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## DOJ Victory in H&R Block/TaxACT Merger Challenge

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On October 31, 2011, in *United States v. H&R Block*, a Federal district court judge in Washington, D.C., granted the Department of Justice's request for a permanent injunction against H&R Block's proposed acquisition of 2SS Holdings, Inc. ("TaxACT"), the maker of TaxACT software. The judge blocked the merger on the ground that the acquisition would substantially lessen competition in the market for digital do-it-yourself ("DDIY") tax preparation products in violation of the Clayton Act, 15 U.S.C. § 18. The court accepted many of the DOJ's arguments, especially with respect to the decisive question of defining the relevant product market. While the court's holding is limited to the specific facts of this case, because it is among the rare decisions issued after a full trial on the merits of a merger challenge, the *H&R Block* decision will receive careful attention for the light it sheds on the types of mergers that will survive government scrutiny going forward.

The result in *H&R Block* was not particularly surprising, given that the judge took a fairly traditional approach to defining the relevant market and assessing the competitive effects of the merger. The court adopted the DOJ's proposed relevant product market of DDIY tax preparation products, excluding other tax preparation methods—such as the "pen-and-paper" or CPA-assisted methods—because those methods were not reasonably interchangeable with DDIY products. The court, thus, rejected the Defendants' assertion of a broader market that would include all tax preparation and filing products, including professional and non-DDIY options. Significantly, the court declined to accept any of the Defendants' expert's conclusions as to market definition, finding that they were based on unreliable data.

The court also relied on well-settled case law as support for the finding that the merger would result in anticompetitive effects under the Clayton Act. First, the court noted that the DDIY tax preparation market was highly concentrated because it was dominated by three companies, Intuit (creator of TurboTax), H&R Block and TaxACT, which were responsible for servicing approximately 90% of consumers in the market. Citing the D.C. Circuit Court of Appeals decision in FTC v. H.J. Heinz Co., the court held that the proposed merger of the second- and third-largest companies in the market would create a duopoly, the effects of which would be (i) the elimination of aggressive, direct competition between the merging parties and (ii) an increase in the likelihood that the remaining significant market participants would coordinate post-merger to reduce competition. It is not surprising that the Heinz decision guided much of the court's analysis because, similar to the proposed H&R Block merger, that case involved a proposed merger between the second- and third-largest producers of jarred baby food in a market characterized by high barriers to entry and high market concentration.

While *H&R Block* is an important addition to the body of law that courts will reference in assessing the competitive effects of proposed acquisitions, the decision takes a fairly traditional approach to merger analysis, including extensive reliance on expert economic testimony. In *H&R Block*, the absence of credible expert testimony in support of the Defendants' proposed market definition was an important, if not dispositive, factor in the court's decision to block the merger. After devoting almost 20 pages to discussing whether the expert economic testimony confirmed that DDIY is the relevant product market, the decision states that "[t]he Court . . . cannot draw any conclusions from defendants' expert's analysis because of severe shortcomings in the . . . data upon which the defendants' expert relied." Thus, the *H&R Block* decision confirms the continuing, vital role of reliable expert economic testimony in successfully defending against antitrust claims.

In light of the decision's conventional approach, we believe—contrary to the views of some commentators—that the *H&R Block* decision adds little predictive value as to the outcome in the DOJ's challenge to the AT&T/T-Mobile merger. Significantly, in the AT&T case, the DOJ has shifted its view of the relevant geographic market for mobile wireless telecommunications services from what it has historically characterized as local and regional markets—where the anticipated anticompetitive effects of mergers could be addressed through local divestitures—to alleging a national market. Whereas, in *H&R Block*, the DOJ's arguments that won the day fit squarely within traditional merger analysis, the DOJ's arguments against the AT&T merger represent a significant departure from past practice. Thus, far from certain, it remains to be seen whether the DOJ will obtain another victory in its challenge to the AT&T merger. These two cases underscore that every acquisition presents unique facts and circumstances, requiring the input of knowledgeable counsel who can aid their clients in successfully navigating the merger approval process.

This memorandum relates to general information only and does not constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

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