Re: Public comment to United States et al. v. Deutsche Telekom AG et al.

August 20, 2019

Scott Scheele
Chief, Telecommunications and Broadband Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 7000
Washington, DC 20530

Dear Mr. Scheele:

I write to you because I believe the Department of Justice's (DOJ) proposed Final Judgment between T-Mobile and DISH Network dramatically reinterprets the risk-allocation framework intended by Section 7 of the Clayton Act. While Congress' intent in allocating risk between the public and merging parties (and remedy buyers) is clearly open to interpretation, the proposed Final Judgment in this case objectively departs from the risk-allocation standard articulated by Assistant Attorney General (AAG) Makan Delrahim as well as his predecessor William Baer. The departure is not a matter of nuance or degree. The DOJ may believe the risk tolerance it applies to enforcement decisions is completely within its discretion (irrespective of Congress' intent); nevertheless, the abrupt and drastic change in the DOJ's risk tolerance requires an explanation. The alternative is that Section 7's risk-allocation framework is so pliable that enforcement decisions are completely unpredictable, subject to the whim and ad hoc justification of any particular DOJ front office on any given day.[1]

To orient the discussion, let me cite from the current and past leadership of the DOJ's Antitrust Division. Here is how Mr. Baer (AAG from 2013 through 2016) described the risk-allocation standard embodied by Section 7[2]:

> *In enacting Section 7 over 100 years ago, Congress decided how antitrust risk should be allocated as between merging parties and the public.* ***The Clayton Act directs antitrust enforcers and the courts to employ a low risk tolerance****, and zealously protect the American economy and American consumers from mergers that may reduce competition and may lead to higher prices, reduced output, lower quality, or lessened innovation. ...*

[1] This is especially true of clearance decisions, which are typically only subject to outside scrutiny in the case of conditional clearances requiring a Tunney Act review (a formality unless the recent Aetna/CVS Tunney Act review becomes more commonplace). Fortunately, the DOJ's proposed Final Judgment in this case will be evaluated by a federal judge (Hon. Victor Marrero) who no doubt will be assiduously interested in Section 7's intended risk-allocation standard. I imagine the DOJ is excited, as I am, to see if Judge Marrero validates its interpretation of Section 7 in this landmark case.

[2] Acting Associate Attorney General Bill Baer Delivers Remarks at American Antitrust Institute's 17th Annual Conference, Washington, DC (June 16, 2016); permanent link: https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute

> ***A remedy should fully and squarely cure the violation. It needs to preserve the status quo ante in affected markets by effectively addressing any and all anticompetitive effects arising from the transaction.*** *Merger law is intended to protect consumers from the potential for diminished competition. Here is where Congress' risk-allocation determination matters a lot. Partial remedies do not cut it. They do not warrant shifting some portion of the risk posed by the merger back to consumers and competition. ...*
>
> *When Sprint's owners suggested that they planned to acquire T-Mobile, threatening to reduce the number of national providers from four to three, we made clear* ***such a deal involved an unacceptable risk-reward proposition for consumers****.*
>
> (Note: Yes, Mr. Baer does ironically use the merger of Sprint and T-Mobile to illustrate Section 7's risk-reward framework; emphasis added)

Indeed, Mr. Delrahim cited Mr. Baer as he endorsed a similar—if not equivalent—view of Section 7's risk-allocation standard[3]:

> *Decrees should avoid taking pricing decisions away from the markets, and should be* ***simple and administrable by the DOJ****.* ***We have a duty to American consumers to preserve economic liberty and protect the competitive process, and we will not accept remedies that risk failing to do so.*** *I believe this is a bipartisan view. As my friend, former AAG for Antitrust Bill Baer said in Senate testimony last year,* ***"consumers should not have to bear the risks that a complex settlement may not succeed."***
>
> (Emphasis added)

Using the standard(s) above to evaluate the DOJ's proposed Final Judgment raises a number of questions:

(1) Given the time required for DISH Network to build a national facilities-based network (i.e. DISH Network has until June 2023 to construct a network covering 70% of the population), how does the proposed Final Judgment "preserve the status quo ante in affected markets"? Does the DOJ believe that Sprint's legacy prepaid brands, reselling capacity provided by T-Mobile under an MVNO agreement, will fully restore the competition lost by allowing Sprint and T-Mobile to merge?

(2) Given the complexity of the proposed Final Judgment (not to mention the fact that key terms and conditions are not yet finalized), the entanglements created between DISH Network and T-Mobile, and the natural uncertainties associated with DISH Network's ability to construct a nationwide facilities-based network, how is the Proposed Final Judgment "simple and administrable by the DOJ"?

[3] Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum, Washington, DC (November 16, 2017); permanent link: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar

(3) Further, given DISH Network's failure to meet prior Federal Communications Commission (FCC) build-out requirements on its existing spectrum[4] and the difficulty of predicting future events and incentives in a dynamic industry (on the cusp of a transition to 5G), how is the proposed Final Judgment consistent with "a low risk tolerance"?

(4) The risk to DISH Network if it fails to build a national facilities-based network is a $2.2 billion financial penalty (spectrum forfeiture is not incremental because it would occur anyway if DISH Network failed to meet existing build-out requirements). In the context of a $146 billion merger and the pre-remedy harm to consumers, does the American consumer or DISH Network bear more risk with this remedy? Said differently, is the proposed Final Judgment consistent with Mr. Delrahim's statement that "consumers should not have to bear the risks that a complex settlement may not succeed"?

