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AT&T / Time Warner Ruling Offers Insights into Antitrust Landscape

In mid-June, a federal judge rejected the Department of Justice's (DOJ) attempt to block AT&T's \$81 billion purchase of Time Warner after concluding that the government failed to prove the acquisition would substantially lessen competition. The merger, which closed two days after the ruling and 19 months after it was first announced, was the first "vertical" merger (i.e., a merger between a buyer and a supplier, as compared to a "horizontal" merger between competitors) to be challenged by the federal government in court since 1979. Although the DOJ's Antitrust Division disclaimed any political influence in its challenge, President Trump had singled out this deal for criticism.

For decades, the trend under U.S. antitrust law has been in favor of a lighter regulatory touch for vertical relationships – those between entities operating at different points in a supply or distribution chain – including vertical mergers and acquisitions. Other jurisdictions in the world regulate vertical relationships more closely; the EU, for example, is more restrictive about vertical agreements than the U.S. Given the long-standing trend in the U.S., however, the DOJ's decision to challenge this acquisition was surprising. The DOJ's primary theory of competitive harm was that the acquisition would give AT&T, as a media and telecommunications distribution company, the ability to harm its competitors and ultimately consumers by denying access to Time Warner's broadcasting content (e.g., CNN, TBS, TNT, and HBO) or by allowing access only at higher than competitive prices. The court didn't buy it . . . at all.

While much of the court's analysis is specific to this transaction, we believe there are two big picture takeaways from the result.

The Ruling Continues the Long-Term Trend Toward a Light Regulatory Touch Up and Down the Supply Chain

If the acquisition had been blocked, the result might have signaled a change in the long-term treatment of vertical acquisitions and vertical relationships generally. Instead, the court's 172-page opinion rejected every substantial argument made by the government over the course of the six-week trial, refused to impose any conditions on the combination, and — in an unusual step — preemptively criticized as “unjust” any attempt to stay the decision pending appeal. The court's refutation of the government's arguments confirmed and reinforced the long-term trend toward looser regulation of vertical mergers and other vertical relationships. This bodes well for other newsworthy vertical mergers/acquisitions in industries such as healthcare (e.g., CVS / Aetna) and media (Disney/Fox or Comcast/Fox). In addition, recent media reports have suggested that some other vertical deals were on hold pending the outcome of the challenge to the AT&T / Time Warner deal. It will not be surprising to now see some of these deals move off the sidelines. Notwithstanding the judge's insistence that vertical mergers are “not invariably innocuous,” the remainder of his opinion makes quite clear that the government has an uphill battle to prove that one is not innocuous.

Market Power is Hard to Come By (and Hard to Prove) in a Rapidly Changing Industry

The court's analysis also highlights the important role of rapid innovation in preserving competitive markets – and in weakening the government's ability to challenge vertical relationships on antitrust grounds. In industries undergoing rapid change (in this case, media), the same factors that drive traditional businesses to pursue vertical relationships (here, the emergence of combined content-creation-and-distribution platforms like Netflix and Amazon) simultaneously shift the competitive landscape in a way that makes it difficult to prove that a proposed vertical relationship would substantially lessen competition. Opportunities to obtain and sustain market power seem less likely to occur where new players with new ideas are constantly entering the competitive field — and in any event, they are certainly less likely to be proven. The more dramatic the industry upheaval, the more such uncertainty will

muddle any governmental attempt to paint a clear picture of consumer harm resulting from a vertical relationship. This is as it should be, because rapid technological or other change in an industry is more likely to foster competition (at least in the long run) than to harm it.

For more information please contact [Matt Blickensderfer](#), [Kirby Ifland](#) or any attorney in Frost Brown Todd's [Antitrust Litigation and Counseling Group](#).

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