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Jacob P. Grosso
University of Richmond School of Law

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COMMENTS

THE PREEMPTION OF COLLECTIVE STATE ANTITRUST ENFORCEMENT IN TELECOMMUNICATIONS

Thirty years ago, cellphones were limited to executives and eccentrics; today, they are a linchpin of modern society. Telecommunications help people connect, access emergency services, and navigate cities, but may represent a high cost to consumers.[1] In 2013, T-Mobile branded itself the "Un-Carrier" and immediately began a strategic and widespread disruption of the consumer telecommunications market.[2] Over the last seven years, T-Mobile instituted policies and campaigns to acquire market share from Verizon and AT&T, the two largest mobile carriers. Looking to jumpstart 5G technology and push the U.S. wireless infrastructure forward, T-Mobile decided to address its spectrum shortcomings by acquiring Sprint Mobile.[3] Sprint Mobile faced an uncertain future, with declining subscribers and revenue.[4] Telecommunications play a central role in the daily lives of most U.S. citizens, and the economics underlying the market determine the shape of that role. Before the merger, T-Mobile and Sprint had a combined 127,166,000 customer base.[5] Changes to the market and the services provided to

1. *See generally Issue Brief: A Communications Oligopoly on Steroids*, WASH. CTR. FOR EQUITABLE GROWTH (July 31, 2017), https://equitablegrowth.org/issue-brief-a-communications-oligopoly-on-steroid/ [https://perma.cc/47BQ-XTH9].

2. *See* Amended Complaint at 24, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 1:19-cv-5434).

3. *T-Mobile Completes Merger with Sprint to Create the New T-Mobile*, SPRINT (Apr. 1, 2020), https://newsroom.sprint.com/tmobile-completes-merger-with-sprint.htm [https://perma.cc/43UF-HNLU].

4. *Deutsche Telekom*, 439 F. Supp. 3d at 194.

5. As of December 31, 2017, T-Mobile had 72,585,000 customers and Sprint had 54,581,000 "subscribers." T-Mobile U.S., Inc., Annual Report (Form 10-K) (Feb. 6, 2020) [hereinafter T-Mobile Annual Report], https://d18rn0p25nwr6d.cloudfront.net/CIK-0001283699/bc54c43f-ee88-42d9-9393807ec361b545.pdf [https://perma.cc/9BZU-CW9W]; Sprint

the existing customers of the new T-Mobile could drastically impact the welfare of a substantial number of consumers.

Federal and state antitrust differences came to a head in *New York v. Deutsche Telekom AG*.[6] On April 29, 2018, T-Mobile announced its intention to merge with Sprint.[7] The firms submitted the merger for review by federal agencies on July 18, 2018.[8] Review by the Department of Justice ("DOJ") and the Federal Communications Commission ("FCC") followed.[9] The DOJ and FCC reached settlements with the merging companies on July 26, 2019, and October 16, 2019, respectively.[10] Then, fourteen States' Attorneys General filed suit to block the merger, alleging concerns of raised costs and decreased competition.[11] The suit proceeded to trial, with the district court reaching a verdict in favor of T-Mobile and Sprint.[12] Finally, on April 1, 2020, the merger closed.[13] Despite the closing of the merger, challenges continued with regulatory pushback from the California Public Utilities Commission ("CPUC") and consumer litigation attempting to block the merger.[14]

Corp., Quarterly Report (Form 10-Q) (Feb. 5, 2018) [hereinafter Sprint Quarterly Report], https://sec.report/Document/0000101830-18000013/#s6D65CC3DBA5052A4987FD222502 6557E [https://perma.cc/J36L-WP4E].

6. *See generally Deutsche Telekom*, 439 F. Supp. 3d at 179.

7. *T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition*, T-MOBILE (Apr. 29, 2018), https://www.t-mobile.com/news/5gforall [https://perma.cc/R87V-XFYY].

8. Public Notice, FCC Establishes Pleading Cycle for T-Mobile/Sprint Transaction, 33 FCC Rcd. 6771 (2018).

9. *Id.*

10. *Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish*, U.S. DEP'T JUST. (July 26, 2019) [hereinafter *Justice Department Settles*], https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package [https://perma.cc/RW34-R9X7]; T-Mobile U.S., Inc., 34 FCC Rcd. 10,578 (2019).

11. Tali Arbel, *State AGs Look to Head Off T-Mobile-Sprint Deal in Court*, ASSOCIATED PRESS (Dec. 6, 2019), https://apnews.com/40684852c3b5a9f5d1564c6b97ca119d [https://perma.cc/V26V-HUZV].

12. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 249 (S.D.N.Y. 2020).

13. Edmund Lee, *T-Mobile Closes Merger with Sprint, and a Wireless Giant is Born*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2020/04/01/business/media/tmobile-closes-sprint-merger.html [https://perma.cc/Q8Q4-99YX]; Andrew Limbong, *T-Mobile Completes Takeover of Rival Company Sprint*, NPR (Apr. 1, 2020), https://www.npr.org/2020/04/01/825523250/t-mobile-completes-takeover-of-rival-company-sprint [https://perma.cc/7RCG-CVPJ].

14. *See* Jon Reid, *T-Mobile, Sprint Pull Merger Request From California Regulator*, BLOOMBERG L. (Mar. 31, 2020), https://news.bloomberglaw.com/tech-and-telecom-law/t-mobile-sprint-pull-merger-request-from-california-regulator [https://perma.cc/8EJH-5XYS];

The dichotomy between the levels of government provided murky guidance to telecommunications firms on what behavior is anticompetitive and what decisions firms will have to spend years defending. Despite T-Mobile and Sprint agreeing to sell off several subsidiaries, helping to create a new competitor, and surviving a gamut of regulatory reviews, these companies still could not merge. At this point, preventing the deal would cause irreversible harm to the merging parties.

The conflicts that arose in the T-Mobile-Sprint merger could have been solved through the preemption of collective state antitrust enforcement in the telecommunications market, which would balance the twin goals of promoting the consumer and aggregate social welfares. The telecommunications market is subject to substantial federal scrutiny and regulation, which limits competitive choices to an abnormal degree and causes the market to suffer extraordinary damage when collective states interject themselves as enforcers. Limiting state antitrust activities is not a novel concept, with a variety of studies arguing that the inefficiencies and competing interests associated with state action substantially hamper state antitrust enforcement of national markets.[15] This Comment does not presume to redefine the antitrust system in its entirety, but narrowly applies the possibility of preempting state action to the telecommunications market.

In Part I, this Comment will explore antitrust in the context of the T-Mobile-Sprint merger, through the federal regulators' enforcement actions and the lawsuit by the States' Attorneys General. Part II will examine previous examples of rifts between state and federal antitrust enforcers. Part III covers the evolving regulation in the telecommunications market, specifically highlighting

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Khorri Atkinson, *CWA, Consumers Drop Challenges to T-Mobile/Sprint Merger*, LAW360 (Mar. 27, 2020), https://www.law360.com/articles/1257577/cwa-consumers-drop-challenges-to-t-mobile-sprint-merger [https://perma.cc/EL8J-XZAX].

15. *See, e.g.*, Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. U. L. REV. 807, 829 (2019); Robert W. Hahn & Anne Layne-Farrar, *The Case for Federal Preemption in Antitrust Enforcement*, 18 ANTITRUST L.J. 79, 79 (2004) [hereinafter Hahn & Layne-Farrar, *Federal Preemption in Antitrust Enforcement*]; Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 6 HARV. J.L. & PUB. POL'Y 877, 878 (2003) [hereinafter Hahn & Layne-Farrar, *Federalism in Antitrust*]; Richard A. Posner, *Antitrust in the New Economy,* 68 ANTITRUST L.J. 925, 940 (2001); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1047 (1990); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 39 (1975).

the pervasiveness of the federal enforcement agencies and the continuing growth of the role of the Committee on Foreign Investment in the United States ("CFIUS") in the market. Part IV explores the potential benefits and dangers of preempting collective state antitrust action in telecommunications.

I. ANTITRUST IN THE CONTEXT OF THE T-MOBILE-SPRINT MERGER

In Part I, this Comment examines mergers by generally exploring the antitrust law governing horizontal mergers and the application of that law to the events in the T-Mobile-Sprint merger. This section explores the federal application of antitrust law, state enforcement through litigation, and the district court's decision in the T-Mobile-Sprint merger.

A. *Mergers Generally*

The Sherman and Clayton Antitrust Acts are the primary sources of antitrust law, and their enactment granted federal regulators the power to enforce federal antitrust law.[16] The Clayton Act's Section 7 governs mergers, due to their high potential to create anticompetitive effects; Section 7 bans the acquisition of a competitor if the result would be to "substantially to lessen competition, or to tend to create a monopoly."[17] The Sherman Act's Section 2 prohibits monopolistic behavior and provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty . . . ."[18] Additionally, the Hart-Scott-Rodino Act requires companies to submit mergers above a certain threshold to federal agencies for review.[19] The Hart-Scott-Rodino Act applies to vertical and horizontal mergers.[20] Federal

16. Sherman Antitrust Act, 15 U.S.C. §§ 1–7; Clayton Antitrust Act, 15 U.S.C. §§ 12–27(a).

17. 15 U.S.C. § 18.

18. *Id.* § 2.

19. *Id.* § 18(a) ("[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired . . . .").

20. *Id.*

agencies, the States' Attorneys General, and private actors may enforce these three statutes.[21]

Mergers are reviewed for anticompetitive effects such as a dangerous concentration of the market and illegitimate restraints on trade.[22] Analysis of a merger's anticompetitive effects is primarily conducted under the Clayton Act's Section 7.[23] With a lack of case law from the Supreme Court of the United States and the lower courts since the 1980s, the Federal Trade Commission ("FTC") and DOJ merger guidelines serve as significant persuasive authority for interpreting the federal standard.[24] The merger review, conducted by agencies and courts, is forward-looking as it attempts to predict effects on competition and the new market structure following the merger.[25]

The goals of antitrust enforcement generally fall into two philosophies: maximizing consumer welfare or maximizing the aggregate social welfare.[26] Both theories are focused on increasing surplus with differing priorities for which surplus to prioritize.[27] Consumer welfare represents the economic surplus retained by consumers.[28] The aggregate social welfare is the surplus retained by both consumers and producers.[29] While the aggregate social welfare initially appears as a secondary concern for antitrust economics, it plays a central role in measuring the continued growth of both mi-

21. *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/UHF3-YV5H].

22. 15 U.S.C. § 18.

23. *Id.*; New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 198 (S.D.N.Y. 2020).

24. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 (1997) [hereinafter HORIZONTAL MERGER GUIDELINES], https://www.justice.gov/atr/horizontal-merger-guidelines-0 [https://perma.cc/EM9Y-M4T5] ("The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.").

25. *Id.* § 1.

26. *See* Alan J. Messe, *The Goals of Antitrust: Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2198–99 (2013) (using the term "total" instead of aggregate).

27. *See id.* at 2219; *see also* Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2509 (2013) ("In this current populist formulation, it is consumer welfare that would be maximized at the expense of producer-and-consumer welfare.").

