

FTC-DOJ Conditional Pricing Practices Workshop

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Segment 8

Where Do We Go From Here? Open Questions and Policy Considerations; Closing Remarks
Transcript

DEBORAH L FEINSTEIN: Great. Well, John remarked to me this is an impressive showing for the end of the day. And I hope it's because we can all expect this panel to tell us all the takeaways and everything that we should now agree on as a result of the day. I'm Debbie Feinstein from the FTC. Renata Hesse here from the Department of Justice. And we're joined by John Baker, Dan Crane, Scott Hemphill, Fiona Scott Morton, Richard Steuer, and Michael Whinston, many of whom you've seen already here today.

I think we'd like to start off with John and Richard, who were not previously on panels, and tell us what they think are the key areas of consensus or, because I think there's nothing on which there was consensus today other than this was a good session, near consensus. Can we agree that price cost probably doesn't end the inquiry? Can we agree that we should only worry about this with dominant firms? What is it that we can agree on?

Thank you, Renata and Debbie and FTC and DOJ. I think the big take-away from me-- and I don't think it was 100% for the panel-- but what I got out of this was that price cost tests or creeping Brookeism as you said, is really not helpful. There are few people who defended it, but the main reasons I thought that came through were, first, there's a big risk of false negatives, not finding a violation when it's really harmful.

There were several examples of that. If the [INAUDIBLE] theory is collusive, you might not have any price below cost. If its exclusionary, you could have simultaneous recoupments, you might have delayed recoupment but no harm to buyers in the short run. And also one way to see why there's a big risk of false negatives is to realize that several speakers saw the kind of practices, the pricing practices we're talking about here, as, in various ways, similar, in some cases, to exclusivity and to tying.

Which were special cases that would not be appropriate places for price cost tests to use as a safe harbor or even a screen. I have some comments on some of the specific arguments for price cost tests, but I think I won't go into that now. But I want to give the other two main reasons why I think price cost tests weren't helpful that I thought came out of the day.

And the second is that this risk of killing meritorious cases that I'm just emphasizing I think is more serious than the risk of not deterring frivolous cases, which is something that Abe Wickelgren was kind of talking about towards the end, about you have to compare-- yes, there are lots of good efficiency explanations for the conditional pricing practices. And it's not surprising that they're used in competitive markets.

But the cases that we're litigating aren't selected at random from all the cases in the economy where these are being used. We're looking at cases where the government or the plaintiff say,

hey, there's other information suggesting competitive harm. That's what Steve was trying to say-- Salop-- at the end there about the dominant firm.

The practice was introducing when the dominant firm faced the threat of entry. And so there's more to it than just the conditional pricing. There's other factors as well. So I wouldn't get overwrought about the need to deter frivolous cases here in this setting.

And then finally, there was a lot of discussion about administrative difficulties that undermine the benefits of bright line rules. When price cost test is the test, the contracts were complex. I think-- I'm sorry I don't remember how to pronounce your last name. Kusum's last name-- to emphasize that in her slides. And it's often hard to measure price and cost and what exactly the conceptual experiment we have in mind is that would reveal price and costs are not obvious.

And so the administrability benefits, I thought, were also overstated. And so my big takeaway from the day-- not 100%, not everyone agreed-- but my view of the general sense is that price cost tests are just not helpful in approaching the analysis of the conditional pricing practices that were at issue today.

RICHARD STEUER: Well, I think it's fair to say there was not complete unanimity on anything, but there were three points that I took away. One is that a lot of what we're talking about, in one form or another, is leveraging. I know that's a dirty word in some circles, but really it all came down to, whether you call it contestability or foreclosure, was leveraging. And it's really hard to measure. I think there was quite a bit of consensus on that.

So because it's so hard to measure, there are two ways we can go. One is a presumption of illegality, like in the EU, which is basically the rule of the emperor's new clothes. Mommy, that's a naked restraint. And I think that, following from that rule, is that, by having a near per se rule, a rule of presumptive illegality, what you create is certainty in counseling, which we heard about, and, beyond certainty, you have more consistency in that I think if there were counseling from a number of the participants on our last panel, companies might be following very different approaches to their programs than if they knew the answer was always going to be no. Now, on the other side, it's hard to measure.

So we should have a presumption of legality or at least we should have a system where the burden of proof is on the plaintiff to prove that there are anti-competitive effects. And that's much closer to, of course, the system that we have in the US. And the hard question to ask, because when we're talking about these loyalty discounts-- and I know there's been a lot of debate during the day-- are they really discounts? Are they really disguised price increases? Well, the bargaining that goes on, in most instances, is really hard bargaining by very sophisticated purchasing departments for a great deal of the American economy.

