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Competitor Benchmarking and Information Exchanges: What Is Safe in a World Without Antitrust Safe Harbors?

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On Friday, February 3, 2023, the Department of Justice's ("DOJ") Antitrust Division formally withdrew three longstanding policy statements relating to antitrust enforcement in health care markets.[1] The withdrawal is significant for all companies that are engaged in benchmarking and other information-sharing activities. Unlike the DOJ, the Federal Trade Commission ("FTC") has neither withdrawn the policy statements nor commented on the DOJ's withdrawal of the policy statements. For decades, a wide range of companies and trade associations had relied on the safe harbors set forth in these policy statements to ensure their activities complied with the antitrust laws and would not trigger enforcement action. The DOJ, however, described the policy statements as "outdated" and "overly permissive on . . . information sharing," and, as a result, asserted that these statements "no longer serve their intended purposes of providing guidance to the public."

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. A recent speech by a senior DOJ official hinted at the factors that the DOJ plans to weigh in its analysis. In light of these developments, companies engaged in such activities should review their antitrust compliance protocols.

The Health Care Policy Statements and Information Exchanges

The policy statements were originally issued jointly by the DOJ and the FTC.[2] Among other guidance, the policy statements established certain enforcement "safety zones" or safe harbors for the exchange of competitively sensitive information and benchmarking exercises. The 1993 and 1996 Policy Statements created safe harbors for, among other things, exchanges of price and cost information among healthcare industry participants. The 2011 Policy Statement created a safe harbor for Accountable Care Organizations (created by the Affordable Care Act) participating in the Medicare Shared Savings Program.

[1] These policy statements are *DOJ/FTC Antitrust Enforcement Policy Statements in the Health Care Area* (1993); *Statements of Antitrust Enforcement Policy in Health Care* (1996); and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organization Participating in the Medicare Shared Savings Program* (2011).

The DOJ/FTC 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 harbors. "Absent extraordinary circumstances," the DOJ and FTC would not challenge such information exchanges.

In order to qualify for the safe harbors, firms were required to satisfy the following elements:

1. The exchange was managed by a neutral third party, such as a trade association or auditor;
2. The information was more than three months old;
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
4. The information was anonymized and aggregated so as to not reveal information related to any individual competitor.

Although these statements addressed the health care industry, companies in a wide range of industries used the policy statements as guidance for the development of compliant information exchanges with the tacit acceptance of the agencies.

DOJ's Withdrawal of the Policy Statements

In its public announcement of the withdrawal, the DOJ explained that the health care industry has changed in recent decades and the withdrawal of the policy statements was "long overdue." Additionally, in a separate speech on Thursday, February 2, 2023, Principal Deputy Assistant Attorney General Doha Mekki described the DOJ's prior treatment of information exchanges as "formalistic" and argued that it facilitated tacit coordination among firms, thereby softening competition. Mekki noted that through experience, the DOJ had determined that while "information exchanges may be easier to facilitate and discipline in concentrated markets," they could potentially cause competitive harm in less concentrated markets as well. Mekki cited various DOJ enforcement actions in the poultry, local advertising, and telecom industries as evidence of instances where information exchanges in less concentrated markets satisfied the safe harbors but nevertheless distorted competition. She explained that these enforcement actions also demonstrated 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."

Implications

The DOJ's withdrawal of the policy statements signals a shift in the agency's approach to analyzing the competitive and legal consequences of information exchanges among competitors, which is reflected in recent DOJ practice and enforcement actions. These changes have a number of implications for clients engaged in such activities:

Case-by-Case Approach: Rather than broadly categorizing activities as in or outside the safe harbors or issuing new guidance, the DOJ will employ "a case-by-case" approach to evaluating the legality of information exchanges. The DOJ's new approach suggests that antitrust concerns might arise even when traditional compliance measures are employed, depending on the context, facts, and circumstances surrounding the activity. From the DOJ's perspective, there are no guaranteed safe zones in which competitors can share competitively sensitive information.

