What Can We Learn from Bazaarvoice?

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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] The Department of Justice challenge to this transaction and the court's ruling have been much analyzed, and for good reason— the case provides significant insights into how the agencies approach merger challenges, how courts view those challenges, and how effective the agencies may be in challenging mergers post-consummation.

I. BACKGROUND

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. On March 24, 2012, Bazaarvoice entered into a contract to purchase PowerReviews for $151 million.[3] The deal was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") because the 2011 assets of PowerReviews did not meet the applicable "size of the parties" requirement under the HSR Act.[4] The transaction was consummated on June 12, 2012,[5] and the Department of Justice Antitrust Division ("DOJ") launched an investigation into the merger two days later.[6] DOJ ultimately sued on January 10, 2013, alleging that the transaction violated Section 7 of the Clayton Act. Its complaint stated:

IN AND OF ITSELF THE CONCLUSION THAT A MERGER TO MONOPOLY VIOLATES THE CLAYTON ACT MAY NOT BE SURPRISING, BUT THE RESULT OF THIS CASE WAS PERHAPS NOT AS OBVIOUS AS THAT FACT ALONE MIGHT SUGGEST

> As a result of Bazaarvoice's acquisition of PowerReviews, customers will lose critical negotiating leverage. The elimination of PowerReviews has significantly enhanced Bazaarvoice's ability and incentive to obtain more favorable contract terms. Accordingly, many retailers and manufacturers will now obtain less favorable prices and contract terms than Bazaarvoice and PowerReviews would have offered separately absent the merger.[7]

After a three-week trial the court issued its ruling, finding that DOJ established a *prima facie* case of likely competitive harm and Bazaarvoice failed to rebut it.[8] After post-trial briefing on remedies issues, the parties agreed that Bazaarvoice would sell all the acquired PowerReviews assets to a divestiture buyer, provide syndication services to the buyer, waive breach of contract claims for customers who switch to the new company, waive trade secret restrictions for employees who join the new company, and permanently license to the divestiture buyer all patents and applications related to review platforms.[9]

In and of itself the conclusion that a merger to monopoly violates the Clayton Act may not be

surprising, but the result of this case was perhaps not as obvious as that fact alone might suggest. Bazaarvoice was not without some reasons for optimism as the litigation began—most important, even after the transaction had been closed and the companies had merged there was no evidence of price effects and little customer opposition to the deal. These normally would be facts difficult for the government to surmount, but it appears to have done so with relative ease in this case. For those reasons alone the court's opinion is worth further consideration, and the case also provides important insights into a number of other significant issues that frequently arise in antitrust litigation.

II. CONSUMMATED DEALS ARE ANALYZED IN THE SAME WAY AS UNCONSUMMATED DEALS

Since the HSR Act was passed in 1976 most of the transactions challenged by the antitrust agencies have been challenged pre-consummation; indeed, the primary justification for the HSR Act was to provide DOJ and the Federal Trade Commission ("FTC") with advance notice of transactions so that they could address potential antitrust issues before the merger took place.[10] This pre-closing notice period would allow the antitrust agencies to avoid the problems inherent in challenging consummated mergers, i.e., the difficulty in restoring competition when the market has already been altered by a combination.[11] It would also allow companies to move forward with their transactions, after review, comfortable that the agencies were unlikely to later challenge those deals.

BAZAARVOICE, HOWEVER, ARGUED THAT CONSUMMATED MERGERS SHOULD BE ANALYZED UNDER A DIFFERENT STANDARD THAN DEALS CHALLENGED BEFORE CLOSING.

Although it is widely acknowledged that the HSR Act has succeeded in achieving these goals, the agencies may still pursue a Clayton Act challenge at any point and challenges of consummated mergers still occur with some frequency. For example, between March 2009 and March 2012 the FTC alone took enforcement action against nine consummated mergers,[12] which made up a full 20 percent of the FTC's total merger challenges during that period.[13] Even relatively small or old transactions are not immune from agency action. In recent years the DOJ has sought to unwind a merger valued at merely $3 million[14] and the FTC took action against a deal eight years after it closed.[15]

Indeed, the agencies have been clear that they will review even non-reportable consummated transactions and take action against those that they believe raise competitive concerns.[16] They have also consistently taken the view that the same substantive standards apply to challenges of consummated deals, though of course the procedural posture is different and often the evidentiary record is more developed.[17]

Bazaarvoice, however, argued that consummated mergers should be analyzed under a different standard than deals challenged before closing. Bazaarvoice cited *U.S. v. Syufy Enterprises*[18] and argued that *Syufy* established three "important principles for post-merger analysis," revolving around the notion that post-acquisition evidence must be given special attention. In particular, Bazaarvoice asserted that:

