

clear, do you go in and try to persuade the agency strictly based on competitive effects? That can be a long process.

Do you think that the agencies are going to have to take into account the litigation risk? Do you roll the dice and recognize that it may well be that your structural argument is stronger than your competitive effects argument, and just go straight to court? I think that is a dilemma that the parties face when dealing with the agencies, and arguably the courts: starting at different ends of the analysis with potentially different results, depending on where they start.

Sean Boland: Here is a quick follow up question on what you just said. I think many people in our audience would be surprised to hear that the FTC goes right to competitive effects in some cases and jumps over structural market. The example that you were using involved a retail situation where you had a very data rich environment. Do you think you would be as likely to go to competitive effects initially if you were dealing in a market where that data was not as freely available?

Susan Creighton: Well, there are certainly cases where you do not have that kind of data in that rich degree. Is it interesting that for people who were at the FTC for *Office Depot/Staples*, they would say that the level of sophistication of economic analysis and refinement that is available because of the data is orders of magnitude better, and increasingly pervasive. I think the default is not to do a structural analysis, but it is to do the next best, albeit not as rigorous, competitive effects analysis. To the extent there has been entry or exit of the parties, what kind of response one can see, even if it is not in the kind of numbers possible when you have a retail situation.

Sean Boland: Thank you. Mark Botti, we have not heard from the Department of Justice. Perhaps you would like to comment. You have been handling a lot of big merger cases over there recently. Comment a little on how DOJ is applying evidentiary standards and merger review.

Mark Botti: Thank you, Sean. I would be happy to. I think our work proceeds pretty consistently with what Susan has described. DOJ uses an evidence-based approach to merger investigations. We have not simply applied quick labels of presumptions without carefully considering the applicability of those labels or presumptions in a particular matter by looking at the evidence. In that regard, I would say that our approach strikes me as similar to what Götz has described as the direction in which the EC approach is going.

Before commenting a little further, I want to see if I can throw off some of the shackles of my government service and have more freedom to comment by saying that my views today are not those of the United States Department of Justice. They don't purport to be; they are my own.

Our approach is to look carefully at all the evidence and try to weigh it. It is important to keep in mind that this is not just something we do only at the ultimate point of decision in a merger investigation, but that applies

in varying degrees throughout the course of an investigation. We look at the evidence at to decide whether or not to open an investigation, to issue a second a request; ultimately, whether or not to challenge an investigation; or, if we have challenged an investigation, whether or not to approve a buyer. Naturally, that wane of the evidence varies, depending on the point at which you are looking at it.

I can flesh that out by talking about two particular substantial investigations that we looked at during the last year. One is United Health Care's acquisition of PacifiCare, and the second is Whirlpool's acquisition of Maytag. Taking United's acquisition of PacifiCare first, it was a very large transaction. These were both publicly traded companies. Their combined revenues were in the range of \$40 billion. The deal was valued at over \$8 billion. The companies were direct and significant competitors with one another. The transaction itself caused quite a stir in the healthcare industry. It was a significant strategic event for the companies themselves, their suppliers, their competitors, and their customers.

As you can imagine, we at the department received a number of significant opinions from participants in the issue, not all consistent with one another, as to whether this was a good or bad deal. The critical point for us in the decision-making in this particular investigation, was whether or not to issue a second request; and if so, how broadly to issue it.

United and PacifiCare actually brought their transaction to us prior to the filing of the Hart-Scott-Rodino notice ("HSR"). They came in July of 2005, told us that they had signed up to do this transaction and gave us approximately three months before they filed the HSR. They required us to decide whether to issue a second request. They filed in October 2005 and it was not until November that we had to reach a decision.

Those three months that we had to investigate allowed us to do a lot of work. We interviewed well over 100 people. They were in-depth interviews, not just quick head counts. We had many substantive meetings with the parties. They provided us with a lot of documents and data. Third parties provided us with documents and data so that we were able to amass quite a record from which to decide whether or not to issue a second request.

It was at that point that decisions were made. In many of the markets that were implicated by this transaction, we decided not proceed and issue a second request. We informed the parties of the remaining markets in which we still had competitive concerns, and we were intending to issue a second request. At that point, we agreed with the parties that they could go forward and consummate their transaction. They addressed the concerns in the markets we had identified by agreeing to a consent decree and making some divestitures and other adjustments in their business practices.

The Whirlpool-Maytag merger had a similar profile in some sense. It also involved publicly-traded companies. It was also a very large transaction. The companies' combined revenues were around \$17 billion. The

transaction was valued at over \$2.3 billion. I thought the companies were significant and direct competitors in a number of markets across the range of appliances they made. It is fair to say that this transaction roiled the waters of the industry to a fairly significant degree. In that one, however, we had to reach the second request decision rather quickly. We received authority to investigate the matter and the HSR was filed in September of 2005. In October of 2005, we had issued a second request to the parties seeking a substantial volume of information and data.

This matter proceeded in some way similar to the other. We had substantial interviews with industry participants, significant meetings with the parties along the way, but it was more intense and more in-depth. We received more documents and more data. We used compulsory process with third parties. We took depositions from parties and third parties and other statements under oath. One of the differences between this matter and the United HealthCare Pacifica one was that we completed the investigation, and thus had to make a decision on whether or not to challenge the transaction in March 2006. After taking all of this evidence weighing it, the Division decided to clear the transaction without challenge.

The common aspect to these transactions was that both were very much focused evidentiary-based evaluations of the transaction. An observation that I would like to make to you is that one reason I believe that we pursue that type of inquiry is because we have the tools to do so. Industry participants in the United States give us the information that we need, or we are able to extract it from them if they do not want to give it to us. We can get beyond the presumptions and other simple rules, and try to get a more accurate decision. One consequence of getting beyond the more presumption-based inquiries is that it adds complexity, intensity, and time to the evaluation of a transaction in the pursuit of accuracy.

Finally, I cannot do justice in our time today to describing the process of weighing all of this evidence. As I mentioned, these are transactions that engaged many industry participants. It is not infrequent in merger investigations that you get very well informed, thoughtful, and frequently conflicting views on a transaction from the industry participants.

Resolving those conflicting views—that is, gathering the evidence and data, examining these folks in-depth, and deciding what to do—is a very exacting process. You cannot and we do not rely simply on rules of thumb in resolving evidence. Customers always tell the truth. Competitors always lie. The data is always accurate. Documents are always something that you can rely on. Anyone who has worked with this evidence in detail knows that in any particular matter in any particular context, you have to look at all these information sources and evaluate them. It varies from matter to matter which is more probative, and whether they are consistent with each other.

One extreme part of weighing the evidence is to not simply talk to complaining parties about a transaction—third parties who say it is a bad

deal. You need to talk to the parties about your evidence. See what they have to say. It gives you insights. You also should not simply rely on the observations from the merging parties about the evidence and what is going on. You need to talk to the industry participants. All of these well-informed people who have a lot more experience in an industry than we do help us understand the evidence and sift through it.

My closing comment is that while it is an intensive process to gather this evidence and weigh it, I think it tends to improve the accuracy of our decision-making. On the other hand, given the nature of the information you get and the circumstances in which you are making these decisions, it is an imperfect process. I would say it is not a science. Substantial judgment comes into play in how you weigh the evidence and what conclusions you reach.

Sean Boland: Mark, thank you. They were all very interesting comments and we appreciate it. Ilene?

Ilene Gotts: I am actually going to speak from down here so I can see you. Good morning. We have heard about transactions while they are still pending at the agencies. That is usually what I work towards—getting the deal to close. I want to spend a few minutes talking about deals that have closed and where you think you are safe, but then as a result of third parties or the actions of the merger parties, the transaction reopens.

First, I want to spend maybe two minutes, which is always dangerous for a U.S. lawyer to do, and talk about the *Sony/BMG* case. *Sony* is a European case. There are a couple of noteworthy points to make that are not about understanding the music industry, but rather about what was involved in this case. This was a decision of the Court of First Instance where they annulled a merger decision clearing the alliance between Sony and BMG that was consummated in 2004. This appeal took about two years, which is quick for the Court of First Instance.

The complaint that started this whole thing was filed by a group of competitive independent music publishers. They were competitors seeking to challenge a decision by the Commission. As you heard, the E.U. had issued a statement of objectives. After the hearing, the E.U. cleared the merger. However, the court was not persuaded that the E.U.'s evidence rebutted the Commission's initial conclusions.

As a result of this decision, the transaction must now be renotified and reexamined, at which point the Commission could either clear the merger, prohibit the merger, or require that there be some undertakings. It is noteworthy that third parties in the E.U. can challenge undertakings as well as clearances. I am going to compare that to the current U.S. policy. I want everyone to think about whether this is a source of divergence between U.S. and E.U. policy and whether such a divergence creates a big problem.

In the U.S., people have heard me speak about government challenges to consummated mergers, which continue to happen. For instance, there have been ten consummated transactions challenged by the Bush Admini-

stration—two of these challenges by the FTC occurred this year. I would point out that Mr. Botti's dairy farmers matter is still pending in court, which is a challenge of a consummated merger. Most of these merger cases are situations where the deal closes and the prices go up. In such instances, there is a "gotcha"—evidence that the merger was anticompetitive based on post-merger evidence or the transaction was not subject to Hart-Scott-Rodino because it falls below reporting levels. No deal is too small to raise antitrust concerns or to be challenged by the FTC or Justice Department if it harms consumers.

Most of such challenges occur within a year after consummation of the merger. Exceptions include AspenTech, which was challenged a little over a year after the merger or Hearst, which was challenged more than two years after. In the Dupont situation, we do not see after 23 years a Clayton Section 7 case brought. I would point out that in these situations it is the post-closing conduct that is a key source of the investigation challenge. It might be that a competitor or consumer sees the prices increase or there is some other competitive effect or some reason to think there is really a problem.

At least as long as there has been the Hart-Scott-Rodino Act, there has not been a reported U.S. case of a competitor challenging a consummated merger under Section 7. Indeed, the track record for a competitor to have standing anywhere other than in the 2nd Circuit for challenging or bringing a preliminary injunction while the merger is pending is pretty abysmal.

Out in California I was involved in the McClatchy News Corp. deal where a competitor complained, but the court refused to grant a preliminary injunction. Note the difference between that and what occurs in the E.U. where a competitor has not only gone in on a pending deal, but here it is a consummated deal. And it is a deal the E.U. did not challenge. It was cleared without any undertakings. Here, that company or association would not have standing to challenge the merger. I always thought once you got beyond the government and close the deal, you can feel fairly comfortable. Very rarely will a deal that is consummated raise problems. The agencies are not going to go after you after you are cleared.

What is the Tunney Act? The Tunney Act was an act that was passed during President Nixon's term. It was alleged that President Nixon and the White House had somehow exerted influence over the Justice Department to settle the ITT investigation. The Tunney Act was intended to act as a check on the Executive Branch by requiring that settlements and complaints be filed with a court. The court must look at it and decide if the complaint and consent meets the public interest.

Is there something going on here? In the twenty years after the Tunney Act passed, we very rarely saw courts do anything. We saw a little bit of review in the *AT&T* case and the *Microsoft* case. Some people at Congress got upset at the lack of court involvement and said that the review was nothing more than a rubber stamp and we really want to give the review

some teeth. Essentially they changed the court “may” to the court “shall.” That is, the court shall decide what is in the public interest and look into certain factors to make a finding. The AT&T/SBC case and the Verizon/MCI matters both settled on the same day and the parties consummated the deal.

