

Antitrust Alert

DOJ Unwinds an Anticompetitive Consummated Technology Acquisition Under Terms Requiring More Than Asset Divestiture

The US Department of Justice has signaled that it will insist on exceptional remedies—requiring more than mere divestiture of acquired assets—when confronted with consummated transactions that prove anticompetitive.

On April 24, 2014, the Antitrust Division of the US Department of Justice (DOJ) and Bazaarvoice announced an agreement that the company would divest all of the assets it acquired when it bought PowerReviews in mid-2012. Bazaarvoice also agreed to a number of additional terms designed to restore competition in the market for ratings and review (R&R) platform software. Judge William H. Orrick of the US District Court for the Northern District of California had previously found, after a three-week bench trial, that Bazaarvoice had violated the federal antitrust laws when it acquired “its only real commercial competitor” in that market. *United States v. Bazaarvoice, Inc.*, 2014 U.S. District WL 203966, *2 (N.D. Cal., Jan. 8, 2014). The parties were preparing to contest the remedy when they reached the settlement, which is subject to court approval. At a hearing a day after the settlement was announced, Judge Orrick indicated that he would likely approve it.

Bazaarvoice sells its R&R platform to manufacturers and online retailers. They incorporate it into their websites to collect and display consumer-generated product ratings and reviews. R&R platforms help drive online sales by providing shoppers with other consumers’ product evaluations. The product has become increasingly sophisticated. One important feature enables a manufacturer to syndicate its reviews to the retailers that sell its products; retailers also can

share their reviews with manufacturers. Thus, syndication allows retailers and manufacturers to display more, and the most current, reviews to their customers. It also provides them with a larger data set to which they can apply market analytics. Syndication gives rise to network effects because as more retailers and manufacturers adopt the software platform, they both have more opportunities to share more reviews with each other for a given product. These network effects create a significant barrier to entry into the R&R platform market.

Reportedly valued at \$168 million, the acquisition was not reportable under the Hart-Scott-Rodino Act because it did not meet the Act's "size-of-person" test. Like many start-up companies, PowerReview's revenues in the year before it was acquired were less than the \$15.2 million threshold that can trigger premerger filing requirements. Because the parties did not have to obtain prior governmental approval, they consummated the acquisition before the Antitrust Division opened its investigation. Therefore, the Antitrust Division sought a remedy that would unwind the deal, rather than merely block it.

In addition to the asset divestiture, the settlement contains additional requirements designed to place the divestiture buyer in the competitive position that PowerReviews would likely have achieved today had it not been acquired nearly two years ago. The buyer will receive perpetual licenses to Bazaarvoice's patents. Bazaarvoice also agreed to allow the buyer to obtain and use its R&R platform trade secrets, know-how and other proprietary information. The Antitrust Division took the position that these provisions would compensate for the deterioration of PowerReviews' business caused by Bazaarvoice's failure to invest in research and development for the PowerReviews platform. In remarks before the Institute for Consumer Antitrust Studies in Chicago on April 25, 2014, Leslie Overton, Deputy Assistant Attorney General for Civil Enforcement at the Antitrust Division, indicated that it was the Antitrust Division's historical practice and current policy in addressing consummated transactions to require divestiture of additional assets beyond those acquired in the transaction when the acquired assets had been rendered obsolete or insufficient by the passage of time.

Moreover, Bazaarvoice agreed to grant the buyer a four-year license to sell Bazaarvoice's syndication services to the acquirer's R&R platform customers. The DOJ required that Bazaarvoice provide those services on nondiscriminatory terms. These services are intended to make the buyer's R&R platform more competitive as it seeks to attract a critical mass of manufacturers and online retailers. They also compensate for Bazaarvoice's migration of PowerReviews customers to its own R&R platform. A court-appointed trustee will monitor Bazaarvoice's compliance with the settlement.

The Antitrust Division made one apparent concession in its settlement. It had previously sought a final judgment on remedies that contained a provision that the asset divestiture would be deemed adequate only if the PowerReviews R&R platform generated, at the time of divestiture,

at least 80 percent of the revenue that it had been generating at the time PowerReviews was acquired. If not, Bazaarvoice would have to license its own proprietary R&R platform to the divestiture buyer. That provision was not included in the settlement.

The Antitrust Division argued that this condition would insure that the buyer would be placed in the competitive position that PowerReviews would have occupied today absent the transaction. For practical purposes, this condition would have insured that Bazaarvoice would meet the benchmark, given the prospect of having to license its “crown jewels.” Nevertheless, this condition would have been the least likely to receive court approval in the context of a contested remedy. A license to the “crown jewels” would put the buyer in a more competitive position than PowerReviews had enjoyed when it was acquired. Not only did PowerReviews have a significantly lower market share, its R&R platform lacked important features offered by Bazaarvoice.

This apparent concession notwithstanding, the settlement demonstrates that the competitive harms arising from consummation of a transaction prior to governmental approval may lead to the imposition of exceptional remedies.

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