Enforcement in Unconcentrated Industries: Information-sharing activities in unconcentrated industries will likely be subject to DOJ scrutiny. While the withdrawn policy statements did not explicitly state that sharing information in unconcentrated industries was always permissible, the aggregation requirement suggested that benchmarking activities involving five or more companies were less likely to be problematic. The DOJ's view that information sharing in unconcentrated industries may affect competition is evident in recent enforcement actions. For example, the DOJ brought civil enforcement actions against more than *twelve* broadcast companies for allegedly sharing information about whether they would raise, lower, or maintain spot advertising pricing with rivals, and separately alleged that at least *fifteen* companies in the poultry

industry had engaged in an unlawful, decades-long scheme to exchange competitively sensitive wage and benefit information and collaborate on employee compensation decisions.

Thus, clients in markets with numerous competitors should reevaluate whether any existing or planned benchmarking activities and information exchanges are sufficiently insulated from antitrust risk based on the number of survey participants alone.

Historical, Anonymized, and Aggregated Data: The DOJ appears to take the view that measures to exchange only historical data, as well as data aggregation and anonymization techniques, may be insufficient to avoid antitrust scrutiny. The now-withdrawn policy statements stated that the exchange of data that is sufficiently historical, aggregated, and anonymized is unlikely to raise antitrust concerns. However, as Mekki noted, the DOJ believes that modern data analysis technologies—such as algorithms, AI, machine learning, and cloud computing, to name a few—have enabled competitors to deanonymize and disaggregate information received from other competitors through otherwise formerly compliant information exchanges. Moreover, in some industries, the DOJ takes the view that even historical information could be competitively significant and sensitive.

Use of Third Parties: The use of a third-party firm or consultant to manage a competitor information exchange is still recommended, but additional antitrust protocols may be necessary, such as clean team arrangements or firewalls. Third parties ensure granular and sensitive confidential data is not shared with competitors and can manage the information exchange. However, as Mekki made clear, the use of a third party might be insufficient where the third party enhances—rather than reduces—the anticompetitive effects.

Standard of Legality: Although the withdrawal removed the presumption of legality afforded to information exchanges that fall within the safe harbors, *the law* on information exchanges remains unchanged. While the DOJ's withdrawal of these policy statements reflects a change in its enforcement policies and practices, the legal framework applicable to information exchanges remains intact for the time being. Generally speaking, under the existing law, the exchange of competitively sensitive information is condemned as illegal *per se* if it is in furtherance of anticompetitive agreements between competitors, such as agreements to fix prices, rig bids, or allocate markets. Information exchanges that do not facilitate such *per se* anticompetitive agreements are evaluated pursuant to the rule of reason, which balances factors including the level of concentration in the relevant markets, the type of information exchanged, and the procompetitive and anticompetitive effects of sharing such information. The traditional antitrust protocols mentioned in the policy statements' safe harbors—*i.e.*, the use of third parties to manage data, limiting exchanges to historical data, anonymization, and aggregation—are still helpful in mitigating, but may not entirely eliminate, antitrust risk.

Due Diligence and M&A-Related Information Exchanges: The agencies have also warned of heightened concern with information sharing in the pre-merger due diligence context, in "industr[ies] with a history of coordination or collusion." Mekki noted that parties with such histories "will face an uphill battle in convincing [the agencies] that post-merger coordination or collusion is unlikely" because pre-merger conduct "may serve as a natural [*sic*] experiment" of the merger's effects. Notwithstanding, companies contemplating mergers or joint ventures often legitimately need to share certain information to conduct due diligence and negotiate an M&A transaction. The DOJ/FTC advises that collaborations are less likely to be scrutinized as facilitating collusion if appropriate safeguards governing the information exchange are in place. Even if such information does not ultimately result in anticompetitive harm, the appearance of impropriety may be enough to trigger antitrust scrutiny, which in turn may delay HSR clearance or trigger additional investigations regarding the parties' pre-merger conduct.

Considering the DOJ's withdrawal of the policy statements, merging companies should establish strict protocols to control the flow of information to external parties—including clean teams. These were best practices prior to the withdrawal of the policy statements and are only more important now.

What Should Clients Do?

Navigating the DOJ's new "case-by-case" policy will require clients to more carefully evaluate any planned or current information exchanges to ensure such exchanges are compliant with existing law, not just the

traditional safe harbors. Companies should review whether existing information exchanges have valid, procompetitive justifications, and whether those justifications outweigh any potential negative impacts on customers, consumers, or employees, including impacts on prices, input costs and wages.

