

# Antitrust Standards in Franchisor/Franchisee Electronic Marketplaces

F. MARTIN DAJANI

In spring 2000, American and international antitrust agencies were considering the antitrust implications of a wave of new potential marketplaces, Internet-based business-to-business exchanges. Known by the buzz term “B2B exchange,” business-to-business electronic marketplaces were touted as the next big thing, and why not? The stock market was soaring, and neophyte companies like Pets.com, Peapod.com and eToys.com, had “proven” that one could create Internet-based markets for consumer goods where none had previously existed. If these companies could successfully market pet food, groceries, and toys over the Internet, it only followed that “bricks and mortar” companies could exploit the same markets. Moreover, why should the Internet be limited to business-to-consumer transactions? Many companies recognized that the Internet was uniquely suited to business-to-business commerce. Armed with the concept, the technology, and significant start-up capital, entrepreneurs, companies, and in some instances entire industries raced breathlessly to create electronic marketplaces. Against this backdrop, federal antitrust agencies, in particular the Federal Trade Commission (FTC), took the lead in considering the antitrust implications of electronic marketplaces. A series of workshops, speeches, a report, and reviews of actual electronic marketplaces memorialized the antitrust policies that still guide the formation and operation of exchanges.

This article traces the conceptual and actual electronic marketplace reviews that took place since 2000 and assesses franchisor and franchisee electronic marketplaces under the government’s B2B antitrust policies and pronouncements.

## What Is an Electronic B2B Marketplace?

Although there are several acceptable definitions of electronic business-to-business marketplaces (B2Bs or exchanges), for purposes of this article, B2Bs are Internet-based electronic markets designed to allow businesses, and not individual consumers, to transact business and communicate with each other via a website or portal. These businesses may operate in manufacturing, service, and other sectors, and include suppliers, vendors, distributors, and business customers. By limiting the definition to Internet-based electronic markets, this article intentionally excludes



F. Martin Dajani

exchanges that use proprietary electronic networks, such as electronic data interchange (EDI) systems and other non-Internet platforms. Although a robust EDI system can perform some of the functions of a B2B marketplace, few EDI systems have approached the functionality and economic scale necessary to seriously implicate many of the antitrust issues associated with B2B exchanges.<sup>1</sup>

## All Electronic Marketplaces Are Not Alike

Many labels are applied to B2Bs, “neutral,” “buy-side,” and “consortium” among them. But most observers recognize two distinct forms of B2Bs: vertical and horizontal exchanges. Horizontal B2Bs are those that tend to link participants in multiple markets or industries. Horizontal B2Bs usually do not cater to a particular industry but instead offer a wide range of goods and services to several markets, industries, or sectors.<sup>2</sup> These B2Bs are the business-to-business equivalents of large discount retailers such as Wal-Mart and Target. Although not limited to indirect materials, most horizontal B2Bs bring together divergent buyers and sellers of indirect inputs, or inputs that do not directly go into the good or service that the purchaser manufactures or produces.<sup>3</sup> Free Markets is one of the leading examples of a horizontal exchange. To date, over \$30 billion of goods and services have been sourced on Free Markets from companies as diverse as BP Amoco, the Quaker Oats Company, and the Royal Bank of Scotland.<sup>4</sup>

In contrast, vertical B2Bs are usually industry or market specific, and tend to offer goods, services, and functionality specific to one industry. Vertical exchanges may include direct and indirect inputs, but tend to concentrate on making available inputs used directly in the manufacturing process. Examples of direct inputs include the nuts, bolts, and steel used in manufacturing automobiles. Computers and software purchased to track and maintain the inventories of these items would be indirect inputs. Because many inputs are industry or product specific, vertical exchanges have emerged in a number of industries, including automobile, aircraft, and steel manufacturing.<sup>5</sup> Vertical exchanges usually involve multiple tiers (or levels of suppliers) within the same industry or market, with each tier producing or supplying increasingly specialized direct inputs. In both the automotive and the aircraft manufacturing industries, vertical exchanges have been formed with the goal of linking most of the supply chain, in turn allowing an automobile manufacturer to place an order for radios that will automatically generate various component orders down the supply chain. Many of the antitrust issues in vertical exchanges flow from vertical restraints placed on the lower tiers by the top tier, particularly when the top-tier users also have an equity interest in the B2B.

