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Additional Lessons From AT&T/Time Warner: Self-Help Remedies in Merger Challenges

The DOJ Antitrust Division's high profile, unsuccessful attempt to block the AT&T/Time Warner merger ended on February 26, 2019 after the U.S. Court of Appeals for the D.C. Circuit affirmed the trial court's decision to allow the merger to proceed. The DOJ announced that it would not be appealing the D.C. Circuit's decision, closing the chapter on the first litigated challenge to a vertical merger by the government in decades.

Among the many issues raised by the litigation is the potential significance of company-initiated "remedies," as opposed to government-mandated divestitures or behavioral commitments, in countering government merger challenges. One of the DOJ's key allegations in the litigation was that the combined AT&T/Time Warner would be more likely to raise prices for Turner Broadcasting content to rival video distributors (such as Comcast or Dish) because in the event of a Turner Broadcasting blackout on rival platforms, some disgruntled customers would switch to AT&T's DirecTV services.

A week after the DOJ filed its complaint to block the merger, Turner Broadcasting sent letters to 1,000 distributors pledging that it would offer arbitration in any renewal disputes and that distributors would have the right to continue to carrying Turner networks pending the outcome of the arbitration, meaning no blackouts during the arbitration process. This arbitration provision would be in place for seven years.

During the trial and the appeal, the merging parties repeatedly referenced the arbitration offer in response to the DOJ's allegations of competitive harm from increased bargaining leverage, and both the trial court and D.C. Circuit emphasized the importance of the arbitration/no-blackout proposal in their decisions. Indeed, the D.C. Circuit said that the arbitration offer made the DOJ's challenges to the district court's treatment of the DOJ's economic theories "largely irrelevant."

Significantly, following the D.C. Circuit's decision, the DOJ has expressly pushed back in recent speeches on the effectiveness of such self-help



commitments in future merger enforcement. Antitrust Division chief Makan Delrahim has continued to emphasize the need for structural, rather than conduct remedies and has criticized the effectiveness of the AT&T/Time Warner arbitration remedy, noting that it expires in seven years and that it may not be realistic to believe that distributors would always be willing to antagonize content providers by engaging in arbitration. Principal Deputy Andrew Finch acknowledged that the DOJ is considering how to approach such behavioral commitments in future merger challenges but warned parties should not believe that they can “change the playing field” after a suit has been filed.

Despite the rhetoric, companies should keep in mind that there may be situations in which tailored conduct commitments may be helpful in navigating a merger enforcement action. This may be particularly true in the context of challenges to vertical transactions which, by the DOJ’s own admission in the AT&T/Time Warner case, present greater theoretical and evidentiary hurdles for the government as compared to horizontal merger enforcement. Given the outcome of the litigation, it is possible that the DOJ and FTC may be a bit more cautious before attempting to bring another vertical merger challenge, and behavioral promises may tip the scales in the enforcers’ decision-making process.

At the same time, companies should be mindful of competing factors. First, commitments generally are not costless: the arbitration offer apparently was irrevocable and likely represented a significant business concession by Turner. Second, the government may be more confident in horizontal enforcement actions in insisting on structural remedies or in blocking the deal entirely as compared to vertical merger challenges.

The agencies have repeatedly established their preferences for structural over conduct remedies and “fix-it-first” options over post-closing remedies. However, the success of the arbitration offer in the AT&T/Time Warner litigation underscores the importance of carefully evaluating remedial options as early as possible for transactions with antitrust risk.

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