Information Exchange Counseling In The Digital Age

By Kristen Harris & Kail Jethmalani

During the 2019 ABA Section of Antitrust Law Spring Meeting, the Corporate Counseling Committee presented a panel about Information Exchange Counseling in the Digital Age, moderated by Elai Katz (Cahill, Gordon & Reindel LLP) and featuring Joseph V. Farrell (University of California at Berkeley), Kyriakos Fountoukakos (Herbert Smith Freehills), Scott A. Scheele (U.S. Department of Justice Antitrust Division) and Amanda L. Wait (Norton Rose Fulbright).[1] *This article recaps that panel and expands upon some of the hot topics in information exchange counseling.*

While technology has advanced and means of communication have become more sophisticated, the antitrust laws apply with as much force today to information exchanges between rivals as they did over 40 years ago.[2] The Corporate Counseling Committee's panel on Information Exchange Counseling in the Digital Age provided a timely refresher on how information exchanges are analyzed in the United States and Europe, explaining how technologies like blockchain and the prevalence of platform markets pose challenges that are not much different than in traditional information exchange cases, and highlighting notable recent and ongoing enforcement actions.

The United States and Europe: a Tale of Two Regimes

U.S. antitrust law takes a relatively permissive approach to information exchanges, analyzing such arrangements under the rule of reason.[3] The facts and circumstances surrounding the information exchange are thus important. Generally, information exchanges are more likely to be condemned where they involve frequent sharing of granular, current or forward-looking competitively sensitive information (*e.g.*, price, output, cost, business strategies, etc.).[4] The degree to which an industry is consolidated can also elevate risk associated with information exchanges. Federal or state antitrust agencies are more likely than private plaintiffs to prosecute information exchanges where they may not support allegations of price fixing or output restrictions.[5] But where such claims can be made, however, the private plaintiffs' bar is active.[6]

Europe, by contrast, takes a stricter approach. As Mr. Fountoukakos explained, some information exchanges, *e.g.*, "between competitors of individualized data regarding intended future prices or quantities[,]" are treated as "restrictions by object[,]"[7] the European equivalent of the per se rule of

---

[1] The panelists' views discussed in this article were only their own and not those of their employers.

[2] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

[3] *Id.* at 442 n.16 ("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.").

[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 3.31(b) (2000).

[5] *See, e.g.*, Complaint, United States v. Sinclair, 1:18-cv-2609 (Nov. 13, 2018); Complaint, United States v. DirecTV, 2:16-cv-08150 (Nov. 2, 2016).

[6] *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015); *In re* Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896 (N.D. Cal. 2008); *In re* Citric Acid Litig., 191 F.3d 1090, 1095 (9th Cir. 1999).

[7] European Comm'n, 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, 2011 O.J. (C 11)

analysis in the U.S.[8] Even the passive receipt of competitively sensitive information from a competitor can result in liability under the Article 101 because the recipient is "presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data."[9]

The Digital Age Creates New Avenues for Information Exchange

Blockchain Repackages Common Antitrust Risks

Blockchain is a technology that allows the public validation, recording and distribution of transactions to all participants in the chain. While cryptocurrencies like bitcoin – an implementation of blockchain technology – have received much of the attention, some believe blockchain technology could revolutionize supply chains,[10] prevent insurance fraud,[11] facilitate sharing of electronic health records,[12] and much more. Blockchain could help achieve those lofty goals simply by facilitating information exchanges. But the same antitrust risks associated with traditional information exchanges apply equally to blockchain.

Mr. Farrell explained that information exchanges are a species of cooperation amongst competitors, and in industries where competitors repeatedly deal with each other, the use of a distributed ledger will raise concerns around coordination. Each competitor on a single blockchain network would have access to records of every transaction handled through the network, including any competitively sensitive information attached to the record, such as price and volume. While such transparency may have benefits, it does heighten the risk that blockchain could be used to facilitate price fixing or provide an enforcement mechanism for a conspiracy.

