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I. Introduction

Business-to-business electronic commerce has exploded in the last year. Analysts project that the volume of B2B commerce will grow from approximately $100 billion in 1999 to over $500 billion in 2001 and more than $1 trillion in 2003.\(^1\) The fact that so much commerce is likely to move through new electronic channels of trade has caused the United States Federal Trade Commission and Department of Justice, the federal agencies responsible for enforcement of the federal antitrust laws, to investigate the competitive consequences of these trends.\(^2\) Both agencies have conducted detailed antitrust reviews of proposed B2B exchanges.\(^3\) The FTC conducted a two-day workshop on B2B exchanges in June 2000 and issued a lengthy report on their findings on October 26, 2000.

There are many companies and industries that rarely face serious antitrust issues. The growth and increasing importance of B2B exchanges in our economy may change this, however, as B2B e-commerce is likely to touch, in one way or another, virtually every industry in the United States. The cost savings and convenience associated with these new marketplaces are attracting large numbers of buyers and sellers, and many companies are taking ownership positions in industry-focused exchanges, ranging from automobiles to beverages to energy.

While the antitrust issues associated with the formation of, or participation in, B2B exchanges can be both complicated and serious, they are by no means novel. The antitrust enforcement agencies have made it clear that they will apply well-settled rules in judging the lawfulness of an exchange’s structure and operations. Consequently, as FTC

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\(^2\) This paper addresses U.S. antitrust issues. Competition authorities in other countries, however, have also expressed potential concerns about the competitive effects of B2B exchanges. Because most exchanges operate worldwide, companies evaluating the antitrust risks associated with participation in B2B exchanges will have to consider the likelihood of enforcement action in other countries, especially European countries, as well as in the U.S.

\(^3\) The FTC, for example, approved the formation of Covisint, the automotive B2B exchange, but expressly reserved the right to take further action once Covisint implemented various structural and operational rules. Likewise, the Justice Department has conducted detailed reviews of exchanges in the airline and meatpacking industries.
Chairman Pitofsky recently observed, “If carefully counseled, there’s no doubt in my mind that [B2B exchanges] can satisfy antitrust review.”

II. What is a B2B Exchange?

The term B2B exchange encompasses a wide range of enterprises. At its heart, a B2B exchange is simply a marketplace in which buyers and sellers trade in goods and services. What distinguishes it from other marketplaces is that it the trades are conducted through computers connected to servers via the Internet. This technology makes it possible for many more buyers and sellers to come together, and for trades to take place far more efficiently, than in a traditional supply chain.

Industry analysts believe that B2B exchanges represent an unprecedented opportunity for businesses to squeeze costs savings out of existing supply chains, which generally involve a more limited number of buyers and sellers and rely heavily on telephone calls, faxes and paper to complete the procurement of goods and services. In some industries, the cost of procuring certain products exceeds the price of the product itself. Several studies predict that “the $100-$150 average cost of processing a procurement order traditionally can be reduced to as low as $5 per order” through B2B exchanges. One analyst reports, for example, that Visa reduced used an electronic procurement solution to reduce the time required to purchase computer hardware from 3 days to 32 minutes, and the administrative costs by an average of $100, representing a savings of 50 to 90 percent.

B2B exchanges can be structured in a variety of ways. For example, some exchanges are owned by buyers of particular goods and services, while others are owned by sellers, while still others are owned by independent third parties (or some combination of buyers, sellers and independent parties). Some exchanges focus on indirect goods, such as office supplies and furniture, while others focus on direct goods, such as inputs into the manufacturing process of a particular industry. Some exchanges are industry-focused, serving only the needs of buyers and sellers in a particular line of business, while others stand willing to serve buyers and sellers in virtually any line of business. Some exchanges offer sales through catalogs, while others offer auctions, bid-ask transactions, or some combination of these and other forms of trade. B2B exchanges, in short, can take a number of forms, each of which presents its own set of business and legal issues.


