

FTC/DOJ Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition¹

Tuesday, May 8, 2007

1:00 pm - 5:00 pm EST

(As reported by Devin Sullivan of Hogan & Hartson LLP)

The final joint Department of Justice/Federal Trade Commission Section 2 Hearing was held on May 8, 2007, with FTC Chairman **Deborah Platt Majoras** and Assistant Attorney General for the Antitrust Division at the DOJ, **Tom Barnett**, acting as moderators.

Chairman Majoras, began by welcoming the panelists and audience. She also introduced her co-moderator, Assistant Attorney General Barnett and went on to thank the FTC and DOJ staff members for their efforts in putting together the Section 2 Hearings. She also thanked the 130 panelists who had participated. Chairman Majoras said that she wanted to convene the hearings because she hoped that they would provide some clarity regarding the conduct that should be permissible for firms with market power and the conduct that should be prohibited. She said she hoped that the hearings would underline areas of broad consensus and highlight areas of debate and disagreement that require further analysis. She then listed the different hearings and hearing topics that had been covered throughout the year.

Following this, Chairman Majoras introduced four of the panelists, **Susan Creighton**, Partner at Wilson Sonsini Goodrich & Rosati, **Prof. Jeff Eisenach**, Chairman of Criterion Economics and Adjunct Professor at the George Mason University School of Law, **Prof. Tim Muris**, a George Mason University Foundation Professor of Law and Counsel at O'Melveny & Myers LLP, and **Prof. Robert Pitofsky**, the Joseph and Madeline Sheehy Professor in Antitrust and Trade Regulation Law at Georgetown University Law Center and Counsel at Arnold & Porter. Assistant Attorney General Barnett next introduced the other four panelists: **Douglas Melamed**, Partner at WilmerHale, **James Rill**, Partner at Howrey, **Rick Rule**, Partner at Cadwalader, Wickersham & Taft LLP, and **Prof. Greg Sidak**, a Visiting Professor of Law at Georgetown University Law Center and a founder of Criterion Economics.

Forthcoming Report and Section 2 Generally

Assistant Attorney General Barnett then began the discussion by asking the panelists what one or two issues most concern them about enforcement of Section 2 today, such that the report coming out of the hearings should deal with those issues. Mr. Rill stated that the

¹ This document is intended to summarize the FTC/DOJ Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition and is not intended as a primary source document. Although the author strives for reporting accuracy, this summary is based on the author's own notes and impressions from the hearings. Any errors or misrepresentations are inadvertent and deeply regretted. For a complete transcript of the hearings and the panelists' written materials, please visit the FTC's website at www.ftc.gov/os/sectiontwohearings/index.htm.

report should address bundled pricing and loyalty discounts. He said that the *LePage's* decision has created a great deal of uncertainty. Prof. Pitofsky stated that one of the most difficult and pressing issues regarding Section 2 is defining exclusionary behavior. He said that he favors a balancing test under Section 2. Mr. Melamed said that he hoped that the hearings would produce some consensus or clarification of what purpose the rules regarding exclusionary conduct serve. He said that in all the discussion of proper rules for exclusionary conduct, the normative objective of those rules has not yet been completely defined.

Chairman Majoras then asked whether courts, in dealing with exclusionary conduct, should focus on the conduct of the defendant or on the effects of such conduct on consumers and competitors. Prof. Pitofsky argued they should not focus on the behavior of the monopolist, but should focus on the effects of the behavior on consumer welfare. Mr. Rule said that he agreed with Prof. Pitofsky's earlier-stated preference for a balancing test as opposed to a unitary test. However, he also said that he does not feel that the world would be a terrible place without Section 2 and argued that most of the conduct covered by Section 2 that is worthy of condemnation can be attacked through other legal means. Thus, he stated that he was most concerned with limiting the enforcement of Section 2 and focusing it. Toward that end, he argued that rather than determine what is efficient and inefficient, courts should focus heavily on whether or not there is exclusion of competition and foreclosure of markets.

Ms. Creighton stated that she hoped any report coming out of the hearings would affirm that promoting consumer welfare is the basis of rules governing exclusionary conduct. She said that we should use something like the balancing test in the *Microsoft* until we identify better tests for specific behaviors. She also stated that she would like the report to address two issues that distort antitrust analysis: (1) fear of treble damages, and (2) ever-expanding privileges and immunities and the ability of people to protect conduct that would otherwise be subject to antitrust enforcement.

