

308. Moreover, to ensure that the results of its ten city study were not anomalous, the Commission has calculated the average DI for a different set of randomly selected markets, both large and small. The average DI for markets in which there are 20 television stations is 612; the average DI for markets in which there are 15 television stations is 595; the average DI for markets in which there are 10 television stations is 635; and the average DI for markets in which there are 5 television stations is 911—all well below the point at which one would characterize them as highly concentrated if one were using the analogous HHI to measure competition in the market.

309. The Commission believes the analogy to the HHI is apt. The HHI is an indicator of economic concentration; it provides an analytical framework for determining when and if an entity or group of entities is likely to wield market power in an economic market. The Commission's DI, which was inspired by and modeled after the HHI, similarly is an indicator of viewpoint concentration. Using the DI as an analytical tool, the Commission can assign approximate weights to different types of media outlets, account for the diversity effects of commonly-owned properties, and measure relative concentration between and among markets. The DI can help the Commission, therefore, identify the point at which an entity or group of entities is likely to wield inordinate power in the marketplace of ideas.

310. Although competition theory does not provide a hard-and-fast rule on the number of competitors necessary to ensure that the benefits of competition are realized, a market that has ten or more equally-sized firms normally can be considered fully competitive.²⁴ A 1000 DI correlates to market in which there are roughly ten firms with approximately equal market power. An 1800 DI would correspond to a market with six roughly equal voices. Using the Commission's DI analysis of sample markets, it notes that it is not until it reaches markets with three or fewer licensed television stations that the average DI exceeds 1000, the point at which the market normally would be characterized as moderately concentrated for competition purposes.²⁵

²⁴ A market with 10 or more equally-sized firms has an HHI of 1000 or less. DOJ/FTC regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.

²⁵ The average DI for markets with three television stations is 1027; the average DI for

311. The Commission's DI analysis of these sample markets, however, is not the end of its inquiry. Because of the importance the Commission associates with maintaining diversity among the three principal platforms—newspaper, radio and television—for the expression of viewpoint at the local level, and because these same three outlets produce a large share of local news content, the Commission previously has used a “voice test” focused on one or more of these outlets for measuring diversity. In larger markets, the Commission expects that the number of distribution outlets for local news content will be larger, and that consumers will have greater access to secondary outlets for news and information.

312. Finally, the Commission is concerned not merely with the absolute level of diversity that might already exist in any market or type of market, but also with the degree to which diversity might be sacrificed as a result of likely transactions. Accordingly, in defining “at-risk” markets, the Commission has used its DI and sampled the effect of transactions, in large and small markets, involving heavily used sources of local news and information. In so doing, the Commission has focused on the types of transactions that most likely will lead to large DI changes and rapid concentration. The Commission's line-drawing effort is informed by the approach the DOJ has taken in assessing competition issues. Although DOJ policy is to review any transaction in a moderately concentrated market that would result in a change in HHI of 100 points or more, the Commission has found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more point HHI change. Based on the Commission's analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations.

313. These changes, of course, reflect approximations based upon sample data and are provided only to be illustrative of the diversity losses that can occur as a result of cross-media combinations in small markets. Nonetheless, based on all of the foregoing, the Commission concludes that a market with the equivalent of ten or more equally-sized

markets with two television stations is 1316; and the average DI for markets with a single television station is 1707.

firms cannot be regarded as even moderately concentrated for diversity purposes. In light of that conclusion, and in consideration of the properties of small markets and on its analysis of potential transactional impacts in those markets, the Commission concludes that markets with three or fewer licensed television stations should be regarded as “at-risk” markets for purposes of diversity concentration. Markets of that size, the Commission expects, will be moderately concentrated and subject to rapid concentration if cross-media combinations are created involving radio, television and/or newspaper properties.²⁶ Accordingly, the Commission will prohibit certain cross-media combinations involving those properties in markets with three or fewer television stations.

314. *Local Cross-Media Limits in At-Risk Markets.* With respect to the limits themselves, the Commission treads lightly in view of the sensitive First Amendment interests at stake and the deregulatory purpose of Section 202(h). The Commission's intent is to draw its rules narrowly, focusing on those transactions that are likely to have a substantial impact on the diversity of voices available in the market. The record shows that broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information. They are, accordingly, the focus of the Commission's diversity concerns, and the Commission declines to impose any cross-media limit on transactions involving media properties other than radio, television, and newspaper outlets.

315. Further, the Commission is establishing rules of nationwide applicability. The Commission desires, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics. The Commission recognizes that, in any given market, the lines the Commission draws here may appear under- or over-inclusive. Again, although they have a methodological foundation in the DI, these judgments are based on agency expertise and experience dealing with broadcast markets and the media

²⁶ A market with an HHI of more than 1800 is regarded as highly concentrated. We noted above that a DI of 1800 would correspond to six equally-sized “voices.” Because of the amorphous nature of diversity as an interest and the difficulty of measuring it with precision, we decline to draw an absolute line prohibiting transactions that would take a market beyond the 1800 DI (i.e., six voice) level. The rules we are adopting herein, however, are intended to protect against markets becoming highly concentrated—in a qualitative sense—for diversity purposes.