

Transparency in Antitrust Merger Review: A Modest Proposal for More

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Public disclosure of the federal agencies' analysis in merger cases serves many purposes. It enables companies to understand better the possible risks associated with proposed transactions. It allows all practitioners—not just those with inside knowledge about recent deals—to predict with greater certainty how the agencies will analyze particular markets. It provides an incentive for the agencies to ensure that their decisions are based on accurate facts and sound economic principles. The public also benefits from a better understanding of this important area of government regulation.

Although there is almost universal agreement that transparency in merger review is a commendable goal, there is disagreement about how much burden should be placed on the agencies to explain their decisions.¹ Transparency requires resources to prepare and publish decisions, and the agencies do not have unlimited resources. A requirement of public disclosure might also discourage the agencies from clearing transactions that arguably raise competitive issues because they may fear that such precedents will be difficult to distinguish in future cases. Perhaps for these reasons, the historical practice in the United States has been to publish statements about the competitive impact of mergers only when the agencies challenge a merger and when the parties enter into a consent decree to remedy the competitive problems. This is in contrast to the European Commission, which publishes a decision in every case reviewed under the Merger Regulation, even those in which the transaction is cleared without remedies.

This article describes the U.S. agencies' approach to publicizing merger decisions, including a recent trend toward greater transparency, and proposes a modest step toward even greater transparency in U.S. merger review. The proposal would require a public competitive analysis in every merger for which the agency has issued a Second Request. This would result in public disclosure of the agencies' analysis in transactions that raise significant competitive issues but would not unduly burden the agencies with a significant amount of additional work. Thus, from a practical perspective, we believe the proposal should be workable.

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¹ A symposium devoted to transparency in antitrust enforcement appeared in the Fall 2003 issue of the *Buffalo Law Review*. The lead article by Warren S. Grimes examined the issue in depth. Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFFALO L. REV. 937 (2003). Critical comments and replies were authored by Robert Pitofsky of the Georgetown University Law Center and former Chairman of the Federal Trade Commission, John M. Nannes, formerly of the Department of Justice, and Peter C. Carstensen of the University of Wisconsin Law School. Robert Pitofsky, *Comments on Warren Grimes: Transparency in Federal Antitrust Enforcement*, 51 BUFFALO L. REV. 995 (2003); John M. Nannes, *Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes*, 51 BUFFALO L. REV. 1017 (2003); Peter C. Carstensen, *Transparency in Antitrust—Do What We Say and Not What We Do: Some Reflections on Professor Grimes's Quest*, 51 BUFFALO L. REV. 1001 (2003).

The U.S. Agencies' Current Practice of Limited Publication Provides Limited Guidance for Future Transactions

Section 7 of the Clayton Act prohibits transactions that may substantially lessen competition in a relevant market. Determining what constitutes a relevant market and what combinations may substantially lessen competition is often difficult. Is the industry susceptible to coordinated interaction? Are the merger parties each other's closest rivals? How easy and likely is it for other suppliers either to enter or expand output in the relevant market? Will buyers turn to substitute goods in response to a small but significant nontransitory increase in prices? These are complicated questions that are highly dependent on both the circumstances in the industry involved and the economic theory used to assess those circumstances.

Recent case law analyzing mergers under Section 7 is relatively scarce, and the agencies' guidelines, while helpful, are general and in some respects obsolete.² Moreover, the occasional speeches delivered by agency officials, which often start with the caveat that they reflect only the views of the individuals involved, also tend to be general. Information about how the agencies analyze specific transactions—which is potentially the best source of information for merger parties in future transactions, especially in industries that have recently been analyzed in depth by the agencies—is available in only a small percentage of cases.

Under current law, the Department of Justice and the Federal Trade Commission are not required to publish their reasoning in merger cases that are cleared without remedies. The typical practice in such cases is for the reviewing agency to allow the waiting period under the Hart-Scott-Rodino Act to expire without any public explanation. Indeed, unless the parties have received early termination of a transaction—in which case a brief mention of the transaction appears on the FTC's Web site—there is usually not even a public acknowledgement by the agency that a transaction has been reviewed and cleared by the government.

