

**DOJ SEEKS TO UNDO ALLEGEDLY ANTICOMPETITIVE ACQUISITION,
CITING BUYER'S INTERNAL "HOT" DOCUMENTS**

The Antitrust Division of the Department of Justice (the "DOJ") recently filed a civil antitrust lawsuit against Bazaarvoice, Inc., challenging the company's June 2012 acquisition of PowerReviews, Inc. as anticompetitive (the "Complaint"). The \$168.2 million transaction was not reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").

The Complaint alleges that the buyer intended to "eliminate[] its most significant rival and effectively insulate[] itself from meaningful competition," citing e-mails circulated among the company's senior executives and other business documents. The suit demonstrates that the government (1) may challenge *any* acquisition of voting securities or assets under Section 7 of the Clayton Act, regardless of whether the acquisition triggers HSR Act reporting requirements, and (2) will focus on internal "hot" documents that characterize a merger as eliminating a close competitor.

The DOJ's Complaint

On January 10, 2013, the DOJ filed a civil antitrust lawsuit challenging Bazaarvoice, Inc.'s June 2012 acquisition of PowerReviews, Inc. The case is *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133 (N.D. Cal.). The suit was brought under Section 7 of the Clayton Act, which prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

According to the DOJ, the acquisition was not reported under the HSR Act, which requires companies to file a report with the Premerger Notification Office of the Federal Trade Commission for certain transactions. The complaint does not state why the transaction was not reported under the HSR Act, but also does not assert a violation of the HSR Act.

The Complaint alleges that Bazaarvoice and PowerReviews competed in a relevant market for the provision to United States manufacturers and retailers of "product ratings and reviews platforms ('PRR platforms') to collect and display consumer-generated product ratings and reviews online." The Complaint focuses on the loss of head-to-head competition between the merging parties. Specifically, the Complaint alleges that "Bazaarvoice provides the market-leading PRR platform, and PowerReviews was its closest competitor. . . . By acquiring PowerReviews, Bazaarvoice eliminated its most significant rival and effectively insulated itself from meaningful competition."

The DOJ alleges that the acquisition was a "calculated move . . . intended to eliminate competition," citing numerous e-mails among Bazaarvoice executives and other business documents that purportedly show such an intent. Among the documents cited in the Complaint are those in which former and current executives allegedly wrote that:

- the acquisition would “[e]liminat[e] [Bazaarvoice’s] primary competitor”;
- the acquisition “was an opportunity to ‘tak[e] out [Bazaarvoice’s] only competitor, who . . . suppress[ed] [Bazaarvoice] price points []by as much as 15%’”;
- the acquisition would “reduc[e] comparative pricing pressure”;
- “Bazaarvoice had ‘literally, no other competitors,’ and [that Bazaarvoice’s CFO] expected ‘pricing accretion’ from the combination of the two firms”;
- “the acquisition would ‘block[] entry by competitors’ and ‘ensure [Bazaarvoice’s] retail business [was] protected from direct competition and premature price erosion”;
- the market for PRR platforms was a “duopoly” and that the acquisition would create a “[m]onopoly in the market”; and
- the acquisition “would ‘further increase[] . . . switching costs’ and ‘deepen[] [its] protective moat.’”

Notably, the Complaint does not quantify the respective “market shares” of Bazaarvoice and PowerReviews prior to the acquisition. Rather, the Complaint relies on the buyer’s own alleged statements to support an allegation that, “[a]s a result of the transaction, Bazaarvoice will be able to profitably impose targeted price increases on retailers and manufacturers based in the United States.”

The Complaint specifically alleges that, for “many retailers and manufacturers, in-house PRR solutions are not sufficiently close substitutes to Bazaarvoice’s platform to impede a post-merger price increase by Bazaarvoice.” Thus, the DOJ alleges that, “in light of the merger, it will be a profit-maximizing strategy for Bazaarvoice to impose targeted price increases on customers that do not consider in-house solutions to be a viable alternative.”

Implications

Although the DOJ’s Complaint has yet to be answered by Bazaarvoice, it provides a few immediate lessons.

First, the government may challenge any transaction, regardless of whether it was required to be reported under the HSR Act.

Second, internal company documents can be used by a plaintiff to characterize as anticompetitive a buyer’s intent in acquiring a rival.

Third, the Complaint’s lack of allegations regarding market shares and its emphasis on allegedly anticompetitive effects on a subset of customers suggest that, in this case, the DOJ will emphasize competitive effects and minimize the role of market definition and structure.

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If you have any questions regarding this memorandum, please contact David K. Park (212-728-8760, dpark@willkie.com), Ross A. Wilson (212-728-8982, rwilson@willkie.com), or the Willkie attorney with whom you regularly work.

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