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FEDERAL TRADE COMMISSION

In the Matter of:)

HEARINGS ON THE)

JOINT VENTURE PROJECT)

Monday, June 2, 1997

Room 322

Federal Trade Commission

6th and Pennsylvania Ave., N.W.

Washington, D.C. 20580

The above-entitled matter came on for hearing, pursuant to notice, at 1:35 p.m.

BEFORE:

ROBERT PITOFSKY, Chairman

MARY L. AZCUENAGA, Commissioner

JANET D. STEIGER, Commissioner

ROSCOE B. STAREK, III, Commissioner

Federal Trade Commission

6th and Pennsylvania Avenue, N.W.

Washington, D.C. 20580-0000

ALSO PRESENT::

STEPHEN CALKINS, General Counsel

SUSAN S. DeSANTI, Director, Policy Planning

WILLIAM E. COHEN, Deputy Director, Policy Planning

LOU SILVA, Bureau of Economics

DAVID MEYER, Bureau of Economics

SPEAKERS:

HARVEY J. GOLDSCHMID, Columbia University Law School

JAMES P. ATWOOD, ESQ., Covington & Burling

JOSEPH GRIFFIN, ESQ., Morgan, Lewis & Bockius

P R O C E E D I N G S

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CHAIRMAN PITOFSKY: Good afternoon, everyone. I am Bob Pitofsky, and I am delighted at the opportunity to kick off another round of hearings on a subject of great importance to competition policy.

It is almost two years since the Commission initiated hearings on the impact of global competition and technology competition on antitrust and consumer protection issues. The hearings led to a report on competition policy in the high-tech global marketplace and contributed to agency thinking on those issues.

And at a more concrete level, those hearings led to the creation of the task force, which eventually offered amendments to the Department of Justice-FTC Merger Guidelines dealing with the issue of efficiency claims.

I would like to restate the first paragraph of my opening statement at the initiation of those earlier hearings: "One of the principal responsibilities of government regulators is to ensure that the laws they enforce are regularly reviewed, and occasionally adjusted, to take account of changing conditions in the world. Many recent challenges to the 'overly intrusive' and 'overly burdensome' regulatory state often should be addressed to obsolete regulation rather than regulation itself."

In that statement I also called attention to the fact that it was an express purpose of the founders of this agency that the agency would occasionally have hearings like this and report to Congress and the public on the changing nature of competition.

In a sense the hearings that we initiate today grew out of efforts that began in 1995. In the process of examining new issues impacted by global and high-tech competition, we asked participants at the hearings what portion of antitrust law and enforcement seemed least clear and arguably most out of date, and a substantial majority of the participants cited antitrust law as it applies to joint ventures.

Our goal in these hearings is to solicit opinions from a wide variety of witnesses and participants on various questions relating to joint ventures. We have no set conclusions in mind, but rather solicit the views of knowledgeable people from academia and representing the business and consumer communities.

In the end, we hope to propose a set of guidelines that will help clarify existing law and possibly offer suggestions that will bring the law up-to-date. We appreciate what a formidable challenge this project offers, but with the assistance of our participants in these hearings, we look forward to a constructive result.

Do any of my colleagues have any opening statement they would like to make?

COMMISSIONER STAREK: I have just a couple remarks. I applaud us in launching these hearings. I think they are important, particularly in light of the fact that the revisions to the International Guidelines did not include any mention of joint ventures and, therefore, have left some sort of a hole in the guidance to the public on how joint ventures should be approached.

In addition, there has been a lot that has taken place since those original International Guidelines were promulgated and a lot that needs to be looked at. I am sort of of two minds on this. I think this is a huge undertaking, and I sometimes fear the result.

However, I think that with the help of our witnesses and with the good guidance of our staff, we ought to be able to come up with a product that will be helpful and provide appropriate guidance to the public.

Thank you, Mr. Chairman.

CHAIRMAN PITOFSKY: Thank you. All right. It is my pleasure to kick off this set of hearings by introducing my good friend and colleague, Harvey Goldschmid. He comes to us from Columbia Law School.

He first joined the Columbia faculty in 1970 after practicing law with Debevoise & Plimpton; a founding director

of Columbia University Center for Law and Economic Studies; and currently is Columbia's Dwight Professor of Law.

Professor Goldschmid has chaired the Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York, and the section on Antitrust and Economic Regulation of the Association of the American Law Schools. His publications include coauthorship of cases and materials on trade regulation, one of the fine case books in the field, since I am a coauthor.

(Laughter)

CHAIRMAN PITOFSKY: And industrial concentration and new learning, along with numerous articles on antitrust, corporate law, legal education.

Professor Goldschmid, it is a great pleasure to welcome you to these hearings.

PROFESSOR GOLDSCHMID: Thank you very much, Mr. Chairman. It is delightful to be here, and I thank you and the other members of the Commission for inviting me.

I am even more delighted that these hearings are being held and a joint venture project has been undertaken. These hearings and the project themselves send a critical message to the legal and business communities, and I think I understand from your opening statement, I understand the Commission is willing to regularly reassess the changing nature of competition as our nation moves towards the 21st

Century and it is prepared to review its enforcement policies and priorities, and make adjustments where appropriate, in light of the evolving competitive conditions.

Another part of the same message, I think, is that antitrust enforcement agencies, the FTC and the Department of Justice, have a large and healthy concern about keeping the U.S. industry productive and efficient.

The FTC's hearings on global competition and innovation, the staff's report on Anticipating the 21st Century, and the resulting efficiency amendments to the Horizontal Merger Guidelines demonstrate how well this reassessment process can work.

In taking on joint venture issues, as everyone here understands, the Commission is committing itself to an immensely complex and daunting task. In an ideal world, an ideal result would be new comprehensive guidelines, but at a minimum, the information gathered at these hearings, the analytical energies that will be expended, and the policy clarifications that are bound to come should provide very constructive contributions.

These hearings, in short, are very much in keeping with the best traditions of this agency.

The staff suggested I provide an overview of these issues, and this obviously is too complex an issue to cover in the few minutes I have, but let me try to do that anyway.

First, I would like to take up the case for joint ventures and key doctrinal empirical issues which should be addressed by the joint venture project. The case for, I should add, is the bottle half full, I think, part of the presentation, although there are some difficult doctrinal issues.

The second thing I would like to address is the competitive concerns about joint ventures. This is the half empty part of my presentation. And, finally, I would like to provide some tentative thoughts about possible approaches or directions to be taken by the joint venture project.

Please feel free to ask me questions at any time. I will be delighted to stop and respond.

The case for joint ventures, let me start there. The Commission's 1995 hearings on global competition and innovation established that joint ventures, strategic alliances, and other competitor collaborations, here I am going to group them all under the joint venture heading for shorthand, are increasing in number, taking on new forms, and often growing more complex.

There is no doubt in my mind and most other minds that joint ventures can enhance efficiency in areas like research and development, production, marketing, and joint purchasing.

Joint ventures may allow for economies of scale to be

obtained, provide synergies, spread risks, and allow firms to exploit, in a healthy way, each other's expertise and technological capabilities, and in the international areas in particular they allow firms to enter otherwise difficult markets to enter.

The case for joint ventures is recognized in legislation, I think in the 1984 National Cooperative Research Act and Extension to Production in 1993, recognized in the Antitrust Regulatory Guidelines, Guidelines for Health Care and Intellectual Property Guidelines, and recognizing the case law of the Supreme Court and lower federal courts.

Less well understood, but important, is the fact that joint ventures may be a less anticompetitive alternative to mergers. On an analogous point, I testified at your 1995 hearings, I said that I was skeptical about proposals for "second looks", conditional clearances and deferred reviews of mergers, but I indicated that I would cautiously experiment with deferred reviews with respect to joint ventures.

Unscrambling joint ventures will usually be easier than a merger because the parties to ventures must plan for possible voluntary or involuntary separation, and less uncertainty will be involved in taking part in a joint venture after it has been initially approved.

