

---

# 14. Vertical Mergers

---

Professor Dale Collins  
Merger Antitrust Law  
Georgetown University Law Center

# Vertical theories of harm

## ■ Theories of harm

### 1. Exclusionary effects (foreclosure/raising rivals' costs)

- “Input foreclosure”
- “Output foreclosure”

NB: “Foreclosure” in this context is loosely used. It includes competitively disadvantaging rivals by raising their costs as well as complete exclusion from the market.

### 2. Coordinated effects

- Elimination of a disruptive buyer
- Elimination/disciplining of new disruptive competition
- Facilitation of tacit coordination through greater firm homogeneity
- Anticompetitive information conduits

### □ NB: These theories are not necessarily separable

- For example, the merged firm may impede new disruptive downstream competition by refusing to supply or raising the costs of an “essential” input produced upstream by the merged firm

# Vertical theories of harm

## ■ Focus of vertical theories

- In modern antitrust law, theories of anticompetitive harm in vertical mergers (as in horizontal mergers) should be on the harm to competition in the market and not on harm to competitors
- As with all Section 7, the anticompetitive effect must be located in a relevant market
  - Determined by the usual *Brown Shoe* and HMG tests

## ■ Efficiencies

- Through most of modern antitrust history, vertical mergers have been generally presumed to create gross efficiencies
  - “Elimination of double marginalization” (explained below)
  - Cost and quality improvements
  - Increased investment incentives
- Beginning in the late Trump administration and continuing into the Biden administration, senior antitrust enforcement officials have rejected this proposition
  - That is, they are neutral on whether a vertical merger is likely to create efficiencies
  - Require proof of each claimed efficiency under the usual tests
    - Must be merger specific, verifiable, sufficient, and not the result of anticompetitive conduct

# Vertical theories of harm

## ■ Vertical mergers in the Supreme Court

### □ Three cases since 1950

#### ■ United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957)

- Requiring du Pont to divest its 23% ownership interest in General Motors for vertical foreclosure

#### ■ Brown Shoe Co. v. United States, 370 U.S. 294 (1962)

- Requiring the #4 shoe manufacturer/#3 shoe retailer to divest the #12 shoe manufacturer/#8 shoe retailer for vertical foreclosure

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

- Finding Ford's acquisition of spark plug manufacturer Autolite would raise barriers to entry in the spark plug market, requiring Ford to divest the Autolite name and its only spark plug factory, and prohibiting Ford from manufacturing spark plugs for 10 years
- Ford did not manufacture spark plugs prior to the acquisition but rather acquired them from independent companies such as Autolite

# Vertical theories of harm

- Modern enforcement practice (until recently)
  - Since vertical mergers do not eliminate a competitor and were generally presumed to create meaningful efficiencies, the agencies did not seek to block these transactions or require divestiture
  - Instead, they accept behavioral remedies
    - Obligations to deal on reasonable terms with rivals
    - Firewalls to prevent anticompetitive information transfers
  - Usual remedies
    - Non-discriminatory access undertakings
    - Undertakings to maintain open systems to enable interoperability
    - Information firewalls (to prevent anticompetitive information conduits)
  - AT&T/Time Warner
    - Enforcement practice changed on November 20, 2017, when the DOJ sued to block AT&T (a subscription TV distributor) from acquiring Time Warner (a content creator/network assembler)
    - The conventional wisdom is that the DOJ concluded, after examining the same markets in a just-conducted Comcast/Time Warner Cable merger investigation, that an access consent decree in Comcast/NBCUniversal did not work<sup>1</sup>

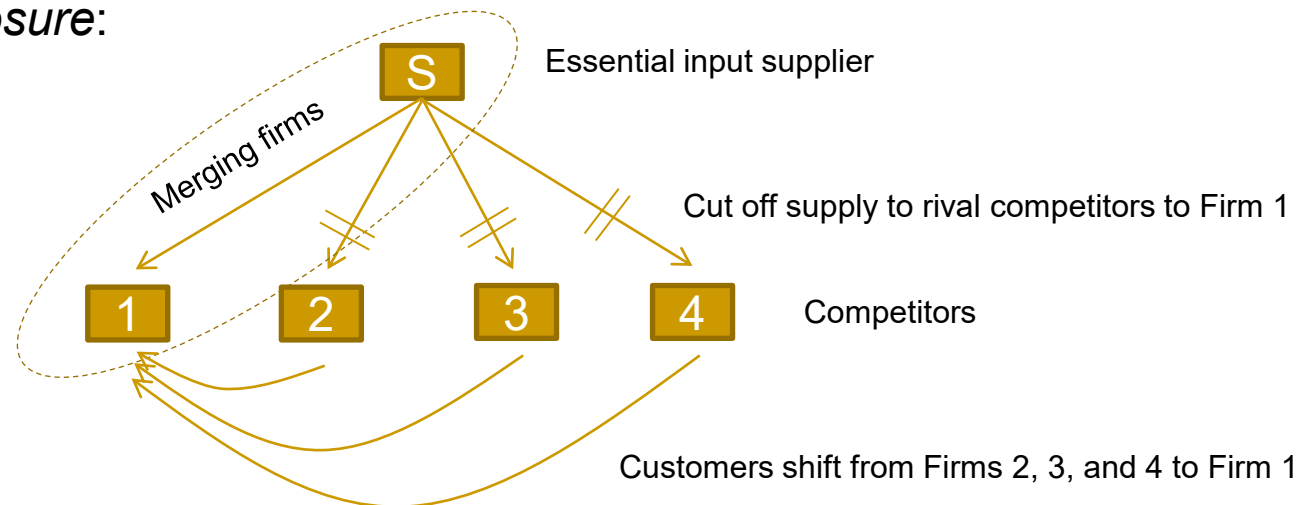
---

<sup>1</sup> Both AT&T/Time Warner and Comcast/NBCUniversal are discussed below.

# Exclusionary effects

- The paradigm case of foreclosure
  1. Combines the only firm producing an “essential” input
  2. With a downstream user in competition with other downstream users
  3. Permitting the combined firm to drive its downstream competitors out of the market by refusing to sell to them

*Input foreclosure:*

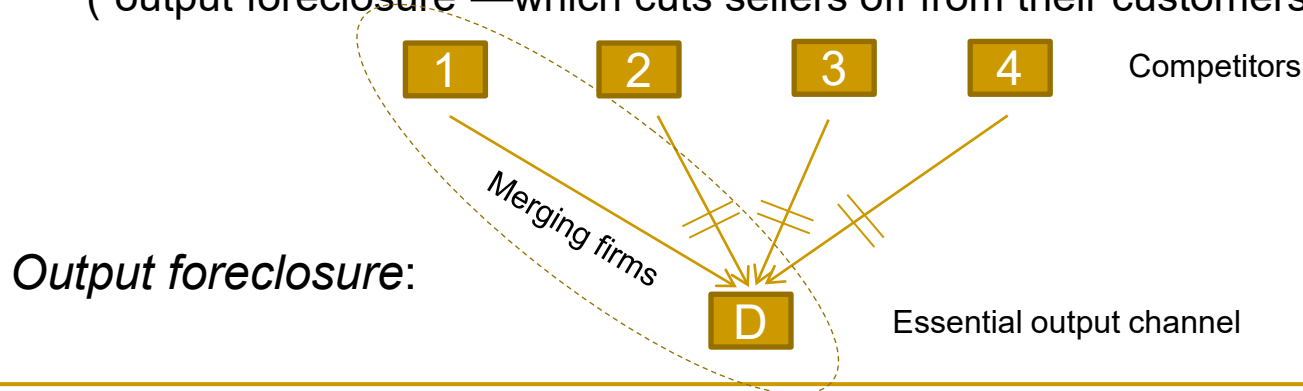


The idea: The combined firm can cut off the essential input from its downstream competitors, gain their customers, and monopolize the downstream market

# Exclusionary effects

## ■ Four variations

1. Firm 1 could be the acquirer of Firm S
2. The combined firm raises the price to its competitors rather than foreclosing them altogether (“raising rivals’ costs” or “RRC”)
3. There could be several suppliers of the essential factor, but the theory still applies if the postmerger market the competitors are significantly competitively disadvantaged because—
  - the other input suppliers are simply higher cost firms, *or*
  - with the vertical merger it is easier for the other suppliers to oligopolistically coordinate and charge higher priceswith the result in either case being that competition in the market is reduced
4. The essential factor could be a distribution or retail channel rather than an input (“output foreclosure”—which cuts sellers off from their customers))



