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Canadian agency considers digital impact on traditional media in Postmedia deal

- Product market definition unchanged
- 'Meaningful' efficiencies recognized

Canada's Competition Bureau (CB) displayed a continuing shift in its framework for analyzing media mergers by not challenging Postmedia Network's proposed acquisition of Sun Media properties from Quebecor, lawyers told PaRR.

The CB issued a No Action Letter (NAL) on 25 March along with a statement saying the proposed CAD 316m (USD 249m) transaction is "unlikely to result in a substantially lessening or prevention of competition."

The regulator reached that decision even though the merger gave the company ownership of more than one daily newspaper in a number of major cities in Canada.

The regulator said it had input from "hundreds of market contacts in the relevant markets" and reviewed a "substantial" amount of evidence during its "extensive five-month review."

As well as determining that there was "a lack of close rivalry" between newspapers in Postmedia's stable and those it would be acquiring, the agency noted existing competition from free local daily newspapers and "the increasing competitive pressures from digital alternatives in an evolving media marketplace."

But while the CB recognized the impact of online media, the regulator stopped short of knocking down any of the walls for product market definition, something antitrust lawyers had been watching for.

"The Commissioner [of Competition] did not conclude that digital and print media were in the same market," said Michael Koch, an antitrust lawyer at Toronto-based Goodmans and a member of the legal team representing Postmedia before the CB. In keeping the two markets separate in its analysis, the CB position largely reflects the stance taken in other jurisdictions, notably in the United States and Europe, said Koch.

Koch said while the lack of close rivalry appears central in the CB analysis in a position paper by the agency, the statement indicates that the regulator did focus on the issue of to what extent being able to advertise in digital markets is a substitute for print markets. In the end, the CB stated that non-newspaper media (primarily digital media), are "more likely complements than true substitutes for newspapers, especially for local advertising."

Another antitrust attorney said regulators have been increasingly recognizing the impact of the Internet and digital media in decisions but have been loath to include all in the same market,

even though advertisers consider the total number of views in their calculations so as not to create any precedent for now. This indicates media transactions will be considered on a “case-by-case basis.”

The lawyer also said the fact that the CB mentioned specifically that it had taken into account “persuasive submissions” by Postmedia that any substantial lessening or prevention of competition “would be offset by meaningful cognizable efficiencies” showed recognition for the importance of the recent Tervita ruling by Canada’s Supreme Court even if not directly applicable in the case.

In that case, the court ruled that the burden is on the CB to quantify anticompetitive effects when it determines there is a substantial lessening or prevention of competition, and that where the regulator cannot, even minimal efficiencies can justify a transaction.

by Kathryn Leger in Montreal