Entering the 21st Century:

Competition Policy in the World of B2B Electronic Marketplaces

A Report by the Federal Trade Commission Staff
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[1] This Report represents the views of the staff of the Federal Trade Commission; it does not necessarily reflect the Commission's views or the views of any individual Commissioner.

[2] Morgan Stanley Dean Witter (Stmt) 37. *See also* Salomon Smith Barney (Stmt) 77 (B2B stocks were worth approximately $130 billion according to the report issued in January 2000).

[3] Morgan Stanley Dean Witter (Stmt) 37 (online B2B purchases will grow to $1.4 trillion

increasing globalization of markets. The Internet technology that powers B2Bs is potentially transformative in that it can speed business-to-business communications into "real-time" transactions, conducted globally, with heightened accuracy and reduced waste, thus increasing the nation's productivity.

This Staff Report seeks to summarize what was learned at the workshop and to lay the foundation for understanding how to answer traditional antitrust questions in the context of new B2B technology. The hope is that this foundation will facilitate further dialogue among antitrust officials, the B2B industry, antitrust practitioners, legal scholars, consumer groups, and other experts with an aim toward developing a common understanding of the types of B2B structures, rules, and practices that, in particular circumstances, are most likely to ensure both antitrust compliance and the efficiencies that B2Bs promise.

EXECUTIVE SUMMARY

Overview of B2B Electronic Marketplaces Although treated as a group in this Staff Report, B2Bs are remarkably diverse. B2Bs serve a broad array of industries, from metals to fresh produce to hotels to chemicals to energy, with some B2Bs focusing horizontally (across various industries) and others vertically (on only one industry). Through B2Bs, participants buy and sell a wide variety of goods and services, from materials to be used in a firm's final product to things that just keep the firm running. B2Bs can be organized under a variety of ownership structures: some are founded by companies who use them; some are founded by third parties who do not plan to buy or sell through them; some are a blend of the two. Prices in B2Bs can likewise be established in various ways: by auction, catalog, a bid-ask system, or negotiation, for example. B2Bs may earn revenue from multiple sources, including transaction-related fees, membership fees, service fees, advertising and marketing fees, and sales of data and information. Market forces are continuing to sort out issues such as which, and how many, B2Bs will succeed, the extent to which potential efficiencies will be realized through B2Bs or instead through private networks, and the likely extent of interoperability among B2Bs.

Efficiencies of B2B Electronic Marketplaces B2B marketplaces have the potential to generate significant efficiencies, winning lower prices, improved quality and greater innovation for consumers. Many panelists stated that savings and increased competition through B2Bs could be substantial; indeed, one business analyst commented that, "[f]rom a very macro perspective, B2B e-commerce is simply the next generation of productivity growth for the U.S. economy."[1]

B2Bs can gain efficiencies in a variety of ways. B2Bs can reduce administrative costs, such as the time and energy a business expends to process an order and correct any mistakes in its processing. B2Bs can reduce search costs, that is, the costs buyers incur identifying suppliers and their offerings, and vice-versa. For example, B2Bs can make it easier for buyers to comparison-shop, replacing thumbing through bulky paper catalogs with quick and efficient mouseclick searching. Reduced search costs also mean that suppliers can have greater and cheaper access to more potential customers. Such reduced search costs can make new sales channels viable, creating markets for goods and services not traded before.

B2Bs can help check unmonitored corporate spending by using technology to enforce spending and other limits on in-house buyers. B2Bs can facilitate efficient joint purchasing, which may help reduce transaction and manufacturing costs and produce other cost-savings. B2Bs can be integrated with a firm's internal computer systems in order to continue reaping, and expanding upon, the benefits of the earlier computer-based systems. Enhanced efficiencies may also arise from increased collaboration facilitated by B2Bs, such as joint product design by the various firms involved in putting a product together. Finally, the heightened interaction between buyers and suppliers that B2Bs offer may facilitate supply chain management. That is, B2Bs could enable suppliers all along the supply chain, potentially reaching multiple tiers of suppliers, to learn more quickly what buyers want and when they want it, reducing forecasting that traditionally has proved inaccurate and expensive.

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[1] *See* Teagarden 100.

This is an impressive list. Although panelists noted that efficiencies may be more easily articulated than realized, the efficiencies that B2Bs may offer merit serious attention in light of their significant potential for cost savings and increased competition.

Antitrust Analysis of B2B Electronic Marketplaces B2Bs may raise a variety of antitrust issues. 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. The efficiencies and possible enhancements to competition that B2Bs can offer stem in part from their collaborative nature, but collaboration among firms also could facilitate anticompetitive conduct in two types of broadly defined markets: the markets for goods and services traded on B2Bs (or derived from those traded on B2Bs) at both the seller and the buyer levels, and the market for marketplaces themselves. In the market for goods and services, workshop panelists noted that competition may be affected by the extent to which information is shared and by whether joint purchasing or exclusionary (membership or access) practices are implemented. In the market for marketplaces, panelists suggested that exclusivity could affect the development of competition.

Competition Issues in the Market for Goods and Services: Information-Sharing Agreements The Internet allows firms to share information at an unprecedented rate. Depending on the operating rules, participants in a B2B could learn in real time, for example, the

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[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.

identities of the purchaser and seller in a transaction, the quantity purchased, the date and time of the transaction, and the purchase price. B2Bs capitalizing on that power can increase efficiencies in the supply chain and facilitate prompt competitive responses in the market, but they also might injure competition by facilitating price or other anticompetitive coordination. Workshop panelists also voiced concern about whether a B2B's operating rules would permit its participant-owners – particularly those with seats on the B2B's board of directors, or places in upper management of the B2B – access to sensitive data about their rivals.

