Recent Cases Show Increasing Focus on Information Exchanges Among Competitors

When we think of a collusive agreement between competitors, we usually think of an act of directly fixing prices or output. But adverse effects on competition can result from competitors just sharing sensitive (non-public) information. Indeed, recent activity in private and public antitrust enforcement shows an increasing focus on competitors' coordinated actions and information sharing. In late January, for example, a group of poultry farmers filed a class action lawsuit against the country's biggest chicken processors (including Tyson, Perdue Farms, and Pilgrim's Pride) alleging the companies had shared highly sensitive and confidential compensation data in an effort to suppress the farmers' pay. The suit further alleges that these defendants agreed not to hire away farmers from each other in order to protect themselves "from normal competitive pressures that could potentially erode the effects of their information sharing agreement."[1] This case comes at the heels of recent developments at the DOJ and FTC that show growing concern with non-price information sharing by market competitors.

Last November, the DOJ and FTC released antitrust guidelines for HR professionals, warning against the sharing of sensitive information with competitors. These guidelines state that "[s]haring information with competitors about terms and conditions of employment can also run afoul of the antitrust laws. Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement."[2] This view presents a less sympathetic stance toward non-price and output information sharing than the agencies have previously expressed in antitrust guidelines.[3]

That same month, the DOJ sued DirecTV under antitrust laws for sharing private information with three other content distributors — Cox Communications Inc., Charter Communications Inc., and AT&T regarding their negotiations to carry SportsNet LA, the channel which has exclusive rights to broadcast Dodgers games in the area. Although there was no mention of the companies colluding over subscribers' prices, or even sharing price information, this behavior was challenged as collusive. The DOJ recently reached a settlement with the defendants, requiring them to monitor communications, implement antitrust compliance programs, and stop sharing competitively-sensitive information with rivals when negotiating with providers. "When competitors email, text, or otherwise share confidential and strategically sensitive information with each other to avoid competing, consumers lose," said Acting Assistant Attorney General Brent Snyder referring to the lengthy blackout of the Dodgers Channel in the LA area that likely resulted from the companies' communications with competitors.[4]

The Agencies' recent attention to competitors' information sharing may reflect an increased appreciation for a long-standing concern in economic research over potential for anticompetitive effects from such behavior. Economists have identified a number of ways in which competitors' sharing of information can be anticompetitive even when the information is not about pricing. Successful cartels often discuss various things beyond just prices, including costs, R&D, customer strategies, plant investment and utilization, backlogs, terms and conditions of sales, product standards, distribution, etc.[5] Economic research also shows that sharing non-price information assists cartels in adjusting to market changes, such as from technological progress. For instance, a cartel that communicates regularly about changing costs can more easily achieve an efficient market-share allocation and maintain operational stability.[6]

Many successful cartels have made use of sophisticated communication structures.[7] Recent antitrust cases illustrate the role of various types of information communicated among competitors. For instance, while the CRT and TFT-LCD price fixing cartels involved explicit price coordination among display manufacturers, information exchanges regarding current and future capacity and production plans were also important to cartel members.[8] These two cartels had a communication protocol with regular multi-level meetings consistent with what economic research predicts will help enhance cartel stability.

There are circumstances in which sharing of certain types of information among competitors can be pro-competitive (e.g., R&D collaboration, industry standard setting, benchmarking or ensuring technological compatibility). However, even without an initial intent to collude, there could be antitrust concern when firms privately share information because such behavior can be a gateway to collusive behavior. Research points to concerns over communications among competitors even when they do not result in or from explicit unlawful agreements. Such communications may act as "facilitating practices" for tacit collusion or "invitations to collude."[9]

This type of behavior seems to have motivated the DOJ and FTC guidelines for HR professionals. The no-poaching agreements in the *High Tech Employees Antitrust* case apparently began with company executives (their CEOs, in particular) sharing frustrations over each others' hiring practices.[10] These firms' communications about their episodic poaching of each other's employees and their efforts to stop them apparently evolved into agreements not to solicit each other's employees. No direct agreement fixing salaries was necessary (or alleged), yet suppressed salaries were a consequence of the reduction in poaching.[11] Since poaching can play an important role in giving employees information about competitive opportunities, it follows that decreasing employees' mobility and awareness of opportunities insulated these firms from salary competition and harmed their employees.

In the Dodger Channel case, similar concerns may have been at play. While no explicit agreement between these firms not to carry the Dodgers Channel has been referenced,[12] it is possible that a broader understanding, or future understandings, might have been facilitated through such cooperative communication. It's likely that cable and satellite distributors saw themselves in a bind. To license this popular programming — the Dodgers' baseball games — is costly, but to independently decide not to license may have been risky. If one distributor does not license the games but its rivals do, that distributor would risk losing substantial numbers of subscribers to its competitors. Yet if all the distributors license the games, each would pay license fees, though none would obtain a unique advantage with which to poach the others' subscribers. That would be a lose-lose situation for distributors — though perhaps a winning situation for their customers. In the absence of this information exchange, more of these distributors may carry the channel with competition constraining the ability to charge for it, which is a beneficial outcome for the consumers. Economists often model such situations as variations of the classic Prisoners' Dilemma which is at the heart of much price competition — and something competitors may try to 'solve' by colluding.[13]

Likewise, central to the above-mentioned case against the poultry processors is their use of a third party data service called Agri Stats. Plaintiffs allege Agri Stats was the vehicle through which the defendants shared competitively sensitive information about farmer compensation and other key metrics such as monthly operating profits and anticipated future capacity and output.[14] Though there is no allegation of an explicit agreement on farmer wages, the exchange of compensation data and an understanding against poaching from one another are sufficient grounds for concern about anticompetitive effects. A different lawsuit last year named Agri Stats as a facilitator for a conspiracy to fix prices of broiler chickens through an exchange of evidentially 'extraordinarily detailed information' about prices, revenue breakdowns, product mixes, capacity, and sales volumes. Agri Stats maintains that no antitrust laws have been broken since the price information is not current.[15] It remains to be seen whether courts find that such exchanges crossed the boundaries of pro-competitive benchmarking information.

