Antitrust Analysis of B2B Ventures (Part 1)

by David A. Balto

The brave new world of Business-to-Business (B2B) buyers' ventures on the Internet offers new competitive challenges and tremendous potential for efficiencies. Since B2B buyers' ventures often involve collaboration among competitors, there may be potential antitrust risks. Most of the antitrust issues arise because often these arrangements are joint ventures established by competitors.[1] Joint venture structures, which offer tremendous flexibility, seem particularly well-suited for arrangements in this emerging and rapidly evolving market. To put things in perspective, although hundreds of joint ventures are proposed and formed every year, very few face antitrust challenges. As a result, the antitrust concerns typically are relatively modest, and that probably is generally true for these B2B ventures.

The Federal Trade Commission (FTC) has been at the forefront of providing guidance on B2B Internet arrangements. It has held two workshops exploring questions such as how these arrangements function, how they generate efficiencies, and what antitrust issues might arise. On October 26, 2000, the FTC staff issued its report, "Competition Policy in the World of B2B Electronic Marketplaces" (FTC Staff Report).[2]

There are several questions that arise in the antitrust analysis of these B2B arrangements. These include: (1) the size of the venture, (2) the potential for coordination and collusion among rivals, (3) the exercise of monopsony or buyer power, (4) restrictions on membership and access, and (5) exclusivity provisions. This is the first of two articles and will address the first two issues, size and collusion. The second article will address monopsony, membership, and exclusivity issues.

Background

The promise of the Internet is the organization and delivery of vast quantities of information, exchanged seamlessly and at the speed of light. It thus appears to be an ideal mechanism for establishing exchanges, or markets for buyers and sellers. Transaction costs can be reduced, as buyers and sellers are able to find each other more quickly and to reach agreement with greater ease, turning a personal and fax negotiation process into "a distinct system of suppliers, distributors, commerce services providers, infrastructure providers and customers that use the Internet for communications and transactions."[3]

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Markets function best when they offer options and transparency. Options are the first ingredient to a market economy, as having a variety of competing goods with a variety of price and nonprice characteristics is what gives consumers the array of alternatives among which meaningful choices can be made. Transparency is the second ingredient of a market economy because it provides consumers with accurate information about product characteristics that they need in order to be sure that those choices actually reflect their true preferences.

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Internet transactions have the potential to enhance both options and transparency. Internet transactions can enhance the range of options because they provide a low-cost means by which suppliers from many backgrounds can be brought together; an Internet market provides a single forum in which buyers can consider the offerings of suppliers large and small, near and far. Internet transactions also enhance the transparency of a market because the medium lends itself to the presentation of a great deal of detailed information about product characteristics, appearances, shipping schedules, and the like. The Internet allows this information to be presented in a public forum so that other suppliers can promptly challenge any misleading elements.

B2B Internet sites have evolved from various sources. First, many firms recognized that the Internet could streamline and improve their procurement processes. For years, firms have attempted to reduce costs, improve just-in-time inventory controls, and better manage procurement through the use of electronic data interchange (EDI). The Internet enhances the ability to use EDI and reach a broader range of suppliers. Some commentators have called B2B Internet exchanges the "Holy Grail" of inventory control.[4] Other B2B Internet exchange sites were developed by parties hoping to establish proprietary markets to serve either a specific industry or to serve all potential buyers and sellers. More than 600 of these sites have been established so far, including markets for steel, meatpacking, chemicals, and plastics, as well as generalized market sites such as FreeMarkets.[5] The eventual success of many of these proprietary ventures is uncertain.[6]

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Several buyer groups have announced their own sites in industries such as automobiles, airlines, defense contracting, and tires.[7] If the procurement process can be weaned away from personal relationships, information exchange, and offers communicated through fax machines, the potential savings could be enormous. General Motors alone "issues more than 100,000 purchase orders a year, with an average processing cost of $125."[8] Some large buyers report savings on average of 15 percent from one proprietary auction site.[9] In addition, the potential reduction in purchasing costs may include more than those accounted for by reducing transaction costs. Sites where buyer orders are aggregated may expect to reap gains from increased purchasing power. It is this commingling of efficiency goals and the hope for increased market power—as well as the potential for collusion—that attract the attention of the antitrust agencies.

