

FTC Blocks Merger Between Staples and Office Depot

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A federal court in Washington, D.C. issued an order blocking Staples' acquisition of Office Depot on the grounds that it would substantially lessen competition in the sale of consumable office supplies to national business customers. The case, decided on May 10, 2016, is important for four reasons.

First, it is the second case in which the FTC has prevailed in a litigated enforcement action to protect the interests of major national corporations as consumers. The first was *FTC v. Sysco*, decided in 2015. Traditionally, major corporations, like McDonald's and Best Buy, are assumed to have sufficient bargaining power in vendor negotiations to protect their own interests.

The agency presented evidence of a market consisting of about 1,200 firms in the United States that purchase at least \$500,000 a year of consumable office supplies. In this market, Staples and Office Depot had an aggregate 79% market share. The court found that these large corporate customers require specialized vendors that offer value-added services, including sophisticated information technology, dedicated customer service representatives and expedited delivery on a national basis. For this reason, the FTC asserted that large customers typically have fewer vendor options than are available to smaller firms operating in a small number of locations.

Second, the agency posited a single "cluster market" consisting of consumable products, like pens, pencils, paper clips and notepads, without analyzing each of these products as a separate market. The court endorsed this analysis, concluding that based on the evidence, it was safe to assume that market shares and competitive conditions were similar for all products in the cluster.

Third, Staples and Office Depot failed to prevail on the basis of the "Amazon Defense." The court found that although Amazon.com's Amazon Business unit competes for sales of office supplies, it was unlikely Amazon Business would, within the next two or three years, pose a major competitive challenge to Staples and Office Depot. Central to this finding was the fact that many of the sales through Amazon are from third-party vendors, whose prices Amazon does not control.

Finally, the decision is a reminder of the risks posed by the merging parties' own documents. Here, the FTC characterized documents from Staples and Office Depot as using the proposed merger as leverage to pressure large business customers to sign long-term contracts locking in current prices, allegedly implying that customers would lose negotiating leverage once the merger was finalized.

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