28. *See* Messe, *supra* note 26, at 2228.

29. *See id.* at 2229.

cro- and macroeconomic markets. By prioritizing consumer welfare, regulatory and statutory enforcement may sacrifice the aggregate social welfare, and the inverse is also true. Further, these twin goals must prevent restraints on trade while allowing competitors to grow and innovate.

Horizontal mergers—mergers between two competitors—are a particular concern in antitrust because of the compounding effects of removing a competitor and the surviving party's resulting increase in market share.[30] Mergers are permissible, however, if they provide efficiencies that would be unobtainable without the combination of the companies.[31]

B. *Federal Actions*

The primary federal antitrust enforcement agencies are the DOJ and FTC. If the federal antitrust agencies suspect a merger will result in anticompetitive effects, then they may call for divestitures, issue consent decrees, engage in litigation to block mergers, and conduct post-merger review.[32] Divestitures and consent decrees may be combined, as seen in the DOJ approval of the T-Mobile-Sprint merger.[33] Divestitures involve a negotiated settlement, with the merging parties agreeing to sell off portions of their business to maintain premerger competition levels.[34] Consent decrees are helpful to competitors by allowing companies to make business plans with clarity; this benefit, however, is eroded by enforcers that

30. 4 EARL W. KINTER, JOSEPH P. BAUER, WILLIAM H. PAGE & JOHN E. LOPATKA, FEDERAL ANTITRUST LAW § 34.3 (2019) ("The following anticompetitive effects typically flow from horizontal mergers: (1) the combined market share percentage of the merged enterprises will exceed that previously enjoyed by either of the two parties to the merger; (2) the new firm will have larger assets; and (3) the number of competitors in the relevant market(s) will be reduced by one.").

31. *See* Alan A. Fisher, Frederick I. Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 778 n.2 (1989) ("Economic efficiency occurs when there is no way to reallocate resources or goods to make any individual better off without making someone else worse off. Perfect competition in all markets ensures economic efficiency." (emphasis omitted)).

32. *See The Enforcers*, *supra* note 21.

33. *See generally* Proposed Final Judgment at 6–11, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. July 26, 2019).

34. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7–10 (2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf [https://perma.cc/TF5U-9WWJ].

do not stand by the terms of the decree.[35] Consent decrees have been used previously in telecommunications to reshape the market. Bell Telephone is the most salient example for our purposes.[36] To combat the AT&T monopoly, the DOJ sued to break up the company and to reinvigorate competition in the industry.[37] This DOJ-led litigation was resolved through a consent decree and resulted in a complete remapping of the market.[38] While an extreme example, it demonstrates the power of consent decrees as a regulatory tool, particularly in telecommunications. This action resulted in a complete restructuring of the market and provided evidence of the overwhelming power available to the federal regulators.

After T-Mobile submitted the merger proposal for review, the DOJ picked up the review and negotiated a divesture plan that would lead to a consent decree from the agency.[39] The DOJ's proposed settlement involved T-Mobile and Sprint divesting Sprint's prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to DISH Network Corp.[40] Additionally, the parties would divest spectrum, at least 20,000 cell sites, and hundreds of retail locations to DISH.[41] Also, T-Mobile would provide DISH with access to the new combined T-Mobile network for seven years while DISH would build its 5G network.[42] The DOJ requested the divesture of the prepaid businesses to protect low-income users, addressing a primary concern later raised by the plaintiff states.[43] The divestitures would result in (1) providing resources to stand

35. *See* Landes & Posner, *supra* note 15, at 39 (describing the monopoly on enforcement necessary for enforcement).

36. Andrew Pollack, *Bell System Breakup Opens Era of Great Expectations and Great Concern*, N.Y. Times (Jan. 1, 1984), https://www.nytimes.com/1984/01/01/us/bell-system-breakup-opens-era-of-great-expectations-and-great-concern.html [https://perma.cc/EZJ9-SYV9]; *Chain of Events Led to Bell Breakup with AM-Bell System Breakup, Bjt*, Associated Press (Dec. 10, 1988), https://apnews.com/d691cca8e5f4729842784cbd978824cc [https://perma.cc/RD7S-8WRW].

37. *See Chain of Events Led to Bell Breakup with AM-Bell System Breakup, Bjt*, *supra* note 36.

38. *Id.*

39. Proposed Final Judgment, *supra* note 33, at 2–18.

40. *Id.* at 6–7.

41. *Id.* at 11–16.

42. *Justice Department Settles*, *supra* note 10.

43. Proposed Final Judgment, *supra* note 33, at 6–11; *see* Fourth Amended Complaint at 9–10, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. Nov. 8, 2019).

up a new competitor (DISH) and (2) removing control of the prepaid market from the combined entity.[44] Following the divestitures, the DOJ's stipulations resulted in a settlement and consent decree blessing the merger.[45]

Following the DOJ settlement, the FCC published a memorandum approval, detailing the effects of the proposed merger and divestitures.[46] The merger required FCC approval because of the transfer of radio licenses from Sprint to T-Mobile, and FCC review may consider impacts including and beyond competition.[47] The FCC's provisions provided further assurance that T-Mobile would meet the promised goals and also provided remedies for the federal government if those goals did not come to pass: T-Mobile agreed to pay $10 to $250 million if it failed to meet verifiable goals relating to the implementation of the 5G network.[48]

C. *State Action*

The plaintiff states filed suit in the United States District Court for the Southern District of New York seeking to permanently enjoin the merger.[49] The action, led by the New York and California Attorneys General, included ten states.[50] Generally, state attorneys general may bring suits under the federal antitrust laws or their respective state laws.[51] Here, the states alleged violations of Section 7 of the Clayton Act, arguing that the merger would (1) decrease competition due to concentration of the market, (2) fail to result in cognizable and merger-specific efficiencies, and (3) cause

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44. Statement of Interest at 10–11, United States v. Deutsche Telekom AG, No. 1-19-cv-5434 (D.D.C. Dec. 20, 2019).

45. Proposed Final Judgment, *supra* note 33, at 6–11.

46. *See generally* T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,583–84 (2019).

47. Amended Complaint, *supra* note 2, at 5; *see infra* section III.A.

48. T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,583–84 (2019).

49. *New York Attorney General James Moves to Block T-Mobile and Sprint Megamerger*, N.Y. ST. OFF. ATT'Y GEN. (June 11, 2019) [hereinafter *Attorney General Moves to Block Megamerger*], https://ag.ny.gov/press-release/2019/new-york-attorney-general-james-moves-block-t-mobile-and-sprint-megamerger-0 [https://perma.cc/6PQR-MCS7].

50. Amended Complaint, *supra* note 2 (noting that plaintiffs included the states of New York, California, Colorado, Connecticut, Hawaii, Maryland, Michigan, Minnesota, Mississippi, Nevada, and Wisconsin; the Commonwealths of Massachusetts and Virginia; and the District of Columbia).

51. *See* Alec Koch, Carrie B. Mahan & John Woykovsky, *Antitrust Violations*, 33 AM. CRIM. L. REV. 511, 534–35 (1996) (discussing state antitrust laws and methods through which states may enforce them).

consumer harm through increased prices.[52] Conversely, the defendants argued that the merger would result in (1) increased competition, (2) decreased prices, and (3) service of the public interest.[53] The suit proceeded and the burden of analyzing the effects of the merger on competition shifted to the district court.

The negotiated divestitures led the DOJ and FCC to bless the merger. Despite federal approval, the collective plaintiff states brought this action in opposition to the settlement.[54] The DOJ opposed the plaintiff states' suit through a Statement of Interest because of the risk to the negotiated settlement.[55] In opposition to the collective state suit, several states joined the DOJ's Statement of Interest to express support for the merger.[56]

In this context, the district court applied Section 7 of the Clayton Act, which prohibits a merger if its effect "may be substantially to lessen competition in any line of commerce in any section of the country."[57] Substantial impairment of competition must be a reasonable probability, not a mere possibility.[58] The likelihood of anticompetitive effects is determined with consideration of the "structure, history, and probable future" of the particular markets that the merger will affect.[59] Courts analyze transactions under "a totality-of-the-circumstances approach to the statute,"[60] which weighs "a variety of factors to determine the effects of particular transactions on competition . . . Evidence of market concentration

52. Amended Complaint, *supra* note 2, at 33; *see Attorney General Moves to Block Megamerger*, *supra* note 49.

53. Defendants' Pretrial Memorandum at 21–30, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 1:19-cv-5434), 2020 U.S. Dist. LEXIS 23716.

54. *See Attorney General Moves to Block Megamerger*, *supra* note 49.

55. *See generally* Statement of Interest, *supra* note 44.

56. States joining the action included Arkansas, Colorado, Florida, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, and Texas; states voicing public approval of the settlement included Arizona, New Mexico, and Utah. Statement of Interest, *supra* note 44, at 6.

57. *Deutsche Telekom*, 439 F. Supp. 3d at 198 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 355 (1963)).

58. *Id.* (citing Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979)); *see id.* ("Section 7 'deals in probabilities, not ephemeral possibilities'" (quoting United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622–23 (1974))).

59. United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962)).

60. United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990). Section 7 analysis requires evaluation of a merger's competitive effects under the totality of the circumstances. *Id.*

simply provides a convenient starting point for a broader inquiry into future competitiveness."[61] With this overarching standard in mind, the court must analyze significant factors that may affect competition, including the market shares of competitors, concentration of the market, barriers to entry, the possibility of collusion in the market, and the motive for the merger.[62]

The states' suit focused in large part on whether the transaction would "significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition."[63] A merger is presumptively anticompetitive if the merged firm would have a market share greater than thirty percent[64] or a market concentration (measured using the Herfindahl-Hirschman Index ("HHI")) that results in a "highly concentrated market."[65] The HHI is a market measurement tool used by the FTC and DOJ.[66] Market concentration analysis, conducted either through the HHI or percentage market shares, is not definitive in determining if a merger is anticompetitive.[67] A court applying the HHI or measuring percentage market shares must then turn to look at the "particular structure and circumstances of the industry at issue."[68] As the court considered the parties' arguments, it placed significant weight on "already extensive scrutiny

61. *Id.*; *see also* United States v. Waste Mgmt., Inc., 743 F.2d 976, 981 (2d Cir. 1984) (noting that "large market shares are a convenient proxy" but are not definitive for assessing horizontal mergers).

62. This list is not exhaustive, and the importance of every factor is determined by the specific facts surrounding the merger. *See* 1 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION § 30.03 (2d ed. 2020).

63. *Deutsche Telekom*, 439 F. Supp. 3d at 199 (quoting Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 423 (5th Cir. 2008)).

64. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 364–66 (1962); Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 260 (2d Cir. 1989).

65. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 5.3. A merger is presumptively anticompetitive if it results in a "highly concentrated market" with an HHI above 2500. *Deutsche Telekom*, 439 F. Supp. 3d at 205–06.

66. *Deutsche Telekom*, 439 F. Supp. 3d at 206; HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 5.3.

