

DOJ: Vertical Merger Precedent

The last time the DOJ tried a vertical merger case, Jimmy Carter was President – and the DOJ lost

United States v. Hammermill Paper Co., 429 F. Supp. 1271 (W.D. Pa. 1977)

- The DOJ attempted to block a merger between a manufacturer of paper and two paper wholesalers. The Court rejected the government’s case and found the merger lawful.
- That court’s reasoning supports this merger too:
 - The companies had a historic policy of wide distribution
 - There was no evidence that the companies merged to foreclose rivals
 - There was no evidence that earlier mergers led to foreclosure
 - Foreclosure would not be profitable because of the market structure

The last time the DOJ blocked a vertical merger in court, Richard Nixon was President

Ford Motor Co. v. United States, 405 U.S. 562 (1972)

- Ford was a classic “old economy” case involving static technologies, high concentration levels and barriers to entry. The merger combined one of only two independent spark plug manufacturers (Autolite) with the number two auto manufacturer (Ford). Both companies had market power.
- In contrast, AT&T and Time Warner are both in wildly competitive, fluid and innovative industries with new entrants on a daily basis. Neither company has market power.
 - Collectively, Time Warner’s basic and premium cable networks command less than 10% of 24-hour broadcast TV and cable viewership, and an even smaller proportion of the broader video landscape including Netflix, Hulu, Amazon and other internet-based services.

The DOJ has approved hundreds of vertical mergers



The DOJ approved a large vertical media merger in 2011

- Just six years ago, DOJ approved a vertical merger between Comcast (a content distributor) and NBCUniversal (a content creator).
- The AT&T/Time Warner merger is even easier to approve because:
 - Comcast and other cable companies, not AT&T, are by far the leading providers of pay-TV services in nearly all localities;
 - Time Warner has no programming comparable to NBC’s broadcast networks;
 - OTT services like Netflix, Amazon and Hulu have exploded since the Comcast/NBCU deal. Programming and distribution are more competitive today than ever before.

The vertical merger recently mentioned by the DOJ is not “precedent”

- The DOJ did not sue to block the Lam Research/KLA-Tencor merger.
 - After consent negotiations broke down, the parties chose to walk away from the deal.
 - The parties did not even complete the DOJ’s second request for information, so they did not reach the point where they could close or where the DOJ would sue.
- Voluntary abandonment is not “precedent.” No court decided anything, because there was no case.
- Vertical mergers raise competitive concerns only where the merging parties dominate both upstream and downstream markets. Lam/KLA-Tencor was such a merger; AT&T/Time Warner is plainly not.
- The market for equipment used to manufacture semiconductors bears no resemblance to the uniquely dynamic and highly-competitive marketplace for video programming and distribution.
- In all the other recent mergers cited by the DOJ, the mergers closed. The mergers were not blocked.