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BLOG

Antitrust Chief Cautions Against Global Relief, Calling for A Review of The Division's International Guidelines

DECEMBER 3, 2019

In a recent speech, Makan Delrahim, Assistant Attorney General for the Antitrust Division of the Department of Justice, announced that he has directed the Division to review its International Guidelines to, among other things, ensure that they "adequately reflect the importance of comity" with international enforcers, particularly with respect to remedies. Delrahim urged that, despite the storied history of cooperation among antitrust enforcers worldwide, the decision or remedial outcome in one jurisdiction should not "set the norm" for global operations. For example, Delrahim said some countries have imposed global licensing of U.S. patents as a remedy for anticompetitive conduct, which "takes away" the Division's ability to reach a different result and/or risks harm to U.S. consumers by dis-incentivizing investment and innovation.

Delrahim emphasized that comity is "the solution" to this to "promote efficiency for international businesses by avoiding unnecessary conflicts." The Division, for example, should not seek worldwide relief if there is a narrower avenue available that would otherwise be "adequate." The concept, he said, ought to be both reciprocal and flexible —the latter as seen in the Vitamin C case where the U.S. Supreme Court rejected the view that comity *requires* deference to a foreign interpretation and instead, made it clear that no "single formula" fits all cases and other materials or interpretations remain relevant.

Delrahim's speech, overall, is consistent with the Division's recent Statement of Interest submitted in the Ninth Circuit appeal of the District Court's decision in *FTC v. Qualcomm*. There, despite the DOJ's request that the District Court hold a separate evidentiary hearing about the proposed remedy, the District Court issued a worldwide injunction covering technologies that were at issue (e.g., CDMA and LTE) and ones that were not at issue (e.g., 5G) in the action. The DOJ claimed that this remedy—an injunction requiring Qualcomm to re-negotiate its licenses on fair, reasonable, and nondiscriminatory (FRAND) terms with no jurisdictional limit—"contravenes the federal enforcement agencies' 'general practice . . . to seek an effective remedy that is restricted to the United States,' unless a broader remedy is necessary to cure the competitive harm to U.S. commerce and consumers."

In the earlier bench trial, the District Court had rejected the DOJ's call for an evidentiary hearing on the remedy before issuing its worldwide injunction. The district court found that an evidentiary hearing was not necessary because the matter of relief was part of the trial on liability due to the "considerable testimony, evidence, and argument on the feasibility of requiring Qualcomm to license its SEPs to rival modem chip suppliers, and on other issues related to the scope or nature of the remedy."

The appeal is currently calendared for January 2020.

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