US Antitrust Policy: A Discussion with Assistant Attorney General Makan Delrahim

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TRANSCRIPT

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HAROLD FURCHTGOTT-ROTH: Good afternoon. My name is Harold Furchtgott-Roth. I'm a senior fellow here at the Hudson Institute, and I'll be your host today. Thank you so much for joining us. We're very pleased and honored to have with us the honorable Makan Delrahim, the assistant attorney general at the U.S. Department of Justice. He needs no introduction. And he has been working in and around issues related to antitrust for a great deal of time. He has a very distinguished resume, which you can find at the Department of Justice's website. Before we get started, I have two requests. One is, if you could take your cellphone and put it on silent mode so that we don't have unnecessary interruptions of that sort. The second is for the Q&A session. We will have cards that you can write questions, and those cards are going to be passed around, and you can write your questions. They will be collected, and I'll sort through those.

We particularly would like to welcome our C-SPAN guests and our other guests that are watching through various video links, as well as our online guests who are watching at the Hudson website. For our online and for our video guests, you, too, can submit questions. Submit them to Hudson - #HudsonEvents, and those questions will be collected. Assistant Attorney General Delrahim, you've had a distinguished tenure as - at the Justice Department that I think has been noted by lots of innovations, lots of ways of looking and thinking outside of the box. One has to do with the review of consent decrees that have been in place since long before the people who signed the consent decrees have unfortunately passed away - decades for some of these consent decrees - that haven't been reopened or reviewed. And you've taken the step of reviewing some of these. Can you tell us - and last summer, the Paramount consent decree was being reviewed. Can you tell us about where you are in reviewing some of these aging consent decrees?

MAKAN DELRAHIM: Sure. Well, first, let me thank you for inviting me to be here. It's always an honor to be with you and to discuss some of the most important issues that we deal with in the Antitrust Division. The consent decrees - it's an interesting one because it's an area where most people were not even aware that we had close to 1,300 consent decrees. These are basically settlements and judicial orders that are between the Justice Department and past defendants with whom we've had an enforcement action. And we began systematically reviewing all of them. Now, some of these involved piano rolls and, you know, a cartel in horseshoes, and some of them go to things that are as relevant as today's theatrical movie distribution or performance rights for music. So we began looking at them in a transparent way, asked for public comment, take a look to see, are they still relevant? And the ones that were not, we wanted to - we would go to the courts and file for their termination or modification as needed. So we - I think - I want to say close to 70% of the consent decrees have been reviewed and filed with courts and pending in some process. And I think over half have already been terminated by various courts.

Paramount is one of the ones that has gotten some attention. I don't recall exactly how many public comments we got, but we put those up; we got a lot of comments about folks. And what's interesting about those decrees, as some of you may know, is that they - I think they have been around since 1948, '49, if I'm not mistaken, so a little over 70 years. And they have regulated, in effect, the way movies are distributed in the theatrical distribution and the exhibitor system. Initially, though, the antitrust action was against a number of studios who had conspired amongst each other. And they also owned the theatrical business, and they wanted to control that system. The settlement basically forced them to sell and not reacquire the theaters if you're
a studio. But it had a number of other conditions. For example, every movie had to be negotiated theater-by-theater basis. And there's been a lot of changes in the marketplace. Movie theaters - you know, there's been circuits that have grown since then. And does it make sense for you to do that?

There's been, you know, bans on block-booking, bans on circuit dealing - and block-booking is, can you have one movie and say that if you're going to take, you know, "Star Wars," you must also take "Hurt Locker" or something like that - and bans on resale price maintenance. A number of the bans, the courts, over the 70 years, have found not to be per se violations. But also, the markets have changed, so we began looking at that. We reached a determination maybe two or three weeks ago. We filed with the Southern District of New York a motion to sunset those decrees other than a transition period for two of the practices - block-booking and circuit dealing. And it was our determination that there was a lot of innovation that could have been prevented by these rules. And Congress has not, you know, given us the authority, the statutory authority to be regulating these in perpetuity. So that's one of the reasons we have done that. We're waiting for the judge to take a look and see if they would. And we're excited about the overall project. It's really part of the deregulatory mission where antitrust enforcement is actually standing in the way of competition and innovation that could be occurring. So that's - that is the process we're in. We have put, for public comment, the two music decrees - ASCAP and BMI. We've received about 850 comments. We're in the process of determining what to do there.

