

DOJ's War on Progress in Rental Markets

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I. Introduction

According to recent reports,² the U.S. Justice Department (“DOJ”) is planning to bring an antitrust suit against RealPage, Inc. (“RealPage”) for allegedly orchestrating collusion in housing rental markets. RealPage is a software company that provides revenue management services for landlords and management companies. RealPage’s software recommends rental prices for individual rental units, using algorithms that analyze price, supply, and occupancy data provided to RealPage by its clients. Previously, the DOJ filed a Memorandum of Law (“Memorandum of Law”) in support of class action antitrust lawsuits against RealPage and its clients.³ These lawsuits allege that RealPage and its clients are operating an illegal price-fixing cartel through the joint use of RealPage’s Revenue Management Software (“RMS”).

The DOJ’s Statement of Interest (“Statement of Interest”) in the antitrust litigation against RealPage describes the case as involving “the use of algorithms by competitors in allegedly fixing prices.”⁴ However, this case is not about a price-fixing conspiracy where the alleged conspirators agree to use a common pricing algorithm. Instead, the DOJ’s theory of the case is that the defendants are engaged in a price-fixing conspiracy by merely using the same third-party software to help determine rental prices. Under the DOJ’s legal theory, using the same vendor as competitors (without ever communicating with the competitors or reaching an agreement on prices) can by itself result in antitrust liability. Such a low threshold for establishing liability poses significant and

imminent antitrust risks for a significant share of U.S. commerce.

The DOJ’s legal theory represents a vast expansion of antitrust doctrine. The antitrust case against RealPage is an extreme application of antitrust law that threatens to harm innovation and economic growth. Although the DOJ is targeting rental markets, the DOJ’s legal theory has broader implications. Applied more broadly, the theory would raise considerable obstacles for the commercial use of algorithms, proprietary data, and artificial intelligence, resulting in significant harm to innovation and efficient operation of markets. Moreover, the DOJ’s opposition to the use of RealPage’s revenue management software will not make rental markets more competitive but may instead reduce the supply of housing and make housing less affordable.

II. DOJ’s Legal Framework in the Realpage Litigation

The DOJ’s Statement of Interest on the RealPage antitrust litigation concludes that, “taking the allegations set forth in the complaints as true, the alleged scheme meets the legal criteria for per se unlawful price fixing.”⁵ It is important to understand how the DOJ arrived at this conclusion. Citing *American Needle*⁶, the DOJ’s Memorandum of Law explains that liability under Section 1 of the Sherman Act requires two elements: “(1) a ‘contract, combination, or conspiracy’—that is, ‘concerted action,’ the joining together of ‘independent centers of decisionmaking’; and (2) that ‘unreasonably restrains trade.’”⁷

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² See Josh Sisco, *Justice Department Preparing Rental Market Collusion Lawsuit*, POLITICO, July 12, 2024, <https://www.politico.com/news/2024/07/12/justice-department-rental-market-collusion-lawsuit-00167838>.

³ See *In Re: RealPage, Rental Software Antitrust Litigation (No. II)*, Memorandum of Law in Support of the Statement of Interest of the United States, filed 11/15/23 (<https://www.justice.gov/atr/media/1325346/dl>).

⁴ *In Re: RealPage, Rental Software Antitrust Litigation (No. II)*, Statement of Interest of the United States, filed 11/15/2023 (<https://www.justice.gov/atr/media/1325336/dl>).

⁵ Statement of Interest, *supra* note 4.

⁶ See *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

⁷ Memorandum of Law, *supra* note 3.

Critical to the DOJ's analysis is determining what constitutes "concerted action." The DOJ's Memorandum of Law explains that "concerted action includes any conduct that joins together otherwise-separate decisionmaking and thus deprives the market of independent centers of decisionmaking."⁸

The DOJ's analysis of whether the alleged conduct constitutes "concerted action" focuses on two key allegations. First, the DOJ's Memorandum of Law explains that the plaintiffs allege that RealPage "contemplated and invited" concerted action among landlords by requiring the landlords to submit real-time pricing and supply data with the understanding that RealPage would use the data for its pricing algorithm.⁹ Second, the Memorandum of Law explains that the plaintiffs allege that the landlords "gave their adherence to the scheme and participated in it" by sending to RealPage their "non-public and competitively sensitive data" and "overwhelmingly priced their units in line with RealPage's suggested prices."¹⁰ The DOJ found that these two allegations alone, if true, are sufficient to conclude that the alleged conduct constitutes "concerted action."

It is important to acknowledge at this point the significance of the DOJ's framework for identifying concerted action. This framework implies a remarkably low threshold for classifying conduct as "concerted action." Under the DOJ's analysis, firms using a common third-party vendor may be engaged in a concerted action to implement a price-fixing conspiracy even if: (1) there is no agreement among them, whether tacit or explicit, to restrict output, marketing, or investment or to maintain price levels; (2) they have no contact with each other or know each other's identity; (3) each firm is unaware of the commercial terms of dealings between the vendor and other firms; (4) they do not know whether others are complying with the alleged price-fixing scheme; (5) they face no punishment for any deviation from such a scheme; (6) there is no evidence to exclude the possibility that each

firm is acting in its own unilateral interest; and (7) the third-party vendor has relatively small shares of the relevant markets. Considering the remarkably low threshold for identifying concerted action, the DOJ's analysis is likely to find concerted action even when a price-fixing conspiracy is implausible.

