

Interview With Pete Levitas

Ken Glazer¹

The Threshold recently had the opportunity to interview Pete Levitas, Deputy Director of the Bureau of Competition at the Federal Trade Commission. Mr. Levitas shared his thoughts on merger enforcement and the state of the Bureau today. The interview was conducted by Ken Glazer of K&L Gates LLP.

Interview

The Threshold: You started your legal career at the Justice Department's Antitrust Division. What kind of cases did you work on there and how do you think that has shaped your thinking about antitrust enforcement? How has it affected the way you do your job today?

Mr. Levitas: I worked at the Division from 1991 to 1997, in a section that later became known as the National Criminal Section, where I worked on merger and non-merger investigations as well as cartel cases. I did some grand jury work, and was on the trial team for three price-fixing cases involving the steel drum industry. I was lucky to be exposed to a fairly wide range of antitrust issues, and also get some litigation experience, all of which has been very helpful for this job.

The Threshold: What differences do you see between the Commission and the Antitrust Division?

Mr. Levitas: I think that the biggest difference between the Division and the FTC is structural. Because the FTC has five decision-makers, it's harder to

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predict whether or not a complaint will be voted out on any given case, and it's sometimes harder to predict which issues will be prioritized.

Also, I do think that the organizations have slightly different cultures. The Commission views itself more as a combination enforcement/policy organization, whereas the Division seems to have a clear sense of itself as an Executive Branch prosecuting agency. So there's a different flavor at the Commission than there is at the Division. But those differences are relatively small; for the most part I think that both agencies approach their missions in essentially the same way.

***The Threshold:* You spent a good part of your legal career on Capitol Hill. How did that come about? And you overlapped with Chairman Jon Leibowitz on Capitol Hill. Did you ever work with him while you were there, and on what issues?**

Mr. Levitas: In 1997 I was detailed as the antitrust counsel to the Antitrust Subcommittee of the Senate Judiciary Committee. A couple of years later, when my direct manager left the staff, I became Chief Counsel for the Antitrust Subcommittee, which was chaired by Senator Mike DeWine (R). That's where I worked with the Chairman. He was Chief Counsel for Senator Herb Kohl (D), who was the Ranking Member on the Antitrust Subcommittee. Senator DeWine and Senator Kohl both agreed that antitrust issues should be handled in a bipartisan fashion, so that's how we ran the Antitrust Subcommittee. It was a very unusual approach – most committees didn't run that way, but we worked very closely together, practically as a single staff.

We worked on antitrust legislation, but more often we were conducting oversight and focusing on specific mergers or broad policy issues. For example, we put a lot of effort into the Microsoft case – the Judiciary Committee had three or four hearings on it. We also had hearings on mergers in the oil industry, telecom, cable, airlines, and others – we were lucky enough to have the opportunity to focus on a wide range of interesting issues.

On all of these hearings I worked closely with Jon and his staff, and for the most part we were in very close agreement on how to approach the key issues.

***The Threshold:* While you were working in the Senate did you have contact with the Division and the FTC?**

Mr. Levitas: Yes, I worked with both agencies, though more so with the Division, because the Judiciary Committee had primary jurisdiction over the Antitrust Division and the Commerce Committee had primary jurisdiction over the FTC. But we still had a lot of dealings with the FTC, and I was privileged to work with people like Bill Baer, Bill Kovacic, Bob Pitofsky, Susan Creighton, Rich Parker, Joe Simons, Mary Anne Kane, and others – including my current boss, Rich Feinstein.

***The Threshold:* You have now been the Deputy Director of the Bureau of Competition for almost one year. Can you give us your high-level overview of the Bureau?**

Mr. Levitas: The Bureau is a great place to work. We get to examine interesting and important policy issues, and we have the opportunity to try to implement our policy decisions by bringing enforcement actions. And most important, it's a great environment to work in because the people are outstanding – smart, dedicated to the mission, and hard working.

I also like the decision-making structure of the Commission. Sometimes it takes longer to resolve issues, because you need to reach some degree of consensus among a number of people, but that often leads to a better, more well-thought out decisions – and in any event, the process is always very dynamic and interesting.

