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Interview with Renata Hesse from WSGR



Adrian Bye: Today I'm here talking with Renata Hesse. Renata works in antitrust at Wilson Sonsini. Antitrust is a pretty important area of law that can affect companies as they become very powerful within the market, and Wilson Sonsini is one of the top technology law firms in the United States so we've got someone of a pretty high calibre in terms of the legal aspect on this to talk with us.

Renata, thanks for joining us.

Renata Hesse: I'm happy to be here.

Adrian Bye: Maybe you can tell us a little bit about yourself, who you are and where you come from?

Renata Hesse: Sure. I'm a native Californian. I grew up in Berkeley, which is obviously a big university town. Whenever I say I grew up in

Berkeley, people always say, "I didn't know people grew up in Berkeley," but I actually did. I went to college outside of Boston. I had a small women's college, and then went back to Berkeley for law school.

I spent the first part of my legal career working for a law firm in San Francisco, and I did mostly intellectual property litigation for technology companies in that practice. Then I think after practicing for about seven years, one of the partners I worked with was asked to go back to the antitrust division and work there on a big merger. At that time, it was two big telecom companies. When he left, I said, "You know, if you ever need help, I might be interested in coming back to help." About a year later, he called me and said, "Are you still interested?" so I moved from San Francisco to Washington and started working at the Justice Department. I had ended up being...

Adrian Bye: Had you done antitrust before or was it your first move into it?

Renata Hesse: It was more or less my first move. Most of the big cases, we handled on the intellectual property side. We did a lot of work for Nintendo when there was a clearly a time where, believe it or not, Nintendo was actually alleged to have a lot market power in the videogame industry. Whenever we filed intellectual property cases, we typically would have antitrust claims brought back against the company. That was how I first became involved in doing antitrust work but I had never done it in a way that I do it now or in the way that I did it at the antitrust division before I took the job at the Justice Department when I moved to Washington.

Adrian Bye: My brother also is in antitrust but it seems like he's been doing antitrust for a long time. He studied that and has gone all the way through. You found it a little bit later.

Renata Hesse: Yes and Matthew's sort of a true-blue antitrust-er. I'm what some people consider to be an interloper but it's certainly become my career. Interestingly enough, I didn't take it in law school. I didn't study it and when I was talking to someone else who was actually one of the lawyers who represented Netscape at the beginning of Netscape-Microsoft stuff, it turned out that neither she nor the partner that she was working with at the time had taken antitrust in law school either. She at least had started out as an intellectual property litigator too. I think people who are looking for interesting practices that have sort of real-world aspects to them gravitate towards it as a subject matter.



Adrian Bye: My list and my audience are CEOs of companies doing between about \$1 million a year up to about \$1 billion. Why is antitrust relevant to them?

Renata Hesse: It's relevant on a whole variety of different levels. If they ever are involved in a transaction, meaning buying or selling...

Adrian Bye: Actually, before we do down that road maybe we should clarify exactly what antitrust is. What is antitrust?

Renata Hesse: Antitrust is an area of law which is designed to preserve the competitiveness of markets. The goal there again is not to keep people from getting big or to punish companies for getting too large. The goal is to keep the marketplace from suffering from impairments to its ability to function properly. What that means. What it's trying to do is to make it possible for people who have interesting ideas, new products or innovative ways of doing business – it makes it possible for them to succeed in the marketplace despite the fact that they're small and it makes it possible for them to be assured that if one of their large competitors tries to do something bad to keep them from succeeding, the law will be there to protect them. It really is just about keeping the free market working fundamentally which is kind of a broad, big way of describing it. But that is the goal.

Adrian Bye: It seems to me when I hear about antitrust, which I hear about it a fair amount in the news, the Wall Street Journal and online – it comes up in the context of Google versus Yahoo! and all that sort of stuff, which is just billion dollar companies fighting it out and then getting regulated by the US Government. How does that then become relevant to a \$50 million a year start-up?

Renata Hesse: It can touch a company like that in a variety of different ways.

