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# Some Lessons from *Bazaarvoice*

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## I. INTRODUCTION

On January 8, 2014, Judge Orrick of the Northern District of California found that a consummated merger between Bazaarvoice and PowerReviews violated Section 7 of the Clayton Act.[2] Bazaarvoice and PowerReviews were the only two major third-party providers of ratings and review ("R&R") platforms, which provide online shoppers the opportunity to comment on purchases and allow prospective buyers to see how other consumers rated products.

The court referred frequently to the 2010 Horizontal Merger Guidelines, though Judge Orrick largely conducted a more traditional analysis that would fit comfortably within the 1992 Guidelines, finding that the Department of Justice established a *prima facie* case of likely competitive harm and Bazaarvoice failed to rebut it. In and of itself the conclusion that a merger to monopoly violates the Clayton Act is not surprising, but there are a number of points worth considering in the court's opinion.

## II. THE ROLE OF THE PARTY DOCUMENTS

One of the most talked about aspects of the case is the important role played by the ordinary course documents. As almost every commentator has observed, the party documents were absolutely crucial in this instance. The Antitrust Division built its case around the documents, and at trial Bazaarvoice found itself in the difficult position of needing to rebut the words of its own executives. Bazaarvoice attempted to do that in several different ways. It argued that the R&R market included numerous significant competitors, it offered testimony that the R&R market was becoming commoditized, and it explained that it had made a business decision that Bazaarvoice needed to merge with PowerReviews in order to pivot towards competing in a broader E-commerce market.

Although Judge Orrick credited to some extent the notion that Bazaarvoice might be interested in shifting its business towards a broader E-commerce offering, he completely rejected the argument that this shift was the basis for the acquisition. The opinion repeatedly and sometimes pointedly expresses the view that the pre-merger ordinary course documents contradicted this proffered rationale. In fact, dozens of quotes from Bazaarvoice executives are woven throughout the opinion to support Judge Orrick's view that Bazaarvoice's primary reason for acquiring PowerReviews was to eliminate its main competitor in the market.

For example, prior to the merger Bazaarvoice's then-CFO acknowledged that the company had "literally no other competitors"[3] besides PowerReviews. Other representative

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[2] *U.S. v. Bazaarvoice*, Case No. 13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014).

[3] *Bazaarvoice,* slip op. at 30.

documents stated that the benefit of the merger would be "'monopoly in the market'[4] and the 'possibility of reducing the discounting . . . seen in the marketplace.'"[5] One of the most colorful documents noted that the merger would "'avoid market erosion' caused by 'tactical knife-fighting over competitive deals.'"[6] The court credited these documents, not the respondent's trial testimony to the contrary, and it seems possible that these documents also colored the court's view of other issues in the case.

## III. CUSTOMER TESTIMONY

Another noteworthy aspect of the decision is that the court disregarded a substantial amount of testimony from customers who stated that they had not been harmed by the merger. Judge Orrick found that such testimony was mostly uninformed because, among other things, the purchase of R&R services was not a central focus of customers and customers did not have access to the economic evidence available to the court.[7] This decision echoes the approach taken in *Oracle*, in which the court also discounted customer trial testimony (in that case attacking the merger as anticompetitive) for largely the same reasons.[8]

The court's opinion is interesting, in particular, when one considers how much emphasis the antitrust agencies routinely put on customer views during the course of their investigations. Public merger data released by the FTC confirm what most practitioners have found via experience—a high percentage of challenges brought by the agencies are supported by customer complaints.[9] In fact, the 2010 Guidelines themselves note that the agencies value input from customers and even indirect customers.[10] So customer views clearly remain significant to the agencies, though courts are perhaps more carefully scrutinizing that testimony to be sure that it represents a well-informed and thoughtful assessment of the transaction, based on practical market knowledge.

## IV. ANTITRUST AND HIGH-TECH MARKETS

Possibly the most significant aspect of the case from the point of view of the antitrust agencies and other future plaintiffs was the way the court handled two issues which are sometimes thought to make it difficult to bring cases in high-tech markets—the arguments that high-tech markets are not susceptible to traditional antitrust analysis and that entry in high-tech markets is so easy that any market power is constrained. The antitrust agencies have consistently maintained the view that the antitrust laws are sufficiently broad and sufficiently flexible to allow

[4] *Id.* at 34.

[5] *Id.* at 30.

[6] *Id.* at 29.

[7] "Post-merger customer testimony is entitled to limited weight given the customer's narrow perspective . . . . Many of the customers had paid little or no attention to the merger; and each had an idiosyncratic understanding of R&R based on the priorities of their company." *Id.* at 138.

[8] *U.S. v. Oracle Corp.*, 331 F.Supp.2d 1098, 1131 (N.D. Cal. 2004) ("If backed by credible and convincing testimony of this kind or testimony presented by economic experts, customer testimony of the kind plaintiffs offered can put a human perspective or face on the injury to competition that plaintiffs allege. But unsubstantiated customer apprehensions do not substitute for hard evidence.").

[9] *See* Horizontal Merger Investigation Data, Fiscal Years 1996-2011, http://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011, at page 19-20, Tables 7.1, 7.2, 8.1, 8.2.