5 B2B eCommerce, supra n.1, at 6.

6 Id.
III. Framework for Antitrust Analysis

A. Applicable U.S. Antitrust Laws

There are two principal U.S. antitrust laws that govern the formation and activities of B2B exchanges. First, the formation of an exchange may be subject to the notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”), 15 U.S.C. §18a. Second, regardless of whether the formation of the exchange is notifiable under HSR, its activities are subject to substantive prohibitions of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 7 of the Clayton Act, 15 U.S.C. §7.7

1. Procedural Requirements of the Hart-Scott Rodino Act

Basic Reporting Thresholds. In the United States, certain mergers, acquisitions, and joint ventures are subject to the pre-merger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”). The HSR Act applies to transactions that meet specified “size-of-transaction” and, in some cases, “size-of-person” tests.8 As of February 1, 2000, the minimum size of transaction that is reportable under HSR is $50 million. In many cases, the formation of a B2B exchange is not reportable because the value of the transaction does not meet this threshold. Several exchanges, however, have been notified and reviewed by the antitrust agencies. Because B2B exchanges often involve joint venture structures, which present a variety of special issues under the HSR Act, parties need to assess carefully whether the formation of an exchange entity requires an HSR Act filing.

HSR Review Process. If an HSR Act filing is required, the filing of the notification forms triggers an initial 30-day waiting period, during which time the parties may not consummate the transaction or begin operation of the exchange. The agencies use the 30-day waiting period to (1) decide which agency will review the transaction, and (2) conduct a preliminary review of the antitrust issues to determine whether a more detailed review is required.

If a transaction raises no significant antitrust issue, the agencies often terminate the waiting period in fewer than thirty days. If, on the other hand, a transaction raises potential antitrust issues, the reviewing agency generally will contact the parties during the 30-day period and ask them to provide supplemental information concerning the transaction and competition in the markets in which the parties compete. If the agency decides, based on this information, that the transaction is unlikely to lessen competition,

7 The activities of B2B exchanges are also subject to, and in theory could be challenged under, other federal and state antitrust laws, including Section 2 of the Sherman Act and Section 5 of the FTC Act. For ease of exposition, however, we focus on the potential Section 1 issues, as this is the most likely ground for any challenge.

8 A transaction valued between $50 and $200 million is reportable only if one party to the transaction has assets or net sales in excess of $10 million and the other party has assets or net sales in excess of $100 million.
it will allow the 30-day waiting period to expire; the parties are then free to consummate the transaction.

The reviewing agency may conclude, however, that a thorough review of the transaction is necessary. In this event, the agency will issue a Second Request to each party. A Second Request contains a lengthy set of interrogatories and document requests. The issuance of a Second Request suspends the waiting period until 30 days after each party completes its response to the Request. The HSR Act places no limit on the time the parties may take to respond to the Second Request. As a practical matter, however, full compliance often takes two months or more. During this time, the reviewing agency will gather additional information from other sources, including interviews with third parties in the affected markets, such as customers, suppliers and competitors. The agency will also interview or depose knowledgeable personnel from each of the parties. The purpose of this investigation is to determine whether the transaction is likely to lessen competition, and to prepare the government, if necessary, to challenge the transaction in court.

2. **Substantive Prohibitions of Sherman Act § 1 and Clayton Act § 7**

Generally, the lawfulness of B2B exchanges is reviewed under Section 1 of the Sherman Act and Section 7 of the Clayton Act. Sherman Act Section 1 prohibits agreements that unreasonably restrain competition. The U.S. courts have held that certain types of agreements between competitors? e.g., price fixing, market allocation? are so likely to reduce competition that they are deemed to be *per se* unlawful. In those cases, there is no inquiry into whether the agreement at issue actually diminished competition. Other agreements among competitors? in particular, agreements that involve some sort of risk sharing or economic integration? are judged under the “rule of reason.” Under the rule of reason, the question is whether the procompetitive benefits of the arrangement at issue outweigh its anticompetitive effects. Section 7 of the Clayton Act prohibits mergers, acquisitions and joint ventures that are likely to diminish competition substantially. As a general matter, the analytical framework used to evaluate the lawfulness of a business combination, such as a B2B exchange, is the same under Section 7 as under Section 1.

The antitrust agencies have stated that they will evaluate the lawfulness of a B2B exchange using the analytical framework set forth in their recently issued “Antitrust Guidelines for Collaborations Among Competitors.” This analysis will generally proceed in three steps:

**First, is the basic purpose of the exchange lawful?** Specifically, is the purpose of the exchange to enable buyers and sellers to realize efficiencies in the sale of products and services? Or is it simply a pretext for an anticompetitive agreement to fix prices,

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divide markets or reduce output? See Competitor Collaboration Guidelines at § 3.2. Unless an exchange is a sham designed to enable horizontal competitors to engage in price-fixing, it will be judged under the rule of reason.