# Exclusionary effects

## ■ Ability and incentive

- Vertical theories of foreclosure/raising rivals' costs are often about incentives rather than the ability of the merged firm to harm competition
  - Consider, as an example, the primary theory of harm in AT&T/Time Warner: that the merged firm would be likely to raise the prices of Time Warner content to distribution rivals of AT&T and so disadvantage these rivals to the injury of competition
  - But Time Warner had the ability premerger to raise prices to AT&T's rivals. Nothing in the merger gave Time Warner more market power in the sale of content. Time Warner could have charged higher prices than it did premerger, it just did not have the incentive to do so (i.e., it would have been less profitable had it raised its prices).
  - What the merger does give the combined company is an *incentive* to raise Time Warner prices to AT&T's distribution rivals. Raising prices to AT&T's distribution rivals without raising prices to AT&T makes AT&T (marginally) more attractive to customers, and some customers may switch from the higher priced rivals to AT&T, allowing the combined company to recapture some of the margin it otherwise would have lost and hence giving the combined firm an incentive to raise prices to AT&T's rivals
    - NB: This is analytically very similar to the shift in incentives of the combined firm under the unilateral effects theory



# Exclusionary effects

## ■ Open legal standard question

- In the AT&T/Time Warner complaint, the DOJ stated:

A vertical merger may violate the antitrust laws where the merging parties would—by means of their control of an input that their competitors need—have the incentive and ability to substantially lessen competition by withholding or raising the price for that input.<sup>1</sup>

- *Query:* Is there an increase in price to rivals that is permissible under Section 7 or any price increase, no matter how small, impermissible?
  - There is no law on this question
  - The language of Section 7 suggests that the price increase to rivals resulting from the merger must be of sufficient probability and magnitude to “substantially” lessen competition by measuring increasing the market power being exercised in the relevant market
  - Whatever the legal threshold, the magnitude of the price increase the merged firm will seek to impose on a competitor will be a function of—
    - The competitor’s loss of customers (and margin) due to the price increase,
    - The percentage of those customers that are captured by the merged firm as customers (the diversion rate), and
    - The margins the merged firm earns from those captured customers

<sup>1</sup> Complaint ¶ 10, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. filed Nov. 30, 2017).

# Coordinated effects

- Elimination of a disruptive buyer
  - When the merged firm can price discriminate in the prices it charges its rivals, it can target particular buyers that disrupt seller coordination by refusing to deal with those buyers or materially raising their input prices
  - Example:
    - In its AT&T/Time Warner complaint, the DOJ alleged that the combined firm would have an incentive to charge virtual MVPDs and online video distributors (OVDs)—two forms of new, disruptive entrants into subscription TV distribution—higher prices to Turner network and HBO in order to protect AT&T's traditional delivery

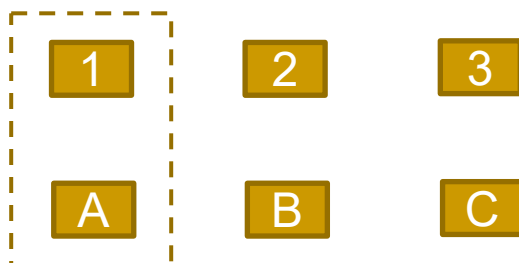
# Coordinated effects

- Elimination/disciplining of new disruptive competition
  - When the merged firm can price discriminate in the prices it charges its rivals, it can target particular new entrants that threaten to disrupt seller coordination by refusing to deal with those entrants or materially raising their input prices

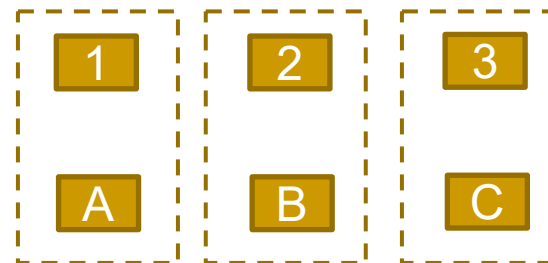
# Coordinated effects

- Create greater firm homogeneity
  - As related markets become more structured as vertical silos through vertical integration, firms become more alike (homogeneous), which causes their incentives to align and so facilitates horizontal coordination

Less likely to tacitly coordinate:



More likely to tacitly coordinate:



- *Example: AT&T/Time Warner complaint*

The merger would also make oligopolistic coordination more likely. For example, the merger would align the structures of the two largest traditional video distributors, who would have the incentive and ability to coordinate to impede competition from innovative online rivals and result in higher prices. In short, the merger would help the merged firm's bottom line by extending the life of the old pay-TV model, but harm consumers who are eager for new innovative options.<sup>1</sup>

<sup>1</sup> Complaint ¶ 9, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. filed Nov. 30, 2017).

# Coordinated effects

- Anticompetitive information conduits
  - *Paradigm case*: Market is otherwise conducive to oligopolistic coordination *except* that information on which to coordinate is not readily available. The vertical merger provides a mechanism for conveying this information.

# Efficiencies in vertical mergers

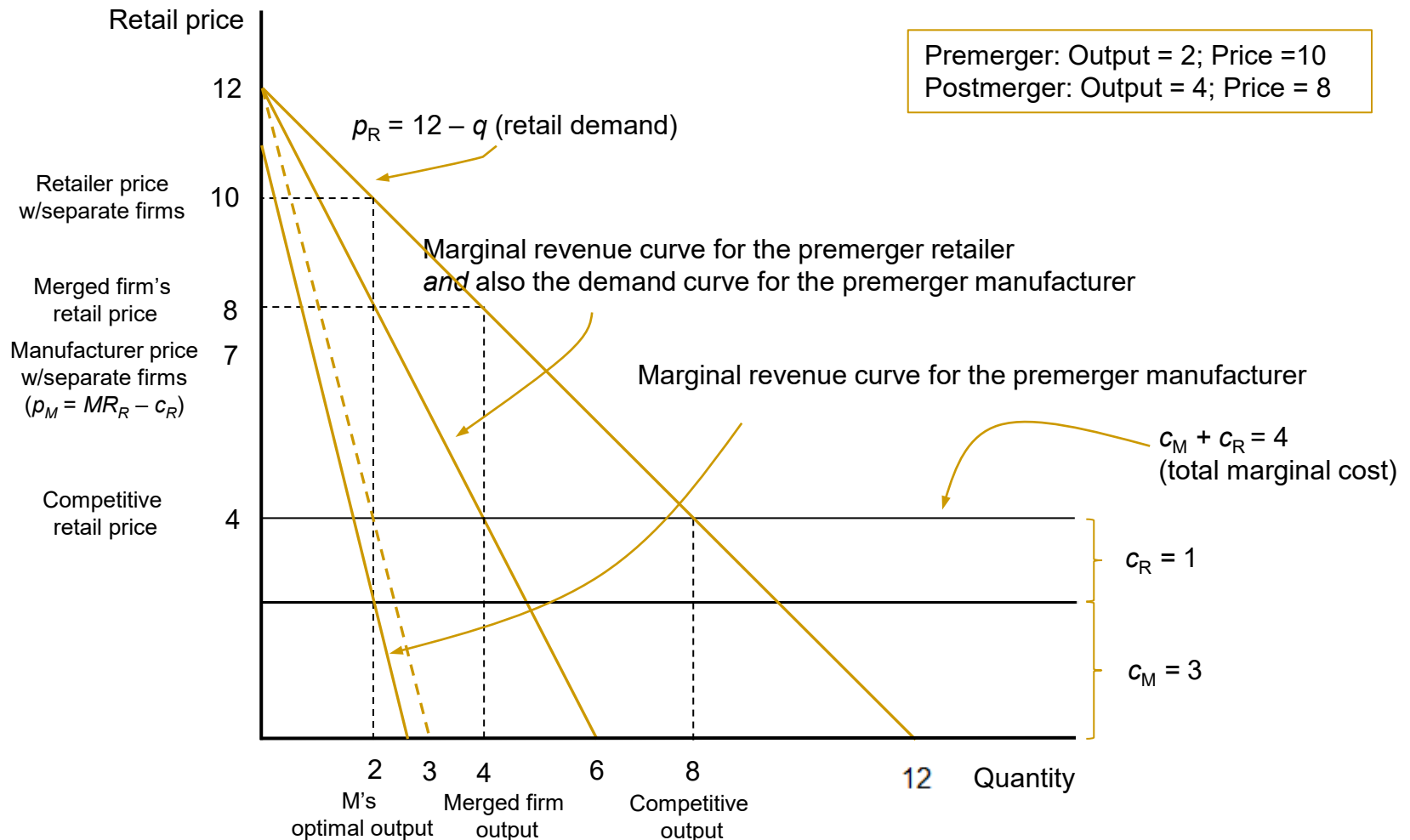
- Elimination of double marginalization
  - This is a widely accepted benefit of vertical mergers
  - Can lower price and increase output
- The idea
  - Consider a manufacturer and a retailer in the chain of distribution
  - Assume that both have some degree of market power
    - That is, each face downward-sloping demand curves
  - They both then have an incentive to “markup” their price above the competitive level and produce at less than the competitive level
  - The “double markup” increases prices and reduces output
  - Vertical mergers eliminate one (but not both) of the markups, reducing price and increasing output compared to the premerger levels, while increasing the merged firm’s profits
  - This drives enforcement policy to allow the merger subject to behavioral remedies but without requiring divestitures
  - NB: The efficiency gain from the elimination of double marginalization decreases as the upstream and/or downstream markets become more competitive
    - This is because the markup—and hence the market distortion to be corrected—decreases as the market(s) becomes more competitive

