Information Exchanges: Navigating Antitrust Risk Without Safe Harbors

June 25, 2024

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Background and Overview

- What is an information exchange?
  - In many industries, it is common for competitors to share certain information with one another, either directly or through a third-party intermediary.
- Why do rivals share competitively sensitive information?
  - Benchmarking
  - Legitimate collaborations
  - Transactions
- Why does exchanging information with a competitor carry antitrust risk?
  - The frequent exchange of non-public, non-aggregated price or output information can be evidence of an illegal agreement to fix prices or rig bids
  - The agreement to exchange information itself can have anticompetitive effects

SCOTUS on Information Exchanges

- In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the U.S. Supreme Court found that information exchanges, without more, are governed by the rule of reason.
- "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." 438 U.S. 422, 441.
- The Court then set out the basic framework for analyzing information exchanges: "A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication." *Id.*

Factors to Consider

- Information exchange cases have historically been challenging
- In *Todd v. Exxon Corp*., 275 F.3d 191 (2d Cir. 2001), for example, the Second Circuit considered:
  - Market power;
  - Nature of the market (i.e., concentration, fungibility, inelastic demand);
  - Nature of the information exchanged (i.e., timing, specificity, public availability, discussions); and
  - Effect on competition.

For 30 Years, Enforcers Allowed Information Exchange Within a "Safety Zone"

- In the past, the DOJ and FTC issued three guidance statements that described a safety zone related to information sharing:
  - 1993 DOJ and FTC Antitrust Enforcement Policy Statements in the Health Care Area
  - 1996 Statements of Antitrust Enforcement Policy in Health Care
  - 2011 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program
- Under this previous guidance, information exchanges fell into the safety zone if:
  1. Parties used a third party, such as a consultant or a trade association, to collect certain data under a specific set of rules;
  2. Data was at least three months old;
  3. Data came from at least five participants;
  4. Data was sufficiently aggregated so that no individual participant could be identified; and
  5. Data was such that no single participant could account for more than 25 percent of the weight of a statistic.

Now You See It, Now You Don't

- On February 3, 2023, the DOJ withdrew these guidance statements. On July 14, 2023, the FTC also withdrew the 1996 and 2011 statements.

- In a February 2023 speech Principal Deputy Assistant Attorney General Doha Mekki explained that:
  - "The safety zones were written at a time when information was shared in manila envelopes and through fax machines. Today, data is shared, analyzed, and used in ways that would be unrecognizable decades ago."
  - "Over the nearly 30 years during which those statements have been in effect, we have learned that concerning anticompetitive conduct can nonetheless satisfy many if not all of the safety zones' factors."
  - "[A] case-by-case enforcement approach will allow the Division to better evaluate mergers and conduct in healthcare markets that may harm competition."

Enforcement Actions

- In addition to withdrawing the “safety zones,” the Biden administration has also taken a more aggressive stance in investigating matters involving the exchange of competitively sensitive information, as well as filing statements of interest supporting plaintiffs in private litigation.
- A litigated DOJ merger challenge against sugar processors turned into private class actions.
- Private litigation and DOJ investigations aimed at poultry wage sharing.
- FTC litigation against Amazon challenging use of AI pricing algorithm.

