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What To Expect From Antitrust Policy Under Makan Delrahim

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April 10, 2017 - President Donald J. Trump has announced his intention to nominate Makan Delrahim to lead the Antitrust Division of the U.S. Department of Justice (DOJ). This position requires Senate confirmation. Mr. Delrahim currently serves as Deputy Assistant and Deputy Counsel to the President, and was previously a partner at the national law firm Brownstein Hyatt Farber Schreck. Prior to his time in private practice, Mr. Delrahim served as Deputy Assistant Attorney General in the DOJ's Antitrust Division from 2003 to 2005, and as Chief Counsel of the Senate Judiciary Committee from 2000 to 2003. During his career, he has served on the U.S. Attorney General's Task Force on Intellectual Property, as Chairman of the Merger Working Group of the International Competition Network, and as a Commissioner on the U.S. Antitrust Modernization Commission.[1] Mr. Delrahim is known for his interests in enhancing global antitrust cooperation and enforcement, as well as his attention to the intersection of antitrust and intellectual property law and policy.

Mr. Delrahim is a former lobbyist for several large corporations facing antitrust issues; most notably, he lobbied on behalf of Anthem Inc. in its proposed \$54 billion takeover of Cigna Corp. before he joined the Trump administration. While in private practice, his corporate clients included Google, Oracle, Comcast, and US Airways, and he is listed on Senate lobbying forms for clients such as Pfizer, Merck, and Johnson & Johnson.[2]

Mr. Delrahim's background suggests that the Trump administration intends to take a more laissez-faire approach to antitrust enforcement as compared to the Obama administration, but within the mainstream of the last several decades' antitrust orthodoxy. Thus he supports the longstanding principle that antitrust laws should protect competition rather than competitors.[3] Where the line between aggressive competition and anticompetitive conduct is blurred, Mr. Delrahim may decide against interference in order to avoid deterring legitimate competition, especially with respect to single-firm conduct.[4]

Mr. Delrahim generally believes that laws governing economic activities need to respond to global change and technological advances. He has stated that more technical expertise on information technology must be injected into antitrust legal analysis, especially in light of the expansion of global commerce.[5] Mr. Delrahim acknowledges that our globalized world fosters economic conduct that has international effects; accordingly, he

has advocated that antitrust agencies around the world should cooperate to effectively enforce national antitrust laws and enhance competition.[6]

If Mr. Delrahim is confirmed, we can expect continued U.S support for greater coordination among antitrust enforcers worldwide. As Deputy Assistant Attorney General from 2003 through 2005, Mr. Delrahim supported greater international cooperation among antitrust enforcement agencies.[7] For example, in a 2004 public statement, Mr. Delrahim explained that he favored coordinated international anti-cartel enforcement so that the United States could prosecute serious cartel violations, but he opposed a "forced path to uniformity," which he said "would result in enforcement at the level of the lowest common denominator" among competition agencies. [8]

Mr. Delrahim's focus on international antitrust enforcement extends to increased protection of intellectual property rights on a global level. Mr. Delrahim has previously represented Oracle, Microsoft, Qualcomm, and Apple on various issues relating to antitrust and intellectual property law.[9] During the time that Mr. Delrahim served as Deputy Assistant Attorney General, the Antitrust Division participated in an intellectual property working group with the European Commission, and Mr. Delrahim expressed an interest in expanding the working group to other countries and antitrust authorities in an effort to share information, develop a regime for the protection of intellectual property rights, and incentivize global innovation.[10] Mr. Delrahim has taken exception to the common belief that antitrust law and intellectual property law are conflicting legal concepts, and argues instead that they should be viewed as complementary. He reasons that intellectual property law fosters innovation through the legal right to exclude competitors, and at the same time, antitrust law helps increase consumer welfare through a competitive economy, which creates incentives for innovation.[11] Mr. Delrahim has expressed concern that antitrust law and policy must not constrain the legitimate exercise of intellectual property rights, and has further cautioned that antitrust enforcement policies should not interfere with the exploitation of intellectual property rights through licensing.[12]

Mr. Delrahim's interest in intellectual property law and incentivizing innovation demonstrate that he is wary of "over-enforcement" chilling conduct that may actually enhance competition.[13] Accordingly, if confirmed, Mr. Delrahim would be unlikely to pursue enforcement against monopolists unless those entities also engage in anticompetitive conduct.