Counseling around the use of blockchain in some ways is no different than with other mechanisms to exchange information. As Ms. Wait and Mr. Fountoukakos both explained, where competitively sensitive information must be shared to achieve the procompetitive purposes, it will be critical to institute guard rails to prevent anticompetitive abuse. As discussed above, however, in Europe even with inadvertent disclosure of competitively sensitive information through a blockchain – which may not be immediately apparent – recipients may be presumed to have altered their market conduct. Whatever the means used to minimize the risks associated with sharing competitively sensitive

---

1, ch. 2, ¶ 74, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF ("Information exchanges between competitors of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object.").

[8] *Id.* ¶ 24 ("Restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1)(6). It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.").

[9] *Id.* ¶ 62 ("When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.").

[10] *See, e.g.*, Paul Brody, How Blockchain is Revolutionizing Supply Chain Management, EY (2017), https://www.ey.com/Publication/vwLUAssets/ey-blockchain-and-the-supply-chain-three/$FILE/ey-blockchain-and-the-supply-chain-three.pdf.

[11] *See, e.g.*, Paul Brenchley, How Blockchain is Tackling Insurance Industry Challenges, KPMG, https://home.kpmg/xx/en/home/insights/2018/09/blockchain-in-insurance-fs.html (last visited Apr. 25, 2019).

[12] *See, e.g.*, RJ Krawiec et al., Blockchain: Opportunities for Health Care, Deloitte (2016), https://www2.deloitte.com/us/en/pages/public-sector/articles/blockchain-opportunities-for-health-care.html.

information through a distributed ledger, they should be considered and implemented before commencing use of a blockchain network.

Platforms Allow Data Collection, But Also Prompt Regulatory Scrutiny

Purely vertical information exchanges between suppliers and distributors, even in dual distribution scenarios, tend not to draw much antitrust scrutiny. But Ms. Wait, Mr. Farrell and Mr. Fountoukakos all highlighted that the intersection of dual distribution and data sharing through platforms does heighten risk. Indeed, it has prompted investigations in multiple jurisdictions. The European Commission ("EC") is investigating Amazon for its business practices – specifically, its use of data – in connection with its Amazon Marketplace service, which allows merchants to sell directly to users in exchange for paying Amazon a referral fee.[13] The EC is concerned about Amazon's use of merchant data to identify successful products and then offer a competing Amazon-branded product or to offer the product through the Amazon Retail channel. That is an arguably pro-competitive use because it increases consumer choice, at least in the short term. The EC is not only concerned about the exchange of information between rivals, which could raise concerns under Article 101, but also whether Amazon can disadvantage merchants using Amazon Marketplace in favor of the Amazon Retail channel, which raises separate concerns under Article 102 and threatens to undermine the pro-competitive benefit that information the exchange could achieve. The EC's requests for information explicitly ask whether and how Amazon's product launches have affected merchants' business.[14]

Modern IT Systems Provide Tools to Safely Exchange Information

While the digital age makes it easier and faster to exchange information or collect data, it also provides more robust tools to safeguard against the improper use of shared information. For example, as Ms. Wait observed, information can be exchanged through data rooms that provide granular control over who can access information and how they can use it. Data rooms and clean teams are commonly used during pre-merger negotiations and due diligence.[15] They could also be adapted for other information exchanges as well.

Recent U.S. Enforcement Actions

Even though the U.S. has a relatively more lenient approach toward information exchanges, Mr. Scheele highlighted some of the Department of Justice's ("DOJ") recent enforcement actions where it secured consent decrees enjoining improper exchanges of competitively sensitive materials.

---

[13] Natalia Drozdiak et al., *Is Amazon Unfairly Copying Products? EU Quizzes Merchants*, BLOOMBERG (Sept. 27, 2018), https://www.bloomberg.com/news/articles/2018-09-27/amazon-s-copy-cat-products-targeted-as-eu-quizzes-smaller-rivals; Aoife White, *Amazon Probed by EU on Data Collection From Rival Retailers*, BLOOMBERG (Sept. 19, 2018), https://www.bloomberg.com/news/articles/2018-09-19/amazon-probed-by-eu-on-data-collection-from-rival-retailers. Germany's Bundeskartellamt was also investigating the alleged conduct at issue. *See* Case AT.40462 – *Amazon Marketplace*. Bundeskartellamt, 27 October 2017, *Bundeskartellamt launches sector inquiry into comparison websites,* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/24_10_2017_Vergleichsportale.html?nn=3591568. It is possible, however, that the commencement of the EC's investigation may have relieved the Bundeskartellamt of its competence to investigate the alleged conduct. *See* Council Regulation 1/2003, art. 11(6), 2003 O.J. (L 1) 1.

