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DOJ & FCC Allow Comcast-NBCU Joint Venture to Proceed with Conditions

Yesterday, after a year-long investigation, the Department of Justice Antitrust Division (DOJ) and Federal Communications Commission (FCC) announced that they reached a settlement with Comcast Corporation (Comcast) and General Electric Co. (GE)'s subsidiary NBC Universal (NBCU). The settlement permits the parties to proceed with their joint venture, under which Comcast will acquire control of NBC Universal Inc. (NBCU) and all of its assets. *See* http://www.justice.gov/opa/pr/2011/January/11-at-061.html.

The DOJ and five state attorneys general—California, Florida, Missouri, Texas, and Washington—filed a civil antitrust law suit in the U.S. District for the District of Columbia to block the formation of the joint venture, and simultaneously filed a proposed settlement that would resolve the agencies' concerns.

Separately, the FCC, in a 4-1 vote, with Commissioner Copps dissenting, issued an order approving the proposed transaction subject to similar conditions imposed by the DOJ. Although the FCC reviewed the transaction pursuant to its public interest mission, in contrast to the DOJ's competition mission, the agencies followed their standard practice of working closely together in investigating the deal and crafting consistent settlements.

Notably, the DOJ's concerns centered on "vertical" antitrust issues: according to the DOJ, the deal would allow Comcast to limit competition from, or even exclude entirely, its cable, telephone, and online competitors. Specifically, the DOJ alleged in its complaint that by gaining control of NBCU's programming, Comcast would acquire the power to deny access to, or raise the cost of, NBCU content to its competitors, thus harming consumers.

This power to harm rivals would also reduce innovation, according to the DOJ. Because Comcast has the incentive to make difficult the development of new distribution technologies, such as those offered by online video distributors (OVDs), by denying those distributors NBCU content, the DOJ reasoned that the joint venture would result in Comcast's having less competitive pressure to innovate.

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The Settlement

To remedy the DOJ and FCC's concerns, the parties agreed to a complex settlement that contains a number of restrictions on the joint venture's operations that will remain in effect for seven years. Among other things, the joint venture must make available to OVDs the same package of broadcast and cable channels that it sells to traditional video distributors. The joint venture must also provide to OVDs content that is equivalent to the content the OVDs receive from NBCU's competitors, such as ABC and CBS. Not surprisingly, the DOJ reserves the right to have an active role in any licensing disputes between the joint venture and an OVD and may even permit, in its sole discretion, the OVD to pursue a commercial arbitration procedure established under the settlement.

In addition, there were provisions designed to ensure that Comcast does not evade the settlement agreement, including:

(1) A prohibition, with narrow exceptions, on any licensing agreements between Comcast and distributors that limit online distributors' access to content;
(2) A requirement (by the FCC) that the joint venture license content to OVDs on reasonable terms;
(3) Comcast must give up its management rights in Hulu, an online OVD; and
(4) Comcast is prohibited from discriminating in the transmission of OVD network traffic to its broadband customers.

Key Takeaways

Although vertical relationships between merging companies do not often give rise to substantial investigations or enforcement actions, a year ago the DOJ reached a settlement agreement with Ticketmaster and LiveNation that reflected concerns similar to those articulated by the DOJ in the Comcast/NBCU joint venture investigation. Indeed, the DOJ's (and to some extent the Federal Trade Commission's) recent focus on transactions in which firms are acquiring access to inputs that their rivals need to compete is consistent with the Obama administration's pronouncements that it intends to examine vertical issues more closely than the Bush administration. As a result, firms that are contemplating transactions where their competitors are dependent on the business being acquired should take into account the vertical antitrust issues arising from the transaction, and in particular, whether as a result of the transaction, they can raise their competitors' costs to compete by impeding access to an input that is needed to compete.

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