# Efficiencies in vertical mergers

- Elimination of double marginalization: The model
  - Consider a simple model in which:
    - There is only one manufacturer, which sells to only one retailer
    - There is a one-to-one correspondence of what the manufacturer sells and what the retailer sells (so that they both face the same ultimate consumer demand curve)
    - The manufacturer has constant marginal costs  $c_M$
    - The retailer has constant marginal costs  $c_R$  (which for simplicity may be zero) in addition to the price  $p_M$  it pays the manufacturer
    - Total retailer's marginal costs  $c_T = p_M + c_R$
  - The manufacturer recognizes the incentive of the retailer to markup its price and takes that into account in determining its own price and output
  - The retailer raises price above the competitive level so that its marginal revenue equals its marginal cost
  - *Key insight:* The retailer's marginal revenue curve is the demand curve for the manufacturer (adjusted for the retailer's other marginal costs)
    - The retailer is willing to purchase from the manufacturer up to the point where the retailer's total marginal costs equals its marginal revenue, that is, where  $p_M + c_R = MR_R$
    - Rearranging,  $p_M = MR_R - c_R$ , which is the demand function for the manufacturer

# Efficiencies in vertical mergers

## ■ Elimination of double marginalization: The model





# Efficiencies in vertical mergers

- Elimination of double marginalization: The math (an example)
  - Retailer (premerger)
    - Demand curve:  $p_R = 12 - q_R$
    - Revenue:  $R_R = p_R \times q_R = (12 - q_R) q_R = 12q_R - q_R^2$
    - Marginal revenue:  $MR_R = 12 - 2q_R$
    - Set marginal revenue equal to marginal cost:  $MR_R = 12 - 2q_R = c_T = p_M + c_R$
  - Manufacturer
    - Demand curve:  $p_M = MR_R \leftarrow c_R$  (rearranging retailer's profit-maximizing condition)
    - Revenue:  $R_M = p_M \times q_M = (12 - 2q_R - c_R) q_M = 12q_M - 2q_M^2 - c_R q_M$
    - Marginal revenue:  $MR_M = 12 - 4q_M - c_R$
    - Set marginal revenue equal to marginal cost:  $MR_M = 12 - 4q_M - c_R = c_M$   
or  $12 - 4q_M - 1 = 3 \rightarrow q_M = 2$
    - Now  $q_M = q_R$  (by hypothesis), so  $p_R = 10$  and  $q_R = 2$
  - Merged company
    - Same demand curve, revenue curve, and marginal revenue curve as retailer premerger, but now we can look at total marginal costs:  $c_C = c_R + c_M = 4$
    - Set marginal revenue equal to marginal cost:  $MR_R = c_C \rightarrow 12 - 2q_R = 4$
    - So  $q_R = 4$  and  $p_R = 12 - q_R = 8$

# Efficiencies in vertical mergers

## ■ Elimination of double marginalization: The numbers

Demand:  $q = 12 - p_R$

Marginal cost (manufacturer):  $c_M = 3$

Marginal cost (retailer):  $c_R = 1$

Marginal cost (total):  $c_M + c_R = 4$

Competitive	p	q	Revenues	Costs	Profits
	4	8	32	32	0

Merged firm	p	q	Revenues	Costs	Profits
	0	12	0	48	-48
	1	11	11	44	-33
	2	10	20	40	-20
	3	9	27	36	-9
	4	8	32	32	0
	5	7	35	28	7
	6	6	36	24	12
	7	5	35	20	15
	8	4	32	16	16
	9	3	27	12	15
	10	2	20	8	12
	11	1	11	4	7
	12	0	0	0	0

# Efficiencies in vertical mergers

## ■ Elimination of double marginalization: The numbers

Retailer	pM	pR	mcR-T	qR	Revenues	Costs	Profits
	0	6.50	1	5.50	35.75	5.50	30.25
	1	7.00	2	5.00	35.00	10.00	25.00
	2	7.50	3	4.50	33.75	13.50	20.25
	3	8.00	4	4.00	32.00	16.00	16.00
	4	8.50	5	3.50	29.75	17.50	12.25
	5	9.00	6	3.00	27.00	18.00	9.00
	6	9.50	7	2.50	23.75	17.50	6.25
	<b>7</b>	<b>10.00</b>	<b>8</b>	<b>2.00</b>	<b>20.00</b>	<b>16.00</b>	<b>4.00</b>
	8	10.50	9	1.50	15.75	13.50	2.25
	9	11.00	10	1.00	11.00	10.00	1.00
	10	11.50	11	0.50	5.75	5.50	0.25
	11	12.00	12	0.00	0.00	0.00	0.00
	12	12.50	13	-0.50	-6.25	-6.50	0.25

Determined simultaneously  
with double marginalization

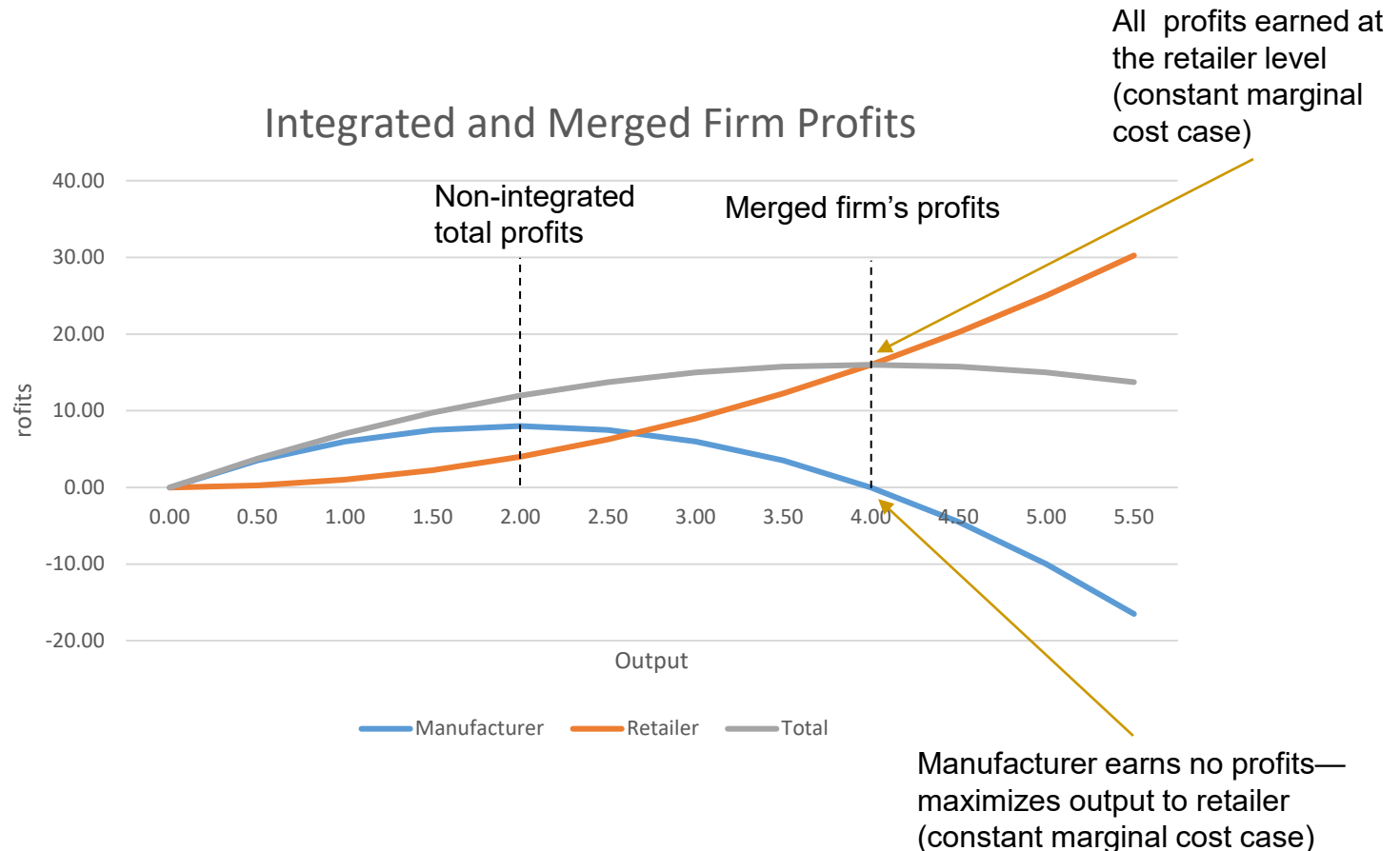
Manufacturer	pM	mcM-T	qR	Revenues	Costs	Profits	Total Profits
	0	3	5.50	0	16.50	-16.50	13.75
	1	3	5.00	5	15.00	-10.00	15.00
	2	3	4.50	9	13.50	-4.50	15.75
	3	3	4.00	12	12.00	0.00	16.00
	4	3	3.50	14	10.50	3.50	15.75
	5	3	3.00	15	9.00	6.00	15.00
	6	3	2.50	15	7.50	7.50	13.75
	7	3	2.00	14	6.00	8.00	12.00
	8	3	1.50	12	4.50	7.50	9.75
	9	3	1.00	9	3.00	6.00	7.00
	10	3	0.50	5	1.50	3.50	3.75
	11	3	0.00	0	0.00	0.00	0.00
	12	3	-0.50	-6	-1.50	-4.50	-4.25

