

Memorandum

DOJ Stakes Out Position That Pricing Algorithms Can Be *Per Se* Illegal in RealPage Case

November 22, 2023

On November 15, 2023, the U.S. Department of Justice Antitrust Division (“DOJ”) filed a statement of interest (the “Statement”) in *In re: Realpage, Rental Software Antitrust Litigation (No. II)* staking out its position that “[a]lgorithms are the new frontier” of price fixing, one that “poses an even greater anticompetitive threat than the last.” In particular, DOJ argues that “competitors’ joint use of common algorithms can remove independent decision making” and that “[a]lgorithmic price fixing must therefore be subject to the same condemnation as other price-fixing schemes.” Although it remains to be seen if U.S. courts will agree, the Statement puts private parties on notice that in certain circumstances, described further in this memo, DOJ may consider bringing its own Sherman Act Section 1 claims against parties utilizing third-party price-setting algorithms.

Background

The underlying lawsuit is currently pending in the United States District Court for the Middle District of Tennessee where it was consolidated as a multidistrict litigation after more than 20 comparable lawsuits were filed in various courts around the country. The Complaints¹ allege that the Defendants, in utilizing RealPage’s software, entered into an unlawful conspiracy to fix, raise, stabilize, or maintain at artificially high levels rent prices. The Complaints allege that the Defendants did so by:

- Sharing non-public and competitively sensitive pricing and supply data with RealPage, which enters the data into its algorithm to generate rental price recommendations;
- Delegating pricing and supply decisions to RealPage, a common (algorithmic) decision maker across all participating landlords; and
- Pricing units in line with RealPage’s suggested prices (80-90% of the time, with RealPage able to police compliance).

¹ After multiple related actions were consolidated and transferred to the Middle District of Tennessee, two consolidated Complaints were filed in connection with the case. One complaint alleges an unlawful agreement to use RealPage’s software in connection with multifamily rental housing prices. A second complaint alleges an unlawful agreement to use RealPage’s software in connection with student housing rental prices.

In utilizing RealPage’s pricing, the Defendants, according to the allegations, engaged in a concerted action to unreasonably restrain trade.

RealPage and more than a dozen landlords now also face a lawsuit brought by the D.C. Attorney General on similar grounds in D.C. Superior Court on November 1, 2023. Furthermore, similar suits have been brought in other courts as well—and while at least one has been dismissed, it was based on different facts and was dismissed for reasons that may have been cured in the RealPage case.²

DOJ’s Statement

DOJ’s Statement argues that the Complaints plausibly allege concerted action by the Defendants, comprising a *per se* violation of Section 1 of the Sherman Act. According to DOJ, RealPage’s proposal and marketing clearly contemplate that it would utilize competitor data to increase prices through collaboration, offering customers “the ability to ‘outsource daily pricing and ongoing revenue oversight’ to RealPage” and “allowing RealPage to ‘set prices for its clients’ properties ‘as though we [RealPage] own[ed] them ourselves.’”

The DOJ asserts that by participating and utilizing the software knowing that concerted action was contemplated and invited, Defendants consciously participated in a scheme to use RealPage’s proposed prices. The DOJ further asserts that these actions demonstrate a *per se* unlawful horizontal agreement to fix rental prices, explaining:

*As with other actions taken in concert, competitors’ joint use of common algorithms can remove independent decision making. Algorithmic price fixing must therefore be subject to the same condemnation as other price-fixing schemes. **It makes no difference that prices are fixed through joint use of an algorithm instead of by a person . . . whether firms effectuate a price-fixing scheme through a software algorithm or through human-to-human interaction should be of no legal significance. Automating an anticompetitive scheme does not make it less anticompetitive.***

Consistent with this view, DOJ argues that the scheme constitutes *per se* illegal price fixing regardless of whether the competing landlords had ever communicated with each other regarding prices.

The rise in the use of artificial intelligence (“AI”), and the desire to protect consumers from potential resulting harms, has led to a focus on AI and algorithms in the legal field more broadly as well. For instance, on October 30, 2023, President Biden issued an Executive Order on AI laying out new standards for a number of concerns including safety and security, privacy, competition, and consumer rights.

² See, e.g., *Gibson v. MGM Resorts Int’l* Case No. 2:23-cv-00140-MMD-DJA, ECF No. 141, (D. Nev. Oct. 24, 2023).

Key Takeaways

- DOJ has clearly staked its position that reliance on third-party price setting algorithms can comprise *per se* illegal price fixing in violation of the Sherman Act.
- That said, it remains to be seen whether courts will agree with DOJ that the elements of a conspiracy claim can be met in the context of an independent decision to use a pricing algorithm that is allegedly used by other, similarly situated market participants.
- The risk is particularly acute when a firm offloads or removes itself from making pricing decisions or independently reviewing and approving prices proposed by the algorithm.
- Firms should also be particularly wary when the third-party software requires participants to provide confidential competitively sensitive information that is used to train or enhance the algorithm.
- More broadly, AI and algorithms remain a “hot topic” and area of focus for competition enforcers around the world, and any intersection of these tools with competitively sensitive business functions—like pricing—should be approached with great care.

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