

Interview with Renata Hesse, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Editor's Note: Renata B. Hesse is Deputy Assistant Attorney General for Criminal and Civil Operations at the U.S. Department of Justice's Antitrust Division. From November 16, 2012, until the confirmation of Assistant Attorney General Bill Baer, Ms. Hesse served as Acting Assistant Attorney General for the Antitrust Division. She joined the Antitrust Division in March of 2012, having previously served as Senior Counsel to the Chairman for Transactions at the Federal Communications Commission, where she oversaw the Commission's investigation of AT&T's proposed acquisition of T-Mobile, and as a partner in the Washington, DC office of Wilson Sonsini Goodrich & Rosati from 2006 to 2011. In this interview with The Antitrust Source, DAAG Hesse discusses patent holdup and other antitrust/IP issues, the recent victories in the American Express and Bazaarvoice litigations, the DOJ's relationship with the FTC, and the Division's approach to merger review. This interview was conducted on March 17, 2015.

THE ANTITRUST SOURCE: Let's start with a topic in which you've been very visible—the intersection of antitrust and intellectual property. How has the Supreme Court's decision in *Actavis* influenced how the DOJ thinks about the relationship between antitrust and intellectual property?



RENATA HESSE: I should first note that the FTC typically takes the lead in antitrust enforcement in the pharmaceutical industry, so the decision is likely to impact the FTC's enforcement activity more than the Division's in the first instance. That said, we're obviously watching developments in this area and considering potential impacts of the decision outside of the Hatch-Waxman context. In fact, as the Acting Assistant Attorney General at the time, I had the privilege of signing the government's Supreme Court brief, along with the FTC and the Solicitor General, which was a thrill.

The case itself is interesting in that the Court recognized that it's conceivable that there's a competitive mechanism here that's being harmed and we should let people explore that by applying the rule of reason. The Court didn't provide detailed guidance about how lower courts should apply the rule of reason in this context. So part of what we're going to want to watch is what the district courts do with that, and what the implications of those cases are for our work. But I don't expect a direct impact on us.

More generally, everybody is, and for a long time has, struggled with this intersection point between two bodies of law that to my mind are very coherent and work together to foster innovation and protect consumer welfare. Ultimately, I believe that they are not in tension with one another. Rather, it's sort of two sides of the same coin driving towards more innovation and more benefits for consumers. They just get to that endpoint in slightly different ways.

ANTITRUST SOURCE: Between the Supreme Court's decision in *Actavis* and the United States Trade Representative's disapproval of the ITC's exclusion order in the *Samsung v. Apple* ITC litigation, do you think there has been a bit of a rebalancing of the relationship between antitrust and intellectual property?

RENATA HESSE: I think that's right. Think about the IP laws and the very narrow ways in which the use of IP can be found to be an antitrust violation. That list has been very, very small for a very long time. What we're seeing recently is an acknowledgment that while an IP right is incredibly important and paramount when it's unencumbered, IP rights can nevertheless also be used in ways that harm competition and consumers.

So, I wouldn't say it's tipping in favor of antitrust but rather that things are moving toward something that is closer to a better balance between the two. Of course, some of the patent lawyers who I interact with have been more than willing to tell me that they take a different view of these developments.

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ANTITRUST SOURCE: Let's talk about the DOJ's Business Review letter to the Institute of Electrical and Electronics Engineers, in which the DOJ took the position that it was not likely to challenge this organization's IPR policy, which, among other things, recommends consideration of the smallest saleable unit when defining a reasonable rate and states that a reasonable rate shall not reflect the value of the standard. Can you talk about the DOJ's current thinking on when conduct related to licensing terms may violate the antitrust laws?

RENATA HESSE: We continue to look at that issue. We haven't done any enforcement in that area, although we have done a lot of competition advocacy.

In the cases that have happened in the past—*Rambus, Unocal, Dell, Qualcomm/Broadcom*—there's some element of deception at the standard-setting body and people have relied on that element of deception to say that the competitive process when the standard was being set was perverted so that that competition between technologies vying for inclusion in the standard was harmed. And that's been the hook for the antitrust laws.

But I've said before that under some circumstances there likely is the potential for a Section 2 violation even in the absence of deception at the time the standard was set. So, say you don't engage in deception in the standard-setting context and you make a FRAND commitment that you intend to abide by. Then, five years later you decide that you really need some additional revenue, whatever the reason is. And suddenly FRAND doesn't mean quite the same thing that you let people think it meant when they agreed to include your technology in the standard.

