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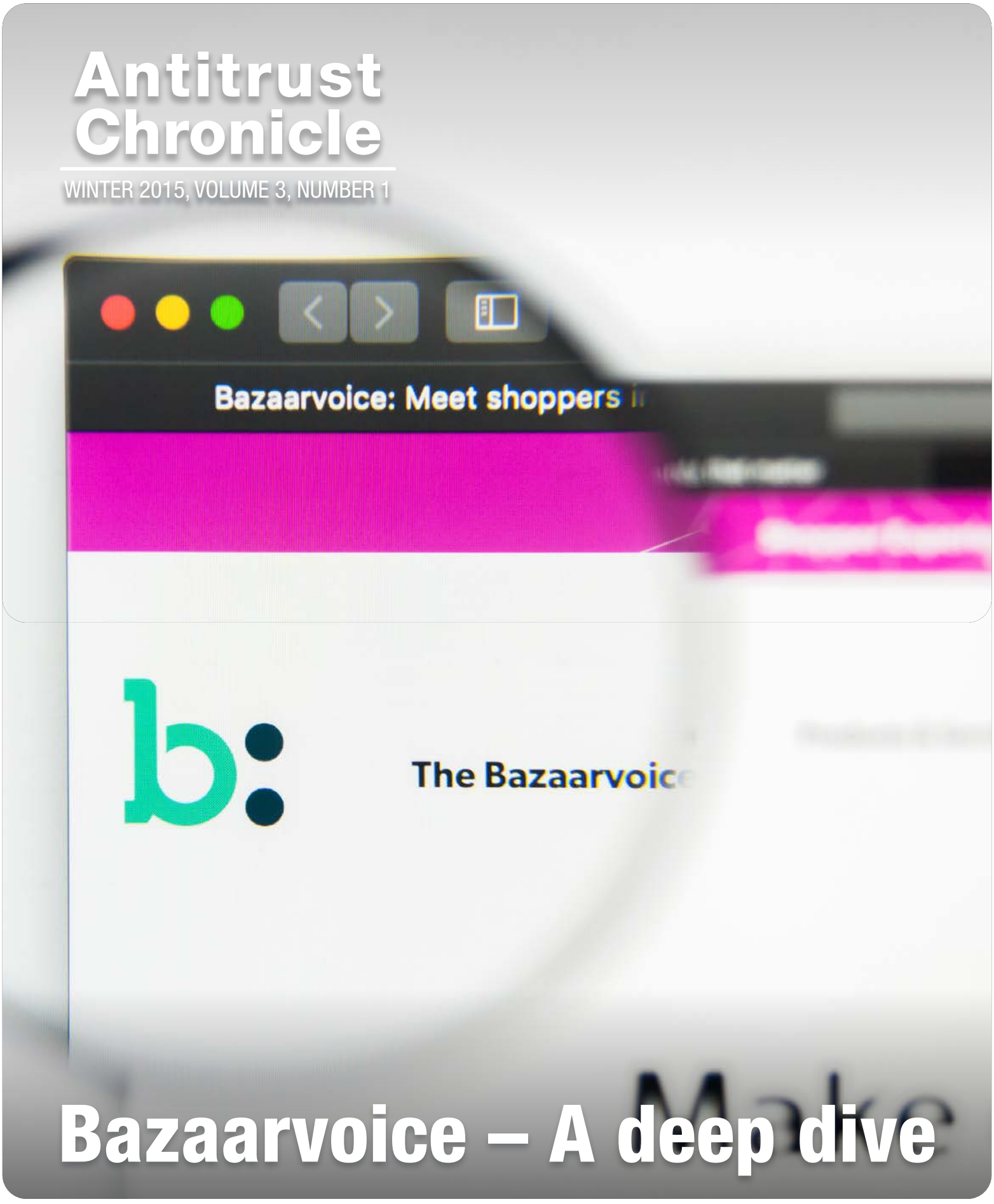

Bazaarvoice – A deep dive

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Some Lessons from *Bazaarvoice*

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Peter J. Levitas[1]

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).

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Bazaarvoice: Protecting Consumers by Silencing the Customer?

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Bazaarvoice: Protecting Consumers by Silencing the Customer?

Tim Muris & Christine Wilson[1]

When the Department of Justice challenged as unlawful the proposed merger of Oracle Corp. and Peoplesoft Inc., it relied heavily on customer testimony in presenting its case. The U.S. District Court for the Northern District of California in 2004 discounted the reliability of the customer testimony and, in a stinging defeat for DOJ, allowed the deal to proceed.[2] Ten years later, the DOJ challenged the legality of the consummated merger of Bazaarvoice and PowerReviews in the same federal district court. Making lemonade out of lemons, DOJ invoked *Oracle* in urging the court to discount the testimony of more than 100 customers favorable to the deal. Extending the lineage of *Oracle*, *Arch Coal*,[3] and the Baby Foods case,[4] the *Bazaarvoice* court earlier this month stated, "it would be a mistake to rely on customer testimony about effects of the merger," and ruled for the DOJ.[5]

Prior to their merger in June 2012, Bazaarvoice and PowerReviews had been the two leading providers of Rating and Review Platforms ("RR Platforms"), packages of software and services that manufacturers and retailers purchase to allow their customers to write and post product reviews. The DOJ alleged, and the court agreed, that Bazaarvoice's purchase of PowerReviews eliminated its "only meaningful commercial competitor" in the U.S. market for RR Platforms. Finding (i) that the merger granted Bazaarvoice market power by raising its market share from approximately 40 percent to 60 percent, (ii) that entry and expansion were unlikely to dilute Bazaarvoice's newfound market power, and (iii) that the efficiencies would be insufficient to offset likely consumer harm, the court concluded that the merger violated Section 7 of the Clayton Act.

Bazaarvoice is remarkable more for its reasoning rather than its result. Typically, the antitrust agencies find customer reactions probative of the likely competitive effects of a merger. In the wake of the *Oracle* decision, the heads of both federal antitrust agencies expressed strong support for the use of customer statements when evaluating a merger, and the *Horizontal Merger*

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[2] *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[3] *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[4] *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000).

[5] *U.S. v. Bazaarvoice Inc.*, 13-cv-00133-WHO, slip op. at 8 (N.D. Cal., Jan. 8, 2014).

Guidelines issued jointly by the DOJ and FTC in 2010 explicitly endorse the usefulness of "[t]he conclusions of well-informed and sophisticated customers."[6]

Moreover, merger challenge data released by the FTC reveal that strong complaints from customers almost always lead to a government challenge. Although the data do not permit us to test the point, most antitrust lawyers would agree that strong support from sophisticated customers generally leads to a merger's approval. In fact, aside from the number of significant competitors in the relevant market (with 4 to 3 being the marginal case in most industries), one of the most important factors in gauging likely government reaction to a merger is the response of sophisticated customers.

Nevertheless, some judges have been quite hostile to customer testimony. Their extreme skepticism differs notably from that of the typical antitrust lawyer. Antitrust enforcers—who routinely assess the competitive effects of mergers, and consequently should be viewed as experts—invariably seek the reactions of customers when evaluating mergers. Judges, in contrast, have very limited experience in evaluating mergers. We believe the experts are more correct than the judges, especially about the general role of customers.

This is not to say that the experts cannot, and should not, be second-guessed. Indeed, Judge Walker's dismissal of the customer testimony in *Oracle* had a solid foundation, a point to which we return below. But the *Oracle*, *Arch Coal*, and *Baby Foods* judges were doing more than questioning whether the particular customers before them had a point. Instead, they attacked fundamentally government reliance on customer complaints.

Take, for instance, the judge in *Baby Foods*. While ruling against the government, he precluded as speculative the best evidence that he had to approve what was, on the surface at least, a three-to-two merger. The customers, in this case large grocery store chains, overwhelmingly supported the merger of the second and third largest baby foods manufacturers, in large part because they thought that the merger would, at last, create substantial competition for Gerber. Gerber held over 60 percent of the market, and, in the views of these customers, was "milking" the business and making the category stagnant. When the government objected to customer testimony on what they expected competitive effects to be, the judge agreed and excluded the testimony. In line with the thinking of the *Oracle* and *Arch* judges four years later, he did not understand why these customers should be allowed to speculate.

One answer, of course, is that the whole merger review enterprise is speculative. Indeed, it is—and despite the advances in economic analysis, lawyers are rightly uncomfortable with the *ad hoc* nature of current competitive effects analysis. Perhaps for this reason they reach for the security blanket of customer testimony. The issue for us is whether they are like Linus in the Peanuts cartoon, clutching his blanket against a large and difficult world. Or, instead, does relying on customer testimony provide an important source of evidence and a sound input in assessing a merger's ultimate effects?

