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THE LATEST: FTC Allows Problematic Vertical Merger to Proceed with a Behavioral Remedy

Article By:

Jon B. Dubrow

Anthony S. Ferrara

On January 28, the US Federal Trade Commission (FTC) announced that it had accepted a proposed settlement with office supply distributors Staples and Essendant in connection with Staples' proposed $482.7 million acquisition of Essendant. The settlement suggests that the FTC is currently more willing than the US Department of Justice (DOJ) to accept conduct remedies to resolve competitive issues raised by vertical mergers.

WHAT HAPPENED:

- The FTC Commissioners voted 3-2 to accept a proposed settlement establishing a firewall to prevent Staples from receiving competitively sensitive customer information from Essendant.

- Staples is the largest reseller of office products in the US, and one of only two retail office supply superstores in the US. Essendant is one of only two nationwide office product wholesale distributors. In September 2018, Staples agreed to acquire Essendant.

- Staples competes with various resellers to sell office supplies to mid-sized companies. Many of those resellers rely on Essendant as their wholesale distributor. In that role, resellers have to provide Essendant with detailed information about their end customers' identities, purchasing history, product preferences, and similar data.

- The FTC alleged in its complaint that the transaction was likely to harm competition by giving Staples access to the commercially sensitive information (CSI) of Essendant's resellers and those resellers' end customers. The FTC contended that access to that information could allow Staples to offer higher prices than it otherwise would when bidding against a reseller for an end customer's business.

- To address this competitive concern, the FTC imposed a conduct remedy. Specifically, the FTC required the parties to establish a firewall limiting Staples' access to the CSI of Essendant's resellers and the end customers of those resellers.

- Two FTC Commissioners issued dissenting statements, arguing that the settlement does not fully remedy the transaction's likely anticompetitive effects. In the dissenters' view, the evidence suggests that the integrated firm could implement a strategy of raising costs for Staples' reseller rivals.

WHAT THIS MEANS:

- The settlement indicates that the FTC remains willing to cure competitive issues raised by vertical mergers with conduct remedies, such as firewalls, instead of imposing a divestiture or seeking to block the deal.
- Under Makan Delrahim's leadership, the DOJ's Antitrust Division has been less receptive of conduct remedies, even in vertical merger cases. Delrahim has stated that conduct remedies are fundamentally regulatory and are inconsistent with the DOJ's role as a law enforcement agency.
- The DOJ refused to accept conduct remedies to resolve the competitive issues arising from AT&T's acquisition of Time Warner. DOJ challenged the transaction in federal court. In June 2018, a DC district court judge ruled against the DOJ, and the case is currently on appeal to the DC Circuit.
- One of the FTC Commissioners, Rebecca Kelly Slaughter, argued in her dissenting statement that the FTC should be more willing to challenge and seek to block vertical mergers when it identifies competitive concerns. That position is more aligned with the DOJ's currently stated policy, but overall the FTC appears more willing to accept conduct remedies than the DOJ.

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