



Insight

DOJ Revs Up Scrutiny of Information Exchanges

FRED ASHTON | NOVEMBER 29, 2023

Executive Summary

- In February 2023, the Antitrust Division of the Department of Justice (DOJ) withdrew several decades-old policy statements outlining information exchange antitrust safety zones – circumstances under which the DOJ will not challenge certain activity.
- On September 28, 2023, the DOJ sued meat industry data provider Agri Stats alleging the competitively sensitive data disseminated via its information exchange operation enabled meat processors to raise prices and reduce output in violation of antitrust law.
- Withdrawing the policy statements – and with no plans to replace them – leaves information exchange operators unable to properly assess the risk profile of their operations at a time when the agency has called for more aggressive enforcement.

Introduction

On September 28, 2023, the [Antitrust Division of the Department of Justice \(DOJ\)](#) sued [Agri Stats](#), a meat processing industry information exchange, alleging the firm disseminated competitively sensitive information that enabled meat processors to raise prices and reduce supply in violation of [Section 1 of the Sherman Act](#). The lawsuit followed the DOJ's withdrawal of decades-old policy statements that outlined information exchange antitrust safety zones – circumstances under which the enforcement agencies will not challenge certain activity – contending the contents were “overly permissive.”

Exchanging information among competitors is a practice that is ripe for running afoul of antitrust law. Such exchanges could be used to fix or coordinate prices, supply, and wages, or divide markets geographically. Absent updated guidance from the DOJ, information exchange operators are left adrift when assessing the risk profile of their practices.

Information Exchanges

Collaboration among competitors can frequently lead to more [efficient, welfare-enhancing outcomes](#) that benefit both firms and consumers. Such [collaborations regularly involve research and development](#), production, marketing, standards development, joint lobbying efforts, [and expanding into foreign markets](#).

Other collaborations involve the sharing of market data through information exchange agreements. Often, information exchanges are operated by third-party consultants that conduct industry surveys and provide aggregated market data to their customers. These surveys frequently include data on production, costs, salaries, benefits, revenue, and quantities sold. The data are used to help firms compete more effectively.

There are varying degrees of antitrust risk associated with sharing information among competitors. Both the [Federal Trade Commission \(FTC\)](#) and [DOJ](#) have expressed concerns

that the “sharing of information relating to price, cost, output, customers, or strategic planning is more likely to be of competitive concern than the sharing of less competitively sensitive information.” The agencies add that “[s]imilarly, the sharing of information about current or future operating and business plans is more likely to be of concern than the sharing of historical information. And the sharing of company-specific data is more likely to raise concerns than the sharing of aggregated data of multiple firms that does not permit identification of information by the company.”

Data received via an information exchange agreement that are current, projected, identifiable at the firm level, or provide specific geographic information can facilitate tacit collusion – a situation where firms coordinate actions without an explicit agreement. To ensure the operation of information exchanges does not run afoul of antitrust law, the agencies outlined antitrust safety zones in several policy statements, the first of which dates to 1993.

Revocation of Antitrust Safety Zones

In a [speech on February 2, 2023](#), Principal Deputy Assistant Attorney General (PDAAG) of the DOJ’s Antitrust Division Doha Mekki said the DOJ would review three decades-old policy statements that the agency argued “no longer reflect market realities or the Division’s current enforcement posture.” The policy statements included *Antitrust Enforcement Policy Statements Issued for Health Care Industry (1993)*, *Statements of Antitrust Enforcement Policy in Health Care (1996)*, and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Share Savings Program (2011)*.

The policy statement issued in 1993 established information exchange antitrust safety zones specific to the health care industry. The safety zone was expanded in the 1996 policy statement. The reach of these guidance documents extended beyond the health care industry as antitrust practitioners used them to inform practices outside of health care information exchanges. Absent extraordinary circumstances, the agency will not challenge information exchange activity if:

1. The survey is managed by a third party (such as a trade association).
2. The data are more than three months old.
3. There are at least five providers reporting data upon which each disseminated statistic is based, no individual provider’s data represents more than 25 percent on a weighted basis of that statistic, and any information is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

Operating within the boundaries of these safety zones leaves little opportunity for tacit collusion.

