



...with Makan Delrahim



In this month's edition of CPI Talks we have the pleasure of speaking with Mr. Makan Delrahim, Assistant Attorney General ("AAG") for the Antitrust Division of the U.S. Department of Justice ("DOJ").

Thank you, AAG Delrahim, for sharing your time for this interview with CPI.

1. What do you see as the biggest issue facing the U.S. Intellectual Property system? And, what are some of the DOJ's priorities in analyzing the intersection between intellectual property protection and antitrust issues? Is there a holistic approach that can be used to "broaden the innovation ecosystem"?

From the Antitrust Division's perspective, our primary concern regarding the intellectual property system is ensuring that competition law does not become a tool for policing the unilateral exercise of IP rights in a manner that curbs incentives for innovation. The balance struck by the Founders and Congress in creating a system of enforceable patent rights helped launch an innovation revolution in the early Republic, and that system has stood the test of time.

In recent years, we have seen a new skepticism toward the exercise of patent rights that has manifested itself in different ways — one of which is through the assertion that owners of standard-essential patents wield market power that should be curbed through the application of antitrust law. These critics assert that patent holders whose technology is essential to a standard engage in "hold up," by refusing to license until their royalty demands are met. As this idea has gained certain traction in the lower courts, we have observed that the prospect of treble damages is being used by patent implementers as a weapon in their licensing negotiations. That is, after a standard has been set, a licensee can threaten to bring an antitrust suit if it believes that a patent holder's royalty demands are too high.

We are concerned about this trend because this debate, for many years, appeared to be one-sided. A more holistic approach that "broadens the innovation ecosystem" should recognize that there are competing concerns in the standard-essential patent arena. Thus, over the past two years, the Division's advocacy has focused on re-balancing the debate over concerns regarding so-called patent "hold-up" with the prospect that patent implementers may engage in "hold-out." "Hold out" occurs where one or more patent licensees refuse to take a license from a patent holder, knowing that the only remedy the patent holder may pursue is an infringement suit or injunction. Some courts have interpreted Supreme Court case law regarding injunctions to make it very difficult for standard-essential patent holders to stop infringement. And patent implementers who infringe only may face damages in the amount of a reasonable royalty calculation. Thus, licensees have a strong incentive to hold out in their royalty negotiations.

At the same time, we believe that antitrust law should play a role in policing patent licensing conduct: that is, where a group of patent implementers or patent holders engage in concerted action to harm the competitive process. The Supreme Court has observed that standard-setting organizations "can be rife with opportunities for anticompetitive activity." While unilateral so-called hold up or hold out may not raise competition concerns, collective hold up or hold out could trigger antitrust liability.

2. As recently announced, the DOJ and USPTO will work together to update their 2013 joint policy statement to provide clarity on several matters, including SEP holders' rights to seek injunctions against infringements, and how best to ensure standards development organizations do not facilitate collusion that undermines innovation. What are some of the next steps in this policy-making effort?

The Antitrust Division has been working with the USPTO to clarify our joint views on the remedies available to SEP holders who bring infringement actions. Our goal is to encourage good-faith licensing negotiations that reflect the value of patented technologies, rather than the cost to a patent holder of having to litigate infringement when an implementer refuses to take a license, or the cost to an implementer of having its standards-compliant product excluded from the market entirely on account of a single patent holder's refusal to license. We hope to issue a joint statement that articulates the prevailing law, including that there is no special set of legal rules that limit remedies for infringement of SEPs subject to a F/RAND commitment. This is why we withdrew from the 2013 policy statement, as we found it misguided.

The Antitrust Division protects dynamic competition by preserving incentives to innovate in other ways as well. We look closely at whether standards development organizations have become havens for self-dealing among competitors. We advocate for standards development organizations to minimize the chance of anticompetitive conduct by maintaining an open and balanced membership with transparent procedures. For instance, the Division filed a Statement of Interest in *NSS Labs v. CrowdStrike, Inc.*, urging the District Court to consider carefully whether an antitrust exemption provided for in the Standards Development Organization Advancement Act of 2004 ("SDOAA")¹ applied to the organization at issue in the case. The statement explained the harm that would arise from interpreting that Act too broadly to protect the anticompetitive conduct of self-dealing groups of competitors.²

The Division also recently urged the American National Standards Institute ("ANSI") and accredited standards developers ("ASDs") to have balanced representation in decisional bodies so that diverse interests are represented and so that their decisions do not shift bargaining leverage in favor of any one particular set of interests. The Division also encouraged ANSI to promote flexibility among ASDs to experiment and compete with one another on their policies.³

3. As the debate on the Consumer Welfare standard rages on, what would you consider to be some important fundamentals that need to be preserved?

The U.S. antitrust agencies, and an increasing number of competition authorities around the world, use the consumer welfare standard to guide their antitrust analysis. The goal of the U.S. antitrust laws is to protect competition. Today, we know that the competition protected by our antitrust laws is broader than just the competition between two firms at the time a transaction is announced or when a business practice is implemented. Over the last 40 years or so, a consensus has emerged among antitrust practitioners and economists that the competition protected by the antitrust laws is a competitive process, the proper functioning of which is consumer welfare maximizing.