1. Changes in "market structure" (such as aggressive discounting from re-positioned competitors) are dispositive evidence that the transaction has not caused competitive harm;

2. Customer testimony that reveals no concerns about the merger weighs strongly against a finding of anticompetitive effects; and

3. Traditional merger analysis may be skipped entirely when it is evident that new entrants can defeat any attempt to raise prices.[19]

Bazaarvoice argued that because each of these three principles weighed in its favor, the court need not engage in an "extended traditional analysis" and the government's challenge should fail.[20]

However, the *Bazaarvoice* court rejected the notion that post-acquisition evidence should receive special consideration. Instead, Judge Orrick specifically declined to credit post-consummation evidence of price increases or decreases.[21] The court was unwilling to consider this evidence because of its concern that post-merger pricing decisions were arguably subject to manipulation by the merged entity and thus could not be relied on to demonstrate the effect of the merger on the market.[22] In particular, the court was concerned that Bazaarvoice, which was aware of the DOJ investigation almost immediately after the deal closed, had consciously avoided price increases in order to avoid antitrust risk.[23]

MORE GENERALLY, THE COURT REJECTED THE IDEA THAT CONSUMMATED DEALS SHOULD BE REVIEWED UNDER DIFFERENT STANDARDS AND INSTEAD HEWED TO THE COMMONLY HELD POSITION THAT CHALLENGES TO CONSUMMATED TRANSACTIONS ARE REVIEWED UNDER THE SAME SUBSTANTIVE STANDARDS AS ARE UNCONSUMMATED MERGERS

More generally, the court rejected the idea that consummated deals should be reviewed under different standards and instead hewed to the commonly held position that challenges to consummated transactions are reviewed under the same substantive standards as are unconsummated mergers. Judge Orrick found that "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."[24]

The court specifically addressed and dismissed respondent's argument that *Syufy* required an "alternative methodology" for post-merger cases.[25] Rather, Judge Orrick found the *Syufy* analysis consistent with the usual approach employed by courts. As he described the approach of the *Syufy* court, it had relied on traditional factors such as low barriers to entry and based its decision, in part, on the fact that post-merger entry had actually increased the level of competition in the market.[26] Judge Orrick thus distinguished *Syufy* on the grounds that in that case, unlike this one, new competitors had quickly entered the marketed and prevented the alleged monopolist from maintaining the market share briefly held at the time of the acquisition.[27]

THE DOJ BUILT ITS CASE AROUND THE DOCUMENTS OF BAZAARVOICE EXECUTIVES, AND THE STRATEGY PROVED HIGHLY SUCCESSFUL

Thus, the *Bazaarvoice* opinion gives additional legal support to the view of the agencies—that consummated and unconsummated deals are subject to the same level of legal scrutiny and will be evaluated under the same legal standards.

III. ORDINARY COURSE DOCUMENTS CAN BE DISPOSITIVE

Party documents are increasingly a cornerstone of agency merger challenges, whether against consummated deals or unconsummated deals, and the *Bazaarvoice* case is one of the most vivid examples of this approach. The DOJ built its case around the documents of Bazaarvoice executives, and the strategy proved highly successful. DOJ argued that the intent of the deal was to create a monopoly by eliminating the company's primary competitor and then raising prices, and it offered dozens of pre-merger ordinary course party documents to support that argument.

STILL, THE COURT'S HEAVY RELIANCE ON THE DOCUMENTS AND ITS REPEATED REFERENCES TO THE SPECIFIC PHRASES USED BY THE EXECUTIVES IS NOTABLE

In its defense, Bazaarvoice relied on executive testimony to the effect that: (1) the R&R market included numerous significant competitors (and thus even after this transaction the market would be sufficiently competitive to avoid consumer harm) and (2) the rationale for the deal was that the R&R market was becoming commoditized and thus Bazaarvoice needed to merge with PowerReviews to gain the scale necessary to begin competing in a broader E-commerce market.

The court was almost entirely unconvinced by the Bazaarvoice defense. Judge Orrick found that pre-merger ordinary course documents contradicted both of these contentions and went to great lengths in his opinion to emphasize that finding and make it clear that he did not find the executive testimony credible. Although the court accepted, to some extent, the notion that Bazaarvoice might be interested in entering the broader E-commerce market, he flatly rejected the notion that this new business strategy was the justification for the deal. To that end, Judge Orrick cited a long string of documents from Bazaarvoice executives demonstrating that Bazaarvoice's primary rationale for acquiring PowerReviews was to eliminate its main competitor.

