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U.S. Department of Justice Litigates to Block Two Mergers

Eric J. Stock (Gibson, Dunn & Crutcher) · Wednesday, February 1st, 2012

The U.S. Department of Justice (“DOJ”) has blocked two mergers in the past several months, in each case after filing a lawsuit against the merging parties. The first case involved a relatively small transaction in the digital tax business involving H&R Block and 2nd Story Software. The second case was the high-profile proposed acquisition by AT&T of rival wireless telephone carrier T-Mobile USA. These cases illustrate an uptick in U.S. merger enforcement and an increased willingness on the part of the DOJ to challenge mergers in court. They also illustrate a resistance on the part of DOJ to accepting concessions proposed by parties seeking to obtain clearance of horizontal mergers.

The H&R Block case involved H&R Block’s proposed acquisition of 2nd Story Software, the maker of TaxACT digital tax software, for approximately \$287 million. H&R Block and TaxACT are the second and third largest sellers of digital tax software, but each is dwarfed by the size of industry leader Intuit’s TurboTax business, which constitutes more than 60% of the digital tax business. H&R Block is much better known for its storefront tax preparation business than for its digital tax offerings. TaxACT is an upstart digital-only player whose prices are frequently much lower than its Intuit’s and H&R Block’s. H&R Block argued that its acquisition of TaxACT would make it a more efficient and formidable competitor to Intuit, and broaden its offerings to include the “value” (lower price) end of the business. H&R Block also contended that the prices of digital tax preparation software are constrained by many other types of tax preparation methods, including the use of accountants or storefront tax preparation services (i.e., “assisted tax preparation”) and the ability of taxpayers to fill out tax forms on their own. The DOJ, however, defined the market to be limited to digital products, and viewed the transaction as an anticompetitive 3 to 2 merger. The DOJ also contended that the transaction threatened to eliminate a “maverick” low priced player, and would have left only two major digital competitors – Intuit and H&R Block – which the DOJ argued could coordinate post-merger. The court ultimately accepted the DOJ’s view, and on October 31, 2011 issued a decision enjoining the merger. (As a matter of full disclosure, the author was part of the team representing the merging parties in this transaction).

In the second transaction, AT&T sought to acquire T-Mobile USA, a competitor that some considered a maverick in the industry, from Deutsch Telecom for approximately \$39 billion. AT&T similarly contended that acquiring T-Mobile would make it a more effective competitor – in particular, it needed access to the “spectrum” that T-Mobile controlled in order to relieve its congested network and provide faster data services to smart phone users. In this transaction as well, however, the DOJ argued that the deal would result in two major players dominating the industry – AT&T and Verizon Wireless. One notable distinction from the H&R Block transaction

was that AT&T was the industry leader prior to the proposed merger, whereas H&R Block – even if combined with TaxACT – would still have been less than half the size of TurboTax. The AT&T/T-Mobile transaction also involved a question of how to define the relevant market: the DOJ complaint focused on the implications of the transaction on competition nationwide, while the more traditional method of analyzing telecommunications-related markets is to assess competition on a more local basis (e.g., the NY metro area). In the face of the DOJ complaint and additional scrutiny from the Federal Communications Commission, the parties abandoned the transaction on December 19, 2011.

As noted, these aggressive actions by the DOJ illustrate an increased willingness to go to court, as well as a resistance to accepting concessions proposed by the parties in horizontal mergers. The economic effect of the DOJ's success in blocking the massive \$39 billion AT&T/T-Mobile transaction dwarfs the impact of the H&R Block transaction. Indeed, the \$4 billion break-up fee alone paid by AT&T to T-Mobile is more than 12 times the size of the purchase price H&R Block proposed to pay for TaxACT. But as far as legal impact is concerned, in the long run it may be the *H&R Block* decision that has the greater impact. Because the parties abandoned the AT&T/T-Mobile transaction prior to a court ruling, that transaction provides no legal precedent for the DOJ to rely upon in future cases. In contrast, the more than 80-page decision from the federal judge in *H&R Block* provides a strongly pro-government precedent in the very district (Washington, D.C.) where the DOJ is likely to bring most of its future cases. Accordingly, even after the world has forgotten that there was a failed AT&T/T-Mobile transaction, U.S. antitrust enforcers may still be talking about digital tax preparation.

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