The Standard Under Section 2 and Possible Safe Harbors

Assistant Attorney General Barnett next asked the panelists whether they could identify any specific safe harbors that should exist under Section 2. Prof. Eisenach said there is no necessary conflict between having safe harbors and presumptions on the one hand and a consumer welfare standard on the other. By way of example of a situation where a presumption or safe harbor can exist within the context of a full rule of reason analysis, he said that if Microsoft had offered legitimate justifications for its conduct across the board, it may have escaped liability.

Following up on Prof. Eisenach's comments, Chairman Majoras said that she has always looked at the test in *Microsoft* as a "weighted balancing test" because whenever Microsoft offered a business justification for particular conduct, the court did not find it in violation of Section 2; the court only found violations for conduct Microsoft could not justify. She asked the panelists what they thought about this weighted balancing test. Mr. Melamed responded that he thought the Chairman's understanding of the *Microsoft* balancing test is exactly right. He said that the *Microsoft* court never did a true balancing. However, he argued that the Rule of Reason in the Section 2 context is actually a meaningless concept. In collusion

cases, he said it makes sense. In Section 2 cases, by contrast, there is no metric or meaning to the Rule of Reason where you have both benefits and harms and are trying to balance them. In terms of safe harbors, he said he feels that a safe harbor should simply cover conduct that did not exclude rivals or create or maintain monopoly power. He added, however, that certain types of conduct like chief exclusion and other forms of naked exclusion, that do not result in efficiencies, should be condemned without more.

Prof. Pitofsky responded to Mr. Melamed's remarks by saying that the balancing test is the baseline for all antitrust law. He asked Mr. Melamed why he singles out Section 2 as an area where the Rule of Reason and balancing are nonsense. Mr. Melamed responded that he was speaking about the differences between collusive and exclusive behavior in the context of a Rule of Reason analysis, not the differences between Section 1 and Section 2 necessarily. He went on to say, that the Rule of Reason does not make sense in regard to exclusionary conduct because, for example, if a firm has an exclusive contract with another firm that enhances the firm's ability to distribute its product, the Rule of Reason would require a balancing of those efficiency gains along with the detrimental effects on competitors and competitors' customers; he argued that we do not have an algorithm that can measure or balance these various factors. In the collusion context, the Rule of Reason requires a much simpler calculation. Mr. Rule joined in, stating that both Mr. Melamed and Prof. Pitofsky were right. He said that antitrust law always requires balancing efficiencies on the one hand and harms to consumers on the other. He agreed, however, with Mr. Melamed's point that this balancing becomes much more difficult in the Section 2 context.

Chairman Majoras then asked the panelists what they thought about a market share safe harbor and what kinds of safe harbors are truly meaningful and would keep people and firms out of the legal system from the beginning. Mr. Rill stated that market share should be a starting point in our analysis, but only a starting point. He said that many other countries employ a market share safe harbor, although he would argue that some of those safe harbors are too low. For example, he said that Japan has a 10% safe harbor. Mr. Melamed added that he was glad that Chairman Majoras asked the safe harbor question in terms of how it would affect client counseling rather than simply in terms of how it would affect antitrust litigation. He said that the antitrust laws affect millions of business decisions, and he has always had difficulty counseling clients on the concepts of market share and market power, both of which depend on market definition. He said it would be much more useful to him in counseling clients if he could cite to safe harbors that covered certain conduct.

Turning to the issue of monopoly power, Chairman Majoras asked whether it is useful to establish conclusive presumptions based upon market share. Ms. Creighton responded that market share and market power are obviously important in monopolization or attempted monopolization cases. However, she said that she does not support using it as a screen, especially in attempted monopolization cases. She pointed out that defendants in attempted monopolization cases sometimes do not possess any market power, but they would have possessed it had their attempts not been thwarted.