For example, prior to the merger Bazaarvoice's then-CFO acknowledged that the company had "literally no other competitors"[28] besides PowerReviews. The court cited to other documents stating that the benefit of the merger would be "'monopoly in the market'[29] and the 'possibility of reducing the discounting . . . seen in the marketplace.'"[30] One of the most colorful documents, widely discussed by commentators and also referenced by the court, claimed that the merger would "'avoid market erosion' caused by 'tactical knife-fighting over competitive deals.'"[31] The court credited these documents and not the respondent's trial testimony to the contrary.

This is not a fundamentally surprising outcome. It is always difficult to contest ordinary course documents with testimony, and Bazaarvoice found itself in the unenviable position of needing to deny or explain away an unusual number of exceptionally damning documents. Still, the court's heavy reliance on the documents and

its repeated references to the specific phrases used by the executives is notable. Reading the opinion one comes away with the impression that the stark language and great number of "bad" documents impacted the court's evaluation of all the other evidence, making it even more difficult for Bazaarvoice to withstand the government challenge.

IV. CUSTOMER TESTIMONY IS NOT ALWAYS PERSUASIVE

Customer testimony is a critical component of the investigations conducted by both the DOJ and the FTC. Both agencies routinely seek out and evaluate customer views as part of their assessment of the competitive effects of a deal; in fact, most practitioners have found that if customers are not concerned about a transaction, the agencies will often stand down, even if the staff has misgivings about a deal. Public merger data released by the FTC confirm the importance of customer reaction,[32] and the DOJ also has acknowledged the role customers play in investigations: "A large percentage of all Federal antitrust investigations results from complaints received from consumers or people in business by phone or mail or in person."[33] Further, the 2010 Horizontal Merger Guidelines (the "Guidelines") themselves note that the agencies value input from customers, even indirect customers.[34]

SO CUSTOMER VIEWS ARE VERY SIGNIFICANT TO THE AGENCIES, BUT IN THIS CASE THE DOJ APPEARS TO HAVE MADE ITS AFFIRMATIVE CASE WITHOUT THE BENEFIT OF SUBSTANTIAL CUSTOMER SUPPORT.

So customer views are very significant to the agencies, but in this case the DOJ appears to have made its affirmative case without the benefit of substantial customer support. Bazaarvoice, in contrast, emphasized customer reaction (which seemed to range from neutral to supportive) to make its point that the merger had not created any consumer harm and had instead provided competitive benefits. Indeed, this is one aspect of the case where it appeared that Bazaarvoice had a decided advantage, and it took great pains to make the point that DOJ had presented very little evidence that customers were opposed to the transaction: "More than 90 customers testified that they had no concerns with the acquisition. The government will present at most only [redacted] customers who claim to have no options aside from Bazaarvoice and PowerReviews."[35]

Customer reaction might normally be considered particularly instructive in a post-merger context, where the market has already changed and customers have already been exposed to any competitive effects, good or bad, but Judge Orrick was not impressed. On this issue also he sided with the DOJ. He disregarded a substantial amount of testimony from customers who stated that they had not been harmed by the merger and instead found that such testimony was mostly uninformed. "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."[36]

IT IS DIFFICULT TO PREDICT WHETHER THE COURT'S ALMOST COMPLETE DISREGARD FOR CUSTOMER TESTIMONY IN THIS CASE IS INDICATIVE OF A LARGER TREND

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.[37] Judge Orrick's approach to the customer testimony in this case has drawn some criticism from commentators expressing the view that the opinions of customers who use and pay for a product are normally entitled to more weight than was given them by Judge Orrick.[38] It is difficult to predict whether the court's almost complete disregard for customer testimony in this case is indicative of a larger trend, but it is clear that the agencies are at least sometimes willing to go to court without significant customer support—particularly in a merger to monopoly—and that limited customer concern about a transaction is not necessarily fatal to a merger challenge.

V. DEMAND SUBSTITUTION FACTORS MAY BE SUFFICIENT TO DEFINE THE MARKET

The economic experts (Carl Shapiro for the government and Ramsey Shehadeh for Bazaarvoice) took opposing positions on whether the definition of the product market required consideration of supply-side substitution. The DOJ position, as expressed through the testimony of Professor Shapiro, tracked the Guidelines and focused on demand for the product.[39] Dr. Shehadeh argued that supply substitution should also be considered at the market definition stage, and Bazaarvoice pointed to a 9th Circuit case, *Rebel Oil*,[40] in support of that position.[41]

Although there is also support for this position in other case law,[42] Judge Orrick disagreed. He found instead that the holding of *Rebel Oil* was limited to instances in which suppliers can swiftly and easily switch production facilities to take advantage of supra-competitive pricing by a monopolist—and this was not such a situation: "*Rebel Oil* merely instructs that where a supplier can "easily"—i.e., "at virtually no cost"—start supplying the product at issue to the relevant geographic market, that supplier should be included in the market definition. Nothing in *Rebel Oil* states that this will necessarily be the case in all mergers."[43] While the court did not actually reject the notion that supply-side substitution should be part of market definition, it effectively sided with the government and adopted the demand-side approach of the Guidelines.

