

ClientAlert

Mergers & Acquisitions

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Buyer Beware: Bazaarvoice and the Risks of Non-Reportable Transactions

If you thought not having to report your proposed acquisition to the US Department of Justice and the US Federal Trade Commission meant never worrying about antitrust issues, think again. The DOJ's recent pursuit of Bazaarvoice, Inc. in connection with its acquisition of PowerReviews, Inc. highlights that even non-reportable transactions can give rise to serious consequences. Remedies may include not only divestitures, but other measures meant to ensure effective competition—even the clawing back of profits gained from increased market power. The case also serves as a reminder to potential buyers to fully diligence potential targets. This includes reviewing the potential anticompetitive effects of the proposed transaction, as well as any recent unreported transactions completed by the target. Failure to do so may result in buyers unwittingly acquiring antitrust liability.

Bazaarvoice acquired PowerReviews in June 2012 in a transaction that fell below the Hart-Scott-Rodino ("HSR") Act reporting thresholds.¹ At the time, the companies were the two leading providers of ratings and reviews platforms ("R&R Platforms"), packages of software and services that manufacturers and retailers use to allow their customers to write and post product reviews. Two days after the deal closed, the DOJ launched an investigation, and eight months after that, the DOJ filed a lawsuit in the Northern District of California challenging the merger under Section 7 of the Clayton Act. The DOJ alleged that Bazaarvoice's purchase of PowerReviews eliminated its only meaningful commercial competitor in the US market for R&R Platforms. In January of this year, the Court agreed and found that the acquisition violated Section 7 of the Clayton Act, holding that Bazaarvoice's purchase of its closest and only serious competitor was anticompetitive.

Bazaarvoice has since reached a settlement with the DOJ and agreed to divest all the assets it acquired when it bought PowerReviews. In addition to the divestiture, Bazaarvoice has agreed to additional measures that, according to the DOJ, "will allow a divestiture buyer to quickly achieve the competitive position that PowerReviews would have occupied today, absent the unlawful transaction." These measures include waiving breach of contract claims against customers, allowing customers to switch to the divestiture buyer without penalty, as well as waiving trade-secret restrictions for any employees who are hired by the divestiture buyer.

Most significantly, Bazaarvoice has also agreed to provide syndication services to the divestiture buyer for a period of four years at actual costs. According to the DOJ, these



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¹ In general, transactions valued below US\$75.9 million (adjusted annually) are exempt from the notification requirements of the HSR Act.

services will allow the divestiture buyer to build its customer base and develop its own syndication network. As a result, Bazaarvoice will lose some benefits of assets it had even before the PowerReviews acquisition—putting it in a potentially worse position than even before the acquisition.

Following the Bazaarvoice settlement, the DOJ confirmed its commitment to the review of non-reportable transactions and its pursuit of remedies beyond divestiture. In remarks prepared for the 14th Annual Loyola Antitrust Colloquium, Leslie C. Overton, Deputy Assistant Attorney General for Civil Enforcement (US Department of Justice-Antitrust Division), noted that between 2009 and 2013, non-reportable transactions accounted for close to 20 percent of all the merger investigations opened by the Antitrust Division during that period. “Merging parties should assume that, even if no HSR filing is required, a deal that prevents competitive concerns is unlikely to escape agency attention,” Overton said. This is true even for very small transactions. In May 2011, for example, the DOJ sued to block George’s Foods’ US\$3.9 million purchase of a single chicken processing plant from Tyson Foods.²

In the same remarks, Overton outlined the types of remedies the DOJ would pursue in its enforcement actions, and raised the specter of seeking disgorgement of profits that are attributable to price increases after the merger. Overton said that even where the DOJ seeks divestiture, it may consider seeking disgorgement “where a firm reaps the benefits of reduced competition during the period before the remedy takes effect.”

Taken together, the DOJ’s actions and words highlight the need to be mindful of antitrust concerns in every transaction. In particular:

- Treat reportable and non-reportable transactions similarly. Both are subject to review, and non-reportable transactions may involve more significant remedies since they would most likely be unwound after the acquisition has been consummated—putting all of the risk on the buyer.
- Review prior transactions. As Bazaarvoice illustrates, the antitrust authorities will not shy away from reviewing transactions after they close. Buyers looking at potential targets with a prior history of roll-up acquisitions should carefully analyze the competitive landscape of the market they are entering. This diligence is critical in light of the DOJ’s threats to seek disgorgement of unlawfully gained profits from unreported transactions.
- Remedies may include more than divestitures—antitrust authorities may seek other remedies to ensure that the divestiture buyer quickly achieves a competitive position in the marketplace. Moreover, they may even seek disgorgement of profits.

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² *United States v. George’s Foods*, 5:11CV00043 (W.D.Va.), available at <http://www.justice.gov/atr/cases/georgefood.html>