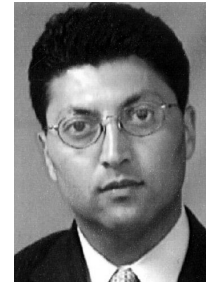


Interview with

Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Editor's Note: *The Department of Justice has appointed a multi-dimensional individual to fill a multi-faceted Antitrust Division position. Makan Delrahim, the Antitrust Division's new Deputy Assistant Attorney General responsible for international, policy, and appellate matters, holds degrees both in law and biotechnology and is qualified to practice before the U.S. Patent and Trademark Office. He was in private practice with Patton Boggs, L.L.P. and worked for the National Institutes of Health's Office of Technology Transfer. He also served as Deputy Director for Intellectual Property at the U.S. Trade Representative's Office.*



Makan Delrahim

This background, plus his most recent work as the Staff Director and Chief Counsel of the Senate Judiciary Committee (where he reported to Chairman Orrin Hatch), should make Delrahim well-equipped to implement the Division's initiatives involving international and intellectual property issues.

Although appointed only just this past July, Delrahim already has a wide-ranging portfolio, focusing on the review and evaluation of issues at the intersection of antitrust law and intellectual property rights—including possible revisions to the Intellectual Property Guidelines—and the advancement of global coordination and antitrust enforcement activities through the International Competition Network, where he chairs the Merger Working Group.

The Antitrust Source conducted this interview on October 20, 2003.

ANTITRUST SOURCE: It has been about three months since you became the Deputy Assistant Attorney General responsible for International, Policy, and Appellate matters. Before your arrival, I believe those areas were overseen by three different people. Can you tell us why the three roles have been combined and describe how you view your responsibilities in the front office?

MAKAN DELRAHIM: Most recently, there was a Deputy for International matters, Bill Kolasky, and I believe that the Policy and the Appellate sections reported directly to the Assistant Attorney General. And in different administrations, different organizational models were in place. I know that when Diane Wood, now a sitting Judge, was here in the early nineties, she oversaw both the International and the Appellate matters. So I think the exact responsibilities vary with who is in the AAG job. As far as why these responsibilities were consolidated, my recent experience here shows me that it makes a lot of sense in ways that weren't apparent even to me when I first got into the job. You see, on the Appellate side, there are matters that are right at the cutting edge of antitrust law that our folks in the Appellate section are the experts on. They know all the issues that are being litigated and what is being considered at the Circuit level. For example, you are aware of the recent Ninth Circuit and the D.C. Circuit's cases interpreting the Foreign Trade Antitrust Improvements Act, relating to international jurisdiction. That is an area where the wrong interpretation of this Act could actually hurt our criminal enforcement efforts. There are real policy issues as new case law develops. And our joint staff meetings allow for our Policy folks, as well as our Appellate folks, to work with each other, to discuss

different issues that might be fit for a policy advocacy or a legislative change in certain areas that would enhance our efforts at the Division. I should also add that I had a personal interest in both appellate and international matters, and given my background, having me oversee the Policy section was probably a natural fit—coming from Capitol Hill and dealing with legislation and antitrust policy.

ANTITRUST SOURCE: You mention your background in Congress. Will you be dealing with legislation before Congress concerning antitrust issues in your new role?

DELRAHIM: I will be. I'll be dealing both with policy development, as well as legislation. As you know, there is some antitrust legislation pending in Congress currently, and some initiatives at the Division that pre-date me, dealing with criminal penalties and enhancing our criminal enforcement program. I will be working further on other policy matters, including competition advocacy at various agencies, in my new role.

ANTITRUST SOURCE: What would you list as your top priorities in each of the three areas for which you are responsible now?

DELRAHIM: In the International area, as you know, my predecessors, Bill Kolasky and before him Doug Melamed, kicked off the ICN here and I know that Hew Pate has an interest in making sure that ICN does continue to develop. There have been a lot of gains. It's amazing what we have achieved for an organization that is only about two years old. Charles James and others around the world deserve a lot of credit here. There are already best practices for foreign antitrust enforcement bodies and various analytical papers that have been circulated amongst the different participating governments, and there are a lot of benefits that come out of that. And, if you look at other international organizations as a benchmark, I think the ICN's accomplishments have been unmatched in the past. I would like to continue pushing those efforts in the ICN, trying to get convergence where we can on both the administrative side of merger reviews and where possible, convergence on antitrust analysis and theory. Trying to break down administrative barriers for mergers that touch on multiple jurisdictions would create real efficiencies and certainty for businesses and consumers. I will also focus significant attention to the issue of Competition and Trade. That has become a significant issue as part of the WTO discussions and I think it is a critically important area, and one on which not enough attention has been focused on it.

