Vertical Merger Enforcement in Light of AT&T/Time-Warner

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I. INTRODUCTION

This Note investigates the Federal Trade Commission's (FTC) approach to evaluating vertical mergers. This Note intends to show that the United States would benefit from reevaluating the considerations it makes when determining whether a vertical merger violates the principles the FTC seeks to enforce. To show this, this Note examines recent vertical merger decisions in the United States and European Union, considers the

approaches' and decisions' implications, and finally argues the United States should take a more active investigatory and enforcement role in vertical mergers to protect competition.

II. BACKGROUND

This Part discusses vertical mergers and the way companies utilize vertical mergers. Additionally, it considers the history of governmental challenge to vertical mergers.

A. Vertical Mergers Generally

Mergers between corporations can be vertical or horizontal.[1] Horizontal mergers are between companies who do similar things or compete with each other.[2] Horizontal mergers combine competitors, necessarily reducing competition by reducing the number of competitors.[3]

Unlike horizontal mergers, vertical mergers do not, by definition, reduce competition.[4] "Vertical mergers involve companies operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the 'upstream firm') merges with one of its distributors (the 'downstream firm'), this is called a vertical merger."[5] Several economic theories show that vertical mergers have the potential to cause harm in certain scenarios, but those theories do not predict such harm in general.[6] Rather, "the evidence on the consequences of vertical mergers suggests that consumers mostly benefit from mergers that firms undertake voluntarily."[7]

Competition policy and economic theory both generally conclude that most vertical mergers are beneficial because they reduce costs and increase inter-brand competition.[8] However, even though vertical mergers are not generally thought to be as threatening to consumers as horizontal mergers, broad concerns do exist. First, a vertical merger might reduce the likelihood of beneficial entry into a market.[9] This means a company with similar products may not be able to enter the market because of a merger.[10] The FTC is concerned about how entry could occur post-merger in addition to concerns where firms are likely to enter each other's market.[11] If something "about the markets . . . like assets, know-how, or

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1. *Commission Notice: Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2008 O.J. (C 265) 1, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=EN [https://perma.cc/654Z-FAPW] [hereinafter Commission Notice].

2. *Id.*

3. D. Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm'n, Remarks at Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC 2 (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf [https://perma.cc/9KKL-YGGW].

4. *Id.* at 6 n. 3.

5. Commission Notice, *supra* note 1, at 6.

6. *Id.* at 7–8.

7. Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 663 (2007).

8. Hoffman, *supra* note 3, at 4.

9. *Id.*

10. OFFICE OF FAIR TRADING, PRODUCTIVITY AND COMPETITION, 2006–7, OFT887, at 29 (UK), *available at* https://pdfs.semanticscholar.org/53db/2a9698301bb1270e79635ca4da80bea2810d.pdf [https://perma.cc/NJ4B-HDM4].

11. *Id.*

reputation[,]" indicates that the merger would favor the vertically-merged firms over a new entry, the FTC examines it closely.[12]

Second, a vertical merger might result in anticompetitive foreclosure.[13] Historically, this meant that the FTC was concerned when an integrated firm could foreclose on supplies that were available to non-integrated firms prior to the merger.[14] For example, in *Ford Motor Co. v. United States*, the government blocked a merger between Ford Motor Co. and Electric Autolite Co. because Ford's acquisition of a spark plug maker would foreclose ten percent of the market for the original equipment of the spark plug.[15] However, this type of foreclosure is unlikely to provide a viable challenge to a merger.[16] The FTC has evolved over time and is currently interested in cases where a merger will raise rivals' costs or harm consumers because market entry becomes more difficult.[17] Therefore, if a vertical merger would require competitors to enter not only one level of the market, but multiple levels of the market, and the barriers are substantial, there is likely market foreclosure.[18]

Third, a vertical merger might lead to anticompetitive behavior because of information sharing about a rival.[19] There are two components of concern related to information sharing about a rival resulting from a vertical merger. First, the firm may use the information about its rival to make it harder for the rival to compete, reducing competition.[20] Second, firms could use information to coordinate.[21]

B. Vertical Mergers in the USA—Antitrust History

In the United States, vertical mergers are a smaller component of the antitrust work taking place in the FTC and Department of Justice's Antitrust Division.[22] As of January 2018, the FTC and DOJ had challenged 22 vertical mergers since 2000.[23] When the FTC and DOJ investigate vertical mergers, they use the same analytical framework used for horizontal merger investigations.[24] That framework involves defining markets, testing theories of harm, and evaluating efficiencies.[25]

The U.S. government enacted the Clayton and Federal Trade Commission Acts in 1914.[26] Section 7 of the Clayton Act is the primary statute involved with mergers.[27] It "prohibits mergers 'where the effect of such acquisition may be substantially to lessen

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12. Hoffman, *supra* note 3, at 4.
13. *Id.* at 5.
14. *Id.*
15. Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972).
16. 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 382 (6th ed. 2007).
17. Hoffman, *supra* note 3, at 5.
18. CHRISTOPHER SAGERS, ANTITRUST: EXAMPLES AND EXPLANATIONS 291 (2nd ed. 2014).
19. Hoffman, *supra* note 3, at 6.
20. *Id.* at 6–7.
21. *See id.* (discussing preventing coordination by the creation of firewalls to prevent corporations which acquired suppliers from gaining information about competitors via employees of the supplier corporation).
22. Bruce Hoffman, *Vertical Mergers, Yesterday and Today*, FED. TRADE COMMISSION (Jan. 19, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/01/vertical-mergers-yesterday-today [https://perma.cc/JY9G-36SH].
23. Hoffman, *supra* note 3, at 1.
24. *Id.* at 1–2.
25. *Id.*
26. *Id.* at 2.
27. *Id.*

competition, or to tend to create a monopoly.'"[28]

Blocking a vertical merger in the United States requires "concluding that the supplier won't sell to some customers simply to benefit its affiliate, a high bar to clear."[29] When considering whether a merger violates Section 7 of the Clayton Act, the FTC operates with the goal of preventing mergers that would "reduce competition and lead to higher prices, lower quality goods or services, or less innovation."[30] The FTC has stated that:

