

Interview with Former Director of the FTC's Bureau of Competition

By: Tyler Tulenko

CTFN interviewed Bruce Hoffman, the former director of the U.S. Federal Trade Commission's Bureau of Competition from August 2017 to December 2019. Hoffman left the FTC in late 2019 to join [Cleary Gottlieb](#) as a partner in the firm's antitrust practice. As the director of the Bureau of Competition, Hoffman oversaw high profile merger cases such as the lawsuit filed against Pacific Biosciences and Illumina, the review of the Celgene/Bristol-Myers Squibb merger which included the \$13.4 billion divestiture of Otezla, and the investigation into the acquisition of Spark Therapeutics by Roche.

Below are the key interchanges from the interview which have been lightly edited for brevity and clarity:

CTFN: A lot of ink has been spilled over your [February 2018 speech](#) and the focus on on-market vs. off-market drug divestitures. The speech was clear that merging parties should know the FTC will ask for the on-market drug when considering complex pharmaceutical products. In the past, we have seen this applied to generic drug overlaps, but after the divestiture of Otezla, a lot of people thought that the on-market vs. off-market rule would be applied to branded products as well. Could you explain, during your tenure, what the Bureau of Competition's policy was and how merging parties should think about it going forward?

Hoffman: So I don't think that I meant to limit it to generic vs. branded drugs. It was an issue that we identified from the 2017 remedy study. The problem had to do with failure rates of remedies. Divestitures of not yet on-market drugs, as well as certain divestitures involving tech transfers, had a higher failure rate.

One of the things that came from that is we felt we needed a policy that says if the competitive issue you are concerned about is an on-market drug that is contract manufactured, you have to divest that contract manufactured on-market drug. The divestiture then becomes very easy. The manufacturing is not owned by the company, all that has to change is where the drugs are ultimately delivered. In that circumstance, the risk of developing a new drug and getting it through manufacturing should be on the merging firms.

The speech was about specific manufacturing considerations. When you get beyond the specific instance of an on-market contract manufactured drug, it becomes more tricky. The contract-manufactured scenario is the easiest question to answer, and the answer is the FTC will require the divestiture of that drug over one still in development.

If the firm is making it in a discrete facility, you are “closer” to that clean divestiture. The FTC will likely want that divestiture since it can be divested whole and many of the complications and variables that exist in other instances are removed.

What is far more likely, is that a drug is one of many drugs manufactured at a plant, and suddenly it becomes a complex divestiture. Maybe the drug shares certain equipment and employees with other drugs made at the same plant. In that instance, you need tech transfers, equipment, employees, which all need to be moved to a new location. That situation becomes a lot trickier and riskier. It may not be impossible, but it changes the risk calculus for the FTC considering the chance of a failure the drug ever gets to market. The more entanglement, the less clear it becomes for the FTC. It is a continuum.

So once you get outside contract manufacturing, it becomes much more difficult to determine what the FTC will do. But it is always a case by case thing. Generally, it is pretty hard to convince the FTC to take anything but the on market product.

CTFN: There was a lot of speculation that the way the FTC looked at pharma mergers had shifted after the Otezla divestiture and the Spark second request, the key difference being that the FTC would now look at end indication and not the mechanism of action. Could you explain how the FTC is looking at drug overlaps now?

Hoffman: I'm not sure I would characterize it as a change. The commission has never been myopically focused on mechanism of action. There is an interesting law article written by Howard Morse in 2003 on the different market definitions used by the FTC for drug

overlaps. There were nine different ways to define a market that had been used. They include strength of dosage, end indication, frequency of dosage, mechanism of action, and mechanism of delivery.

All the FTC cares about ultimately is will the merger result in increased market power? All those different ways to define a market can go into answering that question. What matters to consumers? A combination of any two drugs that can be a substitute for any reason can cause an increase in market power.

If consumers view them as substitutes, then they will compete. I would not perceive either of those cases as being a change. We are trying to figure out if this merger will harm competition. Will prices go up, will output or quality go down? Any measure that hurts consumers.

CTFN: We always assumed the director of the Bureau of Competition and a majority of commissioners are generally on the same page by the time a recommendation goes up to the commissioners. Is this true? How closely do you cooperate with the chair, for example, during an investigation?

Hoffman: First of all, I would say the director and commissioners are frequently on the same page, but not always. There are six people, and you can have six different opinions in that circumstance.

