CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

March 2014 (1)

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I. INTRODUCTION

In a significant victory for the Department of Justice, the U.S. District Court for the Northern District of California recently held that Bazaarvoice's completed acquisition of rival PowerReviews violated the antitrust laws.[2] Bazaarvoice acquired PowerReviews in June 2012 in a $160 million transaction that was exempt from the HSR Act's reporting and waiting period requirements because the target did not satisfy the HSR Act's size-of-person test. Days after the acquisition closed, the DOJ opened an investigation that led to the filing of a complaint in January 2013. After a three-week trial, and relying heavily on the parties' internal documents, the court found that PowerReviews was Bazaarvoice's closest and only serious competitor in the market for "rating and review" platform services sold to e-commerce businesses.

The court's opinion cites dozens of internal documents showing that, prior to the merger, "Bazaarvoice considered PowerReviews its strongest and only credible competitor, that the two companies operated in a duopoly, and that Bazaarvoice's management believed that the purchase of PowerReviews would eliminate its only real competitor." More than 100 Bazaarvoice customers testified at trial or through deposition that the acquisition had not harmed them, but the court found their testimony "speculative at best," and therefore "entitled to virtually no weight." Similarly, the court gave little weight to post-acquisition evidence regarding the transaction's effect on pricing, holding that, since Bazaarvoice was aware of the DOJ's pending investigation, such evidence was subject to manipulation.

The court found that the government would be entitled to an injunction requiring the divestiture of PowerReviews, but acknowledged, "that is not a simple proposition 18 months after the merger" and scheduled a hearing to discuss potential remedies. In a recently filed motion, the DOJ urged the court to order divestiture of all PowerReviews assets acquired by Bazaarvoice and require Bazaarvoice to provide certain services to the buyer to build up its customer base. Alternatively, if the PowerReviews assets are no longer viable to successfully compete in the market for rating and review platforms, the DOJ asked the court to order Bazaarvoice to license its own ratings system to a buyer.

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

II. HOT DOCUMENTS

With its focus on the parties' internal documents, the opinion is an important reminder of the critical role that such documents play in antitrust merger review. *Bazaarvoice* may be an extreme case of bad documents, but merging parties' internal documents always shape the agencies' and courts' views significantly, and unhelpful, hyperbolic, or overly aggressive language can dramatically undermine the parties' defense. In another recently litigated merger, the DOJ's 2011 challenge to H&R Block's proposed acquisition of TaxAct, the court similarly relied on the defendants' ordinary course of business documents in determining the relevant market, and concluded that they supported the market definition alleged by the DOJ, a finding that represented a critical blow to the defendants' case.[3] Trying to refute the parties' own internal documents before the antitrust agencies or in court is always an uphill battle, and the key lesson from *Bazaarvoice* is that businesses and their advisors must always be mindful of what their documents say about industry competition and their rationale for a transaction.

If the *Bazaarvoice* court's reliance on internal documents is nothing new, the weight the opinion appears to give to the parties' intent is somewhat more surprising. The court acknowledges that "intent is not an element of a Section 7 violation," but it places considerable emphasis on the "premerger evidence of anticompetitive intent," noting that "anticompetitive rationales infused virtually every pre-acquisition document describing the benefits of purchasing PowerReviews." The implication seems to be that, if Bazaarvoice intended to enter into the transaction to eliminate a close competitor, then the merger must be anticompetitive. In other words, the court appears to rely on evidence of the buyer's motives for the merger as a basis to predict the merger's likely effects on competition and to establish a Section 7 violation. Rather than one of many indicia that inform the analysis, in *Bazaarvoice* the parties' intent becomes the dispositive factor.