On the Policy front, we are going to redouble our efforts in the area of intellectual property. This is an area of personal interest to me, as a patent and copyright lawyer. We have, as you know, the intellectual property-antitrust joint hearings that were held last year with the FTC, and there will be a joint report on our findings forthcoming later this year.

On the Appellate matters, in addition to supporting the Division's enforcement cases, we will actively be looking for opportunities to file amicus briefs in certain cases where we think the antitrust policy implications are significant. Again, pre-dating me, the Division filed an amicus brief in the *Trinko* case on an issue that had significant impact on Section 2 analysis and that filing was in a matter that was a purely private action.

ANTITRUST SOURCE: You mentioned the joint DOJ/FTC report on the antitrust and IP hearings held last year. When should we expect that report to issue and what does the Division hope to accomplish with it?

DELRAHIM: The joint report should be coming out later this year. We are working through drafts right now and I think our two agencies are making significant progress. The report is not intended as an enforcement guideline, but is intended to provide a compilation of the recent views and thinking with respect to various issues implicated in antitrust analysis where IP is involved, whether it is in a merger context, in a licensing transaction, or unilateral conduct. There will be two reports, as I think had been anticipated: one that deals with Patent Law and Competition—that was something primarily undertaken by the FTC.* And, as I mentioned, the joint report by the DOJ and FTC will relate to issues in the area where antitrust and intellectual property laws intersect.

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ANTITRUST SOURCE: You said the report on the relationship between IP and antitrust would consist of a compilation of views. Is that all it will be, or will it also offer guidance?

DELRAHIM: I think the report will be designed to guide antitrust practitioners and enforcers—as well as intellectual property holders—on various issues that may arise with the enforcement of antitrust laws and certain practices relating involving intellectual property. It is a synopsis of the various papers and views presented, and it will include some conclusions relating to where the two agencies' enforcement objectives might be. So it should be helpful. It's not going to be exactly like the 1995 IP Guidelines, but more of an analysis of where the law is. We are currently considering updating the 1995 Guidelines and improving them with the understandings gained through the recent hearings as well as eight years of experience since the Guidelines were last revised.

ANTITRUST SOURCE: You've anticipated where I was going, and that is to ask you whether the antitrust and intellectual property hearings or anything else on your radar screen indicate to you that the IP Guidelines ought to be updated or revised.

DELRAHIM: We're discussing that, and a formal decision has not yet been made. We are looking at the Guidelines right now. We do anticipate that some updates to the Guidelines are appropriate. I don't know if the guidance will be changed, and we have not looked at that closely, but one of the things we're examining is how the law has developed and if it warrants a change in the guidance. One thing we do know is that over the last eight years, there has been substantial case law that has developed that could fill in the skeletons of the hypotheticals in the IP Guidelines. I should say, though, that I think the IP Guidelines themselves, by and large, have withstood the test of time over the last eight years. But to the extent we can supplement them with some of the case law we've seen from the Federal Circuit and other areas, as well as advances in technology and that experience we've had in some of those cases, they perhaps could use updating.

Editor's Note: On October 28, 2003, after this interview was conducted, the FTC issued its report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>. Makan Delrahim provided *The Antitrust Source* with the following comment on the report:

I think the FTC's recommendation of the creation of a Liaison Panel between the FTC, the DOJ, and the PTO to permit the exchange of policy views on important issues as they arise is something all three agencies can benefit from. A formal or informal tri-agency panel between the PTO and the antitrust enforcers would allow for greater appreciation of IP policy for the antitrust agencies and similarly greater appreciation of competition impact of IP for the PTO. It could also be a basis for the exchange of views on determining patent validity questions that may arise in enforcement actions or in the merger context.

ANTITRUST SOURCE: What is the timing on the decision whether or not to update the Intellectual Property Guidelines and, assuming a decision is made to update them, when could we look forward to seeing the new guidelines?

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DELRAHIM: The decision will be made after the IP report is issued. There's not a specific date for the issuance of the joint report from the hearings, but I have discussed it with Hew and with Chairman Tim Muris and Susan Creighton of the FTC. As far as when it would be completed, if we do decide to move forward, it will probably be a one-year project, given that we already have the hearings as a foundation. We'll likely get comments from outside practitioners and folks interested in the issues and get the benefit of various experiences to update the report.