Merged firm

Separate firms

# Efficiencies in vertical mergers

## ■ Elimination of double marginalization: The numbers



# Ford/Autolite



# Ford/Autolite

## ■ The deal

- On April 12, 1961, Ford Motor Company acquired selected assets of the Electric Autolite Company for \$28 million
  - Autolite's plug facility at Fostoria, Ohio
  - Autolite trade name
  - One of Autolite's six operating battery installations
  - Limited distribution rights

## ■ The parties

- Ford
  - Nation's second largest manufacturer of passenger cars and trucks
  - Sales: 2 million units (28% share of cars)
  - Revenues: Over \$5 billion
- Autolite
  - One of the nation's largest non-integrated auto parts manufacturer
  - Manufactured a full line of automotive electrical products
    - Including batteries, generators, spark plugs, electrical motors, instruments, and ignition systems
  - Supplied—
    - Original Equipment Manufacturers (OEMs)
    - Aftermarket

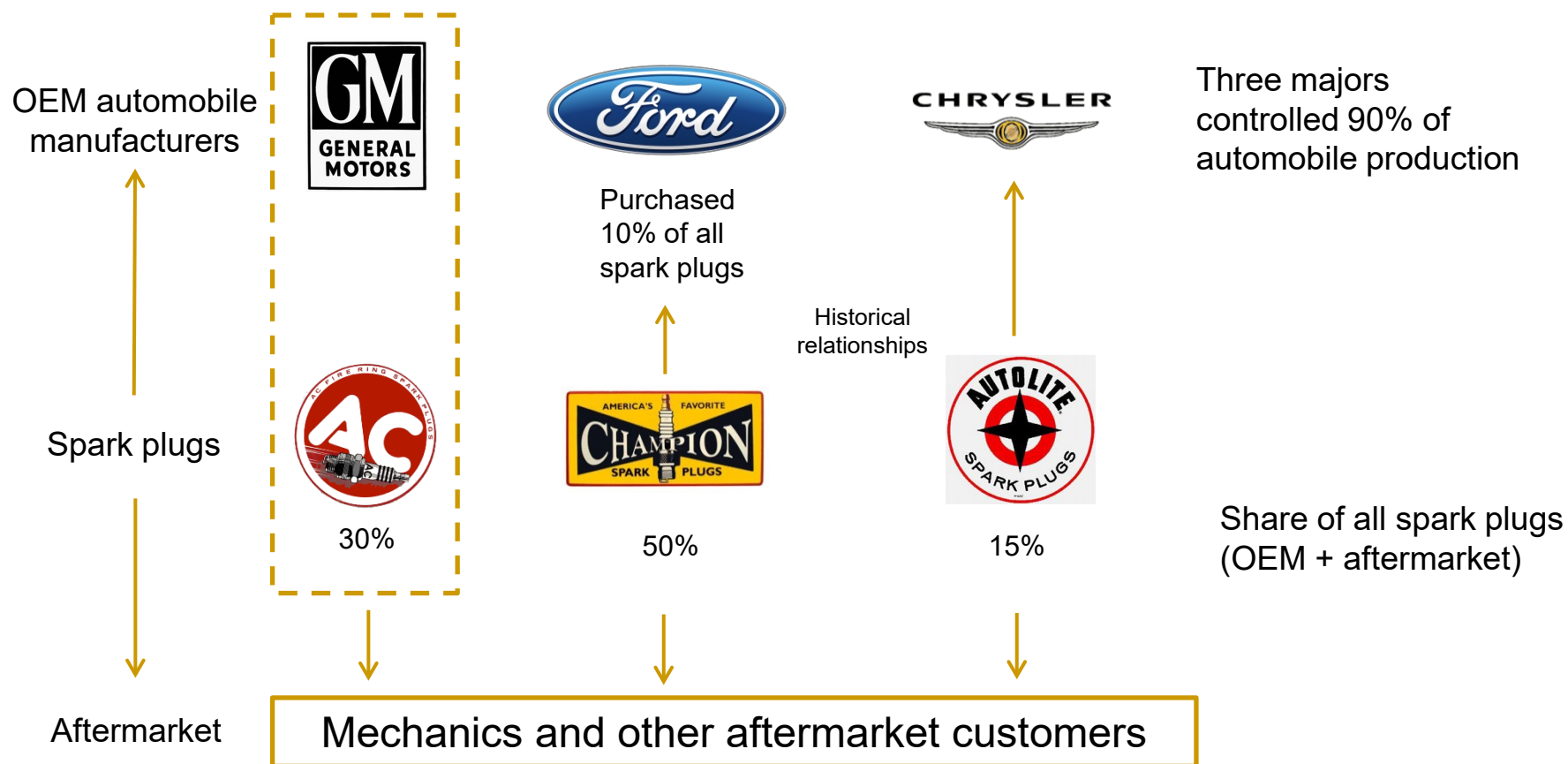
# Ford/Autolite

## ■ Spark plug economics

- Spark plugs have to be replaced about five times in the life of a car
- The OEM market
  - Each OEM contracted to purchase spark plugs from an exclusive supplier
  - Non-integrated spark plug manufacturers bid for exclusive OEM contracts, selling to OEMs below cost
- The aftermarket
  - Aftermarket plug was the same brand as the OEM product and mechanics tended to replace spark plugs with the OEM brand
  - Spark plug manufacturers charged higher prices in the aftermarket to recover their losses in the OEM market and make profits
    - NB: Spark plugs were replaced as part of the car's tune-up and comprised only a small fraction of the tune-up service fee → customer demand for spark plug was relatively inelastic, permitting an oligopolistic equilibrium with high margins

# Ford/Autolite

## ■ The spark plug landscape





# Ford/Autolite

## ■ District Court

- ❑ Complaint filed November 27, 1961
- ❑ Final judgment rendered on December 18, 1970 find a Section 7 violation and ordering relief
  - No manufacture of spark plugs for 10 years
  - Divest Autolite plant and name
  - Purchase one-half of its spark plug requirements from the divested plant for 5 years
  - Enjoined from using its own trade names on spark plugs for 5 years

## ■ Supreme Court

- ❑ Affirmed: March 29, 1972
- ❑ Four theories
  1. The acquisition eliminated Ford as an actual and perceived potential entrant into the manufacture of spark plugs:

An interested firm on the outside has a twofold significance. It may someday go in and set the stage for noticeable deconcentration. While it merely stays near the edge, it is a deterrent to current competitors. This was Ford uniquely, as both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly. Given the chance that Autolite would have been doomed to oblivion by defendant's grass-roots entry, which also would have destroyed Ford's soothing influence over replacement prices, Ford may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication.<sup>1</sup>

<sup>1</sup> Ford Motor Co. v. United States, 405 U.S. 562, 567-68 (1972) (quoting the district court) (internal citation omitted).

