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PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

September 16, 2020

TO: Peyton Burnett

FROM: William H. Stallings

RE: **TAC Index U.S. Antitrust Analysis**

This memorandum analyzes the potential U.S. antitrust risk posed by the information exchanged through the TAC Index. Based on the facts presented to us, including those set forth in the August 4, 2020 letter from F. Fine to R. Frei regarding "EU Antitrust Analysis of the TAC Index" (hereinafter, the "EU Legal Opinion"), and our analysis of U.S. antitrust law, it is our opinion as set forth below that the TAC Index is consistent with U.S. antitrust principles and would not be found to violate U.S. antitrust laws.

I. RELEVANT FACTS

The TAC Index is a market intelligence tool for the air cargo sector (shippers, forwarders and carriers) that provides market participants and the financial markets with "an impartial, robust price reporting service dedicated to providing transparency in the markets it serves."[1] A summary of the key characteristics of the TAC Index for U.S. antitrust purposes is below. This information has been obtained from the EU Legal Opinion, which we understand is based upon TAC documents, a live demonstration of the Index, and discussions and correspondence among Frank Fine, Robert Frei, John Peyton Burnett, and James Notaras (TAC's head of data processing).[2] A more complete description of the TAC Index can be found in the EU Legal Opinion.

Before the TAC Index existed, the air cargo sector lacked tools to allow shippers, forwarders, and airlines to determine pricing trends and calculate risk management.[3] Rates in the air cargo industry are typically negotiated through bilateral, confidential discussions, making it difficult—in the absence of any benchmarking tools—for shippers and forwarders to determine

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[1] TAC Index Pricing Methodology & Specifications Guide, at 1.

[2] August 4, 2020 Letter from F. Fine to R. Frei re: "EU Antitrust Analysis of the TAC Index," pg. 1 (hereinafter, the "EU Legal Opinion").

[3] *Id*. at 2.

whether they are paying a competitive market rate.[4] The TAC Index addresses this problem by publishing weekly airport-to-airport general cargo price trends for block space agreements, spot rates, and weekly allotments.[5]

The TAC Index "helps create more effective pricing negotiations by providing price directionality as a function of certain core (commodity) values."[6] It is "the only index that is solely focusing on general cargo and is not influenced by express shipments like any other available data such as CASS/ CargoIS" and is the only index that is using solely transactional data from a single source (freight forwarders).[7] The TAC Index also enables airlines, who have been significantly impacted by the ongoing COVID-19 pandemic, to "more effectively manage their capacity, thereby increasingly their willingness to invest in this sector and enabling them to purchase new aircraft from a position of strength."[8]

The TAC Index reports base values involved in the transport of goods from one airport to another. These base values do not account for certain values that would impact overall price, such as direct vs. indirect service.[9] Data for the Index is provided by participating airfreight forwarders. Contributing forwarders provide House Air Waybills ("HAWB") and Master Air Waybills ("MAWB") from the previous week. The Waybills include information such as the origin of the shipment, destination, flight number, actual weight, and chargeable weight. "The MAWB data includes additional data relating to the cost of the flight to the carrier, i.e., all-in costs, as well as airline rates, fuel and security surcharges."[10] No confidential data, such as selling prices between the forwarders and their clients, is provided by the forwarders. Additionally, the owners of the TAC Index do not participate "in any of the affected markets and they are contractually bound to maintain independence from all industry players."[11]

The TAC Index, which is published each Monday with the data provided from the previous week, includes three types of calculations in relation to published routes: Actual Net Price, Net Achieve Price MAWB, and Net Achieve Price HAWB. The routes include the airport of origin and a destination, which may be an airport, city, country or region. The published indices only relate to averages, rather than to specific contractual terms. Additionally, the Index provides a

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[4] *Id*.

[5] *Id*.

[6] *Id*. at 3.

[7] TAC Proposal (Jan. 2019), pg. 6.