F. Martin Dajani ([martin.dajani@piperrudnick.com](mailto:martin.dajani@piperrudnick.com)) is Of Counsel in the Washington, D.C., office of Piper Rudnick LLP.

## What Is the Market?

Whether labeled a vertical, horizontal, or hybrid B2B, for purposes of antitrust analysis, the paramount issue is identification of the relevant markets. The implicated markets fall into two general categories: the tangible markets (those in which the members or users of the B2B compete) and the intangible or inchoate market (consisting of the exchange itself and other exchanges, or the so-called market-for-markets).

Accurate market definition is critical to the analysis. Without it, there is no meaningful basis to assess any restraints that the B2B creates.<sup>6</sup>

## Tangible Relevant Markets

Defining the tangible relevant markets requires an analysis of the demand substitution factors, or the willingness of consumers to substitute one product for another, for goods and services bought and sold on the exchange.<sup>7</sup> A horizontal exchange, or an exchange that serves many industries or sectors, is likely to implicate a number of discrete relevant markets, those relevant markets in which the exchange participants compete.<sup>8</sup> An exchange such as Free Markets, which serves companies in petroleum, banking, and food industries, among others, will have some impact on each of those markets. If the horizontal exchange brings together firms that do not compete with each other, it is less likely that the B2B will have a meaningful antitrust effect in any one tangible relevant market.<sup>9</sup>

On the other hand, by its very nature a vertical B2B is more likely to affect a discrete relevant market, and depending on the B2B's aggregate size or the concentration of the tangible market, the impact may be material. For instance, a vertical B2B with many members in the same concentrated underlying market, such as automobile or aircraft manufacturing, is much more likely to have meaningful antitrust implications than a vertical B2B in an unconcentrated market, such as service industries typical to franchised markets.

## Inchoate Market-for-Markets

It is the inchoate market-for-markets, and the persistent question of whether such a market actually exists, that perhaps requires some reconsideration now that we have the benefit of hindsight and real world market experience. The obvious question, easily asked but not so easily answered, is whether B2B exchanges constitute a separate and distinct product or service market. In other words, if a hypothetical B2B monopolist imposed a small but significant nontransitory price increase, somewhere in the magnitude of 5 percent to 10 percent, would B2B users turn to other procurement methods in sufficient numbers to defeat the price increase?<sup>10</sup>

The merger guidelines' "snip test," always an imprecise proxy of future consumer behavior, is further complicated when the proposed relevant market is a new or emerging product or service.<sup>11</sup> Indeed, when one has to explain what a B2B is to prospective consumers in the candidate market, that convincingly suggests that the market may not exist. If the putative consumers do not know what a B2B is, it only

follows that a candidate B2B market is too narrow and that consumers have several traditional procurement options to choose from, including proprietary networks, catalogues, and telephone and facsimile machine commerce.

Early indications are that antitrust enforcement agencies consider B2B exchanges to be a separate and distinct relevant product or service market. In its October 2000 staff report, *Entering the 21st Century: Competition Policy in the World of Electronic Marketplaces*, the FTC devoted an entire section to the "Market-for-Marketplaces."<sup>12</sup> Likewise, the FTC's investigation of Covisint considered potential competitive effects in the upstream tangible markets as well as the downstream market-for-markets.<sup>13</sup> Covisint is an electronic exchange founded by Ford, General Motors, Daimler-Chrysler, Nissan, and Renault. It is the leading automotive industry B2B and has the formidable goal of linking most of the industries' suppliers and manufacturers in one seamless electronic marketplace. The German government's review of Covisint concluded that it will be in competition "with a number of business-to-business (B2B) exchanges" and that B2B platform development "is a market to which software companies have open access."<sup>14</sup>