67. *Deutsche Telekom*, 439 F. Supp. 3d at 206. Here, the plaintiffs determined the market share resulting from the merger to be "either 37.8 percent if measured by subscribers or 34.4 percent if measured by revenues," but the district court did not find this presumption dispositive. *Id.*

68. *Id.* (quoting Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)).

of the Proposed Merger by the FCC and DOJ," due to the complexity in evaluating this market.[69] To determine the merger's competitive effects under the totality of the circumstances, the district court incorporated the market shares, HHI, structure of the telecommunications market, and the scrutiny of the FCC and DOJ.[70]

1. Plaintiff States' Argument

The three primary arguments made by the plaintiff states were that the merger would result in decreased competition; prices would be likely to increase; and that the argued efficiencies were neither cognizable nor merger-specific.[71] Decreased competition would supposedly occur due to the reduction of three competitors and would reduce incentives for T-Mobile to continue its "maverick" strategy.[72] The supposed resulting efficiencies were said to be speculative and able to be achieved without the merger.[73] The merger was argued to be likely to result in increased prices due to the decreased competition and increased opportunities to collude, resulting in disparate negative impacts for low-income consumers.[74]

The plaintiffs stated the merger would result in the consolidation of the third- and fourth-largest national mobile services providers, with the combined firm gaining the largest market share.[75] Market consolidation, combined with high barriers to entry, represents a significant risk to competition; if prices are raised, new competitors still may not be able to enter.[76] The drop to three competitors would drastically change the market structure and market shares.[77] The states estimated the combined entity—the new T-Mobile—would have a market share higher than AT&T and Verizon.[78] The plaintiff states believed this would decrease T-Mobile's

69. *Id.*
70. *See id.* at 205–06, 224–25, 233–34, 239–244.
71. Amended Complaint, *supra* note 2, at 16–18, 24–25, 29.
72. *Id.* at 24.
73. *Id.* at 29.
74. *Id.* at 4–5.
75. *Id.* at 3–4.
76. *See generally* KINTER ET AL., *supra* note 30, § 34.10 (describing barriers to entry).
77. Amended Complaint, *supra* note 2, at 3–4.
78. Under the HHI analysis, the plaintiff states met a prima facie burden, with the court stating that "New TMobile [sic] would have a national market share of either 37.8 percent if measured by subscribers or 34.4 percent if measured by revenues, and the national HHI would increase by 679 points for a total HHI of 3186." New York v. Deutsche

incentives to continue its maverick behavior or to lower its prices.[79] The DOJ merger guidelines describe a "maverick" as "a firm that plays a disruptive role in the market to the benefit of customers."[80] If T-Mobile chose to discontinue its maverick strategy, there would be less incentive for its competitors to drop prices to compete.

Further, the plaintiffs argued that DISH would not enter the market and prevent price increases.[81] Entry into the telecommunications market is difficult due to high barriers to entry, including the massive capital outlay and acquisitions necessary to compete.[82] The inability of new competitors to enter the market allows for the opportunity to raise prices or to coordinate.[83] DISH had not previously chosen to enter the market despite extensive spectrum holdings. Therefore, the loss of Sprint could result in disproportionate adverse effects on the prepaid service market, with fewer low-cost options for consumers.[84] T-Mobile and Sprint were the main competitors for prepaid services.[85] The market's inelastic demand and high barriers to entry are concerning because any changes to price will harm consumers, and there is unlikely to be a maverick or new competitor easily entering. With an almost entirely inelastic demand curve, there is no ready substitute for wireless phone service.[86] Consumers will not stop paying for wireless service regardless of price changes. Therefore, the loss of a competitor providing

Telekom AG, 439 F. Supp. 3d 179, 206 (S.D.N.Y. 2020). Notably, the court restated that this analysis leads only to a presumption and is not definitive. *Id.*

79. Amended Complaint, *supra* note 2, at 24–25.

80. HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 2.1.5; *see* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 24 (2006), https://www.justice.gov/atr/commentary-horizontal-merger-guidelines [https://perma.cc/72D6-ZHTD] (defining maverick firms as those "that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals (e.g., firms that are unusually disruptive and competitive influences in the market.)").

81. Amended Complaint, *supra* note 2, at 5, 13.

82. *Id.* at 13 ("There are significant barriers to entering the market and providing mobile wireless telecommunications services. To replace the loss of competition from a nationwide MNO, a new entrant would need to, among other things, acquire spectrum licenses at a national level, design and construct a nationwide network, and market services nationally.").

83. *Id.* at 25.

84. *Id.* at 5.

85. *Id.* at 21–22.

86. *Id.* at 11.

low-cost services would disproportionately impact the prepaid wireless service market.[87]

The plaintiff states argued that the efficiencies, specifically concerning innovation and 5G, were speculative and not merger-specific.[88] The plaintiffs based this argument on the untested nature of the technology the merging firms planned to create, stating "[t]he claimed efficiencies are based on speculation and assumptions about what the company might achieve years in the future using new and untested technologies and, thus, cannot be verified."[89] They further argued that the individual efforts to roll out 5G networks by T-Mobile and Sprint showed that a 5G network could be completed without the merger.[90] The plaintiffs believed the aforementioned effects would result in decreased competition due to the merger, and should therefore be prevented from moving forward.

2. Defendants' Arguments

To rebut the plaintiffs' suit, the defendants presented procompetitive effects showing that the merger would result in increased competition, decreased prices, and other benefits to the public. Competition would arguably increase due to the entry of DISH and the incentives for T-Mobile to continue its maverick strategy to attract more customers.[91] The defendants suggested this increased competition would result in decreased prices because T-Mobile's efficiencies would allow it to lower costs and it would need new customers or risk wasting its excess capacity.[92] Finally, the public interest was said to be served through the accelerated rollout of a 5G network and expanded service offerings.[93]

Contrary to the plaintiffs' argument, the defendants predicted that competition would increase with the entry of DISH and T-Mobile's lower costs. The defendants presented DISH as a viable en-

87. *Id.* at 5.
88. *Id.* at 29–30.
89. *Id.* at 29.
90. *Id.* at 30.
91. Defendants' Pretrial Memorandum, *supra* note 53, at 14.
92. *Id.*
93. *Id.* at 28–30.

trant to the telecommunications market due to its substantial spectrum holdings and the forthcoming divestitures of retail locations, spectrum, and access to T-Mobile's network.[94] The defendants referred to comments from both the DOJ and FCC which confirmed that DISH would have significant incentives to expand its wireless services in response to any price increases.[95] The divestitures to DISH would provide it the capability to compete, and any decrease in competition would provide incentives for DISH to take customers from the other competitors.[96]

The defendants argued prices would decrease because of lower costs and greater capacity. The lower costs resulting from the efficiencies and carrier aggregation would allow T-Mobile to increase quality and decrease prices.[97] The increased capacity of the merged entity would incentivize the new company to continue its maverick behavior and increase competition, and would not lead to increased costs.[98] The new T-Mobile would need to maximize profits by taking customers from its competitors, not by colluding with them.[99] The excess capacity would be a wasted expenditure if T-Mobile did not continue its maverick strategy to steal customers, expand sales, and thereby find uses for the capacity.[100] Capacity would represent a sunk cost to the new T-Mobile, and a failure to attract new customers could only result in harming T-Mobile's profits.[101]

The defendants argued the public interest would be served by the expansion of service and the accelerated innovation resulting from the merger. To support this argument, the defendants highlighted the comments of the FCC on the benefits of the merger on the innovation of 5G technology, arguing that "the Court should give substantial weight to the FCC's determination that the mer-

94. *Id.* at 3.

95. *Id.* at 3–4.

96. *Id.* at 27.

97. *Id.* at 12.

98. *Id.* at 14; *see* HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 2.12 ("For example, in a market where capacity constraints are significant for many competitors, a firm is more likely to be a maverick the greater is its excess or divertible capacity in relation to its sales or its total capacity, and the lower are its direct and opportunity costs of expanding sales in the relevant market.").

99. Defendants' Pretrial Memorandum, *supra* note 53, at 25–28.

100. *Id.* at 25.

101. *Id.*

ger 'will result in significant public interest benefits, including encouraging the rapid deployment of a new 5G mobile wireless network, and improving the quality of [wireless] services for American consumers.'"[102] The defendants argued the FCC must be given deference in determining how the public interest is best served in telecommunications transactions.[103] Additionally, they argued that the increased capacity would allow for expansion of service to underserved rural areas, a benefit that would not exist without the merger.[104]

3. The District Court's Decision

The district court found the defendants' argument persuasive. It held that the merger would result in procompetitive effects, including efficiencies, innovation, a new expansion of service, and the likely entry of a new competitor, which would outweigh the potential for harm to competition.[105]

Efficiencies are a central concern for telecommunications firms because of the scarcity of essential inputs. The barriers to entry for wireless service providers cause (to an extent) a natural oligopoly.[106] Spectrum is a finite resource and more firms in the market would not enhance the consumer product; rather, more firms would likely degrade it.[107] Creating more competitors to compete for 5G will not necessarily result in a quicker or better product, with the supply of spectrum being further divided and hurting the competitors' infrastructure.[108] As the district court found in *Deutsche Telekom AG*, the logistical realities of the allocation and limited supply of spectrum are a necessary consideration to balance

102. *Id.* at 29.

103. *Id.* (quoting FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981)).

104. *Id.* at 30.

105. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 207–10, 230, 248 (S.D.N.Y. 2020).

106. *See Issue Brief: A Communications Oligopoly on Steroids*, *supra* note 1.

107. Division of the limited amount of spectrum among more parties is logically counter to the efficiencies found in carrier aggregation.

108. Peter Cramton, Evan Kwerel, Gregory Rosston & Andrzej Skrzypacz, *Using Spectrum Auctions to Enhance Competition in Wireless Services*, 54 J.L. & ECON. S167, S169 (2011) (describing "best use" of the assignment of spectrum).

competition concerns in telecommunications.[109] The defense focused on the essential benefits of the merger-specific efficiencies.[110] The district court held that "[t]he undisputed evidence at trial reflects that combining Sprint and T-Mobile's low-band and mid-band spectrum on one network will not merely result in the sum of Sprint and T-Mobile's standalone capacities, but will instead multiply the combined network's capacity because of . . . 'carrier aggregation.'"[111] This resulting "carrier aggregation" is an efficiency that would not exist without the merger.[112] For purposes of evaluating competitive effects, efficiencies due to a merger are a valid procompetitive argument under the federal merger guidelines.[113]

Low- and medium-band spectrum could be combined and deployed more effectively than by either T-Mobile or Sprint individually. The district court found the defendants' argued efficiencies to be plausible and that they would include

> (1) more than doubling the standalone firms' network capacity, which is projected to result in 15 times the speeds now offered by the four major MNOs to consumers; (2) saving $26 billion in network costs and another $17 billion in other operating costs; (3) increasing network coverage to strengthen competition in underserved markets; and (4) accelerating the provision of 5G service.[114]

The defendants had argued that these efficiencies would increase competition.[115] The district court agreed and held that the new T-Mobile efficiencies would result in "low network marginal costs and more excess capacity to fill than AT&T and Verizon" and that "[T-Mobile] could rationally lower its prices and advertise the higher quality of its network to attract customers away from AT&T and Verizon, thus increasing competition in the RMWTS Markets."[116]

109. 439 F. Supp. 3d at 190–92.