Agri Stats

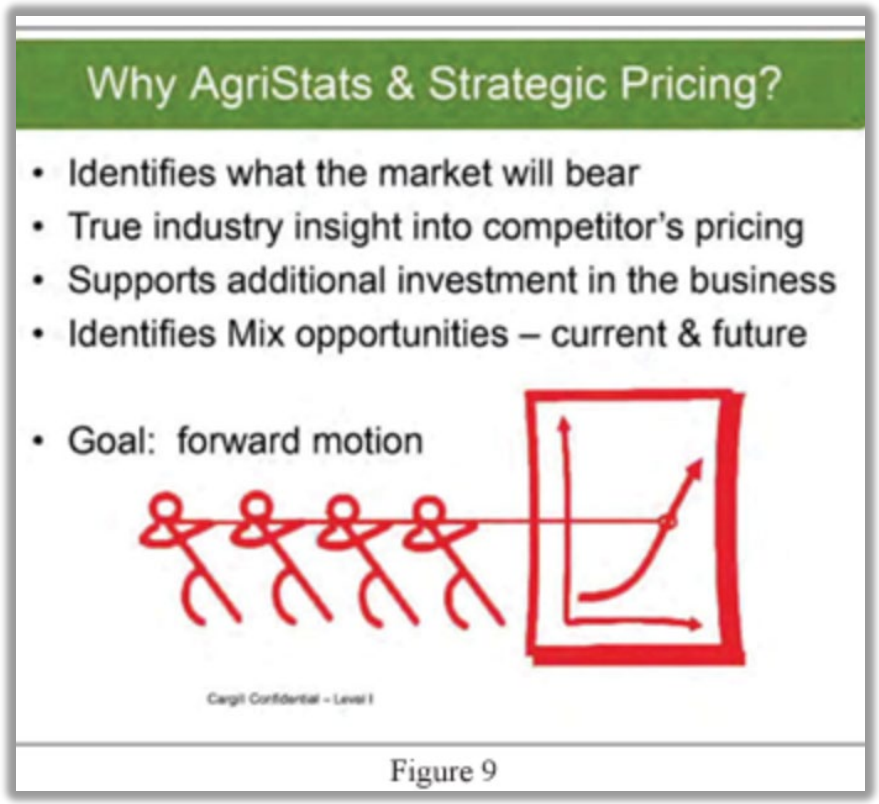

Figure 9

- In September 2023, DOJ brought its first suit targeting an information exchange that would traditionally have fallen within the safety zones, taking aim at Agri Stats—a firm that publishes benchmarking reports to customers in the chicken, pork, and turkey industries.
- The DOJ investigated Agri Stats in 2010 but took no action. In addition, Agri Stats was named as a defendant in the long-running *In re Broiler Chicken Antitrust Litigation* but was granted summary judgment in June of 2023.
- Discovery will likely begin shortly.
- In May 2024, Agri Stats' motion to dismiss and its motion to change venues were both denied shortly after a magistrate denied a motion to stay discovery.

Life in the Danger Zone

- Even without formal guidance from enforcers, certain principles can be gleaned from caselaw to reduce antitrust risk.
- The key question on any exchange of competitively sensitive information:
  - Given the characteristics of the market, the product, and the information and technologies available to the parties, would this exchange of information ultimately result in a significant reduction of the competitive uncertainty that fuels the rivalry between competitors?
- The more the information exchange reduces this uncertainty and rivalry, the more problematic it becomes.
- This is particularly true in cases where machine learning is applied to data, or where rivals are using a common software platform or consultant to inform their pricing decisions.

Are There Procompetitive Benefits?

- Courts are less likely to impose antitrust liability in markets where there is an obvious procompetitive benefit to exchanging information.
- *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.,* 971 F.2d 37, 54 (7th Cir. 1992)
  - Price increase announcements "**served important purpose in the industry**" because customers "**bid on building contracts well in advance of starting construction and, therefore, required sixty days or more advance notice of price increases**."
- *In re Petroleum Prods. Antitrust Litigation*, 906 F.2d 432, 445-48 (9th Cir. 1990)
  - Advance announcements of price increases could support an inference of price fixing where "appellees' officers' own testimony indicate[d] that there was **essentially no purpose for publicly announcing … prices and dealer discount information other than to facilitate … price coordination**."

(emphasis added)

Is There a Vertical Element to the Parties' Relationship?

- Courts are generally more suspect of horizontal competitors that exchange sensitive information.
- Courts are more likely to credit procompetitive justifications for information exchanges between parties that have vertical, or even partially vertical relationships.
- For example, in *Persian Gulf Inc. v. BP W. Coast Prod. LLC*, 632 F. Supp. 3d 1108 (S.D. Cal. 2022), the district court found that plaintiffs had not shown that an information exchange amounted to a conspiracy in part because the defendants were not only competitors "but also customers and suppliers," which alters "the range of permissible inferences to be drawn from information exchanges."
- Because the information facilitated a customer-supplier transaction, the court declined to infer that defendants were exchanging information in their capacity as competitors.

