

The Capitol Forum: Interview with FTC Bureau of Competition Director Deborah Feinstein

Please note this interview was conducted on 9/19/13. The transcript has been modified slightly for clarity.

JOE TIPOGRAPH: As a panelist at this year's ABA spring meeting, the first thing you said is that you are a huge fan of transparency. At that time, you were in private practice, and many lawyers in private practice want transparency for the government. But the real question is when those lawyers come work for the government, what happens? Well, I read the speech that you gave yesterday in New York and the amount of detail that you provided, that and your willingness to meet with me here today, I definitely want to commend you for walking the walk.

DEBORAH FEINSTEIN: Thanks.

JOE TIPOGRAPH: Last Friday, the FTC announced entering into a settlement regarding Honeywell's acquisition of rival scan engine manufacturer Intermecc. The consent order provided that while the FTC found that the acquisition would be anti-competitive, the FTC would not challenge the merger on the condition that Honeywell would license its and Intermecc's patents for 2D scan engines to Datalogic for the next twelve years. Walk me through how you arrived at this remedy.

DEBORAH FEINSTEIN: Sure. So, the way we look at transactions is always the same. We investigate to see if there's any competitive concern. We try to be transparent with the parties, and we were in this case, about laying out the concerns we were seeing which was that it looked like it was a three to two merger in the 2D scan engines.

When we articulated that to the parties relatively early on in the investigation, they proffered a remedy. They suggested a way to resolve the issues. And as we do with all remedies that are proffered to us by the parties, we take a look and determine whether to not it will in fact solve our competitive concern and we do so by thinking about what we have learned in the investigation by talking to third parties in the investigation, by asking them to bring forward in appropriate cases, as was done here, who the licensee would be, or in the case of a divestiture acquirer. And we fully vet the remedy to see if it meets our concerns.

In this case, the primary concern with entry into the U.S. market, because there were a number of people doing it outside the U.S., the primary concern was the patent portfolios of the merged firm. Those patents were keeping people from having the comfort that they wouldn't get sued themselves and were preventing them from being able to give customers the indemnifications the customer sought that they wouldn't be sued if they used the 2D scan engines in their products.

We determined that there was. They brought forth a licensee that basically was ready, willing and able to enter the U.S. market, but for the patent issues. And so we determined that licensing them the patent portfolios of Honeywell and Intermecc that were relevant to the product would enable them to begin competing in the U.S. market, immediately thereby restoring the lost competition and bringing it back to three vibrant competitors.

JOE TIPOGRAPH: The licensee in this case was Datalogic. Was the ultimate remedy that was agreed upon, was that more or less exactly what they proposed from the onset? Or were there some negotiations that went into it?

DEBORAH FEINSTEIN: I don't think it's appropriate for me to go into the details of that. I will tell you that there are always discussions about the nitty gritty and the specific wording of the consent. But I think in large part, they came to us with a framework of a licensing remedy. We told them we would need to know how the actual party was that they were going to license to. They brought forth Datalogic and we worked out the nuts and bolts of the decree. But I think we were all sort of on the same page about what the basic structure was pretty early on in the process of discussing the remedy.

JOE TIPOGRAPH: Often we see consents that are effective for twelve years, but in this case the license is for twelve years. Is that just when the patents expire?

DEBORAH FEINSTEIN: Yes.

JOE TIPOGRAPH: And in this case, the remedy was a license to Datalogic. Did you consider requiring that they make the license available to others?

DEBORAH FEINSTEIN: So our view on that, I get asked that question a lot whenever we enter into a licensing remedy is, well, wouldn't it be better if you license to multiple people? I have two reactions to that. One, our job is to restore the status quo ante. And the status quo ante was three competitors. The goal is not to basically reform the world as you'd like to see it with as many competitors as possible. That's point one. There was one competitor lost, one competitor to be replaced.

Number two, sometimes – I'm not saying it's the situation in this case. But sometimes if you license too many people, it will diminish incentives for any one of them to innovate. And so that's a reason that we don't just make people license to the world. We're trying to restore the status quo ante. And if we put into place one solid competitor who would replace the competition lost by the combination between Honeywell and Intermecc, that would resolve our competitive concerns.

JOE TIPOGRAPH: And in addition to the license, you required the parties to promise not to sue. But isn't the license enough? Why the additional promise needed?

DEBORAH FEINSTEIN: I think really just a belt and suspenders. We wanted to make absolutely sure that there was no issue with respect to freedom to operate and wanting to make absolutely clear that they had a clear path. I don't know if there was anything beyond that.

BENJAMIN GRIS: I think the only other issue was making sure that we had captured all of the appropriate IP which we felt that we had, but again as a belt and suspenders approach, we were able to get even more comfort from the company not to sue.