[8] EU Legal Opinion, pg. 3.

[9] *Id*. at 2-3.

[10] *Id*. at 3.

[11] *Id*.

number of Key Performance Indicators for each route reported, such as HAWB to MAWB ratio. The TAC Index does not engage in any predictive price modeling of the data.[12]

The TAC Index publishes only aggregated data that is not company specific. TAC has taken measures to prevent reverse engineering of the data, including not disclosing any data relating to shipper-forwarder contracts, the total number of carriers operating on a given route, the absolute weights on a given route, or the relative weightings applied. Additionally, the TAC Index requires at least six data providers on any published lane, with no one data providers accounting for more than 40% of the volume weighted average price for the week in question. Routes that do not meet this requirement are broadened until the minimum is exceeded. Data is fully anonymized once it is uploaded.[13]

II. LEGAL ANALYSIS

The Department of Justice ("DOJ") and the Federal Trade Commission's ("FTC") (collectively, the "Antitrust Agencies") joint Antitrust Guidelines for Collaboration Among Competitors ("Competitor Collaboration Guidelines") recognizes that "in order to compete in modern markets, competitors sometimes need to collaborate."[14] More specifically, the Competitor Collaboration Guidelines acknowledge that competitor collaborations may benefit consumers by allowing participants to offer "goods or services that are cheaper, more valuable to consumers or brought to market faster than would be possible absent the collaboration," by "allow[ing] participants to better use existing assets," or by "provid[ing] incentives for them to make output-enhancing investments that would not occur absent the collaboration."[15]

These types of procompetitive efficiencies may be achieved through a variety of contractual arrangements, including through the development of an industry-wide benchmark, such as the TAC Index. The Department of Justice has expressly recognized that "[p]articipation by members of an industry in benchmarking surveys does not necessarily raise antitrust concerns."[16] And, "with appropriate safeguards, such surveys can benefit consumers when

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[12] *Id*. at 3-4.

[13] *Id*. at 4.

[14] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, Preamble (2002), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (hereinafter "COMPETITOR COLLABORATIONS GUIDELINES").

[15] *Id*. at § 2.1.

[16] U.S. Dep't of Justice Business Review Letter to National Association of Small Trucking Companies and Bell & Company (Apr. 9, 2007), available at: https://www.justice.gov/atr/response-national-association-small-trucking-companies-nastc-and-bell-companys-request-business.

industry members use information derived from such surveys to gain efficiencies and price their products or services more competitively."[17]

However, information sharing among competitors can also include a degree of antitrust risk. There are two primary antitrust concerns relating to the sharing of information among competitors: (1) the information sharing may lead to or be part of a price fixing conspiracy or (2) even if unaccompanied by any express or tacit agreement to fix prices, the collaboration may tend to stabilize prices and facilitate coordinated behavior. There is no hard and fast rule with respect to what information may or may not be shared among competitors. The legality of such communications depends on the nature of the information shared and the context in which it is shared. It is also important to consider what steps parties have taken to prevent legitimate information exchanges from leading to potentially unlawful agreements.

a. Federal Antitrust Laws Governing the Exchange of Information Among Competitors

There are two federal statutes that govern the exchange of information between competitors: the Sherman Antitrust Act of 1890 ("Sherman Act")[18] and the Federal Trade Commission Act ("FTC Act"). [19] Section 1 of the Sherman Act prohibits "[e]very contract, combination, or conspiracy in restraint of trade,"[20] while Section 5 of the FTC Act proscribes "unfair methods of competition in or affecting commerce."[21]

All violations of the Sherman Act also violate the FTC Act[22] but Section 5 may reach practices that do not fit neatly into categories of conduct prohibited by the Sherman Act. For example, in *In re Bosley, Inc.*, the FTC alleged that an information exchange created a risk to competition sufficient to constitute an unfair method of competition under Section 5. In *Bosley*, the chief executive officers of two hair restoration companies routinely exchanged detailed, non-public information regarding future product offerings, surgical hair transplantation price floors, discounting, forward-looking expansion and contraction plans, and overall operations and performance. While the FTC did not establish certain facts that typically underlie a Sherman Act Section 1 violation, such as the existence of an agreement to actually limit competition, the definition of a relevant market, allegations the market was highly concentrated or any proof of an

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[17] *Id*.