**Second, is the exchange likely to lessen competition substantially?** Assuming that the purpose of the exchange is legitimate, the second step is to analyze whether the venture will restrict actual or potential competition. See Competitor Collaboration Guidelines § 3.3. To make this determination, an agency or court will usually undertake an extensive analysis of the structure of the affected markets and the relationship among the parties to the exchange.\(^{10}\) Id. It also will determine whether the resulting loss of competition is likely to be outweighed by the procompetitive efficiencies that result from the exchange. See Competitor Collaboration Guidelines § 3.37.

The analysis of the competitive effects of an exchange depend significantly on factors including its structure, the bylaws and operating rules of the exchange, its ownership and management, and the competitive characteristics of the markets in which they operate. See Competitor Collaboration Guidelines § 3.3. As a general matter, B2B exchanges may lessen competition by (1) facilitating collusion or coordinated interaction among either buyers or sellers through the exchange of competitively sensitive information; (2) creating or enhancing market power by permitting group purchasing; (3) foreclosing competitors from access to the exchange (or providing such access only on non-competitive terms); or (4) preventing the development of competing exchange entities.

**Third, are the exchange’s restraints on competition reasonably tailored to achieve its procompetitive objectives?** The final step of the analysis is to determine whether the exchange’s restraints on competition are broader than “reasonably necessary” to achieve the venture’s legitimate purpose. See Competitor Collaboration Guidelines § 3.36(b). In determining whether particular restraints are “reasonably necessary” to the exchange, U.S. agencies and courts generally consider whether the parties could have achieved their legitimate objectives through a less restrictive agreement, but do not require that the restraint be the “least restrictive” way of achieving these objectives.

**Conclusion.** The formation of a B2B exchange may be a reportable event under the HSR Act. Even if it is not a reportable event, the exchange is subject to the substantive provisions of the U.S. antitrust laws. Whether the formation or operation of a B2B exchange raises significant issues under these laws is a fact-specific inquiry. It depends heavily on the structure and ownership of the exchange, its operating rules, and the competitive characteristics of the industry at issue.

\(^{10}\) U.S. antitrust agencies and courts’ analysis of restraints on competition generally focuses on two broad categories of relationships among firms: horizontal and vertical. A horizontal relationship refers to a relationship among firms at the same level in the chain of production or distribution; a vertical relationship refers to a relationship among firms at different but complementary levels in the chain.
B. Major Substantive Issues Under U.S. Antitrust Law

The principal antitrust issues that arise in the context of B2B exchanges are whether the exchange: (1) enables buyers (or sellers) to coordinate their competitive behavior in any market, including upstream or downstream markets; (2) enables buyers to exercise market power in the purchase of particular products through group purchasing; (3) prevents certain buyers (or sellers) from competing effectively by, for example, denying them access to the exchange; or (4) prevents the formation of competing exchanges.

1. Facilitating Collusion. The most common concern raised by antitrust enforcement agencies is whether a B2B exchange will facilitate collusive pricing among buyers or sellers by giving the participants in the exchange significantly more information about the competitive behavior of their rivals. In this context, collusive pricing encompasses both express collusion—in which parties agree on the prices they will pay (or accept), and tacit collusion—in which parties coordinate their pricing by observing, and then accounting for, the actions of their rivals. Whether access to more information is likely to facilitate collusive pricing depends critically on both the competitive structure of the industry at issue and the nature of the information being exchanged.

First, any effort to engage in collusive pricing is unlikely to succeed unless the market at issue is highly concentrated. The antitrust agencies define highly concentrated markets to be those in which market concentration, as measured by the Herfindahl-Hirschmann Index (“HHI”), exceeds 1800 points. In the absence of such concentration, it is very difficult for the leading firms in the market to raise market price by collectively restricting their output, as other firms will be able to expand sales make up for any shortfall in supply. In highly concentrated markets, on the other hand, the leading firms control enough share that they can act collectively to restrict market output and raise market price. In these circumstances, a B2B exchange may facilitate collusion by making it easier for the leading firms in the market to coordinate their pricing behavior, and discipline any company that departs from the collusive scheme, through enhanced monitoring of each company’s pricing and other competitive actions.