What I was starting to say is that one of the easiest and most common ways is just a basic rudimentary thing that happens and that is that if you are being acquired by someone or you are acquiring someone and you are a certain size or the entity that you're doing business with is a certain size, then you have to file a report – a form with a bunch of information with the Justice Department and the Federal Trade Commission. They get the chance to review your transaction before you can close. So very often, small companies are subject to these reporting requirements because they're being acquired by much larger companies. That's just kind of a

basic way you run into it at least in the US. Most foreign jurisdictions have reporting requirements like that as well.

The other way it's relevant is that this is our practice involves a lot of small technology companies that are not necessarily at risk but that are occasionally being pushed around by larger companies that have already gotten into the market and have what we call market power in the world of antitrust. The antitrust laws can be used by those companies either by getting the government to start investigations which is one path that people go down sometimes or even by suing in private litigation. Microsoft again is a classic example.

Adrian Bye: You're explaining how antitrust can relate to smaller businesses that are growing.

Renata Hesse: Right. As I mentioned, one way is just that you kind of run into the antitrust laws in the context of some transactions that you might be doing and there are lots of different ways that those reporting requirements can affect small companies. They even affect officers when they're buying enough stock of the companies that they're part of. That's one easy way. It's not the most interesting way.

The other way is that it can be used as a tool to, for lack of a better word, to go to war with a larger competitor that's threatening you in some way.

Adrian Bye: Antitrust then becomes a way that you're dealing with a very powerful company, for example, Microsoft, Google where my brother's at, or any of these others that are big companies that have a huge amount of market power now. Antitrust can be a way for a smaller company to take on a big company.

Renata Hesse: Right. There are lots of examples. Intel and AMD are going at it. AMD is fighting against Intel by suing them in a law suit but also by getting the European Commission, and trying to get the US and any number of other foreign entities to start investigating Intel's business practices. That can just hang up a large competitor for a long time with a regulator poking around in their documents which can be just as a matter of everyday business, not only hassle for them but it can have pretty severe consequences. Microsoft is the classic example of that. They've been under regulatory scrutiny for now more than 10 years as a result of the convoking engagement.

Adrian Bye: In the case of Microsoft, obviously there's been the whole Netscape and Microsoft thing. Netscape took them on, and obviously Netscape's now gone away and was acquired by AOL, and the browser's been discontinued. You can hardly call that an antitrust victory for Netscape. Was that considered success? Where are cases where a start-up has used antitrust successfully against a bigger competitor?

Renata Hesse: There're different ways of thinking about it. I think it was a success in a sense that it sent a signal to Microsoft that it couldn't engage in these kinds of business practices, and not get caught and taken to task for it. There's been a drag on Microsoft for a long time as a result of that case. Netscape itself obviously at least was kept from the potential that it had to be a big player in the browser market. I think the way to think about the case is from the larger impact it had on the technology marketplace in a sense that it told large companies in the tech sector that they weren't immune from this kind of regulation, that the Justice Department was capable of mustering the resources together and combating them, and that they needed to be careful about how they behaved. There was some arrogance on Microsoft but I think there was a real sense among Silicon Valley at least in the US that said, "Hey they're never going to come after us because

we're this new, dynamic market and nobody could ever understand it well enough or do anything in these kinds of markets to affect us." I think the case really said that's just not true. The other thing in a more practical sense is that all these Netscape, Real Networks which is another company that was alleged to have been harmed by Microsoft's conduct, Novell – all these companies in the wake of that lawsuit have settled cases with Microsoft and I can't now remember how much money Microsoft has paid out but it's been more than \$1 billion, I think, in settlement of cases.

Adrian Bye: Real Networks is still going okay but Novell and most of the others kind of got trashed. Could this raise the question then. Vista hasn't done real well. Microsoft's on a downward slide and they had to get it right with Windows 7. Could the antitrust settlements against Microsoft be one of the things that kind of held the company back, and caused Apple to start moving forward and open up more opportunity for others? The browser's not doing that well either. All of this stuff – it's being affected on every front. Is antitrust one of the reasons?



Renata Hesse: I think the answer to that is sort of. People comment now that Microsoft used to be an agile, competitive entity and that they are now like a slow, lumbering beast, a little bit like what happened to IBM in the wake of all the antitrust.

Adrian Bye: It's exactly how it feels actually. It's a big beast and they've got a really big bank account but the stuff that I'm seeing from them now – they just

don't quite get it.

Renata Hesse: Right.