Although B2B exchanges offer the opportunity to bring great changes to 21st century commerce, exchanges have existed for centuries. An exchange simply brings together groups of buyers and sellers, often in a single location. When sellers aggregate in central locations, buyers reduce their fixed costs of shopping. Economists call these agglomeration facilities.[10] The reduction in fixed costs results in the familiar preference for one-stop shopping, which has led to the success of supermarkets and shopping malls. The reduction in buyers' fixed costs gives sellers who aggregate in central locations a competitive advantage over other sellers.

The New England Fish Exchange

To illustrate the antitrust concerns that these undoubtedly efficient exchanges can nonetheless sometimes raise, consider an example from the turn of the 20th century— the New England Fish Exchange. The Boston fish piers brought together scores of fishermen, dealers, and wholesalers. Organizing trade among these numerous market participants was a daunting task. In 1908, a group of wholesale dealers, with the approval of many of the fisherman, organized an exchange to conduct auctions at the most popular pier, known as T Wharf. The exchange established various rules for its funding, participation, and when trade could be conducted.

Besides the exchange, there had been a series of mergers between groups of fishing companies and groups of dealers. The Department of Justice (DOJ) sued in 1917, seeking to break up the exchange and the companies of dealers and fisherman under the relatively new Sherman Act and the recently enacted Clayton Act.[11] Judge Bingham dissolved the companies of dealers and fishermen. Although his opinion is more than 80 years old, it contains a number of important points for today's analysis.

First, the court declined to dissolve the exchange. Although its reasoning is not transparent, the court appears to have recognized that the exchange offered many efficiencies to the functioning of the market. The court observed that "the exchange is a proper instrumentality through which to conduct the business, provided it is governed by rules and regulations that do not impose an undue restraint upon the trade . . . ."[12] However, the court struck down various restraints imposed by the exchange.

Second, the court focused on the critical nature of the exchange in the market. The concentration of dealers available at the exchange proved such an attraction to fishermen that 83 percent of all fresh fish brought to Boston was sold there. The court found that the exchange had "a predominating control of all the fresh fish dealt in throughout the North Atlantic States, rendering it impossible for an outside dealer to build up a business in interstate trade."[13]

Third, because of the significance of the exchange, the court focused on the exchange rules that limited the ability of retail fish dealers to compete in the market. Privileges at the exchange were limited to wholesale dealers. The court decided that such discrimination violated the Sherman Act and ruled that the defendant could cure the violation by opening the market "upon reasonable terms to such dealers as may desire the privilege of doing business there."[14]

Fourth, the court struck down various other rules, including rules restraining "commission men" from selling fish to dealers outside the exchange and certain fees imposed on all sales that resulted in higher prices. The court also carefully scrutinized the ability of the dominant fish company to bid on the fish sold by rival sellers, perhaps out of a concern that this company could manipulate the market and drive out rival sellers.[15]

That was then, this is now. The task at hand is less challenging in some respects, more challenging in others. Although Judge Bingham did not cite a single case in his opinion, there is now more than a century of antitrust precedent to rely upon and to answer to. Our challenge is to adapt that experience to the emerging economics of commerce in 21st century cyberspace.

Joint B2B buyers' sites raise many of the same issues that antitrust law has long dealt with in the context of other joint buying and selling arrangements. In April 2000, the FTC and the DOJ issued joint venture guidelines, known as the Competitor Collaboration Guidelines (the Guidelines). The Guidelines attempt to present a single analytical framework that cuts across many types of agreements and across different industries. One of the keys to the analytical model presented by the Guidelines is that it focuses on the joint venture agreement and analyses each restraint in the agreement separately. Thus, even if a joint venture is legitimate and pro-competitive, each of the restraints imposed is analyzed separately and may be struck down if it is not reasonably necessary to achieve the pro-competitive benefits of the venture. Essentially, Judge Bingham took that approach, and the courts have followed it for decades.