Chairman Majoras followed Ms. Creighton's remarks about market share screens, asking whether using market share screens is even less advisable in high tech industries because

market power is often fleeting in those industries. Prof. Pitofsky said that market share is the “ramp” that leads into antitrust analysis. The problem, he said, is that judges and lawmakers often treat market share as the end of the inquiry. He said that durability of market power and market share are crucial in the analysis because if market power only lasts a short time, presumably it is less problematic than durable market power. All that said, he stated that if judges and lawyers do not begin with market power in their analysis, he does not know where they would start. He said that there are certain behaviors that firms with 10% of the market may engage in legally, whereas a firm with a 90% share could not engage in those same behaviors without running afoul of Section 2. Thus, starting with market power is necessary to judge conduct in the proper context. Finally, he touched on the safe harbor issue. Prof. Pitofsky said that he is not comfortable with safe harbors, but rather prefers rebuttable presumptions. He said that there are too many “quirky situations” where a safe harbor would cause courts to reach the wrong result. For example, he said that a safe harbor based on market share probably would not reach the right result in a hypothetical situation where the defendant had 40% of the market, but all of its other competitors had extremely small shares.

Chairman Majoras next asked what the panelists thought about starting with entry rather than market share in analyzing monopolization or attempted monopolization cases. Prof. Sidak responded that he is concerned more with price elasticity than he is with market share or entry. He hypothesized a situation where a firm has 40% of the market in a high tech industry and it raises its prices by 10% and yet its competitors lose market share over the same period. He said that it would not make sense in such a situation to infer that there is no problem because the firm has only a 40% market share. Chairman Majoras then followed up by asking whether it is possible to counsel clients about price elasticity. Mr. Rule said that he has not had to do that, fortunately. He said that he has always found market share requirements of Section 2 to be helpful in advising clients. He said that there are difficult cases where he cannot tell a client whether a court would find it has a monopoly or not. He did, however, state that market share screens are less useful in high tech industries. He said that in those industries, conduct safe harbors would be more helpful. All that said, he argued that market share screens have worked and are valuable in client counseling.

Bundled Discounts

Assistant Attorney General Barnett next turned to the topic of bundled discounts. He said that the Antitrust Modernization Commission (“AMC”) had recently issued a report wherein it proposed a three part test for finding that bundled discounts violate Section 2.¹ According to the AMC, bundled discounts should violate Section 2 when (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition. Assistant Attorney General Barnett asked the panelists what they thought about this test.

¹ Final Report of the Antitrust Modernization Commission, *available at http://www.amc.gov/report_recommendation/toc.htm*.

Prof. Pitofsky responded that courts and enforcement agencies should be careful when dealing with bundled discounts because they often benefit consumers. Prof. Muris stated that just about any standard is preferable to the confusion created by *LePage's*. He said that the AMC designed this standard to protect the equally efficient competitor. However, he argued that the problem with this approach is that a firm that sells consumers multiple products is always going to be more efficient than a firm that sells only one. He added that there really is no empirical data to suggest that bundling harms competition. Mr. Melamed said that he felt that the AMC's test could provide a good safe harbor, but he did not feel that it should be the end of the analysis. He stated that the plaintiff and defendant should still have to argue about whether the bundling makes economic sense or not.

Following this exchange, Assistant Attorney General Barnett asked whether the same analysis should apply to both bundling and tying. Mr. Rule said that the question demonstrates a flaw in the AMC's rule; he argued that whether bundling is illegal ought to be related to exclusion and foreclosure. He said that noting that bundling could be viewed as a price tie shows that all of the tests should be focused on exclusion and foreclosure. He said that the first part of the rule ought to be a safe harbor, and that the recoupment portion of the test is useful because it indirectly focuses on exclusion and foreclosure.

Prof. Muris said that, theoretically speaking, tying and bundling differ. He said that he cannot think of a situation where he would support enforcement of Section 2 over a bundle. However, he said that there is slightly more support for worrying about tying. Mr. Melamed said that he agreed with Mr. Rule's point about proving harm to competition, but that the analysis should also focus on conduct. On the question of whether tying and bundling should be treated the same, he said he did not know why the panel was spending so much time worrying about categories. He said that categorization of behavior leads to many formal distinctions that do not necessarily serve any overarching principles.

Chairman Majoras next asked whether the lack of clear guidance and standards for bundling creates any problems in counseling clients. Mr. Melamed said that these are areas where attorneys feel less certain in counseling their clients because of the confusion stemming from *LePage's*. Mr. Rill said that if you look at some of the cases concerning these topics going through the courts, it is obvious that the lack of clear standards is a problem. He also said that there is a global aspect to the problem in that there is also uncertainty in other countries as to how to deal with these practices. He argued that the United States should have clear standards and use these standards in efforts to achieve convergence among antitrust laws and enforcement worldwide. To the extent that U.S. law on these issues remains unclear, achieving convergence remains difficult.

