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REMARKS FROM THE 5TH ANNUAL ANTITRUST LAW LEADERS FORUM / ANTITRUST: HELPING DRIVE THE INNOVATION ECONOMY

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Volume 21

Number 1

REMARKS FROM THE 5TH ANNUAL ANTITRUST LAW LEADERS FORUM

ANTITRUST: HELPING DRIVE THE INNOVATION ECONOMY

*Renata B. Hesse**

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I. INTRODUCTION

The year 2015 was a busy year for the Antitrust Division (Division) of the U.S. Department of Justice (Department)—we opened a number of investigations, logged a lot of trial time, and recorded several victories of note, all of which I will quickly highlight in a moment.

* Renata B. Hesse is Acting Head of the Antitrust Division of the U.S. Department of Justice. The following article are remarks as prepared for the Global Competition Review at the 5th Annual Antitrust Law Leaders Forum on February 5, 2016 in Miami, Florida. Ms. Hesse would like to thank her colleague Anant Raut, Counsel to the Assistant Attorney General, for his help in preparing these remarks.

But while these actions give you a snapshot of what we do on a day-to-day basis, they don't fully capture our role in helping drive innovation. What I want to discuss first is how all of that work that we do maintaining competitive markets intersects with an economy that is constantly changing. Today, there are many companies, and even industries, that did not exist eighteen months ago. We should be asking ourselves: how do we balance a strong enforcement agenda with promoting growth and innovation in the economy? The answer, I think, is twofold. The first part of the answer is something that we all tend to take for granted, but should not: it is precisely because we do our jobs, and do them in a legal system that is transparent and (as much as we can make it) predictable, that innovators and entrepreneurs feel comfortable investing resources to develop new products. The promise that you will be able to compete and, most importantly, win, if you build something that consumers want, is something American businesses rely on every day. But a second, perhaps equally important part of that answer is that our system demands that we maintain flexibility. Our analyses of these industries must keep up with the changes occurring. By faithfully doing so, antitrust will continue to ensure that innovation and entrepreneurs operate in an environment where it is a foregone conclusion that they have the ability to succeed.

II. 2015 HIGHLIGHTS

In 2015, the Division took action to prevent several potential transactions that we believed would ultimately have been bad for consumers. After several weeks of trial in November, General Electric abandoned the \$3.3 billion sale of its appliances business to Electrolux,¹ and two theater advertising networks, National CineMedia and Screenvision, abandoned what would have ultimately been a merger to monopoly after the Division filed suit.²

Comcast and Time Warner Cable dropped their proposed merger after the Division expressed concerns about the effect the deal would have had on the ability of a variety of content providers to reach customers in their homes.³ Parties in two other large mergers, Applied Materials and Tokyo

¹ Ted Mann & Jens Hansegard, *GE Terminates Sale of Appliances Business to Electrolux*, WALL ST. J. (Dec. 7, 2015), <http://www.wsj.com/articles/ge-terminates-sale-of-appliance-business-to-electrolux-1449474391>.

² Jeff Bliss et al., *MLEX IN WASHINGTON: Report from the 63rd ABA Antitrust Law Spring Meeting*, MLEX MARKET INSIGHT 57 (Apr. 2015), <http://mlexmarketinsight.com/wp-content/uploads/2015/04/MLex-ABA-Coverage-Book-20153.pdf>.

³ Press Release, U.S. Dep't of Justice, *Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns*, (Apr. 24, 2015), <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department>.

Electron, and Chicken of the Sea and Bumble Bee, abandoned their deals after the Division expressed concerns that those deals would reduce competition in the markets for semiconductor manufacturing equipment⁴ and canned tuna⁵, respectively.