> The Commission reviews mergers pursuant to Section 7 of the Clayton Act, which prohibits mergers and acquisition where the effect "may be substantially to lessen competition, or to tend to create a monopoly." The key question the agency asks is whether the proposed merger may create or enhance market power or facilitate its exercise in markets in ways that would negatively impact consumers.[31]

C. Vertical Mergers Currently

No vertical merger was litigated in the United States for decades.[32] This changed in 2018 when the DOJ attempted to block the AT&T/Time Warner merger.[33] There, the government argued a merger between AT&T and Time Warner would allow AT&T to force other Pay TV distributors to pay more for Time Warner channels.[34] The government's argument failed,[35] leaving a question as to the direction the investigation of future vertical mergers would take. Since the AT&T ruling, the FTC approved the vertical mergers between Aetna/CVS and Cigna/Express Scripts.[36] However, the DOJ required Aetna to divest its Medicare prescription drug plan business to gain approval.[37]

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28. Hoffman, *supra* note 3, at 2.

29. Greg Ip, *T-Mobile Sprint Merger is a Test of Trump's Antitrust Mettle*, WALL ST. J. (Sept. 5, 2018), https://www.wsj.com/articles/t-mobile-sprint-merger-is-a-test-of-trumps-antitrust-mettle-1536145201 [https://perma.cc/MU2M-P9HN].

30. Federal Trade Commission, FTC File No. 171–0060, Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Luxottica Group S.p.A. by Essilor International (Compagnie Generale d'Optique) S.A. (Mar. 1, 2018), https://www.ftc.gov/system/files/documents/closing_letters/nid/1710060 commissionstatement.pdf [https://perma.cc/GG5W-HRZD] [hereinafter FTC Luxottica/Essilor Statement].

31. *Id.*

32. Maria Raptis et al., *Novel Theories Emerge in Merger Enforcement*, SKADDEN (Jan. 23, 2018), https://www.skadden.com/insights/publications/2018/01/2018-insights/novel-theories-emerge-in-merger-enforcement [https://perma.cc/VMT9-CQ9J].

33. *See generally* United States v. AT & T Inc., No. 17-2511 (RJL), 2018 WL 3752091 (D.C. Cir. June 12, 2018) (concluding the Government failed to carry its burden).

34. Larry Downes, *Is Disney Moving Too Fast on Fox Takeover? Don't Ask Antitrust Regulators*, FORBES (July 10, 2018), https://www.forbes.com/sites/larrydownes/2018/07/10/is-disneys-takeover-of-fox-moving-too-fast/#ad1f3f517d69 [https://perma.cc/XLU2-Y5NR].

35. *See AT & T*, No. 17-2511 (RJL), at *1.

36. Reed Abelson, *CVS Health and Aetna $69 Billion Merger is Approved with Conditions*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/health/cvs-aetna-merger.html [https://perma.cc/A9WZ-NHGV]; Brent Kendall et al., *Justice Department Nearing Antitrust Approval of Health Mergers Combining CVS-Aetna, Cigna-Express Scripts*, WALL ST. J. (Sept. 5, 2018), https://www.wsj.com/articles/justice-department-nearing-antitrust-approval-of-health-mergers-combining-cvs-aetna-cigna-express-scripts-1536171360 [https://perma.cc/G2AU-TC7A].

37. Press Release, U.S. Dept. of Justice, Office of Public Affairs, Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger (Oct. 10, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-

D. Vertical Merger Remedies

Where the DOJ or FTC identifies a competitive threat in a merger, they use structural and behavioral remedies to ameliorate the concern when possible.[38] Structural remedies protect competition by requiring companies to divest certain assets while behavioral remedies require companies to behave a certain way to protect competition.[39] The FTC "prefers structural remedies to structural problems."[40] Structural remedies eliminate the option and ability to participate in anti-competitive behavior, while a behavioral or conduct remedy requires monitoring to ensure compliance.[41] Where the FTC finds that there are competitive concerns with a vertical merger, but no structural remedies are available and behavioral remedies will not work or will be problematic to enforce without a large commitment of FTC resources, the FTC will likely seek to block the merger.[42]

DOJ Guidelines issued in 1984 indicate that the DOJ will not object to a vertical merger under an entry barrier theory unless the vertical integration would mean a new market entrant would have to enter the market at two different levels.[43] This two level entry requirement means increased risk for a company, therefore increased costs of entry.[44] Professor Herbert Hovenkamp further states:

> Today vertical mergers are commonly analyzed under both the foreclosure and entry barrier theories. In both cases, today courts generally hold that the vertical acquisition is illegal if the transactions between the merging firms account for 15% or more of the market. High entry barriers in a particular market will generally warrant condemnation at somewhat lower percentages. Unfortunately, there is little consistency among the circuit courts, and they disagree widely over the relevant percentages. The Supreme Court has not decided a vertical merger case since the *Ford Motor Co.* decision . . . .[45]

New DOJ and FTC Draft Guidelines, issued in January 2020 indicate that antitrust agencies are unlikely to challenge a vertical merger where the merging parties "have a share in the relevant market of less than 20 percent, and the related product is used in less than 20 percent of the relevant market[,]" although this is not to be seen as a safe harbor.[46]

Several recent investigations and resulting remedies offer insight into the FTC's approach to investigating vertical mergers.

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aetna-s-medicare-individual-part-d [https://perma.cc/8ZWR-YKJ8] [hereinafter Justice Dept. Aetna Merger Requirements].

38. Hoffman, *supra* note 3, at 7–8.

39. Phillip A. Proger & J. Bruce McDonald, *Federal Antitrust Enforcers Taking More Regulatory, but More Flexible, Approach to Merger Remedies*, JONES DAY (June 2010), https://www.jonesday.com/en/insights/2010/06/federal-antitrust-enforcers-taking-more-regulatory-but-more-flexible-approach-to-merger-remedies [https://perma.cc/52H7-ZPVD].

