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EDITOR'S NOTE

The Significance of *H&R Block*: *Brown Shoe* Meets Merger Simulation

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AFTER A SEVEN-YEAR DROUGHT, DOJ brought—and won—a challenge to H&R Block's acquisition of TaxACT. The decision makes for a good read, given that the subject is doing one's taxes.

The court enjoined the transaction between H&R Block and TaxACT "on the grounds that the merger violates the antitrust laws and will lead to an anticompetitive duopoly in which the only substantial providers of digital tax software in the marketplace would be H&R Block and Intuit."[1] After finding that the relevant market was digital do-it-yourself tax preparation software (DDIY),[2] the court quickly concluded that the government had established a prima facie case of illegality, based on HHI data.[3]

The opinion then addressed four rebuttal arguments. On entry/expansion, the court examined the likelihood that several existing players would expand, and found the chance of such expansion remote, based in significant part on the difficulty of building a reputation that would attract customers.[4] In assessing coordination, the court showed little interest in weighing in on the debate as to whether TaxACT played a unique "maverick" role.[5] Rather, the court asked perhaps the most basic question of merger analysis: "Does TaxACT consistently play a role within the competitive structure of this market that constrains prices?"[6]—and found that "TaxACT's competition does play a special role."[7]

The decision then turned to unilateral effects, noting that the court need not reach the issue in light of the finding that adverse coordinated effects are likely.[8] The opinion made short shrift of various of the defendants' arguments, finding repeatedly that the parties are significant competitors and that the merged firm's incentives would change after the transaction.[9] Only at the end of the discussion did the court discuss the parties' merger simulations and find that the government's model and evidence were more compelling.[10] Finally, the opinion briefly considered efficiencies and found that they were not cognizable because the defendants had not demonstrated that they were merger-specific and verifiable.[11]

Judge Beryl Howell used the contemporary concepts of merger analysis—discussing separately coordinated and unilateral effects and analyzing the merger simulation models of the government and the parties. Yet in many ways, much of this opinion could have been written decades ago. The discussion of market definition; the presumption of illegality based on HHIs; and the consideration of coordinated effects; entry, and efficiencies read like the merger opinions of the last century.

What then is the significance of the opinion? While making no attempt to go beyond deciding the merits of the case before it, the *H&R Block* (*HRB*) decision makes clear a number of points relevant to the vast majority of mergers that may face government challenge.[12] But, perhaps most importantly, the case sets aside the notion that one must choose between the old ways of defining a market and the new.

Product Market Definition Is Alive and Well

The Supreme Court held in *du Pont* that "[d]etermination of the relevant market is a necessary predicate" to a Section 7 claim.[13] And every merger case since—litigated or resolved by consent decree—has defined a market. These market definitions have ranged from the uncontroversial, such as the bulk supply of gasoline,[14] to the highly disputed, such as "premium natural and organic supermarkets."[15]

The *HRB* decision is no exception, devoting 19 of its 42 pages to market definition. The court's finding was based on a variety of evidence:

- The parties' documents identifying DDIY offerings of others as their primary competitors;
- Significant price differences between DDIY and assisted products;
- The likely limited switching to pen and paper that would occur in the event of a DDIY price increase given the different functional experience;
- Economic testimony based on what the court found to be more reliable diversion evidence, though the court took pains to make clear that it would not rely on that evidence exclusively, but would use it only to confirm other evidence.