110. Defendants' Pretrial Memorandum, *supra* note 53, at 21–24.

111. *Deutsche Telekom*, 439 F. Supp. 3d at 208.

112. *Id.*

113. HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 4 ("Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective [e.g., high-cost] competitors to form a more effective [e.g., lower-cost] competitor. . . .").

114. *Deutsche Telekom*, 439 F. Supp. 3d at 208.

115. Defendants' Pretrial Memorandum, *supra* note 53, at 21.

116. *Deutsche Telekom*, 439 F. Supp. 3d at 210.

Additionally, the district court considered the settlement and opinions of the federal agencies regarding innovation through the 5G rollout plan.[117] The FCC had voiced its agreement with this argument, stating "5G also holds the potential to create three million new jobs in our country and $500 billion in GDP growth as well as providing additional competition in the market for in-home connectivity."[118] Both the DOJ and FCC emphasized a focus on facilitating the rollout of this next step in telecommunications.[119] The agencies argued the merger would allow the new T-Mobile to use the gained spectrum for allocation to the 5G network and would result in a better product.[120] Prior to the merger, T-Mobile's supply of spectrum consisted primarily of low-band, while Sprint's spectrum was mostly medium-band.[121] Low-band spectrum is best for spread-out areas and spreading signal farther, while the medium-band spectrum is useful for denser areas and population centers.[122] The district court agreed with the defendants' and federal agencies' arguments concerning positive impacts on innovation. It held that "[a]lthough 5G, the latest technological standard for mobile wireless telecommunications services, is primarily being deployed across the mid-band spectrum worldwide, this type of deployment has been relatively difficult in the United States because additional undeployed mid-band spectrum is not readily available."[123] There is limited supply for all mobile carriers to utilize in advancing to 5G, so the district court believed that combining efforts would make that advancement more readily achievable.[124]

The argued benefits to innovation from the merger were not limited to the 5G network, with the district court giving weight to plans of substantially expanding services in rural markets. The

117. *Id.* at 224.

118. T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,580–81 (2019).

119. *See id.*; Statement of Interest, *supra* note 44, at 3, 7–8.

120. T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,581 (2019).

121. Defendants' Pretrial Memorandum, *supra* note 53, at 12.

122. NAT'L TELECOMM. & INFO. ADMIN., IDENTIFYING KEY CHARACTERISTICS OF BANDS FOR COMMERCIAL DEPLOYMENTS AND APPLICATIONS: FINAL REPORT AND RECOMMENDATIONS 8–9 (2017), https://www.ntia.doc.gov/files/ntia/publications/key_characteristics_sub-committee_final_report_nov_17_2017.pdf [https://perma.cc/E8JV-XSW5]; Defendants' Pretrial Memorandum, *supra* note 53, at 6.

123. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 191 (S.D.N.Y. 2020).

124. NAT'L TELECOMM. & INFO. ADMIN., *supra* note 122.

creation of a new product may serve as a rebuttal of the anticompetitive effects of a restraint on trade.[125] Analysis of efficiencies may include a new product created by a restraint on trade (here, the merger) and evaluate whether the product could exist without the restraint.[126] Here, the new product available to customers is new—or more significant—services in rural markets.[127] The service in the rural markets, at least at the anticipated quality, would not exist without the efficiencies created by the merger. The district court described the improvements as follows:

> New T-Mobile's 5G network will cover 99% of the United States population with speeds faster than 50 Mbps within six years—double the Commission's definition of advanced telecommunications capability. . . . Rural communities will see especially large benefits from such 5G connectivity as coverage and throughput in rural areas can often lag urban deployment . . . high-speed wireless connections are more valuable for those who lack quality fixed service, telehealth services are more highly demanded the further one lives from a doctor, and distance learning is more important for those far from schools. By bringing new connectivity and competition to underserved rural areas, the transaction will help to ensure that 5G will close the digital divide.[128]

Finally, the district court held that DISH was a likely entrant to the market.[129] The entry of a new competitor is a defense to a Clayton Act Section 7 claim.[130] An entry defense requires a future entrant to be realistic and imminent.[131] The federal merger guidelines provide that the entrant must be "timely, likely, and sufficient in its magnitude, character, and scope" to address anticompetitive concerns.[132] Entry defenses are likely to be uncommon in telecommunications due to the market's high barriers to entry.[133] Effective entry to the telecommunications market requires

125. *Compare* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979), *with Deutsche Telekom*, 439 F. Supp. 3d at 197 (holding that the service will be developed in rural regions as a result of the merger).

126. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 4.

127. T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,581 (2019).

128. *Id.*

129. *Deutsche Telekom,* 439 F. Supp. 3d at 229–32.

130. *Recent Proposed Judgment*, 133 HARV. L. REV. 739, 741 (2019) ("Entry is a hallmark defense to section 7 merger challenges that is based on the idea that a merger will not have anticompetitive effects because a new firm will enter the market and replace the lost competition." (internal citations omitted)).

131. *See generally* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

132. HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 8.

133. Amended Complaint, *supra* note 2, at 29 (describing the difficulty in entering the

a certain minimum threshold of spectrum and infrastructure.[134] Here, DISH is the salient example: despite significant holdings of spectrum, it had still refrained from entering the market.[135] DISH may have lacked sufficient access to low-band spectrum because of the difficulty in procuring it and an inability to purchase specific bandwidths at auction.[136] The district court stated there had not been an auction for low-band frequency in the last five years, and that there was no current plan to have one.[137] DISH's extensive spectrum holdings make it a more realistic new entrant than almost any other firm, which influenced the district court's decision to hold it as a "sufficient," "likely," and "timely" entrant to the market.[138] DISH's ability to meet the minimum spectrum threshold would be measurably improved by the settlement granting divestitures of spectrum, prepaid subscribers, retail locations, and access to the T-Mobile network.

As antitrust enforcers and courts strive to balance the twin goals of consumer and aggregate welfare, creating or maintaining the most effective competitors is essential. Here, competition may be better served by the new competitor than by the current firm being acquired. The district court compared DISH and Sprint as future competitors in the market and found DISH would more likely benefit from competition.[139] The district court found Sprint unlikely to be an effective competitor, stating that Sprint did not possess the "financial and operational means to survive in the near term as a national wireless carrier."[140] The opinion further provided that Sprint's failure was likely due to the vast resources needed to meet the growing demand for 5G service.[141] Not only will DISH have access to its own spectrum reserves, Sprint's spectrum, and retail locations, it will also be able to piggyback off its competitor's (new T-Mobile's) network to decrease costs.

market due to high barriers to entry).

134. *Deutsche Telekom*, 439 F. Supp. 3d at 228–30.

135. DISH's failure to enter the market may be attributable to other business decisions.

136. *See Deutsche Telekom*, 439 F. Supp. 3d at 190, 211.

137. *Id.* at 211.

138. *Id.* at 226–33.

139. *Id.* at 233, 246.

140. *Id.* at 246.

141. *Id.*

D. *Effects of the States' Litigation*

Following the decision in *Deutsche Telekom AG*, it is no longer an open question if the T-Mobile-Sprint merger is valid under Section 7 of the Clayton Act.[142] The states have declined to appeal, and the merger has closed, albeit with regulatory pushback from the CPUC.[143] The intervention of the states did not result in a new settlement, new divestitures, or a restructuring of the deal. The negotiated agreement with the DOJ and FCC will serve as the framework of the new T-Mobile moving forward. The question becomes, what resulted from the collective state action? Simply put, reallocation (waste) of judicial, federal, and state government resources and the delay of business for the merging parties.

II. PRIOR DIVERGENCES BETWEEN STATE AND FEDERAL ENFORCERS

Despite the recent significant overlap between state and federal enforcement actions, the two levels of government generally have different areas of expertise for antitrust. The current antitrust system is multilayered with different domains, enforcement abilities, and motives. The degree of federal enforcement has risen and fallen based upon different executive administrative goals.[144] Recent state action reflects the established trend of state involvement increasing in times of more lax federal enforcement.[145]

State and federal enforcers vary in organization and purpose. The primary federal antitrust enforcers, the DOJ and FTC, generally divide sectors of the economy based on their enforcement history. The DOJ is a federal law enforcement agency with a greater range of remedies than is enjoyed by the FTC, including criminal

142. *See id.* at 249.

143. *See supra* note 14 and accompanying text.

144. *See* Juan A. Arteaga, *New York State Attorney General Office Fast Becoming Epicenter of Reinvigorated State Antitrust Enforcement*, N.Y. L.J. (Sept. 20, 2019), https://www.law.com/newyorklawjournal/2019/09/20/new-york-state-attorney-general-office-fast-becoming-epicenter-of-reinvigorated-state-antitrust-enforcement/ [https://perma.cc/5EK7-RRNA].

145. *See* Michael F. Brockmeyer & Jeffrey I. Zuckerman, *Should Divestiture Be Limited to Federal Enforcers—Point/Counterpoint*, 4 ANTITRUST L.J. 37, 37–38 (1990).

prosecution.[146] The FTC is a bipartisan group with the dual missions of promoting competition and protecting consumers, and may target more extensive ranges of behavior by enforcing the Federal Trade Commission Act against "unfair competition."[147] The states' domain is consumer protection of their citizens. States are not limited to suing under federal law and may bring actions available to them under their respective state's law.[148] Even with application of the same law, there are many different logistical considerations, such as limited staff and resources devoted to antitrust. These logistical difficulties cause most multistate actions to be led by larger states, with smaller states only contributing their limited sized antitrust sections as support.[149] Another significant difference between the enforcers is that state enforcers are generally elected officials while federal enforcers are appointed officials.[150] As elected officials, States' Attorneys General are representing their constituents and will enforce antitrust in a manner that best benefits those constituents.

State action is continuing to rise, with collective action becoming a cemented enforcement strategy.[151] The National Association of Attorneys General ("NAAG") serves to help organize disparate state enforcers and gives them a forum to discuss enforcement policies and cooperation.[152] The NAAG emulates a federal agency in geographic breadth of enforcement but is comprised of individual states and their elected officials (the States' Attorneys General).[153]

146. U.S. DEP'T OF JUSTICE ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 1–2, 7 (2018), https://www.justice.gov/atr/page/file/1091651/download [https://perma.cc/4AQA-DCG8].

147. Federal Trade Commission Act, 15 U.S.C. §§ 41–58; *see What We Do*, FED. TRADE COMM'N [hereinafter *What We Do, FTC*], https://www.ftc.gov/about-ftc/what-we-do [https://perma.cc/KP4Q-R7X7].

148. *See* Koch et al., *supra* note 51, at 534–35 (discussing state antitrust laws and methods through which states may enforce them).

149. *See* D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1088–89 (2010).

150. *See* Hahn & Layne-Farrar, *Federalism in Antitrust*, *supra* note 15, at 893.