With respect to the antitrust doctrine, the following

areas are on my tentative list of key issues which I hope the project will consider and, indeed, on which elaboration and guidance are needed.

The boundaries and analytical frameworks for establishing traditional per se offenses, establishing "quick look" per se offenses, and I will come back to these in a minute, but I think Topco and Palmer v. BRG of Georgia, two Supreme Court cases standing for quick look per se, quick look, truncated, skimmed down, rule of reason analysis, also should be addressed. And here I am thinking of the NCAA case and Indiana Federation of Dentists.

And, finally, more analysis and elaboration on traditional rule of reason analyses for Chicago Board of Trade.

A second area, the analytical framework for distinguishing per se group boycotts and refusals to deal from reasonable joint ventures should be addressed.

And a third area is the proper scope of the Copperweld doctrine. When, for example, is there sufficient commonality of interest so that joint venturers or parents and nonwholly-owned subsidiaries should be treated as a single enterprise?

There is vast confusion and a fair amount of lower court case law on Copperweld, and it would be helpful for this Commission and the Department of Justice to provide

guidance.

With respect to empirical issues, I expect the joint venture project to gather a great deal of useful industrial organization information about various aspects of joint ventures and why they have flourished.

For me, the most significant empirical question with large policy implications is: To what extent, if any, do current antitrust enforcement agency practices, guidelines, or case law prevent or inhibit efficient joint ventures from being formed or moving forward?

On the other side of the coin the question is what are the competitive market concerns that would bar entry, frustrating or retarding efficiency and enhancing joint ventures?

Let me address the competitive concerns of joint ventures, at least as I see them.

One is what I consider or call the "gauzy cloak" problem. In the BMI case in 1979 the Supreme Court rejected easy per se labels and properly recognized the horizontal arrangements, often integrated joint ventures of one type or another, with plausible and significant efficiency, enhancing rationales require serious analysis and not literalistic extensions of per se rules.

A key question after BMI was wouldn't sophisticated lawyers and business types -- here we are talking about

1979 -- address even hard-core anticompetitive activity, price fixing, in joint venture, efficiency-enhancing clothing? And the answer, of course, is yes, they would, they did.

But part of the "yes" is that the shielding of hard-core per se activity with a "gauzy joint venture cloak" has only been successful to a limited extent.

Two Supreme Court developments have helped to keep that in line. One, even where joint venture efficiency-enhancing claims have prevented application of the per se rule, cases like the NCAA case and Indiana Federation of Dentists teach that the rule of reason, and certainly truncated quick look, skimmed down rule of reason, the rule of reason is not, as many thought, necessarily a defendant's friend.

Of even greater significance is the fact that the Supreme Court has proven itself to be quite capable and willing to take a quick look at implausible claims of significant efficiencies, and in a tough-minded fashion, reject them and apply a quick look per se rule. Palmer v. BRG Georgia opinion of 1990 is the paradigm case, but Topco realistically stands for that proposition today.

But the "gauzy cloak" problem remains, and in the BRG case, for instance, the two so-called ventures got together in 1980, not I think accidentally only a year after the BMI

opinion, and clothed what was clearly a price fixing or price tampering case and market allocation case with a power of joint venture.

The District Court and the 11th Circuit accepted it and found it lawful. The Supreme Court, reading the petitions for cert, not briefs, but petitions for cert, quickly understood this was simply a "gauzy cloak", rejected the claim, found the per se without even waiting for briefing, and did so unanimously, but this need to pierce through and reach reality and reject sham remains out there, and the analytical framework for doing so is quite important. So is the framework for looking at truncated rule of reason and other such issues.

Similarly, the loss of present or potential -- going back to anticompetitive concerns about ventures -- the loss of present or potential horizontal competition because of joint ventures in moderately or highly concentrated markets is very much a contemporary concern. The Yamaha/Brunswick case, which stands for that proposition, was affirmed by the Eighth Circuit.

Refusals to deal and denial of access to joint ventures remain of concern. Terminal Railroad and Associated Press come to mind. But in modern times we know of serious problems involved in telecommunications and credit card joint ventures. This too remains a concern.

Anticompetitive collateral agreements in joint ventures too have to be focused upon. Judge Posner and Topco in many ways stand for this concern. And spillover effects, whereby joint ventures facilitate collusion outside the joint venture, where information flows, for example, by the building of trust among participants in highly concentrated markets, trusts that can lead to so-called interdependent conscious parallel pricing scenarios, those are real concerns.

I hope that the joint venture project will develop new information about competitive concerns with respect to joint ventures. A key policy issue is whether there are mechanisms, market power filters, nonexclusivity provisions that will permit early and easy identification and acceptance of reasonableness of joint ventures.

Now, let me conclude by giving you a few tentative thoughts, and maybe more than a few, about possible approaches or directions for the joint venture project.

My bias is towards providing the legal and business community with as much guidance and clarity as possible. These hearings and the joint venture project present an excellent opportunity for the antitrust enforcement agencies to clarify the law and provide certainty.

An ideal result would be new, comprehensive joint venture guidelines, but, in any event, there is much to be

gained, as I indicated, in the collection of joint venture information and the analytical efforts that are now contemplated.

Making joint venture law as transparent as possible will help to prevent traps for the unwary and overly-cautious lawyering. In the R&D, research and development area, for instance, there is anecdotal evidence that overly-cautious lawyering inhibited efficient and perfectly lawful ventures.

Chairman Pitofsky in 1992 addressed this concern about overly-cautious lawyering by indicating what clearly was true, and I am quoting, "The charge that antitrust inhibits efficient R&D ventures is surprising because American antitrust enforcement aimed at R&D alliances has been extremely lenient. For example, in the 102 years since the Sherman Act has been on the books, there has been exactly one government challenge to an R&D venture." And yet the lack of clarity may have been different and that's why guidelines and guidance would be so helpful.

Providing the federal courts, and the legal and business communities, with analytical frameworks for when and how per se and when and how to use the very quick look and rule of reason approaches would be a very significant contribution. So too would be the clarification of areas of the law like the Copperweld doctrine and others I have identified.

In any rule of reason analysis the weight to be attached to efficiencies is a critical factor. Significant joint venture efficiencies should not, of course, be sacrificed easily. But if, for an example, an efficient venture would create substantial and long-lasting market power and barriers to entry, a finding of unreasonableness would be easy indeed.

The April 1997 efficiency amendments to the Horizontal Merger Guidelines will undoubtedly have some very helpful hints with respect to efficiency issues in this area.

There is also a need to develop an effective analytical framework leading to early findings of reasonableness in appropriate cases. This is the conceptual underpinning for various attempts to develop screens and filters.

In the joint venture area, I suspect that factors like the limited market power of a venture, nonexclusivity provisions, and limited duration would point strongly towards early and easy findings of reasonableness.

The same analytical factors may also help us to create safe harbors, which if possible would be very useful.

It may be wise to think about some process issues in terms of the project. The advisory opinion process of both the FTC and Department of Justice, the relationship of joint

ventures to the Hart-Scott-Rodino process might fruitfully be considered.

Finally, with the growth of transnational joint ventures in this increasingly global economy, the joint venture project should consider whether the transnational character of the venture, at least in some special circumstances, may create a different framework. And I know Mr. Atwood and Griffin will address that issue.

Harmonization also ought to be talked about, if we can harmonize with the European Union, at least to any real degree. It will make life for all concerned much easier.

Thank you very much.

CHAIRMAN PITOFSKY: Thank you very much for an outstanding overview. Questions?

COMMISSIONER STEIGER: Professor, you have touched on the legislation involving research and production joint ventures, suggesting that perhaps its relatively low use has been due to overcautious lawyering.

Do you have any other thoughts as to why the legislation has not prompted what I would have expected, an outburst of joint venture activity?

