MASQUERADING AS MERGER CONTROL: THE U.S. DEPARTMENT OF JUSTICE SETTLEMENT WITH SPRINT AND T-MOBILE

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I. Introduction

In announcing settlement of its investigation into the proposed merger of Sprint and T-Mobile, the U.S. Department of Justice ("DOJ") acknowledged the serious competitive concerns with the merger itself. The Complaint filed against the merger declared that

> The merger would eliminate Sprint as an independent competitor, reducing the number of national facilities-based mobile carriers from four to three. The merger would cause the merged T-Mobile and Sprint ("New T-Mobile") to compete less aggressively. Additionally, the merger would likely make it easier for the three remaining national facilities-based mobile wireless carriers to coordinate their pricing, promotions, and service offerings. The result would be increased prices and less attractive service offerings for American consumers, who collectively would pay billions of dollars more each year form mobile wireless service.[2]

This assessment sets a high bar for approval of the merger since competition admittedly requires a fourth firm. That very firm, however, would be eliminated by the merger. How, then, does the DOJ reconcile these two seemingly incompatible forces? How can it approve the merger while acknowledging the need for a fourth wireless carrier?

No problem, apparently. If four carriers are necessary for competition, then DOJ proposes to act as an M&A advisor and broker to help create one and thereby justify approval of this merger.

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[2] Complaint, U.S. et al v. Deutsche Telekom Ag, T-Mobile Us, Inc., Softbank Group Corp., and Sprint Corporation, No. 1:19-cv-02232, at 3 (D.D.C. Jul. 26, 2019) https://www.justice.gov/opa/press-release/file/1187721/download.

But precisely where will this new carrier come from? The settlement envisions creating a new fourth firm by combining some assets of a firm entirely outside the wireless industry (Dish Network or "Dish") with certain assets divested by one of the merging parties (Sprint) plus transition services from the new merged firm (T-Mobile).[3] Dish is currently a satellite-based multichannel video program distributor, with no wireless operation or experience, but now a party to this agreement. Nonetheless, we are assured that this cobbling together of assets will result in an entirely new national facilities-based wireless carrier that will--eventually--bring strong and effective--even "disruptive"-- competition to AT&T and Verizon. In an acknowledgment of the long gestation period for this new carrier to appear, as well as the direct overlap of the merging parties' prepaid wireless businesses, the DOJ settlement also provides for the immediate divestiture of Sprint's prepaid wireless operations, also to Dish. The result would be that Dish would initially offer only prepaid wireless service as a reseller as it acquires and builds out its own facilities and, according to the settlement, becomes a full-fledged national network carrier.

By what standard of viability and effectiveness should this settlement be judged? As it happens, the DOJ itself has provided the relevant standard. Its own Merger Remedies Guide states that a remedy must "effectively preserv[e] the competition that would have been lost through the merger."[4] In this note we evaluate DOJ's proposed settlement of the Sprint/T-Mobile merger against this standard and show why the settlement will not plausibly and predictably succeed in this objective. We also offer some observations on the perilous state of merger control policy implied by this settlement.

II. The Settlement

The settlement has a number of significant parts that require a bit of description in order to provide an evaluation. First, in terms of initial services, Dish will be providing only one wireless service--prepaid service--and that will simply be Sprint's divested Boost and other brands. Prepaid services are a modest fraction of all services, less profitable and less stable than postpaid (subscription) service. Moreover, and crucially, Dish will provide those prepaid services only as a reseller, that is, by buying them from a facilities-based carrier and then simply marketing them.

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[3] Proposed Final Judgment, U.S. et al v. Deutsche Telekom Ag, T-Mobile Us, Inc., Softbank Group Corp., Sprint Corporation, and Dish Network Corporation, No. 1:19-cv-02232 (D.D.C. Jul. 26, 2019), https://www.justice.gov/opa/press-release/file/1187706/download.

[4] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.

The divestiture process involves Dish acquiring Sprint's prepaid retail locations, personnel, licenses, data, and other associated assets. In terms of personnel, the settlement includes a complicated process by which Sprint will identify all employees of its existing prepaid operations so that Dish can vet, interview, and negotiate with those employees for continued employment with Dish's follow-on service. In further support of this, the settlement requires T-Mobile and Sprint to provide certain "transition services" to Dish for a period up to three years. These transition services include billing, customer care, SIM card procurement, device positioning, and "all other services [previously] used by the Prepaid Assets."

Second, within one year, Dish is required to begin providing nationwide retail postpaid wireless service as well. The settlement stipulates that Dish must do so using cell sites and retail stores as they are "decommissioned"--that is, shut down--as they are determined to be redundant by the merged firm. This stipulation is intended to ensure that Dish becomes a facilities-based provider, rather than continuing to provide services simply by resale. The merged company's decommissioning of cell sites is to take place gradually over a period of up to five years, eventually totaling at least 20,000 sites. The actual timing appears to be governed by language simply requiring Sprint and T-Mobile to "decommission unnecessary cell sites promptly" and "as soon as reasonably possible after the site is no longer in use." In the interim, the merged company is required to provide Dish with "robust access" to its own cell sites to ensure nationwide coverage for Dish's postpaid service. If Dish's own network does not serve 70 percent of the country by 2023, it will face penalties up to $2.2 billion.

