

## A Mouse that Roared may be Catnip

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Q: Why not make an acquisition to “eliminate your primary competitor” and get “relief from price erosion”, especially if the deal is below the Hart-Scott-Rodino (HSR) premerger notification thresholds and therefore can close without the feds knowing about it?

A: Because the feds may learn about it, including that you did it because the deal would leave you with “literally, no other competitors”, and sue you 7 months later to take you apart.

Lessons:

- (1) There is no deal too small for antitrust scrutiny.
- (2) A deal done to “eliminate your primary competitor” may attract government attention, especially when you put that goal in writing.
- (3) No business is too small for its officers to be careless about what they write.

The antitrust laws prohibit mergers and acquisitions that may substantially lessen competition, or tend to create a monopoly, regardless of size. Therefore, the Department of Justice and the Federal Trade Commission may investigate and challenge any deal at any time even though the HSR Act requires only deals that cross the reporting thresholds to be notified to them and to observe a waiting period before closing. This is apparently what happened to Bazaarvoice, Inc. on January 10, 2013, after its June 2012 purchase of PowerReviews, Inc. The DOJ sued for divestiture of sufficient assets to form a new viable competitor as substantial as PowerReviews was.

Bazaarvoice and PowerReviews both provided product ratings and reviews platforms. These platforms enable product ratings and reviews by consumers to be posted on manufacturers’ and retailers’ websites. Bazaarvoice and PowerReviews competed fiercely to supply these platforms. Until the acquisition, manufacturers and retailers would pit Bazaarvoice and PowerReviews against each other to get favorable terms, and Bazaarvoice and PowerReviews would compete to offer better terms and more features to gain customers. Bazaarvoice sometimes offered its product free to PowerReviews customers. Its CEO wanted to “destroy” PowerReviews and to “aim a big bazooka in their direction.” Its Chief Strategy Officer wanted to “eradicate” PowerReviews.

The DOJ is relying substantially on Bazaarvoice’s own statements to build the case. In its complaint, the DOJ omitted much of the usual detail about the market that was affected, and focused on what Bazaarvoice’s officers wrote.

Bazaarvoice’s files were apparently filled with statements in emails and other documents along the lines that “[t]here really isn’t a market...it is [Bazaarvoice] or PowerReviews.” The deal was an opportunity to

take out the “only competitor, who...suppress[ed] [Bazaarvoice] price points [by] as much as 15%,” and to “reduce[e] comparative pricing pressure.” Bazaarvoice’s CEO informed its board that it would have “[n]o meaningful direct competitor” and would face less “pricing dilution” after buying PowerReviews. Its CFO wrote the board that the deal would “eliminat[e] feature driven one-upmanship and tactical competition,” and “[c]reate[] significant competitive barriers to entry”. The addition of PowerReviews retailers to Bazaarvoice’s network would “further increase[]...switching costs” and “deepen[] [its] protective moat.” The final due diligence memo recommending the deal to the board concluded that it would “block[] entry by competitors” and “ensure [Bazaarvoice’s] retail business [was] protected from direct competition and premature price erosion.” PowerReviews confirmed this view of the transaction by concluding that it would create a “[m]onopoly in the market.”

The case against Bazaarvoice is a reminder to write with discretion. Being a mouse that roared and using colorful language may backfire. Moreover, a business should keep in mind antitrust when considering a transaction with a major competitor, regardless of its size. A deal that may be too small to report is not too small to be investigated. Early consultation with antitrust counsel may mitigate the risks. Bazaarvoice may ultimately win against the DOJ, but it has already spent many thousands of dollars defending against the investigation and likely will spend more defending against the lawsuit. Failure to take care upfront can be costly in the end.