[18] 15 U.S.C. §§ 1-7.

[19] 15 U.S.C. §§ 41-58.

[20] 15 U.S.C. § 1.

[21] 15 U.S.C. § 45.

[22] *See, e.g., FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (Section 5 encompasses "practices that violate the Sherman Act and the other antitrust laws."); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

actual anticompetitive effect in the market, the parties settled the case and agreed not to exchange information in the future. [23]

b. Analytical Frameworks to Determine Lawfulness of Communications Among Competitors

Two analytical frameworks traditionally have been used by the courts to determine the lawfulness of communications among competitors: the *per se* rule and the rule of reason. Under the *per se* rule, particularly egregious agreements with no redeeming qualities between competitors or potential competitors are condemned without a detailed, case-specific inquiry into their impact on competition. Agreements between competitors to fix prices, rig bids, or allocate territories or customers are typically considered *per se* illegal.

All other agreements are governed by the rule of reason, which varies in focus and detail depending on the nature of the information exchanged and the structure of the industry.[24] Courts in the United States recognize that most information exchanges are competitively neutral or even pro-competitive.[25] As the Supreme Court explained in *United States v. U.S. Gypsum Co.*, "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act."[26]

Because the TAC Index will generate the procompetitive benefits identified above for shippers, forwarders, airlines, and financial markets, the harsh *per se* rule is not applicable here. Instead, in evaluating whether the TAC Index violates the antitrust laws, courts and the Antitrust Agencies would apply a rule of reason analysis. The rule of reason balances the potential for competitive harm resulting from information sharing between competitors against the efficiencies and procompetitive effects that the communication generates.[27] It is a very fact-intensive inquiry.

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[23] *In re Bosley, Inc.*, File No. 121-0184 (2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130408bosleyanal.pdf.

[24] *United States v. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

[25] *See e.g.*, *Todd v. Exxon*, 275 F.3d 191, 207 (2d. Cir. 2001) ("The alleged conduct in this case—the exchange of information—is not so inherently anticompetitive.").

[26] *Gypsum Co.*, 438 U.S. at 441 n.16.

[27] *See NCAA v. Bd. of Regents*, 468 U.S. 85, 103-104 (1984); *see also*, *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 507 (2d Cir. 2004) ("Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.").

In *Gypsum*, the Supreme Court explained that one of the two "most prominent[ ]" factors in the rule of reason analysis of a data exchange is the "structure of the industry involved."[28] In *Todd v. Exxon*, the Second Circuit elaborated, stating that "once a relevant market is defined, a court must analyze the structure of the market to determine whether it is 'susceptible to the exercise of market power through tacit coordination.'"[29] Highly concentrated markets that have fungible products subject to inelastic demand tend to be the most susceptible to coordination.[30]

The "nature of the information exchanged" is the other major factor that courts consider in a data exchange cases.[31] In *Todd*, the court identified "certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges," including:

a. the time frame of the data exchanged;
b. the specificity of the information;
c. whether the information is publicly available; and
d. the context and purpose of the exchange.[32]

In considering the time frame of the data exchanged, the courts look at whether the information is historic, current or forward-looking. The Supreme Court has stated that "[e]xchanges of current price information, of course, have the greatest potential for generating anti-competitive effects and although not *per se* unlawful have consistently been held to violate the Sherman Act."[33] Similarly, the exchange of future price information is typically considered anticompetitive.[34] Exchanging historical data, on the other hand, is less concerning, as it is less likely to "affect future prices and facilitate price conspiracies."[35]

In addition to the time frame of the information exchanged among competitors, courts also look at the specificity of the information. Exchanges of information that allow the recipient to identify specific parties, transactions, or prices are more concerning that exchanges of information that include only aggregated data.[36] The third factor courts examine is whether the information being exchanged is made publicly available. In *Todd*, the court noted that "[p]ublic dissemination

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[28] *Gypsum Co.*, 438 U.S. at 441 n.16.