The DOJ’s primary concern with these antitrust safety zones is how technology can be leveraged to de-anonymize data and take what was formerly a snapshot of the past (old data) and use it to facilitate collusion. Mekki stated that “the 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 learnings, and pricing algorithms that can increase the competitive value of historical data for some products or services.” She continued, noting that “[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 may be eroded.”

Mekki explained that “[i]creasingly health care is a data intensive industry that relies on the power of machine

learning, artificial intelligence, and other advanced tools to develop or deliver products or services.” Addressing each of the antitrust safety zones specifically, Mekki claimed that “exchanges facilitated by intermediaries can have the same anticompetitive effect as direct exchanges among competitors.”

The following day, on February 3, 2023, the DOJ [formally withdrew its support](#) for the policy statements. In July, the [FTC followed suit and withdrew support](#) for the 1996 and 2011 policy statements.

The policy statements do not have the force of law and the outcomes of any future prosecution will still be determined by the courts.

Antitrust Claims Against Agri Stats

On September 28, 2023, the DOJ filed a lawsuit against meat industry data provider Agri Stats alleging the information collected and disseminated among broiler chicken, pork, and turkey processors enabled the participants to raise prices and restrict output to maximize industry-wide profits in violation of Section 1 of the Sherman Act. In early November 2023, state attorneys general from Minnesota, California, North Carolina, and Tennessee joined the lawsuit.

According to the DOJ, Agri Stats “recruited and enabled all major U.S. chicken, pork, and turkey processors to exchange competitively sensitive information through its exclusive subscription and consulting business.” The agency claimed that Agri Stats reports account for more than 90 percent of the broiler chicken, 80 percent of pork, and 90 percent of turkey markets in the United States and compiles data and distributes it back to participating companies in a variety of different reports that include information on “live production, processing, sales, and profitability.”

The DOJ asserted that “Agri Stats understood that meat processors have used these reports for anticompetitive purposes and, in some instances, even encouraged meat processors to raise prices and reduce supply.” The DOJ also claimed that the reports enabled competitors to “forecast and monitor competitor output and confidently restrain production when it is profitable to do so, which can lead to higher prices.” The agency added that “even though Agri Stats masks some of the information it collects, processors receive enough detailed data to allow them to forecast the plans of competitors.”

In a [similar case decided in June 2023](#), however, Judge Thomas M. Durkin of the U.S. District Court of the Northern District of Illinois Eastern Division ruled that Agri Stats’ reports were not evidence of a conspiracy to limit the supply and increase the price of chicken. Judge Durkin found that chicken producers traded these reports but “could have communicated this information without the Agri Stats reports.” He continued, “just because Agri Stats provided a convenient form to transmit information does not mean that Agri Stats itself joined the conspiracy. And there is no allegation that Agri Stats encouraged Defendants to exchange their reports with each other.” Furthermore, Durkin stated that “attempting to deanonymize Agri Stats reports is simply a rational response of competitors trying to gain an advantage over each other.”

While Agri Stats' participation in a conspiracy to restrict output and raise prices is unclear, the DOJ's claim described an information exchange that flirted with the boundaries of the antitrust safety zones outlined in the 1996 policy statement. Though the information was collected and disseminated by a third party, some reports were published weekly and included the previous week's data, or were published monthly and included information between 30–60 days old. Furthermore, the level of detail and the "loosely anonymized" nature of the reports simplified unmasking the identity of individual firms or facilities.

Conclusion

The message by PDAAG Mekki, the withdrawn policy statements that outlined antitrust safety zones for such collaborations, and the subsequent lawsuit against Agri Stats will serve as a clear warning to other information exchange operators that the DOJ is prepared to investigate and litigate potential antitrust infractions of information exchanges. Without replacement guidance, assessing the risk of operating an information exchange is incalculable, and could leave trade associations and other third parties vulnerable to antitrust litigation.