Obviously, the views of the customers must be tested. Thus, in *Oracle*, if there was a market, it was one involving large enterprise customers. Because there are hundreds of such

[6] DOJ/FTC Horizontal Merger Guidelines §2.2.2 (Aug. 19, 2010).

enterprises, customer views must be handled with care. With even 20 such customers, how do we know they are a representative sample? While we are sympathetic to this part of Judge Walker's opinion, he went even further. He implied, in striking language, that some of the largest businesses in the world did not know of what they spoke.

We agree with those who argue that it is important to ensure that customer testimony is informed and not based on anticompetitive incentives. The court in *Bazaarvoice* arguably sought to screen the views of testifying customers in this way. In declining to rely on customer testimony, the court cited the opaque pricing structure of the industry (which limits a customer's ability to "discern what is actually happening in the market"), the fact that Bazaarvoice's post-merger conduct was "likely tempered by the government's immediate [post-merger] investigation," the customers' lack of access to economic evidence, the fact that few customers followed the merger, and the existence of "different levels of knowledge, sophistication, and experience."[7] Furthermore, although not explicitly mentioned, the judge may have viewed the presence of many inflammatory internal documents as weakening the credibility of contrary customer evidence.

Nevertheless, we also have great respect for the invisible hand of the market, and for the ability of businesses to create wealth, if not always to be able to explain themselves in a courtroom. For these reasons, we believe that once customers have passed sufficient screens, their views regarding the ultimate competitive effects of a merger should be given great weight.

One basis for our conclusion concerns the policy judgment that underlies the so-called business judgment rule. This rule essentially requires judicial abstention from second-guessing corporate decisions based in part on the relative expertise of corporate boards *vis à vis* judges and courts. The business judgment rule creates the presumption that corporate directors and officers act on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation.[8] If, however, a court finds that a corporation's directors or officers acted with gross negligence, in bad faith, or based on fraud or self-dealing, they lose the protections of the business judgment rule. States have adopted the business judgment rule based on varying standards—the Delaware common law standard, the American Law Institute principle, and the Model Business Corporation Act. These standards provide significant deference to boards of directors and officers based on their greater knowledge and experience in directing the affairs of a corporation.

As early as 1919, in the famous *Dodge v. Ford Motor Company* case, the Michigan Supreme Court recognized its lack of business expertise and refused to enjoin Henry Ford's plans to expand production. The business judgment rule explicitly recognizes the difficulties that judges face in determining whether judgments are in the corporation's or shareholders' best interests, and in evaluating the many factors weighed in making business decisions that may be unknown or unclear to the court.

This rationale for the business judgment rule applies to customer testimony on mergers. It is certainly appropriate to assess whether customer views are representative, informed, and

[7] *Bazaarvoice, supra* n. 5, at *8, *116-18.

[8] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

unbiased. If they meet these qualifiers, it is hard to see how judges can reasonably choose to rely on their own or economists' intuitions at the expense of customers' relative experience and expertise, absent strong evidence to the contrary. It is the customers who will most directly experience the effects of a merger; their self-interest, combined with their experience in the industry, ensures that their views will provide informative evidence.

We return to *Baby Foods* as an illustration. In that case, the customers—whose stores sell hundreds of products—were well-positioned to perceive that the dominant firm did not face sufficient competition and to conclude that the proposed merger likely would have the beneficial effect of shaking up the stagnant category. In fact, a retrospective analysis conducted several years later provides support for the customers' views.[9] In the absence of the merger, the product category has remained "stale" and the share of the dominant firm has grown.

In *Baby Foods* and *Bazaarvoice*, the customers supported the merging parties, while in *Arch Coal* and *Oracle* they opposed them. Because customers will bear the brunt of any anticompetitive effects, there may be even more reason to trust them when they support a merger. But customers who voice opposition to a merger, again assuming they pass proper screens (including screening for the possibility that they may be trying to "hold up" the merging parties) deserve our consideration as well. It is not always easy to oppose a transaction that, if approved, will force the customer to deal with the new reality of an even larger supplier.

We are ***not*** saying that economists cannot develop reliable evidence sufficient to persuade us that those closest to the market are wrong. We ***are*** saying that the intuition of antitrust enforcement lawyers to rely on the views of those customers is correct. Customer reactions provide crucial evidence of likely competitive effects, and should be given great weight by both the agencies and the courts.

[9] Viola Chen, *The Evolution of the Baby Food Industry 2000-2008*, FTC Working Paper 297 (April 2009).

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Blind Umps & Blown Calls: The Troubling Decision to Ignore "Arguably Manipulable" Evidence in *United States v. Bazaarvoice*

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Blind Umps & Blown Calls: The Troubling Decision to Ignore "Arguably Manipulable" Evidence in *United States v. Bazaarvoice*

Thomas J. Dillickrath & Matthew B. Adler[1]

I. INTRODUCTION

Spring is the air, and this can mean only one glorious thing: the start of baseball season is near. Baseball should have a slightly different feel in 2014. We should expect fewer chest-bumping, dirt-kicking, irate managers storming out of dugouts to chastise umpires for perceived blown calls. Why? Instant replay. In 2014, Major League Baseball will implement the expanded use of instant replay. Managers can now calmly request that umpires take a second look at available evidence to avoid a blown call. Although a game may take a little longer, all parties involved (except maybe the losing team's fans) can take comfort in the outcome because theoretically all available evidence was used. Unfortunately, in the recent case of *United States v. Bazaarvoice*, the merged parties lack the ability to call for a review of all the available evidence, and instead will have to deal with a narrowly circumscribed view of the evidence that may have resulted in what is colloquially termed in baseball parlance a "blown call."

In *Bazaarvoice*, the Department of Justice successfully challenged the consummated merger of Bazaarvoice and PowerReviews.[2] U.S. antitrust authorities have, in recent years, shown a keen interest in challenging consummated mergers.[3] Consummated merger cases pose a unique set of challenges for both antitrust authorities and the courts. Of course, it is technically feasible—and even at times necessary—to disintegrate merging parties in extreme cases, but such instances should be rare. Courts and regulators should exercise extreme caution to avoid results that ultimately are antithetical to the primary purposes of the antitrust law—protecting competition and consumers.

Like many commentators, we believe that the decision in *Bazaarvoice* was wrong. In our view, the court was overly dismissive of post-merger evidence, effectively creating a new evidentiary rule insensitive to context and reflective of an older, classical jurisprudence ill-suited to the complexities of modern antitrust jurisprudence and, specifically, this case.

We do not mean to suggest that this was an "easy case"—indeed, there was a large body of conflicting evidence presented by the parties. But, it is less clear that this was a "hard case" that required the court to create a rule excluding whole chunks of evidence. Admittedly, the court did

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[2] *United States v. Bazaarvoice, Inc.*, 13-CV-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

[3] *See generally* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Consummated Merger Challenges—The Past Is Never Dead*, Remarks Before ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2012), *available at*: http://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf.

face the difficult scenario of weighing "noisy" real-world data showing no anticompetitive effects against structural evidence and economic modeling suggesting the merger was illegal. And, there is an undeniable paucity of binding judicial precedent related to judicial intervention in consummated mergers.

But, there does exist a body of relevant case law that would suggest that the court should have taken a more holistic—and pragmatic—view of the evidence, and if *Bazaarvoice* is seen as a new lighthouse in the fog of antitrust jurisprudence, the ironic result may be to obfuscate the path to clarity for merging parties in sub-HSR transactions. Indeed, the case suggests that parties can take no comfort in real-world post-merger experiences; rather, even the possibility of manipulation by the post-merger entity may be sufficient to unwind a challenged transaction.

II. IGNORING EVIDENCE: TIPPING THE SCALES

As noted, the court's treatment of post-merger evidence reflects a conscious decision to simply ignore real-world experience in favor of "might-have-beens." The court made important judgments determinative of the ultimate outcome based on the perceived lack of probative value of post-merger evidence.[4] The court found "post-merger customer testimony regarding the effect of the merger upon competition is . . . entitled to limited weight given the customers' narrow perspective . . . ."[5] The court also gave limited weight to post-merger evidence more generally because "such evidence *could arguably* be subject to manipulation."[6]

Perhaps ultimately the court may have been right in discounting the weight of such evidence and giving more credence to other evidence while still assigning some weight to the real-world post-merger experiences of the parties. But, the court instead elected to almost completely ignore this evidence in favor of (very) bad pre-merger documents supporting the government's case.

The court's failure to look at the evidence pragmatically is likely a function of how it sees its role. Speaking on the relevance of innovation towards its ruling, the court opined that its "mission is to assess the alleged antitrust violations presented, irrespective of the dynamism of the market at issue."[7] The court seemingly ignored the inherent complexities associated with a consummated merger in a high-tech market in favor of creating a rule that simply dismissed large swatches of relevant, potentially determinative evidence. In short, the court failed to take a pragmatic view of the evidence before it; instead, it used its discretion to create a rule that obviated its need to undertake such a rigorous examination.

