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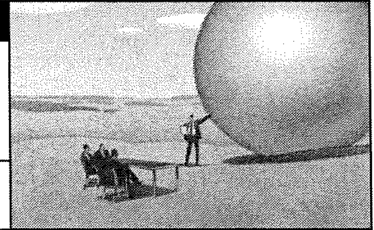
Antitrust Law *A Practice Focus*

Professor at the Helm

How will Timothy Muris change the FTC's enforcement priorities?



By David Balto

Robert Pitofsky, who stepped down after six years as chairman of the Federal Trade Commission, brought the agency to an apex of prominence. By taking on giants in a wide range of industries, Pitofsky's FTC affected practically every consumer in the country.

Pitofsky also proved that the FTC can litigate its cases effectively, and he resumed its role in developing antitrust law and clarifying policy issues.

Pitofsky's guidance came from his experience as an antitrust scholar with two prior terms at the FTC (one as director of the Bureau of Consumer Protection, and another as a commissioner). It is interesting that in Timothy Muris, President George W. Bush has chosen as FTC chairman someone with nearly identical credentials in both government service and academia—an antitrust professor from George Mason University School of Law and the only individual to serve as the director of both the Consumer Protection and Competition bureaus.

Sometimes elections signal a significant change in course for government regulatory agencies. This does not seem to be the case with the FTC. As Muris explained during his confirmation hearings, "Although there is disagreement about the cases on the margin, there is widespread agreement that the purpose of antitrust is to protect consumers."

So, then, what about that margin of difference?

Perhaps the most important factor that will affect antitrust enforcement at the FTC is the size of the caseload. Over the past six years, a merger tsunami consumed more than 70 percent of the FTC's antitrust resources. As the number of mergers has dwindled with the slowing economy, the new administration will have much more flexibility in determining where to devote resources. And with a budget increase from Congress, Muris will have much more discretion to decide how to allocate the FTC's resources than his predecessor.

Additionally, Muris' scholarship suggests additional areas where his approach might differ from his predecessor's.

In mergers, Pitofsky attempted to open the door to more careful consideration of efficiency claims through the issuance of revised Merger Guidelines in 1997. Although the guidelines have a great theoretical importance, in actuality, efficiency arguments were a significant factor in less than a handful of mergers.

In an article aptly titled "The Government and Merger Efficiencies: Still Hostile After All These Years," Muris criticizes the agency's actual execution of the guidelines as taking a stingy view of efficiency claims. He advocates considering a broader range of efficiency claims, such as decreases in "capital raising costs and in promotion, . . . [and] managerial and administrative efficiencies." Because of what he claims is an underlying uncertainty of the presumptions underlying the Merger Guidelines, an efficiency "should be accorded much greater weight than it currently is, absent a specific showing that, given the particular facts of the industry, the merger will raise price."

Muris has also criticized the Merger Guidelines on the basis that their "provisions for assessing the potential adverse effect of mergers do not provide a basis for confident judgments." He has frequently questioned whether there is a strong empirical basis for the presumption that the level of concentration (or number of competitors in a field) has a significant impact on the likely competitive impact of a merger. To the extent that economic research supports any thresholds, in his view, it is only for mergers involving major firms in highly concentrated industries. Because of that, he strongly advocates further research to demonstrate better the relationship between concentration and competitive performance.

Yet those hoping for a significantly more benign approach to mergers should be cautious. History may have an important lesson. During Muris' tenure as director of the Bureau of Competition during the supposedly laissez faire period of enforcement during the Reagan administration, the FTC brought several important merger enforcement actions—including challenges to mergers and joint ventures involving Coke and Dr. Pepper, Warner and Polygram, and PPG and Swedlow (in the airline windshield industry). In all these cases, the FTC successfully stopped the transactions, strengthening merger jurisprudence. And the FTC secured substantial relief in joinings involving Chevron and Gulf, Getty and Texaco, and General Motors and Toyota.