FURCHTGOTT-ROTH: Have there been periodic reviews of these in the past? Or will it take another 70 years to have the Antitrust Division review aging consent decrees?

DELRAHIM: Well, so what's interesting is that since 1979, all consent decrees have about a 10-year time period or shorter. Some are seven or five. But all of them expire. These that we're looking at are the ones that pre-dated 1979. So hopefully, as a matter of course, we won't have any more that are pending for 70 years. You know, if there's a real market failure, that should be something for other policymakers to step in. Have there been periodic reviews? On some of these, there have been. So ASCAP, BMI - there's been a couple of times over the years that there has been a review. I don't believe Paramount, in a public sense, has been. But there was one that I'm told maybe about 11 years ago where the division took a look and wanted to take a similar action but decided not to do.

So - but it was not in a way where it was systematic through all consent decrees. And two, it wasn't one where we had the type of public commentary for that process. So there hasn't been. Now, one of the reasons some people might ask - well, if these are defendants who are long gone or dead, why waste the time to do it? - part of that is that the industry looks at these consent decrees to provide guidance to businesses. So it is, in effect, regulating behavior, and if it doesn't make sense, it should not continue on.

FURCHTGOTT-ROTH: Switching gears a bit to merger reviews - one of the innovations you've done is last summer in an aluminum merger review, you had some of the issues resolved by arbitration rather than taking it to court. Can you tell us about the use of arbitration in merger reviews and whether you think this is something that you might be able to do in the future as well?

DELRAHIM: So we are learning - this is the first time, I believe, in history that we have used arbitration process to resolve our merger action. It was a transaction involving, you know, a
merger of aluminum - some aluminum manufacturing companies. We took a look, and we got to an issue where - there was a distinct issue where largely a lot of mergers fall into - is, you know, can you determine what the market definition is? What is the product market? And you, as a trained economist, know exactly what I'm talking about - is that, you know, do they meet the econometric standards for a separate and distinct antitrust market? In this one, the question was, you know, what we were talking about is aluminum body sheets, whether steel was a close substitute or not. And the merger would have - you know, our concerns would have risen and fallen based on that determination.

So we could've gone to court, got a judge, you know, litigated a matter for months, perhaps a year, and then waited on the judge to determine - there's no time clock for that - another, you know, six, seven months, eight months, nine months, perhaps a couple of years for this process. Instead of doing that, we said, OK, there could be a predetermined outcome depending on which way this market is defined. And we - I proposed to the parties, would they agree to submit this to arbitration? We - you know, the private sector arbitrates many issues. We could actually find an arbitrator who understands law and economics well, that we - you know, if they decide one way or the other, fine; we could live with that.

Two, we could put very certain time limits on the process. We could agree to the discovery process. We could decide amongst ourselves that this will take a two-week trial before the arbitrator. We can use the AAA rules to identify an arbitrator where we're both comfortable or a panel of three or - and there's a process where this is done every single day. And as we were searching this, we also identified a statute, lo and behold, called the Administrative Dispute Resolution Act of 1996. And Attorney General Reno and my predecessor Anne Bingaman had issued some rules and commentary about it, even though it had never been used. So it protected the rights of the parties, for example, to get third-party discovery, which is really important to defend against it. And it preserved that.

We filed the case, and we're going through that now. We have learned, as have the parties through this since it was a brand-new process - but I think what it will do is, if successful - and, again, I think, you know, in a couple of months, once we've gone through it, we will - our staff and the parties will also learn, as well as the arbitrator, about how could this be even more efficient or more direct? Which side could benefit from it? The idea is really to have some certainty and get, you know, a fair look rather than sometimes, you know, a generalist judge who's - you know, two years of multibillion-dollar transaction is dumped on them, and they're expected to rule. This could provide data in some of the more technical areas. And if you're in the business world, if, you know, you're in the private equity and you're looking at a transaction, a lot of times, you want to know what are the risk factors? What are the regulatory risks? Can we get through this?

A lot of times, the merger breakup fees are determined by the assessment of the risk. Here, you can say, OK, well, we can do this; however, there is this issue. We could either sell this plant or this asset, depending on what the market definition is or whatever the potential issue could be. If it could be cabined (ph) something that's manageable, I'm hoping arbitration is a way that we can save taxpayer money and get better results, ultimately, for the taxpayer.