The end result to the consumer is the same, and the holdup, in my view, is the same. So, while it's analytically a little bit more challenging, I've often said I would love for people to think about it and bring us fact patterns that they think merit enforcement under Section 2. I do think the consumer welfare effect ends up being equivalent, and that says to me that if we can find a fact pattern where we feel like we can show harm to consumers, we shouldn't shy away from that.

ANTITRUST SOURCE: Then what would be the right way of thinking about market or monopoly power in that context?

RENATA HESSE: In that situation you would be talking about monopolizing or exercising market power in the upstream technology markets. And, depending on the facts you could also find market power in the downstream market. But if you're thinking about what's happening at the standard-setting level then you're thinking about upstream.

ANTITRUST SOURCE: What is the DOJ's current thinking on bringing antitrust cases where standards-essential patent holders are pursuing injunctive relief?

RENATA HESSE: U.S. federal courts have made a lot of progress in this area. It's pretty well settled under *eBay*, and the cases that have followed it, that the likelihood of getting an injunction on a standards-essential patent subject to a FRAND commitment in the United States is pretty low.

We're still watching the ITC's approach to exclusion orders, but in district courts I would not expect to see a lot of injunctions being issued.

ANTITRUST SOURCE: Since the only remedy at the ITC is injunctive relief does that mean that any standard-essential patent holder who files suit at the ITC against a patent infringer is essentially engaged in an anticompetitive practice?

RENATA HESSE: No. Obviously, this is going to depend a lot on what's going on in the negotiations. What the Administration has said through Ambassador Froman is that you've got to look carefully to see what's actually happening in these negotiations.

As I said the other day on a panel, you have these two polar extremes in this debate. On the one hand, there are certain patent holders who say people are holding out on me, they're not negotiating with me. And on the other hand, there are certain implementers who say I'm being held up.

I inhabit the middle ground in this debate. First, it's important that we all recognize that both patent holders and implementers (who often have substantial patent portfolios of their own) are innovators. I don't think one group can rightly claim that title. Second, it's my view that we're in the midst of a transition or perhaps at an inflection point. There are a lot of different things going on that are causing there to be a real imbalance in the expectations of the potential licensors and potential licensees over the value of the patents. And what both the Division and the courts have done has been to provide at least a framework that people can use to think about how those negotiations should go.

I expect that eventually we'll come out of this to a world where once again parties go into a negotiation and everybody has kind of the same idea of what the value proposition is when you're negotiating for royalties.

ANTITRUST SOURCE: What is your current thinking on the framework that governs determining when parties cross the line in licensing negotiations?

RENATA HESSE: The factors discussed in the Joint DOJ/PTO Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments reflect our current thinking. Last summer, the Division also participated with others in the Administration in crafting the U.S. contribution to the Telecommunications Standardization Advisory Committee to the International Telecommunications Union (<http://www.nist.gov/standardsgov/upload/T13-TSAG-C-0043-A1-r1-E.pdf>). That submission lays out a useful framework and provides explanatory text that reflects our approach to these issues. I'll note, though, that it was created in a context—the ITU—where it would apply outside of the U.S. so it does not line up perfectly with current U.S. case law. Instead, the submission tried to accommodate the law of jurisdictions that approach the IP/antitrust intersection differently than the U.S. But those are the two places where you can see a public position on this issue.

What I personally have been looking for are situations where it's pretty clear that the licensee is willing to pay a reasonable royalty and what's really going on is that the parties just can't agree on how much the license is going to cost.

So, they're willing to pay. They're not bankrupt. They're not causing you to chase them all over the world, and you just are having an argument over money. Where you're effectively having an argument over the royalty—that does not seem to me to be the place for an injunction.

ANTITRUST SOURCE: One of the points in the IEEE Business Review letter is that if a patent holder does not like the policies of a standard-setting organization then they can simply go to another. Do you think that's realistic given how large some of these institutions are—for example, IEEE has 400,000 members in 160 countries?

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RENATA HESSE: So, here's what I think. There probably should be competition among standard-setting organizations for setting rules and policies that people think are best suited to their licensing needs. So it's good for standard-setting organizations to experiment with different solutions as driven by their members and governing bodies.

Whether or not people will vote with their feet I don't know. I mean there is at least one company that has publicly said it will. So, we'll watch and see what happens.