We achieved some notable courtroom victories in civil non-merger matters as well. Last February, Judge Garaufis of the Eastern District of New York ruled in favor of the Division after we sued American Express for anti-steering contract terms that prevented merchants from benefiting from price competition in the market for merchant swipe fees.⁶ Later, in June, the Second Circuit upheld the Division's 2013 victory in the e-books case, in which the Division established that Apple, Inc., and five of the six major book publishers entered into an illegal agreement designed to raise e-book prices.⁷

The Division's criminal lawyers were also busy last year, obtaining pleas, guilty verdicts, and significant criminal penalties. We obtained over \$2.5 billion in criminal fines from major banks that pled guilty to conspiring to manipulate the price of U.S. dollars and euros exchanged in the foreign currency (FX) exchange spot market.⁸

We also unsealed an indictment against an online poster company and its owner for fixing the price of posters sold through Amazon Marketplace.⁹ What's notable here is that this was the Division's first criminal prosecution against a conspiracy specifically targeting e-commerce.¹⁰

Our ongoing investigation into bid rigging involving automotive parts sold in the United States has so far yielded charges against 58 individuals and 38 companies, and over \$2.6 billion in fines.¹¹ Our continuing

⁴ Press Release, Applied Materials, *Applied Materials, Inc. and Toyko Electron Limited Agree to Terminate Business Combination Agreement*, (Apr. 26, 2015), <http://www.appliedmaterials.com/company/news/press-releases/2015/04/applied-materials-inc-and-tokyo-electron-limited-agree-to-terminate-business-combination-agreement>.

⁵ Brent Kendall, *Tuna Leaders Call Off Deal on Antitrust Concerns*, WALL ST. J. (Dec. 4th, 2015), <http://www.wsj.com/articles/tuna-leaders-call-off-acquisition-deal-on-antitrust-concerns-1449205448>.

⁶ *United States v. Am. Exp. Co.*, 88 F. Supp. 3d 143, 238 (E.D. N.Y. 2015).

⁷ *United States v. Apple, Inc.*, 791 F.3d 290, 339 (2d Cir. 2015).

⁸ Press Release, U.S. Dep't of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas*, (May 20, 2015), <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

⁹ Press Release, U.S. Dep't of Justice, *E-Commerce Exec and Online Retailer Charged with Price Fixing Wall Posters*, (Dec. 4th, 2015), <https://www.justice.gov/opa/pr/e-commerce-exec-and-online-retailer-charged-price-fixing-wall-posters>.

¹⁰ Press Release, U.S. Dep't of Justice, *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution*, (Apr. 6th, 2015), <https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace>.

¹¹ Press Release, U.S. Dep't of Justice, *INOAC Corp. to Pay \$2.35 Million for Fixing Prices on Auto Parts*, (Nov. 19, 2015), <https://www.justice.gov/opa/pr/inoac-corp-pay-235-million-fixing>.

investigation into collusion among ocean shipping lines in international ocean shipping services has resulted in 3 companies pleading guilty and collectively paying \$136 million in fines, and, at the individual level, charges against 7 executives.¹² The indictments in both of the investigations demonstrated our continued effort to hold individual, not just corporate, conspirators accountable for their criminal actions.

We are also continuing to prosecute bid rigging and frauds at real estate foreclosure auctions across the country. Through these schemes, real estate investors have tried to keep for themselves money that should have gone to the mortgage holders or, in some cases, the homeowners who suffered through foreclosure. So far, the Division has charged more than 100 investors in northern California and across the southeastern United States.¹³ Most have pled guilty; we will be going to trial against the rest of them in the coming year.

III. FOSTERING CHANGE

I want to turn now to the focus of my remarks, which is about the role of antitrust in advancing the innovation economy. I would like to start with an anecdote.

There was a post circulating on social media a couple of years ago, with the headline, “Everything From This 1991 Radio Shack Ad You Can Now Do With Your Phone.”¹⁴ It advertised both a “mobile cellular telephone”¹⁵ as well as a handset phone with “20-Memory Speed-Dial.”¹⁶ By way of comparison, I have 100+ contacts in my cell phone, which I can voice activate. It advertised a “handheld voice-actuated cassette tape recorder” and an answering machine,¹⁷ which have now been supplanted by voice memos and voicemail, respectively. It advertised a calculator and an alarm clock¹⁸, which are native apps on most cell phones now. It advertised a “Deluxe Portable CD Player,” which plays one CD at a

prices-auto-parts.

¹² Press Release, U.S. Dep’t of Justice, Three Ocean Shipping Executives Indicted for Fixing Prices and Rigging Bids, (Oct. 6, 2015), <https://www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids>.

¹³ E.g., United States Department of Justice, *Two Georgia Real Estate Investors Plead Guilty to Rigging Bids at Public Home Foreclosure Auctions*, (Jan. 4, 2016), <https://www.justice.gov/opa/pr/two-georgia-real-estate-investors-plead-guilty-rigging-bids-public-home-foreclosure-auctions>.

