II-2.5 : Thematic Report (Telecommunications): the American Federal Communications Commission announces closer cooperation with the Department of Justice in reviewing mergers.

Thursday 9 September 2010, by Alex Raiffe, Junior Editor

MAIN INFORMATION

The Federal Communications Commission (FCC) announced on August 5, 2010, that it will cooperate more closely with the Department of Justice (DoJ) in merger reviews in the telecommunications sector. This measure is intended to foster reconciliation of potentially divergent goals for mergers set forth by both authorities.

CONTEXT AND SUMMARY

In the United States, two administrative bodies administer competition law, and especially pre-merger review and approval: the Department of Justice (DoJ) and the Federal Trade Commission (FTC). These two authorities are assigned responsibility for merger approval cases based on the sector of the economy of the companies merging.

However, the Federal Communications Commission (FCC) also has a role in merger review for companies it regulates—notably in the telecommunications sector—because it must approve the transfer of telecommunication operation and frequency licenses.

This double system of merger review can create divergences between the goals set forth by both agencies.

This issue came to light in May 2010, when the FCC was asked to approve a transfer of licenses for mobile telephony operation from Verizon Wireless (the largest American mobile telephony operator) to Atlantic Tele-Network (a company providing telecommunications services to underserved markets in the United States and the Caribbean).[1]

The FCC had ordered Verizon to divest billions of dollars worth of licenses in its decision approving Verizon's merger with ALLTEL, another wireless operator. Pursuant to this decision, Verizon signed a consent decree with the DoJ, according to which Verizon agreed to divest its licenses to a strong competitor.

However, the FCC wanted Verizon to divest its licenses to minor operators. The FCC's position was that the cession of these rare assets (mobile frequencies) to small operators would provide a rare opportunity for increasing competition on the mobile telephony market by enabling small providers to furnish enhanced services and lower prices. [2]

Therefore, there was a divergence in the positions adopted by the two authorities, and Verizon received no guidance as to how to reconcile the instructions it had received from the two agencies.

Nonetheless, the FCC approved Verizon's license divestiture to Atlantic Tele-Network, a relatively strong competitor—a decision in line with the DoJ's goals, but contrary to the FCC's—and merely "encouraged" Verizon to take actions in line with the FCC's goals.[3]

In order to remedy this situation, FCC Chariman Julius Genachowski announced on August 5, 2010 that the FCC would implement a stronger cooperation in merger reviews between the agency he chairs and the DoJ in cases that require approval from both authorities.[4]

[1] WT Docket n° 09-119 (http://fjallfoss.fcc.gov/edocs_publ...)

[2]*Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC,* WT Docket No. 08-95, Memorandum Opinion and Order, 23 FCC Rcd 17444 (2008) ("*Verizon-ALLTEL Order*"). Specifically, this proposed transaction would fulfill the required divestiture in 26 of the 105 CMAs set forth in the *Verizon-ALLTEL Order*.

[3] See final decision at http://hraunfoss.fcc.gov/edocs_publ...

[4] See press release at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0805/DOC-300705A1.pdf; cf. also, Statement of Commissionner Mignon L. Clyburn on the affair made on April 20, 2010, consultable at http://hraunfoss.fcc.gov/edocs_publ....

BRIEF COMMENTARY

This case is an example of the differences between the goals of Competition Law and the goals of Regulatory Law. The Department of Justice's goal to have Verizon divest its licenses to a strong competitor is logical in the sense that only a strong competitor can provide the ambit of services and a guarantee for long-term stability required on the telecommunications market, especially given the rarity of mobile frequencies available in the radio spectrum. However, this position does not take into account Regulation's ex ante specificity, and the FCC's capacity and mission to ensure the development of competition on a market with gross imbalances in operators' power. The FCC's expertise and knowledge of the telecommunications sector and market enable the agency to ensure that the divestiture of frequencies to an emerging or regional operator would be beneficial for the overall market and would not lead to negative effects for the consumer. Furthermore, this is an example of discordance between the notions of symmetrical and asymmetrical regulation. Symmetrical regulation is the form of regulation performed by competition authorities (in this case, the DoJ behaves as a sort of competition authority), who regulate the relations between competitors who are seen as operating on a level playing field, and who are strong enough to compete with one another on the market, in order for this competition to produce a fair price. On the other hand, asymmetrical regulation, performed by specialized regulatory authorities (in this case, the FCC), stems from the observation that there is no market a priori, and therefore a market must be constructed by favoring the weak entrant over its much stronger, established competitor, usually a former monopoly player. Therefore, the DoJ takes into account only the rarity of the resource in question (radio frequencies), whereas the FCC takes into account only the degree of maturity of the market. Indeed, in France, the Autorité de régulation des communications électroniques et des postes (ARCEP – French telecommunication and postal regulator) currently performs symmetrical regulation in the mobile telephony sector, believing that the market is now sufficiently established that competitors are capable of competing on a level playing field, and are strong enough on their own merits that they no longer require asymmetrical regulation. In this specific example, the ARCEP behaves as a specialized competition authority, rather than a true regulatory authority. For an example of an area where the ARCEP continues to practice asymmetrical regulation, see Les cahiers de l'Arcep, n°2, p. 3, on La revolution numérique (The digital revolution). The August 5, 2010 announcement of closer cooperation between the FCC and the DoJ in such affairs is doubtlessly a positive step, for it will allow the DoJ, through enhanced dialogue with the FCC, to take into account the specificities of a market with a designated regulatory authority in its decision making process. Indeed, it would have been impossible to reconcile the contradictory positions between symmetrical and asymmetrical regulation, and therefore, the FCC, in aligning itself with the DoJ's position and increasing cooperation, is taking a step towards becoming a specialized competition authority.