FURCHTGOTT-ROTH: Antitrust law, as an institution, has grown. Sixty years ago, there were really just a handful of countries that had antitrust authorities and antitrust laws. Today, over a hundred countries as well as just about every state in the United States have antitrust laws and
enforcement. An increasing challenge is - or two challenges - one is harmonization across countries with the antitrust laws and enforcement. And the other is, shall we say, the propensity of some countries to use antitrust law as part of industrial policy. How do you think about this?

DELRAHIM: So, you know, I have joked in some - in the past that antitrust has been our most successful export out of the United States. We have now 140 agencies, give and take, that enforce the antitrust laws. Overall, I think that's a positive outcome in the sense that if you have more free markets, more economic freedom out there, whether free from government intervention or from monopolists and anti-competitive conduct by private sector, it's a good thing for consumers. It's a great thing for investment. It's a great thing for innovation. However, it does present a challenge for making sure that you have consistent application and common understanding. We don't have a chapter to the WTO dealing with antitrust. We - you know, we have common understandings over, you know, various tariffs and standards and intellectual property now, but we do not have a common understanding of what and how to analyze an antitrust.

One of the greatest things we've had is this dialogue through the International Competition Network - ICN or OECD - where we engage with our partners, with our colleagues. I was just in Paris a week before last and spent a week, and we have many discussions. But that does not prevent, you know, a party from - whether it's a merger enforcement or conduct - to apply the antitrust laws in a way that we don't recognize it, or we recognized that perhaps in the '50s and the '60s, and economics taught us those were (ph) actually harm consumers. So it's a challenge that we face every single day. But I think the whole international community is committed to an approach to antitrust law that has actually focused on competition. We've had some recent challenges. I think the leaders in France and Germany have both called for an application of antitrust law - and these are not the antitrust authorities - but the political leaders to apply them in a way that they have national champions. So an anti-competitive merger or otherwise should be approved if it creates a French or a German or a European champion. I wholeheartedly reject that. I think that's a bad idea. The Alstom-Siemens merger was one where that issue was potentially addressed. And Commissioner Vestager from the European Commission actually withstood those calls and blocked that transaction in a similar way that we had raised concerns. And I commend that approach.

But that doesn't mean there isn't a concern that, you know, there could be 50 whacks at a pinata of the merger where folks are trying to take and extract divestitures from various countries. One of the things we did to try to address procedural aspects of this is, we announced a - well, an approach to try to see if we could at least get a multilateral agreement on the most basic, fundamental principles of due process. These are, you know, the rights to counsel, transparency, conflict of interest and the broader review. So even if we don't have agreements on the substantive standards, the process - we afford parties national treatment, most-favored-nations treatment, so you can't treat a foreign company any worse than you would your own subject. And I was pleased that after a lot of work, a lot of give and take that occurred, we entered into that agreement in Cartagena in May of earlier this year. And I think as of last week - my staff's telling me - we have 72 countries that have all signed on to those principles which allows for consultation. At least it's the first step towards a commitment on the multilateral front. And it's called the - it's part of the ICN. But you don't need to be an ICN - International Competition Network - member country to join this commitment. And it's called the CAP, the Competition Agency Procedures agreement. And so we are in the process of implementing
those and reviewing various countries. But I think that is probably one of the most significant developments in the international community since the creation of the ICN.

FURCHTGOTT-ROTH: And just on a day-to-day practice today, do you find a lot of coordination with other countries on mergers that go across national boundaries?

DELRAHIM: Every single day. So we have it. Our case teams - with their counterparts, they're coordinating any transaction that crosses borders or has, you know, effects on - in various different countries. So we are seeing that. We also engage at the leadership level with our counterparts. We have - in February, for example, the ICN has different working groups - so a merger working group that is having its annual meeting in Australia. The actual meeting of the ICN for the first time ever will be held in the United States in Los Angeles in May of this year, the second week in May. So all the agencies are going to be coming here. And we're going to be focusing on a number of things, including digital competition. That will be on the campus at UCLA. So there's a lot of discussion going on every single day and - as well as technical assistance. So we send our economists, as well as case handlers and prosecutors abroad on the cartel front, on mergers, on the new platform. How do we look at it? And we hope that through this communication, we have greater and greater convergence on the subsequent standards.

FURCHTGOTT-ROTH: You're mentioning some political leaders in Europe wanting to inject standards that are not the consumer-welfare standard. There's been a lot of talk in America in the past two or three years about what is now popularly called hipster antitrust. I was wondering if you could give us some thoughts about hipster antitrust.

