

More on a possible Comcast/Fox deal: Reports of the death of vertical mergers have been greatly exaggerated

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A few weeks ago I posted a [preliminary assessment of the relative antitrust risk of a Comcast vs Disney purchase of 21st Century Fox assets](#). (Also available in pdf as an ICLE Issue brief, [here](#)). On the eve of Judge Leon's decision in the AT&T/Time Warner merger case, it seems worthwhile to supplement that assessment by calling attention to Assistant Attorney General Makan Delrahim's [remarks](#) at The Deal's Corporate Governance Conference last week. Somehow these remarks seem to have passed with little notice, but, given their timing, they deserve quite a bit more attention.

In brief, Delrahim spent virtually the entirety of his short remarks making and remaking the fundamental point at the center of my own assessment of the antitrust risk of a possible Comcast/Fox deal: **The DOJ's challenge of the AT&T/Time Warner merger tells you nothing about the likelihood that the agency would challenge a Comcast/Fox merger.**

To begin, in my earlier assessment I pointed out that most vertical mergers are approved by antitrust enforcers, and I quoted Bruce Hoffman, Director of the FTC's Bureau of Competition, [who noted that](#):

[V]ertical merger enforcement is still a small part of our merger workload....

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Where horizontal mergers reduce competition on their face — though that reduction could be minimal or more than offset by benefits — vertical mergers do not.... [T]here are plenty of theories of anticompetitive harm from vertical mergers. But the problem is that those theories don't generally predict harm from vertical mergers; they simply show that harm is possible under certain conditions.

I may not have made it very clear in that post, but, of course, most *horizontal* mergers are approved by enforcers, as well.

Well, now we have the head of the DOJ Antitrust Division making the same point:

I'd say 95 or 96 percent of mergers — horizontal *or* vertical — are cleared — routinely.... Most mergers — horizontal *or* vertical — are procompetitive, or have no adverse effect.

Delrahim reinforced the point in an [interview](#) with The Street in advance of his remarks. Asked by a reporter, “what are your concerns with vertical mergers?,” Delrahim quickly corrected the questioner: “Well, I don’t have *any* concerns with most vertical mergers....”

But Delrahim went even further, noting that nothing about the Division’s approach to vertical mergers has changed since the AT&T/Time Warner case was brought — despite the efforts of some reporters to push a different narrative:

I understand that some journalists and observers have recently expressed concern that the Antitrust Division no longer believes that vertical mergers can be efficient and beneficial to competition and consumers. **Some point to our recent decision to challenge some aspects of the AT&T/Time Warner merger as a supposed bellwether for a new vertical approach. Rest assured: These concerns are misplaced....** We have long recognized that vertical integration can and does generate efficiencies that benefit consumers. Indeed, most vertical mergers are procompetitive or competitively neutral. The same is of course true in horizontal transactions. To the extent that any recent action points to a closer review of vertical mergers, it’s not new.... [But,] to reiterate, **our approach to vertical mergers has not changed, and our recent enforcement efforts are consistent with the Division’s long-standing, bipartisan approach to analyzing such mergers.** We’ll continue to recognize that vertical mergers, in general, can yield significant economic efficiencies and benefit to competition.

Delrahim concluded his remarks by criticizing those who assume that the agency’s future enforcement decisions can be inferred from past cases with different facts, stressing that the agency employs an evidence-based, case-by-case approach to merger review:

Lumping all vertical transactions under the same umbrella, by comparison, obscures the reality that we conduct a vigorous investigation, aided by over 50 PhD economists in these markets, to make sure that we as lawyers don’t steer too far without the benefits of their views in each of these instances.

Arguably this was a rebuke directed at those, like Disney and Fox’s board, who are quick to ascribe increased regulatory risk to a Comcast/Fox tie-up because the DOJ challenged the AT&T/Time Warner merger. Recall that, in its [proxy statement](#), the Fox board explained that it rejected Comcast’s earlier bid in favor of Disney’s in part because of “the regulatory risks

presented by the DOJ's unanticipated opposition to the proposed vertical integration of the AT&T / Time Warner transaction."

I'll likely have more to add once the AT&T/Time Warner decision is out. But in the meantime (and with [apologies to Mark Twain](#)), the takeaway is clear: Reports of the death of vertical mergers have been greatly exaggerated.

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