



## POLICY ROUNDTABLES

# Competition Issues in Electronic Commerce 2000

### Introduction

The OECD Competition Committee debated competition issues in electronic commerce in October 2000. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Gary Hewitt for the OECD and written submissions: Australia, Canada, the European Commission, Germany, Hungary, Japan, Korea, the United Kingdom, the United States as well as papers from BIAC, UK OFTEL/OFT and the Frontier Economics Group. An aide-memoire of the discussion is also included.

### Overview

Electronic commerce ("e-commerce") can be defined as business occurring over networks using non-proprietary protocols established through an open standard setting process. Internet mediated e-commerce is the fastest growing part of the phenomenon and was the focus of the roundtable discussion.

Although e-commerce does not seem to raise any truly new or unique competition issues, it may well have already created a need for greater co-operation among national competition authorities and for new investigatory powers and enforcement skills. Guidelines intended to enhance compliance may also need to be supplemented so that executives are better aware of new competition risks posed by e-commerce and how to avoid those while at the same time engaging in vigorous competition.

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Application of Competition Policy to High Tech Markets (1996)  
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**COMPETITION ISSUES IN ELECTRONIC COMMERCE**

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Electronic Commerce which was held by the Committee on Competition Law and Policy in October 2000.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur le commerce électronique, qui s'est tenue en octobre 2000 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*by the Secretariat*

Electronic commerce ("e-commerce") can be defined as business occurring over networks using non-proprietary protocols established through an open standard setting process. Internet mediated e-commerce is the fastest growing part of the phenomenon and was the focus of the Competition Law and Policy's roundtable discussion on the topic.

Considering the discussion at the roundtable, the delegate submissions, and the background paper, a number of key points emerge.

### 1. Infrastructure Issues

#### *1.1 Many of the higher profile competition cases in "e-commerce" to date have focused on protecting competitive access to the Internet. Such access remains vital to ensure that e-commerce delivers its full efficiency enhancing potential*

The Internet has sometimes been described as a network of networks connected by the high speed "pipes" of the Internet "backbone" providers. The largest such providers have practised free interconnection among themselves (i.e. "peering") while charging fees to smaller operators. As evidenced in the *WorldCom/MCI* and *WorldCom/MCI/Sprint* mergers, some competition authorities have been concerned that differential interconnection arrangements could threaten competition. There also appears to be some risk of "Balkanisation" of the Internet as broadband access grows in importance. This would materialise if the largest backbone providers decide to sacrifice universal access in order to obtain strategic advantage in providing services such as Internet telephony and video conferencing.

There have also been competition concerns in relation to vertical integration undertaken by "last mile" connection providers, i.e. cable TV, satellite, and fixed and mobile telephone service providers. When these act as ISPs, offer set-top access to the Internet, or operate their own "portals" (i.e. gateway web sites), they have an incentive to favour themselves over rivals and businesses allied with them. The same concern also arises when last mile providers integrate into content provision, and in that case there may be the added risk of reduced competition in the content market. Competition offices may increasingly be required to make difficult tradeoffs between economies of scope and the benefits of greater competition in Internet access. They may also be called upon to develop expertise in understanding how software or code can be used to discriminate among various competing product suppliers.



## 2. Transactions Issues

### 2.1 *There are many different frameworks for e-commerce and each could have different, not yet clearly identified, pro- and anti-competitive impacts*

The most basic distinction is between "B2C" (businesses interacting with consumers) and "B2B" (businesses interacting with other businesses). There is also a significant volume of transactions conducted over the Internet among consumers themselves. Within the B2B domain, which is larger and growing considerably faster than B2C, there are also a variety of ways in which prices are set including through catalogues, auctions and methods analogous to those found on stock and commodity exchanges.

### 2.2 *Because of its standardised protocols, the Internet has greatly reduced the cost of exchanging information among computers hence potentially lowered both search and transactions costs. It follows that e-commerce could widen product and geographic markets and render them more transparent and competitive*

In e-commerce cases, competition authorities will frequently be faced with the difficult problem of determining whether on-line and traditional commerce are in the same or different product markets. The answer to this question will differ from market to market and will partly depend on whether and how firms in traditional channels became involved in the development of B2Cs and B2Bs (i.e. "e-marketplaces"), and also on the on-line deliverability of a product. Deliverability though will certainly not be determinative, judging from some early cases involving automobile distribution. In those cases, traditional distributors felt threatened enough by B2Cs to take anti-competitive measures against them.