To me it's going to be interesting to see what happens with the IEEE policy and what impact it has because I can't really predict that. I do believe that it's a good thing that the policy gives people a little bit more certainty about the framework that they're working in.

ANTITRUST SOURCE: FTC Commissioner Wright commented last month that the IEEE Business Review Letter was more a reflection of policy choices than legal analysis. What is your reaction to that?

RENATA HESSE: I have to say I'm a little confused by it, to be honest. I understand that Commissioner Wright may not hold the same policy views that the Division holds in this area. But, the business review letter was not an endorsement of any particular policy solution. It was an answer to a pretty narrow question, which is whether or not the Division would be likely to take an enforcement action if the IEEE adopted the proposed patent policy. In any event, I believe that Commissioner Wright has said that our business review letter reached the right answer.

So I'm not exactly sure what he's quibbling with, other than maybe he thought our application of the reasonableness analysis had some policy orientation in it that he found inappropriate. But the business review letter is a pretty straightforward application of the rule of reason to the particular provisions that we were asked to review.

ANTITRUST SOURCE: Do standard-setting organizations need to adopt an IPR policy and one perhaps that is in line with the IEEE to limit their antitrust risk?

RENATA HESSE: No. We have been very open about encouraging standard-setting organizations to clarify the meaning of RAND or FRAND depending on where you are in the world. And I think it would be a good thing for the marketplace if people did that. It will bring some certainty to this world we were talking about before, where people are coming to the table with very different points of view on what the value of a given patent is. And clarifying FRAND and what it means and clarifying what "reasonable" means will help.

And the sooner people get to a point where they're both speaking the same language the better, because we'll have fewer disputes and consumers will not suffer from either hold up or hold out, depending on which you choose to believe is going on.

So it would be a very good thing for SSOs to do, and I'm hopeful that people will continue in their efforts to do it, but I certainly don't think there's one answer for all SSOs. And I don't necessarily think that the IEEE answer is the right answer for others. I think it is an answer and it's the one that the IEEE Board and its members thought was the right one for that organization.

ANTITRUST SOURCE: This is an issue that you've been very invested in personally. Why is that?

RENATA HESSE: I actually started out as an IP lawyer, and so this has always been an area that's been of interest to me. I also have historically worked a lot in the technology sector and the telecom sector in particular. As a consequence, this was a subject matter that was innately interesting to me and an industry sector that I was familiar with. And I kind of like it; it's fun and interesting and it's important. But I don't have a personal agenda here, other than trying to ensure that consumers get the benefits of competition and do not see higher prices or less innovation as a result of conduct that harms competition.

ANTITRUST SOURCE: Switching gears to another recent development, the Division recently had a significant win in the *American Express* case. In that case, the DOJ prevailed on a theory where it alleged that American Express had market power based in part on the fact that it had 26 percent of the general purpose credit card market. What are some of the lessons that can be learned from the court's decision in that case?

RENATA HESSE: First I should say that I didn't participate in the matter, so I'm going on public information. To me, the biggest thing that the case says is that competitive effects matter. If you have a company that has the ability to exercise a significant amount of market power even though they have a market share in the 25 percent range, that's still going to be important.

ANTITRUST SOURCE: In cases where a firm's market share is less than one might traditionally think of as creating market power, what is the DOJ's approach to analyzing market power? Is there specific conduct or effects that you look for?

RENATA HESSE: I don't really think so. I tend to think that we approach most of these cases in the same way. In terms of unilateral conduct, we're looking to see whether the facts show that there is an exclusionary mechanism that allows a company to exert power over output or price.

Certainly with lower market shares you could spend some time grappling with that issue and testing the proposition of market power, but I don't think we approach the investigation differently or look for different kinds of things.

ANTITRUST SOURCE: You have mentioned the role that economics plays in your decision-making. Can you talk about the role that the Economic Analysis Group plays in your case evaluation and investigations?

RENATA HESSE: They are a phenomenal resource. When I left the Division after my first tenure here, I was so sad to leave behind colleagues in EAG who I'd worked with a ton, and who I could just pick up the phone and call. They are with us in every matter from the very beginning and are extremely well integrated into our teams. They and their analyses form a core part of our decision-making process.

And Nancy Rose, our new economic DAAG, is terrific to work with. Unless she's recused, she is part of every significant decision we make. All of the lawyers at the Division rely on EAG to help us figure out whether or not what we're thinking from a legal perspective actually makes sense from an economic perspective.

