# CPI TALKS…

## *…with Ian Conner*

In this month's edition of CPI Talks… we have the pleasure of speaking with Mr. Ian Conner, Director of the Bureau of Competition at the U.S. Federal Trade Commission ("FTC").

Thank you, Mr. Conner, for sharing your time for this interview with CPI.

1. **The economy continues to recover from the effects of the COVID-19 pandemic. How has the FTC responded to the crisis? Have patterns of conduct, merger activity, and enforcement been significantly impacted by the new economic conditions?**

The Bureau and our colleagues throughout the Commission have responded to the changes brought on by the pandemic amazingly well, given the significant challenges that this process has entailed both in the Bureau's work and in the personal lives of our colleagues. A prime example is the HSR program. As soon as we learned that we would be moving to full-time telework, the staff of our Premerger Notification Office rallied to the task of setting up –for the first time ever – an electronic filing system for HSR Notifications. The PNO announced the plan on Friday, March 13th, and it was operational by Tuesday, the 17th. It has been a tremendous success. Staff has been able to process and review HSR filings remotely without disruption.

Not surprisingly, HSR filings have dropped significantly since March. If you compare recent activity to the levels for prior months and years from our annual HSR reports, you can see that there has been a significant drop in filings year-over-year. (Due to increased interest in M&A activity during this time, the Bureau started publishing monthly HSR figures in July. They are on the PNO webpage.) But fewer filings does not necessarily mean less work. We are seeing a higher number of non-reportable deals being flagged to us for potential competition concerns, especially in health care, and we also are seeing a higher percentage of HSR filings that trigger investigations and second requests.

What might be surprising to some is that there has not been a slowdown in merger enforcement. Despite the challenges of working during the pandemic, we continue to operate at an extremely high level of activity, even in comparison to periods before the pandemic. In just the four-month period since we transitioned to mandatory telework, the Commission has challenged one merger, *Altria/Juul*, and required divestitures in six others. Another five mergers have been abandoned while under investigation. We also announced a settlement with Indivior over product hopping, which included $10 million in consumer redress, and settled an order violation investigation of Alimentation Couche Tard, which included a civil penalty of $3.5 million for its failure to divest on time, maintain the divestiture assets and accurately report on its divestitures. We also released the final Vertical Merger Guidelines. All of this new work is in addition to significant investigations and litigations that predate the pandemic period that continue on: we have four matters in active federal court litigation, and those litigation teams, as well as others throughout the Bureau, have pivoted to using technology to participate in hearings and conduct depositions and investigational hearings remotely.

I think our biggest challenge is that many in the Bureau are dealing with personal demands on their time due to changes in childcare or elder care, as well as adjusting to the more mundane changes to many parts of our daily lives. No one misses the commute, but I know we all miss the collegiality and support that we get from seeing one another while working together. The Bureau is staffed by incredibly dedicated public servants and now more than ever those of us in management are trying to ensure that they are able to balance their work and personal demands under these very challenging circumstances.

**2. In May 2020, you drew attention to the issue of the "failing firm" defense, noting that it "has been striking to see firms that were condemned as failing rise like a phoenix from the ashes once the proposed transaction was abandoned." Have invocations of the failing firm defense been more prevalent during the pandemic? How has the agency approached this issue in recent cases?**

I would say what we are seeing more often are failing firm-esque arguments. Multiple parties have said that they "aren't making a failing firm argument, but …" The failing firm is a defense that has been recognized by courts and even litigated to decision. At its core, the defense is just that — it can be employed to absolve an anticompetitive merger. But the defense has specific elements, and if you don't meet those elements, your merger is illegal. We do not reject a failing firm defense out of hand, and it is part of our analysis under the Horizontal Merger Guidelines. Yet even under current conditions, you will be required to show how you have met each of those requirements.

What I am most concerned about is that while many companies face what are hopefully temporary challenges, permitting an anticompetitive merger to proceed will have lasting ramifications long after the present COVID pandemic. The competition that is lost will not come back, even once the economy does. We need to be sure that in permitting such a transaction to go through, it is the best alternative to having the acquired company go out of business and its assets exit the market. That means that bankruptcy reorganization is not an option and there are no less anticompetitive bidders. The fact that one or both companies aren't doing as much business right now or have seen profits fall since March is far from adequate to be deemed failing or to justify the harm customers will face due to an anticompetitive merger.

**3. Antitrust enforcement in the tech sector continues to make the headlines. Throughout 2019 and 2020, agencies around the world (notably in the EU, Germany, Australia, and the UK) have commissioned reports and proposed new laws to bolster enforcement in the "digital economy." What is your view on the state of antitrust enforcement in tech? Are new rules needed in the U.S. or elsewhere?**

While the technology sector poses several challenges for antitrust enforcement, I think existing laws are flexible enough to tackle these challenges. To marshal our scarce resources to meet these challenges, in February 2019, the Bureau announced the creation of the Technology Task Force, which has since become a permanent Division of the Bureau, the Technology Enforcement Division. The Division is meant to develop a deep understanding of the business models, practices and emerging technology used by participants in this important segment of the economy, with a view to promoting and protecting competition.

I would note that while much of the general debate is focused on just a few large tech platforms, there are many tech sector companies throughout the economy. The Commission's pending case involving a multisided e-prescription platform is one example. In April 2019, the Commission voted to challenge the anticompetitive practices of Surescripts in federal court; the matter is presently in discovery.