The antitrust analysis of agreements to share competitively sensitive information would ask whether they might facilitate coordination on price or other terms. The analysis would examine the structure of the market that the B2B serves, including market concentration and the market shares of those sharing the information, whether the information was shared among competitors, the kind of information being shared, and the reasons for sharing. If a market is less susceptible to collusion, information-sharing through B2Bs generally poses fewer collusion risks. All other things equal, sharing information relating to purchases of direct goods may convey

Analysis of this issue would focus first on the extent of the disadvantage that rivals likely would experience if B2B access were denied or limited, taking account of any substitutes, such as offline markets, that could be used equally well to buy or sell the goods.[3] Several panelists suggested that strong network efficiencies in an established B2B might make alternatives significantly more costly and less competitive. The analysis would also inquire whether the effects on rivals' costs could be deterred or counteracted by entry of alternative marketplaces or by counter-strategies that rivals might pursue.

Next, the analysis would examine the likely impact on competition in the markets in which the excluded firms participate. If the excluded rivals were important to maintain effective downstream competition (*e.g.*, for finished products), exclusionary conduct that significantly raised their costs may cause anticompetitive harm. The analysis would consider factors such as downstream market concentration, theories of unilateral and coordinated anticompetitive effects

[3] "Goods" refers to services sold and purchased through B2Bs as well.

concerns are magnified (i) the greater the market share of the B2B participant-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 in many circumstances. It does suggest that high levels of industry ownership or substantial minimum purchase requirements will likely draw a closer look.

Conclusions and Themes for the Futuregnc¡÷ancTw§eröts

PART 1

OVERVIEW OF B2B ELECTRONIC MARKETPLACES

Part 1 discusses the contours of business-to-business commerce and how the Internet provides new avenues for that commerce. It then surveys several key aspects of B2B marketplaces, such as what inputs are traded, whether the B2B is organized vertically or

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[1] B2C refers to business-to-consumer commerce and has been the subject of considerable attention in its own right. However, for instant purposes, B2C falls beyond the scope of this report. To the extent it was addressed by the participants, it was in the context of distinguishing B2B from B2C commerce, with some noting that B2B commerce can be even more complex. *See, e.g.*, Salomon Smith Barney (Stmt) ("Salomon Smith Barney (Stmt)" hereinafter refers to *B2B e*commerce – A Vertical and Horizontal Perspective*, January 2000) 97-100; Bye (Stmt) 4-5. B2G refers to business-to-government commerce. B2G commerce is treated as a subset of B2B commerce in which one of the businesses is the government. *See infra* nn. 39-41 to Part 2 and accompanying text.

[2] Erick Schonfeld, *Corporations of the World, Unite*!, E-Company, June 2000, at 125.

[3] On its broadest level, "e-commerce" refers to "any trade or commercial transaction that is effected via electronic means; this would include such means as facsimile, telex, EDI, Internet, and the telephone." Bye (Stmt) 4. This report adopts the more narrow and more common definition of "trade that actually takes place over the Internet." *Id.*

[4] Baker & McKenzie (Stmt) 3, n.3.

[5] Hereinafter, “goods

[9] *See, e.g.*, Kinney (Stmt) 4-5.

[10] *Id.* at A-1 - A-5.

[11] *Id.* at 5, n.6.

[12] Fromer 45-47.

[13] Kinney (Stmt) A-4.

[14] *See infra*

[15] *E.g.*, Boeth (Stmt) 3.

[16] Harting (Stmt) 7. *See also* Fromer 48.

[17] *Id*

in any given B2B electronic marketplace.[24] Each transaction on the Internet can be tracked in great detail. Participants in any B2B can know, among other things, the identities of the purchaser and seller, the quantity purchased, the date and time of the transaction, and the number of times the specific purchaser looked at the product before making her decision.[25]

B2Bs can operate in conjunction with legacy systems. The integration of B2Bs with "back-offices" or "back ends" refers to linking the new technology with legacy systems so as to

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[24] Mirek 188.

[25] OESA (Stmt) 3.

[26] *See*, *e.g.*, Sullivan 252 (A "compelling reason" to join a B2B is to "leverag[e] the web technologies and ERP technologies out there to integrate into their back ends and improve their bottom lines"); Mirek 145 (Important to participation in B2Bs is their ability to provide "increased operational efficiencies, such as back-office integration.")

[27] Kinney (Stmt) 5 & n.7.

[28] Morgan Stanley Dean Witter (Stmt) 81.

[29] Guerin-Calvert 433-34.

and the nature of the industry. Below is a brief survey of some important dimensions of B2Bs.[30]

1. Direct and Indirect Inputs

All of the goods purchased and sold in business-to-business commerce fall into one of two general categories – direct or indirect inputs. Direct inputs, or manufacturing inputs, are raw materials or components that will be used directly in the manufacturing process.[31] These materials will be used in the buyer's final product or will be sold by a retailer. Examples of these would include the highly-engineered parts that a firm installs into the machinery it manufactures and the different chemicals that businesses may use for purposes as diverse as creating drugs or treating wood products. By contrast, indirect inputs, also known as operating inputs, are used for maintenance, repair, or operation ("MRO") and do not become part of the finished product.[32] Examples of these would include items such as paper clips and janitorial services.

Direct inputs generally account for fewer transactions than do indirect purchases, but the dollar value of each transaction involving a direct good tends to be greater.[33] Moreover, direct material purchasing tends to be a specialized function, whereas the purchasing of indirect materials may be fairly widespread within an organization.[34] Manufacturing firms and retailers typically devote a relatively higher proportion of their spending to direct material than do other types of firms, such as financial service firms, which typically devote more of their spending to indirect materials.[35] Whether a purchase involves direct or indirect materials may have implications for the type of B2B solution that fits best.

