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Antitrust

Insight: Is Antitrust Still the 'Magna Carta' of Free Enterprise?



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Justice Thurgood Marshall once famously remarked that our antitrust laws are the “Magna Carta of free enterprise.” For this reason, many argue that antitrust’s evidence-based and dispassionate approach is a far better mechanism to protect consumers than the often politically-charged approach practiced at major regulatory agencies. Indeed, the Department of Justice cannot block a merger on a whim; if the DOJ wants to block a merger, then it must demonstrate to a federal district court that the transaction will “substantially lessen competition.”

Still, major mergers generate a huge amount of noise in Washington’s political echo chamber. Especially today, when not only do we have the rise of the so-called “hipster” antitrust movement on the left, which views anything that is “big” as automatically being “bad” (particularly in the digital space), but also the rising view in some conservative circles that the cudgel of antitrust is an excellent way to smite one’s political enemies. If firms get spooked by the clatter in Washington, then they will be make the wrong calls and be deterred from entering into efficient transactions that grow the economy and benefit consumers.

By way of example, take the recent courting of 21st Century Fox by rivals Disney and Comcast. Fox has agreed, in principle, to sell a significant portion of their asset portfolio to Disney at a share price of \$29.54 per share—a \$52 billion dollar price tag. In getting to “yes” on this deal, however, Fox rejected a much richer offer from Comcast at \$34.41 per share, a 16 percent premium over Disney’s offer. As such, it is not unreason-

able for Fox’s shareholders to ask what could possibly justify their board’s decision to leave a whopping \$8.5 billion on the table?

According to the company’s proxy statement, the board rejected Comcast’s offer because they believed a deal with Comcast would “be subject to a greater degree of regulatory uncertainty, including the possibility of an outright prohibition. . . .” The proxy statement explains that a combination of two primary factors contributed to this fear of “regulatory uncertainty” (although there were a few others not germane here): First, the board believed that Comcast’s “asset mix” purportedly “raised a significantly more difficult set of regulatory issues than a transaction with Disney” (although the proxy statement did not specify exactly how these assets would do so); and second, given that the DOJ approved the Comcast/NBCU deal in 2011, the board was taken aback by “the DOJ’s unanticipated opposition to the proposed vertical integration of the AT&T/Time Warner transaction. . . .”

Our story does not end here, however: despite the original rebuff, Comcast recently announced that it might be coming back to the table with an “all-cash” offer at a “premium” to the value of the all-share offer from Disney. The structure and terms of this offer, if eventually made, are claimed to be “at least as favorable” to Fox shareholders as the Disney offer, even “with respect to both the spin-off of ‘New Fox’ and the regulatory risk provisions and the related termination fee. . . .”

Assuming Comcast comes back with another (and presumably sweetened) offer, Fox’s board will again

have to ask some tough questions: Are the regulatory risks of a Comcast suitor really worth \$8.5 billion? Are Comcast's risks of antitrust trouble really that much higher than Disney's?

One argument relevant for Comcast and not raised by the Disney deal is the vertical combination of content creation and content distribution, which some claim gives the distributor the incentive and the ability to use content as a means of disadvantaging rival content distributors. We saw this argument raised by opponents of Comcast's merger with NBCUniversal, and the American Cable Association again recently made this claim against the possible Comcast-Fox acquisition.

Fortunately, the passage of time allows such assertions to be put to the empirical test, which is exactly what the Phoenix Center did. In a recent study, the Center's Chief Economist found that there was no net uptick in prices extracted for NBCU programming as a result of the merger. This means that one of the main arguments levelled against vertical combinations is unlikely to stand up in court. This is critically important for any antitrust risk analysis. In any case, Fox's programming assets (e.g., FX and NatGeo) are not of the sort that permit bullying by a vertically-integrated distributor.

If the vertical integration issue is off the table, then it would seem that while both of these deals have their issues, neither deal should be blocked on antitrust grounds—they are both approvable. (Personally, I am ambivalent on whether it is Disney or Comcast who ultimately gets to own the rights to the X-Men franchise.) Indeed, as Wall Street analysts at New Street Research ("NSR") recently observed: "Does the Comcast offer have a bigger antitrust problem than the Disney offer? No."

So, if both suitors raise, *ceteris paribus*, roughly the same level of antitrust concern, then logic would dictate (and 21st Century Fox's board's fiduciary duty would command) that the winner of a fair bidding war should have the opportunity to alleviate any concerns with a combination of behavioral remedies and/or divestitures and, failing settlement with the DOJ, the opportunity to litigate in federal district court. At least one of Fox's largest investors agrees. According to the Financial Times, Christopher Hohn, an investor who holds a 7.4 percent stake in Fox, recently wrote a letter to the board arguing that he believes the regulatory risk of both offers "to be equal and low"; he accordingly urged the board to engage with Comcast.

As John Adams elegantly wrote over two hundred years ago, we are a nation of laws, not of men. As such, when corporations are faced with the cacophony from the political echo chamber about a proposed transaction, they need to remember President Adams' words, ignore the noise in Washington, and focus on real antitrust risks. If they do, then the antitrust laws will continue to be the Magna Carta of free enterprise. But if they do not, then we will be in a wholly different world, which will not be good for anyone.

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