40. Hoffman, *supra* note 3, at 7.

41. *Id.* at 8.

42. *Id.* at 8–9.

43. HERBERT HOVENKAMP, BLACK LETTER OUTLINE ON ANTITRUST 145 (6th ed. 2016).

44. *Id.*

45. *Id.*

46. U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Vertical Merger Guidelines 3 (2020), https://www.justice.gov/opa/press-release/file/1233741/download [https://perma.cc/R3R9-2M96].

1. AT&T/Time Warner

AT&T, a global telecom company, and Time Warner, a global media company, announced a merger in October 2016.[47] The DOJ challenged the merger. The complaint filed by the government challenging the merger alleged that the merger would allow the firm to gain the power to raise the price of Time Warner programming.[48] Ultimately, the Government argued that economic models show that a merger between AT&T and Time Warner would disadvantage network providers, while AT&T used an economic study of a similar past merger to show there was no reduction in bargaining power for content providers because of the merger.[49]

In *AT & T*, the government argued that a vertical merger can "'act as a clog on competition' by giving the merged firm 'control of a competitively significant supplier.'"[50] Specifically, this would occur if a merged firm withheld a supply source from rivals or foreclosed access to the supply source "on competitive terms."[51] For example, causing a rival to pay more to gain possession of necessary supplies could "harm competition and consumers."[52] The government's claim must contend with a widely accepted economic principle that vertical mergers increase efficiency and reduce costs, a claim the government's economist in *AT & T* acknowledges by saying the AT&T merger would lead to cost savings for AT&T customers.[53]

The government failed to show that the AT&T/Time Warner merger violated the Clayton Act because it did not show that the merger is "likely to lessen competition substantially."[54] The government made three main arguments against the merger.[55] First, the government attempted to prove the AT&T/Time Warner merger would allow Turner, a part of Time Warner, to charge AT&T rival distributors a higher price for content as a result of its post-merger relationship with AT&T.[56] Second, the government argued the merger would substantially lessen competition by increasing the risk that the merged firm will "thwart the rise of the lower-cost, consumer friendly virtual MVPDs [multi-channel video program distributors] that are threatening the traditional pay-TV model."[57] Third, the Government argued the merged firm could prevent AT&T's rival distributors from promotionally using HBO material to gain and keep customers, thus harming competition.[58] The government supported its argument that the merger would result in increased leverage when bargaining with affiliate providers with an expert witness, day to day business documents, and third-party competitor testimony.[59] The government's argument failed.[60]

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47. *AT&T to Acquire Time Warner*, AT&T (Oct. 22, 2016), https://about.att.com/story/att_to_acquire_time_warner.html [https://perma.cc/G4YB-6VWJ].
48. United States v. AT & T Inc., 310 F. Supp. 3d 161, 164 (D.D.C. 2018).
49. *Id.* at 215–16.
50. *Id.* at 192.
51. *Id.* at 193.
52. *Id.*
53. *AT & T*, 310 F. Supp. 3d at 193.
54. *Id.* at 165.
55. *Id.*
56. *Id.* at 194.
57. *Id.*
58. *AT & T*, 310 F. Supp. 3d at 194.
59. *Id.* at 199.
60. *Id.*

The government's initial argument that Turner would gain bargaining leverage because of the economic relationship between Turner and AT&T failed.[61] In the media distribution industry, threat of a "blackout" is damaging for both the distributor and the provider.[62] The government did not argue the merger would entice Turner to engage in long-term blackouts with distributors.[63] The government economist agreed that Turner withholding its content from distributors would not be profitable.[64] Therefore, "Turner will not 'foreclose' downstream distributors from accessing Turner content."[65]

Next, the government argued there was a material gain to bargaining leverage because the defendants said so themselves.[66] The defendants submitted documents to regulators in relation to a previous merger arguing against that previous merger.[67] However, the court was hesitant to take these comments into consideration because they were made in opposition to a competitor.[68] AT&T also argued that day-to-day documents discussing the possibility of increased bargaining power were not a persuasive tool to show that the defendant thought the leverage change was material because the documents were not prepared or directed by those orchestrating the merger.[69]

Finally, the government presented third-party competitor testimony to determine whether the merger could cause increased bargaining leverage that would result in reduced competition.[70] Although some competitors testified they were worried about what the merger would mean for negotiations with Turner, the court held the testimony did not support the government's argument.[71] The witnesses had mixed opinions and the opinions were not based in fact.[72]

Ultimately, the government failed to provide an analysis of previous, similar mergers to give a real world example of the alleged harm that would occur as a result of the merger.[73] The defendant provided an expert who examined past mergers of a similar nature and found that "vertical integration in the video programming and distribution industry have had no statistically significant effect on content prices."[74] Whereas, the government expert's model and inputs were not supported by the evidence that prices do not actually increase.[75]

2. Luxottica/Essilor

Essilor Designs is the largest provider of wholesale lab services and manufactures ophthalmic lenses; Luxottica is the largest optical retailer in the United States, and they

61. *Id.* at 200.
62. *Id.* at 172.
63. *AT & T*, 310 F. Supp. 3d at 172.
64. *Id.* at 201.
65. *Id.*
66. *Id.* at 204.
67. *Id.* at 205.
68. *AT & T*, 310 F. Supp. 3d at 205–06.
69. *Id.* at 208.
70. *Id.* at 211.
71. *Id.* at 213–14.
72. *Id.* at 211–14.
73. *AT & T*, 310 F. Supp. 3d at 202.
74. *Id.* at 218.
75. *Id.* at 240–41.

design, manufacture, and distribute optical frames and sunglasses.[76] The two parties decided to merge, and the FTC investigated the merger.[77] In March of 2018, the FTC voted to close the investigation into the merger between Luxottica and Essilor because the merger of the two companies did not violate Section 7 of the Clayton Act by substantially lessening competition.[78]

The DOJ closely "considered three principal theories of harm: (1) vertical foreclosure, (2) potential competition in wholesale laboratory services, and (3) horizontal competition in retail."[79] Primarily of concern in this Note, the FTC determined that there would not be vertical foreclosure because Essilor would lose out to competitors if it attempted to raise lens prices after the merger, and Luxottica's market share of less than ten percent is not large enough to raise upstream prices without losing out to competition.[80]

3. Aetna/CVS

The DOJ approved the Aetna/CVS vertical merger on October 10, 2018.[81] Aetna is a nationwide health insurance corporation and CVS is a nationwide pharmacy corporation. The DOJ only required Aetna to sell its Medicare prescription business.[82] The DOJ's condition created a structural change rather than a behavioral one.

