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In November of 2017, the United States Department of Justice brought its first vertical merger challenge in several decades. Considered one of the largest acquisitions in history,[1] this merger represents a regular pattern of cable and media companies to consolidate in the name of cost efficiencies.[2] Be it good or bad, there is no question that the consolidation of telecommunication and media companies affects our lives on a daily basis. The more content producers a single distributor owns, the more content that distributor's customers get to enjoy. Take Disney+ for example, where Disney's ownership of National Geographic, ESPN, Marvel, and other content producers allows it to provide its customers with a wide variety of content and packages that it otherwise would not be able to.[3] However, as the government argued, these acquisitions are not always in the public's best interest.[4]

A vertical merger is the result of an acquisition of one company by another company which operates at a different level of the same supply chain or in a different market altogether.[5] In either case, the firms were not competitors with each other in the same market. Firms seek to acquire other firms in their supply chain with the hope of improving efficiency and reducing costs.[6] A vertical merger effectively eliminates the costs of negotiation and finding suppliers.

Because the firms in this instance are not in direct competition with each other to begin with, the merger of the two is less of a threat to competition than horizontal mergers (mergers between direct competitors).

However, vertical mergers become suspect when their effect is to reduce a competitor's access to supplies. The principal concern with vertical mergers is the possibility that rival firms will be denied access to significant suppliers or customers, or be treated on unfair terms, putting them at a significant competitive disadvantage to the merging firms and thus allowing the merged firms to charge consumers higher prices.[7]

In 2016, AT&T, a content distributor, announced its plan to begin a vertical merger with Time Warner, a content producer.[8] After the announcement of the deal, the DOJ filed a lawsuit against AT&T and Time Warner to block the proposed merger—its first major challenge to such a merger in several decades.[9] The case went to the District Court of the District of Columbia, where Judge Leon, the same judge that oversaw the Comcast-NBCU merger, approved the merger, but this time, without imposing any limitations on the merged entity's conduct.[10]

After the DOJ's announcement that it would sue to block the merger there was speculation that this move was a direct result of political influence from the White House.[11] Many commentators have contended that the DOJ's challenge to the merger was a direct submission to the Trumps' animosity toward CNN, a Turner-owned network.[12] The speculation arose after then presidential candidate Donald Trump vowed in a rally that his administration would not allow this merger to go through.[13] Then, in 2019, reports were released finding that a few months before the Justice Department filed its lawsuit, President Trump pressured Gary Cohn, then director of the National Economic Council, to tell the Justice Department to block AT&T's Time Warner deal.[14] This sort of information has raised fears for many of the executive branch utilizing its enforcement agencies to instill its own political media arm (here, FOX news).[15]

Whatever the incentive, this remains the first time the government has filed suit to block a vertical merger since 1977, when the DOJ sought to force Hammermill, a paper manufacturer, to divest itself of two paper distributors it had acquired in the 1960s.[16] There, the DOJ believed the acquisitions had violated Section 7 of the Clayton Act by "substantially lessening competition" in the market for the "manufacture and sale of printing and fine paper."[17]

The court in *Hammermill* found that it was very unlikely that Hammermill would manipulate its purchased paper distributors in a way that would harm its competing distributors' ability to sell to them.[18] Unlike in the Time Warner–AT&T case, the actual merger of Hammermill and the paper distribution companies occurred a decade before the case was brought by the DOJ.[19] Thus, the judge in *Hammermill* had the opportunity to look at the actual effects of the merger and the firm's conduct post-merger. The court found that Hammermill had no intent to foreclose on its competitors, but rather was preserving the independent paper merchant distribution system.[20] In AT&T, on the other hand, evidence was based on projections and forward-looking analysis.

Since *Hammermill*, vertical merger enforcement has generally taken the form of settlements–consent decrees–where the merging parties agree to abide by certain conditions for a limited number of years.[21] This pattern is considered to be, at least in part, due to an increased amount of scholarship suggesting that vertical mergers raise few competitive risks and have more inherent procompetitive effects than horizontal mergers.[22] Thus, the agencies that regulate these mergers and the courts that consider any challenges to them operate on the presumption that a proposed vertical merger is likely to be beneficial to consumers.[23]

However, industries have developed substantially since *Hammermill*. Big business is everywhere, companies are constantly changing hands, and with the rise of technology and media, it is unclear what the benefits and costs of conglomeration and acquisitions really are. And further, mergers and acquisitions are on the rise.[24]

This difficulty is exasperated by the fact that since the Hart-Scott Radio Antitrust Improvement Act of 1976, merger law operates prospectively.[25] Under Hart-Scott Radio, rather than analyzing the actual effects of the merger, like in *Hammermill*, courts must base their decisions on both sides' economists' analyses of the market and how it will be affected by the merger.[26]

The $85 billion merger between AT&T and Time Warner provided an opportunity to update U.S. antitrust law to deal with the competitive realities of this new era. AT&T's merger with Time Warner is one example of the growing tendency among telecommunication companies towards consolidation. In the telecom and media world, rapid technological changes, massive economies of scale, and our natural inclinations to be a part of the same networks have helped to incentive firms to monopolize and demonstrate winner-take-all behavior.

However, rather than take this unique opportunity in history to update U.S. vertical merger law to reflect the complexities of modern markets, the courts that decided *United States v. AT&T* reinforced the stringent standard the government has to overcome. The likely result is that a vertical merger will probably not be challenged in the near future, giving the agencies the option of either imposing structural remedies or allowing the merger to go through with no restrictions.

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[3] Mighty Max, *Every Company Disney Owns: A Map of Disney's Worldwide Assets*, Title Max, https://www.titlemax.com/discovery-center/money-finance/companies-disney-owns-worldwide/.

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[11] Hadas Gold, *Report: Trump asked Gary Cohn to block AT&T-Time Warner merger*, CNN Business (Mar. 4, 2019, 4:53 PM), https://www.cnn.com/2019/03/04/media/att-time-warner-trump-gary-cohn/index.html; Jane Mayer, *The Making of The Fox News White House,* The New Yorker (Mar. 4, 2019), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house; Aaron Pressman, *What AT&T Could Do If Trump Blocks the Time Warner Deal*, Fortune (Nov. 9, 2016, 9:06 AM), https://fortune.com/2016/11/09/att-trump-blocks-time-warner/.

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[17] United States v. Hammermill, 429 F. Supp. 1271, 1274 (W.D. Pa. 1977).

[18] *Id.* at 1293.

[19] *See* United States v. AT&T, 310 F. Supp 3d 161 (D.D.C. 2018).

[20] *Hammermill*, 429 F. Supp. at 1288–89.

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[22] *Id.*

[23] JL2977, *Mergers are on the Rise: Is it Good for the Economy?*, The Yale Tribune (June 7, 2018), https://campuspress.yale.edu/tribune/mergers-are-on-the-rise-is-it-a-good-thing-for-the-economy/; U.S. Dep't of Justice, Non-Horizontal Merger Guidelines (June 14, 1984), https://www.justice.gov/atr/page/file/1175141/download?mkwid=c; Christine S. Wilson, Commissioner, U.S. Fed. Trade Comm'n, Keynote Address at the GCR Live 8th Annual Antitrust Law Leaders Forum: Vertical Merger PolicyL What Do We Know and Where Do We Go (Feb. 1,

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[26] *Id.*; United States v. Hammermill, 429 F. Supp. 1271 (W.D. Pa. 1977); *see* United States v. AT&T, 310 F. Supp 3d 161 (D.D.C. 2018).