## A Questionable History from the Government's Perspective

Although B2Bs were essentially new on the scene in early 2000, proprietary networks were already being used, and not always for procompetitive purposes, according to the U.S. government. Indeed, early B2Bs had to confront the lasting legacy of *United States v. Airline Tariff Publishing Co.*<sup>15</sup> and the government's perception that business-to-business electronic marketplaces were nothing more than tools for companies looking to evade the Department of Justice and its Antitrust Division, or at least to test the limits of the Sherman Act.

In *Airline Tariff Publishing*, the Antitrust Division filed suit against the Airline Tariff Publishing Co. (ATP) and most of the major U.S. airlines. It alleged that the member airlines were using the ATP to fix prices and otherwise reduce competition. The ATP provided an electronic platform where, among other things, the member airlines would post future proposed fares in the form of first and last ticket dates.<sup>16</sup> The posted fares did not take effect immediately. Instead, the "first ticket date" showed the future effective date of the new fare, assuming that the fare was not withdrawn before its effective date, as it frequently was.<sup>17</sup> The airlines claimed that the posting of proposed future fares benefited consumers by notifying them of future fare increases or decreases and allowing them to plan their air travel accordingly. The government did not agree and instead alleged that this practice was a form of illegal price negotiation among competing airlines.<sup>18</sup>

According to the Division's complaint, the airlines used future price posting as a way of signaling proposed prices. If other carriers matched the proposed fare, then the posting airline adopted the fare. If other carriers did not follow suit, the original airline would quietly withdraw the proposed fare before the first ticketing date. Without admitting liability,

each of the defendant airlines settled with the Department of Justice, entered into a consent decree, and agreed not to use first and last ticket dates. Under the consent decree, when airlines post ticket prices, they must take effect immediately, thus preventing airlines from “testing” new proposed prices.<sup>19</sup>

The government’s theory in *Airline Tariff Publishing* is consistent with the Horizontal Merger Guidelines’ discussion of “coordinated interaction,” or the ability of competitors to coordinate their activities in a concentrated market. Under the Horizontal Merger Guidelines, product homogeneity, access to key information about rival firms, and the ability to detect and punish deviators are indicative of market conditions conducive to coordinated interaction.<sup>20</sup> The combination of a homogenous product (airline travel between specific cities, or city pairs) and the use and functionality of the ATP electronic platform, which permitted airlines to post, monitor, and react to hundreds of city pair fares instantaneously, provided the perfect conditions for successful coordinated interaction. Because the ATP demonstrated how easily major corporations could abuse an electronic marketplace and because current B2Bs provide horizontal functionality that greatly exceeds that of the ATP, some regulators feared that B2Bs could be a repeat of the ATP experience.<sup>21</sup>

### The FTC Takes the Lead

Thus, the antitrust agencies faced two competing views of B2Bs and their likely effects. Would B2Bs be the harbinger of frictionless commerce with efficiencies driven by economies of scale unavailable in “bricks and mortar” commerce? Or would B2Bs simply be a more powerful tool for facilitating coordinated interaction or outright collusion? The FTC took the lead in forming U.S. B2B antitrust policy, both through its review of Covisint, the first B2B falling within the embrace of the Hart-Scott-Rodino Act,<sup>22</sup> and an FTC-sponsored B2B workshop.