In today's world, the role of economics has become so significant in both the merger and the non-merger contexts, and sometimes in the criminal context too. If the economists are questioning whether the conclusion that the legal staffs are coming to is the right conclusion, that is an important signal that we need to slow down and think hard about what we're doing.

ANTITRUST SOURCE: Let's shift to the DOJ's win in the *Bazaarvoice* litigation. There, the DOJ successfully pursued a case based on a theory that relied in part on the fact that the merging parties were each other's closest competitors. Is there an increased focus now in looking at mergers through the lens of closest competitors?

RENATA HESSE: I don't think we have increased or changed our focus. I should mention that I didn't participate in the Division's enforcement action against Bazaarvoice. But we are always looking to try to find an answer to the question of how close the competition is between the merging parties. That's something we were definitely focused on during my previous tenure with the Division. So I don't think there's something new there.

I'm trying to think about *Bazaarvoice* and whether there's a lesson there. It is clear from the public information that in that case you have some pretty bad documents that were created in the regular course of business. They can tell you something important about the closeness of competition even where some customers might say that there are substitutes or that they aren't worried about the consolidation.

I'm going to transition a little bit from the question you asked to another more general point about the case. If you look at those documents and you look at the structure of the market, it leads one to wonder why the companies thought the deal would survive antitrust scrutiny. And you could say the same thing about *NCM/ScreenVision*, which was the recently abandoned movie screen advertising case.

Both of those cases are illustrative of the point that when companies are in the board room thinking about strategic deals—and which ones are likely to pass muster and which ones aren't—people should think about those two cases and consider whether or not the transaction they are contemplating might fall into that same category.

ANTITRUST SOURCE: Is there a temptation in a case like *Bazaarvoice* when you see such bad documents to pursue a case just based on the bad documents alone? Can you talk about other factors that you consider (if any) in a case with bad documents?

RENATA HESSE: First, we don't just say oh, bad documents let's go sue these people. And as I recall—and again I was not working on it—the Division did a lot of work on the *Bazaarvoice* matter before we decided to challenge the deal.

There is always a desire on our part to make sure that what we're doing is the right thing and to fully vet that conclusion in as many ways as we can. As I mentioned, consulting with the economists in EAG is a key part of that vetting. And I know that our staff attorneys and economists take seriously their obligation to reach the right outcome.

And, in the Front Office, we do another round of poking and prodding. We have a lot of meetings with the staff. We do a lot of looking at memos and economic analyses. We review party doc-

uments and depositions, and think hard about whether or not invoking the power of the U.S. government is the right thing to do in a particular circumstance. It is important that we never forget that the power we wield is very, very significant.

Everyone at the Division understands that and takes that responsibility very seriously. So, no, we try not to get carried away just because there are some nice documents.

ANTITRUST SOURCE: After the 2004 loss in *Oracle/PeopleSoft*, the DOJ went quite a long time without litigating a trial until the 2011 win in *H&R Block/TaxAct*, which appears to have really reinvigorated the DOJ's approach to litigation. Why do you think the Division has become so active from a litigation standpoint? Is it willing to take more risks?

So maybe part of the answer to your question is that we are seeing more activity where there are arguments on both sides and each side believes that it is right on the merits and that a settlement isn't possible. And, at the same time, we could also be seeing more transactions where companies believe it is worth taking a shot at getting them through, even if that means

RENATA HESSE: It's an interesting question. First, most of the cases we take to trial are not easy cases because the easy cases are either abandoned or settled or we don't challenge them. As a consequence, the cases that we do try are usually the challenging ones. So maybe part of the answer to your question is that we are seeing more activity where there are arguments on both sides and each side believes that it is right on the merits and that a settlement isn't possible. And, at the same time, we could also be seeing more transactions where companies believe it is worth taking a shot at getting them through, even if that means going to court—as was apparently the case in *Bazaarvoice* and *NCM/ScreenVision*.

Second, *Oracle/PeopleSoft* was one of my cases, and I've thought a fair amount about whether or not losing that case caused people to step back and think twice about litigating. It's inevitable that, when you lose a case, it does make you stop and think about whether or not you've been thinking about mergers the right way. That kind of introspection or reexamination is a good thing in my view. I think the Division did spend some time after that case thinking through how we look at unilateral effects and becoming a bit more rigorous about how we explain the economics and present our evidence of unilateral effects. You can see some of that work in the 2010 revisions to the Merger Guidelines.