Joint Ventures and Information Exchange

- Firms who compete may have legitimate reasons to exchange information when they enter into a legitimate joint venture
- A legitimate joint venture typically involves two or more separate firms engaged in a joint effort to produce a product – i.e., the JV product
- Joint ventures under antitrust law take many different forms – e.g., trade associations, research consortiums, common ownership ventures
- A joint venture may exchange information that is reasonably necessary to achieve the objective of the joint venture
- A joint venture cannot exchange information that would enable the parties to restrict competition between them that falls outside the joint venture
  - Only exchange information relevant to the joint venture business
  - Keep the information exchange on a “need to know” basis
  - Have an antitrust protocol or guidelines for members
  - Prepare agendas for meetings and keep meeting minutes

Mitigating Risk

- Exchange competitively sensitive information with actual or potential competitors only when necessary for a legitimate business purpose and only with advice of counsel
- Guidelines:
  - Clients should seek advice of counsel before exchanging non-public information with actual or potential competitors
  - Competitively sensitive information, such as current and confidential prices, salaries, and other strategic information typically cannot be shared
  - Aggregating and anonymizing otherwise sensitive business information will mitigate, but not eliminate, antitrust risk
  - Document the legitimate purposes for exchanges of information
  - Exercise caution when communicating with your competitors (even informally) and do not discuss impropriate topics

Algorithmic Collusion

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Algorithmic Collusion

- "Algorithmic pricing" refers to firms plugging certain inputs into an algorithm, which then suggests a price.
- "Algorithmic collusion" refers to competitors agreeing to coordinate pricing through the common use of an algorithm.
- Like other forms of exchanging competitively sensitive information, the key question when evaluating whether algorithmic pricing carries antitrust risk is whether it would result in a **significant reduction of the competitive uncertainty that fuels the rivalry between competitors**.
- Risk is particularly high in cases where machine learning is applied to rivals' non-public, competitively sensitive data, or where rivals are using a common software platform to inform their pricing decision.

DOJ Statements of Interest on Algorithmic Collusion

- In 2022, Assistant Attorney General Jonathan Kanter remarked that: "**Whether you use a smoke-filled room in a basement or you're using AI and an API, it's still the same thing. It's still collusion**."
- The DOJ has recently filed statements of interest supporting plaintiffs alleging that landlords and hotel owners conspired to fix prices using third-party vendors that feed competitively sensitive information into pricing algorithms.
  - *In Re RealPage, Rental Software Antitrust Litigation* (II) (D. TN 2023) alleges algorithmic collusion among landlords.
  - *Gibson v. MGM Resorts International et al*. (D. NV 2023) alleges similar collusion among hotel owners.
- The Attorneys General of North Carolina and Washington, DC have also taken action to address alleged collusion facilitated by RealPage.

Increased Scrutiny from the Hill

- In addition to the DOJ, algorithmic collusion has also received increased scrutiny from Congress.
- In 2024, Senator Amy Klobuchar (D-MN) introduced the *Preventing Algorithmic Collusion Act* to "ensure that pricing algorithms aren't being used to take advantage of consumers and inflate prices."
- The bill would:
  - Increase oversight over the use of pricing algorithms by creating a presumption that a price-fixing agreement has been formed when direct competitors share competitively sensitive information through a pricing algorithm to raise prices;
  - Increase transparency in the use of pricing algorithms;
  - Prevent companies from using competitively sensitive information in their algorithms; and
  - Fund research into pricing algorithms' impact on competition.

The FTC's "A Guy Named Bob" Test

- Many of the issues presented by algorithmic collusion claims are not as novel as they might appear.
- In May 2017, Acting FTC Chair Maureen K. Ohlhausen gave a speech on algorithmic pricing in which she stressed that the dynamics underpinning algorithmic collusion claims are the same as a hub-and-spoke conspiracy where a person is the "hub" rather than an algorithm.
- To demonstrate this point, she gave a hypothetical in which the word "algorithm" was substituted with the phrase "a guy named Bob":
  - Is it ok for a guy named Bob to collect confidential price strategy information from all the participants in a market, and then tell everybody how they should price?
  - If it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it either.