# Ford/Autolite

## ■ Supreme Court

### □ Three theories (con't)

2. The acquisition foreclosed Ford as a purchaser of about 10% of total industry output of spark plugs (output foreclosure)
3. Ford's entry had the effect of raising barriers to entry into the spark plug market, further reducing the chances of future deconcentration of that market:

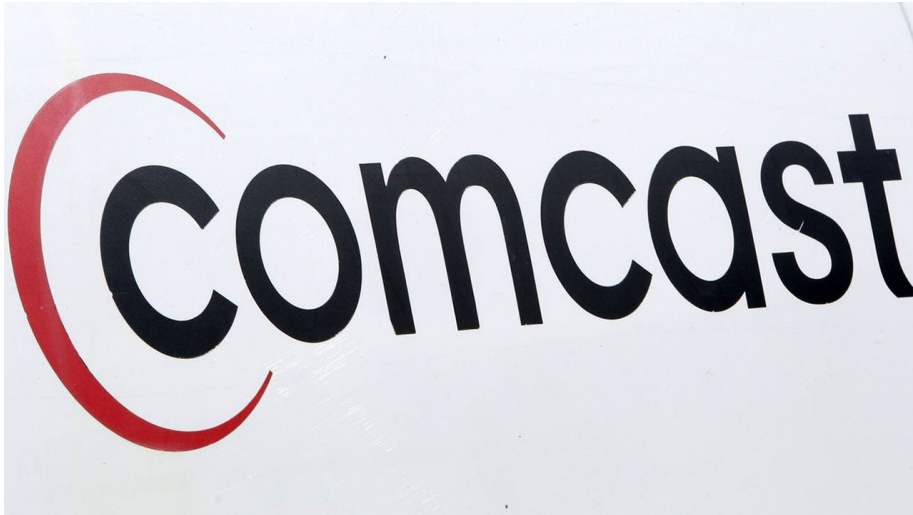
In short, Ford's entry into the spark plug market by means of the acquisition of the factory in Fostoria and the trade name "Autolite" had the effect of raising the barriers to entry in to that market as well as removing one of the existing restraints upon the actions of those in the business of manufacturing spark plugs.

It will also be noted that the number of competitors in the spark plug manufacturing industry closely parallels the number of competitors in the automobile manufacturing industry and the barriers to entry into the auto industry are virtually insurmountable at present and will remain so for the foreseeable future. Ford's acquisition of the Autolite assets, particularly when viewed in the context of the original equipment (OE) tie and of GM's ownership of AC, has the result of transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances of future deconcentration of the spark plug market by forces at work within that market.<sup>1</sup>

- The Court could have added a fourth theory: The acquisition facilitated oligopolistic coordination in the aftermarket sale of sparkplugs
  - This is suggested in the second paragraph of the quote above, although the Court focused more on raising barriers to entry and thereby reducing the prospect of future deconcentration

<sup>1</sup> Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972) (quoting the district court).

# Comcast/NBCUniversal



# Comcast/NBCUniversal

## ■ The deal

- Comcast to buy a controlling interest in NBCUniversal from GE
  - Announced December 3, 2009
- To form a 51%/49% joint venture between Comcast and GE (NBCUniversal LLC)

## ■ Contributions to the JV

- GE: NBC Universal's businesses (valued at \$30 billion), including:
  - The NBC Network (including NBC's 10 owned and operated TV stations) and NBC Sports
  - The NBC cable networks (including USA, Bravo, Syfy, CNBC and MSNBC)
  - Universal Pictures, Focus Films, and Universal Studios (including the film library)
  - The Universal theme parks
  - Hulu (32% ownership) (an "online video distributor" or "OVD")
- Comcast: Cable network businesses (valued at \$7.25 billion), including:
  - Cable networks (including E!, Versus, and the Golf Channel)
  - 10 regional sports networks
  - Certain other digital properties

# Comcast/NBCUniversal

- New NBCU joint venture

## New NBCU

NBCU – Valued at \$30B



Comcast Businesses– Valued at \$7.25B



+

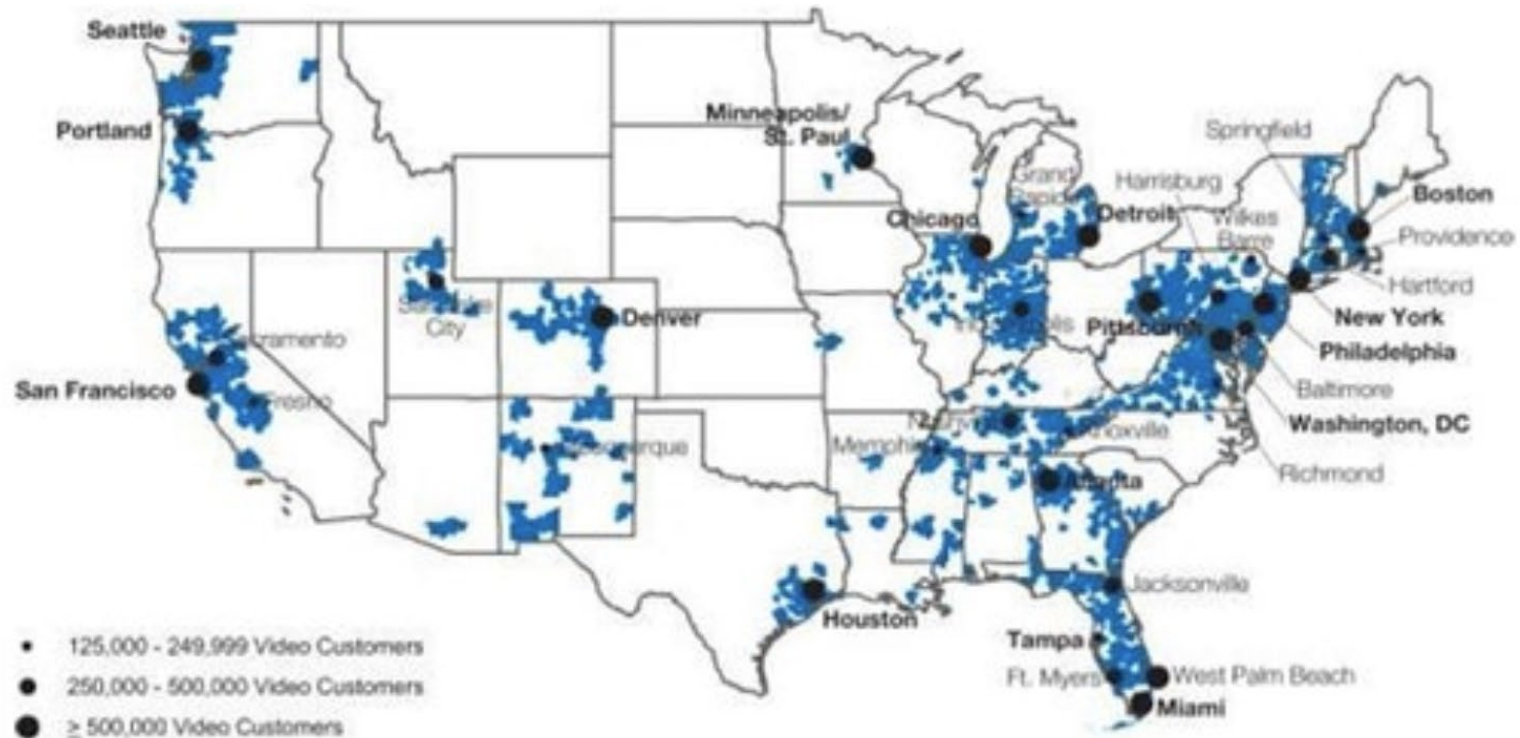
- ✓ Expanded cable offering ... strong management team
- ✓ Chance to create new offerings in key segments – i.e, sports
- ✓ Larger Internet presence ... additional capabilities



3

# Comcast/NBCUniversal

## ■ Comcast cable service areas (2014)



# Comcast/NBCUniversal

## ■ DOJ concerns

- JV give Comcast control over NBCU's video programming
  - Comcast could limit competition with its cable systems by refusing to license (or, more likely, licensing at higher prices) NBC's essential programming content to
    - Multichannel Video Programming Distributors (MVPDs),<sup>1</sup> and
    - Online Video Programming Distributors (OVDs)<sup>2</sup>
- JV gives Comcast control of NBC's 10 O&O TV stations and their local content
  - Comcast could raise fees for retransmission consent for the NBC O&Os or effectively deny this content to certain video distribution competitors of Comcast cable systems
- JV gives Comcast control over a 32% interest in Hulu
  - Comcast could use its rights to impede Hulu's development as a OVD competitor
- Likely effects
  - Decreased competition in the development, provision, and sale of video programming distribution services in local geographic markets served by Comcast cable systems
  - Increased prices for video programming distribution services in local geographic markets served by Comcast cable systems
  - Ability to limit content and raise input prices could also reduce the rate of innovation and quality improvement of video programming distributions services

<sup>1</sup> Includes cable overbuilders (primarily RSN), direct broadcast satellite services (DirecTV and EchoStar DISH), and telephone companies (e.g., Verizon Fios).

