Insights into Antitrust Enforcement in Media Industries[#]

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Competition law is critical to fostering a healthy and vibrant media sector and the Antitrust Division's enforcement matters involving the newspaper, telecommunications, radio broadcast and movie industries have benefited consumers, competition and the marketplace of ideas. This article highlights two such matters - the Division's challenges of the NBCU-Comcast, joint venture and the Google-ITA transaction - both of which also raised vertical concerns. It explains how the Division effectively and efficiently resolved competitive harms through the careful application of legal and economic principles to the particular facts of those transactions. It also highlights the Division's recently updated Antitrust Division Policy Guide to Merger Remedies, which reflects this approach.

Competition law plays a critical role in fostering a healthy and vibrant media sector. As in other industries, antitrust enforcement safeguards the competitive process, ensuring that anti-competitive agreements, mergers and single-firm conduct do not harm consumers in the form of higher prices, lower quality, or reduced innovation. Enforcement can also preserve multiple sources of ideas and opinions, serving broader social and political purposes.[1] Cases brought by the Antitrust Division (Division), recently as well as in the past, involving the newspaper,[2] telecommunications, radio broadcast and movie industries, among others, have benefited consumers, competition and the marketplace of ideas.[3]

This year, the Division challenged a joint venture between Comcast Corporation, the largest cable television and internet

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1 See, for example, *Competitive Impact Statement, United States* v. *Daily Gazette Co.*, No. 07-0329 (SD W Va 20th January, 2010) (explaining that an anti-competitive agreement between newspapers in joint operating agreement resulted in, among other effects, a reduction in the amount and quality of original content generated by one of the newspapers).

2 Former Assistant Attorney General Varney recently examined antitrust enforcement in the newspaper industry. See Christine A Varney, Assistant Attorney Gen, US Department of Justice, Dynamic Competition in the Newspaper Industry (21st March, 2011).

3 For a very recent example, see Competitive Impact Statement, *United States* v. *Cumulus Media Inc.* No. 11-cv-01619 (DDC 8th September, 2011) (explaining that a merger of radio broadcast companies would have lessened competition in the sale of radio advertising time, resulting in increased prices and reduced quality of service for radio advertisers).

service provider in the United States, and NBC Universal Inc, the owner of the NBC broadcast television network, popular cable television networks and studios producing popular news, sports and entertainment programming (the Joint Venture).[4] This transaction, the Division determined, would likely have harmed competition in the distribution of video programming by enabling the Joint Venture to deny, or raise the price of, NBC Universal's programming to Comcast's rival distributors, among other practices. Of particular concern, the transaction would have empowered Comcast to hamstring nascent competition from online video distributors.

The Comcast case provides insight into how the Division analyses competition in media sectors

On 18th January, 2011, the United States, along with a group of states,[5] filed a civil action alleging, among other things, that the transaction violated Section 7 of the Clayton Act.[6] At the same time, the Division filed a proposed settlement, which placed a number of restrictions on the Joint Venture's conduct, and which the Court approved on 1st September, 2011. In resolving this matter, the Division worked jointly with the Federal Communications Commission (FCC), both on the investigation and collaboratively on fashioning an appropriate remedy.[7]

The *Comcast* case provides insight into how the Division analyses competition in media sectors, particularly in rapidly evolving, high-technology industries like the distribution of video programming. First, transactions that give a firm control over a critical input used by its competitors warrant careful scrutiny. Second, innovation represents a critical dimension of competition that must figure prominently in competitive analysis. Third, nascent competition can present an inviting target for anti-competitive conduct. Fourth, in fashioning a remedy, antitrust enforcers should work closely with any regulatory authority and strive for provisions that are quickly and readily administered and do not require excessive entanglement with the competitive process.

Competitive concerns in vertical mergers

Vertical mergers, economic theory teaches, can harm competition by changing the merged firm's ability or incentives to deal with upstream or downstream rivals.[8] For example, a merger may create a vertically integrated firm that has the ability to acquire or maintain market power in a downstream market by denying (or raising the price of) an input to downstream rivals that the upstream operation would sell (or sell

4 *United States* v. *Comcast Corp.*, No. 11-cv-00106 (DDC 2011). The Joint Venture also included General Electric Company, the majority owner of NBC Universal. GE contributed to the Joint Venture NBC Universal's assets, and Comcast contributed its cable programming assets. Comcast is expected to own 100 per cent of the Joint Venture ultimately.

