Anticompetitive Concerns of Internet Bases B2B Marketplaces: Information Sharing, Collusion and Monopsony Power

Michael Stajer

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol53/iss4/7
Anticompetitive Concerns of Internet Based B2B Marketplaces: Information Sharing, Collusion and Monopsony Power

by

MICHAEL STAJER*

On February 25, 2000, General Motors Corporation, Ford Motor Company, and DaimlerChrysler announced a plan to form a joint venture, Covisint, to develop an Internet based business-to-business ("B2B") marketplace for the automotive industry.\(^1\) Together with Nissan and Renault, who have since joined the venture, the automakers plan to move a total of $250 billion of spending among 60,000 suppliers to the marketplace.\(^2\) Covisint is the first Internet based marketplace not founded by independent companies seeking to become third party vendors for industry players. Since the Covisint announcement, several other industry led Internet based exchanges have been announced.\(^3\) The 2001 recession, which dried up capital markets, coupled with the rise of industry investment, has meant that industry led B2B ventures supplanted independent companies as the leader in these efforts.\(^4\)

Covisint was the first industry led exchange subject to Federal Trade Commission ("FTC" or "Commission") scrutiny. As required by the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"),\(^5\) the automakers notified the Commission in June 2000 of their intent to form Covisint, and the Commission began an investigation into

---

* J.D. Candidate, University of California, Hastings College of the Law 2002.
3. See id.
4. See id.
potential anticompetitive concerns. Under the HSR, the Commission assesses whether the proposed business plan violates section 7 of the Clayton Act before granting approval to a proposed venture. Section 7 of the Clayton Act prevents the acquisition of stock or securities in another company "in any line of commerce or in any activity affecting commerce... the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." On September 11, 2000 the FTC terminated the HSR waiting period for Covisint and closed its investigation, permitting the automakers to proceed in developing Covisint.

The FTC ruling was trumpeted as a victory for Covisint and industry led Internet marketplaces. One Covisint executive expounded: "While the FTC's inquiry was extended and thorough, Covisint has been carefully planned from the beginning to address potential concerns that might arise as a result of... forming a business-to-business exchange." The media parroted the auto industry, Wall Street and other supporters' enthusiasm, ignoring the actual merits of the ruling. For instance, soon after the FTC decision, the Financial Times reported, "the FTC found that Covisint would create unparalleled efficiencies and cost savings—setting an important precedent in the B2B arena."

The ruling was seen not only to bless the Covisint venture, but was characterized as an official government blessing, opening the way for other industry led Internet marketplaces. One industry pundit observed: "The approval of the deal has huge implications for the rest of the market. Not having to stand behind the cloak of the government gives competitors opportunities to collaborate. It's a win-win situation because it leads to better standards, increased efficiency, and more supplier connections." The FTC ruling was viewed as "a positive for folks such as Elemica and Envera [chemical

---

8. Id.
10. See Mariko Sanchanta, Survey—World Economy: Sales up yet profit is still an elusive concept, FIN. TIMES (London), Sept. 22, 2000, at 27.
industry marketplaces] because it, in a sense, endorses the idea that they can be good enterprises.'"¹³

Covisint's and the B2B marketplace industry's statements have grossly mischaracterized the FTC ruling. FTC Commissioner Mozelle Thompson stated that though Covisint was not challenged during the HSR waiting period, its future conduct remains subject to antitrust scrutiny,¹⁴ and that Covisint's approval represents a cautionary flag rather than a green light.¹⁵ Contrary to the industry's spin, the FTC's ruling actually deferred making a judgment on anticompetitive issues because the Commission did not have enough information on the operations or structure of Covisint in such an early stage of development.¹⁶ The FTC decision underscored the undeveloped nature of the Covisint joint venture and reserved "the right to take such further action as the public interest may require."¹⁷ In the ruling, the FTC explicitly provided that Covisint would still be closely watched for antitrust abuses that could arise once it is up and running.¹⁸ Most notably, the Commission did not address the merits of whether the formation of Covisint violates section 7 of the Clayton Act or other potential antitrust concerns.¹⁹

One estimate puts the number of B2B marketplaces currently in existence at over 700, with a growth to 5000 within 2 years,²⁰ while Jupiter Research has estimated that up to 1500 such marketplaces are currently in existence.²¹ Marketplaces serving the aeronautics,

---

¹⁶. See Covisint B2B Venture, supra note 6. ("[T]he Commission noted that, because Covisint is in the early stages of its development and has not yet adopted by laws, operating rules, or terms for participant access, because it is not yet operational, and because its founders represent such a large share of the automobile market, the Commission cannot say that implementation of the Covisint venture will not cause competitive concerns.").
²¹. Id. Any one industry may have several B2B marketplaces run by industry participants or third parties in the areas of development and/or operations. McKinsey & Co's E-Commerce Practice director Ron Farmer claims 121 marketplaces serve the electricity, oil, natural gas and chemical markets. See Old Wine in New Bottles?, in FTC! WATCH No. 554 at 4 (Nov. 6, 2000).

A search of the Internet for B2B marketplaces for the seafood industry, for example, has at least nine exchanges set up serving hatcheries, fishers, and processors:
automobile, farming, consumer products, paper, medical products and retailing industries have been announced or are already operating. The rush to develop exchanges that promise lower procurement costs, lower cost of goods, and efficiencies in developing and marketing products has enabled many marketplaces to develop without much attention to potential anticompetitive problems.

