Client Alert

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Justice Department's Successful Merger Trial Informs Antitrust Risk Analysis

On January 9, the US District Court for the Northern District of California found that Bazaarvoice Inc. violated Section 7 of the Clayton Act by acquiring its primary rival, PowerReviews Inc. — launching the new year with a significant merger trial win for the Antitrust Division of the US Department of Justice (DOJ). But, this case also is important for businesses analyzing antitrust risks associated with potential competitor acquisitions.

Prior to their merger in June 2012, Bazaarvoice and PowerReviews were each other's primary competitors in the market for ratings and review platforms on consumer-facing websites. DOJ sued to unwind the merger in January 2013. After a three-week bench trial, the court concluded that the merger was anticompetitive, issuing an opinion that provides a few lessons.

Intent Matters. A merging party's intent is not a legal element of a merger challenge. However, as demonstrated by the court's lengthy description of officer and employee admissions that Bazaarvoice acquired PowerReviews to eliminate its primary competitor and increase price — party intent matters. Indeed, focusing on party testimony is a familiar theme in DOJ's recent merger enforcement challenges. For companies, the court's analysis demonstrates the importance of pre-acquisition statements when considering antitrust risk. Although Bazaarvoice cited other plausible pro-competitive reasons for the merger, the court found that "anticompetitive rationales infused virtually every pre-acquisition document describing the benefits of purchasing PowerReviews," and, as a consequence, was skeptical of "Bazaarvoice's efforts at trial to walk away from its central rationale leading up to the merger."

Customer Testimony Not Dispositive. Customer testimony always has influenced the antitrust agencies' analysis during merger investigations, and complaining customers can be an important factor in the agencies' decision to challenge a merger. Similarly, parties often highlight positive customer testimony in their (sometimes) successful efforts to avoid merger enforcement.

However, at trial, the court discounted testimony from more than 100 customers who asserted they were not harmed by the acquisition. The court concluded that testimony was unreliable because customers had limited — and in some cases unsophisticated — information about the acquisition, market and pricing. Customers also may have been unwilling to testify accurately about their marketing strategies in front of a vendor. Instead, the court relied on the government's economic testimony, which it concluded was more informative. The court's approach is similar to other litigated merger cases where *the antitrust agencies* relied on customer testimony to *their* detriment.

Going forward, the antitrust authorities certainly can be expected to be influenced by complaining customers when investigating mergers. However, customer testimony that is unsupported by expert economic analysis and other evidence may not prove dispositive, particularly in litigated cases.

Proof of Post-Acquisition Price Effects Not Required. At trial Bazaarvoice argued that, given the merger had been consummated, Ninth Circuit precedent required the government to prove competitive harm through evidence of higher prices or consumer testimony. The district court disagreed, concluding that the government carried its burden by establishing the parties' combined market share of 56-68

percent, and demonstrated barriers to new competitor entry. This can be expected to be an important — and cited — conclusion in any future consummated merger challenge.

Technology Mergers Are Ripe for Enforcement. The Bazaarvoice court was careful not to make broad conclusions as to the role of antitrust enforcement in the high-tech sector. But it plainly asserted that the fact that the merger took place in a dynamic and evolving industry was irrelevant to its analysis, given the merger's likely competitive effect. Again, given the agencies' focus on high-tech companies more generally, this is an important conclusion.

The case now proceeds to a remedial phase with a hearing on potential remedies scheduled for January 22, but crafting a remedy may be difficult for a merger that was consummated more than 18 months ago. It also is possible that the parties will appeal the lower court's decision. If they do, this case will continue to be one to watch closely.

Hunton & Williams LLP has significant experience representing companies on merger and other antitrust matters before competition enforcement agencies. The firm's global competition practice combines high-level government and private litigation experience. Lawyers in the group come from both of the US antitrust enforcement agencies and include a former deputy director of the US Federal Trade Commission's Bureau of Competition, a former deputy assistant attorney general and chief of staff of the DOJ Antitrust Division, a former counsel and chief of staff of the DOJ Antitrust Division, four former FTC litigators and other attorneys from the FTC and DOJ. Working from offices in the United States and abroad, the group serves domestic and international companies in merger review, competition litigation, intellectual property matters, consumer protection and privacy, and criminal antitrust defense and related price-fixing litigation.

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