Potential Competitive Concerns: Size

Once a venture is recognized as legitimate, the analysis focuses on the potential for anticompetitive effects. Like mergers, joint ventures that become too large raise concerns over the exercise of market power. The Guidelines provide a safe harbor, and "[a]bsent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected."[16] It must be understood, however, that the Guidelines' safety zones "are designed to provide participants . . . with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the Agencies presume the arrangements to be lawful . . . [but] are not intended to discourage competitor collaborations that fall outside the safety zones."[17] In other words, they are not caps on size. The enforcement agencies have approved many exchanges and joint purchasing arrangements that consisted of more than 20 percent of a market for years. The Guidelines observe that, "[i]f the nature of the agreement and the absence of market power together demonstrate the absence of competitive harm," the agreement will not be challenged.[18]

Why might the antitrust laws care about the size of the venture? First, to the extent one considers exchanges, there could be competition between competing exchanges. If an exchange were overinclusive, competition might never arise or existing competition might be reduced. As the

FTC Staff Report observes, competition can exist among exchanges *(e.g.,* the market for marketplaces). Some of the forms of competition include: (1) the price of the services of the B2B exchange; (2) competition in the services provided by the exchange; and (3) innovation in exchange services.

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Second, there is a potential for collusion with either exchanges or joint purchasing arrangements. Third, joint purchasing arrangements raise concerns over collusion or the exercise of monopsony power. As to joint buying arrangements, the Guidelines observe that "such agreements can create or increase market power . . . or facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement."[19] In addition, such collaborations "may facilitate collusion by standardizing participants' costs or by enhancing the ability to . . . monitor a participant's output level through knowledge of its input purchases."[20]

Of course, there are a number of reasons why a joint auction site might be more efficient than an individual firm site. Many types of endeavors can be done only collectively because of their nature[21] or because of the costs and risks involved.[22] In other instances, there may simply be economies to be gained by bringing a large number of buyers together. The views of sellers are particularly important. Sellers themselves might be asked if they saw efficiencies from dealing with a single site rather than dealing with multiple sites of various buyers, or, on the contrary, if they feared exploitation in such dealing.

Efficiency

Up to a point, a greater number of participants should increase the efficiency of the venture, particularly if their efficiencies are based on economies of scale.[23] At some point, however, those efficiencies may be relatively minimal. As more is learned about B2B arrangements, there will be a better understanding about when that point is reached and whether it is necessary for achieving these efficiencies that a large proportion of the buyers in the market participate in a single venture. Efficiencies based on a faster and more informed purchasing process obviously do not require that the bulk of firms in any industry participate. Many firms have their own Web sites and are able to engage in a wide variety of B2B-type transactions through their sites. Consequently, the focus will be on whether there are legitimate reasons—reasons that do not depend on aggregating market power—for aggregating such large portion of the buying side of the market.

Experience teaches that in many environments where network externalities exist, there is the opportunity for competition among the networks.

One issue that is likely to arise in the B2B context is whether network economies that exist in these sites suggest that any limitation on size would be inappropriate. In other words, parties may argue that these sites will become more efficient as greater numbers of buyers are brought together. Another version of this argument would be that ultimately a single buying site is likely to prevail in the market of each particular industry. Would either of these arguments justify the creation of an all-inclusive buyers' exchange?

Experience teaches that in many environments where network externalities exist, there is the opportunity for competition among the networks.[24] In the past several years, both antitrust enforcement agencies have brought a number of cases involving challenges to network mergers.[25] Competing networks may exist, especially where interoperability exists between the networks, based on agreement on standards. There are many examples of competing networks or exchanges, including stock exchanges, credit card systems, and ATM networks.

Exclusivity

Even if these auction sites are very inclusive, one factor that reduces competitive concerns is the exclusivity of the venture, that is, whether the participants in the buyers' exchange "have the ability and incentive to compete independently" by participating in other sites.[26] The ability of venture members to compete against the venture is known as "insider competition."[27] The antitrust agencies must consider whether, to what extent, and in what manner the relevant agreement permits participants to continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. This inquiry goes beyond the legal agreement and determines whether a collaboration is non-exclusive, both in fact and in name, and considers any costs or other impediments to competing with the collaborations.