Adrian Bye: Is it antitrust or is it because Bill Gates has stepped down and maybe Steve Ballmer is not up to it as much as Gates is? Is it something like that or is the antitrust regulation and the things that have happened to the company as a result is that what's causing it?

Renata Hesse: I think it's a combination of all of those things but I think essentially, once a company becomes subject to the kind of scrutiny that Microsoft has been in...I worked on the case when I was at the Justice Department...the people were just involved in not every aspect of the development of their products but they had regulators or people working for the regulators watching everything they were doing. I think that really does slow you down. There's a way in which companies mature over time and I think they get large. Things are harder to turn on the dime when you get to be that big but I do think that going through that process and

recognising that you couldn't just free wheel your way around in the marketplace did have an impact on the company.

Adrian Bye: Today, what kind of antitrust things is Microsoft having to do to comply to whatever they have to comply to?

Renata Hesse: The main things that they're currently having to do is licence some of their technology so that this is both in the USA and in Europe – they were required to licence what are called communications protocols but it's the way the server talks to Windows operating systems. They were having to licence that technology in some cases for free. They're having to licence it to the open source community in Europe, at least. That is, I think, a big deal for them because the primary competitor on the server side has been Linux servers. These settlements, I think, will help those entities do better in the marketplace as a consequence.

Adrian Bye: What specifically are they being forced to licence? It's not Samba for the disc integration, is it, because I think that's for an engineer? What kind of stuff is being licensed?

Renata Hesse: It's the instructions and language. It's the technology that the server uses to ask the client operating system to send it information.

Adrian Bye: So it's Samba. It's the file-sharing stuff, is it?

Renata Hesse: Yes and Samba is one of the entities that, at least I think in Europe, people hope will benefit from having this technology. This is a bigger part of the European case than it was in the US but the claim was that people like Sun, Samba and Red Hat who build competitive servers to Windows servers, couldn't make it in the marketplace because the Windows servers just always did a better job communicating with the Windows client and the Windows client was a monopoly. So if you couldn't sell to a company, a server that communicated seamlessly with all of the computers that they were working with in their business then what good was it? So the goal of this part of the remedy was to even that out and make it possible for those entities to compete so that Microsoft wouldn't then not only have a monopoly on the desktop but would also have a monopoly on the server side.

Adrian Bye: When Microsoft had these restrictions in the US and Europe, did they then roll that out worldwide or did they go and do whatever they want in the rest of the world?

Renata Hesse: It sort of depends. They had been under scrutiny in Korea and the Koreans had a case against them also not on this particular issue but on another issue which related to bundling of instant messaging programs. As a general matter, I would say that they do these things worldwide because the technology markets tend to be global but the licence in Europe that they're required to enter into is slightly different from the licence in the US. There are differences across the jurisdictions but as a general matter, I'd say that once you start getting involved with a company that size that does business around the world, anything that you make them do...meaning you, being the Justice Department or another regulator...is going to have a worldwide impact.

Adrian Bye: Right.

Let's say I'm doing some stuff that's pretty innovative and I'm having some problems with the market power that Yahoo! has. Let's say it's in the advertising arena because a lot of my guys are doing internet advertising, internet marketing – that sort of stuff. What could be an example of a case around advertising where Yahoo! could be an antitrust problem for us and as a start-up doing \$50 million a year in revenue, what can we do about it?

Renata Hesse: I think the kind of cases that are most likely to be successful in this area that we're talking about now are cases where somebody – whoever it is, whether it's Yahoo! or somebody else, is taking actions that make it difficult or impossible for you to distribute your product effectively to the people who you need to get it to. In the lingo of antitrust called distribution foreclosure...

Adrian Bye: If I have something that I wanted to sell and assuming it's legal in all jurisdictions that Yahoo!'s advertising in and the price I can pay for the media is competitive, if Yahoo! is refusing to run my advertising then that's an antitrust issue, is that correct?

Renata Hesse: It would be if Yahoo! had a product that competed with you. Say both you and Yahoo! are selling Christmas trees... I'm looking at my withered tree.

Adrian Bye: Yes. So I'm doing great with Christmas trees. I'm doing \$50 million a year on Christmas trees and I happen to be very lucky because it's selling all year round.

Renata Hesse: Exactly.

Adrian Bye: Yahoo! decides to go into the same market and sells Christmas trees as well.