The bottom line is that sharing sensitive information among competitors — be it product launches, entry or exit plans, negotiations with suppliers, or employee compensation levels — can raise antitrust concerns. Communication that enables firms to moderate their competition and increase profits may be good for business, but it's bad for consumers and risks antitrust scrutiny.

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[1] Polansek, Tom, "Top U.S. chicken processors face lawsuit over farmer pay," *Reuters*, February 2, 2017, accessed March 14, 2017, http://www.reuters.com/article/usa-poultry-lawsuit-idUSL1N1FO023.
[2] "Antitrust Guidelines for Human Resource Professionals," *Department of Justice Antitrust Division and Federal Trade Commission*, October 2016, https://www.justice.gov/atr/file/903511/download.
[3] "Antitrust Guidelines for Collaborations Among Competitors," *Department of Justice Antitrust Division and Federal Trade Commission*, April 2000, "The sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables," at 15.
[4] "Justice Department Settles Civil Antitrust Claim Against AT&T and DIRECTV for Orchestrating Information Sharing Agreements with Competitors. Settlement Bars Anticompetitive Information Sharing Between Competitors," *Department of Justice,* March 23, 2017, accessed March 27, 2017. https://www.justice.gov/opa/pr/justice-department-settles-civil-antitrust-claim-against-att-and-directv-orchestrating.
[5] Levenstein, Margaret C., and Valerie Y. Suslow, "Cartel bargaining and monitoring: The role of information sharing," "The Pros and Cons of Information Sharing," *Norwegian Competition Authority*, (2006): 43-82; see also Harrington Jr, Joseph E, "How do cartels operate?" *Foundations and Trends in Microeconomics* 2.1 (2006): 1-105.
[6] Athey, Susan, and Kyle Bagwell, "Optimal collusion with private information," *RAND Journal of Economics*, Vol. 32, No. 3, 2001, pp. 429, "The market-share allocation that achieves productive efficiency then may be feasible only if firms communicate cost information."

[7] Levenstein, Margaret C., and Valerie Y. Suslow, "What determines cartel success?" *Journal of Economic Literature* 44.1 (2006): 43-95.
[8] See MDL No. 1917 *In Re: Cathode Ray Tube (CRT) Antitrust Litigation*, No. 3:07-cv-05944-SC – Document 3902 (N.D. Cal. 2015), at 4-5; see also MDL No. 1827 *In Re: TFT-LCD (Flat Panel) Antitrust Litigation,* No. M:07-cv-01827-SI – Document 1641 (N.D. Cal. 2010), at 3.
[9] DeSanti, Susan S., and Ernest A. Nagata, "Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review," *Antitrust Law Journal* 63.1 (1994): 93-131.
[10] For instance, in 2005, around the time that these agreements are alleged to have began, then Apple CEO Steve Jobs wrote to Google co-founder Sergey Brin to stop all recruiting at Apple - "[I]f you hire a single one of these people… that means war," Jobs wrote in an email to Brin. There is also evidence of communications between Google and eBay (which was not named as a defendant in the case), with eBay CEO Meg Whitman complaining about the detrimental effects of Google's recruiting to eBay's profits and suggesting that the Silicon Valley viewed competing away workers by offering higher pay as "unfair." See M. Ames, "Revealed: Apple and Google's wage-fixing cartel involved dozens more companies, over one million employees," *Pando.com*, March 22, 2014, accessed March 21, 2017, https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/.
[11] "Silicon Valley's No-poaching Case: The Growing Debate over Employee Mobility." *Knowledge@Wharton*, The Wharton School, University of Pennsylvania, April 30, 2014, accessed March 14, 2017. http://knowledge.wharton.upenn.edu/article/silicon-valleys-poaching-case-growing-debate-employee-mobility.
[12] Kroh, Eric, "DOJ's Dodgers Info-Sharing Case Is Flimsy, DirecTV Says," *Law360*, January 11, 2017, accessed March 14, 2017, https://www.law360.com/articles/879830/doj-s-dodgers-info-sharing-case-is-flimsy-directv-says.
[13] Dixit, Avinash and Barry Nalebuff, "Prisoners' Dilemma," *The Concise Encyclopedia of Economics,* 2008, Library of Economics and Liberty, http://www.econlib.org/library/Enc/PrisonersDilemma.html.
[14] Class Action Complaint, Haff Poultry Inc et al v Tyson Foods Inc et al, U.S. District Court, Eastern District of Oklahoma, No. 17-CV-00033. Filed January 27, 2017 at 15-16.
[15] Leonard, Christopher, "Is the Chicken Industry Rigged? Inside Agri Stats, the poultry business's secretive info-sharing service," *Bloomberg Businessweek,* February 15, 2017, accessed March 21, 2017. https://www.bloomberg.com/news/features/2017-02-15/is-the-chicken-industry-rigged.