In their rush to market, however, marketplaces such as Covisint have failed to realize or acknowledge that many of the business models they are trumpeting violate the Sherman Act’s restrictions on information sharing and collusion. Transparent systems allow buyers and sellers to monitor others’ transactions, prices, and quantities. EBay avoids antitrust issues because of a complete lack of market power in any market. An industry led marketplace, on the other hand, that controls a substantial segment of a market, would allow sellers and buyers to collude to set prices, gain access to information to which none would have access on their own, and the ability to exercise monopsony power.

Soon after ending the Covisint HSR waiting period, FTC chairman Robert Pitofsky observed, “we need to make sure that [B2B marketplaces] don’t undermine incentives for innovation, because we don’t want people [saying,] ‘Hey, we’re high-tech, antitrust laws don’t apply to us.” The FTC has been trying to make clear that the antitrust laws will apply in cyberspace as they have applied in the offline world. In order to determine what structures of Internet based marketplace systems would comply with existing antitrust law, it is necessary to first examine the marketplaces at issue, the structure of B2B marketplaces, and the technologies involved.

23. EBay (http://www.ebay.com), an Internet based auction house, has provided a base model for the marketplaces of many B2B ventures.
I. Marketplace Overview

A. Incentives for Industries to Create Internet Marketplaces

While an Internet based marketplace may take several forms, the basic concept is for a “distinct system of suppliers, distributors, commerce service providers, infrastructure providers and customers that use the Internet for communications and transactions.” Industry led marketplaces are formed with the specific purpose of reducing costs in an entire supply chain through several means. First, by transforming the procurement process from a haphazard collection of catalogues, phone calls, faxes, and purchase orders into a streamlined electronic process, the cost of purchasing is dramatically reduced. For example, General Motors, with over 100,000 purchase orders a year, currently spends an average of $125 to process a single purchase order offline. The cost reduction from streamlined procurement has been estimated to be from 5—15%, depending upon the level of integration in the industry.

Second, marketplaces created by industry players, who are the sole or a significant number of the buyers or sellers of goods in a market, can use auctions, reverse auctions, and requests for proposals to minimize the cost of goods or maximize revenue. Reverse auctions permit buyers to pit sellers against each other, each offering a lower price in order to win the buyers’ business. Auction sales allow sellers to maximize profit by selling a limited number of goods to the buyers willing to pay the highest prices. For example, at an FTC public workshop discussing B2B marketplaces, Sam Kinney, executive vice-president of Free Markets, Inc., claimed that reverse auctions had reduced United Technologies procurement costs 42% for printed circuit boards.

B. Marketplace Structures and Anticompetitive Concerns

Whether any particular Internet based marketplace will run afoul of antitrust regulators significantly depends on the structure of the

25. Tapscot, supra note 2.
26. Id.
27. See Trevor Williams, Measuring the ‘new economy’, LLOYDS BANK ECON. BULL., Sept. 30, 2000, at 1; see also Transcript, FTC Public Workshop: Competition Policy in the World of B2B Electronic Marketplaces (June 29, 2000), at 53-54, 63-69, available at http://www.ftc.gov/bc/b2b/index.htm [hereinafter Transcript] (Patrick Stewart, CEO of MetalSite, LP., an Internet marketplace serving the metals industry, explained that MetalSite has streamlined the distribution process by eliminating manual processing.).
29. See Transcript, supra note 27, at 80-85.
marketplace. FTC Commissioner Mozelle Thompson has advised antitrust practitioners involved in B2B marketplaces to study how the specific market operates to determine anticompetitive effects because "antitrust issues cannot be solved in a vacuum."³⁰

Generally, a marketplace can take one of three forms. Covisint is attempting to enter a pyramid shaped industry—a few buyers of goods at the top of the pyramid (in this case, Ford, General Motors, DaimlerChrysler, and others) that buy from thousands of suppliers. Another example of a pyramid structured venture, founded by a consortium of aerospace companies—Boeing, Lockheed Martin, BAE and Raytheon—will create a marketplace for those four buyers to transact business with 37,000 suppliers.³¹ Other industries, such as the steel or energy industries, can be represented as a reverse pyramid—relatively few sellers reaching a multitude of buyers. Finally, an industry can be fragmented with a multitude of buyers and sellers, such as the office supply, food processing, or electronics industries.

A B2B marketplace may have several components in addition to a commercial exchange. Often the sites serve as more than just a platform for managing transactions between members and may include industry news,³² a forum for members to discuss issues on electronic bulletin boards,³³ and job boards.³⁴ Covisint offers collaboration tools encompassing product design and marketing to allow members to work together to create new products.³⁵ Many industry led B2B marketplaces also offer supply chain integration services—systems that link purchasers and vendors electronically, thereby allowing for efficient, automated purchasing and distribution, which until recently was limited to expensive proprietary systems.³⁶

It is the transactional components of B2B marketplaces that make them so appealing to their members and so worrisome to antitrust practitioners. These systems can take a variety of forms. At their simplest, a marketplace may just provide a forum where buyers can place requests for quotes (or bids) ("RPQ"). Sellers place offers and participants negotiate the terms of the sale in a traditional manner. Other sites act as electronic catalogs, where a variety of sellers post their products in a single database, which buyers can browse and from which they can buy items directly.