2. Horizontal or Vertical Organization

B2Bs are often categorized as "horizontal" or "vertical." "Horizontal" or "vertical"

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[30] Clark 363-64 (noting that generalizations across industries are difficult because different facts are typically implicated).

[31] Steve Kaplan and Mohanbir Sawhney, *E-Hubs: The New B2B Marketplaces*, Harv. Bus. Rev., May-June 2000, at 98.

[32] *Id*. at 98. *See also* Knight 250. Knight further subdivides MRO into white collar and blue collar. The former refers to indirect goods used in offices (e.g., paper clips), the latter refers to indirect goods used in factories (e.g., gloves, valves).

[33] Kinney (Stmt) 12.

[34] *Id*.

[35] *See, e.g.*, Kinney (Stmt) 8; Gray 160 (noting that among retailers approximately 25% is MRO-type spend and 70% tends to be spend for more complex goods).

organization refers, respectively, to whether the marketplace serves many different industries or a single industry. If the marketplace's "product focus" is not necessarily specialized in any one category but has considerable breadth, then it is usually considered a horizontal marketplace.

[36] Kinney (Stmt) 20.

[37] Additional organizational structures for marketplaces include "diagonal" marketplaces, which "support a specific type of buyer or a specific type of product category across multiple industries." Baker & McKenzie (Stmt) 5. For example, a diagonal marketplace might support the "purchase and sale of electricity, natural gas, and liquefied fuels in Latin American markets." *Id*. "Regional horizontal" marketplaces "serve[] a community's businesses and non-profit institutions of all kinds and sizes, capitalizing on local cohesiveness." Such a marketplace would focus on industries with an inherently regional focus and build upon their "standing in the community to create a marketplace that serves the unique needs of a wide range of regionally or locally focused entities . . . regardless of industry." energyLeader.com (Stmt) 6. Regional procurement markets could, for example, serve regionally focused entities such as utilities, hospitals, and universities. *Id*.

[38] Regardless of the specific mechanism for establishing price, transactions usually assume one of two forms: those made through short-term and long-term contracts. The former, also called a "spot market," encompasses ad hoc purchases such as those made to meet unanticipated needs. Lucking-Reiley 453. *See also* Dupont 267-68.

will be addressed in Part 3.

a. Catalog

Some B2Bs use catalog aggregators, or "metacatalogs," to normalize, or standardize, product data from multiple vendors so that buyers can easily compare it.[39] The Internet allows catalogs to present extensive product information to an extent never before readily available, including multimedia content such as photographs and videos.[40] Once online, the pricing in catalogs can be revised with relative ease.[41]

For example, equalFooting standardizes and aggregates the data of a half dozen of the top MRO distributors, as well as others such as office supplies distributors.[42] Another B2B, HotOfftheWire, provides a catalog of consumer goods targeted to small and midsize retail stores.[43] MetalSite, a B2B serving the metals industry, contains catalog purchasing as an option, although MetalSite'

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[39] Morgan Stanley Dean Witter (*The B2B Internet Report: Collaborative Commerce*, April 2000) 315. *See also* Zaad (23-24) (characterizing the fact that a single B2B catalog may contain the catalog items from many suppliers as the "essence" of the entire system).

[40] Kinney 29.

[41] Morgan Stanley Dean Witter (Stmt) 30 ("Moving the catalog online makes it dynamic; suppliers don't have to wait for the next printing of a paper catalog to change products and prices."). *But see* OESA (Stmt) 7 ("If the procedures required to add a new product [to a uniform product catalogue used in a B2B] are sufficiently onerous, participants would be unlikely to invest in developing new products because there would effectively be no market for them.").

[42] Kim 154-55.

[43] Sullivan 252.

[44] Stewart 55 (noting that metal is a "highly attribute-based product" that has to be defined and described), 66.

[45] Baker & McKenzie (Stmt) 4-5. During the workshop, two demonstrations were given of catalog purchasing on a B2B e-marketplace. *See* Zaad (21-32); Fromer (42-47).

[46] Phillips 300. *See also* Verloop 380 (discussing catalog system with "active pricing

[51] Kinney 162.

[52] *Id*. An English auction is distinguishable from either a Dutch or Japanese auction. A Dutch auction involves "one seller and many buyers in which the auctioneer reduces the price (from a high starting point) until a bidder agrees to buy at that price." Morgan Stanley Dean Witter (*The B2B Internet Report: Collaborative Commerce,* April 2000) 315. In a Japanese auction, which also involves one seller and many buyers, the "auctioneer raises the price (from a low starting point) and buyers must bid at each price to stay in the auction." *Id*.

[53] *Id*. at 8. During the workshop, three demonstrations of reverse auction were given. *See generally* Kinney 81-91.

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information is to be shared, among whom, and for what purpose. For example, the format of different reverse auctions demonstrated during the workshop varied depending upon market concentration in the supply market. In a relatively unconcentrated market, the bidders could see the bids (which were labeled by aliases rather than business name).[58] In a more highly concentrated industry, the auction was conducted according to a rank bidding format.[59] The

[58] Kinney 82.

[59] *Id*. at 88-90.

[60] *Id*. at 90.

[61] Baker & McKenzie (Stmt) 7.

[62] Harting (Stmt) 16-17.

[63] Allgaier 142.

[64] Mirek 140-41.

