

NBC Sports' Purchase Of EZLinks Deserves Antitrust Scrutiny

By **Andre Barlow** (June 9, 2020)

Few missions are as important to the U.S. antitrust agencies as preventing anti-competitive mergers. But sometimes, for whatever reason, anti-competitive mergers do slip under the agencies' radar.

Though a merger may have closed without being thoroughly vetted, the antitrust agencies have jurisdiction to challenge any transaction that may substantially lessen competition. Indeed, the Federal Trade Commission[1] and the U.S. Department of Justice[2] have a strong record of challenging and unwinding consummated mergers that raise serious competition concerns.



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As the role of technology in the economy grows more important every day, the antitrust agencies have stepped up their efforts to investigate and bring enforcement actions against mergers of digital platforms.[3] Indeed, earlier this year, the DOJ went to trial to block Sabre Corp.'s acquisition of Farelogix Inc. to prevent harm in booking services for airline tickets sold through online travel agencies.[4]

At the same time, the FTC continues to go after consummated deals. On Jan. 3, the FTC filed an administrative complaint against Axon Enterprise Inc.'s consummated acquisition of its body-worn camera systems competitor VieVu LLC.[5] The deal closed in May of 2018, so the complaint was filed 20 months after the deal closed and the litigation is ongoing.

Meanwhile, the FTC is currently investigating the past 10 years of technology acquisitions by big tech firms such as Google Inc., Amazon.com Inc., Apple Inc., Facebook Inc. and Microsoft Corp.[6] The FTC's current administrative litigation and reviews serve as a reminder that no deal is safe from agency investigation and enforcement even months or years after closing.[7]

One consummated digital platform acquisition that should be on the antitrust agencies' radar is Comcast's NBC Sports Group's acquisition of EZLinks Golf, its closest competitor in the online tee time agency platform and golf management software markets. The deal closed last November, and the transaction eliminated head-to-head competition.[8]

In 2015, EZLinks entered and disrupted the online tee time agency market by providing public golf courses a listing service for a less expensive commission model and wiping out booking fees for golfers that booked on its platform.[9] Shortly after, GolfNow, an online tee time agency that operates under the Comcast/NBC Sports Group umbrella along with the Golf Channel, set out to regain its monopoly position to be part of the "booking of every round, everywhere." [10] Through a series of acquisitions of eight different technology platforms in the past six years, [11] the company has created a "golf round booking goliath." [12]

With the addition of EZLinks, GolfNow "controls an estimated 90% of the golf industry's aggregated, online tee time inventory" [13] for the public courses that are currently using an online tee time agency to market and distribute their tee times. Further, the transaction also provided GolfNow with control of over 60% of the golf management software market, which is the key technology piece in controlling distribution of a public golf course operator's tee times to any rival online tee time agency or booking technology.

Lessons From DOJ's Block of Bazaarvoice/PowerReviews

The agencies clearly have the tools to enforce the antitrust laws in cases involving digital technologies. Notably, several years ago the DOJ successfully litigated a block of a consummated online platform merger and unwound the transaction.[14] In that case, the DOJ filed a complaint to unwind Bazaarvoice Inc.'s acquisition of PowerReviews Inc. approximately 10 months after the deal had closed. In a huge victory for the DOJ, the trial court made a number of important findings that are still relevant today.[15]

First, the trial court found that PowerReviews was Bazaarvoice's closest and only serious competitor in the market for "rating and review" platform services sold to e-commerce businesses. The court accepted the narrowly defined market notwithstanding Bazaarvoice's arguments that it operated in a larger, dynamic, and evolving technology environment. The court found that rating and review platforms provided an interface for consumers to rate products online. Before the acquisition, Bazaarvoice and PowerReviews directly competed with each other by offering sophisticated rating and review platforms to large enterprise manufacturers and retailers.

The court found that Bazaarvoice's acquisition of PowerReviews eliminated its primary commercial competitor, allowing it to acquire customers rather than to compete for them. The trial court also concluded that Amazon was not in the market or a potential entrant even though it had an in-house rating and review solution for its own website.

