Bazaarvoice merger faces a bizarre fate after court ruling

By Scott D. Stein and Marie L. Fiala

What if the government told you that you have to license your intellectual property to your closest competitor, and allow your employees to work for that same competitor and disclose your trade secrets? That is the position that one company finds itself in as a result of an adverse verdict earlier this year in an antitrust case brought by the Department of Justice in federal district court in San Francisco.

Bazaarvoice provides ratings and review (“R&R”) software and technology. R&R enables manufacturers and retailers to collect, organize and display consumer-generated product reviews and ratings online — think of customer reviews you see on the websites of retailers like Best Buy and Sephora.

In June 2012, Bazaarvoice acquired its next largest competitor, PowerReviews, in a transaction too small to require the federal premerger notification which provides the Federal Trade Commission and the DOJ with information about large mergers and acquisitions before they occur. Nevertheless, last year the DOJ sued to unwind the merger, claiming that the acquisition would lead to anticompetitive effects in the market for R&R services.

In January, following a three-week trial, Judge William Orrick held that Bazaarvoice’s acquisition of PowerReviews was likely to result in anticompetitive effects in the form of higher prices for consumers of R&R services. The court has invited the parties to offer their proposals on how the antitrust violation should be remedied, and is expected to issue its ruling next month.

Yet the DOJ’s arguments in support of its proposed remedy are strangle dismissive of market forces. Indeed, in rejecting the argument that the onerous IP transfer provisions are likely to be unnecessary, the DOJ goes so far as to argue that it is “irrelevant” whether prospective buyers “believe they can profitably operate the PowerReviews assets” without the IP transfer provisions sought by the DOJ. The disputed provisions are — in the DOJ’s view — “necessary to allow the divestiture buyer to gain its footing and establish itself as an effective competitor.” But the DOJ does not convincingly explain why its own judgment should supplant that of an informed purchaser that actually operates in this space, or why the divestiture process should not be allowed to play itself out before implementing the more troubling provisions.

It is of course possible the divestiture alone will not be sufficient to restore effective competition to the market, or that the package of PowerReviews assets that Bazaarvoice will seek to divest simply will not be marketable absent the other provisions being requested by the DOJ. However, it is unclear why this dynamic competitive process should not be given breathing room to operate, hopefully spurring innovation and robust competition, before immediately implementing onerous conduct remedies such as those the DOJ is requesting.

A more conservative course of action would be entirely consistent with the court’s judgment that the acquisition of PowerReviews violated the Clayton Act, while also recognizing that courts and regulators should be wary of dictating how the market “should” work as opposed to allowing it to work freed from competitive constraints.

Scott D. Stein is a partner in Sidley Austin LLP’s Chicago office and Marie L. Fiala is a partner in Sidley’s San Francisco office. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP and its partners.