A similar five-year horizon applies to the transfer of decommissioned retail locations held by the merged company. A total of at least 400 such locations are to be subject to transfer.

Third, the merged company is required to offer to divest to Dish, at Dish's option, all of Sprint's 800 MHz spectrum. This is intended to expand Dish's own 800 MHz spectrum holdings and thereby permit it to build out an entirely new 5G network that would allow for super-high speed wireless transmission. The settlement penalizes Dish for failing to acquire Sprint's spectrum, unless it demonstrates that it can provide such service strictly with its own, currently unused 800 MHz spectrum. Dish has touted this new network as its primary purpose in entering the market and the primary benefit that it will provide. In explaining the terms of this settlement, the Assistant Attorney General (AAG) for Antitrust has echoed this view, stating that the settlement would "facilitate the expeditious deployment of multiple high-quality 5G networks for the benefit of

American consumers and entrepreneurs."

On the other hand, recognizing that the process by which Dish obtains or builds the infrastructure required to provide services on its own facilities might be lengthy, the settlement provides a backstop in the form of a requirement that Sprint and T-Mobile enter into a full resale agreement with Dish for at least seven years. As a result, Dish may remain a reseller of whatever services it does not itself provide for a potentially lengthy period of time. The settlement states that those resale services are to be supplied to Dish by the merged company on "commercially reasonable terms."

III. The Issues

As noted at the outset, this settlement has numerous moving parts. It has only one path to its intended end result, but numerous points on which it is vulnerable to failure. To begin, Dish will be strictly a reseller at the outset, largely a reseller in the first few years, and probably a partial reseller for seven years or more. But resale services are competitively much less significant than those produced by a seller, since a reseller is entirely dependent on one of its facilities-based rivals for the service itself. The reseller's ability to compete by, say, lowering price or devising bundling and marketing options is limited by the potentially narrow margin between the retail price and the price charged by its supplier. In fact, that supplier can alter the margin so as to handicap its competitive impact in a classic strategy generally known as "raising rivals' costs."

For this reason alone, this settlement fails the DOJ's own test of preserving competition in the nationwide wireless market of facilities-based providers over the next few years. And that is not the worst-case scenario: there is no guarantee that current personnel operating Sprint's prepaid business or, for that matter, its customers, will seamlessly transfer over to Dish's operation.

Beyond that, the effectiveness of this proposed settlement is dependent on numerous provisions that elsewhere and often have proven problematic or outright ineffective. These include the already cited dependence of Dish on a major rival for its crucial input, but also the following, among others:

1. **The likelihood that the customer base of divested prepaid services will be difficult to sustain.**

2. **The risk that personnel affiliated with Sprint's prepaid operation do not choose to transfer to Dish's unproven operation.**

3. **The adverse incentives that the merged firm will have with respect to providing transition services to Dish.**

4. **The hazard that the merged firm will not decommission cell sites as quickly as necessary.**

5. **The likelihood that the decommissioned sites and stores will be the weaker ones.**

6. **The difficulty of defining and ensuring "robust access" to the merged firm's cell sites.**

7. **Control that the merged firm will have over price and other terms of the MVNO agreement that represent crucial features for Dish's viability.**

Past experience with such close linkages between a merged firm and divested or new operations are not encouraging. The merged firm has advantages in terms of information, control of assets, and pretextual excuses for what may appear to be non-compliance. It also has strong incentives not to aid its direct rival and make it into a more effective constraint on its own market position. These have proven to be problematic at best, and very often ineffective.[5]

Attempting to counter such arguments, the AAG for Antitrust has described this settlement as "structural" in nature, since structural remedies have a better reputation. The reality is different and more complex. For one thing, in its structural components, it strays far from the classic model of divestiture, which involves identifying an overlapping operation or product of two merging companies, requiring divestiture of one of them, and then--if done well--counting on competition to produce roughly the same market outcome as before. In this case, no further oversight, monitoring, or intervention is necessary.

In the present settlement, the term divestiture might be said to apply to prepaid services, where indeed one of the two overlapping operations are divested to a third party. But competition in the broader "national facilities-based wireless market" will not arise simply from divestiture. Rather, because of the range of assets required to create a brand new wireless carrier and because of the timeline, other assets have to be divested and combined, and crucial supply, transition and support services need to be provided.

[5] D. Moss and J. Kwoka, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," *Antitrust Bulletin*, 2012.

This type of "competitor creation" by cobbling together various necessary assets is a task that would challenge a Wall Street M&A firm or a turn-around specialist. It seems well outside the expertise of any antitrust agency, and indeed more modest efforts to create competitors and thereby resolve mergers have recently resulted in notable failures.[6]

The above-cited provisions make clear that the settlement is by no means simply structural; rather, it has crucial elements of a conduct or behavioral remedy. A conduct remedy is one that does not fully separate the merged firm and the outside firm, but rather locks them into some kind of business relationship, inevitably with incompatible incentives—and disputes--between the parties. Here that relationship arises because Dish will be completely or partially dependent on the merged firm for prepaid services, transition services, asset decommissioning, and the long term MVNO agreement. All of these create abundant opportunities for the merged firm to engage in strategic pricing, slowdown of provision, alteration of terms or quality of the assets and services, and so forth. Not until Dish is completely independent of its rival or rivals--something that will not plausibly happen for seven or more years--will it be a fully competitive entity.

