Keynote Remarks of FTC Chairwoman Edith Ramirez
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Good evening, everyone. I am delighted to be here and want to thank Bates White, and especially Joe Farrell, for inviting me to be a part of this year's conference.

Since we have both economists and lawyers here, I would like to start off by pointing out one thing that we both have in common: we are a frequent subject of jokes. In preparing for tonight, I couldn't help but think of a joke that Laurence J. Peter, the Canadian educator and business management guru, once made about economists: "An economist is an expert who will know tomorrow why the things he predicted yesterday didn't happen today."

Mainly I hoped to elicit at least one laugh, which I think is the duty of a dinner speaker, but it also occurred to me that this quip about the uncertainty of predictions was apt for a conference focused on "dynamic competition" – the topic I was also asked to address this evening.

What I would like to do tonight is to describe some recent Federal Trade Commission cases in which the Commission has addressed dynamic competition, with the aim of highlighting the key issues we have grappled with. Let me begin, though, with three overarching points.

First, the fact that a market may be dynamic in some sense does not mean antitrust enforcers should lower their vigilance. In my view, we should be poised to intervene in any market when necessary to protect competition and consumers. The key is to ensure that our intervention is grounded in a rigorous analysis of the reasonably available evidence. I will give examples of that type of analysis in the three case studies I will discuss shortly.

Second, the fact that a market may be dynamic also does not mean that we should throw out structural evidence. Even market structure can be viewed through a dynamic lens. For

example, we can take account of past changes in market share and past instances of market entry and exit. Data on such variables, if available, should be carefully evaluated and appropriately weighed along with the rest of the evidence. At the Commission, we consider dynamic competition as a matter of course. When we examine the likely competitive effects of an act or transaction, we do not limit ourselves to an evaluation of effects on price or output. If there is evidence that innovation is an important dimension of the relevant market, we take it fully into account.

Third, I disagree with critics who worry that antitrust intervention in dynamic markets will inevitably harm competition by reducing a future upstart's *ex ante* incentives to compete for market leadership. Antitrust doctrine already takes that concern into account and, in my view, is sophisticated enough to impose liability only in contexts where doing so will promote competition rather than hinder it. That certainly was the D.C. Circuit's conclusion in *Microsoft*, where the en banc court unanimously found that Section 2 has a key role to play even in fast-moving technology markets.[1] Indeed, I believe antitrust is needed in a variety of contexts to keep market incumbents from nipping disruptive business models in the bud.

I. Three Case Studies

I will now turn from the abstract to the concrete by discussing three recent FTC cases involving antitrust analysis of dynamic competition.

Perhaps the best recent example of a merger case involving dynamic competition is Nielsen Holdings' proposed $1.3 billion dollar acquisition of Arbitron. In the fall of 2013, the Commission accepted a consent order resolving charges that this acquisition would eliminate future competition in an emerging market for national syndicated, cross-platform audience

[1] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

measurement services.[2] To remedy the likely loss of future competition, we required Nielsen to divest or license certain technological assets and data, including relevant intellectual property, to a Commission-approved buyer, so that the buyer could offer a competing service.

As we explained in our Commission statement, Nielsen and Arbitron were best-positioned to develop and market cross-platform services for two main reasons.[3] First, as current providers of single-platform audience-measurement services for TV and radio, respectively, Nielsen and Arbitron were the only two companies operating large and demographically representative panels capable of reporting television programming viewership on an individualized basis (such as by age and gender). This reporting capability is critical to the development of any cross-platform product that would satisfy likely customer demand.

Moreover, both Nielsen and Arbitron had already invested significant time and resources toward the development of cross-platform products, as evidenced by their internal documents and by statements they had made publicly and to potential customers. Nielsen was already offering audience measurement services across different media platforms; for example, its "Extended Screen" product measures television and online viewing for a subset of its national panel. Arbitron was similarly developing a cross-platform audience-measurement service for ESPN in partnership with comScore. Importantly, networks, media companies, and advertisers all believed that these two companies were best-situated to develop cross-platform services and market them in direct competition with each other.