PROFESSOR GOLDSCHMID: I would have expected more activity. I am not sure why it is not happening. And I think that is one of the important areas for these hearings to focus on.

Why aren't we using the kind of process set up to create some safety, certainly safety from damage exposure, why aren't we using it more often? I don't have an answer, empirical answer to the question.

CHAIRMAN PITOFSKY: One of the findings in our earlier set of hearings was that the whole nature of joint ventures has changed as a result of global competition and high-tech competition, and some of the things that were cited were there are more parents quite often, that the duration is quite brief, sometimes it is a three-month joint venture instead of building a factory that will last for 30 years, more flexible, more occasions where the subject to the joint venture is intellectual property rather than capital assets.

Whether that's right or wrong, we will address that. If some of those things or all of them were true, do you think that the precedent that's on the books now ranging from Minnesota Mining 50 years ago to BMI only 10 or 15 years ago, do you think the precedent on the books is enough for people to know how to handle joint ventures or has it been displaced enough so that more guidance would be useful?

PROFESSOR GOLDSCHMID: I think without doubt it is the latter, more guidance would be enormously useful. Most of those old industrial sector joint venture cases are simply out of date.

For instance, a two- or three-month venture,

particularly if it is nonexclusive and the fruits are relevant to everyone. One can't imagine the harm that would be created and we ought to think about that. That's why part of my drive in my statement was to look for areas where you can carve out and say this is it.

If you are reading the old case law and you are gathering opinions, one can imagine lawyers worrying about things that shouldn't be worried about. On the other hand, we ought to identify what competitive concerns legitimately are and be serious about those concerns.

COMMISSIONER AZCUENAGA: Professor, can you give an example, either a specific example without names, necessarily, or a hypothetical example of a joint venture, the analysis of which as a result of that analysis would be unclear under today's antitrust law?

PROFESSOR GOLDSCHMID: For instance, let's assume in a concentrated industry three different leaders want to get together of a five-firm industry and they are going to do both R&D and production.

Now, how to analyze that venture is very difficult under present law. It clearly is a venture of large size. It clearly could create competitive problems. On the other hand, if it were of short duration, or in using my nonexclusivity terminology, if the fruits were open to all, it may be okay.

But analyzing that kind of development venturing in the context of case law would be very difficult indeed. And we want to look at entry, but we can provide guidance on that. But it would be very hard for anyone to say with clarity where those kinds of things would come out without looking hard at the variables. And certainly you won't get much in the case law.

I have or we have in the case book, I should say, I am not sure who drafted it originally, a problem involving chemical companies. And eight small fry get together in a venture and then one wants to come in. The one that wants to come in is a price cutter. And they want to keep it out.

One variable is if it is only because it is a price cutter and what you do about that. Another variable is if they want to keep it out because of its creditworthiness or other things. Even under the ADP case where you have monopoly dominance, you can keep it out for credit reasons. But they closed the venture, just making the eight, without saying they will allow anyone in.

All of those issues, and there are spins and spins on them, are open. And there is almost no law that is clear. The guidance the Commission can potentially provide, not only to legal and business communities but to the courts is a very large and potentially helpful contribution.

COMMISSIONER AZCUENAGA: Which part of the Merger

Guidelines do you think, if we were to use the Merger Guidelines, which part would be most efficient in analyzing the joint venture?

PROFESSOR GOLDSCHMID: I think the market definition aspect of the guidelines will apply a large degree here, although one thing we all understand today, I think, the 5 percent tests did not work in many R&D contexts. We are looking further ahead, and you have got to have a broader time frame in such a thing.

The efficiency aspects, the new amendments may well be looked at here. If you are evaluating a joint venture under the rule of reason, one set of issues are: Are these important efficiencies? Are they worth giving up some competitive danger? So which efficiencies count, weight to be given to efficiency, the verification, all of that analysis in the new amendments, I think, would be quite helpful.

COMMISSIONER AZCUENAGA: There have been proposals going way back to apply market power screenings to these kinds of issues across the board, like with Judge Esterbrook. Do you support that?

PROFESSOR GOLDSCHMID: No. Frankly I have debated this with Bob Borg at times. In per se areas you worry about screenings, market power screenings. Market analysis is difficult enough, as the Commission knows from some of the

cases before you, to get into that when you have a group that's together setting price in an old-fashioned cartel way, simply isn't worthwhile.

But it is perfectly clear that market power can be very significant in any rule of reason analysis. And it is very important for some per se rules. You can't understand boycotts without market power. You can't understand tie-in without looking at market power. And so there is a perceptiveness in Judge Esterbrook's sense, but it doesn't go quite as far as he suggests.

COMMISSIONER STEIGER: You expressed the purpose for nonexclusivity? Is it a powerful enough factor that you would suggest it confers some kind of immunity or safe harbor? Would it be enough to know that they nonexclusively existed?

PROFESSOR GOLDSCHMID: I don't think so. I actually ask that question on my exam at times, which I am still grading in a form --

COMMISSIONER STEIGER: Fortunately I didn't have to take it.

(Laughter)

PROFESSOR GOLDSCHMID: If it is nonexclusive, so the fruits of this venture can be available to all eight chemical companies and also to anyone else paying a reasonable price, there is a difficulty in calculating the price on the venture

issues raised, of course, but there is another problem.

If this were the two largest companies in a concentrated market with a bunch of small fry and they are going to get together for R&D, even if they are going to make it available, we may not, if there are no economies of scale to be achieved, if there is no particular reason they have gotten together, you may not want to give safe harbor in those kind of special circumstances, but any time it is broadly nonexclusive, I am enormously comfortable, but I don't think safe harbor would work on nonexclusivity alone.

MR. CALKINS: Harvey, in your catalogue of worries, you mentioned that through a joint venture there might be some building of trust, and I was struck, having just read about Pat Riley and his rule that he fines any of his players who will help an opponent up off the court.

And I have seen in the popular press occasional references to that getting to know people better and living more peacefully and happily together.

But beyond having any just general sort of worries, can you think of a situation where that would really in any separate, independent way be a factor that might affect an outcome or any way of being precise about when you would really make that a worry as opposed to just an additional add-on?

PROFESSOR GOLDSCHMID: I hope we will collect some

anecdotal evidence at least on that during these hearings. In my mind's eye, I guess, is two very firm concentrated, highly concentrated markets, and a question that Mike Scherer has asked perceptively in each of these volumes time and again is: Why don't we have a concentrated industry problem every time we have high concentrations in terms of either collusion or price leadership, which we know will follow independently? One answer he partially hints at each time, and I accept entirely, is that sometimes those running firms in concentrated industries don't trust each other, don't like each other, want to run hard anyway, kind of a locker room atmosphere, even though they know there might be more money following each other along.

I do believe that does happen. And I do believe the converse, which is if they learn to trust each other and like each other and know that they are all dependable, that we may get the kind of pricing that the Supreme Court accepted, for instance, in the cigarette industry where it is parallel, conscious, interdependent, but not unlawful under our present circumstances.

And moving against market conditions, we may get that occurring more frequently. If something would develop and look at, I am not sure it will ever pin it down by computer, but there is some concern that -- the good part is that in concentrated industries they don't necessarily do

anticompetitive things, even in highly concentrated industries. The danger that I see is that this could encourage the kind of collaboration without any kinds of words or telephone calls or other things that could be anticompetitive.

CHAIRMAN PITOFSKY: Thank you. Our next speaker is Jim Atwood, widely regarded as the outstanding scholar and practitioner in the area of international antitrust. And, of course, so much of what we care about in the application of antitrust joint ventures relates to those joint ventures in global markets.

Jim is a partner at Covington & Burling. During the Carter administration he served as Deputy Assistant Secretary of the State Department's Bureau of Economics and Business Affairs, and was Senior Deputy Legal Advisor to the State Department from 1979 to 1980.

