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Professor Grimes has prepared a very thoughtful Article regarding transparency in federal antitrust decision-making. Bob Pitofsky has responded based on his experiences at the Federal Trade Commission ("FTC"), and I offer some observations based on my experiences at the Antitrust Division ("Division"). Some of the issues that Professor Grimes raises are common to both of the federal antitrust enforcement agencies, but others, such as procedures and practices arising out of the Tunney Act, apply only to the Division. I will address both.

I. TRANSPARENCY ISSUES COMMON TO BOTH AGENCIES

Transparency in federal antitrust decision-making is a laudable objective. Transparency contributes to reasoned decision-making, consistency, predictability, and fairness. When the Division or the FTC files a case and litigates it to conclusion, the agency's position is a matter of public record. However, when the agency decides not to file a case or settles a case that has been filed, the rationale for doing so often is not disclosed.

But the concept of "transparency" is not self-defining and can, indeed, have many meanings. It can refer, for example, to enforcement standards and procedures. How are decisions made by the agencies? What is the analytical framework that the agencies apply to decision-making? Or, transparency can refer to the reasons for specific

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enforcement decisions. What particular factors, among the many that the agencies consider, were determinative in a specific matter? Does the enforcement decision reflect straight-forward application of generally applicable standards, or were there special factors considered in a particular instance?

Furthermore, transparency can be achieved in many ways, even with respect to merger enforcement that is the principal focus of Professor Grimes's Article. He strongly advocates that the agencies do more to explain decisions when enforcement actions are not brought or are settled. There are, however, various ways for communicating the rationale for such decisions. The Division and the FTC have issued written guidelines that remain a good statement of the analytical framework used to review mergers. In addition, Division and FTC officials often give speeches explaining enforcement policies. And finally, senior officials of the agencies appear frequently before various congressional committees to explain agency enforcement policies.

But, if transparency is a laudable objective, it is not costless to achieve. There are various costs that would flow from a decision by the agencies to provide the kind of reports, decisions, or explanations that Professor Grimes urges. While his Article purports to acknowledge these costs, I am left with the feeling that he has undervalued them.

The transparency issues that Professor Grimes raises have similar implications for both the Division and the FTC. There are, to be sure, differences between the agencies. The Division is a component of the executive branch and has long regarded itself as a law enforcement agency. Unlike the FTC (as well as many of the other agencies cited by Professor Grimes, such as the FCC and FERC), which investigates, adjudicates, and issues orders, the Division can neither adjudicate nor issue orders in its own right. Instead, when the Division issues a complaint, it must be prepared to go to court to obtain relief.

With respect to merger enforcement, however, there are substantial similarities between the agencies. Both investigate mergers. Both may challenge mergers and either may settle those challenges or have them adjudicated. And both agencies may close investigations without taking enforcement action. While Professor Grimes purports to find that the FTC is substantially more forthcoming in providing information about antitrust enforcement decisions, the basis for this assessment is explainable by a single difference in agency practice that he himself recognizes offers some public benefits.[1]

Professor Grimes acknowledges four "costs" of transparency: (1) resources; (2) confidentiality; (3) creation of precedent that would undermine future cases; and (4) awkwardness or difficulty of explaining decisions that are based on administrative or "mixed" reasons.

A. *Resources*

It is easy to dismiss arguments based on resource constraints—most of us have likely said to someone at one time or another: "If you thought it was important enough you would have found time to do it"—but they are very real. While Professor Grimes focuses on the Division's merger enforcement program, the Division has a substantial civil non-merger program and an aggressive criminal enforcement program that compete with merger enforcement for resources. Deal work has been down for the past few years, and thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"), as amended, have been raised. It was not too long ago that there were over 5,000 HSR filings annually, a number that has recently declined to less than 2,000. However, if history is any guide, this will be a temporary lull, which means that

1. Professor Grimes finds that the FTC provided "minimally adequate" disclosure in fifty-six percent of merger cases, whereas the Division provided such disclosure in only twenty-one percent of such cases. Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 967, 971 (2003). The difference is found in the agencies' different treatment of "fix-it-first" resolutions. There are frequently circumstances in which parties, recognizing that a proposed merger raises competitive issues, undertake to "cure" the problem themselves, without awaiting conclusion of an investigation. The FTC generally requires the parties to enter into consent decrees in such circumstances (under threat of an administrative enforcement action if the parties refuse). The Division's practice has generally been to allow the parties to proceed with a restructured transaction without filing a complaint and consent decree, and Professor Grimes acknowledges that there is "much to commend" this approach. Grimes, *supra*, at 981. If the comparison between agencies is adjusted to eliminate the disparate treatment of "fix-it-first" resolutions, then it appears that they are making "minimally adequate" disclosures in roughly the same percentage of matters (fifty-six percent for the FTC and fifty percent for the Division).

fundamental changes in agency decision-making implemented at this time should be considered in a context of limited agency resources.