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[2] Decision & Order, *Nielsen Holdings N.V. and Arbitron Inc.*, File No. 131-0058 (F.T.C. filed Sept. 20, 2013), *available at* https://www.ftc.gov/system/files/documents/cases/140228nielsenholdingsdo.pdf; Compl. ¶ 12, *Nielsen Holdings N.V. and Arbitron Inc.*, File No. 131-0058 (F.T.C. filed Sept. 20, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncmpt.pdf.

[3] Statement of the Fed. Trade Comm'n at 1, *Nielsen Holdings N.V. and Arbitron Inc.*, File No. 131-0058 (F.T.C. filed Sept. 20, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncommstmt.pdf.

In short, although the nascent market for national syndicated, cross-platform, audience-measurement services is "dynamic" and characterized by some amount of uncertainty, we had a solid empirical basis for predicting that Nielsen and Arbitron would likely have become substantial head-to-head competitors absent the merger. Our enforcement remedy took full account of the dynamic character of this marketplace, and consumers are better off for it.

Next, I want to mention a preliminary injunction complaint that the Commission unanimously voted out just last week, which seeks to block STERIS Corporation's proposed $1.9 billion dollar acquisition of Synergy Health.[4] The Commission alleges that this acquisition would violate Section 7 of the Clayton Act by significantly reducing future competition in regional markets for radiation-based sterilization of medical devices and other products.[5]

Let me quickly summarize what the complaint alleges about competition in this market: in the United States, exposure to gamma radiation, generated by the radioactive isotope cobalt 60, is currently regarded as the only feasible method of sterilizing large volumes of dense and heterogeneously packaged products. Only STERIS and one other company, Sterigenics, provide contract gamma sterilization services domestically on a substantial scale. The Commission alleges that when STERIS and Synergy announced their proposed merger, Synergy was implementing a strategy to open new facilities that would provide contract sterilization services using an innovative form of high-powered x-ray technology in the United States for the first

[4] Compl. for TRO & Prelim. Inj., *FTC v. Steris Corp.*, No. 1:15-cv-01080-DAP (N.D. Ohio May 29, 2015) (filed under seal), ECF No. 5; *see also* Press Release, Fed. Trade Comm'n, FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers (May 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services.

[5] Redacted Compl. for TRO & Prelim. Inj. ¶¶ 74, 127, *FTC v. Steris Corp.*, No. 1:15-cv-01080-DAP (N.D. Ohio June 4, 2015), ECF No. 19.

time.[6] According to the complaint, Synergy's planned services would provide a competitive alternative to gamma radiation.[7]

The Commission thus charges that the challenged acquisition would eliminate likely future competition between STERIS's gamma sterilization facilities and Synergy's planned x-ray sterilization services, and that other competitors would be unlikely to fill the competitive gap.[8]

Unlike the Nielsen/Arbitron combination, in which our competitive concerns related to a future market for cross-platform audience measurement services, the STERIS/Synergy case involves concerns about a present market for contract sterilization services. But that market is potentially dynamic, as revealed by Synergy's alleged plans to disrupt the prevailing technology with an innovative competing technology. And that potential dynamism underlies the main competitive concerns expressed in our complaint. We will have to wait and see how the evidence unfolds in the federal district court and administrative proceedings.

Let me now move from merger cases to an illustrative FTC conduct case involving dynamic competition in the real estate market. In 2006, in the *Realcomp* case, the Commission charged that an association of real estate brokers in southeastern Michigan had implemented certain policies aimed at precluding discount real estate broker listings from gaining full access to the association's multiple listing service.[9] Following an administrative trial, the Commission found these policies amounted to an illegal concerted refusal to deal in violation of Section 1 of the Sherman Act.[10]

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[6] *Id.* ¶ 60.
[7] *Id.* ¶¶ 4, 15, 105.
[8] *Id.* ¶¶ 109−11, 115.
[9] Compl. ¶¶ 13−16, *Realcomp II, Ltd.*, Dkt. No. 9320 (F.T.C. filed Oct. 12, 2006), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2006/10/061012admincomplaint_0.pdf.
[10] *Realcomp II, Ltd.*, Dkt. No. 9320, 2009 FTC LEXIS 250, at *89 & *93−94 (F.T.C. Oct. 30, 2009), *petition for review denied*, 635 F.3d 815 (6th Cir. 2011).