From time to time, the public has looked to antitrust to resolve complex economic problems, especially those related to wealth disparity, corporate power, and diminished bargaining power of workers vis-à-vis their employers, to name just a few examples. That has led some observers to question whether the consumer welfare standard is up the task of protecting consumers from anticompetitive actions. The consumer welfare standard offers several effective features that protect competition despite changing circumstances. As I will discuss in further detail, these features must be preserved.

It is Flexible. Any welfare standard that can withstand the test of time must be flexible enough to detect harms in existing, emerging, and unrealized industries. The antitrust laws were flexible enough to condemn anticompetitive practices in the analog world and the digital world alike, and I believe they are sufficient to detect anticompetitive harms in emerging markets as well. Indeed, antitrust enforcement improves as economic thinking improves, and the consumer welfare standard provides a framework that is flexible enough to take into account improved economic analysis.

¹ 15 U.S.C. §§ 4301-4306.

² *Id.* § 4302.

³ See Letter from Principal Deputy Att'y General Finch to Patricia Griffin, Vice Present and General Counsel, American National Standards Institute (October 11, 2008), <https://www.justice.gov/atr/page/file/1100611/download>.

It Offers Consistency and Predictability. The consumer welfare standard provides enforcers, courts, and market participants with a consistent way of determining whether a business practice or transaction violates the antitrust laws. Deterrence is an important goal of antitrust enforcement, and companies that are able to determine what conduct is permissible and what is not are better able to self-regulate. Deterrence also preserves the agencies' limited resources.

It Avoids Muddling Competition with other Values. Competition must remain the sole focus of antitrust enforcement. By sharpening our focus on anticompetitive practices and transactions that are harmful to consumers, the goals of antitrust law are not misapplied to advance exogenous goals. To incorporate other values into antitrust analysis is not only unadministrable, it would open up the agencies to lobbying and rent-seeking that would erode public confidence in markets and law enforcement.

That is not to say that antitrust enforcement and broader social values are mutually exclusive. But to the extent that antitrust delivers those other values, it is by promoting competition. That is, by condemning restraints and transactions that harm competition, vigorous antitrust enforcement can protect free markets that lead to new innovative benefits, which can transform society and benefit consumers and workers alike. As the Supreme Court explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.⁴

It Incentivizes Innovation. The consumer welfare standard is not synonymous with a policy always favoring lower prices. It is a framework that protects multiple dimensions of competition. Where competition is harmed, firms gain market power that can be used not only to raise prices, but also to degrade quality, diminish the rate of innovation, and even lower privacy protections. Protecting competition means protecting all those dimensions of competition. Sometimes, promoting innovation can mean higher prices. For example, high demand for an exciting new product may drive up its price, but that may simply reflect consumer preference for a superior product relative to alternatives. Antitrust law is intended to protect this behavior, not punish it, so that others will have incentives to innovate and compete themselves, all for the benefit of consumers. Such dynamic competition should be encouraged by our enforcement policies.

4. You recently gave a speech at the OECD entitled: “Don’t Stop Thinking About Tomorrow’: Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property.” What are some of the ways to maximize innovation incentives in the long and short run?

Our goals at the Antitrust Division are two-fold: first, make sure that companies do not engage in mergers or anticompetitive conduct that harm the competition for innovation; and, second, ensure that the development of antitrust law generally does not over-deter innovate companies from asserting their IP rights.

On the first point, our merger reviews regularly consider the impact of concentration on incentives to innovate. For instance, in *Bayer/Monsanto* and *Thales/Gemalto*, our investigations revealed that in certain markets where there were horizontal overlaps, the rivalry between the merging companies had been driving investment in developing innovative new products. In both cases, the Division required divestiture of IP and research capabilities for products under development. These structural remedies were designed to ensure that the acquirer of the divestiture assets would step into the shoes of the former competitor, and compete in the development of innovative new products and services.

We also look carefully at the effect on innovation in vertical mergers: a vertically integrated company could acquire the incentive or ability to foreclose innovative new rivals. Where there is evidence that this sort of effect is likely, the Division does not hesitate to use its enforcement authority. We would likewise enforce the antitrust laws against companies that engage in anticompetitive conduct to prevent the adoption of innovative new technologies or to harm competitors who might benefit from that change.

Additionally, we have been advocating to courts for a careful application of the antitrust laws to licensing disputes between patent holders and patent implementers.

⁴ *Northern Pacific Railway Co. pro v. United States*, 356 U.S. 1, 4-5 (1958).

5. Do you have any thoughts on the recent op-ed from Senator Mike Lee entitled “*Just one agency should enforce antitrust law*”?

