PART 3

ANTITRUST ANALYSIS OF B2BS

As illustrated in Part 2, B2Bs can offer tremendous efficiencies. They can help reduce administrative costs, cut search costs, open new markets, check unmonitored corporate spending, aid efficient joint purchasing, facilitate supply chain management, and facilitate efficient collaborations for such projects as joint product design, among other things.[1]

B2Bs may also raise a wide variety of antitrust issues, depending on their structure, bylaws, operating rules, contracts with participants, ownership and management, the characteristics of the markets in which they operate and that they may affect, and other factors. Workshop panelists reported, however, that the antitrust concerns that B2Bs may raise are not new and agreed that B2Bs are amenable to traditional antitrust analysis. Some panelists commented that, when antitrust concerns do arise, familiar safeguards may be sufficient to address those issues. Indeed, it appears likely that many potential concerns could be eliminated through well-crafted B2B operating rules. Consequently, the discussion that follows does not warn of insoluble problems, but rather lays the foundation for identifying and addressing circumstances that warrant antitrust scrutiny.[2]

Rather than address all potential issues, this Report focuses only on those issues that were discussed extensively at the workshop. Workshop participants expressed concerns about how B2Bs would affect competition in two types of broadly defined markets: the markets for goods traded on B2Bs (or derived from those traded on B2Bs) at both the seller and the buyer levels, and the market for marketplaces themselves. Participants noted that markets for goods traded on B2Bs (or derived from those traded on B2Bs) might be affected by information-sharing

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[1] *See supra* at Part 2.B-2.I.

[2] To date, the Commission has reviewed only one B2B. *See* In re Covisint, Inc., File No. 001 0127 (Sept. 11, 2000), *closing letter to General Motors Corp., Ford Motor Co., and DaimlerChrysler AG available at* <www.ftc.gov/os/2000/09/covisintchrysler.htm> (last visited October 23, 2000). In its letter closing the investigation of whether the formation of Covisint violates Section 7 of the Clayton Act and terminating the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act, the Commission found no further action warranted at this time but stated as follows:

> Because Covisint is in the early stages of its development and has not yet adopted bylaws, operating rules, or terms for participant access, because it is not yet operational, and in particular because it represents such a large share of the automobile market, we cannot say that implementation of the Covisint venture will not cause competitive concerns.

Id.

agreements that could facilitate coordination, the exercise of monopsony power by large buying groups, or agreements among competitors to exclude or discriminate against rivals of a B2B's participant-owners. In addition, the health of competition among marketplaces themselves might be affected by exclusivity, either de facto through over-inclusive ownership structures or through rules or incentives that keep a B2B's participants from using or supporting a rival exchange.

Such competition issues are not new to antitrust analysis. Indeed, "the issues in the B2B area are the same kinds of issues that [the FTC has] dealt with in joint venture analysis."[3] "The evolution of dynamic economies is about change, improvements, success, and failures, but always progress,"[4] and although such dramatic technological changes have sometimes "turned the world upside down . . . our antitrust laws and basic modes of analysis have survived."[5] Monitoring B2Bs under the "old rules" of antitrust will present "new challenges to the FTC," to be sure.[6] But the FTC has learned from its decades of experience "that in new markets, like those based in technology, . . . the fundamental principles of antitrust and consumer protection still apply."[7] Panelists agreed that B2Bs are subject to traditional antitrust analysis, noting that "the joint venture analysis and the [Competitor] Collaboration Guidelines are appropriate in this framework."[8] Accordingly, the following discusses these issues pursuant to familiar principles of

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[3] Remarks of Commissioner Thomas B. Leary Before FTC Workshop on Competition Policy in The World of B2B Electronic Marketplaces, Washington, D.C. (June 30, 2000), *available at* www.ftc.gov/bc/b2b/b2bleary.htm (last visited Oct. 18, 2000).

[4] Remarks of Commissioner Orson Swindle Before FTC Workshop on Competition Policy in The World of B2B Electronic Marketplaces, Washington, D.C. (June 29, 2000), *available at* www.ftc.gov/bc/b2b/b2bswindle.htm (last visited Oct. 18, 2000).

[5] Remarks of Commissioner Thomas B. Leary Before FTC Workshop on Competition Policy in The World of B2B Electronic Marketplaces, Washington, D.C. (June 30, 2000), *available at* www.ftc.gov/bc/b2b/b2bleary.htm (last visited Oct. 18, 2000).

[6] Remarks of Commissioner Sheila F. Anthony Before FTC Workshop on Competition Policy in The World of B2B Electronic Marketplaces, Washington, D.C. (June 29, 2000), *available at* www.ftc.gov/bc/b2b/b2banthony.htm (last visited Oct. 18, 2000).

[7] Remarks of Commissioner Mozelle W. Thompson Before FTC Workshop on Competition Policy in The World of B2B Electronic Marketplaces, Washington, D.C. (June 30, 2000) *available at* http://www.ftc.gov/bc/b2b/b2bthompson.htm (last visited Oct. 18, 2000).

[8] Proger 508-09 (suggesting "traditional antitrust analysis" for B2Bs, and referring to the Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors (2000) (hereinafter "Competitor Collaboration Guidelines")); *see also* Wilkinson 557-58 (noting that although the facts presented by B2Bs are novel, the antitrust "analysis remains the same"); Keller & Heckman (Stmt) 1-2 (noting that the Competitor

antitrust law.

A. Market for Goods Bought & Sold on B2Bs

1. Information-Sharing Agreements

As the Competitor Collaboration Guidelines make clear, information-sharing agreements among competitors may be procompetitive and reasonably necessary to realize a collaboration's procompetitive benefits.[9] Indeed, information-sharing within B2Bs may, under certain circumstances, help them realize important efficiencies and facilitate prompt competitive responses in the market.[10] However, at the FTC's workshop, several participants expressed concerns that information-sharing agreements in the context of B2Bs could facilitate coordination on price or other competitive terms and thereby be likely to injure competition in the market for the goods traded on the B2B or in downstream product markets.[11] They noted that the same factors that make the efficiencies of B2Bs possible – the collaborative nature of B2Bs and the Internet's power to allow the efficient exchange of information – also have the potential to raise anticompetitive concerns, particularly in connection with information sharing. The difficult task is determining when information-sharing agreements are procompetitive and when they are likely to injure competition. As one participant put it, "Whether [instant transmission of information] constitutes the effective functioning of Adam Smith's perfect marketplace or collusive violations

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Collaboration Guidelines provide "an analytical framework for examining the organization and operation of B2B sites," and that "[a]lthough Internet transactions and B2B sites are based on new or emerging technology, the same fundamental analytical framework continues to apply"); Foer (Stmt) 1-2 (refuting argument that antitrust should not apply to the "new economy").

[9] Competitor Collaboration Guidelines at § 3.31(b).

[10] *See, e.g., supra* at Part 2.C, 2.D, 2.H, 2.I. *See generally* United States v. United States Gypsum Co., 438 U.S. 422, 443 n.16 (1978) (exchange of information among competitors can "in certain circumstances" promote efficiency and competition).

[11] *See, e.g.,* Foer (Stmt) 2 ("Too much [information] sharing" can enable participants to fix prices "through coordination mechanisms that are so subtle that price fixing may never be provable in court" and thus "[w]e need antitrust rules as to what information can or cannot be shared among competitors."); Cooper 505 (collusion is an issue); Baker 494-95 (raising collusion concerns); Enron (Stmt) 3 (information made available through a B2B "should not be used to reduce competition" among the B2B's participants). *Cf.* Charles F. Rule, Mark E. Plotkin, & Michael J. Fanelli, "B2B or Collusion? That Is the Question Antitrust Enforcers Will Ask of Business-to-Business Sites," Legal Times, April 3, 2000, at 36.

of antitrust laws remains to be seen, and will likely differ in particular cases."[12]

Participants raised a variety of ways in which certain information-sharing agreements through B2Bs could facilitate collusion. In particular, they expressed concern about the incentives of the B2B's participant-owners to share competitively sensitive information only among themselves.[13] They asked, for example, whether seller-owners in a concentrated market could agree to a practice that would let them see B2B data about the prices that their rivals are charging, and whether that could lead to their tacit collusion on price – tacit collusion that might be more likely to succeed given an enhanced ability to monitor such interdependent behavior through the B2B.[14] Concerns were not limited to sellers' actions. Workshop participants questioned whether buyers could share information through a B2B that could lead to tacit collusion and the effective policing of such a tacit arrangement. For example, they expressed concerns as to whether buyers could agree to share through the B2B enough information about their purchases of inputs to lead to tacit collusion on the prices they would charge for their outputs or on the quantity of outputs that they would produce.[15] Such a practice could also offer a means of detecting deviations from such tacit arrangements, they noted.[16] Moreover, they asked whether buyers could agree to share information through a B2B about transaction terms such as "payment options, payment dates, financing terms, and perhaps even warranties," and whether that could lead to the "standardization" of those terms.[17] These are but a sampling of the

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[12] Keller & Heckman (Stmt) 2. *See also* Baker 494 ("B2B exchanges seem to me to be about information exchange . . . but of course information exchange can be the source of competitive problems as well."). *But see* Jasinowski 503-04 (stating that information sharing is more likely to be pro-competitive than anticompetitive).

[13] *See, e.g.,* OESA (Stmt) 4 (if "the exchange is controlled by all participants in a specific level of the supply chain, they will be incentivized to share specific information across that level and to mask the information with regard to participants at different levels."); Keller & Heckman (Stmt) 5-6 (information exchange concerns "may be exacerbated" where one or more market participants own the marketplace). Some raised concerns about whether the participant-owners might do so by sending employees to serve on the board of directors of the B2B or to work for the B2B in some other capacity. *See supra* at Part 1.C.6.

[14] *See, e.g.,* Currenex (Stmt) 2; Bloch & Perlman (Stmt) 4-5; Keller & Heckman (Stmt) 5; *cf.* Mirek 188 (if B2B allows sellers to learn from each other confidential information about buyers' needs in advance, sellers can increase their prices in light of those needs); Shridharani 185 (raising similar concern).