We've also redoubled our efforts to make sure that when we go to trial people take us seriously and understand that the threat of litigation is real and that we can and will maximize the possibility of winning. Over the past six years or so, we've taken steps to strengthen our litigation capabilities. We have created two new senior positions. Mark Ryan has been our Director of Litigation and Dave Gelfand is our Litigation DAAG. Part of what those guys do is spend a lot of time working with the teams, helping them to assess whether litigating is the right thing to do and deciding how we will litigate the case if that is what we decide to do. They've also been great at training people and working with people to enhance both our pre-litigation skills and also our litigation skills. So we've gotten better at it. And we've been winning, and that always helps.

ANTITRUST SOURCE: What is the DOJ's current thinking about the role of customer testimony in a merger case? Has your approach evolved since *Oracle/PeopleSoft*?

RENATA HESSE: I don't think so. I have always felt, and I continue to feel, that customer testimony is very, very important. But the quality of the testimony is also very important. For example, hundreds of one-paragraph declarations solicited by the merging parties may not be terribly persuasive. But there are often customers who understand the relevant market and how competition works, and who can explain in a concrete way how the loss of competition that a merger will cause will harm their ability to obtain better products and/or better prices. That kind of testimony means something to us, and it should.

When customers are worried about a transaction we should pay a lot of attention to that. At the same time, we can't simply take customer testimony at face value. We need to test the factual basis of their concerns. So we have to be careful about vetting what customers are saying and making sure that their testimony and their views are demonstrative of harm to competition and not just reflective of a desire to get a better deal out of the merging parties.

And we do a good job of that. I don't think that's changed very much. We continue to talk to customers routinely and we continue to take their views seriously and that's the right approach. The judge's discounting of the customer testimony in the *Oracle* case was unfortunate because that testimony reflected a well-founded competitive concern.

ANTITRUST SOURCE: How do you think about time horizons in the merger context? Is the default still two years?

RENATA HESSE: Well, the 2010 revisions to the Horizontal Merger Guidelines removed the specific reference to a two-year horizon for entry. In many cases, though, two years turns out to be a reasonable time horizon. But there isn't a bright line here, where if you're at one year and 364 days you get counted and if you're two years and 25 days you don't get counted.

There is a certain amount of discretion and judgment that we use in terms of trying to figure out when we're going to take factors like entry into consideration. So it doesn't surprise me that there have been situations where people have looked at longer or even shorter time horizons.

It's going to depend a lot on the marketplace, the ways we think the market is going to move, how much harm we think is going to happen in the interim. We try to be as transparent as possible about our approach to these issues.

ANTITRUST SOURCE: Continuing with mergers, let's talk about timing agreements. In several recent investigations that we are aware of, the DOJ has asked at the beginning of the Second Request process for as much as 90 days on the back end. Could you elaborate on the thinking behind that practice?

RENATA HESSE: As you know, the HSR Act gives us a minimum of 30 days to review the transaction once the parties have certified compliance. Frequently, it is in both our and the merging parties' interest to determine a timetable for review that goes beyond those 30 days. Coming to an agreed timetable arises out of a desire on the part of the Division and the parties to bring some certainty to how long our review will go and the steps along the way before we arrive at a resolution point. These timetables are formalized in timing agreements, which not only give us extra time to conduct our review, but also guarantee the parties certainty as to meetings with staff, DAAGs, and the AAG during a particular timeframe, and assurance from the Division that we will identify any deficiencies in a party's productions within a particular number of days, among other things.

We recognize that determining a timetable for review by way of a timing agreement is a negotiation. Where they have more flexibility as to the closing of their transactions, parties often see advantages to giving us more time. Of course, parties are free to enter into a timing agreement with the Division, or to decline to do so, and certainly we do have cases where parties have declined to enter into a timing agreement because extending our review doesn't make sense for them timing-wise because of other aspects of their deal. We are certainly sensitive to these timing issues and strive to work with parties who face them. When parties cannot or choose not to give us more time to complete our evaluation, we will nevertheless attempt to engage with them on the substance of their transaction.

ANTITRUST SOURCE: Can you also comment on whether the DOJ has a policy regarding tying some of the second request modifications such as custodians or search terms to the timing agreement?