DELRAHIM: Well, a hipster antitrust, for folks who may not have heard it, refers to kind of twisting the antitrust laws away from the common understanding of industrial organization economics, and it is a way to begin looking at other societal goals outside of competition. And competition - you know, for example, should we take a look at sustainability as part of competition now (ph)? Should we look at labor as part of competition analysis, a way to address, perhaps, shortcomings of other policy goals? And that is - at one level, it might be a misconception that the general antitrust standards only deal with price effects, which is just not true. Over and over, the courts have said that the general antitrust laws, as applied, apply to not only price but quantity, quality, innovation. And so those are all factors that we need to be discussing more. So does a transaction lower the quality of a product and therefore address the antitrust laws? So there's also been calls about, you know, having an absolute moratorium in certain sectors or completely shifting the legal standard that we have become familiar with in a merger review, which is the substantial lessening of competition to some kind of a public-interest test.

What does it mean? Which, you know, as you can imagine, just a public interest - is this merger in the public interest? And now you're getting into a potentially vague and constitutionally vague standard if we ever go there.

FURCHTGOTT-ROTH: A government agency that has that...

DELRAHIM: You might recall, although that agency has at least had some...

FURCHTGOTT-ROTH: Yes.
DELRAHIM: ...Case law that cabins it into a way that is at least cognizable, it would be dangerous because we won't have predictability of the laws, which is really what we need to do. So I think the current laws are flexible enough to address some of the new challenges we are seeing in the general marketplace. That may not result into price effects, but look at quality and innovation and investments and other factors that goes into the consumer welfare standard. And so I have some hope. It doesn't mean we wouldn't be open to legislative changes, should they be proposed and make sense consistent with economic understanding. But to address issues that are important issues that have nothing to do with competition as part of antitrust, I think, would be misguided and lead us to an area that, you know, we have been fighting years to get out of.

FURCHTGOTT-ROTH: Let's switch gears and focus a bit on new technologies. The antitrust division has been doing a lot of work with intellectual property recently and standards-essential patents. How does - how do you think about new technologies and intellectual property in an antitrust context?

DELRAHIM: So I think the intellectual property laws are some of the most important policies that the government has provided the economy. And a lot of our leadership in technology and innovation, especially post-World War II, is the fact that we have protected investment in R&D and perhaps better than most other countries had. In 1995, you know, in the WTO, we had the TRIPS Agreement that allowed for other countries - or required other countries to at least have greater minimal recognition of intellectual property rights. Intellectual property allows you to invent and really provide competition to the customer, to the consumer. We are much better off that we have smartphones today than we had the old - you know, the Motorola track phone, the flip phones that we used to have. That doesn't mean those technologies were bad. It's just that it was a huge paradigm shift to move to what we have now, which - with a computing force that we have in our palms and has created and enabled many other elements of the economy today.

The challenge is, if we don't recognize that innovation, the consumer loses. Investment loses. That small company - the innovator loses because the incumbent will always have more power to crush out a new entrant that otherwise wouldn't be able to - that the electoral properties laws provide. And there's been a lot of debate about this, and it gets down to some nuances of whether or not patent owners can hold up for higher prices than competitive levels. And therefore, the consumer is harmed because they'll have higher prices. Or, you know, you can patent users. The licensees of technology band together and hold out the use and implementation of a new technology in a monopsonistic effect. So they get less money than the intellectual property rights would and should afford them. I'm a big fan of the markets and free market negotiation, determining what those rights should be, and certainly not about collusive activity either by the patent owner or the licensee that disrupts exactly what that licensing rate should be. A lot of the changes, a lot of the policy discussions we have had - some of the statements of interest we have filed in court goes to the heart of that. You know, Congress determines a certain balance in the intellectual property rights, and antitrust law should not be contorted to try to take away rights Congress has given to the small inventor or the big inventor - whoever has invested. Otherwise, the incentive to innovate goes away.

And it would be shortsighted to take a snapshot look at static competition and say, you know, we're going to look at this box, and if this is lower 5%, the consumer benefits without thinking about the implications of what will innovate to make this box almost irrelevant and crush the prices of those imagined. I don't know how much the market is for a Motorola StarTech flip
phone today, but I'll guarantee you it's a hell of a lot lower because of the competition provided by the great new innovations that have come in. And I think, you know, our imagination cannot be broad enough to imagine what the next level of generational technology will be, and we cannot take away that incentive. Otherwise, we lose competitiveness in this United States.