¹⁴ Steve Cichon, *Everything from this 1991 Radio Shack Ad You Can Now Do with Your Phone*, HUFFINGTON POST (Jan. 16, 2014), http://www.huffingtonpost.com/steve-cichon/radio-shack-ad_b_4612973.html.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

time.¹⁹ Meanwhile, I have tens of albums and hundreds of songs on my phone itself, and more than I have time to listen to through various streaming services.

The ad also featured a “VHS Camcorder.”²⁰ I now regularly send short cellphone videos of my children to my family, all over text or email. Also in the ad is my personal favorite: a \$1600 Tandy desktop computer with a 20MB hard drive.²¹ My cell phone has 64GB.

A bonus observation by the author of the post: across the bottom, the advertisement urges you to, quote, “Check Your Phone Book for the Radio Store or Dealer Nearest You.”²² I think it is fair to say that not a lot of people use a phone book for that anymore; between search engines and increasingly sophisticated mapping apps, the whole world, and its accumulated knowledge, is at our fingertips. In just the last decade alone, a combination of innovations, including the introduction of the smartphone and advances in wireless technology, has led to the retirement of some industries, the evolution of others, and the creation of even more. Faster and more powerful chip technology has given rise to innovations as varied as wearable tech, such as a workout shirt that tracks your heart rate,²³ and near field communication, allowing grocery stores to print coupons for you as you walk past.²⁴

A side note—I had been planning to use the intro to “The Jetsons” as my example of how close we are to realizing our vision of the future, when I realized that one of the key features of it will probably start to feel dated within the next few years: the fact that George Jetson is still driving his own car.

We are living in an amazing time in history for innovation, but innovation does not happen in a vacuum. It requires ingenuity, hard work, and access to capital. To thrive, it must be buttressed by a legal system that is both transparent and accessible; that has a clearly articulated framework of laws, and published precedents that help to guide those seeking to understand the meaning of those laws and apply them; and oversight by an independent judiciary, where decisions are reached through rigorous advocacy based upon facts, law, and economics. Is the system perfect? No, but win or lose, those who take part in the system have the assurance that the system will treat them fairly.

So where does antitrust enforcement factor into the calculation? Our

¹⁹ *Id.*

²⁰ Steve Cichon, *supra* note 14.

²¹ *Id.*

²² *Id.*

²³ See generally Azalea Pena, *Your Next Ralph Lauren Shirt Will Measure Heart Rate and Calories Burned*, PSFK (Aug. 25, 2015), <http://www.psfk.com/2015/08/ralph-lauren-smart-shirt-polotech-shirt-app.html>.

²⁴ See generally Lex Friedman, *Grocery Pal for iPhone*, MACWORLD (Feb. 19, 2010 2:30 PM), <http://www.macworld.com/article/1146551/grocerypal.html>.

impact is through equal parts what we do and what we refrain from doing.

IV. REWARDING INNOVATION

A central tenet of modern antitrust is to protect the competitive process, because competition generates innovation. Competition inspires people to try to make the next great thing. However in order to keep the cycle working, you must encourage (even celebrate) the ability of creators to reap the rewards of their efforts, provided they do so lawfully.

Under U.S. antitrust law, we do not punish lawful monopolies. When monopoly profits flow to an entrepreneur because she has made a better product or developed a better service, society still benefits from the competition that produced that better product or service, and the profits that the entrepreneur makes reflect the value that society places on her innovation. Now, contrast that situation with one in which monopoly profits are obtained through the acquisition of a competitor, taking it out of the market. This elimination of competition is a loss for society, which is why a large component of our mission is to prevent these harmful transactions from going forward.

In *United States v. Grinnell Corporation*, the Supreme Court held that a necessary element of an unlawful monopoly under Section 2 of the Sherman Act is the willful acquisition or maintenance of monopoly power in the relevant market that is distinct from “growth or development as a consequence of a superior product, business acumen, or historic accident.”²⁵ In other words, the antitrust laws do not penalize you simply because your product or service is so great or innovative that the majority of the market wants to buy it. Think of the dampening effect that would have on innovation in this country. To put it into modern parlance, we would not expect entrepreneurs to continue working out of their garages for three years, eating two packs of ramen a day, if, in their minds, the success of that next must-have technology they have been building is going to be capped were it to become “too” popular.