WHILE THE COURT DID NOT ACTUALLY REJECT THE NOTION THAT SUPPLY-SIDE SUBSTITUTION SHOULD BE PART OF MARKET DEFINITION, IT EFFECTIVELY SIDED WITH THE GOVERNMENT AND ADOPTED THE DEMAND-SIDE APPROACH OF THE GUIDELINES

VI. BEING IN THE HIGH-TECH MARKET DOES NOT PROTECT YOU AGAINST ANTITRUST ENFORCEMENT

In recent years, some support has developed for the notion that the antitrust laws are not well-suited to high-tech markets.[44] Some of this criticism is based on the notion that these markets evolve too quickly, so that enforcers will always be a step or two behind or will not correctly understand the market,[45] and some of the criticism is based on the notion that even dominant positions are not safe in the face of aggressive and sudden competition from new entrants.[46] Not surprisingly, the antitrust agencies have resisted the notion that antitrust cannot effectively police high-tech markets[47] and instead have emphasized the

THE BAZAARVOICE TRIAL DEFENSE HAD ECHOES OF THE ARGUMENT THAT HIGH-TECH MARKETS SHOULD RECEIVE SPECIAL CONSIDERATION UNDER THE ANTITRUST LAWS

harm that unchecked consolidation in those markets might cause. As the court noted in this case: "In recent years, the Antitrust Division has repeatedly alleged that mergers involving high-technology companies likely would harm competition by reducing innovation."[48]

GIVEN THE ECONOMIC SIGNIFICANCE OF HIGH-TECH MARKETS AND THE ONGOING DEBATE ABOUT THE PROPER ROLE OF ANTITRUST ENFORCEMENT IN THOSE MARKETS, THE COURT'S OPINION ON THIS ISSUE MAY STAND AS THE MOST SIGNIFICANT ASPECT OF THE DECISION, AT LEAST FROM THE POINT OF VIEW OF THE ANTITRUST AGENCIES

The Bazaarvoice trial defense had echoes of the argument that high-tech markets should receive special consideration under the antitrust laws. Bazaarvoice claimed that companies such as Google, Facebook, and Amazon had sufficient resources and technological ability to enter the market rapidly and therefore constrained any potential price increases. It thus argued that these firms should be considered as part of the product market and no antitrust violation could be found.

This argument, however, was rejected in its entirety. The court noted instead that there was "no evidence that any company had made even preliminary analyses of the viability of joining the market."[49] Judge Orrick then addressed the larger issue of how to assess the competitive significance of large, sophisticated, and well-funded high-tech firms, and emphasized that their mere existence could not, in and of itself, justify consolidation in specific market segments that were not specifically the focus of their entry plans:

> 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.[50]

Given the economic significance of high-tech markets and the ongoing debate about the proper role of antitrust enforcement in those markets, the court's opinion on this issue may stand as the most significant aspect of the decision, at least from the point of view of the antitrust agencies. After Judge Orrick's opinion issued, the DOJ re-affirmed its view that antitrust analysis in high-tech industries should be conducted in the same fashion as in any other industry:

> Bazaarvoice is important reading for technology companies and their counsel, as well as those who question the applicability of the antitrust laws in the high-tech space . . . . The decision confirms that merger analysis in high-tech markets, as in other markets, is highly fact specific. High-tech mergers do not get a free pass, and their impact on competition must be evaluated on a case-by-case basis.[51]

VII. REMEDIES

Remedies in a case involving a consummated merger are often difficult to construct; the lapse in time between the merger and the decision allows the parties to integrate, and other changes in the market may also shift the competitive landscape, which makes it difficult to restore competition to its pre-merger state. The

Bazaarvoice court acknowledged this difficulty. It found that the government is "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."[52] It is not surprising that the government has had a mixed record in obtaining substantial relief in other consummated merger cases.[53]

