Bloomberg BNA

Antitrust & Trade Regulation Report™

MERGERS

DOJ's *Bazaarvoice* Complaint Highlights Risk to All Transactions Despite HSR Reporting Thresholds



BY RICHARD FALEK, ELIZABETH CATE, AND BRANDON DUKE

Richard Falek is a partner in the New York City office of Winston & Strawn LLP. His practice focuses on antitrust and trade regulation issues, particularly mergers and acquisitions requiring Hart-Scott-Rodino Act filings, as well as state and foreign filings and approvals. He also has been involved in varied antitrust litigation.

Elizabeth Cate is a litigation associate in the New York City office of Winston & Strawn LLP. She focuses her practice on complex commercial litigation, antitrust litigation, and internal investigations. She has represented clients in a variety of industries in criminal antitrust investigations before the DOJ as well as in class actions.

Brandon Duke is a litigation associate in the New York City office of Winston & Strawn LLP. His practice focuses on antitrust litigation. He has represented clients involved in anticompetitive merger litigation and in criminal antitrust investigations before the DOJ.

A recent complaint filed by the Department of Justice (''DOJ''), challenging the acquisition of PowerReviews, Inc. by Bazaarvoice, Inc., should serve as a cautionary tale for all parties contemplating a transaction, regardless of the size of the transaction and the reporting thresholds set in the Hart-Scott-Rodino Antitrust Improvements Act (''HSR'').

On January 10, 2013, the DOJ filed a civil antitrust lawsuit against Bazaarvoice, a social media marketing company.[1] The lawsuit challenges Bazaarvoice's acquisition of its competitor, PowerReviews, which supplies product ratings and reviews platforms, as an anticompetitive transaction under Section 7 of the Clayton Act.[2] Bazaarvoice did not report the June 2012 transaction to the government because the transaction did not satisfy reporting thresholds.[3]

---

[1] Complaint, *United States v. Bazaarvoice, Inc.*, No. C-13-0133 (JSC) (N.D. Cal. filed Jan. 10, 2013), ECF No. 1, *available at* http://www.justice.gov/atr/cases/f291100/291187.pdf; *see also* Tom Gara, *Is There a Monopoly in Social Media? The DOJ Thinks So*, Wall St. J., Jan. 10, 2013, http://blogs.wsj.com/corporate-intelligence/2013/01/10/ monopoly-busting-goes-social-doj-goes-after-bazaarvoice/.

[2] Complaint, *Bazaarvoice, Inc.*, *supra* note 1.

[3] Press Release, Bazaarvoice, Inc., Statement of Bazaarvoice on Yesterday's Filing of an Antitrust Action Against it by the Department of Justice (Jan. 11, 2013), *available at* http://

The DOJ's lawsuit alleges that the transaction substantially reduced competition in the ratings and reviews platform industry in the U.S., raising prices and reducing innovation.[4] The DOJ seeks to divest Bazaarvoice of sufficient assets to create another competitive business to replace PowerReviews in the market for social media.[5] Bazaarvoice claims that it investigated the social media market extensively before entering into the transaction, and found that the relevant market is bigger and more varied than the DOJ assumes and could therefore sustain the acquisition.[6]

Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect ''may be substantially to lessen competition, or to tend to create a monopoly.''[7] HSR amended the Clayton Act in 1976 and requires all persons contemplating certain mergers or acquisitions, which meet or exceed certain thresholds, to file notifications with the Federal Trade Commission and the Department of Justice.[8] Specifically, the government must be notified of any pending transaction where the parties meet the ''size-of-person'' test and the transaction itself meets the ''size of transaction'' test, if no exemptions are applicable.[9] The thresholds for the tests are adjusted annually, based on changes to the gross national product.

Effective February 11, 2013, the ''size of transaction'' threshold has been increased to $70.9 million.[10] Thus, except in very unique circumstances, any transactions valued below $70.9 million need not be reported to the government.[11] For transactions between $70.9 million and $283.6 million, the ''size of person'' test further determines whether a filing need be made. For an HSR filing to be required in this range, one party to the transaction must have annual net sales or total assets of at least $141.8 million and another party must have annual net sales or total assets of at least $14.2 million (and PowerReviews' revenues were below those levels).[12] Provided no exemption applies, if the transaction is valued above $283.6 million, there is no ''size of person'' test and it must be reported to the government before completion, unless an exemption applies.[13]

The DOJ's lawsuit demonstrates a risk that should be considered by those seeking to enter transactions below the reporting thresholds required by HSR. HSR is mainly a logistical statute designed to facilitate review of larger transactions prior to consummation. The DOJ, as well as the Federal Trade Commission (''FTC''), have recently confirmed that below-threshold transactions may be scrutinized as a matter of policy.[14] There are other recent examples of transactions falling below the HSR thresholds being challenged. In early 2011, the DOJ challenged George's Inc.'s acquisition of Tyson Foods' chicken processing plant, which at a value of $3 million, fell well below the HSR reporting threshold.[15] The court entered a consent decree in November 2011 that required George's to make capital improvements to the chicken plant, thereby increasing the demand for local poultry and reducing the merger's likely anticompetitive effects.[16]

In 2009, Election Systems & Software acquired Premier Election Services at a transaction valued at $5 million. The DOJ filed suit later that same year, claiming that the deal combined the two largest companies that tallied votes in U.S. elections, thereby substantially reducing competition.[17] In 2010, Election Systems & Software was ordered to divest the majority of the assets of the acquisition.[18]

The FTC has also challenged non-HSR reportable transactions in the last few years, particularly healthcare mergers. In 2010, ProMedica Health Systems, Inc. purchased St. Luke's Hospital in a transaction that fell below HSR reporting thresholds. In 2011, the FTC challenged the transaction, alleging that the merger created a company with a disproportionate market share. In March 2012, the FTC held that the merger violated the

www.bazaarvoice.com/about/press-room/statement-bazaarvoice-yesterdays-filing-antitrust-action-against-it-department-justice. PowerReviews' annual revenues of $12 million were below the level necessary for an HSR filing. *Id.*

[4] Complaint at ¶¶ 30, 32-41, *Bazaarvoice, Inc.*, *supra* note 1.