The Justice Department with Judge Sullivan filed both the complaint and competitive impact statement, and consent decree resolving all the problems. Lo and behold, there were certainly competitors in associations during the Tunney Act period who actually filed public comments raising concerns. The concerns are not just limited to what is alleged in the complaint, but also aimed at trying to reopen Pandora’s Box.

Among the arguments being made is that the court is now mandated to review the merger and enter specific findings. Previously, some judges had just given the complaint and settlement a cursory review assuming that the Justice Department has done its job. After all, the FTC also had approved it and it has gotten through many stages in an industry to get to this point.

There are a couple questions that arise in these situations. The first question is: Is the judge limited to just looking at the complaint and the evidence that supports the complaint, and then determine the adequacy of the relief? Or can he open up the whole bailiwick and decide issues that the Justice Department did not think needed to be addressed?

Or, to what extent are evidentiary hearings necessary? All of this has to be decided, but I hope that the court does not take a very active role in deciding whether the complaint and the consent truly match up. That is regardless of my position and what party I end up representing.

If judges start getting actively involved, they could disrupt a system that is working very well right now. It would discourage settlements. It could lead to a difference in outcome depending on whether a matter is reviewed by the FTC or the Department of Justice. At the FTC, the Commission can vote out a proposed consent after the public comment period, they can make it final.

At Justice, we have a situation where a court could overthrow the whole deal—maybe after they have hearings or after a delay. As a result, parties might be less willing to settle with the Justice Department than the FTC, and the Justice Department might be less willing to settle with the party than the FTC will be, not knowing what courts are going to do. As a result, this could delay deals from actually being consummated. It will be rare, if ever, that the consent, when balanced against the extensive record that the Justice Department has, that the consent really does not resolve the problems.

This gives third parties more of an opportunity to challenge deals in which there has been relief imposed than if Justice had simply cleared it. If you have a deal that the Justice Department decides has no problems and clears, a third party will not have standing, but if the Justice Department

does what it thinks it has to get the relief, then you are going to let a third party reopen the case?

Again, it seems to me that active judicial review would totally disrupt a system that is working very well right now. Indeed these are reasons why this change in law was proposed. The ABA section of antitrust law wrote comments expressing their worries about how the system was going to work and suggesting that the change was not needed. Congress, in their usual way, decided they would resolve the problems by adding language that did not really resolve anything. So, we will wait and see if this is still pending.

I do not think Sean is losing too much sleep over it, but at the same time, the broader implications of it are something that warrants our taking a close examination. With that, I will turn it over to Sean.

Sean Boland: Keith Hennessee, you have been out there in the merger world for a long time at Dresser Industries for many years and then Halliburton Corporation and you have probably worked on as many deals as anyone else in this room. I was hoping that you might share with us the most frustrating aspect of the merger review prospect from an industry perspective.

Keith Hennessee: Well, Sean, thank you. I think that basically the U.S. file agents are simply irrelevant to the decisional process. Now, Mark referred to the health care case where the parties had come in and given him a presentation. I think that this is probably the process that all enlightened companies' law firms are following these days. They are working up their own presentations. It is much more likely to be similar to the E.U. filing process or various other national filing processes, such as those in Australia or Canada, than it is to be a pro forma Hart-Scott-Rodino filing when they come to you early. I want to endorse that process. Dresser and Halliburton, I think, have always been treated very fairly by all of the agencies in the world. I do not have any complaints about the ultimate resolutions we have reached in any case. Providing the data has been a headache at times, but the end result has been correct.

I also wanted to make a remark or two on the "power buyer" defense, which I think all the agencies in the world neglect in their analysis. My perspective is that I live in a world of giants. Dresser and Halliburton have fewer than 100 customers in the world on a real basis; probably fewer than 40 of those customers account for 80 or 90% of our purchases. That is not unique to us; it is common for all of our competitors in the oil field service and products supply industry.

It may surprise some of you to know that such giants as Exxon Mobile, Chevron, Texaco, Shell, and BP are not the largest oil companies. They are dwarfed by the national oil companies. Of the 20 largest oil companies in the world, only 4 are major oil companies: Chevron, Texaco, Shell, Exxon Mobile. So, in dealing with customers of this size, we neces-

sarily are sensitive to how are the buyers going to react to any particular deal.

The way I look at mergers is probably too simplistic. I think of an old-fashioned supply and demand curve, where you have the price on the vertical axis and the supply on the horizontal axis. I see all of the sellers as sort of the underneath of that curve and we are there trying to push it higher. We are trying to lift that curve in an upward direction to get an increased price for any given level of supply. I see all the buyers as pushing downward.

I think that traditional merger analysis structural has been saying, by analogy to cartel analysis: if all the sellers link arms and push up on the curve, then there is going to be a higher price. The merger analysis has said if enough of these people on the underside of that curve are pushing up—if you have 40% of the market pushing up on that curve—then there is going to be an increase in price. In my view, before you can analyze what will happen to that curve, especially in our industry, you also have to look at the effect of the people pushing down on that curve. We are always there pushing up against 500-pound gorillas or 1000-pound gorillas (the buyers) who are pushing down very hard. To be a complete economic analysis, you have to look at what is pushing down as well.

Earlier some remarked that when you look at the market after the merger and you can see the price impact, then you can tell something is happening. In my mind, that does not mean that the merger caused any anti-competitive conduct. Rather the market may have moved because the market curve regularly floats and sinks. The fact that a price increase has occurred may or may not be attributable to the merger.

Again, just to close the point, I feel that an economically adequate analysis of the merger has to include some judgment about what is happening on the other side of the curve—those on upper side of the curve pushing down. How are the customers pushing back? How are they organizing to defeat any price effects? If you look at some of the cases in the area, for example General Dynamics, the agency did not look at the top side of the curve—it just concluded that the underside was constrained by the long-term supply contracts and the lack of reserves.

In *Botco*, again the emphasis was on the underside impact. Now in the *Country Lakes Dairy* case there was better analysis because the agency did analyze the potential behavior of the major food chains—the buyers. But that may have been as much a market definition case as a buyer behavior case. It may have simply stood for the proposition that the market was larger than the Minnesota area analyzed.

All of these parts of the analysis get intermingled, but I just want to close by urging the agencies and the law firms and the companies represented in the room to think about the other side of that curve. In other words, who is pushing back? Thank you.

Sean Boland: Mark, a very quick question to follow up on Keith's talk. Do you think if *Whirlpool-Maytag* were decided twenty years ago, before there were large buyers like Lowes and the Home Depot, that there may have been a different result in that case?

Mark J. Botti: Tough question. That is usually asked to predict the future as opposed to the alternative universe of the past. I think the point is that the way in which strong buyers react to a transaction is, in fact, a very important part of merger review. It was in *Whirlpool-Maytag* that you had four retailers who had something like two-thirds of the sales in the marketplace, but it does not stop there. It is very important to know that you have these power buyers. What will they do to the sellers if the sellers try to exercise market power? But then you want to ask the question: what do they do themselves?

In *Whirlpool-Maytag*, the question that came up about the strong retailers—Home Depot, Lowes, Sears—is whether they would try to discipline a price increase. Are they going to shoot themselves in the foot because the brand strength with these products is so great downstream to their customers that they really can not resist the price increase, despite the fact that they were very sophisticated purchasers of services of very large companies? It is a more detailed inquiry. Yes, absolutely, a very relevant point.

Sean Boland: Thank you both. John Taladay, you recently counseled a client, Inco, in its efforts to take over Falconbridge Corporation. This ended up with five different takeover bids for the two target companies and merger filings in ten different countries around the world. It eventually ended up getting all of the various combinations cleared with a remedy that you had to sell to the U.S. and to the E.C. at the same time. Could you give a few words of wisdom on your experience handling that matter?

John Taladay: Thank you, Sean. I did want to share some observations from Inco's attempted takeover of Falconbridge. As Sean mentioned, I think it was what anyone would consider a complex matter, both from the antitrust point-of-view as well as from the standpoint of the battle for corporate control that took place.

To introduce the specifics of the deal to some of you who may not have followed all of the twists and turns, the original deal was an effort by Inco, my client, to acquire Falconbridge. Both of these companies were large producers of nickel and cobalt. They were long-time competitors and, by some allegations, had combined market shares in some segments of somewhere between 80 and 95%. So there was no avoiding the concept of antitrust issues here, and we knew that going into the deal. After Inco made its friendly offer to Falconbridge, Teck Cominco came in and made a hostile tender offer for Inco. A short time later, Xstrata came in and made a hostile tender offer for Falconbridge. We were trying to get the Inco-Falconbridge deal cleared against the backdrop of these hostile tender offers, which had far fewer antitrust concerns. In fact, only the Inco-Falconbridge deal went to second phase either in the U.S. or the E.C.

Later, in a white knight effort, Phelps Dodge made a friendly takeover offer for Inco with or without Falconbridge. It was an effort to have a three-way tie-up against the backdrop of the Xstrata and the Teck Cominco hostile bids. Finally, CVRD came in and made what I would call an unsolicited offer. It was hostile by nature but not necessarily unwelcome under the circumstances.

To cut to the end result, ultimately the Inco-Falconbridge deal did not happen. Xstrata acquired Falconbridge. Teck Cominco dropped out of the bidding because their bid failed. Phelps Dodge recently withdrew from the bidding. Now, we have CVRD's unsolicited offer to Inco that still stands. Our goal became to maintain a level playing field so that the companies could pursue their bid and pursue their merger; and, if that did not go through, so that they could still maximize their shareholder value by having clearance for the other deals at the same time. Otherwise, if we could not obtain clearance for Inco-Falconbridge, the companies would not have been able to gain the value of the other bids.

Now there are some key remedy considerations that we had. We had to consider that we had actual filings in nine jurisdictions. One option would have been a post-filing notification. We had to think about which jurisdictions would actually exercise their jurisdictional authority over these mergers. In other words, which jurisdictions would actually step in and propose a remedy? We had to think about the different kinds of competitive effects in each of these markets. Even though we had a global market, the national authorities were certainly going to look at what the market shares of these companies were in each of their jurisdictions. They would also consider what the competitive dynamics and competitive responses might be within their jurisdictions, because some other competitors were geographically located more conveniently to the customers.

Early on we had to make a decision about whether a remedy would be required and, perhaps more importantly, in what jurisdictions we would want to discuss that remedy. Certainly, we wanted to generate coordination between the jurisdictions that were going to be looking at the remedy. At the same time, we really did not want to complicate matters by inviting authorities who would not necessarily require a remedy into the party.

This kind of coordination requires quite a great deal of careful planning about the implementation of a remedy. One point I would like to emphasize is that when thinking about coordination of remedies, you can very quickly look at the remedy policies of the FTC, the DOJ, the E.C., which are all relatively clear. They want structural remedies instead of procedural remedies. They want ongoing business units. Those remedy policies are really quite easy to understand, but anyone who has dealt with negotiations would also quickly realize that remedy policies are really just the tip of the iceberg. The actual negotiation of the remedy, even with a single jurisdiction, can go quite beyond the scope of the policy guidelines. That problem

is somewhat exacerbated, certainly, when international coordination is required.