THE DIFFICULTIES INHERENT IN CONSTRUCTING POST-CONSUMMATION REMEDIES HAVE NOT CHANGED THE BASIC GOALS OF THE AGENCIES—IN CONSUMMATED DEALS, AS IN OTHERS, THE AGENCIES GENERALLY PREFER STRUCTURAL REMEDIES

The difficulties inherent in constructing post-consummation remedies have not changed the basic goals of the agencies—in consummated deals, as in others, the agencies generally prefer structural remedies. As an FTC official has stated: "If the acquired assets are well integrated, crafting an effective divestiture to eliminate the anticompetitive effects may be problematic, but it nonetheless may be necessary to undo the illegal effects of the merger."[54]

IN BAZAARVOICE, HOWEVER, THE GOVERNMENT WAS FAR MORE SUCCESSFUL IN OBTAINING A REMEDY THAT APPEARS IN LARGE PART TO RESTORE THE MARKET TO ITS PRE-MERGER STATE.

But the realities of the market often dictate that complete divestiture remedies are not obtainable. *Phoebe Putney and Whole Foods*[55] are high-profile examples of situations where the agency won the case but was unable to secure a substantial remedy for the conduct that generated the litigation. Similarly, in the *Evanston* hospital case, the FTC found that a divestiture remedy was impossible to administer adequately because of the complete integration of the merging parties during the years between the close of the merger and the end of litigation. The FTC was also unwilling to sacrifice a few significant post-merger improvements that the parties had implemented, which the agency feared would not survive any substantial divestiture.[56] Instead, the agency required the Evanston hospital system to set up a process whereby insurance companies and other payors were entitled to negotiate contracts for the acquired hospital with a separate negotiating team. The Commission noted at the time that this result was "highly unusual."[57]

In *Bazaarvoice*, however, the government was far more successful in obtaining a remedy that appears in large part to restore the market to its pre-merger state. This outcome, negotiated with Bazaarvoice, may have been a function of the fact that the deal was consummated in the relatively recent past, or perhaps Bazaarvoice felt its bargaining position was relatively weak in light of the court's strong condemnation of the deal.[58] Whatever the reason, the remedy includes almost everything DOJ requested in its post-trial briefing. Bazaarvoice is required to divest all assets acquired in the PowerReviews transaction and, to resolve Bazaarvoice's network effects advantage, provide four years of syndication services, which will allow users of the divestiture buyer's software to view ratings and reviews posted on the Bazaarvoice platform. Bazaarvoice also is required to allow any of its customers to switch to the divestiture buyer without

THE APPOINTMENT OF THE MONITOR MAY BE THE ASPECT OF THE REMEDY THAT HAS THE MOST CONSEQUENCE FOR DEFENDANTS IN FUTURE CASES

penalty, refrain from soliciting any customers of the buyer for six months, and lift non-compete clauses and trade secret restrictions for any employees hired by the buyer. Any patents and applications must be freely licensed to the buyer. Finally, a monitor trustee was appointed to monitor Bazaarvoice's compliance for four years.[59]

The appointment of the monitor may be the aspect of the remedy that has the most consequence for defendants in future cases. The agencies are often interested in utilizing monitors to assist with implementation and oversight of remedies. Both the DOJ and the FTC have recently issued remedies guides discussing compliance monitoring. The DOJ notes that it "may opt to appoint a monitoring trustee to review a defendant's compliance . . . especially when effective oversight requires technical expertise or industry-specific knowledge. A monitoring trustee with industry experience can reduce the burden on the Division and the parties while ensuring that the parties adhere to the decree."[60] Similarly, the FTC remedies guide indicates that it believes compliance monitors can be helpful when judgment requirements are highly complex or technical.[61]

The government has been successful in obtaining monitor appointments in other recent cases, such as *U.S. v. Anheuser-Busch*[62] and *Polypore*,[63] but defendants almost always resist the appointment of a monitor and the issue often creates some controversy. DOJ obtained a long-term monitor in *U.S. v. Microsoft*,[64] and it has been widely debated whether the existence of the monitor and the overall culture of compliance created around that decree affected Microsoft's competitive vigor.

