

Big Data, Price Intelligence and Antitrust

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Make no mistake: big data is revolutionizing the food and beverage industry — indeed the entire CPG sector — giving manufacturers and retailers unparalleled visibility into all aspects of consumer purchases, preferences, and behavior patterns. In the era of big data, manufacturers and retailers can channel the ever-growing ocean of transactional and behavioral data through powerful analytical software to predict consumer behavior and outcomes and optimize their marketing, pricing, and competitive positioning.

Among other things, big data offers businesses extraordinary, real-time insights into competitors' prices. Specifically, price intelligence, through the application of analytical frameworks to big data, allows retailers to monitor rivals' pricing strategies and optimize their own. While price intelligence is used to increase competitiveness, paradoxically, the manner by which businesses gain access to the underlying data may, in some circumstances, be considered anticompetitive. Retailers and manufacturers that take advantage of pricing data gathered or disseminated through data exchanges or trade associations need to remember that sharing pricing information with competitors raises antitrust concerns. The Federal Trade Commission ("FTC") and Department of Justice ("DOJ") (together, the "Agencies") have issued guidelines for collaboration among competitors that can inform companies on how to share pricing data without running afoul of the antitrust laws.

The Value of Price Intelligence

Many price intelligence tools allow retailers to react and recalibrate prices within

seconds and some allow computer algorithms to decide when prices should be changed automatically. For retailers and manufacturers of consumer packaged goods, including foods and beverages, access to price intelligence tools is an increasingly vital asset in an ultracompetitive marketplace.

Consider the example of 360pi, a company that supplies price intelligence to retailers. 360pi gathered data during last year's holiday season and analyzed it to determine how Amazon.com competes for consumer sales against large retailers such as Target, Sears, and Costco.^[1] [1] 360pi found that Amazon successfully engaged in dynamic pricing by being the fastest follower of the price leader, *i.e.*, 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.

Price Intelligence and the Antitrust Laws

The DOJ and FTC recognize that information sharing can be necessary to achieve procompetitive benefits and economic efficiencies. Most pricing decisions influenced by price intelligence will be procompetitive because they end up lowering the price paid by the consumer. However, antitrust concerns can crop up when the underlying data is provided by, or shared with, competitors. This is particularly true with respect to pricing, cost, output or future-plans data because such competitively sensitive information can facilitate price coordination among competitors. That, of course, does not mean that all information sharing can be problematic. As the recent Antitrust Policy Statement on Sharing of Cybersecurity Information released by the DOJ and FTC makes clear, sharing information that is not normally competitively sensitive, such as cyber threat information, is unlikely to raise the same concerns and is considered procompetitive.^[2] [2] Consequently, businesses should be far more mindful when exchanging pricing information than they would be when sharing less competitively sensitive information.

The FTC has explained that any data exchange or statistical reporting, including surveys, that includes current prices, or identifies data from individual competitors, can raise antitrust concerns if it encourages more uniform pricing in an industry.^[3] [3] While developed for health care providers sharing price and cost data, the Agencies' *Statements of Antitrust Enforcement Policy in Health Care* are broadly applicable to other industries as well, including the food and beverage industry. The publication sets out a "safety zone" for data exchanges:

- data collection is managed by a third party (like a trade association);
- any pricing or cost data shared among competitors is over three months old;
- the exchange involves at least five members, where no individual member accounts for more than 25% of a weighted basis of the statistic reported; and
- the data is aggregated so that it is not possible to identify a particular member's data.^[4] [4]

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.

Best Practices in the Exchange of Pricing Data

Generally, if competitors in the food and beverage industry belong to an industry group that gathers historical price data and then shares it on an aggregated basis, membership in the organization is unlikely to raise antitrust issues. Still, when pricing information is shared among competitors, the best practice is to ensure the exchange meets the safety zone guidelines. If a business is considering sharing pricing data and is unsure whether the exchange falls within the safety zone, or has any other concerns about antitrust legality, it can take advantage of the DOJ's expedited business review procedure^[5] [5] or the FTC's advisory opinion procedure.^[6] [6] 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 Agencies' websites.^[7] [7]

Conclusion

Food and beverage industry members can take advantage of price intelligence to compete effectively in the market. However, when price intelligence relies on data provided by competitors, businesses must be careful that the data is gathered and disseminated in a manner that does not raise antitrust concerns. By following the Agencies' guidelines when exchanging pricing information, manufacturers and retailers can stay in the "safety zone", and avoid antitrust liability.

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^[1] [13] Jenn Markety, *Pricing games: four lessons learned from holiday pricing strategies*, internetretailer, Mar. 14, 2014, <http://www.internetretailer.com/commentary/2014/03/14/pricing-games-four-holiday-pricing-strategy-lessons>.

^[2] [14] <http://www.justice.gov/atr/public/guidelines/305027.pdf>

^[3] [15] Federal Trade Commission, *Spotlight on Trade Associations*, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade>.

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[4] [16] U.S. Department of Justice & Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care at 63 (Aug. 1996), <http://www.justice.gov/atr/public/guidelines/0000.htm>.

[5] [17] 58 Fed. Reg. 6132 (1993).

[6] [18] 16 C.F.R. §§ 1.1-1.4 (1993).

[7] [19] For the Department of Justice:

<http://www.justice.gov/atr/public/busreview/201659a.htm> [20] and

<http://www.justice.gov/atr/public/busreview/201659c.htm> [21]. For the Federal

Trade Commission:

<http://www.ftc.gov/tips-advice/competition-guidance/competition-advisory-opinions> [22].

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[20] <http://www.justice.gov/atr/public/busreview/201659a.htm>

[21] <http://www.justice.gov/atr/public/busreview/201659c.htm>

[22] <http://www.ftc.gov/tips-advice/competition-guidance/competition-advisory-opinions>