DOJ Scores as Electrolux and General Electric Abandon Deal; FTC Challenges (Again) Staple's Proposed Acquisition of Office Depot

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December 7, 2015, was an eventful day for U.S. antitrust enforcement agencies. The Department of Justice achieved a high-profile win when General Electric Co. decided to abandon the proposed sale of its appliance unit to Electrolux AB in the face of an ongoing trial to block the deal. A few hours later, the Federal Trade Commission announced that it was suing to block Staples, Inc.'s proposed acquisition of Office Depot, Inc.

Electrolux/General Electric

After four weeks of trial in the U.S. District Court for the District of Columbia, GE terminated its $3.3 billion sale to Electrolux, walking away with a $175 million reverse break fee. Electrolux initially announced its acquisition of GE's appliance business back in September 2014, marking what would have been the largest-ever acquisition for the Swedish home appliance company. The deal aimed to make Electrolux more competitive with Whirlpool and allow GE to simplify its business, focusing on technology and infrastructure. However, on July 1, 2015, the Department of Justice sued Electrolux and GE to block the deal, arguing that the acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act.

The DOJ's main antitrust concerns focused on appliances such as ranges, cooktops and wall ovens sold to "contract-channel" purchasers. According to the complaint, contract-channel purchasers are single-family homebuilders, multifamily homebuilders, property managers of apartments and condominiums, hotels and governmental entities who individually negotiate contracts for major cooking appliances with suppliers like GE and Electrolux. The DOJ alleged that GE, Electrolux and Whirlpool are the three biggest suppliers in this contract-channel market, accounting for more than 90 percent of sales.

Prior to abandoning the deal, GE and Electrolux ran into difficulties at trial. The DOJ's cross-examination of the companies' witnesses raised doubts about the strength of their testimony, and former executives testified that GE and Electrolux only factored in each other, and Whirlpool, when setting prices on cooking appliances. Electrolux also had to retract key portions of testimony from one of its top executives.

Staples/Home Depot

Shortly after the Electrolux/GE announcement, the FTC filed an administrative complaint challenging Staples' proposed $6.3 billion acquisition of Office Depot. This suit comes 18 years after the FTC successfully sued to block the same parties' merger attempt. The FTC's complaint alleges that the current Staples/Office Depot deal would violate antitrust laws by significantly reducing competition nationwide in the market for "the sale and distribution of consumable office supplies to large business-to-business customers in the United States." Business-to-business customers (referred to as B-to-B customers) are large customers who purchase consumable office supplies such as pens, pencils, notepads, sticky notes, file folders and paper clips.

The FTC alleges that sales to large business customers are a separate relevant market, distinct from the more competitive retail markets for office supplies sold to consumers. Many large business customers buy consumable office supplies under a contract, and, in addition to providing these customers with a wide range of office supplies, the vendor also provides them with fast and reliable nationwide delivery, dedicated customer service, customized online catalogs, integration of procurement systems and detailed utilization reports. The FTC's complaint alleges that "Staples and Office Depot are the only two office supplies vendors that can provide on their own the low prices, nationwide distribution, and combination of services and features that many large B-to-B customers require." The complaint also asserts that entry or expansion into the market — by other vendors, manufacturers, wholesalers, or online retailers of office supplies — would not be timely, likely or sufficient to counteract the anticompetitive effects of the merger.

The administrative complaint marks a departure from the FTC's comments published just two years ago regarding its decision to clear Office Depot's merger with Office Max, Inc. without remedies. In that statement, the FTC cited competition from a host of sources — including direct sales by manufacturers, regional vendors like W. B. Mason and competitors in adjacent product categories, such as janitorial and industrial products — as a main reason why the merger would not harm competition for large contract customers.

The FTC successfully blocked the previously attempted combination of Staples and Office Depot back in 1997. Although the parties are the same, the FTC's current theory of harm is different, reflecting the impact of the Internet on distribution for certain customer segments. In 1997, the FTC was concerned about the importance of the brick-and-mortar retail channel for superstores, alleging that the superstores priced differently when close to other brick-and-mortar superstores, regardless of emerging online and other competition. In contrast to its earlier theory of harm, in this action the FTC is not focused on the brick-and-mortar aspect of superstores, but on the unique attributes required to provide B-to-B customers competitive distribution, including online ordering, a full product line, timely delivery and value-added services.

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Although the Electrolux/GE and Staples/Office Depot cases involve different industries and different antitrust agencies, both merger challenges are similar in that they are based on alleged competitive harm in narrow relevant markets centered around large customers with specialized needs. The DOJ's challenge of the Electrolux/GE deal focused on the elimination of competition for the sale of ranges, cooktops and wall ovens to the contract channel. Similarly, the Staples/Office Depot administrative complaint focuses on contract sales to large business customers. These cases follow the same playbook that the FTC used to successfully challenge Sysco's proposed acquisition of US Foods on the ground that the deal would have combined the only two broadline foodservice distributors allegedly capable of serving large national customers, such as health care group purchasing organizations and large chain restaurants. The government's approach appears to be paying quick dividends, and antitrust litigators will be watching to see if the FTC is equally successful in the Staples/Office Deport matter.

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