At the other extreme, in cases in which an agency seeks to block a transaction, its reasoning is set forth in detail in the complaint and other court filings. Absent a settlement, a detailed opinion, either blocking the transaction or finding that it is not likely to lessen competition substantially, is typically published by the court that hears the government's challenge. Even in these cases, however, neither the agency nor the court addresses the product areas and markets the agency has decided not to challenge.

In between these two extremes are cases involving negotiated settlements. In these cases, the agencies are required to publish their competitive analysis.³ These statements can provide helpful insight into how the agencies view the relevant markets and why they believe a particular transaction might violate the antitrust laws but for the proposed remedy. However, they generally focus only on the areas of competitive concern and the reasons for the proposed remedy; they do not explain the agency's analysis of product areas for which the agency decided that no remedy was necessary.

The European Commission's practice stands in contrast to that of the U.S. agencies. For cases in which the EC clears transactions without any conditions, it issues statements identifying the par-

² For example, numerous transactions have been cleared in recent years even though they result in concentration levels that significantly exceed the thresholds in the DOJ/FTC Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

³ The DOJ must issue a public Competitive Impact Statement as required by the Antitrust Procedures and Penalty Act (Tunney Act), 15 U.S.C. 16(b). Similarly, the FTC's rules require an explanation of the consent order to be placed on the public record. 16 C.F.R. §§ 2.31–2.34 (2004).

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said that “it [was] appropriate to provide an unusually detailed explanation for [its] decision” because the matters presented “important, albeit firmly settled, issues of merger policy,” the “issues were complex and the ultimate decision depended on a close analysis of industry-specific facts,” and “the transactions [had] been the subject of unusually extensive media coverage—some of it misinformed.”⁷ A dissenting statement by Commissioners’ Anthony and Thompson was also issued.⁸ Although the FTC’s statement was brief in comparison to the EC’s lengthy analysis in the same transaction, it explained the Commissioners’ final reasoning and analysis in far greater detail than usual. The dissenting statement was also informative as it advocated blocking the transaction in light of the Horizontal Merger Guidelines’ presumptions of anticompetitive effects.

The cruise lines mergers raised several important substantive issues. Was the relevant antitrust market cruises marketed in North America or did the market include other forms of leisure and vacation activities and in other geographical regions? Were cruise offerings differentiated products or were they substantially similar? Would the merger enable the remaining cruise companies to identify a group of less price-elastic customers (similar to business travelers on airlines) to whom they could raise prices? Would the merger increase the ability of the cruise companies to coordinate their capacity expansion decisions?

Had the FTC chosen simply to close the investigation without an explanation of its reasoning, practitioners and the public would not have known the answers to these questions, nor would they have known how the characteristics of the cruise industry affected the FTC’s analysis. With the public statements, the Commissioners’ analytical approach was clearly revealed. They unanimously agreed that the likely relevant market was cruising and not a broader vacation market. The majority explained that they believed that unilateral effects were unlikely because, among other reasons, the merging parties were not uniquely close competitors. They also explained that the economic evidence did not prove that the merger would increase the ability of the remaining firms to coordinate pricing decisions given the complexity of the industry’s pricing behavior, and they found that the characteristics of the cruise industry did not lend themselves to coordination in capacity decisions.

These statements sparked a vigorous dialogue both about public disclosure of agency decisions and about the economic theories at issue in the cruise lines decision. For example, one article applauded the FTC’s decision to publish its reasoning but criticized the FTC’s analysis by questioning the Commission’s dedication to the Merger Guidelines presumptions and by arguing that the evidence did not support the Commission’s conclusion.⁹ In September 2004, two former

⁷ Statement of the FTC, Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, *supra* note 5, at 1.

⁸ See Dissenting Statement of Commissioners Anthony and Thompson, Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, *supra* note 5.

⁹ See Warren S. Grimes & John E. Kwoka, *A Study in Merger Enforcement Transparency: The FTC’s Ocean Cruise Decision and the Presumption Governing High Concentration Mergers*, ANTITRUST SOURCE, May 2003, available at <http://www.abanet.org/antitrust/source/05-03/metstudy.pdf>.