Chairman Majoras then stated that one of the difficulties with the uncertainty is that it may inhibit procompetitive discounting. Ms. Creighton responded that the problem may not lie in the fact that bundling is such a huge issue, but rather in the fact that the *LePage's* decision was so bad. She said that it may not be necessary to get a standard for bundling exactly right; rather, simply having a clear standard may improve the situation, even if such a standard is imperfect.

Loyalty Discounts

Chairman Majoras began the discussion of loyalty discounts by asking (1) whether they really pose a problem, and (2) what the test or standard ought to be for finding that they violate Section 2. Prof. Pitofsky said that loyalty discounts are less of a problem than conduct like exclusive dealing. He said that loyalty discounts are like partial exclusive dealing contracts, but are less problematic than exclusive dealing contracts because either party can decide at any time to opt out. Mr. Rule said that this is again an area where a focus on exclusionary impact could screen out many cases. He said that he is not aware of any case where loyalty discounts have been proven to be anticompetitive. He cited to the DOJ's investigations of travel agent commission overrides in the airline industry, stating that the DOJ found that these commission overrides did not reinforce hub dominance as had been hypothesized.

Ms. Creighton said that one of the interesting things about loyalty discounts as opposed to exclusive dealing is that loyalty discounts are "not found in nature." She said most firms have exclusive dealing contracts, no matter what market share they possess. She went on to say that we only see firms with substantial market shares using loyalty discounts, and that she thinks that there is a question whether firms use these discounts to keep rivals from gaining effective scale. Mr. Rill said that if what Ms. Creighton was saying is correct, that usually only firms with large market shares engage in loyalty discounts, that would be a very interesting fact. He said that he does not know if anyone has done any studies to establish this, but he would be interested to know.

Tying

Chairman Majoras began the discussion about tying by asking whether the panelists felt that courts are moving toward a rule of reason analysis rather than a per se rule in tying cases. Everyone agreed. She next asked whether the standard should be the same for both contractual tying and technological tying. Prof. Sidak responded that he felt that technological tying with respect to product innovations should be per se legal. He argued that the error costs of applying a rule of reason analysis to these cases are too high and that a rule of per se legality is preferable as a result. Ms. Creighton said that she has mixed feelings about per se legality as suggested by Prof. Sidak. She said she understands the need to have clear rules, however, she argued that such a rule may be problematic if the technological tie actually decreased the tying and tied products' performance. Mr. Melamed said that he understands all the reasons courts have to tread carefully in the area of product design innovation, but if a product design has a tie-out feature (say, for example, if Microsoft designed its operating system to be incompatible with Netscape) that kind of conduct should not be subject to a rule of per se legality.

Assistant Attorney General Barnett asked Mr. Melamed whether the outcomes would really be different if the courts did not apply a rule of per se legality for technological tying for product innovations. Mr. Melamed responded that one has to think about how the business community would respond to rules. If a broad safe harbor exists for innovation, firms will manipulate their interfaces to exclude rivals. He said that this is actually a major problem in high tech markets, that competitors often try to exclude their rivals in this way. Mr. Rule then asked Mr. Melamed how his rule would work in these situations. Mr. Rule said that when firms

choose interfaces, they choose them to allow their products to work better, but those interfaces may naturally, and not by design, fail to work with a competitor's products. Mr. Melamed responded that he would not advocate any kind of balancing test. Rather, he said the plaintiff should carry the burden of proving that the component of the defendant's new product that excluded the plaintiff did not serve a legitimate purpose. Mr. Rule responded that there is always an element of arbitrariness or subjectivity in choosing interfaces. It is very difficult therefore to show in an absolute sense that the firm chose the best design from a business or operational standpoint.

Assistant Attorney General Barnett said that he thought he heard Mr. Melamed saying that he would not apply a balancing test in cases of a technological tie, but instead follow the lead of the *Microsoft* court and essentially treat as lawful any behavior for which the defendant can offer a good reason. He asked Ms. Creighton specifically whether she agreed with that approach. Ms. Creighton said that she believed the court in *Microsoft* got it right in the second decision, that where a defendant can offer a plausible efficiency justification for conduct, that should be the end of the inquiry. Prof. Pitofsky asked Ms. Creighton whether she would still follow this approach if the efficiencies generated were very small and the anticompetitive effects were significant. Ms. Creighton said that if this were the case, one would have to wonder whether the efficiency justification offered is actually legitimate at all or whether it is a post-hoc rationalization.

