The Muris Legacy

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Early in the year 2001, when it became clear that Timothy Muris would be the new Chairman of the Federal Trade Commission, there was considerable speculation about the impact that his appointment would have. Some predicted dramatic changes that would reverse the policies of his predecessor, Bob Pitofsky; others predicted continuity with the Pitofsky regime. I was 3ju;h Pitofskym0141

of Tim Muris's success is attributable to the fact that Bob Pitofsky left the agency in such fine shape—and I refer not only to the quality of the staff but also to the unprecedented level of public regard for the agency's work. Muris could stand on some very broad shoulders, and he had one significant advantage that Pitofsky did not have—the resources to do what he wanted to do. It was Pitofsky's fortune (or misfortune) to serve in the midst of the greatest merger wave in the history of this country. The Commission's efforts to accommodate its shared responsibility for merger review consumed a disproportionate share of the agency's resources and of its intellectual energies. It is hard to be innovative in other areas when you are struggling to keep your head above water.[5]

With these preliminary caveats and acknowledgments, I will turn to the subject at hand. I group Muris' most significant initiatives into five broad categories, with full realization that the selection and the arrangement may be arbitrary.

Increased Visibility of the Consumer Protection Mission

Lawyers who attend ABA Antitrust Section meetings tend to practice primarily in areas covered by the Commission's Bureau of Competition. As a result, the Section's programs and publications have emphasized competition issues. Inside the Commission itself, the Bureaus of Competition and Consumer Protection have historically been treated as two separate principalities.

The barriers are now coming down.[6] There is increasing appreciation of the fact that competition law and consumer protection law have a common core. Both are concerned with distortions in the free market. Both can be analyzed and addressed in economic terms. The difference is that competition offenses, like price-fixing or exclusionary conduct, tend to cause distortions on the supply side while consumer protection offenses, like deceptive advertising, tend to cause distortions on the demand side.

Tim Muris deserves much of the credit for this development. He was interested in consumer protection issues to a greater degree than any chairman in recent memory and had focused on this area in his previous academic publications. Many of these publications were co-authored with his colleague, Howard Beales, an economist by training, who came on board with Muris as Director of the Bureau of Consumer Protection. Together, they sought to apply a more sophisticated economic analysis to consumer protection problems.

For example, economic realities suggest that the best way to reduce the harmful effects of fraudulent promotions is to shut down the operations as quickly as possible. The optimal strategy generally is to pare the case down to its essentials and obtain prompt injunctive relief. Therefore, the speed of settlement (and most cases are settled) may ultimately be more important than the breadth of the relief or the size of the dollar judgments, which are often uncollectible anyway. The optimal strategy for a particular case must be balanced, however, against the need for general deterrence and the potentially subversive message conveyed by relatively mild negotiated settlements. These sometimes conflicting objectives were often candidly addressed when particular complaints or settlements were presented for a vote.

I do not mean to suggest that sophisticated economic considerations were ignored before the Muris years. For example, Bob Pitofsky and his Bureau Director, Jodie Bernstein, launched extensive and innovative consumer education programs, in a variety of areas, in recognition of the simple economic fact that the Commission cannot be everywhere and that, to a large extent, consumers have to be educated to look out for themselves. All I am saying is that economic analysis was employed more extensively under Muris and Beales than had been done before.

One particularly imaginative Muris initiative was the campaign against deceptive advertisements of worthless weight-loss products. Part of the campaign followed traditional lines: bring some high-visibility cases and publicize them widely, in order to deter future wrongdoing and to alert consumers. The imaginative part was the effort to persuade responsible media representatives that they should screen out the most blatantly fraudulent advertising on their own initiative—just as they screen out ads that are obscene or otherwise offensive.

This initiative was not only imaginative but daring because media people, who dispense advice so readily, are not comfortable on the receiving end. They complained that we were asking them to decide complicated scientific questions, although the Commission had already published a brochure that identified the most fraudulent claims, in order to make the job easy.[7] They complained that it would be costly to act alone and that collective action to cut off fraudulent advertisers could be construed as an illegal "boycott." The response was that the agency would make no such claim and that the antitrust risks were minimal.[8] In fact, despite public objections, there has been substantial quiet compliance with the Commission's request.