³⁴ See, e.g., Myairplane.com, supra note 32.
³⁶ See id.; see also Transora.com, supra note 33.
Auctions and reverse auctions are the most complex systems, but they promise the greatest price competitiveness and efficiency. In a standard auction format, a seller posts a product to sell along with a minimum price and terms of the sale. Buyers then bid up the price or terms until the auction period ends and the bidder with the highest price or best terms wins. In the reverse auction format, a buyer places a request for goods on the marketplace. Sellers then bid either price or terms, trying to make the most favorable offer to the buyer. At the end of the auction, the seller with the best price or terms will be chosen to complete the transaction.

Covisint operates all three types of transaction systems. Covisint allows suppliers to provide pricing for a broad array of products and services through online catalogs that allow sellers to specify prices for different users as well as maintain a general price list. Covisint's auction systems support both regular and reverse auctions by allowing a member to originate auctions for products or services it wishes to sell or buy. Covisint also offers a "request for quote" or "bid system" that allows one to evaluate bids and quotes based on quality, service, technology, and price. The system also enables buyers to solicit bids from multiple suppliers and, in turn, suppliers can see both their customers' current and new requirements.

II. Per Se Illegality and the Rule of Reason

Joint ventures, as defined by their participants, may be arranged in several forms and it is necessary to apply an antitrust analysis to each of them. FTC Chairman Robert Pitofsky, in an article entitled A Framework for Antitrust Analysis of Joint Ventures, stated, "attaching the label 'joint venture' . . . tells one virtually nothing useful about the likely legality of an arrangement under the antitrust laws," a sentiment echoed by Herbert Hovenkamp ("to characterize something as a 'joint venture' is to say nothing about its effect on competition or its legality under the antitrust laws."). A joint venture that involves an agreement with the primary effect of directly restraining trade or hindering competition will be considered per se illegal, while other agreements with procompetitive benefits and only

41. See id.
42. 74 GEO. L.J. 1605, 1606 (1986).
43. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 186 (1994).
ancillary anticompetitive concerns will be evaluated under the rule of reason. 44

A. Per Se Illegality

An agreement formed for the sole purpose of setting prices, in violation of section 1 of the Sherman Act would be nothing more than a "price fixing cartel" that would be a per se violation of the antitrust laws. 45 A combination that involves an agreement to restrain trade is not legal just because it is termed a joint venture by the participants. 46 A cartel is a combination that involves a complete loss of independent decision-making control regarding competitive issues that can include price, production, and allocation of customers. 47 Cartels do not generally include an economically efficient integration of the participants that results in benefits to consumers. 48 Since such agreements offer no procompetitive benefits, they are considered per se illegal under modern antitrust law.

In Arizona v. Maricopa County Medical Society, an agreement among medical practitioners had the effect of requiring 70% of medical practitioners to adhere to a fixed fee schedule created by Maricopa County Medical Society. 49 The Court determined that the combination did not cause the practitioners to offer any different product or service even though they had "pool[ed]... capital and share[d] the risks of loss as well as the opportunities for profit." 50 There, the lack of any procompetitive benefits, coupled with an apparent purpose of maximizing profit among participants, was a per se violation of section 1 of the Sherman Act. 51 Similarly, in United States v. Topco Associates, Inc., the Court found a per se violation of section 1 where the sole purpose of the joint venture was to divide sales territory with no attempt at achieving procompetitive benefits through economic integration. 52

B. Rule of Reason

A combination that results in any level of genuine economic integration with attendant social benefits, including procompetitive benefits, will be analyzed under the rule of reason, rather than being

45. Id. at 712.
47. Werden, supra note 44, at 712.
48. Id.
50. Id. at 356.
51. Id. at 357.
52. 405 U.S. 596, 612 (1972).
per se illegal. While the Sherman Act literally prohibits every agreement in "restraint of trade," the Supreme Court has held that "Congress could not have intended a literal interpretation" of the statute. Since Standard Oil Co. of New Jersey v. United States, the Court has recognized that some restraints may be reasonable under the totality of the circumstances. Standard Oil requires "the factfinder to decide whether under all the circumstances... the restrictive practice imposes an unreasonable restraint on competition." The agreement must be narrowly circumscribed and reasonably related to the economic integration and reasonably necessary to achieve the expected procompetitive benefits. Under this rule, the agreement is evaluated based upon the level of competition before and after the integration. According to the Guidelines for Collaboration, the relevant inquiry is whether the "agreement likely harms competition by increasing the ability or incentive profitably to raise prices above or reduce output, quality, service, or innovation below what would likely prevail in the absence" of the agreement.

According to Board of Trade of the City of Chicago v. United States, the rule of reason begins with an analysis of the agreement to determine the business purpose of the agreement and whether the agreement has already caused anticompetitive harm. Justice Brandeis provided what has become the classic recitation of the rule of reason, "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

If the parties to the agreement are unable to exercise market power, on their own or in tandem, and the nature of the agreement indicates no anticompetitive harm, the venture will pass the rule of reason. Alternatively, if an agreement is found to contain a likelihood of anticompetitive harm because of the existence of market power, it will violate the rule of reason unless procompetitive benefits offset the anticompetitive harms.

