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The recently concluded Department of Justice enforcement action against Bazaarvoice, Inc.'s 2012 acquisition of rival PowerReviews, Inc. is a reminder of important principles for antitrust enforcement in high-tech industries:

- First, the government scrutinizes transactions that do not have to be reported under the Hart-Scott-Rodino Act; the fact that a deal is not reportable is not a "free pass" under antitrust law;
- Second, internal company documents, particularly deal related documents, can have a huge impact on the outcome; care should be taken in preparing documents anytime a deal may raise antitrust issues;
- Third, while the fact that high-tech markets are dynamic is an important factor in an antitrust analysis, it is not an automatic winner; here, the DOJ and the Court rejected the arguments that innovation and new entry would constrain Bazaarvoice from exercising market power; and
- Fourth, if the government requires a "fix" to a consummated transaction, it will likely seek to restore competition that would have existed if the deal never happened; such remedies can be intrusive and costly, often going well beyond simply divesting the acquired business, and these risks in a consummated transaction are borne exclusively by the buyer and its shareholders.

Buyer beware

Following a trial court finding that Bazaarvoice's acquisition of PowerReviews violated antitrust law, on April 24, 2014, the DOJ and Bazaarvoice addressed the remedy by agreeing to a "fix" that—while subject to public comment—should end the litigation.

In January, Judge William Orrick of the Northern District of California ruled that Bazaarvoice's acquisition of its "closest and only serious competitor" in the market for online product ratings and review platforms substantially lessened competition in violation of Section 7 of the Clayton Act.

Under the settlement, Bazaarvoice must not only sell the assets it acquired from PowerReviews, but it must take what DOJ has characterized as "meaningful additional measures that will allow the divestiture buyer to quickly achieve the competitive position that PowerReviews would have occupied today, absent the unlawful transaction." The merger challenge and remedy may have had a significant impact on Bazaarvoice's shareholders, which have seen the value of their shares fall from \$17 on the day of the PowerReviews acquisition in June 2012 to under \$7 upon the remedy's announcement.

Scrutiny of non-reportable transactions

In June 2012, Bazaarvoice acquired PowerReviews in a transaction that was not subject to mandatory pre-merger notification under the HSR Act. Although the transaction's \$168 million value exceeded the HSR Act's size-of-transaction threshold, PowerReviews had insufficient assets on its most recent regularly prepared balance sheet to meet the Act's size-of-person test, which is fairly common when start-up companies are acquired before they have substantial sales and assets. Because the parties were not required to observe the HSR Act's 30-day waiting period, they were able to close soon after announcing the deal; indeed parties frequently announce deals only after closing when they are not reportable, in a "simultaneous sign and close" process.

The government often learns of non-reportable transactions from competitors that want to throw a "monkey-wrench" into the deal or from complaining customers. Those are not the only ways problematic transactions hit their radar; the DOJ recently disclosed that it first learned of the Bazaarvoice transaction when a staff attorney read about the closed deal in a trade publication.

The DOJ issued subpoenas to Bazaarvoice and to competitors shortly thereafter, and six months later filed an antitrust complaint, seeking to have the Court unwind the transaction. In January 2014, following a three week trial, the Court issued a 141-page decision holding that the acquisition violated the Clayton Act, which prohibits

mergers and acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."

The DOJ has been quick to point to its challenge of the Bazaarvoice transaction as illustrative of its enforcement approach with respect to both high-tech transactions and transactions which do not trigger HSR filing requirements. DOJ officials have called the decision "important reading for technology companies and their counsel," and "a reminder that even transactions that are not reportable under the Hart-Scott-Rodino regulations may violate the antitrust laws."

Company documents provided "overwhelmingly" persuasive evidence

While the Court's opinion summarizes various categories of evidence presented during the three week trial, including economic evidence and substantial support from customers, the defendants' internal documents proved crucial in the Court's condemnation of the transaction.

There was no dispute that Bazaarvoice and PowerReviews were direct competitors, both generating most of their revenues from sales of their respective online product ratings and reviews (PRR) platforms. These platforms are social commerce tools employed by retailers and manufacturers to "collect, organize and display consumer-generated product reviews and ratings online."

