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A BRIEF ANALYSIS OF POLICY AND LITIGATION

Google Search under Antitrust Scrutiny

Clarissa A. Yeap

The European Commission ("EC") recently fined Google €2.42 billion, ruling that Google abused its market dominance in one market, internet search, to illegally advantage itself in a separate market, the comparison shopping market.

EI Senior Economist Clarissa A. Yeap specializes in empirical microeconomic analysis in the assessment of liability and damages in antitrust, intellectual property, and class action matters.

The EC asserts that Google stifled competition by giving prominent placement to Google Shopping in its search results and demoting rival shopping services. The EC points to a large traffic increase for Google Shopping and a sharp decrease for rivals as evidence that competition was harmed. Google's appeal contends that the EC has not adequately accounted for competition from merchant platforms like Amazon and has misconstrued its quality-improving efforts as abusive leverage. In the United States, Google is facing similar scrutiny from the Missouri Attorney General and calls for the Federal Trade Commission to reopen its investigation of Google's search practices.

A key point of contention is whether comparison shopping platforms like Google Shopping, which display advertising from online sellers, constitute a separate market from merchant platforms like Amazon that sell directly to consumers. The EC views them as separate markets. Google argues that Google Shopping is a pro-competitive force in a wider market, allowing smaller online merchants to compete with large sellers like Amazon. Google claims that Amazon's rapid expansion in EU countries explains the sharp drop in traffic to other shopping websites.

Further complicating antitrust analysis is the difficulty of quantifying consumer harm when Google's search services are free. The EC emphasizes the loss of choice and future innovation, citing evidence that, by a large margin, consumers click only on the first ten search results and rarely click on results not shown on the first page. Consumer welfare is allegedly harmed because rivals cannot gain enough visibility to thrive. However, the link between the EC's evidence and alleged consumer harm cannot be assumed. Consumers may directly query other shopping websites in addition to Google. They may well understand that Google has an incentive to promote its own products; Google Shopping results are clearly labelled as advertising. Consumers also may value Google Shopping results if they allow consumers to connect more quickly with what they are seeking.

Analysis of both issues, market definition and the assessment of consumer harm, will be aided by a better understanding of consumer behavior. Behavioral questions include which platforms consumers view as substitutes for different types of search, how many platforms they typically query for a single searches, and whether they expect or value neutral search results.

Also In This Issue

Financial Markets Reform and Alleged Dealer-Bank Collusion

Recent suits claim that securities dealers and prime brokers engaged in collusive conduct in certain financial markets to prevent the entry of more efficient trading platforms. Stuart D. Gurrea and Jonathan A. Neuberger discuss these allegations and their implications. In these suits, plaintiffs identify a number of new entrants offering improvements in execution, price discovery, and risk management through all-to-all trading, pre-trade and post-trade price dissemination, and centralized clearing. Plaintiffs allege that defendants organized collective responses and leveraged their market power to preempt clients from trading on these new trading platforms. To the extent these claims are true, the alleged collusive behavior would undermine competition-based market changes towards more efficient and safer financial markets.

Proposed OFCCP Changes Unlikely to Have Imminent Effect on Contractors

Erica E. Greulich discusses the proposed consolidation of the Office of Federal Contract Compliance Programs ("OFCCP") with the Equal Employment Opportunity Commission ("EEOC"). It remains unclear when or whether the consolidation of these two agencies will occur, and what shape compliance and enforcement activities at a combined agency would take. However, it is unlikely that the proposed OFCCP-EEOC merger will have an imminent effect on existing or potential federal contractors. Even if the OFCCP shifted its approach for compliance evaluations to one of less onerous data requirements, fewer statistical tests, and greater consideration of measures other than statistical significance, the federal government will continue to rely on statistical tests in some degree to monitor contractor compliance.

Financial Markets Reform and Alleged Dealer-Bank Collusion

Stuart D. Gurrea and Jonathan A. Neuberger

Stuart D. Gurrea has extensive experience in assessing economic misconduct in financial markets. His consulting experience includes calculating damages and performing financial analyses.

