

## **Applying Antitrust Law to B2B Marketplaces**

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While B2B marketplaces can create efficiencies and increase production, for the Department of Justice and the Federal Trade Commission they carry the possibility of collusion, exclusionary practices and other antitrust abuses. If your company is setting up a B2B marketplace, the trick to avoiding an antitrust problem is understanding how traditional antitrust rules apply to the new technology of the Internet. The FTC's recent report on e-commerce, *Entering the 21<sup>st</sup> Century: Competition Policy in the World of B2B Electronic Marketplaces*, located at [www.ftc.gov/os/2000/10/b2breport.pdf](http://www.ftc.gov/os/2000/10/b2breport.pdf), and the FTC's joint report with the Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* located at [www.ftc.gov/os/2000/04/ftcojguidelines.pdf](http://www.ftc.gov/os/2000/04/ftcojguidelines.pdf), lay out the antitrust "rules of the road" for structuring a B2B.

Red flags generally go up in the antitrust community when competitors collaborate. From an antitrust perspective, B2B marketplaces in many ways are like any other collaboration among competitors. B2B owners should be aware that potentially anticompetitive practices lurk in such seemingly innocent places as the structure, bylaws, operating rules, ownership and management of a B2B exchange. When examining a B2B exchange's potential for violating antitrust laws, the FTC and the DOJ typically have two basic questions: (1) Will the B2B venture permit rivals to exchange and use competitively sensitive information to raise prices to consumers? (2) Are there exclusionary rules that limit competitors from using the B2B or that unduly impede the development of competing B2B exchanges by preventing shareholders or participants from using competing exchanges?

### **Information and B2B Exchanges**

What is new about Internet technology from an antitrust standpoint is that information that was once hard to come by can now be collected and disseminated with blinding speed. The FTC recognizes the pros and cons of the power to disseminate information which are inherent in B2B exchanges. "[I]nformation-sharing agreements among competitors may be procompetitive and reasonably necessary to realize a collaboration's procompetitive benefits . . . [h]owever. . . information-sharing agreements in the context of B2Bs could facilitate coordination on price or other competitive terms and thereby be likely to injure competition." Federal Trade Commission Staff, *Entering the 21<sup>st</sup> Century: Competition Policy in the World of B2B Electronic Marketplaces* (October 2000), Part 3, p. 3.

On a bright note, the FTC B2B Report suggests "that many potential [antitrust] concerns could be eliminated through well-crafted B2B operating rules." *Id.* at p. 1. The FTC's B2B Report sets out five factors to consider when creating a B2B exchange:

- Who will receive or have access to competitively sensitive information?
- What type of information will be shared?

- How fresh and transaction specific will the information be when it is made available?
- Is the information already available through other sources?
- What is the structure of the market served by the B2B?

*Who gets the information?* B2B owners and operators must carefully consider who has access to the information. They must scrutinize the information flow made possible by the B2B's technology to determine whether competitors can get at competitively sensitive information. They should identify who must not get certain pieces of information and consider how to "wall off" these users.

*Type of information.* Certain information—typically pricing, costs, production, strategic planning—by its nature can be more useful in fixing prices, and B2B owners should carefully weigh the dissemination of such information. Firewalls—operating policies that limit access to information, and network security—are key to protecting against improper disclosure, whether inadvertent or otherwise.

*Age and detail of information.* Old information is usually not helpful in fixing prices. Predictably, information about current or future transactions is most suspect, since it may allow competitors to signal each other about pending transactions. The DOJ, for example, challenged the price signaling aspects of an early B2B-type arrangement among the airlines. In *U.S. v. Airline Tariff Publishing Co.*, 58 Fed. Reg. 3971 (1/12/93) (Proposed Final Judgment and Competitive Impact Statement), the DOJ charged certain airlines with using a complex electronic fare disseminating system to signal potential price increases which could then be withdrawn without any sales being made if competitors did not follow along.

*Where else is the information available?* If the same information is already available, the exchange of the information through the B2B site is unlikely to affect the market, assuming that the B2B doesn't change the speed or manner in which the information is disseminated. Publicly available information is less likely to raise concerns than unique information, and readily accessible information is even less likely to raise concerns.