RENATA HESSE: We should not be holding modifications hostage to timing agreements. We do not have a policy that conditions second request modifications to agreement on a timing agreement. Indeed, we routinely modify Second Requests in matters with no timing agreement. However, it is often most efficient to negotiate custodians and search terms simultaneously with provisions in the timing agreement. When that happens, agreements on custodians and search terms, as well as timing, often naturally become part of a single agreement. However, this is not to say that, when there is no timing agreement contemplated, we don't also negotiate reasonable modifications to custodians or search terms or other aspects of the Second Request that the parties wish to modify.

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ANTITRUST SOURCE: Let's shift to another process issue. From your perspective how are relations between the FTC and the DOJ generally and also with regard to clearance?

RENATA HESSE: I think things are going very well. Chairwoman Ramirez and Bill Baer share a common approach to antitrust enforcement and there is a nice working relationship that's developed between the two of them. And Debbie Feinstein and I likewise have a productive relationship. When there are issues we call each other and we talk them through. On clearance matters, we do occasionally disagree, but we try very hard not to have situations where these disagreements have significantly delayed the timetable of agency review.

We are working well to try to address the clearance questions earlier. Sometimes we could spend a lot of time debating over which agency has expertise. But at some point you have to say, okay, this is a toss-up so let's just resolve it. Because very often when we're having a dispute, there really is not a clear answer to the question of which agency actually has more expertise.

ANTITRUST SOURCE: When you are having the discussions to resolve which agency should be cleared to initiate an investigation, what are the factors that you look at in assessing clearance?

RENATA HESSE: We have an agreement with the FTC that is premised on the notion that the agency with the most experience in the product at issue should undertake the next investigation. We work very hard to be sure that clearance is granted to one of the agencies as quickly as possible. And we're actually doing pretty well. We recently took a look at the time involved in resolving which agency will review a specific transaction or alleged conduct. We used fiscal year 2012 for this look back. In fiscal year 2012, the 20 matters that both agencies sought to investigate (and the 40 corresponding clearance requests, one from both agencies) represented a small fraction of total clearance requests (229) and total HSR filings received (1,429). Most clearance requests were resolved quickly, leading to an average time to resolution of 2.2 business days, or 3.1 calendar days. On average, clearance was resolved in 5.2 business days, or 7.5 calendar days into the waiting period.

We are constantly looking to improve these numbers, but we are confident that the system is working smoothly. Patty Brink, our Director of Civil Enforcement, is actively involved in clearance and only drags me into it when she has to. And most of the time I never hear about disputes because they just get resolved.

ANTITRUST SOURCE: Last June the DOJ and FTC held the conditional pricing practices workshop. What were the origins of that?

RENATA HESSE: Conditional pricing practices, such as loyalty and bundled pricing, are common throughout the economy. In many circumstances, this conduct isn't problematic and can save consumers money. In other cases, however, such as when a monopolist uses conditional pricing practices to restrict competition, they can undermine the competitive process. Both agencies felt like this was an area where there was still some uncertainty and disagreement about what standards should apply and how to think about conditional pricing practices.

So we thought it would be both interesting and also useful to bring together knowledgeable people with a range of views to talk about it. And both of those things turned out to be true. I thought it was an interesting workshop. There were no concrete conclusions that came out of it, but we heard a lot of interesting testimony. And people came away feeling like this is an area that deserves attention and that we should be thinking about whether there are pricing practices that we should be scrutinizing carefully.

ANTITRUST SOURCE: Outside of the standards-essential patent context, are there particular practices that you see as particularly concerning, even if you haven't necessarily brought a case, or where you think the law would benefit from further clarification?

RENATA HESSE: Refusals to deal is an area that I find very interesting, and where it would be worth spending some time on the right fact pattern. That's an area where a little more definition in the law would be helpful. As we discussed, we also continue to think that conditional pricing practices could be an area where, with the right fact pattern, we might be able to make some progress in giving some more definition to this area of the law.

ANTITRUST SOURCE: You've talked a lot today about competition advocacy. Is that something that you think the DOJ has done more of recently, and what sort of role do you see competition advocacy playing in the overall enforcement scheme?

RENATA HESSE: We've always done a fair amount of it. The standards-essential patent issues have gotten a lot of airtime recently, so people hear about it more. But we do engage in a broad range of competition advocacy within the U.S. government, as well as with state and local governments and private organizations. It's an incredibly valuable tool.

Law enforcement often takes a long time and can be a very blunt instrument. And if instead you can approach issues with the goal of trying to solve the problem before it starts, that can be a very good thing. So I'm very much in favor of using that tool when we can and we have pretty consistently done a fair amount of it.

