B2B ANTITRUST ISSUES

INTRODUCTION

- There are a wide variety of B2B configurations, which can include single or multiple buyers and/or sellers in a single industry or across several industries
- Examples include:
  - Auction model - sellers put up items for sale and buyers bid on them
  - Exchange model - B2B hub collects bids from product suppliers and submits them to buyers
  - Catalog model - accumulation of product directories from industry suppliers
- Many B2B's will be hybrids, and almost all will present antitrust issues
- Antitrust issues are particularized to specifics of B2B structure, operation, and industry or industries involved

B2B ANTITRUST ISSUES

GENERAL ANALYSIS

- There are three primary areas of antitrust concern:
  - Over-inclusion of competitors
  - Under-inclusion of competitors
  - Unnecessary sharing of price, output and/or cost information
- Analysis in each area involves four key questions:
  - What cost-saving efficiencies are generated by the B2B?
  - What anti-competitive effects may arise? [usually, higher-than-competitive prices, and lower-than-competitive output or innovation]
  - Are the features of the B2B structure that produce the potential anti-competitive effect necessary to achieve the efficiencies?
  - If so, do the efficiencies "outweigh" the necessarily associated anti-competitive effects?

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ABUSE OF BUYING SIDE MARKET POWER [OVER-INCLUSIVENESS]

- May arise where:
  - B2B sponsored by competing purchasers who coordinate purchases and who together constitute a sufficient share of buyers to exercise buying side market power -- i.e., can push input prices below competitive levels
  - Usually > 35% of all market purchases needed for such power
  - Also, reduced input prices <u>probably</u> need to translate to reduced input quantities, reduced output quantities, and higher output prices for antitrust concern
- Relevant inquiry:
  - What is the probability that purchases may be coordinated (directly or indirectly)?
  - Why is so large a share of purchasers required to capture B2B efficiencies?

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- **EXCLUDING A COMPETITOR FROM AN ESSENTIAL B2B [UNDER-INCLUSIVENESS]**
  - May arise where:
    - B2B becomes so efficient and successful that access is required for competitive survival [If in fact this efficient, generally will not be an "over-inclusiveness" issue.]
    - Probably a relatively rare phenomenon, because normally there will be other avenues of sale or purchase, or the possibility of establishing another B2B
  - Relevant inquiry:
    - What is the rationale for exclusion? How will inclusion detract from efficiency?
    - What is the cost to competition if the excluded party cannot compete?

B2B ANTITRUST ISSUES

- **COLLUSION FACILITATING INFORMATION EXCHANGE**
  - May arise where:
    - Many B2Bs will include a great deal of information about costs,, prices, and output levels. Excessive sharing of previously unavailable information can lead to price or output collusion among competitors.
    - The extent to which this information is shared among B2B participants, beyond pre-B2B dissemination, must be carefully considered.
    - Usually the risk is highest in concentrated industries
  - Relevant inquiry:
    - Why must the information be shared more broadly -- i.e., what additional efficiencies are captured?
    - Can such information sharing enhance the likelihood of collusion, or facilitate the enforcement of price or output agreements?

B2B ANTITRUST ISSUES

CONCLUSIONS

- B2Bs are new and vary widely
- Not much existing law specific to B2Bs
- This means that detailed legal and factual analysis is required in each case
- The three areas of antitrust concern described here are primary examples, useful for spotting issues, but hardly an exhaustive list
- Any significant B2B should receive thorough antitrust review before launching