Jonathan A. Neuberger specializes in financial economics, valuation, and damages analysis in complex commercial litigation across a broad range of industries. He also has extensive experience in constructing and assessing economic models.

Financial market participants have claimed in recent suits that securities dealers and prime brokers active in certain financial markets have engaged in coordinated actions to suppress the introduction of more efficient trading platforms. These trading platforms represent competition to existing over-the-counter trading markets dominated by incumbent dealers and prime brokers. From a competition policy perspective, the alleged collusive conduct represents a violation of antitrust laws to the detriment of customers. More broadly, the alleged conduct runs counter to important regulatory reforms aimed at making financial markets safer, more transparent, and more efficient in the aftermath of the 2008 Financial Crisis.

Recent regulatory reforms have been introduced to increase the efficiency and stability of financial markets. The Financial Crisis Inquiry Commission ("FCIC") found that the lack of transparency and a lack of capital and collateral requirements in over-the-counter derivatives markets contributed to the 2008 financial crisis in significant ways. In the markets for interest rate and other swaps, for example, the FCIC found that the absence of centralized exchanges both suppressed price discovery and increased counterparty risk for market participants. In the aftermath of the 2008 Financial Crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") aimed at reforming the U.S. financial system. Among other reforms, Dodd-Frank laid the foundation for changes in trading execution for swaps that would enhance pre-trading and post-trading pricing transparency to improve price discovery, and mandated centralized clearing to guarantee the performance of contracts, thereby reducing risk.

> "Lack of transparency and liquidity results in a greater gap between the price buyers pay and the price sellers receive."

These changes are significant because the organization and structure of financial markets determine their efficiency. For example, exchange-based all-to-all trading and centralized clearing improve liquidity, transparency, price-discovery, and risk management because investors receive quotes from multiple sources and face less counterparty risk. Over-the-counter trading, in contrast, is based on intermediated bilateral transactions with limited access to information, which usually makes markets less efficient than if there are quotes from multiple sources.

Two recent suits allege that dealer banks colluded to prevent the introduction of trading platforms that would have competed with over-the-counter trading. On June 8, 2017, Tera Group filed a complaint against the twelve largest credit default swap dealers in the United States (*Tera Group, Inc. et al v. Citigroup, Inc. et al, SDNY, 1:17-cv-04302*) for allegedly coordinating to exclude the TeraExchange electronic trading platform from the $9.9 trillion (notional value) credit default swap market. Similarly, on August 16, 2017, certain public employee pension funds filed a class-action lawsuit against Bank of America and other large financial institutions (*Iowa Public Employees' Retirement System et al. v. Bank of America Corporation et al., SDNY, No. 17 Civ. 6221*). Plaintiffs in this suit claim that defendants boycotted new trading platforms that were trying to enter the $2 trillion stock lending market and offer all-to-all trading platforms.

Certain markets, including the credit default swap and the stock lending markets, are characterized by a two-tier structure. On one tier, customers access the market via intermediaries (dealers or brokers) and are prohibited from trading directly with other customers. Intermediaries, on the other hand, typically transact directly with each other (as well as with customers) on electronic interdealer trading platforms. Historically, intermediation in this way was justified as a means to lower search costs and by dealers' expertise in risk analysis. In practice, however, electronic trading and the wide availability of risk analysis tools have lowered the need for strictly intermediated transactions. Plaintiffs allege that intermediaries favor inefficient, opaque over-the-counter trading to take advantage of superior price information and charge their customers (hedge funds and pension funds) inflated bid/ask spreads. Lack of transparency and liquidity results in a greater gap between the price buyers pay and

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Proposed OFCCP Changes Unlikely to Have Imminent Effect on Contractors

Erica E. Greulich

Erica E. Greulich is an empirical microeconomist who has worked on a wide array of employment matters. Her experience encompasses discrimination claims and numerous wage and hour class actions.

The Trump administration's budget proposes merging the Office of Federal Contract Compliance Programs ("OFCCP") with the Equal Employment Opportunity Commission ("EEOC") by the end of fiscal year 2018, creating a single government agency responsible for combating employment discrimination. The stated aims of the merger are reducing superfluous operations, promoting efficiencies, improving services and strengthening civil rights enforcement. However, it remains unclear when or whether the consolidation of these two agencies will occur, and what shape compliance and enforcement activities at a combined agency would take. Neither the potential merger nor recent public calls for changes to the OFCCP's approach to compliance evaluations are likely to have immediate effects on federal contractors.