Various Statements Downplaying the Importance of Market Definition Are—for Now—Just Statements

The FTC-DOJ 2010 Horizontal Merger Guidelines were the first formal statement from the agencies minimizing the role of market definition. The Guidelines note that "[i]n any merger enforcement action, the Agencies will *normally* identify one or more relevant markets,"[16] suggesting there may be times when they do not define markets. The Guidelines went

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a step further in the unilateral effects discussion, indicating that "[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration."[17]

In the *Whole Foods* case, the FTC argued in a discovery dispute that "[i]dentifying the precise metes and bounds of a geographic market is unnecessary when, as here, there is direct evidence of anticompetitive effects."[18] The judge rejected the argument, not because he found market definition necessary, but because at the discovery stage "there is no evidence . . . before this Court of anything at all."[19] The district court went on to define a market,[20] and the court of appeals noted only in dicta, in a footnote, that merger definition might not be necessary.[21]

Similarly, while identifying a variety of sources that indicate that "evaluation of unilateral effects does not require a market definition,"[22] the *HRB* court made clear that it was "not aware of any modern Section 7 case in which the court dispensed with the requirement to define a relevant product market."[23] These statements, while noteworthy, should be recognized for what they are—mere commentary—rather than an attempt to set aside *du Pont*.

Staples Is the New *Brown Shoe*—and More

While the fifty year-old *Brown Shoe* decision[24] has remained relevant through the years,[25] the relatively more junior fifteen year-old *Staples* decision[26] seems to be showing some longevity of its own. This is noteworthy for a case that took some by surprise when it was first decided. *Staples* has played a prominent role in the closing arguments in recent cases. In *Whole Foods*, the defendants presented a chart distinguishing the Whole Foods/Wild Oats transaction from *Staples*, while the government in *HRB* used a chart showing that cases like *Staples* supported the government's market definition. And *Staples* quotes are sprinkled throughout the *HRB* discussion of product market definition.[27]

Staples is also cited for the now-obvious propositions that the Merger Guidelines are not binding but can be persuasive authority; that elimination of a particularly important competitor is relevant to coordinated effects analysis; that the elimination of head-to-head competition can create adverse unilateral effects; and that there must be proper documentation of efficiencies.

Unilateral Effects Analysis Is Not About Closest Substitutes

The *HRB* opinion crystallized several points about unilateral effects analysis that the agencies have been making for some years. First, citing the Areeda & Hovenkamp treatise and the antitrust agencies' 2006 Commentary on Merger Guidelines, the court noted, "The fact that Intuit may be the closest competitor for both HRB and TaxACT also does not necessarily prevent a finding of unilateral effects for this merger."[28] Second, the court rejected the defendants' argument that *Oracle*[29] required a high combined market share for a finding of unilateral anticompetitive effects and thus refused to "impose a market share threshold for proving a unilateral effects claim."[30]

The Fate of UPP Will Have to Wait

Rarely have three letters invoked such heated debate among antitrust practitioners as "UPP," the acronym for upward pricing pressure. There have been well-founded fears that in every merger investigation, UPP would play a prominent role. In my experience, UPP has not been used unduly as a means of analysis (which of course may confirm that it was unnecessary to refer specifically to it in the Guidelines). In any event, as the Guidelines note, "In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger."[31] That the phrase UPP was not used in the *HRB* opinion, and that the government used economic models to confirm their case rather than rely exclusively on such evidence, in no way suggests that the Antitrust Division has abandoned such tools.

Documents Matter

Citing *Staples*, the *HRB* court began the product market discussion with the obvious statement that "[w]hen determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents."[32] The court then discussed a variety of business documents that supported the view of DDIY as a relevant product market.[33] The defendants were left to argue that while "the merging parties certainly have documents that discuss each other and digital competitors generally, and even reference a digital market and the 'Big Three,'" such evidence did not prove that DDIY was the relevant market.[34] The court disagreed, based on all the evidence,[35] but those documents undoubtedly helped shape the court's views significantly.

Protecting Customers May Be Easier Without Their Testimony

For years, there has been speculation about what it would take for the DOJ to win a case after the defeat in *Oracle*. In *Oracle*, the court found that customer testimony suggesting that customers would not switch to other products was not particularly credible.[36] In *HRB*, like *Staples* and many other cases involving products sold directly to individual consumers rather than commercial customers, there was no customer testimony to impeach. The question about what customers were likely to do came not from their testimony but from the parties' documents, which perhaps made it more difficult for defendants to overcome since there was no way to point to actual customer behavior.

