

New Head of Antitrust Division Commits to International Antitrust Efforts in First Public Remarks

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Newly instated Assistant Attorney General for the Antitrust Division Makan Delrahim recently delivered his first public remarks, at the Antitrust in Developing Countries conference at New York University School of Law. Notably, particularly for a new Republican appointee, Delrahim chose this forum for his first speech and focused his remarks largely on the importance of cooperation and consistency in international antitrust enforcement. Throughout his remarks, Delrahim stressed the themes of nondiscrimination, transparency and procedural fairness in antitrust enforcement on a global scale. In doing so, he shed light on how the Antitrust Division will work to accomplish these goals, both internationally and at home.

The Importance of Cooperative International Enforcement

In Delrahim's view, antitrust enforcement provides necessary support to competitive markets, and as more economies become market-based, the need for international dialogue becomes even more critical. According to Delrahim, helping developing countries establish effective competition enforcement is beneficial to both the developing country and the United States, because "competition in markets abroad drives innovation and quality, and reduces price." Due to the global reach of supply chains, market efficiencies abroad will lead to less expensive and better quality goods for American consumers and opportunities for American businesses to compete internationally. Companies and practitioners with recent experience obtaining multijurisdictional clearances for merger transactions will welcome Delrahim's recognition that cooperation and coordination between regulators in different jurisdictions can make the overall process more efficient and consistent.

Delrahim announced his intent to build stronger relationships between the United States and other enforcement agencies and invited newer agencies to request U.S. assistance and guidance in the process of developing their own antitrust enforcement schemes. At home, Delrahim will continue to invest in the Division's International Section to ensure it has the resources it needs. He aims to modernize antitrust facilities with better equipment and technology to make global discussions and international cooperation more routine.

Fundamental Fairness in Antitrust Law

Delrahim acknowledged that, while it is important for each jurisdiction to develop its own set of competition laws, there "should be no debate about fundamental approaches to the just administration of the antitrust laws, such as nondiscrimination, procedural fairness and transparency."

Delrahim spoke at length about the importance of nondiscrimination, stating that when agencies use antitrust laws to discriminate against foreign firms or favor domestic ones, they engage in behavior that is counterproductive to public policy, removing the incentive to innovate and risking stagnation. Regulators that align closely with the interests of "national champions" can "sap local economies of energy and entrepreneurship," harming both domestic consumers and the global markets. Instead, Delrahim expressed his view that every country would benefit from the effective competition that results from nondiscriminatory enforcement.

Delrahim also focused on the necessity of transparency and procedural fairness in antitrust enforcement to strengthen confidence in the free market system, emphasizing his belief that it is the responsibility of antitrust enforcers to develop clear rules and

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enforce them evenly, in order to “create a playing field where innovation and ingenuity can thrive.” Agencies must be willing to open their policies to challenge in order to gain the confidence of the business community and the general public.

Delrahim outlined plans to work with the U.S. trade representative to ensure that trade agreements will guarantee international enforcement procedures that are nondiscriminatory, transparent and procedurally fair. He said he was pleased to report that the Antitrust Division had finalized the competition chapter in the new NAFTA negotiations and promised to renew efforts to evaluate other existing agreements. Delrahim cited his early decision to hire International Trade Law Professor Roger Alford as the Division’s international deputy assistant attorney general as proof of his commitment to these trade goals.

The Challenge and Necessity of Balanced Antitrust Enforcement

Delrahim also used his first public remarks as an opportunity to highlight his philosophical approach to enforcement of the U.S. antitrust laws. Delrahim said he intends to be “an enforcer, not a

regulator.” In order to support a free-market system and maximize welfare, he noted it is important that antitrust enforcement “strike the right balance between over- and under-enforcement.” According to Delrahim, “blocking a procompetitive transaction can be as dangerous as clearing an anticompetitive one.” Part of striking this balance is applying competition law consistently and impartially and engaging in careful analysis. He stated that the Division would not impose enforcement actions or accept potential remedies when not warranted under the facts.

Even with a potentially less aggressive approach to merger transactions, which remains to be seen, Delrahim pledged that criminal enforcement will remain a top priority. He emphasized the Division’s commitment to prosecute those who engage in price-fixing, bid-rigging and other collusive behavior, including by applying the per se rule to the most harmful conduct. As he stated, deliberate anticompetitive behavior not only harms consumers but also harms “their faith in the free market system.”