The historically different roles and expertise of the OFCCP and EEOC may complicate the proposed merger. The OFCCP is charged with ensuring that federal contractors comply with nondiscrimination laws and regulations which require contractors to take affirmative action to ensure equal employment opportunity. The EEOC enforces federal discrimination laws by responding to complaints of discrimination. Both agencies are governed by laws or regulations that protect individuals based on race, color, religion, sex, national origin, and disability status. The laws and regulations governing the OFCCP also cover protected veterans, while the laws and regulations governing the EEOC cover discrimination based on age or genetic information. The OFCCP also has an administrative, compliance-based focus while the EEOC's enforcement is more judicial.

> "[I]t remains unclear … what shape compliance and enforcement activities at a combined agency would take…"

The Acting Director of the OFCCP suggested in August that the start of the proposed OFCCP-EEOC consolidation could be delayed beyond FY2019, as the merger would have to overcome three hurdles: congressional amendments to acts governing federal contractor obligations regarding veterans and individuals with disabilities; rulemaking to implement the statutory changes; and consideration of how to combine the two agencies' substantially different enforcement structures and approaches. He left open the possibility of interim changes at each agency designed to increase efficiency, such as eliminating existing redundancies to generate cost savings.

Independent of the proposed merger, the OFCCP's approach to compliance evaluations has shifted substantially in recent years due to two changes. First, in 2013 the OFCCP shifted its compliance protocol to an "Active Case Enforcement" approach which entails more thorough and intensive contractor evaluations than did the OFCCP's previous approach. Second, in 2014 it revised the "Scheduling Letter and Itemized Listing" it sends to contractors selected for compliance evaluations. The revised letter requires that contractors produce individual compensation data for every employee at the start of an OFCCP audit, plus data relevant to employment decisions separately for each individual racial category. Previously, contractors' initial data productions consisted of data aggregated by broad job groupings or by salary range with the potential for follow-up requests of individualized data in targeted areas, and contractors were permitted to produce data related to employment decisions for aggregated "minority" and "nonminority" categories.

Due in part to these two changes, the OFCCP has reportedly conducted fewer audits in recent years, increased its focus on pay disparities, requested more data and information from contractors selected for evaluation, increased the number of statistical analyses it conducts as part of an evaluation, and increased its reliance on the statistical significance of test results. Industry groups have voiced concerns that the OFCCP's statistical models can omit or misrepresent factors that affect contractors' personnel and pay decisions.

The U.S. House of Representatives, U.S. Senate and industry groups have also raised concerns that the OFCCP's increased reliance on numerical differences, statistical tests, and statistical significance has blurred its focus on identifying and addressing real employment discrimination. These groups have called on the OFCCP to reduce its reliance on benchmarks, statistical tests and statistical significance in compliance evaluations, broaden its consideration of case-specific information, and consider a wider range of measures of practical – and not just statistical – significance.

For example, suppose the OFCCP analyzes a contractor's hiring data. Based on its statistical tests, it

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the price sellers receive. Pre-trade price transparency would inform customers of market opportunities based on available bid and ask quotes. According to the Tera Group plaintiffs, defendant dealer banks' role as market makers accounted for 95 percent of the credit-default swap market, and such collective dominance allowed these banks to structure the market in two tiers to the detriment of customers (institutional investors). Similarly, the public employee pension fund plaintiffs allege that defendant prime brokers' dominance of the stock lending market allowed them to structure trades through intermediaries and generate large fees.

Plaintiffs identify a number of new entrants offering improvements in execution, price discovery, and risk management through all-to-all trading, pre-trade and post-trade price dissemination, and centralized clearing. Plaintiffs allege that defendants organized collective responses to starve these new entrants of liquidity through a group boycott and by leveraging their power over hedge funds and pension funds that depend on a variety of services dealers provide them to preempt them from trading on these platforms. Plaintiffs allege that defendants threatened not to provide their clients these services if they participated in the competing trading platforms.