Renata Hesse: Right.

Adrian Bye: What you're saying is that Yahoo! can't stop me from advertising on Yahoo!'s distribution platforms for selling Christmas trees.

Renata Hesse: That would be a potential antitrust problem, yes.



Adrian Bye: That is fascinating. I didn't realise that sort of thing existed. If that actually happens, I can then go and start mumbling about antitrust to Yahoo! and that would generally force them to open up their platform and allow them to run the advertising, does it?

Renata Hesse: It might. It sort of depends. It depends on how good your case is and it depends on how much they're willing to fight. But certainly, when we're advising small companies that are having problems like that where larger competitors, for example, try to shut them out of tradeshows...that's a classic example...or somehow they made it impossible for your internet e-mail program to work for their users so if you logged on somehow through the internet portal and you were a Yahoo! user – if you couldn't send messages to people on Hotmail or something like that.

Adrian Bye: Actually, I just read something today that Hotmail is apparently not working for people who are using Linux. That's something that's just recently changed.

Renata Hesse: Really?

Adrian Bye: That's the kind of thing, is it?

Renata Hesse: Yes, that would be an example of something that if the Linux people might want to get somebody to figure out what's going on, why is it happening and is there a problem there. These are all ways in which a smaller company can use antitrust as a tool and often just the prospect... In my old section at the antitrust division, we do a lot of work in the financial markets also and typically people just don't like to have other people and particularly regulators looking at all their documents because by and large...

Adrian Bye: ...they'll find something eventually.

Renata Hesse: ...you're going to find something eventually. Exactly. I always felt like the big financial companies always did everything possible to avoid getting into any kind of issue with us because they never want to hand over any documents as it can lead to trouble. So I think it can be a very powerful tool and if you're doing it in a multi-jurisdictional way... If you get the US interested, you get Europe interested, you get Korea interested, you get Japan interested – these are entities...now China and India...that all have big monopoly laws. If you can get a lot of different jurisdictions moving... As compared to filing your own lawsuit against another company, it's relatively inexpensive to do that.

Adrian Bye: How much is relatively inexpensive?

Renata Hesse: Depending on how good your case is, you can probably get an investigation started somewhere worth it in the range of, I would say, something like \$20,000 to \$50,000.

Adrian Bye: Really? For this scale of stuff, it's effectively free.

Renata Hesse: Yes, as opposed to the millions and millions of dollars it would cost you to prosecute a lawsuit against somebody.

Adrian Bye: You end up with a huge amount of leverage because you can spend your \$20,000 to \$50,000, go get all these investigations started and then the government takes over and pays for it.

Renata Hesse: Yes, most of the government agencies expect a complainant, like if you're the one who's unhappy about this stuff, to support their investigation and to be available to them to help them because the interesting thing about working in the government is that you don't have a client to teach you about the industry, to tell you how things work or to do any of that stuff. As a consequence, they really do need the help of people who are in the industry and if you are the person or entity that got things moving, they generally will expect you to invest some resources in helping them pursue it. But the cost of getting the thing up and running assuming you're successful at doing that is, as you said, comparatively almost zero.

Adrian Bye: Let's say I'm running my company and I'm based somewhere in the US. I don't know anyone in the Department of Justice. I do what I've got to do and I run my business but how on Earth does a little guy like me get the attention of federal regulators to put them onto Yahoo!?



Renata Hesse: You hire a lawyer, I'm afraid to say. You hire somebody who knows how to put together the information in a way that's going to be persuasive to them and that will go into the agency, and explain to them why it is that they should look at this and why the conduct that you're concerned about isn't just bad for you but it's bad for consumers. The other touchstone of all of this is that antitrust is not about hurting competitors. It's about hurting consumers. So whenever anybody is thinking about going into a regulator or suing under the antitrust laws, you really have to think about telling a story about how the harm that's happening to your business is impairing you and keeping you from bringing better, cheaper products to consumers because that's what they care about and that's what the law cares about. We used to always joke around that the investigations when we're at the Justice Department that if a competitor is really, really worried about a particular merger or other transaction, we usually thought, "Okay, that means that this is actually going to be good for

competition," because your competitor is concerned.