And so we're talking about parties that are in very, very tough negotiations, and so the question we have to ask, if we're going to forbid discounts of this kind, are we willing to take a bet that the economy would be better off banning these discounts in the short term or in the immediate term when companies are getting low prices in the hope that this will allow more entrants to come in with better products and lower prices in the long term? Or are we better off taking the

bird in the hand and saying, companies should be able to get these discounts, negotiate for a bundle discount, negotiate for a loyalty discount, basically use the purchasing power that these sophisticated purchasing departments have? In the expectation that, in the long run, the gale of creative destruction is going to blow this whole market apart and there'll be an entirely new set of products that approach things in a very different way. So that's point one.

Point two is that, although they say hard cases make bad law, I think we have a problem of easy cases here. And I know it's going to sound strange to call these easy cases, but cases like Meritor and Intel involve markets with two or three manufacturers. In one case, we had two manufacturers and one of them went out of business. That was pretty dramatic. And also very few purchasers.

In the real world that we've been hearing about, usually the facts are much messier than these. And, of course, I understand, naturally, these facts are harder than I'm saying them. Courts tend to streamline the facts, and we see that all the time. If you've actually been in a case, you know what the facts are infinitely more complicated than they read in the opinion.

But, basically, there is a danger that, based on rules coming out of these streamlined facts, we're going to have some oversimplification. And the fact is, there a lot of other variables that go into loyalty discounts and bundle discounts. Just to name a few-- whether the customers are wholesalers or retailers, if they are retailers, do they face tremendous competition, particularly, are they selling products that can be sold over the internet? Because, in a lot of markets, the internet has changed everything.

Otherwise, the question is, do these distributors basically own that part of the market? Do they have something that's locked up for hundreds of reasons that occur in the marketplace? How important it is to get that intermediary? Or is the contract with someone who's actually an end user where having that sale means nobody else is going to make the sale?

And depending on whether the customer is a retailer or end user, the pro-competitive effects vary, of course. With retailers and wholesalers, often, these discounts are meant to induce exclusivity to be able to protect trade secrets, to combat divided loyalties. With end users, there really, on the one hand, is the fact that some end users are always going to want a second source. So these strategies necessarily will fail because there's a need for a backup source.

On the other hand, for some end users, there's tremendous efficiency in having a single source. If you think about, for instance, an airline fleet. Is it more efficient to have one kind of airplane where you only need to stock the same replacement parts and train people on the same equipment or to buy two or three different brands? So that's the second point.

And, finally-- and this was touched upon-- is there a sophisticated enough assessment of the anti-competitive effects? The PeaceHealth test looks very simply on whether an equally efficient competitor can compete at the same price level. But there are other aspects that need to be looked at with potential new entrants.

One is, could it build a better mousetrap? Is its product simply going to be better? Second, could it have an alternate bundle? It may not have the must-have product that it's competing against but it may have a different must-have product and be able to put together a different bundle. It's a very sophisticated analysis but it needs to be done.

Another one is, even if there's only one must-have product that can compete, if one of the entrants doesn't have it, can it partner with somebody else who does have it? Can it piece together a bundle that's at least as competitive or more competitive? And as some of the panelists have pointed out, can it simply save so much money by focusing like a laser on one product where its competitors are trying to manufacture and market a full line that it can give a discount that's enough to overcome.

And I know some courts have looked at this and endorsed a carve-out analysis where-- and I don't think we got to it today-- but is it possible to simply carve out an exception that will allow new entrants to come in, even though those competitors who can compete on an equal footing have to. So those are the points I saw. It's tremendously important because, although it's true, as somebody said, that only a handful of cases ever get litigated, as we know from the folks who have spoken today, for every litigated case, there are thousands of counseling sessions.

DEBORAH L FEINSTEIN: Given what Dick just said, I'm wondering if others on the panel have thoughts on or views on stories of either harms or efficiencies that you found particularly persuasive that you heard today.

C SCOTT HEMPHILL: The big thing for me was that there was such dissensus as to the stories, that everybody-- I mean, not everybody-- a lot of people had very strong intuitions about what theory is usually correct or how the pricing usually happens. But for each of those stories, I felt like there was a pretty strong counter-story. So I was left feeling that we have kind of no idea, collectively, at least, about what's actually going on outside the context of individual matters on which some of us may have worked or are counseled. I mean, there's some bigger picture perspective, but it just seems, on the facts side, extremely mixed.