FTC officials involved in the cruise lines investigation responded to this criticism and defended the Commission's analysis of both unilateral and coordinated effects.¹⁰

Although there has not been another merger in the cruise area since the FTC's decision, those in that industry and in other industries with similar features have the benefit of knowing the FTC's analysis and the reasons for its decision to close the investigation. They are better able to weigh the risks of future transactions and better able to prepare their advocacy before the FTC.

Another important example is the Genzyme/Novazyme decision.¹¹ The merger of the two companies had already been consummated when the FTC opened its investigation of how the merger would affect innovation in pharmaceutical products for treating Pompe disease, a life-threatening medical condition affecting infants and young children. At the time of the merger, Genzyme and Novazyme had the only two research programs for enzyme replacement therapy for Pompe disease. Thus, the merger resulted in a merger to monopoly for pending research in this area. The FTC opened the investigation to analyze whether the merger reduced the innovation incentives of the merged companies, specifically whether absent the merger Genzyme and Novazyme would have engaged in a "race to market" a Pompe disease therapy.

In closing the Genzyme investigation without seeking a remedy, Chairman Muris explained in a detailed analysis of innovation markets that such a "race to market" was unlikely and that the merger had not substantially altered the companies' incentives in this area. He also found that the efficiencies in R&D resulting from the combination of the two companies were proven and significant. In an important development for pharmaceutical and other high-tech companies, Chairman Muris rejected the notion that there should be a presumption of anticompetitive effects in innovation markets, even in cases involving merger to monopoly. His statement also made clear that the FTC can consider the merged companies' post-merger behavior in investigations that arise after closing.

In his dissent, Commissioner Thompson explained that under a Merger Guidelines analysis, the merger should be challenged because it resulted in the merger of the only two companies operating in this innovation market, with new entry unlikely. Thompson argued that absent the merger the companies would have been driven to innovate against each other to be the first to market with an enzyme replacement therapy for Pompe disease. As a result of the merger, he believed that competitive incentive would be lost.

Without these statements, only those practitioners involved in the case would have had the benefit of the FTC's analysis in this important decision. By making its reasoning public, the FTC provided valuable guidance about its evolving approach to innovation markets.

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¹⁰ See Mary Coleman & Joseph J. Simons, *Response to Grimes and Kwoka*, ANTITRUST SOURCE, Sept. 2004, available at <http://www.abanet.org/antitrust/source/09-04/Sep04SimonsColeman.pdf>; Warren S. Grimes, *Reply to Coleman and Simons*, ANTITRUST SOURCE, Sept. 2004, available at <http://www.abanet.org/antitrust/source/09-04/Sep04GrimesReply.pdf>. See also Mary Coleman, David Meyer & David Scheffman, *Empirical Analyses of Potential Competitive Effects of a Horizontal Merger: The FTC's Cruise Ships Mergers Investigation*, 23 REV. INDUS. ORG. 121 (Sept. 2003); Joseph Simons & David Scheffman, *The FTC Cruise Line Merger Investigation*, ABA Section of Antitrust Law "Brown Bag" Program, Address before the ABA Section of Antitrust Law (Nov. 2003), revised version available at <http://www.abanet.org/antitrust/source/01-03/lerner.pdf>, and presentation available at <http://www.ftc.gov/be/hilites/ftcbeababrownbag.pdf>. For a summary of the Grimes/Kwoka exchanges with Coleman/Simons on the rebuttability of the Merger Guidelines presumptions and the competitive effects of yield management systems, see *Cruise Line Mergers: Post-Game Analysis*, FTC: WATCH, Oct. 25, 2004, at 4.

¹¹ See *supra* note 5.

Department of Justice Catching Up. The DOJ has been less active in publicizing its merger decisions. In a November 2004 speech, however, Deputy Assistant Attorney General of the Antitrust Division Thomas O. Barnett explained that the DOJ would be moving toward more disclosure in such decisions.