FURCHTGOTT-ROTH: As a nation, do you think we are addressing disputes in intellectual property as efficiently as we could? And what I'm thinking about is, there are different institutional processes that someone can go through to challenge intellectual property, and there's some discussion that sometimes a lot of innovation is being lost.

DELRAHIM: You know, it's a broader question of the whole legal system. You know, are we - do we have the most efficient system? Can we design a better system? And I don't really know if there is in this area. I do know in antitrust, some of the reasons we were using the arbitration process for our agency cases is to address that, because you can address it in a much more timely and efficient manner to preserve potential pro-competitive effects of a transaction while cabining the harmful effects, rather than waiting two years and even losing that transaction's potential pro-competitive effects. In intellectual property, my guess would be the same, although there has been a lot of debate over the last 10, 15 years in Congress, where there's been a number of changes done at the PTO. And I think, you know, our new leader there, Andrei Iancu, is doing a phenomenal job in ensuring that the quality of patents and that process is as good as it can possibly be. So we will see.

FURCHTGOTT-ROTH: You've also been taking some look at standards development organizations, and a lot of this has a very big effect on 5G development and new wireless technologies. Any thoughts about antitrust in standards development organizations?

DELRAHIM: So we had taken a look at - and I think we have issued a business review letter, which has gone a little bit less noticed - the impact of that - just the last two weeks. And this dealt with eSIMs. These are little SIM cards that we all find in our phones. But the eSIM - as a technology, it's been around about 10 years, believe it or not. And it's in all of our iPads and, I believe, the Apple Watches, but not in our - all of our phones. An eSIM is a way where you don't have to go to a store or buy the little card to switch; you can do that electronically. It's embedded in it, and it's done through software. Why is that good? Because, you know, a carrier could send to you, Dr. Furchtgott-Roth, we can offer you, you know, $40-a-month plan, unlimited. You can switch anytime you want - your carrier. Just press this button. Could you do that? You might be enticed to do that. You might have some real price competition. However, if your current phone prevents you from doing that 'cause you have to go and switch your phone out completely between carriers, that is not available. In Europe, it is available. So what was interesting is that it marries into the standard-setting business. So the GSMA was a - typically a trade association, began going down a path of developing a technical technological standard. Well, what was the goal of that standard is to prevent the implementation of eSIMs, an innovation that could've been fantastic as far as consumer mobility and make it a lot easier for folks to be able to be on the receiving end of aggressive pricing practices.

Well, that business review letter which said that in your future conduct you cannot do certain things you've done in the past is a great resolution. And I understand just last week - I believe Thursday - the GSMA adopted a whole new standard and did away with its previous one that allows, going forward, implementation of these pro-consumer technologies in all the new handsets, which will have real impact. But it also showed that some of the folks who were
implementing the standard - you can take a look at the quoted emails and documents in that review letter about what some went through to try to prevent the consumer from getting the benefit of eSIMs. And that's the type of standard-setting that is nefarious and is anti-competitive.

**FURCHTGOTT-ROTH:** This past summer, you and Chairman Simons at the FTC announced possible reviews or investigations of some tech platforms. Without going into any ongoing investigations or anything like that, but I was wondering if you could just tell us at a very high level of that - antitrust concerns in new technologies.

**DELRAHIM:** So this is something that is - I think many agencies, state attorneys general are looking at. We, like others, hear complaints from market participants, consumer groups, academics about the concerns about competition in some of the larger platform operators. And I gave a speech that laid out some of these concerns and some of the legal concerns in a speech. It was this summer in Tel Aviv. And I've expanded on it a little bit about, you know, do we look at non-price effects? Do we look at data? And how does data play into these concerns? You have a small group of companies that each have very high unsustainable market shares in certain markets. I, you know, don't want to talk about any specific companies, but I think a couple of companies have confirmed publicly that they have received inquiries from us. But it's an important area that I think both agencies are focusing on, partly because it affects every one of us. Every one of us are users of some of these technologies.

And as I have said and the attorney general has said, big isn't bad. And that incentive to grow market share done in appropriate ways should remain there, not punished by the antitrust laws. But if you have gained market share or are maintaining high market shares if you're a dominant player through, you know, conduct, that would violate the antitrust laws. And that's something that the antitrust enforcers should be concerned about and engage. And so we've begun a broad-base review. And we'll see where that leads.