Quite apart from anti-competitive restrictions, there are a number of obstacles to the development of e-commerce that tend to separate it from traditional ways of doing business. Prominent among them are lack of familiarity with the medium and of confidence in payment and delivery systems, plus difficulties in identifying participants and in securing proper redress in the event of disputes. Technical solutions may well be found for some of these difficulties and others may become less important as experience with e-commerce grows. It is also well to bear in mind that these obstacles are less of a problem for B2B than for B2C development.

E-commerce should tend to widen geographic markets, but the mere fact that the Internet is a global medium does not mean that e-commerce takes place in a global market. Language barriers, taxation quandaries, regulatory barriers, physical delivery problems, absence of secure payment systems, and difficulties identifying actors and enforcing contractual rights all mitigate against there being a truly global market in many products. The regulatory barriers include differences in national laws concerning things like discounts, comparative advertising, resale price maintenance and exclusive territories. All these various obstacles are, once again, less likely to be problematic for B2B than for B2C e-commerce.

Although e-commerce is not bound in time and place the way traditional markets are, it is more subtly circumscribed by computer code. For example, there are a wide variety of computerised search engines promising consumers and businesses low cost access to information stored on computers and servers across the globe. But those search engines can be restricted in various ways by code limiting or distorting access to web sites. In e-commerce, anti-competitive restraints can take many subtle, sometimes hidden forms. The simplest example of that is the screen bias featured in the early 1990s airline computer reservation cases.

**2.3 *There is considerable evidence of price dispersion across B2Cs for similar goods. Such dispersion may well be reduced in future as e-commerce is further developed and consumers become more familiar with it. Over the longer term, e-commerce should widen markets and render them more transparent thus reducing the incidence of market power, price dispersion and price discrimination***

Price dispersion across B2Cs casts doubt on the utility of Internet search engines, and on the current ability of entrepreneurs and governments to remove some of the previously mentioned obstacles to the development of e-commerce. It also leads to questions about the near term effects of e-commerce on widening markets and reducing market power. These questions take on greater significance in the light of e-commerce making it considerably easier to quote different prices to different buyers and to use information about consumer buying habits to identify those willing to pay higher prices. Moreover, e-commerce opens up new ways to take advantage of the fact that higher income consumers, i.e. those with a greater ability to pay higher prices, place a higher value on time. There are already examples of the same seller operating two different web sites, with lower prices being quoted on the one that is more time consuming to use.

Before one concludes that e-commerce may indeed increase the incidence of price discrimination, it is well to remember that e-commerce should eventually widen markets and render them more transparent; despite its current imperfections, the Internet does make additional price information available to consumers. Furthermore, familiarity with and confidence in e-commerce is bound to grow over time and should be strengthened by technical improvements in assuring secure payment for on-line purchases. Legislative changes might also reduce obstacles to the development of e-commerce by facilitating the exercise of consumer rights to information and redress. All these will tend to reduce market power and with it both price dispersion and price discrimination in B2C markets, and through price benchmarking, in traditional markets as well. This should be especially so regarding price discrimination carried on as part of a strategy of eliminating or disadvantaging commercial rivals.

**2.4 *E-commerce has the potential to reduce considerably business procurement costs and to increase market liquidity. It may also provide other important pro-competitive efficiencies***

There is little doubt that e-commerce will lower procurement costs by, *inter alia*, reducing: errors in filling out and transmitting orders; costs of internally aggregating and approving purchase orders; costs of calling for multiple tenders and organising auctions; and the incidence of rogue purchasing (i.e. sourcing from friends rather than suppliers offering lower prices). Another source of gain, closely related but not identical to market widening effects, is the greater liquidity resulting from having a larger number of participants in the market. E-commerce should allow consumers and businesses to transact closer to true market prices and to do so quicker and easier than before.

In addition to transaction related savings, further efficiencies may be realised through extending the reach of e-commerce within businesses. For instance, B2Bs can be used to expedite: tracking orders; cutting inventories; lowering the costs of monitoring receivables and accounts payable; making better forecasts; and engaging in speedier, more consumer responsive product design.