151. *See, e.g.*, Andrew Kragie, *Colorado Lets AG Bring State-Law Merger Challenges*, LAW360 (Mar. 24, 2020, 7:28 PM), https://www.law360.com/articles/1256517/colorado-lets-ag-bring-state-law-merger-challenges [https://perma.cc/2U5N-S4FK]; *cf. id.* at 879–81 (describing the role of states in large national transactions and an example of a major case).

152. NAT'L ASS'N ATT'YS GEN., https://www.naag.org/ [https://perma.cc/Z2XZ-YBQK].

153. *Id.*

It achieves its influence through standing committees and task forces, including its Multistate Antitrust Task Force.[154]

Collective actions by states face several unique issues, including coordination costs, differences in law, and different enforcement policies. Differing confidentiality laws may affect investigations and the scope of information requests.[155] Separate standards on vertical restraints in state and federal law may lead to greater enforcement by States' Attorneys General.[156] Also, each state's enforcement policy may vary due to economic and political differences.[157] The fragmentation of central authority over enforcement prevents the ability purposefully not to enforce if the behavior at hand is necessary to achieve a broader policy goal.[158]

While states may differ with respect to their enforcement policies, previous collective state action has led to several disagreements with federal enforcement decisions. In 1994, the DOJ and several states filed suit against Microsoft in the United States District Court for the District of Columbia, alleging violations of Sections 1 and 2 of the Sherman Act.[159] In the end, multiple states disagreed with the settlement forged by the federal enforcement agency.[160] Nine states joined the DOJ settlement, while nine other states proposed substantially different remedies.[161] The dissenting states demanded concessions beyond the scope of the federal settlement, including forcing Microsoft to license significant intellectual property cheaply and to change the company's product offerings.[162] Here, the states undercut a federally engineered settlement, resulting in delays to the suit and continued argument

154. *Multistate Task Force*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee/multistatete_task_force.php [https://perma.cc/4EKY-KFYU].

155. *See* Lande, *supra* note 15, at 1063 ("The prospect of simultaneous investigations or suits by both federal and state enforcers gives rise to more than just costs, delays and uncertainty. As the number of parties increase . . . [c]onfidentiality problems also multiply as the number of investigations rise.").

156. Margaret Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 739 (2011).

157. Hahn & Layne-Farrar, *Federal Preemption in Antitrust Enforcement*, *supra* note 15, at 79.

158. Waller, *supra* note 15, at 829.

159. United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).

160. *See* Hahn & Layne-Farrar, *Federalism in Antitrust*, *supra* note 15, at 896–97.

161. Hahn & Layne-Farrar, *Federal Preemption in Antitrust Enforcement*, *supra* note 15, at 80.

162. *Id.*

over the appropriate remedy.[163] The undercutting of the Microsoft settlement is comparable to the T-Mobile-Sprint merger, where the DOJ and FCC negotiated for divestitures to ensure the national goals of both agencies were satisfied, but still faced pushback from a group of states. If the states and federal enforcers do not agree on the terms of a settlement, the states become a complication to the adjudication process.[164] The inability to rely upon a negotiated settlement agreement also creates uncertainty for merger parties.

In 2015, during the AT&T-Time Warner merger, twenty states investigated; none joined DOJ's action.[165] The DOJ had filed suit to block the vertical merger, alleging violations of Section 7 of the Clayton Act.[166] Nine states filed amicus briefs opposing the DOJ's suit.[167] The DOJ eventually lost the appeal, and the merger proceeded.[168] Instead of a national industry facing a unified enforcement front, the enforcement efforts became fragmented and contradictory. The divergence in enforcement policies showed the competing interests at issue for each enforcer. This split is also apparent in the divergence between the states opposing the T-Mobile-Sprint merger and the DOJ, FCC, and states supporting it.

In an action against American Express in the Second Circuit, the DOJ—the original lead plaintiff—resorted to opposing an appeal by its co-plaintiff states.[169] The DOJ and a group of states had filed suit in 2010 in the Eastern District of New York alleging violations of Section 1 of the Sherman Act.[170] Following a Second Circuit decision against the DOJ and plaintiff states, the DOJ maintained the Second Circuit opinion was incorrect but filed a brief in opposition to the states' petition for a writ of certiorari.[171] The DOJ

163. Hahn & Layne-Farrar, *Federalism in Antitrust*, *supra* note 15, at 892.

164. *See* Lande, *supra* note 15, at 1063. ("The prospect of simultaneous investigations or suits by both federal and state enforcers gives rise to more than just costs, delays and uncertainty. As the number of parties increase, settlements may become exponentially more difficult to reach.").

165. Arteaga, *supra* note 144, at 2.

166. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 164 (D.D.C. 2018).

167. *Id.*

168. Edmund Lee & Cecilia Kang, *U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html [https://perma.cc/L9VF-85Y2].

169. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018); Arteaga, *supra* note 144, at 2.

170. *Am. Express Co.*, 138 S. Ct. at 2283.

171. Brief for the United States in Opposition at 16–17, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454).

advocated for further "percolation in the lower courts," arguing that conflict between the lower courts on the issue was necessary before the Supreme Court should resolve the issue.[172] The plaintiff states maintained their writ for certiorari, and eventually lost in the Supreme Court.[173] The three aforementioned splits in enforcement choices show that the divergence between state and federal enforcement leads to uncertain outcomes, decreases the effectiveness of settlements, and prevents nonenforcement policies that may serve a broader goal.

III. EVOLVING REGULATION IN THE TELECOMMUNICATIONS INDUSTRY

To review the anticompetitive effects of a merger, courts and agencies use a "totality-of-the-circumstances" approach.[174] The analysis of a market "must always be attuned to the particular structure and circumstances of the industry at issue."[175] Therefore, a totality of the circumstances analysis requires due consideration of the effects of regulation on this market. The telecommunications market faces a substantial degree of scrutiny and federal regulation because of the multitude of enforcement agencies. Market-specific circumstances in telecommunications include the effects of regulation, the barriers to entry, and the scarcity of essential inputs. Here, regulators substantially influence competition by controlling entry and inputs, which makes the effects of heavy regulation crucial to evaluating the market. Overregulation can lead to decreases in the aggregate social welfare. Deadweight loss, an economic concept representing the cost of market inefficiency, can be caused by government interference in the market.[176]

In *Deutsche Telekom AG*, the court recognized the exceptional nature of the telecommunications market as a factor for antitrust analysis due to the heightened regulatory scrutiny, stating that

172. *Id.* at 17.

173. Arteaga, *supra* note 144, at 2.

174. United States v. Baker Hughes Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

175. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

176. *See* Fisher et al., *supra* note 31, at 779 n.4 (describing deadweight loss as "pure social loss"); *see also* Taylor LaJoie, *Reviewing the Deadweight Loss Effects of High Tax Rates*, TAX FOUND. (Nov. 8, 2019), https://taxfoundation.org/deadweight-loss-effects-high-tax-rates/ [https://perma.cc/7ARM-4JB7] (discussing deadweight loss in the context of tax).

> [t]he industry's profound impact and importance also serve as a big spotlight to focus more intense attention of public regulators and other law enforcement officials to be more vigilant and aggressive in promoting the public interest and protecting consumers and the national economy from harm. That oversight helps ensure lawful business conduct and enforcement of compliance with remedial commitments the government imposes to enhance competition, as witnessed in this case by the intervention of both federal and various state agencies.[177]

Telecommunications competitors are faced with a deep stable of regulators, massive compliance costs, and limited behavioral choices. The telecommunications market is regulated not just by the DOJ[178] and FTC,[179] but also by the FCC,[180] the National Telecommunications and Information Administration ("NTIA"),[181] the Securities Exchange Commission ("SEC"),[182] and increasingly by CFIUS.[183] The variety of governmental controls over firm behavior indicates how structured the market has become. The firms must comply with numerous priorities, including antitrust, consumer protection, and national security. The result is less freedom to compete and innovate. The addition of further regulations or enforcement actions will serve to compound the restrictions and result in costs to the firms and lessened competition.

A. *Telecommunications Agencies*

Beyond the standard federal antitrust enforcers, the FCC and NTIA are telecommunications-specific agencies that regulate the behavior of competitors in the market.[184] These two agencies regulate spectrum, an essential input for wireless communication.[185] Spectrum is purchased through government-controlled auctions.[186]

177. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 247 (S.D.N.Y. 2020).

178. *See supra* Part I.

179. *What We Do, FTC*, *supra* note 147.

180. *What We Do*, FED. COMM. COMM'N [hereinafter *What We Do, FCC*], https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/VQK6-U8W7].

181. *About NTIA*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/about [https://perma.cc/R4BX-3A7B].

182. *What We Do*, U.S. SEC. & EXCH. COMM'N [hereinafter *What We Do, SEC*], https://www.sec.gov/Article/whatwedo.html [https://perma.cc/89B9-U2T3].

183. *Committee on Foreign Investment in the United States*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius [https://perma.cc/GK5E-PVVC].

184. *See supra* notes 180–81.

185. *See supra* notes 180–81.

186. Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Procedures for

The FCC holds auctions for spectrum after deciding the type and amount of spectrum it will sell to businesses.[187] The NTIA serves as a second regulator on spectrum allocation by recommending policy goals and aiding the FCC in determining the allocation of spectrum.[188]

The FCC is responsible for the licensing, allocation, and distribution of spectrum to providers.[189] Spectrum is a central concern for competition in the market, serving as the most significant barrier to entry due to its scarcity.[190] A crucial consideration is the differences between each type of bandwidth and the need to allocate it carefully to create an effective telecommunications network. Spectrum is comprised of multiple bandwidths: low, medium, and high, each with unique strengths and weaknesses.[191] Similar to the DOJ and FTC,[192] the FCC may evaluate a merger of firms within its purview for the merger's effects on competition.[193] As a specific-sector regulator, the FCC is in a unique position to balance the issue of spectrum scarcity with the competitive effects of a merger.[194] One of the most substantial barriers to entry is the difficulty in acquiring a necessary spectrum threshold to conduct business; the sale of spectrum is regulated by the FCC through auctions.[195]

Competitive Bidding in Auction 1000, 80 Fed. Reg. 61,918, 61,918, 61,920 (Oct. 14, 2015) (to be codified 47 C.F.R. pt. 20); JAMES A. LEWIS, CTR. FOR STRATEGIC & INT'L STUDIES, SPECTRUM MANAGEMENT FOR ECONOMIC GROWTH AND NATIONAL SECURITY 2 (2017), https://www.csis.org/analysis/spectrum-management-economic-growth-and-national-security [https://perma.cc/J52G-YKUJ].

187. *About Auctions*, FED. COMM. COMM'N, https://www.fcc.gov/auctions/about-auctions [https://perma.cc/5LDF-FTT6].

188. *About NTIA*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/about [https://perma.cc/R4BX-3A7B].

189. *What We Do, FCC*, *supra* note 180.

190. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 226 (S.D.N.Y. 2020) (describing how DISH's spectrum holdings will allow it to bypass the high barriers to entry).