He is the author of various articles in the antitrust field and wrote with Caymen Brewster perhaps the most authoritative treatise on international antitrust and American business abroad. He is a former chairman of the ABA Antitrust Subcommittee on International Unfair Competition and a member of the Washington Institute of Foreign Affairs.

Jim, it is a great pleasure to welcome you as a part of these hearings.

MR. ATWOOD: Thank you, Mr. Chairman, members of the

Commission, staff, it is a pleasure to be here.

As has been indicated already, the subject of joint ventures is a huge one. And it is a very difficult one because it is an area of antitrust law that I think inherently necessarily is going to be very fact dependent.

And in the time available here, I am not going to be nearly as comprehensive as Professor Goldschmid was. I am going to try to target my comments on the particular type of joint venture, and I hope that may be helpful for the Commission in a number of respects, including I would think that the best hope for some useful guidelines from the Commission at the end of this process would be one that involved perhaps no more than a half a dozen hypotheticals, common situations, and the Commission's analysis in the antitrust laws that would be applicable to them.

I don't think it is possible to have comprehensive joint venture guidelines, and we shouldn't let the excellent be the enemy of the good. I think if you can develop some targeted, focused guidelines, picking normal typical situations, even if it is only half a dozen, and set up guideposts for counselors and businesspeople to measure their transaction against, that would be a great step forward and a very helpful development.

The particular kind of venture my paper talks about, and I will just review it briefly here orally, is a standard

type of transnational venture where you have got, let's say, a U.S. participant, a foreign participant. I hypothesize that there is not existing competition between the two in the United States in the precise product that's the subject of the venture. And I have included in the example a significant foreign investment abroad by the U.S. firm.

This has been the kind of joint venture that we have seen for many, many years and we are continuing to see them. And it sets up, I think, some general issues that are particularly important to the hypothetical I have drafted here, but applies to a good many other kinds of joint ventures as well, and that's why I think it might be helpful to discuss.

Even though there are so many different legal principles that can be brought to bear on joint venture analysis, I think in the example I have given there are really three principal points that need to be addressed; one of them very important, and two of somewhat secondary concern. And why one is important and why two are of secondary concern in my view is, I think, important and illustrative of some of the analysis that I would urge the Commission to consider.

The most important principle, I believe, is whether the venture is going to have an adverse effect on domestic markups, markets that affect U.S. consumers. And the key

issue there, I think, in a transnational joint venture should be: Does the venture help solidify or entrench a dominant U.S. market position?

If it does, then the venture has serious problems. If it doesn't, then I think everybody ought to draw a sigh of relief and feel, generally speaking, that the venture is not problematical, and then look at some of the secondary issues I identify.

Now, why should this be the principal goal? I think in this audience it doesn't require much explanation. Our antitrust laws are designed primarily to protect the U.S. consumers and the competitive health of markets serving U.S. competitors. That should be principle No. 1 in antitrust enforcement, and I believe it is.

If a joint venture has the effect of solidifying a noncompetitive U.S. market situation, then it should be the subject of concern. And we have seen examples over the years of this kind of joint venture and antitrust attacks against it.

The Brunswick/Yamaha case of this Commission was one example, another example of which I find just sort of intriguing is the Everest and Jennings case of some years ago where you have a clearly dominant U.S. manufacturer of wheelchairs and it, according to the complaint, sort of systematically kept its eyes abroad for a merging foreign

competition that might some day enter the U.S. market and erode its U.S. market position.

And whether it was in Germany or France or Venezuela, when this company spotted a strong emerging U.S. competitor, they got on the airplane and they went over and they worked out a joint venture that effectively kept that company in its market and protected the U.S. market for the dominant American firm. That's a very dangerous kind of joint venture, and it ought to be examined very carefully by the agencies.

But absent that, I think that a transnational venture ought to be given a fairly wide leeway. We are in a very dynamic economy. When a dominant market position arises, which it will from time to time, given shifts in technology and everything else, over time that position will be eroded by new entrants, new competition.

And so long as the antitrust rules protect freedom of entry in that situation, I think we can be confident that competitive problems are going to right themselves in a fairly short period of time.

In the transnational joint venture situation, therefore, I think it is important for the agencies to make sure that those ventures are not excluding competition from the United States, important competition in the case of an entrenched competitor. This is, I think, essentially a

potential competition analysis. And because it is a potential competition analysis, should tell us that it is not going to arise very often because the case law and the analysts have looked at potential competition cases and even domestically have concluded that it requires a congruence of events for a potential competition merger to create serious competitive problems.

You have got to have a concentrated U.S. industry, you have got to have relatively few potential entrants available, the particular party that's involved in the transaction has to be one of those few potential entrants, likely to intercede. You have to be confident that that new entry will be more pro-competitive than the merger or joint venture.

That happens sometimes. It doesn't happen very often. And if you don't have that kind of situation, any remaining concern of potential competition arising from the joint venture is likely to be significantly unimportant and even fairly seemingly farfetched efficiencies have potential enough benefit that I think the basic structure of the transaction ought to be one that the Commission would be comfortable with.

So, again, principle No. 1 would be to look at whether or not the venture is serving to entrench a U.S. market position.

If it isn't, let's assume we have passed that hurdle. I see two secondary issues of market analysis. One would be naked and ancillary restraints which are in effect, in fact, naked, where there is an effort to constrain either the joint venture or the parties in a way that doesn't bear a legitimate relationship to the needs of the venture.

In the transnational joint venture I think that's not going to be a very common problem. And if it is, it is a problem that could be addressed, you know, with the surgical scallop. You don't have to throw the baby out with the bath water.

You should not allow, for example, an arrangement whereby the foreign participant agrees to stay out of the U.S. market in unrelated products. I would, however, not be concerned about agreements whereby the joint venture itself is constrained in its ability to operate in the United States.

I say that because I assumed already that we have -- we are dealing with a U.S. market structure that doesn't raise a serious competitive concern of my first threshold test, and I think that in so many cases it will be a legitimate interest of the parents to be able to make collective decisions about where their joint venture is going to operate and what products the joint venture ought to operate that it will be ill-advised to try and interfere with

joint decisions by the venture partners in terms of what their venture is going to do.

This comes back to the Copperweld point. I think that the Commission would be doing a real service to reevaluate how Copperweld applies in this situation, and I would urge the Commission to restore what had been the Justice Department Guidelines in both '77 and '88, which is where there is effective control over a joint venture by one or more of the parents, the Copperweld Doctrine would apply to the intra-enterprise operations of the venture.

I also would not be concerned about constraints on the ability of the U.S. party to export from the United States in the area of the joint venture's field of operations. This is a voluntary export restraint, engaged in by a party to the transaction who has concluded that the joint venture operation will enhance its business operations.

I don't see a U.S. antitrust objective in second-guessing that company's decision that it is in its best interests to allow, for example, the joint venture to be carrying the flag in South America rather than the parent itself going down to South America itself.

So I think that kind of voluntary restraint by a U.S. parent is of antitrust concern.

The third area where I think there is legitimate

concern and has to be focus is where the joint venture may operate to inhibit some other parties' U.S. export opportunities. The involuntary export restraint, if you will -- and we have seen examples of that in recent years in the telecommunications area, in particular, where there have been U.S.-foreign joint ventures and the Justice Department's concern -- I think these have all been Justice cases -- have been that the venture is going to inhibit the ability of other U.S. competitors to serve certain foreign markets.

That is a perfectly appropriate area of U.S. concern. Those cases resulted in consent decrees that ensured that the foreign markets would not be foreclosed to other U.S. competitors by the venture. And that's fine. I don't think that that situation, that problem is going to arise very frequently, however, and I say that for two reasons.

First, it isn't very often that a private joint venture entity will be in a position to foreclose a foreign market to a U.S. competitor. It can arise particularly in natural monopoly situations or where there is a heavy government regulatory element, in which the joint venture is going to be plugged in, so telecom is an example where a venture could effectively exclude foreign markets from the U.S. competitors, but in the normal situation, private companies just aren't going to have that ability.