While awaiting Mr. Delrahim's Senate confirmation, the DOJ recently announced the appointment of Andrew Finch as Acting Assistant Attorney General in charge of the Antitrust Division, effective April 10, 2017.[14] Mr. Finch will initially assume this temporary role, and following Mr. Delrahim's confirmation, Mr. Finch will serve as Principal Deputy Assistant Attorney General of the Antitrust Division, the number 2 position. Mr. Finch was most recently a partner at Paul, Weiss, Rifkind, Wharton & Garrison, where he worked in the litigation department and advised clients on a variety of antitrust issues across several industries, including financial services, insurance, and publishing.[15] Prior to joining Paul Weiss, Mr. Finch worked in the DOJ's Antitrust Division where he served as Counsel to then-Assistant Attorney General, R. Hewitt Pate, from 2003 through 2005.

Based on the fact that Mr. Delrahim values a competitive global marketplace, we can expect that he will lead the DOJ's Antitrust Division with a continued emphasis on free market principles, innovation, and international coordination. Mr. Delrahim has also shown an interest in policy, particularly the relationship between antitrust law and intellectual property, which may move towards the protection of intellectual property rights. Hughes Hubbard has extensive experience in advising clients on a wide variety of antitrust and intellectual property matters, and is equipped to tackle the interconnected legal issues that may arise under this new leadership.

[1] White House, Office of the Press Secretary, dated March 27, 2017, available at <https://www.whitehouse.gov/the->

press-office/2017/03/27/president-donald-j-trump-announces-intent-nominate-makan-delrahim.

[2] National Law Journal, What to Know About Makan Delrahim, Trump's Antitrust Division Pick, dated March 28, 2017, available at <http://www.nationallawjournal.com/id=1202782210198/What-to-Know-About-Makan-Delrahim-Trumps-Antitrust-Division-Pick?slreturn=20170230100926>.

[3] J.J. Helland, Bush: Friend or Foe to Antitrust Enforcement, March 21, 2006 ("[t]he role of antitrust law is not to keep everybody in business . . . [t]he whole goal is to protect competition.")

[4] Delrahim Speech, Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice (Nov. 15, 2004).

[5] Application of Antitrust to New Economy Uncertain, Washington Internet Daily (June 25, 2001); Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct, NYU Annual Survey of American Law, 61 N.Y.U. Ann. Surv. Am. L. 415.

[6] Delrahim Speech, Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies The U.S. and E.U. (Oct. 22, 2004).

[7] See Interview with Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, dated November 2003, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/delrahim.authcheckdam.pdf.

[8] Delrahim Speech, Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies The U.S. and E.U. (Oct. 22, 2004).

[9] Makan Delrahim, Separate Statement of Commissioner Delrahim, in Antitrust Modernization Commission Report and Recommendations 404 n.1. (2007).

[10] See Interview with Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, dated November 2003, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/delrahim.authcheckdam.pdf.

[11] Delrahim Speech, Contemporary issues at the intersection of Intellectual Property and Antitrust (Nov. 10, 2004).

[12] See Delrahim Speech, The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property (Oct. 6, 2004); see also MLex, Delrahim, DOJ Antitrust Chief Nominee wins praise, but Trump could complicate the job, dated March 28, 2017.

[13] Delrahim Speech, Contemporary issues at the intersection of Intellectual Property and Antitrust (Nov. 10, 2004).

[14] MLex, Andrew Finch named acting US assistant attorney general for antitrust effective April 10, dated April 5, 2017.

[15] See Paul Weiss website, available at <https://www.paulweiss.com/professionals/partners-and-counsel/andrew-c-finch>.

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