ML STRATEGIES

DOJ and FTC Weigh in on Alleged Algorithmic Price Fixing — AI: The Washington Report

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1. On March 1, 2024, the Federal Trade Commission (FTC or Commission) and the Department of Justice (DOJ) submitted a **Statement of Interest** (SOI) in the case *Duffy v. Yardi Systems Inc., et al.* **[1]**
2. In this SOI, the agencies argue that landlords' joint use of Yardi's pricing algorithm could constitute price fixing in violation of the Sherman Act. Significantly, the agencies assert that despite the fact that the parties deviated from the pricing algorithm's recommendations and no information was directly shared between the parties, the defendants may still be guilty of illegal price fixing. However, it is important to note that the courts have not yet endorsed the agencies' theories on algorithmic price fixing.
3. The DOJ and FTC's focus on alleged price fixing by landlords is a part of the Biden administration's broader efforts to clamp down on corporate practices characterized, in the words of FTC Chair Lina Khan, as "**extractive**." Interested stakeholders should pay close attention to DOJ and **FTC guidance** regarding the use of pricing algorithms.

On March 1, 2024, the Federal Trade Commission and the Department of Justice filed a **Statement of Interest** in the case *Duffy v. Yardi Systems Inc. et. al.* (*Duffy*). This case concerns the question of whether competing landlords violated Section 1 of the **Sherman Act** by "unlawfully agreeing 'to use Yardi's pricing algorithms to artificially inflate' multifamily rental prices."

"Tremendous Practical Importance": The DOJ and FTC's Interest in *Duffy*

The DOJ is permitted to submit a Statement of Interest in any case pending in the federal courts "to attend to the interests of the United States."**[2]** The DOJ and FTC highlighted two interests underlying their submission of this SOI. The first is that the "judicial treatment of the use of algorithms in price fixing has tremendous practical importance…" The second is what the agencies believe to be "an incorrect legal position in defendants' motion to dismiss: that the landlords' retention of some pricing discretion dooms a price-fixing claim."

A broader understanding of the agencies' interest in *Duffy* is provided by an FTC blog post concurrent with the filing of the SOI entitled "**Price fixing by algorithm is still price fixing**." The article makes clear that the agencies' focus on landlords' use of pricing algorithms is directly connected with the political issue of rising rental prices. "Algorithms that recommend prices to numerous competing landlords," writes the FTC in their blog post, "threaten to remove renters' ability to vote with their feet and comparison-shop for the best apartment deal around."

While the focus of both the SOI and the blog post is the use of pricing algorithms by landlords, the article ends by warning that that the "housing industry isn't alone in using potentially illegal collusive algorithms," hinting that enforcers may be on the lookout for allegedly illegal deployments of pricing algorithms in other contexts.

The DOJ and FTC's Three Theses on Algorithmic Price Fixing

In their SOI, the FTC and DOJ present three arguments in support of the claim that the defendants' joint use of pricing algorithms for multifamily rental prices constituted a Section 1 violation.

1. **Algorithmic "Concerted Action"**: A violation of Section 1 requires showing that there has been a "concerted action" or a joining together of "independent centers of decisionmaking." The FTC and DOJ argue that "competitors' jointly delegating key aspects of their decisionmaking to a common algorithm" constitutes concerted action "because doing so 'joins together separate decisionmakers' and thus 'deprives the marketplace of independent centers of decisionmaking.'"
2. **Deviation from Algorithmically Recommending Pricing Still Constitutes Price Fixing**: The second element of a Section 1 claim is that the "contract, combination, or conspiracy…unreasonably restrains trade." According to the SOI, the *Duffy* defendants' motion to dismiss argues that the plaintiff's inability to show that the landlords utilizing Yardi stuck to the algorithm's recommended prices "dooms" the claim of price fixing. However, in their SOI, the DOJ and FTC disagree, asserting that it "is per se illegal for competing landlords to jointly delegate key aspects of their pricing to a common algorithm, even if the landlords retain some authority to deviate from the algorithm's recommendations."
3. **Equivalency of the Direct and Indirect Sharing of Confidential Pricing Information with Competitors**: Finally, the SOI asserts that contrary to the arguments made by the defendants, sharing "confidential pricing information with a common pricing agent can be equivalent to sharing that information directly with a competitor." For the DOJ and FTC, "it is irrelevant to the scheme whether landlords share confidential information among themselves or with only the pricing agent; the alleged scheme is designed to obviate the need for competitors to share information directly with each other."

The SOI ends by asserting that, contrary to the arguments of the defendants, there need not be "a binding enforcement mechanism to state a valid claim for per se price fixing," as "the *agreement* is the violation, and unsuccessful price-fixing schemes are as unlawful as successful ones."

Conclusion: Implications of the DOJ and FTC's SOI in *Duffy*

Again, it is important to note that the courts have not yet endorsed the FTC and DOJ's theories regarding Section 1 algorithmic price-fixing. Regardless, given the DOJ and FTC's stated focus on the potentially illegal use of algorithmic pricing tools, businesses considering the use of or actually deploying pricing algorithms should pay close attention to actions and statements made by enforcement agencies on this topic. In their March 1, 2024, blog post accompanying the *Duffy* SOI, the FTC provides two pieces of guidance to businesses:

1. **Agreeing to use an algorithm is an agreement**: "When you replace once-independent pricing decisions with a shared algorithm, expect trouble," writes the FTC. "It's also irrelevant that the algorithm maker isn't a direct competitor if you and your competitors each agree to use their product knowing the others are doing the same in concert."
2. **Price deviations don't immunize conspirators**: "Just because a software recommends rather than determines a price," the FTC asserts, "doesn't mean it's legal."

We will continue to monitor, analyze, and issue reports on these developments. Please feel free to contact us if you have questions as to current practices or how to proceed.

Endnotes

[1] Case No. 2:23-cv-01391-RSL.

[2] Pursuant to 28 U.S.C. § 517.

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