[29] *Todd v. Exxon*, 275 F.3d 191, 207-208 (2d. Cir. 2001) (internal citations omitted).

[30] *Id*. at 208.

[31] *Id*. at 211 (citing *Gypsum*, 438 U.S. at 441 n.16.)

[32] *Id*. at 210-213.

[33] *Gypsum*, 438 U.S. at 441 n.16 (citing *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *United States v. Container Corp.*, 393 U.S. 333 (1969)).

[34] *Todd*, 275 F.3d at 211 (citing *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398-99 (1921)).

[35] *Id*. at 211.

[36] *Id*. at 212 (comparing *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 573-74 (1925) (statistical reports of average prices found lawful), with *Am. Column & Lumber*, 257 U.S. at 410 (violation found where exchanged information provided specific details of transactions).

is a primary way for data exchange to realize its procompetitive potential" because "in the traditional oligopoly (seller-side) context," it "better equip[s] buyers to compare products, rendering the market more efficient which diminishing the anticompetitive effects of the exchange."[37]

Finally, inferences about the business purpose of the exchange that can be drawn from objective facts as well as the subjective intent of the parties, to the extent that it sheds light on competitive effects, are also examined.[38] In *Todd*, the court found it particularly troubling that the defendants frequently met to discuss salary information and assured one another that they would use the information to set their salaries.[39]

c. The Antitrust Agencies' Approach to Rule of Reason Analysis

The DOJ and FTC have described the approach they apply to rule of reason analysis and the Agencies' antitrust enforcement policy with respect to competitor collaborations in their Competitor Collaboration Guidelines.[40] The Competitor Collaboration Guidelines explain that sharing the following types of information will draw the most scrutiny from regulators:

a. information relating to price, cost, output, customers or strategic planning;
b. information about current or future operating and business plans; and
c. company specific data (as oppose to aggregated data of multiple firms that does not permit identification of information by company).[41]

The Competitor Collaboration Guidelines recognize certain "safety zones" that are designed to encourage collaborations the Agencies believe are unlikely to be anticompetitive. The general safety zone identified in the Competitor Collaboration Guidelines states that "[a]bsent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected."[42] The Agencies acknowledge that many lawful exchanges of information do not fit within the established safe zones.[43] The Agencies analyze arrangements outside the safety zones using a rule of reason analysis, which asks "whether the relevant agreement likely harms competition by increasing the

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[37] *Id*. at 213.

[38] *See Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918) ("Knowledge of intent may help the court to interpret facts and to predict consequences.").

[39] *Todd*, 275 F.3d at 213.

[40] COMPETITOR COLLABORATIONS GUIDELINES §1.2.

[41] *Id*. at §3.31(b).

[42] *Id*. at §4.2. The safety zone does not apply to collaborations that are *per se* illegal, would be challenged without a detailed market analysis, or to which a merger analysis is applied. *Id*.

[43] *Id*. at §4.1.

ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[44]

The Competitor Collaboration Guidelines explain that under the rule of reason, the Antitrust Agencies first examine the "nature of the relevant agreement," including the business purpose of the agreement and whether the agreement has already caused, or is likely to cause, any anticompetitive harm.[45] The Agencies also consider whether the procompetitive benefits will offset the likely anticompetitive harms.[46]

d. The Antitrust Agencies' Prior Guidance on Exchanges of Price and Cost Information

