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Robert Pitofsky

Georgetown University Law Center, pitofsky@law.georgetown.edu

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Comments on Warren Grimes:
**Transparency in Federal Antitrust Enforcement**

ROBERT PITOFSKY†

Transparency in government process—primarily fair and responsive explanations of government action and inaction—is an important issue. Professor Warren Grimes's article addresses this topic and explains in detail why transparency matters.¹ In particular, he emphasizes that merger enforcement has become the predominant government enforcement activity in the antitrust field. It is increasingly a matter of bureaucratic judgments because relatively few mergers are challenged in court, and almost all are settled with a restructuring consent order or abandonment.

I agree. Yet, Professor Grimes's proposed remedy, while it points in the right direction, seems to me excessive. He urges that the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") publicly explain all settlements, explain all failures to act, describe near-miss theories that were not pursued even when they did act, and issue statements about the facts relevant to mergers that were abandoned. He also asks that the agencies release summary information with respect to parties, transactions and markets in which parties are active after each filing of a proposed merger by the merging parties. In light of the levels of disclosure already pursued by the two antitrust enforcement agencies, these rules seem to me unnecessary.

Let me start by setting aside reasons that some have offered to curtail the level of transparency. Professor

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† Sheehy Professor of Law, Georgetown University Law Center and Of Counsel, Arnold & Porter; Chairman of the Federal Trade Commission, 1995-2001.

Grimes notes that there is a risk that confidential business information will be disclosed in the process of explaining decisions. But that should not be controlling. The agency staff can be careful to explain its actions or inactions without breaching confidentiality rules. Perhaps disclosure of reasons why enforcement action was not taken will be cited later by defenders of a transaction, but that is no reason not to disclose reasons for enforcement decisions. If the first decision was wrong, the agency has a responsibility to admit it; if the facts are different, the agency has a responsibility to explain. Finally, there is no reason to fear that publication of reasons for decisions, which is already going on at an increasing pace, will politicize enforcement decisions.

The primary reason why an absolute requirement of explanations of all decisions is inappropriate is that it would be a substantial and rarely worthwhile resource commitment. Imagine a situation in which an enforcement agency has the following choice: it can assign staff lawyers and economists to support an enforcement action against an illegal transaction, or it can assign the same staff lawyers and economists to explain a dozen decisions not to act, where the explanation follows inextricably from published guidelines or prior cases, and where explanations of reasons not to challenge add little or nothing to a public appreciation of enforcement priorities. Rather than absolute rules, I believe that explanations of agency decisions, which are already frequently available, should continue to be left to the discretion of the agencies—with these general policies reviewable by Congress, the press and the academic community.

Why not a rule requiring some statement of reasons why the FTC sued or settled, reasons why it failed to act, or an explanation of theories that may have been relevant to a transaction but were not pursued by the FTC? In this review, I will concentrate on the policies and experiences of the FTC—an agency with which I am more familiar than the Department of Justice. Professor Grimes appreciates that FTC disclosure policies provide more information than the Antitrust Division of the DOJ. I will leave it to others to explain why Department of Justice policies, particularly in the area of criminal enforcement, deserve to be different.

First, Professor Grimes recognizes that the FTC offers explanations. The FTC in recent years has offered
explanations that Grimes characterizes as "minimally adequate" in connection with 56% of its merger enforcement decisions. In other instances, the Commission may not offer an explanation but one or two FTC Commissioners, disappointed with the failure to act, or the scope of action, may offer explanatory dissenting opinions. Thus, we are talking about some degree of additional transparency in a little more than 40% of Commission enforcement actions.

Second, in an increasing number of matters, the Commission does offer extensive explanations when it believes Congress, academics or the private sector would profit. For example, when the Commission decided not to challenge a merger between Boeing and McDonnell Douglas, a deal that had important international consequences, it explained its reasons. When America Online ("AOL") sought to merge with Time Warner, the Commission required restructuring before passing on this deal, but did not pursue vertical anticompetitive theories (an example of a "near-miss" theory). The Commission explained why vertical theories were inappropriate. In its enforcement action against record companies for minimum price arrangements on compact disc sales, the Commission thought it important to pursue a rule of reason rather than a per se approach and explained why. Finally, in the recent Cruise Lines decision involving a transaction between several cruise lines, which the Commission failed to

2. Id. at 940.
challenge, a majority offered an extremely extensive explanation of its policies in light of the facts of that transaction and dissenting Commissioners explained why the majority, in their view, was wrong. Those were exceptional enforcement matters and deserved special comment.

Third, the Commission of course could do more, but there is a serious question whether all transactions that are not challenged deserve a full exposition. Investigation may show that the relevant product market is broader than initially anticipated, so that the combined market share of the merging parties is 4% or 5%. What could an explanation of that transaction add to what is already in the horizontal merger guidelines?

Finally, comparisons to other agencies are a bit misleading. At its high water mark, the Federal Trade Commission reviewed almost 5,000 mergers per year predisclosed under the Hart-Scott-Rodino Act. The total is far less today but still more than the number reviewed by other agencies. Because of filing thresholds, the European Union reviews a small fraction of U.S. totals. The Federal Communications Commission examines only media mergers and transactions and the Federal Energy Regulatory Commission examines only transactions in the energy sector of the economy.

CONCLUSION

Transparency in connection with government enforcement is essential. My only reservation about Professor Grimes's proposals is that they appear to


8. See William J. Baer, Report from the Bureau of Competition (1999), Address Before the American Bar Association Antitrust Section Spring Meeting 1999, Federal Trade Commission Committee (Apr. 15, 1999) ("In Fiscal Year 1998, the Commission and the Antitrust Division reviewed a record 4,728 [Hart-Scott-Rodino] filings, over three times as many as six years earlier.").
establish unduly strict requirements for publication of reasons why an agency acted or failed to act. Given the substantial resource commitments that would be triggered by such rules, I would leave the matter to the discretion of the agencies with careful oversight by Congress. If Congress supports a policy of more extensive and fuller explanations, it should be asked to consider making additional resources available for that purpose in its budget review.