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The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal From the Start

BY MELODY WANG, FIONA SCOTT MORTON April 23, 2021

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The Trump-era DOJ's decision to allow the T-Mobile/Sprint merger will go down as one of the worst merger-enforcement mistakes in decades. This merger will be responsible for transferring billions of dollars in wealth from average Americans to the T-Mobile/Sprint shareholders. To guard against repeating the mistake of T-Mobile/Sprint, we need a strengthened structural presumption, one that statutorily instructs flipping the burden of persuasion to defendants and requires "clear and convincing evidence" to be rebutted.

When the Trump-era DOJ allowed T-Mobile and Sprint to merge in July 2019, it promised the best of both worlds: consumers would benefit from T-Mobile's accelerated 5G deployment *and* retain a fourth wireless provider. To effect the latter, then-AAG Makan Delrahim devised a divestiture that would reposition satellite-TV provider DISH as Sprint's replacement.

Here was his plan: Sprint would sell its prepaid-wireless assets to DISH. These assets included Sprint's 9.3 million prepaid subscribers, its Boost brand, its 800 MHz spectrum licenses, and the Sprint stores and cell towers that the new T-Mobile did not want. DISH would then use these cell sites and its pre-existing spectrum, augmented from the divestiture, to build its own wireless network using never-before-deployed technology. While DISH worked on its complex nationwide build, it could serve its customers by paying for them to roam on the new T-Mobile's infrastructure for seven years.

Not even two years later, Delrahim's plan is already falling apart.

The prepaid customers DISH inherited from Sprint disproportionately buy cheap wireless service, which runs on the old CDMA standard used in 3G networks. In the latest turn of events, T-Mobile announced last month that it would discontinue its CDMA service in January 2022, nearly two years ahead of schedule. With T-Mobile's shutdown, DISH's customers will have to "get new devices, new SIMs, or upgrade via software." DISH now has to take on an unexpected upgrade that will cost hundreds of millions of dollars.

T-Mobile's announcement led DISH CEO Charlie Ergen to denounce the unexpected shutdown as "anticompetitive." DISH has already warned investors that with the shutdown, its trend of bleeding hundreds of thousands of subscribers may soon turn into a hemorrhage.

For T-Mobile, this is great news, since many of the subscribers ditching DISH are bound to turn to T-Mobile's own cheap wireless plan. But for price-sensitive consumers, the forecast is grim: while they could choose between T-Mobile and Sprint before the merger, these dissatisfied customers now effectively face a monopoly provider.

It should come as no surprise that DISH is struggling in the wireless market, and price-conscious consumers are bearing the brunt of harm from the merger's fallout. We knew back in 2011 that T-Mobile and Sprint competed particularly closely in low-cost wireless services. We also knew from DOJ's longstanding Merger Remedies Policy that remedies should not require an entrant like DISH to depend on an incumbent who is a direct rival; it makes perfect sense that T-Mobile would rebel against helping DISH grow into a firm that can compete against T-Mobile itself.

Not only was the DISH divestiture ill-devised, but the T-Mobile/Sprint merger never did pass muster under basic logic. If it was really critical to keep four players in the wireless market—so important that DISH needed to enter—why even let T-Mobile buy Sprint in the first place? Why not just keep the existing fourth player, instead of designing a Rube Goldberg settlement in the hopes that a new player will grow to have the competitive force of Sprint in seven years' time?

These frustrations have fueled heated criticism of the merger. Such critiques are well-placed, as the merger has already produced harm and threatens to wreak more damage. Besides hobbling DISH, T-Mobile will degrade the quality of its service this April by automatically enrolling its subscribers into an aggressive, personalized ad-targeting program. T-Mobile has also signaled to investors that it has become more like its rivals Verizon and AT&T. On an investor call in February, CEO Mike Sievert said, "We've competed mostly on price in the past, if we're honest. Now, we have a premium product."

Translation: the era of aggressive price competition in wireless is over. Looking forward, we can expect T-Mobile, AT&T, and Verizon to nestle into a cozy triopoly that returns immense profits to their shareholders. T-Mobile is already prepared to deliver on this prospect. On March 11, it predicted to investors that its free cash flow will be flush enough to support a $60 billion stock buyback within five years.