In dismissing post-merger evidence on pricing and the effects of the merger, the court relied on recent Fifth Circuit dictum arguing that post-merger evidence has limited probative value "whenever such evidence *could arguably* be subject to manipulation."[8] Both the court here and the Fifth Circuit in *Chicago Bridge* premised the use of the "arguably manipulable" standard

[4] *United States v. Bazaarvoice, Inc.* 2014 WL 203966, at *73–74.
[5] *Id.* at *74.
[6] *Id.* at *73 (quoting *Chi. Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 435 (5th Cir. 2008)).
[7] *Id.* at *76 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 49–50 (D.C.Cir. 2001)).
[8] *Chi. Bridge,* 534 F.3d at 435.

on the Supreme Court's ruling in *United States v. General Dynamics*.[9] While *General Dynamics* did raise questions about the value of some post-merger evidence, the Court still analyzed whether the post-merger evidence at issue was actually subject to manipulation.[10]

Notwithstanding its understanding of *Chicago Bridge* and *General Dynamics*, the court's decision on post-merger evidence is, nevertheless, problematic for at least two reasons:

First, the "arguably manipulable" rule does not seem like an effective rule. Antitrust law is no stranger historically to bright-line rules for the sake of efficiency, although more modern jurisprudence and scholarly commentary take a more sophisticated view.[11] But even where bright-line rules are appropriate, a bright-line rule related to an amorphous "arguably manipulable" standard seems impossible to enforce.

Any post-consummated transaction is "arguably manipulable," so if this standard is to apply, then post-merger evidence is, for all practical purposes, excluded, with the only cognizable benefit being an easier prosecution for the government. If there is evidence suggesting actual manipulation, or even the likelihood of manipulation, then it seems that the court may, compatible with existing precedent, weigh post-merger evidence accordingly, but simply creating a *de facto* exclusionary rule goes far beyond the existing case law and creates unnecessary and overly restrictive new law.

Second, while the *Bazaarvoice* court drew inspiration for the "arguably manipulable" standard from *Chicago Bridge*, the court's application of the "arguably manipulable" test—the flawed application of a superfluous rule—was even more troubling in context. In ignoring post-merger pricing evidence for fear of manipulation by the merged parties, the court failed to recognize basic economic theory connecting price and entry. In *Chicago Bridge*, the Fifth Circuit declared that because Chicago Bridge & Iron could manipulate pricing, it could manipulate entry into the market.[12] Accordingly, the Fifth Circuit devalued post-merger evidence of *entry*.

Underpinning the Fifth Circuit's logic is the economic theory that, all else being equal, high prices will lead to more entry (because of higher profits) and, by the same token, low prices will lead to less entry (because of lower profits). So if a firm has the power to manipulate prices, it also has the power to manipulate entry. In fact, the connection is invariably linked—a firm cannot manipulate prices without also manipulating incentives for entry for competing firms. So if a court downgrades the value of post-merger pricing evidence on account of possible manipulation, it should also, in the interest of consistency, downgrade the value of post-merger evidence of entry.

The court in *Bazaarvoice* failed to take this second step, and, by so doing, the court tipped the evidentiary scales further in the government's favor.[13] Thus, even if one accepts that there is a

[9] *United States. v. Gen. Dynamics Corp*., 415 U.S. 486, 504-05 (1974).

[10] *Id.* at 504-06.

[11] *See e.g.,* the abandonment of the long held *Dr. Miles* doctrine regarding resale price maintenance in favor of the considerably more nuanced approach advocated in *Leegin*.

[12] *Chi. Bridge*, 534 F.3d at 435.

[13] *See United States v. Bazaarvoice, Inc.*, 13-CV-00133-WHO, 2014 WL 203966, at *72 (N.D. Cal. Jan. 8, 2014).

basis for application of the court's test, the court further used unwarranted discretion in selectively fitting the rule to the evidence.

III. DOJ'S PROPOSED REMEDY

Much has been written about the decision itself, but the pending decision on the appropriate remedy is also worthy of some commentary. In addition to seeking a divestiture remedy, the government is also seeking, under certain conditions, "a perpetual, irrevocable license to the latest version of [Bazaarvoice's technology]."[14] The government argues that this remedy may be required because Bazaarvoice "stopped investing in R&D for the PowerReviews platform."[15]

Consider the unstated assumption underlying this request: in order for the two platforms to now be unequal, Bazaarvoice must have continued to innovate its own technology after the merger was consummated. Innovation is paradigmatic of procompetitive effects. Here, given that Bazaarvoice will hardly be inclined to innovate on its platform with the incipient threat of a free license hanging over its head like a Damoclean sword, both post-merger real-world evidence and economic theory is turned on its head with a concomitant disincentive to future innovation. Moreover, at least on the current record, there does not appear to be evidentiary support for such a remedy.

What may be most puzzling for parties engaging in post-merger activities is the Catch-22 approach that the government's motion suggests. The court has already held that post-merger experiences should be excluded if arguably manipulable. But, under the government's theory here, even innovation decisions can be given a nefarious twist. If a company chooses to innovate, one could imagine that any potentially positive inferences that could redound to its benefit would be dismissed by the government as nothing more than attempt to curry favor, a mere sham to show a competitive marketplace. On the other hand, where a company does not innovate, even where there may be legitimate reasons for doing so, the government would suggest that the failure to do so is cause for harsh remedial measures.

The best approach would be for the court to weigh the countervailing considerations, consider all the available facts and evidence (including economic evidence), and make a judicial decision based on the record. But, it would be inconsistent for the court to weigh different types of post-merger evidence based on different standards, and the judicial theory undergirding the liability decision is at odds with the approach apparently advocated by the government at the remedy phase. This places the court in a difficult conundrum, but one hopes that it will find a way to develop the rules propounded at the liability phase into a cohesive framework that allows for a more holistic approach here.

IV. CONCLUSION

Was (and is) *Bazaarvoice* a "hard case"? If by that one means a case where primary recourse to rules, cases, and texts reveals no clear answers, we think not. Indeed, assessing the

[14] Plaintiff's Motion for Entry of Final Judgment and Memorandum in Support of Plaintiff's Motion for Entry of Final Judgment at 12, *United States v. Bazaarvoice, Inc.*, 13-CV-00133-WHO (Dkt. 249-3) (N.D. Cal. Feb. 12, 2014).

[15] *Id.* at 13.

evidence consistent with well-established precedent suggests to us that the court should have given much more attention to the post-merger evidence. At the liability phase, the court exercised unneeded discretion in stating a formalistic rule serving to functionally exclude important, perhaps even determinative, evidence from its consideration. In doing so, the court ignored the contextual aspects of the legal issues at hand; the unique posture of this case, with its real world experiential aspect, is shunted to the side. However, despite not doing so at the liabilities phase, the court has an opportunity to reverse this exclusion in considering the appropriate remedy.

In sum, a pragmatic ruling on this case would have taken a contextualist approach, considering a broad perspective of the available evidence—theoretical, economic, empirical—and provided appropriate weight to each. Instead, a too-strict reliance on this new rule led to a curiously narrow decision that may have the ironic effect of causing widespread confusion.

In the 2014 MLB season, umpires will take the time to review various angles on the play, even those it would not have seen with the naked eye. This overarching ability to consider all the evidence is likely to lead to better outcomes; an umpire only having one angle on the play is less likely to call it right than one who can consider every angle after the play is over. We hope that courts and regulators will agree that there will be a far better chance of getting the calls right if all the evidence is considered and given appropriate weight. There will be a lot less dirt-kicking (and article-writing) if this is the case. Let's hope that umpiring decisions result in a few more wins for the Nationals, and judicial and regulator decisions prove similarly helpful for the consumer.

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Reflections on *Bazaarvoice*

Gregory K. Leonard & Parker Normann
Edgeworth Economics

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Reflections on *Bazaarvoice*

Gregory K. Leonard & Parker Normann[1]

I. INTRODUCTION

Because merger cases get litigated to judgment only every so often, when such a case comes along, it is useful to take stock. We reflect on issues of interest to us as economists that are raised by the recent ruling in the United States Department of Justice's challenge of the Bazaarvoice acquisition of PowerReviews.[2]

II. MARKET DEFINITION VERSUS DIRECT EVIDENCE OF COMPETITIVE EFFECTS

Many economists see little utility in market definition, particularly when direct evidence regarding competitive effects is available.[3] Yet, historically, courts have routinely required that a market be defined in an antitrust case, and we have found that many lawyers support this position.

In our view, *Bazaarvoice* illustrates the problems with making market definition a requirement. The court devoted considerable effort to describing the relevant market and the importance of the relevant market definition to its conclusion that the merger was likely to lessen competition. Indeed, dozens of pages of the court's opinion explicitly covered topics related to market definition. Yet, given the direct evidence of competitive effects presented and relied upon by the court elsewhere in the decision, there seems to have been little need to undertake the extensive effort involved in the market definition exercise.