ANTITRUST SOURCE: There have been a lot of complex, major cross-border transactions, and one would expect there will only be more in the upcoming years. Obviously there's the European Commission but there are a lot of newer agencies that are springing up. How do you see the Division's role in a global antitrust enforcement system?

RENATA HESSE: I believe we have an incredibly important role. As a mature competition agency with a very sophisticated way of thinking about antitrust issues, we can be an effective advocate

for antitrust enforcement around the world. So, to me, it makes sense to engage using the great people we have at both the staff and the Front Office levels, and to go out and talk to people.

For example, we engage through OECD, through ICN, and through our bilateral or trilateral relationships with at least a dozen foreign jurisdictions. We continue to invest a lot of effort in those relationships and on working with those agencies to work towards convergence and to ensure that we're all speaking the same language and prioritizing harm to competition over other concerns.

We have people who go and visit other countries and talk to them outside the context of an ongoing investigation. Leslie Overton is our DAAG with primary responsibility for coordinating the Division's engagement with foreign enforcement agencies. Over the past few years, she has helped us strengthen those relationships in a range of contexts. For example, we engage through OECD, through ICN, and through our bilateral or trilateral relationships with at least a dozen foreign jurisdictions. We continue to invest a lot of effort in those relationships and on working with those agencies to work towards convergence and to ensure that we're all speaking the same language and prioritizing harm to competition over other concerns.

ANTITRUST SOURCE: Do you have concerns that we may see a situation in the vein of *GE/Honeywell* where there is divergence between the U.S. and another major competition authority?

RENATA HESSE: One of the reasons we spend so much time and effort on enforcement cooperation with other jurisdictions is to avoid conflicting or contradictory outcomes. Over the past decade, the Division has increased its efforts to work closely with our international counterparts. Our day-to-day cooperative relationships with the EC, Canada, and other jurisdictions have improved tremendously at every level, sharing views—and, with party waivers, often evidence—on market definition, competitive effects, and remedies. But cooperation does not always lead to the same outcome, most often when markets differ between jurisdictions.

International cooperation on our investigations is important to the Division leadership, and Bill has made this a priority by tasking Patty Brink with managing our day-to-day cooperation efforts. She has regular communications with her counterparts at other agencies, and she and her team keep track of our staff attorneys' interactions with their counterparts so that within the Division we are all aware of the status of various jurisdictions' investigations into the same transaction or conduct. And there's a lot of cooperation to keep track of. In the last 12 months alone, we have cooperated with an international counterpart on 17 different civil matters with 15 distinct international counterparts. On the criminal enforcement side, our cooperation efforts are led by Brent Snyder, our Criminal DAAG, and Marvin Price, our Director of Criminal Enforcement.

I'm very optimistic that our relationships with our counterparts—really longstanding relationships with folks, particularly in Europe—reduce the potential for conflicting outcomes. I was in China a couple of years ago on a panel and two of my cohorts from the European Commission were people I'd gotten to know working on the *Microsoft* case, probably 15 years ago. They are still at the Commission and I'm back at the Division. And I was feeling at that moment like the relationship that I have with those two gentlemen is emblematic of what good interagency, international relations is all about: really getting to know people and being able to pick up the phone and understand people's voice inflections and know when they're joking and when they're not. We're doing a great job at developing and keeping those relationships at all levels of the Division.

ANTITRUST SOURCE: With respect to both merger and conduct cases, the Division probably hears a lot about the dynamic nature of markets, including potential entry by Google, Apple, Amazon, Pandora, and others. How do you evaluate these arguments and, in particular, whether a high-tech entrant serves as a competitive constraint?

RENATA HESSE: Again, I'm not sure we think about it all that differently today than we have in the recent past. Any time we're told that there's some dynamic change occurring in an industry and

that we therefore shouldn't be worried about an otherwise problematic transaction, you can be sure that we're going to test the claim.

We test these claims by looking at strategic documents from everybody who's involved to try to figure out whether or not that story of entry is likely or true. We look at win/loss data and ask whether we are actually seeing competition between any of these entrants occurring. We use all the information available to us to test the claim that this change is coming and to determine whether it's as close as people claim it is.

I have a very distinct recollection from many, many years ago. I'm not going to identify the industry because it will be too obvious who I'm talking about, but it was a technology industry. And every time they did a deal the refrain was the same: Google's coming; Google's going to be in. That was the argument for literally five years. And yet Google had not ever actually appeared. My recollection is that Google eventually did appear, but it happened many years later than people thought it was going to happen.