I enjoyed reading Senator Lee’s op-ed, and I believe there is wisdom in his observation that having a single agency enforce the antitrust laws may be more efficient than tasking two agencies with overlapping jurisdiction. We should continually examine our enforcement system and processes to ensure that we are best serving the American consumer. We nevertheless respect the current allocation of authority that Congress has granted federal enforcers at the DOJ and the Federal Trade Commission (“FTC”).

In the spirit of innovation, we also may want to refresh our thinking about how authority within the existing statutory framework is allocated. Two ideas come to mind, one regarding state enforcement and the other regarding national enforcement of the antitrust laws.

First, we should not lose sight of the role that states have asserted for themselves in enforcing the federal antitrust laws. Senator Lee’s op-ed focused on the two federal agencies, but in reality there are 53 agencies that wield this power: the DOJ, the FTC, 50 states, and the District of Columbia. As businesses increasingly expand their geographic range, the mergers that come before the Division more and more often have broad impacts on interstate and international commerce. While there is an appropriate role for antitrust enforcement by the states in intrastate matters, to permit every state enforcer to impose its own, unique remedy would be deeply problematic. Allowing states to impose their own remedies when they are inconsistent with a remedy that was imposed by federal authorities would be even more unworkable.

Second, even where the federal agencies have overlapping authority, it is important to ensure that the United States speaks with one voice regarding antitrust matters that impact international affairs, and that the Executive Branch speaks for the United States where there is any risk of disagreement between the two agencies on matters of antitrust law or policy. These principles follow from Article II of the U.S. Constitution, which grants the President authority to conduct foreign relations on behalf of the United States.

Although the U.S. government includes a number of independent agencies, only Executive Branch agencies may represent the United States and speak on its behalf in international affairs unless the President or Congress specifically has delegated authority to an independent agency to do so. The DOJ is responsible for enforcing the antitrust and competition laws, and representing the United States with respect to U.S. antitrust policy interests. In particular, the DOJ is authorized under 28 U.S.C. § 517 to attend to the interests of the United States, and those interests extend to conduct occurring abroad or involving foreign commerce that violates the U.S. antitrust laws.

Although Congress has granted the FTC certain authority to engage in international antitrust investigations and enforcement, including providing technical investigative assistance to foreign antitrust authorities, it would be inconsistent with our constitutional framework — in particular, the role of the Executive Branch under Article II — for the FTC to assert a policy position in an international forum that contradicts the policy position of the United States. When the agencies are at risk of disagreement on any matter of antitrust law or policy, it is crucial that they work out their differences and that, ultimately, the DOJ, on behalf of the Executive Branch, should represent the policy positions of the United States in any foreign relations, consistent with the U.S. Constitution.

6. In your remarks at the New York University School of Law on July 11, 2019, you announced a significant policy shift at the DOJ that would incentivize the adoption of adequate and effective corporate compliance programs. Can you please go into a bit more detail about this?

Antitrust compliance programs are the first line of defense against misconduct. The Division is committed to incentivizing antitrust compliance efforts by rewarding investment in compliance, even when the program did not deter all misconduct. I hope our announcement will increase corporations’ commitment to antitrust compliance and thereby help stop costly crimes before they happen or, failing that, mitigate the damage to consumers and the free market by detecting wrongdoing sooner.

On July 11, I announced that the Division will consider and allow for crediting corporate compliance at the charging stage in criminal antitrust investigations. When considering corporate charges, Division prosecutors will now consider compliance together with all the other factors under the Principles of Federal Prosecution and the Principles of Federal Prosecution of Business Organizations, as well as our Corporate Leniency Policy. The potential credit is resolving the matter by a deferred prosecution agreement, rather than by guilty plea.

In connection with my announcement, the Division revised the Justice Manual to reflect this policy change, and updated the Antitrust Division Manual to address evaluating compliance programs, selecting monitors, and Division processes for recommending indictments and plea agreements. Finally, for the first time, the Division published a guidance document that focuses on evaluating compliance programs at both the charging and sentencing stages of criminal antitrust investigations. This guidance document is intended to assist Division prosecutors in their evaluation of compliance programs, and to provide greater transparency as to the Division's compliance analysis.

The Division's policy change, along with revisions to public documents and the publication of a guidance document, are intended to deter antitrust violations and reward the efforts of good corporate citizens who invest in, and commit to, a culture of compliance.

Despite our focus on compliance, the Division will not evaluate compliance programs in a vacuum. A truly effective compliance program is one of the ten factors the Justice Manual directs prosecutors to consider when weighing charges against a corporation. Of the ten factors, four stand out as hallmarks of good corporate citizenship. Good corporate citizens not only implement robust compliance programs, but if misconduct occurs, they promptly self-report, cooperate, and take remedial action. Effective compliance and prompt self-reporting are intertwined: the Justice Manual directs prosecutors to consider "the promptness of any disclosure of wrongdoing to the government," when evaluating the compliance program itself.⁵ Accordingly, prosecutors will not credit compliance programs when the other hallmarks of good corporate citizenship are absent.

⁵ Justice Manual § 9-28.800.



CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