On the other hand, we will enforce the antitrust laws against successful innovators if they abuse their positions and try to hobble or exclude rivals. If you go back through and take a closer look at some of the monopolization cases the Division has brought in the last two decades, you will see that our focus was not so much on the party’s monopoly power as the actions it was taking in order to *maintain* that market dominance. Consider the *Microsoft* case that the Division brought in the late ‘90s.²⁶ As you may recall, Microsoft controlled nearly 90% of

²⁵ *United States v. Grinnell Corp.*, 384 U.S. 563, 571–72 (1966).

²⁶ Complaint, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C., May 18, 1998), available at <http://www.justice.gov/sites/default/files/atr/legacy/2012/08/09/1763.pdf>.

the PC operating system market through Windows OS.²⁷ Microsoft Explorer also commanded a large share of the burgeoning internet browser market.²⁸ These monopolies by themselves were not a violation of the antitrust laws. The conduct we challenged was how Microsoft attempted to protect its dominant share of the operating system market by entering into exclusive (or near-exclusive) agreements with ISPs and OEMs and by designing Windows in a way that discouraged the development of rival platforms.²⁹

A decade later, the Division brought a Section 2 case against United Regional Health Care System for attempting to maintain its market share by penalizing insurers that contracted with its competitors.³⁰ At that time, United Regional controlled nearly 90% of inpatient hospital services and 65% of outpatient surgical services in the Wichita Falls, Texas market, and was the only provider of certain essential services in that market, making it a “must-have” as part of a provider network.³¹ The behavior we challenged was United Regional’s imposition of restrictive contract conditions on any of its insurers that tried to contract with one of United Regional’s competitors.³² Specifically, insurers that included United Regional’s competitors in their networks would have faced steep reductions in their discounts off of United Regional’s billed charges, prohibitively raising the insurers’ effective rates.³³ These pricing practices kept competitors out the Wichita Falls market.³⁴ As a result, consumers could not receive the benefit of alternate and more innovative insurance plans.³⁵

In these instances, what triggered the Division’s actions wasn’t the market share that these companies had lawfully obtained, but rather the steps that they were taking to keep smaller competitors, who might have offered better prices or more innovative products, out of the market. Monopolists tend to grow comfortable with monopoly power, and when they do, some find it easier to outmuscle rather than outcompete the smaller competitor gunning for their business. Scrappy underdogs will often enter a static, concentrated market by upending the business model entirely—selling books online instead of through brick-and-mortar

²⁷ See *United States v. Microsoft Corp.*, 243 F.3d 34, 47 (D.C. Cir. 2001) (citing the trial court’s finding of fact on the issue).

²⁸ See *id.* at 71.

²⁹ See generally Complaint, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C., May 18, 1998), available at <http://www.justice.gov/sites/default/files/atr/legacy/2012/08/09/1763.pdf>.

³⁰ See generally Complaint, *United States and State of Texas v. United Reg’l Health Care System*, No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011), available at <http://www.justice.gov/atr/case-document/file/514171/download>.

³¹ *Id.* at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 18.

³⁵ *Id.* at 19.

stores, for example. Incumbents tend to dislike disruptive innovation, because it has the potential to knock them out of their position at the top. However, disruptive innovation is usually good for consumers, and that is what we care about.

V. WITHOUT PENALIZING ICARUS

Earlier, I mentioned that understanding how we clear the way for innovation would involve a discussion of what we as enforcers do as well as an understanding of what antitrust *does not* do. Take the U.S. approach to patents. Patents, once obtained, can confer a type of market (or monopoly) power on the patent holder for the length of the exclusivity period. We are okay with that, and allow patent holders to earn those profits, because we want to reward the investment and the ingenuity that goes into creating the patented invention and encourage the innovations that can now be built on top of it. What we do not do is take away those monopoly profits if earned lawfully. If a patent becomes more popular than expected, we do not seize control of it. If a patent becomes more useful than predicted, we do not mandate its licensing. If a patent becomes commercially important, we do not impute F/RAND commitments.