JOE TIPOGRAPH: Is that something that you would typically want to see in a licensing remedy, that belt and suspenders?

DEBORAH FEINSTEIN: I think each context is different. Sometimes it is very clear that there's a limited number of license and the IP is very straight forward and we can be more certain that we've captured it. If there's any doubt, that would be something that we would require. And it's certainly appeared in a number of our other consent decrees. There are various ways to make sure that somebody has freedom to operate and that's really the goal.

JOE TIPOGRAPH: Thank you. Now, in the press release, you stated that although divestiture of assets is the preferred remedy in merger cases, licensing requirements can prefer competition in markets where access to needed technology is the main barrier to entry. Focusing on the first part of that sentence, did you contemplate the structural remedy in this case?

DEBORAH FEINSTEIN: I would say that we always contemplate a structural remedy in the sense that early on I think we try to think about both what's the competitive concern and to have in the back of our minds, even if it's not in the forefront of our minds, is there a way to resolve this? And certainly, if the parties had simply come to us and said we want to resolve this. Is there a divestiture that would work? We would have said, certainly. A divestiture would almost certainly have worked here as well. But again, we don't basically have in our mind a particular remedy. The parties are free to offer anything they want. If we see that the remedy that they've offered solves our competitive concerns, we will go forward with that remedy.

JOE TIPOGRAPH: Do you think that given Datalogic's experience in this field that in this particular case, the licensing remedy was better than a structural remedy might have been?

DEBORAH FEINSTEIN: It's always hard to predict whether it's better in the sense that I don't know what a divestiture remedy would have looked like because we never explored that. We never explored what would have been divested. We never explored who the divestiture buyer would be.

What I can tell you is in this case, we were very confident that this was a very effective remedy. We had somebody who already knew how to make the product, who was already making the product, who already wanted to enter into the U.S. and was taking affirmative steps. And the main obstacle to doing so was the IP. Clearing away that issue meant that they were free immediately to enter. So we were quite comfortable that this is an effective remedy in restoring the competition that would otherwise be lost.

JOE TIPOGRAPH: Now, when you enter into settlement agreements, and specifically in this one, what do you contemplate and discuss about the implications of any particular settlement having on future mergers?

DEBORAH FEINSTEIN: I think we worry about each case specifically. I'm not particularly concerned that a party is going to come to me and say you accepted a licensing remedy there and you have to accept a licensing remedy here. I don't ever have to do the same thing twice. If it's a different factual situation, then it won't solve the competitive concern.

It's sort of what I said in my speech yesterday is obviously there are core things that we look at. There are a lot of similarities in our decrees. There's a lot of similarities in what we want. But each case is fact specific. And a remedy that works in one situation at one point in time, may not work in another situation at another point in time.

I never want to be in a situation of rejecting a perfectly acceptable remedy in a case because I'm worried that that remedy might be inappropriate in another case. I want to do what's right for the case before me. And when the next case comes up, I'll look at whatever remedy's proper and decide whether it's the right case there or not.

JOE TIPOGRAPH: So in this instance, Datalogic already sells the products that use these patents abroad. So the license effectively allows them to enter and no help is necessary from the merging parties here. Is my understanding correct?

DEBORAH FEINSTEIN: In the sense that, yes, they don't need technical assistance. They don't need to be taught how to make the product. There are licensing remedies of that sort that the commission has taken over time. That is not one of those remedies here. They are already making the product they know how to make it. They simply needed the freedom to operate.

JOE TIPOGRAPH: So what challenges arise in a situation when a third party is actually dependent or has to collaborate with the merging parties after the transaction?

DEBORAH FEINSTEIN: Well, there we're going to look generally – and I think this is spelled out pretty clearly in our FAQs on negotiating merger remedies. We look pretty carefully at any ongoing interactions and entanglements between the merged firm and the divestiture buyer. We tend not to like those. And we're going to look far, far more skeptically at a remedy that rather than giving somebody the needed assets and personnel and products and ongoing marketing that one of the merged firms has, but instead simply gives them a license and hopes that they will eventually learn how to make the product and make it into the marketplace.

That's a very different kind of licensing remedy than what we did here. And that is going to be subject to much more scrutiny. And we have to think very hard about a situation where they're learning how to make a product as opposed to getting the divestiture of the product and getting a license that allows them to use information that they already have.

JOE TIPOGRAPH: So in that situation where you're looking at it a little bit more skeptically because there is the ongoing relationship, what measures do you put in place to try to ensure merging parties are going to act in the licensee's best interest? Or is that something that you try to avoid having any reliance on?

DEBORAH FEINSTEIN: Well, we try to avoid it. It's not always possible. There are a number of things. Sometimes we will require interim cooperation provisions. We will in those sorts of cases almost inevitably put a monitor in place to oversee to make sure that if there is technical assistance, it will be in place. I'll tell you we haven't done one of those since I've been here.