Adrian Bye: There're a lot of people online. I have some interest as well in the views of libertarians and libertarians would say, I imagine and tell me if I'm wrong, that antitrust is just a sign of big government going in to regulate things they shouldn't be regulating. It should be just a free market and let the market work itself out anyway without any kind of intervention. What's your response to that?

Renata Hesse: There's a balance there and that it's certainly what the libertarian view of antitrust is, is that it itself interferes with the free market. My general response to that is that the market's not perfect and it

doesn't work perfectly. When you have companies that what we call durable and longstanding market power...meaning that it's not just a flash in the pan – it's going to last for more than a couple of years...their economic incentives turn in such a way that they actually are working at cross purposes with the way that the free market should function because they get the most benefit out of keeping that market power in existence regardless of whether or not the next little guy who's come up has a better idea and a better, cheaper product. They don't care. They want to keep making the money that they're making and as a consequence, they start thinking about the world in a way of how do I preserve what I've got.

Adrian Bye: ...rather than thinking about how can I innovate up to the next thing and kill your own product because you're innovating out with the next thing. Instead it's how can I lock the market down stronger so the new innovator thing can't get past, is that what you think?

Renata Hesse: Right and how do I keep what I have instead of how do I move forward, and continue to do new and interesting things so that I'm responsive to the marketplace out there.

There's obviously a balance there because interfering with the marketplace too much, I think, can mess things up and there's no question about it.

But doing nothing. When there's a lot of discussion right now about the economic crisis in the US and whether or not the lack of regulation in some of the financial markets was a cause of it – I think it will take us a long, long time to know the answer to that question. But there's certainly been a lot of discussion about whether or not the SEC, the Commodities Future Trading Commission and other government regulators should have been more involved in regulating the investment banks. Shockingly, you see some of these companies like Morgan Stanley now saying, "I want to become like a commercial bank and subject myself to greater regulation in that process."

Adrian Bye: But then they get government access to cash and stuff, right?

Renata Hesse: Right, right.

Adrian Bye: That's a fascinating environment.

Renata Hesse: Yes.

Adrian Bye: You're saying that basically there's a balance that the libertarians would say, "Antitrust is bad," you're saying, "We need some of it but not too much." Does that sound accurate?

Renata Hesse: I think that's right. I think too much of it can clog up the marketplace in a way that is a drag on the free market. I think that's absolutely right.

Adrian Bye: I've read a bunch about the history of John D Rockefeller and Standard Oil, and learned that antitrust is actually against the trust and the trust were what they made in the 1880s and 1890s – you'd have a trust that made your oil, another trust that made your sugar and another trust that made your butter – everything was run by trust.

Renata Hesse: Yes.

Adrian Bye: I don't actually completely understand what that means. Is it just a collection of companies collaborating or is it always just one single company that had market power? How did the world actually look in those days that caused antitrust regulation to come down?

Renata Hesse: It was not collaboration. To be perfectly honest, my history knowledge on this is pretty lame. The problem was that these large companies simply had too much power and force in the marketplace, and that they were impairing the ability of the economy to function in a way that, I think, people realised it really needed to function in order to transform itself in the 20th century. There is a part of antitrust that is about illegal collaborations between competitors and we haven't talked about that at all. My recollection of this is that, that's not particularly what was going on at that time. But it is illegal for companies to get together and agree on the prices that they should sell their products at, which parts of the country they're going to sell in or which kinds of customers they're going to sell to. It's illegal regardless of your size and regardless of how much power you have. You simply cannot do that.

Adrian Bye: You say size but let's say if it was a bunch of \$5 million companies all ganging up against one other company, is that something that antitrust would still step in for?

Renata Hesse: If they were getting together and agreeing to, for example, boycott a particular large distributor, it could be. There're lots of cases. The classic example of the kind of thing you're talking about are cases where doctors get together and agree on how they're going to negotiate with insurance companies or hospitals. Those are violations of the antitrust law. Well, they can be.

Adrian Bye: What if a bunch of \$5 million companies get together against a small competitor and have an agreement on how to handle that competitor? Would that be antitrust?

Renata Hesse: Same thing.

Adrian Bye: In a case like that, is that still the same sort of stuff – you get your attorney, file stuff with the government, and they go on and look into it all?

Renata Hesse: Yes. You can also just sue them directly but yes.