[R]egarding the goal of increased transparency, the European Commission and others have been ahead of the U.S. when it comes to explaining the reasons behind decisions not to bring challenges. During the past year we announced a policy of issuing public statements beyond the usual press release upon the closing of certain investigations, for example in cases where public dissemination of the rationale behind our decision not to bring an action might benefit businesses attempting to comply with complex antitrust standards."¹²

Mr. Barnett cited the DOJ's statement explaining the Arch/Metrocall merger (involving electronic pagers) as an example of the DOJ's increased dedication to transparency.¹³

Although it included some background on the industry and a short explanation of the DOJ's reasoning, the Arch/Metrocall statement was fewer than two pages long and was less detailed than a Competitive Impact Statement. It merely described the market and the recent competitive situation as demand for paging has declined. It then listed the reasons for the DOJ's conclusions that the merger would not lead to a substantial lessening of competition on a unilateral or coordinated effects theory. This type of summary statement is a helpful step toward transparency but still lacks much of the detailed analysis needed to fully understand the DOJ's competitive assessment of the industry.

A Modest Proposal Toward Greater Transparency in Merger Decisions

Despite the movement toward more public statements by both U.S. agencies, it remains unclear which mergers will be covered by this policy. The current practice involves selective announcements of the agencies' analysis in closing merger investigations where the agency involved believes that the decision deserves a public explanation. Although a good start, the statements are issued only in selected cases, and practitioners are without the benefit of the agencies' analysis for a number of other cases that raise significant competitive issues. Moreover, because agency statements do not provide detailed information for all of the potential overlaps, the agencies' reasoning is often not complete.

The public would benefit from a more consistent policy of public disclosure. But when should public statements be required? Recognizing that there are significant costs involved in publicizing the agencies' analysis, it would be imprudent and enormously burdensome to require that the agencies publish statements explaining their reasoning in every transaction notified under the HSR Act. Such a requirement would have resulted in over 1,000 decisions in 2003 (nearly five times more decisions than the EC issued) with the vast majority of decisions involving no competitive issue whatsoever. Insisting on this level of publication would be tremendously burdensome, and would result in hundreds of cursory opinions that provide little guidance to the public.

¹² Thomas O. Barnett, Deputy Ass't Atty Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement Priorities: A Year in Review, Address Before the Fall Forum of the ABA Section of Antitrust Law 5 (Nov. 19, 2004), available at <http://www.usdoj.gov/atr/public/speeches/206455.htm>.

¹³ *Id.* See Statement of the Department of Justice, Background to Closing of Investigation of Proposed Acquisition by Arch Wireless of Metrocall Holdings (Nov. 16, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/206339.htm.

However, requiring a statement of analysis in all merger cases in which Second Requests have been issued, even where the agency decides to close the investigation without a challenge or settlement, would be a meaningful further step toward transparency and consistency. Moreover, the burden of such a requirement would be relatively limited.¹⁴ The agencies through the Second Request process have access to significant amounts of information, data, and internal company documents; have access to staff recommendations which outline the relevant markets, the competitive issues, and possible remedies; have often conducted extensive economic analyses; and have talked to industry participants, such as customers and competitors. Public statements could easily be prepared based on this information. Furthermore, this proposal would not require an unmanageable number of additional statements. Only 35 Second Requests were issued in 2003 (with 49 the year before), and many of these resulted in settlements requiring public statements in any event.

While the burden would be limited, the benefits from such a requirement would be considerable. It would increase the amount of information available to practitioners and companies considering future transactions. It would eliminate the discretion agencies currently have to keep their competitive analysis confidential. And it would lead over the years to a more complete body of precedent in a range of industries.

Conclusion

The FTC and the DOJ have taken initial steps toward greater transparency in merger cases. Further improvements are needed, however, to ensure consistency and provide the public with information about the agencies' analysis of all cases involving significant competitive issues. A requirement of public disclosure in cases involving Second Requests would go a long way toward achieving this goal without imposing undue burdens on the agencies. ●

¹⁴ Although the confidentiality of company information is a valid concern, it is an issue with which the agencies (and the European Commission) effectively deal when issuing statements, filing court briefs, and giving speeches. There should be little doubt that the agencies could protect company confidential information under this proposal, while still describing their competitive analyses. In order to ensure this information is protected, any public statement should be reviewed with the merging parties' counsel.