[10] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010) § 2.2.2-2.2.3.

for appropriate application to any market. Judge Orrick noted the ongoing controversy surrounding this issue, and while he stated that "[i]t is not the Court's role to weigh in on this debate…." he went on to effectively side with the antitrust agencies by finding "[t]he Court's mission is to assess the alleged antitrust violations presented, irrespective of the dynamism of the market at issue."[11] The court thus rejected the notion that any particular market should be treated differently under or exempt from the antitrust laws.

The court also rejected the argument that companies such as Google, Facebook, and Amazon have sufficient resources and technological ability to enter rapidly, and thus constrain any potential price increase. The court emphasized that there was "no evidence that any company had made even preliminary analyses of the viability of joining the market."[12]

Judge Orrick then sounded a larger theme about competition in high-tech markets, noting that the mere existence of well-funded, technologically savvy players in the broader E-commerce market would not, in and of itself, justify consolidation in specific market segments. "Companies do not simply enter any market they can—they will only do so if it is within their strategy to do so and they have the requisite ability to do so . . . . To conclude otherwise would give eCommerce companies carte blanche to violate the antitrust laws with impunity with the excuse that Google, Amazon, [and] Facebook . . . stand ready to restore competition to any highly concentrated market."[13]

In essence, the court found that there are no special antitrust rules for the internet, in particular rejecting the notion that entry should routinely be considered as easy in the E-commerce sector. This holding will certainly be a prominent part of agency briefing in any future enforcement actions in high-tech internet markets.

## V. CHALLENGING CONSUMMATED DEALS

The case also provides confirmation that the agencies will continue to challenge consummated deals. The size of the transaction is not a barrier, and neither is the age of the transaction. Mergers to monopoly, of course, are almost always a cause for concern to the agencies, but the issue needs not be that stark. There have been a number of such challenges in the last several years and the agencies have been clear that if they come upon deals that they believe raise competitive problems they will challenge them.[14]

Further, the *Bazaarvoice* opinion affirms that when such challenges occur they are reviewed under the same substantive standards as are unconsummated mergers. "Supreme Court authority predating the enactment of the HSR Act establishes and affirms the burden-shifting framework for analyzing Section 7 cases and applies equally to pre- and post-merger cases."[15] The court specifically dismissed respondent's argument that Ninth Circuit case law required an "alternative methodology" for post-merger cases.

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[11] *Bazaarvoice,* slip op. at 141

[12] *Bazaarvoice,* slip op. at 133.

[13] *Id.*

[14] *See, e.g.*, *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1211 (11th Cir. 2012) (upholding divestiture order where two of three battery separator producers merged).

[15] *Bazaarvoice,* slip op. at 140.

## VI. REMEDY

Finally, the issue of remedy is an important one raised by this case, though it remains unclear how that will be resolved. The court found that the government was "entitled to an injunction that requires Bazaarvoice to divest PowerReviews," but also noted that such a divestiture is "not a simple proposition 18 months after the merger."[16] The government has had a mixed record in obtaining substantial relief in other consummated merger cases, and it is unclear what it can achieve in this instance.[17]

The court has ordered briefing on this subject. The Antitrust Division asked for the divestiture of all the PowerReviews assets obtained by Bazaarvoice, as well as a number of conduct remedies designed to restore the market to the competitive state it would have been in had the transaction not occurred. It is, of course, virtually impossible to know with any degree of certainty or precision what that state is and, not surprisingly, the parties have a different view of both what legal standards are appropriately applied and what is necessary in this particular situation.

The Antitrust Division argues that any uncertainty should be resolved in its favor[18] and any steps necessary to restore competition in the market should be taken, even if those steps are "harsh."[19] Some of those requests may indeed be seen as somewhat aggressive, in particular the recommendation that Bazaarvoice be required to provide the divestiture buyer with a perpetual, irrevocable license to the most recent version of the Bazaarvoice platform (if the revenue associated with the divested customers does not represent at least 80 percent of the revenue of the original PowerReviews customer base).[20] Bazaarvoice takes particular exception to that request and contests the need for most of the specific remedies requested by the Antitrust Division, emphasizing the need to avoid "punitive" remedies.[21] The court has set a hearing for early April to address these points.

## VII. CONCLUSION

*Bazaarvoice* was a big victory for the Antitrust Division, and it offers important guidance on a number of substantive antitrust issues. It remains to be seen whether the reality of competition in this particular market allows for an effective remedy.

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[16] *Id.* at 10.

[17] *Compare, e.g.*, *Polypore*, 686 F.3d at 1218-19 (11th Cir. 2012) (upholding divestiture order requiring complete divestiture of Microporous, including an out-of-market manufacturing plant) and *Chicago Bridge and Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008) (upholding order requiring firm to split into two divisions and divest one) *with, e.g.*, *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013) (state action doctrine did not prevent antitrust enforcement, but subsequent consent order did not order separation of the entities, merged since 2010) and *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (merger violated Section 7 and subsequent consent order required Whole Foods to sell Wild Oats brand name and 32 stores, but buyers were only found for three).

[18] Brief of Plaintiff at 3, *U.S. v. Bazaarvoice*, Case No. 13-cv-00133-WHO, Doc. 249 (N.D. Cal. Feb. 12, 2014).

[19] *Id.* at 13.

[20] *Id.* at 12.

[21] Brief of Defendant at 9, *U.S. v. Bazaarvoice*, Case No. 13-cv-00133-WHO, Doc. 249 (N.D. Cal. Mar. 4, 2014).