So I can't tell you the circumstances under which we might accept that kind of remedy or precisely what we would do. Again, we prefer divestitures and structural remedies and accept licenses only when we feel quite comfortable that it will actually create an independent, viable effective competitor to replace the competition that was lost.

And that's a fact specific inquiry that looks not only at the assets being divested or the technology being licensed, but also at who the buyer is. You can imagine a situation where, for a variety of reasons, the buyer has most of what it needs to be an effective competitor. It needs a license. It needs how to be taught, you know, one small component of it. And we are comfortable that there's no black art to that, that it can be something that can be transferred relatively easily. We put a monitor in place to make sure that the transfer occurs. One could imagine that that could be an effective remedy. But again, it really depends on the specifics of the case.

JOE TIPOGRAPH: What if we take it a step further than just learning the practice? What if the licensing creates some sort of ongoing relationship with the party?

DEBORAH FEINSTEIN: Now we're into speculation and it's fact specific. I don't know the circumstances under which we would accept an ongoing relationship. Typically, we avoid those in our consent decrees. And I

can't think of a recent one where there's an ongoing long-term relationship between the parties other than there are sometimes short term, twelve-month, interim supply agreements and that sort of thing, but not an ongoing relationship between the parties.

JOE TIPOGRAPH: How does a licensing remedy preserve competition when it comes to innovation?

DEBORAH FEINSTEIN: Well, in this situation, Datalogic and Honeywell have every incentive to continue to compete and innovate. In terms of Honeywell's incentives to innovate, they sell a lot of the 2D scanners through their downstream products as well. So they're always going to have an incentive to innovate because they can use that in their downstream products as well. So they're going to be encouraged to continue to innovate as well.

JOE TIPOGRAPH: What gave you confidence that Datalogic has the same incentives to innovate that Intermec may have had?

DEBORAH FEINSTEIN: They're competing in the marketplace. We couldn't think of a reason why they wouldn't continue to innovate. They want to compete aggressively in the marketplace. They're no different from that than Intermec.

They also use these products in their downstream products as well. And so in order to basically sell their downstream products, they want to have the best scan engine technology that there is. They want to be able to convince customers, hey. We've got the product you want to use. We've got good downstream technology. It's the same thing that causes anybody to want to continue to innovate as they want to sell both the product at issue plus their downstream products.

JOE TIPOGRAPH: Did you look into Datalogic's history of innovation or R&D efforts when you considered them as a –

DEBORAH FEINSTEIN: I'm not going to go into that much detail as to precisely what we did. But I think suffice it to say that when we look at licensees or divestiture acquirers, we take a close look at how they've operated their businesses, what their business plan is for the specific product at issue. We spend time talking to them about what their plans are. We talk to customers about whether or not the customers think that they will be an effective candidate for being the new competitor in the marketplace to ensure that they will be viable. We look at all of those things in making sure that a divestiture acquirer or a licensee is going to create an effective competitor.

JOE TIPOGRAPH: I typically think of remedies as being either structural or behavioral. Would you classify this remedy as structural or behavioral?

DEBORAH FEINSTEIN: Structural. Absolutely structural.

JOE TIPOGRAPH: You see it as structural?

DEBORAH FEINSTEIN: Absolutely. We gave them a tangible asset. They acquired a tangible asset which is these patent rights. Patent rights are a tangible asset. This was not a behavioral remedy of you will do X. You will do Y. We gave them an asset. It's a clean break from the merged firm. I view this as a structural remedy.

JOE TIPOGRAPH: Okay. The statement that you made about although divestiture of assets is the preferred remedy, licensing requirements can preserve competition. That doesn't suggest that this isn't a divestiture of assets?

DEBORAH FEINSTEIN: It's not a divestiture of assets in the sense that it's not an exclusive license. But that doesn't mean it's not a structural remedy.

JOE TIPOGRAPH: Fair enough. Thank you for clarifying that. But nevertheless, prior to joining the FTC, you negotiated behavioral remedies on behalf of parties. You've written articles about behavioral remedies and you've participated in panels on behavioral remedies. Do you think that behavioral remedies are underappreciated as tools to fix anti-competitive, horizontal mergers?

DEBORAH FEINSTEIN: No, the matters in which I negotiated behavioral remedies were vertical transactions. I think that conduct remedies are quite appropriate in a vertical transaction. An example of one that I did when I was on the outside that the commission accepted was Pepsi's acquisition of its bottlers. It was a vertical transaction and the remedy there was essentially a series of firewalls with the use of a monitor to ensure that competitive harm didn't occur, completely appropriate for a vertical transaction.