DANIEL CRANE: One of the things I wanted to point out is that today we heard a lot of the collusion stories. All the action on the ground is on exclusion stories. This is mostly about private litigation, B2B private litigation. It's not consumer cases mostly. We're talking mostly about businesses suing other businesses. So, to the extent that we have collusion stories and that's driving antitrust analysis in some way, that's not really matching, at least, the practical questions of counseling or of litigation that those of us involved in this are looking at today.

So, for example, in the price cost test, to the extent that one wants to argue that the price cost does not capture collusion stories, well, should that have any bearing on the cases where the theory is an exclusion story? And if so, I want to hear more about why the law on exclusion, which is what's being asserted in most of these cases, should be changed in a context when, because of concerns about collusion, those aren't even being presented at all in the case.

FIONA SCOTT MORTON: I just want to point out that, in an exclusion case, you have a harmed party who would like to sue. In a collision case, both firms are making more money, so you wouldn't really expect to see private litigation in that context.

RENATA HESSE: Right. So that raises the question of, what should the agencies be looking at? I mean, there are sort of two scenarios. One is when we have a complainant here. So let's start with that. Somebody says they've been foreclosed.

When should we care about it? Only when they have exited the market? Only when their share has been decreased significantly? Only when they say they want to enter and they can't? And then once we do have a complainant and we decide to look at it, should we use price cost as an initial threshold?

Is it completely meaningless? Should we just do a full-blown rule of reason? Are there safe harbors in terms of the dominant firm's market share or the amount of market share required to get the discount? How do we start on that sort of easier of the two cases?

MICHAEL WHINSTON: So maybe I could just say something at least on the price cost test. At the beginning of the day, I listed a number of arguments for price cost tests that were kind of argued for predation. And I think if you go through those, the first two apply here. Which is you can cut down on litigation and you can create a bright line with the price cost test.

But I think the relevant question is there are many ways you can do those things with other safe harbors or other rules. And there's a question whether the price cost test is really doing those things well. So I guess my own sense is, when you go through the other kinds of arguments, it's in line with what a lot of people said. I think it's not at all clear that it's doing it well.

And, especially this equally efficient competitor argument-- if you think about the theories, say, the theories of exclusion, we know that the cases that we're concerned about most are cases where there's a relatively dominant firm. And so the equally efficient competitor argument, I think, sort of just isn't getting at the right point.

FIONA SCOTT MORTON: I just want to say one brief thing about-- it's not clear to me that the price cost test is so terribly useful, but as I tried to say in my presentation in the last panel, I do think it's worth figuring out what the orders of magnitude are. I mean, is your discount going to create \$350 to work with or \$3.50 to work with? I mean, it's worth working through some of the arithmetic because you might find that you just don't have much that can affect competition or you might find that you have something that creates a large incentive and I think it's worth knowing that.

MICHAEL WHINSTON: Actually, if I could just-- in terms of other safe harbors, I mean, you can think of, as I said, many other things. And it could be based on the share of the firm employing it. It could be based on the share-- if there's a discount, how large a share do you have to have? I mean, if a firm had a discount that applied when it got 1% of the market, probably, we would think that's something that we wouldn't want to look at.

So I'm not saying exactly what these things should be, but I think there are, potentially, other kinds of safe harbors that would be useful and useful for counseling as well.

RENATA HESSE: So now the tougher case, which is, how do we know when one of these loyalty discounts that looks like a price decrease, looks like everybody's competing because we don't have the supposed foreclosed competitor coming in to complain to us, how do we even identify that case? And how do we think about trying to stop those sorts of things if we think they're a problem? Don't all speak at once.

[LAUGHTER]

RICHARD STEUER: If Fiona is correct that everybody is benefiting, you're not going to be hearing about those cases until there is somebody who feels that they're foreclosed. And then the hard questions are looking at what is a must-have product, looking at particularly time horizons because, obviously, if you choose not to bring a case, it's a matter of saying to somebody who feels aggrieved, go out and compete harder. You're positing a case where there's nobody who's come in and complained about it all, which is even more difficult.

JONATHAN BAKER: I took the question to be addressing the collusive potential. And so the harmed parties are the customers. And maybe they're intermediate customers and maybe they know it and complain or maybe not. But so I think the way you would identify the case is that you would have some concern about the industry in the first place and you would be thinking about why are prices high.

