

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS

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The Presidential Campaign

Antitrust policy is one of the issues on which the two presidential candidates appear to disagree, although it has not become a significant campaign issue. Governor Dukakis has issued a statement on merger and acquisition policy in which he advocates a more activist government policy in preventing anticompetitive mergers, basically through enforcement of the *Clayton Act*. His position is reflected in the Democratic Party platform, which states:

We further believe in halting such irresponsible corporate conduct as unproductive takeovers, monopolistic mergers, insider trading and golden parachutes for executives by reinvigorating our anti-trust and securities laws, reviewing large mergers, and discouraging short-term speculation taking place at the expense of long-term investment.

It can probably be inferred from this that Governor Dukakis and the Democratic Party are concerned about the mergers and acquisitions in recently deregulated industries (readers will recall earlier reports in this column about mergers in the airline and railroad industries).

The Republican Party platform takes credit for the deregulation accomplished during the tenure of the Reagan administration. It further states:

Consistent with the maintenance of a competitive market place, we are committed to breaking down unnecessary barriers to entry created by regulations, statutes and judicial decisions, to free up capital for productive investment.

In addition, on the subject of public services, it states:

We resolve to defederalize, denationalize, and decentralize government monopolies that poorly serve the public and waste the taxpayers' dollars. To that end, we will foster competition wherever possible. We advocate privatizing those government assets that would be more productive and better maintained in private ownership.

Merger Policy

In a related development, in one of his last acts as Attorney General, Edwin Meese III approved the formation of a "joint operating agreement" for the two daily newspapers in Detroit, *The Detroit News* and *The Detroit Free Press*. In doing so, he rejected the recommendations of both the Antitrust Division and an administrative law judge. Application for a joint operating agreement had been made by the two newspapers in 1986 under the *Newspaper Preservation Act* of 1970, which permits such agreements for failing newspapers. They are the only two daily newspapers in Detroit and are owned by the two largest newspaper groups in the United States, Gannett (which owns the *News*) and Knight-Ridder (which owns the *Free Press*).

The administrative law judge found, and the Attorney General agreed, that the two papers had engaged in fierce competition over the last ten years as each pursued the goal of dominance of the local market by charging the lowest circulation and advertising prices in the country at the expense of current profits. Neither paper had yet succeeded, and the *Free Press* had operated consistently at losses greater than those of the *News*, which was more successful in terms of circulation, revenue and lineage measures.

The Attorney General found that the *Free Press* met the definition of a "failing newspaper" under the *Act* and therefore approved the merger. He did this notwithstanding the fact that the four prior applications under the *Act* (all of which were approved) involved market settings in which a

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demonstrably weaker newspaper was experiencing mutually reinforcing market trends of declining advertising revenues and circulation, creating a "downward spiral" phenomenon that in all probability could not be reversed. It was generally agreed that this was not true of the Detroit market. Mr. Meese based his decision on the fact that the *Free Press* had operated for years at a loss and on the proposition that "as all seemed to acknowledge..., the *Free Press* is unable

unilaterally to restore the paper to a profitable position...." In the Attorney General's view, the *Free Press* could not raise its circulation prices because the *News* could not be expected to follow along. He was thus convinced that the failure of the *Free Press* was "probable." The policy and purpose of the *Act* would be served, he said, because approval of a joint operating agreement in this case would avoid a "near certain newspaper monopoly."