Most of the time people agree. But most of the action happens well before it gets to the commissioner level. A lot of the activity gets concluded at the staff level, bureau level, etc. Most of those are consensus decisions. There are times where there are substantial disagreements. I argue that is not a bad thing. If you always have unanimity, if everyone always reaches the same conclusion, that looks troublesome. It starts to look like a Soviet election.

The commission has been pretty good at getting through these disagreements. I can't think of a situation where we didn't work through things in a mutually respectful way.

There is a lot of interaction with the chair ... he stays very informed. All commissioners get regular updates on what the bureau is doing. And they get briefed on whatever the commission wants to find out.

Every single day there will be informal communication between the bureau and commissioners. Anything, from investigations, and media coverage, speeches, etc.

The commission under Maureen [former FTC Chair Maureen Ohlhausen] and Joe [present FTC Chair Joseph Simons], has had a very open policy. Very detailed run downs on everything going on in the bureau. The commissioners could get any information they wanted.

The chair, of course, is very closely in the loop with the bureau. The bureau briefs the chair every week on all pending matters, and there are constant communications beyond that. But the other commissioners also are very informed. They get formal biweekly briefings on all pending matters, weekly memos summarizing pending matters, and are free to ask questions at any point.

Additionally, if a matter is likely to raise serious issues, for example is potentially headed toward litigation, the bureau front office will reach out to the commissioners' offices to talk about the matter. Also a lot of informal interactions occur - getting lunch, walking into your office to chat, and similar things.

So for second requests, technically the Bureau of Competition (that was me) gives a recommendation, along with the Bureau of Economics, and the chair authorizes the second request. For those, there is no commission vote; the formal decision is the chair's after the recommendations.

But that doesn't mean that the commissioners have no say in that. They have a lot of informal sway. It was part of my job to keep them informed and hear what they have to say. They have a great deal of influence. Their wishes are not ignored. And it's their job to have views and express them. They are politically accountable - they are the ones who were appointed by the president and confirmed by the Senate. Now, sometimes things may not come out the way every commissioner might want, but that's not because they had no input or were ignored.

Maybe a different commission might work a different way. The actual rules of the FTC could allow information to be more closely held between the Bureau and the Chairman's office. But the two times I was there, 2001-2004 and 2017-2019, the non-chair commissioners were heavily involved and informed.

The FTC has a culture of congeniality, and trying to get to a consensus. That is reflected in the availability of information to all of the commissioners.

CTFN: How often when you send up a recommendation, do you see commissioners come back with additional investigative questions for the staff to pursue? How often do commissioners insist on sending out additional questions?

Hoffman: I assume we are talking here about a final bureau recommendation, not an interim recommendation such as to open a full-phase investigation and authorize a compulsory process. With a final recommendation, both of those things are unusual, but not unheard of.

For starters, it is not the case that the front office is sending up recommendations that are a complete surprise to the commissioners. They are well informed. Recommendations never go up to the commissioners where they haven't been discussed and assessed over and over again.

At the end of the day, you have to make a decision and you know sometimes some commissioners are going to disagree. But only a tiny amount of cases end up like that, and they can end up in cases where people push for more information.

We did go through a period where that was more common. It coincided with the current commissioners coming in. It happened early on for a couple reasons.

Since it was founded, the FTC never had a situation where we had four – then five – new commissioners. It has always been one or two new commissioners at a time. There would be more people that know the practices and procedures of the agency, and that inherited a set of practices and procedures that their colleagues were using, compared to this circumstance where we had five new commissioners, and there was nothing like normalized procedures that they were picking up on. They were inheriting nothing.

They had attorney advisors who knew the ropes, but still it was a weird situation. Also, three of five of the commissioners were new to the FTC.

Additionally, when they joined the commission, they inherited investigations that in some cases were very far along. So everyone was new, and they were handed a bunch of stuff that had been in progress for a bunch of months. That is a situation where you can have an unusual number of inquiries at late stages of investigations.

Each commission has to figure out how it is going to function on a practical level. There are a lot of practicalities about how the commission and the commissioners' offices work that are not really driven not by rule, but by practice and norms. For example, how long should the chair's office give for commissioners to ask for additional information, or to write a dissent? If you don't have some extrinsic deadline, do you give a month, one week, six weeks to write a dissent?

The commissioners needed to figure out how they were going to govern themselves. The commission norms are totally outside the Bureau of Competition and there are not many rules that govern. There is a lot of culture, a lot of norms. So the commissioners have to figure that out.