Stock buybacks benefit the investor class, whose members are disproportionately the wealthiest people in America; recent surveys show that the top 10 percent of households own approximately 80 percent of all stocks. In contrast, nearly all households across the income distribution buy wireless services, and low-income households particularly favor prepaid plans, a segment where T-Mobile and Sprint had competed vigorously pre-merger. With its latest proclamations to investors, T-Mobile celebrates the fact that its merger will transfer billions of wealth from average Americans to the rich, further widening the chasm between the haves and have-nots. For this reason and many others, the T-Mobile/Sprint deal will go down as one of the worst merger-enforcement decisions in decades.

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In this postmortem, we examine how the deal came to close, and what we might learn from the mistakes made along the way.

The Prosecutor: Dealmaker Delrahim Helming DOJ

DOJ should never have approved the deal in the first place. The T-Mobile/Sprint merger presented a harmful 4-to-3 combination in the critical and well-defined market of mobile wireless services. Four-to-three mergers deservedly raise eyebrows, and evidence from other countries showed that 4-3 mergers in the wireless market would increase prices. Further, the post-merger market shares blasted through the HHI thresholds in the Horizontal Merger Guidelines, making the transaction presumptively anticompetitive. As such, a settlement should never have been on the table.

But after many years of trying to merge, the parties finally found a receptive agency head in Delrahim, the "veteran lobbyist" tapped to be head of the Trump Administration's Antitrust Division. When presented with the deal, Delrahim was eager to refashion the telecom market and less eager to deliver on his charge of protecting consumer welfare.

Delrahim took a series of unorthodox steps. He became a mediator between the parties, helping hold the deal together when tensions between the CEOs ran high. He exchanged text messages with Ergen and advised him on how to secure regulatory approval from the Federal Communications Commission, which also needed to approve the deal. And when the parties closed their transaction in July 2020, Delrahim issued a press release to "congratulate" T-Mobile and Sprint for merging.

Not only did his conduct conflict with his role as the nation's head antitrust enforcer, but the behavioral remedy Delrahim reached in T-Mobile/Sprint contradicted his 2017 statements. Then, with an eye toward signaling his unwillingness to settle in AT&T/Time Warner, he inveighed against behavioral remedies. "[A]t times antitrust enforcers have experimented with allowing illegal mergers to proceed subject to certain behavioral commitments. That approach is fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market." He added, "[I]f a merger is illegal, we should only accept a clean and complete solution." Perhaps Delrahim was conscious of his hypocrisy when he later announced the settlement he had reached in the T-Mobile/Sprint merger, as he was careful to cast it as "structural" and not "behavioral." But because the crux of the settlement is to have DISH roam on T-Mobile's network for seven years, the settlement is behavioral at its core.

Makan Delrahim

Studying the divestiture against the Trump-era DOJ's handling of other antitrust cases sheds additional light. Compare Delrahim's adamant refusal to accept behavioral conditions when the parties proposed them in AT&T/Time Warner—which presented a weaker merits case—with his enthusiasm to strike behavioral conditions in the T-Mobile/Sprint divestiture to DISH—even though this 4-3 merger was presumptively illegal and raised nearly every red flag in the Horizontal Merger Guidelines. Taken together, these two decisions cannot be reconciled on principle.

The Court: Judge Marrero Fails as "Fortuneteller"

Because the Delrahim-led DOJ was derelict in policing the T-Mobile/Sprint deal, a group of states challenged the merger in federal court. In presenting their case, they pointed out flaws in the DISH settlement—chiefly that the divestiture relied on T-Mobile to help DISH grow to scale in wireless, but T-Mobile would have the ability and incentive to cripple DISH.

At trial in the Southern District of New York, Ergen testified that he was confident DISH would receive adequate service from T-Mobile through the roaming agreement, even though new T-Mobile and DISH would compete for wireless subscribers. He offered that DISH had never had a problem with buying services from AT&T, despite AT&T's DirecTV competing head-to-head with DISH's satellite-television offering.

Ergen, however, conveniently omitted the fact that AT&T, after merging with Time Warner, had blacked out HBO and Cinemax for DISH's satellite and Sling TV subscribers. The loss of

AT&T's content contributed to DISH's loss of more than 330,000 subscribers that quarter. Despite this recent experience, Ergen maintained in court that there would be no problem with DISH relying on a direct competitor for a critical input in the mobile-wireless industry it was preparing to enter.

