WINSTON & STRAWN LLP

BLOG

Searching for Safe Harbor: Navigating Information Exchanges Moving Forward

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INTRODUCTION

On February 3, 2023, the Antitrust Division of the U.S. Department of Justice (DOJ) announced that it had withdrawn three policy statements that established certain enforcement "safety zones" or safe harbors for the exchange of competitively sensitive information and benchmarking exercises. Although these statements originally addressed the health care industry, for the past 30 years, companies in a wide range of industries used the policy statements as guidance for the development of compliant information exchanges. The withdrawal of the policy statements, along with recent statements and enforcement actions, signals that the DOJ intends to step up its efforts to scrutinize and investigate benchmarking and competitor information exchanges. In light of this, companies engaged in the exchange of competitively sensitive information should review their antitrust compliance protocols.

On February 2, 2023, Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division of the DOJ gave a speech describing the DOJ's prior treatment of information exchanges as "formalistic," arguing that it facilitated tacit coordination among firms, thereby softening competition. Mekki cited DOJ enforcement actions in the poultry, local advertising, and telecom industries as examples wherein information exchanges in less concentrated markets satisfied the safe harbors but still distorted competition. She explained that these enforcement actions also showed how "[a]n overly formalistic approach to information exchange risks permitting or even endorsing frameworks that may lead to higher prices, suppressed wages, or stifled innovation."

On July 14, 2023, the Federal Trade Commission (FTC) announced that it would also withdraw the same policy statements, determining that the withdrawal was the best course for promoting fair competition. The FTC agreed with Mekki's comments that "much of the statements were outdated, reflecting market realities that are no longer extant." Moreover, the statements may be overly permissive on information sharing. Companies have used the safe harbor zone for information exchanges in contexts and industries that were never contemplated by the agencies, including sharing competitively sensitive wage and benefit information with other employers. Moving forward, the FTC "will rely on general principles of antitrust enforcement and competition policy for all markets, including markets related to the provision of healthcare products and services."

THE HEALTH CARE POLICY STATEMENTS AND INFORMATION EXCHANGES

The withdrawn policy statements listed several factors that, if met by firms participating in a collaborative information exchange, would allow the firms to qualify for the safe harbor. "Absent extraordinary circumstances," the agencies would not challenge such information exchanges. To qualify for the safe harbors, companies needed to satisfy these elements. Note that while safe harbors no longer exist, these general suggestions still hold true.

1. *The exchange was managed by a neutral third party, such as a trade association or auditor*

See Winston's Competition Corner post on cautions for trade associations for tips for third parties. The DOJ's stance moving forward is that "exchanges facilitated by intermediaries can have the same anticompetitive effect as direct exchanges among competitors. In some instances, data intermediaries can enhance—rather than reduce—anticompetitive effects."

2. *The information was more than three months old*

The exchange of current price information has potential for generating anticompetitive effects and such exchanges, although not per se unlawful, have consistently been held to violate the Sherman Act. The exchange of forward-looking, competitively sensitive information should be even more concerning.

3. *Each reported statistic was comprised of data from at least five competitors; no individual competitor's data represented more than 25% of the total data on a weighted basis; and the information was anonymized and aggregated so as not to reveal information related to any individual competitor*

Mekki stated, "In some industries, high-speed, complex algorithms can ingest massive quantities of 'stale,' 'aggregated' data from buyers and sellers to glean insights about the strategies of a competitor. When that happens the distinctions between past and current or aggregated versus disaggregated data may be eroded." The agencies may urge courts to look beyond data that appeared to be somewhat aggregated to conclude that defendants had the ability to effectively disaggregate it, raising serious antitrust concerns.

IMPLICATIONS

The agencies' joint withdrawal signals a shift in their approach to analyzing the competitive and legal consequences of information exchanges among competitors. These changes have implications for clients engaged in such activities:

Case-by-Case Approach: Generally, under the existing law, the exchange of competitively sensitive information among competitors may serve as evidence of a per se illegal conspiracy under Section 1 of the Sherman Act (e.g., an agreement to fix prices, rig bids, or allocate markets). The agencies are shifting away from broadly categorizing activities as anticompetitive and will employ a "case-by-case" approach to evaluating the legality of information exchanges. Information exchanges that do not per se facilitate anticompetitive agreements are evaluated under the "rule of reason," which is a balancing test that weighs the procompetitive benefits of an agreement against its anticompetitive effects. The analysis depends on many factors: the type of information shared; whether the information that is disseminated is made available to other market participants, such as customers; and safeguards implemented to minimize the risk that competitively sensitive information would be disclosed. The agencies' new approach suggests that antitrust concerns might arise even when traditional compliance measures are employed.

Historical, Anonymous, and Aggregated Data: Data that is at least three months old can be competitively sensitive or valuable due to the rise of data aggregation, machine learning, and pricing algorithms. These tools can increase the competitive value of historical data for some products or services. Mekki noted that "where the companies exchanging the information collectively have significant shares of the relevant market, the DOJ believes that modern data analysis technologies—such as algorithms, AI, machine learning, and cloud computing . . .—have enabled competitors to deanonymize and disaggregate information received from other competitors through otherwise formerly compliant information exchanges."

Mergers and Acquisitions: The DOJ also warned of heightened concern with information sharing in the pre-merger due diligence context, applied to industries with a "history of coordination or collusion." Mekki stated that parties

with such histories “will face an uphill battle in convincing [the DOJ] that post-merger coordination or collusion is unlikely” because pre-merger conduct may serve as a natural experiment of the merger’s effects.

TAKEAWAYS

Simply because an information exchange previously fell within safe harbor provisions does not necessarily mean that the agencies will now view it as anticompetitive and illegal. Companies should expect, however, that the agencies will scrutinize (1) exchanges of competitively sensitive information between competitors and (2) the use of algorithms and other AI technology that helps companies predict competitors’ strategies and decision-making, particularly when they rely on data collected from competitors. The reminders below may help companies assess and mitigate their antitrust risk.

- Carefully review all information exchange policies and practices to determine: (1) whether the exchange is reasonably necessary to achieve a legitimate business purpose, (2) whether the exchange has any anticompetitive effects, and (3) whether the procompetitive benefits of an agreement outweigh its anticompetitive effects.
- Companies should exercise extreme caution if using algorithms that rely on external parties’ data to determine prices, production levels, and employee compensation. The DOJ expressed significant concern over these types of AI data processes. Mekki stated, “Where competitors adopt the same pricing algorithms, our concern is only heightened. Several studies have shown that these algorithms can lead to tacit or express collusion in the marketplace, potentially resulting in higher prices, or at a minimum, a softening of competition.”
- Winston & Strawn attorneys are positioned to assist in advising on benchmarking activities and can help seek an FTC Competition Advisory Opinion and DOJ Business Review to confirm that an information exchange would not be challenged.

6 Min Read

Former summer associate Calvin Kim also contributed to this blog post.

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