There was a period where the commission itself was trying to figure out how they were going to do those things. Now, unlike when the commissioners took their offices and inherited some late-stage matters, they will all have been briefed several times on any big issues coming before them. Today, you should see these kinds of issues much less often. There will still be some unique issues where this might arise, but now this commission has its culture, its norms, its way of doing things, and everyone knows the cases.

CTFN: Could you talk about the cooperation between the FTC and other regulators such as the European Commission and UK's Competition and Markets Authority?

Hoffman: The FTC and the DOJ cooperate with sister agencies. They interact a lot on policy, antitrust thinking, and other issues that aren't matter-specific. On specific matters, the cooperation is on information, mostly. And the parties have to give permission for that sharing. It is more about keeping each other informed.

We have had instances where parties said completely different things to the EC than they did to us. They were making claims to one of us that the other antitrust team was not making. That is just stupid. Maybe the parties weren't cooperating internally between the two teams. Maybe there is some other explanation. But that doesn't go well.

But the agencies don't gang up to try to block a transaction.

They each apply their own laws under the facts that apply to them. You do want to know whether they are likely to oppose a merger, for example. The reason you want to know is that it affects what you might do. If Europe is going to block, I might not need to prepare and file a suit. And if they aren't going to, I have to prepare my lawsuit. It is coordination

on information, theories, processes, sharing the facts of a case, but outcomes are not coordinated, they can be conscious of each other but not coordinated.

CTFN: You testified in front of Congress about the acquisition of nascent or potential competitors by large digital platforms. Could you talk about where you think the FTC is on that issue? Do you believe they will be much more aggressive on this issue moving forward?

Hoffman: I'll start by saying there is not evidence that there has been weak enforcement. People that say that are just being sloppy. Here are two examples: Number one, people say evidence of lax enforcement stems from looking at something like five big "tech companies." Then they say that those five or so companies have done in the last ten years between them something like one hundred and thirty acquisitions and no remedies have been taken or mergers blocked.

That is an incredibly poor understanding of basic statistics. First, who knows which of those transactions were even reportable? But even if you assumed that one hundred and thirty were reportable, statistically that would generally be two to three mergers that would receive a second request. So then how many would you expect to generate enforcement action? One or none.

So anyone that says that there is something sinister about the fact that over a hundred transactions didn't produce an enforcement action is either being misleading or doesn't understand the statistics.

Number two, the notion that the government hasn't taken action in nascent competition is just flat out wrong. For example, the FTC sued to block both the Illumina/Pacific Biosciences and CDK/Automate deals. The CDK deal involved digital platforms for car dealers using apps for backbone car dealer activities. The major competitive issue was the proposed acquisition—of a very small competitor—presented nascent competition risks. That merger was abandoned after the FTC sued.

In Illumina/Pac Bio, if you read the FTC complaint, the whole thrust of the suit was about future competition. If you look at Sabre/Farelogix, the case the DOJ just lost in court, you see to a certain extent another potential competition example. The fact that the DOJ lost that case in court doesn't indicate that somehow DOJ's enforcement was lax.

So the notion that the agencies do nothing in this area is empirically false. It is true you don't see as many cases as in horizontal merger enforcement, but that shouldn't be surprising since it isn't nearly as clear that these mergers will be a competitive problem. The economic models out there don't predict that. When you have company A and company B and they aren't competing yet, it becomes much harder, it is a harder case to win and it is harder for the enforcer to make the right decision.

We don't have a system where the government just gets to decide who gets to merge. Companies have a legal right to merge, unless they are breaking the law, in which case the burden of proof is on the government and they can bring a case to prevent the merger.

So when you have two firms merging and they aren't competing, how can I confidently predict, or put another way, considering a preponderance of the evidence, I am at least 51% sure this will harm competition. Bruce Hoffman can't just think it will be a problem. There has to be real evidence. But I don't think that it is a bad thing that I have to have evidence. When big companies buy smaller competitors, they are often doing it to improve the product, increase reach, or acquire some capability that the big company can put to better uses.

Look at the stereotypical Silicon Valley acquisition of a five person firm where they just want to get those employees to work for them because they're brilliant engineers. The acquiring firm is just improving its capabilities. They don't want a product or current technology, they just want those five smart people to come solve a problem for them. That is good for both the acquirer and the small target.