<sup>2</sup> Includes "over the top" (OTT) services delivered over the Internet but not through a cable system set-top box.

# Comcast/NBCUniversal)

## ■ DOJ consent decree<sup>1</sup>

### □ Traditional competitors

- Coordinated with the FCC—FCC order requires the JV to license NBCU content to Comcast's cable, satellite, and telephone company competitors
- Not included in DOJ consent decree as redundant

### □ Online video distributor competitors

- Must make available same package of broadcast and cable channels that JV sells to traditional video programming distributors
- Must offer broadcast, cable, and film content similar to, or better than, distributor receives from JV's programming peers
  - NBC's broadcast competitors: ABC, CBS, Fox
  - Largest cable programmers: News Corp., Time Warner, Viacom, and Walt Disney
  - Largest video production studios: News Corp., Sony, Time Warner, Viacom, Walt Disney
- Commercial arbitration if cannot reach agreement on license terms
- Prevents restrictive licensing practices and retaliation
- Comcast prohibited from unreasonably discriminating in the transmission of an OVD's lawful traffic over Comcast ISP

### □ Hulu

- Comcast to relinquish voting and other governance rights in Hulu
- Comcast precluded from receiving confidential or competitively sensitive information about Hulu's operations

<sup>1</sup> DOJ action joined by five state attorneys general: California, Florida, Missouri, Texas and Washington.



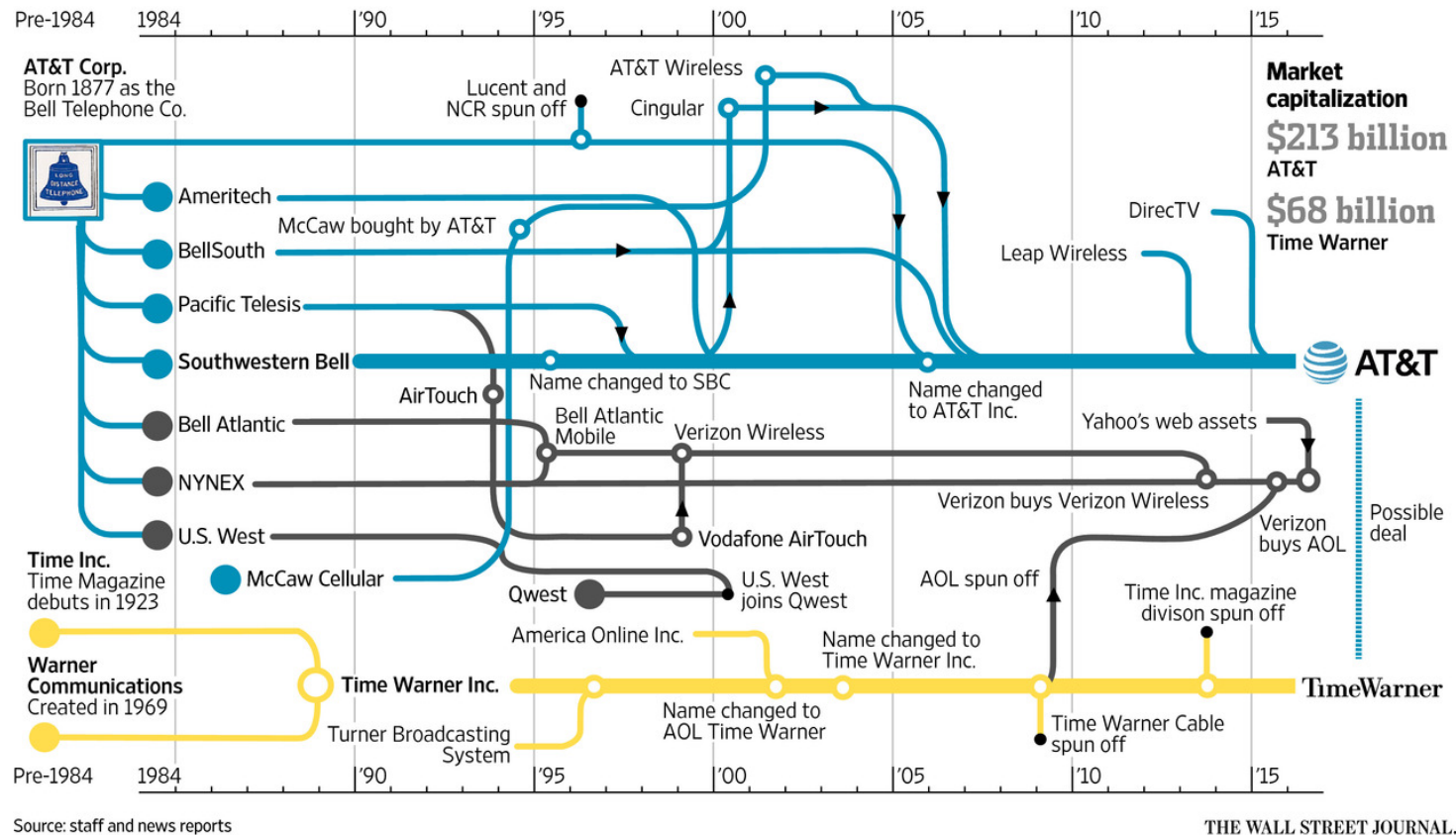
# AT&T/Time Warner



# AT&T/Time Warner

## Converging Destinies

Here is how AT&T and Time Warner got to where they are, after decades of consolidation and deals in the telecommunications and media industries.



# AT&T/Time Warner

## ■ The deal

- AT&T/DirecTV to acquire Time Warner for \$85.4 billion
  - Announced October 22, 2016
  - Half cash/half stock
  - \$500 million antitrust reverse breakup fee

# AT&T/Time Warner

## ■ The parties

### □ AT&T

- Revenues: \$163 billion (2016)
- Second largest wireless company (including broadband internet)
- Third largest home internet provider
- Large landline telephone service provider
- Largest Multichannel Video Programming Distributor (MVPD)
  - DirecTV (satellite-based, with 21 million subscribers)—Acquired in 2015
  - U-Verse (AT&T local fiber optic and copper wire, with 4 million subscribers)
  - DirecTV Now (online video, with 800K subscribers)

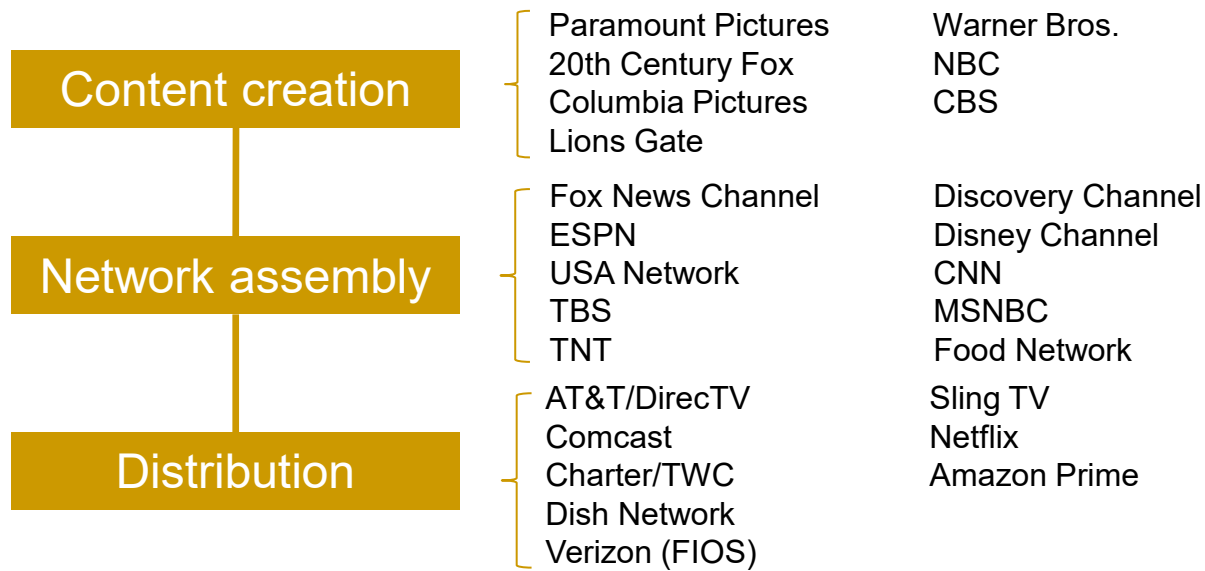
### □ Time Warner

- Revenues: \$29.3 billion
- Reaches over 90 million households of the nearly 100 million households that subscribe to subscription television
- Media content business units
  - Turner Broadcasting System (including CNN, TBS, TNT, Cartoon Network, sports programming )
    - Sports programming includes NCAA March Madness, some regular and playoff MLB and NBA games, and PGA Championship
  - Home Box Office (HBO and Cinemax)
  - Warner Bros. Entertainment (film and TV studio)

