CLIENT ALERT

DOJ Withdraws "Safety Zones" for Information Exchanges Evaluating Benchmarking Activities On A Post-Guidance Landscape

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On February 3, 2023, the Department of Justice Antitrust Division ("DOJ") announced its withdrawal from a set of long-standing antitrust enforcement policy statements that many companies have relied on to determine whether to share historic pricing and related data with competitors.[1] Among other rationales for its policy change, DOJ representatives have pointed to the growing use of sophisticated pricing algorithms in many economic sectors, which the agency contends have the capacity to use historic pricing data to align pricing among competitors to an extent unforeseen when the policy statements were adopted almost three decades ago.

Just a month later, on March 2, 2023, several U.S. senators echoed these concerns by urging the DOJ to investigate the algorithmic rent-setting software YieldStar, which the Senators contend has led to nationwide residential rent increases. Against this backdrop, many companies no doubt are re-evaluating whether, and under what circumstances, they may continue participating in industry data exchanges in the absence of the antitrust "safe harbors" they previously relied on. We outline below a number of considerations for companies to assess in determining whether to engage in procompetitive benchmarking activities in light of this shift in agency guidance.

[1] Press Release, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), here. It remains uncertain whether the FTC will follow suit.

Prior Data-Sharing Safe Harbor. The recently revoked policy statements, which were intended to address enforcement ambiguities within the health care industry,[2] offered a set of "safety zones" to facilitate the reasonable exchange of price and non-price information among hospitals and health care providers.[3] One such safety zone applied when:

a) The exchange was managed by a third party, like a trade association;

b) The information provided by participants was more than three months old; and

c) At least five participants provided the data underlying each statistic shared, no single provider's data contributed more than 25% of the "weight" of any statistic shared, and the shared statistics were sufficiently aggregated so that no participant could discern the data of any other participant.[4]

Although this and other "safe harbors" were not formally applicable outside of the health care context, companies across other industries have historically relied on them to evaluate whether their participation in a market benchmarking activity is consistent with the antitrust laws. Indeed, many benchmark surveys have been conducted by third-party intermediaries to aggregate and evaluate data within a particular industry according to the guidelines noted above.

DOJ's Withdrawal. According to the Principal Deputy Assistant Attorney General for the DOJ, Doha Mekki, in remarks issued just the day prior to the DOJ's withdrawal, the agency was doubtful that these policy statements continued to "reflect market realities, the risk of serious competitive harm, or the full scope of liability under the antitrust laws." [5] In particular, Ms. Mekki pointed out that the means by which companies distribute information have drastically changed in recent years, noting that "machine learning, artificial intelligence, and other advanced tools" were not present at the time these policy statements originated.[6] Ms Mekki further emphasized potential issues raised by the use of complex

2 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Policy Statements Issued for Health Care Industry (Sept. 15, 1993), at 1.

3 This and other safety zones were subsequently broadened in a 1996 policy statement update, and in 2011, the agencies issued a policy statement that addressed information exchanges among Accountable Care Organizations that were participating in the Medicare Shared Savings Program.

4 Michael Bloom, FTC Bureau of Competition, Information Exchange: Be Reasonable (Dec. 11, 2014), available here.

5 Doha Mekki, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023 (Feb. 2, 2023).

6 *Id.* ("[T]he suggestion that data that is at least three-months old is unlikely to be competitively-sensitive or valuable 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.").

algorithms in certain industries[7] as well as third-party data intermediaries, which "can enhance – rather than reduce – anticompetitive effects." [8]

As noted above, similar concerns were recently highlighted in a March 2 letter sent by a group of U.S. senators, led by Senators Elizabeth Warren and Bernie Sanders, who asked the DOJ to investigate the algorithmic rent-setting software YieldStar offered by RealPage, a private equity portfolio company.[9] Referencing the DOJ's withdrawal of its information-sharing guidance, the senators urged the DOJ to take action and "closely review rent-setting algorithms like YieldStar to determine if they are having anti-competitive effects on local housing markets."[10] The senators' letter, which echoes class action lawsuits brought against RealPage at the end of last year,[11] shows the DOJ's concerns about the use of complex pricing algorithms are gaining prominence. Information-sharing conduct previously considered legitimate and pro-competitive under the agency's prior guidance could now become the subject of an investigation or even litigation.