**FURCHTGOTT-ROTH:** Is privacy an antitrust concern?

**DELRAHIM:** It's a great question. So privacy could be an element of quality. So if you don't have competition and there's a revealed preference in consumers that they would like to have this product with more privacy, but there's no ability for a new entrant to come in to provide a product that respects privacy. And that is an antitrust concern because that could be an element upon which companies will compete. However, you not providing certain privacy protections in and of itself does not become a violation of antitrust law. And we have a number of privacy regimes. We have, you know, financial privacy and health care privacy and electronic data privacy in different ways - you know, bank records privacy, credit reports privacy, driver's license privacy. We don't have a generalized privacy regime in the United States. And so that's something, I think, that is a larger policy debate between the policymaking authorities. We just enforce the law. But to the extent it's an element of the quality element of the antitrust law, it certainly can be.

**FURCHTGOTT-ROTH:** I've often argued that the antitrust division has the greatest concentration of economic thought in the federal government, certainly the greatest concentration of economists who do nothing but think about markets. Do other - and the FTC has a great concentration, as well. Do other federal agencies approach you and sort of say, we need help with understanding how markets operate in some area that they might be regulating? Or they may be purchasing goods and services in some way, and they want to understand a bit better how markets operate.
DELRAHIM: So the short answer is yes, and we do have, you know, probably the greatest group of approximately 50 or so Ph.D. economists at the antitrust division, give or take a couple based on attrition. We do provide other executive branch agencies - Department of Transportation, Agriculture, trade reps, the Council of Economic Advisers - with either, you know, details where folks get ensconced in some of those agencies. Or we'll provide some analysis for them, depending on what they are looking at. Sometimes, they may not even ask, but we might provide our views. You know, FERC is another one. But any economic regulatory agency where which there could be economic input into how they regulate the market we have been engaged in. And we have provided what we think would be our - the best analysis for their mission and what to do or what not to do in certain circumstances because it ultimately would harm the consumer. But we're proud of the economic work that comes out of the division. A lot of them produce a lot of academic research. Going forward, we have recently held a number of workshops that The Economist have been involved in - for example, antitrust and labor markets. We looked at digital advertising markets and antitrust. We looked at government regulation and competition. And The Economist played a huge role in helping us think through these issues.

FURCHTGOTT-ROTH: I could go on asking you questions all day, and that wouldn't be fair to you or to our audience that I'm sure has a lot of questions.

DELRAHIM: You don't want to punish them that long.

FURCHTGOTT-ROTH: Yes. I or I want to punish you, either. But I think we are collecting some questions from the audience. And - all right. Thank you very much. This one about health care - in managed care, how sufficient are the state review approvals when conducting DOJ investigations?

DELRAHIM: Are those state approvals?

FURCHTGOTT-ROTH: Yeah, the state reviews and the...

DELRAHIM: Well, we work closely with both the state regulatory bodies as well as the state AGs. We are dealing with several health care transactions right now - one in Massachusetts, including Harvard and Tufts. We're looking at Centene and WellCare - a few others. But we work closely with them, and, you know, sometimes, there's dual authorities upon which their results could impact our decision because it changes the market.

FURCHTGOTT-ROTH: Here's a question going back to the GSMA issue. And it says, why did you do this through a BRL rather than a binding consent decree?

DELRAHIM: Well, it was one where we - and a number of factors go into those decisions, you know? One is it will - a past negative practice - be stopped, and a new process will be put in place with our guidance. And that was a case where that occurred. And also, you know, depending on litigation risks and resources of the division and the parties, we thought that, you know, when the request came in through a business review letter to abstain from harmful conduct and accept guidance of the proper way of going forward, we thought that was the better way, and that was the part of what went into the thinking.

FURCHTGOTT-ROTH: Last week, your EU counterpart stated, with the benefit of hindsight, she wishes she would have been bolder. And there are a couple questions here that - about Google, about EU pursuing cases against Google. I don't know if you'd like to address that or if you want to dodge. That's fine, too.
DELRAHIM: No. You know, I have a tremendous amount of respect for my counterpart in Europe. I think Commissioner Vestager, who was just re-upped for another five years and also expanded her authorities, is a phenomenal enforcer. Now, they have different laws and tools at their disposal in Europe. In the United States, as many of you know, we have to go to court, bear the burden of proof, prove a case by preponderance of the evidence in a civil case; in a criminal case, beyond the shadow of a doubt. So - and then, we also don't have civil fine authority in - for violations of the antitrust laws. But we also complement that with private rights of action. In Europe, the commission can - you know, through the statement of objectives, can impose a duty, and then the court case comes afterwards. So it goes through a process. And their standard for monopolization or abuse of dominance, as it's called in Europe under section - Article 102 of the treaty there is - the equivalent to our Section 2 is a different standard and a little bit lower standard than what we have to face. So a little bit of a different legal regime between the two agencies - but as far as, you know, her wish to have been more aggressive, I'm not fully familiar.