4. Cigna/Express Scripts

In yet another healthcare vertical merger, the DOJ approved a vertical merger between Cigna and Express Scripts in September 2018. Cigna, a health insurance company, and Express Scripts, a pharmacy benefit manager (PBM) company,[83] announced a plan to merge in March 2018.[84] The DOJ sought to determine if the merger would "(1) substantially lessen competition in the sale of PBM services or (2) raise the cost of PBM services to Cigna's health insurance rivals."[85] The DOJ determined that the merger would not substantially lessen competition for PBM services because Cigna does not have a large nationwide PBM business. Additionally, the DOJ found that the merger would not raise the cost of PBM services to Cigna's competitors because Cigna's pre-merger PBM provider, Optum, will be "free to compete for PBM customers that purchase medical insurance from Cigna upon closing of the transaction."[86]

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76. FTC Luxottica/Essilor Statement, *supra* note 30, at 1.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 2.
81. Justice Dept. Aetna Merger Requirements, *supra* note 37.
82. *Id.*
83. PBM's are administrators of prescription drug plans. *What is a PBM?*, RXRESOURCE, https://www.rxresource.org/pbm/what-is-a-pbm.html (last visited Feb. 14, 2019).
84. Shelby Livingston, *Cigna-Express Scripts Merger Slated to Close Thursday*, MOD. HEALTHCARE (Dec. 19, 2018), https://www.modernhealthcare.com/article/20181219/NEWS/181219893 [https://perma.cc/W3PE-E8HB].
85. Closing Statement, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger (Sept. 17, 2018), https://www.justice.gov/atr/closing-statement [https://perma.cc/5JY8-ZMLE].
86. *Id.*

5. Google/DoubleClick

The FTC did not seek to block the Google/DoubleClick merger in 2007.[87] DoubleClick is an online advertising company.[88] The FTC found that the two companies did not compete, the merger would not eliminate potential competition, and that the merger would not foreclose competition in the ad intermediation market because DoubleClick did not have market power in the third-party ad serving markets.[89] Therefore, the FTC approved the merger.[90]

E. Vertical Mergers in Europe

The European Union Merger Regulation governs mergers within the European Economic Area (EEA).[91] The primary goal of the E.U. Merger Regulation is to protect consumers.[92] The European Commission is the European Union's governing body and enforces the Merger Regulation. There is "a three-step analysis in which the Commission assesses (i) the merging parties' ability and (ii) their incentives to pursue a foreclosure strategy, followed by (iii) an analysis of the impact that such foreclosure would have on consumers in the downstream markets in terms of prices, quality and similar competitive parameters."[93] The Commission has historically been less interested in vertical mergers than horizontal mergers, but recent history indicates that trend may be changing.[94] Several recent cases highlight the European Union's policies as they relate to vertical mergers. E.U. regulators have stated that "[i]n particular, we have made sure that the number of global players actively competing in these markets stays the same."[95] Finally, when the European Union believes a vertical merger threatens consumers, it mandates remedies where a remedy would resolve the concern.[96]

The following cases illustrate the use of the European Union's consumer welfare analysis.[97]

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87. *Federal Trade Commission Closes Google/DoubleClick Investigation*, FED. TRADE COMMISSION, (Dec. 20, 2007), https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation [https://perma.cc/9YUU-5JSL] [hereinafter *FTC Closes Google/DoubleClick*].

88. Louise Story & Miguel Helft, *Google Buys DoubleClick for $3.1 Billion*, N.Y. TIMES (Apr. 14, 2007), https://www.nytimes.com/2007/04/14/technology/14DoubleClick.html [https://perma.cc/3DH4-QK2H].

89. *FTC Closes Google/DoubleClick*, *supra* note 87.

90. *Id.*

91. *See generally* Press Release, European Commission, Mergers: Commission opens in-depth investigation into Apple's proposed acquisition of Shazam, IP/18/3505 (Apr. 23, 2018), http://europa.eu/rapid/press-release_IP-18-3505_en.htm [https://perma.cc/P2YU-FNY3].

92. Carles Esteva Mosso, *Non-Horizontal Mergers: A European Perspective*, 31 FORDHAM INT'L L.J. 1442, 1442 (2008).

93. Pierre Lahbabi & Sophie Moonen, *A Closer Look at Vertical Mergers*, 2 COMPETITION POL'Y NEWSL. 11, 16 (2007), http://ec.europa.eu/competition/publications/cpn/2007_2_11.pdf [https://perma.cc/D3FG-MXFE].

94. Maria Raptis et al., *Skadden Discusses Novel Theories Emerging in Merger Enforcement*, CLS BLUE SKY BLOG (Mar. 6, 2018), http://clsbluesky.law.columbia.edu/2018/03/06/skadden-discusses-novel-theories-emerging-in-merger-enforcement/ [https://perma.cc/3RBD-34XQ].

95. Foo Yun Chee, *Bayer Wins EU Approval for $62.5 Bln Monsanto Buy*, REUTERS (Mar. 21, 2018), https://www.reuters.com/article/us-monsanto-m-a-bayer-eu/bayer-wins-eu-approval-for-62-5-billion-monsanto-buy-idUSKBN1GX14U [https://perma.cc/D7WF-N34Q] (quoting Margrethe Vestager, the European Competition Commissioner).

96. Lahbabi & Moonen, *supra* note 93, at 16–17.

97. *Id.* at 16.