Adrian Bye: How routine is that sort of thing? Does that sort of thing happen a lot?

Renata Hesse: There are tons of these. These are typically criminal cases. It depends on what you're doing but if you're getting together and saying, "We don't want to deal with that distributor," that's going to be a civil case. If you're getting together, no matter how small you are...you can look on the Justice Department website...there are all sorts of rinky-dink people getting together and fixing prices. On a recent case and these weren't rinky-dink people, Marine Hose for, I think, oil rigs... If you are. In the technology market, the biggest ones recently that the Justice Department did were these cases involving price-fixing in DRAM. People went to jail, and paid lots and lots and lots and lots of money in fines in those cases.

Adrian Bye: They went to jail for antitrust issues?

Renata Hesse: Yes.

Adrian Bye: This is where they'd gotten together in a room and set prices on stuff.

Renata Hesse: Absolutely. In the DRAM cases actually, they...

Adrian Bye: It's something you go to jail for?

Renata Hesse: Yes, yes. In the DRAM cases, they...

Adrian Bye: Why would that be criminal rather than civil?

Renata Hesse: The notion behind this is that, that kind of behaviour is so pernicious and so against the principles of the functioning of the free market that the liability should be criminal. It's sort of an interesting area because there's not a bright line between when you charge someone with a criminal violation and a civil violation but people say if you're literally getting in together in a room with your competitor and that you have the classic smoke-filled room scenario, you know you're doing something bad, you are cognitive that what you're doing is not consistent with your obligations as a good actor in the economy – we're going to prosecute that criminally. Executives go to jail for that, and they pay hundreds of millions of dollars in fines for that kind of behaviour. Just to note, the interesting thing about the DRAM case was that it was not a situation where people got together in a room and talked. It was a much more obscure way of communicating the price issues – people having lunch, people talking on the phone – that kind of stuff. It was not the classic smoke-filled room.

Adrian Bye: What are the typical types of illegal collaborations between competitors? There's pricing. There's selecting working with another related company. What would be some others?

Renata Hesse: The three big, classic examples are price-fixing, bid-rigging and market allocations. The first two are probably pretty obvious. The third is where you agree with one of your competitors to only concentrate in a particular type of product. You say, "I'm going to take toilet paper, you take paper towels," "You take DRAM, I'll take SRAM," "I'm going to focus my business on selling only to customers in California, you take Nevada and Wyoming," or "I'm going to focus on just selling to customers that have businesses with more than 500 people in it." If you're an ERP software seller, for example, you'd say, "Okay, you take all the big companies, I'm going to take all the small ones." What you're doing when you do that is you deprive those customers or those markets – those geographic areas of the competition between the two entities and you're essentially agreeing upon between the two entities, the three entities or how ever many there are in the agreement that you're going to be able to have a lock on this particular area or this particular type of customer. As a consequence, you're going to be able to charge them with whatever you want to charge them because we're not going to compete with you there. So those are the three. Bid-rigging, price-fixing and market allocation are the classic criminal violations.

Adrian Bye: Here in the Dominican Republic which is where I live, it's an island. It's a country of about 9 million people. It's obviously third-world. There's a couple of very big companies that run a lot of stuff. One of the biggest – it looks like their annual sale is somewhere around \$500 billion a year and they control sales of some of the major brands of alcohol, cigars and things like that. I would imagine that this country doesn't have the resources or the size to justify antitrust so maybe I'm incorrect. I'm wondering, some of these companies have been around for 100+ years – is this the sort of stuff that because there probably isn't any antitrust law here that, that's the reason why they do have such market power and staying power.

Renata Hesse: The other possibility is that they've been government-owned or there's a transition from a government-controlled economy to a private economy and that's what happened.

Adrian Bye: Most of them came about when there was a dictatorship here in the past.

Renata Hesse: Right.

Adrian Bye: A lot of them started during the dictator's time but they are privately family-held. I think they were created during the smoke-filled backroom rooms. Now 40 years later, it's still incredibly powerful, and no one seems to be able to compete.

Renata Hesse: Right. It's possible. Often, one of the things that happens in the US that drives people crazy is that sometimes different state legislatures are past laws that immunise. Alcohol distribution is one of the classic examples where the states will enact what are essentially very protectionist laws for the local distributors or local producers. So that sometimes protects entities like that. I think the lack of antitrust regulation certainly can have an impact on that.