Secondly, it is the issue of market definition. And I am going to echo something that Mr. Griffin says in his paper. And I think the issues of market definition in international joint venture contexts require careful analysis and a special analysis.

My view on this is that the U.S. antitrust concern here should be, again, No. 1, protecting U.S. consumers; No. 2, protecting the export opportunities of U.S.-based operations.

But the U.S. antitrust rules are not intended to police the competitive health of particular foreign national markets. That's an issue for foreign antitrust authorities, and an appropriate issue for them, but it is not our job to make sure that the shoe industry in Guatemala is competitively healthy for people buying shoes in Guatemala or the rice industry in Japan or the television industry in France.

Our job, "our" meaning your job, is to protect the U.S. export opportunities of U.S. companies. And they have many broad export opportunities available to them. Single national markets may or may not, therefore, be a relevant market for antitrust concern.

If a joint venture happens to give one or two U.S. competitors an extra healthy, strong market position in a particular foreign country, that is worth looking at, but the

impact of that restraint on U.S. firms has to be viewed more broadly. What are the broad export opportunities available to American industry? I am not saying you excuse a restraint because it only -- it forecloses only one market, but there is a balancing process in rule of reason cases that necessarily has to take place.

And that balancing process requires you to gauge market effects. And in thinking about how significant are the market effects, you should put yourself in the position of the U.S. export market broadly and not narrow segment foreign markets. That kind of analysis is more appropriately the concern of the foreign authorities.

Combining those two factors, the fact that ventures can rarely foreclose foreign markets and, two, we should be thinking broad market definitions when we are involved in export commerce leads me to think that this concern about constraining U.S. competitors is going to be a secondary issue and not frequently a major problem for joint ventures.

Let me close with a few more specific points that are at the bottom of my paper, and I can tick them off quickly. One is I do think it would be useful for the Commission to develop guidelines. I know I continue to use the antitrust guides from 1977 and 1988, Justice Department guidelines, still helpful materials.

And while I understand why that analysis, joint

venture analysis was removed from the 1995 guidelines because it dealt with jurisdictional issues and the like, I do think it would be helping the legal and business community to restore some of the analysis found in those earlier guidelines.

Second, I mentioned Copperweld already, and I think that would be a particularly important area for the Commission to try to clarify. And I support the arguments made in Steve Calkins' recent article in the Antitrust Law Journal as to how that rule ought to come out in Copperweld.

Finally, the National Cooperative Research and Production Act, the 1993 amendments, have some particular foreign joint venture implications, both dealing with the availability of protection from treble damages, one point is the requirement that production facilities be principally in the United States. The second requirement is that the parties be ones whose governments do not discriminate against U.S. firms. I think on both of those points some clarification from the agencies on how those restrictions are interpreted would be helpful.

I know they have been a subject of concern and debate within the bar, and some clarification as to what those constraints mean would be helpful. And I would urge the Commission to construe those provisions in a way to make as broadly available the protections of that statute as

possible.

And after all, I think it is ironic that the way the statute is written is that domestic ventures get greater protection than many kinds of perfectly legitimate transnational ventures, even though I think all else being equal, a domestic venture is going to have greater antitrust risks than the transnational one.

COMMISSIONER STEIGER: Concerning voluntary restraints on limited exports, just to take one, your reference said in your paper on page 11, saying that it is lawful under the Webb-Pomerene Act, which as you know comes under attack periodically with our international friends, could you foresee that position, this lack of concern, as clashing at all with the positive comity stressed in our memorandum of agreement with the EEC? Can you foresee a situation where hands-off in these two areas you mentioned could raise a problem if we were asked to exercise positive comity?

MR. ATWOOD: I mean, I think let me first say I have never been a strong believer that positive comity is the answer to international antitrust enforcement and international antitrust cooperation. It seems to me --

COMMISSIONER STEIGER: I suspected that.

MR. ATWOOD: Yes. It seems to me inherent that when there is an antitrust problem in the United States, your main

concern, the Justice Department's main concern is going to be with its effect on U.S. consumers. And I think that's how it ought to be.

And if conduct here is having an adverse effect on foreign markets, I think we have a strong obligation to cooperate, to provide judicial assistance, to provide discovery assistance, to the extent Congress will allow us to do it, to help the foreign antitrust body applying its law as it sees fit, and we should apply our law as we see fit.

Having said that, I think this is more theoretical than a realistic problem. That is, I don't think in practice results are going to change very much. After all, it is not just that act but the Export Trading Company Act, it is, I think, basic interpretation of the Federal Trade Commission Act and the Sherman Act, particularly in light of the 1982 guidelines.

Voluntary export restraints simply are not improper under U.S. law, so even if we had all the positive comity incentives in the world, I don't think they are illegal under U.S. law, nor do I think they should be. So I think, I am not supporting export cartels, what I am supporting is what I think is a reasonable allocation of enforcement responsibility and the antitrust authority that should have primary jurisdiction or primary interest is the authority whose consumers are being hurt.

COMMISSIONER STEIGER: Thank you.

MS. DeSANTI: I wanted to follow up with you on the potential competition issue and in particular your requirement for likely independent entrant in the near future, the third of your four requirements.

I gather you have to have all four in order to meet the test that you articulated, and I wanted to get some of your views on that articulation of what kind of a potential competition you were looking for versus the articulation that most recently appeared in the intellectual property guidelines in which the FTC and the Antitrust Division defined a likely potential competitor as one whose entry was reasonably probable in the absence of the licensing arrangement in that case.

And I am sure you know there has been this dispute about, you know, how broad should the test be, and I am wondering why you chose a more stringent articulation in your piece rather than something that would presumably take into account the potential for entry over the longer term?

MR. ATWOOD: I am not nervous about the phrase reasonably probable. I think that's not a bad standard. And I didn't mean to part with that, frankly. I went back to Phil Areeda's standards from his book, which have more or less been recognized and applied in the courts.

I think that no matter what standard you pick, it is

going to require judgment and intelligent application and require thoughtful fact-finding. And this can be difficult because there isn't a sophisticated company in the United States today that isn't always thinking about possible expansions.

So you have to make reasonable judgments between what is sort of some assistant manager's pipe dream because he would love to have the chance to start up a new business with the financing of his company and this new product and what is something that is reasonably probable in the light of realities.

For every 20 proposals for new entry that come through the corporate pipeline, maybe one is ultimately approved. So I am not quarreling with the standard in the Intellectual Property Guidelines. I think it has to be applied intelligently and carefully.

MS. DeSANTI: That's obviously the case, and it is something that the Commission has to deal with in many different types of entry scenarios. Let me flip the situation that you just posed.

In some cases, particularly in the kind of a transnational joint venture scenario that you put in here, the question would be whether the foreign company was going to be entering the U.S. market.

MR. ATWOOD: Yes.

MS. DeSANTI: There can sometimes be difficulties with foreign discovery, and one doesn't always have access to the documents, the strategic planning documents of those foreign companies.

To what extent do you think it is imperative that the evidence be an internal strategic planning document versus the perceptions of customers, other evidence that one might gain in a market analysis?

MR. ATWOOD: I think objective market analysis may be at least as important as sort of subjective internal corporate documents. I spoke on this subject at the last round of hearings and continue to believe that on these discovery issues, the fact remains that the Commission is going to have the burden of proof, but that there are such a wide range of sources, reliable sources of business information.

And if, for example, you had significant U.S. customers for this particular industry that were prepared to come forward and said they have had some contacts with this potential entrant from abroad, taking all the business considerations into account, strongly believe that their business could be attractive in the United States, I think that's certainly worth very careful consideration.

So I would not say that you need to have a smoking gun in a strategic planning document to make out a potential

competition case.

MS. DeSANTI: Thank you.