1. AT&T/Time Warner

The European Commission approved the AT&T/Time Warner merger in March 2017[98] and placed no restrictions on the merger.[99] The Commission found that the merger did not pose a threat in the European Union because AT&T and Time Warner are not competitors in European markets.[100] The Commission further clarified by saying that AT&T only provides business telecom services within the European Union, and Time Warner operates in global media entertainment services markets. Thus, the Commission approved the merger with no restrictions.

2. Luxottica/Essilor

The European Commission opened an investigation into the Luxottica/Essilor merger, much like the FTC.[101] The Luxottica/Essilor merger brought two large companies in the optical industry together.[102] The European Commission was initially concerned that the "merged company might use Luxottica's powerful brands to make opticians buy Essilor lenses and exclude other lens suppliers from the markets, through practices such as bundling or tying."[103] Ultimately, the merger was approved. Margrethe Vestager, the European Commission for Competition, discussed the Commission's decision to approve the merger saying:

> Our job is to ensure that a merger won't lead to higher prices or reduced choices. In this case for opticians and consumers in the EU. We've received feedback from nearly 4,000 opticians in a market test in Europe that Essilor and Luxottica would not gain market power to harm competition. As the result of the market test did not support our initial concerns we can let this merger go ahead unconditionally.[104]

However, the Commission determined that Luxottica's strongest brands, which include Ray-Ban, are not essential and many optical stores in Europe do not sell Luxottica frames.[105] Additionally, bundling and tying are prevented by the risk of losing customers. The sunglasses product could not be used to harm competing lens companies because sunglasses often do not have prescription lenses, and finally, Luxottica had limited lens activity while Essilor had limited eyewear activity so the stifling of emerging competition

98. *European Commission Approves AT&T Acquisition of Time Warner*, AT&T (Mar. 15, 2017), http://about.att.com/story/european_commission_approves_att_acquisition_of_time_warner.html [https://perma.cc/HX6A-AK3B].

99. *Id.*

100. Eleanor Tyler, *AT&T-Time Warner Merger Breezes Through EU Approval*, BLOOMBERG L. (Mar. 16, 2017), https://www.bloomberglaw.com/product/blaw/document/X7BH23R0000000?criteria_id=9f6a01dc1cfa42fd1348a25d135b7b6c&searchGuid=f175c3f9-5338-40a1-acc9-cb15cc62b18c.

101. European Commission Press Release IP/17/3481, Mergers: Commission Opens In-Depth Investigation into Proposed Merger Between Essilor and Luxottica (Sept. 26, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-3481_en.htm [https://perma.cc/JHL8-D65L].

102. European Commission Press Release IP/18/1442, Mergers: Commission Clears Merger Between Essilor and Luxottica (Mar. 1, 2018), *available at* http://europa.eu/rapid/press-release_IP-18-1442_en.htm [https://perma.cc/SJC2-AL5H].

103. *Id.*

104. *Id.*

105. *Id.*

was not a concern.[106]

3. Microsoft/LinkedIn

The European Commission investigated Microsoft's merger with LinkedIn and ultimately allowed the merger, but placed conditions on the merger that it believed would preserve competition between social media platforms.[107] The Commission considered the following areas when considering if the merger was allowed under E.U. rules, "(i) professional social network services, (ii) customer relationship management software solutions, and (iii) online advertising services."[108] The Commission was concerned that LinkedIn could gain users as a result of the merger because Microsoft could pre-install LinkedIn on PCs and make LinkedIn a part of the Microsoft Office suite.[109] The Commission then found that the Customer Relationship Manager software was not the only customer relationship software on the market and faces strong competition from industry leaders like Oracle and Salesforce. Therefore the merger would not allow Microsoft to foreclose competitors in this market.[110] The Commission determined that within online advertising services, user data consolidation was not a concern because so much user data is still available.[111] However, the Commission did find that privacy competition on professional social networks could be negatively impacted by the merger.[112] Microsoft agreed not to require PC manufacturers and distributors to install LinkedIn on computers and to ensure that LinkedIn could be deleted from a PC if a distributor or manufacturer decided to install LinkedIn.[113] Microsoft also agreed not to increase difficulty for other social media networks to work within the Microsoft system.[114] Finally, Microsoft committed to allowing competing social networks to access "Microsoft Graph," a tool for building applications and services that also stores data.[115]

III. ANALYSIS

The DOJ issued guidelines for evaluating vertical mergers in 1984 and subsequently revoked and replaced with draft guidelines in January 2020.[116] The 2020 draft guidelines reflect the types of analysis Agencies applied in prior investigations, such as CVS-Aetna

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106. *Id.*

107. European Commission Press Release IP/16/4284, Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions (Dec. 6, 2016), *available at* http://europa.eu/rapid/press-release_IP-16-4284_en.htm [https://perma.cc/4MUL-HPRP] [hereinafter European Commission LinkedIn/Microsoft Press Release].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. European Commission LinkedIn/Microsoft Press Release, *supra* note 107.

113. *Id.*

114. *Id.*

115. *Id.*

116. UNITED STATES DEP'T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES (1984), https://www.justice.gov/atr/non-horizontal-merger-guidelines [https://perma.cc/3MXA-8AFE]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, DRAFT VERTICAL MERGER GUIDELINES (2020), https://www.justice.gov/opa/press-release/file/1233741/download [https://perma.cc/UML6-65YK].

merger and the more recent AT&T-Time-Warner merger.[117] Although there have been few real enforcement actions against vertical mergers, in 2017, the DOJ challenged AT&T's merger with Time Warner, resulting in the issuance of a judicial opinion dealing with vertical mergers.[118] First, this Part will explore the analysis applied by the court in *United States v. AT & T*. Second, this Part will analyze mergers in light of other enforcement cases. Finally, this Part will consider whether the court's economic analysis and evaluation process provides an adequate enforcement mechanism to deal with modern instances of vertical mergers.