Implications and Conclusions. In withdrawing its policy statements, the DOJ has not expressly repudiated the so-called "rule of reason" generally applied to procompetitive information exchanges, where courts examine and weigh the alleged anticompetitive harms against any procompetitive benefits resulting from the agreement.[12] Companies that wish to proceed with benchmarking activities may still benefit from that standard. As of now, information exchanges also remain covered by the 2000 Antitrust Guidelines for Collaborations Among Competitors.[13] Those Guidelines recognize that "the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations." Those Guidelines, however, note that the reasonableness of an information exchange pivots mostly "on the nature of the information shared"[14] and provide little other guidance.

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7 *Id*. ("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. Where that happens the distinctions between past and current or aggregated versus disaggregated data may be eroded.").

8 *Id.* ("[E]xchanges 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.").

9 Letter from Senators Elizabeth Warren, Tina Smith, Bernard Sanders, and Edward J. Markey to Hon. Jonathan Kanter, Assistant Att'y Gen. of the U.S. Dep't of Justice (Mar. 2, 2023), here.

10 Leah Nylen, *Warren Urges DOJ Review of Thoma Bravo Rental Software Unit*, BLOOMBERG NEWS (Mar. 3, 2023 at 7:44 AM), here.

11 *See, e.g.,* Complaint at 2, *Bason et al. v. RealPage, Inc. et al.*, No. 22-cv-01611 (S.D. Cal. 2022) (alleging that lessors coordinated efforts to inflate multifamily real estate prices by "outsource[ing] daily pricing and ongoing revenue oversight to RealPage").

12 *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) ("The 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.").

13 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors at 1 (Apr. 2000), here.

14 *Id.*

In some cases, perhaps where the benchmarking activities are facilitated by pricing algorithms and/or where the information exchanged exceeds that described by the withdrawn guidance, the agencies or private plaintiffs may assert claims of price-fixing.[15]

Given the heightened risk of a possible antitrust investigation or other claim of anticompetitive behavior in the wake of the DOJ's withdrawal, benchmarking activities should be carefully reviewed by antitrust counsel to determine whether the information exchange has a legitimate business purpose, is reasonably necessary for achieving that purpose, and is structured to minimize potential anticompetitive effects. Among other considerations:

- Companies should anticipate increased scrutiny of information exchanges that use complex pricing algorithms to aggregate pricing data for redistribution to competing participants, even when administered by third-party intermediaries.
- Companies, particularly in concentrated industries, should consult antitrust counsel before engaging in any benchmarking activities with respect to highly sensitive data, such as prices, margins, and input costs.
- Benchmarking activities should always be structured in a manner that prevents participants from inferring the current or forward-looking competitive behavior of their competitors.
- To avoid even an inadvertent impact on competition, when participating in benchmarking activities, companies should consider using more conservative metrics, as described in the next bullet, that are evaluated on a case-by-case basis, rather than relying on the specific criteria set forth in the rescinded guidance.
- Specifically, competitively sensitive data incorporated in benchmarking studies might need to be older than three months old, aggregated using the input of a higher number of competitors, and displayed in broader categories, to prevent the "reverse engineering" of competitively sensitive information and/or the widespread dissemination of pricing and related data that could result in allegations of price-setting conduct.

[15] In the recent flurry of Agri Stats cases, for example, plaintiffs asserted that the information exchange facilitated by Agri Stats' benchmarking activities constituted a "plus factor" for an alleged conspiracy to fix prices and supported a claim of per se violation of the Sherman Act. *See, e.g.,* Order, *In re Turkey Antitrust Litigation*, No. 19-cv-08318 (N.D. Ill. 2022) (denying defendants' motion to dismiss plaintiffs' per se price fixing allegations). In these cases, however, the plaintiffs argued that Agri Stats' behavior was particularly egregious. *See, e.g*., Complaint at 2, *McDonald's Corp. v. Agri Stats, Inc. et al*., 22-cv-071882 (E.D.N.Y. 2022) (stating that "Agri Stats' reports are unlike those of lawful industry reports."); Complaint, *Compass Group USA, Inc. v. Agri Stats, Inc.* et al. at 5, No. 22-cv-00251 (W.D.N.C. 2022) (noting, in particular, that "[o]n at least a monthly basis, and often far more frequently . . . Agri Stats provides the [defendants] with current and forward-looking sensitive information (such as profits, costs, prices and slaughter information), and regularly provides the keys to deciphering which data belong to which participant."); s*ee also* Eli Hoff, *'Is this legal?': Why an obscure data service has been sued nearly 100 times for facilitating anti-competitive behavior*, INVESTIGATE MIDWEST (July 29, 2021), here.

Willkie would be happy to advise any companies planning to evaluate their benchmarking activities in light of the DOJ’s withdrawal from its information-sharing guidelines.

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