[15] *See, e.g.,* Keller & Heckman (Stmt) 5; Bloch & Perlman (Stmt) 4-5.

[16] *See* Bloch & Perlman (Stmt) 5.

[17] *See* OESA (Stmt) 7.

concerns raised.

Agreements to share information are typically assessed under Section 1 of the Sherman Act, 15 U.S.C. § 1, under the "rule of reason."[18] Thus, an antitrust analysis of such agreements would focus first on the likelihood of any anticompetitive effects,[19] examining, among other things, the structure of the market, the market shares and relationships among the information-sharing parties, and the kind of information shared.[20] Only if the analysis suggests that anticompetitive harm is likely would the focus shift to an examination of the efficiencies the information-sharing practice may promote, and whether practical, significantly less restrictive alternatives would achieve the same efficiencies.[21]

Certain types of information-sharing agreements might facilitate coordination on price or other matters. In principle, a firm in a concentrated industry

> may set its prices knowing that a price cut would be quickly matched by others; each would also know that stable high prices, maintained by all firms, would benefit all. But, the problem for such firms (at least in principle) is that each also knows that for it alone the best of all possible worlds is to attract customers through a small price cut not matched by the others. Since all know this, how can they keep each other from

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[18] *See* Gypsum, 438 U.S. at 443 n.16. Of course, price-fixing is a per se violation of Section 1 (*see, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 8 (1979)), and evidence of information exchange can be used to support a claim of a price-fixing scheme. *See, e.g.,* In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 447 n.13, 448 n.15 (1990), cert. denied, 500 U.S. 959 (1991); Areeda, Antitrust Law, at ¶¶ 1407a, 1407b (1986). However, discussion of such price-fixing agreements is beyond the scope of this report.

[19] *See* Competitor Collaboration Guidelines at § 3.3.

[20] *See infra* at Part 3.A.1.a; *see also* Competitor Collaboration Guidelines at § 3.31(b).

[21] *See infra* at Part 3.A.1.b, c; *see also* Competitor Collaboration Guidelines at §§ 3.3, 3.36; Susan S. DeSanti & Ernest A. Nagata, "Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review," 63 Antitrust L.J. 93, 96 (1994) (outlining issues to address in applying rule of reason analysis to an information exchange). Panelists noted, however, that even though antitrust enforcers should test efficiencies only when the analysis suggests anticompetitive consequences in the first place, *see* Competitor Collaboration Guidelines at § 3.31 ("The Agencies do not undertake a full analysis of procompetitive benefits . . . unless an anticompetitive harm appears likely"), counselors may wish to ask their clients, as an initial matter, whether their B2B practices are necessary to promote the efficiencies they seek. *See* Krattenmaker 500, 577; Muris 554-55; *cf.* Baer 538.

cutting prices? How can they guarantee that industry prices stay high? How can they prevent the forces of competition from breaking out, with one or another firm yielding to the temptation to cut its own prices while hoping the others will not match the low price? Each firm realizes that any formal communication with its competitors about such matters could lead to antitrust prosecution and a finding of a traditional agreement. But each fears that, without such communication, its competitors will "chisel" on the tacit pricing arrangement, perhaps through secret or selective price cuts (which from the public's point of view should be encouraged).[22]

Information-sharing agreements (and other facilitating practices) can reduce this uncertainty. They can increase the likelihood that firms in a concentrated market will set supra-competitive prices and can "help [them] 'police' interdependent pricing practices, practices that help them keep prices above competitive levels without the need for any formal price agreement."[23] Likewise, as the Competitor Collaboration Guidelines make clear, buying collaborations might also "facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases."[24] As one industry's suppliers' association has noted, an "entirely transparent collaborative venture" can reduce the "level of uncertainty" in this way.[25] "Eliminate the uncertainty, and participants will tend to move away from individual profit maximizing models to a collusive one."[26] For these reasons, such agreements to share competitively significant information are examined closely.[27]

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[22] Clamp-All Corp. v. Cast-Iron Soil Pipe Inst., 851 F.2d 478, 484-85 (1st Cir. 1988) (Breyer, J.), cert. denied, 488 U.S. 1007 (1989). *See also* DeSanti & Nagata, 63 Antitrust L.J. at 95-96 (distinguishing "coordinated interdependence or tacit collusion" from "a facilitating practice that increases the likelihood of tacit collusion").

[23] Clamp-All, 851 F.2d at 484; *see also* DeSanti & Nagata, 63 Antitrust L.J. at 95. Nor is tacit collusion on price the sole concern. Tacit collusion on other terms may be significant as well. *See, e.g.,* DOJ & FTC Horizontal Merger Guidelines at § 2.11 (April 2, 1992, revised April 8, 1997) ("Terms of coordination need not perfectly achieve the monopoly outcome in order to be harmful to consumers."); Catalano v. Target Sales, 446 U.S. 643 (1980) (per curiam) (unlawful agreement on credit terms).

[24] Competitor Collaboration Guidelines at § 3.31(a).

[25] OESA (Stmt) 3.

[26] OESA (Stmt) 3.

[27] *See, e.g.,* United States v. Container Corp. of America, 393 U.S. 333, 337 (1969) (agreement to exchange information held to violate Section 1); United States v. ATP, 58 Fed. Reg. 3971 (1993) (Proposed Final Judgment and Competitive Impact Statement, U.S. v. Airline Tariff Publishing Co.) (describing charge that airlines operated a fare dissemination system that

a. Factors Suggesting Antitrust Concern

Whether information-sharing agreements are indeed likely to injure competition depends on the facts, which are likely to vary among B2Bs. Where agreements that may facilitate anticompetitive coordination are at issue, certain key factors may shape the analysis. Each of these factors contributes to the analysis; one must look at them together to assess any given factual circumstances. Nevertheless, with that caveat, at least five factors, among others, are relevant.

First, what is the structure of the market that the B2B serves? All other things being equal, the greater the degree of concentration in the market, the greater the concern about possible effects on competition.[28] For example, under certain circumstances, greater information flow in a B2B market with many buyers and few sellers may drive up the prices that those buyers pay.[29] Likewise, all other things being equal, the greater the share of the market controlled by the information-sharers, the greater the likelihood of concern.[30] On the other hand, low entry barriers to the market for the goods traded on the B2B may enable new entrants to foil any chances for information-sharing to facilitate collusion. Finally, the homogeneity of products or firms within

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unreasonably facilitated airfare coordination); Competitor Collaboration Guidelines at § 3.31(b). Possible competitive concerns arising absent an agreement (*see, e.g.*, Stone Container Corp., Docket No. C-3806, Complaint, *available at* <www.ftc.gov/os/1998/9802/9510006.cmp.htm> (charging invitation to collude in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45), settled by consent decree, *available at* <www.ftc.gov/os/1998/9806/9510006.do.htm>, *but see* Stone Container Corp., Dissenting Statement of FTC Commissioner Orson Swindle, 5 Trade Reg. Rep. (CCH) ¶ 24,390, *available at* <www.ftc.gov/os/1998/9802/9510006.os.htm> (last visited Oct. 19, 2000) (stating that facts do not support invitation-to-collude theory in this case); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (discussing unilateral facilitating practices)) were only briefly discussed during the workshop and are beyond the scope of this report.

[28] *See, e.g.,* Kinney (Stmt) 37 (where sellers are fragmented, online reverse auctions "can be set up with little fear of outright supplier collusion or tacit collusion through signaling."). *See generally* Gypsum, 438 U.S. at 443 n.16 ("structure of the industry involved" can be an important factor in determining whether information-sharing among competitors is pro- or anti-competitive).

[29] *See* Hal R. Varian, "Economic Scene: When commerce moves online, competition can work in strange ways," N.Y Times, August 24, 2000, at C2.

[30] *See* Container, 393 U.S. at 337 (noting relevant industry's "dominat[ion] by relatively few sellers" in finding information-sharing agreement violates Section 1); Competitor Collaboration Guidelines at §§ 3.33 & n.43 (discussing importance of market share); 4.2 (establishing safety zone where market shares of the collaboration and its participants collectively account for no more than twenty percent of relevant market or markets).

the market, the characteristics of buyers and sellers, the characteristics of typical transactions, and the advantage a firm might gain by cheating on a price-fixing deal are additional factors relevant to such an analysis.[31] 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.

Second, who is sharing the information? Information shared among competitors is generally, although not always, more likely to raise concern than information shared among non-competitors.[32]

Third, what type of information is being shared? As the Competitor Collaboration Guidelines point out, "[o]ther things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables."[33] For example, shared information relating to direct goods is generally more likely to generate antitrust concern than shared information relating to indirect goods. Thus, retailers sharing information about their purchases of lightbulbs to illuminate their stores may raise fewer concerns than their sharing information about their direct input purchases.[34]

Fourth, how old is the information? All other things being equal, sharing contingent or future pricing information is generally more troubling than sharing information about past transactions.[35] Sharing information about contingent pricing can allow competitors to signal

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[31] *See* Container, 393 U.S. at 337 (noting relevant product's "fungib[ility]" in finding information-sharing agreement violated Section 1); Competitor Collaboration Guidelines at § 3.33 (noting importance of factors discussed in Section 2.1 of the 1992 DOJ/FTC Horizontal Merger Guidelines which discusses factors relevant to likelihood of coordinated interaction).

[32] Baker 495. However, under certain circumstances, even information-sharing between buyers and sellers can raise concerns. *See, e.g.,* In re Lockheed Corp., 119 F.T.C. 618 (1995) (consent order); Lockheed Corp., et al., Proposed Consent Agreement With Analysis to Aid Public Comment, 60 Fed. Reg. 5408, 5413 (Jan. 27, 1995) (discussing proposal that certain information that firm received from military aircraft manufacturers who purchased its military aircraft components, not be disclosed to the firm's division that manufactured and sold competing military aircraft).

[33] Competitor Collaboration Guidelines at § 3.31(b); *see also* Gypsum, 438 U.S. at 443 n.16 ("nature of the information exchanged" can be an important factor in determining whether information-sharing among competitors is pro- or anti-competitive).

[34] *See* Krattenmaker 498-99.