MR. CALKINS: Jim, let me follow up on Commissioner Steiger's question, just press you a little bit. I take it if I understand your position correctly that if you had what was billed as a joint venture but which at the end of the day one concluded was an agreement by a European Asian firm to essentially pay money to a U.S. firm in return for the U.S. firm promising not to export to Europe and Asia, you would regard that as something that should not be challenged under U.S. laws, and my follow-up is is it the same answer if it is a three-party joint venture with two U.S. firms and one European Asian firm and, again, the agreement is it is essentially a payment not to export? Do you still say it is not an appropriate antitrust subject for the U.S.?

MR. ATWOOD: I think the answer to that is yes. And you don't even, to my way of thinking, have to call it a joint venture; that an agreement by a U.S. firm not to export in exchange for some consideration from abroad that makes that a profitable transaction for the U.S. firm, I think is indistinguishable from and thus equally lawful as an agreement between two U.S. companies saying you take Asia, I will take Europe.

It may violate that -- that would violate the laws of Europe. It probably would violate the laws of Japan. But I

don't think that, if U.S. consumers are not hurt and if no U.S. party is prevented against its will from exporting from the United States, I don't see the U.S. antitrust laws as speaking to that transaction. And I don't think -- Minnesota Mining is a case that goes the other way on that.

MR. CALKINS: I read your paper. I just want to make sure I read it correctly.

COMMISSIONER AZCUENAGA: How about a hypothetical that you would suggest we address in the guidelines?

MR. ATWOOD: Well, it would be, you could just easily take a case I was talking about and put some facts on it. Have your U.S. company and your foreign company that decide to jointly build a plant in Argentina, to manufacture X, and they agree that the U.S. firm will not sell in Argentina in competition with the joint venture, they agree that the, let's say the other party is a Brazilian, he will not sell in Argentina in violation of the, in competition with the venture, that the U.S. market is either going to be served exclusively by the U.S. parent, using whatever foreign off-take it wants from the Argentine plant, but that the plant, the joint venture plant will not sell into the United States, except by or through, with the consent of the U.S. parent, 50/50 joint venture.

I am prepared to say that I think those restraints are lawful, but I could write you an argument that goes the

other way. And even though it is a fairly simple stylized hypothetical, I don't think the law is as clear as it should be on even that.

MR. COHEN: I just wanted to return a little bit to your discussion of potential competition as the basis for your transnational hypothetical. And you have stated this in terms of dominance or near dominance.

Other times I have seen you talk in terms of a noncompetitive market position. I am really trying to find out if dominance is the key to what you are going after here because sometimes some analyses of potential competition have required -- haven't required quite that much. Sometimes they talk in terms of a concentrated market and a firm of some size, which is being called -- I think the 1984 guidelines said it had reached 20 percent, anything over that was likely to lead to a challenge in a concentrated market when the other conditions were met.

Were you really trying to go beyond that when you are talking in terms of dominance? If so, is that because of something specific about the transnational nature of this, which is imposing a higher standard?

MR. ATWOOD: I was trying to go beyond simply saying a concentrated U.S. market, if that means a 2,000 HHI, for two reasons. First, I think the practice of the agencies has been to treat concentrated markets not as an area of shark

infested waters but as an area where perhaps more analysis is required, but that there is an appreciation that even transactions in concentrated markets, if you are in the 2,000 HHI range, may not be as troublesome as ones it thought, it would require some more fact-specific analysis.

I think that's part of it. Secondly, yes, I think the transnational venture ought to be treated a little more flexibly because mistakes here in terms of overenforcement are going to inhibit these transactions and that means limiting the ability of perhaps important U.S. companies to engage more in international commerce, and that we are better off erring on the side of encouraging international investment by U.S. firms and ensuring against artificial barriers to entry to be sure, but letting the dynamics of the international market and the efficiencies that can be derived from joint venture investments, giving that a fair amount of play, and I think that's a more appropriate balance than to inhibit and scrutinize with and to discourage transactions wherever you have got a 2,000 HHI.

One of the hypotheticals that was distributed late last week by the staff, your automobile glass situation was one where you had, I think, a relatively concentrated U.S. market but where the transnational venture resulted in new production, and which is likely to have a pro-competitive effect; new production; new output, and where there are no

indications that the foreign party was one of a very few number of potential entrants.

In this economy today, there are potential entrants from every corner of the globe. And, therefore, the kind of transnational venture we are talking about here is one that I don't think should worry us very much, unless you have really got, as I say, a dominant or near dominant U.S. market position.

CHAIRMAN PITOFSKY: I am very interested in whether we are going to be able to define some safe harbors in the joint venture area. Bill Baxter, when he was here in Washington once said that if the merger is legal, if the merger falls in the safe harbor, a joint venture involving the same firms must be in the safe harbor.

And it has a certain gut appeal to it, but I have always wondered -- you have thought about this a great deal -- I have always wondered whether that applies across the board. What is your reaction?

MR. ATWOOD: Unfortunately, I don't think it does apply across the board because in one respect, at least, and Professor Goldschmid alluded to this, joint ventures can be more of a problem than mergers because there are still two other entities out there who may be very significant competitors in other areas and who now have developed a new relationship because of the joint venture.

And so you still have to worry about whether those two areas are starting to resonate together.

So in that respect I don't think you can always say they could have merged, there is no problem whatever, because it isn't a complete merger. You still have privately, separately held entities out there that are independent competitive actors, but the joint venture may affect that competition.

CHAIRMAN PITOFSKY: Thank you. Other questions?

MR. CALKINS: Just a last quick follow-up. Your test for dominance, what do you have in mind, a monopoly power-like standard, something short of monopoly power? What do you mean by dominance?

MR. ATWOOD: If I had to pick a number, I would pick 35 percent market share, but there are no bright lines.

MR. CALKINS: Could a number two firm, take a Coke-Pepsi situation, when you say Pepsi, you mean second automatically couldn't be dominant so they would qualify for your safe harbor?

MR. ATWOOD: I think the Brunswick decision was decided correctly, and Brunswick was the No. 2 company in the U.S., it wasn't the No. 1. So I think the No. 2 company could be big enough in conjunction with a very large No. 1 that you could be worried even about the No. 2.

CHAIRMAN PITOFSKY: Ready to move on? Our final

speaker is Joseph P. Griffin, another scholar and lawyer who has made a specialty of analyzing problems in international antitrust.

He is the manager of the international section of Morgan, Lewis & Bockius. And from 1989 to 1993 he was founding partner in charge of that firm's Brussels office. He is a specialist in international European competition law. He is a member of the Secretary of State's Advisory Committee on Private International Law, and adjunct professor at Georgetown University Law Center, and former chairman of the ABA's International Law and Practice Section.

Joe, it is a great pleasure to welcome you here.

MR. GRIFFIN: Thank you, Mr. Chairman, commissioners, and staff. I am honored to be back here again. I think I am for the second time running the honorary European, and I am supposed to be talking, I think, a little bit about a comparison with the way the European Commission handles these issues.

I have got to tell you my heart is not entirely in this because my first recommendation to you is that you not even consider doing it the way the Europeans agreed to, and I devote a fair amount of my paper to that. So I will try to gloss over rather quickly how the Europeans do it, except that I do think there are some lessons to be learned that might be useful for you to consider.

As you know, the Europeans' attitude in general is very permissive, and to the extent that there are statistics available, you are down the 1, 2, or 3 percent range of joint ventures considered by the Europeans in any other various contexts, they consider them that present any problems in terms of fixes or restructuring or prohibition, so well up in the 95, 98 percent range are cleared rather quickly under various theories.

It is unfortunate that since 1989 the Commission has created sort of a nightmare for itself by this concentrative-cooperative distinction, which creates both major jurisdictional problems and dramatic distinctions about which I think you should best ignore and, therefore, I will gloss over in my paper, other than to say if you actually care, for those of you who want some bedtime reading, I have given you in my paper a sort of quick overview of those issues and some of the leading cases that deal with how the European Commission has dealt with that, but, as I say, turning to the recommendations in my paper, which are at the end of the paper, my first recommendation is don't even think about going down the road of cooperative-concentrative.

