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'Hot' Documents Do Not Tell The Whole Story In Antitrust

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David Balto

In a recent Law360 Expert Analysis piece — "DOJ Merger Challenge Highlights Danger Of Bad Documents" — several attorneys opine that "'[h]ot' documents can be crucial to the outcome of any antitrust matter" and they use the recent U.S. Department of Justice complaint against the Bazaarvoice Inc./PowerReviews Inc. merger to illustrate the use of such "hot" documents. "Hot" documents are always helpful to catch the interest of the press, a busy judge or an unsophisticated jury. But more times than not, antitrust cases are resolved on economics and what John Adams called "hard facts," not snippets from emails or musings from corporate MBAs. Antitrust case books are littered with cases that initially looked promising based on some supposed "hot" documents, but ultimately failed because the foundations of a sound antitrust case were missing. And, as we discuss below, the Bazaarvoice complaint faces many of the same pitfalls encountered by these cases.

The crafting of a civil antitrust complaint by a federal antitrust regulator is both a science and an art. On one hand, the regulators must adhere to well-defined principles of antitrust enforcement, including the definition of proper geographic and relevant product markets, a coherent model of anti-competitive harm, and a demonstration that any anticipated harm will outweigh any pro-consumer benefits and will not be cured by competitive forces. On the other hand, the regulators want to capture the interest of a busy judge by saying, "This case is not so complicated — look at these documents!"

Litigation seems most sexy when practiced with exclamation points, especially since antitrust cases typically rely on daunting economic analysis. This litigation reality creates a need to find and utilize apparently inflammatory "hot docs" to supplement the dry mechanical nature of the antitrust analysis. In striving to achieve this balance, antitrust regulators routinely include internal company documents in their complaints. This is different from including economic conclusions derived from third party documents; instead, the agencies will often include provocative snippets from emails or normal course of business

materials that appear to support their case.

These documents may take many forms, but can generally occupy two groups: documents that suggest a relevant product market and documents that suggest a merging party's intent to engage in anti-competitive practices post-merger. When combined with rigorous antitrust analysis, these documents can be very helpful for antitrust regulators' cases. However, in isolation, these documents can elicit competitive concerns when they simply do not exist.

With this in mind, it is vital that antitrust regulators do not build an entire case around inflammatory documents. Quotes from executives, internal memoranda about competitors, and customer presentations are the icing on the cake after a proper antitrust analysis. As the International Center for Law and Economics' Geoff Manne once explained, "The problem is that these documents are easily misunderstood, and thus, while the economic significance of such documents is often quite limited, their persuasive value is quite substantial."[1]

Let's just focus on supposed evidence of intent. Certainly, documents suggesting intent to raise prices should bring an antitrust plaintiff across the goal line? Not so, as Seventh Circuit Judge Frank Easterbrook has explained:

"Almost all evidence bearing on "intent" tends to show both greed and desire to succeed and glee at a rival's predicament. ... [B]ut drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind competition."[2]

In that case, needless to say, the plaintiffs lost in spite of documents that clearly stated an intent to "flush these turkeys."

One need look no further than the DOJ challenge to the Baker-Hughes merger in 1992 to find an example where a "smoking gun" of post-merger predatory intent was rejected. The DOJ hung its case on a document from the acquirer bluntly stating the purpose of the merger was to "manipulate the market more effectively" and to gain, "more flexibility in price setting."[3] Regardless of this smoking gun, District Judge Gerhard Gesell rejected the DOJ's case because it had failed to properly define the market. (This case must be dear to current Assistant Attorney General Bill Baer, who defended Baker-Hughes.)