A. Vertical Merger Case Analysis

First, in a vertical merger case, like in a horizontal merger, the market is defined.[119] However, "[n]o immediate change in the level of concentration in any relevant market" occurs in vertical mergers.[120] Therefore, in a vertical merger case, there is less reason for the DOJ to oppose the market definition than in a horizontal merger.[121] Second, if the government challenges a merger, there is not a presumption of harm on the part of the merger and the government must make a "fact-specific" case showing that the merger is likely to have an effect that is "likely to be anticompetitive."[122]

To prove that a vertical merger violates Section 7 of the Clayton Act, the government must show, through "case-specific evidence," that a merger, at the time the case is brought and in the industry the companies operate in, is "likely to substantially lessen competition in the manner [the government] predicts."[123]

Ultimately, the AT&T case does not answer the question of whether increased bargaining leverage could result in a substantial lessening of competition because the court found that the government failed to show that an increase in bargaining leverage would result from the merger.[124] The question then remains: is it sufficient to show that prices will likely go up or customers will likely be harmed? Or does the government need to show that downstream competitors will be harmed, as well?[125]

Although *AT & T* offers an in-depth analysis of one vertical merger, it is the only litigated vertical merger in recent history. Thus, an examination of other DOJ and FTC actions is necessary to understand the U.S. approach and its consequences.

As discussed in Part II, the Aetna/CVS merger was allowed by the DOJ with a stipulation that Aetna divest a portion of its holdings.[126] The American Medical Association ("AMA") opposed the merger and claimed it was not a vertical merger at all because Aetna and CVS operate in some of the same markets, expressing primary concern

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117. Ian G. John et al., FTC, DOJ Release Updated Vertical Merger Guidelines, KIRKLAND & ELLIS (Jan. 21, 2020), https://www.kirkland.com/publications/kirkland-alert/2020/01/ftc-doj-updated-vertical-merger-guidelines [https://perma.cc/SD5C-ZS49].

118. *See generally* United States v. AT & T, 310 F. Supp. 3d 161 (D.D.C. 2018) (analyzing vertical mergers).

119. *See id.* at 195–97 (defining the product and geographic market for the product in *AT & T*).

120. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1474 (5th ed. 2002).

121. *Id.*

122. *AT & T*, 310 F. Supp. 3d at 192.

123. *Id.* at 194.

124. *See id.* at 74–108 (showing the court does not answer questions on bargaining leverage).

125. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1985 (2018).

126. *See supra* Part II.D.3.

about the Medicare prescription business.[127] The DOJ requirements that Aetna divest its Medicare Prescription Part D business seems to resolve the AMA's main concern. However, other concerns about the merger should be considered. Others are concerned that the merger of a major healthcare provider and a major pharmacy chain could lead to less patient choice and less prescription price transparency.[128] Representative Rick Crawford has similar concerns, "vertical integration does not encourage competition or lower prices, but rather, could limit the choices and access for patients, driving out competitors while driving up prices and reimbursements for themselves."[129] If Aetna owns CVS, it could require patients to visit a Minute-Clinic at a CVS prior to being authorized to visit another doctor.[130]

These concerns permeate many of the vertical merger discussions. For example, concern about less choice as a result of concentrated power comes up in discussions of the Cigna/Express Scripts merger[131] and the AT&T/Time Warner Merger.[132]

Vertical mergers often result in increased efficiency and reduced costs to consumers.[133] The DOJ acted on the belief that vertical mergers can be anti-competitive when it challenged the AT&T/Time Warner merger.[134] Despite the government's loss in AT&T/Time Warner, one should not conclude that all vertical merger challenges will fail if litigated.

The Clayton Act seeks to prevent mergers that would reduce competition and lead to higher prices, lower quality of goods or services, or less innovation.[135] The E.U. cases do not appear to result in more enforcement action, even though the Commission seems to consider Data Privacy competition concerns more actively.[136] The head of E.U. Competition, Margrethe Vestager, is seen as an antitrust cop with a "take-no-prisoners" approach.[137] Although perhaps seen as a tougher enforcer, the European Union does not appear to limit vertical mergers more or less often than the United States. Luxottica/Essilor

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127. Erin Connolly, *AMA Opposition to the CVS-Aetna Vertical Merger Grows with Statement to DOJ*, MED. BAG (Sept. 24, 2018), https://www.medicalbag.com/business/ama-cvs-aetna-merger-opposition/article/802035/ [https://perma.cc/D4W8-JH8Q].

128. Theresa Rohr-Kirchgraber, *Here's How the Proposed CVS-Aetna Merger Could Increase Costs, Restrict Access*, CNBC (Aug. 10, 2018), https://www.cnbc.com/2018/08/10/how-the-proposed-cvs-aetna-merger-could-boost-costs-restrict-access.html [https://perma.cc/55VS-CVBS].

129. David Balto, *Why DOJ Must Block the Cigna-Express Scripts Merger*, HILL (Mar. 27, 2018), https://thehill.com/opinion/healthcare/380522-why-doj-must-block-the-cigna-express-scripts-merger [https://perma.cc/M9S8-7HS2].

130. Rohr-Kirchgraber, *supra* note 128.

131. *See, e.g.*, Balto, *supra* note 129 (discussing the possibility of less choice with a merger).

132. *See, e.g.*, Jacob Passy, *Why the AT&T-Time Warner Merger Could Be Bad News for Consumers*, MKT. WATCH (June 14, 2018), https://www.marketwatch.com/story/why-the-att-time-warner-merger-could-be-bad-news-for-consumers-2018-06-13 [https://perma.cc/6X2X-WGXP] (discussing the possibility of less choices for consumers after a major merger).

133. Will Kenton, *Vertical Merger*, INVESTOPEDIA, https://www.investopedia.com/terms/v/verticalmerger.asp [https://perma.cc/AP5H-9RE8] (last updated Jan. 16, 2020).

134. *See generally* United States v. AT & T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (discussing that vertical mergers can be anti-competitive throughout).

135. *Mergers*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers [https://perma.cc/M3QT-MDA3] (last visited Feb. 15, 2019).

136. *Compare* Microsoft/Linked In, *supra* Part II.E.3 *to* Google/DoubleClick, *supra* Part II.D.5.