ANTITRUST SOURCE: Are there any other intellectual property initiatives that are in the works or that we are likely to see from the Division in the next few years?

DELRAHIM: I would like to focus on the international aspects of intellectual property issues arising in antitrust enforcement. You will see an increased focus on bilateral consultations relating to IP. In fact, you may be aware that over the past year, we've had an intellectual property working group with our European counterparts where we've had six or seven very productive meetings and/or video conferences to exchange our different views with respect to the intersection of antitrust and intellectual property. We hope to expand that relationship not only with the EC, but also with other countries and antitrust authorities. We have recently invited the Japanese Fair Trade Commission and the Taiwanese to establish similar IP working groups. Many would agree that this area is really the cutting edge of antitrust development. It is critical in our new global economy where there is an increased reliance on intellectual property rights and where these rights have become truly global through various treaty obligations and agreements. We hope that the increased dialogue on the intersection of IP and antitrust with our foreign antitrust partners would help develop a workable and efficient regime to provide for certainty of rights and increase the incentives to innovate, whether in the health care field or electronics or with creative works, such as music and motion pictures.

ANTITRUST SOURCE: Is the work with the foreign counterparts in the IP working group likely to affect the content of any updates to the IP Guidelines?

DELRAHIM: I don't know at this time. If we see that there's an area where our understanding is advanced through our dialogues with our foreign counterparts, that could certainly find its way into the report, but given that we have not had many of these discussions, it's hard to predict. We have looked at the recent proposed European Regulation, called the Technology Transfer Block Exemptions—or TTBE—which is their version of IP Guidelines, and right now we're reflecting on the changes they have proposed. I think the recent European regulation relating to intellectual property is a good example of the common good that comes from some of the bilateral discussions we've had. The recent changes are a significant improvement from the EU's past approach, although there may remain some areas where our approach differs significantly from theirs. Those regulations are scheduled to take effect in May 2004, and we hope to discuss this further with the Commission in the coming months. We might express some of our views to Commissioner Monti and Director General Lowe next month when they are here for our annual bilateral discussions.

ANTITRUST SOURCE: You mentioned the case law since the IP Guidelines were issued. Evidenced in that case law is a struggle that the courts are having about how to strike the balance between antitrust enforcement and enforcement and preservation of intellectual property rights. While both sets of laws are designed, at least in part, to promote innovation, they go about that task in ways that are sometimes in tension with each other. What are your thoughts about that issue and where do you believe it's appropriate to draw the line?

DELRAHIM: I really don't believe there is much tension. There's some perceived tension by practitioners and commentators. I don't see much tension either with policy or in the law right now. In my view, they both are intended to promote a competitive marketplace for new ideas and incentives for research, and both have as their ultimate goal benefits to consumers. The intellectual property laws—particularly, the patent laws and copyright laws—provide that incentive for you to bring something new to the consumer and in exchange you get a certain limited right to enjoy exclusivity for that. And then after that period, everybody is free to exploit that for the benefit of the consumers, and often the product becomes a commodity. The antitrust laws, as you know, are ultimately to protect the competitive marketplace which, again helps the consumer. So, I may have just made two statements that are very obvious, but I don't see much conflict between the two. Some people view intellectual property law as protecting monopolies, but as our forefathers in the Constitution anticipated, it's an exchange that we are making as a society with those creators and inventors—in exchange for a limited period of market position in the legal sense. And as you well know, that is not necessarily a monopoly in the product market/economic sense, which is what antitrust is concerned with. For example, one company might have a patent on an ulcer medication, but that doesn't mean another company cannot have a patent on another ulcer medication, and you have two competitors in the same market for the market of ulcer drugs. In short, the fact that the IP laws provide the incentive to innovate means they actually help provide an incentive to have more and better competition among existing products.

ANTITRUST SOURCE: A couple of years ago, you were quoted in a technology industry publication saying that it may be time for a “new injection of technical expertise into antitrust law, just as there was an injection of economic analysis into antitrust law in recent decades.” Is that your view and, if so, would you rank “technical expertise” as high as economics in terms of its importance for antitrust analysis?