Precursors to Algorithmic Collusion

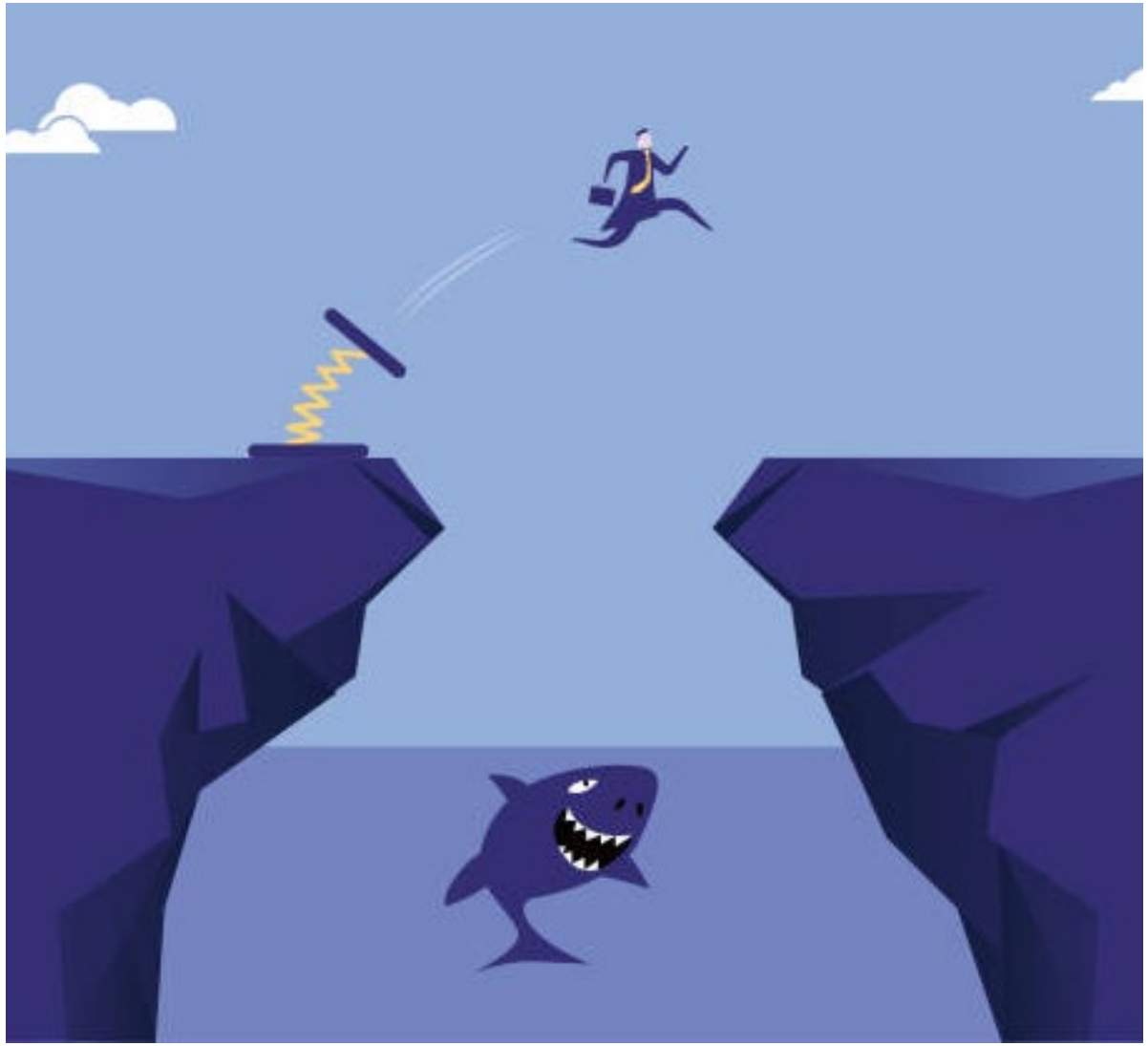
- *U.S. v. Masonite Corporation* (1942): **"The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action."**
- *U.S. v. Airline Tariff Publishing Company* (1991): The parties were alleged to have shared anticipated prices and price changes through a software meant to collect and disseminate airfare to booking agents.
  - A civil consent decree ended the publishing of planned prices or price changes, unless the price change was simultaneously advertised widely to the public.
- *United States v. Topkins* (2015): Sellers of wall posters on Amazon Marketplace were alleged to have discussed "fixing, increasing, maintaining, and stabilizing" prices for their products and, to do so, agreed on specific pricing rules to be implemented via a pricing algorithm.
  - Topkins pleaded guilty and agreed to pay a $20,000 criminal fine.