In contrast to most platforms available from third parties and internal solutions developed by potential customers, the Bazaarvoice and PowerReviews platforms include sophisticated features, such as syndication (enabling manufacturers to share ratings and reviews with retail partners) and moderation (evaluating submitted reviews to ensure they are credible, inoffensive and in compliance with a customer's business code).

The government argued that PRR platforms were the relevant product market, while Bazaarvoice contended that the market was broader, including other "social commerce engagement tools." The Court sided with the DOJ, noting that it "found it persuasive that in the ordinary course of business Bazaarvoice and PowerReviews recognized that PRR platforms comprise a distinct market."

The Court rejected the defendants' arguments that new entry and other market forces would limit Bazaarvoice's post-acquisition market power. The Court also rejected Bazaarvoice's argument that post-merger conduct demonstrated that there had been no anticompetitive effect and no customer had claimed to have been harmed by the merger. The Court concluded that post-merger conduct necessarily would have been influenced by the pending DOJ investigation.

Importantly, the Court was persuaded by Bazaarvoice's documents describing its rationale for the transaction. According to the Court, "while Bazaarvoice fought against every material argument of the government, its defenses were often undermined by pre-acquisition statements from its and PowerReviews' executives." Bazaarvoice documents described PowerReviews as Bazaarvoice's "fiercest competitor," "only real competitor," "biggest competitor," and "an ankle biter that cause[d] pressure on deals." Internal Bazaarvoice documents outlining the reasons for the transaction included statements such as the "elimination" of Bazaarvoice's "primary competitor," "relief from...price erosion," and improvement of Bazaarvoice's "pricing power."

The Court's decision underscores the need to get antitrust lawyers involved early in transactions between competitors in order to assess risk, advise senior executives, and review drafts of documents to ensure that they do not use language that may be misunderstood. Once documents are created, merging parties cannot easily walk away from their pre-acquisition business rationale.

"Unscrambling" Bazaarvoice: onerous remedy in post-consummation merger challenge

In a typical merger case, reviewed before consummation under the HSR Act, where the government has decided there is a competitive concern, the parties agree to divest businesses or assets to avoid a government challenge. Because the Bazaarvoice case arose in the context of an already-consummated acquisition and the DOJ

prevailed on the merits in Court, the remedy requires Bazaarvoice to do much more.

Under the terms of the proposed order, Bazaarvoice must divest all PowerReviews assets acquired in the June 2012 transaction, as well as assets acquired after the transaction obtained for use with the PowerReviews assets. In addition, Bazaarvoice must provide a list of personnel to enable the acquirer to make offers of employment to individuals knowledgeable about PRR. Bazaarvoice must also provide a list of former PowerReviews customers, new customers obtained after the acquisition date and customers that renewed a contract for Bazaarvoice PRR platforms since the acquisition. The company must waive breach of contract claims related to the transfer of such customers to the acquirer, and waive trade secret restrictions for any of its employees hired to work at the divested business (so as to better enable the acquiring company to benefit from R&D that was conducted by Bazaarvoice after it acquired PowerReviews). Bazaarvoice is also obligated to provide a four-year license, at cost, to the acquiring company, to allow the acquirer to sell customers Bazaarvoice's syndication services—one of the most distinguishing features of the Bazaarvoice platform and a key to Bazaarvoice's success. By requiring these additional measures, the DOJ aims to facilitate the divestiture buyer's growth into a competitive force in the market for PRR platforms.

The heavy costs of being the buyer on the losing side in a challenge to a consummated transaction should inform firms' evaluation of proceeding with non-HSR reportable transactions. This risk can be eliminated by presenting the transaction to the antitrust agencies before the acquisition even if no HSR filing is required. Doing so, however, may invite scrutiny of transactions where there otherwise would have been none. Thus acquirers must weigh the costs of notifying the agencies against the risks of consummating without notification. The appropriate course of action will depend on the facts of each transaction and the company's tolerance for risk and delay. But the result in the Bazaarvoice case teaches that this evaluation should be based on sufficient antitrust due diligence, particularly by the buyer, in order to make an informed decision in light of the potential consequences.

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