In June 2000, the FTC brought together industry participants, academics, antitrust practitioners, and government officials for a two-day workshop, an event that has been likened to a debutante ball for B2Bs.<sup>23</sup> At the same time, the Bureau of Competition was actively investigating Covisint, a vertical B2B that was submitted for review pursuant to the Hart-Scott-Rodino Act.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR),<sup>24</sup> certain parties to mergers and other ventures are required to file a detailed submission to the agencies to notify them of the pending transaction.<sup>25</sup> This HSR filing starts a waiting period in which the agency may (1) take no action; (2) commence a limited investigation; or (3) launch a full investigation and request additional documents. During the HSR waiting period, the merging parties may not con-

summate the transaction without approval from the reviewing agency. If the agency does not have sufficient information to review the competitive implications of the proposed transaction or if it has concerns about the proposed transaction, it may issue a request for additional documents, known as a “second request.” The second request tolls the running of the waiting period until thirty days after the merging parties have substantially complied with the document request.<sup>26</sup>

Although the Covisint investigation prompted a second request and some modifications to Covisint’s terms and conditions, in September 2000, the FTC cleared Covisint, signaling to the antitrust community that collaborative B2B exchanges would be permitted to operate.<sup>27</sup> However, in a departure from standard closing letter language, the FTC cautioned that “[i]n view of the undeveloped status of Covisint, the Commission reserves the right to take such further action as the public interest may require.”<sup>28</sup> This unorthodox language reflects the FTC’s uncertainty about the implications of such a large consortium exchange.

The June 2000 B2B workshop produced two volumes of testimony, dozens of public comments and submissions, and ultimately resulted in the October 2000 FTC B2B report.<sup>29</sup> Because there are no formal agency guidelines, the report provides the best articulation of B2B antitrust policy to date. In light of the FTC’s report, the government’s review of Covisint and other B2Bs, and recent industry developments, the antitrust “rules of the road” for exchanges are now clearer than they were during the formative days of early 2000.

### Information Sharing

Information sharing is routinely identified as one of the key antitrust issues for B2B exchanges. At one end of the spectrum, agreements among competitors to fix prices, allocate markets, or reduce output are per se illegal under the Sherman Act, with no additional analysis necessary to determine whether there is any procompetitive justification.<sup>30</sup> At the other end of the information exchange spectrum, it is often necessary for competitors to exchange information in order to achieve legitimate procompetitive benefits.<sup>31</sup> Because B2Bs can facilitate the horizontal flow of information among competitors and the vertical flow of information to the B2B itself, appropriate information rules and technology to enforce the rules are essential.

Some franchisee trade associations have considered establishing B2Bs or other forms of purchasing cooperatives and ventures.<sup>32</sup> Although there is no prohibition against trade associations establishing B2Bs, care must be taken to segregate the association’s lobbying and political activity from its business activity.<sup>33</sup> While members of a trade association are obviously permitted to engage in legitimate concerted con-

---

**Information sharing is  
routinely identified as one  
of the key antitrust issues  
for B2B exchanges.**

---

duct in order to advance political and legislative goals, their business conduct is subject to state and federal antitrust laws, regardless of whether it is a trade or political action association that hosts or sponsors the B2B.

B2B information exchange rules do not differ from traditional information exchange rules among competitors. Governed by the “rule of reason,” if a proposed information exchange is likely to have an anticompetitive effect, the parties exchanging the information must be able to demonstrate that the procompetitive justifications for doing so outweigh the anticompetitive effects. All other things being equal, exchanging price information is more likely to cause anticompetitive effects than not exchanging price information. Moreover, exchanging information about future pricing is more likely to have an anticompetitive effect than is the exchange of past or even present pricing information.

Although there are no definitive safety zones for the exchange of pricing and other competitively sensitive information on B2Bs, the health care antitrust statements (that have application beyond the health care industry) contain safety zones where, absent extraordinary circumstances, the antitrust authorities will not challenge the collection and dissemination of pricing information. Under the health care safety zones, the collection and exchange of price or cost data are permitted when:

- (1) the collection is managed by a third party, such as a purchaser, government agency, consultant, academic institution, or trade association;
- (2) any information that is shared among or is made available to competitors is more than three months old; and
- (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider’s data constitute more than 25 percent of the data for which the disseminated statistic is based, and the information is sufficiently aggregated such that it would not permit one to identify the prices charged by an individual provider.<sup>34</sup>

The health care statements model is particularly adaptable to B2Bs, as the B2B itself can fulfill the third-party role discussed above if it is independent of its members. Moreover, if the B2B draws from a wide range of users, as a B2B serving franchisees would likely do, the resulting data should be sufficiently diverse to satisfy the aforementioned 25 percent and aggregation requirements.

