

Antitrust observers react to judge's approval of AT&T/Time Warner

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The US Department of Justice's antitrust division failed to satisfy its burden on three separate theories trying to show AT&T's \$85.4 billion acquisition of Time Warner violates the antitrust laws and harms competition, Judge Richard Leon has held.

Yesterday's ruling, which Judge Leon [issued](#) in a brief afternoon hearing in which no one was allowed in or out of the courtroom after proceedings began, comes as a crushing blow to the Antitrust Division, which sought a preliminary injunction in November to block the deal.

Lawyers, consumer advocates and economists rushed to read Judge Leon's [opinion](#) yesterday, deciphering the court's stance on the first litigated vertical merger challenge in decades.

Milbank Tweed Hadley & McCloy partner Fiona Schaeffer said that Judge Leon's ruling was not unexpected. While some thought the deal would be approved with conditions, behavioural remedies are typically negotiated and not ordered, she noted.

The approval has implications for several deals that have been waiting in the wings – some public and some undisclosed of yet – and will now move forward with Judge Leon's useful guidance.

“Was this a case worth bringing?” Schaeffer asked. “I think it was.”

While the companies would not agree that the lawsuit was warranted, there are broader public benefits to the DOJ having brought the case, she said. Prior to this trial, no recent guidance from the courts or agencies indicated when vertical deals are problematic and when they are not, Schaeffer said.

Judge Leon's opinion and the trial as a whole “provides much-needed 21st century thinking on these issues”, with useful guidance for the antitrust agencies and the business community on future vertical mergers, she said.

The DOJ should continue to bring test cases where merited, Schaeffer said, but now that the trial court has issued its decision, an appeal would not be worth the additional government time and resources.

George Mason University professor John Yun, a former acting deputy assistant director at the Federal Trade Commission's bureau of economics, pointed out that Judge Leon basically started his opinion by saying that AT&T and Time Warner need each other to compete in the crazy, evolving media industry.

The judge accepted that vertical mergers in general have a lot of efficiencies and that this merger in particular is no exception, Yun said. The economist highlighted Judge Leon's discussion of the combined company being able to run targeted advertisements after the deal, instead of the traditional “spray and pray” method of trying to get ads in front of as many eyeballs as possible.

Judge Leon also bought into the notion that the merger will remove the bargaining friction between AT&T and Turner – which Yun said he translates to transaction costs – and will allow them to maximise their innovations.

Yun said Judge Leon's opinion ultimately concludes that the government did not even meet its initial burden of showing that Turner will have the increased bargaining leverage after the merger. But while the efficiencies might not have been a factor in the legal analysis of the merger, they clearly played a role in establishing a story of why the companies are merging, Yun said.

He was impressed by Judge Leon's discussion of the bargaining leverage – including a recognition that the market is essentially two-sided and one in which Time Warner wants to increase distribution – and recognition that the companies actually have embraced virtual providers, since they provide another avenue for distributing content.

Judge Leon properly focused on the evidence as to what Turner's incentives are, Yun said; he was rightly sceptical of the allegations that Turner would threaten to withhold its content from rival distributors after the merger.

Diana Moss, the president of the American Antitrust Institute, called Judge Leon's ruling “an enormous setback for competition, consumers, innovation and diversity in the media”. The institute had opposed the merger and applauded the Antitrust Division's efforts to stop it, she noted.

“Kudos to them for standing firm and going to court,” Moss said of the DOJ. “We hope they will continue to pursue vigorous vertical merger enforcement.”

A former antitrust enforcer, who asked to remain confidential due to client concerns and several pending mergers, said Judge Leon's opinion should inject more humility into the government's approach to merger challenges.

Multiple pending vertical deals raise similar issues, and Judge Leon made it very clear that the government must have the evidence, facts and analysis to back up its claims, the source said; it cannot rely on a gut feeling or theory to bring a case.

The *AT&T/Time Warner* outcome might even inject more humility on horizontal mergers, the source added, as the DOJ had perhaps become arrogant after too many wins in succession. Judge Leon's opinion – “appellate-proof” and a scathing rebuttal to the government's case – showed that not only can the government lose a merger challenge, it can lose one by a wide margin, the lawyer said.

The judge seemed to be very dismissive of competitor testimony and pretty dismissive of customer testimony, the source said of Judge Leon's analysis. It was not enough for customers to take the stand and parrot the DOJ's complaint and theories without facts and evidence to support the testimony, the lawyer noted.

Speaking to the press after the decision, AT&T's lead attorney Daniel Petrocelli at O'Melveny & Myers said "the case stands as a testament to the wisdom of this combination of these two great companies and how it will benefit consumers for generations to come."

While the companies are not happy that it took 18 months to secure approval, they "are relieved" to have put the investigation and challenge behind them, Petrocelli said.

"The court's summary made clear that this decision was grounded in... the facts and evidence that were presented at trial," Petrocelli said, adding that the government failed to show proof to support its "various theories".

Assistant attorney general for antitrust Makan Delrahim said the DOJ is "disappointed" with the ruling. "We will closely review the court's opinion and consider next steps in light of our commitment to preserving competition for the benefit of American consumers."

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