137. Parmy Olson, *Google's $5 Billion Escape: Why Europe's Antitrust Cop Could Be Tougher on Data*, FORBES (July 23, 2018), https://www.forbes.com/sites/parmyolson/2018/07/23/google-5-billion-facebook-eu-antitrust-margrethe-vestager/#55ae86537f5e [https://perma.cc/9FHX-82KR].

was approved in both markets. Although the European Union did not consider the Aetna/CVS or Cigna/Express Scripts mergers and did place some requirements on the Microsoft/LinkedIn merger, the general trend seems to allow vertical mergers, perhaps with some caveats.

However, such a limited consideration of vertical mergers could result in a realization of the consumer harms many worry about. Considering vertical mergers in light of the recent trend toward data hoarding brings up different concerns. For example, companies like Google are merging with companies like DoubleClick, an online advertising company, gaining ownership of data as a result.[138] Before assuming vertical merger regulation should remain as it exists now, it is worth considering whether the potential to own a large share of data is problematic.

B. Google/DoubleClick Dissent

Although the FTC approved the merger, then-Commissioner Pamela Harbour filed a dissenting opinion in the Google/DoubleClick merger.[139] Commissioner Harbour believes that the Clayton Act requires the FTC to look forward and consider where markets are headed rather than consider the situation exactly as it is presented to the FTC.[140] The Clayton Act and cases interpreting the Clayton Act to mean that it gives the government authority to stop mergers and to stop certain practices at their "incipiency" support this idea.[141]

Commissioner Harbour held that there were competition and security concerns that fell within the FTC's power to evaluate and impose conditions.[142] Commissioner Harbour argued the merger has horizontal concerns in addition to vertical concerns because of the market effects, and she also believes that the merger is at a nexus between traditional competition and consumer protection issues.[143] Harbour stated: "[t]he Commission is uniquely situated to evaluate the implications of this kind of data merger, from a competition as well as a consumer protection perspective. The Commission should maximize its opportunity to do so, especially where the merged firm will be capable of dominating the 'Database of Intentions.'"[144]

Harbour argues the merging of the two datasets in Google/DoubleClick is particularly concerning because it leads to questions about whether Google/DoubleClick will face meaningful competition if advertising is driven by behavioral targeting.[145] Harbour preferred that the FTC continue their investigation and potentially require Google/DoubleClick to commit to certain behaviors post-merger.[146] Additionally, Harbour

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138. *Google to Acquire DoubleClick*, GOOGLE (Apr. 13, 2007), https://googlepress.blogspot.com/2007/04/google-to-acquire-doubleclick_13.html [https://perma.cc/Y3NM-4Y49].

139. *In re* Google/DoubleClick, F.T.C. File No. 171-0170, 1 (2007) (Pamela Jones Harbour dissenting statement), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf [https://perma.cc/2YQJ-52FC] [hereinafter Harbour Dissenting Statement].

140. *Id.*

141. Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 46 (2018).

142. Harbour Dissenting Statement, *supra* note 139, at 1.

143. *Id.* at 1–4.

144. *Id.* at 4.

145. *Id.* at 8.

146. *Id.* at 1.

argues that the FTC should request data in the future that specifically speaks to the combination of the data sets of the two merging companies.[147] This type of inquiry was attempted in *AT & T/Time Warner*, but was not grounded in enough data to convince the judge of its validity.[148]

Further, Harbour states that the FTC could have jurisdiction over privacy concerns that arose from the merger because if fewer search companies like Google exist as a result of the merger, there might be less inclination for the remaining search companies to compete based on privacy protections or in similar, other non-price areas.[149] In fact, in *Wyndham Worldwide v. Federal Trade Commission*, the Third Circuit found that the FTC has the authority to regulate cyber security under the FTC Act.[150] Similarly to Harbour's recommended approach, in *Microsoft/LinkedIn*, the European Union considered the potential privacy competition reduction brought on by the merger and ultimately addressed it by placing other limitations on the deal.[151]

IV. RECOMMENDATION

In an economy where data plays a growing and important role, allowing vertical mergers to go unchecked is a dangerous option. The FTC should approach vertical mergers using a method similar to that suggested by Commissioner Harbour to best protect consumers and competition.[152] Taking such an approach could lead the FTC to consider vertical mergers between major health insurance companies and PBM providers, software creators and social network companies, and service and content providers within a larger context of market trends and potential consumer harm down the road.

A. Adopting Harbour's Approach to Vertical Mergers

First, the FTC has broad capabilities for evaluating mergers because vertical mergers have the potential to change the industry a merged corporation operates in. Second, the *AT & T* decision provides some direction for what types of economic analysis courts are looking for. Third, and finally, to best protect consumers, the FTC should take a broader approach when determining what constitutes a consumer harm.

A lack of infrastructure in place for the government to evaluate mergers' impacts on consumers (considering potential privacy and data competition) opens a significant vulnerability in the FTC's approach. Harbour's point that data ownership could change the industry a merged corporation operates in—by pushing competitors out and reducing competition—provides an entrance for the FTC.[153]

Further, pursuant to the *AT & T/Time Warner* decision,[154] the FTC should analyze the economic impact of data mergers in light of past mergers and strive to provide concrete

147. Harbour Dissenting Statement, *supra* note 139, at 4.

148. United States v. AT & T Inc., 310 F. Supp. 3d 161, 215–16 (D.D.C. 2018).

149. Harbour Dissenting Statement, *supra* note 139, at 1.

150. Greg Dickenson, Wyndham Worldwide v. Federal Trade Commission*: The Developing Parameters of the FTC's Data Security Requirements*, 19 J. INTERNET L. 9, 11 (2015).

151. European Commission LinkedIn/Microsoft Press Release, *supra* note 106.

152. *See generally* Harbour Dissenting Statement, *supra* note 139 (discussing the increased role the FTC should play).

153. *Id.* at 9.