### **Monopsony**

Monopsony, or the exercise of buyer market power, was one of the key issues on which antitrust regulators focused in the initial reviews of B2Bs. Because of the belief that B2Bs would be primarily used as aggregated purchasing mechanisms, regulators feared that in certain concentrated markets with a limited number of buyers, aggregated purchasing would permit buyers collectively to drive the price of key inputs below the competitive level by coordinating and limiting their purchases. Regulators were particularly concerned that competing buyers in concentrated industries could use vertical B2Bs to exercise collective monopsony power. In an apparent attempt to head off any potential monopsony con-

cerns, Covisint took the unusual step of barring original equipment manufacturers from aggregating their purchases with other original equipment manufacturers (OEMs), meaning that car makers could not aggregate their purchases with each other.<sup>35</sup> Moreover, Covisint’s operating rules bar the aggregated purchase of automotive-specific parts, or direct inputs, meaning that OEMs are barred from collectively purchasing with any Covisint participants (OEMs or suppliers) parts that go into automobiles. They may collectively purchase indirect inputs such as paper clips and computers.<sup>36</sup>

Although Covisint chose to take an extremely conservative approach in barring OEMs from aggregating their purchases with other OEMs, Covisint’s decision to limit its aggregated purchasing activities should not be taken as an FTC prohibition against competitors jointly purchasing goods and services on B2Bs. Indeed, the market conditions that likely led to Covisint’s decision—high concentration in the underlying market (automobile and truck manufacturing), the high collective market share of the underlying participants, specialized inputs (automotive components), and relatively few suppliers—are not present in most markets for franchised goods or services. Instead, the typical market for franchised goods or services is highly diffused and the competitors tend to be small, independent operators. For example, the restaurant industry is highly competitive, and it is very unlikely that a group of restaurant franchisees could ever exercise buyer market power.

Even from the upstream perspective, franchisor markets tend to be highly competitive with multiple restaurant, hotel, and other service-oriented franchisors competing in crowded markets. In such markets, it is far less likely that any purchaser or aggregation of purchasers will reach a level sufficient to implicate monopsony concerns.<sup>37</sup> Moreover, it is less likely that franchisors or franchisees will use B2Bs to purchase specialized goods or inputs, such as highly engineered parts unique to a specific industry or product. Instead, they are more likely to purchase commodity items less susceptible to monopsony buyer power.

Moreover, although many in 2000 identified monopsony as the key anticompetitive risk of B2Bs, to date there have been no challenges to B2Bs on monopsony grounds. Although many exchanges included forms of joint or group purchasing in their initial releases, currently the focus is on individual procurement. It is unclear why existing B2Bs have not more frequently pursued joint purchasing, but it may be that joint purchasing has proven to be burdensome from technology and administrative perspectives.

### **Exclusion**

In the formative years of B2Bs, many antitrust commentators expressed concern that B2Bs, or, more precisely, the member companies that make up B2Bs, would exclude competitors from their B2B. Because most B2Bs thirst for customers, transactions, and volume, this concern now appears a bit dated. However, while current conventional wisdom is that exclusion from a nascent exchange does not yet pose any competitive issue, as consolidation among

B2Bs proliferates, exclusion may yet be an issue that antitrust enforcers must confront.

