The American Antitrust Institute

AAI SEES MORE UNCERTAINTY AFTER DOJ IMPOSES CONSENT DECREE IN GOOGLE/ITA

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AAI applauds the Department of Justice (DOJ) for recognizing and taking steps to prevent the Google/ITA transaction's potential harm to quality, innovation and consumer choice in the comparative flight search services market. We nevertheless have concerns that the proposed remedy may not adequately prevent such harms. The parties' Proposed Final Judgment (PFJ) contains a wide array of features designed to protect competition.[1] However, notwithstanding the DOJ's forward-looking and creative effort to address both obvious and subtle risks posed, several important questions remain. Moreover, it will be difficult to truly evaluate the remedy's effectiveness for several years, for several reasons.

First, most of the affirmative obligations imposed on Google by the PFJ contain exceptions and provisos whose meanings are not readily ascertainable to laypersons. How deftly Google might elude any of these affirmative obligations is not immediately evident.

Second, the PFJ apparently does little to adequately address the risk of long-term harm to competition in the meta-search engine market, as it will remain in effect for only five years. The PFJ seems designed merely to delay the onset of foreclosure effects, which the DOJ's complaint otherwise deems likely. The licensing and related obligations contained in the PFJ attempt to prevent Google from degrading or restricting access to ITA's QPX pricing and shopping system (P&S system) or its forthcoming InstaSearch service for five years. However, given the degree to which meta-search engines (Metas) rely on QPX in order to innovate in comparative flight search, and given the extremely high entry barriers to the P&S system market, a five-year delay may prove insufficient to protect competition. Potential entrants into the comparative flight search services

[1]The PFJ provides for continued licensing of ITA products to online travel intermediaries (OTIs) on fair, reasonable and non-discriminatory price and non-price terms, inclusive of access to ordinary course upgrades and supported by a Google commitment to devote engineering resources to product research and development and maintenance that are equal to or greater than what ITA committed on average over the last two years; an arbitration system for resolving fee disputes related to such licensing; a reporting and disclosure obligation requiring Google to submit certain qualifying complaints to the DOJ for monitoring; a limited prohibition on Google entering agreements that restrict the rights of airlines to share certain data with parties other than Google; a limited obligation on Google to include certain airline data in the pricing and shopping system results it generates for all OTIs; a prohibition on Google conditioning the provision of ITA products and services on the purchase of other Google products or services; a series of modifiable firewall protections including (1) a limited prohibition on certain Google employees accessing OTIs' plan or configuration information and (2) a limited prohibition on Google's use of OTIs' confidential information; and, finally, a requirement that Google accede to continued document requests, officer, employee or agent interview requests, and requests for interrogatories or written reports relating to the PFJ. Proposed Final Judgment, United States v. Google, No. 00688 (D.D.C. April 8, 2011).

market may be deterred due to the short time window of reliable access to QPX, and by the prospect of having to compete with a merged Google/ITA in light of the leverage this firm may have over them. Existing entrants not inclined to exit the market are left to hope that global distribution systems (GDSs), as-yet-unsuccessful newcomers, or a miraculous new P&S system market entrant will surpass or at least match ITA's offerings during the next five years. We are not aware of any evidence to suggest that such an outcome is likely. Furthermore, the PFJ does not alter the merged firm's long-term anticompetitive incentives, including its incentives to foreclose third-party access to QPX or to allow QPX to languish while Google develops a superior P&S system for its own use.

The DOJ's complaint suggests that Metas are currently driving competition in the comparative flight search services market through innovation. If viable alternatives to ITA do not soon emerge and Metas are gradually forced out of the market, consumers presumably will have to turn primarily to online travel agents (OTAs) as alternatives to Google's future comparative flight search services product. Even assuming OTAs themselves would not be significantly weakened, as many rely on ITA as well, there is a serious risk that consumers would be harmed by this result. As the DOJ's complaint suggests, consumers would be left with fewer and less innovative airfare comparison shopping options. This could lead to their discovering significantly less information about available flight options. This in turn could lead to consumers paying more than they should for airplane tickets and booking flights that are less suitable for their needs.

Lastly, we are concerned that if this merger does enable Google to monopolize the meta-search engine market, this could help raise barriers to entry into the overall general search market. Google already has a monopoly position in this market, and any merger that might help protect or enhance this monopoly is a serious cause for concern.

We are encouraged, however, that the Antitrust Division's Competitive Impact Statement (CIS) notes explicitly that the parties have not settled any potential Section 2 claims. This unusual proviso, coupled with the competitor complaint mechanism built into the PFJ, could be a welcome sign that the DOJ (or perhaps the Federal Trade Commission) will monitor the risk of monopolization. The agencies should certainly protect against, for example, the future risk that Google may be able to leverage its tremendous search engine market share into related vertical markets by favoring its own products in search results. Indeed, complainants have alleged this conduct in the State of Texas and the European Union. However, any future action may be cold comfort to the comparative flight search services market if the risk of harm posed by this transaction comes to pass before the U.S. government can prepare and win a Section 2 case. Indeed, considering that the CIS does not explain proffered efficiencies from the transaction or suggest that such efficiencies could not be achieved through less restrictive means (such as a licensing or joint venture agreement), it is hard to see any justification for permitting the merger to go forward given these attendant anticompetitive risks.

Finally, in the broader scheme, it is worth noting that the outcome of this investigation may be further evidence that the DOJ is developing a penchant for fixing troublesome vertical mergers with complex and highly contingent behavioral remedies. The result is that massive, vertically integrated

firms are being allowed to form in key industries, with the DOJ accepting oversight responsibility for such firms and agreeing to perform a day-to-day monitoring function for which it may be ill-staffed, ill-funded and ill-equipped.[2] AAI continues to disfavor behavioral remedies because of the difficulty of predicting their effectiveness and because of their costs of administration, their risks of circumvention, and their concentrating effect within the overall economy.

[2] Here, for example, the DOJ opted for price regulation but saw fit largely to delegate the regulatory function to private arbitrators. See *id.*