Staying in the patent world, our approach to the standard setting process presents another example of where we foster innovation by refraining from action. Standard setting involves a group of competitors getting together and deciding upon a common technical standard incorporating a patented technology,³⁶ ending competition between alternative technologies. Such patents become that much more valuable after adopters are locked into the standard and cannot easily revise the standard, or use an alternative standard. Naturally, this raises antitrust concerns but, for the most part, we have not challenged standard setting because this particular type of cooperative activity has a lot of procompetitive benefits. It is oftentimes essential for the development of entirely new technological ecosystems, such as the 802.11 standard for Wi-Fi.

Where we do grow concerned is when holders of standards essential patents seek to exploit their newfound market power by evading the licensing commitments they voluntarily made and threaten to exclude implementers in order to demand excessive royalties. The competitive process suffers from this type of hold up and victimizes those who have, in good faith, begun implementing the standard. Alternative technologies

³⁶ See U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 33–34, (Apr. 2007), www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

may no longer be available after the standard has been adopted and set. Benefits that implementers of the standard may have been able to wrangle through competition between technologies is lost once one is selected for inclusion into a standard. Implementers may be effectively locked in. There are long-term consequences as well. Companies that thought that they could rely on the F/RAND licensing commitment may be less willing to implement the standard, or future standards. Just the prospect of such hold up can prevent or delay other products from coming to the market—or, they arrive, but with fewer bells and whistles. For these reasons, antitrust enforcers and competition advocates are addressing this behavior where appropriate.

VI. ELIMINATING REGULATORY FRICTION ALSO CLEARS THE PATH FOR INNOVATION

Enforcers and regulators can also keep the engine of innovation going by being as transparent and predictable as possible. People do not become entrepreneurs because they have a burning desire to interact with more regulatory and oversight bodies—I am sure that is pretty low on their list. People become entrepreneurs because they are trying to solve a problem; or want to build things; or want to make something that people want to use. For that reason, we have worked with the Federal Trade Commission, as well as officials at the federal, state, and local levels, to oppose unnecessary regulatory barriers to entrepreneurialism, including state laws that require sellers of over-the-counter teeth-whitening products to be licensed dentists³⁷ or that require hospitals to obtain certificates of need before expanding their provision of service.³⁸ We also work closely with our counterparts at other agencies, such as the Federal Communications Commission and the Patent and Trademark Office, to find ways of using our enforcement or regulatory powers to further our common goal of unleashing competitive forces into the market.

Being as transparent as possible about our actions is another way that we can help companies understand where they might run afoul of the antitrust laws, so they can spend less time talking to their lawyers and more time growing their businesses. For this reason, we are strongly committed to open courtroom proceedings wherever possible. The public has a right to be in the courtroom. The parties we sue will frequently err

³⁷ See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108–09 (2015) (describing a Federal Trade Commission challenge to such a law in North Carolina).

³⁸ See FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, *IMPROVING HEALTH CARE: A DOSE OF COMPETITION*, ch. 8, at 3–6 (2004), available at <https://www.justice.gov/atr/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice>.

on the side of caution, and seek closed proceedings during litigation. We absolutely respect their concern and do not wish to see truly confidential information released in open court, but open courtrooms help promote integrity and confidence in our judicial process, and we have an obligation to protect that interest.

To the extent that we can, we try to work with parties to head off potential antitrust violations. Companies, trade associations, and other parties are welcome to follow the procedures outlined on our website to formally request a review of a business practice that they are concerned may violate the antitrust laws. Such business review letters require a considerable investment of time and resources by both the Department and the requesting parties, but it is something that we are happy to do to help well-intentioned parties avoid inadvertently violating the law. Last February, we issued a business review letter to the Institute of Electrical and Electronics Engineers (IEEE), an organization that develops standards in the electronics and communications sectors, regarding a proposed update to its patent policy.³⁹ Our letter helped the IEEE clarify the scope of the licensing commitments made by participants in its standard setting process, which in turn will facilitate licensing negotiations and mitigate the risk of hold-up, giving implementers greater confidence in using the IEEE's standards for developing new products.

We also try to provide as much guidance as we can in the form of guidelines, such as our Horizontal Merger Guidelines,⁴⁰ and our Intellectual Property Guidelines,⁴¹ both published jointly with the Federal Trade Commission, and we periodically revise these guidelines to reflect current enforcement practices.