DELRAHIM: I remember that quote. I don't know if I rank one higher than the other. I think they are both very important in developing the proper approach to antitrust enforcement. Of course, economic analysis helped guide and shape antitrust jurisprudence as we know it today. Through the works of the Chicago school, Judges Posner and Easterbrook, and Bill Baxter, among others, economics helped show whether or not certain practices that might be literal violations of the black letter law were in fact procompetitive and pro-consumer. Before that, enforcers took actions to prevent practices and ended up actually hurting consumers. So, it was more or less the injection of economics that helped show the true market impact of various activities that helped prove that case and change jurisprudence in the area. I think the consumers, the markets, and all the antitrust enforcers involved have benefited from that evolution; otherwise, we'd be stuck with a two-line statute under the Sherman Act saying that anything that restricts competition is against the law. With respect to the infusion of technical understanding, I really mean we need to fully appreciate how certain business activities—certain marketing activities or other practices relating

to high-technology—work in the real world. And if you do have a full appreciation of the impact on markets and consumers by understanding the technology itself, you come to a better conclusion of what is or should be illegal under antitrust laws. You have certain technologies, whether in the computer technology field or in pharmaceuticals, that will have different market implications than just regular widgets. So my comments were really to emphasize that if the law somehow restricts procompetitive behavior or allows anticompetitive behavior because we apply old economy understanding to new-economy technology challenges, we may inadvertently hurt consumers.

ANTITRUST SOURCE: What is the Antitrust Division doing to promote the use of technical expertise in antitrust analysis?

DELRAHIM: I am too new here to comment on that intelligently right now. But I do know that in various cases, experts, and not just economic experts, are consulted. Also, the most recent reorganization of the Division just last year was done to enable the Division to best take advantage of different expertise within it. We have a networks and technology section. In the *Microsoft* case, for example, it wasn't just lawyers and economists, there were all sorts of computer experts who were consulted, and I presume that in other merger cases, and even in agriculture, experts in those markets are used regularly, pre-dating my comments several years ago in the technology industry journal you mentioned. I should add that it is not just adding people with certain backgrounds, it is looking at antitrust analysis and asking, "That makes sense for the widgets market, but does the analysis make sense for the same practice in this new high-tech market?"

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ANTITRUST SOURCE: Let's shift gears a little bit. Earlier you alluded to legislation pending in Congress about proposed enhancements to antitrust criminal penalties. Can you tell us what the Division's view of that legislation is?

DELRAHIM: Yes, and I would refer you to Hew Pate's speech at the ABA Conference in San Francisco this past August [<http://www.usdoj.gov/atr/public/speeches/201241.htm>]. Hew did discuss that the Antitrust Division believes it is time to rethink some of the criminal penalties, as well as the jail sentences, and consider improvements that have been developed here to the amnesty program that could benefit the Division's criminal enforcement activities. There's a lot of evidence, both anecdotally and otherwise, that shows that members of an illegal cartel would be more willing to come forth and turn themselves and the cartel in if they had some assurances that they would not be subject to treble damages in a private action. Right now, some cartels continue to live on, partly because one member who otherwise would be willing to come forward, does not, out of fear of follow-on treble damages actions. The proposal that has been put forward would, I think, benefit consumers and significantly benefit the enforcement against cartels.

ANTITRUST SOURCE: Has the Division taken a position as to this particular legislation, other than Hew Pate's remarks last August?

DELRAHIM: No, I know a legislative proposal has been forwarded over for the clearance process within the administration, but we do not have an official comment other than what Hew Pate's comments said. We have provided technical assistance to staff members of the House and Senate Judiciary Committees who are considering various aspects of the legislation, including some changes to the laws relating to standard-setting organizations.

ANTITRUST SOURCE: Would it be fair to say that the Division favors enhancing criminal penalties for antitrust violations?

DELRAHIM: I think it would be fair to say that the Division certainly wouldn't oppose such a change if Congress made it.

ANTITRUST SOURCE: There is also legislation in Congress concerning protections for standard-setting organizations and activities. What is the Division's view of that proposed law?

DELRAHIM: I don't know if we have officially commented on that, but based on the latest versions of the legislation that we have reviewed, we believe the legislation could provide some consumer benefits in the limited area of standard setting. I think it could help the standard-setting organizations that are more actively engaged in some cooperative limited-purpose activity, and I don't see the Division opposing that legislation that is currently pending before the Senate. And it's already passed the House, I believe with an overwhelming bi-partisan vote.

ANTITRUST SOURCE: In connection with appellate advocacy, you said earlier that the Division looks for opportunities to file amicus briefs where it thinks it's important enough to warrant it. One of those places was the *Trinko* case. I believe that the Division may be providing input to a brief in the *LePage's* case and, of course, there is *American Airlines*. All of these cases concern Section 2 enforcement. My question is, does the Division have a unified philosophy of Section 2 enforcement and, if so, what is it and how can we look forward to it being expressed?