Chairman Majoras then posed a hypothetical wherein the FTC or DOJ conducted an investigation in which they found documents saying specifically that the defendant chose technological designs to avoid allowing competitors to interface with their products. However, under the hypothetical Chairman Majoras' hypothetical, even with this evidence, the defendant's innovation proved to be a superior product and benefited consumers. Mr. Melamed said that he would not focus on subjective intent so much but on the relevant underlying facts. He said the documents would be very relevant because they might illuminate the underlying facts. He went on to relate an anecdote about the *Microsoft* case. He said that that there were plenty of documents in the *Microsoft* case that demonstrated subjective intent to exclude Netscape. However, he said that he and others kept saying at the time that they could think of a dozen legitimate explanations for Microsoft's choice, despite the reasons related in the documents. However, when they served interrogatories on Microsoft, the company could not come up with legitimate reasons.

Mr. Rule interjected, saying that he wanted to tell the other side of the *Microsoft* story. He said that Microsoft and other high tech firms have scores of software engineers working in teams throughout the company developing complex products. He said that it is not the orderly process that lawyers have in mind. It tends, rather, to involve a lot of people working in small collaborative groups writing code, compiling it, testing it, and moving on to write more code. He said that these engineers' actions do not fit into some grand scheme. Thus, it is difficult to find an overarching company strategy, and so a company like Microsoft may not be able to point to specific business justifications for the choices their software engineers make. In many cases, these high tech companies do not do a cost-benefit analysis for every decision they make.

Refusals to Deal

Assistant Attorney General Barnett began the discussion on refusals to deal by saying that it has been suggested during the hearings that a unilateral refusal to deal with a rival should not be viewed as an exclusionary act and should be deemed per se lawful. He asked whether the panelists agreed or disagreed with this proposition. Prof. Eisenach said that he agreed with the proposition, citing the telephone industry as a good example of a situation where antitrust enforcement in the context of unilateral refusals to deal has led to negative consequences. He said that the regulatory regime imposed on the telephone industry reduced competition and innovation. He said that in this case, the “remedy was worse than the disease.” Assistant Attorney General Barnett followed up by asking whether such activity should be per se lawful or whether compelling firms to deal in some circumstances might make sense. Mr. Pitofsky said that mandated dealing by a single firm, even a monopolist, should be very rare. He said that he felt that the balancing test set forth in *Aspen* is the correct test. He stated, however, that the courts and the agencies should not pursue exclusive dealing cases where they know *ex ante* that they cannot design a remedy that will do more good than harm. That said, he said that the difficulties in reaching remedies in these cases have been exaggerated.

Mr. Melamed joined in on the question of remedies. He said that to answer the remedy question and the liability question together is a mistake. By analogy, he said we prohibit murder even if we cannot resurrect the corpse. He also said that that unilateral refusals to deal should not be per se lawful because of cases like *Aspen*. Mr. Rule responded by saying that we do not have per se rules of legality because we know that certain activity will not harm competition in all circumstances. Rather, we create per se rules for certain conduct because the error costs of engaging in a more searching inquiry are so high. Prof. Muris then asked the other panelists what would have happened in *Aspen* if they had a business dispute about sharing proceeds and whether that would have been a legitimate justification. Mr. Melamed said that under those circumstances, the court may have reached a different result but pointed out that Prof. Muris had changed the facts.

Prof. Pitofsky then said that he gathered from Mr. Rule’s comments that he would overrule *Aspen*. He asked whether Mr. Rule would overrule *Lorain Journal*. Mr. Rule responded that he is not a big fan of *Lorain Journal* because the court did not look at the competitive impact of the defendant’s conduct, and it was sort of a precursor to many of the unitary tests. Prof. Pitofsky said that he is a great fan of the *Lorain Journal* decision because it was a situation where there was absolutely no justification for the conduct at issue and significant anticompetitive effects.

Cheap Exclusion

Before getting into cheap exclusion, Chairman Majoras mentioned that that the Court of Appeals in *Microsoft* in 2001 upheld Microsoft’s liabilities partly on the basis of the deception in which Microsoft engaged. She asked if anyone on the panel disagreed that misleading or deceptive conduct could be considered exclusionary under Section 2, and if it can be, how the panelists would draw the line between situations that justify antitrust enforcement and situations where other laws, like the laws of contracts or torts, might better address the

problem. Mr. Melamed said that misleading or deceptive conduct can be anticompetitive but conduct is not anticompetitive simply because it is misleading or deceptive.