# AT&T/Time Warner

## ■ Business rationale

- AT&T problem: Little future growth expected in wireless subscribers
- Transaction permits the combined company to compete against traditional cable companies (MSOs) nationwide and OTT providers in offering a subscription TV bundle
  - Now offers the pipes
  - Combined company will offer the pipes and the content



# AT&T/Time Warner

## ■ DOJ complaint

### □ *Theory 1: Foreclosure/raising rivals' costs to subscription TV distribution rivals*

Specifically, as DirecTV has explained, such vertically integrated programmers “can much more credibly threaten to withhold programming from rival [distributors]” and can “use such threats to demand higher prices and more favorable terms.” Accordingly, were this merger allowed to proceed, the newly combined firm likely would—just as AT&T/DirecTV has already predicted—use its control of Time Warner’s popular programming as a weapon to harm competition. AT&T/DirecTV would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner’s networks, and it would use its increased power to slow the industry’s transition to new and exciting video distribution models that provide greater choice for consumers. The proposed merger would result in fewer innovative offerings and higher bills for American families.<sup>1</sup>

### ■ Specifically, would lessen competition in—

- All Video Distribution local markets
- Multichannel Video Distribution local submarkets

by increasing the fees charged to rivals for the Turner networks and impeding their use of HBO<sup>2</sup>

<sup>1</sup> Complaint (Introduction), United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. filed Nov. 30, 2017).

<sup>2</sup> *Id.* § V(A)

# AT&T/Time Warner

## ■ DOJ complaint

- *Theory 2*: Impeding entry and growth of disruptive online video distributors (OVDs)
  - A type of “over the top” (OTT) provider that uses the Internet or IP to deliver services that is seriously challenging traditional cable companies
  - *Allegation*: Time Warner’s Turner networks are extremely important for many emerging video distributors and are tied for second behind only Disney in their ability to attract customers to emerging platforms

After the merger, the merged firm would likely use Turner’s important programming to hinder these online video distributors—for example, the merged firm would have the incentive and ability to charge more for Turner’s popular networks and take other actions to impede entrants that might otherwise threaten the merged firm’s high profit, big-bundle, traditional pay-TV model.<sup>1</sup>

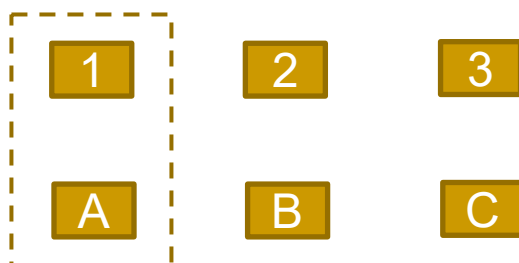
<sup>1</sup> Complaint ¶ 9, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. filed Nov. 30, 2017).

# AT&T/Time Warner

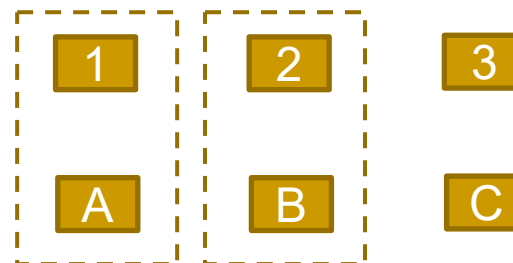
## ■ DOJ complaint

- *Theory 3: Create greater firm homogeneity facilitates tacit coordination*
  - As related markets become more structured as vertical silos through vertical integration, firms become more alike (homogeneous), which causes their incentives to align and so facilitates horizontal coordination

Less likely to tacitly coordinate:



More likely to tacitly coordinate:



- *Example: AT&T/Time Warner complaint*

Merger under review

The merger would also make oligopolistic coordination more likely. For example, the merger would align the structures of the two largest traditional video distributors [Comcast/NBCUniversal and AT&T/Time Warner], who would have the incentive and ability to coordinate to impede competition from innovative online rivals and result in higher prices. In short, the merger would help the merged firm's bottom line by extending the life of the old pay-TV model, but harm consumers who are eager for new innovative options.<sup>1</sup>

<sup>1</sup> Complaint ¶ 9, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. filed Nov. 30, 2017).




# AT&T/Time Warner

- *Final query:* Was there anyone left in the Antitrust Division who was not on the complaint?

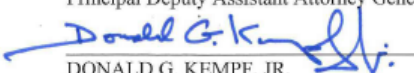
Dated: November 20, 2017

Respectfully submitted,


FOR PLAINTIFF UNITED STATES OF AMERICA:


  
MAKAN DELRAHIM  
Assistant Attorney General for Antitrust

  
ANDREW C. FINCH  
Principal Deputy Assistant Attorney General

  
DONALD G. KEMPF, JR.  
Deputy Assistant Attorney General for  
Litigation


  
BERNARD A. NIGRO, JR.  
(D.C. Bar #412357)  
Deputy Assistant Attorney General

  
PATRICIA A. BRINK  
Director of Civil Enforcement

  
BRYSON L. BACHMAN (D.C. Bar #988125)  
Senior Counsel to the Assistant Attorney  
General

  
SCOTT SCHEELE (D.C. Bar #429061)  
Chief, Telecommunications and Broadband  
Section

  
JARED A. HUGHES  
Assistant Chief, Telecommunications and  
Broadband Section

  
CRAIG W. CONRATH  
ERIC D. WELSH (D.C. Bar #998618)  
SHOBITHA BHAT  
ALEXIS K. BROWN-REILLY (D.C. Bar #1000424)  
DYLAN M. CARSON (D.C. Bar #465151)  
ALVIN H. CHU  
ROBERT DRABA (D.C. Bar #496815)  
ELIZABETH A. GUDIS  
JUSTIN T. HEIPP (D.C. Bar #1017304)  
ELIZABETH S. JENSEN  
MATTHEW JONES (D.C. Bar #1006602)  
MELANIE M. KISER  
KATHRYN B. KUSHNER  
DAVID B. LAWRENCE  
DAPHNE LIN  
CERIN M. LINDGRENSAVAGE  
MICHELLE LIVINGSTON  
BRENT E. MARSHALL  
ERICA MINTZER (D.C. Bar #450997)  
SARAH OLDFIELD  
LAWRENCE REICHER  
LAUREN G.S. RIKER  
LISA SCANLON  
PETER SCHWINGLER  
DAVID J. SHAW (D.C. Bar #996525)  
MATTHEW SIEGEL  
CURTIS STRONG (D.C. Bar #1005093)  
FREDERICK S. YOUNG (D.C. Bar #421285)  
RACHEL L. ZWOLINSKI (D.C. Bar #495445)

United States Department of Justice  
Antitrust Division  
Telecommunications and Broadband Section  
450 Fifth Street, N.W., Suite 7000  
Washington, DC 20530  
Telephone: (202) 514-5621  
Facsimile: (202) 514-6381

# Coca-Cola/Coca-Cola Enterprises (2010)

## ■ Transactions

- Coca-Cola to acquire CCE's North American operations for over \$12.3 billion
- Separately, Coca-Cola paid Dr Pepper Snapple Group (DPSG) \$715 million to distribute DPSG brands (including Dr Pepper and Canada Dry) in specific geographic areas

## ■ Parties

- Coca-Cola: The largest manufacturer of soft drink concentrate and carbonated soft drinks
- CCE: Coca-Cola's largest independently owned North American bottler
- DPSG: The third largest soft drink competitor after Coca-Cola and PepsiCo