Ultimately the importance of *HRB* is that the government will challenge anticompetitive mergers when they feel the need to. They can win such challenges—using both old-

fashioned evidence and newer economic tools. And the government need not choose between *Brown Shoe* and sophisticated economic tools. Both can be useful when properly applied. ■

[1] United States v. H&R Block, Inc., No. 11-00948, 2011 WL 5438955, at *1 (D.D.C. Nov. 10, 2011).

[2] *Id.* at *8–27.

[3] *Id.* at *28–29.

[4] *Id.* at *29–33.

[5] *Id.* at *35–36.

[6] *Id.* at *36.

[7] *Id.*

[8] *Id.* at *38.

[9] *Id.* at *38–41.

[10] *Id.* at *41–44.

[11] *Id.* at *44–47.

[12] For a more detailed discussion of the *HRB* decision, see James Keyte's article in this issue, United States v. H&R Block*: The DOJ Invoke*s Brown Shoe *to Shed the* Oracle *Albatross*.

[13] United States v. E.I. du Pont Nemours and Co., 353 U.S. 586, 593 (1957).

[14] FTC v. Foster, No. CIV 07-352, 2007 WL 1793441, at *17 (D.N.M. May 29, 2007) (defendants' stipulation of the market as "bulk supply of gasoline").

[15] FTC v. Whole Foods Mkt., 548 F. 3d 1028, 1037 (D.C. Cir. 2008) (quoting Complaint at ¶ 34, FTC v. Whole Foods Mkt., 2007 WL 1849944 (D.D.C. June 6, 2007) (No. 07-cv-01021)). For the circuit court's disagreement with the district court's holding that the relevant product market was all supermarkets, see *Whole Foods*, 548 F.3d at 1037–41.

[16] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010) [hereinafter Guidelines], *available at* http://ftc.gov/os/2010/08/100819hmg.pdf (emphasis added).

[17] *Id.*

[18] Memorandum Opinion and Order at 2, *Whole Foods*, 2007 WL 1849944 (No. 07-cv-01021) (quoting Second Supplemental Responses and Objections at 2, *Whole Foods*, 2007 WL 1849944 (No. 07-cv-01021)).

[19] Memorandum Opinion and Order at 2, *Whole Foods*, 2007 WL 1849944 (No. 07-cv-01021).

[20] *Whole Foods*, 2007 WL 1849944 at *15–38.

[21] *Whole Foods*, 548 F.3d at 1036 n.1 (Brown, J.).

[22] *H&R Block*, 2011 WL 5438955 at *40 n.35 (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 913a, at 66 (3d ed. 2007).

[23] *H&R Block*, 2011 WL 5438955 at *40 n.35.

[24] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[25] For a more detailed discussion, see Robert Skitol & Kenneth Vorrasi, *The Remarkable 50-Year Legacy of* Brown Shoe Co. v. United States, in this issue.

[26] FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[27] *E.g.*, *H&R Block*, 2011 WL 5438955 at *9 ("In other words, courts look at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.'" (quoting *Staple*s, 970 F. Supp. at 1074)); *H&R Block*, 2011 WL 5438955 at *9 ("[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant market for antitrust purposes." (quoting *Staple*s, 970 F. Supp. at 1075)).

[28] *H&R Block*, 2011 WL 5438955 at *39 (citing Areeda & Hovenkamp, *supra* note 22, ¶ 914, at 77–80; and U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf)). This is consistent with the Guidelines, *supra* note 16, § 6.1 ("A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.").

[29] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[30] *H&R Block*, 2011 WL 5438955 at *40.

[31] Guidelines, *supra* note 16, § 6.1.

[32] *H&R Block*, 2011 WL 5438955 at *10 (citing *Staple*s, 970 F. Supp. at 1076).

[33] *Id.* at *10–11.

[34] *Id.* at *11.

[35] *Id.* at *11–27.

[36] United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1131–32 (N.D. Cal. 2004).