191. NAT'L TELECOMM. & INFO. ADMIN., *supra* note 122.

192. *See supra* notes 110–13 and accompanying text.

193. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 401, 132 Stat. 348, 1087–88 (2018) (requiring that the FCC publish and submit to Congress every two years a report on its actions in the marketplace and its agenda for the next two years); *Mergers and Acquisitions*, FED. COMM. COMM'N, https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions [https://perma.cc/J36L-WP4E].

194. *See* D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 142 (2009) ("Sector regulation may also include requirements for the supply and/or quality of service, depending on the sector. Strategic factors may play a role in how sector regulators choose to regulate, given overall political economy concerns.").

195. *Deutsche Telekom*, 439 F. Supp. 3d at 211 (describing the difficulties in acquiring spectrum and the auctions facilitated by the FCC).

These auctions occur with the FCC's determination of the type of bandwidth available to competitors and after the reservation of segments of bandwidth for government use.[196] The FCC is required to consider all forms of competition, report on service by geographic area, and consider the market-entry barriers under the national policy to promote competition, technological advancement, "public interest, convenience, and necessity."[197] As discussed in Part I, the FCC's actions in the T-Mobile-Sprint merger track its congressionally designated goals. The advancement of 5G technology, expansion to rural markets, and economic efficiencies fit the regulatory aims of the agency.

The NTIA, through its Office of Spectrum Management, further regulates spectrum.[198] Under the directive of the Spectrum Pipeline Act of 2015,[199] the NTIA allocates frequencies with assistance from the Interdepartmental Radio Advisory Committee, the Policy and Plans Steering Group, and the Commerce Spectrum Management Advisory Committee.[200] The goal of the NTIA is to administer spectrum and propose policies to the executive branch.[201] Spectrum is a finite resource, and wireless carriers do not comprise the only industry that needs and uses spectrum, with large portions retained by the government.[202] The NTIA and FCC can shift the market by reallocating spectrum supply and reducing or increasing the amount available at auction.[203]

196. *About Auctions*, *supra* note 187; *United States Frequency Allocations*, FED. COMM. COMM'N, https://www.ntia.doc.gov/files/ntia/publications/january_2016_spectrum_wall_chart.pdf [https://perma.cc/EZD5-CAMS].

197. Consolidated Appropriations Act §§ 401, 607(a)(3).

198. *Office of Spectrum Management*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/office/OSM [https://perma.cc/A8TE-Y2ZF]; *National Spectrum Goals*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/book-page/national-spectrum-goals [https://perma.cc/C8V6-S83R]; *United States Frequency Allocations*, FED. COMM. COMM'N, https://www.ntia.doc.gov/files/ntia/publications/january_2016_spectrum_wall_chart.pdf [https://perma.cc/EZD5-CAMS].

199. Implementing Certain Provisions of the Spectrum Pipeline Act with Respect to the Duties of the Technical Panel, 81 Fed. Reg. 3337 (Jan. 21, 2016) (codified at 47 C.F.R. pt. 301).

200. *Office of Spectrum Management*, *supra* note 198.

201. *National Spectrum Goals*, *supra* note 198; *Internet Policy*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/category/internet-policy [https://perma.cc/CP72-YXG4].

202. *See generally* FCC Online Table of Frequency Allocations, 47 C.F.R. § 2.106 (2020); *FCC Allocation History File*, FED. COMM. COMM'N, https://transition.fcc.gov/oet/spectrum/table/FAHF.pdf [https://perma.cc/RUM3-NR6P].

203. LEWIS, *supra* note 186, at 1, 3–4 (demonstrating an example of the FCC and NTIA

The FCC and NTIA decisions regarding spectrum weigh impacts broader than competition alone. In designating spectrum for use, the NTIA and FCC must consider: "(A) the need to preserve critical existing and planned Federal Government capabilities; (B) the impact on existing State, local, and tribal government capabilities; (C) the international implications; (D) the need for appropriate enforcement mechanisms and authorities; and (E) the importance of the deployment of wireless broadband services in rural areas."[204] Regulatory control of behavior is not limited to standard antitrust enforcement. Additional remedies, such as fines, are available under consumer-protection laws.[205] The agencies may use allocation to shape the behaviors available to competitors.[206] If the agencies shift more spectrum to exclusive government use, the scarcity of this input will change competitor behavior.[207] Any given competitor may only acquire greater supply with the consent of these two agencies.[208] The agencies' allocation of available spectrum serves as another check on impermissible consolidation of the market.

B. *Other Agencies*

Further regulation in the telecommunications industry comes from transparency and national security concerns. Beyond the telecommunications- and antitrust-specific agencies, competitors face regulatory restrictions from the SEC and CFIUS. The SEC works to provide transparency for public companies and to prevent abuse

reallocating certain parts of spectrum to the Department of Defense).

204. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 603(a)(7), 132 Stat. 348, 1098–99 (2018) (codified at 47 U.S.C. § 1502(a)(7)).

205. Klint Finley, *The FCC Fines Wireless Companies for Selling Users' Location Data*, WIRED (Feb. 28, 2020), https://www.wired.com/story/fcc-fines-wireless-companies-selling-users-location-data/ [https://perma.cc/GT5W-2DAE].

206. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 211 (S.D.N.Y. 2020) (describing how the spectrum the FCC choses to auction may not meet the needs of competitors).

207. *How the Spectrum Is Used*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/bookpage/how-spectrum-used [https://perma.cc/QQZ6-UW73] (showing the variety of government needs for spectrum); *How the Spectrum Is Shared*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/book-page/how-spectrum-shared [https://perma.cc/7RCL-VWK5] (showing the allocation of government-exclusive and private/government-shared spectrum).

208. *See Deutsche Telekom*, 439 F. Supp. 3d at 211.

of the securities market.[209] CFIUS focuses on protecting national security and interference from foreign entities.[210]

The SEC works to ensure transparency in the dealings of publicly traded companies.[211] While not playing a direct role in telecommunications, the SEC's involvement arises from the publicly traded nature of the competitors.[212] The SEC regulates markets, aiming to promote fairness and efficiencies, facilitate capital formation, and protect investors.[213] The effects of the SEC's oversight and involvement create greater transparency and increased compliance costs.[214] Compliance with the SEC represents a high cost and limits behavior options concerning corporate governance.[215] The SEC's involvement is not unique to telecommunications, but exemplifies another source of regulation competitors face. The SEC's effects on competition result from its civil enforcement actions and from promoting the exchange of information in a marketplace.[216]

Today, telecommunications competitors are facing a new and rapidly expanding source of regulation: the CFIUS. CFIUS's evolution into a mainstay regulator of telecommunications is demonstrated by its recent interventions and its changing structure. CFIUS's growing authority springs from the Foreign Investment Risk Review Modernization Act of 2018.[217] CFIUS focuses on "critical technologies," sensitive personal data, and "critical infrastructure," which includes telecommunications.[218] The FCC's memorandum ruling on the T-Mobile-Sprint merger demonstrated these

209. *What We Do, SEC*, *supra* note 182.

210. *Committee on Foreign Investment in the United States*, *supra* note 183.

211. *See What We Do, SEC*, *supra* note 182.

212. *See* T-Mobile Annual Report, *supra* note 5 (demonstrating that T-Mobile is a publicly traded company that files corporate governance reports with the SEC); Sprint Quarterly Report, *supra* note 5 (demonstrating that Sprint is likewise a publicly traded company that files corporate governance reports with the SEC).

213. *See What We Do, SEC*, *supra* note 182.

214. *See* Thomas A. Sporkin & Meredith Leeson, *SEC Risk Factors: A Single Wrong Word Could Cost Millions*, A.B.A. BUS. L. SEC. (Jan. 17, 2020), https://businesslawtoday.org/2020/01/sec-risk-factors-single-wrong-word-cost-millions/ [https://perma.cc/AY2X-L683].

215. *See, e.g.*, Cydney Posener, *SEC Proposes Amendments to Financial Disclosures in M&A*, A.B.A. BUS. L. SEC. (May 10, 2019), https://businesslawtoday.org/2019/05/secproposes-amendments-financial-disclosures-ma/ [https://perma.cc/5VRR-KHTB].

216. *What We Do, SEC*, *supra* note 182.

217. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1702, 132 Stat. 1636, 2174–77 (2018).

218. Guidance Concerning the National Security Review Conducted by CFIUS, 73 Fed.

focuses by explicitly addressing the national security concerns and CFIUS's involvement.[219]

CFIUS's role has shifted from serving as a backstop to prevent foreign control of critical technologies to reviewing foreign purchases of noncontrolling interests.[220] In the recent Qualcomm-Broadcom merger, CFIUS intervened and recommended blocking the transaction.[221] When Grindr became a target for Chinese investment, CFIUS forced the divesture of the company to protect sensitive information of United States citizens.[222] CFIUS raised concerns about the collection of intelligence on U.S. citizens, a concern widely applicable to telecommunications.[223] In Huawei's attempt to expand through the purchase of 3Leaf, CFIUS intervened and launched a full-scale investigation into Huawei's governance practices.[224] CFIUS concluded the investigation by stating that any acquisitions of U.S. assets by Huawei posed a threat to national security.[225] CFIUS's recent involvement in mergers and acquisitions demonstrates a shift from blocking foreign entities from gaining controlling interests in specific U.S. companies to preventing foreign investment at lower levels. As such, national security concerns may prevent foreign firms with the capital to purchase the requisite levels of spectrum from entering the market.[226] Blocking foreign investment further limits the ability of the telecommunications market to operate freely and creates a high barrier to entry.

In addition to the growing frequency of CFIUS interventions, structural changes to the committee suggest it may take an even more significant role in the future.[227] CFIUS has announced it will

Reg. 74,567 (Dec. 8, 2008).

219. T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,732–33 (2019).

220. *See* 31 C.F.R. § 800.101 (2020).

221. Exec. Order No. 2018-05479, 83 Fed. Reg. 11,631 (Mar. 12, 2018).

222. Sarah Bauerle Danzman & Geoffrey Gertz, *Why is the U.S. Forcing a Chinese Company to Sell the Gay Dating App Grindr?*, WASH. POST (Apr. 3, 2019), https://www.washingtonpost.com/politics/2019/04/03/why-is-us-is-forcing-chinese-company-sell-gay-dating-app-grindr/ [https://perma.cc/SC4U-GQYM].

223. *Id.*

224. Patrick Griffin, Note, *CFIUS in the Age of Chinese Investment*, 85 FORDHAM L. REV. 1757, 1778–79 (2017).

225. *Id.* at 1779.

226. Alan Rappeport, *U.S. Outlines Plans to Scrutinize Chinese and Other Foreign Investment*, N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/us/politics/china-foreign-investment-cfius.html [https://perma.cc/PUC4-GGPB].