This settlement has all the hallmarks of a detailed, regulatory, and interventionist remedy, one that will spark conflicts between the parties and require active oversight by the agency. It is ironic, therefore, that approval of this conduct-laden settlement has been fashioned and defended by the same AAG who, upon assuming his position in 2017, announced a skeptical view toward conduct remedies. He did so because of past experience as well as economic arguments and evidence of their ineffectiveness. He specifically criticized their regulatory nature for requiring on-going monitoring of the relationship between the parties.[7] Those concerns and criticism apply with equal force in this instance.

Finally, it is worth noting that the DOJ appears to fully accept the need for the merger in order to achieve benefits claimed by the parties. Those claimed benefits (not really "efficiencies") are centered on faster deployment of much faster 5G wireless technology, a technology that remains for all carriers an expensive and longer-term strategy. The parties to this case argued that Sprint in particular would not have the resources to undertake the necessary investment and so, in that longer term, would not be a viable player anyway. Despite evidence that both Sprint and T-Mobile were

[6] J. Kwoka, "Merger Remedies: An Incentives/Constraints Framework," *Antitrust Bulletin*, 2017.
[7] M. Delrahim, "Modernizing the Merger Review Process," Global Antitrust Forum, 2018. That speech cited the very work by myself and Diana Moss as support for rejecting a conduct approach.

separately rolling out 5G technology prior to the merger proposal,[8] the DOJ appears to accept that claim uncritically. If it did not, of course, the merger would be automatically rejected for its acknowledged anticompetitive effects.

This is not the first instance in which DOJ has confronted the argument that a merger between major wireless companies is required for network expansion. DOJ and the FCC firmly rejected AT&T's attempt to acquire T-Mobile in 2011, concluding there would be substantial competitive harms and, upon careful examination, few if any attributable benefits.[9] The rejection of that merger has been widely credited with preserving--indeed, enhancing--competition in the wireless business, triggered largely by the very companies that now seek to merge.[10] In the present case and without much disclosure of its reasons, the DOJ has taken a different view, even though the benefits claimed here--a new 5G network build-out--are at least as speculative as those in the prior case.

IV. Conclusions

The settlement permitting the merger of Sprint and T-Mobile fails the test of plausibly and predictably preserving competition in the U.S. wireless market. It is anything but certain that Dish can successfully make itself into the fourth carrier that otherwise will disappear. Even if it does, it will be years before that happens, during which time the effect of approving the merger will be precisely as predicted in the paragraph cited from the complaint--significant harm to consumers and competition in a three-firm national wireless market.[11]

To be sure, there are two aspects of this agreement that represent some improvement over past practice. One is the use of benchmarks in this settlement, such as the requirement that by a date certain Dish create enough of the new network to serve a specified percent of all possible customers. The second is the threat of financial penalties for Dish's failure to comply or failure to meet the benchmarks, although it is doubtful these are large enough. Clear benchmarks and large

[8] R. Cheng, "Sprint: We're in a Unique Position to Deliver Broader 5G" CNET, Feb. 2018. T-Mobile Newsroom, "T-Mobile Building Out 5G in 30 Cities This Year…and That's Just the Start." Feb. 2018.
[9] Patrick DeGraba and Greg Rosston, "The Proposed Merger of AT&T and T-Mobile," in *The Antirust Revolution*, J. Kwoka and L. White, eds., 6/e, 2014.
[10] The then AAG for Antitrust noted the "much more favorable competitive conditions" that emerged after rejecting the AT&T/T-Mobile proposal and, looking ahead, opined that "It's going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers."
[11] As noted elsewhere, The EU has resisted allowing mergers to three wireless firms, while Canada, with just three, appears to suffer from weak competition. "Why the Proposed Sprint-T-Mobile Merger Should be DOA at the DOJ," D. Moss, AAI, June 2018, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI_Sprint-T-

penalties can be useful devices for focusing the parties' attention and providing better incentives. They do not, however, rescue a fundamentally flawed merger remedy, as is the case here.

More broadly, this settlement represents a worrisome new development in merger control. Merger control has demonstrably weakened over time, resulting in documented competitive harms.[12] Permitting a four-to-three merger based on a remedy that accepts competitive harms in the short and medium term for an exceedingly optimistic view of possible benefits in the longer term does not represent good policy. Rather, this remedy suggests heroic efforts to devise a basis for approval of a merger that is anticompetitive on its face. Indeed, if the substantial and acknowledged competitive problems with this four-to-three merger are fixable by this strategy of re-arranging some assets, negotiating some contracts, and then hoping for the best some years down the road, it is unclear what merger is not fixable.

We must hope this is not what masquerades as merger control in the future.

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[12] Kwoka, *Mergers, Merger Control and Remedies*, MIT Press, 2015