DELRAHIM: The same test that the Division put forth in the *Microsoft* case, in *American Airlines*, and in *Trinko* were consistent, and that is whether or not the conduct had a business justification other than excluding the competitor. That would be the same test, and it pre-dated Hew Pate's and Charles James' administrations of the Antitrust Division, and it's the same test we've applied and anticipate to continue to apply in similar Section 2 cases.

ANTITRUST SOURCE: Let's turn to the International Competition Network. Are we likely to see concrete proposals emerge from the work of the ICN?

DELRAHIM: I think so. I've been pleasantly surprised by the benefits we've seen. I am pleased to say that I recently became the Chair of its Merger Working Group, a position most recently held by my colleague here, Debbie Majoras. By the progress the ICN has made, you know, the best practices they were able to put forward is something that I think we are seeing many more countries look to and develop. I think I saw today a report that the Brazilian government has agreed to certain changes in its merger law and to adopt the best practices of the ICN. That's a concrete example for us to gauge the accomplishments of the ICN. And we just came back from the OECD, where the various member countries, as well as several observers who were there, discussed the role and progress of the ICN. The ICN members met in France last week, and it was very helpful. ICN is plugging away as a virtual organization—we are now solidifying our plans for the next ICN meeting in Korea early next year. We have seen best practices for investigative techniques in merger enforcement and for notices to parties. I am excited by what it can accomplish in the future.

ANTITRUST SOURCE: In recent years there have been some very public debates between the Justice Department and the EU regarding the application of certain merger theories, the chief example of which is the GE/Honeywell merger. Do you think that this form of debate is helpful, in terms of harmonizing rules or theories, or in solidifying the relationship between the two enforcers?

DELRAHIM: I think it is helpful, both bilaterally and in these types of multilateral forums. From what I can see, I don't think we've had a stronger relationship with the European Commission than we have now. I think part of that could have been a result of the discussions and the debates that started with the Honeywell/GE merger, but that has continued. There's a lot of cooperation on various enforcement actions and discussions of how we should proceed in the approach to antitrust law. The technology transfer regulation I mentioned earlier is another example. They've actually asked for our comments as part of that IP working group, and we'll be providing that, and I think that only shows that the discussions have had a good benefit. Commissioner Monti and DG Phillip Lowe are going to be in town for our bilaterals next week and at the Fordham Conference in New York later this week. There are going to be opportunities when Hew and I and others at the Division will get to meet and solidify our relationship over the coming weeks, and I hope that will continue.

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ANTITRUST SOURCE: In your view, is the trend still toward convergence or are we in a time now in which international actors are emphasizing differences in their philosophies?

DELRAHIM: So far it's still toward convergence. And as new countries are adopting new laws, I think they are benefitting from a lot of these discussions. You know, of course, there are some areas in which different members of the international community will have different approaches, but that's not any different from the difference of ideas here in the United States, when different judges will hear the same case but decide it in different ways. So, I think we'll always have some areas of disagreement, no matter what the area of the law is. But overall, we're still moving toward convergence. And we hope that we'll be able to achieve administrative convergence for enforcement sooner than substantive convergence. That's probably easier to accomplish than getting agreement on a substantive approach to antitrust law.

ANTITRUST SOURCE: Substantively, what would you say are the top two or three areas of significant difference between U.S. antitrust philosophy and that of the EU?

DELRAHIM: The one area I think most people can point to is our differing approach to Section 2-type practices, whether it's pricing or non-pricing practices. The EU takes a view that with a particular level of market position, there are certain practices you can engage in and some you cannot. And right now in the United States, that approach is different. Our approach to market share is that it is a starting benchmark, that other factors come into play, such as the strength of the dominant power and whether there will be competitors coming in. It's not as rigid. And the EU's approach is different—there are some absolutes when you have a certain market share, regardless of your ability to maintain that. I should also mention that the two jurisdictions approach some areas of antitrust IP differently, such as the unilateral practices of IP holders. We don't have a rule here in the U.S. that a unilateral refusal to license valid intellectual property, by itself, is a violation of the antitrust laws. The rule in the EU might be different, which is why we are closely monitoring the development of the recent *IMS Health* case.

ANTITRUST SOURCE: In your view, is there a difference between the U.S. and EU approach to merger analysis?