And we need to be careful about that. We don't want to challenge a merger when entry really is happening or something really is changing. And yet at the same time you do have to be careful about those claims, which are sometimes overstated.

ANTITRUST SOURCE: You mentioned that the hard cases are the ones that tend to get litigated. When outside counsel are debating the hard cases with the DOJ before you decide what course of action to take, what are some of the things you've seen people do that are effective?

RENATA HESSE: A couple things. One is having the best command of the facts as possible—and recognizing that there are often critical facts that are only available to the agencies. It's important that parties not make unfounded assumptions about what those uncertain facts actually are. So, I would say, assume the worst regarding the stuff that you don't know and then explain to us in a very fact-based analysis why you think the merger or conduct at issue is not a problem.

That factual command, coupled with robust economic analysis that doesn't include a lot of sleight of hand—where if you tweak one variable then everything changes—those two things together can be very meaningful. Good economic analysis that can be tested and vetted by our economists and verified is incredibly important. But in my view, the fact piece is the most important part. I always told my clients who were engaged in a merger review that the single most important thing when you start in advocacy with the Division is to have a well-supported, contemporaneously-documented reason for doing the deal that makes sense to people.

ANTITRUST SOURCE: Do you think that reason needs to be procompetitive or does it simply need to be a good reason that is not anticompetitive?

RENATA HESSE: It's great if it's procompetitive. If it's anticompetitive that's not so good. If it's neutral then you should have some other arguments to support the conclusion that the deal is procompetitive. You have clients and most of the time they're doing a deal for a perfectly good reason. Sometimes they have people who have written down bad things and that's not very helpful. But, perhaps the worst thing you can do is come into the Division with an executive who sounds like he's making something up in some post hoc way to justify a transaction that, on its face, maybe doesn't appear procompetitive.

People should own their business decisions about why they are doing the deal. It goes a long way if you're credible and you've got a good procompetitive justification for a deal.

ANTITRUST SOURCE: Do you have an expectation of seeing business people at key meetings?

RENATA HESSE: We usually do see business people at key meetings and it's often helpful. We had a deal recently where we were trying to figure out what to do and there was a debate among our team about what the company was going to do post-merger. And the CEO came in and told us his story and his plans in a credible manner. That was meaningful to me in terms of my decision about how to think about the deal.

ANTITRUST SOURCE: Before we finish, do you have anything you want to add?

RENATA HESSE: I'd like to highlight our recent emphasis on seeking disgorgement in civil enforcement cases. We just had the case addressing the New York City Tour Bus Joint Venture, and before that the *Flakeboard* matter. So that's something we have been thinking a lot about. It is an important principle. In appropriate circumstances, we want to ensure that people who would otherwise profit from unlawful conduct are required to give up their ill-gotten gains. That's something that has been and will continue to be a priority for us.

ANTITRUST SOURCE: In closing, what advice would you give to a young antitrust lawyer who is just starting off his or her career?

RENATA HESSE: There are a few things. First, take every opportunity that is given to you, even if it doesn't seem very glamorous at the time. Reviewing those documents and really figuring them out and being an integral part of a team is one of the best training grounds you will ever get.

As I have said to people many times, this includes even staying until 2 a.m. making copies. I do believe that one of the best things for me as a young associate was doing all sorts of tasks that were not terribly glamorous, but were tasks that needed to get done as we got ready for a trial or to file an important brief. It meant that I was in the middle of the action and I got to see everything that was going on. And I learned a ton that way.

Second, you have to be a team player. Try to find a workplace—whether it's a firm, or a company, or a government agency—where you can experience lots of different working styles. It was invaluable to me as I was growing up as a lawyer to see lots of different lawyers practice law in different ways. And it made me realize there was no one right way to do it. That was helpful because one of the most important things you can do is learn to be comfortable with yourself and who you are, to be comfortable in your own skin. Trying to be something you are not may not be a recipe for failure outright, but it's going to be a long hard road.

Third, don't be afraid to speak up, but also know when to be quiet. Pay attention to your surroundings and the people you're working with. You'll learn from people when they want to hear from you and when they don't want to hear from you.

Anyway, the biggest things are to be a team player and be yourself.

ANTITRUST SOURCE: That's a great place to end. Thank you. ●