In assessing exclusivity when an agreement is already in operation, the agencies have to examine whether, to what extent, and in what manner participants actually have continued to compete against each other and the collaboration.[28] For example, in the case of an exchange, the question is whether there are restrictions on a firm's participation in other exchanges. In the case of a joint buying arrangement, the question focuses on whether the firm made purchases outside the arrangement or made purchases through other joint purchasing agreements.

Thus, the absence of an exclusivity requirement often will reduce competitive concerns, even when an exchange appears to have market power. With *real* non-exclusivity, a seller has alternative paths to reach any individual buyer. In situations where the buyers participate in several other sites, even an exchange that includes a very large percentage of the market might not raise competitive concerns.

This article does not suggest that from an antitrust perspective one type of structure is preferred or that there are regulatory limits on the size of these endeavors. The fact that many very inclusive exchanges and joint buying arrangements have passed antitrust scrutiny means that size is only one of many factors evaluated. The size of the venture will play an important role in the analysis of other potential competitive concerns—collusion and monopsony power. The larger and more inclusive the venture, the more significant these concerns may be.

Potential Competitive Effects: Coordination and Collusion

As noted earlier, the Internet can be a boon to consumers through its promotion of efficient markets, the increased transparency of information that it offers, and the ability to bring together the broadest array of suppliers. Both universality and transparency, however, can be double-edged swords, potentially facilitating anticompetitive collusion. Yet these concerns need not dampen the formation of these arrangements. By properly structuring B2B arrangements to limit the transparency and access to competitively sensitive information, concerns over potential coordination can be significantly reduced.

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Consider the pro-competitive side of the equation. As already suggested, a buyers' exchange may have several positive effects on competition because of the transparency of prices and other competitive information. The Guidelines recognize that "the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations."[29] First, the exchange may accelerate the dissemination of information throughout an industry and in that way permit buyers and sellers to adjust more rapidly to changes in demand and supply conditions. For example, informing rival sellers of transaction prices may facilitate competition by compelling those sellers to meet the lower prices that they know competitors are charging. As a result, industry prices may reach the competitive level more quickly than if specific transaction price information were not available.

Second, these arrangements may make it easier for buyers to compare products. When it is easier for buyers to select among competing products on an objective basis, sellers may be forced to compete more vigorously. Product standardization, for example, may have this effect because it permits buyers to comparison shop more vigorously and effectively on the basis of price.

Third, these arrangements may promote competition by placing buyers or seller, regardless of their size or other characteristics, on a relatively equal competitive footing. These types of exchanges may eliminate certain types of friction in the market, making it more difficult for smaller, less well-known sellers to compete against larger, well-known rivals. Fourth, output-related information, such as announcements of capacity expansion, may promote efficiency by discouraging capacity bunching and by inviting appropriate expansion in related upstream or downstream industries.

Market Transparency

Market transparency can be a double-edged sword. The Guidelines note that "the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables."[30] Public disclosure of prices, for instance, especially future prices, can have significant anticompetitive effects. Under some conditions, a systematic and parallel pattern of public announcements of prices or other terms of trade can provide important evidence that a group of firms has agreed to coordinate pricing and output strategies,[31] thereby supporting a finding of agreement in restraint of trade under Section 1 of the Sherman Act[32] or of a facilitating practice under Section 5 of the Federal Trade Commission Act.[33] Public announcement of price and output plans can make it easier for firms in a concentrated industry to arrive at consensus price and output levels because their announcements permit participating firms to communicate their price and output preferences to one another instead of having to rely on observations of or inferences from rivals' behavior, which ordinarily is much less obvious in its meaning.

What are some of the considerations that are important in determining whether information transparency is of competitive concern?[34] First, the structure of the market (as well as other factors affecting the market's susceptibility to collusion) is relevant. Both the Competitor Collaboration Guidelines (§ 3.33) and the Horizontal Merger Guidelines set forth several factors that may facilitate coordination. Some of the factors include the level of concentration, ease of entry or expansion, the homogeneity or heterogeneity of the products or firms involved, the pricing and marketing practices employed by firms in the market, the availability of information concerning market conditions, and whether there is evidence of past coordination. With all else being equal, the greater the level of concentration the greater the level of potential competitive concerns.

