



## AT&T wins (again): Insights from the appeal

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On 26 February 2019 AT&T won its appeal at the U.S. Court of Appeals for the District of Columbia Circuit when the district court's decision denying the government's attempt to block AT&T from acquiring Time Warner Inc. was upheld.

This ends a lengthy antitrust saga that began with AT&T and Time Warner's merger announcement over two years ago in October 2016. Following an in-depth investigation, the U.S. Department of Justice (DOJ) Antitrust Division filed a complaint to block AT&T's acquisition of Time Warner in November 2017. Shortly after the district court decision in favor of AT&T in June 2018, the government confirmed that it would not seek to stay the merger pending an appeal, and it would allow AT&T to close its transaction on the condition that AT&T would continue to hold separate Turner networks (including Time Warner's HBO, CNN, TBS, and TNT assets) through 28 February 2019. The government filed a notice of appeal in July 2018.

On appeal, the government focused on the district court's rejection of its "increased leverage" theory, which was only one of the three antitrust theories DOJ relied upon at trial. Since DOJ's challenge was based on the district court's factual conclusions rather than a pure question of law, the relevant standard of review was whether the decision was "clearly erroneous" in its application of facts – a very challenging criteria to meet.

Writing for a unanimous panel, Judge Judith Rogers rejected nearly all of the government's objections to the district court's factual findings and described DOJ's arguments as "unpersuasive." Following the decision, DOJ released a statement confirming that it would not seek further appeal. Below are some key takeaways from the opinion.

### **Conduct remedies – even if implemented unilaterally by the merging parties – cannot be ignored for vertical transactions**

The government's leveraging theory hinged on the prediction that Time Warner, under the ownership of AT&T, could more credibly threaten to withhold content (i.e., blackouts) during negotiations with distributors, thereby increasing the combined firm's leverage over rival distributors. One week after the government filed the initial suit in November 2017, Turner Broadcasting, a Time Warner business unit, sent an irrevocable offer to approximately 1,000 distributors agreeing to engage in "baseball style" arbitration for seven years if the parties could not reach a renewal agreement, eliminating the possibility of blackouts. The government argued against considering this unilateral remedy because it would "undermine enforcement" by creating an incentive for firms to "take similar actions" in order to "evade antitrust review."

This argument failed at the district court, and the panel decision concurred, as Judge Rogers was highly critical of the government's argument that it need not account for the merging parties' unilateral arbitration offers. In particular, the panel highlighted that DOJ had previously agreed to a similar remedy when entering into a consent decree that would allow the Comcast-NBC Universal merger to move forward and had asserted in those proceedings that "conduct remedies... can be a very useful tool to address competitive problems while preserving competition and allowing efficiencies." This is a pointed rebuke of DOJ leadership's recent pronouncements that behavioral remedies are generally inadequate to address anticompetitive harms in vertical cases. The assistant attorney general leading the Antitrust Division, Makan Delrahim, stated in a speech following his appointment in 2017 that "behavioral remedies often fail" to "let the competitive process play out," and "instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation." Delrahim also recently announced the withdrawal of DOJ's "2011 Policy Guide to Merger Remedies" on the ground that it takes too solicitous an approach to behavioral relief. In contrast, the *AT&T* court concluded that the "government's challenges to the district court's treatment of its economic theories becomes largely irrelevant" while the arbitration agreements remained in force, thereby signaling that the parties' unilaterally imposed behavioral remedy was sufficient to mitigate any potential anticompetitive effect.

### **"Real-world" evidence carries more weight than theoretical modeling**

Throughout the opinion, the court emphasized the value of "real-world" evidence over theoretical modeling, siding repeatedly with the district court's decisions in weighing the evidence. In addition to the government's failure to account for econometric studies on past media mergers, the court particularly called out DOJ's failure to factor into its models the existence of long-term contracts, the post-litigation remedy of arbitration offers, and the dynamic nature of the industry. *AT&T*, meanwhile, was applauded for incorporating econometric studies on past media mergers such as Comcast-NBC Universal, which the court also noted as positive precedent for this type of transaction.

### **The "fact-specific" arguments required for vertical transactions are particularly difficult to challenge on appeal**

When challenging a transaction between head-to-head competitors, DOJ benefits from a presumption of anticompetitive effect when the transaction leads to an increase in concentration above a certain level under the Supreme Court's decision in *Philadelphia Natl. Bank*. Since a vertical transaction like *AT&T-Time Warner* does not involve an increase in concentration in any market, the presumption does not apply. Therefore, vertical transactions require a "fact-specific" showing that the proposed merger is "likely to be anticompetitive." Appeals of fact-specific findings in a lower court are evaluated under the challenging, and highly deferential, "clearly erroneous" standard. In this case, even though the panel opinion acknowledged that some aspects of the district court decision were "troubling" and that some statements "in isolation... could be viewed as addressing the wrong question," the panel stressed the fact-specific nature of the district court's factual findings and tended to review the district court's underlying analysis favorably in light of the record as a whole.

As a practical matter, *AT&T* demonstrates that the government may find it challenging to carry its evidentiary burden in future vertical cases. At a minimum, DOJ will need to marshal significant real-world evidence such as ordinary course business documents and testimony from the merging parties and third-party market participants to support any theoretical economic models to demonstrate likely harm to competition in future vertical cases.

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