[5] *Id.* at ¶ 63(b).

[6] Press Release, Bazaarvoice, Inc., *supra* note 3.

[7] 15 U.S.C. § 18.

[8] 15 U.S.C. § 18a. After the parties involved in the transaction have filed their completed forms, the government has up to 30 days to decide whether to seek additional information — a process commonly known as a ''second request.'' *Id.* at § 18a(b). The parties may also seek ''early termination'' which, if granted, will shorten the 30 days to approximately two weeks. *Id.* If the 30-day waiting period expires without the issuance of a second request, or if early termination is granted, the parties may close the transaction. *Id.* If a second request is issued, the government has 30 days from the date the parties comply with the request to decide whether to let the transaction proceed or to attempt to block it in court. *Id.* at § 18a(e).

[9] 15 U.S.C. § 18a(a); 16 C.F.R. § 802; *see also* Federal Trade Commission Premerger Notification Office, To File or Not to File: When You Must File a Premerger Notification Report Form 4-10,12-15 (Sept. 2008), *available at* http://www.ftc.gov/bc/hsr/introguides/guide2.pdf. 16 C.F.R § 802 contains certain exemptions for types of transactions that otherwise would be reportable. For example, the purchase of certain real estate and certain acquisitions made ''solely for the purpose of investment'' are exempt from HSR reporting requirements. 16 C.F.R §§ 802.2, 802.9. Before filing, parties should consult with antitrust counsel regarding application of these exemption rules and the exemptions set out in the statute itself.

[10] 78 Fed. Reg. 2406 (Jan. 10, 2013); *see also* Press Release, Federal Trade Commission, FTC Announces Revised Thresholds for Clayton Act Antitrust Reviews for 2013 (Jan. 10, 2013), http://www.ftc.gov/opa/2013/01/clayton.shtm.

[11] *See* 15 U.S.C. § 18a(a)(2)(B)(i); 16 C.F.R. § 801.1(h)(1).

[12] *See* 15 U.S.C. § 18a(a)(2)(B)(ii). Under the HSR ''size of person'' test, the annual revues for Bazaaarvoice, Inc. ($106.1 million for fiscal year 2011) and PowerReviews (11.5 million for 2012) fell under the 2012 thresholds of $136.4 million and $13.6 million respectively. *See* Complaint at ¶¶ 11-12, *Bazaarvoice, Inc.*, *supra* note 1 (listing annual revenue); Press Release, Federal Trade Commission, FTC Announces Revised Thresholds for Clayton Act Antitrust Reviews (Jan. 24, 2012), *available at* http://www.ftc.gov/opa/2012/01/hsr.shtm (announcing 2012 HSR thresholds).

[13] *See* 15 U.S.C. § 18a(a)(2)(A).

[14] Press Release, Department of Justice, Justice Department Files Antitrust Lawsuit Against Bazaarvoice Inc. regarding the Company's Acquisition of PowerReviews Inc. (Jan. 10, 2013), *available at* http://www.justice.gov/opa/pr/2013/January/13-at-039.html (quoting Bill Baer, Assistant Attorney General, Department of Justice Antitrust Division).

[15] Complaint, *United States v. George's Foods, LLC*, No. 5:11-CV00043 (W.D. Va. May 5, 2011), ECF No. 1, *available at* http://www.justice.gov/atr/cases/f270900/270983.pdf.

[16] *Id.*

[17] Complaint, *United States v. Election Systems and Software, Inc.*, No. 1:10-cv-00390 (D.D.C. Mar. 8, 2010), *available at* http://www.justice.gov/atr/cases/f256200/256275.pdf.

[18] *Id.*

Clayton Act and ordered ProMedica to divest the hospital.[19]

The FTC was poised to challenge another below-threshold transaction in 2010, Scott & White Healthcare's acquisition of King's Daughters Hospital in Texas.[20] The FTC claimed that this transaction would eliminate Scott & White's only competitor. The parties agreed that Scott & White would offer to sell King's Daughters to another buyer on specified terms to avoid litigation, although when the sale fell through, the FTC closed its investigation.[21]

Seeking out government scrutiny of a proposed transaction that is not HSR reportable seems counterintuitive, and we are by no mean suggesting it as a blanket approach. However, parties to a transaction must be keenly aware that the lack of an HSR filing does not mean the transaction will necessarily escape government review and perhaps be challenged in court. Thus, parties contemplating a non-reportable transaction should at minimum evaluate the potential antitrust enforcement exposure and consider whether to allocate risk of such exposure in the purchase or merger agreement.

[19] *ProMedica Health Sys., Inc.*, Docket No. 9346 (FTC Mar. 28, 2012), *available at* http://www.ftc.gov/os/adjpro/d9346/120328promedicabrillopinion.pdf (Opinion of the Commission) *and* http://www.ftc.gov/os/adjpro/d9346/120328promedicaorder.pdf (Final Order).

[20] Federal Trade Commission, Statement of Bureau of Competition Director Richard Feinstein on the FTC's Closure of its Investigation of Consummated Hospital Merger in Temple, Texas (Dec. 23, 2009), *available at* http://www.ftc.gov/os/closings/091223scottwhitestmt.pdf.

[21] *Id.*