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Antitrust Concerns in the B2B Marketplace: Are They "Bricks and Mortar" Solid or a "Virtual" Haze?

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ANTITRUST CONCERNS IN THE B2B MARKETPLACE: ARE THEY "BRICKS AND MORTAR" SOLID OR A "VIRTUAL" HAZE?

Daniel Doda[†]

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I. INTRODUCTION

As more and more firms transact online in an attempt to cut procurement costs, operate more efficiently, and reduce transaction costs, business-to-business (“B2B”) electronic commerce sites have abounded. Tagging along with the increased interest of businesses conducting transactions online is the attentive and watchful eye of antitrust regulators. For example, the Big Three auto manufacturers (General Motors, Ford, and Daimler Chrysler) want to plan a venture creating a B2B marketplace where they can transact in raw materials, components, and parts.¹ The Federal Trade Commission is currently reviewing the venture.² Similarly, six of the nation’s largest meat agribusinesses (IBP Inc., Cargill, Inc., Smithfield Foods, Tyson Foods, Gold Kist, and Farmland Industries) are planning to launch a B2B cooperative site.³ Senator Paul Wellstone, D-Minn., and other Minnesota legislators have asked the Justice Department’s Antitrust Division to investigate the cooperative.⁴

This article begins by tracking the explosive growth of electronic commerce. Second, it provides a thorough description of the B2B marketplace.⁵ Third, in order to understand the framework of antitrust, this article provides a brief history of the relevant antitrust laws as applied in the traditional bricks and mortar marketplace.⁶ Fourth, a discussion applying the most relevant traditional antitrust laws to the B2B marketplace identifies several questions. Specifically, it questions the definition of the Internet’s

1. Charles Bogino, *Commercial Law—Electronic Commerce: Business-to-Business E-Markets Imperiled by Possible Antitrust Action*, *NAM Claims*, 68 U.S.L.Wk. 2632, 2633 (Apr. 25, 2000).

2. *Id.*

3. Andrea Foster, *B2Bs Raise Antitrust Concerns FTC Probes and Advises Exchanges*; *Lawyers in Demand*, *NAT’L L.J.*, May 8, 2000, at B1.

4. *Id.* (quoting Wellstone, “[w]hile this new alliance purports to enhance efficiencies, I am concerned about the market implications of our nation’s largest meat agribusinesses sharing market information and resources”).

5. *Infra* Part II.B.1-6.

6. *Infra* Part III.A-E.

relevant market,⁷ the formation of biased partnerships,⁸ the availability of pricing information on the Information Superhighway,⁹ and the identification of competitive relationships.¹⁰ Lastly, a review of the Antitrust Guidelines for Collaborations Among Competitors identifies some key issues to consider when forming a B2B marketplace, as well as a safety zone for joint ventures.¹¹

II. THE INTERNET REVOLUTION

The online marketplace, commonly known as electronic commerce,¹² is growing and developing at an astronomical pace. For example, radio took thirty-eight years to reach fifty million Americans, network television took thirteen years to reach fifty million and cable television took ten years to reach fifty million.¹³ By comparison, it took only three years after the first web browser became widely available for the Internet to reach approximately fifty million domestic users.¹⁴ In 1998 alone, the number of Internet domain names increased by forty-five percent and consumers spent roughly \$11 billion online.¹⁵ In 1999, consumers spent \$15 billion online.¹⁶ Consumers can now perform virtually any transaction online from purchasing airline tickets, to buying and selling stocks, to getting the top news story of the day. Currently, there are an estimated 171 million people using the Internet.¹⁷

A. *Types Of Electronic Commerce Transactions*

There are several ways investors can make money using the types of transactions on the Internet.¹⁸ Most investors' attention is

7. *Infra* Part IV.A, B.

8. *Infra* Part IV.C.

9. *Infra* Part IV.D.

10. *Infra* Part IV.E.

11. *Infra* Part V.

12. H.R. 4429, 106th Cong. (2000) (defining electronic commerce as "[c]ommercial transactions on the Internet, whether retail business-to-customer or business-to-business").

13. Robert Pitofsky, *Electronic Commerce and Beyond: Challenges of the New Digital Age*, at <http://www.ftc.gov/speeches/pitofsky/rpwilson2.htm> (Feb. 10, 2000).

14. *Id.*

15. David Balto, *Antitrust and the Emerging World of Electronic Commerce*, 10 ELECTRONIC BANKING L. & COM. REP. 9 (Apr. 1999).

16. Pitofsky, *supra* note 13.

17. *Id.*

18. ARTHUR B. SCULLEY & W. WILLIAM A. WOODS, *B2B EXCHANGES, THE KILLER APPLICATION IN THE BUSINESS-TO-BUSINESS INTERNET REVOLUTION* 3 (1999) [herein-

focused on companies or businesses that sell to consumers.¹⁹ This economic transaction is known as the “business-to-consumer” (“B2C”) transaction.²⁰ A consumer buying a book from Amazon.com, Inc.²¹ is an example of a B2C transaction.²²

Consumers can also transact with other consumers (“C2C”). Online auctions, such as eBay, Inc.,²³ where individuals can purchase items from other individuals, is an example of a C2C transaction.²⁴

Consumer-to-business (“C2B”) transactions, though relatively new, occur where the consumer states a price for a product.²⁵ Priceline.com,²⁶ where consumers can indicate a price they are willing to pay for such things as airline tickets, is an example of a C2B transaction.²⁷

The B2B is the last type of transaction that occurs on the Internet.²⁸ The B2B transaction occurs when businesses transact with other businesses over the Internet.²⁹

B. Growth Of The B2B Marketplace

Before the emergence of the B2B marketplace, a complex application called enterprise resource planning (“ERP”) was created.³⁰ ERP, used by large companies, manages inventory and integrates business processes across divisional and organizational boundaries.³¹ The application allows a company to keep track of

after “B2B EXCHANGES”].

19. *Id.*

20. *Id.*

21. Amazon.com, at <http://www.amazon.com> (last visited Sept. 14, 2000).

22. B2B EXCHANGES, *supra* note 18, at 3.

23. eBay.com, at <http://www.ebay.com> (last visited Sept. 9, 2000).

24. B2B EXCHANGES, *supra* note 18, at 3.

25. *Id.*

26. Priceline.com, at <http://www.priceline.com/> (last visited Sept. 9, 2000).

27. B2B EXCHANGES, *supra* note 18, at 3-4.

28. *Id.* at 4.

29. *Id.* Some examples of B2B exchanges are: Catastrophe Risk Exchange (www.catex.com), Chemdex Corporation (www.chemdex.com), Credit Trade (www.credittrade.com), e-Chemicals, Inc. (www.e-chemicals.com), Elinex, Inc. (www.el-in-ex.com), e-Steel (www.e-steel.com), MetalSite (www.metalsite.net), The National Transportation Exchange (www.nte.net), PaperExchange (www.paperexchange.com), PlasticsNet (www.plasticsnet.com), TechEx (www.techex.com). *Id.* at 196-246.

30. Susan S. DeSanti, *The Evolution of Electronic B2B Marketplaces*, at <http://www.ftc.gov/bc/b2b/b2bdesanti.htm> (last visited June 29, 2000).

31. Glossary, at <http://www.netmarketmakers.com/glossary/index.asp>. (last visited July 20, 2000).

products necessary to meet production schedules.³²

Companies then hardwired themselves together with other companies and acted as buyers and suppliers for each other.³³ This process is known as electronic data interchange (“EDI”).³⁴ Because EDI costs thousands of dollars to implement and acts within a closed system, businesses have looked for a more efficient way to conduct electronic commerce.³⁵

Thus, the B2B marketplace emerges as open for business from anywhere in the world, twenty-four hours a day, 365 days a year. In 1998, B2B marketplaces generated \$43 billion, and an estimate for 2003 is that B2B marketplaces will generate \$1.3 trillion.³⁶ By comparison, B2C will generate only \$108 billion by 2003.³⁷ That is explosive growth!

1. *Defining The B2B Marketplace*

The most basic definition of the B2B marketplace is “online transactions between one business, institution, or government agency and another.”³⁸ The B2B marketplace is about allowing “multiple buyers and sellers to carry out sales and procurement activities over the Internet.”³⁹

2. *Benefits Of The B2B Marketplace*

By bringing together large numbers of buyers and sellers, the B2B marketplace allows businesses to automate transactions, make

32. DeSanti, *supra* note 30.

33. B2B EXCHANGES, *supra* note 18, at 18-19.

34. Glossary, *supra* note 31 (defining EDI as an “[o]lder version of electronic commerce between buyers and suppliers; more cumbersome and costly than Net-based commerce, feasible only for large companies and their most significant trading partners”).

35. B2B EXCHANGES, *supra* note 18, at 18-19 (stating that the “reliability, speed, and security of the Internet” as well as the “acceptance of standards like extensible markup language (XML)” allows companies to exchange information on the Internet using a PC with a web browser and an Internet connection).

36. *Id.* at 18; *see also* H.R. 4429, 106th Cong. (2000) (stating that business-to-business transactions are “[o]ne of the fastest growing sectors of electronic commerce” and that by 2003, “business-to-business transactions will amount to more than ten times the amount of the 131 billion dollars estimated to have been reached in 1999”).

37. B2B EXCHANGES, *supra* note 18, at 18.

38. Glossary, *supra* note 31.

39. DeSanti, *supra* note 30 (describing the B2B marketplace as the process of “searching for, identifying, negotiating with, ordering and receiving from, and then paying an input supplier” while online).

choices available to buyers, give sellers access to new buyers, and reduce transaction costs.⁴⁰ In addition to businesses that reap rewards from buying and selling in the B2B marketplace, market makers can “earn vast revenues” by “extracting fees for transactions occurring within the B2B marketplaces.”⁴¹ Finally, “because the marketplaces are made from software—not bricks and mortar—they can scale with minimal additional investment, promising even more attractive margins as the markets grow.”⁴² All in all, it is estimated that B2B electronic commerce accounts for approximately seventy percent of the regular economy.⁴³ Thus the efficiency implications of B2B marketplaces are vast.

3. *How Businesses Conduct Business In B2B Marketplaces*

In order to understand B2B marketplaces, it is important to know how they conduct business online.⁴⁴ Businesses make purchases in two broad categories.⁴⁵

The first category, called “manufacturing inputs,” consists of “the raw materials and components that go directly into a product or a process.”⁴⁶ Because these goods produce a finished product, manufacturers usually purchase them from industry specific suppliers known as vertical markets.⁴⁷

The second category, called “operating inputs,” is generally not industry specific.⁴⁸ These goods, typically used by all businesses, are purchased from horizontal markets.⁴⁹

40. Steven Kaplan & Mohanbir Sawhney, *E-Hubs: The New B2B Marketplaces*, HARV. BUS. REV., May-June 2000, at 97-8.

41. *Id.* A net market maker is defined as a company, who does not necessarily own the goods, that creates an Internet market matching buyers and sellers. Glossary, *supra* note 31.

42. Kaplan & Sawhney, *supra* note 40, at 98.

43. DeSanti, *supra* note 30 (citing Eric Schonfeld, *Corporations of the World, Unite!*, E-COMPANY, June 2000, at 125).

44. *Id.*

45. Kaplan & Sawhney, *supra* note 40, at 98.

46. *Id.*

47. *Id.* A vertical market is defined as a market that “tend[s] to serve particular industries and provide product expertise and in-depth content knowledge for that industry.” DeSanti, *supra* note 30.

48. Kaplan & Sawhney, *supra* note 40, at 98. Another name for operating inputs is maintenance, repair, and operating (“MRO”). Glossary, *supra* note 31 (defining MRO as “routine purchases such as office supplies, travel services, or computers needed to run a business but not central to the business’s output”).

49. Kaplan & Sawhney, *supra* note 40, at 98. Two examples of vendors serving all types of industries are Staples and American Express. *Id.* Horizontal markets are markets that sell “materials or services that any company needs, not those used

Once it is understood what businesses purchase, it is necessary to determine how they purchase products and services. Basically, goods are bought through either systematic sourcing or spot sourcing.⁵⁰ Buyers purchase through systematic sourcing when they have “negotiated [long term] contracts with qualified suppliers.”⁵¹ By contrast, spot sourcing does not likely involve a long-term relationship between the buyer and seller.⁵² In spot sourcing, a buyer can purchase an immediately necessary product at the lowest possible price.

4. Classification Of B2B Marketplaces

After determining how businesses purchase goods and what goods they purchase, B2B marketplaces can be classified into four main markets: MRO hubs, yield managers, exchanges, and catalog hubs.⁵³

MRO hubs use a systematic sourcing buying technique for operating inputs.⁵⁴ Thus, they tend to develop long-term contracts across several different industries (horizontal markets).⁵⁵ MRO hubs tend to provide value by distributing goods with low value and high transaction costs.⁵⁶

Yield managers use a spot sourcing buying technique for operating inputs.⁵⁷ Accordingly, they provide short notice purchasing across several different industries (also horizontal markets).⁵⁸ Yield managers provide value by distributing goods and services that have significant “price and demand volatility.”⁵⁹

for manufacturing or production.” Glossary, *supra* note 31. Some companies serving the horizontal market in the B2B marketplace are Ariba Network, CommerceOne’s MarketSite.net, and EmployEase. *Id.*

50. Kaplan & Sawhney, *supra* note 40, at 98.

51. *Id.* (describing that buyers and sellers have a close relationship).

52. *Id.* A spot market is a “market for unplanned purchases not made under contract terms” and occurs on a “one-time basis.” Glossary, *supra* note 31.

53. Kaplan & Sawhney, *supra* note 40, at 98.

54. *Id.* at 98-99 (listing Ariba, W.W. Grainger, MRO.com, BizBuyer.com, CommerceOne, PurchasingCenter.com, and ProcureNet as MRO hubs).

55. *Id.* at 98.

56. *Id.*

57. *Id.* at 99 (listing Employease, Aداuction.com, CapacityWeb.com, Youtilities, eLance, and iMark.com as yield managers). An auction, “where buyers bid competitively for products from individual suppliers” is an example of a yield manager. Glossary, *supra* note 31. Auctions work well for hard-to-move goods and in situations of excessive inventory. *Id.*

58. Kaplan & Sawhney, *supra* note 40, at 98-99.

59. *Id.* at 99.

Exchanges use a spot sourcing buying technique for manufacturing inputs.⁶⁰ They provide short notice exchanges of “commodities or near-commodities [necessary] for production” in a specific industry (vertical markets).⁶¹ Exchanges provide value by maintaining a relationship with buyers and suppliers, but without the commitment of a negotiated contract.⁶²

Lastly, catalog hubs use a systematic sourcing buying technique for manufacturing inputs.⁶³ They provide purchasing and selling through long term contracts for goods used in specific industries (vertical markets).⁶⁴ Like MRO’s, catalog hubs create value by reducing transaction costs and by providing a large number of suppliers.⁶⁵

5. *The Market-Making Mechanism For B2B Marketplaces*

There are two different mechanisms used in B2B marketplaces: aggregation and matching.⁶⁶ Each mechanism works best under specific applications.

Aggregation provides one-stop shopping for companies.⁶⁷ It provides value by streamlining the transactions between businesses by “aggregating the product catalogs of many suppliers in one place and in one format.”⁶⁸ This mechanism is quite stable because prices are pre-negotiated.⁶⁹ Buyers will benefit when more sellers are added and sellers will benefit when more buyers are added.⁷⁰ Thus, aggregation is useful when: (1) transaction costs are high

60. *Id.* (listing e-Steel, PaperExchange.com, Altra Energy, and IMX Exchange as exchanges). An exchange is a “[t]wo sided marketplace ... where buyers and suppliers negotiate prices, usually with a bid and ask system, and where prices move both up and down.” Glossary, *supra* note 31.

61. Kaplan & Sawhney, *supra* note 40, at 99.

62. *Id.*

63. *Id.* at 98-100 (listing Chemdex, SciQuest.com, and PlasticNet.com as catalog hubs).

64. *Id.* at 99-100.

65. *Id.* Catalog hubs “[m]ake sense of buying options by aggregating catalogs from multiple vendors with relatively static prices” and assist buyers in understanding the multiple vendors. Glossary, *supra* note 31. They “function as virtual distributors but don’t take possession of goods themselves.” *Id.*

66. Kaplan & Sawhney, *supra* note 40, at 100.

67. B2B EXCHANGES, *supra* note 18, at 34 (listing e-chemicals, Chemdex, MetalSite, and PlasticsNet as examples).

68. *Id.*

69. Kaplan & Sawhney, *supra* note 40, at 100 (stating “the aggregation mechanism is static in nature”).

70. *Id.*

compared to the cost of the item; (2) the "[p]roducts are specialized, not commodities"; (3) there are a large number of specialized products; (4) the suppliers are fragmented;⁷¹ (5) buyers do not understand "dynamic pricing mechanisms"; (6) "[p]urchasing is done through pre-negotiated contracts"; and (7) metacatalogs can be created.⁷²

By contrast, matching "brings buyers and sellers together to negotiate prices on a dynamic and real-time basis."⁷³ Matching can occur on an auction and is required in spot sourcing because "prices are determined at the moment of purchase."⁷⁴ Both buyers and sellers benefit when either a buyer or a seller is added.⁷⁵ Therefore, matching is useful when: (1) commodities "can be traded sight unseen"; (2) trading costs are huge; (3) buyers and sellers understand "dynamic pricing"; (4) "[c]ompanies use spot purchasing to smooth the peaks and valleys of supply and demand"; (5) third parties perform shipping; and (6) "[d]emand and prices are volatile."⁷⁶

6. *Biases Of B2B Marketplaces*

The last important characteristic of a B2B marketplace is its bias. A B2B marketplace is either biased or neutral.⁷⁷

Neutral B2B marketplaces are "operated by independent third parties" and favor neither buyers nor sellers.⁷⁸ However, biased B2B marketplaces operate without a third party intermediary.⁷⁹ Basically, a partnership is formed and the B2B marketplace will then entertain either sellers or buyers.⁸⁰

71. Fragmentation is a "[m]arket condition when there is no dominant group of buyers or suppliers, but where many buyers are chasing many suppliers, often inefficiently." Glossary, *supra* note 31.

72. Kaplan & Sawhney, *supra* note 40, at 100.

73. *Id.* at 100-02.

74. *Id.* at 102.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Glossary, *supra* note 31.

80. *Id.* (stating that buy-side coalitions provide a lot of transactions, creating liquidity). An example of a bias for buyers is an auction, where there are several sellers, but only one buyer.

III. HISTORICAL DEVELOPMENT OF THE UNITED STATES ANTITRUST LAWS

Before there can be an antitrust analysis of the virtual B2B marketplace, there must be an understanding of how the antitrust laws have been applied to the brick and mortar marketplace.

Because the nation's economy underwent significant changes in industrialization and urbanization in the nineteenth century, Congress passed the Sherman Act in 1890.⁸¹ Congress followed up by passing the Federal Trade Commission Act in 1914.⁸²

The Sherman Act states in section 1 that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is ... declared to be illegal."⁸³ Section 2 states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"⁸⁴

The Federal Trade Commission Act empowers the commission to declare unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"⁸⁵

A. Monopolize

The concept of monopolization under section 2 of the Sherman Act is violated when a defendant: (1) possesses monopoly power; (2) in a relevant market; and (3) willfully acquires and maintains that power.⁸⁶

The possession of a monopoly power requires the "power to

81. Saul P. Morgenstern & Eamon O'Kelly, *Antitrust Enforcement in High Technology Industries: Keeping Cyberspace Safe For Innovators or Just Another Speed Trap On the Information Superhighway?*, 547 PLI/PAT, 1009, 1016 (1999).

82. *Id.*

83. 15 U.S.C. § 1 (1994 & Supp. IV 1998). Section 1 provides for very steep penalties for a violation of the Sherman Act. *Id.* If convicted, corporations may be fined up to \$10 million, individuals may be fined up to \$350 thousand, and both may face imprisonment of up to three years. *Id.*

84. 15 U.S.C. § 2 (1994 & Supp. IV 1998).

85. 15 U.S.C. § 45(a)(1) (1994 & Supp. IV 1998).

86. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (holding that eighty-seven percent of central station service business constitutes monopoly power).

control prices or exclude competition" in a relevant market.⁸⁷ Generally, a company's market share indicates whether a monopoly power exists.⁸⁸ However, market share alone may not be dispositive of a company's monopoly power because the company still must demonstrate the power to control prices or exclude competition.⁸⁹

The power to monopolize must occur within the relevant product market and relevant geographic market.⁹⁰ The relevant product market includes "commodities reasonably interchangeable by consumers for the same purposes."⁹¹ A product does not have to be fungible in order to be considered part of a relevant product market.⁹² The relevant geographic market is the "section of the country" in which firms compete with one another.⁹³

Lastly, monopolization requires "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."⁹⁴ The courts generally use such words as, "exclusionary," "anticompetitive," and "predatory" to describe the acts of monopolization.⁹⁵

An example of a predatory act occurs when a company harms consumers or competition "by making a short-term sacrifice in or-

87. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (appraising the illegal power to monopolize according to the terms of the competitive market for the product). "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *Id.* at 394.

88. *Grinnell*, 384 U.S. at 571. *See also* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2nd Cir. 1945) (stating that a market share of ninety percent gave it a monopoly). The court in *Aluminum Co.* stated that "it is doubtful whether sixty or sixty-four percent" of the market share constitutes a monopoly and "certainly thirty-three percent is not." *Id.* at 424.

89. *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993) (arguing that a sole existing bowling center with 100 percent of the market share is not a monopoly because it did not demonstrate the power to control prices or exclude competition).

90. *E.I. duPont de Nemours & Co.*, 351 U.S. at 394-95 (holding that the relevant market for cellophane includes other flexible packaging materials).

91. *Id.* at 395. An example of products competing in the same relevant market occurs when a decrease in the price of cellophane causes a significant number of other flexible packaging customers to switch to cellophane. *Id.* at 400.

92. *Id.* at 394.

93. *Brown Shoe Co., v. United States*, 370 U.S. 294, 324-28 (1962) (stating that the geographic market was nationwide when shoe manufacturers merged and distributed their shoes nationwide).

94. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

95. *Id.* at 576 (stating that restrictive agreements, pricing practices, and acquisition of competitors were part of an unlawful and exclusionary practice); *see also* *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990) (identifying "predatory conduct").

der to facilitate its exclusive, anti-competitive objectives.”⁹⁶ Exclusion occurred in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* when Aspen Skiing Company could not justify, by normal business purposes, its conduct of refusing to continue offering ski passes to Aspen Highlands customers, even though it would have been beneficial to Aspen Skiing Company.⁹⁷

B. Attempt To Monopolize

A violation of section 2 of the Sherman Act’s “attempt to monopolize” requires the plaintiff to “prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”⁹⁸

Proof of anticompetitive conduct may be used to infer “specific intent to monopolize.”⁹⁹ The intent necessary is “a specific intent to destroy competition or build [a] monopoly”¹⁰⁰ Lastly, a dangerous probability of achieving monopoly power requires a definition of the “relevant market” and an “examination of market power.”¹⁰¹ Generally, courts tend to reject claims of “dangerous probability” when a company’s market share is below fifty percent.¹⁰²

C. Contracts, Combinations And Conspiracies

There is a basic distinction between section 1 and section 2 of the Sherman Act. A violation of section 1 requires an unreasonable restraint of trade caused by a “contract, combination, or conspir-

96. *Advanced Health-Care Servs., Inc.*, 910 F.2d at 148 (arguing that the durable medical equipment provided for by the defendant was inferior in quality and more expensive than their competitor’s with adverse effects on the consumers and the competition).

97. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985) (sacrificing “short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival”).

98. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

99. *Nat’l Ass’n of Pharm. Mfrs., Inc., v. Ayerst Lab.*, 850 F.2d 904, 915 (2nd Cir. 1988).

100. *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 626 (1953) (stating that “no monopolist monopolizes unconscious of what he is doing”).

101. *Spectrum Sports, Inc.*, 506 U.S. at 455.

102. *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 1001 (11th Cir. 1993), cert. denied, 512 U.S. 1221 (1994); *Wichita Clinic, P.A., v. Columbia/HCA Healthcare Corp.*, 45 F. Supp. 2d 1164, 1193 (D. Kan. 1999).

acy” between separate entities.¹⁰³ A violation of section 2 occurs when a single firm “threatens actual monopolization.”¹⁰⁴ Thus, a section 1 violation occurs “when ‘the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.’”¹⁰⁵ Generally, restraint of trade is assessed through either a rule of reason analysis or a per se analysis.¹⁰⁶ However, the rule of reason is the standard most often used.¹⁰⁷

The “rule of reason” analysis, whether there is a restraint of trade, considers “a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.”¹⁰⁸ Thus, the rule of reason inquires only upon the “restraint’s impact on competitive conditions.”¹⁰⁹

There also exists a hybrid analysis of the rule of reason, coined the “quick-look” analysis.¹¹⁰ Nevertheless, the inquiry of “whether or not the challenged restraint enhances competition” remains the same in both analyses.¹¹¹

103. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (stating that concerted action involving horizontal price fixing and market allocation are “inherently anticompetitive” and illegal per se). The Court in *Copperweld Corp.* stated that concerted activity should be approached more aggressively because concerted activity divests the marketplace of its own individual decision-making. *Id.* at 768-69. Thus, multiple entities act to combine for a “common benefit,” which decreases diversity in the marketplace. *Id.*

104. *Id.* at 767.

105. *Id.* at 771 (stating that a corporation cannot conspire with its own subsidiary).

106. A.B.A. SECT. OF ANTITRUST LAW, 1999 REV. ANTITRUST L. DEV. 34 (2000).

107. *Id.*

108. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The Court in *Khan* explained that a supplier of gasoline may set a maximum price that a gas station operator can charge to its customers as long as the price fixing does not amount to “anticompetitive conduct.” *Id.* at 22.

109. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688-91 (1978) (holding that the rule of reason only considers whether the agreement is procompetitive or anticompetitive). The Court in *National Society of Professional Engineers* clearly demonstrated the rule of reason when it rejected the Society’s claim that competitive bidding for engineers may pose a threat to the public safety. *Id.* at 695. Safety and other ethical conduct is not a sufficient reason to abort competitive activity. *Id.* at 696.

110. *California Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (stating that the “quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained”).

111. *Id.* at 780 (reversing the court of appeals’ quick-look analysis that a dental association violates restraint of trade when it prevents dentists from certain types of advertising because of lack of anticompetitive scrutiny).

Certain types of agreements are deemed unreasonable restraints of trade per se when the "challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry'"¹¹² Examples of per se violations of section 1 of the Sherman Act include "horizontal price-fixing, market division, and certain types of group boycotts and tying arrangements."¹¹³

D. Pricing Arrangements

Vertical price-fixing arrangements between firms in an attempt to set a minimum price are illegal per se.¹¹⁴ However, vertical maximum price setting follows the rule of reason analysis and is not illegal per se.¹¹⁵

Horizontal price-fixing is considered to be unlawful per se.¹¹⁶ Fixing prices by competitors is illegal per se when it is either used to eliminate competition of other competitors or used as an in-

112. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing*, 472 U.S. 284, 289 (1985).

113. A.B.A. SECT. OF ANTITRUST LAW, *supra* note 106, at 37.

114. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400 (1911). Vertical agreements setting a minimum price between firms has been illegal per se as stated by the Supreme Court:

The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus, all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about.

Id. at 399-400 (quoting *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 42 (6th Cir. 1907)).

115. *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (holding that vertical maximum price setting is subject to the rule of reason analysis).

116. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101-02 (9th Cir. 1999) (stating that competitors in the sales of ski packages and lodging accommodations have standing "to enforce a price-fixing conspiracy," but first must allege antitrust injury).

strument of a conspiracy among competitors to reduce competition among themselves.¹¹⁷

"Price-fixing includes more than the mere establishment of uniform prices."¹¹⁸ The Supreme Court has stated that the "exchange of price data and other information among competitors does not invariably have anti-competitive effects."¹¹⁹ Therefore, when assessing the exchange of price data between competitors, the correct tool is the rule of reason analysis and not the per se rule.¹²⁰ This is so because in some cases the exchange of price data "increases economic efficiency and renders markets more, rather than less competitive."¹²¹

E. Refusals To Deal

"A 'refusal to deal' may raise antitrust concerns when the refusal is directed against competition and the purpose is to create, maintain, or enlarge a monopoly."¹²² In the absence of an intent to monopolize, a refusal to deal is generally lawful.¹²³

The establishment of a predatory intent is quite necessary in upholding a refusal to deal.¹²⁴ However, another approach in re-

117. *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 784 (7th Cir. 1999). "Competitors are permitted by the antitrust laws (and certainly by the per se rule) to engage in cooperative behavior, under trade association auspices or otherwise, provided they don't reduce competition among themselves." *Id.*

118. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940).

119. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). However, the Supreme Court asserted that competitors exchanging current pricing information, though not a per se violation, has been consistently held as a violation of the Sherman Act. *Id.*

120. *See id.*

121. *Id.* *See also* *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 390 (1923); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411 (1921).

122. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1358 (Fed. Cir. 1999) (holding that Intel's refusal to deal with Intergraph was without merit since Intergraph provided no support, indicating Intel's competitive position was enhanced).

123. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992) (stating that a monopolist may rebut evidence of refusals to deal by establishing a valid business justification for its conduct); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (stating that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

124. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (describing that an intent to monopolize the dissemination of news and advertising

fusal-to-deal cases is to invoke the “essential facilities” doctrine.¹²⁵ Crucial to the successful application of the “essential facilities” doctrine is the presence of a competitive relationship between the plaintiff and the defendant.¹²⁶

In *MCI Communications Corp. v. AT&T Co.*,¹²⁷ the court found liability under the “essential facilities” doctrine because the following elements were present: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”¹²⁸

IV. POTENTIAL ANTITRUST CONCERNS FOR THE B2B MARKETPLACE

There is no question markets are changing at Internet speed. With the rapid technological development and the accompanying market changes, the B2B marketplace has become the subject of market abuse. Accordingly, B2B marketplaces potentially may raise the same traditional antitrust questions that are raised by the traditional bricks and mortar marketplaces.¹²⁹

A. Monopolize

Recall that the concept to monopolize under section 2 of the Sherman Act consists of the possession of monopoly power in a relevant market willfully acquired and maintained.¹³⁰ B2B market-

occurred when the only newspaper in town refused to sell advertising to persons who also advertised on a competing radio station).

125. *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 400 (1912) (holding that an association of railroads controlling railroad terminals, bridges, and switching yards was created for the anticompetitive purpose of limiting competitors’ access to the crucial facilities).

126. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998) (stating that an antitrust claim occurs when a competing plaintiff is denied access by a monopolist to an essential facility); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991) (stating “the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first”). The court in *Alaska Airlines, Inc.* stated that the anti-competitive action by the monopolist must be intended to “eliminate competition in the downstream market.” *Alaska Airlines, Inc.* 948 F.2d at 545.

127. 708 F.2d 1081 (7th Cir. 1983).

128. *Id.* at 1132-33.

129. DeSanti, *supra* note 30.

130. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

places must be able to live within this rule.

In *Sea-Land Service, Inc. v. Atlantic Pacific International, Inc.*,¹³¹ the court stated that Sea-Land's market share of thirty-three percent was not sufficient to support a monopoly power.¹³² More interestingly, the court also stated that Sea-Land's and Matson's market shares could not be lumped together without a showing of concerted action.¹³³ This holding infers that for a B2B marketplace to possess a monopoly, the multiple buyers and/or sellers must act in a concerted manner.¹³⁴

*America Online, Inc. v. GreatDeals.Net*¹³⁵ recently addressed the concept of the relevant market. In that case, the court rejected the defendant's description of e-mail advertising as a relevant product market because GreatDeals.Net did not present evidence of an interchangeable substitute.¹³⁶ The court described a number of interchangeable substitutes for e-mail advertising, including "World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets."¹³⁷

Interestingly, the court also defined the relevant geographic market of the Internet.¹³⁸ The Internet cannot be defined by its outer boundaries because "[i]t is not a place or location; it is infinite."¹³⁹ In AOL's case, the geographic market could not be limited to just their subscribers because there are "literally tens of millions of people with access to the Internet [and] there are other means of advertising" to people on the Internet and AOL subscribers.¹⁴⁰

Thus, a B2B marketplace only provides one place to supply or buy a product or service. Therefore, any conceptualization to monopolize by a B2B marketplace would be difficult due to the current definition of the geographic market of the Internet. Obviously, a competitor would still have other more traditional means to supply or buy products and services.

131. 61 F. Supp. 2d 1102 (D. Haw. 1999).

132. *Id.* at 1113; see also *supra* note 88 and accompanying text.

133. *Sea-Land Serv., Inc.*, 61 F. Supp. 2d at 1113-14.

134. *Id.*

135. 49 F. Supp. 2d 851 (E.D. Va. 1999).

136. *Id.* at 858. See also *supra* notes 91 & 92 and accompanying text.

137. *Am. Online, Inc.*, 49 F. Supp. 2d at 858.

138. *Id.*

139. *Id.* (quoting *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 456, 457 (E.D. Pa. 1996)).

140. *Id.*

B. Attempt To Monopolize

As stated in *Spectrum Sports, Inc. v. McQuillan*,¹⁴¹ any attempt to monopolize requires the plaintiff to show "anticompetitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power."¹⁴²

The most often used criterion in determining whether there is a dangerous probability of achieving monopoly power is a company's ability to stifle competition in a relevant market.¹⁴³ As seen in *America Online, Inc.*, the geographic market of the Internet is without boundaries and is infinite.¹⁴⁴ That court held there was no probability that AOL could achieve a monopoly because the Internet is infinite.¹⁴⁵ A court is unable to measure the market share of companies conducting business on the Internet simply because that market is without definition.¹⁴⁶

Thus, because the B2B marketplace conducts business through the Internet,¹⁴⁷ the B2B marketplace has no defined relevant market. Unless and until a court determines the geographic boundaries of the Internet, B2B marketplaces cannot be found inviolate of an attempt to monopolize.

C. Contracts, Combinations And Conspiracies

As stated earlier in Part III.C., any restraint of trade by a con-

141. 506 U.S. 447 (1993).

142. *Id.* at 456.

143. *Id.*

144. *Am. Online, Inc.*, 49 F. Supp. 2d at 858.

145. *Id.* at 861; *see also* *Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 486-87 (D.C. Cir. 1996) (stating that there is no unlawful attempt to monopolize the "Blue Car" corporate contract service market when there is no indication that monopolization of that relevant market is even possible).

146. *Am. Online, Inc.*, 49 F. Supp. 2d at 861 (stating that "[t]he Internet is not regulated and an entrant's ability to participate in the market and offer services like that offered by AOL is without boundary"). The lack of regulation upon the Internet has been recognized:

No single entity—academic, corporate, governmental, or non-profit—administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocol to exchange communications and information with other computers (which in turn exchange communications and information with still other computers).

Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 456, 459 (E.D. Pa. 1996) (quoting *Am. Civil Liberties v. Reno*, 929 F. Supp. 824, 832 (E.D. Pa. 1996)).

147. *Supra* note 29 and accompanying text.

tract, combination, or conspiracy between two entities is illegal. Generally, the rule of reason analysis will determine whether there is a restraint of trade.¹⁴⁸

In determining a violation of restraint of trade by contract, combination, or conspiracy in a B2B marketplace setting, some determination of its bias is inevitable. For example, a neutral B2B marketplace is unlikely to be in violation since it is operated by an independent third party and favors neither buyers nor sellers.

However, a biased B2B marketplace may present a question of whether the forming of a partnership, for the purpose of entertaining either suppliers or buyers, amounts to a conspiracy. The district court in *Modesto Irrigation District v. Pacific Gas & Electric Co.*¹⁴⁹ reiterated the Supreme Court's holding that "[a] § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement."¹⁵⁰

Thus, in this context, the formation of a biased B2B marketplace should be advanced with some trepidation.

D. Pricing Arrangements

Generally, price-fixing agreements are per se illegal.¹⁵¹ However, when pricing occurs as merely an exchange of information, certain economic efficiencies and procompetitive behavior may result.¹⁵² In this case, where there is no direct evidence of price-fixing, the rule of reason analysis applies.¹⁵³

In the context of B2B marketplaces, the exchange of pricing information occurs almost instantaneously, assuming firms wish to provide their most current and accurate price. This raises the concern of "conscious parallelism" where two or more competitors in a market act separately but in parallel fashion in their pricing decisions.¹⁵⁴ Conscious parallelism is probative evidence of competitor price-fixing.¹⁵⁵ Certain "plus factors" must exist in an analysis of

148. *Supra* Part III.C. and accompanying notes.

149. 61 F. Supp. 2d 1058 (N.D. Cal. 1999).

150. *Id.* at 1065 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984)).

151. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

152. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125-26 (3d Cir. 1999).

153. *U.S. Gypsum Co.*, 438 U.S. at 441 n.16.

154. *In re Baby Food Antitrust Litig.*, 166 F.3d at 121-22.

155. *Id.* at 122.

conscious parallelism, including action contrary to economic interest and motivation to enter a price-fixing arrangement.¹⁵⁶

The court in *In re Baby Food Antitrust Litigation* used the rule of reason to affirm the lower court's decision, holding that the exchange of price information, by word of mouth, between sales representatives of the three largest manufacturers of baby food, does not rise to a conspiracy to price-fix.¹⁵⁷ The court reasoned the selected information was current, public and available for all to see.¹⁵⁸

Using this analysis, pricing information placed on the Internet by B2B marketplaces likely would fall short of price-fixing because the Internet is public and available for all to see and use. Unless there is collusion between competitors (discussed below in section V under the heading of Joint Ventures), price-fixing within a B2B marketplace under the exchange of information theory likely requires direct evidence.¹⁵⁹

E. *Refusal To Deal*

Recall a refusal to deal is an antitrust violation when the refusal, directed against competition, is intended to create, maintain, or enlarge a monopoly.¹⁶⁰

In *Intergraph Corp. v. Intel Corp.*,¹⁶¹ Intergraph sued Intel's customers, alleging infringement of its patents.¹⁶² Intel then withdrew its technical assistance and other special benefits it previously provided Intergraph.¹⁶³ The lower court issued an injunction, requiring Intel to continue to deal with Intergraph.¹⁶⁴ However, the Federal Circuit reversed, holding that there was no violation of section 2 because Intel's action injured a customer, not a competitor.¹⁶⁵

156. *Id.*

157. *Id.* at 121-27 (stating that defendant's communications with competitors were not related to the setting of price, the information the defendant communicated was all current or public, and defendant did not act on any information obtained through the communications).

158. *Id.* at 126.

159. *Id.* at 118-21.

160. See discussion *supra* Part III.E.

161. 195 F.3d 1346 (Fed. Cir. 1999).

162. *Id.* at 1350.

163. *Id.* The court recognized that the bringing of a lawsuit by a customer is a legitimate business reason for a manufacturer to terminate their business relations. *Id.* at 1358.

164. *Id.* at 1350-51.

165. *Id.* at 1358-59.

The requisite intent was also lacking in *America Online, Inc.*¹⁶⁶ GreatDeals.Net alleged that America Online threatened to cut off AOL subscribers from other Internet providers if they continued to deal with GreatDeals.Net.¹⁶⁷ The court stated GreatDeals.Net failed to plead facts sufficient to infer intent to monopolize or attempt to monopolize.¹⁶⁸

Thus, the cases cited above indicate the current trend continues to require a competitive relationship between the plaintiff and the defendant. When the structure of a B2B marketplace resembles suppliers and buyers using a matching mechanism for spot sourcing, such as an exchange or yield manager, a competitive relationship is usually lacking. Consider the relationship. It is symbiotic. A supplier requires a means to distribute its product, and a buyer requires a means to acquire a product. In addition, since prices are negotiated on a real time basis in an exchange or yield manager, the addition of new buyers or sellers is beneficial because the lowest prices can be attained. Accordingly, the intent necessary for a refusal to deal allegation is unlikely found in such a symbiotic relationship.

The refusal to allow a competitor access to an essential facility¹⁶⁹ also implicates a refusal to deal.¹⁷⁰ In *Intergraph Corp.*, the court rejected Intergraph's claim that Intel's chip samples and technical information were essential facilities.¹⁷¹ The court based its decision on the absence of a competitive relationship and a relevant market.¹⁷²

In *America Online, Inc.*, the court granted AOL's motion to dismiss because the defendants failed to plead the second, third, and fourth elements of the essential facilities test.¹⁷³ "Elements two, three, and four require that the monopolist and the plaintiff are competitors."¹⁷⁴ Specifically, the defendants failed to allege AOL was a competitor in the unsolicited bulk mail market and that the

166. *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 862 (E.D. Va. 1999).

167. *Id.* at 860-61.

168. *Id.*

169. *Id.* at 862 (stating "[a]n 'essential facility' is one which is not merely helpful but vital to the claimant's competitive viability").

170. See discussion *supra* Part III.E.

171. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-58 (Fed. Cir. 1999).

172. *Id.*

173. *Am. Online, Inc.*, 49 F. Supp. 2d at 862-63.

174. *Id.* at 862.

defendants could not reasonably duplicate AOL's facility.¹⁷⁵

When considering whether a claimant's denial to a B2B marketplace violates the essential facilities doctrine, one vital element is to determine if there is a competitive relationship between the market maker and the claimant.¹⁷⁶ When the bias of the market maker is neutral or operated by an independent third party, the competitive relationship element will most likely be lacking. On the other hand, if the market maker is biased, the market maker could possibly have competitive reasons for denying the claimant access to the essential facility.

V. JOINT VENTURES

A. *Collaboration Guidelines*

Typically, a collaborative venture to form a B2B marketplace is negotiated to achieve cost savings or other procompetitive benefits.¹⁷⁷ Recognizing the potential cost savings, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") have issued the Antitrust Guidelines for Collaborations Among Competitors (Collaboration Guidelines).¹⁷⁸

The preamble of the Collaboration Guidelines acknowledges that competitors occasionally need to collaborate "[i]n order to compete in modern markets."¹⁷⁹ "Such collaborations often are not only benign but procompetitive."¹⁸⁰ The purpose of the Collaboration Guidelines is to explain how certain antitrust issues raised by collaboration between competitors will be analyzed.¹⁸¹

175. *Id.* at 862-63.

176. Recall a market maker is someone who creates an Internet market that matches buyers and sellers. Glossary, *supra* note 31.

177. Marc D. Machlin, *Sleeping with the Enemy? Antitrust Advice For Online Collaborators*, 16 FORT. 38, 38 (Sept. 2000).

178. Guidelines for Collaborations Among Competitors, 4 Trade Reg. Rep. (CCH) ¶ 13,160 (Apr. 7, 2000) [hereinafter Collaboration Guidelines].

179. *Id.* ¶ 13,161, preamble (stating "[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs").

180. *Id.*

181. *Id.* (explaining that no set of guidelines can provide specific answers to every antitrust question arising from competitor collaborations). Thus, the Collaboration Guidelines provide an analytical framework in which competitor collaborations may be formed procompetitively. *Id.*

B. Overview Of The Collaboration Guidelines

Section 1 of the Collaboration Guidelines provides a basic outline of the analysis the DOJ and FTC will use in addressing the legality of competitor collaborations.¹⁸²

Section 2 provides general principals for evaluating competitor collaborations.¹⁸³ This section lists four principles: identifying potential procompetitive benefits,¹⁸⁴ identifying potential anticompetitive harms,¹⁸⁵ analysis of the overall collaboration,¹⁸⁶ and assessing the competitive effects at the time of the harm to competition.¹⁸⁷

Section 3 provides the analytical framework for evaluating competitor collaboration agreements.¹⁸⁸ For example, "[a]greements that always or almost always tend to raise price or reduce output are per se illegal."¹⁸⁹ However, if the participant's agreement is related to an efficiency enhancing activity and is reasonably tied to procompetitive benefits, then a rule of reason analysis will be used.¹⁹⁰ In determining whether the procompetitive benefits offset the anticompetitive harm, the inquiry is whether the agreement limits the ability of participants to make decisions on such things as price and output, or whether the agreement facilitates an opportunity for competitors to collude on anticompetitive

182. *Id.* ¶ 13,161, § 1 (defining a competitor collaboration as an agreement "between or among competitors to engage in economic activity, and the economic activity resulting therefrom").

183. *Id.* ¶ 13,161, § 2.

184. *Id.* (recognizing some possible procompetitive benefits from competitor collaboration, including the ability to offer goods and services that are cheaper and more valuable to consumers, the ability to bring the goods to market faster, and the ability to reduce the time to develop and ultimately sell new products).

185. *Id.* (stating that "[c]ompetitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement").

186. *Id.* (explaining that any agreement or set of agreements between competitors will be analyzed to determine whether it harms competition).

187. *Id.* (realizing that the relevant agreement may change over time, due to change in circumstances, internal reorganization, adoption of new agreements, change in market conditions, or change in market share, competitive effects will be assessed at the time of the possible harm to competition).

188. *Id.* ¶ 13,161, § 3.

189. *Id.* ¶ 13,161, § 3.2 (identifying agreements by competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce as illegal per se).

190. *Id.* ¶ 13,161, § 3.3 (stating that the rule of reason is a flexible inquiry and focuses on the nature of the agreement and market conditions). The inquiry is to determine the business purpose of the agreement and whether it has already caused anticompetitive harm. *Id.*

terms.¹⁹¹

Some key issues concerning B2B marketplace collaboration agreements include purchasing and buying collaborations, exclusion, and information sharing.

1. *Purchasing Or Buying Collaborations*

Joint purchasing can help to reduce transaction costs and be procompetitive by enabling “participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies.”¹⁹²

On the other hand, there are risks associated with the efficiencies. For example, there is the possibility purchasing agreements can create or increase market power, or produce an incentive to drive the price of the product downward, ultimately limiting the output below what would prevail in the absence of the agreement.¹⁹³

The essential element to consider is whether the collaboration can obtain market power. Thus, when the collaboration combines to purchase an item bought in large quantities worldwide, such as pencils, it is unlikely the collaboration will obtain market power.¹⁹⁴ However, market power is likely to occur when the collaboration is buying a specialized item, such as automobile axles.¹⁹⁵

2. *Exclusivity*

Exclusivity involves rules prohibiting B2B marketplace participants from joining other B2B marketplaces.¹⁹⁶ A collaboration of competing firms should be allowed to compete against each other and against new B2B marketplaces.¹⁹⁷

The Collaboration Guidelines suggest competitive concerns

191. *Id.* ¶ 13,161, § 3.31(a-b).

192. *Id.* ¶ 13,161, § 3.31(a).

193. *Id.*

194. DeSanti, *supra* note 30.

195. *See id.*

196. *Id.*

197. Machlin, *supra* note 177, at 43 (recommending that “participants should avoid financial arrangements that eliminate their incentives or ability to compete”). Machlin suggests the B2B marketplace should be managed independently of the participants, allowing sensitive decisions to be made without consulting the individual participants. *Id.* at 43-44. Under this reasoning, a participant in a bi-sided B2B marketplace, in order to compete independently, should retain other assets necessary to compete. *Id.*

are lessened, provided that B2B marketplace participants “actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.”¹⁹⁸ Susan DeSanti outlined three inquiries when analyzing anticompetitive effects from exclusion from the B2B marketplace: (1) whether the excluded company can obtain an adequate substitute at a comparable cost; (2) whether the exclusion had competitive consequences in the relevant market; and (3) whether the exclusion harmed competition as opposed to a single competitor.¹⁹⁹

3. Sharing Of Information

Certain collaboration agreements between competitors may present an opportunity for the participants to collude anticompetitively.²⁰⁰

The Collaboration Guidelines suggest that “other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concerns.” As discussed previously, the B2B marketplace is in a position to publish pricing information on a real time basis, suggesting collusion.

An example of information sharing using modern information technology occurred in *United States v. Airline Tariff Publishing Co.*²⁰¹ In this case, the defendant airlines used a computerized fare dissemination service to announce price changes in the future for the purpose of reaching an agreement on price.²⁰² The airlines eventually signed a consent agreement prohibiting specific price-fixing agreements.²⁰³ This case indicates computerized information networks are capable of disseminating collusive price signaling and price-fixing information.²⁰⁴

On the other hand, not all exchange or disclosure of information between competitors involves collusion. The Collaboration Guidelines “recognize that the sharing of information among com-

198. Collaboration Guidelines, 4 Trade Reg. Rep. ¶ 13,161, § 3.34(a).

199. DeSanti, *supra* note 30.

200. Collaboration Guidelines, 4 Trade Reg. Rep. ¶ 13,161, § 3.31(b).

201. 58 Fed. Reg. 3971 (1993).

202. *Id.* at 3976 (explaining the defendant airlines “exchanged clear and concise messages setting forth the fare changes that each preferred, and [then] engaged in an electronic dialogue to work out their differences”).

203. *Id.* at 3978.

204. Richard M. Steuer, *To B2B Or Not To B2B?*, 14 ANTITRUST 4, 4 (Summer 2000).

petitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations.”²⁰⁵

4. *Safety Zone*

Lastly, section 4 of the Collaboration Guidelines identifies two “safety zones” for collaborative ventures.²⁰⁶ Since not all competitor collaborations are anticompetitive, the DOJ and FTC adopted a “safety zone” to encourage procompetitive behavior.²⁰⁷

Section 4.2 is the most relevant when considering the collaboration of competitors in a B2B marketplace. The Collaboration Guidelines provide that “[a]bsent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.”²⁰⁸ However, this safety zone is not available if a collaboration agreement is per se illegal.²⁰⁹ Reliance on this safety zone when forming a B2B marketplace may be risky. For example, participants to a collaboration agreement for a B2B marketplace may experience an increase in market share over time that exceeds the twenty percent level.²¹⁰ However, simply because a competitor collaboration falls outside the twenty percent safety zone does not automatically indicate anticompetitive behavior.²¹¹

Because a B2B marketplace offers significant transactional cost savings, increased efficiency does not make it immune from anti-trust concerns. Specifically, the DOJ and FTC indicate concern regarding increased market power of collaborating competitors, exclusive dealings, and collusive information sharing. The Collaboration Guidelines provide some guidance as well as a “safety zone” to navigate clear of these areas.

205. Collaboration Guidelines, 4 Trade Reg. Rep. ¶ 13,161, § 3.31(b) (stating the “sharing [of] certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration”).

206. *Id.* ¶ 13,161, § 4.

207. *Id.* ¶ 13,161, § 4.1.

208. *Id.* ¶ 13,161, § 4.2.

209. *Id.*

210. Machlin, *supra* note 177, at 42.

211. Collaboration Guidelines, 4 Trade Reg. Rep. ¶ 13,161, § 4.1.

VI. CONCLUSION

As more and more businesses discover the savings and efficiencies available through a B2B marketplace, scores more will want to become part of the “technological renaissance.” Although B2B marketplaces are reinventing the way to do business online, they cannot evade antitrust scrutiny. The purpose of this article is not to suggest the application of some hard-fast rules to the progressively evolving B2B marketplace technology, but to identify key antitrust issues pertaining to the B2B marketplace.

The application of the “bricks and mortar” antitrust laws to the “virtual” B2B marketplace requires a specific definition of a relevant market and specifically the geographic market. Defining the geographic market of the Internet as “infinite” may not be specific enough. In addition, determining whether the B2B marketplace operates by an independent third party or a partnership of buyers and/or sellers will be important and, if it is a partnership, whether the partnership consists of competitors needs to be determined. A final issue is whether public information exchanged on the Internet on a real time basis constitutes an illegal exchange of information. These questions require answers.

Recognizing these issues, the DOJ and FTC have published the Collaboration Guidelines to provide guidance in the formation of B2B marketplaces. The Guidelines specifically address the formation of buying collaborations, exclusivity, and the exchange of information. However, they are only guidelines. Whether they can keep pace with the B2B marketplace technology remains to be seen.

The ultimate question is whether certainty achieved through more regulation will offset the business and public benefits B2B marketplaces create.