Second, even in a market that is structurally susceptible to collusion, whether an exchange will enable participants to engage in such conduct will depend on the nature of the information that is available through the exchange. As a general matter, an exchange may enhance the ability of competitors to coordinate their competitive conduct only if the information they receive through the exchange is non-public, relates to current or future prices or volumes (or other competitive terms), and is sufficiently detailed to permit the

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11 The HHI is calculated by taking the sum of the squares of the market shares of each market participant. Thus, the HHI can range from approximately zero (in a highly atomistic market) to 10,000 (in a monopoly market). A market with 10 competitors, each of which has a share of 10 percent, would have an HHI of 1000. In this context, it should be emphasized that the antitrust enforcement agencies, and many courts, define relevant markets narrowly for purposes of antitrust analysis.
parties to reach or monitor a collusive agreement. See Competitor Collaboration Guidelines § 3.31(b). In United States v. Airline Publishing Co., 1994 Trade Cas. ¶ 70,687 (D.D.C. 1994), for example, the Justice Department alleged that the major airlines engaged in collusive pricing by using an electronic airfare database to signal each other as to proposed price increases, as well as threatened price cuts in the event that other carriers did not adhere to the collusive scheme. If the only information available through the exchange, however, is information that is publicly available (on a contemporaneous basis), historical information, or aggregated information that provides no insight into the actions of individual competitors, it is unlikely that a serious antitrust issue would arise.

2. Group Purchasing. The prohibitions of the U.S. antitrust laws with respect to agreements on price apply to buyers as well as sellers? *i.e.*, naked agreements among competitors as to the price they will pay for a particular product, like naked agreements as to the price at which they will sell a particular product, are *per se* illegal under Section 1 of the Sherman Act. Consequently, a group purchasing arrangement that is simply an agreement on to pay a common price for a product or service is *per se* unlawful. See, *e.g.*, Manville Island Farms v. American Crystal Sugar Co., 334 U.S. 2119 (1948), National Macaroni Mfrs. Ass’n v. FTC, 345 F.2d 421 (7th Cir. 1965). On the other hand, group purchasing agreements that involve some economic integration or risk-sharing among the participants will be judged under the rule of reason. See, *e.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). In most instances, group purchasing agreements do not raise serious antitrust concerns because (1) they involve some economic integration or other efficiency-enhancing activity among the parties, and (2) they do not threaten to lessen competition substantially. See Competitor Collaboration Guidelines § 3.31(a) (“Many [group purchasing] agreements do not raise antitrust concerns and indeed may be procompetitive”).

Once it is established that a group purchasing arrangement involves some economic integration or other efficiency (*i.e.*, it is not simply a device to fix prices), the antitrust question becomes whether the arrangement, on balance, will lessen competition. A group purchasing agreement is unlikely to have this effect unless the parties to the agreement account for a substantial share of all of the purchases of a particular product or service. If the parties to the agreement have such “monopsony” power, they may be able to drive the price of the good or service being purchased below competitive levels. See Competitor Collaboration Guidelines § 3.31(a). If the parties to the agreement also compete in the sale of products, their agreement could also facilitate anticompetitive conduct in the selling market as well. *Id.*

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12 The Justice Department challenged two mergers in recent years on the ground that they would give the resulting firm monopsony power to lower the price it paid for goods or services below the competitive level. See United States v. Aetna, Inc., 1992-2 Trade Cas. (CCH) ¶ 72,730 (N.D. Tex. 1999) (insurance company merger could lower prices paid to physicians); United States v. Cargill, Inc., 1999-2 Trade Cas. (CCH) ¶ 71,893 (D.D.C. 1999) (grain company merger could lower prices paid to grain sellers).
On the other hand, if parties to a joint purchasing agreement account for only a portion of the purchases of certain products, it is unlikely that they will be able to force prices below competitive levels, as suppliers will be able to sell their products to other customers at the market price. The antitrust agencies’ Competitor Collaboration Guidelines state that collaborations involving firms with 20 percent or less of the market fall within an antitrust “safe harbor.” As a practical matter, in most circumstances, competitors accounting for as much as 30-35 percent of purchases (or sales) can safely engage in collaborations such as joint purchasing arrangements. At these levels of market share, the U.S. courts and agencies generally conclude that any potential threat to competition will be negligible, and will be more than outweighed by the procompetitive benefits of the agreement.