In addition, we try to disseminate, where possible, insight into how we arrive at the conclusions that we do on cases. We will on occasion publish a closing statement explaining the rationale behind our decision.⁴² We also file Competitive Impact Statements in conjunction with proposed Final Judgments that describe the events that gave rise to the alleged violations, and how the proposed remedy resolves those concerns

³⁹ Letter from Renata B. Hesse, Acting Assistant Attorney General, U.S. Dep't of Justice, Antitrust Division, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP (Feb. 2, 2015), available at <http://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated>.

⁴⁰ See U.S. Dep't of Justice and Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

⁴¹ See U.S. Dep't of Justice and Fed. Trade Comm'n, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf>.

⁴² E.g., Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp.* (Feb. 13, 2012), <https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations>.

in the public's favor.⁴³ The public then has the opportunity to offer its comments on our proposed Final Judgments for 60 days through the Tunney Act, after which a judge, not the Department, must ultimately decide whether the remedy we have proposed is in the public interest.⁴⁴

VII. MAINTAIN FLEXIBILITY TO GO AFTER BAD CONDUCT

At the same time, there is a limit as to how absolute we can be in our guidance. We try to provide as much specificity as possible, but we cannot provide 100% certainty. The facts matter.

Antitrust has been protecting the markets for over a century, but it would be outdated if we still looked at markets the way we did in 1890 when the Sherman Act was passed. Going back to the example I started with, if we were hidebound in our product market definitions, we would end up analyzing the smartphone market as a combination of the camcorder, CD player, and answering machine markets.

Sometimes, we review mergers in industries we know very well that are pretty straightforward, and we can use the same analysis that we used in a previous investigation. However, we are not constrained by a prior playbook. Markets change. Every merger has unique facts, even if it is just a function of occurring in the same market a year later. What we have shown, and what you will see, is that we are not going to take a static approach to how we look at markets.

Take a look at AT&T's attempted acquisition of T-Mobile, abandoned after the Division sued to block it and Federal Communications Commission (FCC) Chairman Julius Genachowski circulated a draft order at the FCC referring the transaction to a hearing.⁴⁵ Traditionally, we have examined the competitive impact of wireless mergers by looking at a series of local markets,⁴⁶ but each case is different, and each gives us an opportunity to take a fresh look at the market. Unlike many of the mergers we see in this industry, which involve one of the big national providers acquiring a regional provider, this one involved two nationwide wireless providers. What we saw, as we delved into the market structure,

⁴³ E.g., U.S. Department of Justice, *Competitive Impact Statement: U.S. et al. v. U.S. Airways Group, Inc. and AMR Corporation* (Nov. 12, 2013), available at <https://www.justice.gov/atr/case-document/competitive-impact-statement-219>.

⁴⁴ See Ben James, *Senators say DOJ ignoring the Tunney Act*, LAW 360 (Sept. 28, 2006, 12:00 AM), <http://www.law360.com/articles/10947/senators-say-doj-is-ignoring-the-tunney-act> (explaining the requirements of the Tunney Act in more depth).

⁴⁵ Michael J. De La Merced, *AT&T Ends \$39 Billion Bid for T-Mobile*, DEALBOOK (Dec. 19, 2011, 4:44 PM), <http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/>.

⁴⁶ See, e.g., U.S. Dep't of Justice, *Competitive Impact Statement: U.S. v. AT&T Inc. and Dobson Communications Corporation* (Oct. 30, 2007) (explaining impact proposed merger would have on certain geographic markets comprising part of a single state), available at <https://www.justice.gov/atr/case-document/competitive-impact-statement-39>.

was an acquisition that not only had competitive effects in local markets, but also on a nationwide basis. Regardless of where they were in the United States, customers of the “big four” wireless providers⁴⁷ tended to experience very similar choices, because the competition among the four providers was fundamentally national, not local, in nature. Moreover, the elimination of T-Mobile from the market would have eliminated an aggressive price competitor that had introduced a number of innovative pricing plans and promoted a number of new devices in the marketplace. The transaction would have been bad for consumers. We were swift to block it—and we were right. Look at the innovation that a standalone T-Mobile has introduced into the wireless market since the merger was abandoned. It spent billions improving the products it offers⁴⁸ and aggressively went after other carriers’ customers by eliminating 2-year lock-in plans and offering to pay early termination fees for those who switched to T-Mobile.⁴⁹ Their competitors responded in kind. Sprint began offering lower prices and alternative plans,⁵⁰ and AT&T began targeting T-Mobile customers with a \$200 credit, plus money for smartphone trade-ins, if they switched to AT&T.⁵¹