The U.S. Department of Justice and the Federal Trade Commission have also issued guidance on the exchange of price and cost information among competitors in the healthcare space.[47] Although the Healthcare Statements technically apply only to "various joint activities in the health care area,"[48] they provide insight into how the Agencies may evaluate collaborations in other markets and have previously been applied to other industries.[49] The Healthcare Statements recognize that "[p]articipation by competing providers in surveys of prices for health care services … does not necessarily raise antitrust concerns. In fact, such surveys have significant benefits for health care consumers."[50] Among those benefits, is the fact that surveys allows providers to "price their services more competitively and to offer compensation that attracts highly qualified personnel."[51] On the other side of the market, purchasers are able to use the survey information to "make more informed decisions when buying health care services."[52]

As part of the Healthcare Statements' guidance on the use of surveys, the Antitrust Agencies set forth an "antitrust safety zone" that "describes exchanges of price and cost information that will not be challenged by the Agencies under the antitrust laws, absent

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[44] *Id*. at §3.3, §4.1.

[45] *Id*. at §3.3.

[46] *Id*.

[47] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (Aug. 1996) https://www.justice.gov/atr/page/file/1197731/download (hereinafter, the "HEALTHCARE STATEMENTS").

[48] *Id*. at Introduction, page 1.

[49] *See, e.g.*, U.S. Dep't of Justice Business Review Letter to Truckload Carriers Association (updated Jan. 7, 2017), available at: https://www.justice.gov/atr/response-truckload-carriers-associations-request-business-review-letter.

[50] HEALTHCARE STATEMENTS at pg. 49.

[51] *Id*.

[52] *Id*.

extraordinary circumstances."[53] In order to fall within the established "antitrust safety zone," the survey must meet three requirements:

1. the survey is managed by a third-party;
2. the information provided by survey participants is based on data more than 3 months old; and
3. there are at least five participants reporting data upon which each disseminated statistic is based, with no individual participant's data representing more than 25% on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.[54]

The Healthcare Statements explain that the purpose of the conditions stated above is to balance the "provider's individual interest in obtaining information useful in adjusting the prices it charges … against the risk that the exchange of such information may permit competing providers to communicate with each other regarding a mutually acceptable level of prices for health care services."[55]

As discussed briefly above, under US antitrust law, an information exchange does not need to fall within an established "safety zone" to be legal. If the exchange of price or cost information falls outside the safety zone, it is "generally [] evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs the procompetitive justification for the exchange."[56] The Healthcare Statements acknowledge that whether a survey raises competitor concerns is very fact specific. While a "public, non-provider initiated survey[ ] may not raise competitive concerns," "[e]xchanges of future prices for provider services or future compensation of employees are very likely to be considered anticompetitive."[57] Exchanges of such information that are sufficiently aggregated so that it is highly unlikely that any given recipient could "reverse engineer" the data to identify the prices or costs of a particular competitor are unlikely to raise antitrust concerns.

III. APPLICATION OF LAW TO RELEVANT FACTS

While the TAC Index does not specifically meet the requirements to fall within the Agency safety zones, it is our conclusion that, for the reasons explained in more detail below, the TAC

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[53] *Id*. at 49-52.

[54] *Id*. at 50.

[55] *Id*. at 50-51.

[56] *Id*. at 51.

[57] *Id*.

Index complies with the U.S. antitrust laws and it is unlikely that the Antitrust Agencies would raise concerns with the Index or that a court would find it problematic.

a. The TAC Index Fall Outside Established Antitrust Safety Zones

In order to fall within the safety zone established by the Competitor Collaboration Guidelines, the combined market shares of the participants in the collaboration must account for less than 20% of each relevant market in which competition may be affected.[58] The U.S. Antitrust Agencies may define the "relevant market" as narrowly as an individual route. Because the TAC Index may provide information based on data from participants that account for at least 20% of a particular route, this safety zone would not apply.