While the court likely reached the correct ultimate decision from the market definition analysis, it was only because the direct evidence of competitive effects lined up with the finding of high levels of concentration. In fact, it appears that the court's conclusion regarding the appropriate market definition was heavily influenced by its observation regarding the importance of the pre-merger competitive constraint the merging parties placed on each other. But, when the merging parties have been determined to impose significant pre-merger competitive constraints on each other, the need to define a market is largely obviated. In that event, market definition is not needed to serve as an initial screen, and instead becomes merely a box to be checked, adding little to the process.

Bazaarvoice seems to have presented an opportunity to support a conclusion about competitive effects based on direct evidence alone, without first undertaking an extended market definition exercise. The court noted that Bazaarvoice had been forced to lower its bids to

[1] The authors are partners at Edgeworth Economics LLC. We thank Becca Schofield for helpful comments.

[2] *See* Memorandum Opinion - Public Redacted Version ("Bazaarvoice Opinion"), *United States of America v. Bazaarvoice, Inc.,* United States District Court Northern District of California, 13-cv-00133-WHO, *available at* http://www.justice.gov/atr/cases/f302900/302948.pdf.

[3] *See* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARVARD L. REV. 437 (2010) for a recent example. There are, however, dissenters among economists who see value in market definition. See *Gregory J. Werden*, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729 (2013).

customers in response to competition from PowerReviews. Consistent with this, the court quoted from numerous Bazaarvoice documents that: (i) identified PowerReviews as its primary competitive threat, (ii) stated that the removal of PowerReviews would solidify Bazaarvoice's market position and prevent further price erosion, and (iii) noted that a primary motivation for the acquisition was to remove that competitive threat. Moreover, empirical analysis measuring the frequency of competitor mentions in Bazaarvoice's "Win/Loss" opportunities and "How the Deal was Done" documents indicated that PowerReviews was involved in 80 percent or more of the competitive bids Bazaarvoice faced while no other independent seller was as high as 5 percent.[4]

While this direct evidence of competitive effects appears to be strong, it is largely based on documents. We are disappointed that neither the DOJ's economist nor Bazaarvoice's economist appears to have attempted a more sophisticated economic analysis of competitive effects. For example, neither economist appears to have analyzed the relationship between Bazaarvoice's price to a customer and the presence of PowerReviews in the bidding process for that customer. To the extent that the absence of a more sophisticated economic analysis was due to the litigants focusing their efforts on meeting the hurdle of defining markets, it illustrates a danger of "requiring" market definition—to ensure that the market definition box is checked within the limited time frame provided in litigation, the litigants may forego what would actually be a more probative analysis.

The "requirement" to engage analytically on market definition also appears to have prompted the litigants to search for evidence that, at best, added little incremental value and, at worst, confused matters. Bazaarvoice, for example, argued that the market was wide, encompassing other product options such as a social media, and attempted to show the differences in the level of market concentration if the market were defined to include customers outside of the IR 500.

However, such efforts are not needed and, indeed, are irrelevant when price discrimination markets are appropriate (discussed further below) and direct competitive effects can be identified for a substantial set of customers as appears to have been the case here. If it was already established that PowerReviews served to constrain Bazaarvoice's pricing for some customers within the IR 500, an effort to show lower measures of market concentration under broader definitions of the relevant market would have little or no additional value.[5] The effort to define the market therefore only acted to divert the litigants from the more important question of the extent to which the two merging parties disciplined each other's pricing with respect to those customers for whom they competed.

[4] Bazaarvoice Opinion, ¶¶270-273. In-house or Internal builds, where the company builds their own infrastructure, was mentioned in 12-15 percent of the bidding situations as a competitive threat to Bazaarvoice's position. That the company was able to so closely identify the frequency of the in-house threat is an indication that absent sufficient competitive constraints from other third-party sellers, there would exist the ability to raise prices on a targeted basis to those customers that did not have viable internal options.

[5] It is possible that analyzing the set of providers beyond the IR 500 might identify sets of potential suppliers to the IR 500. This could be useful information, especially if there are instances of an actual supplier repositioning in response to changing market conditions.

Similarly, market definition and the calculation of concentration measures have long been recognized to be seriously flawed as a methodology for analyzing competitive effects of a merger in a differentiated products industry.[6] Here, the products that Bazaarvoice argued should be added to the relevant market definition were substantially differentiated from the products of the merging parties. In this situation, a more reliable assessment of the merger's competitive effects would result from directly analyzing those effects rather than devoting effort to arguing about the boundaries of the relevant market.

In addition to diverting the litigants and the court away from more useful questions, the primary focus on market definition could also have led to the wrong conclusion, although that does not appear to have been the case here. Bazaarvoice took essentially what amounted to two different positions on the relevant market, suggesting that the market should be broader, but simultaneously arguing that PowerReviews was not a viable competitor for Bazaarvoice's core customer base of larger internet retailers. From a market definition perspective this would imply that there are different markets—one consisting of large retailers and another of midsize or small retailers, each with different levels of concentration. If such a position were adopted it could lead to the conclusion that the two firms were not important competitors to one another, as the change in HHIs from the combination would be modest. But such a conclusion would seem to be erroneous given the strong direct evidence regarding competitive effects.

We do not advocate abandoning market definition entirely, nor do we argue that the market definition process never has any value. The market definition process can help identify important characteristics of the competitive environment faced by merging parties. The initial steps involved in performing a hypothetical monopolist test, for example, entail gathering the set of products that could potentially be viable substitutes for the products of the merging parties. Such analysis is valuable because it can explain why, in a post-merger world, the merged firm might be unable to increase prices even if prior evidence showed that the merging parties frequently competed directly against one another.

But, where possible, any conclusion regarding the competitive constraints provided by other products should be informed by an analysis of whether these other products actually disciplined prices in the pre-merger world, for example, in situations where Bazaarvoice and PowerReviews did not compete directly.[7] If this were found to be the case, it potentially would alleviate concerns of a post-combination exercise of market power by the merging parties because the existence of substitute products prevented such an exercise in the pre-merger environment.

In sum, while *Bazaarvoice* presented a golden opportunity for the litigants and the court to downplay market definition and make competitive effects the centerpiece of the antitrust

[6] *See*, e.g., Jerry A. Hausman, Gregory K. Leonard & J. Douglas Zona, *A Proposed Method For Analyzing Competition Among Differentiated Products*, 60 ANTITRUST L.J. 889 (1992).

[7] Of course, a further element of the analysis would involve analyzing entry, either from new suppliers or customers pursuing in-house options, in response to a relative price premium charged by Bazaarvoice where PowerReviews had no visible presence. This type of exercise is more fruitful than simply trying to estimate market share of a potential supplier and drawing some inference from its shares, without knowing whether the presence of that firm has any material effect.

analysis, that opportunity was missed. Indeed, the decision gives no reason to believe that the requirement of market definition, seemingly so embedded in the antitrust case law, will be dropped anytime soon. However, hope springs eternal, even among practitioners of the Dismal Science, and we look forward to future cases giving more weight to direct evidence of competitive effects and less to market definition.

III. PRICE DISCRIMINATION MARKETS

A price discrimination market consists of a subset of customers that could be identified and targeted for a price increase by a hypothetical monopolist. The 2010 Merger Guidelines, as did the previous 1992 Merger Guidelines, discuss conditions under which price discrimination markets may be defined. Thus, the concept of price discrimination markets has been embraced by the U.S. antitrust agencies for an extended period of time. However, previous attempts by the agencies to define price discrimination markets in litigated merger cases have often run aground. An example is the Oracle-PeopleSoft merger.

Bazaarvoice seems to have presented the DOJ an opportunity to give price discrimination markets another try. The court found that pricing was individually negotiated between a customer and a supplier and that suppliers had information about customers that they used to determine the prices they offered to those customers. As a result, pricing varied across customers.

In particular, as discussed above, the court found situations where Bazaarvoice offered discounts to customers for whom it faced direct competition from PowerReviews. When firms set a single price to all buyers, that price is disciplined by the competitive pressure provided by options considered by the marginal customer. With individually negotiated pricing and its knowledge of customers' preferences and options, Bazaarvoice was able to set different prices to different buyers based to some degree on the options available to each buyer. Similarly, a hypothetical monopolist controlling both Bazaarvoice and PowerReviews may have been able to target certain customers (e.g., those who viewed PowerReviews as the only close substitute for Bazaarvoice) for a price increase. This suggests that such customers may form one or more separate price discrimination markets.

The DOJ does not appear to have pursued a price discrimination market argument in *Bazaarvoice*, perhaps being mindful of the difficulties encountered in previous cases. However, as with the excessive focus on market definition, the failure to embrace price discrimination markets may have actually served to reduce the level of clarity. For example, as discussed above, Bazaarvoice argued that the relevant market should be expanded to include customers outside the IR 500. In a situation where a single price was charged to all customers, and the marginal customer was outside the IR 500, that would make sense. However, in the context of price discrimination markets and the associated evidence cited in the court's decision, Bazaarvoice's argument to include customers outside the IR 500 does not make economic sense. If the customers outside the IR 500 had different preferences or options than those inside the IR 500, and this was recognized and acted upon by suppliers, those customers may be in separate price discrimination markets from the customers inside the IR 500.

