

Antitrust Law Blog

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Antitrust Division's Top Economist Addresses Congress On The Newspaper Industry

Carl Shapiro, Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice, provided a Statement, entitled "A New Age for Newspapers: Diversity of Voices, Competition and the Internet" (April 21, 2009), to the Subcommittee of Courts and Competition Policy, Committee of the Judiciary, United States House of Representatives. Mr. Shapiro, who served in that position once before, has been a Professor of Business and Economics at the Haas School of Business at the University of California at Berkeley since 1990.

Mr. Shapiro's conclusion is that the pressures faced today by newspapers do not require any changes to antitrust enforcement principals: "We believe that antitrust analysis is forward-looking and flexible enough to take into consideration the economic and technological pressures facing newspapers as we continue to make market-by-market and case-by-case determinations pursuant to the antitrust law."

Traditionally, newspapers have been a keystone to the proper functioning of our democracy, Mr. Shapiro said. He stated that the newspaper industry is entering a new age due to the advent of new technologies and the proliferation of online content. In the past, pressure from new technologies such as television reduced the number of newspapers and caused Congress to pass the Newspaper Preservation Act of 1970 ("NPA" or "Act") to preserve independent newspaper voices within the community.

The NPA (15 U.S.C. § 1801, *et seq.*) articulates the "public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." The Act permits newspapers to engage in types of joint business activity, such as joint printing, distribution and sales of advertising, by two previously competing daily newspapers that form a Joint Operating Agreement ("JOA"). The JOA is exempt from antitrust liability provided that the two newspapers maintain separate news and editorial staffs and have independent editorial policies.

Newspapers are again under pressure, most notably from the Internet and the current recession, he said. According to the Newspaper Association of America, since 2002 circulation declined by 8 percent, print advertising decreased by 23 percent, and classified advertising decreased by 37 percent. The continued viability of many newspapers has been put into serious doubt.

Mr. Shapiro stated that antitrust enforcement is particularly critical in industries experiencing technological change. In the newspaper industry, major changes are taking place in the creation and distribution of content, and in the business models of those who create content. Newspapers are considering many different strategies for survival, such as “new revenue models for traditional newspapers, user-supplied online content including blogs, open-source approaches like wikis, crowd-sourcing, and non-profit news organizations,” which is the essence of the competitive process.

However, nothing in the Act or its legislative history suggests that the NPA immunizes the acquisition by one JOA partner of the other JOA partner's newspaper. Such an acquisition “would be directly contrary to Congress’s goal of ensuring independent and competitive editorial and reportorial voices.”

When analyzing a newspaper merger, the Division applies Section 7 of the Clayton Act, which is a forward-looking statute focusing primarily on the “likely future competitive effects of a proposed merger.” The Division applies the Merger Guidelines of the DOJ and FTC, which condemn mergers that “create or enhance market power or facilitate its exercise,” or “distort market outcomes.”

DOJ evaluates possible competition for both advertisers and readers, such as from a national daily newspaper or a local community weekly. Mr. Shapiro stated that a key issue for determining the presence of competition depends on what types of information are highly valued by readers, giving several examples, and “[w]e ask similar questions with regard to advertisers.”

Advertisers are willing to pay more for newspaper with many readers, so newspapers have an incentive to attract subscribers. If advertising revenues decline, “newspapers may have an incentive to raise their subscription prices. Competition with another newspaper can prevent such increases. . . .”

Under Section 7 and the Guidelines, DOJ’s analysis “will depend upon the extent to which subscribers and advertisers would shift to other media in response to a price increase.” This analysis could lead to different results now than it would have in the past. In past investigations, DOJ has found that local daily newspapers constituted a relevant market. Some degree of competition across market boundaries is the norm. But it may well be that changes in technology and consumer preferences could lead DOJ to conclude in a specific instance that other media outlets provide a sufficient competitive restraint to alleviate concerns raised by a merger or acquisition.

Even if the relevant market is limited to local daily newspapers, there still may be no harm to competition. “The Division is in general receptive to the argument that a proposed merger generates sufficient synergies to benefit consumers, notwithstanding the resulting loss to competition.”

The Division expects an increase of cases in which the acquiring firm argues that the acquired firm (or division) is failing. He said that the failing firm defense has “strict requirements” and “rightly so.” In a newspaper case DOJ would also consider whether the assets of the weaker

paper, such as features and reporting staff, “would exit the market if not acquired by the stronger local newspaper, or whether they could go to other competitors, or support a new competitor.”

In his oral testimony before the Subcommittee (April 25, 2009), Mr. Shapiro again stated that antitrust law does not need to be modified for the newspaper industry and that no new exemptions are needed. He suggested that newspapers seeking to pursue a new business model could engage in a business review with DOJ.

He said, “The situation where we would – tend to be most concerned would be two local daily newspapers in the same town, the only two, where our investigation revealed that they were both substantial direct competitors for readers or advertisers or both.”

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