I'd say they've been pretty aggressive in some of the matters, but also, these markets evolve. I know market shares remain, and there's some changes that, you know, you might not have done, you know, six years ago. And sometimes, as a Monday morning quarterback, you might think, well, had we blocked that transaction or otherwise, this company wouldn't be where they are. And some have raised the - you know, Facebook consider - concerns, you know? Had they not merged with Instagram or WhatsApp, you know, maybe we would have a different marketplace. And I'll leave that to the agency who is looking at those issues, but it's difficult to kind of look back in every instance.

FURCHTGOTT-ROTH: Here's a question that says that Attorney General Barr said that tech platforms should be, quote, unquote, "good Samaritans" in the context of Section 230. Section 230 is provision of the Communications Act that creates sort of a safe harbor on uploaded content that's supposedly not edited. And the question really has to do with this concept of good Samaritan. And are technology platform companies acting as good Samaritans, or is that maybe not the most exact description?

DELRAHIM: I would refer folks to the attorney general's speech. He gave a fantastic speech at the National Association of Attorneys General last week that discussed Section 230 and the department's review and interest in the issue. So I think that's - you know, it's really not an antitrust consideration, but it's one where he has raised it. And, you know, Congress recently did address some small aspect of dealing with, you know, protection of child predation where - you know, whether or not the absolute immunity made a whole lot of sense. And I think the attorney general referenced Judge Katzmann's Second Circuit dissent in a case. So I'll leave it to folks to read and decide for themselves.

FURCHTGOTT-ROTH: Here's a question that goes back in history. And it goes back to the Microsoft case, which was one of the great antitrust cases of the past 20 years. And how was it - how was that case played out? Any thoughts? Is that something that you think about back on historical cases and whether they would be done in the same way today as they were then?

DELRAHIM: I do. So we look back at that case. That's an important case for a couple of reasons. And, you know - not exactly on all fours of some of what we're looking at, but it's an important one for not only the law developed in Section 2 but also to push back on the argument that the antitrust laws were not equipped to deal with software or new technology. You might
recall that was one where they said, oh, how could there be an antitrust violation? The Internet browser is being given away for free attached to the operating system, and so how could there be a possible antitrust violation? And the courts - and a unanimous court, you know, whose chief judge at the time was no less than one of the greatest antitrust lawyers and jurists of our time in Doug Ginsburg, you know, wrote a unanimous decision on some aspects of that. I think that is - you know, continues to build on the important legacy. What's also important to note is our - my colleague and our deputy attorney general of the United States was also a litigant in that case representing Netscape at the time in that case. So we're fortunate to have, you know, leadership at the Justice Department who really understand the critical elements of antitrust law, particularly in these dynamic market economies.

FURCHTGOTT-ROTH: Here's a question about 5G and Huawei. And those are two topics that have gotten a lot of attention here at Hudson over the past couple of years. There's a lot of jockeying for position in the network equipment manufacturing market, which is a global market. And let's just say, parts of the market are very competitive, and parts are maybe not quite as competitive as they could be. Is this an area that the Antitrust Division is - and again, I don't want to get into any ongoing things, but do you think about the global markets for the development of 5G as part of the division?

DELRAHIM: So we think about them. And I'll explain how and what ways we think about them. We don't think about, you know, national championship as an antitrust issue. But we - you know, and certainly, you know, to the extent there's National Security Division issues or if the question refers to those with Huawei, I'll refer them to the National Security Division of the Justice Department and other folks at CFIUS and the Treasury Department. But as a general matter, sure, 5G is something that is going to be here, you know, within the next three years in different markets very soon. And it played into our Sprint and T-Mobile merger review, which was one that, you know, we determined that there would be harm if not remedied. And there was a lot of pro-competitive elements of that merger, which we wanted to harness and then address the anti-competitive elements and - which we did with the resolution we reached. Now, of course, the states are litigating that in Southern District of New York. This is the second week of the trial going on.