Algorithmic Collusion Today

- Courts have so far rejected contentions that using a third-party pricing algorithm in-and-of-itself constitutes a *per se* illegal price fixing agreement but have been willing to examine such claims under the Rule of Reason.
  - A federal court in Nevada recently dismissed a case alleging that Las Vegas casinos had agreed to fix prices through the use of a third-party pricing algorithm.
- The court in *RealPage*, however, found that a similar complaint lodged against landlords might plausibly allege a Rule of Reason case, crediting plaintiffs' allegations that "characteristics of the multifamily housing market … make it more susceptible to price-fixing conspiracies" such as
  - The market being **highly concentrated**;
  - The market having **high barriers to entry** for would-be competitors;
  - The market having **high switching costs** for renters;
  - The market having **inelastic demand**; and
  - The market is for **a fungible product**.

Mitigating Risk of Price Algorithms

- Use third-party pricing algorithms as benchmarks/recommendations, exercising independent judgment where appropriate
- Refrain from using any pricing algorithm that relies on non-public information from other companies
- Customize the algorithm to your specific business needs – i.e., don't use the same algorithm that your competitors use
- Do not communicate with your competitors about their use or development of price algorithms
- Prohibit third parties from sharing any non-public information you provide with other clients



Questions?

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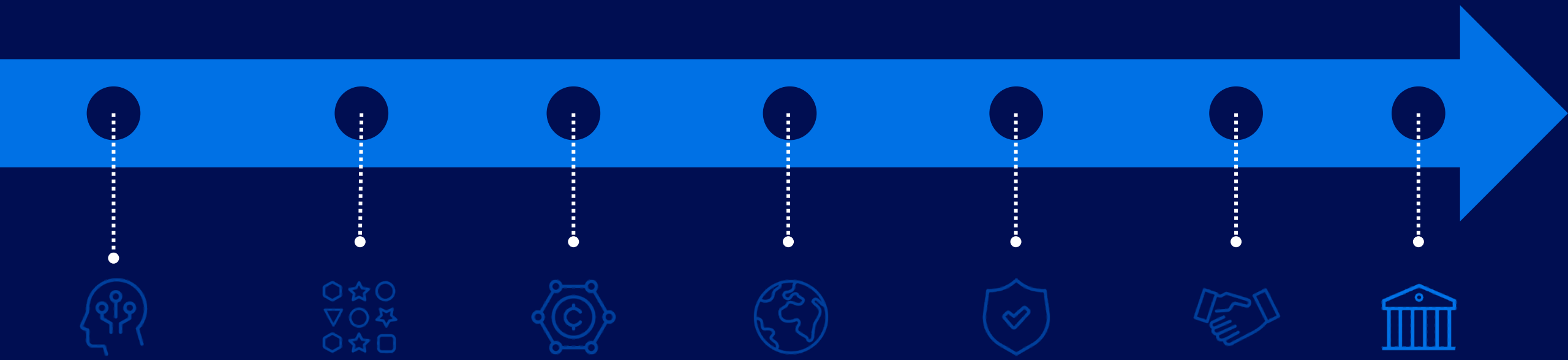

Session 1
Inputs and Outputs: The State of Play in Year Two of Generative AI

Friday, May 10
12 pm CT

Session 2
One Year Later: DEI in a Post-SFFA World

Friday, May 17
12 pm CT

Session 3
Hot Topics in Fintech and Crypto

Friday, June 7
12 pm CT

Session 4
How to Navigate Government Scrutiny from Regulators and Legislatures Worldwide

Friday, June 14
12 pm CT

Session 5
Global Enforcement Trends and Emerging Risks in Sanctions, Export Control, and Supply Chain

Friday, June 21
12 pm CT

Session 6
Information Exchanges: Navigating Antitrust Risk Without Safe Harbors

Tuesday, June 25
12 pm CT

Session 7
US Supreme Court Term in Review

Thursday, June 27
12 pm CT