Obviously, a proposal to issue "non-enforcement" explanations will have resource implications for career staff. Consider, too, the implications of what Professor Grimes proposes with respect to senior officials at the Division. Today, when the Division files a case, the complaint is signed by the Assistant Attorney General ("AAG"), and the AAG is personally involved in the decision to bring that case. To a limited extent—that I will address later—the Division provides an explanation for settlements of civil cases, but settlements, by their very nature, are not intended to establish precedent for subsequent enforcement actions. However, Professor Grimes's proposal goes beyond urging greater elaboration of statements accompanying settlements and would include, in addition, statements regarding enforcement actions that are *not* brought by the Division, including a "detailed explanation" whenever a second request has been issued.

For those statements to be meaningful, in the way that Professor Grimes intends, they, no less than decisions to file complaints, must represent the personal thinking of the AAG. Under his proposal, the Division would have had to issue 228 such decisions (dropped investigations plus abandoned mergers plus fix-it-first resolutions) over the last four years. That is more than one a week. The impact upon the AAG and his or her senior advisors would be a substantial one, indeed.

B. *Confidentiality*

I was at the Division in the 1970s and was very involved personally in the legislative battle surrounding HSR. Confidentiality assurances played an important part in passage of HSR. Under existing practice today, companies do not have to worry about disclosure of confidential business information when they respond to a second request. With broad confidentiality assured, companies responding to a second request do not look for ways to circumscribe production; close calls are resolved in favor of production. It is one thing to say that an agency may use a company's documents against the company if a transaction is challenged; that is simply the risk that comes from proposing a merger. But it seems to be a different matter to say that an agency can disclose a company's confidential information when the agency has concluded that a merger does not violate the law.

Third parties also often value confidentiality, sometimes more than the merging parties. Often third parties—customers, suppliers, or small competitors—may fear retaliation. They realize that their information may be disclosed if the agency decides to challenge a merger, but if they believe that their information may be disclosed even if the agency does not challenge the transaction, it may discourage them from coming forward in the first place.

That having been said, this is certainly an area in which the Division could exhibit considerable care through the exercise of discretion. In the instances in which the agencies have issued explanations of decisions not to take enforcement action, those explanations have generally not disclosed the kinds of information—marketing plans, future product plans—that are most sensitive to the business community.

C. *Creation of Precedent that Would Undermine Future Cases*

If the Division issued decisions explaining non-enforcement decisions, there is no reason to believe that the defendants in litigated merger cases would not seek to use those statements against the agencies. Here, we do have some experience. Those of you who were around twenty years ago may recall that the 1984 merger guidelines spoke very broadly about the role of entry in the agencies' analysis of proposed mergers. The guidelines were intended to provide guidance regarding the analytical framework that the agencies would bring to the task of merger review and an enumeration of factors that they would consider in the process. A number of subsequent court decisions cited to the discussion in the guidelines regarding ease of entry and used those statements to support decisions permitting mergers to proceed.[2] This was one of the factors that caused the agencies to revise the merger guidelines in 1992 to clarify the standards for entry; the clarifications did not

2. *See* United States v. Waste Mgmt., Inc., 743 F.2d 976, 982-83 (2d Cir. 1984).

materially affect how the agencies performed their review, and were intended largely for judicial consumption.

The argument can be made, of course, that this is how the process should work. If an agency statement of enforcement rationale is not precise or is construed outside the agencies in a manner not intended by the agencies, then the proper course may be to revise the guidelines as necessary. However, the context in which this issue arises under Professor Grimes's proposal is that the agencies will be writing dozens, if not hundreds, of statements explaining decisions for not challenging particular mergers. This will put inevitable pressure on the agencies to write statements in such a manner that they cannot be "used against them" at a later time. To the extent that the agencies accede to this natural inclination, this will reduce the value of such statements substantially. A pattern of "cookie-cutter" explanations would do little to advance the interests in transparency and yet may be the inevitable outcome. Indeed, as Professor Grimes and others have argued, a similar tendency has been observed in the context of the Tunney Act, about which more will be said later.