227. Here, there is an assumption that collecting fees will increase the budget, allowing CFIUS to review more transactions, hire more staff, and generally conduct business on a

begin collecting merger filing fees, similar to those imposed on companies by the HSR Act.[228] This restructuring reflects CFIUS's growing involvement in mergers and provides the funding to continue in a more active role. Another recent development in telecommunications oversight includes "Team Telecom," a collection of executive-branch leaders who recently recommended the FCC "terminate China Telecom (Americas) Corp.'s authorizations to provide international telecommunications services to and from the United States."[229] Team Telecom's posture towards foreign activity in telecommunications is another example of the rising policies seen in CFIUS's interventions. As regulatory authorities grow in scope and number, compliance in telecommunications becomes an increasingly difficult prospect.

IV. EFFECTS OF PREEMPTING COLLECTIVE STATE ANTITRUST ENFORCEMENT IN TELECOMMUNICATIONS

State and federal antitrust enforcement disagreements in telecommunications cause conflicting enforcement objectives, false positives, and reduced efficiencies, and further prevent nonenforcement policies. One option to mitigate the interference of state enforcers is the preemption of collective state antitrust enforcement in this market. A field preemption of state law occurs when the "Federal Government has occupied the entire field . . . ."[230] The Supreme Court of the United States held that

> [a]bsent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be

larger scale.

228. Filing Fees for Notices of Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 13,586 (Mar. 9, 2020).

229. *Executive Branch Agencies Recommend the FCC Revoke and Terminate China Telecom's Authorizations to Provide International Telecommunications Services in the United States*, U.S. DEP'T JUST. (Apr. 9, 2020), https://www.justice.gov/opa/pr/executive-branch-agencies-recommend-fcc-revoke-and-terminate-china-telecom-s-authorizations [https://perma.cc/7UHB-E9XM].

230. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212–13 (1983) (internal citations omitted).

> obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."[231]

This contemplated preemption should not be read as applying to antitrust law generally, where the states have apparent authority to act;[232] instead, it should be viewed more narrowly in the context of the regulatory scheme in telecommunications.

Conflict arises where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[233] The federal regulatory scheme in telecommunications has become so pervasive that any conflict with state law should be preempted.[234] State enforcers work to protect the consumers of their respective states and should continue to do so. But the immense federal regulatory scheme in telecommunications makes the market a unique one, not well suited to state actions and better handled by specialized federal agencies.[235] While Congress intended to give states the power to enforce antitrust law, state antitrust enforcers may be exceeding this authority in a market that has become thoroughly occupied by the federal government.

The regulatory landscape of telecommunications stands apart. The large number of regulatory bodies, rules, and statutes governing conduct in telecommunications leads to the conclusion that the federal government has filled the field in telecommunications. The federal regulators have continued to expand antitrust enforcement in the telecommunications market, moving from preventing foreign control of sensitive companies to greater oversight of all foreign investment as well as actively facilitating the innovation of 5G technology in the field. The recent changes demonstrate the enhanced federal interest in the competition of this market and the

231. *Id.* at 203–04 (quoting Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

232. *See* Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. SEC. ANTITRUST L. 358, 363 (1962).

233. Lozano v. City of Hazleton, 724 F.3d 297, 303 (3d Cir. 2013) (quoting Arizona v. United States, 567 U.S. 387, 399 (2012)).

234. *See Arizona*, 567 U.S. at 399 ("The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (citations omitted)).

235. *See supra* Part III.

national security concerns that remain a backdrop to telecommunications transactions.

A. *Benefits of Preempting Collective State Action*

Preemption would result in cognizable benefits to the regulatory and business spheres. These benefits would include clear guidance, increased enforcement efficiencies, and the ability to pursue non-enforcement agendas and broader policy goals.[236] Businesses would receive clear guidance on the legality of their business choices. State antitrust enforcers would redeploy costs to state-specific issues. Federal enforcers would be able to effectively pursue broader policy goals.

Consolidated enforcement and regulatory schemes would provide clarity to businesses through more uniform regulations and decreased litigation concerns. This consolidation, in turn, would reduce costs for the government and the competitors while encouraging competition and unnecessary compliance costs.[237] Clear regulations serving a common goal, without the inherent biases of individual state interests, can provide clarity to businesses and preserve the balancing of consumer welfare with the aggregate social welfare. Individual states make decisions based on their individual needs, as seen in the T-Mobile-Sprint merger.[238] When federal law conflicts with state law, federal law controls.[239] Despite this standard, multistate task forces continue to come forward as the interpreters of federal law.[240] This approach poses problems because of the inherent state biases that underlie the enforcement

236. *See* Landes & Posner, *supra* note 15, at 39 ("The existence of a public monopoly of enforcement in a particular area of the law is a necessary . . . condition of discretionary non-enforcement.").

237. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 16 (2008) [hereinafter COMPETITION AND MONOPOLY] (describing decision theory's role in antitrust and the effects of false positives).

238. Tali Arbel, *supra* note 11 ("Texas, Nevada, Colorado and Mississippi have dropped out over the past two months after reaching separate settlements in which T-Mobile typically promised 5G service in the states and steady prices or low-price options.").

239. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

240. *See, e.g.*, *supra* Part II.

actions. Preemption could decrease the effects of individual state biases on the guidance given to competitors.

Antitrust analysis considers geographic differences in determining the concentration of a market, meaning a one-size-fits-all approach does not work for aggregating individual state markets.[241] This restructuring would reduce the effects of an individual state's interests on collective action.[242] While any individual state may be best served by one plan, the economy as a whole might suffer for that decision.[243] "Divergent approaches to the exercise of enforcement discretion are not just possible, they are likely."[244] States likely face pressure from several groups that can influence their enforcement decisions, as well as the selfish motivation to protect their consumers regardless of the cost to national welfare.[245] Uniform, clear guidance at the federal level, without state interference, will reduce opportunities for the individual motivations of states to negatively impact a clear enforcement scheme. Adding states as parties to a telecommunications antitrust lawsuit complicates the suit by increasing the number of parties that must agree to a settlement.[246] The effects of the preemption and resulting enforcement system will create efficiencies for federal and state enforcers, as well as for businesses. For telecommunications antitrust enforcement actions, this will limit costs to the federal agencies, prevent the duplication of effort (in reviewing transactions), and eliminate the costs of coordination that NAAG multistate enforcement teams face.[247] Extending even beyond telecommunications, this results in a net positive for the antitrust sections of state attorneys general offices to redeploy resources to monitor and combat

241. *See* KALINOWSKI ET AL., *supra* note 62, § 24.03; 2 BYRON E. FOX & ELEANOR M. FOX, CORPORATE ACQUISITIONS AND MERGERS § 16.06 (2020).

242. Sokol, *supra* note 149, at 1089.

243. Posner, *supra* note 15, at 940 (asserting the effect of state involvement is to "lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs.").

244. Lemos, *supra* note 156, at 720.

245. *See* Hahn & Layne-Farrar, *Federalism in Antitrust*, *supra* note 15, at 897.

246. Lande, *supra* note 15, at 1063 ("The prospect of simultaneous investigations or suits by both federal and state enforcers gives rise to more than just costs, delays and uncertainty. As the number of parties increase, settlements may become exponentially more difficult to reach. Confidentiality problems also multiply as the number of investigations rise.").

247. Hahn & Layne-Farrar, *Federal Preemption in Antitrust Enforcement*, *supra* note 15, at 80.

anticompetitive behavior in the state-specific areas that these sections were designed to handle.[248]

The reduced litigation could represent a net positive for both state governments and competitors. Even responding to discovery requests from one state can cost two to nine million dollars.[249] Dealing with multiple suits, as in the T-Mobile-Sprint merger, causes a compounding of these costs resulting from duplication of effort. For T-Mobile, the firm has now faced multiple reviews concerning the same issues that it believed it had resolved. The FCC review alone took 317 days.[250] In total, from the initial merger review submission on April 28, 2018, until April 1, 2020, it took two years to close the transaction.[251] The T-Mobile-Sprint merger exemplifies how further delays can slow the competitor's ability to continue with business, as it must divert attention to compliance and litigation efforts. [252]

Preemption would address the effects of the growth of federal regulators in the telecommunications market, particularly CFIUS, as well as the resulting changes to the regulatory landscape. If the states act as another national regulator in telecommunications, then innovation, competition, and the ability of federal enforcers to pursue policy goals will be stifled. To solve this problem, collective state antitrust action should be preempted by federal law in the telecommunications market. States likely remain better plaintiffs than consumers in many situations and therefore should litigate on behalf of their citizens. This litigation should be conducted individually, with federal regulatory enforcement generally left to federal regulators.

States should not be prevented from enforcing antitrust law; instead, states should focus exclusively on violations of their own

248. *See* Hahn & Layne-Farrar, *Federalism in Antitrust*, *supra* note 15, at 889 (describing the resources available to the antitrust sections of state attorneys general offices).

249. Jonathan Jacobson, *Tackling the Time and Cost of Antitrust Litigation*, 32 ANTITRUST L.J. 3, 4 (2017).

250. *T-Mobile and Sprint, WT Docket-18-197*, FED. COMM. COMM'N (Apr. 1, 2020), https://www.fcc.gov/transaction/t-mobile-sprint [https://perma.cc/TCA6-QZVC].

251. *See supra* Part I.

252. Following the district court's decision, the DOJ remarked on the need for finality in decisions by the federal government. *See Justice Department Welcomes Decision in* New York v. Deutsche Telecom*, the T-Mobile/Sprint Merger*, U.S. DEP'T JUST. (Feb. 11, 2019), https://www.justice.gov/opa/pr/justice-department-welcomes-decision-new-york-v-deutsche-telecom-t-mobilesprint-merger [https://perma.cc/9986-3Z4D].

state laws and on protecting their citizens as individual enforcers, not as a collective body. Federal agencies are the proper regulators of national industries such as telecommunications, while state enforcement prevents federal nonenforcement policies which may benefit social welfare overall.[253] With respect to policy goals, CFIUS's interventions in recent years showcase the federal government's focus on national security concerns in the telecommunications market. Agendas balancing broader policy goals—such as national security—with competition are only possible under a more centralized enforcement system and by specialized agencies.[254]

Specialized agencies are therefore the best regulators of the telecommunications market.[255] The requirement that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue" leads to efficiencies from the use of specialized enforcers.[256] The inelasticity of the market and the significant barriers to entry require oversight by specialized expert regulators to maintain a competitive environment, and interference from other government regulators will only impede the ability of the federal regulators to direct this market. Nonenforcement policies, used when the agencies determine doing so is in the best interests of competition, cannot be enforced without a monopoly on enforcement.[257]

Placing control in the hands of more centralized regulators reduces uncertainty for competitors due to the inherent inconsistencies in court proceedings and allows for better market functioning.[258] The inability to pursue nonenforcement agendas and reduce litigation will cause unnecessary false positives. False positives can discourage competition and innovation.[259] Too many false positives will cause competitors to restrict their behavior drastically

253. *See* Landes & Posner, *supra* note 15, at 39; Waller, *supra* note 15, at 829.

254. *See* Hahn & Layne-Farrar, *Federal Preemption in Antitrust Enforcement*, *supra* note 15, at 79–81; Waller, *supra* note 15, at 829.

255. See Hahn & Layne-Farrar, *Federalism in Antitrust*, *supra* note 15, at 888–90.

256. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

257. *See* Landes & Posner, *supra* note 15, at 39.

