DEPARTMENT OF JUSTICE

Remarks as Prepared for the Chatham House Conference on "Politicization of Competition Policy –Myth or Reality?"

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I'd like to thank Dr. Niblett for the invitation to address this distinguished group of fellow enforcers, legal practitioners, and academics. It is a pleasure to be here, in London, at the Royal Institute of International Affairs. For nearly a century, Chatham House has been promoting the exchange of ideas and discussion relating to international politics, economics, and law. The resulting competition of ideas has done much to advance the Institute's goal of helping to build a sustainably secure, prosperous, and just world.

Today's conference poses the question: "The Politicization of Competition Policy: Myth or Reality?" Let me offer some observations on this question based on more than a few years in and out of public service, and as a witness to the evolution of competition policy in the United States and around the world.

My first point is pretty basic. Competition policy and competition enforcement succeed where they are based on an unwavering commitment to the competitive process and to protecting consumer welfare. Enforcement decisions need to be fact-based, analytically sound, and legally grounded.

When competition enforcement stays tethered to those principles, decisions have a certain predictability and credibility. If competition enforcers stretch to advance non-competition goals, we risk losing our hard-earned legitimacy. We must not wield our substantial enforcement powers to protect or advance certain competitors or industries. We must call it like we see it, without undue influence from any quarter. Our focus needs to be on ensuring that consumers benefit from a vibrant competitive process.

Of course, this commitment to sound antitrust enforcement must be paired with transparency and due process. If we don't explain our analysis to the parties we are investigating, how will they have confidence that our enforcement decisions are indeed based on the facts and sound economic analysis? If we don't provide actionable guidance to the broader business community, how will corporate executives have confidence that they will receive a fair hearing before the agencies? If we do not articulate plainly and clearly how our actions benefit consumers and competition, we miss an important opportunity to show how and why we make a positive difference in our respective jurisdictions.

During my time – some would characterize it as my considerable time – as an antitrust lawyer, I have seen the U.S. move in the direction of a more coherent and consistent approach to competition enforcement. Antitrust officials – whether Republican or Democrat, whether at the Department of Justice or the Federal Trade Commission – have pursued fact-based and analytically sound enforcement, and demonstrated a commitment to transparency and fair process. This consistency in approach has bred confidence in antitrust enforcement and engendered a growing consensus on core issues of competition law.[1]

One key benefit of this trend is that competition enforcement is increasingly viewed as non-partisan. My friend, former Republican FTC Commissioner Tom Leary, noted a decade ago that while reasonable people may differ at the margins, there is, "a broad mainstream consensus on the basic approach to antitrust issues."[2] Over time, this

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[1] *See* RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001) ("Almost everyone professionally involved in antitrust today—whether as a litigator, prosecutor, judge, academic, or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.").

[2] Thomas B. Leary, The Bipartisan Legacy, Speech delivered at the American Antitrust Institute's 6th Annual Conference, Washington, D.C. (June 21, 2005), at 1, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/bipartisan-legacy/050803bipartisanlegacy.pdf.

basic agreement on core antitrust values has diminished the role politics plays in influencing the outcome of specific law enforcement decisions. Said another way, enforcement in the U.S. today is less of a political football than at any time in its history. It can be seen in the evolution of the U.S. Horizontal Merger Guidelines – perhaps the single most important competition enforcement policy statement in the modern era of antitrust enforcement. The core of those guidelines dates to the 1980s and the Reagan Administration. Since that time, they have been updated repeatedly by enforcers from both political parties. But, rather than changing dramatically with each new update to reflect the politics of the day, these revisions have gradually adjusted merger guidance to reflect widely accepted advances in mainstream antitrust law and economics. They reflect consensus between the Department and the FTC, and between Republicans and Democrat alike. The most recent 2010 revisions, like the 1997 revisions before them, were approved by unanimous 5-0 votes in the bipartisan FTC.