On the topic of cheap exclusion, Prof. Muris said that it is an extraordinarily useful way for the government to think about monopolization because it points the government in the direction of truly anticompetitive conduct without real efficiency justifications. He termed this “fishing where the fish are.” He said that the Bush Administration has had a spectacular record of Section 2 enforcement actions. He said that, during this Administration, the government has entered into two settlements that are as large as any in history. and he said that this has resulted from the fact that the Administration has tried to “fish where the fish are” in keeping with the concept of cheap exclusion. Mr. Rill responded by saying that he thought that adopting a notion like cheap exclusion and then using it for a variety of practices creates serious danger of over-enforcement and inefficiencies. More specifically, he said that situations like Rambus’ alleged deception of a standard-setting organization are not common. He said that cheap exclusion does not apply very well in the context of innovative evolution through highly technological products.

Mr. Rill’s comments set off a discussion of standard setting organizations. Prof. Sidak said that he thinks that costs in standard setting organizations are much like the access pricing problem in network industries. He also seemed to disagree with the idea of applying the concept of cheap exclusion to standard setting organizations. He argued that other members of a standard setting organization should have to conduct due diligence just like parties participating in any transaction. Chairman Majoras pointed out, however, that there are costs in requiring each member of a standard setting organization to go out and seek their own information, which is part of why these standard setting organizations put in place rules requiring disclosure. Prof. Sidak rejoined by saying that if you are in a high tech industry, investing in trying to resolve uncertainty and plumbing the unknown are what you should be doing just as a matter of course. Mr. Rule then asked what the costs are from a competition standpoint of permitting the standard setting organization to require full disclosure from its members. Prof. Sidak responded that there is always a kind of moral hazard in placing a burden on parties to inform others when others have not invested enough in creating their own body of information with which to verify the technology or to explore other technologies.

Mr. Rule said that he does not know the facts of *Rambus* that well and that it may be that their activities were particularly heinous. He said that it is definitely a bad thing when parties gain competitive advantage through fraud or force, but there are a myriad of statutes and as well as the law of torts to address fraud or force. He said that he does not see why antitrust also needs to address the situation. He said that maybe those other statutes or legal regimes would go directly to that sort of conduct, regardless of market power or potential market power of the person engaging in it, and therefore may be better suited to address the conduct. Ms. Creighton disagreed, saying that in the context of criminal antitrust, we do not say we will only apply the antitrust statutes unless we first find that the conduct is not reachable by wire or mail fraud. She said the same logic should apply to civil antitrust enforcement: just because some conduct constitutes a tort does not mean that it should be excluded from antitrust challenge. Mr. Rule responded by disagreeing with the criminal law analogy. He said that the only reason that some behavior is challenged as wire fraud or mail fraud is generally because the underlying

conduct violates the antitrust laws; it usually is the violation of criminal antitrust laws that leads to the secondary charges of wire or mail fraud. He went on to say that his only point was that in the case of fraud or force, there are other regimes that are intended to impose optimal punishments on this behavior and that adding antitrust on top of it creates too much enforcement.

International Antitrust

Assistant Attorney General Barnett next turned the discussion to the issue of convergence of antitrust enforcement internationally. He asked whether there are particular areas where convergence is important and does not exist and also whether it is better to achieve convergence for convergence's sake or whether it is more important that the United States develop sound law, even if that makes convergence impossible.

Prof. Pitofsky responded that there is a great deal of divergence internationally about how to define and how to address dominant firm behavior. He said that the United States' position that only economics matters and no other factors should be taken into account differs with most of the world. Beyond that, he said that convergence is a good thing. Mr. Rill then stated that we should not be too pessimistic and not too humble about the opportunities for convergence and the role that the United States can play in producing convergence. He said that U.S. leadership has been critical in getting other countries to recognize the problems with cartel activity and that the U.S. should continue to try to lead.

