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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Data Screening Tools for Competition Investigations – Note by the United States

28 November 2022

This document reproduces a written contribution from the United States submitted for Item 3 of the 136th OECD Working Party 3 meeting on 28 November 2022.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/data-screening-tools-for-competition-investigations.htm

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United States

1. It is critical for competition enforcers to develop data analytics tools to identify and investigate conduct that undermines or distorts competition in government procurement. In this context, the United States Department of Justice (DOJ) Antitrust Division (Division) in the last decade has made strides in deploying resources to develop effective data-driven lead generation tools.

2. In 2019, the Division formed a Procurement Collusion Strike Force (PCSF) with the goal of coordinating a national response in combatting antitrust crimes in government procurement, grant, and program funding at all levels of government—Federal, state, and local.¹ The PCSF is organized as an interagency partnership, consisting of federal prosecutors across the U.S. and national law enforcement partners tasked with detecting and preventing fraud, waste, and abuse. The PCSF has two objectives: (1) deterrence through outreach and training, and (2) more effective detection, investigation, and prosecution of these crimes.

3. To detect procurement-related crime, the PCSF needs cutting edge analytics tools.² The PCSF has leveraged current tools used across the government; however, such tools have limited reach due to the decentralized nature of government procurements in the U.S. Unlike in some other countries, procurements in the U.S. happen at local, state, and federal levels, which means the data tied to procurements is fragmented and “owned” by a variety of government agencies. Additionally, government entities in the U.S. may use different procurement and data collection processes. The lack of a unified approach is due in part to the absence of federal law that would require a centralized electronic repository of procurement data.

4. The PCSF innovated in the face of those barriers. To seize on technological advances in data aggregation, the PCSF launched a data analytics project in 2020 to facilitate collaboration across the United States law enforcement community in developing and using data analytics to identify signs of potential criminal anticompetitive collusion in government procurement data.

5. The goal of the project is not to build a universal data analytics program, but instead to build analytics tools that increase detection of anticompetitive collusion across all levels of government. The PCSF’s role in the data analytics project is to act as a subject-matter expert, advising governmental agencies on how to use procurement data in building their own tools. The PCSF also trains data scientists, analysts, auditors, and investigators on detecting suspicious patterns and red flags that indicate anticompetitive collusion. Additionally, the PCSF advocates for collection and retention of “pre-award data” across the government which will enhance the tools necessary to proactively detect anticompetitive collusion and supplement traditional investigatory techniques.

6. Cooperation with our international partners is also critical to the PCSF’s success. The PCSF has collaborated with international competition authorities such as Switzerland’s

¹ Procurement Collusion Strike Force, <https://www.justice.gov/procurement-collusion-strike-force>.

² See, e.g., *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, Report Submitted to the Administrative Conference of the United States, <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf> (Feb. 2020).

Competition Commission and the Danish Competition and Consumer Authority by sharing analytics, statistical, and machine learning tools.

7. The PCSF data analytics approach has been bolstered through a recent administration order and guidance. On July 9, 2021, President Joseph Biden signed an Executive Order on Promoting Competition in the American Economy, which calls for a “whole-of-government approach . . . to address overconcentration, monopolization, and unfair competition” and directs agencies to adopt pro-competitive “approaches to procurement and spending.”³ DOJ’s Associate Attorney General Vanita Gupta issued a memorandum calling on the Division to develop of plan of action for outreach and implementation of the Order, which includes the directive to “[c]ontinu[e] the Division’s leadership of the Procurement Collusion Strike Force, working with procurement officials throughout the government to promote and protect the competitive process for public procurement, including by drafting internal policies; educating procurement officials on antitrust crimes; *working with federal partners to create best practices for data collection and analytics that can help detect collusion*; and working with law enforcement partners to prosecute actionable misconduct.”⁴

8. Analytical tools used by PCSF’s partners have enhanced the detection of suspicious behavior. As a final note, the Division encourages companies to use screens, communications monitoring tools, and statistical testing designed to identify potential antitrust violations, by including such factors while evaluating a company’s corporate compliance program.⁵

Technology Expertise in the Agencies

9. Antitrust law in the United States calls on enforcers to be prescient. The Clayton Act, for example, prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.”⁶ However, maintaining this forward-looking perspective is challenging when evaluating sectors of the economy that are changing rapidly due to technological advancement. Doing this requires the agencies not only to consider the immediate impacts of a specific transaction, but also to understand the future of the entire sector in which the transaction is happening. The agencies are also required to evaluate impacts on consumers not only in terms of prices, but also with respect to product quality and innovation. To keep up with rapidly evolving markets, DOJ is beginning a process of expanding its capabilities to perform such evaluations in new, technology driven sectors of the economy.

10. This need for expansion in the capabilities of regulators is driven by changes in the larger American economic landscape. In 2018, it was estimated that 1.7MB of data was

³ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁴ Memorandum from Associate AG Vanita Gupta on Promoting Competition in the American Economy to the Antitrust Division (July 9, 2021), <https://www.justice.gov/asg/page/file/1410836/download>.

⁵ Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, <https://www.justice.gov/atr/page/file/1182001/download>.

⁶ 15 U.S.C. sec. 18.

generated for every person on earth every second.⁷ Much of this data is stored by businesses, rather than individuals. A natural consequence of this is that the volume of data that needs to be analyzed to answer even traditional questions about market definitions can now stretch into the range of petabytes. The data that represents new markets not only poses challenges of scale; new markets sometimes also create new categories of data. For example, many businesses now compete to offer genetic sequencing to consumers. Several others compete to offer real-time mapping data, including traffic estimates, to every user with a smart phone. Data brokers maintain extensive user data profiles about the majority of American adults that are regularly rented or sold for the purpose of advertising. All of these markets are represented by unique data types that require significant expertise to use effectively.

11. To meet these challenges, DOJ foresees the need for additional capacity in three primary areas: technological expertise to support legal evaluations of matters under our review, data engineering to enable larger scale analyses, and data science expertise to allow for exploration of new categories of data. These are areas where other regulatory bodies, including the FTC and CMA, have added significant capacity in recent years, and the Division hopes to benefit from the experiences of these other organizations.

⁷ <https://www.domo.com/solution/data-never-sleeps-6>.