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Antitrust Enforcers Preview Incoming Spotlight on Blockchain

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The tide of regulation of cryptocurrency and blockchain could be turning in the United States. Following comments by newly-confirmed Treasury Secretary (and former Federal Reserve Chair) Janet Yellen describing Bitcoin as "inefficient" and "extremely volatile," the price of the coin dropped 10% in 24 hours. During her confirmation hearings, Yellen described cryptocurrencies as a "particular concern" and signaled that the Treasury would begin examining blockchain-based financial networks. On the heels of Secretary Yellen's comments, Congressman Patrick McHenry (R-NC), head of the House Financial Services Committee, and Congressman Stephen F. Lynch (D-MA), Chair of the Financial Technologies Task Force, introduced H.R. 1602, bipartisan legislation which directs the CFTC and the SEC to "jointly establish a digital asset working group" to "provide regulatory clarity" and to "create a critical collaboration [between the two agencies to] create fair and transparent markets." Notably absent from this proposed collaboration is any mention of antitrust enforcement or involvement of the DOJ antitrust division or the FTC. However, recent comments by outgoing DOJ chair Makan Delrahim provide clues as to how antitrust may play a part in the regulatory framework for blockchain and cryptocurrency.

Speaking at the 13th Annual Conference of Innovation Economics at Northwestern University's Kellogg School, Delrahim spoke broadly about the importance of innovation and ensuring competition in digital markets. Referencing Nassim Taleb's seminal book, " Antifragile," which posits that embracing randomness and volatility can strengthen economic systems, Delrahim commented that, in order for the Antitrust Division to become "antifragile" it must be prepared to confront and address how blockchain technology will impact competition in multiple markets. Delrahim explained that he, along with other senior enforcers at the Division, had been enrolled in a course in blockchain technology offered by the MIT Sloan School of Business. This course, Delrahim claimed, imposed upon him and his colleagues the "transformational effect" that blockchain will have on certain markets – but warned that while blockchain "carried the promise of toppling existing monopoly structures," it also presented the "prospect of new monopolies emerging and seeking to entrench themselves." He then declared that the Antitrust Division "will play a critical role in ensuring market conditions are conducive to unleashing blockchain's revolutionary potential."

Delrahim explained that the Antitrust Division shares in some of the goals offered by the promise of blockchain technology – specifically achieving network cost reductions that can offer consumers "lower cost or higher value options." At the same time, according to Delrahim, DOJ must prevent "competitive abuses" in those same markets. But the examples of such competitive abuses Delrahim identified did not consist of the "new monopolies" he warned of moments before. Instead, he cautioned against competitors either conditioning access to industry blockchains as part of a tacit agreement to collectively fix prices or output, or to use the anonymity of blockchain as a cloak to share competitively sensitive information with impunity.

Delrahim's comments regarding monopolies suggest an activist focus that could draw parallels to the agencies' current enforcement actions against digital platforms. Indeed, many of the practices that the FTC, DOJ, and state enforcers are investigating concerning Big Tech – issues of lockup/lock-in, bundling, refusals to deal, and purchases of competing technologies to stifle competition – all could conceivably emerge as private blockchain gains prominence. But the specific examples of "competitive abuses" Delrahim focused on were not of dominant technologies, but instead focused on the garden variety horizontal collusion that has been the subject of government enforcement since the dawn of antitrust enforcement. Nor did Delrahim's comments, made just weeks before he left the Division, lay out a specific plan of action for enforcement in cryptocurrencies or blockchain. Instead, his comments could be seen as an acknowledgement that enforcers' efforts were better spent trying to understand blockchain and its implications, or otherwise risk "fall[ing] behind and learn[ing], only too late, that entrenched monopolists have taken anticompetitive actions to eliminate the threat from blockchain technology to their business models." As enforcers get further steeped in the issues, industry observers expect further guidance from regulators, particularly new DOJ leadership, on threshold issues including potential refusals to deal, and the impact of network effects within and throughout blockchain ecosystems.

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