I think you may have gotten a taste of this as Professor Goldschmid mentioned in the somewhat arcane area of how joint ventures are treated under Hart-Scott. And that might have taught you a lesson that is not a road you want to

go further down in terms of creating those kinds of distinctions and then trying to say: Well, what do we do about the limited liability partnerships and this, that and the other thing.

I think you are best advised to stay entirely away from those issues and focusing rather on what are the anticompetitive effects. You are lucky that you are not burdened with either the history or political considerations that forced Europeans to go down the road they have gone down. As I say, you are best to stay out of it in that sense.

So my first recommendation is don't even think about doing the concentrative-cooperative. Secondly, I pick up on something that I think all three of us today agree on, what I have labeled "transnational ventures are different". I picked up by harping on a statement that appeared in the 1995 International Guidelines, which I characterize as unfortunate, it is a statement that says that once you view jurisdictional issues, the same substantive rules apply to all cases. I believe that is incorrect.

Now, part of that may be purely semantic. That is, if by that the agencies meant to say that the same standards apply; that is, the test is whether on balance it is anticompetitive or whether on balance it is unreasonable, I certainly think that's fine, but my point is that there are

many different and additional factors to be considered in the analysis of a transnational venture than occur in domestic ventures.

And it would be a mistake to formulate a list of issues and say that's the same list of issues we always look at in every venture, regardless of whether it is transnational or domestic. I think that would be a mistake.

I quote the Ninth Circuit decision in Metro that was decided after the guidelines were written. It seems to say that rather clearly. It seems to say even per se rules do not apply to conduct outside the United States.

And I have given you at pages 18 and 19 of my paper some of the factors that may well be different in transnational transactions. The chairman and others have written on this topic, so I may be preaching to the choir.

But I think the other issue here which I am sure is more controversial, the staff said there is no harm in being provocative, part of this issue is how narrow you take antitrust analysis to be. And this is the issue of what I call in my paper pure antitrust analysis. That is, you do your Herfindahls, look at case precedent, you say that's all we have to think about or do you think about other things that the Europeans surely think about? Like industrial policy, broader technology issues, international competitiveness, international trade.

It is a problem for our government as opposed to the Europeans that one of these, just instructive here, is to think about this for a second or two, and I know you have a number of cases before you which will force you to think about this.

But the issue really is in Europe when a case that raises these kinds of issues comes up through Commission structure, it is first handled by the commissioner in charge of competition policy, who is ultimately under the College of Commissioners, if you will, the cabinet.

Here we have a much more fractionated approach to decision-making, so you have our antitrust agencies, you have our trade agencies, you have our commerce and various others have their fingers in this pie one way or another. And when you get to interests like telecommunications, aviation, to name a few at random, these issues become rather complex.

The question I think that you all need to wrestle with is how relevant are some of those issues which are not pure technical antitrust issues? Think about what happened in the telecommunications industry in the cases that both my predecessors mentioned, the combination of ventures that went on with Sprint, MCI, and AT&T forming competing international ventures around the world.

When you look at the European decisions on each of those ventures, you see a heavy dose of what Americans would

call industrial policy.

A lot of consideration about who is going to compete with whom and national champions and who was a national monopoly and who wasn't, how did we, the European Commission, want this to come out in the sense of what did we want the industry to look like at the end of the day? Our answer was we wanted to be more competitive, we wanted to be open to new players and so forth.

But they were very up front and direct about saying those are just as valid considerations as are market share numbers or our traditional pure theories of what is anticompetitive.

So I urge you in that sense in the transnational area to think with a broader brush and a broader set of issues than you might in a purely domestic area.

Third, I echo my two colleagues in saying it certainly would be very useful for you to do international joint venture guidelines. It frankly is not very helpful to refer people to the Health Care Guidelines or to the Intellectual Property Guidelines and saying that's really all you need to know.

And I think Jim was right that some of us actually still use the '77 and '88 and other guidelines out there because in a sense that is all there is.

And if you wanted, one of the Commissioners asked a

question, if you wanted a place to start, you could start there. You have already on the books some hypotheticals that were published in earlier editions of these guidelines, and it seems that might be a useful place to start and go back and revisit. Would those be decided the same way today? Would you make the same statements today that you made in 1988 or 1977 or whatever?

On the issue of safe harbors, again, I think there are some things to at least consider from the European experience here. They do believe firmly in safe harbors and, unfortunately, they are not consistent in them. There is littered through there various exemptions and notices of various numbers, but the one I offer up for you to consider is simply the easiest one to apply and to find, which is the one in the merger regulation, European regulation, which basically says that at a 25 percent market share level, you presume there will be no anticompetitive effect. That is, if you will, a presumption of legality.

In response to one of other questions one of the Commissioners asked, in Europe, the dominance test usually extends to coming in at about the 40 percent share. There have been one or two cases below 40 percent, but the vast majority cite -- a couple of my footnotes begin at about the 40 percent market share level.

And, accordingly, the Commission has said it is

somewhere in the 40 to 60 percent where you start thinking about dominant position. And above 60 percent, you think less and presume more, but so in the sense of safe harbors, there is both that issue of a bright line market share test, to simply screen out transactions that I will say you don't really want to consider in the sense of your own staff time and process time. You can do that in a market share approach.

The other thing that the Europeans do which, again, I think is worthy of thought in their so-called block exemptions, you remember those are the exemptions that apply to classes of transactions such as research and development transactions or specialization agreements or transfer technology, there are a number of them. They have developed over time what they call a list, white lists and black lists, and those are lists of basically ancillary agreements that you may or may not have in your venture.

And basically the way the system in Europe works is if you have only white lists restrictions and no black list restrictions, then you have an exemption without having to go through the process and formally applying. It is sort of a self-certification situation. But the point is there, again, are lists available and you might refer to their lists to see whether you might in your guidelines be willing to offer the same lists, but perhaps some guidance on issues about

ancillary restrictions.

And, again, there is a ready made list there for you to at least refer to.

As well as the other speakers, I also applaud your efforts at convergence and harmonization. I am one of the skeptics that thinks harmonization is not going to happen in my lifetime, and probably not in my children's lifetime, but, on the other hand, I think convergence particularly at the procedural level is a very worthy goal.

I point out one recent example of just the real world problems of being counsel here, that was the Shell/Montecatini case where the parties having settled with the Commission, then settled with this Commission, and then had to go back and resettle with the European Commission.

What that points out is simply the problem of finality in these multi-national deals. When you think of as the OEC report, Woodwish report pointed out in the context of mergers, you now routinely have transactions filed in five or eight or ten jurisdictions.

So you, as well as everybody else, have to begin to understand that when you make a settlement, it may well not be a final settlement until all agencies have been heard from, and the companies all have settled all around the world and have figured out how they can do that harmoniously.

And that may mean going back to certain agencies and

saying: Well, in light of what somebody else made us do, would you please agree to a revision of your relief? I think that's just the reality of the real world. So it is one reason in a sense in your own self-interest to continue your efforts at procedural convergence and consultation and notification. I think those are all good things.

And speaking to somebody who is often in the middle of them, I think clients generally find them productive and useful, even to the point of waiving their confidentiality rights and so forth to speed up the consideration by multiple enforcers and encourage the enforcers to get on with making the decision.

The final recommendation I have, again meant to be provocative, I don't think that the advisory opinion procedures are very user friendly, particularly in comparison to the European system.

Here I will spend a minute or two on how the Europeans do it because I think it is something worthy of your consideration.

The premises in Europe are very different. That is, the European enforcers have taken the view that it is their job to help companies get along with the rules, to help them get their transactions done, to teach them what the rules are. They encourage frequent informal consultations.