Second, the merged firm's high market share, estimated at 56% to 68%, established a prima facie violation of Section 7 of the Clayton Act. There was no direct evidence of post-consummation competitive harm, but the agencies still examine whether the merger is likely to cause future anti-competitive effects. The court explained that the government did not need any direct evidence of post-consummation harm such as whether the merger had resulted in higher prices or other anti-competitive effects to establish a violation. Instead, all it needed to show was a "reasonable likelihood" of anti-competitive effect in the relevant market using the same type of evidence used in nonconsummated merger challenges.

Thus, the government was able to establish an antitrust violation through market share data and concentration levels measured through the Herfindahl-Hirschman Index even though none of the more than 100 customers who testified at trial or through deposition believed that the acquisition had harmed or would harm them. The court held that their testimony was "speculative" and gave little weight to post-merger pricing evidence that did not show any anti-competitive effect because the court believed that the merged firm could manipulate its pricing.

Third, the trial court found that significant entry barriers arising from network effects and high switching costs would limit potential competitors that might counteract Bazaarvoice's increased market power.

Applying the Lessons to Comcast's Acquisition of EZLinks

Applying some of the lessons learned from Bazaarvoice to Comcast's acquisition of EZLinks would suggest that the agencies could successfully mount a challenge to this consummated transaction.

First, as held in Bazaarvoice, trial courts accept narrowly defined markets even in technology mergers. Here, an online tee time agency platform is the only means by which a

golfer can conveniently compare and contrast tee time availability, location, price and course conditions at multiple public golf courses in one search. Likewise, the only efficient means by which a public golf course can market to new golfers on the internet is through an online tee time agency platform. No other products have the same attributes as an online tee time agency platform. GolfNow and EZLinks actually competed on both sides of the online platform: They competed for golfers through subscription and booking fees and for public golf courses through bartered tee times or commissions for listing services.

Second, the online tee time agency market is far more concentrated than the market challenged in Bazaarvoice. Comcast's GolfNow has approximately 90% of the online tee time agency market post-merger, having eliminated its only meaningful competitor. In other words, the merger is presumptively unlawful. And given the Bazaarvoice decision, it would be difficult for defendants to overcome the presumption even with compelling facts such as Amazon being on the sidelines ready to expand. The fact that the merger eliminated head to head competition as well as a maverick that had disrupted the market would also favor a challenge.

Third, just like in Bazaarvoice, significant entry barriers for any rival online tee time agency or online booking application exist due to indirect network effects. And the success of any (new) online tee time agency depends on it being adopted in large measure by golfers and golf courses alike. That is, the more golfers use an online tee time agency platform, the higher the value of the platform for public golf courses, and vice versa.

Now that Comcast's GolfNow has nearly all the public golf courses and golfers that use an online tee time agency using its platform, it would be extremely difficult for any new online tee time agency to enter and expand. Add in the fact that GolfNow controls the booking engines, e-tee sheets, and the websites of over 60% of public golf courses (i.e., the so-called golf management software market), and the company is in position to deny rival online tee time agencies and online booking apps access to its clients' e-tee sheets and booking engines.

Consolidation and monopolistic conduct cost consumers and the economy in the form of less competition, which results in higher prices, less choice and less innovation. Fortunately, the FTC and DOJ have shown a willingness to investigate consummated transactions and unwind them when appropriate.

While most consummated merger challenges occur more than a year after closing, consumers are harmed during the interim. And while we can all understand that the antitrust agencies are extremely busy investigating big tech, they should not be sleeping on Comcast's monopolization of online booking services for tee times sold through online tee time agency platforms.

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[1] Some of the FTC's most recent challenges include: In the Matter of Otto Block

Healthcare North America, Inc., complaint filed December 20, 2017 approximately 3 months after the deal closed, available at https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf; In the Matter of Valeant Pharmaceuticals International Inc., complaint filed November 7, 2016, approximately one year and six months after the closing, available at https://www.ftc.gov/system/files/documents/cases/161107valeant_paragon_pelican_complaint_2.pdf; In the Matter of Keystone Orthopedics Specialists Inc., complaint filed October 15, 2015, approximately four years and 9 months after the closing, available at <https://www.ftc.gov/system/files/documents/cases/151015keystonedcmpt.pdf>.

