Closing the Gaps: DOJ Cracks Down on Information-Sharing

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In step with the Federal Trade Commission ("FTC"), and in line with the Biden Administration's Whole-of-Government Competition Policy,[2] the Department of Justice Antitrust Division ("DOJ" or the "Division") is identifying "so-called" gaps in the antitrust laws and positioning itself to take enforcement action in ways that are likely to affect financial services companies ("FSCs"). Most recently, the Division has signaled increased scrutiny of information-sharing—a practice that is common in benchmarking, joint ventures, and joint marketing efforts. This move has far-reaching implications.

On February 2, 2023, speaking at the Global Competition Review Live, Deputy Assistant Attorney General Doha Mekki ("Mekki") announced that the Division was withdrawing three prior healthcare-related policy statements (the "Statements"), issued in 1993, 1996, and 2011. These Statements assured healthcare companies that the Division would not prosecute certain types of collaborative conduct[3] as violations of the antitrust laws if the conduct met specified criteria, effectively carving out "safe harbors."[4]

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[2] *See* Exec. Order No. 14036, *Promoting Competition in the American Economy* (July 9, 2021), published at 86 Fed. Reg. 36987, 36989 (July 14, 2021) (calling on executive departments and agencies "to protect conditions of fair competition," including by "promulgating rules that promote competition, including the entry of new competitors" "to address overconcentration, monopolization, and unfair competition in the American economy").

[3] The Statements carved out safe harbors for non-fee-related and fee-related information exchanges. *See, e.g.*, Dep't of Justice & Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, at 40–48 (Aug. 1, 1996), *available at* https://www.justice.gov/atr/page/file/1197731/download [hereinafter, "1996 Statement"].

[4] Dep't of Justice, *Justice Department Withdraws Outdated Enforcement Policy Statements | The Withdrawal Best Serves the Interests of Healthcare Competition* (Feb. 3, 2023).

Although the withdrawal affects nine types of collaborative conduct, Mekki's speech focused on information-sharing,[5] a category that has particularly far-reaching implications. Firms across a wide range of industries have relied upon the now-withdrawn Statements[6] for the proposition that they faced little (if any) risk of prosecution[7] if they participated for legitimate business purposes[8] in information-sharing where the exchange:

- Was managed by a third party;
- Used backward-looking data, at least three months old; and
- Sufficiently aggregated the data, so that individual competitors could not be identified.[9]

These criteria provided important guidance to firms. Absent explicit collusion, the legality of an information-sharing agreement is judged by the "rule of reason," which weighs anticompetitive harm against procompetitive effects and assigns liability when the balance

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[5] 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) [hereinafter, "Speech"].

[6] Mekki acknowledged as much in her speech: "We have seen the safety zones be misinterpreted. Sometimes they are misapplied to other contexts or industries that were never contemplated by the guidance. Moreover, markets have evolved well beyond the context in which the safety zones, and some of the guidance more broadly, were articulated." *Id.*

[7] In the Statements, the Division represented that it did not intend to treat health care any "more strictly or more leniently" than other industries, i.e., companies understood that to mean that these criteria provided reliable guideposts for limiting their participation to "safe" conduct. *See, e.g., 1996 Statement*, *supra* note 3, at 3.

[8] The Division left open the possibility that it could prosecute firms in "exceptional cases"—one of which would surely have been using information-sharing, even the type that met the criteria, as a tool to effectuate or police an agreement among competitors to fix prices or output. Such an agreement would violate Section 1 of the Sherman Act and information-sharing would have been evidence of and part of that agreement. *See* 15 U.S.C. § 1 (prohibiting agreements to unreasonably restrain trade).

[9] Dep't of Justice & Federal Trade Commission, *Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sept. 15, 1993); *1996 Policy Statement*, *supra* note 3; Federal Trade Commission & Dep't of Justice, *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (2011). These factors also appeared in the Federal Trade Commission and Department of Justice's 2000 Competitor Collaboration Guidelines, which provided guidance to companies across industries on how the agencies would analyze various types of collaborative conduct and identified the characteristics more or less likely to result in an enforcement action. *See* Federal Trade Commission & Dep't of Justice, *Competitor Collaboration Guidelines*, at 13–15 (April 2000).

tips in favor of the former. The Division's safe-harbor criteria suggested that, absent exceptional circumstances, information-sharing under these circumstances was likely to yield net benefits for competition and consumer, and therefore meet the rule-of-reason standard.

On February 2, that changed. According to Mekki, advances in technology and changes in "market realities" rendered the criteria no longer fit to "serve their intended purpose,"[10] making them unreliable "heuristics."[11] She explained that modern technology makes it possible for firms to use "high-speed, complex algorithms to 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."[12] In short, the Division's rule-of-reason assessment had changed because firms are now able to use shared information to more accurately forecast their competitors' future pricing and incorporate that information into their own unilateral pricing decisions.

Mekki described the effect the Division feared as "tacit coordination" that would "soften competition."[13] But "tacit coordination" is not illegal under the U.S. antitrust laws.[14] The Division is, to borrow a term from the FTC's recent Section 5 Policy Statement, identifying a "gap" in the antitrust laws: conduct that falls short of an express agreement to collude

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[10] *Speech*, *supra* note 5.

[11] *Id.*

[12] *Id.*

[13] *Id.* Agencies and regulators outside the United States have expressed similar concerns about harm to competition "based principally on coordinated effects . . . of information exchanges" that "can facilitate collusion among competitors by allowing them to establish coordination, monitor adherence to coordinated behaviour and effectively punish any deviations." *See* Organisation for Economic Co-operation and Dev't (OECD), *Policy Roundtables | Information Exchanges Between Competitors under Competition Law*, at 10–11 (2010).