Let me be clear. While a focus on consumer welfare has diminished the extent to which political considerations in the U.S. affect law enforcement outcomes, political pressure is still there. We should expect that. Competition results in winners and losers. A lot of money is at stake. Regardless of the size of the transaction or market at issue, firms will continue to attempt to use various means – some legitimate and some not – to preserve or obtain a competitive advantage.

One recurring fact pattern where these pressures can be particularly pronounced occurs when disruptive innovation challenges the continued dominance of incumbent competitors. These situations are increasingly common. We live in an era of unequaled innovation; and the pace of that change seems to be accelerating. A recent OECD discussion paper references a study that found that it took 75 years for the telephone to be adopted by 100 million users after its launch in 1878. In contrast, mobile phones hit the same mark in just 16 years, and the World Wide Web achieved that level of ubiquity in just 7 years. These revolutions in communication technologies have, in turn, facilitated the rapid adoption of other innovative products, from iTunes to Facebook.[3] They have also enabled the rapid dispersion and acceptance of new business models – epitomized by Uber, Airbnb, and other peer-to-peer commercial platforms.

Innovation can be the means by which new or emerging competitors gain a foothold in a crowded marketplace. By pioneering a new product or business model, an entrant can hope to overcome the brand recognition, established relationships, scale, and other advantages enjoyed by many incumbent firms. Consumers invariably are the ultimate winners. Economists have long recognized that these types of innovations are responsible for the lion's share of economic growth and advances in consumer welfare.

Of course, innovation often poses a threat to incumbents. As the adoption of new technologies and business models accelerates, incumbents recognize that they can no longer depend on traditional barriers to entry to maintain market share and healthy profits. When threatened, incumbent firms have a natural tendency to look for ways to protect their revenues and margins.

How do incumbent firms respond? In many cases incumbents choose to compete on the basis of price or quality. They invest in the R&D necessary to develop innovative, next-generation products – even at the risk of cannibalizing their own sales. Competition

[3] *See* Organization for Economic Co-Operation and Development, Hearing on Disruptive Innovation, Issues Paper by the Secretariat, at 5 (May 28, 2015), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP%282015%293&docLanguage=En.

has driven many of the world's largest companies to instill a culture of innovation. When incumbents react to disruptive competition by redoubling their commitment to innovation, consumers win.

But we also know that in the face of new challenges some incumbents respond in ways that do not promote consumer welfare. Some resort to conduct that violates the antitrust laws. As a law enforcement agency, the Department's foremost obligation is to detect and challenge such conduct – including actions that raise barriers to entry or expansion by disruptive competitors.

The e-books conspiracy involving publishers and Apple is an example of incumbents colluding to thwart a disruptive threat to the status quo. In 2007, Amazon began offering an innovative new e-books reader and a disruptive low-price pricing strategy. Its business model, quickly embraced by consumers, posed a threat to traditional book publishers, who believed that in the long-term Amazon's $9.99 price point for e-books would "erode prices for all books, thereby threatening the business model for the publishing industry."[4] By conspiring with Apple, which was seeking a fail-safe way to enter the market, five major publishers and Apple reached an agreement to drive the industry to an agency sales model and seize back control over and raise retail pricing of e-books. The Department successfully challenged this conspiracy to quash Amazon's disruptive business model, forcing the defendants to terminate the contractual agreements they had used to effectuate the conspiracy. Since then, Amazon's disruptive business model has continued to stoke competition in the e-books marketplace.

Incumbents also may attempt to block new forms of competition or new competitors by imposing restrictive contract terms on customers or suppliers. The

[4] *United States v. Apple*, 952 F.Supp.2d 638, 649 (S.D.N.Y 2013), appeal filed, No. 13-3741 (2d Cir.).

Department's recent successful enforcement action against American Express, Visa and MasterCard challenged restraints the major credit card companies imposed on merchants restricting them from steering consumers to competing credit cards or other forms of payment. After Visa and MasterCard settled, the Department went to trial against Amex. The district court agreed that Amex's rules eliminated the incentive for credit card companies to compete on the basis of price. Moreover, the district court also found that the rules made it "nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks" and that the rules were "responsible for impeding development of novel payment solutions" that would have led to greater diversification and competition.[5] When the court's injunctive remedy takes effect, competition – rather than contract restrictions – will determine the commercial success of disruptive new strategies.