55. 221 U.S. 1 (1911).
57. Id.
58. Id.
59. Guidelines, supra note 53.
60. 246 U.S. 231, 238 (1918); see also Guidelines, supra note 53.
61. Chi. Bd. of Trade, 246 U.S. at 238.
62. See Guidelines, supra note 53.
63. See Cal. Dental Ass'n, 526 U.S. 756, 770-71 (1999) (an agreement with an obvious anticompetitive effect, determinable from the language, would violate the rule of reason);
Determining the existence of market power is done by evaluating the type of economic activity at issue. For a seller, market power is the “ability profitably to maintain prices above competitive levels for a significant period of time.” A seller may be able to exercise market power regarding competitive components other than price, such as quality, service or innovation. For a buyer, market power is the “ability profitably to depress the price paid for a product below the competitive level for a significant period of time” resulting in depressed output.

Where analysis of an agreement reveals actual or potential anticompetitive harm, it may be permitted under the rule of reason if the procompetitive benefits outweigh the harm. Competitor collaborations may enable companies to offer goods or services that have added value to consumers, are better quality, cheaper, or brought to the market more quickly than without the collaboration. It has also been recognized that efficiency gains are often the result of competitors combining resources in a manner that would have been difficult or impossible for one firm to accomplish. The FTC has recognized that “efficiencies generated through competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products.”

Though based on new technologies, potential efficiencies from Internet based B2B marketplaces can easily be reviewed applying a current understanding of antitrust law. The difficulty arises when attempting to determine the potential anticompetitive harms that may arise from these new technologies and business models.

III. Anticompetitive Concerns of B2B Marketplaces

A. Overview of Potential Anticompetitive Concerns

FTC Policy and Evaluation Office Assistant Director David Balto has observed that the reasons why marketplaces must be run by industry participants with substantial market share have not been well

---

64. See GUIDELINES, supra note 53, § 3.3.
65. See id.
66. See id.
67. Id.
68. See id. § 3.3.
69. See id. § 3.36.
70. See id.
71. Id.
articulated, which increases the concern these participants will use the marketplace to obtain advantages to which they would not have otherwise been entitled. At the FTC workshop, panelists Patrick Stewart of MetalSite and Andra P. Dupont of Dow Chemical Company believed that industry leadership was required to achieve the promised efficiencies of B2B marketplaces. To achieve these efficiencies, Stewart and Dupont reasoned, requires the extensive resources of industry leaders, and the ability to attract substantial transaction volume to the marketplace. While few non-industry led marketplaces have achieved the transaction volume of industry led efforts, the sheer number of independent marketplaces rebuts the contention that the necessary resources cannot be obtained outside the industry. Therefore, Mr. Balto's and the FTC's concern is justified. Antitrust regulators examining the efficacy of an industry led marketplace, must examine if the countervailing benefits outweigh the harm on competition.

An industry led B2B marketplace is analyzed as a joint venture or competitor collaboration under current antitrust laws. FTC Policy Planning Office Assistant Director Gail Levine told a conference on energy, e-business, and information technology that the three major issues raised by B2Bs are: information exchange, joint purchasing, and exclusionary practices. Commissioner Thompson believes that online marketplaces are susceptible to many of the same antitrust concerns that plague offline markets including exclusive dealing, collusion, price-fixing, tipping of network markets, monopsony, competitive information spillover, and abuse of standard setting procedures. The efficiencies that make B2B marketplaces valuable business entities do not absolve them from compliance with the Sherman Act and without "technological and procedural safeguards, B2B marketplaces may inadvertently make it easier to

73. See Transcript, supra note 27, at 68-70, 317-18.
74. See id.
75. See GUIDELINES, supra note 53, § 1.2 (While relevant to B2B issues, these guidelines were not issued specifically in response to the growth of B2B marketplaces, but have been in development for several years.); see also *Enforcers*, supra note 72; see also Paul A. Greenberg & Lori Enos, *FTC and DOJ Issue Joint Antitrust Guidelines, E-COMMERCE TIMES*, Apr. 10, 2000, available at http://www.ecommercetimes.com/perl/print/2930; William Blumenthal, *B2B Internet Exchanges: The Antitrust Basics, ANTITRUST REPORT*, May 2000, at 34; Bloch and Perlman, supra note 28.
create antitrust problems, especially in highly concentrated markets with limited numbers of players."\textsuperscript{78}

**B. Threshold Concerns: Is a B2B Marketplace A Cartel Or Joint Venture?**

The threshold issue of analysis is to determine whether the formation of an industry led B2B marketplace will be analyzed as a joint venture or a cartel formed for the purpose of engaging in anticompetitive behavior. According to the FTC Antitrust Guidelines for Collaborations Among Competitors, an agreement by competitors to fix prices or to allocate markets, customers, or suppliers is per se illegal.\textsuperscript{79} A joint venture is legitimate only if it provides a new service or product that would not have been possible without collaboration or if "it involves substantial economic integration likely to result in significant efficiencies."\textsuperscript{80} A legitimate joint venture will be evaluated under the rule of reason, balancing the venture's anticompetitive effects, actual or potential, against the procompetitive benefits.\textsuperscript{81}

