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Practice Group:**Antitrust,
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Recent Developments in Antitrust Enforcement Within High-Tech Markets

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In January 2014, the U.S. District Court for the Northern District of California found that Bazaarvoice, Inc. violated Section 7 of the Clayton Act by acquiring its primary rival PowerReviews¹. The Department of Justice, Antitrust Division, challenged Bazaarvoice's US\$168 million acquisition of PowerReviews in January 2013, six months after the close of the transaction, which was non-reportable under the reporting thresholds of the *Hart-Scott-Rodino Antitrust Improvements Act* (HSR Act).

The Department of Justice, Antitrust Division's Deputy Assistant Attorney General for Criminal and Civil Operations, Renata Hesse, commented on the decision and other recent trends related to merger enforcement in high-tech industries during the Conference on Competition and IP Policy in High-Technology Industries (Conference on Competition)². Below is a summary of the significant themes from these recent events and practical advice for high-tech companies contemplating a merger or acquisition.

Significant Themes

1. A Negative Impact on Innovation Will Raise Antitrust Concerns

The possible detriments to innovation are becoming an increasing concern in merger enforcement cases, particularly those involving high-tech industries. As Hesse commented, "Innovation can dramatically improve consumer welfare by motivating the introduction of extraordinary new products, including some that meet demands that consumers didn't even anticipate."³ The Antitrust Division's complaint against Bazaarvoice focused on the fact that PowerReviews was an innovator in the Ratings and Reviews (R&R) platforms market, continually pushing Bazaarvoice to innovate to remain competitive, and alleged that the merger would lead to reduced innovation and lower quality products for consumers.

The court found that pre-merger competition between Bazaarvoice and PowerReviews was a driving force of innovation. While intent is not an element of a Section 7 violation, the court focused on Bazaarvoice's premerger rationales for the acquisition and used them as evidence that the merger would have an anticompetitive effect on innovation. The court relied on internal documents, such as emails, board presentations, SEC filings and notes from executive meetings, which indicated that a motivating factor in Bazaarvoice's decision to acquire PowerReviews was to eliminate its primary competitor. Although Bazaarvoice asserted additional, pro-competitive rationales for the acquisition during trial, Bazaarvoice's internal documents undermined those arguments and Bazaarvoice could not overcome the Antitrust Division's theories on the likely effects of the merger. The court ultimately found that the merger's effect on innovation could substantially lessen competition.

In her comments at the Conference on Competition, Hesse stressed the importance that the Antitrust Division places on preventing harm to innovation in high-tech markets, explaining that it is often a deciding factor in the Division's enforcement decisions involving technology

Recent Developments in Antitrust Enforcement Within High-Tech Markets

companies. She noted that evidence “of pre-merger ‘one-upmanship’ is a significant red-flag for antitrust enforcers”⁴ and that the Division will be concerned where there is evidence that the acquired firm was “a particularly innovative or disruptive competitor.”⁵

2. High-Tech Mergers Require a Fact-Intensive Analysis of the Barriers to Entry

The existence of other well-funded technology companies in adjacent markets will not by itself overcome the effects of an anticompetitive merger. The court’s opinion in Bazaarvoice made clear that high-tech companies cannot just point to other companies operating in the broader eCommerce space to argue that other competitors could easily enter the market. Bazaarvoice pointed to Google and Facebook, among others, as potential entrants into the R&R market, but the court criticized this defense, arguing that Bazaarvoice failed to provide any reason or evidence that those companies were likely to enter the market.

The court heavily focused on the ‘network effect’ and high switching costs as evidence of high barriers to entry in the R&R market. The network effect is when a network/syndication-oriented media platform attracts a strong network, creating a chain reaction in which potential customers will continue to choose the brand that is better connected, fueling an even stronger network. The court also emphasized the importance of reputation and retaining a large number of clients in the R&R industry as evidence of a high barrier to entry. Ultimately, the court found that “syndication, switching costs, intellectual property/know how, and reputation are formidable barriers to new firms entering the market for R&R platforms and to existing R&R providers expanding their operations to replace the competition previously provided by PowerReviews.”⁶

In her comments at the Conference on Competition, Hesse warned that high-tech mergers would not get a ‘free pass’ from the barriers-to-entry factor, but would instead be subject to a highly fact-specific merger analysis. Hesse also focused on the importance of network effects in high-tech markets, explaining that the value of a product to consumers can increase with the total number of users of a product, thus creating a powerful barrier to entry.

3. Non-Reportable Transactions can Violate the Antitrust Laws

Bazaarvoice’s acquisition of PowerReviews was not a reportable transaction under the HSR Act, but that did not shield it from a government challenge or from a finding that it violated the antitrust laws. Hesse acknowledged that many high-tech mergers do not raise antitrust concerns, particularly when they result in a combination of complementary products or technologies, but she urged companies contemplating a non-reportable transaction that could raise antitrust concerns to seek advice from antitrust counsel and consider consulting with the Antitrust Division before closing the transaction.

Practical Implications

High-tech companies contemplating a merger should use care when documenting their merger rationales. As seen in the Bazaarvoice opinion, a company’s own documents can and will be used against it to evidence potential anticompetitive effects of a merger. However, providing antitrust counsel with certain types of contemporaneous, ordinary course of business documents can also help demonstrate that a merger will not have anticompetitive effects. As Hesse pointed out, such documents can include:

- win/loss reports evidencing a wide range of competitors

Recent Developments in Antitrust Enforcement Within High-Tech Markets

- a business plan that preceded consideration of the merger that identified the threat posed by an emerging technology
- engineering documents evidencing a struggle to achieve an efficiency that could be enhanced by the merger
- documents identifying the pro-competitive justifications for the merger.⁷

Conclusion

The court's opinion in *Bazaarvoice* and Hesse's recent comments provide valuable insight into the antitrust analysis that high-tech companies will face when contemplating a merger that raises potential anticompetitive concerns. Companies considering such transactions should seek the advice of antitrust counsel early in the process to avoid unnecessary pitfalls and to help them navigate the merger enforcement process.

References

¹ United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014), available at <http://www.justice.gov/atr/cases/f302900/302948.pdf>.

² Renata B. Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement, Remarks as Prepared for the Conference on Competition and IP Policy in High-Technology Industries (Jan. 22, 2014), available at <http://www.justice.gov/atr/public/speeches/303152.pdf>.

³ Id. at 2.

⁴ Id. at 4.

⁵ Id.

⁶ United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO at 132–133 (N.D. Cal. Jan. 8, 2014), available at <http://www.justice.gov/atr/cases/f302900/302948.pdf>.

⁷ Renata B. Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement, Remarks as Prepared for the Conference on Competition and IP Policy in High-Technology Industries, at 12 (Jan. 22, 2014), available at <http://www.justice.gov/atr/public/speeches/303152.pdf>.

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