[35] *See, e.g.,* 58 Fed. Reg. 3971 (1993) (Jan. 12, 1993) (Proposed Final Judgment and Competitive Impact Statement, U.S. v. Airline Tariff Publishing Co.). The case settled through

potential prices to each other while preserving "the opportunity to pull those prices back if their rivals [do not] act in a certain way."[36] And, as discussed in the Competitor Collaboration Guidelines, sharing information about instantaneous transactions can also raise antitrust concerns.[37] For example, in frequent, small-stake online auctions, bidders may have a chance to learn strategic behavior and adjust their future bids accordingly.[38]

Fifth, how accessible is the information other than through the B2B? All other things being equal, sharing information that is unique to the B2B is generally more likely to raise antitrust issues than sharing information that can be found elsewhere, and sharing information that can be found elsewhere but only with difficulty is generally more likely to merit antitrust scrutiny than sharing information that can be found elsewhere just as readily as it is found on the B2B. One panelist's comments illustrated this point well. The panelist, the head of a foreign currency B2B, stated that until the advent of B2Bs, suppliers in the market that her B2B serves had "typically only known about a small sliver of the customer transactions that they were particularly

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consent decrees that, among other things, prohibited dissemination of fares that were intended only to communicate planned or contemplated fares or contemplated fare changes. *See* United States v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993) (settlement with two defendants); United States v. Airline Tariff Publishing Co., 1994 WL 502091, 1994 WL 454730 (D.D.C. 1994) (settlement with remaining defendants). *See also* Rule 512-13 (indicating current prices less troubling than future prices). Reflecting a similar judgment, Statement 6 of the 1996 DOJ & FTC Statements of Antitrust Enforcement Policy in Health Care establishes an antitrust safety zone for the exchange of certain past pricing data (specifically, data over 3 months old) in particular circumstances.

[36] Correia 502 (exchanging such contingent prices ought to send up a "red flag" for enforcers); *see also* Proger 509 (agreement to publish future pricing "raise[s] an issue"); Rule 512-13 (future prices problematic); Jonathan B. Baker, "Identifying Horizontal Price Fixing in the Electronic Marketplace," 65 Antitrust L.J. 41, 51 (1996) (rapid information exchange "can facilitate coordination even if it is what economists term 'cheap talk,' – that is, communication imposing little or no costs of commitment on the parties").

[37] *See* Competitor Collaboration Guidelines at § 3.31(b) ("Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.").

[38] Kinney (Stmt) 32. *See generally* Gypsum, 438 U.S. at 443 n.16 ("Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."). *But see* Correia 502 (exchange of current price information raises fewer concerns since it is "very hard to imagine a very effective way to collude" when transactions are basically instantaneous).

bidding on."[39] She stated that now, however, suppliers who own a B2B in this market (and who thus would appear to compete with hers) are in a position to discover "every transaction that a customer is involved with, whether they participate [in that transaction] or not."[40] B2Bs have also introduced an "unprecedented ability to monitor prices in realtime" in that market.[41] This new ability of competing sellers to learn "each other's bids and prices on every trade instantly," she said, raises a significant collusion concern.[42]

Exclusivity policies may also aggravate collusion risks. If, notwithstanding the advantages of B2B participation, B2B participants have the ability and incentive to trade secretly outside the B2B, they may undermine a collusive scheme. Exclusivity could shut off the opportunity to cheat. Moreover, it may enhance the value of the information being shared. For example, if Seller 1 can discover what Seller 2 sold on a B2B, and also knows that Seller 2 is required by the B2B's exclusivity policy to do all its selling on that B2B, then Seller 1 knows quite a bit about Seller 2's selling practices. By contrast, if there is no exclusivity policy, Seller 2 might commit only a small fraction of its sales to the B2B, greatly reducing the value of the information that Seller 1 could glean from the B2B. (This is also true of buyers who purchase through the B2B.)[43]

b. Efficiencies

Is the information-sharing practice reasonably necessary to promote certain efficiencies? How might information sharing enhance competition? In some cases, information-sharing may promote competition or make businesses run more efficiently. It is, after all, the information-sharing capabilities of B2Bs – particularly their powers to let trading partners share information with each other – that help enhance price transparency by letting buyers solicit more bids more quickly, by facilitating comparison-shopping, and by giving sellers and buyers greater and cheaper access to more potential trading partners. Likewise, it is the information-sharing properties of B2Bs that make supply-chain management possible. These are but a few examples of the ways that information-sharing can enhance efficiencies and competition.[44] In practice, the import of

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[39] Mirek 188.

[40] Mirek 188.

[41] Mirek 199.

[42] Mirek 200. *See also* Currenex (Stmt) 2.

[43] *Cf.* Cooper 506 (raising this issue in general terms).

[44] *See supra* note 10 to Part 3. *But see* Mitnick 519-20, 546-47 (stating that efficiencies may be sacrificed when antitrust concerns prevent owner-participants from using the B2B both as a buyer and as a seller in the same market, but speculating that some architectural solution may be able to solve the problem); *cf.* energyLeader (Stmt) 14 (to avoid such problems, energyLeader

such effects would depend on the facts of the particular setting in which they were presented.

c. Avoiding Antitrust Risk

In light of any such efficiencies, there would also be consideration of whether they could be achieved through a practical, significantly less restrictive alternative. Workshop participants identified many possible mechanisms for doing so. For example, a B2B may restrict the information available to certain participants in online auctions or exchanges.[45] In "fragmented global market[s]," one B2B's auction server can be programmed to allow suppliers access to more information, and in "more concentrated markets," it can allow them access to less information.[46] In some B2Bs, a seller can only see other sellers' prices but not their names,[47] or can see only where its latest bid ranks among other sellers' bids.[48] Online catalogs may also be segmented so that sellers cannot see the prices quoted by their competitors[49] and buyers cannot see what other buyers are being charged.[50]

B2Bs may also use nondisclosure and confidentiality agreements. Buyers and suppliers using FreeMarkets work under nondisclosure agreements that require potential suppliers to keep a buyer's proprietary RFQ information confidential, for example, and MetalSite gives its employees antitrust training and requires them to sign agreements relating to confidentiality and

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sites "in some cases" deny sellers access to pricing information of other sellers in the same market).

[45] In some matters, the FTC has determined that provisions to limit the exchange of information can help address competitive concerns. *See, e.g.,* In re Eli Lilly and Company, 120 F.T.C. 243 (1995); In re Martin Marietta Corp., 117 F.T.C. 1039 (1994); In re General Motors, 103 F.T.C. 374 (1984).

[46] *See, e.g.,* Kinney (Stmt) 39 (discussing FreeMarkets); *see also* energyLeader (Stmt) 8 (designer of the online auction can determine whether to hide bidders' identities and/or bids).

[47] *See* Stojka 381-83 (anonymous online auction); Mashinsky 272-73 (price information for specific transactions available on an anonymous basis).

[48] *See* Kinney 81-82, 88.

[49] *See* energyLeader (Stmt) 14 (depending on the software used, a seller in an online catalog may be prevented from accessing other sellers' price information).

[50] *See* Phillips 300-01 (discussing online catalogs permitting some data to be seen only by certain buyers); Verloop 380 (discussing online catalog that prevents buyer from seeing what seller is charging other buyers).

noncompetition.[51]

B2Bs may develop practices that keep sensitive information from board members employed by B2B participants. At the workshop, for example, one B2B founder stated that he planned to have his B2B require that its board of directors not receive information from the exchange.[52]

Finally, some participants suggested the use of "audit mechanism[s]" that let participants know whether the B2B's rules are being followed,[53] and the use of penalties for violating operating rules.[54]

Would such measures adequately safeguard against the anti-competitive harm? The record reflected a variety of views on that score.[55] In this regard, it may help that B2Bs often have inherent incentives to make sure such measures do work, since the participants who use the

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[51] *See* Kinney 186; Stewart 104. *But cf.* Chen 187 (nondisclosure and confidentiality agreements will take time to develop).

[52] Roberts 384. *But see* Currenex (Stmt) 2 ("there is no firewall that can be constructed to separate board members from the information required to fulfill their fiduciary responsibility vis-a-vis the exchange").

[53] Sunder 465-66; *see also* Ernst & Young (Stmt) 2; Mark Del Bianco, "Meet the Old Boss, Same As the New Boss: Emerging Antitrust Issues in the Second Wave of B2B E-Commerce," ABA Antitrust Section Internet Committee Newsletter, Summer 2000 (forthcoming) (discussing source code audit provisions).

[54] Bloch & Perlman (Stmt) 10 (suggesting that improper information sharing could be reduced by having a marketplace promulgate "strict antitrust and confidentiality guidelines that provide, among other things, that improper sharing of competitive information will result in severe penalties, including possibly requiring equity members to sell their interests in the exchange and/or prohibiting the offending party(ies) from being able to conduct business on the exchange").

[55] *Compare* Bloch & Perlman (Stmt) 10 (pass codes and firewalls can manage such information-sharing concerns); Mitnick 546-47 (suggesting that firewalls or other architectural software solutions would provide sufficient protection); Correia 502-03 (firewalls "seem to work pretty well") *with* Mirek 189 (traditional firewalls likely to be particularly ineffective because of necessary integration of supplier's and exchange's computer information systems), Currenex (Stmt) 2-3 (firewalls cannot ameliorate problems posed by seller consortiums, including "increased barriers to entry, leveraging effects and a net decrease in the intense level of competition that currently exists among the participating sellers").

marketplace typically do not want their competitively sensitive information disclosed to anyone.[56]

2. Monopsony

Several participants also voiced concerns that B2Bs could allow the exercise of monopsony power.[57] Monopsony is "market power exercised on the buying side of the market," power that lets a buyer or buyer group "reduce the purchase price by scaling back its purchases."[58] Thus, the Horizontal Merger Guidelines provide that "[m]arket power . . . encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers."[59] Under the "classical theory of monopsony," a single buyer (or a group of firms acting as a single buyer) in the market seeks to lower the price it must pay for a given input through the means of reducing its purchases of that input.[60]

By no means do all B2Bs facilitate joint purchasing. Indeed, group buying is difficult to execute, some panelists stated.[61] Perhaps because of this, many B2Bs merely enable participants to purchase parts individually, a practice that is no more controversial than firms "using the same telephone network to purchase parts today."[62]

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[56] *See, e.g.,* Arnold 184; Krattenmaker 499-500; Mirek 230-31; Leahy (Stmt) 3.