(ii) buyer searches by requirements, and is shown all sellers with posted profiles or proposals meeting those requirements.
(iii) buyer chooses a seller, and advises that seller of its requirements.
(iv) seller, if interested, then responds to that buyer, and seller and buyer negotiate directly with each other."[65]

4. Ownership and Control

As with most other aspects of B2B marketplaces, a review of current ownership structures reveals both that they defy easy categorization and that they are continuing to evolve. On the most basic level, distinctions are typically drawn between ownership by industry participants, that is, the companies that plan to use the B2Bs, and ownership by non-industry participants, such as venture capitalists or technology firms. Within the context of industry participant ownership, further distinctions are drawn between whether it is a buyer-participant or seller-participant. Types of contributions each of these groups can make are relatively clear: buyers and sellers

[65] Baker & McKenzie (Stmt) 6.

[66] Harting (Stmt) 8.

[67] *Id*.

[68] *See, e.g.*, Mirek 172; IPPN (Stmt) 1; Kim 197-98.

[69] Mirek 190.

[70] *See, e.g.*, Gray 204; Walsh 366-67; Strojka 364-65.

[71] Clark 362.

[72] *See, e.g.*, van Breen 191, 207; Spradlin 316-17; Gray 208.

[73] *See, e.g.*, Brodley 575-76 (described the argument that B2Bs require groups with market power, especially as it pertains to raising capital, as not being "very convincing"); Kinney 211-12 (questioned, "Why do you need to be working in an exchange that's . . . explicitly co-owned with you and some of your horizontal competitors in order to do what you've been able to privately for years?"). *See also* Foer (Stmt) 1 (characterizing the motivation behind establishedÉ

[79] Gray 361.

[80] *See, e.g.*, energyLeader (Stmt) 7-8; Harting (Stmt) 19-20; Morgan Stanley Dean Witter (Stmt) 40-1.

[81] Harting (Stmt) 4.

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c. Service Fees

Service fees are fees for additional functionality that B2Bs may offer either directly or indirectly. Value-added services that B2Bs are offering include logistics (e.g. shipping services); systems integration (e.g. coordinating legacy systems with B2Bs); financial services (e.g. credit assessments); and industry information (e.g. identification of new products and services, various trade-industry events, links to useful sites, news feeds pertaining to the industry, chat rooms).[84] B2Bs may provide value-added services themselves, or may receive a portion of the fee collected by third parties that the B2B permits to supply services through its e-marketplace. Several panelists asserted that service fees for value-added services will dominate over membership and transaction fees as the primary source of significant revenue.[85]

d. Advertising and Marketing Fees

Advertising on B2Bs can take many forms including "banner advertising" or "opt-in e-mail marketing."[86] The value of such advertising stems from the ability to target key purchasing decision-makers. B2Bs, like trade publishing, trade shows, and trade conferences, represent a means to achieve such targeted marketing. As one panelist explained, "there are really only about 100,000 buyers and [suppliers] in the pollution control business domestically, for instance, and we get about 30 to 60 percent of them in a given month to come multiple times to our site to get information, [so] we sell access to those eyeballs . . . [T]here are very robust revenue streams in advertising and promotion."[87] A related revenue source is "listing (or hosting) fees," which suppliers typically pay "to have a storefront" (a separate, supplier-specific segment) within a given marketplace.[88]

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[84] Harting (Stmt) 9-10.

[85] *See*, *e.g.*, Harting (Stmt) 4; Verloop 420.

[86] Baker & McKenzie (Stmt) 13. Opt-in e-mail marketing refers to "sending e-mail messages to those who have opted to receive them." *Id*. One panelist noted that her customers, small businesses, are extremely concerned about online privacy. Buyers on her B2Bs do not want to be deluged with junk mail from suppliers who received information about the buyer from the exchange. Kim 182. Another panelist, also characterizing this as a consumer privacy issue, noted that "in a lot of respects it would be nice to get more targeted advertisements." Knoll 182.

[87] Walsh 421-22.

[88] Baker & McKenzie (Stmt) 13.

e. Data or Information Sales

The accumulation of composite transaction or other market data by B2Bs was viewed as having tremendous value. Historically, such data typically would only have been available through sources such as vendors, competitors,[89] or middlemen. Now, if a B2B had adequate liquidity, it could accumulate detailed data regarding many aspects of particular chains of commerce. In theory, the data might be sold in aggregate form.[90] As one panelist noted, the information gathered a the B2B in the course of transacting millions of transactions may yield "overall statistics" that could be extremely valuable.[91] As an example, he noted that pipe mills

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[89] Morgan Stanley Dean Witter (Stmt) 101.

[90] *Id*.

[91] Gray 230.

[92] *Id*. at 229-30.

[93] *Id*.

[94] Clark 402.

[95] *Id*. *See also*, Morgan Stanley Dean Witter (Stmt) 101.

[96] Clark 401-02.

marketplace allows the sharing of aggregated data.[97] Likewise, information about buyers is aggregated and shared among buyers at FacilityPro.com.[98] In the B2B electronic marketplaces designed by energyLeader.com, "data may . . . be aggregated by marketplace personnel in a manner that does not reveal any one buyer's activities, e.g., for purposes of negotiating volume discounts."[99]

One panelist noted that companies consider "their transactional record[s] as part of their trade secrets, as part of their proprietary intellectual property."[100] Accordingly, it is necessary for B2Bs to address whether they are "custodians" of the data or "owners" of the data.[101]

6. Access to Information

Information on specific and aggregate transactions, supplier prices, buyer purchases, and other confidential or proprietary information could potentially be accessed by a B2B's participants, owners, management team, employees, or board of directors. Many workshop panelists suggested that each marketplace handles issues of information sharing differently, and that typically either the board of directors or management decides how to use this information.[102] Other panelists observed that a marketplace's operating rules may control how information is used,[103] or the contractual arrangement that each participant has with the marketplace may govern the confidentiality of transaction data or other proprietary information.[104] Thus, whether participants, owners, management, employees, or the board of directors has access to confidential or proprietary information depends on the B2B marketplace's rules on how information is shared or secured.[105]

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[97] Gray 400.