Second, who is sharing the information? Information sharing among competitors obviously raises concerns. Third, what is the information being shared? As the Guidelines note, 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."[35] Thus, the information that is being shared must be competitively significant. For example, the fact that rivals know about each other's purchasing of pencils is unlikely to be competitively significant.

Fourth, how old is the information? The Guidelines note that historical data is less likely to raise concerns than disclosure of current or future business plans and that individual company data raises greater concerns than aggregated data that cloak the identity of any individual firm.

Finally, for competitive concerns to arise, the disclosure in question must actually enhance the prospect of collusion by some increment. If the information is already publicly available or widely known, its dissemination on an Internet exchange may have no significance.[36] Information transparency also can raise competitive issues when it involves transaction variables other than price. The mere standardization of bids may have potential pro- and anticompetitive effects. Consider, for example, that a bidding exchange establishes certain requirements for time of delivery, credit, or shipping costs. Such standardization can enhance price competition. If products are effectively standardized, price may be the only means by which one firm can prevail over another. Product standardization may therefore compel rival firms to compete more vigorously on that basis. In addition, such standardization may simplify the task of evaluating and comparing products, and, in this fashion, standardization may facilitate comparison shopping on the basis of quality and thus enhance both price and quality competition.

However, product standardization, even if instituted by a group of buyers rather than sellers, can raise competitive concerns, particularly where such a program is the product of an agreement designed to stabilize prices. In *In re National Macaroni Manufacturers' Association*, the FTC challenged macaroni and spaghetti manufacturers which collectively established the proportions of ingredients to be used in producing macaroni and related products—and agreed not to compete on this aspect of quality.[37] The FTC prohibited this practice on the principle that "where all or the dominant firms in the market combine to fix the composition of their product with the design and result of depressing the price of an essential raw ingredient they violate the rule against price fixing agreements as it has been laid down by the Supreme Court."[38] The FTC particularly recognized the power of an oligopsony to fix the prices of component materials.

Trade terms such as credit, warranty, or other contractor sales terms can be important dimensions of competition. Eliminating these terms as a source of diversity by standardizing their characteristics makes it easier for firms to reach a consensus on price and output strategies. The Supreme Court has recognized the anticompetitive effects that standardizing trade terms can have within the more specific context of credit term standardization.[39]

None of the potential problems with information transparency is new.[40] However, the speed with which information can be made available and processed on the Internet adds a new dimension to this issue. A speech entitled "Horizontal Price-Fixing in Cyberspace," by Jonathan Baker, the former Director of the Bureau of Economics,[41] highlights the potential of the dissemination of price data on the Internet for reducing transactions costs and its more worrisome potential as a medium for both covert price negotiation among competitors and for the exacerbation of the "oligopoly problem"—the tendency of an oligopoly to reach anti-competitive results without traditional agreement, "by means that the law cannot or should not prevent."[42] Baker notes the concern that "rapid, costless, and extensive exchange of information among sellers" can enable both implicit and explicit coordination among competitors, as well as improve policing of explicit collusion.[43] If everybody knows what everybody is asking by way of price, in other words, there will be little chance of cheating or reward for trying (since a price-cut can quickly be matched before it is rewarded with increased market share). At the same time, however, Baker acknowledges that because of potentially strong business justifications for public communications, "the difficulties of inferring an agreement among rivals may become even greater with the growth of electronic commerce."[44]

Collusion by Sellers

The coordination issue can be addressed from two perspectives: collusion by sellers and collusion by buyers. How might these auction sites facilitate collusion by sellers? The rapid dissemination of information by computer may even help potential colluders solve the problem of covert negotiation of the terms of trade. The negotiations can take place in plain sight, as long as all members of the conspiracy know the proper code. Tentative prices can be negotiated back and forth until a "conspirators' equilibrium" is reached, and then that price will be offered by all. The DOJ charged just such a conspiracy in the *Airline Tariff Publishing* case.[45] In this case, the DOJ alleged that a number of airlines colluded on prices through the mechanism of advance announcements of price changes and the use of "footnote designators" that the parties understood as linking one route/price pair with another. The DOJ viewed this system of advance announcements as a code for negotiating the terms of collusion. Of course, it is easier to see the anticompetitive potential in this case because the network on which prices were communicated was created by the sellers and the information was useful primarily to rivals rather than customers, thus making the proffered business justification of allowing customers to plan in advance less credible.

