What a Difference 16 Years Can Make: FTC Approves Merger Between Office Superstore Giants Office Depot and OfficeMax

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In 1997, most people thought of Amazon.com as mainly an online bookseller, you couldn't buy groceries at Wal-Mart or Target, and if you wanted floppy disks, VHS tapes, or a fax machine, you drove to your local Staples, OfficeMax, or Office Depot.

In light of developments in the office supply market in the last 16 years, the Federal Trade Commission (“FTC”), in a complete about-face from its successful 1997 challenge of the proposed merger of office supply superstores Staples, Inc. (“Staples”) and Office Depot, Inc. (“Office Depot”), recently unanimously voted to close its seven-month investigation into the proposed $1.2 billion merger of Office Depot, Inc. and OfficeMax, Inc. (“OfficeMax”).

**FTC v. Staples**

In its Statement closing the investigation into the proposed merger of Office Depot and OfficeMax, the Commission found that the competitive dynamics were very different than in the 16-year-old *Staples* case. In 1997, the FTC successfully obtained a preliminary injunction blocking the proposed merger of Staples and Office Depot (at the time two of the three largest office supply superstores), arguing that the deal would lead to competitive harm in the relevant product market — the “sale of consumable office supplies through office supply superstores.” The *Staples* case was a notable victory for the FTC. In the two decades prior to *Staples*, the Antitrust Division of the Department of Justice and the FTC had brought few cases, instead choosing to negotiate consent settlements. Moreover, the antitrust agencies’ win-loss records at the time could be described as mediocre, at best. When the *Staples* case went to court, stock market speculators and the national press were overwhelmingly of the position that the superstores would prevail and the government would lose its first big merger case of the 1990s.

In *Staples*, the FTC used strategic plans and pricing information to show a distinct market for the sale of consumable office supplies through office supply superstores. By establishing that these superstores were a market unto themselves, the FTC was able to reduce the number of players from two to one in 15 cities and from three to two in 27 more cities. The FTC then presented pricing evidence, including internal Staples documents and Office Depot documents illustrating price comparisons, and showing that in geographic areas where three office supply superstores competed, prices were at their lowest; when two were present prices increased; and prices were at their highest when there was only one. Although the FTC did not provide the court with evidence regarding the amount of non-superstore competition (that is, mass merchandisers such as Wal-Mart, Kmart, Target, or wholesale clubs such as BJ’s and the then-PriceCostco, among others) in each of Staples’ and Office Depot’s markets, the Court nonetheless concluded that the evidence showed that prices were affected primarily by other office superstores, and not by the presence of non-superstore or mail-order competitors.

The *Staples* case also demonstrated the important impact that econometric analysis could have in merger enforcement. In addition to documentary evidence, the FTC estimated the effect of having an Office Depot located in a metropolitan area on Staples’ prices in that area while controlling for cost differences and the presence of other...
competitors. The analysis concluded that Office Depot was a significant constraint on pricing by Staples, even after taking into account the presence of other types of retailers. The court found that the merger would have likely led to price increases in the areas where the two companies were competing.

Over the past 15 years, the antitrust agencies have used Staples as an important precedent in seeking narrower product market definitions. For example, in 2011, citing Staples, the government in United States v. H&R Block successfully argued, based upon company documents, for a narrow product market of tax preparation software, excluding other tax preparation approaches from the market. In enjoining the proposed acquisition by H&R Block (which markets the tax-preparation software “H&R Block at Home”) of 2SS Holdings, Inc. (which markets the tax-preparation software “TaxACT”). The court agreed the acquisition would reduce competition in the market for “digital do-it-yourself tax preparation products” (”DDIY” products). The court found that while defendants’ internal documents did discuss the broader tax preparation industry, including assisted and manual tax preparation, the “documents make clear that TaxACT’s own view — and that conveyed by its investment bankers to potential buyers — is that the company primarily competes in a DDIY market against Intuit and H&R Block and that it develops its pricing and business strategy with that market and those competitors in mind.”

**FTC’s Enforcement Decision Regarding OfficeMax and Office Depot**

Office Depot and OfficeMax, respectively the country’s current second and third largest chains of office supply superstores, announced the merger earlier in 2013, with the expectation to create a combined company with sales of $17 billion, putting it in a stronger position to navigate the changing tide in the market for consumable office supplies.

In direct contrast to both the Staples and H&R Block cases, the FTC decided last week that the current office supply market in the retail sector as occupied by OfficeMax and Office Depot is broader than that articulated in Staples. The FTC based its changed position on significant developments in market dynamics in the past 16 years. These changes consist primarily of: (1) brick-and-mortar companies such as Wal-Mart, Target, Costco, and Sam’s Club that have expanded their offerings and sales of office supplies to compete with traditional office supply superstores. These stores have won over consumers by offering the option to purchase office supplies at locations that also offer other products that those consumers purchase; (2) the “explosive growth of online commerce,” most notably Amazon.com, which has had a major impact on the office supply market by offering convenience and often lower prices.

The FTC also concluded that the merger was unlikely to substantially lessen competition in the market for the sale of office supplies sold to businesses and other large customers on a contract basis, a market not addressed in the Staples case.

**Conclusion**

Given the background of the hard-won Staples case and agency use of that case as an important precedent to advocate for narrower product markets, last week’s decision to clear OfficeMax and Office Depot may have been unexpected. As it is a decision not to proceed, it is not precedential in litigation. However, as the Commission’s unanimous decision noted, “yesterday’s market dynamics may be very different from the market dynamics of today,” demonstrating that each transaction requires a hard look at the specific facts at issue, and in the tug of war between antitrust enforcers and merging parties over market definition, an important milestone has occurred.

**Endnotes**


2 Defined as pencils, pens, Post-it notes, paper, even staples — the sort of products that people return again and again to purchase at Staples. Id. at 1075.
Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 196 (1992) (“By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors.”).

David Scheffman, Malcolm Coate, and Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, available at [http://www.justice.gov/atr/merger/12881.htm](http://www.justice.gov/atr/merger/12881.htm) (In the 1980s and 90s, “the major FTC monopolization cases were lost or abandoned. None of the many industry investigations led to significant cases that were won.”); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 2 (2003) (“the establishment of sensible merger policy does not take place until the 1990s, when the federal agencies began challenging substantial mergers and prevailed more often in court.”).


970 F.Supp. at 1081.

Id. at 1075-1078.

Id. at 1077 (The Court came to this conclusion by relying on the testimony of executives of non-superstore competitors, such as the Wal-Mart executive who testified that "where both Staples and Wal-Mart exist [price-checking] showed that, on average, Staples’ prices were higher where there was a Staples and a Wal-Mart but no other superstore than where there was a Staples, a Wal-Mart and another superstore.”).

Id. at 1081 (The FTC relied heavily on economic analysis to show high concentration in post-merger market shares).

Id. at 1082-1083.


Id. at 53.