III. CUSTOMER TESTIMONY

In contrast with the emphasis on hot documents, the *Bazaarvoice* opinion dismisses the probative value of customer testimony. Finding that customers "generally do not engage in a specific analysis of the effects of a merger," the court expresses skepticism as to their ability to testify on this issue. And while customer testimony may have been particularly unpersuasive in *Bazaarvoice* given that many customers "had given no thought to the effect of the merger or had no opinion," the District Court for the Northern District of California was similarly dismissive of customer witnesses in the DOJ's failed challenge to Oracle's acquisition of PeopleSoft in 2004.[4]

In *Oracle*, the DOJ relied heavily on customer complaints, presenting 10 customer witnesses at trial, but the court questioned the grounds upon which they offered their opinions on market definition and competitive effects. The court found that the customers had speculated on the issue of what they would do if faced with a price increase post-merger, and concluded that "unsubstantiated customer apprehensions do not substitute for hard evidence." The outcomes for the DOJ in *Oracle* and *Bazaarvoice* were different, but the court's disregard for customer

[3] *U.S. v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).
[4] *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

testimony was strikingly similar. Here, the lesson seems to be that customer support, while generally helpful before the antitrust agencies, is unlikely to be sufficient to win the day in court.

The court's disregard for customer testimony, however, is questionable. As the 2010 Horizontal Merger Guidelines make clear, the antitrust agencies usually find customer opinions highly relevant. The Guidelines indicate that the "conclusions of well-informed and sophisticated customers on the likely impact of the merger [can] help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers."[5]

A recent FTC report on horizontal merger investigations covering the fiscal years 1996 to 2011 shows that the FTC relies heavily on customer views in its enforcement decisions. The report reveals that the FTC challenged almost all mergers in which strong customer complaints were present, while it challenged less than half of the transactions where such complaints were absent.[6] Similarly, a senior DOJ official recently acknowledged the importance of customer reactions in merger investigations, noting that the DOJ looks to customers to help "identify, understand, and challenge anticompetitive conduct and transactions."[7]

The agencies correctly recognize that customers directly experience the effects of a merger and are therefore well positioned to predict its competitive impact. While there may be situations where customer testimony should be discounted, such as when the customer witnesses are not representative or not sufficiently informed or unbiased, generally customer views regarding the likely competitive effects of a merger are given considerable weight. This should be the case, *a fortiori*, when customers support a merger of two competing suppliers—a transaction that will inevitably lead to fewer options for them, even when the merging parties are not close competitors or the market is not concentrated.

IV. THE ROLE OF ANTITRUST IN HIGH-TECH MARKETS

Bazaarvoice will likely add fuel to the debate over the proper role of antitrust enforcement in rapidly evolving high-technology markets. Some observers have argued that special caution should be used in these markets because—in the words of the Court of Appeals in *Microsoft*—"rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product enhancement."[8]

The antitrust agencies, on the other hand, believe that antitrust enforcement has an important role to play in the high-tech industry, particularly in protecting innovation, a goal that is often a decisive factor in enforcement decisions involving mergers of technology companies. As indicated in a recent speech by a senior DOJ official, while "the rapid pace of change in technology markets can sometimes minimize the potential for the accumulation or misuse of

[5] *DOJ and FTC Horizontal Merger Guidelines* (Aug. 2010), § 2.2.2.

[6] FTC, *Horizontal Merger Investigation Data: Fiscal Years 1996-2011* (Jan. 2013).

[7] Renata B. Hesse, Deputy Assistant Attorney General, U.S. Dept. of Justice, *At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement* (Jan. 22, 2014).

[8] *U.S. v. Microsoft*, 253 F.3d 35, 49 (D.C Cir. 2001).

market power, other common attributes of high-tech markets counsel careful scrutiny."[9] Among such attributes, network effects are common in some high-tech markets while in others, particularly platform markets, tipping can occur, resulting in a "winner take all" outcome—characteristics that can exacerbate the potential for competitive harm and therefore justify the government's intervention.