[57] Foer (Stmt) 2 (oligopsony); Keller & Heckman (Stmt) 3; OESA (Stmt) 8 (aggregating purchase power is the biggest competitive threat B2Bs pose); Enron (Stmt) 3 (raising concern that Internet "exchange/consortium or its operators" could "unreasonably reduce input prices").

[58] Areeda, Hovenkamp, & Solow, Antitrust Law (1995) at ¶ 574. *See generally* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); National Macaroni Manufacturing Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); United States v. Rice Growers Ass'n, 1986-2 Trade Cas. (CCH) ¶ 67,288 (E.D. Cal. 1986). One workshop panelist stated that in a monopsony scenario, "[t]he supply curve has to be upward sloping." Warren-Boulton 537.

[59] DOJ & FTC Horizontal Merger Guidelines § 0.1 (1992, revised 1997).

[60] *See, e.g.,* Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, 76 Cornell L. Rev. 297, 297-98, 301-303 (1991). Competitive concerns extending beyond classical monopsony were only briefly discussed during the workshop and are beyond the scope of this report.

[61] *See, e.g.,* Kinney (Stmt) 11 (group buying can be difficult in practice).

[62] Keller & Heckman (Stmt) 5.

B2Bs can, however, be used by a buying group with adequate market share to coordinate the reduction of purchases. Such coordination could be done expressly,[63] through an agent,[64] or perhaps through consulting services that permit coordination of input purchases. One workshop participant noted that such coordination could also be facilitated by certain B2B information-sharing practices,[65] but this might prove difficult in practice.[66] Exclusivity policies that require that the group's members purchase through the group may make the exercise of monopsony power easier. Such exclusivity policies could help prevent the group's members from "cheating" by buying, through outside sources, more than they agreed to buy.[67] Another panelist, however, stated that such rules could contribute to achieving other efficiencies.[68]

Panelists stressed the importance of asking whether the buying group in question accounts for a sufficient share of the buying market such that its purchases influence the price of the inputs bought.[69] Indeed, identifying whether the buyer or buying group buys a sufficiently large share of the inputs in the market to make a difference should be "a first screen," according to one panelist.[70] For this reason, the joint purchasing of indirect inputs such as MROs is generally less likely to raise concerns than joint purchasing of direct inputs. Joint buyers are generally less likely to dominate the market for MROs, which companies in many other industries will often buy, than

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[63] Correia 536.

[64] *Cf.* Warren-Boulton 531 (describing two-round auctions).

[65] *See* OESA (Stmt) 8.

[66] *See* Correia 536 (noting that such coordination through signaling mechanisms might be difficult).

[67] *See* Warren-Boulton 529-30, 534. *See also* Hovenkamp, Antitrust Law (1999) at ¶ 2135.

[68] *See* Salop 534-35. *See also* Hovenkamp, Antitrust Law (1999) at ¶ 2135.

[69] *See, e.g.,* Foer (Stmt) 2 (oligopsony concerns arise when "the leading buyers in an industry can utilize an electronic market place as a kind of buyers' consortium").

[70] Warren-Boulton 537. The Competitor Collaboration Guidelines provide that, "[a]bsent extraordinary circumstances, the [antitrust enforcement a]gencies 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. The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis." Competitor Collaboration Guidelines at § 4.2; *see also* Bloch 12 (applying 20% safety zone to monopsony concerns).

they are the market for direct inputs, which companies in few other industries may buy.[71]

Buyer groups driving prices down through monopsony power are not to be confused with buyer groups winning better prices through increased efficiencies, such as by enabling their suppliers to save money by selling to the group. In such cases, there may well be savings to suppliers warranting quantity discounts.[72] Indeed, one participant suggested that if buyers representing a small share of the buying market are collectively winning a better price, efficiencies – not monopsony – may well be responsible.[73]

One concern relevant to the monopsony issue is whether new entry could cure the potential injury to competition that a buying group might pose. As stated in the Competitor Collaboration Guidelines, if collaborators exercising monopsony power reduce their purchases, "they may create an opportunity for new buyers to make purchases without forcing the price of the input above pre-relevant agreement levels."[74] These new entrants could thus "deter[] or counteract[]" the power of the monopsonist.[75]

Finally, the panelists discussed remedies that could be adopted should monopsony indeed prove a valid concern. One workshop participant suggested methods that would keep the market share of the buying group low, for example, by restricting membership in the buying group once the group's purchases reached 30% of the market.[76] Another workshop participant, concerned that certain B2B information-sharing practices could facilitate monopsony coordination, suggested remedies that limit the flow of that information,[77] such as firewalls, anonymity, the "isolation" of management, or ensuring management's independence.[78] This participant also

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[71] Warren-Boulton 537; Krattenmaker 498-99 (purchasing of indirect goods generally poses fewer concerns than purchasing of goods for resale). *See also supra* at Part 3.A.1.a (noting similar point with respect to information-sharing).

[72] *See, e.g.,* Kim 227 (discussing how equalFooting wins treatment as a national account by serving as a "virtual distributor" for small buyers); Kafka 228 (aggregation permits purchasing at truckload prices like a distributor). *Cf.* Kinney (Stmt) 11-12 (volume purchasing only works in those industries in which suppliers add capacity in large increments).

[73] Correia 536.

[74] Competitor Collaboration Guidelines at § 3.35 n.50.

[75] Competitor Collaboration Guidelines at § 3.35 n.50.

[76] Bloch & Perlman (Stmt) 12.

[77] OESA (Stmt) 5, 8.

[78] OESA (Stmt) 5.

suggested "limiting (or extending) equity ownership in the exchange," so that, for example, sellers could gain ownership stakes in – and some control over – a buyer-owned B2B at risk for monopsony.[79]

3. Exclusion

As discussed in Part 1, many B2B e-marketplaces are being set up using the consortium model, with ownership by several of the major players in a particular industry. If these B2Bs yield substantial efficiencies, the owners' competitors may well wish to use the B2B services. Several panelists raised the issue of whether there may be circumstances under which participant-owners of the B2B could undermine competition by denying their competitors access to the B2B or by otherwise disadvantaging those competitors in their use of the B2B. As discussed below, such treatment might raise the competitors' costs of doing business and limit their ability to provide effective competition in markets for the goods traded on the B2B or for goods derived therefrom.

The workshop record yielded little evidence of current exclusion from B2Bs. To the contrary, several panelists stated that their B2Bs would be open to all comers.[80] The record, however, contains warnings regarding the potential for exclusion[81] and reveals widespread concern about possibilities for disadvantageous treatment of the owners' rivals, which could take various subtle forms short of outright access denials. For example, owners might receive rebates of fees that are unavailable to their rivals.[82] Information might be presented in ways that give

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[79] OESA (Stmt) 5.

[80] *See* van Breen 205 (Worldwide Retail Exchange open to all retailers and suppliers); Arnold 220 (electric utility exchanges are open); Dupont 303-04 (marketplaces are totally inclusive); Verloop 346 (BuyProduce.com is "wide open"); Bloch & Perlman (Stmt) 6-7 (most B2B marketplaces plan to create "open platform[s]").

[81] *See, e.g.*, Mirek 200 (citing the "real potential for owner suppliers to exclude non-owner suppliers" from the marketplace); Sandhu 295-96 (suggesting that marketplace participants may wish to condition their participation on denial of access to competitors); Heymann 368-69 (the more concentrated an industry, the more "gatekeeping" efforts evolve, reflecting differences among major participants); Glover 473 (expressing concern that small businesses could be excluded); Spectrum Meditech (Stmt) 2 (expressing concern over possibility that B2B partially owned by competitors will exclude a smaller rival).

[82] *Compare* Foer (Stmt) 2 (fear that owners will disadvantage outsiders by combining high user fees with rebates to owners) *and* Bhatt 287 (fear that consortium run by large suppliers will "bid" small suppliers "out") *with* Worldwide Retail Exchange (Stmt) 5 (Worldwide Retail Exchange "will be open, on equal terms, to all -- suppliers and purchasers alike. User fees will be equal, regardless of any ownership position in the WWRE.").

preference to marketplace owners.[83] Discriminatory operating rules or disadvantageous access to electronic interchange standards could leave rivals with reduced functionality or higher costs.[84] As one comment, discussing currency exchanges, explained:

> It is also important to examine the "rules of the game" to determine whether the exchange has imposed rules that subtly tilt the playing field in favor of the owners/sellers. For example, there are exchanges that are theoretically open to a multitude of players, but close bidding after a limited number of bids have been received. These systems thus favor those sellers with better integration into the exchange's systems, typically those with the greatest ownership stake in the exchange itself. By arbitrarily limiting bidding or engaging in display bias, such exchanges . . . are using the purportedly neutral "rules" to exclude potential competitors (e.g. non-exchange partners) and avoid competing on price or another objective standard. . . . It would also be very easy for the top market players to manipulate smaller market participants by blocking access or offering access on unequal terms.[85]

Denying or disadvantaging competitors in their access to a B2B e-marketplace could raise their costs or maintain them above levels that otherwise would prevail.[86] Typically, though, this alone has not been viewed as an antitrust violation.[87] Rather, antitrust analysis generally treats

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[83] *See, e.g.*, Kafka 195-96 (recognizing importance that information not be skewed but stressing that bias is not inherent in seller ownership or governance); Walsh 365-68 (B2Bs must not withhold information from buyers or bias the presentation in a way that prevents buyers from being empowered); Mitnick 550 (presentation bias a legitimate issue).

[84] OESA (Stmt) 6; Internet Public Policy Network (Stmt) 1; Keller & Heckman (Stmt) 3-4, 8. *But cf*. Phillips 324 (rivalry among large suppliers that own an exchange will ensure adoption of neutral rules).

[85] Currenex (Stmt) 3.