[98] Haines 380.

[99] energyLeader (Stmt) 11.

[100] Chen 235-36.

[101] *Id.* at 236.

[102] Mirek 234-35.

[103] Gray 204.

[104] Gray 383.

[105] Practices vary. *See, e.g.*, Stojka 381-83 (in Commerx, in which strategic investors are limited to one percent ownership interests, detailed information may be available to management and board members, but an unwritten rule prevents the information from flowing to participant-owners); Gray 361-62 (in Petrocosm, an industry-owned consortium marketplace, the board and

management will not have access to participants' proprietary information); Roberts 384 (announcing plans to bar M-Xchange's board of directors from receiving proprietary information from the exchange).

[106] Mirek 188.

[107] *Id.* at 199-200.

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7. Barriers to Entry, Network Effects, and Intellectual Property Issues

Many workshop panelists noted that B2B electronic marketplaces are proliferating now at a rapid pace.[112] One industry analyst expects to see 2,000 marketplaces by the end of 2000 and 5,000 by the end of 2002.[113] This rapid pace, however is not expected to last, as the industry moves into a phase in which various B2B electronic marketplaces will consolidate and differentiate.[114] Industry analysts offered varying opinions as to how far consolidation would ultimately reach.[115]

Other workshop panelists predicted that although marketplaces eventually will consolidate, there will be many segments and tiers within any specific industry,[116] and that there will be many niche players within each industry.[117] Moreover, if there is interoperability among marketplaces so that buyers and sellers conduct transactions not only within any one B2B but across multiple B2Bs (also known as exchange-to-exchange commerce), there is a possibility that there will be specialists competing for business from a number of marketplaces.[118]

The course of development will be greatly affected by the extent of entry barriers into the market for B2B marketplaces. One workshop panelist stated that B2B electronic marketplaces are proliferating now because barriers to entry are low, thus enabling multiple marketplaces to emerge.[119] Another suggested that if a start-up B2B offers only limited functionality, such as catalog purchasing or auction capabilities, it does not take much transaction volume or liquidity

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control of competitive information within B2Bs).

[112] *See*, *e.g.*, Gray 412; Jasinowski 556; Rule 561-62.

[113] Morgan Stanley Dean Witter (Stmt) 17.

[114] *See*, *e.g.*, Shridharani 214 (economies of scale and network effects drive consolidation).

[115] *Compare* Harting 415 (suggesting there will be two B2B electronic marketplaces within each relevant product market and relevant geographic market) *with* Gray 414 (suggesting the number would be five).

[116] Shridharani 214.

[117] Gray 213.

[118] Kinney 209.

[119] Harting (Stmt) 21.

[120] Gray 413.

[121]

purchase necessary goods and services with more sellers in the marketplace.[128] To the extent that network effects create significant advantages for large incumbent B2Bs, entry could be impeded.

One commentator observed that independent B2Bs are finding it harder to locate necessary capital when an industry consortium forms a B2B aimed at the same market the independent B2B plans to serve. Suppliers of venture capital tend to assume that the industry coalition model will capture the liquidity necessary for a successful marketplace.[129] In addition, some panelists indicated that antitrust laws that vary from country to country can amount to an entry barrier for B2B marketplaces, which conduct business without respect to national boundaries.[130]

a. Incentives Used to Attract and Retain Volume

One panelist suggested that industry ownership provides both economies of scale and economies of know how and information,[131] and workshop panelists observed more generally that many marketplaces have offered equity investments to leading buyers or suppliers to generate critical mass in a marketplace.[132] Indeed, the CEO of Metalsite suggested that having industry ownership is one of the reasons why the marketplace is still operational.[133] The equity can be offered in exchange for market participants' commitment to provide a certain level of volume.[134] Others workshop panelists asserted that offering equity to marketplace participants appears to occur in markets that are concentrated with fewer buyers and sellers, rather than in markets that

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[128] Sunder 427. *See also* Rule 559 (network effects are present in that information provided by these marketplaces will be more valuable and accurate with a larger number of buyers and sellers); Guerin-Calvert 433; energyLeader (Stmt) 12-13 ("The attractiveness of the marketplace to the seller is often a function of the extent to which the marketplace is used by the seller's major buyers. . . . Sellers who wish to continue their relationships with these buyers will want to participate in the marketplace.").

[129] Clark 363. Nonetheless consortium B2B marketplaces could fail if long-time competitors find it difficult to work together. *Id.*; s*ee also* Heymann 368-69.

[130] *See, e.g.*, Krattenmaker 578; *cf.* Foy (Stmt) 2-6.

[131] Krattenmaker 546.

[132] Kafka 222-23 (equity gives incentive to use the exchange and thereby generate critical mass); Gray 225 (giving equity one way to drive for liquidity).

[133] Stewart 70.

[134] Kafka 219.

are fragmented and in which there are more buyers and sellers.[135]

In addition to equity, other workshop panelists suggested that other ways to entice volume to a marketplace are to provide volume discounts to incentivize buyers and suppliers to use a marketplace,[136] to establish rebates or revenue-sharing devices in return for commitments to achieve certain volume levels,[137] or to present information that highlights a particular marketplace participant.[138]

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[135] Shridharani 224 (equity seeds liquidity in a concentrated market, not so much if a fragmented market); Harting 348 (big buyers and sellers get equity in order to induce liquidity in concentrated markets).