Mr. Rule said that given the choice between convergence and advocating the right principle, he would always support the second option. He said he recognized that divergence can impose significant costs on companies and that convergence, where possible, is a good thing. However, he said that even where there is divergence, if the United States sticks to its principles, other countries will come around. He also cited cartel enforcement as an example of an area where the U.S. led and other countries eventually followed. Mr. Melamed drew attention to the problem of overlapping investigations internationally. He said that multiple reviews insure that there is a bias in the system in the favor of false positives. Thus, he said the United States should stand firm on the principle that multiple agencies should not be looking at the same transaction.

Prof. Pitofsky added that he feels that convergence is a long way off. That said, he thinks that comity can play an important role in harmonizing antitrust enforcement internationally. He stated that comity does not mean that a country has to do anything another says. He said that, where there are multiple investigations of the same behavior, comity allows countries to simply wait and see what the others do. He stated that Canada does this on a regular basis, and he believes it is a step in the right direction. He added that comity requires different jurisdictions to do everything possible to avoid inconsistent judgments. Assistant Attorney General Barnett then asked Prof. Pitofsky how countries decide who goes first and who sits back under principles of comity. Prof. Pitofsky agreed that this is difficult. He said that in the international bankruptcy field, the rule is that the country with the most connections with the debtor goes first. He stated that antitrust is more difficult, but that we can find a way to decide which country has the greatest connection to a transaction.

Remedies

Chairman Majoras turned next to remedies. She said that panelists throughout the hearings had agreed that one of the goals of equitable remedies is to restore competition in the applicable market. She asked whether that is realistic in the dynamic markets of today. She also asked whether, in a situation where a remedy is difficult or might do more harm than good, the agencies should do nothing at all and count on private plaintiffs to deal with the offending conduct through civil litigation and treble damages. Prof. Sidak said that the approach of leaving enforcement to private plaintiffs has a lot to commend it. He said that it was unfortunate in the *Microsoft* case that there was not a clearer statement of what remedies the government desired from the beginning. He said that divestiture was introduced later on in the case. He further stated that the critical issue over which Microsoft and the government disagreed was the measure of harm to consumers and that the economists would try to answer that question by measuring damages. Chairman Majoras said that many of the public comments they received echoed that sentiment. She said that many people submitting comments asked why the government did pursue any civil penalties in *Microsoft* (even though the government had no authority to do so). Prof. Eisenach said that Microsoft did have to pay civil damages in the case. He said that he did not know the numbers exactly, but he thought that Microsoft had to settle with Sun for some \$4 billion. He said that Microsoft's conduct also resulted in additional civil damages. Mr. Rule joined in saying that Microsoft had to pay Netscape and others settlement payments in excess of \$10 billion. He added that he thinks it is important for the government to think about remedy before it brings a case and that if the government cannot think of a clear remedy, it probably should not bring a case and should defer to private plaintiffs.

Prof. Sidak then interjected asked Mr. Rule what a court should do if the government does not articulate a clear remedy in its complaint. Mr. Rule responded that a court is not going to throw the case out on that basis under the rules. A court would likely say that it cannot understand what the appropriate remedy will be until the factual record is built. He added that the real problem with the remedy in the *Microsoft* case lies in the protocol licensing provision. He argued that it is a problem because it really was not part of the government's case but came out in the course of a negotiation and therefore was not very well thought-out. Otherwise, he said that the strength of the *Microsoft* remedy lies in its prohibition of certain specific practices. He said that remedies like those work in Section 2 cases. Structural remedies, by contrast, create the most problems.

Prof. Muris stated that the remedy issue raises another benefit of the cheap exclusion approach. He said that by "fishing where the fish are," you are more likely to find significant problems. Additionally, he said that the remedies are easy in these cases.

Chairman Majoras said that she was surprised earlier when Mr. Rule seemed to prefer private suits over government action, considering the fact that private suits result in treble damages. She said that some have suggested that treble damages should be abolished. She asked Mr. Rule whether the government should have civil penalty authority if treble damages were abolished. He responded that his earlier comments were premised on the idea that treble damages could not be abolished. He said that when he advocated private suits before, he advocated private suits for damages, not for injunctive relief. He said that to the extent that

injunctive relief is available, it probably should be limited to the federal government because expanding it beyond that creates too many problems. Having said that, he argued that treble damages remedies pose major problems and that there generally is no reason to give plaintiffs compensation greater than their injury. He also added that he did not think Congress was prepared to abolish treble damages.

Conclusion

Seeing that the time had run out, Chairman Majoras concluded the hearing by thanking the panelists for taking the time to participate.