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T-Mobile's Marathon to Acquire Sprint: Five Takeaways from the *T-Mobile/Sprint* Antitrust Litigation

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After almost two years of scrutiny by state and federal regulators and an ensuing court battle, T-Mobile US, Inc. (“T-Mobile”) is moving forward with its acquisition of Sprint Corporation (“Sprint”).¹ Although the case is unlikely to incite a change in how the U.S. Department of Justice Antitrust Division (“DOJ”) and Federal Trade Commission (“FTC”) review the vast majority of proposed transactions, it does leave the agencies with some “merger-friendly” language with which they will have to deal. The *T-Mobile/Sprint* litigation also is interesting because there are so few challenges by states to an acquisition that federal antitrust authorities have already approved. Below, after some background on the matter, we examine five important takeaways from the Court’s 170-page opinion.

Background

On April 29, 2018, T-Mobile announced its plan to acquire Sprint, in a transaction that would combine the third and fourth largest U.S. wireless networks. State and federal investigations began soon after the announcement, resulting in a July 2019 settlement between the DOJ and several states that *approved* the merger on the condition that Sprint sell certain assets to allow Dish Network Corporation (“DISH”) to replace Sprint as the fourth major carrier.² In November 2019, the Federal Communications Commission (“FCC”) also approved the deal subject to T-Mobile’s commitments to deploy next-generation 5G service and facilitate DISH’s entry into the wireless industry.

Notwithstanding the DOJ’s and FCC’s endorsements of the transaction and the blessing of 10 state attorneys general, 13 dissenting states³ and the District of Columbia (“the States”) elected to proceed with their June 2019 suit seeking to block the merger.⁴ The States litigated their case in a highly-publicized two-week trial during December 2019. Last week, U.S. District Judge Victor Marrero of the Southern District of New York denied the States’ petition to block the acquisition. Crediting executive testimony over expert economic models, Judge Marrero rejected the States’ arguments that “New T-Mobile” would be incentivized to “pull its competitive punches” against AT&T and Verizon, and that a weak #4 DISH would be unable to fill the gap left by Sprint. Further, in accepting a dynamic view of the future wireless industry, the Court was not convinced that Sprint would remain a viable competitor absent the merger.

1. The Decision Does Not Signal a Major Shift in Merger Review Analysis or Outcomes

Merger litigation is highly fact-specific. *T-Mobile/Sprint* represented an exceedingly unique fact pattern underscored by the deal's potential to accelerate the deployment of 5G wireless to consumers, Sprint's fading competitive significance, and prior approval of the transaction by multiple expert agencies, including the DOJ. Critically, Judge Marrero evaluated the competitive landscape by taking into account DOJ's required divestiture to DISH and the FCC's additional conditions aimed at ensuring 5G availability to consumers. The fact that the DOJ and FCC had "blessed" the merging companies' proposed remedy was a major factor in the litigation, and one that Judge Marrero found "significantly reduce[d] the concerns and persuasive force of the Plaintiff States' market share statistics." The remedy framework thus allowed the Court to accept a number of arguments that typically are considered "uphill battles" for merger defense teams, such as the treatment of maverick competitors and the relevance of dynamic market trends, as discussed below.

2. CEOs Won the "Battle of the Experts"

The "battle of the experts" is a common phenomenon in antitrust litigation, where two well-credentialed, well-paid economists often disagree on the key evidence and its implications, but Judge Marrero's frank commentary on the issue is somewhat unusual. Simultaneously over- and underwhelmed by each side's expert testimony, Judge Marrero observed at the outset of his opinion that "the parties' costly and conflicting engineering, economic, and scholarly business models . . . essentially cancel each other out The resulting stalemate leaves the Court lacking sufficiently impartial and objective ground on which to rely in basing a sound forecast of the likely competitive effects of a merger."⁵ This skepticism of economic and other expert testimony colors the entire opinion. Judge Marrero ultimately relies "less on equipoise of mathematical computations" and more on his "own skills and frontline experience in weighing, predicting, and judging complex and often conflicting accounts of human conduct."⁶ Dueling economic evidence, therefore, resulted in greater weight of non-economic evidence.