Avoiding application of a rule of per se illegality requires only an application of a current understanding of traditional antitrust law—agreements that would not have been permitted in an offline venture are not legitimate just because they involve the Internet. Otherwise, an industry led marketplace should be evaluated under the rule of reason as a legitimate joint venture. The joint venture creates a marketplace (a new service) that the founders would not have otherwise been able to realize, producing efficiencies of reduced procurement and transactional costs.\textsuperscript{82}

**C. Monopsony and Monopoly Power**

In a monopsony market, one or a few buyers control a significant amount of the purchasing of a particular good or service, permitting them to exercise price control over sellers.\textsuperscript{83} According to the Guidelines for Collaborations Among Competitors, joint purchasing, accounting for less than 20 percent of the total products or purchases of an industry, will not raise monopsony issues.\textsuperscript{84} Even a purchasing agreement among competitors which implicates more than 20% of a

\textsuperscript{78} Id.

\textsuperscript{79} See GUIDELINES, supra note 53.

\textsuperscript{80} See id. § 3.2; see also Bloch & Perlman, supra note 28.

\textsuperscript{81} See GUIDELINES, supra note 53, § 3.2.; see also Block & Perlman, supra note 28.

\textsuperscript{82} See Bloch & Perlman, supra note 28.

\textsuperscript{83} RICHARD POSNER & FRANK EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 148 (2d ed. 1981) ("Monopoly is the term used to describe the situation where there is only one seller of a product, monopsony where there is only one buyer.").

\textsuperscript{84} See GUIDELINES, supra note 53, § 3.34.
market may not be a per se violation of antitrust laws, but is evaluated under the rule of reason to determine if the procompetitive benefits outweigh the risk of improper use of monopsony power. The FTC determined that purchasing agreements with procompetitive benefits, such as "enabling participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies" meet the rule's requirements.

Agreements that create or enhance market power or that provide incentive to exercise market power, violate the rule of reason because they increase buyers' ability to control the price of purchased products. In a typical monopsony situation, a coordinated group of buyers uses its combined market power to drive the price of purchased products down, making the sale of those products less profitable for sellers, who are forced to cut output. Absent the purchasing agreement, no market player would have been able to exercise the same market power necessary to control prices, therefore, such agreements violate section 1 of the Sherman Act. The Guidelines for Collaboration also note that buying collaborations may facilitate collusion either by "standardizing participants' costs or by enhancing the ability to project or monitor participant's output level through knowledge of its input purchases."

Participants in a B2B marketplace, who do not have a formal or even explicit agreement, can still violate the Sherman Act through implicit collusion. Though section 1 requires the existence of an agreement, the courts have not interpreted the Act to require an overt understanding or agreement between colluders. Liability for violation of the Act may be based upon any type of concerted action, defined as a form of activity meeting the "contract, combination... or conspiracy" requirement of section 1. A "unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement" will suffice to meet the requirements of the Act. Thus, the Sherman Act would allow challenge of an implicit conspiracy to fix prices over an Internet based marketplace.

85. See id.
86. See id.
87. See id.
88. See id.
89. See id; see also 15 U.S.C. § 1 (2000).
90. See GUIDELINES, supra note 53, § 3.31(a).
91. See Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994).
92. See id.
94. Alvord-Polk, 37 F.3d at 999.
Implicit price fixing is a significant concern in an improperly structured industry led marketplace. If the marketplace allowed all participants to see bids and offers placed by all other participants, two or more participants, who together are a monopsonist, could easily set a price in concert that is higher than what either would be able to set on his or her own. Though the participants may never speak to each other, self-interested activity could lead each party to monitor the other's pricing. One party could float a "tender" bid at a slightly lower price to see if the other party would keep its higher price or lower it to the tender bid. In a competitive market, the second participant has incentive to keep his offer high, however, in a monopsony situation, if the participant lowers his bid to meet the "tender" bid, sellers have no choice but to sell and both buyers get the benefit of reduced costs. For example, in a transparent marketplace for rolled steel, automakers would each submit their bids to buy. Since each competitor could see each other's bids, none would have incentive to offer a higher price than the other. In fact, especially since there are so few buyers, each party would have incentive to lower its bid. The other parties, witnessing one party lower a bid, would be motivated to lower their bids to capture the lower price for themselves. The seller who can only sell to a few buyers in a monopsony will have to take one of the bids because no other market exists for his product.

Bloch and Perlman have suggested two self-regulatory methods for reducing the potential for the illegal exercise of monopsony power through Internet marketplaces. First, they suggest limiting the proportion of the relevant goods or services marketplace participants are permitted to purchase through the marketplace. By limiting purchases in this way, participants will be unable to use the marketplace to drive prices or collude. This restriction will significantly undermine procompetitive benefits, however, by limiting the purchase of certain goods or service to a small portion of overall purchases, requiring the remainder of purchases to be handled offline.

Second, Bloch and Perlman suggest limiting the number of participants who may participate in joint purchasing agreements through the marketplace once the total volume of purchases exceeds a certain percentage of the relevant market. This could be accomplished by either prohibiting involvement in joint purchasing agreements once the agreement involves more than 30% of the total

95. Presumably, where there is limited product, sellers will sell to the higher bidder.
96. See Bloch & Perlman, supra note 28.
97. See id.
98. See id.
purchases, or by raffling off slots in the agreements for up to 30% of the marketplace.99 This solution also undermines the procompetitive advantages of Internet marketplaces by restricting the amount of purchases of any product through the marketplace in the same manner that restricting the amount of purchases of a good or service would.