But what the pro-competitive benefits for the consumer in the development of 5G - and not just 5G in and of itself. It's the quality elements that the combined T-Mobile-Sprint will provide and compete with AT&T and Verizon - but even more importantly, the ability to compete with cable by providing, you know, wireless fixed broadband to many homes. Many homes right now will have one or perhaps, at most, two broadband providers and - or cable operator and a fiber operator. And what we studied and saw is that if we could speed up and allow for greater competition to come in, that 5G is going to be able to provide you broadband access. And that'll shift a lot of other markets rather - and not just the retail telephony, which is going to be really important. So that's one way we considered that because it's not something we can deny. It's a matter of time.

There will be a 5G. And my guess is, in many of our lifetimes, there's going to be a 6G - not a surprise to folks. The engineers who are working on these are not going to stop thinking about them and improving, which is the dynamic competition I was talking about. And we want to incentivize that because we all benefit from that. And I don't know if we know even - we could even imagine the types of innovations and consumer products and the type of connectivity
today that will come with 5G. I don't think many of us would have imagined the type of product and services we're getting now with 4G and LTE that was in place, you know, 10 years before.

FURCHTGOTT-ROTH: Is there a precedent for states going to court and overturning a DOJ consent decree on a merger?

DELRAHIM: Not that I know of and certainly not where states have gone in, where there has been a considered view of the division and a remedy to it, as well as another economic regulatory agency which Congress has given, you know, a lot of authority to in this field - so when the two expert national agencies have done so - there isn't a precedent. We will see. If there is going to be an overturning, it's going to be in the judge's hands. So what they're looking at is not the underlying merger. What I assume and hopefully that we'll be looking at as a matter of law is the underlying merger as remedied by the Justice Department review. And I've seen some press reports that it's so simplistic; this goes from four to three, but the remedy creates a fourth; why would we want to do that?

And that is just a very sophomoric reading of what the transaction provides, partly because, as you understand it better than most, is that all of a sudden with this remedy, you're going to have 200 megahertz of very powerful mid-band, low-band frequency that is not being used put into work and create additional competitive forces on AT&T and Verizon, perhaps, to also catch up real fast. So the pro-competitive efficiencies here are cognizable, they are real, and they should be considered. And we will see what happens in the Southern District of New York. I've been very impressed with the judge's attention in that trial as I've been getting the daily reports of that, and I've been paying very close attention. So I think the judge has been paying good attention and asking important questions. It seems like he's really understanding the transaction.

FURCHTGOTT-ROTH: Final question - if you look at the largest corporations in America today, none of them existed a generation ago. And they operate in markets, many of which didn't exist a couple years ago. It must be a daunting task to keep track with understanding markets that are, I would argue, changing more rapidly than they have in the past. And how do you do that? Is that something that, whether it's in electronic technology or pharmaceutical technology or financial technology - there's all of these new types of services that have created new markets. And the Antitrust Division needs to understand how these operate to understand competition in those markets. How do you do that?

DELRAHIM: Well, it is. At some level, it can be daunting except for when you, you know, focus on, what is it that we do at its core? As an antitrust enforcer, we're law enforcers. We enforce what Congress has given us, not what we wish a market could look like. We are policing, really, fair markets, you know, free from cheating, you know, cheating by collusive activity, cheating by somebody who is a monopolist. And we are not here to pick winners and losers. We let the market decide whether or not, you know, VHS or Betamax wins. It's not our job to put in - there's a lot of folks, you know, who get paid - they're elected and usually have certificates of election - to say what the world should look like, and sometimes, they'll introduce legislation to do that. Our job - it's really important for us to know the limited role - and that humility is important - of what we do.

We just police the markets, let the market win. And I think that is the most significant thing for us to do to allow the progression to take place, for that benefit. And if we can prevent monopolists from blacking out a market where there's no investments because of their activity for that next generation or new competition to that or enforce against - you know, collude - folks who engage
in collusive activity to fix prices, divide up the markets, divide and allocate customers, which they go to jail for - then we have done our job and let the system win. It's not our job to determine whether blockchain is a success or artificial intelligence goes faster or not. It's just to allow those markets and the market economy function properly.

FURCHTGOTT-ROTH: Well, with that, thank you so much...

DELRAHIM: Thank you.

FURCHTGOTT-ROTH: ...Assistant Attorney General Delrahim.

DELRAHIM: Thank you for having me.

FURCHTGOTT-ROTH: It's been an honor to have you.

: (APPLAUSE)

DELRAHIM: Thank you so much.

: (APPLAUSE)