

Q&A with Bruce Hoffman of Hunton & Williams

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D Bruce Hoffman has headed the global competition practice at Hunton & Williams since 2009. He returned to the firm in 2005 after more than three years at the Federal Trade Commission, where he served as deputy director for the Bureau of Competition.

What do you think are the most interesting or important issues in antitrust law today?

At a very high level, the biggest and most important issue that I see floating around today is probably the proper treatment of unilateral or single-firm conduct – and when I say that I’m including in that vertical contracting, so this can be thought of as an agreement but it’s not an agreement between competitors. It’s instead contracts like most-favoured nations or bundling contracts or other kinds of price-parity provisions, exclusivity arrangements, all these sorts of things. So I’d lump that in single-firm conduct, because that along with true single-firm conduct tends to get looked at under a somewhat different analytical framework than true horizontal collusion.

I say this is important because I think it’s an area that’s still very much in flux. There’s a lot of uncertainty, a lot of thinking about it, and also I think there’s at least arguably a growing dichotomy between the way these kinds of issues are treated in the US and the way they are being treated in Europe and then increasingly in other parts of the world. You see more and more activity in this space in Korea and Russia and China and all kinds of other places.

There are over 100 antitrust regimes all around the world, and each of them have their own kind of way of handling things. Are there any issues specifically internationally that you keep an eye on, and how might that affect antitrust law here in the US?

You can really think of it in three big buckets. One is international cartel enforcement, and that's obviously an area that's hugely important. When I first started doing antitrust law you had US cartel prosecution, and everybody else in the world would appear to be basically pro-cartel -- so you had things like blocking legislation in Europe that prevented cooperation with US antitrust enforcement. Today, it's the complete opposite, and everybody is after cartels, and so you have the internationalisation of cartel work as the norm, and so that's a critical big piece of the international space.

Second is mergers. Probably half of mergers today have an international component of some form or another, and that requires you to pay a lot of attention to what's going on worldwide and have good contacts with firms everywhere so you can get help right away if you need it. I mean, we've had to look around quickly and find a law firm in Zambia to help us with a merger. These kinds of things happen, because as you said, there's so many regimes and you never quite know where your deal's going to touch.

And then the third is the single-firm conduct issue that I mentioned. That's one where sometimes investigations sprawl across the world; sometimes they're more localised but thinking about the different standards that could apply and how things might get looked at is really important.

It's been over 11 years now since you were deputy director of the Bureau of Competition of the FTC. How do you look back on that experience? And how has that influenced your time back at Hunton & Williams?

I don't think you can easily sum that up. I was at the FTC for almost four years and it was the best professional experience of my career. I think I learned the most. I worked with an incredibly talented and diverse group of people both inside the agency and outside it -- worked on great things. Sometimes I compare it to being in sort of a really advanced graduate school for years. Just no matter what level you are, you learn all the time that you're there, you learn from the most junior people in the agency, and you learn from the most senior people in the agency and the most senior practitioners outside of it.

How does that affect or shape what I do? I think it shapes everything about what I do. The things that I learned there, the people whom I met, and the things that I keep learning as a consequence of that, basically are the things that I use every single day in my practice. It's one of the reasons why I tell young lawyers if you have the opportunity to serve in the government, you absolutely should take it. It's an unparalleled experience, as well as having the value of giving something back to the country. Serving at the FTC or the DoJ is a way to do something that's for more the common good and not so much about your own personal career. It can have benefits for your personal career, but it's not just about that.

Which antitrust investigations or litigation are you following closely besides the cases you are working on personally, and why?

That's a tough question to answer actually, because I look at a lot of cases and it's not so much that I follow one in particular. It might be whatever I'm thinking about on a given day. The various investigations and cases that are going on that involve Google are important, because I think they get right at this issue I mentioned at the beginning, which is single-firm conduct. So how that set of cases or set of investigations evolves I think is going to be something that's going to be important for everybody in the space to pay attention to.

I've been following somewhat the American Express case that the Department of Justice brought, because -- and for similar reasons -- there you really have a case that's right at the edge of the law, of which people would say 'Oh, it's a bold case by the DoJ.' To some extent you might say that the antitrust agencies are supposed to bring the cutting-edge cases. Who's going to bring those cases if not them? But it certainly does -- at least in one way of looking at that case -- it frames up a set of facts or issues that would be a novel or very aggressive interpretation of antitrust law, with very arguable consumer effects. It's hard to say how it would play out, so I think that's a really interesting case and how that fares on appeal could be quite influential, and it has some potential effect on this whole space of vertical contracts and what people do with that.

Is there someone you particularly admire in the antitrust community?