So in Europe it is very common, particularly in a

large sort of transaction that we have been talking about today, where as soon as you have begun to structure the transaction and you can see that there may well be competition issues, what you do and what the enforcers encourage you to do is go speak to them in what they call informal guidance contexts, meaning it is not a formal filing, it is a check.

And you go down and explain the situation and seek their guidance. And often they give very useful guidance along the ways of saying: Whoa, don't want clause 5 or like exclusivity, but other than that we think we can live with it.

And in complicated cases that process occurs two or three times before you actually settle on the deal and make a formal notification seeking an exemption or seeking a clearance of some type to what procedures apply to you. That's why when people not familiar with the system look at the statistics, they say that the Europeans appear to process these things much more quickly than the Americans do.

Why is that? The answer is because all this preparatory work has gone on before. And by the time you actually get to make the formal filing, it is the last stage in the process rather than the first phase in the process.

Historically the enforcers here have traditionally taken, particularly the staff people who administer these

programs, taken the view that we don't deal with hypothetical transactions. We don't have the time or manpower to deal with sort of your continued revisions of your transactions. Present us something that's final and then we will give you a final view on it.

I think that is not as user friendly as sort of helping the parties evolve to get to the answer the enforcers want them to get to anyway. It certainly saves litigation at the end of the day. It is another explanation why few cases in Europe are litigated in this area. Generally it is all worked out before you actually get around to the formal filing.

I have not seen any statistics or reports on the Justice Department's 1992 pilot program in this area, so I don't have any sense of whether that's been successful or not, but at least emphasis on quick turn-arounds and so forth seems to me to be moving in the right direction.

So I would encourage you to, despite manpower problems and so forth, to be more receptive, again particularly in transnational mergers where the parties are doing this with the Europeans officials, to encourage people to come in early, have these informal chats, get some informal guidance, so that at the end of the day, again, you avoid the situation where you have perhaps inconsistent remedies imposed by different competition authorities, which

then have to be sort of revised and resettled.

I think I should stop there, but I will be happy to take your questions. Thank you.

COMMISSIONER STEIGER: Going back to your applause for convergence on the shell matter, I would, of course, like to argue that what happened there is that we just got it more right.

MR. GRIFFIN: I didn't want to argue the merits of the case. I simply wanted to point out that the parties kept going back and forth.

COMMISSIONER STEIGER: I understand. I don't know how you overcome a problem in this area, whether it be joint ventures or mergers, if, in fact, you perceive anticompetitive impact differs from country to country. I don't know how you are going to avoid your problem of conflicting remedies.

MR. GRIFFIN: You are never going to avoid it at that level. The questions, again, and Shell is a good example of this, it turned out that the Europeans believed that the remedy agreed to by this Commission was, in fact, at least as effective, if not more effective, to solve their problem.

So the point is at the end of the day there wasn't any inconsistency. My point was if there had been in place the kind of informal consultation I have been talking about, you all might have, both sets of enforcers might have gotten

to that quicker and only had to do the remedies once, rather than twice.

COMMISSIONER STEIGER: Thank you.

CHAIRMAN PITOFSKY: Other questions?

COMMISSIONER AZCUENAGA: I have a comment and a question for you.

MR. GRIFFIN: I am disappointed that there are no comments, let alone hostile.

COMMISSIONER AZCUENAGA: It has come up several times now that people rely on the '77 and '88 guidelines, and I do too, so I am not quite sure which way I would argue. They are very useful.

My question is you have indicated that we should consider a much broader range of issues, competitiveness, industrial policy and trade and so on. And those are all important areas and certainly someone should be thinking about them, but it is not all that easy given our statutory mandate and the law.

How would you suggest we go about that? I wonder if you could expand on that.

MR. GRIFFIN: I thought you might ask me that. I said in my paper I am not reorganizing the government, I am suggesting you might consider it broadly. I understand the difficulty of the issue. And, as I said, I was going to bite my tongue and not say anything about Boeing/McDonnell Douglas

or British Airways/American Airlines, but they are, in fact, perfect examples of what I am talking about in the abstract.

I don't want to talk about the merits of those cases, but in terms of the issues they raise, let's take the clear joint venture, the British Airways and American Airlines. To me it is one thing to say we as an antitrust agency will decide that based on Herfindahl indexes and anticompetitive doctrine and, you know, it is for somebody else to think about what the aviation industry ought to look like and how competitive that joint venture is going to be against competing joint ventures.

Those same ventures, of course, are being processed in Europe in sets, so that the Europeans are looking at all of the various match-ups together, just as they did with the telecommunications match-ups. So my point is I don't know how far you all feel comfortable taking into consideration those sorts of factors, but my view is that you should to the extent that you believe that the law allows you to do, rather than ignoring them and saying: Well, that's for someone else to do and we have nothing to say on that and that's irrelevant.

I understand it is a difficult -- I will use the word -- jurisdictional issue.

COMMISSIONER AZCUENAGA: How far do you think the law would allow us to consider them?

MR. GRIFFIN: I think the answer is a good way to think of the remedies in the telecommunications ventures where the Europeans asked the American government and the American government agreed to provide undertakings by AT&T that AT&T would provide the same service to other people.

Now, that was in one sense a trade issue, but the European competition authorities believed it was appropriate for them to ask through diplomatic channels, the American government, to seek that undertaking from AT&T as a condition of granting that, so that's the kind of thing as an example that I have in mind.

Would it be inappropriate? I don't know the answer because I am not an expert on constitutional powers, but would it be inappropriate for this Commission to go to the U.S. Trade Representative or State Department and make a similar request? We are dealing with a transnational transaction. It clearly has trade policy competitive implications.

We think there would be a way to make us feel more comfortable on the anticompetitive side by certain agreements from foreign governments about access to local markets or not being barred from at least telecommunications, SWATS or whatever, but it is not within our powers as an antitrust agency to get those, what would you, Mr. USTR or State Department, could you help us get those? It seems to me

that's, I think, perfectly fair and reasonable for you to do.

COMMISSIONER AZCUENAGA: And how do we decide that we want those under our laws?

MR. GRIFFIN: I don't know. I think that's part of your competitive analysis. Again, I am posturing this thing. I will try to stay away from pending cases, but take the Telecom case. If you concluded you were analyzing the Sprint deal -- not the current MCI but the original joint venture you might say: Look, we are uncomfortable making an antitrust decision about this until we know what France Telecom and Deutsche Telekom are going to do about opening their monopoly markets to AT&T, who we see as one of the competitors to this transaction.

Now, how might we, the Federal Trade Commission, get anything out of France Telecom and Deutsche Telekom about that? Answer? In part by talking to them because they are parties to the transaction, but you might as the Commission -- this is my point, this is what the other agency did -- say no, no, it is perfectly appropriate for us in the exercise of our competition powers and authority to ask other parts of our own government to assist us, so to follow that precedent you might say, I will say USTR or State Department, somebody like that, saying: Look, is it possible to talk to the French government and German government, get undertakings

that they will not bar AT&T from having access to those monopoly government-owned telephone networks? And we need to know the answer to that question before we make a final ruling on this case.

COMMISSIONER AZCUENAGA: Thank you.

CHAIRMAN PITOFSKY: Questions? Well, thank you very much. I must say our lead-off speakers have gotten us off to an ideal start.

We heard, along with a lot of other good advice, we heard, one, that this is a very challenging project; two, that comprehensive joint venture guidelines are absolutely impossible, and; three, if we want to look for precedent, the principal precedent is in the EU, and their guidelines were a disaster.

(Laughter)

CHAIRMAN PITOFSKY: Thus, encouraged and challenged, we will proceed head-long into this project. Thank you very much.

(Whereupon, at 3:15 p.m., the hearing was adjourned.)

C E R T I F I C A T E O F R E P O R T E R

CASE TITLE: JOINT VENTURE PROJECT HEARING

HEARING DATE: June 2, 1997

CASE NO.: P971201

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 6/2/97

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KAREN BRYNTESON

C E R T I F I C A T E O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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SARA J. VANCE

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