The most noteworthy achievement on the consumer protection side was, of course, the publication of the "Do Not Call" Rule,[9] which now benefits over 60 million households (with thousands still added every day). This has turned out to be the most popular initiative in the Commission's history. In fact, it is so popular that when implementation was temporarily stalled by an unfavorable court decision,[10] corrective legislation passed both houses of Congress and was signed by the President within a day![11]

People may not fully appreciate that the Do Not Call Rule was also an imaginative way for Muris to avoid a divisive pre-existing debate over "privacy" legislation and to re-channel the agency's energies in a way that could command unanimous support internally and externally. The previous debate had focused on one aspect of consumer privacy—the protection of personal information obtained in e-commerce transactions—and the subject was controversial both in the Commission

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7

tlement agreements between the manufacturers of patented drugs and potential generic challengers. These cases collectively presented, and still present, a number of challenging issues at the intersection of patent law and antitrust law, and these were the issues that we all focused on when the *Schering* complaint was voted out and that I focused on in the first draft of the opinion. It was Muris who saw most clearly the similarities and the differences between *Schering* and *Polygram*, purely as a matter of legal structure, wholly apart from the widely divergent factual issues in the two cases. The *Schering* words may be mine but I acknowledge his unique contributions to the analysis in the opinion.

We do not know right now what will happen in the courts of appeal, so it is premature to speculate on the influence, if any, that these opinions will have. However, Tim Muris deserves a large measure of credit for the effort to bring some clarity to a muddy area of law—and the fact that both the *Polygram* and the *Schering* opinions were unanimous also says a lot about the atmosphere of the Commission under his leadership.

Narrowing Antitrust Exemptions

Many students of antitrust believe that the most effective and durable restraints on competition are those that are mandated, or at least tolerated, by governments. For this reason, they also believe that the so-called "state action"[18] or *Noerr*[19] defenses should be narrowly construed. When Muris found himself in a position to do something about it, he took full advantage of the opportunity. This is noteworthy in itself but equally interesting is the way he went about it.

The first thing that he did was prepare the ground carefully by ordering an extensive internal evaluation of existing law on the state action and the *Noerr* defenses. Successive drafts of these evaluations were shared with his fellow commissioners, who had the opportunity to comment. In this way, Muris was able to achieve a broad internal consensus on principles and objectives before there were any public expressions of opinion. He also then had in place an extensive body of scholarship, which facilitated prompt and principled Commission responses as opportunities arose.

These responses have included statements to state legislatures on pending bills,[20] amicus briefs in pending cases in other jurisdictions,[21] as well as the initiation of administrative complaints.[22] The Commission's efforts to limit the scope of antitrust exemptions and immunities has focused on matters like restrictions on the provision of professional services, maximum or minimum price fixing, and bans on Internet sales. The bottom line results have been mixed—for the most part, other decision makers have agreed with the Commission but sometimes they have not

and, of course, the Commission's own administrative complaints may or may not be supported when all the facts are in. It is noteworthy, however, that all of these initiatives were approved unanimously, and I predict that—regardless of individual outcomes—the cumulative effect will be an important part of the Muris legacy.

Restoration of the Commission's Traditional Functions

The Federal Trade Commission was originally designed to be a deliberative agency that could provide expert guidance for the future, rather than a prosecutorial agency that would focus on punishment for past offenses. For a variety of reasons, that deliberative and future-oriented role of the FTC had been neglected. The ability to get prompt injunctions and ancillary equitable relief like asset freezes and disgorgement orders under Section 13(b) of the FTC Act[23] meant that most consumer protection cases migrated into federal courts. At roughly the same time, pre-merger notification under Hart-Scott-Rodino had shifted the focus away from administrative proceedings and toward preliminary injunction actions in federal courts. The Commission was just one more prosecutor.

Tim Muris took a number of actions designed to restore the agency's special role.

Revival of Administrative Litigation. During Muris's tenure, there was a marked increase in administrative litigation. Some twenty-two cases were brought or decided in the three years that he served—a dramatic increase over the immediately preceding years.[24] Most of the cases settled, as might be expected, but currently there are thirteen cases pending. Two are now pending in federal courts of appeal and eleven are pending in various stages of the Commission's administrative process.

A few years ago, we were concerned that our Administrative Law Judges were not fully utilized. Today, we are concerned that they may be overburdened. Other commissioners endorsed these initiatives with near unanimity, but it was Muris who drove them.

Transparency. "Transparency" is a fancy word for the agency's effort to explain its actions, even when it is not required to do so. In particular, the term has been applied to voluntary explanations of decisions *not* to act. Agencies have traditionally been reluctant to volunteer these explanations—in part, because they impose additional burdens on limited resources and, in part, because there always is the fear that explanations for non-action in some situations will provide ammunition for parties who are resisting action in other situations that may superficially appear comparable.

On the other hand, an agency like the FTC, with an overtly educational mission, does have a

ed.[26] It may be that the samples are just too small to support any conclusions, or it may be that commissioners feel greater freedom to express individual views when matters are terminated, one way or another, and there is no risk that these views will affect later litigation in the matter.