In fact, there is a lot of variety in the business models used by technology platforms. Even though the GAFAM companies are often grouped together in antitrust discussion, each of these companies is quite different. They operate in very different markets and provide different services. Some provide a free service that is funded through advertising while others provide services and sell products using commission-based pricing while also selling their own products. And then there are aspects of the tech companies that combine these business models. Each platform presents different questions about how they operate their business, what agreements they have with their suppliers, sellers, and users, and how to calculate prices when products are free, including initial sunk costs such as hardware or subscriptions. Remember that the FTC is a law enforcement agency and not a regulator and so our focus is on enforcing the laws to prevent anticompetitive conduct. In order reach any conclusions about a particular company or industry sector, an antitrust enforcer has to go through a fact-intensive analysis that is unique to each case.

**4. Following the FTC's own hearings (in 2018) and the recent and upcoming Congressional hearings into the technology sector, what actions can be expected by the agencies in this sector? Is the FTC planning to modify its enforcement practice in the near to medium term?**

I highly recommend watching the archived videos of some of the panels, where we gathered experts to discuss and debate thorny issues of antitrust law. I think the hearings highlighted that there is great complexity and varied views on the technology sector and antitrust laws' ability to tackle that complexity. But, most importantly, the Hearings indicated that there was a need to expand our expertise in this area. That is what we are doing through the work of the Technology Enforcement Division and through the Commission's 6(b) study of acquisitions by the largest companies in the technology sector.

While I cannot speculate as to what actions may be taken by the Commission in any particular matter or following the study, it is clear that all of these efforts taken together help advance our understanding of the practices of the platforms and the rationales behind acquisitions. Where our investigations produce evidence that companies have engaged in practices or acquisitions that are anticompetitive, we will bring recommendations for enforcement to the Commission.

I think the Commission has a good track record of vigorous enforcement and getting things right. But we're not infallible. Sometimes our predictions about the likely effects of a merger or the remedies we impose may not pan out, and sometimes courts disagree with our predictions and decline to block a merger. That's why periodic look-backs and broad public conversations are essential to recalibrating our approach and our expectations of what we can achieve through antitrust enforcement. The Hearings have been invaluable in that regard, and we are now in that period of self-reflection that will help determine if there are areas in need of additional attention in our enforcement or changes necessary to the law.

**5. Specifically, concerning merger review in technology, the FTC's probe into Facebook, (including its Instagram acquisition), raises the possibility of unwinding historical deals if they are found to be anti-competitive. Are such transactions a particular risk in the tech sector? What should be the thresholds for agencies to contemplate such a remedy?**

I gave a speech earlier this year on our remedies toolbox. For consummated mergers, our first tool is always unwinding the transaction to restore the level of competition that existed prior to the acquisition. I don't think that this option is any more or less preferred in the technology sector. Being able to accomplish an unwinding may be more challenging in the technology sector given the speed of technology developments and the presence of network effects, but the perfect cannot be the enemy of the good. Even if we think a full structural remedy is not workable, we can look to other tools in our toolbox to restore competition as best we are able. The fact that an anticompetitive transaction is consummated and a remedy is complicated should not stop us from counteracting the harmful effects.

**6. In June, the FTC and the DOJ issued new Vertical Merger Guidelines. What are the most significant changes to the guidelines? Do the guidelines usher in a new approach to enforcement, or do they reflect a codification of existing practice? Do you agree, as some authors have suggested, that merger review in the U.S. is in need of "revitalization"?**

The Vertical Merger Guidelines are not intended to signal a change in policy from existing practice, but instead meant to codify our present enforcement approach. Unlike the 1984 Guidelines, the new Guidelines clarify that the agencies consider a full range of possible harms from vertical transactions, and provide a non-exhaustive set of examples. Raising rivals' costs, foreclosure, and concerns around diagonal or vertical complements are not new theories of harm, but they have not been set out in a guidance document before now. The most important insights in the Guidelines relate to expanded guidance regarding unilateral effects arising from opportunities post-merger for the integrated firm to engage in foreclosure or raising rivals' costs. Practitioners should pay close attention to the discussion of how the agencies determine if the merged firm has the ability and incentive to engage in such behavior, and how we assess the net effects of that conduct after accounting for the elimination of double marginalization.

Regarding the issue of "revitalization," I think there is a narrative, that some commentators have simply accepted without evidence, that the agencies are lax in merger enforcement. They typically cite several mergers that are six or eight years old to condemn the Commission's entire merger enforcement regime. Most people would quibble about the outcome on one or two particular mergers (probably different ones), but I simply reject the overall premise. There is no need to revitalize merger enforcement because it has not been lagging.

Let's look at the recent level of enforcement. So far in the current fiscal year, the Commission is on pace to have the highest number of merger challenges, abandonments, and settlements since the HSR thresholds were raised twenty years ago. This level of activity is remarkable, but even more so if you consider that we have been operating under mandatory telework for half the fiscal year in the wake of global pandemic. More importantly, we are not shying away from hard cases. For instance, we have been willing to look at multiple theories in merger reviews. Two of our merger reviews this year include not just Section 7, but also Section 1 and Section 2 claims. We are also currently litigating two monopolization cases in federal district court. And we are willing to accept some litigation risk, because we are not going to win every case. I think our record demonstrates that we are already willing to employ the tools that we have to aggressively combat anticompetitive mergers and conduct. We will continue to question whether there is more that we could do. That is not evidence of needed revitalization, but rather of constructive self-reflection.

CPI COMPETITION POLICY INTERNATIONAL

## CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.