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AT&T-Time Warner Suit a First

by

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The U.S. Department of Justice recently [filed a lawsuit](#) to block the proposed merger of AT&T and Time Warner. Its case is questionable on the merits in a market where television viewing habits are rapidly changing. But this lawsuit is especially unusual for seeking unprecedented relief for this type of merger in the modern antitrust era.

Time Warner is a programming content provider. Its channels include CNN, HBO and the Turner channels. AT&T delivers video content through its DirecTV satellite service and its broadband and mobile services. That makes this a “vertical” merger with no meaningful “horizontal” overlaps between the companies.

DOJ is claiming that the combined entity may place video content distributors that compete with DirecTV or AT&T’s broadband video distribution services at an unfair disadvantage by charging them high fees or denying them access to Time Warner content. According to DOJ, if the other video distributors pay, that is more revenue for the merged company. If they don’t pay, DirecTV or AT&T broadband will gain customers who want the Time Warner channels. Either way, the combined company wins.

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This theory suffers from some obvious problems. Cutting off rival distribution systems from Time Warner programming to help AT&T's video distribution services will lead to loss of viewers and revenues for Time Warner channels. It seems unlikely that AT&T would pay \$85 billion for these channels only to damage their value by using them for leverage against competitors of AT&T. Moreover, consumers have many more alternatives to both traditional channels and in their programming distributors than ever before, so threatening to withhold the Time Warner channels will be less effective than it might have been a few years ago.

But DOJ presses its claims even further. It argues that past remedies in recent vertical merger cases, which required the parties to refrain from certain conduct that might be anti-competitive are not good enough. Instead, DOJ argues that only major divestitures, of DirecTV or of Time Warner's channels, can prevent the harm alleged by DOJ.

Vertical mergers — as opposed to horizontal ones involving direct competitors — are rarely challenged under the antitrust laws, and for good reason. The last vertical merger challenged by U.S. antitrust agencies was in 1979, when the FTC [lost its challenge](#) to truck trailer manufacturer Fruehauf's acquisition of a brake component supplier. The last vertical merger [successfully challenged](#) was in 1972, when Ford Motor Co. bought a supplier, Autolite, and was forced to sell off some of the assets after DOJ challenged the merger. The DOJ is seeking a similar outcome in 2017, but a lot has changed since 1972.

U.S. antitrust agencies before the 1980s were criticized by economists and legal scholars for their hostility to vertical mergers. Since the 1980s, vertical mergers have rarely led to antitrust challenges. Former FTC Commissioner J. Thomas Rosch found in his [2007 study](#) that the federal government has only challenged 23 vertical mergers since the 1979 Fruehauf merger. Of those, three were abandoned by the parties, and the others were all approved, most with behavioral conditions to address the alleged harms.

Since 1979, with regard to vertical mergers, the government has consistently negotiated for behavioral changes rather than sue seeking major divestitures. For example, Comcast's 2011 acquisition of NBC raised similar alleged competitive issues as the AT&T/Time Warner merger, and was settled with behavioral restrictions that allowed the merger to proceed without structural changes. The market today is even more dynamic since the 2011 Comcast/NBC merger as consumers are now far more willing to cut the cord and look to internet platforms for information and entertainment.

The Justice Department will have to clear several hurdles if it is to prevail in this case. It will have to show how this merger would cause harm to consumers in an increasingly dynamic communications and media marketplace with more alternatives for receiving information and entertainment programming than ever before. Then it will have to explain why this vertical merger case deviates from past antitrust enforcement precedent in which, at most, behavioral conditions were sufficient remedies. And it will have to do all of this without having any legal precedent after 1972 to support the vertical theories of harm being raised by the government.

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