THE FREE STATE FOUNDATION
A Free Market Think Tank for Maryland......Because Ideas Matter

Perspectives from FSF Scholars
June 20, 2018
Vol. 13, No. 24

After AT&T/Time Warner, Antitrust Authorities Should Abandon Their Craft

by

Randolph J. May* and Theodore R. Bolema**

Real Clear Markets
June 20, 2018

We already knew before June 11, 2018, that the converging communications and media marketplace was dramatically different – and much more competitive – than it was even four or five years ago. We didn't need a federal judge to tell us so, in a 172-page opinion no less. Nevertheless, it's significant that federal judge Richard Leon acknowledged, in his June 12 decision rejecting the Department of Justice's (DOJ's) attempt to block the AT&T/Time Warner merger, that the "tectonic changes" that have occurred in the broadband distribution and video programming markets are necessarily consequential for purposes of assessing marketplace competition.

This legal recognition of the new competitive realities has important implications for other communications and media merger and proposals currently in the works, such as Comcast's proposed acquisition of Fox's programming assets and the merger of T-Mobile and Sprint.

The first lesson is that antitrust authorities should focus on making a persuasive showing in court, rather than trying their case in the media with headline-grabbing characterizations. For example, DOJ's brief filed shortly before the trial mocked as the "Star Wars defense" AT&T's evidence about the rapidly changing nature of competition in the marketplace. According to the DOJ, AT&T was claiming that "everything the government is telling the Court is stale and out of context – it is from a long time ago in a galaxy far, far away." But Judge Leon ignored the cutesy allusion and demanded evidence of anticompetitive harm.

DOJ was more right than it realized – just not in the way that it intended. The DOJ theory of harm was reminiscent of cases it brought a long time ago in a different antitrust era. Back in the 1970s and earlier, vertical mergers –like the combination of AT&T's distribution network and Time Warner's program content – were challenged using dubious theories of economic harm. Economists explained that vertical mergers, with their integration efficiencies, usually produce consumer and competition benefits, and this view was generally adopted by courts. The antitrust agencies got the message, and until this year had not brought a single vertical merger case since 1979. Judge Leon's decision in AT&T/Time Warner is an unmistakable reminder that antitrust authorities should avoid bringing cases based on questionable economic theories like those used in the 1970s.

A second important lesson is that legacy market definitions, such as the "multichannel video program distributors" market, are unduly narrow when it comes to evaluating the market power of today's video distributors like AT&T or Comcast. Consumers today are far more willing to "cut the cord" of traditional cable and satellite providers in favor of Internet platforms like Amazon Prime and Netflix – each of which has a far larger market capitalization than any cable or satellite video operator, and far more U. S. subscribers. Plus we can't forget the impact of Google's YouTube, with its 30 million daily visitors who consume 5 million videos per day.

Indeed, mobile broadband providers such as Verizon, T-Mobile and Sprint are distributing an ever-increasing amount of video programming to American consumers, which will increase still further when new super high-capacity 5G wireless networks are deployed. The notion that today's mobile broadband providers should still constitute a separate and distinct "wireless" market is increasingly difficult to defend. More likely, for purposes of competitive analysis, they are now part of a larger dynamic "broadband" market that includes wireline, fiber, satellite, and wireless platforms.

Moreover, as global media, entertainment and communications markets continue to evolve and integrate, the focus of any merger reviews should not be limited to possible antitrust risk in narrowly-defined U.S. markets. Rather, antitrust authorities should consider how a proposed transaction will impact the ability of U.S. companies like AT&T and Comcast to take on global rivals.

Finally, it is paramount to remember that the ultimate aim of antitrust law is to enhance consumer welfare, not to protect competitors. The reality is that the efficiencies and cost savings realized by integration often make markets more competitive to the benefit of consumers. As Judge Leon recognized in his AT&T/Time Warner decision, the test is whether any anticompetitive harm outweighs the benefits of the acquisition. Because Comcast's proposed acquisition of Fox's assets, akin to the AT&T/Time Warner merger, is largely a vertical merger combining broadband distribution facilities with programming content, there is no reason to think a court would view the competitive analysis much differently.

In the case of the T-Mobile/Sprint merger, the companies combined would have greater resources and a larger customer base not only to better compete against rivals but also to financially support a faster 5G buildout. So, even if there is one less competitor among a number of broadband providers, this loss, if any, may well be greatly outweighed by the efficiency gains and scale economies that make possible faster 5G deployment.

Judge Leon's decision rejecting the Department of Justice's case against the AT&T/Time Warner merger should be a spur to further critical thinking regarding the application of antitrust law to today's technologically dynamic communications and media environment. It's not acceptable for antitrust authorities to rely on outdated market definitions that bear little resemblance to today's shifting competitive market realities.

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. *After AT&T/Time Warner, Antitrust Authorities Should Abandon Their Craft* was published in *Real Clear Markets* on June 20, 2018.

** Theodore R. Bolema is a Senior Fellow of the Free State Foundation.