

US regulators face off in court tussle over Qualcomm

DoJ fears an FTC case against chipmaker could weaken US in its battle against China's Huawei

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The Trump administration is set for an unusual courtroom showdown on Thursday between lawyers of two federal antitrust agencies who will argue opposite sides of a Qualcomm case that could help shape the race to develop 5G technology.

The Department of Justice has taken the US chipmaker's side as Qualcomm tries to overturn its loss at trial last year in a Federal Trade Commission lawsuit filed in the final days of the Obama administration.

Lawyers for the DoJ's antitrust division, headed by Makan Delrahim, a former Qualcomm lobbyist recused from the case, have argued that US national security is at stake, while FTC attorneys have accused the DoJ of interfering with antitrust enforcement.

"This is not just unusual, it's more directly confrontational than anything I've ever seen," said Bill Baer, a fellow at the Brookings Institution who has headed competition enforcement under Democratic presidents at both the DoJ and the FTC.

The controversial move by the DoJ is just one example of the interventionist approach increasingly taken by parts of the Trump administration as the White House tries to chip away at the lead China has taken in the development of 5G communications.

Qualcomm is accused of overcharging for patents that smartphone makers have to buy to meet industry standards for cellular communications. A district judge ruled in May last year the US chipmaker had "strangled competition" and ordered drastic changes to its sales practices.

The DoJ argued that even if Qualcomm had charged "unreasonably high" prices, that would be allowed under US competition law, saying that to find otherwise could "radically undermine important incentives to innovate".

Its lawyers have argued that a loss for Qualcomm could damage national security by "potentially undermining US leadership in 5G technology and standard-setting, which is vital to military readiness and other critical national interests".

In 2018, the US cited national security concerns when it blocked a \$142bn bid for Qualcomm by Singapore's Broadcom.

More recently, the administration had countenanced radical steps such as purchasing direct controlling stakes in competitors to Huawei, the Chinese telecommunications equipment provider, to help secure US 5G capabilities.

The DoJ's intervention in the FTC's Qualcomm case has given the chipmaker much-needed support in a lawsuit that could deal a serious blow to its business after a series of similar cases across the world.

But it has also fuelled tensions between the two agencies, which have become more apparent as both the DoJ and the FTC have pursued parallel and sweeping investigations of possible antitrust violations by Big Tech companies

Both the DoJ and the FTC have responsibility for civil enforcement of US competition law. But they have historically avoided interfering in each other's cases, instead allocating investigations to each other through a clearance process.

Joseph Simons, the FTC's chairman, who is also recused from the lawsuit because his former law firm worked for Qualcomm, has called the DoJ's intervention "highly unusual".

"I'm sure they would not be happy if we did that to their case. So, you can imagine what the reaction was over here," he told the Financial Times in an interview last year.

The FTC first sued Qualcomm in January 2017, just days before Donald Trump was inaugurated as president, when two of its five commissioner positions were vacant. The vote to file the case was 2-1.

After a trial last year, the DoJ intervened to urge Judge Lucy Koh not to impose tough remedies on Qualcomm. The DoJ also helped Qualcomm secure a partial stay on Judge Koh's ruling as it supported the company's appeal to the Ninth Circuit.

FTC lawyers have hit back at the DoJ's involvement, arguing that its position amounts to giving Qualcomm immunity from "any financial consequences for violating the antitrust laws".

In filings, Qualcomm has said its negotiations with phonemakers are in effect between equal parties, saying they "negotiate hard" and it "takes steps to preserve its patent rights".

"There is no basis for the FTC's attempt to recharacterize this common bargaining between sophisticated companies as federal antitrust violations," it said in a December filing. The company also seized on the DoJ's intervention to bolster its position. "The dubious quality of the District Court's reasoning is also underscored by regulators' own stark disagreement about this case," it wrote.

The litigation has highlighted a broader programme of intervening in non-DoJ lawsuits spearheaded by Mr Delrahim, as well a deeper ideological dispute about the proper role of competition enforcement in matters involving patents.

Mr Delrahim, a patent lawyer by training, has argued forcefully that antitrust law has little role to play in disputes over the licensing of intellectual property.

Though his signature is absent from filings in the FTC v. Qualcomm case, he has made his views clear in a series of speeches and by backing his former client in a related class-action lawsuit whose allegations are similar to the FTC's.

His views are shared by at least one Republican FTC commissioner, Christine Wilson, who wrote in the Wall Street Journal last year that the district court ruling against Qualcomm was "far outside the mainstream".

"I encourage higher courts to reconsider the wisdom of the judge's conclusions," she wrote.

Mr Simons' recusal has left the FTC in effect deadlocked on the case, unable to signal clear political support for the litigation, nor to reach a settlement with Qualcomm.

Without his vote, the agency is split between the remaining two Republicans, including Ms Wilson, and two Democratic commissioners.

In November, William Rinner, Mr Delrahim's chief of staff, said at a conference that the FTC's case was going "forward like a ship without a rudder".

He argued that history would view the DoJ's actions as "probably one of the least controversial aspects of the case".

Spokespeople for DoJ, FTC and Qualcomm had no comment for this piece.