DELRAHIM: I think the GE/Honeywell case highlighted a major difference between the two countries in their approach to mergers. The Court of First Instance in Europe, where the Commission's decisions are appealed to, has reversed the Commission several times in the recent past on some of its merger enforcement actions. The GE/Honeywell case is being appealed, and we'll see where it goes. But so far, I think, we have moved much closer on our approach to merger analysis, and it's probably due to the experience in that case and our efforts to build a better understanding and cooperative relationship with the European Commission.

ANTITRUST SOURCE: There was a concern expressed by the Division in its amicus brief that the *Empagran* decision could lead to a reduction in amnesty applications. Has it had that effect?

DELRAHIM: It's always tough to evaluate such things with respect to criminal enforcement and amnesty. I'll leave that to our Deputy in charge of criminal enforcement, Jim Griffin. But, intuitively, you can't guess how many cartels are out there that have not come forward; you can't really do a survey out there, asking "Hey are you violating the antitrust laws and would you have, had this case gone the other way?"

Just last week at the OECD, this *Empagran* matter became a big issue that a number of other countries raised. They were concerned. That raises a concern with respect to international cartel enforcement, as well, where countries are afraid to share information out of fear that activities that occur wholly on their soil, that don't even involve a U.S. plaintiff, could now be subject to U.S. treble damage private actions by a plaintiff from a foreign country. This one has caused many countries some discomfort. One official was telling me that if the *Empagran* decision stands, it is tantamount to a usurpation of legislative sovereignty by the U.S. courts. He basically said that if his country has not seen fit to provide treble damages against conduct by defendants in his country by a plaintiff in his country, this case will now decide that for them, and the U.S. courts and laws would be the welcoming host for such activity. As you know that issue is being litigated now. The D.C. Circuit in its 4-3 decision interpreted it a certain way, and now it will likely be up for appeal to the Supreme Court. My guess would be that given there's a clear conflict now with the Fifth and Second Circuits, they likely will take it on *cert* and try to resolve it. But I think that's an issue not only for the Division, but for policy makers on Capitol Hill to look at and consider because now you have, as I said, the specific fact of the *Empagran* case highlighting the problem that it could cause with respect to criminal cartel enforcement.

ANTITRUST SOURCE: What is the Division's view about the split in authority over the FTAIA?

DELRAHIM: The Division filed an amicus in the D.C. Circuit, so I would refer you to that. As you know, we filed on the side that ultimately did not prevail at the D.C. Circuit en banc, but the Division has not filed an amicus for *cert* at the Supreme Court at this time. We also have the Ninth Circuit case, better known as the *Tomato Seeds* case, which involves another aspect of the FTAIA. We have argued that case and are awaiting a ruling by the Ninth Circuit.

ANTITRUST SOURCE: Is the Division contemplating urging legislation in that regard?

DELRAHIM: No, not at this time. That's one of the things we'll look at, particularly given the impact of this line of cases on our criminal enforcement efforts and also on our relations with foreign antitrust bodies. But whether the split in authority is fixed by the Supreme Court or by legislation, the Division will welcome it.

ANTITRUST SOURCE: Recently, arbitrage firms have hired lawyers to try to influence the outcome of merger investigations involving public companies. These arbitrage firms have a significant financial interest in whether or not a deal goes through, having wagered very large sums of money based on the "spread" between the announced deal price and the target's actual stock price. The arbs hire lawyers who locate parties (e.g., customers) to represent before the agencies to present arguments against the deal. The arbs pay the fees of the lawyers and experts, and the agencies are never informed that the arguments they are hearing are being sponsored by arbitrageurs with a large financial stake in blocking the deal. In the Division's view, does this raise any ethical issues, or does it otherwise cause any concern about the integrity of the merger review process?

DELRAHIM: I have not been in the arbitrage business, but I would guess that it is probably a practice that has been going on for some time. Having come from the legislative branch of government, where you are faced constantly by front organizations, such as the Association to Promote this or that, or the Council to Better X or Z, I would be surprised if anyone is easily fooled by the true motives of such groups, who do have a Constitutionally protected right to petition the government. The Division is always looking for credible evidence of the impact of a merger or about a questioned practice by parties. In my personal view, which is not necessarily the Division's view, I don't think it really matters if those customers' plane tickets were paid for by an arbitrage firm or group associated with them, so long as the customers are legitimate and credible. If the information is true, and the customers or witnesses are legitimate, there really is no concern. We hear from parties on different sides of a case or merger all the time. On the other hand, however, I would think that if someone was trying to influence the merger review process by providing sham witnesses or impact evidence, that would be something that would raise serious concerns and would probably instigate the filing of charges, whether under our fraud statutes or under antitrust laws, depending on the facts of the case and the parties involved. ●