As Harvard law professor Phil Areeda observed, relying on these types of documents is inherently risky because, “(1) the businessperson often uses a colorful and combative vocabulary far removed from the lawyer’s linguistic niceties, and (2) juries and judges may fail to distinguish a lawful competitive intent from a predatory state of mind.”[4]

The most recent example of the risky course of relying on provocative documents appears in the DOJ’s complaint against Bazaarvoice and PowerReviews, in which the Antitrust Division seeks to unwind the acquisition of a company with less than $12 million in revenue. The DOJ’s complaint includes a litany of quotes from Bazaarvoice executives’ emails, notes and memoranda. Some of these statements seem inflammatory, suggesting that Bazaarvoice would welcome the acquisition as an opportunity to eliminate a competitor, raise prices or even to insulate the company from the need to continue innovating. The problem is that, notwithstanding their provocative nature, these statements have little grounding in the reality of competition in the market for ratings and review software. Although there are many problems with singular reliance on “hot docs” by the DOJ, three main issues with their position stand out.

First, most of the documents are outdated. All of the documents relied on by the DOJ range from May to December 2011 — over a year before the case was filed. By the time litigation actually starts in this case, the majority of the government’s evidence will be verging on two years old — or a near eternity in the software world. The market likely changed dramatically in the year between the first of the government’s quoted documents and the eventual consummation of the transaction. It is disingenuous to offer these documents as a reflection of the current state of competition, especially in the technology industry. Documents should only be introduced if they are reliably predictive and relevant.

Second, the selective quoting of internal memoranda and meeting notes suggests a narrow market and a high level of concentration resulting from Bazaarvoice’s acquisition of PowerReviews. This suggestion contradicts reality. Customers of Bazaarvoice and PowerReviews choose between the two companies, as well as an entire host of alternatives that include direct competitors, substitute services, social media alternatives and in-house solutions. The relevant market advanced by the government simply is not a proper relevant market, regardless of whether select documents appear to support it.

The DOJ Antitrust Division and the Federal Trade Commission once acknowledged that

documents alone do not create a market, writing in their 2006 commentary on the Horizontal Merger Guidelines, “The Agencies are careful, however, not to assume that a ‘market’ identified for business purposes is the same as a relevant market defined in the context of a merger analysis. … It is unremarkable that ‘markets’ in common business usage do not always coincide with ‘markets’ in an antitrust context, inasmuch as the terms are used for different purposes.”[5]

Third, just because a businessman wants to do something such as raise prices above a competitive level or scale back research and development expenses — even if he genuinely believes he will have the ability — does not mean that he can. (One need look no further than the Baker-Hughes example where, even though the key executives thought Baker-Hughes could raise prices post-merger, they were unable to do so.)

Merger analysis is not a question of mens rea (or subjective intent). Rather, the analysis must show that such behavior will be likely as a result of diminished competition. Regulators must not look at evidence of this subjective intent and then conclude that the behavior must be possible and that a merger is therefore likely to substantially lessen competition. This would be to allow the tail to wag the dog. Instead, regulators must first determine whether, as a matter of economic principle, a merger is likely to have a particular effect. Then, once the analytical tests have been run, documents can support these theories. But without sound support for the underlying theories, documents (however condemning) cannot bring the case across the goal line.

So-called “hot” documents may help guide merger analysis, but served up as a main course make a paltry meal. Merger cases rise or fall on the hard facts and economics, and those will be the crux of the decision in the Bazaarvoice case.

--By David A. Balto, Law Offices of David A. Balto

David Balto is a former policy director of the Federal Trade Commission, attorney-adviser to Chairman Robert Pitofsky and antitrust lawyer at the U.S. Department of Justice.

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[1] Geoffrey A. Manne & E. Marcellus Williamson, Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication, 47 Ariz. L. Rev. 609, 612 (2005).

[2] 881 F.2d 1396 (7th Cir. 1989).

[3] 731 F.Supp. 3 (D.D.C. 1990).

[4] 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 1506 (2d ed. 2003).

[5] Federal Trade Commission and U.S. Department of Justice. Commentary on the Horizontal Merger Guidelines. March 2006, 11. Available athttp://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf