

June 15, 2001 01:01 PM PST

## Exchanges avoid antitrust Lawrence Savell

POTENTIAL ANTITRUST concerns arising from business-to-business exchanges are not new to the federal agencies that monitor such activities -- just new to some b-to-b operators and members. And therein lies the problem: How far is too far for exchanges?

Potential antitrust exposure may arise from the particular operating rules or ancillary procedures governing the business of the exchange if they are viewed by authorities as anticompetitive.

### Safe harbors

Not all b-to-b exchanges are created the same. The Federal Trade Commission and the Department of Justice, which have antitrust oversight, afford more leeway to exchanges that serve as forums for individual buyers and sellers making independent decisions. Indeed, the government has granted a tentative "safe harbor" for the b-to-b exchange that falls short of a 20 percent market share in its market.

Some insight into the FTC's thoughts on antitrust and b-to-b exchanges is in an October report, "Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces." In that report, the FTC stated that "B2B marketplaces have the potential to generate significant efficiencies, winning lower prices, improved quality and greater innovation for consumers." The FTC conceded such undertakings can reduce administrative and processing costs, reduce buyer-seller search and access costs, facilitate joint purchasing to reduce transaction costs, and increase competition.

But the FTC also cautioned that these efficiencies can be taken too far -- information-sharing allegedly facilitating anti-competitive coordination, alleged exclusionary practices keeping competitors of participants out of the marketplace, and alleged requirements of exclusivity preventing members from doing business with other competing marketplaces and exchanges.

### Avoid antitrust allegations

Joint e-commerce undertakings can avoid allegations of collusion -- improper agreements to act in a common way -- between competitors by following some simple guidelines.

Require confidentiality agreements among participants, both buyers and sellers, to bar dissemination of sensitive business information to competitors.

Assign members anonymous log-in passwords and bidder identification numbers in lieu of actual names.

Aggregate data so that information about individual participants cannot be identified and used by exchange members.

- \* Appoint independent data managers to review and process information confidentially.
- \* Enforce strict confidentiality guidelines.
- \* Impose meaningful penalties for noncompliance.

Similarly, a joint e-commerce undertaking can take measures to avoid allegations of exclusion, such as improper prohibitions preventing other competing buyers or sellers in the market from participating. Using reasonable, objective criteria in admitting legitimate participants avoids claims that a competitor was improperly denied access to the exchange. On the other hand, don't be so overinclusive that the entity takes over the market, as that can create its own set of antitrust concerns.

*Lawrence Savell is a writer and attorney in New York. Contact him at [lsavell@chadbourne.com](mailto:lsavell@chadbourne.com).*