***The Threshold:* Do you have a different view of Capitol Hill now that you're inside the agency you used to oversee?**

Mr. Levitas: Not really. In my previous experience I found that the vast majority of members of Congress and Hill staffers were working hard to make the best decisions they can, and really, that's still the case. Part of our job is to provide them information they need to make their decisions, and then to implement the policy decisions they make. And overall, Congress has been very supportive of our work and the mission of the Commission, so the relationship is very good and very productive.

And, of course, Jon has had a great deal of Hill experience and has a great understanding for the type of information and assistance we can provide to the policy-makers.

***The Threshold:* How busy is the Bureau these days?**

Mr. Levitas: Very. The shops are all busy. There's definitely an ebb and flow, so some shops have more hot matters than others at any given time, but the staff are all busy, and many of the shops are almost too busy.

***The Threshold:* If the deal flow is slow, then why are you all so busy?**

Mr. Levitas: Actually it seems that the deal flow has started picking up from its low point. But even beyond that there are two other reasons. First, maybe because of the economic dislocations we saw last year, a higher percentage of the deals now are strategic, and therefore potentially problematic. I don't know for sure but it seems that way. Second, there are always deals that we would like to review or review more closely but that we cannot focus on because of resources; so I think that maybe we were forced to do some additional triage back when the deal flow was stronger. The result is that even with fewer total mergers, there still seem to be a lot of mergers that require careful review. And, of course, we always have a lot of conduct work that keeps us busy in addition to the merger work.

***The Threshold:* What were you expecting before you arrived at the Bureau, and what has surprised you the most about the Bureau's work since you arrived?**

Mr. Levitas: I have been surprised by how smoothly things run here given that we have this complex, multidimensional structure we discussed earlier. With so many moving pieces and inputs – the Bureau of Economics, International, OGC, the Office of Policy and Planning – you would think there would be lots of potential for things to bog down but it doesn't really happen very often. The agency is really pretty efficient, especially given the complexity of the decision-making structure.

***The Threshold:* How is supervision of the Bureau allocated between you and the other two deputies, Norm Armstrong and Marian Bruno?**

Mr. Levitas: Marian oversees the Compliance Division, the Bureau's policy shop, the Premerger Office, and the administrative functions. Norm oversees Mergers 2, 3 and 4, and I oversee Mergers 1, Health Care, and ACP. So I have responsibility for two conduct shops plus the merger shop that covers pharmaceutical mergers.

***The Threshold:* Mergers I is known primarily for dealing with big pharma mergers like last year's Pfizer/Wyeth and Merck/Schering-Plough mergers. What do you think are the most important issues in the pharma mergers?**

Mr. Levitas: The pharma cases are particularly important because the industry is so important – an anticompetitive deal in this industry affects prices and innovation on products that are critical to consumers. But I don't know that the issues and basic analysis are all that different from non-pharmaceutical mergers – we look to see if a proposed merger will substantially lessen competition and try to find ways to remedy any negative effects. We are

examining effects in specific overlap markets, and also analyzing the overall effect of consolidation in the industry, especially as it affects R&D.

***The Threshold:* Mergers I also has jurisdiction over medical devices. How do those transactions differ from the pharma ones?**

Mr. Levitas: Again, the essential analysis we conduct is very similar. In fact, one way that both of the pharma and medical device areas collectively differ from other areas is that we are very conscious of the fact that lives may be at stake. So I think that maybe we're more sensitive to potential competition issues in the pharma/medical devices area. Potential competition came up, for example, in the Thoratec matter. We challenged Thoratec's planned acquisition of Heartware International because Heartware was developing a heart pump to compete with Thoratec and it was the strongest potential competitor. Following our challenge, the companies abandoned the transaction.

***The Threshold:* What other noteworthy issues have you dealt with in Mergers I?**

Mr. Levitas: We also recently obtained a consent ordering the divestiture of laser microdissection devices in the merger of Danaher Corporation and MDS Analytical Technologies, and we ordered Panasonic to divest Sanyo's portable nickel metal hydride battery business in order to proceed with the Panasonic/Sanyo merger.

***The Threshold:* Do you have any overall impressions of how the Bureau is handling merger investigations generally?**

Mr. Levitas: Yes, we try to be efficient and make our decisions as quickly as possible, and we don't want to challenge deals that are procompetitive or competitively neutral. But we're also being aggressive on deals that raise concerns. We've seen a number of parties abandon their deals – some before the Commission's complaints were issued and some after the complaints were issued.