Then last year, there was Comcast’s proposed acquisition of Time Warner Cable.⁵² Relying upon past precedent, a lot of people assumed that we would evaluate the transaction based upon head-to-head competition for subscribers in a series of local geographic markets, and conclude that since the parties did not overlap geographically the transaction posed no competitive concerns.⁵³ However, the markets at issue had evolved, something our analysis took into account. What concerned us was the competitive threat created by the merged company’s control over so much of the national market for content distribution. New Comcast’s share of the high speed broadband market

⁴⁷ AT&T, Verizon, Sprint, and T-Mobile. See generally Scott Webster & Jessica Dolcourt, *Before You Switch Wireless Carriers, Read This*, CNET (Feb. 3, 2016, 7:59 AM), <http://www.cnet.com/news/comparing-wireless-carrier-plans-us>.

⁴⁸ See T-Mobile, *2.3 Million New Customers Join the Un-carrier Revolution as the Company Delivers 11% Service Revenue Growth and 42% Adjusted EBITDA Growth Year-Over-Year* (Oct. 27, 2015), <https://newsroom.t-mobile.com/media-kits/q3-2015-earnings.htm> (detailing T-Mobile’s investment in expanding its 4G LTE network).

⁴⁹ T-Mobile, *Trapped by Contracts and Phone Payment Plans?*, <http://www.t-mobile.com/offer/switch-carriers-no-early-termination-fee.html> (last updated 2016).

⁵⁰ See Kellex, *Sprint’s “Biggest Wireless Offer in History” Slashes Verizon, AT&T, T-Mobile Plans by 50%*, DROID LIFE (Nov. 18, 2015), <http://www.droid-life.com/2015/11/18/sprint-50-deal-att-verizon-tmobile/>.

⁵¹ See Todd Bishop, *AT&T Confirms \$200 ‘Switcher Credit’ for T-Mobile Customers*, GEEKWIRE (Jan. 3, 2014), <http://www.geekwire.com/2014/att-confirms-200-switcher-credit-tmobile-customers/>.

⁵² Rupert Neate & Dominic Rushe, *Comcast Announces \$45.2bn Takeover of Time Warner Cable*, GUARDIAN (Feb. 13, 2014), <http://www.theguardian.com/media/2014/feb/13/comcast-takeover-time-warner>.

⁵³ See *supra* text accompanying note 46.

would have been nearly 60%, generating substantial leverage against edge providers, including over-the-top video distributors, who need to reach those customers.⁵⁴ The merger would have placed Comcast in a stronger position to frustrate the rise of online video competitors, who provide new competitive alternatives to traditional cable service that could become substitutes for Comcast's video business. Ultimately, our concerns—and the concerns of our colleagues at the FCC – led the parties to abandon the transaction.⁵⁵

VIII. CONCLUSION

We are always trying to nurture and promote competition, because the fruits of competition are better products and services, and lower prices, for consumers. When we look at conduct, what we are looking at is its competitive effects, not the label it falls under. When market circumstances change, we adjust our thinking based upon those changes, and we remain reflective about that. It's always worth asking ourselves, is there something we're missing?

Antitrust alone does not drive the innovation economy, but what it can do, and where it excels, is to make it possible, at the ground level, for a hard worker with a good idea to get her company launched and competing on equal footing with the companies that have been at it for decades. If you don't believe me, ask the answering machine companies.

⁵⁴ Shalini Ramachandran, *New FCC Broadband Benchmark Lifts Comcast's Share to Nearly 60%*, CORPORATE INTELLIGENCE (Jan. 29, 2015, 5:17 PM EDT), <http://blogs.wsj.com/corporate-intelligence/2015/01/29/comcast-bulks-up-on-broadband>.

⁵⁵ Devika Krishna Kumar, *Comcast Drops Time Warner Cable Bid After Antitrust Pressure*, REUTERS (Apr. 24, 2015, 6:25 PM EDT), <http://www.reuters.com/article/us-comcast-timewarnercable-idUSKBN0NE2D220150424>.