[86] In addition to denying the rival the cost-saving benefits of B2B participation, exclusionary treatment may impair a rival's ability to continue dealing with suppliers or customers who are committed to a given B2B. *See* Bloch & Perlman (Stmt) 6; OESA (Stmt) 6. Consequently, "exclusivity" provisions of the type discussed in the next section, which work to bind a supplier or purchaser to a particular B2B, may raise the costs of any rival barred from using that B2B.

[87] *See, e.g.*, Lie v. St. Joseph Hosp., 964 F.2d 567, 570 (6th Cir. 1992) (loss of personal income experienced by a physician excluded from a hospital not sufficient to demonstrate injury to competition); Bhan v. NME Hosps., 929 F.2d 1404, 1414 (9th Cir.) (exclusion of one nurse anesthetist from one hospital not enough to demonstrate actual detrimental effects on competition), cert. denied, 502 U.S. 994 (1991).

exclusion as an antitrust problem when it harms competition, not merely competitors.[88]

That approach has long been followed by the courts. When the Supreme Court has condemned agreements among competitors to deny access to their jointly controlled activities, harm to competition has been clearly demonstrable. For example in *Associated Press v. United States*, where the Court condemned a rule that permitted members to block competing newspapers from using the wire service, it concluded that the arrangements for blocking access were "designed to stifle competition" and were "aimed at the destruction of competition," and that they had the effect of "seriously . . . limit[ing] the opportunity of any new paper to enter" numerous local markets.[89] Moreover in *United States v. Terminal Railroad Ass'n*, the Court imposed requirements to ensure equal access to a railroad association's terminal facilities, after finding that, as a practical matter, it was "impossible for any railroad company to pass through, or even enter St. Louis . . . without using the facilities entirely controlled by the Terminal Company."[90] In a case involving single-firm conduct, the Court condemned an electric utility's refusal to sell or transmit electric power to proposed municipal systems that threatened to "erod[e] its monopolistic position."[91]

On the other hand, the courts have not hesitated to reject challenges to denials or limitations on access in settings when they have not found harm to competition. For example, the U.S. Court of Appeals for the Tenth Circuit found no illegality when a subsidiary of Sears, Roebuck & Company, proprietary issuer of Discover Card, was denied membership in Visa USA; it determined that the evidence was insufficient to show market power, observed that the exclusionary rule could have efficiency justifications, stressed that "[t]he Sherman Act ultimately must protect competition, not a competitor," and concluded that no harm to consumers had been

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[88] In some settings exclusionary agreements among competitors may be per se unlawful group boycotts. *See, e.g.,* Northwest Wholesale Stationers v. Pacific Stationary & Printing, 472 U.S. 284, 294, 298 (1985) (requiring a showing of "market power or unique access to a business element necessary for effective competition" as a prerequisite for per se condemnation and noting that in per se unlawful group boycotts "the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); Federal Trade Commission v. Toys "R" Us, 221 F.3d 928 (7th Cir. 2000). This Report concentrates on the factors relevant for determining when exclusionary B2B conduct might be anticompetitive under the rule of reason. The legal principles delineating per se unlawful exclusion are beyond its scope.

[89] 326 U.S. 1, 13, 18-19 (1945).

[90] 224 U.S. 383, 397, 411 (1912).

[91] Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973) (invoking Section 2 of the Sherman Act, 15 U.S.C. § 2).

shown.[92] In a case involving computer reservation systems ("CRSs"), in many ways forerunners of today's B2Bs, claims that two airline owners of proprietary computer reservation systems unilaterally had denied their competitors reasonable access to an "essential facility" by charging airlines $1.75 per booking were rejected on grounds that the CRS operators lacked power to eliminate competition in the downstream air transportation market.[93] A potentially more troubling set of allegations about CRS operations–that flights of owning airlines were listed on the CRS screens before their competitors' flights–had been resolved years earlier, when the Civil Aeronautics Board promulgated regulations requiring non-discriminatory treatment.[94]

In recent years, a considerable body of scholarship has sought to make operative the mandate that antitrust analysis focus on harm to competition.[95] That literature presents a useful framework for analysis of the competitive effects of conduct that raises rivals' costs and thereby impairs downstream competition. It examines, sequentially, two markets: the market for inputs, from which the rival is excluded, and the market for outputs, in which the rivals' ability to compete is impaired.

In the context of B2Bs, analysis would focus first on the market for services rendered by the B2B. In that connection it would consider the extent of the disadvantage that likely would ensue from denying or limiting rivals' access to the B2B, as well as the substitutes to which the

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[92] SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 969-72 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995).

[93] Alaska Airlines v. United Airlines, 948 F.2d 536 (9th Cir. 1991), cert. denied, 503 U.S. 977 (1992). The case involved allegations that each defendant had violated Section 2 of the Sherman Act. The court indicated that standards for assessing access denial under Section 2 are more stringent than those required under Section 1. *Id.* at 542 (citing Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844-45 (1990)).

[94] 14 C.F.R. Part 255 (establishing requirements for the operation by air carriers of computer reservation systems "so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation"). The reviewing court rejected a challenge to the rule against presentation bias under an analysis focused on deception, without reaching the competition issues. *See* United Air Lines v. Civil Aeronautics Board, 766 F.2d 1107, 1112-13 (7th Cir. 1985). It also rejected challenges to a rule against CRS price discrimination and to a companion rule prohibiting deletion of information about rivals' connecting flights, finding that the Board's competition analysis was not arbitrary or capricious. *Id.* at 1113-16. The court viewed the governing transportation statute as "essentially a copy of section 5 of the Federal Trade Commission Act," the transportation statute's "progenitor." *Id.* at 1112, 1114.

[95] For a comprehensive introduction to raising-rivals'-cost theory, *see* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986).

disadvantaged firms could turn to avoid or mitigate the disadvantage. But this would only inform us about harm to the disadvantaged competitor. To show harm to competition, we would need to consider the likely impact on competition in the markets in which the excluded firms participate. Finally, if anticompetitive harm were likely, analysis would ask whether the access denial was reasonably necessary for achieving procompetitive benefits that likely would offset the anticompetitive harm.[96]

For example if a consortium of widget manufacturers formed a B2B for purchasing widget components and excluded an up-and-coming, new widget manufacturer from buying through their B2B, the analysis would inquire first how much this raised the excluded firm's costs and whether the firm could turn to substitute sources to minimize any harm. It then would inquire into the likely competitive consequences downstream, in the market for widgets. Even if the excluded firm's costs rose, there might be no downstream effect if competition in the widget market were otherwise vigorous. Ultimately, the inquiry would focus on the likely overall competitive effect in the widgets market, taking account of both anticompetitive harms and procompetitive benefits from the exclusion.

These inquiries are likely to be highly fact-specific in application. Indeed, exclusionary incentives will not even be present in many settings. A B2B owned and operated by firms or individuals independent of those who buy or sell through that marketplace may lack any incentive to exclude or disadvantage any participants. In contrast, other B2Bs, such as those owned or operated by consortia of industry members may have incentives to exclude.[97] Where exclusion is an issue, certain key factors may shape the analysis. Questions to focus upon include:

> (1) Is the B2B the only way the product – or adequate substitutes for it – can be bought or sold at comparable prices? Alternatively, could another B2B or a private network based on Internet infrastructure readily be used, or are there offline markets that could be used instead? Would the alternatives be as efficient, or does the excluding B2B offer special advantages?
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> If the excluded rivals can readily reach suppliers or buyers through alternative mechanisms at comparable costs, they can avoid the harm. Several panelists, however, suggested that strong network efficiencies in an incumbent marketplace might make alternatives unsatisfactory.[98] Their theme was familiar: the 1996 Staff Report following

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[96] *Cf.* Competitor Collaboration Guidelines at § 3.36 (discussing analysis of efficiencies in competitor collaborations outside the context of exclusionary conduct).

[97] *See* Clark 364 (consortium B2Bs are more likely than others to skew functionality in favor of the owners, but few are up and running now).

[98] *See, e.g.*, Mirek 200-01 (real potential to exclude non-owners from marketplace altogether in light of network effects that could make marketplace an essential facility); OESA

the FTC's Hearings on Global and Innovation-Based Competition similarly reasoned that network efficiencies "magnify any disadvantages of exclusion and tend to burden intersystem competition" and concluded that "demand-side scale economies associated with networks warrant a heightened degree of scrutiny in assessing denials of access to joint venture membership."[99] That scrutiny is likely to be highly fact-intensive, requiring consideration of the extent to which buyers and sellers remain available to support cost-effective B2B alternatives and the extent to which other trading mechanisms can substitute for B2B e-marketplaces. As explained in one comment, the latter inquiry may entail a look at the types of services offered, the interchangeability of use for participants, and the cross-elasticity of demand between alternative trading mechanisms.[100]

(2) Will effects on rivals' costs be deterred or counteracted by entry of alternative marketplaces or by counter-strategies that rivals might pursue? As discussed above in Part 1.C.7, the workshop record on the ease, and hence the curative power, of entry was mixed. Some argued that entry would quickly provide ready B2B alternatives for disadvantaged rivals.[101] Others questioned the ease of entry in these markets.[102]

(3) If the B2B were in fact the only way the product or adequate substitutes could be bought or sold at comparable prices, would denial or limitation of access give the B2B's participants the power to raise or maintain the price of the products they sell above what

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(Stmt) 6-7 (dominant B2B could become an essential facility; network effects must be taken into account).

[99] *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace* (1996) ("1996 FTC Staff Report"), ch.9 at 8. Similarly, the courts in some settings have recognized that excluding a rival from a joint venture benefitting from substantial network efficiencies may harm competition. *See*, *e.g.*, Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991), *cert denied*, 506 U.S. 903 (1992); United States v. Realty Multi-List, 629 F.2d 1351 (5th Cir. 1980).

[100] *See* Keller & Heckman (Stmt) 6 (recommending that Internet sites be evaluated like other retail formats in defining the relevant product market).

[101] *See, e.g.,* Harting 372-73 ("[C]oncerns that owners will manipulate the presentation of data or prices are overblown. These are ruthlessly competitive markets" since competitor B2Bs face "low" entry barriers and since "buyers can search, almost for free, for other venues where they can purchase"; a marketplace that excluded participants or biased data presentation "would be punished very, very quickly"). *See supra* Part 1.C.7.