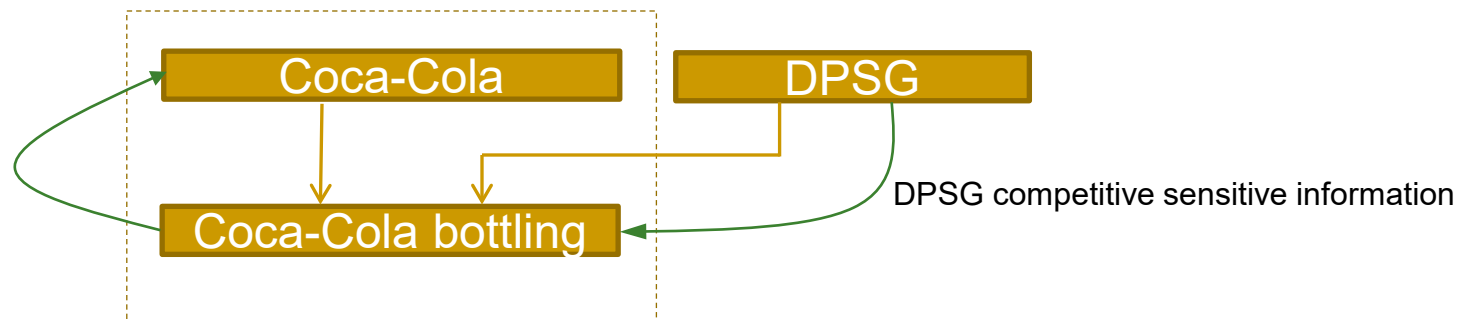
## ■ Soft drink bottling

- Soft drink shares: Coca-Cola (40%), PepsiCo (30%), DPSG (17%)
- Soft drink concentrate manufacturers license bottlers to produce, bottle/can, and distribute the manufacturer's soft drinks in a prescribed geographic area
- CCE
  - Accounted for 75% of Coca-Cola's U.S. sales of bottled and canned soft drinks
  - Accounted for 14% of DPSG's U.S. sales of bottled and canned soft drinks

# Coca-Cola/Coca-Cola Enterprises (2010)

## ■ FTC concerns

- ❑ Concentrate manufacturers need to provide their bottlers with advance confidential information regarding their advertising, marketing, and promotion strategies and their new product introductions
- ❑ The DPSG distribution agreement with Coca-Cola did not provide adequate safeguards against access by Coca-Cola's competitive operations to DPSG competitively sensitive and confidential information obtained by Coca-Cola's bottling operations, resulting in:
  - Likely elimination of direct competition between Coca-Cola and DPSG
  - Increase in the probability that Coca-Cola could unilaterally exercise market power or influence and control DPSG's prices
  - Increased in the probability of coordinated interaction



# Coca-Cola/Coca-Cola Enterprises (2010)

## ■ FTC consent decree

- Information firewall to
  - Limit access to and use of DPSG' competitively sensitive information to Coca-Cola bottling operation for use in the bottling and marketing of the DPSG products
  - Prevent Coca-Cola's competitive operations from gaining access to such information
- Set procedures for changing bottling operations personnel
- Imposed a compliance monitor

## ■ Query

- Why did the FTC believe that the confidentiality provisions of the DPSG distribution agreement were insufficient?

# Appendix

## OPTIONAL

# Elimination of double marginalization

## ■ Eliminating “double marginalization”

- This is a major claim of efficiencies in vertical mergers

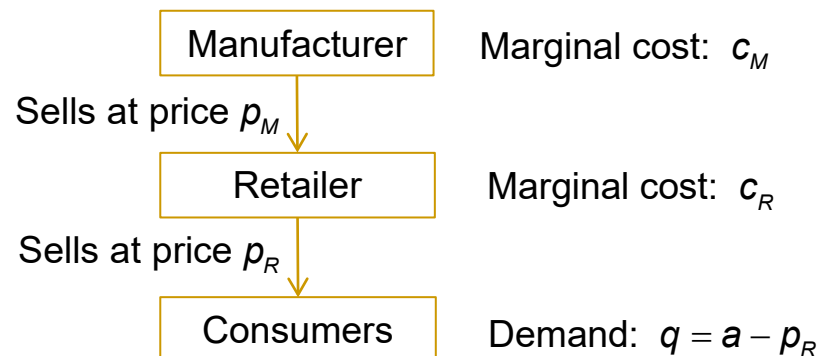
- Paradigm example:

- Conditions

- Firms M and R are adjacent firms in the chain of distribution, both of which have some market power (i.e., face downward-sloping demand curves).
- Assume without loss of generality, that Firm M is a manufacturer and Firm R simply resells M's product without modification and that  $c_M$  and  $c_R$  are the (constant) marginal costs of production and resale, respectively, for manufacturer M and reseller R.
- In equilibrium, manufacturer M sells quantity  $q$  to reseller R at price  $p_M$ , which in turn sells the same quantity  $q$  to consumers at price  $p_R$  (i.e., there is no overproduction or inventory holding).

- Assume that consumer demand is linear and normalize  $p$  so that:

$$q = a - p_R.$$



# Elimination of double marginalization

## ■ Eliminating “double marginalization”

- *The retailer's problem:* The profit function and first order condition for the retailer R are:

$$\begin{aligned}\text{Max}_{p_R} \pi_R &= p_R q - (p_M + c_R) q \\ &= (p_R - (p_M + c_R))(a - p_R) \\ \frac{\partial \pi_R}{\partial p_R} &= -(p_R - (p_M + c_R)) + (a - p_R) \\ &= -2p_R + a + (p_M + c_R) = 0\end{aligned}$$

Firm R's marginal cost is its unit input cost  $p_M$  plus its unit distribution cost  $c_R$

$$\text{so that } p_R = \frac{a + (p_M + c_R)}{2}$$

$$q = \frac{a - (p_M + c_R)}{2}$$

$$\pi_R = (p_R - (p_M + c_R)) \left( \frac{a - (p_M + c_R)}{2} \right)$$

# Elimination of double marginalization

## ■ Eliminating “double marginalization”

- *The manufacturer’s problem:* Now consider the profit function and first order condition for the manufacturer M, which understands how retailer R will price the resale and can take this into account when maximizing its own profits:

$$\begin{aligned}\text{Max}_{p_M} \pi_M &= p_M q - c_M q \\ &= (p_M - c_M) \left( \frac{a - (p_M + c_R)}{2} \right) \\ \frac{\partial \pi_M}{\partial p_M} &= -\frac{(p_M - c_M)}{2} + \left( \frac{a - (p_M + c_R)}{2} \right) \\ &= \frac{-2p_M + a + (c_M - c_R)}{2} = 0\end{aligned}$$

Since retailer R holds no inventory, the demand  $q$  for M’s product by R is equal to the demand  $q$  for R’s products by consumers

so that  $p_M = \frac{a + (c_M - c_R)}{2}$

$$q = \frac{a - (p_M + c_R)}{2} = \frac{a - \left( \frac{a + (c_M - c_R)}{2} + c_R \right)}{2} = \frac{a - (c_M + c_R)}{4}$$

$$\pi_M = (p_M - c_M) q = (p_M - c_M) \left( \frac{a - (c_M + c_R)}{4} \right)$$



# Elimination of double marginalization

- Eliminating “double marginalization”
  - Total profits of the manufacturer and retailer:

$$\begin{aligned}\pi_M + \pi_R &= (p_M - c_M)q + (p_R - (p_M + c_R))q \\ &= (p_R - (c_M + c_R))\left(\frac{a - (c_M + c_R)}{4}\right)\end{aligned}$$

# Elimination of double marginalization

## ■ Eliminating “double marginalization”

- *The merged firm's problem:* Assume that M and R merge. Keep in mind that the merged firm is a monopolist at both the manufacturer and retailer level. Now consider the profit function and first order condition for the combined firm:

$$\begin{aligned}\text{Max}_p \pi &= pq - (c_M + c_R)q \\ &= (p - (c_M + c_R))(a - p) \\ \frac{\partial \pi}{\partial p} &= a - 2p + (c_M + c_R) = 0\end{aligned}$$

$$\text{so that } p = \frac{a + (c_M + c_R)}{2}$$

$$q = \frac{a - (c_M + c_R)}{2}$$

$$\pi = (p - (c_M + c_R))q = (p - (c_M + c_R))\left(\frac{a - (c_M + c_R)}{2}\right)$$

# Elimination of double marginalization

- Eliminating “double marginalization”
  - Comparing the non-integrated and merged firm solutions

	Non-Integrated Firm	Merged Firm
Price to consumers	$\frac{a + (p_M + c_R)}{2}$	$\frac{a + (c_M + c_R)}{2}$
Quantity produced	$\frac{a - (p_M + c_R)}{2}$	$\frac{a - (c_M + c_R)}{2}$
Total profits	$(p_R - (c_M + c_R)) \left( \frac{a - (c_M + c_R)}{4} \right)$	$(p - (c_M + c_R)) \left( \frac{a - (c_M + c_R)}{2} \right)$

- If  $p_M > c_M$  (which it will be so long as  $q > 0$ ), then the merged firm has lower prices to consumers, higher output, and higher profits than the two firms operating independently.
- The merged firm has a “transfer price”  $p_M = c_M$ , that is, the manufacturer within the merged firm prices as if it is in a competitive market and all profits are taken out at the retailer level.