Many of the efficiencies expected from e-commerce could be particularly beneficial to businesses too small to afford the high fixed costs of creating direct computer links with other businesses. In this way, as well as by eliminating the need for physical outlets, e-commerce could effectively lower the barriers of entry into many markets, hence render them more competitive. Lower transactions and associated co-ordination costs might also permit firms to specialise more in what they do best by outsourcing some of the inputs they now provide internally.

**2.5 *While e-commerce may yield significant efficiencies in many markets, it might also produce difficult competition problems such as insufficient competition among e-marketplaces***

The greater liquidity made possible by e-marketplaces could be associated with powerful network effects (i.e. the value of the marketplace grows with the number of participants) in some markets. These effects are probably significantly stronger for B2Bs than for B2Cs because the former inherently entail considerably greater interaction among participants. While network effects can benefit consumers, they can also lead to competition problems if they are sufficiently strong to reduce the field to one or a small number of networks.

In theory, network effects do not necessarily mean there will be just one or a small number of e-marketplaces. Instead, the network effects could be reaped through interconnection arrangements. For that to be a viable alternative, however, there would have to be a considerable degree of standardisation in the software employed by the various e-marketplaces. In addition, larger networks might prove reluctant to provide inter-connection to smaller ones even though both might stand to gain roughly the same amount in the short run through those arrangements. This is because in the longer run, larger networks stand to gain more if the smaller networks either fold or are folded into the larger ones.

Using powers to prohibit abuse of dominance and/or monopolisation, competition authorities may be able to exert pressure in favour of the interconnection alternative. Whether that would make sense or not will depend on the expected benefits of greater competition among e-marketplaces versus any efficiency losses occasioned by things like greater co-ordination costs and reduced innovation in software design.

**2.6 *E-marketplaces could employ exclusivity inducements having both pro- and anti-competitive effects***

Since an e-marketplace cannot be created without considerable sunk costs (i.e. customised software expense), its owners will probably do what they can to attain a critical mass as quickly as possible. They will also wish to prevent free riding. Exclusivity inducements are a good way to do both.

Exclusivity inducements can take the form of both "carrots" and "sticks". Two examples of carrots are loyalty rebates and arranging for at least major participants to hold equity in an e-marketplace (especially B2Bs). The most obvious sticks are contractual obligations to deal exclusively with the e-marketplace or to commit a high minimum volume of business to it. Exclusivity could also be encouraged by raising the costs of switching from one e-marketplace to another. This could be accomplished, for example, by employing proprietary standards, or by reinforcing network effects by encouraging greater interaction or interdependence among participants (e.g. providing "chat rooms" or forecasting services).

Competition officials could find it difficult to assess the net competitive effects of exclusivity inducements. About the only general rule applicable across markets is that exclusivity inducements are more harmful the greater the market power enjoyed by the e-marketplace employing them. This also means that exclusivity is more likely to be harmful during the mature as compared with start up phase of an e-marketplace.

**2.7 *Another possible competition problem associated with e-commerce could be an enhanced ability to co-ordinate competitive behaviour***

Since e-commerce makes prices more transparent and reduces the costs of changing price lists, prices could tend to rise in markets where sellers are acutely aware of their interdependence (i.e. in oligopolies). This could happen because price decreases will be more quickly known to competitors and possibly more rapidly matched, while price increases can be more easily and quickly rescinded if rivals fail to follow.

E-commerce could also facilitate outright collusion by providing new ways to exchange information, some of which might be nearly impossible for competition authorities to trace and use as evidence. The most obvious means is through on-line chat rooms. In addition, there are more sophisticated methods such as those illustrated in the United States *Airline Tariff Publishing* case where possible price changes were revealed to rivals but not to consumers and the price notices were accompanied with "tags" hinting at the conditions under which the changes might be rescinded. Moreover, e-commerce could make it easier to detect cheating on anti-competitive agreements and to target retaliatory price changes thus lowering the costs of punishing cheaters.

While collusion on the part of sellers might be more common, there is also the possibility that buyers will use B2Bs to acquire and exercise monopsony power. Where a market is conducive to the exercise of such power, e-commerce could again facilitate it by making it easier to reach agreement and subsequently to detect and punish cheating.