[102] *See, e.g.,* Clark 363 (difficult to start an independent B2B once a consortium B2B is already present); Brodley 542, 576 (same); Blankenhorn (Stmt). *See supra* Part 1.C.7 and *infra* Part 3.B.3.

otherwise likely would prevail? This would be a function of the role of the disadvantaged participants in maintaining downstream competition. If the excluded rivals were important to maintain effective downstream competition, exclusionary conduct that significantly raised their costs would cause anticompetitive harm. The analysis here would consider factors such as downstream market concentration, theories of unilateral and coordinated anticompetitive effects in the downstream markets, and downstream entry, as well as any unique competitive significance of the excluded firms. The workshop record did not delve into the likelihood of anticompetitive effects in any particular downstream market, and this would have to be analyzed in fact-specific terms.

(4) What are the efficiencies of the exclusion? How might exclusion enhance competition? One panelist stated that some B2Bs seek to differentiate their marketplace from competitors by limiting participants to select, "qualified sellers."[103] Another panelist stressed that some differences in treatment may be warranted as a means of dealing with free riding by non-owner participants.[104] In practice, of course, the significance and cognizability of efficiency claims would be analyzed in the context of particular factual settings and would include consideration of any practical, significantly less anticompetitive alternatives to the exclusion.[105]

B. Market for Marketplaces

1. The Nature of Marketplace Competition

To this point, analysis has focused on possible competitive concerns in the markets for goods traded on, or derived from goods traded on, B2Bs. Now we shift our focus to the emerging competition for the provision of B2B services. Just as competition issues can arise in connection with other business-support activities, such as commercial telephone service or commercial Internet access, competition in the market for marketplaces raises its own set of antitrust concerns.[106] B2Bs provide and charge for business services, and antitrust has a role in

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[103] Loevy 306.

[104] Mitnick 550-51. For example, it might be suggested that firms that begin participation only after a B2B has proven successful should pay a higher membership fee than a firm that bore greater risk by joining earlier. *See generally* 1996 FTC Staff Report, ch. 9 at 23-26.

[105] *Cf.* Competitor Collaboration Guidelines at § 3.36(b).

[106] *See, e.g.,* Bloch & Perlman (Stmt) 11 (distinguishing antitrust concerns in market for marketplaces from those in markets for products in which the marketplace participants operate).

maintaining competition in the market for marketplaces.[107]

The workshop demonstrated that we are in an early, but potentially critical stage of development of that market. Determinations made at the outset may shape B2B competition for years ahead. That competition likely will be affected both by the nature and magnitude of network effects in the market for marketplaces and by marketplace practices employed by the incumbents.

Specifically, several panelists expressed concern that B2Bs may undermine the development of effective B2B competition by improperly encouraging or requiring buyers or sellers, including those holding B2B ownership interests, to deal with them to the exclusion of others.[108] As discussed in Part 1.C.7 above, B2Bs may use a variety of carrots (profit interests or rebates or revenue-sharing devices in return for commitments to achieve certain volume levels) or sticks (minimum volume or minimum percentage requirements, bans on investment in other B2Bs, up-front membership fees or required software investments, or pressure on suppliers and buyers) to capture business. These exclusivity practices impose switching costs in terms of benefits to forgo or penalties to pay if a participant chooses to use or to support another B2B. In light of the potentially powerful network effects at work in B2B contexts, *see supra* Part 1.C.7, exclusivity practices warrant close attention as potential catalysts for market domination. Of course, to the extent they also give rise to efficiencies, the practices may prove procompetitive overall, but that merely highlights the need for taking a close look.[109]

Some panelists warned that even without overt exclusivity practices, over-inclusive B2B ownership by a consortium of large industry members could raise similar concerns.[110] To the

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[107] References to the "market for marketplaces" are not intended to suggest that the relevant antitrust market necessarily is limited to B2B e-marketplaces. In theory, more traditional alternatives, such as EDI connections, could remain competitive constraints. Delineating the relevant antitrust market would proceed case-by-case under general market definition principles. *See* Competitor Collaboration Guidelines at § 3.32; Horizontal Merger Guidelines at §§ 1.1 and 1.2.

[108] *See, e.g.,* Simkins 409; First 553; Cooper 571; Currenex (Stmt)1; OESA (Stmt) 6-7.

[109] B2Bs, of course, also use practices other than exclusivity to attract volume – they try to offer the best services or functionality. *See, e.g.*, Heymann 388; Simkins 408. Such practices are procompetitive and do not raise antitrust concerns.

[110] *See, e.g.*, Brodley 542 ("to the extent that . . . dominant factors of the industry have ownership in the exchange, then they're going to be less interested in participating in another exchange . . . [and this] could restrain the ability for other exchanges to develop"), 576; Baker 579-80 (over-inclusive ownership in incumbent B2B will make it hard for rival to get going); Foer (Stmt) 2 ("By being designed to be overly large, the joint venture may make competition with it

extent that ownership interests yield incentives that result in *de facto* exclusivity, much the same analysis outlined below may apply in evaluating the formation or consolidation of consortia B2Bs. However, as one panelist explained, the likely effects of the incentives derived from holding an ownership interest could vary from setting to setting and would have to be explored through factual inquiry.[111]

2. Case Law

The exclusivity practices at issue may attach horizontally among competitors who establish a B2B or they may attach vertically to suppliers or customers of the B2B founders. Different strains in the law have developed for the different settings, but in each instance the ultimate inquiry is the actual or likely effect on competition. In the horizontal context, an agreement among competitors to refrain from dealing with a rival to their B2B potentially raises issues as a concerted refusal to deal. Courts have reached divergent conclusions in different factual settings as to likely effects on competition of such horizontal arrangements. For example, when four major motion picture studios established a pay television network and agreed to supply certain films exclusively to that network for nine months, the mechanism for pricing the films and the 9-month exclusivity requirement were found likely to harm competition.[112] Moreover, an agreement among members of the National Football League to prohibit NFL owners from holding ownership interests in teams in other major professional sports leagues was found unlawful under the rule of reason.[113] On the other hand when a group of soft drink bottlers entered a joint venture to build and operate a facility to produce plastic bottles and agreed to purchase 80% of their bottle requirements from their joint venture, the court found no evidence of actual or

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impossible.").

[111] *See* Mitnick 547 (stressing importance of asking where ownership incentives lead); *see also* Krattenmaker 546 (analogizing the necessary inquiry to merger analysis).

[112] United States v. Columbia Pictures Industries, 507 F. Supp. 412 (S.D.N.Y. 1980) (preliminarily enjoining the joint venture), *aff'd mem.*, 659 F.2d 1063 (2d Cir. 1981). The U.S. Court of Appeals for the 10th Circuit recently registered similar concerns in reinstating allegations based on an alleged group boycott. There, a group of archery manufacturers, in joining to form a new trade show, had agreed to withhold their business from the only competing trade show. The court concluded that the facts alleged by plaintiffs stated claims against the agreement under Sections 1 and 2 of the Sherman Act. *See* Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999).

[113] North Am. Soccer League v. National Football League, 670 F.2d 1249 (2d Cir.), cert. denied, 459 U.S. 1074 (1982).

probable harm to competition.[114]

To the extent the exclusivity practices are purely vertical, in that they attach only to B2B users who are customers or suppliers of the B2B owners, the line of cases analyzing vertical exclusive dealing arrangements under Section 1 of the Sherman Act and Section 3 of the Clayton Act should be added to the mix. As with the examples of exclusion discussed in Section A.3. of this Part, the focus is on harm to competition from the exclusionary effects. Thus, in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the Supreme Court framed the inquiry in terms of:

> weigh[ing] the probable effect of the [exclusive dealing] contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.[115]

Similarly, Judge Boudin, writing for the U.S. Court of Appeals for the First Circuit, has described

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[114] Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1217-20 (W.D.N.C. 1989) (finding insufficient market power to cause undue foreclosure and concluding that defendants' supply contracts were reasonably justified means for achieving procompetitive purposes), *aff'd per curiam,* 1990-2 Trade Cas. (CCH) ¶ 69,165 (4th Cir. 1990), cert. denied, 498 U.S. 1110 (1991).

As discussed in n.88 above, some concerted refusals to deal are per se illegal. *See also* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593-94 (1st Cir. 1993). The line between per se and rule of reason analysis in these contexts is particularly murky, *compare* Columbia Pictures, 507 F. Supp. at 427-30 (exclusivity restriction likely a per se unlawful group boycott) *with* Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973) (exclusivity rule preventing banks issuing credit cards in one credit card network from becoming members in a competing network not per se unlawful), cert. denied, 415 U.S. 918 (1974), and raises issues beyond the scope of this Report.

[115] Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961). As four Justices explained in a subsequent, concurring opinion, "[e]xclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition." Jefferson Parish Hospital District v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J. concurring). The concurring Justices advocated an analysis focused on "the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others." *Id.*

the "ultimate issue in exclusivity cases" as that of "foreclosure and its consequences."[116] Factors identified by appellate courts for analyzing these competitive consequences include the degree of exclusion flowing from the restraint,[117] its duration and terminability,[118] the percentage of the market foreclosed and other indicia of the likely effect on competitors' ability to operate,[119] the availability of alternative access routes to supplies or customers,[120] rivals' ability to employ countermeasures to defeat the attempted exclusion,[121] and, ultimately, the likely impact of raising rivals' costs on competition in a relevant market,[122] including consideration of any procompetitive justifications.[123] In appropriate settings, when a B2B has monopoly power or a dangerous probability of achieving monopoly power, exclusivity practices could also give rise to an inquiry under the proscriptions against monopolization and attempted monopolization in Section 2 of the

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[116] U.S. Healthcare, 986 F.2d at 596.