The *Bazaarvoice* opinion vindicates the DOJ's position with respect to the applicability of the antitrust laws in the high-tech industry. In *Bazaarvoice*, the court acknowledged the debate and recognized that the e-commerce industry is at an early stage of development, rapidly evolving, and subject to potential disruption by technological innovations, all of which makes its future composition unpredictable. Nevertheless, the court concluded, "while Bazaarvoice indisputably operates in a dynamic and evolving field, it did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects." In particular, the court held that the "fact that [e-commerce] tastes and products are developing and constantly changing does not diminish the applicability of the antitrust laws—they apply in full force in any market. There is no antitrust exemption that allows the market-leading company in a highly concentrated market to buy its closest competitor, even within the evolving social commerce space, when the effect is likely to be anticompetitive."

Similarly, the court found that, despite the dynamic and evolving nature of the rating and review platforms market, network effects and high switching costs are significant barriers to entry, and rejected the idea that tech companies can defend an anticompetitive merger simply by pointing to the existence of well-funded companies in adjacent markets. Applying a traditional entry analysis, the court concluded:

> [t]he marketplace may be filled with many strong and able companies in adjacent spaces. But that does not mean that entry barriers become irrelevant or are somehow more easily overcome. To conclude otherwise would give eCommerce companies carte blanche to violate the antitrust laws with impunity with the excuse that Google, Amazon, Facebook, or any other successful technology company stands ready to restore competition to any highly concentrated market.

In particular, and somewhat surprisingly, the court concluded that Amazon could not be considered a rapid entrant, despite two facts: (i) it has an in-house rating and review solution for its own website that, according to the DOJ's economic expert, accounts for a 28 percent share of the market, and (ii) testimony from a company executive that Amazon "almost daily" considers entry into the commercial supply of rating and review platforms.

V. *BAZAARVOICE*'S IMPACT ON FUTURE MERGER ENFORCEMENT

Bazaarvoice is the DOJ's second major merger court victory during the Obama administration. In 2011, the DOJ prevailed at trial in its challenge to H&R Block's proposed acquisition of TaxAct, the first win in a fully litigated merger case since its 2004 defeat in *Oracle*. Coming after a long drought, the *H&R Block* outcome has had a significant impact on the agency's willingness to challenge mergers in court. Since then, the DOJ has shown a more aggressive stance towards merger litigation, challenging a number of high-profile transactions,

[9] Renata B. Hesse, *At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement* (Jan. 22, 2014).

including AT&T's proposed acquisition of T-Mobile, Anheuser-Busch InBev's proposed acquisition of Grupo Modelo, and, most recently, the proposed merger of US Airways and American Airlines. If anything, the latest win in *Bazaarvoice* may further embolden the DOJ's litigation strategy.

Bazaarvoice does not represent a departure from the past, nor should it be expected to have a major impact on future merger enforcement. The case, however, highlights an increased scrutiny of non-reportable transactions, which may be attributable—at least in part—to excess enforcement capacity at the agencies caused by the drop in the number of reportable deals following the recession. Just a few days before the court issued its opinion in *Bazaarvoice*, the DOJ challenged another consummated acquisition by Heraeus Electro-Nite, requiring a clean sweep divestiture of the acquired assets.[10] And a few weeks later, the FTC prevailed in its challenge to St. Luke's completed acquisition of Saltzer Medical Group, with the U.S. District Court for the District of Idaho holding that the transaction violated the antitrust laws and must be unwound.[11]

These actions underscore the antitrust risks buyers assume in these deals. As discussed in a recent client memo, while parties to HSR-exempt mergers sometimes operate under the misimpression that antitrust concerns are moot, ignoring the issue effectively transfers all antitrust risk to the buyer at closing. Before entering into such transactions, buyers should consider the substantive antitrust issues raised by the acquisition just as they would in a reportable deal, including the feasibility of remedies short of clean sweep divestitures, the practicality of unscrambling assets post-integration, and the impact on their business in the event of a future mandated divestiture.

[10] *U.S. v. Heraeus Electro-Nite Co., LLC*, Case 1:14-cv-00005 (D.D.C. Jan. 2, 1014).

[11] *FTC v. St. Luke's Health System, Ltd.*, Case No. 1:13-CV-00116-BLW (D. Idaho Jan. 24, 2014).