And you would be thinking about, is there an agreement? You may say, well, I don't know. But maybe this is a facilitating practice and is worth challenging for that reason. That's the articulation Michael Salinger used this morning, which I thought was perfectly fine. It's just the same analysis you would bring to any concern about high prices in an industry. And this might be one of the practices that could facilitate it.

MICHAEL WHINSTON: Actually, if I could just jump in-- so a lot of these collusion stories-- one of the ways in which the loyalty contract is being used is to prevent access to some other rival. There's a dominant firm that's facilitating collusion in the vertical structure and charging a high price to retailers or distributors. But part of it is then keeping out-- the distributors have an incentive to go find someone else.

And that was true in Joe's story and in some of the papers in the literature as well. So it may look like an exclusion case, but, in reality, it has some of these collusive features in the end. So I don't know if every case that we-- I could imagine cases that appear because of an exclusion complaint. But, in the end, the theory is actually something that is what we, in the context of today's discussion, would have called a collusive story.

C SCOTT HEMPHILL: The last point does create, of course, a pretty important difference between what we would expect from private litigation on these cases them and agency cases. I think agencies, with all the pre-complaint discovery, compulsory process, have, whether you like it or not, a kind of opportunity to be sort of curious or suspicious and jump in and kind of muck

around and work out over time what the real issue is. I think a private filing complaint would face some severe challenges.

At least, I would suspect so. You know, putting out their Winston [INAUDIBLE] story and then sort of over time moving their way toward Salinger.

RICHARD STEUER: Of course, let's recall the reason for having all of these programs is to get closer to exclusive dealing. And if you had an industry where everybody had exclusive dealing, that wouldn't be enough to make out a case of collusion. At most, that would be conscious parallelism without more.

JONATHAN BAKER: Well, what I wanted to add was that if the problem is collusive and if Dan's right that all the case law is being developed in the context of exclusion cases, that's another danger that the legal rule that might develop involving a price cost test would be problematic. It could be a rule suited for exclusion cases and-- if Dan had his way and some of the others-- Leah-- was a very skeptical rule involving a price cost test, it could have spillover effects in impeding meritorious agency litigation when the theory isn't exclusion at all or else in Mike Whinston's version where it's exclusion supporting collusion.

DANIEL CRANE: The other problem, John, is that you write a rule or you institute a set of legal principles about exclusion, but thinking about collusion, they don't apply at all. So my point would be, if the agency is concerned about collusion, you're looking for different markets. I mean, first of all, the products are more likely to be fungible.

Most of the exclusion stories we've heard today rely on some degree of product differentiation. Without product differentiation, you don't get to contestable and then contestable shares of the market. So I think it would be useful to sort of sketch out, if you're going to write a report, the market conditions that would give rise to a collusion story. And I think there are going to be different from the market conditions that give rise to an exclusion story.

And then, if you have an exclusion concern over market and a complaining competitor, then I think you need to think about the mechanisms of exclusion and not try to write a general antitrust policy that takes into account conditions in very different kinds of markets.

DEBORAH L FEINSTEIN: Let me try to broaden this out just a teeny bit since it seems like we're now hemmed in by whether we call something collusion or exclusion. And really what we should be thinking about is what the impact on the consumer is. So how would you think about advising either clients or the agency in terms of thinking about these problems?

It sounds like we'd either have a price cost test that everybody agrees on or an exclusion based test that everybody agrees on. So where do we go from here? How do we think about these problems if you have a course of conduct or a type of conduct that appears to be discounting that's causing an impact on a rival?

MICHAEL WHINSTON: So I guess one, maybe related to this question and backing up a little bit from the price cost test, is-- one issue that came up today is this difference between, say,

volume based pricing and pricing based on share or loyalty, where you the pricing depends on, basically, what a rival gets. And I think those two things are different. I think often those who want a fairly laissez faire approach, their arguments tend to be about volume pricing.

So, for example, Ben Klein today, in the examples that he gave, they were all volume pricing examples. But then that is extended, by analogy, into loyalty pricing. And I think one of the things the theory tells us is those two things are different. They can be, in some extreme cases, exactly the same thing. That point was made.

But they're not always the same thing and they're often not the same thing. And so I think the two things we want to approach in different ways and perhaps with different tests and safe harbors.

FIONA SCOTT MORTON: I also thought one of the interesting things we learned from professor Ailawadi is how many different marketing tools there are out there that firms seem to use in various creative ways to create incentives for distributors or retailers to do what they want. And so I think, if you are contemplating favoring some kinds of contract types and disfavoring other kinds of contract types, there seem to be a lot of directions a firm could go to achieve efficiencies that are arguably pro-competitive.

