

Combination of online consumer review platforms Bazaarvoice and PowerReviews found to violate Clayton Act

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Last week, the federal district court in San Francisco ruled that Bazaarvoice Inc.'s June 2012 acquisition of PowerReviews Inc. violated Sec. 7 of the Clayton Act. In a "necessarily lengthy Opinion," the court concluded that the Department of Justice Antitrust Division prevailed in the liability phase of its case against the leading provider of online Ratings and Reviews platforms (R&R) over its acquisition of its primary competitor. A status conference has been set for January 22 to consider the remedy phase of the litigation. The court could order Bazaarvoice to divest PowerReviews assets to create a viable competitor, even though the merger was completed 18 months ago.

The Justice Department filed a civil antitrust complaint on January 10, 2013, challenging the \$168.2 million transaction on the ground that it substantially lessened competition in the U.S. market for product ratings and reviews platforms (PRR platforms) for companies involved in online commerce. According to the government, the combination would drive up prices and diminish innovation in the PRR platform marketplace.

Bazaarvoice's acquisition of PowerReviews was not reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which requires companies to notify

and provide information to the Justice Department and the FTC before consummating certain acquisitions, because it was below the reporting threshold. The Justice Department said that it began its investigation shortly after the transaction closed.

R&R platforms provide an interface for consumers to rate a product online. Some R&R platforms allow manufacturers to share, or “syndicate,” ratings and reviews with their retail partners and to analyze information collected from R&R, among other features. Before the acquisition, Bazaarvoice and PowerReviews each offered sophisticated R&R platforms to large enterprise manufacturers and retailers with these added features, among others. According to the court, Bazaarvoice recognized that, by acquiring PowerReviews, it would eliminate its primary commercial competitor, allowing it to scoop up customers that it would otherwise have to expend \$32-50 million to win over from its rival.

The government’s efforts to use internal company documents to help establish that the transaction was anticompetitive were apparently successful. The court noted that there was “overwhelming” evidence that Bazaarvoice and PowerReviews expected the transaction to have anticompetitive effects. Bazaarvoice’s “defenses were often undermined by pre-acquisition statements from its and PowerReviews’s executives.”

Relevant Market, Market Share

The court accepted the government’s proposed relevant market limited to R&R platforms sold in the United States to retailers and manufacturers. Bazaarvoice had called for a much larger market definition, including other user-generated-content collected by other social commerce products.

The court was persuaded in part by the fact that Bazaarvoice and PowerReviews recognized that R&R platforms comprised a distinct market. Competitors and former competitors in the R&R platform market also recognized that R&R was a distinct market. In addition, Bazaarvoice was unable to convince the court that the relevant geographic market was worldwide on the ground that “technology knows no borders.” Lastly, the court concluded that the testimony offered by the government’s expert witness, Dr. Carl Shapiro, buttressed the court’s definition of the relevant market.

In light of the commanding position occupied by Bazaarvoice and PowerReviews in

the relevant market, the government established a *prima facie* violation of Sec. 7 of the Clayton Act, the court decided. Based on one indicator, in 2012, the combined Bazaarvoice-PowerReviews' share was 68 percent of the companies using R&R, and all other commercial vendors had a combined market share of three percent. Based on customer revenues, the combined Bazaarvoice-PowerReviews share was 56 percent.

The court went on to conclude that Bazaarvoice's acquisition of PowerReviews significantly increased concentration in the already highly-concentrated R&R platform market. Using the Herfindahl-Hirschmann Index, the court found that the increase in concentration was significantly above thresholds set out in the joint Department of Justice/FTC merger guidelines and created the presumption that that the transaction would substantially reduce competition.

"By all measurements presented, whether based on market share or market concentration, the government easily made a *prima facie* showing of a Section 7 violation," the court ruled.

Bazaarvoice was unable to rebut the presumption of illegality by arguing that PowerReviews was a weak competitor that would be easily replaced by other competitors. Moreover, it was unlikely that other social commerce companies or large software companies would be "rapid entrants" into the R&R platform market in the United States, and barriers to entry would discourage newcomers. The court noted that the few companies that had entered the market recently were "unlikely to represent a challenge to the [Bazaarvoice's] market power."

Anticompetitive Effects

The court explained that the government did not need to prove that the merger had resulted in higher prices or had other anticompetitive effects to establish a violation of Sec. 7 of the Clayton Act. Instead, it needed to show a "reasonable likelihood" of anticompetitive effect in the relevant market.

"Bazaarvoice's enhanced market power, the significant barriers to entry, and the weakness of its remaining competitors leads the Court to agree with Dr. Shapiro's central conclusion that it is more likely than not that the merger will have anticompetitive effect," the court noted.

Bazaarvoice pointed to the fact that none of the more than 100 customers who

testified in the case believed that the acquisition had harmed or would harm them to refute the alleged anticompetitive effects. However, the court found that the customers' testimony on the impact and likely effect of the merger was speculative at best and was entitled to virtually no weight. The court noted that the customers were not privy to most of the evidence presented to the court, they paid little or no attention to the merger, and each had an idiosyncratic understanding of R&R based on the priorities of their companies. The customers were, however, the most credible sources of information on their need for, use of and substitutability of social commerce products, as well as regarding their companies' past responses to price increases, the court noted.

Efficiencies

The court was not persuaded that Bazaarvoice's acquisition of PowerReviews resulted or will result in efficiencies that overcome the merger's anticompetitive harms. "While the merger absolutely benefits Bazaarvoice on a number of levels, it is unclear that its customers will reap those benefits absent price increases or, in some cases, that they would not have received those benefits if the merger had not occurred," the court said.

In closing, the court noted that "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."

Antitrust Division Statement

William Baer, Assistant Attorney General in charge of the Antitrust Division, issued a statement on January 9 in response to the ruling, expressing his pride in the work done by the trial team and reminding firms that nonreportable transactions don't get a "free pass" from antitrust scrutiny.

"By acquiring its only significant rival, Bazaarvoice deprived its customers of the benefits of competition," said Baer. "We are pleased that the court, after carefully weighing all of the evidence, agreed with the Justice Department that Bazaarvoice's acquisition of PowerReviews was likely to extinguish price competition and substantially diminish the pace of innovation in the market for product ratings and reviews platforms."

"As shown during trial, Bazaarvoice executives clearly intended to eliminate

competition by acquiring PowerReviews,” Baer stated. “Consistent with Bazaarvoice’s own pre-merger view of the marketplace, the evidence presented at trial demonstrated that PowerReviews was a significant threat to Bazaarvoice and that other rivals are poorly positioned to fill the competitive void created by the merger.”

Bazaarvoice Reaction

Bazaarvoice issued a statement on January 9, expressing disappointment with the decision. The company said it would not make a decision regarding an appeal until after the court concluded the remedy phase of the litigation.

We believe that the merger with PowerReviews has been beneficial to customers, as did the more than 100 customers who testified that they did not believe that the acquisition affected them adversely in any way,” said Gene Austin, president of Bazaarvoice. “Throughout this process, our focus has remained on serving our clients and providing them with a full range of social software that helps them engage more powerfully with their customers. With the Court’s decision, we’ll now do everything we can to help ensure that the final order achieves the best outcome for our clients, shareholders, and employees.”