I have a couple of additional points to make. The U.S. and E.C., in my observation, are really quite sophisticated in their coordination on the substantive analysis of mergers. It is really a matter of routine. Often, the U.S. and the E.C. identify similar issues when both jurisdictions substantively review the merger. The U.S. and E.C. work very closely when looking at substantive issues, but they quite infrequently, I believe, look at remedial issues. According to the statistics (this is an informal survey and I am sure the experts in this room will point out cases I have missed) there are really only a couple of cases a year in which the mergers are notified to both the U.S. and the E.C. and in which a remedy is required at all. In most of those cases, the remedies imposed are actually more national in their structure than they are international. Usually that is because there are brand differences and brand preference differences in the U.S. and the E.C.. For instance, Iams dog food might be very popular in the United States, but it is not so popular in the Netherlands, so the divestitures required in the different jurisdictions are quite different.

This suggests that the parties cannot necessarily sit back and expect coordination on the remedy to go as naturally as it would on the substantive review. Parties will have to push the remedial process forward and produce, I think, more coordination and more joint thinking about the structure of the remedy. From our experience in Inco-Falconbridge, we noticed that there is a great desire in the U.S. and the E.C. to have a consistent remedy in a merger that has international scope. Where the same remedy is imposed, the U.S. and the E.C. want it to be the same in both jurisdictions.

That, Sean, I think is the key takeaway from Inco-Falconbridge. Thank you very much.

Sean Boland: Thank you, John. Tasneem Chipty is our final commentator.

Tasneem Chipty: Yes, thank you. I would like to talk today about the tools that we might bring into the analyses to shed light on the competitive effects of the merger. Indeed, the call is to prove it, and there are many analyses that have the potential to shed light on the competitive effects of the merger or acquisition. Economists can construct analyses that range from simple description analyses to complex theoretical and econometric models. Really, in mirroring some of the comments from earlier on this panel and from my own personal experience, the call is really for understanding the facts and presenting the facts in very clear and compelling ways.

Today I would like to talk about the use of straightforward descriptive analysis that characterizes the environment in which the merging parties compete. This analysis is called bid analysis and it has been successfully used in a number of recent transactions. So, what is bid analysis? I would describe it as, in the shortest form, a bottom-up analysis. It starts with a

consideration of what the products are. Identify the merging party's products and figure out who else out there is capable of supplying the same products. In this way, we can start to assess whether there are enough competitors out there to discipline the merging parties.

A bid analysis begins with a description of the products being offered. It requires understanding the functional capabilities of the products and consideration of what the relevant product market is. The only work required to establish a structural model of the relevant market is to take guidance from the people who work with the product. Often you have to talk to engineers and the business people to understand the functional capabilities of the products that are of interest here.

After an analysis of what products are at issue, you move to analysis of the bid data. Herein lies the burden on the companies trying to provide this information to the economist in a timely fashion.

What are bid data? Bid data are usually competitive, intelligent information that companies maintain in the normal course of business. This is information on customer contracts that the companies have bid on—potentially bidding against their now merging partner. Importantly, these data have to provide enough information to identify the products being bid on, the competitors against which the bids were compared, and ultimately, if possible, the winner. The types of questions that the bid analysis can try to answer are things like: who are all of the other firms that bid against the merging firms; and, how often do the merging firms bid against each other on individual tenders.

Let me stop and introduce an example before we go through these questions. Not too long ago in about late 2005 in the European Union, there was the merger of Ericsson and Marconi. It closed in part because of successful use of this type of bid analysis. In that case, the arguments included an analysis of Marconi's win-loss database. As I understand, it included something on the order of 700 to 800 tenders in which Marconi participated. This database satisfied several of the elements of bid data I have already talked about. The database was maintained in the normal course of business and gave us enough information to actually drill down and understand who the competitors are and what their potential capabilities are.

To give you sense of how often the merging firms bid against each other, in Ericsson Marconi of the 700 to 800 tenders that were in the database, Ericsson and Marconi bid against each other in about 100 of those tenders. Out of those 100 tenders they were the only bidders against each other in about five of the transactions. In fact, the large majority of the transactions involved three or more other firms in addition to Ericsson and Marconi.

So really we can use this type of data to drill down on exactly these questions. How often are the merging parties the only bidders? Are the prices lower when the merging firms are bidding against each other? The latter question is actually very difficult to answer, even with the data I have

described. This question is particularly hard because tenders usually involve multiple products. You have to assign value to individual products. Also, as it happens in practice, there are partial wins. Even if you have a composite price, it is very hard to understand how to attribute the value of the deal to the portion of the bid that was actually won. In fact, I understand that in *Oracle-PeopleSoft*, an economist in the E.U. tried to use econometric analysis to tease out whether prices were statistically significantly lower in instances where the merging parties bid against each other relative to when they did not bid against each other.

You can use bid data for other types of analysis. For example, you can use bid data to evaluate whether a merging firm is more likely or less likely to win a tender if the other firm is competing against it. Additionally, recoding these bidders in the normal course of business provides a real sense of what other players in the marketplace have the capability to compete now or in the foreseeable future.

When is bid analysis appropriate? As I stated, there are a range of potential analyses that we might build to shed light on the competitive effects question, so when is bid analysis particularly appropriate? It has been used successfully in several cases where the firms appear on the surface to be the principle competitors in a marketplace. The products may be intangible, like telecom or software, so it is not very clear at all whether other competitors sell products that are functionally equivalent, even though the two merging firms appear to be two large players in a marketplace.

It becomes necessary, as I started to say, to understand functionally what the products do. Often, in settings where bid analysis is appropriate, I think you will find that firms submit private bids for contract. So, you do not have all of this scanner data or observable market prices to analyze. You really need to go into the proprietary data maintained by the companies. Then, of course, bid analysis data can be used to avoid building a structural model of the market, where the product market definition is driven in large part by understanding the functionality of the product. Lastly, bid analysis is appropriate if, in fact, there is good bid data available.

Let me close by giving some recent examples of cases. From the public record, the three cases that have closed recently are *Oracle-PeopleSoft*, *Ericsson-Marconi*, and *Alcatel-Lucent*—all of which relied on bid analysis. Generally speaking, the types of deals in which bid analysis is appropriate are deals in telecom, software, defense, and certainly there are others. This list is by no means exhaustive. Thank you.

Sean Boland: I would like to thank everyone on the panel very much for coming and commenting today and the cartel panel is up next. Thanks.

II. CARTELS: PUBLIC AND PRIVATE ENFORCEMENT

MODERATOR:

Roxann Henry, Partner, Howrey LLP

SPEAKERS:

Scott Hammond, Deputy Assistant Attorney General, Antitrust Division,
U.S. Department of Justice

Alan Wiseman, Partner, Howrey LLP

DISCUSSANTS:

Donald Baker, Partner, Baker & Miller PLLC

Diane E. Bieri, Vice President, Compliance Officer and Deputy General
Counsel, Pharmaceutical Research and Manufacturers of America

Julian Joshua, Partner, Howrey LLP, Brussels

Karen Narwold, Former General Counsel, GrafTech International Ltd.
(f/k/a UCAR International Inc.)

Jean Paul van Marissing, Partner, Howrey LLP, Amsterdam

Proceedings

Roxann Henry: This is the panel on Cartels: Public and Private Enforcement. I am Roxann Henry. I am a partner at Howrey. We have a number of distinguished panelists here. Scott Hammond, to my right, is the Antitrust Division's Deputy Assistant Attorney General in charge of criminal enforcement, otherwise known just as the head of U.S. Criminal Enforcement. To his right is Diane Bieri. Diane is with Pharma, which is a trade association whose members include many of the pharmaceutical companies represented here at the symposium. To her right is Julian Joshua. Julian is another partner here at Howrey. At the other table, we have Alan Wiseman, another partner of mine at Howrey. We also have Karen Narwold. Karen was the former general counsel of UCAR International, Inc. Next to Karen is Don Baker of Baker & Miller. Finally, next to Don is Jean Paul van Marissing, who is a partner in Howrey's Amsterdam office.

With that, let me immediately add a subtitle to the name of our discussion. Officially, we are here to talk about public and private enforcement of anti-cartel rules. It seems to me that the word "global" needs to be in the title too, because that is one of the most important attributes of what is happening in our cartel world. We have a growing number of jurisdictions, not only with anti-cartel laws, but who are actively enforcing laws against cartels. There are over 100 jurisdictions with cartel-related laws. The growth in active enforcement of cartel laws is in large part attributable to my friend here to the right, Mr. Hammond, and the Department of Justice of the

United States, which has stimulated enforcement around the globe by more or less convening what I refer to as their own trade association of government cartel enforcers to share best practices and do those types of things that trade associations are frequently do. That is why I thought putting Scott and Diane next to each other was a good idea.

The penalties for violating anti-cartel laws have also been increasing. On the private side, this morning you heard Philip Lowe note that in the E.U., they are advocating for more private actions—which I know strikes terror into the heart of many folks. The costs of cartel activity for perpetrators are rising on every level, not only in the public area but also in the private enforcement field. For example, the first class action antitrust settlement in Australia was recently announced. Canada obviously has a very active enforcement program, and we will hear a little bit more about some of the enforcement that has already taken place in the E.U. later in our discussion.

Let me talk very briefly about the format for our panel. We would like very much to hear your questions about cartel-related enforcement issues. It is an extremely fertile area for issues and questions, and we would like to focus it as much as possible on the issues of concern to you

I would like to turn the discussion over initially to Scott, so that he can give us a little bit better perspective on the U.S. government's enforcement activities now that he is closing out his fiscal year. Scott, what are the most important developments that have happened in your area?

Scott Hammond: Our fiscal year ends on the thirtieth of September. I think by any measure we have had a pretty impressive year. We obtained over \$500 million in criminal fines—the second largest total in the division's history—and had a number of high-profile investigations like the DRAM case, which has resulted in the incarceration and conviction of ten foreign nationals already, bringing the total now to twenty-seven nationals from nine different countries who have submitted to U.S. jurisdiction and served time in U.S. prisons.

But, quite frankly, the most significant developments in U.S. cartel enforcement, those that I would think are most significant from your perspective as in-house counsel or representing clients, are developments that are taking place abroad. I have said this before, at the close of a fiscal year. I last said it when the European Commission revised their corporate leniency program. That was the single biggest development in U.S. cartel enforcement. We predicted then, and it has since come to pass, that when the E.C. changed their leniency program to bring it more in line with and create convergence with our own program, it would result in an increase in amnesty applications in both the U.S. and the E.U., and that is precisely what has happened. We now routinely see simultaneous amnesty applications taking place in the U.S. and in Europe, and in other jurisdictions as well.

Now, the trend is not just towards creating leniency programs across the globe. There is also a growing trend towards individual accountability

and criminalization. Those developments abroad are having a profound impact on U.S. cartel enforcement. I point you first to Japan, where there have been staggering developments over the last year. In Japan, we now have a corporate leniency program, something that many folks predicted would never happen. I sat on panels year after year where people said that, for legal reasons and for cultural reasons, there can never be and will never be a corporate leniency program in Japan and, if it does come, it will not be effective.

Well, that is not the case. Japan passed the legislation. It went into effect January fourth of this year. We have already had a couple dozen amnesty applications in the first six months of this year. Japan has already announced the first cases being brought as a result of the corporate leniency program. Not only that, but Japan, like many other nations, has been very sensitive to making sure that their leniency does not exist only on paper, but that it has all the ingredients necessary to be a successful program. They have made it very clear that they are going to increase—and then have increased—the number of criminal referrals they are making in their cases. The Japan Fair Trade Commission is bringing cartel cases forward and then making criminal referrals to the Justice Ministry, which is following on up with criminal prosecutions.