3. Exclusion or Discrimination. As a general matter, U.S. antitrust law recognizes the right of a single firm, or even two or more firms operating a joint venture, to refuse to deal with third parties or to deal with those parties on discriminatory terms. Issues can arise, however, when the firm or joint venture owns or controls access to a facility (or input) that is important to competition in certain markets. In these circumstances, if a competitor or group of competitors denies its rivals access to the facility (or input), or grants them access only on discriminatory terms, competition may be lessened.

B2B exchanges are characterized by what economists call “increasing returns to scale,” meaning that the value of the exchange to each user increases as more users join and make trades through the exchange. Thus, it is generally in the exchange owners’ business interest to make the exchange available to as many buyers and sellers as possible, as the value of the exchange will increase with each additional user and transaction.

If an exchange becomes very successful, however, this incentive may change. Buyers or sellers (or both) may find that they must be able to trade through the exchange in order to be able to compete effectively, especially in cases in which the goods sold through the exchange are key inputs for a particular industry. In these circumstances, if the exchange is owned or controlled by a group of buyers or sellers, the owners of the exchange may find it in their interest to deny access to the exchange (or provide access only on less advantageous terms) in order to raise their rivals’ costs of doing business; this conduct may violate the antitrust laws. In sum, exchanges that exclude or discriminate against certain buyers or sellers are likely to raise antitrust issues primarily in cases in which the exchange has become the dominant means of trade in an industry, such that access to the exchange on equal terms is essential to effective competition.

4. Limitations on Firms’ Participation in Exchanges. Antitrust issues can also arise if a B2B exchange engages in conduct that has the effect of preventing the development of competing exchanges. There are two types of conduct that most often give rise to this concern: (1) inclusion of a large number of industry participants in a single exchange, and/or (2) restrictions on the ability of significant industry participants in one exchange to participate in competing exchanges.
In most circumstances, an exchange must attract a critical mass of buyers, sellers and transactions to be successful. Thus, if one exchange includes most or all of the significant buyers or sellers in an industry, it may as a practical matter prevent the development of competing exchanges. Whether such exchanges develop will depend in significant measure on whether the participants in the first exchange are free to participate in competing exchanges. Exchanges commonly require their founding members to commit to make a substantial portion of their trades through the exchange, at least for a period of time, to ensure that the exchange achieves the critical mass necessary to succeed. If the effect of these restrictions is to require a very large portion of the trades in a given market to be made on a single exchange, it may be difficult for another exchange to develop and compete effectively. In sum, the larger the number of buyers and sellers that participate in a given exchange, and the more stringent the requirements that they use that exchange exclusively, the more likely it is that a serious antitrust issue will arise.

There is, of course, an irony here. On the one hand, there is a potential antitrust risk from allowing every industry participant to trade on a single exchange. On the other hand, as noted above, there is a potential antitrust risk from not allowing every industry participant to trade on a single exchange. The application of the antitrust laws to B2B exchanges is reminiscent, in some ways, of Goldilocks’ search for the perfect bed: it should be not too small nor too big, but rather “just right.” It is very difficult to determine, however, the minimum efficient size, much less the optimal size, of a particular exchange. Thus, as a practical matter, the antitrust laws seek to ensure that there is an opportunity for competing exchanges to develop, and then leave it to the free market to determine the number and relative size of the exchanges that ultimately survive.

IV. Benefits and Costs of Antitrust Safeguards

A. Structural and Behavioral Safeguards

The parties to a B2B exchange can address each of the antitrust issues discussed above through various structural mechanisms, business policies or governance rules.

1. Information Exchange. Concerns relating to the availability of sensitive competitive information can be addressed by implementing various disclosure rules and firewalls. Many B2B exchanges adopt these safeguards for business, as well as legal, reasons: most participants in an exchange want to be assured that their confidential business information will not be shared with competitors or other third parties.