One other example of an argument that drives me a bit crazy ... I testified on this issue. Some people say, "There have been X number of acquisitions in digital markets" (footnote, there isn't even such a thing as a "digital market," nor do the "big tech firms" necessarily all compete in one and only one market, but let's leave that aside). Well, how many companies have the big autos bought? What about big retail chains? Big oil companies? It is totally meaningless to throw out a number without context. It's like saying "the cancer rate in Peoria is X." Well, is that good, or bad? Without context, who knows? This argument is just a soundbite aimed at uninformed audiences.

It is not at all impossible that there are nascent acquisitions that are bad. But it is an area that is harder for the FTC to predict. A lot of troublesome acquisitions seem to happen

below the HSR threshold. So if people want enforcement, the people that are aware of these deals have to go tell the FTC about them.

One other point on this topic. The raw number of transactions doesn't tell you anything about what is good or bad. There can be one terrible transaction and one thousand good ones.

Bottom line is that the people who are throwing out these numbers either have an agenda or don't know any better.

CTFN: Does the FTC need new tools, such as new laws that will shift the burden of proof onto the companies in order to combat some of these nascent competition/potential competition cases?

Hoffman: My answer might surprise you: I don't know. The sample set is really small. I don't think the data supports this, but I can't rule it out. But it's not yet supported by objective data.

Let me elaborate. I can look at a particular case. Take Steris/Synergy, hypothetically—I could look and say “I think the judge got that wrong,” for any number of reasons. But that can happen in any circumstance. I started my career as a litigator, and I can tell you that judges sometimes get things wrong. If you look at one hundred cases judges decide, some of them would be wrong. I always felt that most wrong decisions I was involved with were my fault, because it's my job to persuade the judge, but judges are human and they get some percentage of things wrong, sometimes no matter how good a job you do.

But let's look at the pool of cases to test to see if there's a systemic problem here. There are not that many of them. Typically, from the DOJ and the FTC, thirty five to forty five mergers are challenged in any given year, and only about one or two would involve a nascent or potential competition issue.

Then from there, a majority of those are either dropped because the parties abandon the merger, or settled. So you have an incredibly small sample set. Assume there is, say, a 20% chance of a judge just making a mistake, and you only have one case on this issue that comes in front of a judge every four to five years, and the government loses but objective observers think that outcome was wrong. Well, you could have a situation where it looks like the government doesn't have the tools, but it could just be random; it could just be a product of one bad decision and not a big enough sample size.

So I don't see evidence that there is systematic underenforcement for nascent competition or a fundamental gap in the legal system for assessing such mergers. I am not aware of solid statistical evidence that there are systematically transactions occurring that should be blocked but aren't. There is the [killer acquisitions paper](#), that looked like pretty good work, but that involved one particular industry, and the problematic transactions were under the HSR threshold. So that has more to do with detection and not enforcement.

I think it is right to say that the legal burden of potential competition cases is relatively high, higher than with existing horizontal competition. But I don't know if that is a bad thing. I don't know if that has caused the government to lose more cases than it should. Remember, the government better be losing some cases. If the government is losing zero, it isn't bringing enough cases, or the judicial system is flawed, or both.

The FTC and the DOJ win most of their merger challenges, but not all. I don't think the data supports saying that a handful of losses is indicative of a fundamental, systemic flaw in enforcement.

CTFN: Bruce, I probably approached you at ten different public events in the past few years where you were "scrummed" by reporters and analysts. I'm curious, what goes through your mind during that sort of encounter?

Hoffman: Well, I always believe as an enforcer, that to the greatest extent possible it was part of our job description to communicate to the media and the public. We are in a democracy, and for that reason we should be transparent.

There are significant issues, though. Specific investigations are protected by statutory confidentiality. When people are throwing questions, you have to think about what you might say because you don't want to reveal things relating to a current investigation.

You also have issues about policy, you don't want to get out there and say something about policy which is not consistent with the policy of the agency. I don't want to say something that a commissioner would be upset about. During a panel or speech, you're in a controlled environment where you have time to think about what you are going to say and can operate within certain bounds.

The last thing is, when you are talking to the media in uncontrolled circumstances you are worried you will be quoted incorrectly. Things can be lost in those scrums. As the director of the Bureau of Competition, people pay a lot of attention to what you say, so you want

what you say to be accurately reflected. But, I tried to be sympathetic because you were just doing your job too.

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