In Europe this spring there was a monumental criminal price-fixing trial in Ireland. In the U.K, we have seen decisions by a magistrate and then affirmed by the UK High Court which are paving the way for the first extradition of a former U.K. CEO to the United States to face antitrust and obstruction charges. Australia has also revamped its leniency program and the government has sponsored legislation to criminalize cartel conduct in Australia. At the Organization for Economic Cooperation and Development next February, we will have our second workshop for public prosecutors to provide them with information, guidance, advice, and instruction on pursuing cartel offenses.

Of course, the workshop may involve public prosecutors from many jurisdictions that do not currently have cartel offenses, but one day might. Even if those jurisdictions do not have criminal cartel offenses, they do have obstruction laws, which will be a topic of our discussion and workshop in February. The Division has been assisting and encouraging foreign prosecutors to investigate document destruction, false statements, and other conduct that obstructs the integrity of cartel investigations around the globe.

Why is this the biggest single development, having the greatest impact on the division's program and on all of you? First, to the extent that these developments are taking place abroad, they are eliminating or at least shrinking safe harbors for cartel conduct around the world. That is obviously good and is very important for deterrence. It is very important for your clients, since they are businesses who are usually on the front lines, and who are the first victims of cartel conduct. It is very important for U.S.

consumers. Certainly, our main objective is to promote deterrence, so it is important in that respect.

It is also very important to the extent that conduct is not deterred. These developments abroad are strengthening the tools that we bring to the table in order to have a strong anti-cartel enforcement program. By that, I am referring to the leniency program. Our leniency program becomes much more attractive, as you can imagine, to a Japanese company that is involved in international cartel conduct as a result of the creation of an effective leniency program in Japan. Our ability to incentivize a foreign national to come to the United States to accept responsibility, to cooperate in our investigation and serve time in prison, is improved when we can put that individual on an Interpol red notice watch. And they understand that we will seek their extradition and they realize that living as an international fugitive today is not what it used to be.

I am mindful of the amount of time I have, so I want to skip to the conclusion. I submitted two papers that I have asked you to consider if you have time. The conclusion of the paper entitled *Charting New Waters in International Cartel Prosecutions* talks about the progress and the truly staggering developments that have taken place just in the last ten years with respect to individual accountability for foreign nationals engaged in international cartel activity targeting U.S. consumers. In the 1990s, up until May 1999, the typical resolution for a foreign, multi-national company involved in international cartel prosecution was a very large fine and the prosecution of the single most culpable individual—just one individual—who would obtain a no-jail deal.

That changed in 1999 when we cracked and prosecuted the vitamin cartel. We began prosecuting more individuals, and we began to insist on jail sentences. As I said, as of today, already twenty-seven foreign nationals have spent time in prison since 1999. The reason why we are able to insist on jail time is because of the increased leverage that we now bring to the table in these negotiations. That leverage, as I just mentioned, is getting stronger and stronger. In the 1990's, when we were agreeing to the no-jail deals, it was not because we did not appreciate that individual accountability in the form of jail sentences was the single greatest deterrent to the commission of cartel offences. It was because of the problems that we had getting access to foreign-based witnesses, documents, subjects, targets, and defendants in the investigation. As we began to get jail sentences, beginning with very short jail sentences of three or four months, we were very transparent and we said quite openly that we were going to gradually step things up.

We were concerned about the disparity in the way we treated foreign nationals versus their equally culpable U.S. domestic counterparts. In order to eliminate that disparity, first we had to obtain jail sentences and only then could we build on those jail sentences. That is what we have done. As I have said, this year, as a result of the DRAM investigation, we obtained

the longest jail sentence ever for a foreign national. Our goal, and you can see it now before us, is to obtain proportional treatment for foreign nationals and U.S. citizens who engage in cartel conduct aimed at U.S. businesses and U.S. consumers. I think we are well on our way to achieving that goal. I think that this trend towards criminalization and individual accountability is only going to become more pronounced.

Roxann Henry: With that chilling thought, Alan, could you give us the perspective from the private side, especially in the E.U.?

Alan Wiseman: I think that Scott has demonstrated the success of the United States in exporting antitrust to the world, and it is only going to get worse. The press noted recently that in the past year, there were over 500 class actions filed, and that was a major, major spike. It reminds me a little bit of the 1970's when there was a huge swirl of class actions arising out of U.S. government actions. This spike is really arising out of two things: one, extraordinary cooperation among enforcement authorities globally, as Phil Lowe and Scott have commented; and two, a convergence of public and private enforcement globally, which will only get worse, as Phil Lowe commented this morning. The U.S. is at the forefront of pushing for private litigation in Europe.

Picture Scott Hammond for a moment, sitting around a table with the Department of Justice on a conference call. That conference call is global and on the call he has representatives of the E.C., Canada, Japan, Korea, and who knows what other countries. They are discussing a worldwide cartel that an informant has just blown the cover off and, as general counsel, you know nothing about it. They all agree that we are going to have a worldwide launch of dawn raids.

Some of you in the room have experienced this; many of you have not. But all of you need to be prepared for that potential in the future. The question is, do you have a global plan in place today that could deal with the potential of myriad criminal investigations and at the same time? Are you prepared for not only class actions in the U.S., but also in the U.K., Australia, and a bunch of other countries in Europe. This is not fiction.

Some might say that something like this happened on February 13, 2006. What happened on that day? There was a worldwide raid in the airline industries by the E.C., Korea, the U.S., Canada, the U.K., and other countries. That, to me, demonstrated the most extraordinary cooperation that I have seen at the global level among criminal enforcement authorities. Those investigations have spawned over 80 class actions in the United States, which were recently consolidated in New York.

There are also class actions in Canada, and we do not know where else they may show up. So, law departments now have to put into place, if they have not already, mechanisms for global antitrust compliance, audits, and procedures to protect the corporation in these massive proceedings. You have to view public and private enforcement as intermingled, because

within 72 hours of publicity about these dawn raids, the U.S. class action bar immediately goes into action.

This is a huge change. Personally, I think that it is in large part because the E.C., with the U.S. pushing them along, have become vigorous enforcers. If you look at the class actions that have been filed in the past year, many of them were Eurocentric. There are a slew of class actions that have been filed that involved the E.C. at the forefront. One example is the acrylics investigation that led to class actions in the U.S., even though there was no evidence of wrongdoing in the U.S.

The reason I say it is going to get worse is because, as Phil Lowe indicated, the EC has really stepped up the dialogue on the need for private enforcement in Europe. A year ago Neelie Kroes said: "I am personally convinced that there is a lot of potential in advancing private enforcement. It could really put some extra wind in the sails of our enforcement boat." There has been a lot of dialogue amongst dozens of countries now about what type of legislation will be passed. These countries do not want our style of litigation, but they will institute some form of class action. They have a problem with contingent fees. They have a problem with damages, whether it is single, double, or triple. But they do want to find a mechanism to give the leniency applicant incentives, along the lines of what the United States does.

One important issue counsel needs to look at on a global basis is consistent presentations to different government agencies. You have different executives involved on different continents. They may have different in-house and outside lawyers. You may be on a real fast-track trying to get amnesty or leniency. What you do in one jurisdiction may have a dramatic impact on what you do in another jurisdiction.

You have problems with emails—where are they, how do you collect them, do you have a global system in place to deal with them? You have the problem of the U.S. plants wanting to get discovery of whatever is produced in the E.C. They want written submissions. You have attorney-client privilege issues, because the rules are different across jurisdictions.

Most importantly, you have the issue of the impact of a plea agreement. You have different considerations where you are seeking leniency—What is the scope of the conspiracy you're going to plead to? What are the products involved? What is the geography? What is the time period? How does that, in turn, impact the private litigation you face?

In closing, I think that this extraordinary enhanced cooperation among government authorities will only get worse. Private litigation will, in the next few years, truly go global, and I think your job as in-house counsel is going to become much more complicated.

Roxann Henry: I would now like to turn next to each of our commentators. Karen Narwold, as the in-house counsel perspective here, could you give us a highlight of some of the most important considerations that you face in the context of cartel enforcement?

Karen Narwold: Thank you. First, I just want to reiterate, to be clear, as my government colleagues do, that my words are my own. I am no longer general counsel of Graphtech International, which was formally UCAR International, as we are known in the cartel enforcement arena. During my years at Graphtech, we were the subject of a global enforcement for a price-fixing cartel back in 1997. As general counsel during that time, it took approximately 90% of my time for about eight years to resolve all of the government investigations and the ancillary civil litigation. My suspicion is that my counterparts in corporations subject to global enforcement today will find resolving these issues even more difficult than I did a number of years ago.

Let me highlight just a few governance issues, which I think are important for you as in-house counsel and counsel advising corporations to keep in mind. I would also like to reiterate some of the things that Alan just pointed out. Hopefully you already have some of those processes and procedures in place. It would be extremely difficult to react to an enforcement action without having in place some very good, basic governance procedures.

I am sure you are all aware of some very standard ones. The implementation or the use of these procedures is very dependant upon what point in the enforcement process you become aware of the scope of the enforcement and particularly the role your company or your client is playing in it. Certainly, you want to have in place an antitrust compliance program. One of the first things that UCAR (Graphtech) did after facing enforcement by various jurisdictions was to enhance our compliance program, and that would include an auditing piece.

You also of course want to make sure you have a code of conduct or business ethics in place. This is particularly important in my opinion for dealing with your employees when it comes down to doing an internal investigation after learning of an investigation. You need to be very clear with your employees what conduct is expected of them, not only on a day-to-day basis, but also during the course of an internal investigation and their requirements to cooperate with the company.

You also want to ensure that you have a document retention program in place. It has become much more complicated today than it was when I was dealing with this issue back in 1997. The plethora of email and electronic documentation requires you to have a very strong program in place with a very strong IT component to it. You have to understand how your documents are created and how they are maintained. Also, for those of you who deal with companies that are publicly traded in the United States, you certainly want to have very good disclosure control procedures in place for managing your disclosures with the public and other stakeholders in the company.

Another thing to keep in mind: you want to make sure you have good corporate policies in place. For instance, if you are a public company in the

United States, you want to make sure that upon learning of an investigation other policies such as insider trading restrictions are put in place. These policies should affect not only on people who are aware of the investigation within the company but also the company itself. The company cannot be in the marketplace trading on its own securities, either through a debt or equity type of transaction, so you need to be sure that those go into place very quickly.

Last, I will highlight some of the points that I think Alan was making. It is very important that you have a defense strategy in place. That is a lot easier said than done. Today, you have to expect that any type of enforcement will be global. You will have civil, criminal, and administrative proceedings arising out of it, and you need to be very attuned to developing a strategy very early on to manage that from a government standpoint.

Roxann Henry: Karen, thank you very much. I would now like to turn to a little bit more about what is going on in the E.U. with private enforcement. There is a certain degree to which the U.S. bar does hope to export their enforcement activity to Europe (and there is already ongoing activity).

Don Baker, could you provide us a little bit of information about what's going on right now in the U.K. and Germany?