154. United States v. AT & T, 310 F. Supp. 3d 161, 197 (D.D.C. 2018).

examples of harms to competition. The *AT & T* opinion highlighted the court's hesitancy to rely on broad assumptions based on broad economic principles when there is an opportunity to closely examine past mergers.[155] This preference led the court to rely on AT&T's economic analysis over the government's in *AT & T/ Time Warner*.[156] Going forward, examining the economic impact of the Google/DoubleClick merger could provide such basis for economic analysis.

In light of the *AT & T* court's hesitancy to rely on economic assumptions when a concrete example exists,[157] the FTC should conduct an economic analysis of the privacy implications that resulted from the Google/DoubleClick Merger. Such an examination could provide the DOJ and FTC with real data to support opposition to future mergers. Therefore, should the government wish to challenge vertical mergers involving data in the future, establishing that competition was harmed in a previous merger would go beyond what the government showed in *AT & T*. Perhaps even providing extrapolation from previous instances of similar mergers in different industries would help persuade a court that the effect of a merger would be substantial. The economic analyses should consider network effects to best protect consumers from less obvious effects of vertical mergers.

B. Proactive Approach in a Changing Market

Commissioner Harbour is correct that the Clayton Act requires the FTC to take a proactive approach. Markets change quickly, and companies are constantly working to stay ahead of that change to best position themselves to make a profit. If the market is moving towards data collection and the FTC does not actively think about the potential privacy implications of such data hoarding, the American consumer could be placed in an objectively worse position because of reduced competition. Since the FTC's ultimate goal is to protect consumers from adverse competitive effects,[158] the FTC should take a more proactive approach in the vertical merger area.

Although not in a vertical merger context, the European Union has expressed concern on multiple occasions about the power that several companies exert in the market as a result of their data control.[159] This has resulted in behavioral remedies designed to spread that data power throughout the market to avoid the isolation of the data in one company's hands.[160] The FTC has expressed a dislike for behavioral remedies in comparison to structural remedies,[161] but if requiring a merged corporation to behave in a certain way could prevent potential harm, behavioral remedies should be considered. Companies should not be able to get around antitrust law by pursuing vertical mergers rather than horizontal ones.

There is a strong argument that the FTC can regulate areas where competition reduction does not directly impact price, but does impact competition by way of reduced consumer benefit in privacy policies. The FTC's primary purpose is to protect the

155. *Id.* at 190–92.

156. *See id.* at 199–202 (reasoning that the government failed to meet its burden and holding that AT&T did not violate the Clayton Act).

157. *See generally id.* (citing examples of MVPDs).

158. *About the FTC*, FED. TRADE COMMISSION, https://www.ftc.gov/about-ftc [https://perma.cc/Y5QA-ZKX6] (last visited Feb. 8, 2019).

159. *Supra* Part II.

160. *Supra* Part II.

161. Hoffman, *supra* note 3, at 2.

consumer by protecting competition.[162] This does not restrict its actions to those related to competition and prices. Engaging in more abstract thought about the network effects or wider market effects of a merger would allow the FTC to more accurately assess the impact of a vertical merger. Vertical mergers are, by definition, not a merger of two competing corporations.[163] Therefore, the evaluation of competition impact should be conducted differently than a typical merger.

Harbour's concern that the Google/DoubleClick merger could change the landscape of an online market is applicable to AT&T/Time Warner. With the convergence of various levels of media consumption, the merged firm has the potential to market to customers more effectively, thereby reducing the ability of other companies to compete. Perhaps if the government took a different, broader approach and examination of market impact in its case against AT&T, the court would have come out differently. It does not appear that the government's economic analysis of similar market types changes as a result of past mergers, but the government rather argued the merged firm would have more bargaining power going forward.[164] The result is concerning because concentrated data ownership could result in market foreclosure.[165]

A simple analysis of basic competitive changes does not seem to be a sufficient mechanism to measure the potential impact and convince a court that the impact on competition is significant. The *AT & T* decision highlights that courts are looking for specific economic repercussions.[166] The FTC should look to previous mergers to ensure that there are no points of comparison before proceeding on a purely theoretical economic theory. Analysis of the broad market impacts of past mergers that appear to be motivated by the same goals—data acquisition, for example—would be persuasive to show substantial impact on competition.

The FTC should implement an approach to vertical mergers consistent with Commissioner Harbour's dissent in Google/DoubleClick.[167] If the FTC does this with a strong example of a past case where a vertical merger created privacy concerns resulting in reduced competition for consumers, the FTC would likely have a strong case that the vertical merger was substantially lessening competition. This approach, similar to that suggested by Harbour, would best protect consumers, thus fulfilling the FTC's primary purpose.

In today's market, consumer protection from unfair competition has taken on more than its traditional meaning. Rather than solely protecting consumers from increased prices, the FTC needs to consider whether a merger harms privacy competition. The Clayton Act prohibits mergers whose effects would include substantially lessening competition.[168] This is a broad mission that lacks the specificity indicating the FTC is limited to examining mergers on such limited grounds as price. Therefore, to best protect consumers, the FTC should analyze the competitive impact on consumers under a broad framework that includes both price and other consumer impacts, like privacy protection.

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162. *Id.*
163. *Id.* at 3.
164. United States v. AT & T, 310 F. Supp. 3d 161, 206 (D.D.C. 2018).
165. Patrick Bolton & Michael D. Whinston, *The "Foreclosure" Effects of Vertical Mergers*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 207, 207 (1991).
166. *See AT & T*, 310 F. Supp. 3d at 253 (showing the court wants specific economic repercussions).
167. *See generally* Harbour Dissenting Statement, *supra* note 139 (discussing the dissenting approach).
168. Clayton Antitrust Act of 1914 § 1, 15 U.S.C. § 18 (2018).

V. CONCLUSION

The FTC and DOJ should move towards a broader enforcement plan. Vertical mergers in the era of data are even more concerning because privacy is potentially implicated in mergers. The FTC should interpret its power to regulate competition to incorporate consumer harm from lack of privacy competition. This approach by the FTC would allow the market and corporations to enjoy the benefits of vertical mergers while also protecting consumers from unfair competition.