258. *See* Sokol, *supra* note 194, at 147 ("Antitrust litigation produces regulatory uncertainty because different courts may rule inconsistently with the same set of facts.").

259. *See* Lande, *supra* note 15, at 1063.

to comply with enforcers at the cost of innovative business practices.[260] Overenforcement and the resulting false positives reduce competition, inviting harm to both the consumer and the aggregate social welfare.[261] Reduction in states' ability to conduct collective antitrust litigation will naturally decrease the overall amount of litigation, which provides several benefits to competition and to regulators. These benefits include reduced compliance costs, legal fees, and the redistribution of resources.[262] Reduced costs will benefit administrative costs, particularly those resulting from the coordination of state agencies. The result is a leaner, specialized enforcement system; increased market freedom due to clear regulations; and the opportunity for regulators to balance broader policy goals with antitrust.

B. *Dangers of Preempting Collective State Action*

It is essential, however, to address the dangers of preempting collective state antitrust enforcement in telecommunications. The three main dangers of preemption lie in the under-enforcement of antitrust, in state-specific issues, and in the balance of power between federal and state governments.

Perhaps the greatest argument for maintaining states' ability to litigate collectively is a fear of the federal government under-enforcing antitrust law. If the federal government fails to act or does so ineffectively, the result could be extensive anticompetitive behavior, including the abuse of consumers, restraints on trade, and monopolization. Generally, state antitrust enforcers serve as a check on federal enforcement policies.[263] If collective action is preempted, states will face major logistical hurdles to individually bring suits against national telecommunications firms. Except for those in larger states such as New York and California, state-level

260. *See id.* ("The additional uncertainty from fifty potential state reviews, along with the inevitable accompanying delays and costs, could cause many beneficial transactions never to be attempted.").

261. COMPETITION AND MONOPOLY, *supra* note 237, at 16 ("The cost of false positives includes not just the costs associated with the parties before the court (or agency), but also the loss of procompetitive conduct by other actors that, due to an overly inclusive or vague decision, are deterred from undertaking such conduct by a fear of litigation.").

262. *See id.* (describing enforcement costs and the importance of enforcement discretion).

263. Hahn & Layne-Farrar, *Federal Preemption in Antitrust Enforcement*, *supra* note 15, at 80–81.

antitrust sections may not be well-funded enough to protect their constituents' interests against national firms.[264]

Further, federal enforcement does not protect individual states or their distinct issues. The federal enforcement system is just that: a *federal* system. Complete preemption of state antitrust action would open the door to discrimination against individual states and their consumers. Absent federal enforcement and without preserving the rights of states to act in the best interests of their citizens, the burden would fall solely on private parties. This could be mitigated by allowing states to litigate on their individual issues, just not as a class. The antitrust sections in state attorneys general offices were not designed for enforcement in national markets; they are best suited to deal with state and local violations of antitrust law.[265]

Additionally, preempting collective state antitrust enforcement in telecommunications may be an untenable expansion of federal power. This is a concern if applied across several markets, but limiting the preemption suggestion to the markets heavily regulated by the federal government does not produce significant change from the status quo. States are already limited in what actions they take in the telecommunications market.[266] Current arguments against preemption may fail to realize how far the balance of power has shifted over the past decade. In particular, CFIUS's enhanced involvement has eliminated many nonenforcement choices for procompetitive deals that do not align with national security concerns, significantly limiting foreign entrants in a wide variety of markets.[267] CFIUS's interventions often target telecommunications because of its designation as "critical infrastructure."[268] CFIUS's involvement limits the ability of the DOJ and

264. *Id.*

265. Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679–82 (2003) (discussing the advantages of state enforcement in dealing with local markets and companies).

266. 47 U.S.C. § 332(c)(3)(A) ("No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding federal law preempted state law disallowing class arbitrations).

267. *See supra* section III.B.

268. *See* Guidance Concerning the National Security Review Conducted by CFIUS, 73 Fed. Reg. 74,567 (Dec. 8, 2008).

FTC to pursue competition-focused policy goals, which is further hampered by state involvement.

C. *The Path Forward in the Context of the T-Mobile-Sprint Merger*

The preemption of collective state antitrust action in the telecommunications market will benefit competition and serve the antitrust goal of promoting the aggregate social welfare. This preemption would have created cognizable benefits in the T-Mobile-Sprint merger. Antitrust law cannot serve consumers to the exclusion of business interests; as the sliding scale moves farther to consumers' interests, competition will suffer.[269] Preventing state interference in telecommunications allows federal regulators to shift their focus from purely consumer welfare to a broader concern for the aggregate social welfare. In line with this reasoning, the district court and the federal agencies identified aggregate social welfare concerns as their primary reason for their consent to the T-Mobile-Sprint merger.[270]

In that merger, the effects on the aggregate social welfare included new efficiencies, potentially a stronger competitor, and innovation.[271] Oversight by federal regulators in telecommunications is continuing to rise in scope and type, creating less of a need for litigation by other parties. Richard Posner described state involvement in federal antitrust as serving to "lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs."[272] The plaintiff states' suit served to delay the competitors' ability to move forward with business and further created unnecessary costs and burdens on the competitors and courts. Nothing in the events surrounding the T-Mobile-Sprint merger suggests that Posner was wrong. DISH's ability to begin deploying spectrum and reimplementing Boost Mobile has been delayed because the merger was delayed. The 5G innovation, a large focus of the federal agencies, was similarly delayed. The plaintiff states raised legitimate antitrust concerns, but the DOJ and FCC had addressed those issues

269. Blair & Sokol, *supra* note 27, at 2509.
270. Statement of Interest, *supra* note 44, at 10.
271. *See supra* section I.C.3.
272. *See* Posner, *supra* note 15, at 940.

and regulated a path forward while balancing consumer and social welfare. Consent decrees and settlements will not work if they face regular challenges by other government actors.

Given the competition analysis the FCC undertakes and reports to Congress, it must consider the long-term viability of competitors.[273] Here, DISH is presented as a potential entrant, while there are concerns Sprint is no longer a viable firm.[274] As the district court held, "[o]ver the past eight years, DISH has amassed a large portfolio of spectrum, roughly equivalent in size to that of Verizon, through a series of private transactions and purchases at FCC auctions. DISH is also financially stable, being a successful provider of consumer services in the satellite TV industry"[275] DISH's abundant supply of spectrum and financial security make it a realistic competitor, and potentially a better firm than Sprint to ensure competition in the market.[276]

Conversely, Sprint was an ineffective company headed in the wrong direction.[277] Sprint's subsidiary Boost Mobile was the main positive for the company, and it is being divested to DISH.[278] Financial struggles and bad brand image signal an inability to compete. An ineffective competitor cannot adequately serve as a check on anticompetitive behavior.[279] In telecommunications, ineffective competition from one competitor can harm the market because of the allocation of finite spectrum to that competitor.[280]

In the context of the T-Mobile-Sprint merger, the biggest efficiency was carrier aggregation. More concentrated carriers can more effectively deploy a scarce resource, resulting in a better product for consumers.[281] While this degree of consolidation of the market represents a restraint on trade, the federal agencies and the courts have determined the procompetitive justification of a

273. *See* T-Mobile U.S., Inc., 34 FCC Rcd. 10,578, 10,614 (2019) (analyzing Sprint's viability as a future competitor).
274. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 224 (S.D.N.Y. 2020).
275. *Id.* at 195.
276. *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489–90 (1977) (holding that a better competitor did not commit an antitrust violation against another competitor).
277. *See supra* Part I.
278. *See supra* Part I.
279. *See Deutsche Telekom*, 439 F. Supp. 3d at 217–18.
280. *See supra* notes 106–14 and accompanying text.
281. *Deutsche Telekom*, 439 F. Supp. 3d at 208–09.

better product is sufficient to outweigh the dangers of the restraint.[282] The defense's argument centered on the need for the merger-specific efficiencies to effectively implement the new 5G network.[283] Efficiencies such as carrier aggregation and innovation are difficult to weigh against potential risks to consumers; therefore, this analysis should be limited to the specialized agencies uniquely equipped to balance the competing interests at stake.

The DOJ and FCC were the best-situated regulators to guide the transaction for the maximum benefit of the aggregate social welfare due to their expertise and national focus. The plaintiff states' actions demonstrate a focus on individual motivations—particularly state-level consumer welfare—at the cost of innovation and national development. The need to focus on rural service is apparent in the FCC's approval of and stipulations to the T-Mobile-Sprint merger,[284] but may be less important to certain states. Similarly, the FCC believed the enhanced 5G technology from the merger would extend benefits "beyond mobile wireless services alone, to enhance the competitiveness of the United States' economy."[285] To steer the market towards this goal requires a macroeconomic view of the economy, not a collection of the states' local preferences.[286] Facilitating this goal is not possible when competing interests (such as collective states) can effectively oppose the coordination of the federal agencies.

Finally, this restriction of collective state action would have saved years' worth of time, streamlined the inevitable merger, prevented multiple states from shifting their collective focus from antitrust violations in their state to a national market, and reduced costs.[287] Antitrust is a balance between encouraging competition and protecting consumers. In telecommunications, the groups best suited to determine that balance are federal regulators. The settlements and divestitures created by the federal enforcers gave the

282. Statement of Interest, *supra* note 44, at 5.

283. Defendants' Pretrial Memorandum, *supra* note 53, at 21–25.

284. T-Mobile U.S., Inc., 34 FCC Rcd. 10,578 (2019).

285. *Id.* at 10,582.

286. Waller, *supra* note 15, at 829 (discussing executive branch decisions that antitrust goals must be supplanted by broader policy goals).

287. *See* Posner, *supra* note 15.

merging parties the opportunity to reinvigorate competition, create significant efficiencies, and provide a new and better product to many consumers.

CONCLUSION

While this Comment discusses the issue of collective state antitrust enforcement in the telecommunications industry, its suggestions can be applied to similar federally regulated industries. Competitors in strictly federally regulated markets deal with the universal costs of compliance inherent in all markets, but additionally must adhere to market-specific restrictions of the federal regulatory scheme. The applicability of this Comment's suggestions to similarly regulated industries, such as the airlines and pharmaceutical markets, will need to be covered in a later article.

The telecommunications market is striving towards its next major market innovation while facing substantial novel and preexisting regulatory hurdles. To preserve the innovation necessary for this market, it may be time to provide regulatory and adjudicative clarity to the competitors. After negotiations, divestitures, and approval of a transaction, competitors must be able to continue their business without risk of their transactions being unwound. The States' Attorneys General serve as vital checks on federal agencies and anticompetitive behavior, but should not masquerade as another federal enforcer in telecommunications.

Jacob P. Grosso *

* J.D. Candidate, 2021, University of Richmond School of Law. B.A., 2018, George Mason University. I want to thank Professor Kristen J. Osenga for her mentorship, guidance, and friendship through this pandemic. I thank my fellow members of the *University of Richmond Law Review* for their hard work and dedication. Finally, I am forever grateful to Niamh Grosso and my family for their unwavering support.