Antitrust challenge to a business-to-business electronic marketplace (B2B) is only a matter of time. Businesses eager to seize the opportunities of the Internet will inevitably, through either inadvertence or temptation, cross the boundary of illegality.

When they do, career antitrust lawyers will be only too eager to break new ground in one of the most exciting areas of antitrust law since passage of the Sherman Act in 1890. With careful legal and business planning, however, most companies will find B2Bs to be a procompetitive and efficient method for a myriad of horizontal and vertical transactions.

In fact, most B2Bs do not raise antitrust concerns. Simply stated, B2Bs are electronic means for businesses to engage in commerce with each other. Since most traditional business-to-business commerce is conducted without so much as raising an antitrust eyebrow, the same is true with B2Bs.

After all, the Internet has not changed the fundamentals of economic theory, the discipline on which antitrust law is founded. It has merely offered a new medium to which the same antitrust laws must be applied.

Nonetheless, the communicative efficiencies of the Internet make possible significant new ways for businesses to combine their efforts, such as through electronic marketplaces.

Whether they are based on an auction model, a simple buy-sell model or other format, the B2B electronic marketplace, particularly under certain market conditions, can be fertile ground for anticompetitive behavior. Companies need to mind their “Ps and Qs” in order to avoid potential antitrust challenges.

Federal Trade Commission Activity

The Federal Trade Commission, in the forefront generally on matters affecting consumers and the Internet, held a public workshop in June 2000 to study B2Bs and their antitrust implications. By far the most well-attended of the FTC’s numerous workshops in 2000, a standing room only crowd of more than 600 lawyers, regulators and Internet executives gathered in Washington, D.C., for two full days of discussion.


For lawyers actually giving any advice in this area, the Antitrust Guidelines for Collaborations Among Competitors are a must read. These “Competitor Collaboration Guidelines,” 4 Trade Reg. Rep. (CCH) para. 13,161 (2000), were issued jointly by the FTC and the Department of Justice in April 2000 and address many of the antitrust issues that arise in the context of B2Bs. They are available online at www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.
The FTC’s B2B Report and most commentators have identified three categories of antitrust issues most likely to be raised by B2Bs: information sharing, monopsony power, and exclusive practices.

**Information Sharing**

A typical B2B business model involves collaboration between direct competitors. Such collaborations in most instances are conducted lawfully and with legitimate business justification. Taken to an illicit extreme, however, horizontal agreements can be per se illegal, as in the case of price-fixing. When looking at B2Bs between competitors, therefore, antitrust enforcers are particularly concerned about the type of information that may be shared. Certainly, current and future pricing information should not be shared. In addition, B2B participants should avoid sharing information on output, significant input costs and other competitively sensitive information.

There is some precedent in this area. In 1994, the Department of Justice obtained a consent agreement settling antitrust charges involving a joint venture among airlines of an electronic fare operation. *See United States v. Airline Tariff Publishing Co.*, 1994-2 Trade Cas. (CCH) 1 70,687 (D.D.C. 1994) (ATP). This electronic fare system allowed the exchange of actual and future pricing data as well as certain hypothetical fares not actually available to consumers.

Allegedly, the type of information available to member airlines allowed the airlines to engage in price signalling. According to an attorney who represented one of the airlines in that case, the government’s evidence of illegality was largely inferential. Because the fare system exchanged certain information for which there was no apparent business justification, the government inferred that the only possible reason for its exchange was illegal.

The *ATP* case underscores the need for good business planning of a B2B at the outset. Antitrust considerations should be taken into account at the time the business plan is written. Careful articulation of the business justification for particular procedures in any B2B structure will not only serve to pinpoint any potential problems at the outset, but it will also serve as a record of legitimacy, should the venture ever come under antitrust scrutiny later.

The structure of the B2B should include passwords, firewalls and encryption, as necessary, to protect sensitive information. The B2B’s written operating rules also should articulate what information is off-limits and will not be shared. Remember that anticompetitive concerns may be decreased if information is anonymized and provided in aggregate form. As a further safeguard, companies should consider seeking contractual rights to audit the B2B’s source code periodically.

**Monopsony**

A B2B that is essentially a buying collaboration, where companies purchase direct inputs collectively, raises the issue of monopsony. Whereas monopoly represents control of an output market, monopsony represents the ability to control or affect price for inputs - the supplies needed to manufacture the ultimate product. Why is monopsony a problem? In the first place, monopsony is rare and antitrust challenges have therefore been rare. Nevertheless, due to the Internet’s revolutionary change in how business is conducted, what is past may not be prologue.

Now, businesses have a significantly greater ability to communicate. Using an Internet hub, for example, businesses can communicate both in larger numbers (thus increasing the collective market share) and with much greater speed and efficiency. Whereas monopsony power may simply have been too practically difficult to accomplish in the past, the Internet suddenly increases the potential for sightings of this rare animal.

If the Internet moves monopsony from the realm of theoretical concern to one of practical reality, how do we know it when we see it? Like the wind, monopsony is best observed by its effects.

In a buying collaboration, antitrust concerns are heightened when the collective power of the buyers is such that they are able to depress the price of the purchased input below efficient levels, causing harmful effects in the input market. Input producers may go out of business or may have to shift their resources to less valuable uses. Alternatively, input producers may raise the price they charge to non-monopsonistic purchasers.