[14] *See* COMP/AT.40462 - Amazon Marketplace - Sache AT.40462 Amazon Marketplace - Fragebogen für Einzelhändler, *available at* https://www.wortfilter.de/wp/wp-content/uploads/2018/09/Fragebogen_Amazon_EU_Kommission.pdf.

[15] *See, e.g.*, Holly Vedova et al., *Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence*, Fed. Trade Comm'n (Mar. 20, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger.

In its 2016 complaint against DirecTV, for example, DOJ focused on three separate agreements that allowed DirecTV – the alleged ringleader – and its competitors to share competitively sensitive information about parallel ongoing negotiations to carry SportsNet LA, the Dodgers channel in the Los Angeles area, as well as future plans to carry the channel (or not).[16] The DOJ concluded, after its investigation, that the information exchange gave DirecTV's competitors greater bargaining leverage against SportsNet LA and thus chose not to carry the channel.[17] The consent decree entered prohibits DirecTV and AT&T from sharing or seeking to share competitively sensitive information with any multichannel video programming distributor, which applies much more broadly than to the conduct at issue.[18]

In Sinclair, the DOJ alleged that defendants were reciprocally exchanging revenue pacing information for the broadcast TV spot advertising market.[19] Doing so allowed defendants to understand the availability of inventory on competitors' stations, which in turn affected negotiation and pricing strategies.[20] The information exchange thus distorted the normal price-setting mechanisms in the spot advertising market.[21] The consent decree prevents defendants from sharing competitively sensitive information with rivals in the same geographic market.[22]

These examples highlight that the U.S. antitrust agencies will not hesitate to prosecute improper information exchanges. Such enforcement actions may also be followed by private treble damages litigation by the aggrieved parties, which could also be factored into the risk calculus.[23]

Conclusion

Even though the digital age has facilitated new means of exchanging information, the panelists agreed that the antitrust risks are not much different than in the analog age. The law does not change when applied to high or low technology. The U.S. continues to have a more laissez-faire approach to information exchanges, while Europe tends to be stricter. Fortunately, the digital age has also brought with it robust tools that empower firms to fine tune exactly how and with whom they exchange information, and how that information can be used. Vigilance is still essential to minimize the risks associated with information exchanges.

Kristen Harris is an Associate in the Washington, D.C. office of Axinn, Veltrop & Harkrider LLP.

Kail Jethmalani is an Associate in the New York office of Axinn, Veltrop & Harkrider LLP and is the Young Lawyer Representative for the Corporate Counseling Committee.

[16] Complaint, United States v. DirecTV, 2:16-cv-08150 (Nov. 2, 2016).
[17] Competitive Impact Statement, United States v. DirecTV, 2:16-cv-08150 (Mar. 23, 2017).
[18] *Id.*
[19] Complaint, United States v. Sinclair, 1:18-cv-2609 (Nov. 13, 2018).
[20] *Id.*
[21] *Id.*
[22] Competitive Impact Statement, United States v. Sinclair, 1:18-cv-2609 (Nov. 13, 2018).
[23] As a practical matter, however, there does not (yet) appear to be private follow-on litigation in *United States v. DirecTV* or *United States v. Sinclair.*

The Antitrust Counselor is published quarterly by the American Bar Association Section of Antitrust Law, Corporate Counseling Committee.

The views expressed in *The Antitrust Counselor* are the authors' only and not necessarily those of their employers, the American Bar Association, the Section of Antitrust Law, the Corporate Counseling Committee, or the editor of this newsletter. If you wish to comment on the contents of *The Antitrust Counselor*, please write to:

The American Bar Association
Section of Antitrust Law
321 North Clark Street
Chicago, IL 60654

Nothing contained in this newsletter is to be considered to be the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

You may contact the editors, Mary Lehner, at Mary.LEHNER@freshfields.com and Seth Wiener, at seth.wiener@arnoldporter.com.