IV. ENTRY

It is often said that, in an antitrust case, entry is a trump card: if you have it to play, you win. It appears that Bazaarvoice tried mightily to convince the court that potential entrants abound. However, the court was not persuaded, seemingly for three reasons:

1. The court found that any new entry was unlikely to have any significant competitive effect within a two-year time window and thus would not be timely.
2. The court found that, while companies such as Google and Amazon might possess the general capabilities required to enter, they had shown no inclination to do so either before or after the transaction. Thus, identifying potential entrants was not enough. To make a persuasive entry argument, Bazaarvoice had to show that the potential entrants actually would be induced to enter if Bazaarvoice were to attempt a price increase.
3. Most interestingly, the court concluded that, if anything, the merger likely would deter, rather than induce, new entry. The court found that network effects are present and constitute a barrier to entry. Because Bazaarvoice has greater scale after acquiring PowerReviews, its network effects are larger post-merger and thus the barriers to entry faced by a new entrant will be more significant.

A point on entry that does not appear to have been addressed by the litigants relates to the fact that the court found that Bazaarvoice had never made a profit. It is difficult to tell whether the court meant that Bazaarvoice had not yet made a cumulative profit (i.e., recovered all of its previous investments) or it had not yet even achieved an operating profit in any period. Either way, it would not paint an attractive picture to any firm considering entry. Suppose that, due to competition between them, prices were well below the level that would allow Bazaarvoice and PowerReviews to recover their previously sunk costs. In that event, prices could increase substantially post-merger without attracting entry because a potential entrant would fear not being able to recover its sunk costs. Thus, the economic conditions in the industry may make an entry argument even less persuasive.[8]

V. DOES ANTITRUST APPLY TO DYNAMIC INDUSTRIES?

Finally, we note with interest that the court touched upon the question of whether antitrust law should apply to "dynamic industries." The court concluded that it need not address this question in general since there was strong support in the facts of the case that the antitrust laws should apply here.

Our own conclusion is that there is no reason to exempt "dynamic industries" from antitrust analysis. Indeed, as the facts of this case demonstrate, "dynamic industries" may be particularly subject to certain forms of antitrust conduct. For example, as mentioned above, the court found that the existence of network effects meant that the merger was likely to increase the barriers to entry. Network effects are common in high-tech industries.

[8] The U.S. agencies typically use the current pre-merger price level (with adjustments for any expected future changes in economic conditions) as the benchmark for evaluating post-merger prices. However, when current prices are "sustainable" in the sense of allowing the recovery of ongoing costs, but are too low to allow the recovery of previously sunk costs, arguably they are below the "competitive level."

Similarly, the court found that one motivation for the merger was that Bazaarvoice wanted to consolidate its position in its existing product market to "protect its flank" while it attempted to extend into "adjacent" product markets. This strategy bears a resemblance to the strategy identified by Carlton & Waldman in which a firm protects its market power in one market by forestalling entry into a second, adjacent market from which the entrant could leapfrog into the first market.[9] Again, because this type of anticompetitive strategy has application in "dynamic industries," there is no reason to exempt such industries from antitrust scrutiny.

[9] Dennis Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 215 (2002).

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Lessons From *United States v. Bazaarvoice*

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Lessons From *United States v. Bazaarvoice*

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I. INTRODUCTION: *BAZAARVOICE* LESSONS

Two days after Bazaarvoice acquired its rival, PowerReviews, for $168.2 million, the Department of Justice ("DOJ") initiated an investigation into the acquisition's competitive effects. Eighteen months later, Judge William Orrick of the Northern District of California held that the acquisition was unlawful because it eliminated Bazaarvoice's "only credible competitor."[2] Judge Orrick found that within the "highly concentrated" ratings and reviews ("R&R") market, the two-to-one merger would have anticompetitive effects, including higher prices and diminished innovation.

What lessons should we take from *Bazaarvoice*? First, the antitrust agencies continue aggressively to enforce Section 7 of the Clayton Act against mergers of all sizes, including consummated mergers not reportable under the Hart-Scott-Rodino ("HSR") Act. Second, the role of customer opinions, at least in court, is not outcome determinative. Third, even in high-technology markets, when there is evidence of anticompetitive effects in one market, courts are reluctant to ignore those effects in favor of offsetting pro-competitive benefits in a separate market. Finally, "hot" documents, especially when supported by economic experts, continue to rule the day.

II. BACKGROUND: BAZAARVOICE'S ACQUISITION OF POWERREVIEWS

Bazaarvoice provides manufacturers and retailers with software and services to collect, organize, and display online consumer reviews and ratings of their products. Purchasers rely on R&R for its authentic consumer reports, while companies rely on R&R to increase product web sales and reduce product returns. R&R software and service designs, such as the familiar five-star rating system, vary from company to company.

After beginning as a classic R&R company, Bazaarvoice had begun using its access to customer interests, ratings, and purchasing patterns to enter the "big data" market, a much larger and more profitable market. As a result, Bazaarvoice claimed during the trial its greatest asset was not its product review platform, but its inventory of customer data. Bazaarvoice argued that its business was rapidly evolving and insisted that its acquisition of PowerReviews occurred within a highly competitive market that included firms such as Amazon, Google, and Facebook, among others.

Before its acquisition of PowerReviews, Bazaarvoice was still a significant R&R provider, often winning business from large manufacturers and brands. Although PowerReviews had a bigger customer base, its customers comprised primarily small- to medium-sized businesses.

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[2] *United States v. Bazaarvoice*, No. 13-cv-00133-WHO, slip op. at 8 (N.D. Cal. Jan. 8, 2014).

Despite Bazaarvoice's focus on the larger customers, PowerReviews regularly competed with Bazaarvoice for sales, leading Bazaarvoice to characterize PowerReviews as "ankle-biters."[3] These pricing challenges sometimes forced Bazaarvoice to lower its rates, although Bazaarvoice's customers tended to pay significantly higher prices than PowerReviews' customers did.

Starting in 2011, PowerReviews aggressively pursued Bazaarvoice's clients by offering a less expensive R&R alternative. Bazaarvoice dubbed its response to PowerReviews assault "Project Menlogeddon" in recognition of PowerReviews' primary financial supporter, Menlo Ventures.[4] While many clients remained with Bazaarvoice notwithstanding PowerReviews' efforts, larger customers like Best Buy and Wal-Mart purportedly gained negotiating leverage from the competitive pressure applied by PowerReviews.

According to contemporaneous business documents, Bazaarvoice saw an opportunity to end its "10-20 percent price erosion" by acquiring PowerReviews.[5] Both companies envisioned "margin expansion" by "eliminating competitive risk" and "reduc[ing] comparative pricing pressure" with the acquisition of each other's "only meaningful competitor."[6] On the other hand, the testimony of more than 100 customers, who reported no change in price during the 18 months since the acquisition, belied the documents.

III. NO MARKET TOO SMALL: BAZAARVOICE PROVES AGAIN THAT THE ANTITRUST AGENCIES WILL LITIGATE

Although the size of the Bazaarvoice deal was below the HSR Act reporting thresholds, the antitrust agencies showed, once again, that they will challenge consummated and non-reportable transactions. The relatively small size of the deal—PowerReviews generated just $11.5 million in profits in 2011, only a portion of which overlapped with Bazaarvoice[7]—did not discourage DOJ from litigating to unwind the transaction. Indeed, within the past several years, the antitrust enforcement agencies have challenged 17 consummated deals, including deals involving very small markets such as George's Inc.'s $3 million acquisition of a Tyson Foods chicken processing plant and Election Systems & Software's $5 million acquisition of Premier Election Services.

As a result, like buyers engaged in larger, HSR-reportable mergers, buyers involved in smaller, non-reportable deals should evaluate whether and how to manage the antitrust risk. The courthouse steps are littered with examples of transactions in which the antitrust agencies litigated to enjoin or unwind a merger.[8] With no time bar on investigations and no special burden dissuading the government from challenging a consummated deal, the antitrust agencies will continue to scrutinize non-reportable transactions. No transaction or market is too small to investigate or challenge.

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[3] *Id.* at 22.

[4] *Id.* at 27.

[5] *Id.* at 31.

[6] *Id.* at 31–32.

[7] A segment of PowerReviews' profits came from turnkey R&R products that did not compete with Bazaarvoice's offerings.

[8] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *FTC v. St. Luke's*, No. 1:12-CV-00560-BLW, slip op. at 1 (D. Idaho Jan. 24, 2014).

IV. WHO CARES WHAT CUSTOMERS THINK?

The first question antitrust practitioners typically ask when advising a client on a transaction is: Will customers support or oppose the deal? Customers are at the top of the list of fact witnesses the antitrust agencies call to learn about the market and understand the likely competitive effects of the transaction. In most markets, it is the customers of the merging firms that are harmed most by an increase in price, or diminished quality or investment in innovation.

This emphasis on customer opinion is not necessarily true in court. *Bazaarvoice* is an additional example in which a court was dismissive of the customer testimony. At trial, Bazaarvoice presented more than 100 customer witnesses who testified that the acquisition was harmless. Although the customers are on the front lines of the market, the court in *Bazaarvoice* discounted their opinions.

As Judge Orrick put it, "[i]t is difficult for those customers to discern what is actually happening in the market."[9] Judge Orrick's view is consistent with how the courts viewed the customer testimony in *Arch Coal*[10] and *Oracle*.[11] According to Judge Orrick, the customers' testimony merited little weight because: (i) Bazaarvoice likely tempered its actions during the investigation; (ii) customers were not privy to the persuasive economic evidence and internal documents presented at trial; (iii) customers generally pay little attention to mergers; (iv) every customer has its own level of R&R knowledge; and (v) customers received personalized price offerings based on its individualized needs.

While the value of customer testimony in litigated matters is uneven, customers remain critical to the antitrust enforcement agency's initial decision whether to investigate and challenge a deal. Customers' opinions are important to discovering and understanding the competitive effects story. Once the agency decides to challenge a transaction, however, customers' opinions tend to play a supporting role. That does not mean their views are unimportant. Customer testimony can be valuable in bolstering the other evidence, including the evidence derived from the contemporaneous business documents, as well as the expert opinions of the economists.

V. HIGH-TECH MARKETS DO NOT MERIT SPECIAL TREATMENT

Some antitrust experts argue that high-tech markets are different from other markets and merit special treatment or, at least, deference to take account of ease of entry and the rapid pace of innovation. However, *Bazaarvoice* "confirms that merger analysis in high-tech markets, as in other markets, is highly fact specific. The antitrust agencies have made clear that high tech-mergers do not get a free pass, and their impact on competition must be evaluated on a case-by-case basis."[12] This sentiment is reflected in Judge Orrick's opinion:

> The 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

[9] *Bazaarvoice*, slip op. at 8.

[10] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[11] *United States v. Oracle Corp.*, 331 F. Supp. 2d. 1098 (N.D. Cal. 2004). *But see FTC v. Lundbeck*, 650 F.3d 1236 (8th Cir. 2011) (the Eighth Circuit's decision focused primarily on market definition and credited customer opinions in support of its holding).

[12] Deputy Assistant Attorney General Renata B. Hesse, U.S Dep't of Justice, *At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement*, U.S. Dep't of Justice (Jan. 22, 2014).

> 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.[13]

Market definition is a critical aspect in any Section 7 case. In the context of high-tech markets, however, defining markets in a highly dynamic environment is a challenge. Bazaarvoice argued that its acquisition of PowerReviews was an effort to promote competition and enter the more expansive "big data" market. Bazaarvoice claimed it was simply looking ahead—it viewed its business as vulnerable if it did not expand and innovate, and believed the acquisition of PowerReviews was a step toward improving its ability to compete with larger firms. At trial, Bazaarvoice pointed to companies like Google and Amazon as competitors lurking on the edges of the R&R market.

Judge Orrick, however, rejected this argument, citing the absence of actual entry by the larger high-tech firms or evidence that they would do so in the next two years. Arguing that an entity that is capable of entering a market is different from showing potential entrants are taking concrete steps to enter the market.

The antitrust agencies and the courts will credit arguments for broader markets if there is tangible and (mostly) uncontradicted evidence supporting the proposition. But, as in *Bazaarvoice*, arguments that firms are capable of entering a market or capable of providing similar services are unlikely to overcome an anticompetitive presumption based on "hot" documents.

In addition, there is a risk that courts will be dismissive of evidence that other firms provide the same services, unless those firms are marketing the services in direct competition with the merging parties. In *Bazaarvoice*, the court was unimpressed by the evidence that Amazon accounted for 27 percent of the R&R market because Amazon did not offer its services to third parties. Even testimony that Amazon considered entering the broader R&R market "almost daily," was insufficient to overcome the presumption the court found based on the documents.[14]

The fact that a transaction may be critical to entering or increasing competition in one market (big data), however, does not mean that the antitrust agencies or the courts will ignore anticompetitive harm in adjacent or historic markets (R&R). Yes, the Merger Guidelines take specific note of "inextricably intertwined" markets, but they also concentrate on the current market.

VI. HOT DOCUMENTS ARE (REALLY) HARD TO OVERCOME

As referred to above, and like *Whole Foods* before it, *Bazaarvoice* shows how too many hot documents can be damning.[15] In both cases, top executives made pre-merger statements, as reflected in contemporaneous business documents, suggesting that a purpose of the merger was to eliminate a significant competitor. The court in *Bazaarvoice* cited several pre-merger

[13] *Bazaarvoice*, slip op. at 133.
[14] *Id*. at 89.
[15] *FTC v. Whole Foods, Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

statements suggesting that Bazaarvoice sought to (i) eliminate a significant competitor, (ii) gain relief from price erosion due to competition, (iii) discourage entry by competitors, (iv) ensure Bazaarvoice's retail business was insulated from direct competition, and (v) expand margins.

Hot documents remain a critical factor in assessing whether the antitrust agencies are likely to challenge a transaction. From 1996 to 2011, the Federal Trade Commission brought enforcement actions in 90 percent of the cases in which it identified hot documents. Courts, too, are reluctant to brush aside hot documents. While not dispositive, there is a correlation between bad documents and negative outcomes in merger challenges. Courts are hesitant to credit parties' efforts to "explain away" or impeach their prior statements, especially when the contemporaneous business documents explicitly confirm the expert economic testimony.

The *Bazaarvoice* documents not only shaped the court's definition of the relevant market, but also revealed the parties' intentions. To be clear, intent is not an element of a Section 7 claim. However, that does not mean that the antitrust agencies and the courts will disregard the parties' statements if they reflect a belief or expectation that the transaction will have anticompetitive effects. As Judge Orrick found, "The evidence that Bazaarvoice and PowerReviews expected the transaction to have anticompetitive effects is overwhelming."[16] When the business documents undercut the defense, the parties face a steep uphill battle to persuade the agencies or a court that their ordinary course of business documents had it all wrong.

VII. ECONOMIC EXPERTS ARE THE FINAL PIECE TO THE PUZZLE

The role of economic experts in antitrust cases has expanded over the past few decades. Included as part of the Merger Guidelines, the antitrust agencies and the courts regularly look to economic experts as critical witnesses. The opinions of the economists are important, although they often are not decisive, especially when each side is represented by well-respected economists testifying in favor of opposing conclusions. Instead, the economic testimony is one more piece to the puzzle. Courts typically ask, when considering all of the evidence, whether the economic expert's opinion aligns with the facts, the documents, or the views of the customers. Economic experts, similar to internal documents and customers' opinions, can fill out the picture for the court.

Judge Orrick's opinion references the government's expert, finding that he "testified convincingly" that the acquisition was likely to have anticompetitive effects. However, the court seemed to use that testimony to confirm what it already suspected.[17] Once the parties' ordinary course of business documents creates a presumption of anticompetitive effects, the experts can bolster the case. This was the case in *Bazaarvoice* just as it was in the government's victory in *H&R Block*, which also used internal documents, supplemented by expert economic testimony, to define the relevant market and prove anticompetitive effects.

VIII. *BAZAARVOICE*'S IMPLICATIONS FOR MERGER REVIEWS

While merger review is forward-looking and asks whether a transaction may reduce competition in the future, the answer to that question is often derived almost entirely from

[16] *Bazaarvoice*, slip op. at 6.
[17] *Id* at 7.

historic, backward-looking evidence. Courts are most comfortable relying on hard facts, and hard facts are typically reflected in business documents and historic market metrics. Opinion testimony, thus, is at a disadvantage when confronted with too many "hot" documents. The challenge for merging parties attempting to identify and evaluate antitrust risk is to evaluate the totality of the evidence—documents, customer opinions, market dynamics, and economics—before reaching a conclusion.

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Key Lessons from the Recent *Bazaarvoice* Decision

Franco Castelli
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Key Lessons from the Recent *Bazaarvoice* Decision

Franco Castelli[1]

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).

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Bazaarvoice: Applying Traditional Merger Analysis to a Dynamic High-Tech Market

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Bazaarvoice: Applying Traditional Merger Analysis to a Dynamic High-Tech Market

James A. Fishkin[1]

I. INTRODUCTION

United States v. Bazaarvoice, Inc.[2] is a particularly important and highly complex case that raises significant issues regarding (i) the application of merger analysis to high-tech industries, (ii) the importance of deal rationale documents, and (iii) the weight given to customer opinion testimony in merger cases. Judge Orrick applied traditional merger analysis to determine that Bazaarvoice's consummated acquisition of rival PowerReviews was anticompetitive and in violation of Section 7 of the Clayton Act.