An incumbent may also eliminate a disruptive threat by buying it. The Department confronted this in the wireless space with AT&T's attempt to acquire T-Mobile in 2011. T-Mobile was responsible for numerous innovations in the wireless industry and was committed to a disruptive strategy.[6] It vowed to "attack incumbents and find innovative ways to overcome scale disadvantages," to champion the customer, and "breakdown industry barriers with innovations."[7] These disruptive tactics featured prominently in the Department's legal challenge to the merger. The Department's complaint predicted that "by eliminating T-Mobile as an independent competitor the

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[5] *United States v. American Express*, 2015 WL 728563, *55, 60 (E.D.N.Y 2015), appeal filed, No. 15-1672 (2d Cir.).
[6] Second Amended Complaint, ¶28, *United States v. AT&T*, No. 11-01560 (D.D.C.) (filed Sept.30, 2011). *available at* http://www.justice.gov/atr/cases/f275700/275756.pdf.
[7] *Id.* ¶ 31.

transaction likely [would] reduce innovation and product variety."[8] Today, more than three years after AT&T abandoned its bid, T-Mobile remains a disruptive force for change. Characterizing itself as the "Un-Carrier," T-Mobile declares that it is "redefining the way consumers and business buy wireless services through leading product and service innovation." [9]

Mergers can also be problematic where they further entrench incumbents, enhancing their incentive and ability to block innovation. The Department's opposition to Comcast's proposed acquisition of Time Warner Cable is a case in point. The Department was concerned that the transaction would leave Comcast with close to 60 percent of all high-speed broadband subscribers in the United States, strengthening its ability to block the adoption of innovative products, including "over-the-top" video services that threaten the traditional cable business model. Comcast's decision to abandon the transaction has cleared the way for future innovations that seem poised to transform how consumers interact with video and other online content.

While the Department's approach in each of these cases was merits-based, each encountered significant political headwinds. Apple, American Express, Comcast, and AT&T are among the largest, most valuable, and respected companies in America. And these incumbents have the resources and the right – and it is important to acknowledge and respect this legal right – to spend millions on public relations and lobbying campaigns. I leave it to others to decide whether this is money well spent. I am confident, though, that the Department's recent enforcement decisions demonstrate that it

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[8] *Id*. ¶ 38.
[9] T-Mobile US, Inc., "Company Fact Sheet", *available at* http://newsroom.t-mobile.com/content/1020/files/TMUS%20Fact%20Sheet_4_28_15%281%29.pdf (last accessed June 12, 2015).

will not be swayed by public opinion, professional pundits, or political influence. And, where we are able to demonstrate that the facts and law are on our side, the courts will support our law enforcement challenges. The Department's landmark monopolization suit against Microsoft illustrates this. Even in the somewhat unsettled legal area of dominant firm conduct, seven judges of the D.C. Circuit Court of Appeals issued a unanimous decision that upheld the key liability determinations against Microsoft for maintaining its monopoly in the operating systems market.[10]

We also often see threatened incumbents attempt to protect their commercial interests by distorting regulatory processes and outcomes. But, when government intervenes in free markets at the behest of private interests, competition and consumers are rarely the winners. Unwarranted occupational licensing requirements, unjustified health and safety regulations, and time-consuming permitting requirements can all act as effective barriers to entry – insulating incumbents from disruptive competition and preventing new products and business models from reaching consumers.