Is *Airline Tariff Publishing* necessarily a template for the potential coordination issues that arise in the B2B environment? There are many reasons to temper that conclusion. First, the identity of the creator of the network matters. In *Airline Tariff Publishing,* sellers had established the information system. Typically, we are less concerned when buyers have established an exchange because we assume that they are capable of protecting themselves from seller collusion.

Second, in *Airline Tariff Publishing,* the prices bid were tentative and the firms went through an iterative process of communicated bids until an agreement was reached. Further, the identity of each bidder was known to all the other bidders. In the B2B auction setting, this process of tentative communications may be impossible. The auction site may prevent bidders from knowing the identity of other bidders, or it might prevent bidders from knowing that other bids exist. Moreover, unlike the *Airline Tariff Publishing* situation, a buyer may accept a bid at any point. This might frustrate attempts at signaling through tentative and presumably insincere bids.

Third, preventing cheating plays a critical role in assuring that a tacit agreement works. The auction model here, however, may undermine the ability to police cheating by instantaneously rewarding the party that breaks the price consensus. If somebody is going to win the whole contract, instead of having everybody share it by holding the price line, speed of data transfer appears a friend to competitive vigor, not an enemy.

Dual Participation

Yet another type of "signaling" scenario is suggested by the possibility that a particular firm could participate both as seller and, at least on occasion, as buyer on the same exchange for the same commodity. One potential mechanism for such signaling is found in the allegations that formed the basis for the FTC's decision and order in *Stone Container.*[46] In that case, the FTC charged that Stone had instituted and communicated to its competitors in the production and sales of linerboard a program of downtime in its own mills, combined with very large purchases of linerboard from the overhanging inventory of competing producers. According to the complaint, as part of its communication with competitors, Stone had indicated its view that its actions should enable a general price increase to succeed in the market where it had previously failed.

More straightforwardly, perhaps, dual participation as buyer and seller on the same exchange might be seen simply as a way to circumvent firewalls designed to prevent a firm from looking over its competitor's shoulders while the competitor is carrying out its own sales or procurement processes and discovering competitively sensitive information. In any case, dual participation seems like a problem that should be avoided.

Collusion by Buyers

Coordination concerns also may arise where buyers can acquire competitively sensitive information about their rivals through information from the B2B exchange. For example, would an output-market competitor of the buyer have means of learning the prices a particular auction yielded? If so, in time it could derive its rival's cost structure to a degree that would undermine competition. On the other hand, when each auction only concerned highly specific component inputs to a product of some complexity, "peeking" at auction results could take too long to accumulate a useful understanding of a rival's total costs.

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Another concern focuses on quantity ordered rather than on price. If the particular input can be assumed to be used in a fixed proportion to output, the rival could derive the auction buyer's production plans and might thereby gain anticompetitively. By the same token, of course, the buyer concerned about such information leakage to a competitor likely will not be without means to defend itself. In a variation of this concern, however, rivals might conceivably use procurement quantity advance announcements for the kind of disguised negotiation alleged in the *Airline Tariff Publishing* case, though this sort of use could have significant costs if it confused the actual bidders and deterred them from making serious preparations for the auction, robbing the exchange of some of its vaunted efficiency.

Finally, if the exchange was employed for joint buying by firms that competed in an output market, these concerns could of course be exacerbated. If the output market is concentrated, joint purchasing could be used to coordinate the pricing of output directly (especially if the jointly purchased product represents a large portion of the final product's price) or to transfer competitively sensitive information that could be used to coordinate pricing.

The key preventive medicine for all of these coordination concerns seems likely to be the use of firewalls to limit transparency, particularly of competitively sensitive information. Fortunately, both private parties and the antitrust agencies have extensive experience in designing firewalls.[47] Where there is the potential for coordination concerns, antitrust enforcers will look carefully to determine whether the site has developed adequate firewalls to wall off competitively sensitive information.