The TAC Index also falls short of meeting the requirements of the antitrust safety zone established in the Healthcare Statements. As discussed above, to fall within this safety zone, the survey must meet three requirements. First, it must be managed by a third party. Because the TAC Index is owned and managed by persons who do not participate in any of the affected markets and all the owners are contractually bound to maintain independence from industry players, the TAC Index satisfies the first prong. It does not, however, meet the requirements of the second and third prongs, which require that the data being exchanged be at least three months old and that no single participant represent more than 25% of the weighted basis of a particular statistic. Here, the TAC Index is comprised of data that is only a week old (although good arguments exist that this information should still be considered "historic"). And, while the TAC Index requires six participants per route, a single provider could account for up to 40% of the volume weighted average price for the week in question.

b. The TAC Index Passes Rule of Reason Analysis

Even though the TAC Index does not fall within the established safety zone, there are strong arguments that it its procompetitive effects outweigh any potential harm. As a result, it would be found lawful under a rule of reason analysis under the applicable precedent.

i. The Information Included in the TAC Index is Historical Data

First, even though the information provided by the TAC Index is only one week old, it should not be considered "current" for antitrust purposes. In order to determine whether the claimed antitrust violation is plausible, courts assessing information exchange claims place great weight on the age of the information being exchanged. Courts have repeatedly recognized that while "exchanges of future price information are considered especially anticompetitive," "the

[58] COMPETITOR COLLABORATIONS GUIDELINES, §4.2. The safety zone does not apply to collaborations that are *per se* illegal, would be challenged without a detailed market analysis, or to which a merger analysis is applied. *Id*.

exchange of past price data is greatly preferred" because past data has the least "potential to affect future prices and facilitate price conspiracies."[59]

In previous cases, the Supreme Court has distinguished "current" information—the sharing of which typically violated the antitrust laws—from "historic" information, which is less problematic to share among competitors. In *United States v. Container Corporation of America*, competitors exchanged "the most recent price charged or quoted" for corrugated containers "whenever [a competitor] needed such information."[60] The Court said that the most recent price charged or quoted was considered the "current price" because it was the "price which a customer would pay in order to obtain products from the defendants furnishing the data."[61] This practice had an effect of "stabiliz[ing] prices," and "reduc[ing] price competition," which amounted to a violation of the antitrust laws.[62] In *Gypsum*, defendants "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom."[63] The Court found that "exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."[64] And, in *American Column & Lumber Co. v. United States*, defendants exchanged reports that included forward-looking information on "what the production of each [member] will be for the next 'two months,'" "significant suggestions as to both future prices and production," and "opportunities for future meetings for the interchange of views, which the record shows were very important."[65] The Court found that "the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices."[66]

Although the safety zone identified in the Healthcare Statements only protects information more than three months old, exchanges of more recent historical data may not necessarily be anticompetitive. Indeed, no court has applied the "three month" limitation in assessing claims. Here, the TAC Index will report on a service that has several commodity characteristics and has daily (if not multiple times per day) price movements. Prices oscillate significantly and change

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[59] *Todd*, 275 F.3d at 211; *see also Gypsum*, 438 U.S. at 441 n.16 (the exchange of historical data entails the lowest "potential for generating anticompetitive effects").

[60] *United States v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969).

[61] *Id*. at 336.

[62] *Id*. at 337.

[63] *Gypsum Co.*, 438 U.S. at 428; *id*. at 426 (defendants engaged in "interseller price verification," which involved "telephoning a competing producer to determine the price currently being offered on gypsum board to a specific customer").

[64] *Id*. at 441 n.16 (internal citations omitted).

[65] *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398, 399 (1921).