Safeguards commonly employed by B2B exchanges include data security measures, such as firewalls and encryption, to ensure that competitively information is available only to authorized individuals. In an exchange that is owned by members of an industry, it is important that the exchange have independent management and employees, and that the owners not have access to competitively sensitive data through any other means. It is also important that industry members not use the formation or operation of
the exchange to discuss or reach agreement concerning their competitive behavior (with respect to trades through the exchange or otherwise). Finally, B2B exchanges generally adopt audit procedures to test the efficacy of, and ensure compliance with, their security measures. The presence of stringent audit procedures also serves as a deterrent to the use of the exchange for anticompetitive purposes, as each participant in the exchange knows that its actions can be reconstructed from audit records.

2. **Group Purchasing.** As discussed above, group purchasing is unlikely to lessen competition unless the parties to the agreement account for a substantial share of all of the purchases of a particular product or service. Thus, for example, if the group purchasing arrangement concerns indirect goods, it is unlikely that the participants in the group will have market power in the purchase of those goods. Alternatively, an exchange can adopt rules that limit the number of companies that may participate in a group purchasing arrangement, or the volumes that any individual purchaser may make through the arrangement, if it is clear that such rules will prevent the group from exercising market power in the relevant market.

In many cases, it will be difficult to determine the proper scope of the “relevant market,” much less whether a particular group of buyers has market power in that market. In these circumstances, it may be possible to structure a group purchasing agreement in a way that effectively limits the parties’ ability to exercise market power. For example, group purchasers can designate an independent agent to act as a purchasing agent on behalf of the group and inform the seller that it is free to deal with the purchasers collectively or individually through the agent. If the seller elects to deal with the purchasers individually, the agent may not share information relating to one purchaser’s negotiations with the other purchasers. The use of this type of “messenger model” allows purchasers to realize at least some of the benefits of group purchasing while protecting sellers from the exercise of monopsony power. See U.S. Dep’t of Justice & Federal Trade Comm’n, Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153, at 20,812 (1996).

3. **Exclusion and Discrimination.** Business as well as legal concerns generally lead B2B exchanges to open their exchanges to as many buyers and sellers as possible. Nevertheless, exchanges are properly concerned that buyers and sellers meet certain minimum financial and other eligibility criteria, and comply with the rules of the exchange. Concerns about exclusion of certain competitors can, therefore, be addressed through the adoption of minimum, non-discriminatory criteria for participation in the exchange; these criteria should be objective, limited to those necessary to promote the development and success of the exchange, and applied equally to all participants.

Implementation of these safeguards will be particularly important in exchanges that (1) are owned and/or controlled by industry members and (2) have become important to effective competition in the industry. It is in these circumstances that the owners of the exchange, at least in theory, may have an incentive to exclude particular buyers or sellers in order to gain a competitive advantage. This concern can also be addressed through governance structures, including a board of directors that features a majority of independent directors, a board that is balanced between buyers and sellers and includes
independent directors, or a board that may have a majority of buyers or sellers, but has supermajority voting requirements on key issues.

4. Limitations on Firms’ Participation in Exchanges. Concerns about limitations on the ability of firms to participate in competing exchanges can be addressed by ensuring that any limitations of this nature are restricted to those necessary to encourage initial investment in the exchange and the development of the requisite critical mass. Thus, if a limited number buyers or sellers own an exchange, a requirement that they make most or all of their trades through the exchange may well be necessary to promote the development of the exchange; as the number (and/or size) of the owners increases, however, such a requirement may not be necessary to promote the development of the exchange and, in fact, may impede the development of competing exchanges. In the latter case, to minimize antitrust risk, the exchange may require the founders to purchase a limited percentage of their trades through the exchange, or may allow them to make their trades through their own exchanges or competing exchanges.

As a general matter, it will be difficult to justify a requirement that non-owners make all of their trades through an exchange. It is unlikely that an exchange would impose such a requirement as a business matter unless it believed that buyers or sellers had little, if any, choice but to use that exchange. It is precisely in this circumstance, however, that the antitrust risk is the greatest: if the exchange is the dominant provider of such services, then it does not need an exclusivity commitment from all of its users in order to ensure that it achieves the requisite critical mass; on the other hand, the restriction might well inhibit the development of competing exchanges. Likewise, all else equal, it will be more difficult to justify exclusivity rules if they go beyond one or two years. The main justification for these provisions, as noted above, is to encourage initial investment in, and use of, the exchange; this justification necessarily becomes weaker the longer the exchange is in business. Longer exclusivity provisions may be appropriate if they do not have a substantial effect of the ability of competing exchanges to develop and compete, but these should be evaluated on a case-by-case basis.