Regarding the "unreasonable restraint" prong of the DOJ's RealPage framework, the DOJ concluded that: "it is *per se* unlawful when, as alleged here, competitors knowingly combine their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same."¹¹

The DOJ's *per se* treatment of conduct alleged in the RealPage antitrust litigation means that there is no room under the framework to consider whether the conduct caused any anticompetitive harm or whether there are plausible efficiency justifications for the conduct. There are, however, plausible efficiencies from aggregating landlords' pricing, supply, and occupancy data for the purpose of assessing market conditions and estimating market prices. The DOJ's analysis overlooks such efficiencies.

III. Antitrust Risks for a Vast Segment of Commerce

The DOJ's RealPage legal framework sets forth an extremely low threshold for establishing liability under Section 1 of the Sherman Act for firms that disclose non-public information to their vendors. Because firms commonly share non-public information with their vendors, the framework implicates a vast amount of commerce in the U.S. economy. The essence of the DOJ's framework in defining concerted action is that disclosing private information to a vendor that the vendor can use in serving a competitor is no different than meeting with the competitor in the proverbial smoked-filled room and reaching an agreement related to the vendor's service. If there

⁸ Id.

⁹ See id.

¹⁰ Id.

¹¹ Id.

is a limiting principle for applying this framework, the DOJ's commentary has not provided one. Although the DOJ's advocacy focuses on pricing algorithms, the framework can be extended to other types of services.

Firms commonly disclose non-public information to their vendors.¹² Vendors also frequently work with multiple clients who may be competing against each other in some market. Indeed, the experience that vendors gain from serving their clients makes them much better at serving other clients. However, under the DOJ's RealPage framework, working with multiple clients that disclose non-public information may expose the vendor to significant antitrust risk. Such risks would discourage vendors from working with multiple clients and may deter them from using the experience gained from serving a client to improve services for another client. In either case, the heightened antitrust risks would reduce the effectiveness of the vendor business model across the U.S. economy.

Consider, for example, an employment agency that is recruiting software developers for multiple technology companies. The technology companies disclose to the employment agency non-public information about how many developers they would like to hire, the desired experience level, and the compensation level they are willing to pay. The employment agency may provide guidance to a client about the labor markets for software developers based on the agency's experience in recruiting developers for other companies. For example, based on prior recruiting experience, the employment agency may tell a technology company that they need to offer more pay to hire the workers that the company desires. However, the DOJ's legal framework may condemn as illegal price-fixing the employment agency's conduct of advising clients based on the information they learned from providing services for other clients, thus threatening the core business model for employment agencies. Employment agencies are

just one example of the many types of businesses that would face significant antitrust risks under the DOJ's RealPage legal framework.

IV. Harm to Innovation

Much of modern progress comes from technologies that aggregate private data across individuals and businesses. Examples include online search, artificial intelligence, social media, smart devices, e-commerce, ride-share applications, and many others. Many of these applications harness the power of big data to bring important innovations to consumers and businesses.¹³ In all these cases, technological advancements depend on the ability of technology firms to aggregate data across many individuals or businesses. To the extent that the DOJ's RealPage legal framework increases antitrust risks for companies disclosing non-public information to third parties, it is impeding the flow of data necessary for the development of new business applications.

RealPage's RMS is an example of how data aggregation across businesses enhances efficiency. RealPage aggregates data across landlords to calculate accurate, real-time market rental rates for individual units. Data aggregation across landlords is what enables RealPage to calculate more accurate market rental rates, reflecting local market conditions. Without aggregation across landlords, the calculation of rental rates would suffer from diminished reliability, leading to erroneous assessments of market rental rates. Such errors would lead to less efficient market performance and potentially shortages of housing. Charging rents that are above the market level would lead to excessive vacancy rates and higher tenant costs. Conversely, charging market rates that are below the market level would lead to excess demand, rationing of rental units, underinvestment in new supply, and inefficient allocation of units across renters. Thus, aggregation of rental data across

¹² Such information may include purchase or supply quantities, pricing strategy, marketing, expansion, exit, investment, or acquisition plans; wages; litigation strategy; terms of supply agreements; computer software; internal hardware infrastructure; planned layoffs and hiring; customer complaints; product quality problems; labor contract negotiations; and negotiating positions, many other sensitive items.

¹³ See Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV. (Oct 2012), <https://hbr.org/2012/10/big-data-the-management-revolution>.

landlords via RealPage and other similar services helps the rental markets to operate more efficiently.

A DOJ lawsuit challenging RealPage's business model would have a chilling effect on the development of new applications for calculating real-time rental rates, potentially reducing competition for such applications. If the DOJ lawsuit is successful in prohibiting RealPage and others from aggregating rental data across landlords, the resulting outcome would not advance the interest of renters. On the contrary, it would impede the efficiency of rental markets.

There are many other markets that use algorithmic AI tools for optimizing pricing

decisions. For example, Wise Athena helps Consumer Packaged Goods companies to "optimize their pricing and promotion strategies through A.I., thereby increasing their sales and margin."¹⁴ A DOJ lawsuit against RealPage would also have a chilling effect on the development of other applications that offer algorithmic AI solutions through data aggregation across clients.

Dissuading investments in new applications that offer AI solutions through data aggregation would be a negative development for progress and innovation.

¹⁴ About Wise Athena, <https://wiseathena.com/about/> (accessed July 24, 2024).