D. *Difficulty of Explaining Decisions Based on Administrative or "Mixed" Results*

Professor Grimes acknowledges a fourth sort of catch-all argument against transparency: that some decisions not to pursue enforcement reflect factors other than a determination that the merger is lawful or harmless. Let us leave aside two examples he cites—the "priority" assessment is usually made at the outset of an investigation rather than at its conclusion and staff "mistakes" have not motivated enforcement decisions, at least in my experience. But the recognition that enforcement decisions reflect a "mix" of factors is certainly true, and it greatly complicates the analysis.

The suggestion that the agencies issue decisions regarding non-enforcement decisions proceeds, in my view, from a simplified view of factors that actually go into antitrust decision-making. These factors arise both initially and subsequently in the course of an investigation. With respect to a merger, for example, there are times when the issuance of a second request does not reflect an affirmative judgment that competitive issues are significant, but rather only that staff has some issues of concern that it has not been able to resolve within the initial waiting period. Thus, there are circumstances in which the agency issues a second request when neither the agency nor the parties expect full compliance. Instead, the agency identifies potentially dispositive issues that the parties seek to address at the outset. Yet, under Professor Grimes's proposal, the issuance of a second request would become the triggering mechanism for the obligation to issue an explanatory decision.

Perhaps more fundamentally, however, there are often many factors that go into a decision to sue or not to sue, especially in close cases. The suggestion that there is a single rationale for a decision that can be easily encapsulated in an explanatory statement does not comport with the realities of the decision-making process. Often, the decision to bring or not bring an action reflects not the inquiry "Is the merger 'lawful or harmless'?" but, rather, "If we think this merger is unlawful and harmful, can we prove it in court?" Consider the following factors that could affect such an inquiry:

1. *Evidentiary limitations*. There are times when the agency believes that a transaction will violate the law, but the agency is unable to identify witnesses who will come forward and testify. Such reluctance need not necessarily reflect witness concerns about potential retaliation by the merging parties (although it may), but may simply reflect corporate policies not to participate in such litigation or practical assessments that the nature of the competitive harm to a particular entity is not sufficiently substantial to warrant the time and expense associated with actively participating to oppose it (although the agency believes harm to all affected entities would be sufficiently substantial to warrant an enforcement action).

2. *Multiple reasons*. There are often circumstances in which a non-enforcement decision represents a confluence of different rationales that both point in the same direction. For example, there may be circumstances in which the competitive case is marginal, but might warrant being brought in certain circumstances, except the agency concludes that an enforcement action is not warranted because of financial difficulties facing the acquired

company. Even if the financial difficulties would not meet the criteria of the failing company doctrine, the combination of a marginal case and financial difficulties might tip the scale against an enforcement action.

3. *Bad facts to test a principle of law*. Occasionally, an agency may believe that a transaction raises an important principle of law that should be tested, but that the facts are such that it may be difficult to prevail or difficult to get the issue ripe for decision. Thus, the decision not to challenge a particular transaction should not be taken as an indication that other transactions that raise similar issues would not be challenged in the future.

Thus, any particular non-enforcement decision may reflect many different factors. Importantly, too, certain of the factors may weigh more heavily for different members of the staff and senior officials at the agency. The suggestion that this could all be boiled down into a simple explanatory statement is just not realistic.

For these reasons, I am left with the feeling that a mandatory rule of the kind Professor Grimes suggests would be too burdensome. However, the suggestion that the Division should consider statements in cases that present issues of particular importance is a good one and should be considered in appropriate circumstances. When Bob Pitofsky and I were discussing Professor Grimes's Article, he reminded me of an instance he was aware of some time ago when Tom Kauper, who was AAG in the mid-1970s, issued a lengthy memorandum explaining why he had decided to drop a shared-monopoly case against tire manufacturers, even though the government had survived a motion for summary judgment. I was actually able to offer some context for that memorandum, since I was serving as a special assistant to Tom Kauper at the time.

In the environment of the times—the Division was still recovering from the IT&T scandal—Tom Kauper decided to explain his decision in a memorandum to the Attorney General, to release the memorandum to the press, and to brief Senator Phil Hart and Representative Peter Rodino, who at the time were chairmen of the relevant committees in both houses of Congress. There was barely a ripple in the press or on the Hill. Transparency worked.