5 The states of California, Florida, Missouri, Texas and Washington were co-plaintiffs.

6 15 USC Section 18 (2006) (proscribing certain acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly").

7 See note 6 above.

8 See, generally, Jeffrey Church, "Vertical Mergers", in Wayne Dale Collins (ed), *II Issues in Competition Law & Policy* (2008), 1455.

9 See Competitive Impact Statement at 20-27, *United States* v. *Comcast Corp.*, No. 11-cv-00106 (DDC 18th January, 2011).

at a lower price) if a stand-alone firm. That firm may find it profitable for its upstream operation to cut off, or disfavour, some of its customers in order to hobble them as competitors to its downstream operation.

The *Comcast* matter presented this scenario.[9] Generally, a programmer, like NBC Universal, wants to distribute its content in multiple ways in order to maximise licensing fees and advertising revenues. However, the Joint Venture would face a different calculus in making decisions about licensing NBC Universal's content, considering not just NBC Universal's licensing and advertising revenue, but also the impact of licensing that content to Comcast's rivals on Comcast's distribution business. In particular, the Joint Venture would feel an incentive to disadvantage Comcast's competitors — namely, other multi-channel video programming distributors (MVPDs), like satellite providers, cable overbuilders, and telephone companies, plus online video distributors (OVDs), like Hulu, Netflix and Apple — by raising the licensing fee or denying them a licence outright. These tactics would likely render other MVPDs less effective competitors and delay, or impede substantially, the development of OVDs as alternatives to MVPDs.

The Division explored a similar theory of competitive harm in another recent case involving a high-technology industry; Google Inc's acquisition of ITA Software Inc.[10] ITA marketed QPX, a leading piece of software used in online search for air travel. Google planned to introduce its own online travel-search product, which would compete with many search providers currently utilising QPX. Thus, the merger would have given Google the incentive and ability to foreclose rivals from the comparative fight search markets, either by restricting access to QPX or by failing to continue to develop QPX. The Division settled the case with a consent decree designed to ensure Google's competitors will have continued access to QPX.

Anti-competitive conduct can be particularly effective against new products or technologies

Nascent competition in the competitive analysis

As a matter of theory, anti-competitive conduct can be particularly effective against new products or technologies just entering the market. It may be relatively easy to quash a nascent competitor, which has not yet established a foothold in the market, and a strategy of exclusion or predation may come at relatively minor cost to the incumbent.[11] For example, a dominant firm might deny a critical input to a nascent competitor, crippling that competitor at a minimal loss of current revenues, given the competitor's small customer base. The suppression of nascent competition can pose particular concern in industries marked by rapid or revolutionary change.[12]

10 *United States* v. *Google Inc*, No 1:11-cv-00688 (DDC 8th April, 2011).

11 See Phillip E Areeda et al, *Antitrust Law* 3d ed (2007), 349 ("Indeed, early exclusion may be far cheaper than ruining or disciplining a recent entrant who has become established.").

12 See, for example, *United States* v. *Microsoft Corp*., 253 F.3d 34, 79 (DC Cir 2001) (Suffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to quash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts.).

In the *Comcast* matter, the Joint Venture's impact on nascent competition from OVDs was a central concern for the Division.[13] Online viewing has grown dramatically over the past few years, with some consumers substituting OVDs for a portion of their traditional viewing while others have dropped traditional viewing altogether in favour of OVDs. Currently, OVDs have a *de minimis* share of the video programming distribution market. However, as consumer demand evolves and the relevant technology improves, OVDs could become stronger competitors to MVPDs for an increasing number of viewers and occupy a significant place in the competitive landscape,[14] particularly since new entry into the traditional programming distribution business is unlikely given, among other difficulties, the enormous investment required.

But to compete effectively, OVDs require access to programming demanded by consumers, as well as a broadband service allowing suitable delivery of that programming to those consumers.[15] Comcast, which, like other MVPDs, already had recognised and reacted to the competitive threat of OVDs, would gain control of NBC Universal's important portfolio of programming. Comcast potentially could have withheld that portfolio from promising OVDs that had yet to build a significant customer base, eliminating a competitive threat while costing itself little. Amplifying this concern was the fact that NBC Universal had been one of the content providers most willing to support OVDs, including its part ownership of Hulu, one the most successful OVDs.

