



The American Antitrust Institute

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AMERICAN ANTITRUST INSTITUTE¹ DISHEARTENED BY DOJ'S APPROVAL OF XM-SIRIUS MERGER

(Washington, DC) The American Antitrust Institute today described the Antitrust Division of the Department of Justice's (DOJ) approval of the proposed merger of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio as a reward to the companies for managing to squelch competition between them.

The AAI had pushed the Antitrust Division to conclude that the proposed XM- Sirius merger violates Section 7 of the Clayton Act which requires courts to predict when the effect of a merger "*may* be substantially to lessen competition, or to tend to create a monopoly." The DOJ stated that the merger will not be stopped "because the evidence did not show that the merger *would* enable the parties to profitably increase prices to satellite radio customers." The AAI is alarmed that, with this press release, the DOJ has created a higher standard - replacing "may" with "would" - and focusing only on the effect on prices when such other goals of antitrust as diversity, choice, and innovation are either ignored or shortchanged. Moreover, the DOJ statement suggests it is using a lower standard for alleged efficiencies, accepting them if they "could benefit consumers."

"The DOJ should enforce the law that Congress wrote, not the law they prefer," said AAI President Bert Foer.

The critical decision in this case involves market definition, which the DOJ concluded to be much broader than satellite radio and include a variety of sources of audio entertainment. The AAI believes the market should have been more narrowly defined as satellite broadcast radio. The AAI acknowledges that satellite radio competes to some degree with other modes of entertainment communication. However, the satellite market has many special qualities that set it apart and the AAI believes these qualities have not been given proper weight or consideration in the ruling.

The DOJ reported that it found there is already no competition between the companies in the sale of equipment and service for consumers purchasing cars with pre-installed satellite radios because the companies have long-term exclusive deals with the individual car manufacturers. The AAI fears that this argument results in a DOJ endorsement of a merger to monopoly as long as a large portion of the parties' business is accounted for by long-term contracts.

¹ The American Antitrust Institute is an independent Washington-based non-profit education, research, and advocacy organization. Its mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. For more information, please see www.antitrustinstitute.org. A list of contributors is available on request. The AAI White Paper on this merger is at <http://www.antitrustinstitute.org/Archives/xm.ashx>

The DOJ also stated that XM and Sirius do not compete for each other's existing subscribers because there is no interoperable receiver that will play both XM and Sirius offerings. The AAI finds this to be a particularly weak argument because the providers themselves never fully complied with the Federal Communications Commission (FCC) mandate to develop such a receiver. The DOJ acknowledged that the companies do compete for consumers who purchase aftermarket receivers, but failed to take into account the intensity of the head-to-head competition in this channel, especially on equipment pricing and innovation.

The matter will now proceed at the FCC, where the merging parties have the burden of establishing that competition in satellite radio service no longer serves the public interest. Given the different standards and concerns of the FCC, the AAI believes it is perfectly appropriate for the FCC to reach a different conclusion from the DOJ.

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