

Spanish-language television and radio. The Complaint, however, makes no such factual allegation. The proposed market differs significantly from the one alleged in the Complaint and would require markedly different supporting facts to be justified. Moreover, market definition is but one step toward the ultimate goal of determining competitive effects. The Complaint alleges that the transaction would likely cause anticompetitive effects with regard to Spanish-language radio (Complaint ¶¶ 24–27); it makes no such allegations regarding a combined television and radio market. So, SBS asks not only that the court redraft the complaint to include an additional market but also that the court impose a competitive effects analysis based on that new market to find cognizable harm.

As discussed above, the United States is entitled to deference as to the case it brings, and, as *Microsoft* makes clear, it is not proper during a Tunney Act review “to each beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made.” *Microsoft*, 56 F.3d at 1459. The Tunney Act does not authorize the Court to consider allegations not raised in the Complaint based on concerns raised by a member of the public. Accordingly, SBS’s suggestion that the Complaint is defective for failing to allege harm in a combined Spanish-language television and radio market should be rejected as a matter of law.

#### The CIS Properly Addresses the Market Effects Relevant to the Allegations in the Complaint

AAI takes the position that the United States has not satisfied its requirements under the Tunney Act because the CIS fails to identify the competitive effects of the transaction in an “overall” Spanish-language media market and fails to justify the United States’ decision not to challenge the transaction based on those purported effects. This position is not valid. Not only is the Court’s review limited to the case actually brought by the United States, there is no requirement that the United States disclose its decision-making as to cases it chooses not to initiate. Rather, the Tunney Act provides that the United States must inform the public about the case it did initiate and explain how the proposed decree serves to resolve the competitive effects alleged in the Complaint.

The purpose of a CIS is to provide the public with “basic data about the decree” to allow for informed comment. See generally *United States v. Microsoft*

*Corp.*, 215 F. Supp. 2d 1, 14–15 (D.D.C. 2002) (describing legislative history relating to CIS) (quoting 119 *Cong. Rec.* at 3452 (1973) (statement of Senator Tunney)). To that end, the Tunney Act provides that the CIS shall “recite” the following:

(1) The nature and purpose of the proceeding;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) The remedies available to potential private plaintiffs damages by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) A description of the procedures available for modification of such proposal; and

(6) A description and evaluation of alternatives to such proposal actually considered by the United States. 15 U.S.C. 16(b). The United States’ CIS has satisfied all of these requirements. More specifically, the CIS explains the nature and purpose of the proceeding (at 1–3), describes the events that gave rise to the alleged violation of the antitrust law (at 3–9), explains the proposed Final Judgment (at 9–15), explains the remedies available to potential private litigants (at 15), explains the procedures available for modifying the proposed Final Judgment (at 15–16), and describes and evaluates alternatives to the proposed Final Judgment (at 16–17). There is simply no requirement that the Government identify purported effects it did not allege in the Complaint or explain why it did not make certain allegations in the Complaint. Accordingly, AAI’s challenge to the sufficiency of the CIS fails.

#### 3. The Government’s Investigation Did Not Demonstrate the Likelihood of Substantial Harm in an “Overall” Spanish-Language Media Market

Although the United States has no legal obligation to address matters raised in the Complaint, we note that the United States conducted an extensive inquiry into the issue of whether the combination of Univision’s Spanish-language television stations with HBC’s Spanish-language radio stations in geographic regions where both are located was likely to cause significant anticompetitive effects. The inquiry included numerous interviews

of a wide range of advertisers and review of over a million pages of documents provided by the defendants and other entities. In the end, the evidence did not support the claims proffered by the comments.

a. *The evidence did not justify a combined media market for advertisers.* The United States has traditionally treated radio and television as separate antitrust markets. Past investigations involving general-market (English-language) media mergers revealed that few advertisers consider the two media to be close substitutes; rather, most advertisers viewed the two media as separate or complementary products given the qualitative differences between the two media.<sup>3</sup> In examining whether this “separate market” conclusion applied in this transaction, the United States recognized that Univision has a strong presence in Spanish-language television and that, in certain geographic markets, there are a limited number of other Spanish-language television stations with ratings that would be attractive to advertisers trying to reach Spanish-language viewers. Nevertheless, the evidence garnered in this investigation showed the same qualitative differences between television and radio that exist for general-market advertisers also exist for Spanish-language advertisers. In the end, the investigation did not produce sufficient evidence to support the proposition that a significant number of advertisers considered Spanish-language television and Spanish-language radio to be sufficiently interchangeable to support the “combined” market proposed by the comments.<sup>4</sup>

b. *The United States considered non price competition.* AAI also argues that the United States should examine indicia of harm other than price, such as quality and innovation. AAI cmt. at 4–5. The United States, in fact, considered such indicia during this

<sup>3</sup> See, e.g., Complaint ¶¶ 11–14, *United States v. Clear Channel Communications*, No. 1:00CV02063 (D.D.C. filed Aug. 29, 2000); Complaint ¶¶ 34–41, *United States v. Chancellor Media Company, Inc.*, No. CV–97–496 (E.D. N.Y. filed Nov. 6, 1997); Complaint ¶ 12, *United States v. EZ Communications, Inc.*, No. 1:97CV00406 (D.D.C. filed Feb. 27, 1997).

<sup>4</sup> SBS’s submission does not provide a basis to establish a combined Spanish-language television and radio market. The letters that SBS attached to its comment as Exhibit A for the most part discuss how certain advertisers depend on Spanish-language media (a point with which the United States does not disagree). Only two of the letters, however, discuss the interchangeability of Spanish-language television and radio (May 27, 2003 letter from Castor A. Fernandez; May 27, 2003 letter from Caballero TV & Cable sales); the rest are silent on the issue.