Judge Victor Marrero did pick up on this danger during his questioning at trial, but he ultimately believed the DOJ-appointed monitor and wholesale-price formula would be enough to rein in T-Mobile's incentives. We have now seen that those checks were inadequate. This is no surprise, as economic theory predicts that companies' profit incentives are strong enough to overcome inevitably incomplete contractual restraints.

More generally, Judge Marrero underestimated the strength of the parties' incentives in his assessment of the merger. Instead of accounting for how the merger would facilitate collusion by creating three symmetrical players, for instance, he decided it would be easier to assess witness credibility. Judge Marrero purported to study the executives' behavior and glean "telltale" patterns of truthfulness, concluding that the new T-Mobile would continue to compete vigorously against AT&T and Verizon. In so doing, he placed his faith in the self-serving testimony of executives rather than in decades of enforcement experience, economic evidence, and jurisprudence.

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Any student of corporations knows that firms operate to maximize their profits, and shareholders will replace managers who routinely turn down legal opportunities to earn profit. The managers of T-Mobile and Sprint are no different. Even though they promised the court they would compete vigorously and keep prices low, they will—and in fact, they must—fulfill their profit-maximizing mandate. So when "pulling their punches" in a comfortable oligopoly is more profitable than competing vigorously, we should expect companies to do so—even if particular executives have promised otherwise.

Even more troubling than ignoring firms' profit motivations is the idea that the fate of a merger that posed $8.7 billion in annual consumer harm would be based on perceptions of individual executives' demeanor. The entity to analyze in a merger is "the firm," not any one individual. Not only does the individual manager have a financial interest in the merger being consummated, but the manager is not the dispositive player, as they may change roles or move on from the company. And regardless of what that manager says in court, he (in this merger, they were all "he's") has a fiduciary duty to shareholders and the same set of incentives and assets as anyone else in that role. Therefore, the company's incentives are the correct focus for a court.

Lessons

We need clear-eyed decision makers to decide antitrust cases. Judges need to understand firms' incentives and should be willing to wade into the evidence, engage with economics, and respect the many decades of learning embedded in the structural presumption. In T-Mobile/Sprint, Judge Marrero dismissed the structural presumption, finding it was overcome by the arrival of 5G, DISH's pseudo-entry as a tenant on T-Mobile's network, and executives' self-interested representations.

The structural presumption is strongly supported by theory and experience. To accord it the weight commensurate with its robust support, the structural presumption should be enshrined into the law itself and rebutted only upon "clear and convincing evidence." When setting up the structural presumption, *Philadelphia National Bank* had required defendants to produce evidence "clearly showing that the merger is not likely to have such anticompetitive effects." In the decades since, however, courts have watered down the standard to allow defendants to rebut the presumption upon only a "showing." The judiciary has worried about imposing a "heavy burden of production" on defendants when "it is easy" for the government "to establish a prima facie case." But the very point of the structural presumption should be to require defendants to demonstrate convincingly why their merger would not harm competition in cases where the government can easily show that market shares are high.

To overcome decades of judicial erosion, we need new legislation to shore up the structural presumption. Specifically, a statutory structural presumption should go beyond the existing *Baker Hughes* formulation—it should fully flip the burden of persuasion to defendants when the presumption is triggered and require "clear and convincing" evidence to be rebutted. Senator Klobuchar's recently proposed bill marks a step in the right direction, as it would hardwire the existing structural presumption into statute and expand it to include acquisitions of nascent competitors and mega-mergers valued at more than $5 billion.

Further, the episode of the T-Mobile/Sprint merger underscores the need for multiple enforcers to police the antitrust beat. Left to its own devices, DOJ waved the merger through. If not for the state attorneys general, the story would have ended there, without any governmental challenge. In T-Mobile/Sprint, however, the states took on the unprecedented task of challenging the merger themselves, demonstrating the valuable function of the states to undergird antitrust enforcement efforts when a federal agency has abdicated that duty.

Fiona Scott Morton served as an economic expert and testified at trial for the states in their challenge of the T-Mobile/Sprint merger. Melody Wang worked on the T-Mobile/Sprint merger while at the New York Attorney General's office. She also assisted with The Capitol Forum's coverage of T-Mobile/Sprint, both when the deal was announced in 2018 and during the 2019 trial.

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