But if the process demonstrates the benefits of transparency, it also demonstrates the costs of transparency. The AAG literally spent weeks reading staff memoranda, reviewing the trial record, and meeting with staff lawyers and economists to review the case. Once he had made up his mind, he worked on the explanatory memorandum. It turned out that this was one instance when explaining a "non-enforcement" decision was exactly the correct thing to do. But the principle it demonstrates is not that such a process is appropriate all the time; rather, it is an important option that is available and should be utilized with respect to matters of important competitive interest.[3]

II. THE TUNNEY ACT

Professor Grimes also addresses the Tunney Act. I think it is fair to say that he thinks the Act has not been reasonably construed and applied. Here, again, I think a little history may be instructive.

The Tunney Act was a response to a specific series of events: the connection between a contribution by IT&T to help finance the 1972 Republican Convention in San Diego and a decision by the Division to accept a settlement with IT&T in lieu of appealing a decision challenging IT&T's acquisition of the Hartford Insurance Company to the Supreme Court.

The provisions of the Act dealing with consent decrees required disclosure of contacts by a defendant with the government, submission of a competitive impact statement ("CIS"), opportunity for public comment, and a judicial finding that the decree is in the public interest. The

3. It is interesting to note that recently the Division issued an explanatory statement in connection with the closing of the investigation into Orbitz. *See* Statement by Assistant Attorney General R. Hewitt Pate, Department of Justice, Regarding the Closing of the Orbitz Investigation (July 31, 2003), *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201208.htm. This was an antitrust investigation into a joint venture among airlines to provide electronic ticketing services that competed with independent electronic ticketing services and traditional travel agents. It was also a matter in which the Department of Transportation had issued various orders and statements. Importantly, the statement issued by the Division identified the competitive concerns presented by the venture: whether the joint venture would facilitate coordination among the airlines or diminish incentives to discount fares and whether the joint venture would make Orbitz dominant in online air travel distribution. This indicates that the current leadership of the Division recognizes the benefits of transparency.

Division opposed the bill, fearing that it would interfere with the settlement process in antitrust cases, lead to protracted evidentiary hearings, and encroach on the separation of powers.[4] As we approach the thirtieth anniversary of the Act, what do we find?

The Act seems to have worked well in addressing the principal concern that prompted it: discouraging political interference. There have been very few claims that I know of that the merger review process has become politicized in anything remotely approaching the sense that gave rise to the Act. Indeed, for many years the culture of "independence" fostered by the Act has, as a practical matter, erected a wall between the White House and the Division that is virtually unique in the executive branch. Beyond that, however, it seems that no one is happy with the Act.

The Division does not seem fully satisfied with the Act. It imposes substantial costs, not only in terms of resources– it takes time to prepare the CIS, even more time to respond to public comment, and the Federal Register and other notice costs can be quite significant. I have seen cases in which commentators have submitted prior works, such as lengthy law review articles or congressional testimony, in the guise of comments to a decree, and the Department has had to publish them in the Federal Register and to respond to them.

Third parties do not seem fully satisfied, either. They are frustrated by judicial decisions that limit the scope of judicial review under the Tunney Act. The concerns they express most often go to the heart of prosecutorial discretion: claims that the government chose not to bring and forms of relief that the government chose not to seek. The 1995 *Microsoft* case rejected inquiries into these areas, relying not only upon statutory construction but also upon constitutional concerns relating to separation of powers.[5]

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4. In reviewing the Division's testimony on the bill, I was surprised to find that, as a matter of course before the Tunney Act, the Division's policy was to enter into stipulations with defendants to defer entry of a decree for thirty days, to issue a simultaneous press release inviting comments of interested parties, and to reserve the right to withdraw its consent at any time during that period. I was struck with how similar that process is to the current process utilized at the FTC.

5. United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995) (per curiam).

Even judges are beginning to scratch their heads. In *United States v. Pearson plc*,[6] Judge Robertson mused when he found himself reviewing a decree in which the core transaction among the merging parties had long been consummated and Pearson had already sold the assets covered by the decree—all before Tunney Act approval. After reviewing applicable court decisions, he concluded that the public interest inquiry "is so limited in scope as to be very nearly a ministerial act."[7]

The time would seem ripe for a re-examination of the Tunney Act, without any preconceptions about the need or direction of any amendments. The pending appeal in the Microsoft monopolization case may provide an occasion for judicial examination of the Act (albeit not in the context of merger review). Now that the American Antitrust Institute has had a conference on transparency in antitrust decision-making, perhaps the next item on its agenda could be a conference on the Tunney Act.

6. 55 F. Supp. 2d 43 (D.D.C. 1999) (mem.).
7. *Id.* at 45.