[136] *See, e.g.*, Gray 225, energyLeader (Stmt) 12 ("energyLeader.com may offer incentives to encourage entities to bring a large volume of transactions to the market.").

[137] Kinney 220-21 (price based on a "blanket dollar commitment"); Foer (Stmt) 2.

[138] Kafka 195; Walsh 366 (Sabre system provides an example of information presentation issue).

[139] Harting 372.

[140] *See, e.g.*, Simkins 409-10 (contractual provisions or other exclusivity practices may be used that limit participants' flexibility and prevent them from "go[ing] where their best economic judgment dictates that they should go").

[141] Perlman 567-68.

[142] *See, e.g.*, Cooper 571.

[143] *See*, *e.g.*, Knoll 281 ("benign coercion" used by customers to force sellers to

intellectual property, drawings [and databases,] for example."[151] Given that, the panelist then queried why the business would want to participate unless the business also has a capital interest.[152]

Another panelist stated that the impact of shop-bots on market transparency will be unclear until the intellectual property issues are "sorted out."[153] Shop-bots are "metasearch

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[151] Knoll 308.

[152] *Id.*

[153] Lucking-Reiley 455-56.

[154] *Id.*

[155] *See infra* Part 1.C.3.a (discussing pricing as proprietary information).

[156] Clark 387-88; *see also* Kinney (Stmt) 5.

interoperability will be important in the future.[157] Buyers may want the ability to select trading partners without being limited by the technology they use.[158] Indeed, as has been suggested, suppliers want to be able to digitize the content of its catalog once and be able to place it on multiple marketplaces without extensive reformatting.[159] It may require not only interoperable technical standards, but also interoperable business standards such as standardized product descriptions.[160] In any case, one workshop panelist cautioned, it may be premature to settle on interoperable standards now and, consequently, to stop innovation.[161]

* * *

Business-to-business commerce can assume as many forms online as it does offline. Thus, while the building blocks of B2Bs are clear, the ultimate forms that B2Bs will take remains to be seen. Nonetheless, understanding the foundation of B2B marketplaces and certain basics about how they operate is necessary because, as will be discussed in Part 2, it is through the shift from the offline to online world that tremendous gains in efficiency are promised.

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[157] *See, e.g.*, Stojka 408 (buyers need to gain access to many B2Bs, and today, "there isn't a lot of interexchange communication"); Boeth 116 (interoperability issues have not become so painful that companies are screaming yet, but they will become important in the future); van Breen 205-06, 219 (by using a consortium, WorldWide Retail Exchange hopes to achieve an interoperable standard in next few months so that exchanges can be linked in the future).

[158] *See, e.g.*, Knoll 293; Open Buying on the Internet (Stmt) 1.

[159] Fromer 111. Nonetheless, one workshop participant noted that in concentrated markets, interoperability may be of limited value. Knoll 308. In a concentrated market, participation in more than one exchange may require the company give up valuable product-related information. Such a trade-off may be worth it only if the company has a capital stake in the B2B. *Id.*

[160] Tarkoff 120.

[161] Kinney 119.

of service centers that can receive an EDI transaction through PC software, but that must print out the order and then have it re-keyed to process the order through their system.[4]

Even if the technology is in place and accessible, there is still likely to be an "adjustment" period. One panelist noted that among her clients, typically small-sized businesses, more than 60 percent that completed their first transaction through her B2B did not do so online but, instead,

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[4] *Id*.

[5] Kim 181-82.

[6] Walsh 407.

[7] Knight 290.

[8] *Id*.

[9] *Id*. *See infra* at Part 1.C.3.b (describing reverse auctions).

[10] *Id*.

[11] Fromer 45-47 (discussing administrative costs as pertains to the financial department of a business).

usually take place through some combination of phone and fax interactions. One panelist detailed the process of purchasing via the phone and fax: An employee would have to call his purchasing manager; the purchasing manager call her supervisor and then send the response back to the employee, who would fill out a purchase order manually (purchase orders can be extensive documents), fax that purchase order to the supplier, who would determine the right price and return an invoice which, itself, would have to be processed.[12] Regardless of industry, company size, or product involved,[13] the costs attendant to purchasing through these more traditional mechanisms are often described as substantial and subject to significant reduction through B2B marketplaces. For example, one workshop panelist stated that, within the chemical and pharmaceuticals industry, the cost of a "face-to-face sales call is about $575."[14] One of his dealers concluded, after some study, that the same transaction would cost about $10 through a B2B.[15] Another panelist, addressing small and medium-sized enterprises in particular, stated that what would otherwise be a paper transaction costing $100 could be reduced to $10 when conducted through a B2B.[16]

Administrative costs also encompass the cost of fixing an incorrectly processed transaction. The pervasiveness and, therefore, the expense of administrative mistakes in the procurement process appears to be high. One panelist said that one of his "major retailers" told him that "40 percent of all of their purchase orders have errors in them."[17] The panelist elaborated, "That means that 40 percent of [the time of] their accounting staff, their receiving staff, and their production staff is spent on doing nonvalue-added activities."[18] The result is that consumers face higher prices to "cover our inefficiencies."

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[12] Tarkoff 32.

[13] The substantial prospect for increased efficiency appears to hold to true for highly-engineered products, such as automotive parts, as well as outright commodities and more modestly-engineered retail goods. Knoll 263.

[14] Bhatt 276.

[15] *Id*.

[16] Loevy 261. Other estimates are more modest. *See, e.g.*, Jasinowski (Stmt) 3 (reduction in transaction costs by 10% or more had been experienced).