[14] *See Brooke Group Ltd. v. Brown Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").

on prices, but constitutes more than mere conscious parallelism.[15] The FTC has asserted that it has "gap-filling" authority under Section 5—allowing it to prosecute "incipient" conduct that "violates the spirit of the antitrust laws" and "tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a 'gap' in those laws."[16] The Division does not.

The Division could, however, withdraw the safe harbors that healthcare-related firms might try to use to shield information-sharing that facilitates tacit coordination. In doing so, it withdrew the safe harbor for every other firm as well. That does not mean that all firms participating in information exchanges are now in violation of the antitrust laws, but it does increase the level of uncertainty and unpredictability with respect to the risk of Division prosecution. Moving forward, firms must assess that risk based on common law without any safe-harbor assurances, instead heeding signals embedded in the Division's announcement.

In *United States v. Gypsum*,[17] the Supreme Court identified two factors to help detect anticompetitive information exchanges: "the structure of the industry involved"—whether the relative concentration of the industry indicates susceptibility to collusion—and the "nature of the information exchanged"[18]—particularly, the age of the information exchanged, the degree to which it is backward looking, and whether it is facially aggregated, all of which were thought to reduce the likelihood that participants in the information exchange could or would use the data to coordinate future pricing or output.

But in her speech, Mekki discounted the effect of limited market power (the first factor above), noting that industry concentration, or lack thereof, was no longer an indicator of lack of anticompetitive harm. And as to the nature of the data (the second factor), Mekki

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[15] Other regulators and agencies outside the United States have identified similar issues: "Between explicit collusion (which should always be regarded as illegal under competition rules) and mere conscious parallelism (which should fall outside the reach of competition law as it does not entail any form of co-ordination between competitors), there is a grey area of business behaviour which goes beyond conscious parallelism but at the same time does not involve an express agreement between competitors." *See* Organisation for Economic Co-operation and Dev't (OECD), *Policy Roundtables | Unilateral Disclosure of Information with Anticompetitive Effects*, at 30 (2012).

[16] Federal Trade Commission, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202, at 12–13 (Nov. 10, 2022).

[17] 438 U.S. 422 (1978).

[18] *See id.* at 441 n.16.

suggested that stale, backward-looking, or aggregated data could still be used by firms to "soften competition."

The practical effect of these changes is to bring at least some tacit coordination within the ambit of Section 1 by using it as evidence of an illegal agreement, i.e., that the anticompetitive effects of an information-sharing agreement outweigh its procompetitive benefits.[19] In short, firms that are setting prices based on their ability to effectively predict competitive behavior using data drawn from industry information-sharing may find themselves in the cross-hairs of DOJ enforcement—particularly, as Mekki emphasized, those that adopt industry-standard pricing algorithms or those attempting to convince the Division that a proposed acquisition will not increase coordinated effects in their respective markets.

Even under the Division's new position, a gap remains in the law. Some tacit coordination will still fall outside the scope of this Section 1 enforcement mechanism and beyond the Division's reach. Section 1 of the Sherman Act requires an "agreement."[20] The Division cannot prosecute violations of Section 1 if there is no agreement. And, it therefore cannot prosecute firms that engage in the same kind of predictive pricing exercise ***without*** having entered into an information-sharing agreement—for example, by accessing legally disclosed, publicly available data. It is unclear whether other agencies, like the FTC, will seek to fill this remaining gap by identifying "tacit coordination" as an unfair method of competition under Section 5. Or whether other agencies that draw on the same Section 5 authority—such as the Federal Deposit Insurance Corporation, Office for the Comptroller of the Currency, and the Federal Reserve Board—would invoke their enforcement powers under Section 5 (as discussed in our companion article, *supra* p. 3).[21]

Notably, Mekki emphasized that the authority of coordinate agencies or departments "is broader than the Sherman Act," and that some of their enacting statutes lend DOJ enforcement authority or allow the agencies "to refer or delegate their authority to the DOJ for

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[19] This tactic bears some similarity to DOJ's current use of information-sharing evidence when it prosecutes firms who have allegedly engaged in explicit price-fixing. But rather than using information-sharing as evidence of an illegal agreement to fix prices; here DOJ would use tacit coordination as evidence of an anticompetitive effect sufficient to make the agreement to share information illegal under the rule of reason.

[20] 15 U.S.C. § 1.

[21] In his Executive Order, President Biden cited the Bank Merger Act as a statutory basis for his authority, and called out the Department of the Treasury, the Federal Reserve System, and the Federal Deposit Insurance Corporation as "agencies that administer such or similar authorities . . . ." Exec. Order No. 14036, 86 Fed. Reg. at 36989.

investigation and/or enforcement."[22] And under the Whole-of-Government approach, which Mekki referenced several times in her speech, the whole of federal law (including the antitrust laws) may be used to pursue the Administration's objective of not merely preventing anticompetitive conduct, but actively promoting competition. To the extent that "tacit coordination," not illegal under the antitrust laws, stands in the way of that objective, DOJ's withdrawal of the Statements is a first step toward knocking down that legal barrier.

This article is a summary for general information and discussion only. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Kati Robson, an O'Melveny partner licensed to practice law in California and the District of Columbia, and Emme Tyler, an O'Melveny associate licensed to practice law in California and New York, contributed to the content of this article. The views expressed in this newsletter are the views of the authors except as otherwise noted.

[22] *See Speech*, *supra* note 5.