C SCOTT HEMPHILL: Can I just pick up on that just for a minute? This also is from the same presentation. I don't remember whether it was only on the slide or whether it was also said, but you get the sense-- and I've heard this from other people too-- that sometimes the party engaged in the practice doesn't know why. Maybe they forgot. Maybe they did it because another firm is doing it.

I would think that, from a counseling perspective, have them figure that out. And work that out pretty carefully. And this connects just to a small second point. I was at a conference last week on a different topic and a prominent practitioner basically made the point that we sort of need clear rules. It's a little bit like we heard. We need clear rules so we can work with that. They

Analogized to tax. With tax law, [INAUDIBLE] engaged in practices to try to figure out, given the letter of the law, how to do something sort of functionally similar. This was the context of reverse payments settlements. As long as we know what's legal, we can do something that kind of accomplishes a similar goal.

Now, put to one side that tax has an economic substance doctrine that at least tries to avoid that kind of gaming, I think clearly antitrust certainly has that. So picking up a point made earlier, if the client is basically trying to figure out how to functionally accomplish exclusive dealing but without the form of exclusive dealing, the initial reaction should be you're probably in trouble unless your book group really, really does carry the day across this whole terrain.

RENATA HESSE: Well, I tell you the answer that got a lot of time in private practice-- and Richard can say if he got the same-- and then you tell me all how to deal with it is my customers are demanding volume discounts. And you told me I can't do that under the Robinson-Patman

Act so is there another way I can do it? And the answer is, well, if you make it practically available, you can do market share discounts.

RICHARD STEUER: And the other thing that comes into this is that, in talking about the supplier who doesn't know why they're doing it, sometimes that actually is an efficient and logical reason based on the theory that, when you're dealing with distribution, with retailers and wholesalers, that they know better how to market your product because they're closer to the customer. And although you can give them direction, you must put in six SKUs in your vending machine or you must have this display, you may not know it as well or be able to do it as efficiently as saying, I want your undivided loyalty for this product and together we'll figure out because you're nearer to the customer, the ultimate customer, the consumer.

And by having you loyal to us, we'll come up with strategies together and you won't share them with my competitors because you're carrying a lot of other brands.

JONATHAN BAKER: So I'm loving this idea that, in this area of antitrust, we're dealing with firms who are maximizing profits by having no idea why they're doing what they're doing.

[LAUGHTER]

RICHARD STEUER: They're sophisticated

[LAUGHTER]

RENATA HESSE: They're very sophisticated.

JONATHAN BAKER: But I did want to take this discussion that we just had and bring it back to Renata's original question which is, so what do we do either as, I guess, enforcers or counselors or whatever? And I think this last discussion makes clear that the first thing we do is we try and develop a clear understanding of the mechanism by which the particular practice we're looking at affects the incentives of rivals and customers. What does it actually do to change the incentive space by the actors?

And then we can work out from that whether it appears to be a collusive practice or is excluding someone. And then if it's excluding, we have to go think about, is competition harmed or is it just excluding someone without harming competition? But the first step is to figure out what the practice really does. Which is another way of saying, which model really applies?

The efficiency models? Which are the harmful models that are on the table.

FIONA SCOTT MORTON: And I agree with that. I just want to interject something that's slightly different, but everybody always calls for more research at these kinds of things. And I totally agree with that, and I wanted to echo what Julie Mortimer said earlier. Which is it's hard to get data from firms. And it's going to be especially hard if the reason they're using the conditional pricing is to exclude or collude.

I think that what you're going to see from academics probably is a biased set of results where there's a lot of nifty contacting going on that's doing really efficient stuff. And that we should expect to see it. It's not a surprise, but I think those are the firms that would be most willing to share their data if they understand that that's why they're using those practices. So I think just a flag that the problematic cases might arise in litigation or might arise with agencies and not so much in the academic arena.

RENATA HESSE: So what are the proper efficiency defenses? What would be a good rationale? Is it enough that an equally efficient competitor would be able to compete? What gets us out of this box? When can the agency's not worry about a complainant? When can clients not worry about that from an efficiency standpoint, assuming that they have a reasonably high market share and that it's a reasonably high market share loyalty they're requiring?

RICHARD STEUER: Well, I can start it. There's two sets of efficiencies. One is with the distribution channel, what I talked about a moment ago. Which is that having undivided loyalty leads to certain marketing efficiencies. With end users, it's a little bit different. There are sometimes the efficiencies of carrying a single brand, like the airline example I mentioned, which is a little bit streamlined.