I think it's the rare case, and I can't think of a behavioral remedy I ever negotiated on the outside in that horizontal case. And it's hard to imagine other than the very, very exceptional case which doesn't come to mind at the moment, when you're going to see a purely conduct remedy in a horizontal case.

You may see conduct provisions in aid of a divestiture or a licensing agreement. That's quite common. Such as making access to employees, such as not using confidential information that you have from the business that is being acquired, those sorts of things. So I think you'll see conduct provisions in aid of a horizontal structural remedy. But I don't think you'll see a lot of, if any, conduct remedies in horizontal cases.

JOE TIPOGRAPH: Do you have any interest in studying behavioral remedies now that you're with the FTC?

DEBORAH FEINSTEIN: I don't know why I would want to change what's been the longstanding practice of the agency, and frankly the Department of Justice, to strongly prefer structural remedies in the case of horizontal mergers. I just don't see that changing. I think we've used conduct remedies effectively in vertical cases at both agencies. I think that will continue in appropriate cases.

JOE TIPOGRAPH: This past spring, you wrote an article entitled, "New Leadership At the Federal Antitrust Agencies: Change Matters". Now you're the new leadership. So why does this change matter?

DEBORAH FEINSTEIN: I think anytime you have new leadership, it sort of invigorates the agency. It gives a chance for everybody to reflect on what they're doing right and what they're doing better. And I like to think that that's a role I can play here in helping energize the staff, have us all think about how we're doing things around here and bring the perspective of somebody who's been on the other side for a very long time to try to think about how the agency can fulfill its mission in the absolute best way.

JOE TIPOGRAPH: Do you mind if I ask your staff?

DEBORAH FEINSTEIN: Not at all.

JOE TIPOGRAPH: Just would each of you mind chiming in about how things have been since Debbie – may I call you Debbie?

DEBORAH FEINSTEIN: Mm-hmm.

JOE TIPOGRAPH: Since Debbie's joined as Director?

DAVID MORRIS: She's been a very dynamic and involved leader, really getting into the facts of the cases.

JOE TIPOGRAPH: Wonderful.

BENJAMIN GRIS: Yeah, I mean, this is I guess my fourth transition that I've seen while I've been at the agency. Each person is different. Each person, as Debbie identified, brings something new and unique to the table which is why it is good to have an evolution. And then I would fully agree with David that Debbie has been active and engaged in every matter that I've seen her on.

JOE TIPOGRAPH: Thank you. What do you hope to accomplish during your term?

DEBORAH FEINSTEIN: Well, I mean, I think first and foremost I want to help the Chairwoman in ensuring that we continue to fulfill the agency's mission of promoting competition and protecting consumers as much as possible. I think that can happen in a variety of ways, both in the merger and non-merger cases. So I think that's first and foremost, make sure that we're bringing cases effectively.

I think as you've said, the other thing I'd like to do is promote transparency. I think that we've been doing that before. I want to continue that trend. I think that can come in a variety of ways. It comes through coherent and understandable to the outside world complaints and consent orders and aids to public comment. It comes through talking to reporters and making sure that our message is understood.

It goes to making speeches and writing them up and putting them on a website, even though that's more work than just talking to a group of people so that they're available for others to see and continuing a dialogue about what we're doing effectively and then help work with the staff to make sure that they have the tools and resources they need to do their jobs as effectively as possible in a time of constrained budget resources, thinking about how to effectively marshal our resources, are all things that I'd like to help accomplish.

JOE TIPOGRAPH: What opportunities do you see to improve how antitrust laws are enforced, particularly Section 7 in the Clayton Act?

DEBORAH FEINSTEIN: I think we're doing a great job. I think the agency has done a great job for years. I don't think it's so much about improving. I think it's really about continuing the fine work that the agency has been doing for a decade upon decade of enforcing the antitrust laws, bringing sensible merger cases, using the enhanced merger guidelines, using increased economic tools to try to bring the best cases possible.

JOE TIPOGRAPH: And as we sit here right now, down the street I believe, at least she's scheduled, the person nominated for the fifth commissioner's seat, Terrell McSweeney, is schedule to have her confirmation hearing. If she is confirmed, what do you think she'll bring to the Commission?

DEBORAH FEINSTEIN: I think it's going to be terrific to have another commissioner who's been involved in antitrust matters over the year, but also involved in a variety of policy matters, consumer protection, all kinds of issues, you know, bring another perspective to the table. And we're all really looking forward to her joining us.

JOE TIPOGRAPH: Well, thank you very much. That's all I've got for you today. I hope that we can do this again.

DEBORAH FEINSTEIN: Sure. Sure, just reach out to Mitch.

JOE TIPOGRAPH: Thank you.

DEBORAH FEINSTEIN: Terrific. Thanks.

(END OF TRANSCRIPT)