Notes

1. In some cases, the firms may be in the same industry and thus compete in the same output market. In other situations, the firms will not be rivals in any output market. In both situations, the firms will be rivals for purchases of the input being acquired.
2. The transcript of the workshops, various papers, and the FTC Staff Report are available on the FTC Web site, *http://www.ftc.gov/ftc/antitrust.htm.* In April 2000, the FTC and the Department of Justice issued the Competitor Collaboration Guidelines, which are particularly useful in answering questions on these arrangements. United States Department of Justice and Federal Trade Commission, "Guidelines for Collaborations Among Competitors," (April 7, 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,160. Some of the questions addressed are also covered in the Healthcare Guidelines. United States Department of Justice and Federal Trade Commission, "Statements of Antitrust Enforcement Policy in Health Care," (Aug. 28, 1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153.
3. Don Tapscot, "Virtual Webs Will Revolutionize Business," *Wall St. J.,* Apr. 24, 2000, at A38.
4. Eryn Brown, "Is the Internet Stronger Than Steel?," *Fortune,* May 15, 2000, at 166.
5. *See* "The B2B Boom: What's Real, What's Not," *Fortune,* May 15, 2000, at 142; Daniel Lyons,"B2Bluster," *Forbes,* May 1, 2000, at 122.
6. Lee Gomes, "Once Hot Business-to-Business Dot-coms Are Next Area of Web Worry," *Wall St. J.,* April 7, 2000, at B1.
7. Robert Guy Mathews, "Six Largest Tire and Rubber Companies Join Forces to Create Online Marketplace," *Wall St. J.,* April 18, 2000, at A4; Melanie Trotman, "Airline Alliance Is Set to Form Online Market," *Wall St. J.,* April 28, 2000, at B2; Clare Ansberry, "Let's Build an Online Supply Network!," *Wall St. J.,* April 17, 2000, at B1.
8. Tapscot, *supra* n.3, at A38.
9. Shawn Tully, "The B2B Tool That Really Is Changing the World," Fortune, March 20, 2000, at 133.
10. *See* David J. Gerber, "Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of 'Essential Facilities,'" 74 *Va.L.Rev.* 1069, 1085-1087 (1988).
11. United States v. New England Fish Exchange, 258 F. 732 (D. Mass. 1919), *modification denied,* 292 F. 511 (D. Mass. 1923).
12. *Id.*

13. *Id.*

14. *Id.*

15. Although many aspects of Judge Bingham's order comport with contemporary antitrust analysis, some aspects do not. For example, the 1917 order limited the amount of capital the exchange could accumulate to $51,000. Because of these limits, the exchange was unable to keep up with capital improvements to its building. The order was lifted in 1995 primarily because Boston ceased to be a critical destination for the sale of fish.

16. Competitor Collaboration Guidelines, *supra* n.2 at § 4.2. In computing market share, a footnote to this passage observes that for this purpose the market share would be the sum of that of the participants and the joint venture, if they buy separately.

17. *Id.* at § 4.1.

18. Id. at § 3.3.

19. *Id.* at § 3.31(a).

20. *Id.* For further discussion of the potential of certain agreements to facilitate collusion, see *id.*

21. NCAA v. Board of Regents, 468 U.S. 85, 101 (1984) (horizontal restraints on competition necessary to make the product, college football games, available at all).

22. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1052-1053 (9th Cir.) (agreement "actually foster[s] competition by allowing both parties to compete in a market from which they were otherwise foreclosed."), *cert. denied,* 464 U.S. 849 (1983); SCFC ILC, Inc. v.Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994), *cert. denied,* 115 S. Ct. 2600 (1995).

23. White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495 (6th Cir. 1983).

24. *See* David A. Balto & Robert Pitofsky, "Antitrust and High-Tech Industries: the New Challenge," 43 *Antitrust Bull.* 583 (Fall-Winter 1998).

25. United States v. Microsoft Corp., No. C 95 1393 WHO (N.D. Cal. filed Apr. 27, 1995).

26. Competitor Collaboration Guidelines, *supra* n.2 at § 3.3.

27. See Michael S. McFalls, "The Role and Assessment of Classical Market Power in Joint Venture Analysis," 66 *Antitrust L.J.* 651 (1988).