[117] For example, a minimum purchase contract sometimes has been viewed as less restrictive than a full-requirements contract. *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237 (1st Cir. 1983) (Breyer, J.). Some courts have rejected complaints based on the offering of incentives to deal exclusively, but others have condemned them as the economic equivalent of prohibitions. For a detailed discussion of this case law, *see* Willard K. Tom, David A. Balto, & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615, 630-36 (2000) (concluding that "the case law does not forbid anticompetitive exclusive dealing contracts only when they embody a binding 'requirement' of exclusivity" or "only when they embody an undertaking to deal 100 percent 'exclusively'") and David Balto, *Networks and Exclusivity: Antitrust Analysis to Promote Network Competition*, 7 Geo. Mason L. Rev. 523, 563-71 (1999).

[118] *See, e.g.*, Omega Environmental, Inc. v. Gilbarco, Inc. 127 F.3d 1157, 1163-64 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998); U.S. Healthcare, 986 F.2d at 598; Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 394-95 (7th Cir. 1984) (Posner, J.).

[119] *See, e.g.*, US Healthcare, 986 F.2d at 596; Retina Assocs. v. Southern Baptist Hosp., 105 F.3d 1376, 1384 (11th Cir. 1997).

[120] *See, e.g.*, CDC Technologies, Inc. v. Idexx Laboratories, Inc., 186 F.3d 74 (2d Cir. 1999); Gilbarco, 127 F.3d at 1163.

[121] *See, e.g.*, U.S. Healthcare, 986 F.2d at 595-96.

[122] *See, e.g.*, Roland Machinery, 749 F.2d at 394 (requiring a showing that probable effect of the exclusion is to raise price above the competitive level or otherwise injure competition).

[123] *See, e.g.*, *id.* at 395. The Supreme Court has described several potential efficiencies. *See* Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949).

Sherman Act.[124]

A recent series of consent decrees entered by the antitrust enforcement agencies reflects heightened concerns with both horizontal and vertical exclusivity practices in settings exhibiting strong network effects. For example, the United States challenged the "FTD Only" program, which provided a set of economic rewards to florists who used the FTD floral delivery network exclusively. Incentives for maintaining exclusivity included awards of voting stock, increased local advertising, and reduced fees.[125] The parties consented to an enforcement order prohibiting FTD from offering any financial incentives or rewards to members who refrain from participating in competing wire associations.[126]

The FTC issued a complaint charging that RxCare of Tennessee, Inc., the state's leading pharmacy network, had effectively penalized members for participating in competing, discount networks.[127] RxCare's rules included a "Most Favored Nation" provision that required members accepting a lower reimbursement rate outside the RxCare network to accept the same lower rate on their RxCare contracts. Because RxCare represented a large portion of most pharmacies' business, the complaint alleged, the rule made participation in other networks unacceptable and inhibited the establishment or expansion of competing pharmacy networks. The resulting consent order barred use of "Most Favored Nation" clauses in RxCare's participation agreements.[128]

The United States also challenged a rule barring participating banks in MAC, a major ATM network, from purchasing ATM processing services from others. According to the complaint, the rule was an unlawful tying arrangement and a means for maintaining monopoly power in the market for regional ATM network access. Control over processing, it was alleged, permitted MAC to withhold the connections necessary for its member banks to also participate in other networks, making it substantially more difficult for those other networks to develop.[129] The

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[124] *See, e.g.,* United States v. Microsoft Corp., 87 F. Supp.2d 30, 53 (D.D.C. 2000), *appeal docketed*, No. 00-5212 (D.C. Cir. June 13, 2000).

[125] Petition by the United States for an Order to Show Cause, United States v. FTD Corp., 1996-1 Trade Cas. (CCH) ¶ 71,395 (E.D. Mich.1995). The conduct was challenged as violating a modified, 1956 consent decree resolving allegations that FTD, the largest flowers-by-wire association, had violated Section 1 of the Sherman Act by prohibiting members from using other wire clearinghouses. *Id.*

[126] United States v. FTD Corp., 1996-1 Trade Cas. (CCH) ¶ 71,395 (E.D. Mich.1995).

[127] In re RxCare of Tennessee, Inc., 121 F.T.C. 762 (1996).

[128] *Id.* at 766-69.

[129] 59 Fed. Reg. 29711, 24712-14 (1994).

consent decree prohibited MAC from tying network access and ATM processing services and from forbidding its members from participating in other ATM networks.[130]

In addition, the United States brought an enforcement action against licensing arrangements alleged to have exclusionary effects in the market for personal computer operating systems. According to the complaint, Microsoft's licensing practices foreclosed rivals' access to the original equipment manufacturer ("OEM") channel and lessened competition in the operating system market.[131] The consent agreement barred Microsoft Corporation, among other things, from entering "per processor" licenses, *viz.*, licenses that require OEMs to pay royalties on all PCs using a particular microprocessor type, whether or not they use Microsoft's operating system, and from entering license agreements containing minimum commitments.[132]

3. Potential Competitive Concerns

In 1995 the FTC conducted extensive hearings concerning competition policy in high-tech markets. After reviewing the relevant testimony, case law, and analytical literature and noting the pronounced advantage that network effects can give an incumbent operator, the ensuing 1996 FTC Staff Report cautioned that conduct that could contribute to achieving dominance warrants heightened scrutiny in settings with prominent network effects and switching costs.[133] Substantial network efficiencies and consumer switching costs make it difficult for an entrant to start small, compete effectively and grow to become a significant factor in the market. In high-tech network settings, this means that me-too or incremental competition or mere shading of the price may not suffice; competition "for a future technology" may predominate at the expense of competition "in the present technology."[134] However, it may take time to develop advances sufficient to overcome the advantages of a dominant incumbent's network, and in the interim, the incumbent may be able to exercise market power.[135]

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[130] United States v. Electronic Payment Servs., 1994-2 Trade Cas. (CCH) ¶ 70,796 (D.Del. 1994). In a case decided at an earlier stage in ATM network development, a court rejected a competing network's challenge to a MAC rule prohibiting the use of rivals' ATM cards at MAC automatic teller machines. Treasurer, Inc. v. Philadelphia Nat'l Bank, 1988-1 Trade Cas. (CCH) ¶ 67,943 (D.N.J.), *aff'd mem.*, 853 F.2d 921 (3d Cir. 1988).

[131] 59 Fed. Reg. 42845, 42846-49 (1994).

[132] United States v. Microsoft Corp., 1995-2 Trade Cas. (CCH) ¶ 71,096 (D.D.C. 1995).

[133] 1996 Staff Report, ch. 9 at 13-14, 29 (discussing interface standards).

[134] *See id.* at ch. 9, 12 n.34, *quoting* testimony of William F. Baxter.

[135] *See id.* at ch 9, 12-13 (explaining that market power may prove unusually enduring in network settings).

The need for heightened scrutiny of restrictions on outside purchasing or selling seems fully applicable to B2Bs. As a leading economist explained at the workshop, once a marketplace monopoly is attained, it may be very difficult to dislodge.[136] Under these circumstances, antitrust review should focus closely on the harms and benefits of the practices used to achieve exclusivity, that is, to keep buyers or suppliers away from competing B2Bs. In particular circumstances, such practices may cause substantial anticompetitive harm even if they rely on incentives rather than requirements and stop short of full exclusivity.[137]

Exclusivity practices – and ownership interests giving rise to *de facto* exclusivity – affect the extent to which participants in a B2B are able to support or patronize a rival B2B or other alternative trading system. Tying the participants to a single B2B may undermine the ability of alternatives to compete, effectively increasing the B2B's market power.[138] Indeed, adding exclusivity to a setting already characterized by substantial network effects could "tip" the market in favor of a given B2B and impede development of alternatives.[139] As workshop testimony

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[136] Salop 573. *See also* Carl Shapiro & Hal R. Varian, *Information Rules* 190 (1999) ("Let there be no doubt: building your own base of users for a new technology in the face of an established network can be daunting.").

[137] *See* Balto, *supra* note 117, at 563 ("penalty contracts, discounts, rights of first refusal, or 'most favored nation' provisions may create strong incentives that may effectively replicate exclusive arrangements"). Tom, Balto & Averitt, *supra* note 117, at 621-30; *cf*. Department of Justice and Federal Trade Commission *Antitrust Guidelines for the Licensing of Intellectual Property* at § 4.1.2 ("Exclusivity may be achieved by an explicit exclusive dealing term in the license or by other provisions such as compensation terms or other economic incentives. . . . A license that does not explicitly require exclusive dealing may have the effect of exclusive dealing if it is structured to increase significantly a licensee's cost when it uses competing technologies."). Similarly, the Department of Justice and Federal Trade Commission *Statements of Antitrust Enforcement Policy in Health Care* explain, "The Agencies will determine whether a physician network joint venture is exclusive or non-exclusive by its physician participants' activities, and not simply by the terms of the contractual relationship." *Id.* at Statement 8.A.3.

[138] Under the Competitor Collaboration Guidelines, exclusivity requirements are one of the factors applied in interpreting the market power of a collaboration. *Id.* at §§ 3.33-3.34. As Section 3.34(a) explains, "In general, competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so."

[139] *See, e.g.*, Carl Shapiro, *Exclusivity in Network Industries*, 7 Geo. Mason L. Rev. 673 (1999) ("exclusivity provisions can interact with network effects to create substantial barriers to entry"). "Would-be early adopters of the new network are faced with what can be a prohibitive opportunity cost of joining the new network: cutting themselves off from the larger, established network," and the expectation that exclusivity rules will prevent some from joining the new

reflected, power in the market for marketplaces raises several competitive concerns.

An obvious possibility is higher price. B2Bs charge for their services, and a B2B with market power could impose supracompetitive prices.[140] Normally, that market power would be limited by participants' ability to shift to other B2Bs, private Internet-based networks, their own EDI systems, or offline trading mechanisms.[141] To the extent that exclusivity impedes such shifting – either by preventing use of alternatives or preventing the alternatives from developing – it buttresses the B2B's market power.

Another concern is less efficient service. A B2B with market power may be able to rest on its laurels and offer less functionality.[142] More subtly, it could be able to tilt its service in favor of its owners rather than its customers. For example, a seller-owned B2B with market power might be able to structure its services in ways to favor sellers, such as by designing auctions in a way to maximize prices.[143] Competition from other B2Bs could prevent this, but exclusivity might impair that competition.