B. Benefits and Costs of Adopting Safeguards

While a B2B exchange can be structured so as to eliminate virtually all antitrust risk, there may be significant business costs to doing so. Consequently, parties participating in B2B exchanges will often find it necessary to strike a balance between the business objectives of the exchange and the level of antitrust risk associated with the exchange’s activities. Two areas in which parties must frequently make this trade-off are (1) exclusivity provisions? i.e., restraints on the ability of certain buyers or sellers to participate in the exchange or, conversely, restraints on the ability of participants in the exchange to participate in other exchanges or markets; and (2) group purchasing provisions. As discussed in the previous section, in the case of exclusivity provisions, some form of exclusivity may be necessary to encourage investment in, and use of, the exchange, yet an agency or court may conclude that exclusivity reduces competition in an upstream or downstream market or in the development of competing exchanges. Likewise, group purchasing may enable buyers to significantly reduce their procurement
costs, but an agency or court may find that these savings are the result of the exercise of market power rather than greater efficiency. The relative costs and benefits of making these trade-offs have to be evaluated in the context of each individual exchange and, depending on the initial outcome, may need to be re-evaluated as the exchange grows and the market in which it competes changes over time.

V. Checklist of Key Issues

A. Procedural Issues: Notification and Pre-Consummation Review by Antitrust Agencies

The formation of an exchange may require the filing of notification forms, and review and approval by governmental antitrust agencies, before the exchange may begin operations.

1. US: HSR Filings. Whether one or more of the parties forming a B2B exchange must make HSR filings will depend on the nature of the transaction, including (1) the size of the parties (revenues, assets) and the transaction; (2) the structure of transaction (corporation, joint venture, LLC); and (3) the availability of certain exemptions (e.g., shares held for “investment only”).

2. EU: European Commission or Member Nation Filings. The European Commission (or, alternatively, the antitrust authorities in various European countries) may require filings even if the exchange has no plans to operate in Europe. Whether any filing is required will depend on the nature of the transaction, including: (1) the size of the parties (revenues, assets) worldwide and in the EU or various member nations; (2) the structure of the transaction (corporation, joint venture); and (3) the availability of certain exemptions.

3. Other. Countries in virtually every part of the world now have reporting requirements that potentially could apply to a particular exchange transaction. A list of these countries and their requirements is beyond the scope of this paper, although in many cases no filing will be required so long as the exchange does not operate in those countries. Filing obligations in other countries will need to be evaluated on a case-by-case basis.

B. Substantive Issues: The Formation and Operation of the Exchange

The antitrust agencies have recognized that B2B exchanges are procompetitive because they lower supply chain costs, but have expressed concern that such exchanges could, in some circumstances, lessen competition. The key antitrust concerns are:
1. **Buyer Collusion:** Does the exchange facilitate price collusion among the buyers?

   - What fraction of total purchases of particular products do the buyers account for? What fraction of the buyers’ total costs are accounted for by the products purchased in the exchange?

   - Can the buyers engage in group purchasing? If so, can they collectively agree on the price to be paid?

   - Do the buyers have access to information about the prices paid, and the quantities and types of products purchased, by other buyers?

2. **Seller Collusion:** Does the exchange facilitate price collusion among the sellers?

   - What fraction of total sales of particular products do the sellers account for?

   - Do the sellers have access to information about the prices paid, and the quantities and types of products sold, by other sellers?

3. **Reduced Competitiveness of Particular Buyers or Sellers:** Is the exchange open to all buyers and sellers on equal terms?

   - Is the exchange closed to certain buyers and sellers? If so, does this eliminate or significantly reduce their ability to compete?

   - Does the exchange impose higher costs on certain buyers and sellers? If so, does this eliminate or reduce significantly their ability to compete?

4. **Reduced Competition Between Exchanges:** Does the exchange effectively limit the ability of other exchanges to compete?

   - Are buyers or sellers precluded from participating (in whole or in part) in competing exchanges or other types of transactions?

   - Are buyers or sellers given significant incentives not to participate in competing exchanges or other types of transactions?