The Threshold: How about the Merger Guidelines?

Mr. Levitas: The Horizontal Merger Guidelines review project has been very successful. We worked with DOJ to hold five public workshops, which were very informative and productive, and we've now released a draft for public comment. I think the draft is excellent, and we're going to consider the comments and suggestions to see if we can improve it. The goal of the revised Guidelines is to do a better job of reflecting how we are actually conducting our merger investigations and how we are making decisions on which cases to pursue. That will make it easier for business and counsel to decide on the appropriate course of action in the future.

The Threshold: From the outside, the agency appears to have been extremely energized and emboldened by its victories in the Whole Foods case and CCC/Mitchell, as well as by other steps the Commission has taken such as overhauling Part 3 Rules and changing its approach to administrative litigation during a pending district court 13(b) proceeding. As one commentary put it in the pages of this publication last summer [Paul Hewitt and David Altchuler's article on the FTC], the agency "has been engaged in an aggressive push to inject its in-house adjudicatory proceedings into pre-consummation merger enforcement and urge upon federal courts a lenient interpretation of section 13(b) of the FTC Act. . . . The Commission's strategy could have significant ramifications for mergers reported under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) and has already generated a fair amount of commentary and critique." How do you view all this?

Mr. Levitas: It is hard for me to compare our approach now with that of the previous period, but from what I can tell, I don't see much difference. People here are energized, but I don't think that's because of any court rulings on the standard of review. We pursue our mission the way we always have – we're

going to go after anticompetitive mergers and conduct where we see them, no matter what the standard.

Let me also say that I don't think the standard the FTC has to meet is different from the standard facing DOJ. You have to bear in mind that when we go to court, it's to get a preliminary injunction; when DOJ goes to court, it's generally to get permanent relief, because of course they don't have the administrative process we have. When we get into Part 3 litigation we face essentially the same standard DOJ faces in federal court.

***The Threshold:* By our count, around ten transactions have been abandoned in the last year in the face of FTC opposition or serious investigation. Does the Bureau feel these days that it has a virtual veto over deals it doesn't like?**

Mr. Levitas: Not at all. I can't really compare the current situation to the way it was before I got here, but I can say that we're very aware of the fact that the Commission can't just block deals after a quick look – we need to investigate and develop a strong case, or we won't prevail, which is how it should be. We're pleased with the success we've had lately, but it's up to the courts how these cases come out. We're glad that things seem to be working well and we are stopping the deals (and getting consents) where we have reason to believe the transactions are anticompetitive.

***The Threshold:* Chairman Leibowitz has made it clear in speeches and other statements that he views the reverse payment cases to be one of the agency's highest priorities. How has that affected the Bureau in terms of allocation of resources?**

Mr. Levitas: We allocate resources to our highest priorities. The Bureau agrees with the Chairman's emphasis on reverse payments because the practice is blatantly anticompetitive and has cost consumers \$3.5 billion a year. That makes it very important, and makes it a top priority. The Chairman is speaking about it

and emphasizing it for that reason. So we're going to put the necessary resources into this area.

The Threshold: The agency has been trying to get Congress to repeal Schering. But that was dropped from the health care bill. What was the Bureau's reaction?

Mr. Levitas: We would have preferred if reverse payments legislation had been included in the final health care bill, but we were pleased that the Administration supported a legislative fix, and we're pleased about the bi-partisan support we've seen in Congress. We're still hopeful.

The Threshold: Is there a realistic chance Congress will address it now that the health care bill has passed? Won't Congress turn away from this whole health care area?

Mr. Levitas: No, I don't think so. There are other legislative avenues to pursue, and we are going to keep working with the Congress along those lines.

The Threshold: The Commission recently enjoyed a victory in Cephalon. Your reaction?

Mr. Levitas: We're very pleased about the court's decision and we look forward to proving our allegations that Cephalon's agreements with generics were anticompetitive and greater than the exclusionary authority of its patent.

The Threshold: Do you think this one victory in an otherwise dismal stretch of defeats will make a difference?