Reduced innovation is another possibility. Panelists generally agreed that innovation will be a key component of B2B competition.[144] Some cautioned that removing the spur of competitive rivalry could slow the process,[145] and observed that this could follow from exclusivity

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network reduces incentives for others to join. *Id.* at 677-78. The article also provides a useful summary of economic literature explaining how exclusive dealing provisions can elevate entry barriers in markets characterized by traditional, supply-side scale economies. *Id.* at 678-79.

[140] *See e.g.*, Baker 579-80 (exercise of monopoly power in market for marketplaces could tax transactions); Bloch & Perlman (Stmt) 11.

[141] *See* Dupont 319-20 (exercise of power limited by ability to buy and sell independently); Harting 416 (same).

[142] *See* Bloch & Perlman (Stmt) 11.

[143] *See* Salop 523-25 (rules of auctions can be manipulated so as to yield higher prices); Sandhu 256-57 (suppliers may find means to retard price discovery mechanisms); Currenex (Stmt) 1 (supplier-owners may tilt the exchange in their favor).

[144] *See*, e.g., Krattenmaker 545 (exchanges will compete by offering better software).

[145] *See* Whinston 430 (marketplace monopoly may lead to less innovation); First 552-53 (competition among marketplaces in offering innovative services crucial); Brodley 542 (unnecessary standardization of marketplace platform might limit innovation by buyers or sellers who link to the platform).

provisions.[146] Others, however, questioned whether this was a significant concern in the B2B context; they argued that B2B innovation would likely develop on a cross-industry basis, so that B2B competition within any given industry would not likely be essential for innovative activity.[147] Both arguments potentially have some validity in different fact contexts -- core software, for example might develop across industries, while the customizing and linking together of various services might be more industry-specific – but it may be too early to speculate as to their relative weight.

Moreover, exclusivity could sustain any existing market power over time by making entry more difficult. As described in Part 1.C.7, the record on B2B entry barriers is mixed. Some argue that entry will eliminate all competitive concerns; others contend that it will occur too slowly to maintain competition.[148] It is clear, though, that to the extent network efficiencies or other scale economies are reinforced with exclusivity provisions tending to deprive an entrant of the buyers or suppliers it needs to succeed, entry is likely to be less effective in deterring or counteracting anticompetitive effects.

4. Analytical Framework and Guideposts

How then might we assess the competitive consequences of exclusivity? The inquiry should focus on the impact of a given practice or ownership structure on the ability to form effective competing marketplaces and the consequences this bears for competition in the market for marketplaces.

An assessment of potential anticompetitive harm could begin with an examination of the nature of the practices at hand and an inquiry as to how restrictive they actually are: how severely do they limit the ability of buyers and sellers to support rival B2Bs? For example, some panelists stressed that minimum commitment requirements typically have been relatively modest and

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[146] *See* OESA (Stmt) 6-7 (exclusivity practices could thwart innovative B2Bs).

[147] *See* Rule 561-62 (no need to worry about B2B innovation because it will develop on a cross-industry basis, so there will be lots of innovation competition); Henry 562 (no real fears about innovation competition at this point).

[148] *Compare* Jasinowski 556 (entry will erase concerns about undue standardization or monopoly rents) *with* Simkins 409-10 (even if the market ultimately corrects problems, energyLeader may still feel the short-term consequences, and since “we were just born in January [2000], the short term is very important to us”).

unlikely to have much effect.[149] Then there may be need to focus on the specific activities in which a B2B will engage and to assess the role likely to be played by exclusivity in the particular factual circumstances.[150] Finally, an analysis would inquire if the exclusivity practices or ownership structure leave available sufficient buying, selling, or other support to sustain alternative marketplaces capable of maintaining competition.[151] If not, they may well cause anticompetitive harm.

Of course, we then need to consider any procompetitive benefits attributable to exclusivity. Clearly, network effects are likely to be an important source of efficiency in B2B contexts, and an analysis that failed to consider that greater B2B size may generate benefits as well as possible competitive concerns would be incomplete.[152] To the extent that exclusivity contributes to realizing network efficiencies, therefore, it could be beneficial. That reasoning, however, is not dispositive, and a deeper examination would pose some probing questions:

> (1) How strong and pervasive are the network efficiencies in a particular industry context? Network efficiencies may begin to diminish at some level or may not be strong enough to justify reduced competition.[153] Absent overwhelming network economies, there may be ample room for B2B marketplace competition. Indeed, most panelists believed that more than one B2B per industry supply chain would survive. *See supra* Part 1.C.7. Even if strong network efficiencies would eventually drive rival B2Bs to seek consolidation, however, there may be significant benefit in maintaining competition to select the surviving network.[154]

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[149] *See, e.g.*, Kinney 220-21; Shridharani 224; Perlman 568 (minimum purchase requirements "so soft that they're very unlikely . . . to have any consequence").

[150] *See, e.g.,* Correia 569-70 (urging that analysis look beyond market share to consider what the B2B is doing and how it is structured).

[151] *See* Perlman 569 (asking if there are enough potential participants outside the exchange so that other exchanges can form); Cooper 571 (asking if there are enough people outside to support a market).

[152] *See, e.g.*, Rule 559-61.

[153] First 553-54 (don't assume network effects inexhaustible or justify loss of competition). *See generally* Krattenmaker 546 (finding efficiencies in ownership by industry members "at least to some level").

[154] *See* 1996 FTC Staff Report, ch. 9 at 27 (discussing relevant merits of achieving standards through the winnowing process of competitive rivalry as opposed to cooperative agreements).

(2) Are the exclusivity practices reasonably necessary for achieving the network efficiencies? Given that a B2B with strong network efficiencies would hold inherent attractions for buyers and sellers, an analyst may question whether exclusivity requirements are reasonably necessary. Similar questions could be asked with respect to large-scale consortium ownership: as one panelist explained, network efficiencies derive from broad *participation*, but this does not necessarily require broad *ownership*.[155]

(3) Would interoperability between competing B2B marketplaces permit achievement of comparable network efficiencies without sacrificing competition? Stated differently, would open access to marketplace interfaces serve as a "practical, significantly less restrictive" alternative?[156] Some panelists indicated that, at least in theory, interoperability might be an alternative means of achieving network efficiencies.[157] At this point, however, its practicality remains unclear. As discussed in Part 1.C.8, there is little inter-exchange communication now;[158] there are hopes that it quickly can be developed;[159] but there may be significant hurdles – such as potential property rights in transaction records[160] – still to be surmounted. Moreover, there may be potentially significant issues as to competitive effects. The likely nature and extent of competition among interoperable marketplaces and the likely impact of interoperability on incentives to develop and improve B2Bs would have to be further explored.

Exclusivity practices may also be supported by other efficiencies.[161] Some panelists observed that they may be reasonably necessary to persuade investors that the B2B will indeed

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[155] Baker 579-80.

[156] *See* Competitor Collaboration Guidelines at § 3.36(b).

[157] Rule 559-60 (interconnection will enable realization of network efficiencies); *see also* Stojka 408 (noting consumer benefits from interoperability).

[158] Stojka 408.

[159] van Breen 205-06, 219.

[160] Chen 235-37 (businesses regard transactional records as trade secrets; may need exchange-to-exchange cooperation to sort out).

[161] It sometimes may be difficult to assess the full range of potential efficiencies because of the nascent nature of many of the services that B2Bs may grow to offer. Although an evaluation of efficiencies should seek to take account of all likely procompetitive benefits, the general caution against "vague or speculative" efficiency claims, Competitor Collaboration Guidelines at § 3.36(a), bears repetition here.

attract – and keep – enough trading volume to be viable.[162] Similarly, some suggested that consortium ownership by major industry members was a means for ensuring sufficient usage to spread fixed costs over a large volume of transactions.[163] Others cited reduced selling costs from negotiating a blanket price for a given volume commitment rather than re-negotiating price for each increment of service.[164] One panelist suggested that prohibiting investments in competing marketplaces may be necessary to align the incentives of B2B owners and that minimum purchase requirements may be needed to avoid "cherry picking" on particular contracts to the disadvantage of the B2B.[165] Another indicated that in some settings exclusivity may facilitate creation of industry-wide communication standards.[166]

The workshop was not intended to resolve these issues, and it is unsurprising that the record does not permit a full-scale evaluation of the significance or legitimacy of the various efficiency claims for exclusivity. That must await fuller investigation in actual factual settings where inquiry can be made as to whether particular efficiency claims are verifiable and potentially procompetitive; whether costs are incurred that reduce the claimed benefits; whether similar efficiencies could be attained through practical, significantly less restrictive means; and whether the cognizable efficiencies would be likely to offset the potential for anticompetitive harm.[167]

The fact-specific nature of these inquiries makes specific conclusions as to the competitive consequences of the various exclusivity practices impossible. In some settings they may raise competitive concerns, and in others they may be procompetitive. Nonetheless, some guideposts can be planted. All else held equal (including the ability to achieve efficiencies and innovations), competitive concerns are magnified (i) the greater the market share of the B2B owners; (ii) the greater the restraints on participation outside the B2B; and (iii) the less the interoperability with other B2Bs. This does not mean that industry consortia B2Bs are presumptively unlawful or that minimum volume commitments cannot be imposed. It does suggest that high levels of industry ownership or substantial minimum purchase requirements will likely draw a closer look. On the other hand, all else held equal (including the level of likely anticompetitive harm), competitive concerns are reduced the greater the contribution of exclusivity to achieving procompetitive

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[162] *See* Bloch & Perlman (Stmt) 9.

[163] *See, e.g.*, Gray 207-08; Bloch & Perlman (Stmt) 8; and *supra* Part 1.C.4. Another panelist, however, responded that the showing to this point has not been convincing. Brodley 575-76.

[164] Kinney 220-21.

[165] Perlman 567-68; *see generally* Salop 534-35 (noting possibilities for free riding).

[166] *See* OESA (Stmt) 7 n.10.

[167] Competitor Collaboration Guidelines at §§ 3.36-3.37.

benefits.   As with most areas of antitrust analysis, there is no magic formula for evaluating competition in the market for marketplaces, only a framework of analysis designed to weave complex and sometimes-conflicting tendencies into an assessment of likely competitive effects.