Group boycotts or concerted refusals to deal are often thought of as per se violations of section 1 of the Sherman Act, usually included in the antitrust “taboo list” with price fixing and market allocation.<sup>38</sup> This is still an area in which competitors should tread with extreme caution, but recent decisions have eroded the per se label for some agreements to exclude, or otherwise not deal with, certain competitors. *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.*<sup>39</sup> involved a wholesale purchasing cooperative whose membership consisted of office supply retailers. Absent any explanation, notice, or hearing, the cooperative expelled one of its members.<sup>40</sup> Despite its own ruling in *Silver v. New York Stock Exchange*,<sup>41</sup> the U.S. Supreme Court declined to apply the per se rule.<sup>42</sup> Instead, it found that

[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis.<sup>43</sup>

Thus, “[w]hen the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.”<sup>44</sup>

With the *Northwest Wholesale* “market power/unique access to a necessary business element” standard firmly in place, it appears that, at least for the near term, exclusion from B2Bs will be guided under the rule of reason. If the exclusion is likely to have an anticompetitive effect, the B2B will then be permitted to set forth any procompetitive justifications. A list of possible procompetitive justifications for excluding a company or competitor from a B2B would be long and beyond the scope of this article. However, one of the most likely justifications is to prevent so-called “free riders” from taking advantage of the B2B without making a financial, volume, or other commitment to the B2B. Exclusivity agreements can prevent marginal users, or those users that contribute nothing in terms of capital, volume, or support, from deriving benefits from the exchange without the necessary commitment to it.

### Exclusivity

The fixed cost of launching a successful B2B can be substantial but the marginal cost of each incremental transaction is extremely small. Hence, most B2B revenue models are premised on charging a small “per-transaction” fee, either a flat fee or a percentage (or fraction of a percentage) of the value of the transaction. This revenue model, and indeed the success of the B2B itself, requires the exchange to achieve

high volume. In order to generate sufficient volume levels, many B2Bs adopt various exclusivity requirements that function either as a carrot or as a stick.<sup>45</sup> As the carrot, the B2B offers the participants incentives for using the exchange, such as volume discounts, increased features, or in some instances equity in the exchange itself.<sup>46</sup> The stick is more direct. It can range from forbidding the member from using competing exchanges to, in the case of very vertically integrated relationships, requiring the participant to use the exchange for all or some of its procurement.<sup>47</sup>

Regardless of whether the carrot or the stick is employed, exclusivity agreements are vertical nonprice restraints properly analyzed under the rule of reason. Indeed, well-established case law recognizes that many exclusive dealing arrangements are procompetitive and not motivated by anticompetitive plans.<sup>48</sup> One of the primary procompetitive justifications of exclusivity agreements is to allow a new competitor to gain a meaningful presence in a market dominated by entrenched competitors. However, how can there be any entrenched competitors in what is, at best, an emerging market? The answer lies in how much of the potential B2B market is actually foreclosed by the exclusivity agreement. In assessing the degree of foreclosure in the potential B2B market, two inquiries are necessary: (1) to what degree are the participants exclusively committed to the B2B, and (2) how much commerce is available to actual or potential competing B2Bs. Stated another way, the analysis should focus on “the number of sellers and buyers in

the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others.”<sup>49</sup>

The degree to which participants are exclusively committed to a B2B is a function of the exclusivity requirement. There need not be an absolute prohibition against using other

B2Bs effectively to foreclose exchange competition. While a “near-exclusivity” clause, such as one committing the participant to use the exchange primarily or to commit to a specific percentage of the participant’s B2B commerce, may cause less concern than a complete bar against using competing exchanges, the inquiry ultimately turns on whether competitors are foreclosed from competing in the market. If competitors in a highly concentrated tangible market form an exchange, and require the founders and participants to use the exchange exclusively, it is more likely to cause anticompetitive harm since the exclusivity requirement will foreclose competing exchanges from entering the market to compete. Moreover, any tangible market competitors excluded from the exchange are likely foreclosed from establishing a competing exchange in that there would be an insufficient number of potential participants to support the competing exchange. In the automobile manufacturing industry, there are relatively few large competitors. If a substantial number of them formed

---

## Exclusivity agreements are vertical nonprice restraints properly analyzed under the rule of reason.

---

an exchange and collectively barred their competitors from participating, this could harm competition. Moreover, there may be an insufficient number of remaining manufacturers to form a viable competing exchange.