Mr. Levitas: We've had some setbacks but I don't think I'd characterize it as "dismal." In any event, I think that this case is a sign of increasing recognition that these deals are anticompetitive and bad for consumers. And we've seen another promising development in the Cipro case in the Second Circuit – the panel opinion encouraged the plaintiffs in that case to ask for en banc review so that the circuit can reconsider its approach to these pay for delay settlements.

That's pretty unusual, and we think it's a very positive indication that the courts are re-thinking this issue.

The Threshold: What other work is done by the Health Care Division?

Mr. Levitas: They work on a range of other kinds of cases, including health care conduct cases such as the physician price-fixing cases.

The Threshold: You also oversee the Anticompetitive Practices Division. Tell us about that division. What kind of work does it do?

Mr. Levitas: The Anticompetitive Practices group handles all conduct cases outside of the health care market. That shop conducted the investigation of the Intel case, for example. It investigates a whole range of potentially anticompetitive activities, including unilateral conduct such as exclusive dealing and anticompetitive conduct in the context of standard-setting. In many ways, these are the most challenging types of cases. They're legally and factually complex, and they're the kinds of cases that move the law.

The Threshold: The agency suffered a major loss two years ago in the Rambus case. Has that put the FTC out of the standard-setting business? If not, what kind of an agenda is the agency pursuing these days in the standard-setting area?

Mr. Levitas: Absolutely not. Standard setting activity will remain an area of great interest. We're continuing to examine potentially anticompetitive efforts to disrupt standard setting.

The Threshold: I assume the Bureau was pleased by the Commission's ringing endorsement of its case in Realcomp. Will the Bureau continue to pursue real estate cases? Will it now go after the 6% commission?

Mr. Levitas: Yes, we were pleased with the Commission's opinion in Realcomp – specifically, the finding that the realtor's group violated the antitrust laws by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services. The matter has been appealed, so I can't say much more than that. But we continue to watch the industry and we will take action if competition is threatened.

The Threshold: Speaking of cooperating with other antitrust agencies, how are things going these days with your old agency, the Antitrust Division? It has been rumored that relations between the two agencies have frayed in recent months over clearance battles such as the fight over which agency would get Comcast/NBCU. Can you comment on that? What are the agencies going to do about improving the intractable clearance problem?

Mr. Levitas: I understand the potential for concern about the clearance process, but as I see it from here, disputes do not happen very often. In general, we have a very good relationship with the Antitrust Division. As you know, it is no secret that there were significant policy disagreements between the DOJ and the FTC in the recent past – such as the Schering case and the Section 2 Report. But the current Commission and Division leadership are closely aligned in terms of our approach to enforcement. For example, the DOJ withdrew the Section 2 report and supported the FTC's position on pay for delay settlements in the recent brief to the 2nd Circuit in Cipro. Our senior staffs meet and talk regularly on many issues, and I think you will see fewer disagreements going forward.

The Threshold: For years the agency has talked about trying to unify the two sides of its mission – competition and consumer protection. Have there been any notable efforts in that regard since you started? How much contact do you have with the other Bureau?

Mr. Levitas: There are competition matters in which consumer protection issues are important and need to be investigated, so we have been working closely together on these cases. I can't say much more than that publicly about any

specific cases, but certainly there is a good working relationship between the bureaus and we have ongoing contact on a range of issues.

***The Threshold:* Tell us how you work with the Bureau of Economics. What role does that Bureau play in your investigations?**

Mr. Levitas: We work very closely with the Bureau of Economics on all our investigations. BE offers great insight and analysis on competition matters, and we rely heavily on their contributions. They are part of the investigative team from the beginning and we couldn't do what we do without their efforts.

***The Threshold:* Finally, let me ask you this: You succeeded Ken Glazer as deputy director. Would you say that it has been extremely difficult to fill his shoes, or impossible? And would you say that he left the Bureau of Competition in incredibly good shape, or the best shape it has ever been in? Please limit your answers to one of the two choices provided.**

Mr. Levitas: This is the easiest question you've asked; it's clearly been impossible to fill Ken's shoes, and I'd say he left the Bureau in the best shape it's ever been in. That is great for consumers, but it has made it a little bit awkward for me because virtually every conversation I've had since I got here started with, "Oh, you're not Ken. That's disappointing."

***The Threshold:* Thank you very much.**