Innovation as a critical dimension of competition

In its analysis, the Division determined that the Joint Venture could harm consumers in a number of ways.[16] Consumers would, more than likely, have to pay more for video programming, as rival distributors pass on any higher fees for NBC Universal's programming and as reduced pricing pressure on Comcast enables it to increase its prices. In addition, consumers would likely suffer lower quality programming and service, as Comcast's rivals would lack the incentive or ability to invest in improvements and as the weakened state of competition would allow Comcast to decrease investment in its own offerings. In recent years, competition has spurred cable companies and other MVPDs to upgrade their systems, increase the number of channels available, and introduce further innovations like digital video recorders and video-on-demand service, and it is important that this competition is not diminished in the future.

Finally, and very importantly, the Division determined that, absent conditions, it is likely that the transaction would depress the level of innovation, including experimentation with new models of content delivery.

Today, dozens of companies are striving to develop new ways of delivering programming online. New developments, products and models greet consumers on an almost daily basis. NBC Universal had supported these efforts, but control of its programming now would transfer to a company

13 See Competitive Impact Statement at 17-19, 26-27, *Comcast Corp*. No 11-cv-00106.

14 Recent OVD developments include NetFlix's announcement of a partnership with DreamWorks. See Brooks Barnes and Brian Stelter, "Netflix Secures Streaming Deal With DreamWorks", *NY Times*, 25th September, 2011, at B1.

15 The consent decree includes provisions that prevent Comcast from manipulating its broadband services offerings in ways that are designed to harm OVD competition. See Final Judgment, section VG, *Comcast Corp*, No 11-cv-00106 (1st September, 2011).

16 See Competitive Impact Statement at 23-27, *Comcast Corp.*, No 11-cv-00106.

viewing OVDs as a serious competitive threat. Facing the prospect of the denial of, or disadvantageous terms for, NBC Universal's content, companies would have less incentive or fewer resources for experimentation. Likewise, Comcast, subject to lessened competition, would have a reduced incentive to innovate.

As *Comcast* demonstrates, the impact of conduct or a transaction on innovation plays a central role in the Division's competitive analysis.[17] Innovation drives our economy's growth and, in particular, has revolutionised certain media sectors. The suppression of innovation, in at least one commentator's view, "very likely produces a far greater amount of economic harm than classic restraints on competition".[18] Appropriately, then, the Division carefully scrutinises activity that has the potential to do so.[19]

The types of conduct that can suppress innovation are manifold. For example, in certain circumstances, most favoured nation clauses can dampen innovation, among other anti-competitive effects,[20] and the Division has a watchful eye focused on their potential misuse. For instance, the *Comcast* decree prohibits the use of agreements that "require that Defendants are treated in material parity with other similarly situated MVPDs" when they undermine the decree.[21] The United States currently is challenging a dominant firm's use of most favoured nation clauses in a matter that is pending in the Eastern District of Michigan.[22]

Because mergers "come in a variety of shapes and sizes", effective remedies also come in a wide variety of shapes and sizes

A remedy that meets the case

The recently updated Antitrust Division Policy Guide to Merger Remedies explains that, because mergers "come in a variety of shapes and sizes", effective remedies "also come in a wide variety of shapes and sizes".[23] The touchstone principle, of course, is that "a successful merger remedy must effectively preserve competition in the relevant market", and, to accomplish that, "a remedy needs to be based on a careful application of legal and economic principles to the particular facts of a specific case".[24] Conduct remedies, the Policy Guide notes, "often can effectively address anti-competitive issues raised by vertical mergers".[25]

17 See also Complaint Paragraph 39, *United States* v. *Google Inc*. No 11-cv-00688 (DDC 8th April, 2011) (alleging that Google's acquisition of ITA would reduce travel site innovation as ITA's collaborations with travel sites had produced a variety of fight-search features).
18 Herbert Hovenkamp, "Restraints on Innovation", 29 *Cardozo L Rev*, 247, 253-54 (2007).
19 See, generally, *US Dep't of Justice & Fed Trade Comm'n, Horizontal Merger Guidelines* Section 6.4 (2010) (explaining how innovation factors in the Division's analysis of horizontal mergers).
20 See, for example, Competitive Impact Statement, *United States v Delta Dental Plan*, No 94-1793 (D Ariz 30th August, 1994) (stating that most-favoured nation clauses inhibited the development of dental coverage alternatives).
21 See Final judgment section VC 3, *Comcast Corp*, No 11-cv-00106.
22 Complaint at 1, *United States* v. *Blue Cross Blue Shield of Mich*, No 10-cv-14155 (ED Mich 2010) (alleging that most-favoured-nation clauses harmed competition in the sale of health insurance by inhibiting defendant insurer's competitors from negotiating competitive contracts with hospitals).
23 *US Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies* 2 (2011).
24 *Ibid*, at 1-2.
25 *Ibid*, at 2.

