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The FTC at 100: The Impact
of Globalization and
Technology

Christopher S. Yoo
University of Pennsylvania Law School

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I. INTRODUCTION

The issues in antitrust law have long had a timeless quality. Although the legal doctrine and the economic theory underlying them have changed over time, the fundamental issues of cartels, vertical exclusion, market definition, oligopoly pricing, and monopolization that were the focus of antitrust policy when the Federal Trade Commission was first created continued to be the central focus of the agency's activities during most of its history.

Over the past few decades, however, certain issues have arisen that have begun to raise concerns that are quite different from those that dominated the FTC's first century. Two of the most significant changes are globalization and the growing importance of technology.

II. GLOBALIZATION

When Congress created the FTC in 1914, the vast majority of the economy consisted of local markets. Goods typically traveled only a short distance and rarely crossed state lines. Even as the scope of the economy grew, antitrust remained largely domestic. Indeed, as of the end of the twentieth century, European competition policy authorities had never blocked a merger between two U.S.-based companies.

All of that came to an end in July 2001 when the European Commission blocked the proposed merger between GE and Honeywell. That action was simply a reflection of the fact that commerce had become increasingly international in scope. U.S. companies routinely operate in a wide range of countries. Business practices that once affected only domestic economies now have ramifications that are felt around the globe.

The increasing globalization of the economy places new demands on agencies charged with enforcing the antitrust laws. Not only must they investigate conduct that spans multiple nations; the fact that multiple regulatory authorities have jurisdiction over the same matter can force companies to incur duplicative compliance costs. To the extent that substantive standards differ, companies faced with inconsistent mandates may be forced to reduce their practices to the least common denominator or forsake doing business in a country altogether. As a result, regulatory harmonization has also emerged as a key element of trade policy.

¹ Christopher S. Yoo is the John H. Chestnut Professor of Law, Communication and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania. This article is based on his testimony at the hearing on "The FTC at 100: Views from the Academic Experts" before the Subcommittee on Commerce, Manufacturing, and Trade of the House Committee on Energy and Commerce on February 28, 2014.

Towards these ends, the FTC has developed increasingly close relationships with other competition authorities both through bilateral cooperation and through a global organization of competition policy authorities known as the International Competition Network. Such efforts help coordinate and standardize the work of competition authorities and will continue to grow in importance in future years. The trans-Atlantic engagement has encouraged European competition policy to become increasingly focused on consumer welfare, although significant doctrinal differences remain. Countries that have failed to make this shift have seen their influence over European competition policy wane.

III. TECHNOLOGY

The other big change is the increasingly central role that technology plays in the modern economy. Innovation has emerged as a key driver of economic growth. Products and services have become increasingly sophisticated both in their own right and in the extent to which they have become part of a larger and more tightly integrated economic system. Technological change can also be very disruptive, altering old patterns of doing business and creating new business models and market-leading companies in the process. Companies who find themselves disadvantaged by technological change may be tempted to look to the government for relief.

The growing importance of technology will require the FTC to expand its institutional capabilities. One key step in that direction has been the creation of the office of Chief Technologist. This position is only four years old, and the agency is still exploring how it can best contribute to the FTC's mission. In addition, the FTC's usual practice is to require that every major decision be accompanied by an analysis by the Bureau of Economics. The agency has not always adhered to this practice in recent years and would be well advised to make sure to follow this important procedural guideline in the future in every major case.

The FTC will also have to determine what substantive legal principles it will apply to high-tech industries. The problem is that our current understanding of innovation remains nascent and largely unsettled. This creates the risk that enforcement authorities will apply antitrust law without a clear theory or with a multitude of theories in mind. And the past has taught us that unless the antitrust laws are applied with a clear understanding of how innovation affects consumer welfare, antitrust law may be abused to protect specific competitors instead of consumers.

Under these circumstances, the FTC must adhere to the principles that have emerged to guide its conduct since its founding in 1914. These principles require that all decisions must be based on a solid empirical foundation, not speculation, and must protect consumers, not competitors. In particular, the agency should make sure that it does not embroil itself in routine disagreements over price that are everyday occurrences in any market-based economy. Indeed, both the Supreme Court and enforcement authorities have long recognized that antitrust courts are institutionally ill-suited to overseeing prices to make sure they remain reasonable.

Consider, for example, the FTC's growing interest in standard-essential patents. The FTC has waded into the fray by using the merger review process to mandate that the merging parties make their standard-essential patents available on a fair, reasonable, and nondiscriminatory basis

and to forego seeking injunctions as potential remedies.² The debate presumes that patents are being asserted in ways that harm consumers by increasing prices without a clear understanding of how government intervention could also harm consumers by discouraging innovation. Moreover, the typical remedy mandates uniform rates despite the fact that economic theory shows that innovation is best promoted when innovators are allowed flexibility in the business models they pursue. Instead of directly overseeing the outcomes of negotiations, the FTC already has ample authority to preserve the integrity of standard-setting processes that are abused in ways that harm consumers.

Finally, some are calling for the FTC to exercise the authority granted by Section 5 of the FTC Act to police unfair methods of competition in ways that go beyond consumer welfare. The past has taught us that attempting to use the antitrust laws to promote goals other than consumer welfare opens the door to a wide range of intrusive government intervention that often harms consumers. Indeed, the FTC's Administrative Law Judge hearing the case against LabMD concurred, ruling that the FTC must reveal the data security standards it intends to use to show that LabMD's data security was so inadequate as to constitute an unfair trade practice.³

IV. CONCLUSION

The challenges posed by both globalization and new technologies underscore the importance of adhering to consumer welfare as the guide to antitrust policy. Any other approach opens the door to governmental overreach and allowing the law to be abused so as to benefit individual competitors instead of consumers.

² *Motorola Mobility LLC*, 156 F.T.C. No. C-4410 (July 23, 2013); *Robert Bosch GmbH*, 155 F.T.C. 713, 739-40 (2013).

³ *LabMD, Inc.*, No. 9357 (F.T.C. Off. Admin. Law Judge May 1, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140501labmdordercompel.pdf>.