[66] *Id*. at 399.

frequently. Prices that are a week old are not current and cannot be used by competitors to coordinate or match prices. There is no indication of *how* in such a fluctuating price environment participants could use *historical* data to know exactly how far they could raise their prices to conform with their competitors' prices. This distinguishes the TAC Index from *Container Corp.*, *Gypsum*, and *American Column*, where the current nature of the information allowed the defendants to stabilize industry prices. In fact, in other commodity markets, the government recognizes the procompetitive benefit of sharing recent, yet historic information, and itself publishes daily pricing. For example, pork processors are required to report prices twice daily to the United States Department of Agriculture, which then aggregates and publishes the data on the same day.[67]

Additionally, the TAC Index can be distinguished from the information exchange that was found anticompetitive in *Todd*. There, the court upheld a claim concerning the exchange of salary information about "current and future increases in Defendants' salary budgets" "such that 'all participants learn where each other participant is going with its salary budget for the upcoming year.'"[68] Unlike shipping prices, which typically fluctuate daily, salaries do not change daily, weekly, or even monthly. Employee salaries are typically fixed for an extended period of time. As a result, the age of information that was considered "current" in *Todd*, may be considered "historic" in the cargo shipping market. Because the TAC Index deals with an industry that has many characteristics of a commodity market, there are strong arguments that data that is a week old should be considered "historic" for antitrust purposes.

ii. The Information Included in the TAC Index is Sufficiently Aggregated

Secondly, the TAC Index provides information that is sufficiently aggregated and difficult to reverse-engineer, even though a single participant may account for up to 40% of a given route. As with the age of data being exchanged, there is no law that says a benchmark where an individual provider's data represents more than 25% on a weighted basis of that statistic is necessarily anticompetitive. The antitrust laws are primarily concerned with the ability of recipients of the data to identify prices charged or compensation paid by any particular competitor. For example, in *In re Pork Antitrust Litigation*, the Plaintiffs alleged that information provided by Agri Stats, a company that provides benchmarking information to the pork industry, "contain[ed] such detailed figures covering every aspect of pork production and sales that participants can accurately identify the companies behind the metrics."[69] Similar allegations were made in *In re Broiler Chicken Antitrust Litigation*, where Plaintiffs alleged that "[a]lthough the [benchmarking] reports do not

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[67] 7 C.F.R. §59.205.

[68] *Todd*, 275 F.3d at 212, 213.

[69] *In re Pork Antitrust Litig.*, No. CV 18-1776 (JRT/LIB), 2019 WL 3752497, at *3 (D. Minn. Aug. 8, 2019) (citing Civ. No. 18-1776, IPP Compl. ¶ 61, Aug. 17, 2018, Docket No. 74).

identify the Broiler producers by name, the reports are so detailed that a reasonably informed producer can discern the other producers' identities, and it is common knowledge among producers that this is possible."[70]

Based on the factual information provided in the EU Legal Opinion, it is our understanding that no such concerns exist here. The TAC has taken multiple steps to ensure that the Index's aggregated data cannot be reverse engineered, including:

1. TAC requires at least six data providers on any published lane;
2. TAC prohibits any single data provider from accounting for more than 40% of the volume weighted average price for the week in question on a given route;
3. there are no fixed weightings on any given route from week-to-week, making it impossible to identify the participants on the lane;
4. TAC routinely reviews the data it receives to prevent the skewing of the resulting averages and the identification of specific routes; and
5. TAC Index's only reported pricing information is in the form of "all-in costs," which prevents recipients from identifying market rates, fuel surcharges or security surcharges. Key variables affecting final price, such as the nature of the product shipped and whether the shipment is consolidated, are not disclosed in the TAC Index.[71]

"TAC concludes that its safeguards make '*any attempt to do reverse engineering impossible.*'"[72] Based on the above, it appears that TAC has implemented adequate safeguards to prevent the disaggregation of company-specific data. As a result, it is unlikely that the TAC Index would be found to be in violation of the antitrust laws.

iii. Additional Factors Considered In Rule of Reason Analysis

In applying the rule of reason, courts and the Antitrust Agencies will also evaluate whether the information provided by the TAC Index is publicly available and the context and purpose of the information exchange,[73] including whether market conditions increase the likelihood that the exchange may tend to stabilize prices and facilitate coordinated behavior. Although certain TAC Index reports are available only to forwarders (the entities that provide information) and therefore not publicly available, the market is significantly dynamic and the procompetitive justifications for the TAC Index are sufficiently robust that a court or the antitrust agencies are likely to find that it is within the bounds of the antitrust laws.