D. Information Sharing and the Problem of Collusion

Regardless of whether a marketplace is industry led, it is necessary to protect buyers and sellers from collusion. Several types of information sharing mechanisms promise to result in significant efficiencies for marketplace participants, but also threaten to facilitate collusion.100 While the exchange of information will ultimately work to protect and foster competition in any marketplace, Chairman Pitofsky has said, "there comes a point where there is so much information being exchanged that it becomes anticompetitive."101 Allowing companies to share past or present information about their prices, even absent an explicit collusive agreement, would violate current antitrust laws by permitting buyers and sellers to come up with the same price and exclude parties from competition who do not follow that pricing scheme.102

Integrated supply chains permit completely transparent information sharing. An integrated chain allows manufacturers to monitor their customers' inventory levels through the marketplace. When inventory levels for a particular part fall below a preset level, the system automatically reorders the part from a pre-selected vendor. The manufacturer has access to the vendors' inventory and can see if they have the part in stock and whether it will be delivered in time. The vendor, in turn, has access to the manufacturer's inventory levels to be able to anticipate demand and prepare for future orders. This type of supply chain integration, made famous by Dell Computer and Wal-Mart, reduces procurement costs and keeps inventory levels at a minimum.103

99. See id. It is unclear why Bloch and Perlman suggest that a threshold of 30% should be the limit, while the FTC's safe harbor has been limited to 20% of total purchases. See GUIDELINES, supra note 53, § 4.2.

100. For an involved discussion of different types of express and tacit joint agreements concerning buying and selling, see William Blumenthal, B2B Internet Exchanges: The Antitrust Basics, ANTITRUST REP., May 2000, at 34.


102. See id.

103. This is known as "just in time" (JIT) inventory. A company that does not have to spend money on maintaining an inventory level certain to ensure continual operations can shift this money to more profitable enterprises.
Marketplaces also result in cost reductions by price transparency between buyers and sellers—each buyer will be able to see the price of a product from multiple sellers and sellers can determine the demand of a product by looking at the buying activity of other sellers. An improperly designed system would allow any participant to determine the quantity and price of any product sold on the exchange, which provides the tools for anticompetitive coordination. Buyers, able to see what others are bidding for products, could implicitly collude by not paying more than what other buyers have bid. Sellers, knowing that their product cannot be bought elsewhere, could set prices by not selling below what other sellers have offered. The FTC’s concern is that “rapid, costless, and extensive exchange of information among sellers” can provide an efficient method for sellers to implicitly coordinate prices. In a properly structured market, however, “transparency can enhance overall market efficiency and improve competitiveness.”

Even if a system were designed to keep bids and offers secret, all the information would be available to the managers of the exchange. In that situation, a close relationship between marketplace and industry players increases the risk of collusion and impermissible information sharing. A prudent industry led marketplace would allow the founders to contribute money and resources to the marketplace, but fill all executive positions and board of directors with independent third parties.

*United States v. Airline Tariff Publishing Co.* illustrates the potential for abuse. Eight airlines were accused of using an airfare publishing joint venture to collude to set prices. The venture disseminated current airlines fares to travel agents and others and the government contended that the airlines used this service to collude to set prices. According to the government, the airlines were able to collude by publishing advance pricing information—the fares airlines

104. See Blumenthal, *supra* note 100.
105. See id.
107. See Blumenthal, *supra* note 100.
108. Transcript, *supra* note 27, at 188-89 (workshop participant expresses concern that industry led marketplaces would have difficulty keeping the available data from the founders).
110. See *Airline Tariff Publ’g Co.*, 836 F. Supp. at 10.
111. See id.
planned to charge in the future. By knowing what other airlines planned to charge for similar routes in the future, airlines could adjust their prices accordingly to maximize profit.

The potential for abuse is exacerbated in an Internet based B2B marketplace. While the fare dissemination system in Airline Tariff was limited to the fares of eight airlines, an exchange could conceivably contain hundreds of thousands of products. Any one central authority would have a difficult time monitoring for collusion because of the sheer volume of transactions occurring. Vendors and buyers of a particular product, however, would monitor prices routinely. For example, if there are few buyers for a product, it is within each buyer's best interest not to pay more than what others are paying, which could be easily accomplished by monitoring others bids on an unregulated exchange. These systems would also facilitate more advanced collusion through forums that allow members to communicate with each other, or placement of false offers or bids merely to establish a price.

Most of these problems can be easily addressed through prudent marketplace management. In an industry led exchange with a pyramid or reverse pyramid shaped market, all bids and offers should be sealed from everyone except the transaction participants. Though some exchanges believe they can offer value to members with a price history of transactions (allowing participants to search the transaction history of a particular product to determine pricing), this can potentially lead to collusion. Safeguards would ensure that marketplace participants could not access price or volume information about competitors that would otherwise be inaccessible. At the FTC workshop, DeSanti expressed her belief that most information sharing issues can be addressed through use of firewalls and access restrictions to ensure participants were only viewing information directly related to their own transactions.

