

Antitrust Enforcers' Views On Info Exchanges Are Evolving

By **Eliot Turner, Helen Fairhead and Robin Adelstein** (March 15, 2024)

Antitrust and competition enforcers in the U.S., the European Union and the U.K. have recently turned their attention to information exchanges — a practice that in the past was more often cited as a so-called plus factor or appended as an afterthought to a traditional price-fixing claim. The times, though, they are a-changing.

In 2022, the U.S. Department of Justice's Antitrust Division sued a number of poultry producers alleging that they had violated the Sherman Act by agreeing to, among other things, exchange "competitively sensitive information about poultry processing plant workers' wages and benefits at both local levels and the national level," according to the U.S. District Court for the District of Maryland's decision in *U.S. v. Cargill Meat Solutions Corp.*[1]

In February, the Antitrust Division withdrew its endorsement of the safety zones for information exchanges that were included in the 1996 "Statements of Antitrust Enforcement Policies in Health Care,"[2] with the Antitrust Division's Principal Deputy Assistant Attorney General Doha Mekki noting that "long-held sensibilities about when information exchanges are more benign than harmful" may, in certain markets and industries, be "insufficiently sensitive to market developments and thus fail to capture the broader range of harm in the modern economy." [3]

According to Mekki, while the guidance may have made sense in an age when information was exchanged through manila envelopes and over fax machines, with the advent of data aggregation, machine learning and pricing algorithms, the safe harbor no longer made sense.[4]

Several months later, the Federal Trade Commission followed suit, noting its view that the earlier statements were outdated, and that they "may be overly permissive on certain subjects, like information sharing." [5]

Unmentioned in either release was that both agencies had cited to the 1996 Health Care Statements' section on information sharing as guidance for how to structure information exchanges to avoid antitrust concerns when they issued their joint guidance for human resources professionals in October 2016.

Although that guidance has not been withdrawn, its value in predicting how the agencies might view information sharing is decidedly less helpful than it might have been even at the beginning of the Biden administration.

Since withdrawing their earlier guidance, the Antitrust Division and the FTC have continued to take action against information exchanges that they contend violate the antitrust laws. For example, in September 2023, the Antitrust Division sued Agri Stats Inc. in the U.S. District Court for the District of Minnesota for allegedly "organizing and managing anticompetitive information exchanges among broiler chicken, pork and turkey



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processors." [6]

Notably, the Antitrust Division is targeting not only those companies that it believes exchange information, but also the companies that facilitate the exchanges. A few months later, that lawsuit was joined by several states. And the FTC, in obtaining a consent decree to prevent an interlocking directorate, noted that part of its rationale for doing so was to prevent "the exchange of confidential and competitively sensitive information," which, in its view, would have stifled competition in natural gas production in the Appalachian Basin. [7]

Despite their withdrawal of previous guidance, U.S. antitrust enforcers have signaled at least some of the factors they consider in assessing whether an information exchange violates U.S. antitrust law.

To begin with, industry structure is important, as the Antitrust Division views more concentrated industries as susceptible to collusion or tacit coordination; however, it has also advised that even when information exchanges involve a substantial number of participants, including in unconcentrated industries, that may also suggest the information exchange is anticompetitive. [8]

Likewise, in evaluating whether an information exchange is, in their view, anticompetitive, the Antitrust Division and the commission consider the nature of the information exchanged as an important factor in considering whether the exchange is anticompetitive.

Current price information remains of paramount concern to the agencies, but, as Mekki's February 2022 remarks illustrate, they have emphasized that "forward-looking, competitively sensitive information" — whether it relates to price or not — may be even "more concerning." [9]

Whether information can be disaggregated remains a key factor, but also important is that the Antitrust Division's past views about how old information had to be before it became stale have changed.

As Mekki said: "[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." [10]

In short, as our capacity to evaluate and process information has evolved, so too have the agencies' views on when even the exchange of historical information might raise anticompetitive concerns.

And the U.S. antitrust enforcers are not the only ones newly focused on information exchanges. Competition law enforcers in the EU and U.K. recently issued guidance setting out their views on when information exchanges among competitors raise competitive concerns. [11] Like their U.S. counterparts, EU and U.K. enforcers are quick to note that, despite potential procompetitive benefits from exchanging information, such exchanges can both facilitate anticompetitive practices or have anticompetitive effects themselves.

Nonetheless, the EU and U.K. guidance sets out how firms can avoid entering into prohibited territory. This will always be context-specific but may include, for example: imposing restrictions on who can view information and how it can be used by recipients; for data pools, ensuring that data is aggregated and that no participant is able to view another participant's individual data; for public announcements, evaluating whether the information

is exchanged for a legitimate purpose and that what is exchanged is no more than is necessary for that legitimate purpose.

And because EU and U.K. law presume that a party that has received information as part of an unlawful information exchange will continue to use it, until that presumption is rebutted, it is equally important for companies to evaluate whether they need to publicly distance themselves from the participants in an unlawful information exchange by making it clear and unequivocal to them that they do not wish to take part in the conduct or by reporting the conduct to the appropriate competition authorities.

Nor are enforcers on the other side of the Atlantic simply issuing new guidance — following the issuance of a market report on the housing market, the U.K. Competition and Markets Authority recently announced it had launched an investigation into alleged sharing of competitively sensitive information, which may have had an effect on housing availability and prices.[12]

Just as antitrust enforcers have revisited their views on information exchanges, companies would do well to reconsider whether any information exchanges in which they participate or plan to participate have kept up with the times.

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[1] U.S. v. Cargill Meat Solutions Corp. et al, Case No. 1:22-cv-1821, ECF 1 ¶ 202 (D. Md. July 25, 2022).

[2] Department of Justice, "Justice Department Withdraws Outdated Enforcement Policy Statements," Press Release No. 23-137 (Feb. 3, 2023), available at <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements>.

[3] Doha Mekki, Principal Deputy Assistant Attorney General, Dep't of Justice, Remarks at GCR Live; Law Leaders Global 2023 (Feb. 2, 2023), available at <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0>.

[4] Id.

[5] Federal Trade Comm'n, "Federal Trade Commission Withdraws Healthcare Enforcement Policy Statements," (July 14, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P859910FTCWithdrawsHealthcareEnforceStmts.pdf.

[6] Department of Justice, "Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors," Press Release No. 23-1064 (Sept. 28, 2023), available at <https://www.justice.gov/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat>.

[7] Federal Trade Comm'n, "FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal" (Aug. 16, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>.

[8] Doha Mekki, Principal Deputy Assistant Attorney General, Dep't of Justice, Remarks at GCR Live; Law Leaders Global 2023 (Feb. 2, 2023), available at <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0>.

[9] Id.

[10] Id.

[11] See European Commission, Dir. Gen. Competition, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" (June 1, 2023), available at https://competition-policy.ec.europa.eu/document/download/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en?filename=2023_revised_horizontal_guidelines_en.pdf; U.K. Competition & Markets Auth., "Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements" (Aug. 2023), available at https://assets.publishing.service.gov.uk/media/64dba33bc8dee400127f1d25/Horizontal_Guidance_FINAL.pdf.

[12] UK Competition & Markets Auth., "CMA find fundamental concerns in housebuilding market," (Feb. 26, 2024), available at <https://www.gov.uk/government/news/cma-finds-fundamental-concerns-in-housebuilding-market>.