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Court substituted gut instinct for robust anti-competition analysis

By Jonathan Rubin and Timothy LaComb

Following a two-week trial, the Southern District of New York ruled against attorneys general from 13 states and the District of Columbia who sought to enjoin T-Mobile's acquisition of rival wireless provider Sprint. Because the U.S. Department of Justice had previously determined the merger would be unlawful absent conditions negotiated with the parties, the primary issue at trial should have been whether the agreed-to behavioral and structural remedies actually cured the competition problems flowing from the merger. However, despite issuing a 170-page order on Feb. 11, the court largely sidestepped this fundamental issue.

To briefly recap, the DOJ determined the merger was unlawful absent conditions because it would reduce competition between suppliers of nationwide mobile wireless services, which, in turn, would threaten the benefits produced by that competition (e.g., lower prices, better service, and increased innovation). The DOJ negotiated significant behavioral and structural remedies that

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Pedestrians outside a T-Mobile store in New York. A federal judge on Feb. 11 ruled in favor of T-Mobile's takeover of Sprint in a deal that would combine the nation's third- and fourth-largest wireless carriers.

require T-Mobile to provide third-party Dish Network (a satellite television provider) with access to T-Mobile's network for seven years, to make available to Dish at least 20,000 cell sites and hundreds of retail locations, and to divest Sprint's prepaid business and certain spectrum assets to Dish. The DOJ believed these conditions would preserve competition by making Dish a viable mobile wireless services competitor. The court was essentially tasked with scrutinizing whether the DOJ was correct.

Courts analyzing a merger subject to a "fix" must apply an appropriate analytical framework. This is particularly true where, as here, the set of remedies includes significant behavioral conditions that require ongoing cooperation between rivals. In these instances, courts should: (i) determine the feasibility of any behavioral remedy and its shortcomings in light of relevant experience; (ii) identify and assess the competition problems caused by the merger; and (iii) determine whether, based on legal and economic principles, the proposed remedies are likely to cure the problems and preserve market competition. Only if a court determines the proposed fix will cure the competition problems does it need to assess the likelihood that the parties will implement their behavioral commitments.

Unfortunately, the order gave short shrift to such an analysis. Instead, the court simply adopted the presumption that the merger was anticompetitive because of the increased market concentration reflected in the HHI index. With that, the court simply declared that plaintiffs had proved their prima facie case without addressing the underlying competition problems identified by the DOJ or why the plaintiffs believe the proposed conditions are inadequate.

The court then assessed the proposed remedies. The court framed the issue as whether the parties were likely to implement the merger conditions rather than whether the conditions were adequate. What should have been a methodical analysis into whether the plaintiff States had reason for concern turned into a decision involving "competing crystal balls," credibility contests, and, ultimately, the court's gut business instinct. After concluding the parties would likely fulfill their commitments, the court ruled that the defendants

had rebutted the plaintiffs' prima facie case; the proposed remedies, the court said, "significantly reduce the concerns and persuasive force of [the plaintiffs'] market share statistics."

Only after it accepted the proposed remedies did the court substantively address some of the competition issues identified by the DOJ and plaintiffs, including the potential for price increases and the heightened risk of coordination from reducing the number of national competitors from four to three. But rather than meaningfully analyze whether the proposed remedies would cure these risks, the court appeared to rule the merger would not result in higher prices or increase the risk of coordination, even without the proposed remedies, thereby directly contradicting the DOJ.

By sidestepping the underlying competition problems, the court precluded meaningful assessment of its decision. For example, failing to identify what made the merger illegal in the first place prevented the parties from understanding which conditions the court determined were necessary to transform the merger from unlawful to lawful or evaluating whether the court's gut instinct concerning the post-merger market was correct.

This approach also left several important issues inadequately answered. The court did not explain how DISH will transform into Sprint's competitive equivalent despite starting with less than a quarter of Sprint's current client base (9 million compared to 40 million) and operating as an MVNO in the smaller prepaid segment for at least the next several years. The court's confidence that DISH would develop into a significant rival while operating as an MVNO seemed to contradict other findings in its order, including that "MVNOs face significant constraints on their ability to compete independently with MNOs and thus lack the ability to significantly constrain MNOs."

Likewise, the court did not detail how Dish would attract customers to a 5G network in 2023 that, at best, will cover just 70% of potential subscribers. And again, this assumption appears to contradict other portions of the order, particularly the court's conclusion that Sprint would not remain a viable competitor if it neglected a small portion of its network because it is "highly improbable" that consumers "would be satisfied with a network that works in some places but not others."

Finally, the court failed to assess realistically the likelihood of success of the behavioral remedies. Had it done so, it would have observed that the head of the DOJ's antitrust division, Makan Delrahim, recently stated that behavioral remedies should be disfavored because they often do not protect competition and can serve to replace competition with regulation. Similarly, recent real-world examples highlight the ineffectiveness of long-term behavioral remedies (e.g., Live Nation/Ticketmaster and Comcast/NBC Universal). Finally, DISH has a history of failing to meet commitments made to the federal government concerning wireless network construction deadlines and spectrum use. At minimum, these facts should have more heavily influenced the court's calculation of the likelihood of success of the proposed merger remedies.

This case provides a cautionary tale. It is the rare antitrust case that can be reduced to a credibility contest between testifying witnesses or decided correctly based on the court's gut business instincts. To produce economically coherent and reasonably transparent judicial decisions, courts must apply the appropriate analytical framework when presiding over complex antitrust cases. ■

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