Don Baker: Indeed. I am very glad to do so. I think it is important to remember that the law in this area is very likely to be national law. The European Commission may encourage private actions, but the parliaments in places like Bratislava, Rome, and Berlin are going to make some key decisions on many questions in which there may be a lot of diversity, such as use of the "passing-on" defense, contribution, and how you prove damages.

What we are looking at today are two of the lean competition law countries where damage remedies have been enacted through important resolutions—the Competition Act and the Enterprise Act in the United Kingdom and the Seventh Amendment passed in 2005 in Germany. These cover a whole variety of things that I do not have time to talk about, including tolling the statutes of limitations and so forth.

One of the most important elements of these laws is the private plaintiff's ability to use public infringement findings. In Germany, not only can a plaintiff use findings of the European Commission, but also the findings of an antitrust authority in any member state. Meanwhile, in the United Kingdom, the plaintiff can use European Commission findings and Office of Fair Trading findings.

In the U.K., they have done something really interesting. They have a group called the Competition Appeals Tribunal presided over by leading European and British competition lawyer Sir Christopher Bellamy. The tribunal has been given jurisdiction over follow-on cases, so that in the U.K. you can go either to the high court or to this specialized competition tribunal. Part of the big momentum for these changes is a belief among the

public authorities that having private remedies will have a good deterrent effect. I agree that introducing private remedies will up the stakes for companies and will cause them to enhance compliance programs and auditing programs.

I respectfully dissent, if there is a contrary view, from the view that it has much to do with the individual wrongdoers. My experience over the years is that the people who do these things spend very little time worrying about whether the company is going to be socked with damages or fines. They worry about getting caught and punished, which is why Scott Hammond's pushing on individuals is such an important part of the equation.

Cartel cases are hard to prove, and I think that a higher proportion in Europe are going to have to be follow-on cases. Discovery is limited, particularly in civil law cases. Loser pay cost rules have a somewhat chilling effect on private litigation. I cannot resist mentioning the famous *Crehan* case, which has been to the European Court of Justice and the House of Lords. It has in fact been fought under an English equivalent of the American rule. It was bought by its legal aid, which means that if the plaintiff is ultimately successful, legal aid recovers its fees and if the company is successful, it does not recover its fees.

I also think there are more psychological barriers in Europe to bringing cases against your suppliers and so forth. Our fiduciary duty has had a pretty big impact on that. I mentioned arbitration clauses, which are a complexity in the United States, a complexity in Europe, and I do not think any of us know how it will go on that.

My last comments are on forum shopping. Just remember how diverse the judicial systems are in Europe. Remember that Europe does not have anything like what we have in 28 U.S.C. §§1404 and 1407—the ability to consolidate cases across jurisdictions. Remember that there are huge differences in discovery and procedural rules, particularly between civil and common law countries. I foresee people trying to go to the U.K. courts in a whole variety of circumstances, including ones where they think discovery is important, because they may want to use oral testimony.

In the *Provimi* case a bunch of Germany plaintiffs were able to establish jurisdiction in the European courts on the grounds of various corporate relationships, but the transactions of the defendants—this was a vitamins case—were used. Meanwhile, as I indicated earlier, the German courts will have an advantage when you want to rely on the findings of a third-party national authority, say Spain or Malta. You can use that order of the Maltese authority in Germany, but you cannot use it anywhere else.

The European Commission has expressed concern about not following the American example. The situation in the E.C. is different because of loser pay cost rules, limited ability of counsel to share risks, and less commitment to damages, I believe we will see. In a way, we say, well, “these guys have engaged in a cartel.” You are entitled to presume that they must

have made some money out of it. Of course, on top of that, individual European jurisdictions have all of the questions the Commission has confronted with respect to “passing-on” defenses, indirect purchasers, and so forth. The European working group that produced the Green Paper spent a lot of time, and is spending a lot of time, worrying about the indirect purchaser and passing-on issues. So that’s a brief story from two of the more antitrust countries in the European Union.

Roxann Henry: Thank you, Don. Jean Paul, private plaintiffs have also been looking at France and the Netherlands as possible forums. What can you tell us about those jurisdictions?

Jean Paul van Marissing: Thank you, Roxann. When I think of the Netherlands, I always think it is a bit of a strange country, and let me tell you why. Until a few years ago, the Netherlands was called the cartel paradise of Europe. Some people considered that to be a compliment. Now that is a bit strange, is it not? But times have changed. After more than eight years of effective public enforcement, the Dutch competition authority became the world champion of imposing fines. For a small country, that is a big achievement. So, public enforcement in the Netherlands has become vigorous, and in that sense, the landscape has changed dramatically.

What about private antitrust litigation? Why is it underdeveloped in the Netherlands, as it is, in almost all other European countries? Why are there only a few cases where damages have been awarded? The legislation allowing private plaintiffs to claim damages and class actions is in force.

In France, you can claim damages based on tort law and fraudulent participation in cartels. Now, I admit that this legislation is not perfect, but it is there. Why is it not used to fight anti-competitive behavior? Is it because of the difference in business mentality? It could well be. For example, we, the Dutch, we are a nation of traders. We trade, we do business, and we want to stay friends. We always think about the next day.

At the same time, things are changing, and let me give you one example. Five years ago, we organized a seminar on leniency. We asked Dutch companies to come forward and spill the beans. We told companies not to be afraid to give sensitive information about competitors and their role in cartels. Five years ago, almost no Dutch company was interested in leniency. However, today, a large number—I think even the majority—of investigations led by the Dutch competition authority result from leniency applications.

That is an enormous change in mentality. It is taking place in the Netherlands, and it is taking place in other European countries. I do not have a crystal ball, but I would not be surprised if there is also a change in the E.U. with respect to private antitrust litigation in the next five years. I expect a more favorable attitude. We still want to do business and we still want to be friends. But with successful public enforcement as a fact of life, the stakes are simply getting too high. Companies in Europe are beginning to understand that flaming damages is also an option.

Two years ago, Mario Monti already stated that private litigation is a key complement to public enforcement. And Commissioner Kroes has stated her course by publishing the Green Paper on antitrust damages actions. It seems that cartel victims are no longer left in the dark. That is exactly the message that we try to convey to companies in Europe. If you have the courage to stand up for your rights, the European Commission will stand by your side. You might lose a business partner, but you will also find a new friend. To me, that sounds like a good trade-off.

I think that it is time to change the landscape so that companies in the E.U. will see public and private enforcement as two roads. One is existing, and the other one seems brand new. But both roads are leading to a business community where competition is fair and where competition can be what it is intended to be: the driving force of our economy.

Roxann Henry: Thank you, Jean Paul. I would now like to turn to Diane Bieri. Trade associations have often found themselves front and center in some of the cartel investigations. Because of that, I thought we could turn to Diane for some thoughts on how to avoid issues with trade associations.

Diane Bieri: Thanks, Roxann. I guess my first comment is that I am not sure you can avoid it. I think the best thing you can do is be in a position where you can defend against it if you do get pulled in.

First, the association should have a clear mission. Obviously that mission should be pro-competitive. All of the activities of the association should be in line with and consistent with that mission. I think that goes a long way. The mission with our association, as with most trade associations, often centers on advocacy. I think the more that you can train your staff and members to really weave that advocacy basis into your documents, communications, and the entire context of what you do, the better you serve yourself and the association.

You need a good comprehensive antitrust compliance guide, antitrust training for your staff and for members involved in the association, and, depending on the size of your association, you probably want to consider having a designated antitrust compliance officer. Maybe that is a prerequisite these days for an association regardless of its size. It is certainly important for our association. You want to make sure you have antitrust counsel attending all board functions, senior staff functions, and all meetings where potentially sensitive topics might be covered.

I have a couple of practical tips that go beyond the basics and just talking about my experience. First, you want to have a culture of compliance among the association staff and the staff of member companies who interact with your association. Instilling a culture of compliance can be a challenge because the staffs of member companies are often coming in and out, depending on the issue, and they are not part of the regular association life.

A culture of compliance can be created starting with the association staff members. As antitrust counsel, you train your association staff to be-

come your eyes and ears. Perhaps they are not as experienced as you—they may not know all of the details in and out—but they do know the basics. You must make sure that they know the basics, and emphasize that it is their job to intercede whenever they see something going on that they think should not be happening. There are no stupid questions at trade association meetings, but you have to teach people to ask first rather than to blurt something out in the middle of a meeting or via email. They have to know they can come to counsel or staff members and ask if it is appropriate to raise a specific topic.

Everyone should know that certain topics should not be discussed period, like prices or relationships with customers. We all know those topics are off limits and your association staff need to know them backwards and forwards as well. You also need to know your objectives. You need to have agendas for your meetings; you need to have minutes that show the outcomes of the meetings, especially at the board level.

Finally, you need to train the staff to bring antitrust counsel in right away whenever they are going to do something that may extend beyond the traditional activities of the trade association. If they are doing surveys or data gathering, doing some sort of consortia where all the member companies are trying to interact together on a special project, or pursuing a code of conduct initiative it is imperative that antitrust counsel get in on the ground floor of those activities. That way, antitrust counsel can steer them in a pro-competitive direction rather than trying to fix any problems after the fact.

Roxann Henry: I understand that many companies these days are actually vetting trade associations, before they actually allow their members to participate, to see whether trade associations have these types of requirements in place.

Diane Bieri: I am sure that's true, and in our case we frequently interact with the antitrust counsel of the member companies to reassure them that we are taking measures to ensure compliance.

Roxann Henry: Julian, penalties—we have talked a lot about the process and how to get there, but give us some perspective on what is really is happening with penalties. In particular, I understand that in the E.U. they are possibly becoming harsher.

Julian Joshua: Thanks, Roxann. The most important recent development is the new fine guidelines issued by the Commission. The guidelines apply to any case where the statement of objections is issued after publication of the notice. Basically they are effective now, because they are already enforced for any new statement of objections.

Privately, Commission officials have said that they want to bump the level of fines up by three to five times the current amount. You may have seen on the news this morning that a fine of over 200 million euros was imposed on a cartel in the Netherlands where the annual value of the market

was only 60 million. The level of fines is already pretty high. The message is to pile on the deterrent effect.

What changes have been made in the fine guidelines? Well, I will tell you briefly what the old guidelines were. The Commission used to pluck a figure, X, out of the air. What are the secrets of X? Then they would multiply it or bump it up by 10% per year for the duration of the infringement, but you did not know how they arrived at X. The main change is that now the Commission is moving to a sort of modified volume of commerce test, similar to what the DOJ guidelines call for.

The starting point for the calculation will be up to 30% of annual sales. In the U.S., I think the start point is 20%. The big change has to do with using duration of the offense in calculating fines. Up to now, duration has not played a really big role in the amount of a fine. If you were in a ten-year cartel with the fine bumped up by 10% per year, all it did was to double the fine. What is happening now is that the fine will be multiplied by the number of years the cartel was in operation. If you are in the cartel for ten years that means the fine will be ten times the basic amount. This change really increases the stakes.

Other important changes include the 25% entry fee, as the Commission calls it, just for being in the cartel. This fee is added on the fine amount. I think a bigger change is in the treatment of recidivism. Up to now the maximum increase for companies with an appalling antitrust record was 50% of the total fine. Now it is going to be a 100% increase for each infringement. If you have a record involvement with three or four previous cartels—I do not want to use the word convictions—instead of a 50% increase in your fine, your fine will be multiplied by 3 or 4 times.