Marketplaces which do want to disseminate aggregated data on transaction history, such as price and volume statistics, must work to ensure that the data cannot be used to facilitate anticompetitive collusion. Two practitioners have suggested adhering to the safety

112. See id.
113. See id.
114. These problems exist in non-pyramid shaped markets, but the potential for abuse is less significant. In a pyramid shaped market, only a few participants have to be implicitly or explicitly colluding to injure consumers, requiring heightened vigilance in these areas.
115. See Bloch & Perlman, supra note 28.
116. Transcript, supra note 27, at 14, 378-80, 389-91 (workshop panelists Gina Haines, FacilityPro.com, and Roy Roberts, M-Xchange.com, echoing DeSanti's belief that information sharing issues can be adequately addressed).
zone for dissemination of fee-related data among competing health care providers\(^\text{117}\) found in Statement No. 5 of the Justice Department and Federal Trade Commission's Statements of Antitrust Enforcement in Health Care.\(^\text{118}\) According to Bloch and Perlman, to meet the safe harbor:

(a) the data should be collected by a third party (e.g., an outside accounting firm or other consultant), or an employee of the exchange who is not a current or former employee of any competing member of the exchange; (b) the data should be more than three months old; and (c) there should be at least five parties providing data for each data point, no individual party's data should represent more than 25 percent on a weighted basis for any data point, and the data should be sufficiently aggregated so that they will not allow recipients to identify the prices charged or costs of goods for any individual competitor.\(^\text{119}\)

Under this regime, a marketplace could provide relevant data to participants without concern for anticompetitive collusion.

Patrick Stewart, a panelist at the FTC workshop, advocated the importance of enacting strict antitrust guidelines that can be enforced against marketplace participants.\(^\text{120}\) Every company that wishes to become a market participant can be required to agree to limit the use of proprietary information obtained from the marketplace. These agreements can be enforced through sanctions such as terminating membership or requiring a founding member to sell his equity in the marketplace.\(^\text{121}\) A comprehensive plan should include agreements that cover employees and a method of auditing the manner in which the marketplace manages proprietary information.\(^\text{122}\)

E. Exclusivity and Standard Setting Procedures

A marketplace has the potential to increase competition among industry players through lower transaction costs only if it is an "open platform" for all buyers and sellers in the industry.\(^\text{123}\) The marketplace is not required to admit all who desire entry. The

\(^{117}\) See Bloch & Perlman, supra note 28.

\(^{118}\) U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT IN HEALTH CARE, STATEMENT NO.5 (1996) [hereinafter STATEMENTS OF ANTITRUST ENFORCEMENT].

\(^{119}\) See Bloch & Perlman, supra note 28; see also Statements of Antitrust Enforcement, supra note 118.

\(^{120}\) Transcript, supra note 27, at 30.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) See Bloch & Perlman, supra note 28; see also United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912) (competitor collaboration violated section 1 of the Sherman Act by excluding non-members from using terminals, where terminal use was necessary to compete).
Supreme Court has recognized that a joint venture of competitors may exclude others so long as the exclusion is supported by a business justification of "enhanc[ing] overall efficiency and mak[ing] markets more competitive."¹²⁴ In Allied Tube, a joint venture member had "packed" a committee vote to exclude a competitors products from a report.¹²⁵ Justice Brennan, writing for the majority, noted that a joint venture that uses objective business justifications to evaluate products, and by extension, members, can have significant pro-competitive benefits.¹²⁶

Similarly, in Northwest Wholesale, the Court held that denial of access is not permissible where "the cooperative possesses market power or exclusive access to an element essential to effective competition."¹²⁷ In Northwest Wholesale, denial of access to a participant was permitted where the cooperative lacked any market power.¹²⁸ The Court applied Silver v. New York Stock Exchange, which held that procedural safeguards are required when denying access to a cooperative with market power.¹²⁹ Together, Allied Tube, Northwest Wholesale, and Silver indicate that a joint venture may legitimately exclude industry players without procedural safeguards or legitimate business reasons. Once a marketplace has achieved a critical mass endowing market power, however, exclusion is subject to more rigid scrutiny. Northwest Wholesale suggested that exclusion from a joint venture "might justify per se invalidation [of the joint venture] if it placed a competing firm at a severe competitive disadvantage."¹³⁰

It is clear that a rule requiring all members to be active participants in the industry or to be creditworthy to become a member of the marketplace would be permissible under Allied Tube, however, a rule of eligibility which tends to exclude smaller manufacturers, wholesalers, or retailers from accessing a marketplace through minimum transaction requirements, may raise anticompetitive concerns.¹³¹ If smaller players were kept from participating, the anticompetitive effects would get worse as the transaction volume in the marketplace grew and eventually, the lack


¹²⁵ Allied Tube, 486 U.S. at 496-97.


¹²⁸ Id.


¹³⁰ 472 U.S. at 295-96 n.6.

¹³¹ See Bloch & Perlman, supra note 28; see also Enforcers, supra note 72, at 6.
of access to the marketplace could effectively exclude a company from participating in the industry altogether. In her remarks at the FTC public workshop on B2B marketplaces, Susan DeSanti, Director of Policy Planning, said the FTC will determine whether excluding certain rivals from the marketplace “significantly raises rivals’ costs.”