[2] Some of the DOJ's most recent challenges include: United States v. TransDigm Group Incorporated, complaint filed December 21, 2017 approximately ten months after closing (alleging loss of head-to-head competition in highly concentrated markets (3-2 and 2-1 in various markets) and requiring a divestiture to resolve concerns), available at <https://www.justice.gov/atr/case-document/file/1020256/download>; United States v. Parker-Hannifin Corporation and CLARCOR, Inc., complaint filed September 26, 2017 approximately 10 months after closing (alleging loss of head-to-head competition in 2-1 market), available at <https://www.justice.gov/opa/press-release/file/999266/download>.

[3] In 2018, the FTC challenged CDK Global Inc.'s proposed acquisition of Auto/Mate, which involved software platforms used by auto dealers to run their operations. The parties abandoned the merger when faced with the lawsuit. Complaint, In the Matter of CDK Global, Inc., et al. (F.T.C. March 19, 2018), available at https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf.

[4] The DOJ is currently trying to vacate the court's controversial decision where the district court ruled that it was bound by the Supreme Court's decision in [Ohio v. American Express Co.](#), 138 S. Ct. 2274 (2018) to hold that the two firms do not compete despite its own factual findings that they did. [United States v. Sabre Corp.](#), D. Del., No. 1:19-cv-01548, Order 4/7/20.

[5] In the Matter of Axon Enterprise, Inc. complaint filed January 3, 2020 available at https://www.ftc.gov/system/files/documents/cases/d09389_administrative_part_iii_-_public_redacted.pdf.

[6] FTC Press Release, FTC to Examine Past Acquisitions of Large Technology Companies, February 2, 2020, available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

[7] The FTC challenged the deal more than eight years after closing. Complaint, In the Matter of Graco Inc., No. 101 0215 (F.T.C. Apr. 17, 2013), available at <https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130418gracocmpt.pdf>.

[8] NBC Sports Group Press Release, November 20, 2019 available at <http://nbcsportsgroup.com/2019/11/20/nbc-sports-group-acquires-ezlinks-golf-expanding-digital-portfolio-of-golf-related-lifestyle-businesses/>.

[9] Erik Matuszewski, Golfers Rejoice, TeeOff.com Ends Booking Fees While GolfNow Drops Them in New VIP Offering, Forbes, March 13, 2017 available at <https://www.forbes.com/sites/erikmatuszewski/2017/03/13/golfers-rejoice-booking-fees-from-third-party-tee-time-providers-are-being-eradicated/#75e6e18e2037>.

[10] Adam Shupack, *Welcome to the Revolution*, Golfweek, January 25, 2016 available at https://www.mydigitalpublication.com/publication/?i=287902&p=14#%22page%22:%2214%22,%22issue_id%22:287902,%22publication_id%22:%2211863%22}.

[11] *Id.*

[12] Mike Dojic, *NBC Sports Acquisition of EZLinks, Parent of TeeOff.com, Creates A Golf Booking Goliath*, Forbes, November 21, 2019 available at <https://www.forbes.com/sites/mikedojc/2019/11/21/nbc-sports-acquisition-of-ezlinks-parent-of-teeoffcom-creates-a-golf-round-booking-goliath/#53e34faf278c>.

[13] Jack Crittenden, *NBC acquires EZLinks to take control of 90% of tee time market*, Golf Magazine, November 25, 2019 available at <http://www.golfincmagazine.com/content/nbc-acquires-ezlinks-take-control-90-tee-time-market>.

[14] *United States v. Bazaarvoice, Inc.* (complaint filed January 10, 2013 approximately seven months after closing, alleging loss of head-to-head competition in ratings and reviews platforms sold to retailers and manufacturers with market shares in excess of 50% and at least four remaining players) available at <http://www.justice.gov/atr/cases/f291100/291187.pdf>.

[15] *U.S. v. Bazaarvoice, Inc.*, Case No. 13-cv-00133-WHO (N.D. Cal., Jan. 8, 2014).