Although this merger involves an evolving high-tech product—online platforms for product ratings and reviews ("R&R")—Judge Orrick methodically utilized the same analytical tools that are applied to mergers in more traditional industries to find that Bazaarvoice and PowerReviews were each other's closest competitor in a narrow, highly-concentrated product market with virtually no remaining competitors and entry barriers. He also found that competition between the merging firms had resulted in lower prices. Based on the totality of the evidence, Judge Orrick found that that the transaction would likely result in "significant anticompetitive unilateral effects."[3]

II. THE DECISION

A. Premerger Intent

In making his decision, Judge Orrick heavily focused on the "stark premerger evidence of anticompetitive intent"[4] for the acquisition even though he recognized that "intent is not an element of a Section 7 violation."[5] The evidence showed that the rationale for the deal from both parties, based on an extensive number of documents, was to enable the larger Bazaarvoice to eliminate its closest rival and raise prices. The parties were unable to effectively explain or rebut their own documents using post-acquisition analysis.

Based on these premerger documents and other evidence, Judge Orrick concluded:

> Bazaarvoice recognized that the acquisition of PowerReviews would eliminate its primary commercial competitor, allowing it to scoop up customers that it would otherwise have to expend $32 to $50 million to win over from PowerReviews, raise prices, and discourage any new competitive threats in its existing space while

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[2] *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, slip op. (N.D. Cal. Jan. 8, 2014).
[3] *Id.* at 102.
[4] *Id.* at 10.
[5] *Id.* at 21.

> pivoting to a bigger opportunity through its control of UGS [user-generated-content] in the broader eCommerce market.[6]

B. Existing and Potential Competition

In a highly detailed 141-page opinion, Judge Orrick rejected Bazaarvoice's arguments that there were many other strong firms in the same R&R market and that the relevant product market was broader. He also rejected Bazaarvoice's assertion that technology-oriented firms such as Amazon, Google, Salesforce, Facebook, and Oracle, with the alleged necessary infrastructure, reputation, and relationships with retailers and manufacturers, would become rapid entrants into R&R. Bazaarvoice provided "no reason why those firms would enter the market" particularly when "[t]here was no evidence that any company had made even preliminary analyses of the viability of joining the market."[7]

Judge Orrick also rejected Bazaarvoice's alleged substantial efficiencies claims, ruling thatthey were not cognizable and merger-specific.

C. Post-Merger Evidence and Customer Opinions

Judge Orrick entirely discounted Bazaarvoice's post-merger evidence, particularly since the Department of Justice opened its investigation two days after the merger closed. Judge Orrick gave no weight to claims by Bazaarvoice that the merger had not resulted in price increases because "[t]he post-acquisition evidence regarding pricing and the effect of the merger is reasonably viewed as manipulatable and is entitled to little weight."[8] He also cited to Section 2.1.1 of the Horizontal Merger Guidelines for the point that "a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct."[9] He further warned that "[i]f a court incorrectly relies on post-merger testimony that a merged entity has not raised prices and the court blesses the transaction, there is little to prevent the merged entity from creating anticompetitive effects at a later time."[10]

Significantly, Judge Orrick totally discounted opinions from more than 100 current, former, and potential customers that the merger had not and would not harm them. Judge Orrick credited the testimony of customers "on their need for, use of and substitutability of social commerce products as well as regarding their companies' past responses to price increases."[11] But he rejected customer opinions about the likely effects of the merger because he thought:

> . . . customers generally do not engage in a specific analysis of the effects of a merger. . . . Many of them had given no thought to the effect of the merger or had no opinion. They lacked the same information about the merger presented in court, including from the economic experts. Their testimony on the impact and

[6] *Id.* at 21.
[7] *Id.* at 133.
[8] *Id.* at 108.
[9] *Id.* at 136.
[10] *Id.*
[11] *Id.* at 116.

> likely effect of the merger was speculative at best and is entitled to virtually no weight.[12]

Judge Orrick further stated that the "complexity of the economic and legal issues in antitrust actions warrants affording limited value to lay testimony regarding the effects of the merger."[13]

The rejection of customer opinions (*i.e.*, lay testimony) by Judge Orrick is consistent with Section 2.2.2 of the Horizontal Merger Guidelines. Section 2.2.2 states that customers "can provide valuable information about the impact of historical events such as entry by a new supplier." At the same time, Section 2.2.2 states that "conclusions" about the likely impact of the merger are limited to "well-informed and sophisticated customers," which apparently did not exist in the view of Judge Orrick.

D. Adapting Traditional Merger Analysis to High-Tech Mergers

In applying traditional merger analysis, Judge Orrick frequently cited to the 2010 Horizontal Merger Guidelines, although he largely followed the step-by-step structural market analysis outlined in the 1992 Horizontal Merger Guidelines. To further support his opinion, he cited landmark merger cases where the government had prevailed, including *United States v. Philadelphia National Bank*, *United States v. Brown Shoe Co.*, *FTC v. Staples, Inc.*, *FTC v. H.J. Heinz Co.*, and *United States v. H&R Block, Inc.*, and he distinguished cases cited by Bazaarvoice where either the government or the private party lost, including *United States v. Baker Hughes, Inc.*, *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, Inc., and *United States v. Oracle Corp.*

At the same time, Judge Orrick clearly recognized that he was applying traditional merger analysis to a high-tech merger where the broader "social commerce industry is at an early stage of development, rapidly evolving, fragmented, and subject to potential disruption by technological innovations" and that "the future composition of the industry as a whole is unpredictable."[14] Nevertheless, after evaluating all of the evidence presented at trial, Judge Orrick concluded:

> The fact that social commerce and eCommerce 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 with the evolving social commerce space, when the effect is likely to be anticompetitive.[15]

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[12] *Id.*

[13] *Id.* at 137.

[14] *Id.* at 19-20.

[15] *Id.* at 133. *See also* Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Reflections on Antitrust Enforcement in the Obama Administration," Remarks as Prepared for Delivery to the New York State Bar Association (Jan. 30, 2014) ("the antitrust laws apply with full force to transactions in the high-technology sector").

Judge Orrick concluded his decision by stating, "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."[16]

III. KEY TAKEAWAYS

There are four key takeaways from the *Bazzarvoice* opinion. First, acquiring parties need to consider antitrust risk in non-reportable deals. Second, deal rationale documents carry significant weight and should not be underestimated. Third, customer opinions, while important to agencies in merger investigations, may have limited value at trial. Finally, mergers in evolving, high-tech industries may not receive any extra leeway in merger trials.

A. Parties Need to Evaluate Antitrust Risk in Non-Reportable Deals

Parties to non-reportable mergers must be aware that mergers with competitors may be investigated and they should account for this possibility, as well as a risk of divestiture, in their risk analysis. With victories like *Bazaarvoice*, the agencies will continue to investigate non-reportable consummated mergers and, if necessary, litigate them.

B. Deal Rationale Documents Should Never Be Underestimated

Deal rationale documents are important to the government and to judges. In reportable transactions, the deal rationale documents are included in an HSR filing in response to items 4(c) and 4(d). For investigations of non-reportable transactions, similar deal rationale documents are almost always the agencies' first request. Parties contemplating mergers, either reportable or non-reportable, should be on notice that the initial impressions of the lawyers working on a matter are frequently formed by the discussions in the deal rationale documents. Parties need to be able to explain the contents of "bad documents."

C. Customer Opinions May Have Limited Value in Court but the Agencies Give Them Weight in Investigations

A key issue in Judge Orrick's decision was his decision not to credit opinion testimony from the more than 100 customers who did not believe that the acquisition had harmed or would harm them. Judge Orrick discredited customer opinions because "it was speculative at best and is entitled to virtually no weight."[17]

This is not the first time courts have discredited customer testimony. For example, in a pre-trial motion in *FTC v. H.J. Heinz Co.*, the court granted the FTC's motion to exclude from the record customers' lay opinions on the merger. In *United States v. Oracle Corp.*, moreover, the court also dismissed customer views regarding likely competitive effects—in this case, views by government witnesses. Nevertheless, customer views during an investigation have great weight on the agencies and frequently affect the decision to file a complaint.

[16] *Bazaarvoice,* slip op. at 141.
[17] *Id.* at 116.

D. Mergers in Rapidly Changing, High-Tech Markets are Not Immune From Antitrust Enforcement and are Analyzed Similarly to Other Mergers

No one should be surprised that the government will investigate mergers involving products in a high-tech industry utilizing the same Horizontal Merger Guidelines that apply to all merger investigations—regardless of the industry. As Renata Hesse recently stated, "[h]igh-tech mergers do not get a free pass, and their impact on competition must be evaluated on a case by case basis."[18] Although high-tech industries generally are changing rapidly, the details are still fact-specific for each merger and the government is focused on near-term changes (*e.g.*, entry within about a two-year time frame), not long-term changes over many years. In late 2001, for example, the FTC was prepared to challenge the merger between Monster and HotJobs, which, at the time, were the two largest online job search firms, even though the parties claimed the industry was rapidly evolving. Using the same investigative tools, coupled with detailed economic analysis presented by the merging parties, the FTC cleared Monster's acquisition of HotJobs in 2010 after a detailed investigation due to significantly changed market conditions.