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[70] *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 780 (N.D. Ill. 2017).

[71] EU Legal Opinion, pg. 11.

[72] *Id*. (internal citations omitted).

[73] *Todd*, 275 F.3d at 210-213.

As explained in the EU Legal Opinion, "Generally speaking, both forwarders and air cargo operators compete [i]n markets that are typified by: dynamic rather than stagnant conditions …; complex, volatile pricing; low barriers to entry; changing market shares; differing cost structures and ranges of services; and rapidly evolving markets services (such as the impact of e-commerce."[74] During normal times, air cargo shipping markets are "dynamic and complex due to the wide variety of products shipped, the specific services required for any given shipment and any relevant safety/security measures that must be taken, taking into account the costs involved and how efficiently the products can be delivered to their destination."[75] The ongoing COVID-19 pandemic and the resulting economic crisis has only increased the volatility of these markets. There has been significant disruption in cargo services due to flight cancellations and re-scheduling. This has led to a lack of consistency and predictability in terms of services and pricing.[76]

Moreover, there are low barriers to entry for both the air forwarding and air cargo markets, market shares are constantly changing and there is a lack of concentration in each market. The largest freight forwarder worldwide has under a 10% market share.[77] And, "cost structures in the relevant markets lack transparency and consistency" and "internal capacities will differ significantly due, for example, to wide differences in flight schedules and frequencies."[78] Calculating capacity is extremely difficult due the fact that regional air forwarding competitors often will coordinate with forwarders to rent assets at a lower price than they would cost to own.[79] These factors suggest that the information exchange proposed by the TAC Index will not result in coordinated behavior or price stabilization.

iv. Procompetitive Benefits of the TAC Index

As explained in the Competitor Collaboration Guidelines, in applying the rule of reason analysis, the Antitrust Agencies and courts consider whether the procompetitive benefits of the proposed conduct will offset the likely anticompetitive harms.[80] Here, the purpose of the TAC Index is procompetitive and the benefits it provides likely would be found to significantly outweigh any potential for anticompetitive harm. As discussed in the Relevant Facts section above, the TAC Index is intended to allow participants in the air cargo sector to operate more efficiently. "Prior to the introduction of the Index, forwarders and airlines had no independent and neutral

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[74] EU Legal Opinion, pg. 12.

[75] *Id*. at 13.

[76] *Id*. at 12.

[77] *Id*. at 13.

[78] *Id*.

[79] *Id*.

[80] *Id*.

benchmarking product for near real-time transactions, while for shippers, financial institutions and industry analysts, risk management tools such as derivatives were not available because they required an industry-wide accepted index."[81] The TAC Index solves this information gap, thereby enhancing internal efficiencies and making available risk management tools, which are necessary to address the unstable demand in the current market.[82]

IV. CONCLUSION

For the reasons stated above, it is our opinion that there is no appreciable risk that the TAC Index would be found to violate the U.S. antitrust laws. Under established legal precedent, an antitrust Agency or a court is highly likely to find that:

- the more lenient "rule of reason" – which balances harms and benefits – is the appropriate legal framework to analyze the TAC Index instead of the harsh *per se* rule;
- the historic nature of the data being exchanged, safeguards such as the aggregation of data from multiple providers, and the facts and circumstances of the marketplace make anticompetitive effects unlikely to occur; and
- the procompetitive benefits of TAC Index are significant.

Given the above, it is our conclusion that the TAC Index, including participation in the Index by data providers, is fully consistent with the U.S. antitrust laws.

Best regards,

William H. Stallings

William H. Stallings

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[81] *Id.* at 15 (internal citations omitted).

[82] *Id.*