[17] Verloop 394. *See also* Phillips 269 ("40 percent of the orders that are done manually have [require] some sort of rework after the fact [owing to inaccuracy]").

[18] Verloop 394.

[19] *Id*.

CFO of the same small steel company mentioned above stated that, whereas "[he] used to have to make 20 phone calls to get one coil of steel," through use of a B2B he now has purchasing relationships with large suppliers who previously would not have even "notice[d]" this small buyer.[34]

In highly fragmented industries, it is particularly important to be able to reach suppliers at a lower cost.[35] The examples above involve MROs and the metals industry, both of which have a highly fragmented supplier base. In MRO distribution, the "top 50 players make up 13 percent of the marketshare. The number one player has less than three percent of the market share."[36] Likewise, the metals industry is "highly, highly fragmented."[37] "[T]he largest metals company in the world only owns three and a half percent of the global market."[38] Reduced search costs may be particularly significant in this context.

Nonetheless, industries with more concentrated supplier bases – such as those manufacturing more complex products – also may benefit from heightened market transparency, for example, through reverse auctions. The lure of a reverse auction is that if competition in the marketplace is "relatively robust," if the good has "a lot of price flexibility," and if a contract for a sufficient amount of money is at stake, a buyer could have sellers from across the globe bidding against each other for its business. For example, in May 2000, the federal government held its first reverse auction.[39] The U.S. Navy sought a highly technical part with extensive specifications – the brains of an ejection seat used in Air Force aircraft. Three qualified sources which had previously provided such goods bid against one another. As the Navy Captain in charge of procurement summed it up, "[we] went online and we ended up achieving a savings of about 28 percent."[40] The success was such that the long-term vision of the Navy Inventory Control Point is to "do all of our competitive procurements that make sense in a reverse auction scenario."[41]

B2B reverse auctions also can facilitate competition between heterogeneous products by

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[34] Eryn Brown, *Is the Internet Stronger than Steel*?, Fortune, May 15, 2000, at 162.

[35] Kafka 169.

[36] Kim 154.

[37] Stewart 53.

[38] *Id*.

[39] B2G, business-to-government, is treated herein as a form of B2B wherein one of the businesses is the government.

[40] Huff 147-48.

[41] *Id*. at 149.

[42] Kinney 77-79.

[43] *Id*. 86-87.

[44] Salomon Smith Barney (Stmt) 16.

[45] *Id*. *See also* Kinney 79.

[46] Salomon Smith Barney (Stmt) 16.

[47]

have gone unused is now being standardized and traded over the Internet through an exchange mechanism. Another example, the National Transportation Exchange (NTE), is a B2B focusing on the billions of dollars of trucking capacity that goes unused each year.[51] Through the NTE, shippers are able to post their excess trucking capacity. These postings are then matched with businesses who have goods to transport.

E. Maverick Purchasing

Maverick purchasing – buying that occurs outside the normal channels – is a substantial problem for businesses. The National Association of Purchasing Managers estimates that maverick purchasing constitutes approximately thirty percent of company purchases.[52] B2Bs may

[51] Salomon Smith Barney (Stmt) 17.

[52] Shridharani 157. *See also* Tarkoff 33.

[53] Gray 160-61.

[54] Clark at 404.

[55] Salomon Smith Barney (Stmt) 23.

can help reduce transaction costs through scale economies in purchasing, reduce manufacturing costs, and produce other efficiencies as well.

The following example illustrates the benefits of volume discounts for a single business with multiple buyers. Appleby's is a chain restaurant with approximately 400 company-owned stores. Through the services of a B2B, Instill, Appleby's was able to know exactly who was buying what and when. If each store goes through different distributors, it is extremely difficult to aggregate that data. But, once aggregated through a B2B, the chain could go to its suppliers and ask for a volume discount.[56]

Price discounts because of volume can also be achieved by aggregating the purchasing needs of wholly-separate businesses. One B2B, equalFooting, enables small business buyers to achieve some volume discounts through a "virtual" aggregation of purchases.[57] The founder of this B2B noted that as a logistical matter, the B2B would be unable to pool discrete orders as the need for them arises because in the MRO context, there are "over two million SKUs of items," and it is unlikely that sufficient buyers will need the same item around the same time. Instead, this B2B successfully requested that suppliers treat it as a large national account entitled to volume discounts. Frequently, this B2B received discounts not only from the suppliers, but also from shippers and other related services. Small businesses receive discounts on their purchases, discounts that would have otherwise been unavailable. XML integration between the B2B and the suppliers is integral to keeping such arrangements cost efficient for suppliers.[58]

G. Systems Integration

Not only can B2Bs increase efficiency through the many mechanisms discussed thus far, but B2Bs can also be integrated with a firm's legacy computer systems so as to continue to reap, and expand upon the benefits of the earlier systems.[59]

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[56] Clark 403.

[57] One analyst viewed such a system as the virtual equivalent of an offline distributor. Kafka 228-29.

[58] *See* Kim 227-28; Morgan Stanley Dean Witter (Stmt) 81. *See also* Cogan 107-08 (Another B2B, GoCo-op, works with companies where there is "an opportunity for competitors to get together and either leverage certain services or have a division of labor where each of the members provides a different service or a different portion of the services to each other, and they gain economies of scale that way."). *See infra* at Part 1.B.2 for a discussion of the role of XML in facilitating the rise of B2Bs.

