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Food and Beverage's Big Data Surprise: Antitrust Rules Still Apply

By Steve Safranski, Partner and Elizabeth Friedman, Associate, Robins, Kaplan, Miller & Ciresi L.L.P.



Steve Safranski

“No matter how new the technology, competitors who share pricing information often create antitrust concerns”

Big data seems poised to make a paradigm-shifting change to the food and beverage industry—and CPG as a whole. Big data gives business in this deeply consumer-connected space a whole new level of access and insight. Now, both manufacturers and retailers in the sector can review a real-time ocean of transactional and behavioral data on all aspects of consumer purchases, preferences, and behavior patterns. And, perhaps more importantly, big data's new analytic tools let food and beverage businesses discern and predict consumer behavior and outcomes—enabling marketing, pricing, and competitive positioning optimization.

In particular, food and beverage and other retailers have, and will continue to, turn to the extraordinary, real-time insights into competitors' prices that big data can offer. Big data price intelligence frameworks allow retailers to monitor rivals' pricing strategies and, if needed, recalibrate their own. The information gained from price intelligence analytics should increase competition. But, paradoxically, the manner by which businesses gain access to the underlying data may be considered anticompetitive in some circumstances.

Specifically, pricing data gathered or disseminated through data exchanges or trade associations can be problematic without the proper safeguards. The reason? No matter how new the technology, competitors who share pricing information often create antitrust concerns. To avoid antitrust issues when using

price intelligence analytics, food and beverage companies can turn to guidelines issued by the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) (together, the “Agencies”). These guidelines address how and when competitors can collaborate and can inform companies on how to share pricing data without running afoul of the antitrust laws.

Price Intelligence at Work

Big data will have big reach into food and beverage pricing. Many of the price intelligence tools big data offers provide ongoing and sometime automatic price recalibration. That kind of on-point pricing information for today's more fully wired consumer can end up influencing critical purchase and point of purchase decisions—contributing to today's ultracompetitive marketplace.

For example price intelligence provider 360pi analyzed its data to determine how Amazon.com competes for consumer sales against large retailers such as Target, Sears, and Costco, in a recent article 360pi found that Amazon successfully engaged in dynamic pricing by being the fastest follower of the price leader—when a retailer dropped its price, Amazon quickly followed suit. A retailer without this knowledge might accidentally start a “race to the bottom” against Amazon, not realizing the better price strategy would be to offer a competitive price, but not necessarily the lowest price.

New Tech and Old Rules: Price Intelligence and the Antitrust Laws

The DOJ and FTC know that procompetitive effects and economic efficiencies can occur when competitors share information. When it comes to pricing decisions based upon price intelligence, most decisions will likely have a

procompetitive effect because consumers will end up paying a lower price.

Nonetheless, if the underlying data is provided by, or shared with, competitors, antitrust concerns can arise—especially for pricing, cost, output or future-plans data. This kind of competitively sensitive information tends to facilitate potentially problematic price coordination among competitors. According to the FTC, competitors' data exchange or statistical reporting can raise antitrust concerns if it ends up encouraging more uniform pricing in an industry. Even surveys may raise concerns if they include current prices or identify data from individual competitors.

For advice on how to avoid inappropriate price data exchanges, food and beverage companies can turn to the Agencies' Statements of Antitrust Enforcement Policy in Health Care. While developed for health care providers sharing price and cost data, the guidelines contained in the Statements are broadly applicable to other industries as well, including the food and beverage industry.

Under the publication, avoiding antitrust concerns begins with creating a “safety zone” for data exchanges. Best practices include:

- Having data collection managed by a third party (like a trade association);
- Requiring that any pricing or cost data shared among competitors be over three months old;



- Creating a minimum membership of five competitors. No individual member may account for more than 25 percent of a weighted basis of the statistic reported; and
- Data aggregations that prevent identification of particular member data.

Absent extraordinary circumstances, data exchanges that operate within these guidelines will not be challenged by the FTC or DOJ as anticompetitive. And, where a data exchange falls outside the safety zone, the Agencies typically will evaluate to determine whether the exchange has an anticompetitive effect that outweighs any procompetitive justification. In addition, sharing information that is not normally competitively sensitive, such as cyber threat information, is unlikely to raise the same concerns and is considered procompetitive—as the Agencies recently made clear in their joint Antitrust Policy Statement on Sharing of Cyber security Information.

Staying in the “Safety Zone”

In most instances, membership in an industry group that gathers historical price data and then shares it on an aggregated basis should not raise antitrust concerns for food and beverage members. Still, best practices call for making sure that the exchange meets the safety zone guidelines when pricing information is shared among competitors. Competitors that belong to trade groups should be particularly mindful given a recent blog post on the FTC's website regarding the potential for harm arising from the activities of trade groups. While the post's primary topic was restrictive trade association rules that constrain competition—not the sharing of pricing information—legal commentators have characterized the post as a general warning to trade associations that the FTC is closely scrutinizing their activity to ensure that it does not raise antitrust concerns. In fact, the author of the post notes that future blog posts will address other trade association activities, including information exchange.

Fortunately, businesses considering sharing pricing data don't have to guess whether their exchange falls within the



Elizabeth Friedman

safety zone. Both Agencies have processes to review concerns about antitrust legality. The DOJ has an expedited business review procedure (58 Fed. Reg. 6132 (1993)) and the FTC offers an advisory opinion procedure (16 C.F.R. §§ 1.1-1.4 (1993)). Under either, the Agency in charge will make its best effort to respond within 90 days as to its current enforcement intentions with respect to the conduct at issue. Specific guidance as to the information a business should submit in order to expedite the review process is available on the Justice Agencies' websites.

Conclusion

Moving forward, food and beverage industry members (and CPG as whole) will have their pricing impacted by big data price intelligence—either as owners of the knowledge or outsiders unable to compete. But business must be careful that the data is gathered and disseminated in a manner that does not raise antitrust concerns if their price intelligence relies on data provided by competitors. To manage risk and avoid antitrust liability, food and beverage manufacturers and retailers should follow following the Agencies' guidelines when exchanging pricing information. That way, everyone in the industry can both compete and still stay in the pricing intelligence “safety zone.”