In recent decades, the United States has witnessed a trend away from government regulations that unnecessarily restrain competition. In our role as advocates for the competitive process, the Department and other antitrust authorities have contributed to the effort to deregulate many markets. And, where there is a need for continuing market regulation, the Department regularly advises federal agencies about competitive implications of regulations, particularly where incumbents have accumulated significant control over scarce public resources. In the wireless industry, for example, we have supported changes to the rules governing Federal Communications Commission auctions of an essential input to effective competition – wireless spectrum – to ensure that smaller,

[10] *See United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

disruptive firms are not blocked by the leading carriers from obtaining the spectrum they need to compete.[11] And, in the airline industry, we have urged the Department of Transportation to allocate take-off and landing slots in a manner that ensures that low-cost airlines can enter and compete for business at capacity constrained airports.[12]

In the U.S., our state action doctrine leaves some anticompetitive actions by states beyond the reach of federal antitrust enforcement.[13] In those cases, or where advocacy offers a more efficient means of preserving competition, the Department works to educate state authorities about the anticompetitive potential of state laws and regulations. For example, in the health care sector, the Department has advocated for the elimination or reform of state certificate of need regulations. These regulations can stifle competition and innovation in health care markets by prohibiting entry unless a potential entrant demonstrates that there is an unmet need for the medical service at issue. The Department has also worked to repeal state regulations that block innovation in real estate markets, including rules that bar brokers from offering less than a specified list of "minimum services" or from rebating sales commissions. Finally, we have repeatedly challenged unjustified occupational licensing regulations, which some observers have characterized as cartels by another name.[14] These regulations, which now affect nearly a third of the U.S. workforce, have been shown to drive up consumer prices, often without

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[11] *See Ex Parte* Submission of the United States Department of Justice, In the Matter of Policies Regarding Mobile Spectrum Holdings, Federal Communications Commission Docket No. 12-269 (Apr. 11, 2013).
[12] *See e.g.*, Comments of the United States Department of Justice, Docket No. FAA-2010-010 (Mar. 24, 2010) available at http://www.justice.gov/atr/public/comments/257463 htm and Reply Comments of the United States Department of Justice, FAA Docket No. FAA-2010-0109 (April 5,2 010), *available at* http://www.justice.gov/atr/public/comments/257467.pdf.
[13] Helpfully, a pair of recent Supreme Court decisions in actions initiated by our partners at the FTC has clarified the narrow limits of the state action doctrine, particularly where conduct is undertaken by market participants or local government entities. *See North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015); *FTC v. Phoebe Putney Health Systems, Inc.*, 133 S.Ct. 1003 (2013).
[14] *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U.Pa.L.Rev. 1093 (2014).

a corresponding health or safety benefit.[15] The Department – frequently in coordination with our partners at the FTC – engages in competition advocacy at the state level, supporting repeal of unwarranted occupational licensing regulations in a variety of professions.[16] As at the federal level, we remain committed to engaging with state authorities to help them distinguish between legitimate health and safety regulations and unjustified protection of the status quo.

As competition authorities, our mandate is to ensure that marketplace winners and losers are dictated by the competitive process – undistorted by either anticompetitive conduct or attempts to manipulate the instrumentalities of government to achieve anticompetitive ends. Our ability to enforce and to advocate is anchored in our credibility. We need to act – and be perceived as acting – in a consistent, coherent and transparent fashion.

So long as enforcement agencies are guided by these principles, we will retain our credibility with judges and parties, as well as with legislators and regulators. And, if we faithfully discharge our obligations without bias or favoritism – without twisting competition principles to achieve politically desired outcomes – we will find ourselves in a good place. We will ensure that the disruptors, the innovators, and the revolutionaries will be able to compete and will continue to drive advances in consumer welfare that are crucial to the long-term health and growth of our economies.

Thank you for the privilege of being with you today.

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[15] *Id.* at 1096, 1112-17.

[16] *See e.g.* Letter from Department of Justice and Federal Trade Commission officials to Rep. Paul Kujawski, Massachusetts House of Representatives (Oct. 6, 2004), *available at* http://www.justice.gov/atr/public/comments/205772 htm (supporting revision to Massachusetts laws to permit non-attorneys to perform certain real estate settlement services in competition with attorneys.)