At the opposite end of the concentration spectrum, for an exchange serving a highly competitive tangible market or a number of different underlying tangible markets, exclusivity requirements are unlikely to cause serious anticompetitive concerns because they are unlikely to cause adverse effects. In such a market, exclusivity may serve the procompetitive end of increasing volume in order to establish a viable, competitive exchange. For example, a number of exchanges have been created that cater to the restaurant industry. Many have failed, due to insufficient volume. Exclusivity requirements could help the market sustain fewer, more viable exchanges rather than having numerous marginal exchanges unable to sustain sufficient volume.

A related exclusivity issue is particularly pertinent to competing franchisors. Although it may be permissible to establish a consortium B2B, the competitors should not require individual customers, suppliers, or franchisees to use the exchange, regardless of the concentration of the tangible or exchange markets. Although franchisors can, subject to state and federal franchisee protection laws, generally determine with whom they and their franchisees do business and on what terms, those decisions must be made individually and not collectively. A hotel franchisor that establishes a B2B with competing franchisors may unilaterally decide that all business between the franchisor and its suppliers must be conducted through the exchange. However, if the same franchisor enters into an agreement with the competitor co-founders of the exchange to require all of them to transact business exclusively on the exchange, this is more likely to cause horizontal competitive concerns.

### It's the Same, Only Different

When asked if the antitrust issues surrounding B2B exchanges are the same as those associated with other competitor collaborations, I am reminded of the answer that Winnie the Pooh always gave to his friends in the Hundred Acres Wood: "It's the same, only different." Indeed, the issues are largely the same as those present in other competitor collaborations. However, given the nature and scope of the technology and the functionality of many exchanges, the potential for anticompetitive conduct or effects is heightened, causing a corresponding heightened level of concern on the part of United States and foreign antitrust enforcers. Despite the heightened risks, a B2B fostering appropriate antitrust compliance rules and the necessary technology to enforce those rules can achieve the efficiencies attainable through electronic commerce and network effects while remaining fully compliant with federal and international antitrust laws.

### Endotes

1. The Airline Tariff Publishing Company's (ATP) proprietary network is an infamous exception. The ATP saga is discussed later in this article.

2. Free Markets and eScout are examples of horizontal exchanges. See <http://www.freemarkets.com>; <http://www.escout.com>.

3. Such inputs are also known as maintenance, repair, and operating equipment.

4. Free Markets: Supplying, available at <http://www.freemarkets.com/benefits/supplying/default.aspx>.

5. See, e.g., Covisint (automobile manufacturing), Cordiem (aircraft manufacturing), and Steel Exchange (steel manufacturing).

6. See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 381–82 (1967); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

7. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.0 (1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104. The Horizontal Merger Guidelines, a collaboration of the Department of Justice's Antitrust Division and the FTC, set forth the merger enforcement policies of the federal antitrust agencies. Although not binding, the merger guidelines have been cited by a number of courts.

8. For example, an exchange such as Worldwide Retail Exchange ([www.worldwideretailexchange.org](http://www.worldwideretailexchange.org)) includes members in the grocery, general retail, apparel, and retail pharmacy markets.

9. This should not be read to imply that participant conduct on horizontal exchanges is unlikely to have tangible antitrust effect. Obviously, if participants (or the operator of the B2B) misuse the exchange, or if the exchange itself lacks the rules and technological safeguards to ensure antitrust compliance, this can have civil and criminal antitrust consequences.

10. HORIZONTAL MERGER GUIDELINES, *supra* note 7, § 1.0.

11. The "snip test" refers to the attempt to predict upstream and downstream reaction to a hypothetical monopolist's imposition of a small but significant nontransitory increase in price. *Id.*

12. FEDERAL TRADE COMMISSION, ENTERING THE 21ST CENTURY: COMPETITION POLICY IN THE WORLD OF B2B ELECTRONIC MARKETPLACES (2000) (FTC B2B Report), Part 3(B), reprinted in 7 Trade Reg. Rep. (CCH) ¶ 50,176.