More recently, Apple litigated against the DOJ regarding the need for and appropriate duration of compliance monitoring.[65] In that case, a civil action, Apple was found to have facilitated a price-fixing conspiracy regarding e-books. Initially, the DOJ proposed installing a monitor trustee for 10 years following the entry of judgment.[66] Apple objected, arguing first that no compliance monitor was necessary because the consent decrees it entered into made it impossible to repeat the conduct at issue.[67] Further, it contrasted the DOJ proposal for a 10-year compliance program with the outcome in *AU Optronics*, a criminal case in which the defendant was required to accept compliance monitoring for only three years.[68] Finally, Apple argued that the imposition of a monitor would undermine the free-market competition that DOJ sought to protect and hinted that such harm had been created by the Microsoft monitor: "Requiring Apple to employ an external compliance monitor . . . will place bureaucratic tentacles around Apple's . . . business, stifling the company's ability to innovate and compete . . . . Observers have pointed to such negative effects arising out of Microsoft's consent decree, which lasted for nearly ten years."[69] The DOJ amended its proposal to seek a five-year term[70] and the court eventually approved a two-year term.[71]

THE FACT THAT BAZAARVOICE AGREED TO THE APPOINTMENT OF A MONITORING TRUSTEE FOR FOUR YEARS WILL BE USED AS A POINT OF REFERENCE IN FUTURE NEGOTIATIONS OR LITIGATION ON THIS ISSUE AND WILL LIKELY AID THE GOVERNMENT IN ANY EFFORTS TO OBTAIN A MONITOR

Because of the controversy surrounding the appointment of monitors and the fact-specific nature of the issue, any disputes between the government and respondents regarding the need for and duration of a monitor

arrangement rely heavily on precedent. The fact that Bazaarvoice agreed to the appointment of a monitoring trustee for four years will be used as a point of reference in future negotiations or litigation on this issue and will likely aid the government in any efforts to obtain a monitor.

VIII. CONCLUSION

The outcome of this case was about as favorable as possible for the government. While one might expect the DOJ to successfully challenge a merger to monopoly, this case posed some notable difficulties—in particular, the lack of demonstrable price effects and very few complaining customers. The government successfully utilized a strategy of relying on party documents to overcome these obstacles, effectively rebutted jurisprudential attacks regarding the enforcement of antitrust in a high-tech market, and obtained a robust remedy for a consummated transaction, including the appointment of a monitor to oversee the settlement. This case raised a number of important antitrust issues, and DOJ seems to have won them all. ▲

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This article reflects solely the views of the authors, and does not reflect the views of Arnold & Porter, its partners, or its clients.

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

[3] Anthony Ha, B*azaarvoice to Acquire PowerReviews for 151M*, TechCrunch (Mar. 24, 2012), http://techcrunch.com/2012/05/24/bazaarvoice-acquires-powerreviews/.

[4] 15 U.S.C. § 18a (a)(2)(B)(ii)(II) (2014) (Filing must be made if "any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more."). Whether or not a company meets the relevant threshold is a function of the last full year of revenues or assets. In 2012 the $10 million threshold had been adjusted for inflation to $13.6 million.

[5] *Bazaarvoice*, slip op. at 4.

[6] *Id.*

[7] Complaint, U.S. v. Bazaarvoice, Case No. 13-cv-00133-WHO (N.D. Cal. Jan. 10, 2013).

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

[9] Stipulation and [Proposed] Order, U.S. v. Bazaarvoice, Case No. 13-cv-00133-WHO (N.D. Cal. Apr. 24, 2014).

[10] FTC Premerger Notification Office, *What is the Premerger Notification Program?*, (March 2009), *available at* http://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf ("The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. In the past, the enforcement agencies found that it is often impossible to restore competition fully once a merger takes place. Furthermore, any attempt to reestablish competition after the fact is usually very costly for the parties and the public. Prior review under the Program enables the Federal Trade Commission . . . and the Department of Justice . . . to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.").

[11] *Id.; see* also Richard Feinstein, Director, Bureau of Competition, FTC, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission n.6 (January 2012) (noting one purpose of HSR Act was to avoid the problem of "unscrambling the eggs.").

[12] J. Thomas Rosch, Comm'r, FTC, Consummated Merger Challenges - The Past is Never Dead 2 (Mar. 29, 2012).

[13] *Id.*

[14] Complaint, U.S. v. George's Foods, LLC, Case No. 5:11-cv-00043 (W.D. Va. May 10, 2011).

[15] Complaint, In the Matter of Graco, Inc., No. 101 0215, 2013 WL 1840931 (F.T.C. Apr. 17, 2013).

[16] *See, e.g.*, J. Thomas Rosch, Comm'r, FTC, Consummated Merger Challenges - The Past is Never Dead 2 (Mar. 29, 2012).

[17] *See*, U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010) § 2.1.1 ("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. Consequently, the Agencies also consider the same types of evidence they consider when evaluating unconsummated mergers."); Renata Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, Antitrust Division, Department of Justice, At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement 8 (Jan. 22, 2014) ("There is no specific legal standard or alternative methodology for analyzing consummated mergers.").

[18] 903 F.2d 659 (9th Cir. 1990).