(5) The DOJ Complaint identifies anticompetitive effects on the market for wholesale MVNO access.[5] Section VII.A. of the proposed Final Judgment seeks to address these harms with a behavioral remedy requiring Sprint and T-Mobile to extend existing MVNO agreements throughout the term of the proposed Final Judgment.[6]

   a. Given that Sprint was a well-documented innovator in the wholesale market (e.g. Sprint's MVNO with Altice USA was the first and only MVNO agreement with so-called "core control" provisions), how does T-Mobile simply extending *existing* MVNO agreements fully restore competition in wholesale? Doesn't innovation necessarily concern the potential for new agreements that improve upon *existing* agreements? Does the proposed Final Judgement "preserve the status quo ante" in the wholesale market?

   b. How did the DOJ overcome its concern that "conduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid"?[7] (Note: This question seems especially germane given Mr. Delrahim's oft-cited aversion to conduct remedies.)

---

[4] Attorneys for T-Mobile said the following in a March 11, 2019 letter to the FCC: "DISH has a track record of price increases for its services, speculative warehousing of spectrum, and failing to meet FCC-imposed deadlines to construct the facilities required to deliver wireless services to the public. Indeed, DISH stands out for its efforts to game the regulatory system by proffering a modernized version of last century's two-way paging as a substitute for meeting its obligations to start building a real 5G network."; permanent link: https://ecfsapi.fcc.gov/file/1031124977749/March%2011%202019%20Pricing%20ex%20parte.pdf

[5] Paragraph 22 of the Complaint: "Competition between Sprint and T-Mobile to sell mobile wireless service wholesale to MVNOs has benefited consumers by furthering innovation, including the introduction of MVNOs with some facilities-based infrastructure. The merger's elimination of this competition likely would reduce future innovation."

[6] Page 20 of the proposed Final Judgment: "Divesting Defendants shall agree to extend existing MVNO agreements on their existing terms (other than any "most favored nation" provisions) until the expiration of this Final Judgment."

[7] Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice, Antitrust Division (October 2004); permanent link: https://www.justice.gov/atr/page/file/1175136/download

The above list of questions is not meant to be exhaustive; indeed, these questions reflect just a handful of potential deficiencies with the proposed Final Judgment. While the DOJ's leadership may have resolved these questions to its satisfaction, the Competitive Impact Statement does not adequately address any of these questions, let alone the extent to which the DOJ's enforcement decision in the Sprint/T-Mobile merger reflects a revised view of risk-allocation under Section 7.

I appreciate that the DOJ conducted a lengthy review of the proposed merger, and all enforcement decisions require a complex balancing of issues and, ultimately, judgment and discretion. Moreover, the facts of each case are different, which may require the DOJ to adjust its analytical framework accordingly. Thus, I do not expect to be able to draw a straight line from one DOJ enforcement decision to the next; however, I do expect there to be a semblance of consistency across the DOJ's enforcement decisions. For instance, it is instructive to compare the DOJ's decision to sue to block the vertical Time Warner/AT&T merger, rather than accept a conduct remedy, while accepting a largely behavioral remedy to clear the horizontal (and presumptively anticompetitive) Sprint/T-Mobile merger.[8] Again, trying to reconcile decisions involving different facts is a fraught analysis; however, the contrasting enforcement outcomes in these two cases, under the same DOJ leadership, raises nagging questions.

I want to conclude with my core concern: Namely, what Section 7 risk-allocation framework does the DOJ now endorse? To this end, if the DOJ responds to any of the issues raised in my letter, I am most interested in a reconciliation of the DOJ leadership's prior views on risk-allocation with Mr. Delrahim's purported assessment of the risk associated with the proposed Final Judgement[9]:

> *"When asked about the risk of Dish possibly not becoming a serious competitor, Delrahim said, "Look, it's a risk for me walking across the street.""*

Is this really the new risk tolerance the DOJ is using to evaluate proposed mergers? Is it consistent with Mr. Delrahim's professed "duty to American consumers to preserve economic liberty and protect the competitive process, and [to] not accept remedies that risk failing to do so"?

---

[8] While DOJ leadership has taken pains to portray the proposed Final Judgement as "structural," this is misleading because even the divested prepaid brands critically rely on the MVNO with T-Mobile. Further, while there are aspects that may strengthen the MVNO relative to other reseller agreements, the problems of entanglements and dependency between DISH Network and T-Mobile remain. It is telling that one of the conditions of the proposed Final Judgment requires DISH Network to "offer retail mobile wireless services, including offering nationwide postpaid retail mobile wireless service" (Section IV.F.); a formal requirement to "compete" seems to nicely illustrate the DOJ's reservations with conduct remedies in other instances. Finally, even if the DOJ wishes to construe the remedy associated with the retail mobile wireless market as "structural," the remedy associated with the wholesale market is certainly a pure conduct remedy.

[9] Ebersole, Jenna. "T-Mobile-Sprint remedy sets Dish up as 'disruptive force in wireless,' DOJ antitrust chief says." MLex (July 26, 2019).

Re: Public comment to United States et al. v. Deutsche Telekom AG et al.

Sincerely,
Josh Wool