13. It should be noted that in its early termination letter to the parties, the FTC only referred to the "automobile market." FTC Closing Letter to Ford, General Motors, DaimlerChrysler, Nissan, and Renault (Sept. 11, 2000), available at <http://www.ftc.gov/os/2000/09/covisintchrysler.htm>.

14. Press Release, Bundeskartellamt, Bundeskartellamt Allows Covisint Internet Platform to Go Ahead (Sept. 26, 2000), available at [http://www.bundeskartellamt.de/26\\_09\\_2000\\_englisch.html](http://www.bundeskartellamt.de/26_09_2000_englisch.html).

15. 1994–2 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994) (Competitive Impact Statement and Final Consent Decree).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. HORIZONTAL MERGER GUIDELINES, *supra* note 7, § 2.1.

21. See, e.g., FTC Public Workshop: Competition Policy in the World of B2B Marketplaces (June 29–30, 2000), Hearing Tr. at 493–95, 512–14, 525–26.

22. 15 U.S.C. § 18a (2001).

23. Mark S. Popofsky, *Antitrust's New Frontier*, 9 GEO. MASON L. REV. 565 (2001).

24. 15 U.S.C. § 18a (2001).

25. See 16 C.F.R. §§ 801.1–803. The HSR Act and accompanying federal rules are highly technical and beyond the scope of this article.

26. 15 U.S.C. § 18e(2) (2001). For a thorough explanation of the second request process, see ABA Antitrust Section, *Guidance for Federal Merger Investigations and Complying with "Second Requests"* (Dec. 2000), available at <http://www.abanet.org/antitrust/mergerguidelines.html>.

27. FTC Closing Letter to Ford, General Motors, DaimlerChrysler, Nissan, and Renault (Sept. 11, 2000), available at <http://www.ftc.gov/os/2000/09/covisintchrysler.htm>.

28. *Id.*

29. See *supra* note 9.

30. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396–401 (1927) (agreement to fix prices); *United States v. American*

Linseed Oil Co., 262 U.S. 371, 389–90 (1923) (agreement to reduce output); *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1371–73 (6th Cir. 1988) (agreement to allocate bids).

31. For example, most research and development collaborations are procompetitive and are typically analyzed under the rule of reason. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161.

32. *See, e.g.*, American Association of Franchisees and Dealers eCommerce Marketplace, *available at* <http://www.aafd.org/power>.

33. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

34. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), Statement 5A, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153.

35. *See* [www.covisint.com/faqs/gen\\_current.shtml#cs3](http://www.covisint.com/faqs/gen_current.shtml#cs3).

36. Covisint still does not offer aggregated purchasing on its site, perhaps suggesting that a market has yet to materialize for such a service. However, when Covisint's aggregated purchasing service becomes operational, its restrictions will be among the most stringent of any B2B. *Id.*

37. HEALTH CARE STATEMENTS, *supra* note 34, Stmt. 7.

38. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656

(1961); *Fashion Originators Guild v. Federal Trade Comm'n*, 312 U.S. 457 (1941).

39. 472 U.S. 284, 286 (1985).

40. *Id.* at 287.

41. 373 U.S. 341 (1963).

42. *Northwest Wholesale*, 472 U.S. at 291–94.

43. *Id.* at 296–97 (internal citations and parentheses omitted).

44. *Id.* at 298.

45. B2B REPORT, *supra* note 12, pt. 3 at 23.

46. *Id.*

47. *Id.*

48. *See, e.g.*, *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949) (“[t]hey [exclusive dealing arrangements] may be useful, moreover, to a seller trying to establish a foothold against the counterattacks of entrenched competitors”); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961); *cf.* COMPETITOR COLLABORATION GUIDELINES, *supra* note 31, § 3.34a, where, in a horizontal context, “competitive concern likely is reduced to the extent that participants [in a competitor collaboration] actually have continued to compete through separate, independent business operations or through membership in other collaborations, or are permitted to do so.”

49. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).