Exclusivity concerns are heightened when dominant players in the industry own the marketplace. Covisint’s founders, GM, Ford, DaimlerChrysler, Renault, and Nissan represent well over the 20% of purchasing that FTC Policy and Evaluation Office Assistant Director David Balto intimated would be a safe harbor. Again, reasons why marketplaces must be run by market participants with a substantial market share have not been well articulated; this increases the risks that the marketplace will be used to obtain illegal advantages.

Marketplaces are neither prohibitively risky nor unable to raise capital through private markets; therefore, industry involvement is not clearly necessary. In an industry led marketplace, market forces would not correct a bias against a particular player by another, stronger participant. While any marketplace needs credibility to attract users beyond the founding members, in an industry led marketplace, the founding members are able to coerce their current vendors and buyers to use the exchange. A marketplace that doesn’t have credibility among its members would lose business to other more credible exchanges. There are no credible alternatives to an industry led marketplace because the major suppliers or buyers would only use the system they founded and own. Without rigorous antitrust scrutiny, smaller industry players without leverage would be stuck in a situation rigged against them.

While rival exchanges may not have a problem raising the necessary funding or creating the marketplace itself, they will have difficulty generating a sufficient amount of transactions to be a viable competitor to industry led marketplaces. If the major players of an industry have founded a marketplace, they will have incentive not to distribute their business between their marketplace and rivals.

132. See Bloch & Perlman, supra note 28.
134. FTC Enforcers Believe B2B Auctions Are Similar to JVs, supra note 72, at 6.
135. Id.
136. Id.
137. Covisint founding members will force their vendors to use the system. See Covisint.com.
138. Transcript, supra note 27, at 368-75.
139. See Bloch & Perlman, supra note 28.
Moreover, any agreement between competitors not to compete would be a per se violation of section 1 of the Sherman Act. The FTC's Guidelines for Collaboration Among Competitors assert that if the agreement is ancillary to a joint venture with a procompetitive purpose it will be evaluated under a rule of reason to determine if the restraint on competition is "reasonably related to, and reasonably necessary to achieve" the procompetitive benefits. A reasonably necessary restriction is a narrowly tailored situation where equivalent or comparable efficiencies cannot be achieved through "practical, significantly less restrictive means."

Any exclusionary practice, such as a restriction on competition or a minimum purchase requirement, must also withstand scrutiny under the rule of reason, though it may be reasonably necessary. Director DeSanti has noted that it is necessary to examine the specific facts of the exclusionary practice to determine if the impact on exchange market is anticompetitive. An industry led marketplace that dominates a significant portion of the industry will have difficulty justifying an exclusionary practice that tends to prevent firms from competing entirely.

F. Monopoly Concerns

Internet B2B marketplaces can raise monopoly issues where dominant industry players create marketplaces. Through network effects, a marketplace led by dominant industry players can create a monopoly in the market of exchanges serving that industry. If an industry is only served by a few marketplaces, it may be possible for one marketplace to capture all or a significant portion of the transaction volume. This may be due to "internal growth, 'network effects' that result in most industry participants flocking to what is perceived to be the industry's leading exchange, restrictions on member participation in rival exchanges, mergers with other exchanges, or some combination of these factors."

If a marketplace is able to capture a significant amount of transaction volume, the exchange may be able to exercise monopoly power over fees by "increasing the fees it charges participants for its

140. 15 U.S.C. § 1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce..., is hereby declared to be illegal.")
141. See GUIDELINES, supra note 53, § 1.2.
142. Id.
143. See Bloch & Perlman, supra note 28.
144. Id.
145. See GUIDELINES, supra note 53, § 3.36.
146. See id.
147. See id.
services above, and/or by reducing the quality of those services below what would prevail in a competitive market."148 This issue is significant in light of the fact that many marketplace analysts believe most industries will only be able to support two or three major marketplaces and a few marketplaces serving niche markets.149 Susan DeSanti, Director at the FTC, has stated her belief that "network effects may dictate that only a few marketplaces dominate the industry."150

Conclusion

By the first months of 2002 the rush to develop independent B2B marketplaces had died down as the capital markets began to scrutinize business models more closely and their potential for profit. Since late 1997, when B2B marketplace proponents first began making claims of cost and speed efficiencies, few, if any, marketplaces have actually lived up to expectations. Even under these conditions, however, an industry led marketplace may offer benefits beyond price and related efficiencies to industry players who believe that they could force suppliers to reduce costs or earn higher margins on their profits. The central issue in examining these exchanges will be to evaluate the technology employed and the structure of the organization to determine if the marketplace violates antitrust laws.

Pundits often lament that current analysis of the Sherman Act is outmoded and does not apply to the business models of the new economy. The contention is untenable. Markets are still markets, regardless of what heralds of the new economy say, and can be analyzed for existence of market power. Agreements may be reviewed for naked and implicit anticompetitive restrictions. Though the means may change, firms still seek the same advantages—lower prices, broader markets, and lower transaction costs. The Sherman Act, coupled with the rule of reason, is still a vibrant method for limiting the power of firms who seek to go beyond what their competitive place in the market otherwise entitles them, thereby ensuring healthy competitive markets.

148. See id.
149. See, e.g., Transcript, supra note 27, at 414-16, 431-32, & 443-44.
150. See DeSanti, supra note 133, at 16.