Is there any level or threshold under which a percentage of purchases is not a problem? Specific numerical guidance is available in the joint DOJ/FTC “Statements of Antitrust Enforcement Policy in Health Care,” 4 Trade Reg. Rep. (CCH) para. 13,153 (1996), which establish an antitrust safety zone under specific circumstances. Although the Health Care Statements were written to apply to the specifics of the health care industry, Statement 7 regarding joint purchasing is particularly useful. According to Statement 7, the agencies will not challenge (absent extraordinary circumstances) joint purchasing arrangements that meet
two conditions: 1) they account for less than 35 percent of the total sales of the product within the relevant market; and 2) the cost of the jointly purchased products or services account for less than 20 percent of “the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.”

An alternative, but similar, numerical measure is available in the Competitor Collaboration Guidelines. There, unless an agreement is illegal per se, an antitrust safety zone is established generally for collaborations where the “market shares of the collaboration and its participants collectively account for no more than 20 percent of each relevant market in which competition may be affected.” These safety zones simplify antitrust analysis when the participating venturers collectively account for a relatively small share of total purchases in the relevant market.

Monopsonistic effects on the input sellers are not the only reason a purchasing B2B may be anticompetitive, however. Without proper rules protecting the confidentiality of individual purchase information, participants may be able to collect enough data regarding the inputs of their competitors that they can then predict the level of production of their competitors. This is an issue only when the buying cooperative involves direct input, not indirect inputs such as light bulbs or maintenance supplies for a manufacturing facility. If a B2B involves direct input, purchasing but the inputs represent a fraction of the resources necessary to produce a final product, however, the potential for collusion is greatly reduced.

Covisint, the joint venture of General Motors, Ford, DaimlerChrysler, Nissan and Renault to purchase auto parts electronically through a common Internet source, is the most well-known example of a B2B buying cooperative. Covisint currently connects more than 250 auto parts suppliers with its member manufacturers. Covisint has been in the planning stages for more than a year and was subjected to close scrutiny by the Federal Trade Commission.

Recently, the FTC closed its review of Covisint. See Federal Trade Commission News Release, “FTC Terminates HSR Waiting Period for Covisint B2B Venture,” www.ftc.gov/opa/2000/09/covisint.htm. Some inferred from this action that the FTC had essentially approved the Covisint structure. In fact, this is not the case at all. The FTC’s closing letters basically say, we don’t see anything unlawful at this point, but it’s too early to tell. I expect that the FTC used its investigation and a dialogue with attorneys for Covisint to explore ways to minimize any potential anticompetitive effects of the venture. This dialogue was no doubt a significant learning vehicle for both sides. The FTC probably closed its investigation only after receiving enough assurances that Covisint was headed in the right direction. You can bet, however, that the FTC’s radar will make a periodic sweep of Covisint as it evolves.

Exclusionary Practices

Exclusive practices are governed by the rule of reason. Generally, an exclusive contract is problematic from an antitrust perspective only if the restricting firm (or firms) has market power. Exclusive contracts can, and often do, have legitimate business purposes. Purchase requirement contracts, for example, can ensure sufficient volume to justify discounts. Requirements of exclusivity may be necessary to warrant the expenditure of additional resources to meet individualized customer demands.

But exclusive practices can be anticompetitive, particularly when they are used to seek a monopoly or unfairly diminish competition. Exclusive contracts should have a clear business justification and their term should be limited to the time necessary to achieve that purpose. If less than 20 percent of a market is affected by an exclusive arrangement, the practice will likely avoid regulatory scrutiny because it falls within the antitrust safety zone articulated in the Competitor Collaboration Guidelines, discussed supra, as long as the agreement is not otherwise illegal per se.

B2B electronic marketplaces may need to require some exclusivity in order to achieve the volume necessary to warrant the cost of building and operating the Internet site. Contrary to popular belief, building a Web site is not cheap, particularly for complex commercial transactions involving multiple participants in a B2B exchange. It is clear, however, that antitrust officials are concerned about the potential for exclusive practices to create monopoly effects in product markets served by B2Bs, as well as in the market for marketplaces themselves.

Thus, to avoid antitrust scrutiny, the rules of trade of B2B exchanges should allow its members and participants to use other exchanges freely, and they should have liberal rules for membership and participation. Certainly, an “all comer” rule is not expected - exchanges may need a set of standards for membership and participation. But such standards should be carefully written to avoid disadvantaging competitors for less than legitimate business reasons.

At the FTC B2B workshop, FTC lawyers asked the panelists numerous questions regarding ownership
of exchanges, evidencing a concern over the potential issues raised when firms with significant shares of a market also possess equity interests in a B2B exchange serving that market. It is clear that owner-participants must be careful to keep a level playing field in their B2Bs. Rules that give owners unfair advantages will be frowned upon. For example, using a search engine on the site that routinely listed owners first in response to a search request would be dubious. (Of course, this would be problematic only if there were market power, and one questions whether a B2B with such rules would be in existence very long in the absence of market power.)

Even subtle methods of discrimination between owner and non-owner participants should be used advisedly. Owner-participants also should be careful not to seek anticompetitive advantage by allowing themselves access to information that may be unavailable to other participants.

**Conclusion**

Some observers expect that the various markets for B2B exchanges cannot support more than one or two exchanges, which will be their natural evolution. Antitrust regulators are watching closely to make sure that this evolution is not unduly shortened by anticompetitive behavior. Thus, some caution is advised. On the other hand, companies with significant investments in B2Bs will want to be as aggressive as possible, within the bounds of law, to ensure that they are the survivors of an inevitable shakeout.

As always, the role of antitrust counselors will be to assist their clients in making the proper judgment regarding practices that may be good for individual businesses but bad for competition as a whole. B2Bs are a bold and exciting new frontier for commercial transactions. The antitrust laws represent an important safeguard to keep these markets fair and competitive.

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