The *Comcast* decree illustrates this fact-specific approach to remedies. In this matter, the Division looked for a remedy that, among other things, would prevent Comcast from using its control of NBC Universal's programming to disadvantage its rivals in anti-competitive ways.[26] Given the furry of experimentation and the rapid pace of change in the industry, finding a remedy that would be quickly and readily administered and would avoid excessive entanglement with the competitive process was particularly important.[27]

The consent decree contains a number of conduct remedies that meet these goals. For example, the decree requires the Joint Venture to license certain content to OVDs, specifically (i) content the Joint Venture licenses to MVPDs on economically equivalent terms and (ii) content comparable to content that the OVD licenses from one of the Joint Venture's programming peers.[28] This remedy adopts a benchmarking approach, using existing contracts to establish the Joint Venture's obligations to license to OVDs. This approach approximates the terms that NBC Universal would have agreed to had the Joint Venture not changed its incentives and spares the Division the difficult task of setting licence terms.[29]

Additionally, if an OVD and the Joint Venture reach an impasse in negotiating a licence, the OVD may apply to the Division for permission to submit the dispute to commercial arbitration.[30] Arbitration can speed the enforcement, and improve the effectiveness, of the licensing requirement, avoiding the expense and length of judicial enforcement of the decree and entrusting dispute resolution to arbitrators with relevant expertise.

The Division included a similar provision in the consent decree in the Google/ITA merger. That consent decree included a provision requiring Google to continue licensing QPX, ensuring that Google will not diminish competition in the comparative fight search market by denying its rivals access to the software. With the Division's permission, disputes over fees can be submitted to arbitration, where the dispute can be resolved quickly by an impartial third party using existing contracts as benchmarks.[31]

The *Comcast* decree works in tandem with relief obtained by the FCC, a regulatory body with authority to review the transaction under a public-interest standard. The Division worked closely with the FCC, sharing expertise and insight and working toward a common end of identifying a remedy that protects competition and consumers. Following its review, the FCC approved the transaction subject to certain conditions, including a requirement that the Joint

26 See *ibid* at 5 (explaining that "vertical mergers can create changed incentives and enhance the ability of the merged firm to impair the competitive process" and that, in such circumstances, "a remedy that counteracts these changed incentives or eliminates the merged firm's ability to act on them may be appropriate").

27 See *ibid* at 7 n.12 ("In determining appropriate conduct remedies, the Division appreciates that displacing the competitive decision-making process widely in an industry, or even for a firm, is undesirable. The Division is not a regulatory agency charged with determining how competition should occur in a particular industry.").

28 See Final Judgment sections IVA-B, *United States* v. *Comcast Corp*, No 11-cv-00106 (DDC 1st September, 2011).

29 See *US Dep't of Justice*, note 23 above, at 14-15 (discussing non-discrimination and mandatory-licensing provisions).

30 See Final judgment Section IV C, *Comcast Corp.*, No 11-cv-00106.

31 See Competitive Impact Statement at 10-13, *United States* v. *Google Inc.*, No 11-cv-00688 (DDC 8th April, 2011).

Venture license all of its programming to MVPDs, enhancements to its existing process for commercial arbitration for licensing disputes involving MVPDs, and a requirement that the Joint Venture license content to OVDs on reasonable terms, along with an arbitration mechanism for resolution of any resulting disputes.

The Division's decree accounts for the terms of the FCC order. The order protects MPVD access to the Joint Venture's programming, making it unnecessary for the Division to include similar terms in its decree. As noted above, the Division's decree permits an OVD to apply to the Division for permission to submit a licensing dispute to commercial arbitration. However, under the decree the Division normally will defer to the FCC process, authorising arbitration only when necessary to advance its competitive objectives. In this matter, as in others, close co-operation with the expert regulator best advanced the end of protecting competition.

We can expect that, in the future, media sectors will witness new periods of rapid or revolutionary change, with new technologies or other innovations challenging reigning paradigms. We can also expect, if the past supplies any lessons, that incumbents will react in different ways, sometimes responding to the new competitive challenge with their own innovations, sometimes with anti-competitive stratagems, sometimes in both or other ways. The Antitrust Division stands ready to police any efforts to short-circuit the competitive process, applying sound principles of antitrust enforcement.