[19] Defendant's Pre-Trial Brief (Redacted), U.S. v. Bazaarvoice, Case No. 13-cv-00133-WHO, (N.D. Cal. Sep. 20, 2013).

[20] *Id.*

[21] *Bazaarvoice*, slip op. at 108 (quoting Chicago Bridge and Iron Co. v. FTC, 534 F.3d 410, 435 (5th Cir. 2008)).

[22] *Id.*

[23] DOJ introduced a document at trial, written by the Bazaarvoice Director of Communications in response to a news article speculating that post-merger prices would rise, indicating that "[w]hatever we come up with will need to be vetted by legal so we avoid any anti-trust gotchas." *Id.*

[24] *Bazaarvoice*, slip op. at 140 (N.D. Cal. Jan. 8, 2014).

[25] U.S. v. Syufy Enterprises, 903 F.2d 659, 665-9 (9th Cir. 1990).

[26] *Bazaarvoice*, slip op. at 139.

[27] *Id.*

[28] *Id*. at 30.

[29] *Id*. at 34.

[30] *Id*. at 30.

[31] *Id.* at 29.

[32] *See* Horizontal Merger Investigation Data, Fiscal Years 1996-2011, at 19-20; 29-30. http://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011.

[33] U.S. Department of Justice, *Antitrust Enforcement and the Consumer 5 available at* http://www.justice.gov/atr/public/div_stats/antitrust-enfor-consumer.pdf.

[34] U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines (2010)* §§ 2.2.2-2.2.3.

[35] Defendant's Pre-Trial Brief (Redacted), U.S. v. Bazaarvoice, Case No. 13-cv-00133-WHO, (N.D. Cal. Sep. 20, 2013).

[36] *Bazaarvoice*. slip op. at 138.

[37] 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.").

[38] *See, e.g.*, Muris, Tim and Wilson, Christine, *Muris and Wilson on Bazaarvoice*, Antitrust & Competition Policy Blog (Jan. 27, 2014) http://lawprofessors.typepad.com/antitrustprof_blog/2014/01/muris-and-wilson-on-bazaarvoice.html.

[39] *Bazaarvoice*, slip op. at 53-58; See, U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (2010) § 4 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.").

[40] Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995).

[41] *Bazaarvoice*, slip op. at 126.

[42] *See, e.g.*, Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 665 (6th Cir. 1993) ("The relevant product market cannot be determined without considering the cross-elasticity of supply.") and Twin City Sportservice, Inc. v. Charles O'Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) ("To determine the relevant market in which this buyer operates we must, as already indicated, examine the cross-elasticity of supply.").

[43] *Bazaarvoice*, slip op. at 126.

[44] *See* Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 Harv. J.L. & Pub. Pol'y 171 (2011), David McGowan, *Between Logic and Experience: Error Costs and* United States v. Microsoft Corp., 20 Berkeley Tech. L.J. 1185 (2005).

[45] Manne, 34 Harv. J.L. & Pub. Pol'y at 187 ("The combination of (1) the antimarket bias in favor of monopoly explanations for innovative conduct that courts and economists do not understand, and (2) the increased stakes of antitrust intervention against innovative business practices is problematic from a consumer welfare perspective."); *see also* id. at 186 ("[A] significant portion of important antitrust cases can

be characterized as interventions undertaken under uncertainty, in the face of a novel business practice or product, relying on fundamentally flawed or misapplied economic analysis, later demonstrated to have been mistaken. In some cases the courts correct the error of the initial enforcement or litigation decision; in most cases they do not.")

[46] Peter T. Barbur, Kyle W. Mach, Jonathan J. Clarke, *Market Definition in Complex Internet Markets*, 12 Sedona Conf. J. 285, 292 (2011) ("Market shares in markets characterized by dynamic competition tend to be unstable, and new entrants to the market may rapidly capture large shares if they introduce a superior product.").

[47] Renata Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, Antitrust Division, Department of Justice, At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement 7 (Jan. 22, 2014) ("High-tech mergers do not get a free pass").

[48] *Bazaarvoice*, slip op. at 3 (citing Complaint, *Bazaarvoice*, at ¶54; Complaint, U.S. v. H&R Block, Inc. et al., 833 F.Supp.2d 36 (D.D.C. 2011) (1:11-cv-00948) (filed May 23, 2011); Second Amended Complaint, U.S. v. AT&T et al., ¶48 No. 11-01560 (D.D.C) (filed Sept. 30, 2011)). In *Bazaarvoice* specifically the DOJ raised concerns based in part on documents stating that Bazaarvoice and PowerReviews had "pushed each other to innovate in ways that helped consumers and retailers." Id. at 4.