28. Competitor Collaboration Guidelines, *supra* n.2 at § 3.34(a). The Healthcare Guidelines also look carefully at the issue of non-exclusivity and treat it as a plus factor only where firms actually engage in transactions outside the network. Health Care Guidelines, *supra* n.2 at Statement 7, Joint Purchasing Arrangements Among Health Care Providers.

29. Competitor Collaboration Guidelines, *supra* n.2 at § 3.31(b).

30. *Id.*

31. *See e.g.,* In re Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), *cert. denied,* 500 U.S. 959 (1991).

32. 15 U.S.C. § 1.

33. 15 U.S.C. § 45.

34. *See generally FTC Staff Report,* Pt. 3, at 7-10.

35. Competitor Collaboration Guidelines, *supra* n.2 at § 3.31(b).

36. *See* Business Review Letter to Retail Price Auditing Company (DataCheck Inc.) (Jan. 6, 1997) (collection and sale of retail store price information approved where no future information would be provided and "where the prices at issue already are publicly available and generally are not subject to negotiation").

37. In re National Macaroni Manufacturers' Association, 65 F.T.C. 583, 612 (1964), *aff'd,* 345 F.2d 421 (7th Cir. 1965). Because of a shortage of durham wheat and the prospect of much higher durham wheat prices, the respondent manufacturers had agreed to reduce the percentage of durham wheat in

their macaroni products from 100 percent to 50 percent.

38. *Id.* at 612.

39. Catalano, Inc v. Target Sales, Inc., 446 U.S. 643, 648 (1980). In *Catalano,* the Court noted that credit terms are "an inseparable part of price . . . ," that an agreement to terminate the practice of extending credit in essence constituted an agreement to eliminate discounts and that such an agreement constituted a per se violation of Section 1.The Court recognized that eliminating credit sales had the effect of "extinguishing one form of competition among the sellers."

40. Sugar Institute v. United States, 297 U.S. 553 (1936); Maple Flooring Manufacturers Ass'n, v. United States, 268 U.S. 563 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). For example, in the Sugar Institute case, the Supreme Court held unlawful an agreement to adhere to pre viously announced prices and terms of sale, even though the particular prices and terms were not themselves fixed by private agreement. In *American Column & Lumber,* the Court found a trade association's "Open Competition Plan" involving exchange of detailed information on sales, production, and inventories was evidence of an agreement to curtail production and raise prices.

41. Jonathan B. Baker, Director, Bureau of Economics, Federal Trade Commission, "Horizontal Price-Fixing in Cyberspace," before the Conference Board, 1996 Antitrust Conference: Antitrust Issues in Today's Economy (March 7, 1996); *see also* Jonathan B. Baker, "Identifying Horizontal Price Fixing in the Electronic Marketplace," 65 *Antitrust L.J.* 41 (1996).

42. *Id.* at 4.

43. *Id.* at 3.

44. Baker, "Identifying Horizontal Price Fixing," *supra* n.41 at 54- 55.

45. United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶ 70,687 (D.D.C. Aug. 10, 1994) (final consent decree); 1993-2 Trade Cas. (CCH) ¶ 70,410 (D. D.C. Nov. 1, 1993) (consent decree). *See also* Competitive Impact Statement, 58 Fed. Reg. 3971 (Jan. 12, 1993). A similar situation arose in United States v. Omnipoint Corp., Civ. No. 1:98CV02750 (D.D.C. Nov. 10, 1998). In this case the DOJ alleged that a group of wireless communications firms formed agreements not to bid on radio spectrum licenses by signaling each other through bid codes in individual license auctions. The DOJ alleged that each firm used specific area codes in its bids to highlight the licenses it wanted and invite its rivals to cease bidding for those licenses.

46. FTC Dkt. No. C-3806 (May, 1998).

47. *See, e.g., Eli Lilly & Co.,* 120 F.T.C. 243 (1995); *Martin Marietta Corp.,* 117 F.T.C. 1039 (1994); *General Motors,* 103 F.T.C. 374 (1984). *See generally* FTC Staff Report, Pt. 3 at 11-13.