



*With Makan Delrahim, an interview by Judge Douglas Ginsburg*

Makan Delrahim, the Assistant Attorney General for Antitrust at the U.S. Department of Justice, delivered the keynote address at the Leadership Conference on IP, Antitrust, and Innovation Policy, which was co-sponsored by Competition Policy International. Following up on that discussion, Mr. Delrahim graciously agreed to answer the following questions posed by Judge Douglas H. Ginsburg.

Thank you, AAG Delrahim, for granting this interview to CPI.

- 1. You mentioned that some foreign enforcement agencies have read the 2015 IEEE business review letter as endorsing efforts by standard-setting organizations to restrain patentees from seeking to enjoin infringement of a patent subject to a FRAND commitment. You have advanced a very different view of the propriety of seeking an injunction in that circumstance. Why not just rescind the IEEE letter, at least prospectively, so as to avoid the possibility of further misinterpretation?**

The business review letter that the Division issued to IEEE in 2015 in response to IEEE's request states that "[t]he Department's task in the business review process is to advise the requesting party of the Department's present antitrust enforcement intentions regarding the proposed conduct." While many in the antitrust community – including our foreign enforcer colleagues – may look to our business review letters for insight, it is important to keep in mind that these letters are limited in their application to our *present enforcement intentions* as they relate to the conduct proposed in the request. The Division always reserves the right to bring an enforcement action if, as more evidence becomes available, the actual operation of the proposed conduct proves to be anticompetitive. I have lately expressed concerns that promulgating rules that limit the ability of patent holders to seek injunctions risks undermining incentives to innovate. I have also said that such rules could potentially violate the antitrust laws where the limitation is imposed by a group of implementers with market power and has the effect of pushing royalty rates down. Nothing in the IEEE letter prevents the Division from acting where newly uncovered evidence discloses that those circumstances are present.

- 2. Referencing your earlier speech at the University of Southern California, you stated that when a court denies injunctive relief to a patentee, it “run[s] the risk of turning a FRAND commitment into a compulsory license.” Yet a FRAND commitment is by its nature a promise to license, albeit at a rate to be set later. What, then, is the precise nature of your concern?**

A FRAND commitment may be a promise to license, but it should certainly not be construed as an *unconditional* promise. In fact, it is rather typical for a FRAND commitment to include conditions. To take one example, it frequently occurs that one patent holder offers to license on FRAND terms a second SEP holder, so long as the second SEP holder reciprocates. In a situation in which the second SEP holder refuses to offer a reciprocal license to the first SEP holder, we would not expect the first SEP holder to proceed with licensing the second SEP holder, and we would not think it reasonable for a court to require it, because the court would be imposing on the first patent holder a more onerous set of obligations than the patent holder agreed to honor when it made the commitment. The same principle applies to a patent holder's right to seek an injunction. The patent right confers on the patent holder a right to exclude. Courts should not take it upon themselves to craft additional limitations on that right, or they risk undermining the system of incentives that our forefathers contemplated when they framed the U.S. Constitution. If, in making a FRAND commitment, a patent holder has expressly agreed not to seek an injunction against a putative licensee, then that is a fact that courts can take into account during litigation.

**3. Referencing your earlier speech at the University of Pennsylvania, you argued antitrust law is not an appropriate means by which to resolve licensing disputes “between intellectual property holders and implementers regarding the scope of FRAND commitments.” Instead, you said “a contract theory is adequate and more appropriate” to the task. Is there no role for other sources of law, such as the trade statutes administered by the International Trade Commission?**

