AN FTC GUIDE TO

Dealings with Competitors

Price Fixing

PRICE FIXING IS AN AGREEMENT (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes price or competitive terms. Generally, the antitrust laws require that each company establish prices and other terms on its own, without agreeing with a competitor. When consumers make choices about what products and services to buy, they expect that the price has been determined freely on the basis of supply and demand, not by an agreement among competitors. When competitors agree to restrict competition, the result is often higher prices. Accordingly, price fixing is a major concern of government antitrust enforcement.

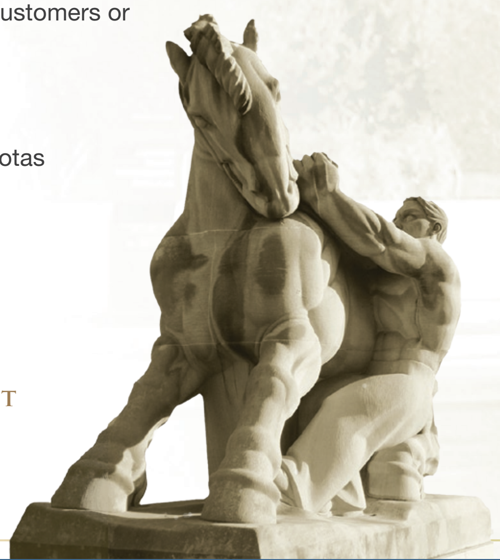
A PLAIN AGREEMENT AMONG competitors to fix prices is almost always illegal, whether prices are fixed at a minimum, maximum, or within some range. Illegal price fixing occurs whenever two or more competitors agree to take actions that have the effect of raising, lowering or stabilizing the price of any product or service without any legitimate justification. Price-fixing schemes are often worked out in secret and can be hard to uncover, but an agreement can be discovered from "circumstantial" evidence. For example, if direct competitors have a pattern of unexplained identical contract terms or price behavior together with other factors (such as the lack of legitimate business explanation), unlawful price fixing may be the reason. Invitations to coordinate prices also can raise concerns, as when one competitor announces publicly that it is willing to end a price war if its rival is willing to do the same, and the terms are so specific that competitors may view this as an offer to set prices jointly.

Not all price similarities, or price changes that occur at the same time, are the result of price fixing. On the contrary, they often result from normal market conditions. For example, prices of commodities such as wheat are often identical because the products are virtually identical, and the prices that farmers charge all rise and fall together without any agreement among them. If a drought causes the supply of wheat to decline, the price to all affected farmers will increase. An increase in consumer demand can also cause uniformly high prices for a product in limited supply.

Price fixing relates not only to prices, but also to other terms that affect prices to consumers, such as shipping fees, warranties, discount programs, or financing rates.

ANTITRUST SCRUTINY may occur when competitors discuss the following topics:

- Present or future prices
- Terms or conditions of sale, including credit terms
- Pricing policies
- Discounts
- Promotions
- Identity of customers
- Bids
- Allocation of customers or sales areas
- Costs
- Production quotas
- Capacity
- R&D plans



A plain agreement among competitors to fix prices is almost always illegal, whether prices are fixed at a minimum, maximum, or within some range.

A defendant is allowed to argue that there was no agreement, but if the government or a private party proves a plain price-fixing agreement, there is no defense to it. Defendants may not justify their behavior by arguing that the prices were reasonable to consumers, were necessary to avoid cut-throat competition, or stimulated competition.

EXAMPLE: A group of competing optometrists agreed not to participate in a vision care network unless the network raised reimbursement rates for patients covered by its plan. The optometrists refused to treat patients covered by the network plan, and, eventually, the company raised reimbursement rates. The FTC said that the optometrists' agreement was illegal price fixing, and that its leaders had organized an effort to make sure other optometrists knew about and complied with the agreement.

An agreement to restrict production, sales, or output is just as illegal as direct price fixing, because reducing the supply of a product or service drives up its price. For example, the FTC challenged an agreement among competing oil importers to restrict the supply of lubricants by refusing to import or sell those products in Puerto Rico. The competitors were seeking to pressure the legislature to repeal an environmental deposit fee on lubricants, and warned of lubricant shortages and higher prices. The FTC alleged that the conspiracy was an unlawful horizontal agreement to restrict output that was inherently likely to harm competition and that had no countervailing efficiencies that would benefit consumers.

Q: The gasoline stations in my area have increased their prices the same amount and at the same time. Is that price fixing?

A: A uniform, simultaneous price change could be the result of price fixing, but it could also be the result of independent business responses to the same market conditions. For example, if conditions in the international oil market cause an increase in the price of crude oil, this could lead to an increase in the wholesale price of gasoline. Local gasoline stations may respond to higher wholesale gasoline prices by increasing their prices to cover these higher costs. Other market forces, such as publicly posting current prices (as is common with most gasoline stations), encourages suppliers to adjust their own prices quickly in order not to lose sales. If there is evidence that the gasoline station operators talked to each other about increasing prices and agreed on a common pricing plan, however, that may be an antitrust violation.

Q: Our company monitors competitors' ads, and we sometimes offer to match special discounts or sales incentives for consumers. Is this a problem?

A: No. Matching competitors' pricing may be good business, and occurs often in highly competitive markets. Each company is free to set its own prices, and it may charge the same price as its competitors as long as the decision was not based on any agreement or coordination with a competitor.