The implication is that the exposure is much higher. Couple this with the tendency of the Commission to automatically impose a fine on the top company in the group, or a whole string of companies and make them all jointly and separately liable, irrespective of whether the parent company is involved or has any knowledge of the infringing behavior. Trying to look into a crystal ball, how does this pan out? Obviously the stakes are higher. The dynamic of the leniency program may change. I am not quite sure how, because Europe is sort of a funny place with its long history of involvement in cartels. There are many companies who say they do not even want to be the first to go in and snitch because they do not know how many cartels they are in. If we go in and rat out somebody in cartel A, B, and C, they may come back and rat us out for being in cartel D, E, F, and G.

One important thing with the stakes being high is that the duration is so important. An unintended consequence of this change could be an encouragement to fight the Commission line by line on every single allegation. If Commission relied too heavily on the unsupported word of an immunity applicant, you can take that case apart if you really want to. The Commission may never have anticipated these changes. I hope that what

we have is a precursor to a system of negotiated settlements, which Philip discussed.

If you are facing a fine of astronomic proportions, the tendency is to negotiate for a settlement that is manageable. I do not think there is any real opposition in business quarters for a negotiated settlement system, but there are member states and elements of the Commission which have objected to it. I hope it will eventually provide a basis for a principled settlement of fines.

Roxann Henry: Let me ask quickly whether we have any questions from the audience. I am going to pose one quickly to Scott. We have been talking about plea bargaining issues in the E.U. Perhaps you could give a little perspective from your vantage point.

Scott Hammond: I will begin with the caveat that I am sure that I am not sensitive to all the institutional hurdles to instituting that program, but I am optimistic that we will see that. I mentioned earlier today when I was talking about leniency that a number of jurisdictions had legal and cultural hurdles to overcome. They managed to overcome those hurdles and I think that is what we will see with respect to instituting a system that allows for negotiated settlements—not just in the Commission but in other jurisdictions.

I would submit to all of you who could potentially be representing a client in front of the Commission that you should see this as a very positive development and one that you should encourage. What is missing right now for the Commission is that they are trying to address through this plea bargain system some key attributes in the U.S. system that are advantageous to all of you. When I say U.S. system, I am not just talking about the antitrust division, but also our court system and rules of current procedure.

What is missing in the E.U. is a degree of certainty, expediency, and finality. In the U.S., when you enter into a plea agreement with the antitrust division you are coming into the investigation, you offered to accept responsibility, the attorney has made an offer in terms of what his cooperation could be, and then we are sitting down and negotiating a settlement. You are informed through a joint recommendation what the fine will be, which individuals are covered and will receive non-prosecution, etc. Then we go into court together and give the judge a joint recommendation as to the appropriate disposition (as part of a C Agreement, which refers to Federal World Crime Procedure 11E1C) and 99.99 % of the time the judge accepts that recommendation.

The company has achieved its goal of certainty. You know what your sentence is going to be and you know it before you have completed all of your cooperation and before the investigation is completed. You have certainty and you have what is most important to your client, finality. You want to put this matter behind you as quickly as you can, and you want to put the civil matters behind you as quickly as you can. You have to handle the criminal first before you can move to the civil matter.

I am very supportive of the efforts of the Commission to try to work through this. It is going to be good for them as well, to the extent potential cooperating companies are interested and see this as an incentive to come forward. That is good for the Commission and that is good for the Antitrust Division. These piecemeal resolutions are very important in creating momentum in our investigations as well, something that the Commission will find if they can put this in place.

I would submit that it is a win-win for the cooperating company and the government enforcement agency. I will say that there is interest in this not just at the commission level. We are addressing this issue next month at the OECD, and it will also be a central topic of discussion at the ICN cartel workshop in November. A number of jurisdictions are interested in the idea of negotiated settlements in the form of plea agreements with cooperating parties.

Audience Member: I have a quick question for Scott. How are you able to convince foreign nationals to serve prison terms in the United States?

Scott Hammond: Every one of those twenty-seven foreign nationals who came over here submitted to jurisdiction voluntarily. Now, we have provided them with incentives to come over and we have made it quite clear what the consequences will be if they do not submit to jurisdiction, but it is, obviously, a very intensely personal decision that every one of those individuals has to make. They are weighing the idea of coming over, traveling 3,000 to 7,000 miles over to the United States, being away from their families, submitting to jurisdiction, and going to jail, against the alternative. The alternative is being placed on an Interpol red notice watch and being a fugitive, and we will track their movements and detain them and extradite them if we can.

There may be a misconception in the room that we secure these jail sentences by entering into a pact with the company or that the company rewards executives for coming over and submitting to jurisdiction. I think that's a serious mistake. First of all, I cannot imagine how large the incentive would have to be for the individual to make the decision solely in order to be in good grace with the company. Apart from that, what typically happens is that the company enters into a plea agreement, just as I described, in which certain individuals are carved out of the plea agreement. The company pleads guilty, is convicted, is fined, and sentenced. It is only later that individuals come to the table and either make a deal with us in which they enter into a plea agreement or do not. So it cannot be that the individuals are doing this only because of a pact between the government and the company and individuals, because the company's deals are done. They are finalized. The company is not getting any more credit one way or another with respect to whether or not the individual comes in or not.

Now I can see why there may be incentives for the company and they may be happy to see that the individual resolves his exposure so that, again,

2007] REMARKS ON MERGERS, CARTELS, AND SINGLE FIRM CONDUCT 913

the company truly puts it behind them. But there are no side deals or added incentives to the company just because the individual has decided to accept responsibility in that regard.

Roxann Henry: We are going to proceed immediately to the panel on dominance. Let me introduce Trevor, who will introduce that panel.

III. SINGLE FIRM CONDUCT: DOMINANCE, DIFFERENCES, REFORM AND OTHER HOT TOPICS

MODERATOR:

Trevor Soames, Partner, Howrey LLP, Brussels

SPEAKERS:

Hendrik Bourgeois, General Electric, Europe

DISCUSSANTS:

Einer Elhauge, Petrie Professor of Law, Harvard Law School

Damien Geradin, Partner, Howrey LLP, Brussels

Donald L. Martin, Chairman, CapAnalysis

John Thorne, Senior Vice President & Deputy General Counsel, Verizon

Joshua Wright, Professor, George Mason Law School

Proceedings

Trevor Soames: Lars-Hendrik Röller, until very recently the chief economist at DG Competition, accepted an invitation to the symposium and did want to attend. However, in his new capacity in Berlin he had no choice but to attend a meeting today, so he sends his apologies. We also invited Professor Damien Neven, who accepted but briefly and then cancelled because he has case work to do in Brussels. Though we lost Hendrik and we lost Damien, we have Hendrik Bourgeois, another Hendrik, who comes from Ghent and is the antitrust general counsel for Europe on antitrust with General Electric, a worldwide, major corporation, very well-known in the field of antitrust. He lectures widely.

To his right is Professor Damien Geradin, another Damien, like Damien Neven from Liège. Anyone who knows people from Liège in Belgium will know that they are very, very different from other Belgians. Damien holds three professorships, and is presently counsel at Howrey in Brussels. On the other side, we have Damien's co-conspirator at Harvard, Professor Einer Elhauge, professor of antitrust and many other things at Harvard University. He is a well-known commentator on Section 2 and Article 82. Both Damien and Einer were speakers at the recent Article 82 Day held by DG Competition in Brussels.

To Einer's right is John Thorne of Verizon, another very well-known in-house antitrust counsel, counselor of record in the worldwide critically important *Verizon-Trinko* case and many others as well. We are very happy to have him. To his right is Professor Joshua Wright of George Mason Law School, who we are happy to see again at this conference. To his right is Dr. Don Martin, chairman of CapAnalysis, CapAnalysis of course being the economics and accounting consulting group affiliated with Howrey. I welcome everybody.

I am not going to make any introductory remarks, because we do not have time. I am going to pass immediately to Hendrik Bourgeois. We have three main discussions. Hendrik, Einer, and Damien will each speak for about seven or eight minutes. Then we will move on to the other commentators, and if we have a moment, we will try to engender some panel discussion. So, if I may pass to Hendrik.

Hendrik Bourgeois: Thank you very much, Trevor, for the kind introduction. As I am sure most of you will agree, providing efficient and accurate advice to companies, particularly multinational companies, about how to ensure that a proposed commercial behavior complies with competition law rules on unilateral conduct can be quite difficult and quite challenging. My sense is that the difficulty and the challenge results mainly from the body of law related to Article 82 of the E.C. treaty and its counterpart in U.S. antitrust law. These laws contain a number of criteria—a number of standards—that are not objective, that are either ill-defined or undefined or even subjective.

Of course, these competition regulations on unilateral conduct are, in part, responsible for determining to what extent companies compete aggressively and vigorously. Therefore, initiatives that take a close look at how these rules should be applied, interpreted, and enforced are very important initiatives. These initiatives are very important to corporations, including GE, because corporations generally try to win competitions—competitions on price, quality of products, and innovations—in order to maximize profits in open market economies.

That is why these rules are important. That is why a lot of companies, including GE, welcome the lead the European Commission is taking in reviewing the rules of Article 82. They also welcome the joint efforts of the Federal Trade Commission and the Department of Justice in doing their analysis. They further welcome the working group on international competition set up to examine unilateral conduct.

I do not know whether it is a happy coincidence that all of these legal and policy communities are looking at the same issue at the same time, but, in any event, I think it provides an important opportunity for trying to achieve at least a certain degree of convergence in this area. As the title of the symposium suggests, we are in a global marketplace and an increasingly global economy. A greater number of factors are present on a global basis, so it would make sense for policy makers from different jurisdictions to

undertake efforts to work together to achieve a greater degree of convergence on certain key criteria, a certain number of key terms, or issues. This would help avoid situations where single business conduct can be treated differently depending on whether the E.U., the U.S., China, or Russia is applying their competition to the same factual pattern.

That is why I think objective standards are important. That is why I think convergence is important as well. In the absence of objective standards, we are left with ill-defined empty standards. We are left with empty bottles that, as all of us know, can be filled with all types of liquids: healthy liquids, harmful liquids, or toxic and dangerous liquids—as the airline employee told me when I was boarding the plane to come over to this conference.

My sense is that in the absence of objective standards, companies and their lawyers really tend to err on the side of caution and tend to adopt conservative approaches in their analysis of proposed conduct, even where that particular conduct is in reality, pro-competitive. What does it mean when we say that dominant firms can compete as long as it is “competition on the merits?” What does it mean when a dominant firm can engage in conduct that is not abuse if it is “normal competition”? And finally what does market distorted foreclosure, as suggested by the Commission’s discussion paper, really mean?

Foreclosure can occur even where rivals are merely disadvantaged and consequently compete less aggressively. These, in my mind, are ill-defined criteria, which do not promote pro-competitive conduct. Having said that, I think there is a reason why we have ill-defined criteria and objectives. I think it results from a need to avoid false negatives.

The less precise the standard, the easier it becomes to intervene when there is a perception that there is a need to intervene. At the end of the day, the real question is whether the benefits derived from having looser standards outweigh the disadvantages created by the subjective criteria that can cause companies to feel restrained from adopting aggressive competitive behavior.

