D.C. Circuit Allows AT&T-Time Warner Merger to Stand, Rejecting DOJ's Challenge

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Last June, following a highly publicized trial in which the U.S. Department of Justice ("DOJ") challenged AT&T Inc.'s acquisition of Time Warner Inc. on antitrust grounds, the U.S. District Court for the District of Columbia ruled in favor of the parties and rejected the DOJ's challenge. Yesterday, the U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") affirmed the district court's decision.

The DOJ brought suit in November 2017 to block the vertical merger of AT&T, the United States' largest traditional pay-TV distributor, with Time Warner, a significant television programmer that owns cable television networks including the Turner networks (e.g., TNT, TBS, CNN) and HBO. At trial, the DOJ's principal theory of harm was that the merger would increase the leverage of the Turner networks in negotiating carriage agreements with television distributors that compete with AT&T, thus leading to higher prices to those distributors which would be passed on to television consumers. Under that theory, Turner would have greater bargaining leverage because, in the event that negotiations with a distributor reached an impasse and led to a blackout of Turner networks on that distributor, some consumers would switch from the distributor to DirecTV, mitigating Turner's affiliate fee losses during the blackout.

The matter was tried before District Judge Richard J. Leon in March–April 2018, making it the first litigated vertical merger challenge brought by the DOJ in 41 years. On June 12, 2018, Judge Leon issued a 172-page opinion rejecting the government's theories of harm and denying its request to enjoin the transaction. The DOJ appealed and argument was held before a three-judge panel (Judges Judith Rogers, David Sentelle, and Robert Wilkins) of the D.C. Circuit on December 6, 2018.

In a fact-driven unanimous decision, the D.C. Circuit, in an opinion by Judge Rogers, held that the district court did not commit clear error in concluding that the DOJ failed to prove that the transaction is likely to increase Turner's bargaining leverage. The court rejected the DOJ's arguments that the district court erroneously disregarded or misapplied "Nash bargaining theory" (on which the DOJ's economic expert based his analysis) and the principle that a firm with multiple divisions will seek to maximize its total profits. The D.C. Circuit also affirmed Judge Leon's finding that there was insufficient evidence to substantiate the DOJ's economic model of harm.

Shortly after the decision was released, the DOJ reportedly announced in a press statement that it "has no plans to seek further review" of its challenge to the AT&T-Time Warner transaction.

On balance, the D.C. Circuit's decision may be viewed as a setback for the government in vertical merger enforcement, but more centrally, it highlights the fact-specific nature of merger challenges.

Although the D.C. Circuit observed that the government's guidelines for non-horizontal mergers were last updated in 1984 and that several *amici curiae* sought the court's guidance on the proper standard for evaluating vertical mergers, the decision was more narrowly fact-bound. The D.C. Circuit expressly avoided "opin[ing] on the proper legal standards for evaluating vertical mergers because, on appeal, neither party challenges the legal standards the district court applied, and no error is apparent in the district court's choice." Instead, the D.C. Circuit focused closely on the evidence at trial supporting the district court's decision and found no clear error that would require reversal.

Together with the district court's ruling, the D.C. Circuit's decision may be viewed by some in the bar as a setback for proponents of a more aggressive approach to vertical merger enforcement. The D.C. Circuit's fact-driven analysis suggests, however, that future vertical enforcement cases will rise or fall on the evidence specific to the industry and parties at issue.

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