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TYPES OF ENFORCEMENT

With greater resources, the FTC might also devote more attention to nonmerger enforcement. Some of the substantive areas that should receive greater attention involve restraints by associations, such as standard setting conduct. As Muris has noted, "competitors can use associations to achieve market power through rules that raise marginal costs for members," and those rules can harm consumers through reduced price and service competition. Muris was critical of the FTC's apparent abandonment of the use of a truncated rule-of-reason analysis (which he helped to develop) in its 1996 California Dental Association decision, and was even more critical of the Supreme Court's 1999 failure to uphold the commission's decision that the dental association's advertising restraints were anti-competitive.

The most significant area of nonmerger enforcement is the current focus on pharmaceutical competition. The FTC is now conducting a wide-ranging study of the industry. The types of conduct at issue in those investigations could have a substantial impact on health care costs, and with the current congressional concern, the FTC's focus on those cases is likely to continue.

The past again may also be prologue. Muris had a very active nonmerger enforcement program during his earlier tenure. A strong focus was horizontal conduct, immunities, and the abuse of governmental processes. Prominent cases included the FTC's challenges to a boycott by an ad hoc group of court-appointed criminal defense lawyers (*FTC v. Superior Court Trial Lawyers* (1990)) and to title insurance price-fixing (*FTC v. Ticor* (1992)), both of which ultimately resulted in Supreme Court victories. Perhaps Muris' greatest success at the Bureau of Competition was a case involving a dentist boycott of a managed care program, in which the FTC secured a unanimous Supreme Court reversal of an adverse opinion of the 7th Circuit (even when the solicitor general refused to support the case).

Muris may be less likely to pursue some areas of enforcement, such as monopolization cases. From a practical perspective, the new chairman has noted that government monopolization cases "produced little benefit, other than employing a large number of lawyers and economists." From a theoretical perspective he has been critical of two theories that were important to many of the Pitofsky-era enforcement actions: raising rivals' costs and network effects. According to Muris, "[n]either theory has a strong empirical foundation."

He has also questioned the FTC's monopolization enforcement actions because of the FTC's failure to demonstrate likely anti-competitive effects. He has noted that the "Clinton administration went too far" in pursuing companies for allegedly abusing a dominant position to fend off rivals. Most big firms, he says, "are successful because they built a better mousetrap, not because they did something illegal." Even so, Muris pursued monopolization cases in the past. For instance, he oversaw a case against U-Haul, which focused on the company's abuse of the bankruptcy process to keep a rival firm out of the market.

In addition, one can expect fewer enforcement actions involving distribution restraints. Muris, for example, testified against the FTC in its landmark Toys "R" Us enforcement action, arguing that vertical price restraints should be evaluated with greater attention to efficiencies. He criticized the FTC's per se approach, which was based on a horizontal conspiracy of the toy manufacturer's, as "vitiat[ing] much of current distinction between horizontal and vertical restraints and would be a major expansion of per se categorization." Generally, Muris will bring greater attention to the efficiencies of distribution restraints.

APPROACHING IP

Perhaps the most challenging area facing the Muris-led FTC is the treatment of the intersection of intellectual property and antitrust law. Muris, like Pitofsky, appears willing to inquire where these boundaries belong. As he noted in a recent speech before the American Antitrust Institute (a pro-enforcement think tank), he and Pitofsky "agree that the potential for anti-competitive abuse of intellectual property is an increasingly important area."

But there are still important differences in their approaches. The most controversial issue might be the obligation of an IP owner to share its intellectual property. A 9th Circuit opinion, *Kodak v. Image Technical Service* (1997), found a duty to share certain types of intellectual property, while a Federal Circuit opinion, *Xerox v. Independent Services Organizations* (2000), held in favor of stricter intellectual property protections. Pitofsky criticized the Federal Circuit decision for using "sweeping language that exalts patent and copyright rights over other considerations" such as antitrust law. Muris, however, criticized the 9th Circuit decision as contrary "not only to case precedent but also to express language in the Patent Act." The proper place to draw the line in this area should be an important priority for antitrust enforcers.

Ultimately, the change in administrations is likely to result in more similarities than differences. That suggests what may be the most long-lasting accomplishment of the Pitofsky-led FTC—the establishment of an antitrust agenda based on a strong bipartisan consensus. The differences matter, but consensus matters more.