But beyond that is also the efficiency of using purchasing power. Which is what Dan was talking about. But it happens in a lot of industries where purchasers feel that they should be able to get the benefit of their purchasing power to be able to exact lower prices from their suppliers. So we have to look at all of that.

JONATHAN BAKER: There were really two questions there. One had to do with what are good efficiency explanations for the conduct? And the other is, what about efficient pricing? On the first one, there are lots of good efficiency explanations. We heard lots of them.

This whole area, just as an aside, reminds me of the discussions about most favored nations and customer clauses because there are exclusionary stories, collusive stories, efficiencies stories, and you got to figure it out, and it's complicated. But I heard lots of stories about ways in which the conditional pricing practices promote complementary investments by, say, vertically related firms by aligning incentives better or preventing free riding, eliminating double marginalization.

I heard stories about cost savings, some of them were on the slides, to the seller in production and distribution and to the buyer in searching and sorting. I heard stories about price discrimination, which can be efficient and expand the market. And several of Ben's stories were like that too. So there's plenty of good efficiency stories.

As to whether the equally efficient rival test is a good one, I'm not so sure about that, however. Because the problem is that is, again, false negatives that-- was it Mike who said this before?-- of course the dominant firm's rivals aren't going to be equally efficient all the time. And yet you're excluding them as a way to extend market power.

So you're just missing that if you're use the equally efficient rival test.

C SCOTT HEMPHILL: One piece of the evaluation of efficiencies that we've only sort of talked about in passing-- it's been mentioned a bunch of times I think-- is what do we make of the availability of less restrictive alternatives? If we do have a plausible efficiency and there's a plausible anti-competitive effect here, how deeply are we going to interrogate whether they could have done this some other way? I mean, knowing that we have this enormous variety of contractual tools at our disposal, why is this one being chosen instead of another one? Could this be accomplished in a less restrictive way?

If there's a way that could have been done slightly less effectively but a lot less restrictively, under what circumstances are we going to insist on that as a policy matter I think is a hard question that we sort of take for granted-- we repeat it a lot at least. This is part of the rule of reason. When are we going to actually do that? is an important question, at least conceptually.

DANIEL CRANE: One point about efficiencies is that, in antitrust analysis, there are lots of circumstances when we don't require efficiency or inefficiency to be proven on a case by case basis. So there are plenty of models where price fixing cartels can produce efficiencies and yet we make a blanket rule that we're not going to entertain those arguments on a case by case basis because we sort of have this very strong prior belief that cartels are much more likely to harm efficiency in the aggregate and that the costs of inquiring on an individual basis don't justify that inquiry. I'm not suggesting per se legality for loyalty discounts nor do I suggest that the analysis needs to be open-ended rule of reason to the extent that, in every case, the defendant is sort of put to the burden of proving every possible efficiency.

I think part of this learning process includes some kind of evaluation of what are the generally realized kind of efficiencies, including just what we talked about. Which is dominant buyers or buyers of any kind lowering their cost structure by trading loyalty for a lower price. And I think that needs to be embedded in whatever the legal rule is without requiring proof of that on an individual basis.

Which we all know from the merger context, proving efficiencies on a case by case basis ends up meaning that efficiencies really often falls out of the analysis altogether.

DEBORAH L FEINSTEIN: So listening to this discussion, it sounds like we're in a little bit of the world of, you know it when you see it. I know a bad one when I see it and I know a good one when I see it. And that's not usually a very satisfying place for folks to end up in these kinds of discussions. So I'm wondering, what do you think the agency should be doing to try to maybe develop some better guidance in this area, given that there doesn't seem to be any great consensus around any principles, at least not on this panel?

FIONA SCOTT MORTON: Yeah, I think the great strength of American antitrust law and enforcement is that it's case by case. You take it and you take the facts and you look at the facts and you figure out if there was anti-competitive harm. So I think one of the early panels this morning stressed how complex all these contracts can be and how complex relationships with retailers or distributors can be.

And I don't disagree with that, but I think that it's only relevant when you're trying to build a meta-model that you're then going to say, now the agency is going to take this path if A and this path if B and this path if C. And I actually think it's simpler to wait until you have an example in front of you, whereupon a lot of the different cases fall away because you're dealing with a specific set of facts and it gets much easier. So I think trying to so broad rules is quite difficult and it's not clear to me it's worth it.

