

Shifting Paradigms in Market Definition – From Staples/Office Depot to AMR/US Airways

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Recent merger enforcement suggests that the U.S. antitrust authorities have engaged in detailed re-examinations of market definition in a number of industries in which the historical definition of a market was thought to be well understood. One of the most recent examples, of course, is the Department of Justice's challenge of the proposed American Airlines/US Airways merger. This article examines the extent to which recent merger review reflects a "paradigm shift" in market definition, whether in terms of the product market, the geographic market, or relevant market participants. It then reviews historical examples in which these "paradigm shifts" occurred and identifies risk factors that may presage such shifts in the future. These potential "paradigm shifts" may present additional risks, and the occasional opportunity, to antitrust practitioners as they analyze and counsel on potential transactions. The concern with a paradigm shift is that what was previously thought was needed to get a deal through may no longer be enough, and the shift can threaten the deal as a whole. Conversely, certain paradigm shifts may actually enable clearance where historically the deal would have faced scrutiny and required meaningful divestiture or remedies – if not an outright challenge.

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