Relying on his judicial abilities to properly account for potential bias from the companies' own executives, Judge Marrero heavily credited the testimony of T-Mobile, Sprint, and DISH executives over the expert economists' predictions. The Court found that the executive testimony revealed the "behavioral forces" behind actual business practices and provided the Court with "substantial guidance about how the parties are likely to conduct themselves after the merger."⁷ In particular, Judge Marrero relied on the testimony of T-Mobile's CEO and COO regarding T-Mobile's history of aggressive competition, as well as their verbal assurances that the company would continue that strategy post-merger.

Judicial frustration with dueling expert opinions regarding the inherently uncertain future competitive effects of a merger is a theme echoed in other merger opinions. Here, the Court's near-dismissal of the economic evidence as "competing crystal balls" is a reminder to litigants that it is often difficult for judges to accept complex models and analytics, unless expert analysis can be explained clearly as a supplement to the "real world" documentary and testimonial evidence.

3. Economic Evidence May Be Less Persuasive in So-Called Dynamic Markets

Judge Marrero's view that the retail mobile wireless and telecommunication services market ("RMWTS Market") is "dynamic"⁸ – or rapidly changing – also played a major role in his analysis. Judge Marrero found that traditional methods of economic analysis are less effective in the context of "complex" and "dynamic" markets than in simple and stable markets, like "milk" or "beer, paper clips, and tuxedos."⁹ In other words, the Court found that post-merger pricing structure in a dynamic market "is less likely to be a function of . . . the experts' traditional economic analysis," and more likely to be captured "by the

measures of conduct that reasonable business managers are likely to adopt when making real-world pricing decisions.”¹⁰ For Judge Marrero, the best barometer of the future conduct of New T-Mobile was the testimony of “reasonable corporate executives.”¹¹

The Court’s finding that economic evidence holds less weight in cases involving dynamic markets is particularly noteworthy in light of the dynamic market structures at the heart of the DOJ’s and FTC’s ongoing investigations of the tech industry. The agencies may be forced to distinguish Judge Marrero’s analysis and conclusions as they consider the use of economic analysis in dynamic, high-tech industries.

4. Unusual Treatment of Maverick Behavior and Weakened Competitors Leaned in Favor of the Merger

Just days before Judge Marrero handed down his decision in *T-Mobile/Sprint*, the FTC sued to block Edgewell’s (Schick’s) proposed acquisition of Harry’s, Inc., alleging that the merger would eliminate competition from a low-priced and innovative “maverick” in the market for wet shave razors.¹² Unsurprisingly, the antitrust agencies are skeptical of mergers involving mavericks due to the potential of such transactions to reduce competitive intensity.

In the *T-Mobile/Sprint* trial, the States characterized both T-Mobile and Sprint as mavericks based on their history of low prices and aggressive offers such as unlimited data plans and no roaming charges.¹³ Consistent with the FTC’s concerns in *Edgewell*, the States argued that the reduction in competition resulting from the combination of T-Mobile and Sprint would lead to higher prices in the RMWTS Market “because New T-Mobile will engage in business strategies that would create coordinated or unilateral effects, such as by failing to lower prices when the opportune occasion to do so arises, and pulling punches by not engaging aggressively enough in competing with Verizon and AT&T.”¹⁴

In contrast, Judge Marrero was convinced that “T-Mobile’s longstanding business strategy as the self-styled maverick and disruptive Un-carrier” would continue post-merger.¹⁵ Finding that “anticompetitive results . . . are not self-executing,” Judge Marrero rejected the States’ arguments that New T-Mobile executives would fail to invest, innovate, and improve its network post-merger because such a strategy would be detrimental in a dynamic market.¹⁶ According to the Court, there is no “demise” of the maverick, because T-Mobile’s magenta-wearing executives will continue such strategies as they lead New T-Mobile. The Court also downplayed Sprint’s competitive significance, pointing to Sprint’s persistently poor mobile wireless network quality, negative customer perception, and paralyzing financial condition, to conclude that it would be unlikely to compete effectively absent the merger.

T-Mobile/Sprint stands out as a merger-friendly decision in a landscape where “maverick competitor” status usually is used offensively *against* the merger parties, and “weakened competitor” defenses are often rejected. In contrast, here T-Mobile/Sprint successfully relied on evidence of T-Mobile’s history as a maverick competitor, as well as Sprint’s status as a weakened competitor, to convince the Court that the merger would not lessen future competition.