Emphasis on Research and Education. The Commission was not created just to bring cases. A study of the legislative history of the FTC Act demonstrates that the Commission was intended primarily to fill an educational role. The Supreme Court decided the *Standard Oil* case in 1911 and held, among other things, that the antitrust laws were subject to a so-called "rule of reason."[27] Congress believed that people in the business community needed some guidance on what would be considered reasonable and what would not, and that it would be better if they could find out before they were sued. The Clayton Act[28] and the FTC Act[29] were considered and passed as a package to meet this need. The Clayton Act had more specific provisions on matters like exclusive dealing, mergers and director interlocks; the FTC Act created an administrative body to provide informed guidance.

As time passed, the educational role of the FTC was progressively de-emphasized. The impact of Hart-Scott-Rodino and the particularly attractive remedies under Section 13(b) of the FTC Act have already been mentioned. Other factors include the ponderous nature of "notice and comment rule making" and the hostile reaction to some Commission rule making efforts in the late 1970s, as well as the evolution of a rich "rule of reason" jurisprudence in the courts, which mitigated the need for administrative guidance.

In more recent years, however, it has become evident that some issues were a lot more complicated than we had believed—we really did not know as much as we thought we did. Bob Pitofsky first recognized this in 1995 and held extensive hearings, which focused on complex high-tech problems in an international setting but also ranged much further afield.[30] During Muris's tenure, the Commission was in an almost continuous hearing or "workshop" mode on subjects ranging from basic patent/antitrust issues to Internet privacy,[31] with input from all spectra of opinion. There is now available an immense body of learning that will be an invaluable resource for decision makers and other interested groups for many years to come. Tim Muris cannot be credited with the original idea but he can fairly be given credit for adopting it and expanding it.

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[26] *See, e.g.*, Dissenting Statement of Commissioner Mozelle W. Thompson, Genzyme Corporation's Acquisition of Novazyme Pharmaceuticals Inc., *available at* http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf; Statement of Commissioner Pamela Jones Harbour, Genzyme Corporation's Acquisition of Novazyme Pharmaceuticals Inc., *available at* http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf; Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, Royal Caribbean/Princess and Carnival/Princess (Oct. 4, 2002), *available at* http://www.ftc.gov/os/2002/10/cruisedissent.htm.

[27] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[28] 15 U.S.C. §§ 12–26.

[29] 15 U.S.C. §§ 41–58.

[30] *See* Hearings on Global Competition/High-Tech Innovation, Federal Trade Commission, Oct.–Nov. 1995, *available at* http://www.ftc.gov/opp/hitech/global.htm; Federal Trade Commission, Office of Policy Planning Report, Anticipating The 21st Century: Competition Policy in the New High-Tech Global Marketplace (1996), *available at* http://www.ftc.gov/opp/hitech/global.htm.

[31] *See, e.g.*, FTC/DOJ Hearings on Competition and Intellectual Property Law and Policy in the Knowledged-Based Economy, Feb. 2002–Oct. 2002, *available at* http://www.ftc.gov/opp/intellect/index.htm; FTC/DOJ Hearings on Health Care and Competition Law and Policy, Feb. 2003–Sept. 2003, *available at* http://www.ftc.gov/ogc/healthcarehearings/index.htm; FTC Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet, Oct. 2002, *available at* http://www.ftc.gov/opa/2002/09/ecomagenda.htm; FTC Public Conference: Factors that Affect Prices of Refined Petroleum Products, Aug. 2001, May 2002, *available at* http://www.ftc.gov/bc/gasconf/index.htm; FTC Workshop: Technologies For Protecting Personal Information, May 2003, June 2003, *available at* http://www.ftc.gov/bcp/workshops/technology/index.html. For a more complete listing of workshops, conferences and reports during the Muris tenure, see http://www.ftc.gov/ftc/workshops.htm.

Unfinished Business

Tim Muris, like any other chairman, inevitably leaves some unfinished business behind. Some of the landmark cases brought during his term are still in active litigation;[32] very recently the Commission lost its application for a preliminary injunction in a case that raised significant issues in the analysis of coordinated effects;[33] and the effort to eliminate case-by-case clearance battles

Conclusion

It has been a privilege to serve with Bob Pitofsky and Tim Muris, two of the finest chairmen in the history of the Federal Trade Commission. When I celebrate the significant contributions that Muris made, I do not mean to neglect the significant contributions of his predecessor. Each had different areas of primary interest and each faced a different external environment. They each left behind an agency that was even stronger and more esteemed than the agency that they inherited. The bar continues to be raised—and that is a formidable legacy and a challenge for those of us who remain.