

Bazaarvoice Trial Will Test Antitrust Question For Done Deals

By **Melissa Lipman**

Law360, New York (September 19, 2013, 8:59 PM ET) -- With a bench trial set to begin next week, the U.S. Department of Justice's challenge of Bazaarvoice Inc.'s \$168.2 million acquisition of a rival online product ratings platform business will force the court to contend with a rarely litigated question unique to mergers that have already closed: whether a deal not yet having thwarted competition means it won't do so further down the road.

As the DOJ prepares to fight Bazaarvoice's purchase of PowerReviews Inc., the trial will likely hinge on whether the company can counter comments from its own executives boasting that the tie-up would stifle competition with evidence that the 15-month-old deal hasn't actually harmed the market.

The DOJ is set to present documents indicating that Bazaarvoice's own leadership believed the deal would let them shut down a tough competitor and make it difficult for new customer review platforms to enter the market. Meanwhile, the company has claimed that none of those predictions have come to pass, and U.S. District Judge William H. Orrick will have to weigh that lack of evidence against the relatively short period of time between deal's closing and the agency's investigation.

"The challenge for the DOJ is the Ninth Circuit precedent that in a consummated transaction, you need to consider what happened between when the transaction closed and when the trial takes place," WilmerHale partner Jim Lowe said. "The counter to that for the DOJ is, 'Of course they didn't do any of those things because we opened an investigation, so they're just going to sit and wait and if you, Judge, allow this transaction to continue ... they will simply then implement the things in the documents.'"

Bazaarvoice announced its plan to buy up PowerReviews in May 2012 and closed the deal that June. Both companies provided systems to help companies offer consumer product ratings and reviews for online retail sites, and Bazaarvoice claims major retailers ranging from QVC Inc. to Best Buy Co. Inc. as clients.

But six months after the deal closed, the DOJ sued to unwind it, arguing the transaction dramatically decreased competition. In the complaint, the watchdog cited a series of comments from Bazaarvoice executives, including one of the co-founders writing that the deal would "eliminat[e] [Bazaarvoice's] primary competitor" and offer "relief from price erosion."

The suit also points to a memo from the company's CEO to its board of directors explaining that the deal would "eliminat[e] feature-driven one-upmanship and tactical competition" and "create significant barriers to entry."

Those documents and others illustrate one of Bazaarvoice's biggest obstacles in the case, experts say.

"The key issue is how the parties handle their documents in the case," said Skadden Arps Slate Meagher & Flom LLP's Sharis Pozen. "The internal documents cited in the DOJ's complaint are strong evidence from the parties' own files on why they wanted the deal and what they expected from it."

A plus for the company is that, in the Ninth Circuit, district courts do have to contend with the question of whether there is any evidence a deal has in fact harmed competition when it comes to reviewing consummated transactions, thanks in part to a decision penned by Judge Orrick's own father two decades ago.

In that case, the DOJ had sued to force Raymond Syufy, a cinema chain operator in Las Vegas, to sell off several theaters he bought from rivals in the 1980s. The Ninth Circuit, however, ultimately concluded that there was no evidence the deal had actually given Syufy enough market power to set prices in negotiations with the studios or that the acquisitions kept rivals out of the market.

"Syufy really is, in some senses, the poster challenge for this situation," Lowe said.

Though there is not a lot of other law on the question, there is at least one example of an agency overcoming arguments that a consummated transaction had not actually harmed competition: the Federal Trade Commission's successful challenge of Chicago Bridge and Iron Co.'s acquisition of a rival engineering and construction company.

In that case, the Fifth Circuit ultimately concluded that the FTC's evidence about the barriers to entry in the market outweighed the company's evidence about what had happened since the deal closed.

"Every time you have a challenge in a consummated deal you have a data point that you don't have otherwise, [and] if there's no evidence of post-closing consumer harm, the question is why," Crowell & Moring LLP's Olivier Antoine said. "It'll be interesting to see whether this is really a differentiator here, considering they had very little time outside of the regulatory process even though it's a consummated deal."

Indeed, the case may well turn on just how skeptical the court is of the evidence from what has happened with the merger so far, experts said.

"Does the court say, 'DOJ's right, of course none of that's happened because certainly they wouldn't do it once they found out they were being investigated,' or does the court say, 'Well when I look at the market overall, I'm finding things here that lead me to believe that the predictions in the documents not only didn't occur, but couldn't occur,'" Lowe said.

Bazaarvoice is represented by Dominique-Chantale Alepin, Boris Feldman, Dylan James Liddiard, Chul Pak and Scott Sher of Wilson Sonsini Goodrich & Rosati PC.

The case is U.S. v. Bazaarvoice Inc., case No. 3:13-cv-00133, in the U.S. District Court for the Northern District of California.

--Additional reporting by Stewart Bishop. Editing by Elizabeth Bowen.