Companies should consider the following questions to mitigate risk:

- **What information exchanges are more likely to trigger antitrust scrutiny?** Information exchanges might raise antitrust concerns if they involve the disclosure of (i) competitively sensitive information to (ii) competitors. Information might be viewed as competitively sensitive if it includes data on price (and price-related terms such as discounts and rebates), unit costs, terms of sale, capacity, bids, customers, compensation (salaries and wages) or employee benefits. Certain confidential strategic information such as plans to enter or introduce new products or expand into new geographic areas, or data on R&D might also be viewed as competitively sensitive. Exchanging sensitive information with competitors is more likely to trigger antitrust scrutiny if the data exchange does not serve any legitimate procompetitive purpose and in particular if the data: (i) involves future projections or is current; (ii) is historical but still actionable in current or future competitive environments; or (iii) is capable of being disaggregated or deanonymized through algorithms or other technologies.

- **What competitively sensitive information exchanges are unlikely to raise concerns?** Notwithstanding its withdrawal of the safe harbors, the DOJ has signaled that the sharing of competitively sensitive information is unlikely to be challenged in certain circumstances. In settlements of recent enforcement actions, the DOJ notably permitted information exchanges that involved (i) sharing information with non-competitors, such as employees or prospective advertisers, for legitimate business purposes, and (ii) sharing information for the purpose of evaluating or effectuating a bona fide acquisition, disposition, merger or exchange of assets (so long as appropriate protocols are in place). Generally speaking, sharing pricing and price-related information with a customer or consumer who is not a competitor is both lawful and necessary to negotiate and carry out legitimate business transactions. Prior to disclosing competitively sensitive information to a competitor, however, companies should weigh the potential benefits against the risks, and carefully evaluate the information that is proposed to be shared with the assistance of antitrust counsel.

- **Is the data exchanged sufficiently historical?** Mekki indicated that even historical data may be competitively sensitive because "the rise of data aggregation, machine learning, and pricing algorithms [] can increase the competitive value of historical data for some products or services." Companies should ensure historical data is truly competitively stale before sharing it. Three to six months might still be considered sufficiently "historical" in some industries but not others, depending on how bids and pricing are structured in the industry and whether the pricing data shared is still actionable in the context of ongoing competition.

- **Is the information sufficiently aggregated and anonymized?** Companies should assess whether aggregated, anonymized information is capable of being reverse-engineered using modern data analysis technologies, including artificial intelligence and machine learning. To do this, companies should put themselves in the shoes of their competitors (including, in the case of employee information, competing employers) and consider the technologies they might employ to glean insights about the underlying data. As a rule of thumb, if anonymized data can be analyzed in a way that provides competitively useful information on pricing, bids, or wages, aggregation might not help avoid antitrust scrutiny.

- **What are the procompetitive benefits of the information exchange?** The DOJ has suggested that information exchanges can have procompetitive benefits, including increased transparency to employees on industry compensation levels. For example, the DOJ's recent settlement in the poultry case permitted poultry companies to share competitively sensitive wage and compensation information with actual or prospective employees. This is consistent with the Biden Administration's position that workers can benefit by having access to their wage data. Companies should ensure their information exchanges have valid, procompetitive justifications, even if they have other safeguards in place and should monitor over time for potential anticompetitive effects.

- **Have antitrust counsel or compliance officers reviewed and approved the information exchange?** In recent consent decrees, the DOJ has explicitly required that the settling companies secure the advice of counsel and consult with their “Antitrust Compliance Officers” prior to disseminating any competitively sensitive information in connection with an acquisition or merger. Given the uncertainty created by the DOJ’s rescission of the safe harbors, all companies engaged in such exchanges should seek the advice of antitrust counsel prior to sharing, or continuing to share, any competitively sensitive information.

Takeaway

The withdrawal of the policy statements signals that the DOJ will eschew traditional assumptions about anticompetitive information sharing and instead adopt a more individualized approach. Regardless of their industry, companies that share, or are considering sharing, competitively sensitive information with third parties should evaluate these risks and adopt safeguards to minimize these risks.

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