

Client Alert

Antitrust & Litigation Practice Group

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DOJ Successfully Challenges Non-HSR Reportable Bazaarvoice Merger

On January 8, 2014, the U.S. District Court for the Northern District of California held that Bazaarvoice, Inc.'s \$168 million acquisition of PowerReviews violated Section 7 of the Clayton Act. Section 7 prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." To establish a Section 7 violation, the government need only show that there is a "reasonable likelihood" that the transaction will have anticompetitive effects. The court's ruling followed a three-week trial that began on September 23, 2013.

Bazaarvoice, a social media marketing company, provides ratings and review platforms that allow online retailers to organize and display their customers' product reviews. In June 2012, Bazaarvoice acquired PowerReviews in a transaction that did not trigger reporting requirements under the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act. Two days after the transaction was consummated, the Department of Justice, Antitrust Division (DOJ) launched an investigation and later filed a civil suit on January 10, 2013. In its complaint, the DOJ alleged that Bazaarvoice had acquired PowerReviews to eliminate its most significant competitive threat and to stem price competition, in violation of Section 7. As part of the relief sought, the DOJ requested that the court order divestitures of assets from the transaction consummated months earlier that would be "sufficient to create a separate, distinct, and viable competing business that can replace PowerReviews' competitive significance in the marketplace."

After a three-week trial that included testimony from 40 live witnesses and 980 exhibits, the district court issued a 141-page decision that affirmed virtually all the DOJ's arguments as to why the transaction was anticompetitive. The court accepted the DOJ's narrow market definition (ratings and review platforms in the United States), in which Bazaarvoice and PowerReviews had a combined market share exceeding 50 percent, based largely on the defendants' own internal documents and witness testimony. The court also rejected Bazaarvoice's contention that entry by other firms could counteract the alleged anticompetitive effects based on companies' documents suggesting "significant barriers to entry."

The district court's opinion addressed only Bazaarvoice's liability. A hearing is set for January 22, 2014 to begin the remedy proceedings.

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Implications

Be Careful What You Put Down On Paper

The companies' own internal documents played a pivotal role in the litigation. Although it is not surprising that the DOJ's complaint and the district court's opinion were riddled with quotes from the companies' e-mails, board presentations, SEC filings, and notes taken during executive meetings, the fact that the court devoted over 20 pages of its decision to a thorough examination of these "bad" documents is unusual. Perhaps in an effort to focus the district court on the significance of these documents, the DOJ's opening and closing presentations extensively highlighted and summarized this key evidence. These documents played a critical role in the court's acceptance of the government's *prima facie* case (including its definition of the market), and they undermined Bazaarvoice's ability to rebut the DOJ's theories regarding its motives in pursuing the transaction and likely effects the merged entity would have on the market.

Customers' Testimony May Not Carry The Day

In contrast to other courts' treatment of customer testimony in merger litigation, the district court here discounted "[t]he fact that none of the more than 100 current, former and potential customers who testified in this case believed that the acquisition had harmed or would harm them." Despite finding Bazaarvoice customers "the most credible sources of information on their need for, use of and substitutability of social commerce products," the court found that as to the "impact and likely effect of the merger" customer testimony was "entitled to virtually no weight." In other words, the court found customer testimony persuasive for market definition purposes but nearly irrelevant for evaluating the transaction's competitive effects. The court was dismissive of customer testimony regarding competitive effects because, according to the court, many of the customers had given little or no thought to the merger, had little or no knowledge of alternatives, or were not currently using the relevant products, but they nonetheless expressed opinions about the merger.

Although there was a different outcome, the court's rationale in *Bazaarvoice* appears to be consistent with its 2004 decision in *United States v. Oracle Corp.*, in which this same district court rejected a DOJ challenge to the merger between Oracle Corp. and Peoplesoft Inc. In *Oracle*, the DOJ offered customer testimony that the court disparaged as "devoid of any thorough econometric analysis." This time, the DOJ convinced the court that the customer testimony offered by Bazaarvoice lacked "the sort of 'serious analysis' courts have required from customer witnesses in other Section 7 cases." Essentially, the court extended the same treatment to the positive customer testimony offered by Bazaarvoice as it did to the negative customer testimony offered by the DOJ in *Oracle* – it discredited customers as a source of unbiased and well-informed evidence.

In addition, the court did not consider the lack of evidence of a price effect post-merger dispositive and noted that the company's conduct after the deal went through was probably "tempered" by the fact that the DOJ began investigating the deal almost immediately.

The Rationale for The Transaction Is Important

To overcome presumptions of anticompetitive effect, it is important for merging parties to have a strong procompetitive rationale for the transaction, such as giving the combined company the scale and scope necessary to compete more effectively against much larger and financially stronger competitors. In the *Bazaarvoice* opinion, the court found that the procompetitive rationale was unconvincing and that Bazaarvoice could not rebut the government's evidence of anticompetitive effects with legitimate business justifications, because its pre-acquisition documents stated that acquiring PowerReviews would eliminate its "primary competitor" and provide "relief from [] price erosion."

Also, although the court recognized the dynamic changes in the high-tech industry, it ultimately concluded that those changes were likely not quick enough in a two-year timeframe to overcome the likelihood of the anticompetitive effects created by the merger. In particular, the court acknowledged that ratings and review platforms are part of a "broader

social commerce and eCommerce economy,” that such markets evolve over time, and that a number of large, sophisticated online companies (*e.g.*, Facebook) could enter the market, but the court nevertheless employed the same traditional antitrust analysis that it would apply to any other industry. Specifically, the court relied on customer testimony and “bad” documents to define the relevant market, focused on the closeness of competition between the parties, and though recognizing potential entry by other companies, pointed out that these other companies had no plans to enter the market within two years.

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The DOJ’s victory in *Bazaarvoice* indicates the agency’s willingness to challenge consummated mergers and serves as a reminder to those considering transactions that do not meet the HSR reporting requirements that it is still necessary to evaluate the potential risk of antitrust enforcement. It also marks the second recent merger litigation victory for the DOJ. In 2011, the DOJ successfully challenged H&R Block’s proposed acquisition of TaxAct, and also used those companies’ documents to establish a relatively narrow market definition and demonstrate that the deal would have anticompetitive effects. Going forward, parties should be mindful that “bad” company documents can create significant risks that are difficult to overcome in litigation and should assess critically the analytic strength of customer support for a given transaction.

Documents

The DOJ press release (Jan. 9, 2013) is available at http://www.justice.gov/atr/public/press_releases/2014/302941.htm.
The district court opinion (Jan. 8, 2013) is available at <http://www.justice.gov/atr/cases/f302900/302948.pdf>.
The DOJ complaint (Jan. 10, 2013) is available at <http://www.justice.gov/atr/cases/f291100/291187.pdf>.

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