As the Commission's opinion discusses, *Realcomp* involved a textbook story of dynamic competition. Under the traditional brokerage model, home sellers paid their brokers approximately six percent of the sales price for a bundled set of services. Under a new business model propelled by the Internet, sellers could instead contract with upstart brokers for a smaller set of services in exchange for a discounted fee. Citing Schumpeter, the Commission noted that "technological and organizational dynamism are powerful stimulants for economic progress," and that therefore the antitrust laws play a critical role in keeping incumbent service providers from using improper means to squelch competing business models.[11]

Real estate brokers grasped and feared the disruptive potential of this new business model. A 2003 analysis by the National Association of Realtors observed that, even though some limited service brokers "may not currently command significant market share … their significance goes beyond size. They may be serving a customer need that is not currently being served by the dominant players. In addition, they may play a larger role in selected markets or may serve a particular consumer segment better than the dominant models."[12] In other words, the market shares of the limited-service brokers understated their competitive significance because the upstarts were addressing customer needs that traditional brokers had left unmet.[13]

The *Realcomp* case exemplifies two key points relevant to antitrust enforcement in dynamic markets. First, antitrust enforcement is sometimes necessary to allow disruptive business models to succeed in the face of entrenched opposition from incumbents. Second, documentary and other qualitative evidence is often critical to understanding these markets. Here, the real-world analysis of the National Association of Realtors and others was invaluable

[11] *Id.* at *7 & n.3 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (1942)).
[12] *Id.* at *60.
[13] *See id.* at *60−61.

to understanding what was at stake. Market participants experience first-hand the disruptive effect of new business models as they emerge, and their observations can be just as powerful as econometric analyses in framing our understanding of the relevant market.

Finally, although the cases I have discussed involved antitrust enforcement against private actors, the FTC plays an equally valuable role in protecting consumers against regulatory barriers to nascent competition – barriers erected by governmental authorities but often solicited by entrenched commercial interests. For example, in *North Carolina Dental*, the FTC successfully challenged anticompetitive efforts by a state dental board, composed mainly of practicing dentists, to suppress low-cost alternatives to the teeth-whitening services traditionally provided by dentists.[14] And the FTC has actively opposed anticompetitive state-law restrictions on disruptive business models in other markets as well, including local car-for-hire services and retail automobile sales.[15]

II. Lessons Learned

In short, antitrust enforcers should not let down their guard just because someone shouts the word "dynamic." If anything, we should be especially vigilant to keep incumbents—acting alone or through state actors—from suppressing disruptive threats to their dominant business models. Of course, as with intervention in any market, we must carefully gather reliable evidence, both qualitative and quantitative, so we can have a good understanding of the competitive dynamics. We may not be able to know everything about a market and its likely future, but certainty is neither practical nor necessary, and the absence of certainty should not keep us from making reasonably informed judgments based on what we do know.

[14] *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).
[15] *See Barriers to Entrepreneurship: Examining the Anti-Trust Implications of Occupational Licensing: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 14−25 (2014) (statement of Andrew Gavil, Dir., Office of Policy Planning, Fed. Trade Comm'n).

In short, enforcement decisions should be grounded in facts and rigorous analysis, even when—indeed, especially when—we are dealing with dynamic markets.

Finally, we should not discard information about a relevant market simply because that information bears a "structural" label. Structural information can still be useful, provided we assign it the weight it deserves in context and consider it together with other available and reliable evidence.

Thank you.