[18] Renata B. Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, Antitrust Division, U.S. Department of Justice, "At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement," Remarks as Prepared for the Conference on Competition and IP Policy in High-Technology Industries" (Jan. 22, 2014). In the same prepared remarks, Deputy Assistant Attorney General Hesse discussed recent high-tech mergers where the Antitrust Division has sought enforcement such as H&R Block/TaxAct (2011) and AT&T/T-Mobile (2011), as well as high-tech mergers where the Antitrust Division has not sought enforcement such as XM/Sirius (2008) and Google/Admeld (2011).

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No Longer Dazed and Gun Shy: The *Bazaarvoice* Decision

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No Longer Dazed and Gun Shy: The *Bazaarvoice* Decision

Michael Cohen & Amanda Fretto[1]

Prior to 2011, the United States Department of Justice, Antitrust Division ("DOJ") carried the characterization "dazed and gun shy" when it came to trying merger cases.[2] The DOJ had not actively tried a merger case since its loss in *Oracle* in 2004.[3] *Oracle* came to stand for the proposition that something was wrong with the way the DOJ was trying merger cases; the DOJ's trial strategy was less than viable. Commentators, when discussing *Oracle*, have gone so far as to evoke an image of the judge as coroner presenting the cause of death for the DOJ's case.[4] As a result, the DOJ was forced to take a hard look at how it tried merger cases.

Post-*Oracle*, an introspective DOJ appeared to become less active in the courthouse, settling most challenged transactions prior to litigation.[5] That has changed.

In its first merger challenge to go to trial since *Oracle,* the DOJ won a permanent injunction against H&R Block's $287.5 million cash acquisition of TaxACT in October 2011.[6] Just prior to that win, in September, the DOJ had made a striking move to halt negotiations with AT&T regarding its $39 billion proposed takeover of T-Mobile, and filed its complaint in court. AT&T had met with the DOJ repeatedly and, according to AT&T, the DOJ gave no indication that it was considering filing a complaint.[7] Without a resolution in sight, AT&T abandoned the transaction in December 2011.[8]

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[2] J. Thomas Rosch, *Changing the Way We Try Merger Cases*, Remarks of FTC Commissioner before the 14th Annual Sedona Conference on Antitrust Litigation: Strategic & Tactical Considerations in the Trial of an Antitrust Case, at 2, Oct. 25, 2012.

[3] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[4] Rosch, *supra* note 2 at 4 ("Judge Walker . . . in his post-mortem discussions of the customer testimony"; citations omitted).

[5] In 2008, DOJ challenged 16 transactions, 15 resulted in consent decrees and 1 was restructured. Hart-Scott-Rodino Annual Report, Fiscal Year 2008, at 2. In 2009, DOJ challenged 12 transactions. 6 resulted in consent decrees, and 1 transaction was abandoned after the complaint was filed. The other 5 transactions were abandoned or restructured. Hart-Scott-Rodino Annual Report, Fiscal Year 2009, at 2. In 2010, DOJ challenged 19 transactions. 10 resulted in consent decrees, and 1 (Dean Foods) was in litigation at the time of the report. 8 of the transactions were abandoned or restructured. Hart-Scott-Rodino Annual Report, Fiscal Year 2010, at 2.

[6] In 2011, DOJ challenged 20 transactions. 13 were "brought in court"; of those, DOJ successfully litigated 1 (H&R Block/TaxACT). 11 resulted in consent decrees, and 1 transaction was abandoned (AT&T/T-Mobile). Hart-Scott-Rodino Annual Report, Fiscal Year 2011, at 2.

[7] "AT&T said yesterday that it was surprised by the government's lawsuit and that it will ask for an expedited hearing. . . . 'We have met repeatedly with the Department of Justice and there was no indication from the DOJ that this action was being contemplated,' Wayne Watts, AT&T's general counsel, said in a statement." Bloomberg, Tom Schoenberg, Sara Forden, & Jeff Bliss, *T-Mobile Antitrust Challenge Leaves AT&T With Little Recourse on Takeover*,

H&R Block and AT&T/T-Mobile appear to have marked a change, or at least a willingness, at the DOJ to negotiate merger remedies in litigation, demonstrating a new "litigation-ready" mentality.[9] This shift to filing lawsuits raises serious policy questions. It has the potential to position merging parties into early adversarial stances, which could lead to far less constructive capacity for transparent discussions about a deal with competitive implications. And this "litigation-ready" mentality can leapfrog the exercise of critical prosecutorial discretion. Put another way, this aggressive mentality can overcome the basic initial question whether the agency **should** take action, leading to early and often lawsuits anytime it **can**. Given the stakes to businesses, that outcome courts danger. Take the recent *Bazaarvoice* case.

On June 12, 2012, Bazaarvoice acquired PowerReviews, both competitors and providers of ratings and reviews platforms ("R&R"), in a transaction falling below HSR thresholds. The DOJs launched an investigation two days later, and on January 10, 2013, it filed a lawsuit in district court challenging the merger under Section 7 of the Clayton Act. In a 141-page "necessarily lengthy" opinion, Judge Orrick of the Northern District of California held that Bazaarvoice's purchase of its closest and only serious competitor was anticompetitive in a narrowly defined R&R product market.

Bad documents gave the DOJ the ability to bring the case. The court found that Bazaarvoice and PowerReviews' own internal documents "overwhelmingly" showed that the companies "viewed themselves as operating in a 'duopoly'" and that eliminating PowerReviews "would eliminate Bazaarvoice's only meaningful commercial competitor."[10] But should the DOJ have pursued it? A 141-page opinion might seem on its face to answer that question. But it's not that clear cut; every private practitioner has seen bad documents that actually had little, if any, bearing on the actual facts or company's decisions.

Bazaarvoice combined two "young" technology companies, one of which was not profitable and has never been profitable and another which was set to run out of cash by year-end,[11] in a "new, dynamic," and "constantly evolving" social commerce industry in its "early stage of development."[12]

Even as narrowly defined, market share based on customer revenues would only leave the combined new entity at 56 percent (Bazaarvoice with 41 percent and PowerReviews with 15

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available at: http://www.bloomberg.com/news/2011-08-31/u-s-files-antitrust-complaint-to-block-proposed-at-t-t-mobile-merger.html.

[8] DOJ Press Release, *Justice Department Issues Statements, Regarding AT&T Inc.'s Abandonment of its Proposed Acquisition of T-Mobile USA Inc.*, December 19, 2011,, *available at* www.justice.gov/atr/public/press_releases/2011/278406.htm.

[9] "Under [Assistant Attorney General Bill] Baer and his predecessors, the division has coined a term—'litigation-ready'—to represent a new willingness to go to court, and it has built up its courtroom experience with the hiring of its first director of litigation, Mark Ryan." "'Time is not the friend of these merging companies. Litigation as a playing-out-the-clock process is something that helps the government,' he said." Reuters, *In airline suit, U.S. antitrust enforcers try to build on wins*, David Ingram, Aug. 13, 2013, *available at:* http://www.reuters.com/article/2013/08/13/us-amr-usairways-lawsuit-outlook-idUSBRE97C11V20130813.

[10] United States v. Bazaarvoice, 13-cv-00133, 2014 WL 203966, at 6 (N.D. Cal. Jan. 8, 2014).

[11] *Id*. at 74, 114.

[12] *Id*. at 19.

percent prior to the transaction) standing in minimal contrast to in-house, self-developed R&R solutions, which accounted for 42 percent of the market.[13] Amazon alone accounted for 28 percent of the relevant market, developing its own R&R platform.

The court found that there were significant barriers to entry and expansion in the R&R market, including network effects from syndication, high switching costs, intellectual property/know how, and reputation.[14] Yet, both the DOJ and the court seemed to ignore that viable foreign technologies could begin selling in the United States anytime (despite acknowledging that R&R software is generally sold worldwide "quite easily"),[15] and that e-Commerce platform companies like Oracle that could add the R&R functionality at any time.[16] The court also dismissed the fact that Bazaarvoice and PowerReviews customers (comprising almost half of the IR500 companies) could themselves develop in-house solutions just as Amazon had successfully done. According to Judge Orrick, these customers just did not know what they were talking about.[17]

Bazaarvoice, really? Combined 56 percent? Nascent technology market with half the customers already using self-developed alternatives? And tech behemoths in adjacent platform space able to add alternatives at any time? And zero customer concerns?

Bazaarvoice presents a strong word of caution: it may signal that the antitrust agencies will now bring a case anytime evidence can support a mere complaint—overcoming holistic views based on full evidence and bypassing the all too critical role responsible government requires in the prosecutorial discretion arena.

[13] *Id*. at 65.
[14] *Id*. at 133.
[15] *Id*. at 52.
[16] *Id*. at 87.
[17] *Id*. at 8.