Let me give two examples of useful objective standards. One, which is introduced by the discussion paper, is the test of the efficient competitor. I think it is an objective standard and it is a useful standard because it includes a benchmark that is practical. It refers to the costs and prices of the dominant firm itself and not of other firms, so it is practical for companies. They can analyze themselves and predict whether proposed conduct will actually be permissible or not. I think this is useful.

Another useful example of an objective standard is being introduced in the rebates area. There is now at least an introduction of an average total costs standard in the rebates area. This is a big improvement when you compare it with the case of the European Court of Justice on fidelity rebates. There again, I think this is really helpful.

Let me give you a final example of the flip side, where a lack of an objective standard can create the risk of chilling pro-competitive conduct. I am thinking of the rule in the refusal to supply situation, in which there is no need to show indispensability of an upstream input product or service in the case of termination of an existing supply relationship. Contrast this with a refusal by a dominant firm to start supplying the input where it is required to show indispensability.

The rationale for not retaining this indispensability requirement appears to be an assumption that since the dominant firm entered into the relationship in the first place, there must be some type of pro-competitive or efficient reason for the dominant firm to do so. Secondly, customers who have entered into the supply relationship have probably made investments as well and those investments need to be protected. Therefore, the rule is that a firm need not show indispensability to prove that terminating an existing supply relationship is abusive.

In my view, that rule can have a chilling effect on competition because firms internalize the rule. Firms might be reluctant to enter into a supply relationship in the first place if they know that breaking up the relationship will be quite difficult. That is why I think we really need objective standards. I also think it would be appropriate to try to find some convergence on the standards within the international competition law communities. Thank you.

Trevor Soames: Thank you very much, Hendrik. I shall toss the ball swiftly to Professor Elhauge.

Einer Elhauge: Thank you very much. Damien and I have actually just finished a book on global antitrust law and economics. It covers the whole range of topics at this workshop in a brief 1200 pages, 480 of which are devoted to single firm conduct issues under Article 82, Section 2. With your indulgence, I thought I would just read that to you. In order to stay within the time limits I think I will have to oversimplify the discussion of one of the topics, which is bundled or loyalty discounts. There is an initial question of terminology. Loyalty discount is a nice term for defendants because loyalty is good and discounts are good.

The term loyalty discount certainly has a warm pleasant feeling to it, but one could equally characterize discounts as price penalties on choice. All we really know from the structure of these loyalty discounts is that there is a price difference. There is one price charged to people who are not compliant with the condition, and a lower price is charged to those who are compliant.

What really matters in trying to figure out whether this is a penalty or a discount is the relationship of the discount to the but-for price. We do not know that there is a discount from the but-for price merely because a higher price has been announced. If it is a discount from the but-for price, then at least we have a short-term discount. Then there is the question of whether there is a long-term anticompetitive effect.

The notion that loyalty discounts are somehow a novel animal from those dealt with in existing legal doctrines also causes confusion. In fact, from an economic standpoint, it is the same thing as tying and exclusive dealing, all of which depend on implicit discounts to encourage people to enter into the agreements. There is an underlying question about whether those existing doctrines are wrong because of the famous single monopoly theory for these sorts of vertical agreements. It seems to me that it is now time to announce the death of the single monopoly profit theory.

The single monopoly profit theory was an elegant theory first championed by Ward Bauman. The theory depended on four assumptions, none of which turn out to really hold true on a wide range of cases. I hope you all remember the nuts and bolts type of example that he used. For that kind of example the theory worked. There is only one single monopoly profit; therefore, there must be something pro-competitive going on. Nuts and bolts are in a fixed ratio. Once you have variable or independent demand, it turns out that price discrimination is possible. Of course, it is true that price discrimination may or may not harm consumer welfare, but at least this example shows loyalty discounts can be profitable in the short run and thus require no short-term sacrifice of profits or commitment strategy.

The second assumption really was that consumers only buy one unit of each product. As soon as you introduce the possibility that consumers will buy multiple units, you realize that consumers could have declining demand curves for the products. That opens up the opportunity to use bundles and bundle-discounts to squeeze out consumer surplus by tying the product.

A third key assumption was that tied costs were constant, but this does not hold where firms can achieve economies of scale. The final assumption in these models was that the degree of tying market power was fixed. In fact, often it is not fixed and it is affected by whether or not other firms in the tied market could enter or serve as partial substitutes to whom the market might shift.

The analogy between loyalty discounts and exclusive dealing is similar. The old argument goes all the way back to Director and Levi, although they themselves actually did not make this claim. Nonetheless, they have often been read to suggest that since a buyer agrees to exclusive dealing, it must necessarily be good, on balance, for the buyer. Why else would the buyer agree to exclusive dealing?

It turns out that this assumption ignores certain economic problems. One is that many exclusive dealing arrangements involved a kind of intra-product bundling of products with elastic and inelastic demand. I think this is particularly the case where the product involved is consumable or cases where some set of the downstream buyers are inflexible for some reason and others are not.

Even without intra-product bundling, a lot of economic analysis has shown that the decision to agree to exclusive dealing does not serve as good proxy for what is efficient because there are external factors which effect

that decision. Even if there is a single buyer, there can be externalities on potential entrance. In most cases though, there are multiple buyers and the problem is that you are contributing to a market-wide foreclosure that might affect other buyers. There might be even collective action problems or effects downstream. All of this shows that there should be no per se rule of legality for these kinds of agreements. The question is, what test should we have or where are we right now?

Although we like to chide E.C. law for being a little unclear on the current test, the U.S. law is very unclear as well. The Clayton Act does explicitly cover these kinds of discounts, and there are old Supreme Court cases which do not require below cost pricing.

There have been a lot of recent divergent lower court cases which tend to ignore the old Supreme Court precedent. Some of the courts have required below cost pricing in loyalty discount cases and some do not. Some courts have applied the following test for bundled discounts: Is the incremental price below cost or not? Others basically apply this test: Was there any price penalty on noncompliance that we can then link to some anticompetitive effect?

Lastly, some cases are split as to whether or not the mere existence of these kinds of discounts, coupled with some suggestive theory of anticompetitive effect, is enough where no pro-competitive justification has been offered. There is an unanswered question about whether an abbreviated rule of reasoned scrutiny applies in cases where the defendants are unable to come up with a pro-competitive justification for their actions.

What about the EC law? The old case law going back to *Hoffman* is sometimes read as a per se rule of illegality, but that is not quite right. The old cases said there is illegality without showing substantial foreclosure, but only if no justification has been offered. The *Hoffman* case can be interpreted to stand for the proposition that if you, as a defendant, have nothing positive to say for yourself, you lose. To me, this rule emphasizes that if you are a defendant you have to put something on the positive side of the ledger. I see this situation again and again in the antitrust cases. When you nothing positive to say for yourself, then tribunals tend to weigh the ephemeral anticompetitive effects more heavily.

The discussion paper helps clarify things, but it also creates some problems. The discussion paper would make illegality turn on the sliding scale of the nature of the conduct, the incidents which I think is proxy for foreclosure shares, and the degree of dominance.

The sliding scale creates a lot of ambiguity because I am not exactly sure how it would be applied. The test for whether or not the conduct is anticompetitive is: Is the incremental price below average total cost? For loyalty discounts, the formulas assume two things: one, the contestable share for each buyer equals a rival market share; and two, that you could fit that share in any headroom left open by the defendant. If the jurisdiction only has an 80% loyalty requirement, you could not fit that in the 20%.

The fact that you cannot compete for the whole market does not preclude you from concentrating your sales on individual buyers. There is no reason to think you have to sell the same share to everybody. I had hoped one interpretation might be that this is a safe harbor, but after hearing Philip's comments this morning, maybe not. I am more worried that this is creating a presumptive illegality. That would be an even bigger problem.

There are general problems with any cost-based test that makes such tests unattractive. Cost-based tests tend to convert every exclusionary agreement case into a predatory pricing case. This has been a problematic body of law. Cost-based tests also ignore the problem that foreclosing rivals may impair their efficiency and make themselves no longer equally efficient. Cost-based tests ignore pricing responses by the defendant that can make it irrational for an equally efficient rival to cut their price to cost. These tests also ignore the problem that foreclosing even less efficient rivals can create anticompetitive harm.

Since I do not have any time left, I will leave you with this: in loyalty discount cases what you really need to explain and justify is not the price, but the conditions imposed on that price. I was going to go on and say what the solution is, unfortunately, I do not have time.

Trevor Soames: I am sorry to bring it to an end because I would love to have heard what the solution would be. Okay, now on to your co-author Professor Geradin.

Damien Geradin: Well, thank you very much, Trevor. Today I am going to focus on one specific topic, which is single firm conduct and innovation. There are several reasons for this focus. First is the importance of innovative industries. If you look at this short example, you will see that in 2005 the European ICT sector was worth 614 billion euros. I am only talking about ICT. There are many other innovative industries, such as pharmaceuticals and so on. These are very significant industries in terms of turnover and also in terms of the percentage of the overall GDP.

The second reason is that there are a number of critical cases on both sides of the Atlantic relating to single firm conduct and innovation. Some of these cases are also pending before agencies in Korea, Japan, and so on. Third, these industries raise extremely complex antitrust issues. These are complex industries, complex technologies, and complex market structures.

Finally, if you find that my presentation is a little bit too short and would like to have more details, I submitted along with two other economists a very long comment to the European Commission discussion paper on Article 82, which I am happy to provide to any one of you.

Let me say a few words about specific features of innovative industries. Innovative industries are quite different from traditional industries, like chemical industries for example, although chemical can innovative as well. First, competition in innovative industries is dynamic and often consists of a series of races for market dominance. In other words, these markets are not static. They move all the time and they change all the time.

Second, firms do not compete by slightly undercutting each other. In other words, we are not in a commodity market where if you want to win business you have cut prices by 2, 3, or 5%. Instead, these firms engage in what is described as the “perennial gale for creative destruction” that strives not to earn the margins of profits of the existing firms, but to supplant their foundation and very lives.

There are winners and losers. The loser might simply disappear from the picture. There is a kind of Darwinian element in these markets. Third, the winners get huge market shares and enjoy substantial profits. If you come up with a new product—the new iPod for instance—typically you will make a lot of money.

Your returns will be very high and that is important for two reasons. First, firms only invest in markets where many firms fail if the expected returns are very large. Second, they need large returns to invest into new products and technologies. Of course, this last feature makes these firms ideal targets for antitrust investigations. Why? Typically, “losers,” or firms that are not confident about winning future innovations races, will complain.

Probably the most fundamental question is whether high profits mean that there is a lack of competition in the market. I strongly believe that the answer is no for at least three or four reasons. First, in these industries firms heavily invest to displace the leader by leapfrogging on its technology. In other words, markets are not static. Sooner or later, people will come up with new technologies and the market leader will be displaced and sometimes disappear. We have seen that in some industries, for example, video games. Some very successful companies simply disappeared from the picture, sometimes for several years and sometimes for good.

The history of high-tech industries has shown that major innovations occur repeatedly, and that neither replacement costs to implement a new system nor networking effects are strong enough to prevent displacement of market leaders. This image has been distorted by the Microsoft case. I am not involved in that case, but I think that this case is very unique. My experience is that few markets in these industries actually resemble the operating systems market. There has been a lot of focus on the Microsoft case, which tends to ignore the fact that most of these markets are incredible dynamic, with firms and products appearing and disappearing.