Contract theory is certainly an appropriate and useful mechanism for assessing the scope and application of FRAND commitments, but it may not be the only mechanism. There have been cases in which the courts have construed the meaning and application of FRAND commitments in the context of patent infringement claims, which may also be an appropriate mechanism for adjudicating these disputes. Similarly, the ITC has the ability to consider FRAND commitments in the context of 337 actions, and the authority to issue exclusion orders where infringement is established. There may also be legitimate fraud claims when, for example, patentees make deliberate misrepresentations to SSOs in their letters of assurance. As an antitrust enforcer, my focus has of course been on the proper application of the antitrust laws to these disputes, and as I have said, it is my view that antitrust theories generally are not an appropriate mechanism for resolving disputes relating to the infringement or licensing terms of SEPs. Antitrust is not appropriate for solving every and any inefficiency in the economy; the proper role of antitrust is limited to where inefficiencies arise from identifiable harms to a competitive process. Moreover, as I have explained, an antitrust theory carries with it the threat of treble damages, and the related risk of blunting incentives to innovate and participate in standard setting in the first place. My emphasis on contract law is not meant to exclude theories of infringement, in either the district courts or at the ITC. Rather, I mean to highlight the fact that there are mechanisms other than antitrust claims that are appropriate to resolving FRAND-related disputes.

**4. You note the Division “strive[s] to impose remedies that are carefully tailored to the harm we identify.” Does this mean you rule out conditioning mergers on prospective commitments such as tightening data security or licensing patents more freely that may be viewed as desirable but are unaffected by the proposed transaction?**

In the context of merger enforcement, the appropriate goal is to accomplish a remedy that effectively preserves competition in the relevant market. There should be a close, logical nexus between the proposed remedy and the alleged violation. Furthermore, the remedy should fit the violation and flow from the theory or theories of competitive harm. I have on several occasions expressed that the Division prefers structural to behavioral relief in addressing the anticompetitive effects of mergers. In crafting a remedy that meets these requirements, we apply economic and legal analysis to the particular facts of each case. Using merger enforcement to accomplish goals unrelated to the alleged harm – however desirable those goals may be on some level – is contrary to our mandate as antitrust enforcers, and could ultimately undermine public trust in our mission.

**5. You have often emphasized the importance of strong intellectual property rights. How did you come to this view? Did personal experience shape your perspective?**

The intersection of antitrust and intellectual property has long interested me, and personal experience has undoubtedly shaped my perspective. Before beginning my career as an antitrust lawyer, I was a registered patent agent. I also hold a Master’s Degree in Biotechnology. My experience in the fields of science and technology give me a real appreciation for what this country’s forefathers aimed to accomplish when they drafted Article I, Section 8 of the U.S. Constitution, which empowers Congress to promote the progress of science and the arts by granting authors and inventors exclusive rights to their writings and discoveries. I believe that this feature of the Constitution is a cornerstone of our country’s ingenuity and success. As some people may know, I emigrated to the United States from Iran as a child, in 1979. I have seen firsthand, as an employee at my father’s gas station, and throughout my career as an antitrust lawyer, how a free market economy facilitates innovation and entrepreneurship. Taking all of these experiences together, it is fair to say that it is a deeply held personal goal of mine to ensure that the antitrust laws and the intellectual property laws work in harmony to facilitate a climate in which the market rewards ingenuity, innovation, and dynamic competition.

**6. Some might say the debate over the proper role of antitrust in the standard-setting process poses a choice between weakening patent rights, which would favor implementers and maximize static efficiency, and leaving patent rights unimpaired, which would favor innovators and maximize dynamic efficiency. Do you agree that patent and antitrust policies can maximize either static efficiency or dynamic efficiency, but not both?**

There are enormous benefits to the public from standard setting. Particularly in the information and communications technology (or “ICT”) sector, we all have a richer, more varied set of choices thanks to the work of all of those companies and individuals that participate in setting technical standards. The system works best when both innovators and implementers are attracted to the standard setting process. It follows that the ideal antitrust policy is calibrated to forestall anticompetitive conduct while attracting a diverse set of participants to standard setting. As I have said on multiple occasions, I am concerned that over the past few years, antitrust policy has been too focused on the incentives of implementers, and not focused enough on the incentives of innovators. I have advocated for a rebalancing, so that we have a system that more appropriately accounts for the interests of both groups. Ideally, we should strive for an ecosystem in which patent holders are rewarded for their innovations and consumers have access to exciting new technologies at competitive prices. The choice is not binary. Both static competition and dynamic competition are worthy of the protection of the antitrust laws. With the right policies, we can all benefit.

