Antitrust & Competition Policy Blog

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Monday, January 27, 2014

Comments of Franco Castelli on Bazaarvoice

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Posted by Franco Castelli

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. 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 "that is not a simple proposition 18 months after the merger" and scheduled a hearing to discuss potential remedies.

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 the merging parties' internal documents always help 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. 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 the transaction.

If the 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 fact 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 parties' motives for entering into the merger as a basis to predict the merger's likely effects on competition and establish a Section 7 violation.

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. In *Oracle*, the DOJ relied heavily on customer complaints, presenting ten 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 could do if faced with a price increase post-merger, and concluded that "unsubstantiated customer apprehensions do not substitute for hard evidence." The outcome for the DOJ in *Oracle* and *Bazaarvoice* was different, but the court's disregard for customer 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.

Economic analysis does not play a prominent role in the *Bazaarvoice* opinion, although the court did rely on the government's economic expert on the issue of product market definition. It is unclear whether this represents a setback for the role of economic analysis in merger review. The simple explanation may be that the documentary evidence was so compelling and hard to rebut that the court did not feel the need to engage in complex economic analysis to validate its findings.

Bazaarvoice is the second major court victory for the DOJ 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 major win in a fully litigated merger case since its 2004 defeat in *Oracle*. Coming after a long drought, the *H&R Block* victory had a significant impact on the agency's willingness to challenge

anticompetitive mergers in court. Since then, the DOJ has shown a more aggressive stance towards merger litigation, challenging a number of high-profile transactions, 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 the increased scrutiny of non-reportable transactions. 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. And just last Friday, 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. 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.