

separate markets, in that there are so many sources of information for English-speakers that diversity of sources has not appeared to rise to an antitrust concern. But here we are potentially face with a different situation. Should television and radio directed at a Spanish-speaking audience be deemed a relevant market, not on the basis of competition for advertising but on the basis of competition for the consumer's attention? Even though the merger, after the divestiture of overlap radio markets, will arguably not increase concentration in either the television or the radio market, will it reduce in a significant way the diversity of sources of political and cultural information available to the Spanish-speaking consumer? This also raises the question of the role of other aspects of Spanish-language media, such as newspaper publishing and the Internet, which are not discussed in the CIS. An appropriate larger Spanish-language market should be analyzed not only in traditional (advertising) terms but also in terms of diversity of content sources.³

II. The Hypothetical of the Dominating Voice

Consider the following hypothetical. There is a substantial group of Americans who only speak Spanish and whose sources of information are limited to Spanish-speaking TV, Spanish-speaking radio, and Spanish-speaking newspapers. A single corporation by acquisition gains control over all three media. The head of that corporation would be in the position to wield enormous political and economic influence by determining what the Spanish-speaking community will know and believe. He or she could determine what political candidates will gain exposure to the Spanish-speaking electorate and whether that exposure will be positive, negative, or neutral. Being able to sway a substantial part of the Hispanic vote could determine the outcome of local, state, and national elections and the owner of this political power would be in position to make deals with a political party and with an Administration. The same corporation could dramatically influence within the Spanish-speaking community which cultural trends, products and services will be ignored, denigrated or positively portrayed, thereby having a significant impact on the economy. This is the Hypothetical of a Dominating Voice.

Are the assumptions of this hypothetical far removed from the reality of the present acquisition?⁴ Aside from the distinction that

the present merger does not involve newspapers, one can not tell from the CIS because the implications of putting the leading Hispanic radio and TV stations under the same corporate control is not addressed. In the section on Alternatives to the Proposed Final Judgment, we are only told that the Department considered a full trial on the merits and a proposal by the defendants for placing Entravision stock into a long-term trust.

Having advised the public that the leading Spanish-language TV conglomerate was acquiring the leading Spanish-language radio company, the DOJ has the Tunney Act obligation to explain why it has made the determination that this highly suggestive scenario is of no antitrust concern. The fact that there are relevant antitrust markets for Hispanic radio and Hispanic TV does not preclude the possibility that in certain circumstances there may also be a larger relevant antitrust market, depending on what types of anticompetitive effects one is concerned about. There is no inconsistency in being concerned both with advertising rates in radio markets and diversity of producers/editors of content in a more general market for information or specific categories of information.

Let us be more precise about what information is lacking.

1. What proportion of Spanish-speaking consumers in the U.S. are completely or highly dependent upon Spanish-language sources of information? (Call this the "highly dependent consumer market.")

2. What proportion of the highly dependent consumer market pre- and post-merger depend on the merging parties as a principal source of information?

3. What options apart from Univision and HBC are available to the highly dependent consumer market, pre- and post-merger?

4. Using a variety of measures (e.g., advertising dollars, number of message recipients, contact hours), how substantial are these options in comparison to Univision and HBC? What are the relevant market shares and HHI's?

We recognize that these are not easy questions to answer, and that the answers will depend on the assumptions made about such matters as the definition of 'highly dependent'. Nevertheless, with answers to these questions and explicitness about the assumptions used, one can begin to evaluate whether the Hypothesis of a Dominating Voice represents a realistic threat.

15% do not speak the language well. Spanish is said to be the language most frequently spoken by nearly 75% of adults in the top ten Hispanic metropolitan areas. If these figures are approximately correct, there appears to be reason to believe that at least a significant section of the Spanish-speaking community in the U.S. is highly dependent on information it receives in Spanish and that English is in these situations an inadequate substitute. There are also studies demonstrating that commercial information conveyed in Spanish is far more persuasive to this group than information conveyed in English, even among those who are bilingual. Arguably, the same would be true of political information.

III. Protecting the Public Interest Requires Analysis of the Impact of This Acquisition on Consumer Choice

Based on what is said in the CIS, there is no evidence that the DOJ has considered anything other than the probability of short-term price increases. Why no discussion of such other traditional antitrust concerns as the effect on consumer choice?⁵ There have been many antitrust cases in which non-price factors were considered.⁶ As one example, in *United States v. Philadelphia National Bank*, the Court expressed a concern with possible adverse effects of a bank merger on "price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services" * * *⁷

Theories of possible antitrust liability in First Amendment-related cases come from many reputable sources. For example, Robert H. Lande and Neil W. Averitt have argued that consumer choice is no less a goal of antitrust than competitive pricing.⁸ Maurice E. Stucke and Allen P. Grunes, two DOJ attorneys, have argued that it is proper to look beyond price effects to "the marketplace of ideas" in order to consider non-price dimensions of economic competition, such as diminished quality and choice.⁹ Joseph Farrell, a former Chief Economist for the Antitrust Division, argued that price is merely a synecdoche (a part representing the whole) for what we desire from competition (i.e., innovation, quality, and price), and that it does not always adequately represent the package of desirables.¹⁰ Robert Pitofsky has argued that non-economic political values such as the First Amendment can be relevant and may justify a higher degree of scrutiny in certain cases.¹¹ FTC Commissioner Thomas Leary has argued that diversity is an appropriate goal of antitrust.¹²

⁵ Although the Federal Communications Commission has the opportunity to stop this merger on "public interest" grounds, this possibility would not relieve the Department of Justice from fully considering legitimate antitrust theories of competitive harm that coincidentally have the benefit of protecting First Amendment values.

⁶ See Robert H. Lande, "Consumer Choice and Antitrust," 62 U. Pitt. L. Rev. 503, 508-512, and cases cited therein.

⁷ 374 U.S. 363, 368 (1968).

⁸ "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713, 715 (1997).

⁹ "Antitrust and the Marketplace of Ideas," 69 Antitrust L.J. 249 at 297 (2001).

¹⁰ "Thoughts on Antitrust and Innovation," Speech to the National Economists Club, Washington, DC (Jan. 25, 2001), at <http://www.usdoj.gov/atr/public/speeches/7402.pdf>.

¹¹ Robert Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051 (1979).

¹² See Thomas B. Leary, "The Significance of Variety in Antitrust Analysis," based on a speech delivered at the Steptoe & Johnson 2000 Antitrust Conference, on May 18, 2000, and available at <http://www.ftc.gov/speeches/leary/atljva4.htm>.

"It does not make sense to simply ignore the issue, however, because for many consumers variety may be a more significant issue than price. Consider the example of two chains of bookstores

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³ It is true that for much of radio and TV, the consumer is not directly charged for consuming the product, although higher advertising costs may be passed on to the consumer in product prices and the consumer has opportunity costs that represent a kind of price to be paid for consumption. Nonetheless, producers of, e.g., news, are in competition with one another not only to gain advertisers, but to gain the consumer's business. Compare this with doctors who compete with one another for their patient's business, even though the medical bill may be paid by a third party. Would not the importance of consumer choice in medical care justify an antitrust case if the only two medical practices in a community were to merge, even if the merger would be guaranteed by the doctors not to affect the fees charged to health insurers?

⁴ According to various sources, at least 9% of Hispanics do not speak English at all, and at least