[49] *Bazaarvoice*, slip op. at 133.

[50] *Id*.

[51] Renata Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, Antitrust Division, Department of Justice, At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement 5-8 (Jan. 22, 2014).

[52] *Bazaarvoice*, slip op. at 10.

[53] *Compare, e.g.*, Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012) (upholding divestiture order requiring complete divestiture of Microporous, including an out-of-market manufacturing plant), *and* Chicago Bridge & 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 3).

[54] Richard Feinstein, Director, Bureau of Competition, FTC, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission 4 (January 2012). *See also*, Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes 4-5, Remarks as Prepared for the Georgetown Law 7th Annual Global Antitrust Enforcement Symposium (Sep. 25, 2013) ("Where parties have already begin the integration of assets it may be necessary for the merged firm to 'unscramble the eggs' to create an effective, stand-alone competitor. . . . We look to remedy an unlawful consummated deal in a fashion that restores a meaningful competitor and deprives the acquirer of unlawfully obtained market power."); J. Thomas Rosch, Comm'r, FTC, Consummated Merger Challenges - The Past is Never Dead 15 (Mar. 29, 2012) ("A divestiture remedy is more likely to restore competition than a conduct remedy and does not entail long-term monitoring of the respondent.").

[55] *See, supra*, n. 53

[56] Opinion of the Commission at 88-91, Evanston Northwestern Healthcare Corp., Docket No. 9315 (Aug. 6, 2007) (holding that post-merger development of a cardiac surgery program and a state-of-the-art electronic records program would not survive divestiture and relying instead on conduct remedies).

[57] *Id*. at 11.

[58] A similar dynamic plays out in the consent negotiation context as well, where the result of the negotiations is routinely driven by the strength of the evidence and the perceived ability of the relevant agency to obtain the desired relief. *See*, Deborah Feinstein, Director, Bureau of Competition, DOJ, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts (September 17, 2013) ("The stronger the evidence of likely competitive harm or the more predictable the needed remedy, the more likely parties are willing to discuss options to resolve our concerns.").

[59] Stipulation and [Proposed] Order, *U.S. v. Bazaarvoice*, Case No. 13-cv-00133-WHO, (N.D. Cal. Jan. 8, 2014) (parties have stipulated to the proposed order pending a Tunney Act hearing).

[60] U.S. Department of Justice, Antitrust Division, *Antitrust Division Policy Guide to Merger Remedies* 26 (June 2011).

[61] Richard Feinstein, Director, Bureau of Competition, FTC, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission 16 (January 2012).

[62] Final Judgment, U.S. v. Anheuser-Busch InBEV SA/NV, Case No. 13-cv-00127-RWR, (D.D.C. Oct. 24, 2013) (appointing a monitoring trustee for a three year period).

[63] In the Matter of Polypore International, Inc., Federal Trade Commission, Docket No. 9327 (appointing a compliance monitor for five years).

[64] Final Judgment, U.S. v. Microsoft Corp., No. 1:98-cv-01232-CKK (Docket No. 746) (D.D.C. Nov. 12, 2002) (appointing a three-person technical committee to monitor compliance).

[65] Plaintiff United States' Final Judgment and Plaintiff States' Order Entering Permanent Injunction, U.S. v. Apple, Inc., Case No. 12-cv-02826-DLC, (S.D.N.Y Sep. 5, 2013).

[66] Memorandum in Support of Plaintiffs' Revised Proposed Injunction, U.S. v. Apple, Inc., Case No. 12-cv-02826-DLC, (S.D.N.Y Aug. 23, 2013) (revising term from 10 years to 5).

[67] Apple Inc.'s Memorandum of Law in Response to Plaintiff United States' Proposed Final Judgment and Plaintiff States' Proposed Order Entering Permanent Injunction, U.S. v. Apple, Inc., Case No. 12-cv-02826-DLC, (S.D.N.Y Aug. 2, 2013).

[68] *Id*. at 12 (citing U.S. v. AU Optronics Corp., No. 3:09-00110, (N.D. Cal. Oct. 2, 2012)).

[69] *Id.*

[70] Memorandum in Support of Plaintiffs' Revised Proposed Injunction, U.S. v. Apple, Inc., Case No. 12-cv-02826-DLC, (S.D.N.Y Aug. 23, 2013) (revising term from 10 years to 5).

[71] Plaintiff United States' Final Judgment and Plaintiff States' Order Entering Permanent Injunction, U.S. v. Apple, Inc., Case No. 12-cv-02826-DLC, (S.D.N.Y Sep. 5, 2013).