*Market structure.* It is important to evaluate the relevant market because it reveals how susceptible the market might be to price fixing. In spotting potential antitrust issues, consider how many competitors are in the market and how many of those competitors will be participating in the B2B exchange. Consider such structural aspects as market concentration, the characteristics of the buyers and sellers, and the advantage to be gained in colluding on price. Although the FTC report shied away from hard and fast rules, it did note that antitrust concerns increase in proportion to the degree of concentration in the market. Market concentration can take several forms. For example, if there are many buyers and few sellers, market control is concentrated in the hands of the sellers who account for a greater share of the market in their particular industry. In that case, a B2B founded by even a few of the sellers is likely to draw more attention than a B2B founded by a large group of buyers. B2B owners and operators should also consider barriers to the market for the goods traded on the B2B and homogeneity of the goods in the market.

No one element is conclusive and the facts of each case will determine the results. Market structure is dynamic, therefore certain elements can offset others and all relevant factors must be considered together. For example, high market shares may be irrelevant if there are low entry barriers, and the exchange of seemingly sensitive information may not raise substantial concerns if the same information is already available from other sources. "In short, to the extent

that a particular market is less susceptible to collusion, information-sharing agreements through B2Bs are likely to pose fewer collusion risks.” *Id.* at p. 8.

### **Exclusionary Rules: Who’s In and Who’s Out?**

The second area the DOJ and the FTC will ask about is whether the exchange is overly exclusive or overly inclusive. A B2B exchange might be overly exclusive when a group of competitors exclude other competitors from using or owning the exchange. If the exchange becomes essential for competition, the excluded firms may go out of business, thereby decreasing competition against the founders. An exchange might be overly inclusive if exchange owners adopt rules that prohibit other owners or participants from associating with competing exchanges. If the founders of the first B2B control enough of the market, it may be impossible for a rival exchange to develop, again, insulating the founders from competition.

Improper exclusion takes many forms. A straight agreement to prohibit certain rivals from investing in or using the B2B exchange is the most obvious type of exclusionary rule. Less obvious, but perhaps equally effective, are rules that discriminate against disfavored competitors. For example, operating rules that limit a disfavored rival’s use of certain features of the site may impose unrecoupable costs on those rivals, making them less effective competitors.

Similarly, improper inclusion takes multiple forms. The agreements between the founding members of a B2B exchange can limit their ability to invest in rival exchanges. Operating rules might prohibit anyone using the B2B exchange from using a rival exchange. Less explicit, but, again, perhaps as effective, are rules that require founders or other users to commit to use a B2B exchange for a certain portion of their business. If the “dedicated” portion of business is too high, there may not be enough business left for the rival exchange to effectively compete against the incumbent exchange.

There are no hard-and-fast rules about what is too exclusive or too inclusive. The FTC and the DOJ both recognize that the exclusive and inclusive aspects of a B2B exchange are not necessarily bad. To find the right balance, B2B owners should carefully evaluate the relevant market to determine what competitive effects the exclusionary and inclusionary provisions will have. These are highly fact-intensive inquiries. It is important in assessing whether a B2B is overly exclusionary to look at how important using the B2B exchange is for effective competition. If excluded rivals have good alternatives available to them, there probably won’t be antitrust concerns. In assessing whether a B2B is overly inclusive, B2B owners should look at a variety of factors, including what share of the market is controlled by the founders and users of the B2B and what share is available to competing exchanges.

The fact that most B2B exchanges are fledging enterprises with little or no market clout complicates the analysis. If and when an exchange takes off and becomes the gold standard for an industry, seemingly innocuous provisions can become antitrust problems. A B2B exchange must be evaluated for antitrust consequences at its launch and throughout its development which may be greatly accelerated by the ease and speed of communication on the Internet. In fact, it is the prospect of a B2B’s rapid success that makes the DOJ and the FTC leery of even start-up ventures that superficially seem to have no market power.

In the end, a B2B, stripped to its essential features, is little more than a joint venture among competitors—a structure the antitrust agencies have been evaluating for years. The difference is that the technology driving these ventures presents new ways in which information

can be collected, shared and used. In addition, the exclusionary and inclusionary rules designed to ensure the successful launch of a B2B site may quickly become dangerous to competition if the exchange achieves its promise. The message is that no B2B involving competitors is immune from antitrust scrutiny. The good news is that developing rules consistent with antitrust regulations can usually be done without impairing the basic business objectives of the exchange. By paying attention to antitrust issues at the outset, founders of B2B exchanges can be confident that their site won't a bumpy road on the information highway.

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