[59] *See, e.g.*, Sullivan 252 (A "compelling reason" to join a B2B is to "leverag[e] the web technologies and ERP technologies out there to integrate into their back ends and improve their bottom lines."); Mirek 145 (Important to participation in B2Bs is their ability to provide "increased

As a practical matter, integrating B2Bs with back-offices or back-ends means that the B2B can receive necessary information, such as purchasing requirements, as it has been assembled by the legacy systems rather than requiring input into new B2B order screens.[60] The process may also work in reverse, with the B2B sending information directly into a legacy system. That way, if a B2B sends e-mails to panelists regarding orders, those business will not have to "re-key" that information into their legacy systems in order to process it.[61] For example, an ERP system may provide many items of information, including a determination of what is needed and when, notification of relevant departments (*e.g.*, receiving department) that a delivery is due, and verification of an invoice for the accounts payable department. "Because these internal notifications are so important, a web site that merely accepted orders could not serve industrial buyers. The receiving dock would not have authority to receive the goods, nor would the accounts payable department have authority to pay the invoice."[62]

H. Supply Chain Management

Heightened interaction between buyers and suppliers may facilitate supply chain management. B2Bs could enable suppliers all along the supply chain, potentially reaching multiple tiers of suppliers, to more quickly and more accurately learn what the buyers want and when they want it.[63] In the absence of such information, "buyers and sellers must make assumptions about each other's needs."[64] Unfortunately, as a practical matter, such efforts to predict needs are typically ill-fated. One workshop panelist stated that a steel company CEO had told him that in "the last 91 years they've never got a forecast [right]."[65] Consequently, "when evaluated along the entire length of a supply chain, the amount of inventory being held for contingencies is quite large, and collectively adds much inventory carrying cost, obsolescence, spoilage, or overstocks [or shortfalls]."[66] Supply chain management is particularly important for

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operational efficiencies, such as back-office integration.")

[60] Kinney (Stmt) 5.

[61] Morgan Stanley Dean Witter (Stmt) 81.

[62] Kinney (Stmt) 5-6.

[63] Sculley & Woods (Stmt) 1 ("[T]hese net markets have the capability to tie together the manufacturer with its suppliers (Tier 1) and its suppliers' suppliers (Tiers 2 & 3). This can lead to greater efficiencies . . . that dramatically reduce manufacturing time, inventory levels and distribution costs.").

[64] Kinney (Stmt) 10.

[65] Stewart 65.

[66] Kinney (Stmt) 10.

"very complex products," such as many direct products, because efficiencies are more closely tied to capacity planning.[67] Some speculate that B2Bs will enable companies to move from "push marketing" to "pull marketing."[68] In a push model, business produces first and then tries to sell. In a pull model, "the consumer – stimulated, of course, by smart advertising and promotion – will pull product through the supply chain."[69]

B2Bs are equipped to improve inventory management. "[Supply chain] optimization techniques require a near-constant level of analysis and refinement of production plans as conditions change, the volume of interaction that might occur between a buyer and a supplier attempting to jointly optimize is huge. The Internet can help solve the integration challenge by providing a low-cost conduit for requests and acknowledgments, as well as by defining standards for how requests and acknowledgments are formatted and shared."[70]

With regard to inventory management, a purchase order may have several hundred line items on it. And companies may not pay the order until all of those line items are adequately reconciled. That is, it is only when someone signs off that they have received all the proper items in proper form and condition that the purchase order moves from accounts payable to the treasury for actual payment.[71] The result of this protracted process is that the supplier ends up bearing the financial burden of "a lot of inventory financing" resulting in "a lot of cost to capital."[72] Increased automation, "getting the items standardized and getting that invoice flowing electronically and the reconciliation of that invoice electronic," will save considerable money.[73]

I. Collaborations

Enhanced efficiencies may also arise from other forms of collaboration.[74] Outsourcing

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[67] Kafka 169.

[68] Jay Akasie, *Ford's Model E,* Forbes, July 17, 2000, at 30, 31.

[69] *Id.*

[70] Kinney (Stmt) 28.

[71] Gray 156. *See also* WorldWide Retail Exchange (Stmt) 8 (noting potential for "improved payment terms").

[72] WorldWide Retail Exchange (Stmt) 8.

[73] Gray 156.

[74] Kafka 146.

[75] Jasinowski (Stmt) 2.

[76] Sandhu 277-78. *See also* Lucking-Reiley 453 ("[I]f, in fact, electronic commerce is

Accordingly, the more seamlessly the B2B is able to incorporate logistics services,[81] the better for its participants. But when a middleman is inefficient or fails to provide any value-added services, disintermediation may also be an avenue for increased efficiencies.[82]

* * *

There is no clear division between the differing efficiencies detailed. When efficiency is promoted in one area, other efficiencies are often concurrently promoted. What is more, it is not clear to what extent these efficiencies will be realized and which, if any, will not. Part 3 will discuss the role of efficiencies within antitrust analysis.

[81] *See, e.g.*, Libicki (Stmt) (weights and measures are an example of possible logistics services).

[82] *See, e.g.*, Allgaier 175-76; Loevy 327.

[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

[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).

[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

[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;

cutting prices? How can they guarantee that industry prices stay high? How can they prevent

[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

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 "

[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

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 "

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]

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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]

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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 B2

[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").

[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'

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

[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).

[79] OESA (Stmt) 5.

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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).

[88] In some settings exclusionary agreements among competitors may be per se unlawful

[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 (7

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?
>
> 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

(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

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).

[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.*

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]

[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.

[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

[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).

[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).

[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

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);

[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").

[149] *See, e.g.*, Kinney 220-21; Shridharani 224; Perlman 568 (minimum purchase requirements “

(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.

APPENDIX A:
WORKSHOP PANELISTS

NAME	AFFILIATION	DATE
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Rod **Gray**	CFO, Petrocosm Corporation	6/29/00 & 6/30/00
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APPENDIX A

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