But it's interesting. I was in Japan last year at a meeting of the International Competition Network and there were antitrust regulators from all sorts of little teeny countries. It's a growing field of interest for even very small economies. You can have an antitrust law but whether or not you have the resources to invest and the wherewithal to go after a large company if they're violating the law is a different question.

Adrian Bye: From the other side, are there lessons that start-ups can take from companies that have successfully put themselves into a position where they do get prosecuted by antitrust? Are there things that we can look at and say these are the kinds of things that we can learn to make ourselves more competitive? Is there anything you think a company could apply?

Renata Hesse: Apply from the antitrust context?

Adrian Bye: Yes, because in antitrust, your area is all about making sure that companies stay competitive so you're looking at how companies get to a certain size in their restraining markets and stopping people from becoming competitive. There're obviously some techniques that big companies use that restrain competition and make themselves stronger.

Renata Hesse: Yes.

Adrian Bye: Are there things that we could be thinking about now like there's a playbook – The 10 Tricks that Microsoft Use to Become in the Position It's In. Are there things that we can learn from that to apply to our business models?

Renata Hesse: You don't want to do those things as a general matter because...

Adrian Bye: When we're small though, we can, can't we?

Renata Hesse: Some of them, you can do. There are lots of things that people do to protect their marketplaces, for example, exclusive relationships with suppliers, and those can be legal if you're small enough and you're not foreclosing a rival. The principle tools, as I said, that Microsoft used to hurt Netscape

were using primarily its relationships with its OEMs and with its other software developers to impair Netscape's ability to get out there on desktops and be used by consumers. So on a smaller level, you can do some of those very same things and these are mostly what one would call exclusive dealing relationships that is just saying, "I'm going to enter into a deal."

I'm going to say something and I haven't thought through. I don't know if this would be legal or illegal.

You say, "I've made this beautiful, new pottery which will last forever and you can use it to make dishes. It never breaks. You can drop it on the floor. It feels like glass but it's not glass, whatever it is. I'm going to make sure that I'm the only person who can distribute this through UPS and Federal Express."

I'm not sure whether that would help you but you can think of ways...

Adrian Bye: Okay. That's kind of the way you do it. If they permit to signing that then you'd be all set.

Renata Hesse: Right.

Adrian Bye: Are there any others that are possible, that are legal, obviously?

Renata Hesse: Yes, I'm just trying to think of other things you can do. The main kinds of things that, again, you're going to be looking at is how you keep yourself out in front and legally keep your rivals from getting to be in the forefront of people's minds. The ones that are coming to mind are different kinds of exclusive relationships with suppliers, distributors or advertising channels. We talked about the example of selling Christmas trees using internet advertising. Done correctly by a small enough company, those kinds of relationships, I think, can help you succeed and can be legal.

Sorry, I'm not coming up with a better example.

Adrian Bye: I bet you haven't been asked that question many times before.

Renata Hesse: No, most of the time what people want to know is what can't I do.

Adrian Bye: Right.

Renata Hesse: Typically when we do counseling, people come to us and say, "Hey, I really would like to do this. Is that okay?" and sometimes you get some pretty interesting questions that way. Usually, the business people are the ones who are thinking of the clever ways of making sure that their products succeed and not the lawyers.

Adrian Bye: Right.

There've been obviously antitrust issues between Google and Yahoo! Are you able to comment on any of those?

Renata Hesse: I'm not, really, I'm afraid since I did a lot of work for Google on it.

Adrian Bye: Okay.

I've asked you everything I can think of. Is there anything you'd like to talk about that we haven't covered?

Renata Hesse: I don't think so. I think I'll just give a plug for antitrust is an area that's both interesting and again relevant to the kinds of people who you are working with on your website. One of the most interesting and fun things for antitrust lawyers to do is to have someone come to them and say, "I've got this big company and they're giving me a really hard time. Help me think through all the various ways that I might be able to fight back," and there are a lot of different options.

Adrian Bye: They can make a lot of stuff.

Renata Hesse: Yes and that's a fun thing to do.

Adrian Bye: Cool, okay. Well, thank you very much and I really appreciate your time.

Renata Hesse: Alright.