There's lots. The antitrust bar I think is a really good bar. It's got some people who are incredibly good lawyers, who do antitrust work as part of a broader practice. I'd put Glenn Pomerantz from Munger Tolles in that category. I think he's just an absolutely phenomenal litigator, and antitrust is only one of the things he does, but everything he does, he does really well. I've worked with Glenn a lot, and every time I work with him I learn a lot.

I've been fortunate to work with people who I think are just amazing intellects – Tim Muris, Joe Simons, Susan Creighton, these are people who are phenomenally intelligent, and they have different things that they are particularly interested in. People who I think are great lawyers – there's a lot of other people I could name, once I start down this road I'll name 20 or 30 people. Someone who's a little bit closer I think in terms of their age and practice to me is Christine Wilson at Kirkland – I think she's an incredibly good merger lawyer, someone who really knows how to run a merger well. I like working with her, because I like the way she organises things, thinks things through. Again, I could name a bunch of other people who have been very influential and helpful to me and whom I've learned from, like Sean Royall, Barry Nigro, Rich Parker, and some who are great antitrust lawyers but have kind of moved on from the pure antitrust space, like Hew Pate and Debbie Majoras, and many others.

What advice would you give to a young antitrust lawyer?

I'd say first of all you got to be a good lawyer. I think you can get a little caught up in the antitrust world of being such a subject matter expert that you forget how to be a good lawyer, or you never learn how to be a good lawyer. I didn't really start as an antitrust lawyer. I started out at a smaller firm in Miami being handed cases and told to go litigate them with no guidance other than that, so I just went down to court and argued. And you learn a lot from that, and so I have a somewhat non-traditional background for what we do, and I think that was helpful to me. So I'd say be a lawyer first – learn how to litigate, learn how to do the things that a lawyer needs to do.

Other things I would say would be if you get the opportunity to work for the government, do that. You'll never regret it. And I think the other thing is keep an open mind. One thing that young lawyers have a tendency to do is think whatever side they're on is always right. And what you find is, for example, if you work for the government and then you work in the private sector, you find that neither side are angels and neither side are demons. They're both groups of people who are trying hard to do their job and do the best work they can for the government or for their clients, but they're rarely malicious. It's much more common that everybody's doing the best they can and honestly believes in what they're doing. As a young lawyer you can get very caught up in the "us" versus "them" mentality, and it's useful to remember that the people on the other side are probably not very different from you.

If you could give one piece of advice to the FTC or the DoJ, what would it be and why? And then also, in light of the merger wave – the regular mergers and the mega-mergers, \$10 billion mergers and stuff like that – what advice would you give to the FTC and the DoJ?

On general advice, there's a lot of things I could say and probably not much of my advice would actually be very good. But the one thing I do think is worth thinking about or that the agencies ought to always keep in mind – and I think they largely do – is that models are models but you've got to be very careful about models as compared to empirical results. I think looking at empirical results is a lot more probative than looking at models. You can construct economic models to produce almost any outcome you want. There's a concept called the Folk Theorem, which I won't get into for this purpose, but it applies really well on a lot of these models that you think about and as a consequence it's very easy to convince yourself that conduct is anticompetitive or could be anticompetitive and to not look at, not even so much why people are doing it, but what are the actual effects? What's the actual outcome? And if that differs from what your models are predicting, or if your models are predicting something that makes no sense on an intuitive level then I think a lot of caution is called for. That's a sort of general point.

On the mergers, I think overall the government does a pretty good job of handling merger waves. I think they're doing a pretty good job now. They put the resources into it that they need. This is kind of an unsung hero thing: the staff lawyers at the FTC, the DoJ, as well as the senior people will kill themselves working on mergers without any benefit. It's not like you work overtime, you work around the clock at the FTC or the DoJ, and then you're going to get a big bonus as if you were a lawyer at a private law firm. It doesn't happen. But they work it anyway, and they

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get the job done. So I don't have advice to give them other than keep doing what you're doing and keep doing good work.

We have heard that you might be interested in the commissioner vacancy at the FTC. Is there any truth to that? And, if so, why are you interested and what do you hope to accomplish if you do go back?

That's a good question. I think it would be more accurate to say I would welcome the opportunity to serve again in the government at some time. I don't know if that opportunity will come. I'd have to consult with a lot of people – most importantly my wife – on whether or not that would be something that I could do if it were to come.

But I think anybody who had the chance to serve with the government, as I said earlier, should. I was in the FTC in two different positions. I learned a lot from it. It was a tremendously, tremendously educational experience. I also think that I gave the FTC something when I was there. I think I contributed – at least I hope I contributed, you'd have to ask the people I worked with. And I think I could do that again at some point. I could learn from working in the government again, and I think I could contribute to it.

How or when or if that would happen? I have no idea.