Plaintiffs claim that the defendant banks' alleged misconduct violated Section 1 of the Sherman Act. Other recent lawsuits and decisions concerning large banks and collusive conduct since the 2008 Financial Crisis have focused on bid rigging in the municipal bond market, LIBOR manipulation, foreign exchange spot market price and benchmark rate manipulation, and interest rate swaps benchmark rate manipulation. These more recent claims involve alleged conduct in other securities markets. To the extent these claims are true, the alleged collusive behavior would undermine competition-based market changes towards more efficient and safer financial markets.

determines that there is evidence of hiring discrimination against Hispanics for two job titles at the company. However, the contractor's hiring data show that there are fifty job titles at the company, the OFCCP's analyses show no evidence of discrimination against Hispanics in the other 48 positions, and Hispanics were hired into a substantial number of the open positions at the company during the period at issue. Broader consideration requires anecdotal evidence, statistical evidence of hiring disparities at all roles and not limited to a single position (or two, as in the example above), statistical evidence over an extended period, and an appropriate statistical model. The appropriateness of a model can be gauged by whether it accurately captures the process by which the company makes personnel or pay decisions, and whether it accounts for information such as applicants' skills, productivity, and experience.

The recent calls for changes to the OFCCP's approach to compliance evaluations and the proposed OFCCP-EEOC merger are unlikely to have an imminent effect on existing or potential federal contractors. First, it is uncertain whether or when the merger will happen. Second, it is uncertain whether the OFCCP or a merged compliance/discrimination agency will address the concerns related to the OFCCP's current approach to compliance evaluations.

Regardless, even if the OFCCP shifted its approach to compliance evaluations to one of less onerous data requirements, fewer statistical tests, and greater consideration of measures other than statistical significance, the federal government will continue to rely on statistical tests in some degree to monitor contractor compliance. The collection and maintenance of employment and compensation data, plus internal analyses of compensation, hiring, promotions and other employment decisions, may be useful should the contractor be selected for a compliance evaluation by the OFCCP. More generally, internal compensation, hiring and employment analyses can assist companies in assessing the extent to which their practices treat all employees equitably.

EI News and Notes

International Energy Sector Economist Joins EI

Amparo Nieto, an economist with over twenty years of international experience in energy sector regulatory policy and electricity markets, has joined EI's energy practice. Ms. Nieto has advised electric utilities, regulatory commissions, and independent system operators worldwide. Ms. Nieto has testified before state regulatory commissions in the United States, typically in matters involving marginal cost modeling and regulatory decisions including rate reforms, power contract design, Distributed Energy Resources (DER) proceedings, energy litigation matters, and competition analysis.

Ms. Nieto's recent work has focused on market-based and regulatory solutions to address customer-owned renewable generation integration challenges and on enhancements to distribution regulatory models. At the wholesale level, Ms. Nieto has reviewed ISO forward capacity auctions and proposed market power mitigation measures; designed and conducted energy auctions on behalf of utilities; reviewed resource planning methods; and recommended regulatory mechanisms to support renewable generation.

Ms. Nieto has published energy papers in The Electricity Journal and other leading journals and often participates as an expert panelist at energy regulatory conferences.

EI Principal on USPTO Copyright Panel

EI Principal Stephen E. Siwek recently spoke at the United States Patent and Trademark Office's Copyright Seminar 2017, hosted in Alexandria, Virginia from November 6th-9th, 2017. Mr. Siwek was a presenter for the panel on "Economic Impact of Copyright Industries."

Economists
INCORPORATED

OFFICES:

2121 K Street, NW
Suite 1100
Washington, DC 20037
phone: (202) 223-4700
fax: (202) 296-7138

101 Mission Street
Suite 1000
San Francisco, CA 94105
phone: (415) 975-5510
fax: (415) 281-9151

1276 Metropolitan Blvd.
Suite 303
Tallahassee, FL 32312
phone: (850) 558-6030

www.ei.com

President
Jonathan L. Walker

Editor
Stephanie M. Mirrow

in association with
The Allen Consulting Group in Australia

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