Second, in innovative industries, competition takes place for the market and not in the market. In other words, the real battle is to take over the market, not to add a few percent of market shares. If you want to win, you have to take over the whole market. You may be the leader in a market for a couple years, and then someone will come up with a new product that displaces you.

The final characteristic, which is a result of the first three, is that very often market leaders are fragile monopolists since they can only retain their

position if they continue to invest heavily. Even if these firms invest, they may not succeed in maintaining their strong position in the marketplace.

What are the implications for the design of antitrust rules? The current tests being used by courts or agencies are not well-suited to innovative industries. I would like to make four propositions, which are pretty widely accepted. First, competition policy rules should operate more as a system of deterrence rather than as regulation. In other words, efforts to decide what an appropriate price is or what rate of return should be are counterproductive and designed to fail. Let me give you an example. The reason why the Commission pushed so hard in the 1990's for liberalization of network industries like telecom and energy was because the limited rate of return allowed by the regulation did not encourage new products. It was not leading to lower prices. In fact, it had little benefit. Now you have to follow the same logic for innovative industries. Trying to regulate prices does not make much sense. Secondly, competition policy analysis should be tailored to the special characteristics of these industries. This is perhaps one minor criticism I would have for the discussion paper. It is a kind of one-size-fits-all solution. I think these industries, because they have specific features, need to be dealt with in a specific manner. I am not suggesting that antitrust rules should not apply. Obviously you can see anticompetitive behavior, but I think one should take into account the dynamic nature of competition and the role of innovation in these industries.

Thirdly, the characteristics of these industries make the competitive assessment of unilateral business practices a daunting task, for which courts and competition agencies might not necessarily be well prepared. I am not suggesting that they should not deal with these industries, but I am suggesting that they only prosecute a case when they can put in enough resources to analyze these complex markets in a sophisticated way.

Fourth and finally, I think the cost of rebating efficient practices tends to be pretty high. Why? The market power of these firms tends to be quite fragile. New products will not be offered to customers and that will be a major loss for everyone. This is all I had to say. I stuck to my seven minutes. Thank you very much.

Trevor Soames: Thank you, Damien. Thank you very much indeed. I am passing to John Thorne straight away.

John Thorne: Thank you very much. It's a pleasure to be here. It's hard to follow these particular speakers, but maybe I could extend just a little bit on what Damien said in thinking about how rules should be designed for unilateral conduct. A lot of us have thought about rules. What is prohibited under Section 2, Article 82? What are the things that are prohibited, and what are the standards used for defining the prohibited conduct? I was at a conference with Judge Diane Wood where she said we are going to have international harmony of antitrust and we are going to do it by starting with the definitions.

What is a conspiracy? What is dominant? Define the prohibited entities and behaviors. It is a completely different way to look at this. Instead of defining what ought to be prohibited and what is dangerous, focus on what freedoms firms should have. The problem with deciding what to prohibit is that there is an awful lot that that is potentially dangerous, for instance the bundle discounts Einer discussed. It is possible that bundle discounts could harm competition. It is possible that above cost price cuts could be dangerous in some circumstances.

I have identified five freedoms firms should have, and I would not make them just normative good things to think about freedoms, but categorical freedoms. Usually the behaviors are good ones and courts are not good at sorting out which ones are not. Einer could and Judge Posner could. There are a few people that could actually sort out what is bad in these areas and maybe do it reliably, but I think the general competence of courts and the general category of these behaviors makes them deserving of categorical freedom.

The first is the freedom to cut price, at least down to cost. The second is the freedom to offer packages at a discount. Third is the freedom to innovate. Fourth is the freedom to increase efficiency. And fifth is the freedom to make investments without sharing them.

There has been some progress on the American side over the last decade, and I suspect the next term of the Supreme Court will lead to more recognition of these freedoms. The *Discon* case is a 9-0 Supreme Court decision written by Justice Breyer. It is properly read as talking about the freedom of single firms to switch suppliers. It was a 12b motion to dismiss the case. Read it again—it says a firm is free to switch suppliers.

The *Trinko* case, which I was involved in, is a case about companies being allowed to invest without sharing their investments. There was a similar extension of the case, which actually came before *Trinko* and Judge Posner. *Olympia Equipment Leasing v. Western Union*, which says you can stop dealing after you start dealing; you do not have to continue dealing forever with a firm once you start dealing with that firm.

The *Twambley* case, in which I am involved, is currently pending in the courts—it will probably be argued sometime in December of this term. It is a conspiracy case, but actually *Twambley*, as a plaintiff, started out with a Section 2 case. The core issue in the case, although it is framed as a Section 1 conspiracy case, is really about whether a single firm can decide to refrain from entering markets without easy challenges. The decision whether to enter or refrain from entering markets is a kind of unilateral firm freedom.

The *3M* case came out the other way. This was an important case on firm freedoms to offer packages at a discount. You can look at these as price penalties on choice, as Einer says, but if you look at the economy these package discounts are pervasive among firms that have no dominance in any product. If the non-dominant firms are pervasively and regularly

offering discount packages, there must be something pro-competitive about this practice. Firms are not doing it to garner market power. Something pro-competitive is going on. I come to the question: Can courts reliably decide which packages are good and which are to be condemned? Dominant firms should be allowed to use efficient practices that are otherwise pervasive in the economy.

Other pricing cases have come up. There is a whole bunch of interesting lower court litigation going on right now. There are four cases that I know of since the 1945 *Alcoa* decisions by Judge Hand involving price squeezes—three have come out my way, and one is pending.

The three that have come out my way are the *Goldwasser* decision in the 7th Circuit, where Judge Wood held that a price squeeze was not an antitrust issue, the *Cavalier* decisions in the 4th Circuit; and the *Covad* decision in the D.C. Circuit; all three cases held that price squeezes are not actionable as an antitrust matter. A firm has a freedom in those circuits to set independently wholesale and retail prices without worrying whether another rival can still make a living profit.

There is a pending case in the 9th Circuit called *Linkline*. I submitted an amicus brief. The *Linkline* case could be a vehicle for Supreme Court review of whether there is such a doctrine in America as price squeeze.

The last on my list is sort of the flip side, *Brooke/Weyerhaeuser*, which is pending in the court now. It poses the question: are firms individually allowed to bid aggressively for inputs they want, or does a dominant firm somehow have to restrain itself even though it has a valid use for the inputs?

The rationales for these freedoms are clear. They tend to be good. Price cuts are good; efficiency, innovation, package discounts, and making investments are good. Those are all behaviors to be applauded, not condemned. There is a real difficulty that the courts are beginning to acknowledge in sorting out the good from the bad that is leading to categorical freedom as a method of deciding these cases.

Trevor Soames: Thank you very much indeed. I pass straight away to Professor Wright, but I fear that Professor Wright and Dr. Martin have to share about 5 or 6 minutes.

Joshua Wright: I will try to take just two and pass four, but that will mean I will speak relatively quickly. I want to talk about following both Einer's and John's examples of speaking of specific practices that are pervasive, but I am going to talk about shelf space contracts and slotting allowances rather than loyalty discounts. I think there is a body of law handling shelf space contracts and retail redistribution developing on both sides of the Atlantic, specifically with respect to slotting allowances. I will not get into a great deal about the differences here, instead I will talk about the economics of the practice itself. Suffice it to say, I think there are differences.

If you are interested in looking at this further you can consider the undertaking at Coca-Cola, and the discussion paper I submitted. This is not to say that the U.S. approach is a model of clarity, because it is not. We have the Robinson-Patman Act revived in the *McCormick* case and we have the *Conwood* case. It seems to be the case that in the U.S. at least partial or limited exclusivity is a necessary condition for a finding of liability. This returns to the comments on bundled discounts where I think we can agree the focus is correctly on the role of the conditions; not on figuring out whether these things are always pro-competitive or always anti-competitive.

I would be happy to join Einer in announcing the death of the single profit theorem if we can all agree to focus on the necessary conditions of the anti-competitive theories, and test those necessary conditions against what we observe in the contracts. In that respect, with slotting allowances I think that from the evidence it is relatively clear that these contracts are a normal part of the pro-competitive process. Here I am borrowing liberally from a work I have done with Ben Klein on slotting allowances that is coming out in the *Journal of Law and Economics*. But we suggest a promotional services theory of slotting, where manufacturers competing for retail shelf space and incremental sales driven by eye level shelf space drives manufacturer profits; buyers or consumers don't necessarily switch stores based on whether Coca-Cola is at the eye level or on the second shelf. We show that such conditions, we have a pervasive incentive incompatibility issue between manufacturers and retailers. Slotting is meant to solve that problem.

It is amazing if you look at the evidence on where we have seen slotting and where we do not; there is virtually no overlap in the margins. Where you see slotting is all on high-margin products and never on low-margin products. We do some other empirical testing of our theory in the paper, but the important thing to remember on the pro-competitive side of the ledger is that these payments are passed on, regardless of the form of the payment (whether it is discount or lump sum) to consumers.

Trevor Soames: Professor Wright, if I may. You're focusing on one single subject—slotting—and I think given the time constraints, may I pass on to Dr. Martin?

Joshua Wright: Sure. No problem.

Donald Martin: Since everyone has stolen my fire up here, I am going to have very little to say. I would like to focus a little bit more on bundling. My comments are really in the form of a warning more than anything else. To paraphrase Nobel Laureate Ronald Coase, when an economist or government official is unfamiliar with a business practice or strategy that appears to not fit his model, he is frequently inclined to label it a monopoly or abusive monopoly. I think the practice of bundling or loyalty discounts fits that description.

There are several competing theories of bundling and loyalty discounts, and we have heard many of them. We have focused on the conditions under which a general theory is applied. There really are not any good tests of these alternative competing theories. Most of it is anecdotal. It is dangerous to take action on theories that have not been tested. However, the uncertainty about which competing theory of bundling should apply in any one case has not stopped the courts from ruling on them.

You are warned against pursuing practices that are not really clearly spelled out or clearly understood, and then adopting antitrust policy with fines or decisions that discourage others from that kind of practice. If you look at dynamic rapidly changing industries, the application of antitrust rules to those industries with practices that are not clearly understood have all sorts of risks for Type 1 and Type 2 errors. That is no surprise, but imposing such fines can be very costly to the development of an industry. I think we should proceed with caution under those circumstances.

Trevor Soames: Don, thank you very much. If I may, thank you panel for squeezing your presentations in. If anybody has any questions, please debate.

John Briggs: I want to make comment on something John Thorne said. There is a lot of violent agreement on this panel, Trevor, which I think most people in this room would agree with.

I just put forth two cautionary notes. One is that while everybody seems to agree in this room and a lot of other places that the *LePage's* case was probably wrong, there is a very interesting case called *Freightliner v. General Motors* that some of you may be aware of. If you are aware of it, you ought to look at the complaint. It is a very interesting complaint, just like *LePage's*, brought by the customer and not a competitor who was foreclosed. *Freightliner* may be another case that eventually heads right to the Supreme Court.

The other one is the *Weyerhaeuser* case that everyone seems to laugh at, about predatory buying. If you read the 65-page amicus brief of the FTC and the DOJ on the side of the defendants, one is struck by how many words are spent to avoid recognizing that it is a case about cornering a market on saw logs in the Pacific Northwest. The company had 65% market share. It cornered the market, or very nearly so, and the lower courts found that they did.

The Supreme Court will sort it out soon, but long after we have finished our lunch which starts right now next door. Thank you for being here.