

The FTC's Crisis of Legitimacy: Comment from the Open Markets Institute on the FTC's 3-2 clearance of the Staples-Essendant Merger

How easy should it be to start or run an independent business? That was the immediate question the Federal Trade Commission answered with a 3-2 vote to allow the nation's largest reseller of office supplies, Staples, [to acquire](#) the nation's largest wholesaler of office supplies, Essendant. The answer the FTC gave, unfortunately, adds to the legitimacy crisis facing the Commission.

The majority's answer was to make independent office supply stores dependent on, and put them at the mercy of, one of their biggest rivals, Staples. The tie-up between Staples and Essendant is what's known as a "vertical" merger, or a merger between corporations at different levels of a supply chain. Once the corporations merge, independent resellers of office supplies will have to purchase wholesale office supplies from Staples, their biggest rival, which also just became their biggest supplier.

Historically, enforcers generally frowned on large vertical mergers, fearing corporations would block rivals from access to key sources of supply markets (a process known as "foreclosure"). Congress designed an antitrust law, the Robinson-Patman Act of 1936, to stop chain stores from using their bargaining power over manufacturers and wholesalers to disadvantage and drive their smaller competitors out of business. The Celler-Kefauver Act of 1950, gave enforcers additional tools to stop vertical tie-ups.

Since the early 1980s, however, enforcers have largely been guided in their thinking by Robert Bork and other libertarian antitrust scholars. In his 1978 book, *The Antitrust Paradox*, Bork wrote, "Foreclosure may occasionally be a threat to individual firms. It is never a threat to competition." In its decision to allow the Staples to acquire Essendant, the Republican majority continued to adhere to this now 40-year-old idea.

[They held](#), for instance, that Staples had no incentive to use its increased power over the wholesaling of office supplies to harm its smaller rivals. After all, they argue, there is still one other wholesaler in the market – S.P. Richards (SPR) – and retailers still can buy from SPR if Staples tries to raise their prices or manipulate them. This optimism is misplaced and rests on faulty assumptions about how Staples is likely to use its power in the duopolistic wholesaling market.

We are heartened by the dissents offered by the two Democratic commissioners. Commissioner Rebecca Kelly Slaughter's [dissenting statement](#) marked a return to congressional intent in enacting anti-merger law (and also is more attuned to contemporary thinking on vertical mergers than the majority's approach is). Slaughter argued the acquisition would increase the bargaining power of both Staples and the remaining wholesaler. Slaughter also noted that FTC staff analysis indicated "the transaction would result in significant harm" to Staples' rivals, in the form of higher prices or degraded service, "regardless of which supplier they chose for their office supply needs."

Slaughter placed her statement in the context of a "great debate... taking place in Washington policy circles and even around the country at family dinner tables" about the rising power of dominant corporations "controlling [large swaths of industries](#) and firms across sectors of the

economy.” Vertical mergers, Slaughter wrote, “can be just as pernicious” as horizontal mergers, or mergers between direct competitors. Slaughter then expressed concern that the FTC is “too credulous about claimed procompetitive benefits unique to vertical integration” and that those benefits “often go unsubstantiated.”

The Open Markets Institute encourages the Commission to follow the consequences of the merger in the office supply market, and to take remedial actions if necessary to ensure that competition can thrive. We have little hope that the FTC can restore its legitimacy as an enforcement or regulatory body until it gives up the ahistorical, unreliable, and dangerous pro-monopoly philosophy entrenched by Bork and his ideological allies.

The FTC must stop serving as the guardian angel of monopolists and return to its roots as the policeman of fair markets and protector of the liberty of the American businessperson.