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Equifax / Experian Corner Worker Verification Space, Would-Be Rivals Seek Probe

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Since the mid-1990s, credit reporting in the U.S., which has its roots in the records of consumer accounts held by local merchants and small-town credit bureaus, has been a tight oligopoly of three consumer data repositories, Equifax, Experian, and TransUnion. These firms collect account data from banks and businesses that furnish credit to consumers. The data is then sold as a credit report to other credit furnishers, typically packaged with one or more credit scores.

The control of consumer data is what differentiates the three credit data repositories from the 25-40 remaining local credit bureaus, or "credit reporting agencies" (CRAs). By purchasing and maintaining the data once held by the local bureaus, the repositories have assembled databases with near-national footprints. What sustains Equifax, Experian and TransUnion is their continued collection and maintenance of consumer credit data submitted from thousands of banks and businesses that furnish credit. At the same time, the role of CRAs has been relegated to "resellers" of the repositories' data, often packaged for a particular use, such as an auto loan or home mortgage. The repositories have been enormously successful at maintaining their oligopoly in credit reporting by holding the CRAs to their role as sellers of credit reporting products built on raw consumer data purchased wholesale from them.

Cornering the Employment Verification Market?

It is no wonder, then, that the repositories—Equifax and Experian, in particular—have endeavored to replicate their data-centric strategy in the expanding field of income and employment verification. Implementing their expertise in negotiating with companies to access their consumer credit data, Equifax and Experian have been busy tying up deals with the nation's employers for access to the records of current and former employees, allowing employers to out-source the administrative task of responding to inquires from third parties seeking to verify a consumer's income or employment. In many cases, such inquires are simply redirected to Equifax's "The Work Number" or Experian's "Verify."

With a finite number of employers in the U.S., the efforts of Equifax and Experian to induce employers to sign exclusive deals for access to their data either has or soon will create a barrier to entry to other firms seeking to enter the income and employment verification field. Responding to how Equifax and Experian are cornering the market, California-based data protection startup, Certree,

joined by Argyle Systems, Inc., an employment data firm, are asking the Federal Trade Commission to investigate the “anti-consumer” and “anti-competitive” practices of Equifax and Experian. Argyle was founded in 2018; Certree in 2021. Equifax was founded in 1899; Experian in 1996, the product of a series of mergers and acquisitions.

In a November 2 letter to FTC Chair Lina Khan, Shmulik Fishman, CEO and founder of Argyle, wrote that the “employer verification industry is fundamentally broken” and called on the Commission to investigate “the anticompetitive and anti-consumer practices” of the Equifax and Experian. Fishman wrote that after spending billions buying out other data verification companies, Equifax now controls half of all employment data in the U.S. The Argyle CEO concurred with a September 27 letter from Certree CEO Pavan Kochar, who said Experian and Equifax offer financial incentives to employers to gain exclusive access to their payroll data, making it nearly impossible for other payroll companies to exist. Experian has struck exclusive deals with HR and payroll software providers, with many of them attesting to receiving “loyalty points” and other rewards for sharing employee information. According to Kochar, this practice hardens the oligopoly in employment verification, stifles innovation, and creates “unique harms to consumer privacy, data security, choice, and financial security for consumers.” Certree and Argyle observe that repositories are collecting payroll records on millions of individuals without the individual’s knowledge or consent.

Both letters point out that consumers often have no idea how their information will be used in the system and cannot correct inaccuracies that may ultimately prevent them from renting an apartment or obtaining a loan or a job. Moreover, Equifax and Experian have had several data breaches over the last two decades, which become more consequential the greater quantity of data maintained by a single firm.

An Antitrust Issue or Industrial Policy?

Although Argyle notes that the repositories are “engaging in rampant anti-competitive practices” and Certree complains that their practices undercut smaller and newer data collection companies, edging them out of the industry. Thus, even if a newer, more innovative company has far more transparent data privacy policies, they are unable to break into the industry, thereby halting progress in innovation, according to Argyle and Certree. According to the letters, data collection practices have stayed the same for decades for this exact reason.

Both companies ask the FTC to investigate Equifax and Experian. The letters suggest an industry-wide investigation into privacy and anti-competitive practices. Argyle argues that “empowering consumers to control their own data will protect consumer interests better than the current broker-centric system, which depends on information asymmetries to drive profits while abusing consumer data.”

> But, for all the sound and fury, the letters do not describe with clarity any specific anticompetitive conduct by Equifax or Experian. Smaller employment verification firms, like those in consumer credit reporting, have accepted their role as (mostly) resellers of data held by the repositories.

Striking exclusive deals for data access, without more, is not clearly anticompetitive. And while the letters describe a tight oligopoly in employment verification that mirrors the organization of the

consumer credit data industry, they fail to describe any specific harm to competition beyond their own difficulty in entering the market. This is precisely the kind of competitor-specific harm for which antitrust offers no remedy. Antitrust, it is often said, is to protect competition, not competitors.

The issues raised by Argyle and Certree fit more comfortably into the category of competition or industrial policy. But it is far from clear that the FTC could or even should intervene to soften the tight oligopoly in employment and income verification services. Although the repositories' conduct may fall into the FTC's recently expanded concept of "unfair methods of competition," prohibited by Section 5 of the FTC Act, governmental intervention for the sole purpose of wedging in a pair of new competitors is probably not an endeavor on which the FTC should embark.

Edited by Tom Hagy for MoginRubin LLP.

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