DOJ ANTITRUST DIVISION INDICATES INCREASED SCRUTINY OF INFORMATION SHARING AND USE OF PRICING ALGORITHMS

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U.S. Policy and Regulatory Alert

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On 3 February 2023, the U.S. Department of Justice Antitrust Division (Division) announced significant changes to its review of companies' information sharing practices, withdrawing three policy statements that previously outlined safe harbors for information sharing in the healthcare industry, but indicating that the increased scrutiny would apply to other industries as well. In announcing the policy shift, Principal Deputy Assistant Attorney General Doha Mekki of the Division cautioned that "[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. A softening of competition through tacit coordination, facilitated by information sharing, distorts free market competition in the process." Companies who previously relied on the Division's guidance that sharing historic data through a third party who would then disseminate the information in a disaggregated form should take note that the Division is likely to view these exchanges with increased scrutiny going forward.

In this alert, we provide an overview of the legal framework for analyzing information exchanges, discuss the Division's withdrawal of a long-standing safety zone for information exchanges and key takeaways from the Division's decision, as well as provide practical guidance for companies engaged in or considering information exchanges.

LEGAL FRAMEWORK FOR ANALYZING INFORMATION EXCHANGES

Information exchanges, in and of themselves, are not per se illegal under the Sherman Act. Courts have acknowledged that there can be legitimate, procompetitive reasons for exchanging information, and thus such exchanges are judged under the Rule of Reason, which is a balancing test that takes into account all of the facts and circumstances and then determines whether the anticompetitive effects outweigh the procompetitive benefits of the restraint. See U.S. v. U.S. Gypsum Co., 438 U.S. 422 (1978). That said, courts have prohibited information exchanges in industries with structural characteristics (e.g., high concentration), where such exchanges may be more likely to have anticompetitive effects. See U.S. v. Container Corp., 393 U.S. 333 (1969) (prohibiting price verification practices in a concentrated industry). Additionally, although not itself illegal per se, proof that competitors have shared price information sometimes has served as evidence of a per se illegal conspiracy. See In re Flat Glass Antitrust Litig., 385 F. 3d. 350 (3d Cir. 2004) (jury could infer that the exchange of pricing information was concerted action designed to fix prices). Accordingly, exchanging competitively sensitive information, particularly with competitors, has always been a practice that requires careful review and safeguards. Those safeguards have historically been structured based on guidance from U.S. antitrust enforcement agencies.

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THE DIVISION WITHDRAWS INFORMATION SHARING "SAFETY ZONES"

The Division recently withdrew three policy statements that it viewed as "out of date" and "overly permissive" on certain subjects, including information sharing. The three withdrawn statements are:

- Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area (1993);
- Statements of Antitrust Enforcement Policy in Health Care (1996) (1996 Guidance); and
- Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011).

These statements covered a wide variety of issues related to the healthcare industry, but the 1996 Guidance laid out what was perhaps one of the most prominent "safety zones" related to information sharing and formed a backbone of principles upon which the broader business and legal community relied to form the rules of the road for information sharing. More specifically, the 1996 Guidance stated that industry surveys concerning prices, wages, salaries, or benefits were unlikely to violate the antitrust laws and would not be prosecuted by the agencies, absent extraordinary circumstances, if they satisfied three conditions:

1. The survey was managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);
2. The information shared was more than three months old; and
3. The information was sufficiently aggregated such that no recipient could identify the prices charged or compensation paid by any particular provider (e.g., there were at least five participants reporting data and no individual participant's data represented more than 25% on a weighted basis of that statistic).

For the past 30 years, these factors served as guideposts, across a wide variety of industries, to assist companies in assessing the antitrust risks when engaging in information exchanges. Principal DAAG Mekki stated, however, that "the Division is concerned that the factors do not consider the realities of a transformed industry and, therefore, understate the antitrust risks of competitors sharing competitively-sensitive information."

KEY TAKEAWAYS REGARDING THE DIVISION'S CONCERNS ABOUT INFORMATION EXCHANGES

A few key takeaways can be gleaned from DAAG Mekki's remarks when announcing the withdrawal of the policy statements.

- The Division no longer believes competitors' use of a third party to aggregate and share data necessarily reduces the risk of anticompetitive harm. In announcing the withdrawal of the policy, Principal DAAG Mekki stated, "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."
- The Division no longer believes an exchange of historic data necessarily reduces the risk of anticompetitive harm due to advances in artificial intelligence. Principal DAAG Mekki stated, "the suggestion that data that is at least three-months old is unlikely to be competitively-sensitive or valuable

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is undermined by the rise of data aggregation, machine learning, and pricing algorithms that can increase the competitive value of historical data for some products or services."

- Similarly, the Division no longer believes use of aggregated data necessarily eliminates the risk of anticompetitive harm, "especially in situations where the companies exchanging the information collectively have significant shares of the relevant market."
- The Division is concerned with and closely scrutinizing the use of pricing algorithms and other artificial intelligence technology capable of analyzing large amounts of data and predicting competitors' strategies. Principal DAAG Mekki explained, "[i]n 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. Where that happens the distinctions between past and current or aggregated versus disaggregated data may be eroded." "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."

PRACTICAL GUIDANCE

It is important to note that just because an information exchange previously fell within the now-withdrawn safety zone does not necessarily mean that the Division will now view it as anticompetitive and illegal. Companies and counsel should expect, however, that the Division will be closely scrutinizing exchanges of competitively sensitive information between separate entities, particularly competitors, as well as companies' use of pricing algorithms and other AI technology that assists companies in predicting competitors' strategies and decision-making, particularly when those algorithms and AI rely on data collected from competitors. The following steps can assist companies in assessing and mitigating 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; and (2) whether the exchange has any anticompetitive effects. The Division is likely to more closely scrutinize whether information sharing is truly reasonably necessary and ancillary to a legitimate business venture and also more likely to scrutinize any claimed procompetitive benefits. Additionally, while the riskiest type of information exchange is between competitors, the Division expressed concerns about increased concentration amongst vertical and neighboring products and services. Accordingly, if a company is vertically integrated, it is important to analyze carefully any competitively sensitive information that the company is receiving from customers or suppliers in one product or service market—who are also competitors in another product or service market— to ensure the existence of appropriate safeguards and firewalls.
- Companies should exercise extreme caution if using algorithms that rely on external parties' data to determine prices, production levels, employee compensation, etc. The Division expressed significant concern over these types of AI data processes, and there have been a number of class action complaints filed in recent months attacking use of these types of algorithms as a form of per se illegal price-fixing.

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- It is always best practice to consult antitrust counsel prior to exchanging competitively sensitive information with others outside of your organization. Antitrust counsel can assist in assessing the risks of such exchanges and provide guidance on additional safeguards that may assist in mitigating those risks.

K&L Gates Antitrust practice members regularly counsel clients on a broad range of antitrust and competition issues, including exchanges of information. Our attorneys also defend individuals and companies in a wide variety of criminal cases and civil litigation in the United States and also provide corporate counseling and training on how to remain compliant with U.S. antitrust laws.

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