MICHAEL WHINSTON: I also think there are low cost ways of screening out a lot of cases, potential abuses of these practices where we don't think there is any real threat. Small market share for the firm using it is one example. So we're really talking about those examples and cases that aren't screened out in that way. At that point, I think you do need to look and have a very fact specific investigation and have a theory of harm that explains both why competition and consumers are harmed and that's consistent with facts in the case.

RICHARD STEUER: Certainly, the first step is the easy one. Which is, assuming that these are effective and result in 100% exclusivity every time they're used, would that exclusive dealing be unlawful under the traditional law on exclusive dealing? If not, then you need look no further. Then it becomes much more complicated.

And I agree. What we've learned today is more complicated than anyone's identified because when you put together everybody's complications that were articulated today, you've got thousands of them. And I think we understand what the complications are, but I wish there were a golden thread that we could point to from today to tie them all together. I don't think it exists.

DEBORAH L FEINSTEIN: For example, would anyone on the panel think it would be wrong for the agency to pursue one of these cases and not use a price cost test as two of the three cases have recently used?

FIONA SCOTT MORTON: I mean, I think price cost tests have all sorts of disadvantages as many people have pointed out and, depending on the circumstances, might not really tell you anything very useful. But, again, you'd be hard pressed to say that that's going to be true every single time because, what is marginal cost? How do we measure these things? Are we talking about contestable share that's right where the cliff is or is the cliff located in some far distant place from the contestable share?

You can go on and on in that way. And so I think you could easily have a set of facts where the price cost test was really just not helpful at all. But does that mean you shouldn't ever look at prices or effective prices generated by the contract? I think that would be a little bit extreme also.

DANIEL CRANE: I would urge that it's important to keep in mind the institutional context that we're talking about. If we're asking what the agencies, whether its DOJ or FTC themselves should do an investigation or seeking injunctive relief some kind, that may be quite different than what the agency should recommend in an amicus brief to a court. Private litigation for treble damages after the fact, with juries as decision makers, is very different in terms of what's possible and necessary in terms of structuring legal rules than an injunctive action by the FTC to have someone stop doing something in the future.

So it is important because we've heard today from a number of people about the open ended, throw to the jury type instruction, which is sort of a tempting strategy. We can't answer the questions that we're answering, but if we don't have a consensus view, or economists don't have a consensus view on something, punting it to a jury and asking them to decide is really the worst possible strategy. So I do think that, to the extent the agencies want to counsel courts as to what courts should be doing in private cases, you can't have sort of the infinite flexibility or the greater flexibility you might have if you're simply thinking about how you would formulate the case yourself as an injunctive matter within the agency.

C SCOTT HEMPHILL: We do have some help also from pre-jury techniques, from Twombly and from Matsushita. I do want to mention Matsushita in one other context because I have not been the only one to quote the rarely tried and rarely successful language from Brooke Group and you ask whether these other kind of pricing contexts also pick up that same degree of skepticism. Brooke Group said it that way but Matsushita actually explicitly referred to a consensus among commentators that predation was rarely tried and rarely successful.

If nothing else, I think the absence of consensus here suggests the huge degree of skepticism that we have, which may not match a consensus among commentators either for predation. That is, even as to predation, I'm sure there's a consensus among commentators that price predation is rarely tried, rarely successful. That's certainly absent when it comes these other pricing practices.

RICHARD STEUER: I think what we've learned is between the easy cases for the plaintiff and the easy cases for the defendant, the gray area here is probably larger than in most areas of antitrust law. And the cost of making wrong decisions in terms of stopping discounts present some dangerous. So I think that, on balance, we're better off with the American burden of proof rule than the presumptive illegality rule that we see emerging in the EU. But those are the choices.

RENATA HESSE: Before we turn it over to Andy and Bob for closing remarks, does anybody have any final thoughts on the issue?

RICHARD STEUER: Well, I did learn today that applying economics Snickers bars are interchangeable with Hershey bars, which I never would have guessed before.

[LAUGHTER]

AUDIENCE: Only when you're at the vending machine and you have to have a candy bar?

[LAUGHTER]

MICHAEL WHINSTON: I guess, just on this last point that Richard was saying, I think you have to be a little bit careful about-- again, it's this analogy. If you say we're going to be concerned about discounts that are based on market share, loyalty, reference rivals, that we're killing discounting. There's a lot of other ways to discount, including based on just your own quantity.

Now, I think this issue about Robinson-Patman is kind of an interesting and-- if part of the problem is coming from a different antitrust law, what do we do? But I think you need to be a little careful about that.

RENATA HESSE: All right. Thanks to our panel.