5. The States’ Loss Potentially Discourages Future Deviation From the Feds

A key subplot, and the elephant in the room, was the rare public clash between federal agencies and state attorneys general. During trial, the DOJ and FCC jointly filed a statement of interest, requesting that the Court treat their views with “due weight and consideration.”¹⁷ In the days leading up to the decision, Assistant Attorney General for the DOJ Antitrust Division, Makan Delrahim, expressed concern regarding the States’ challenge, declaring that “a minority of states . . . trying to undo [the merger] . . . is incompatible with the orderly operation of [U.S.] antitrust merger laws and telecommunications regulations,” and warning that state-led challenges to federally-approved mergers could undermine beneficial transactions and settlements nationwide.¹⁸

Although the Court noted that it was “not bound by the conclusions of the [federal] agencies,” it afforded their views and actions weight as “persuasive and helpful evidence” in analyzing the competitive effects of the challenged merger.¹⁹ While the decision does not limit any state’s legal ability to challenge a merger that has been approved by a federal agency, it may nevertheless discourage such attempts in the future.

Conclusion

Although *T-Mobile/Sprint* is not likely to signal a significant shift in antitrust merger analysis, it is nevertheless a noteworthy decision due to its heavy reliance on executive testimony and focus on fast-changing industry dynamics over expert analysis and market share presumptions. Further, the Court’s endorsement of the DISH remedy that was approved by the DOJ and the FCC represents an important win not only for the merging companies, but for the federal regulators as well. Assuming the opinion is not upended by a possible appeal, it also may deter future attempts by state attorneys general to challenge federally-approved mergers.

- ¹ *T-Mobile and Sprint Win in Court; Companies Moving to Finalize Merger to Create New Supercharged Un-carrier*, (Feb. 11, 2020), <https://www.t-mobile.com/news/t-mobile-sprint-merger-court-win>. As of the time of this writing, the NY Attorney General's Office has publicly stated that it will not appeal the ruling, but an appeal remains possible as other states have not yet revealed their intentions. See Attorney General James' Statement on T-Mobile/Sprint Appeal (Feb. 16, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-statement-t-mobilesprint-appeal>. The Proposed Final Judgment remains subject to approval by the United States District Court for the District of Columbia under Tunney Act Procedures. In addition, the transaction remains under review by the California Public Utility Company.
- ² *Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish* (July 26, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package>.
- ³ New York, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Pennsylvania, Oregon, Virginia, and Wisconsin.
- ⁴ *FCC Approves Merger of T-Mobile and Sprint* (Nov. 5, 2019), <https://docs.fcc.gov/public/attachments/DOC-360637A1.pdf>.
- ⁵ DECISION AND ORDER at 4-5, 7, *New York v. Deutsche Telekom AG*, 19-CV-5434, (S.D.N.Y. Feb. 11, 2020) (*hereinafter* "T-Mobile").
- ⁶ *Id.* at 7.
- ⁷ *Id.* at 8.
- ⁸ The Court defined dynamic markets as ones "in which the essential qualities of the goods and services can shift quickly from year to year ... current product lines and prevailing business models could be rendered obsolete within a relatively brief time frame." *Id.* at 147-48.
- ⁹ *Id.* at 145-47.
- ¹⁰ *Id.* at 157.
- ¹¹ *Id.* at 156.
- ¹² COMPLAINT at ¶ 1, *In the Matter of Edgewell Personal Care Co.*, Dkt. No. 9390 (F.T.C. Feb. 2, 2020), https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf.
- ¹³ *T-Mobile*, at 109, FN 22.
- ¹⁴ *Id.* at 159.
- ¹⁵ *Id.* at 162.
- ¹⁶ *See id.*
- ¹⁷ STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA at 25, *New York v. Deutsche Telekom AG*, 19-CV-5434, (S.D.N.Y. Feb. 11, 2020).
- ¹⁸ Remarks Delivered by Makan Delrahim at Media Institute Luncheon, "Getting Better": Progress and Remaining Challenges in Merger Review (Feb. 5, 2020), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-media-institute-luncheon>.
- ¹⁹ *T-Mobile*, at 106.



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