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U.S. Antitrust Agencies and Challenges to Mergers

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Yesterday [December 7, 2015] was a busy day for antitrust enforcement, as the United States Federal Trade Commission sued to block the proposed merger of Staples, Inc. with Office Depot, Inc., and the Department of Justice announced that AB Electrolux and General Electric Company have abandoned their proposed transaction after five months of litigation with the DOJ. These events highlight aggressive positions the FTC and DOJ are taking with respect to market definition and competitive effects at the end of President Obama's second term, leading to a number of court challenges seeking to block proposed deals.

On September 7, 2014, Electrolux agreed to purchase GE's appliance business for $3.3 billion. After a ten month investigation, the DOJ sued in federal court to block the transaction. In its complaint, the DOJ alleged two relevant markets: one for the sale of cooking appliances generally, and another limited to the supply of cooking appliances to "home builders, property managers, and other contract-channel appliance purchasers." A trial in the U.S. District Court for the District of Columbia started a month ago, but before the judge could even begin considering his decision, General Electric opted to terminate the agreement and abandon the transaction—apparently GE's earliest opportunity to do so under the agreement. GE is also seeking to collect a $175 million reverse termination fee from Electrolux.

In February 2015, Staples and Office Depot agreed to merge, proposing to combine their operations in a transaction valued at $6.3 billion. This is the second time the two office supply retailers have sought to merge. The FTC successfully sued to block the companies' first such attempt in 1997, sustaining a theory that "office superstores" constitute a distinct relevant market, based on company documents and econometric evidence that the three national office superstore chains (Staples, Office Depot, and then-competitor Office Max) had direct price effects on each other in the retail sale of office supplies. The market alleged in yesterday's FTC action is notably not the same one the agency pursued in 1997. While the FTC again claims the sale of consumable office supplies is a relevant market, yesterday's administrative complaint limits that alleged market to direct sales "to large business-to-business customers." Staples and Office Depot have affirmed their intention to contest the FTC's challenge in federal court.

These actions follow the DOJ's press release last week trumpeting a decision by Chicken of the Sea and Bumble Bee Foods to abandon their merger plans after the DOJ expressed "serious concerns that the proposed transaction would harm competition."

As the recent spate of antitrust agency activity makes clear, it is critical for parties considering potential transactions to evaluate not only traditional market definitions, but also alternative theories of competitive harm, including possible effects on distribution channels and relatively narrow customer classes. Potential merger partners need to carefully allocate the risks inherent in the proposed combination so that reverse break fees, termination rights, and similar requirements properly incentivize both parties to see the deal through to completion.