[APPLAUSE]

ANDREW GAVIL: So as I demonstrated this morning, I don't do substance. Thank you all for joining us and participating in today's exceptional presentations and discussions. We had hoped to advance the collective thinking on these issues and our presenters have risen to the occasion and made that happen. Even if we agree that there's disagreement, I think that we have aired out some arguments that hadn't really been fully developed, and I'm very pleased with how the day unfolded.

I especially want to thank our presenters and discussants who have provided us with so much intellectual food for thought. Your hard work was evident and we very much appreciate your efforts today. So please all join me in thanking all of our speakers and presenters and moderators.

[APPLAUSE]

As you all know, it takes many people to conceive of and organize a workshop such as this one, and I'd like to acknowledge some of our organizers for their enthusiasm, their dedication and creativity in assembling today's program. While it's late in the day, please indulge some well-deserved expressions of appreciation. From the Federal Trade Commission, I want to start by thanking chairwoman Edith Ramirez, Debbie Feinstein, and Marty Gaynor for their support of the project and our planning team participants, Michael Bloom, Andrea Zach, Doug [INAUDIBLE], Dan O'Brien, Patrick DeGraba, Mike Vita, Dan Greenfield, Chris Brian, Andrea Kelly, and Natasha [INAUDIBLE].

From the Office of International Affairs for their help in securing speakers with accents, Maria Coppola, Joshua Barton Gray, and Molly Askin. And they're all saying the same thing about us. For our workshop logo and graphic work, Carry [INAUDIBLE], Teresa Peeler, Chris [INAUDIBLE], and Wayne Abramovich. And from our Office of Public Affairs, Peter Kaplan, Mitch Katz, Cheryl Warner, and Gail Kingsland. Thank you all for your work.

For today's webcasting, Bruce Jennings and our webcasting team in the back of the room. And last but definitely not least, our events planner, Laura [? Kittelsen ?]. From the DOJ, we also had a planning team, and I want to thank them as well, starting with Assistant Attorney General Bill Baer Deputy Assistant Attorney General Renata Hesse. They have both been very supportive of the project from the start and we appreciate that in.

And I just want to comment on how I think, together, our teams worked pretty well, splendidly, in fact. And it was a pleasure to work with Bob and our colleagues at the Department of Justice. In particular, I want to cite Bob, Bob Potter, Patrick Greenlee, Matt Mandelberg, and Sam Weinstein, as well as Jeff Wilder and [? Garner ?] [? Crop ?] I'd like to single out one person,

and I think all of us know why-- Andrea Zach from the Bureau of Competition's Office of Policy and Coordination for recognition and a special note of appreciation.

As all of our workshop participants and all of the planning team members well know, Andrea has worked tirelessly over these last few months with good cheer on the workshop tending to every detail in order to make today's workshop a success. Please join me in thanking Andrea for her dedication and patience.

[APPLAUSE]

Finally, I'd like to remind you all that the public comment period for today's workshop will remain open for 60 days, until August 22. The details of the submission process can be found in the press release announcing the workshop, which is available on our website. We encourage and look forward to receiving and considering your comments.

And, finally, I'd like to turn things over to Bob Potter from the Justice Department.

ROBERT POTTER: Thank you, Andy. When Andy explained this to me and we talked about how we were going to present, Andy said, I'll go first. And you do clean up and I thought that sounded pretty good. And now I realize I'm in the unenviable position of everything having been said but not everybody said it. And I'm the one who has to say the final words.

So I want to just say on behalf of the Department of Justice, we thank the participants for their important contributions today and their really tireless efforts to come here, present, think about these issues, make presentations that hadn't been done in advance, and contribute to the dialogue. We're very fortunate to have them. They're leading economists, leading academics, and leading practitioners. And we really thank them for that.

Secondly, I wanted to just mention that these types of workshops and the material we get at them are very, very important in our policy and enforcement planning. We look at these for years and years to figure out, oh, wait a minute, in the workshop we thought about that issue. Let's go back and check that and think about that in the context of this particular case.

So I wanted to just say that this is not sort of a one day and it goes away. This is something that's going to impact our enforcement for years and years. So I want to thank you for that.

And then my final thing is I wanted to make a special thank you to two people. On the Department of Justice side, Matt Mandelberg did a lot of the behind the scenes grunt work, don't get a lot of appreciation for that. Thank you, Matthew. And then I especially wanted to double Andy's thanks of Andrea, who just did a fantastic job. Thank you, Andrea. And thank you, everybody, for coming.