**2.8 *In addition to various "co-ordinated effects", e-marketplaces could be associated with harm to competition when they are used to exclude or discriminate against rivals***

The risk of anti-competitive exclusion or discrimination against some participants in an e-marketplace rises with the degree of market power enjoyed by a site and the degree to which its control is concentrated in the hands of one or a small number of participants. Although anti-competitive exclusion may be easy to detect and eradicate, the same may not apply to a host of more or less hidden ways that computer code can be used to disadvantage one or more participants.

**2.9 *Competition authorities should carefully consider the implications of allowing significant participants to own or control B2Bs, especially if that is expected to outlast the establishment phase***

It may be possible to install "fire walls" to eliminate or at least reduce the risk that B2Bs will be used to effect anti-competitive co-ordination and exclusionary/discriminatory behaviour. That remains, however, an incomplete solution since the party installing fire walls can also selectively and perhaps secretly de-activate them. It would be best if that party did not stand to gain directly from such activity and instead had an interest in ensuring that as many buyers and sellers as possible transact over the B2B. Strict transparency and neutrality as regards buyers and sellers and among both groups would seem to be the best recipe for building successful B2Bs, and that presumably would be the sole objective of third party owners. Another advantage of third party ownership is that it does away with a continuing bias on the part of owning participants to deal exclusively with their own exchange. Third party ownership would also deprive owning participants of a good opportunity to share sensitive information on the pretext that this is necessary for the effective management of the exchange.

There could be cases where the establishment of a B2B is next to impossible unless major participants take equity stakes. That does not necessarily mean though that the owners should be involved

in the day to day management of the exchange, or that they should retain their stakes once the B2B is well established. In addition, if the founding owning participants were aware from the beginning that they would lose their equity holdings within a fairly short period of time, they might be more reluctant to artificially raise switching costs or enhance network effects to favour their newly established B2B.

**2.10** *Although e-commerce does not seem to raise any truly new or unique competition issues, it may well have already created a need for greater co-operation among national competition authorities and for new investigatory powers and enforcement skills. Guidelines intended to enhance compliance may also need to be supplemented so that executives are better aware of new competition risks posed by e-commerce and how to avoid those while at the same time engaging in vigorous competition*

Since e-commerce should tend to widen geographic markets, it will also tend to increase the incidence of competition cases crossing national boundaries. That in turn means that national competition authorities will more frequently require each other's help in obtaining information and in co-ordinating the adoption of appropriate remedies.

It was pointed out during the roundtable discussion that computer code can be used to make it difficult, perhaps impossible to gain lawful access to certain evidence. This may be less of a problem as regards evidence generated and stored in intranets such as B2Bs as contrasted with communication unmediated by such intranets. In any case, even if evidence can be traced, recovered and properly produced in court, competition authorities will have to invest in training staff to master such techniques. They will also have to become more familiar with how software can be used to effectively exclude or discriminate against certain e-commerce participants.

## SYNTHÈSE

*par le Secrétariat*

Le commerce électronique peut se définir comme l'ensemble des activités commerciales menées par l'entremise de réseaux qui utilisent des protocoles non exclusifs établis selon un processus de normalisation ouvert. Le commerce sur Internet (également appelé « commerce en ligne » ou « cybercommerce »), qui est le segment du commerce électronique dont la croissance est la plus rapide, était le thème central de la table ronde du Comité du droit et de la politique de la concurrence.

Les échanges de vues qui ont eu lieu au cours de la table ronde, les exposés des délégués ainsi que le document de référence permettent de dégager un certain nombre de questions importantes.

### 1. Questions concernant l'infrastructure

#### *1.1. A ce jour, bon nombre des affaires de concurrence fortement médiatisées concernant le commerce électronique étaient surtout axées sur la protection de l'accès concurrentiel à l'Internet. Cet accès demeure vital pour concrétiser pleinement le potentiel du commerce électronique au plan de l'amélioration de l'efficacité*

On a parfois décrit l'Internet comme un réseau de réseaux raccordés par les "canaux" des fournisseurs de "dorsales" Internet. Les plus importants de ces fournisseurs ont mis en application entre eux le principe de l'interconnexion gratuite (d' « égal à égal ») tout en percevant des redevances des opérateurs plus petits. Comme on a pu le constater lors des fusions Worldcom/MCI et WorldCom/MCI/Sprint, certaines autorités de la concurrence ont craint que des accords d'interconnexion différentiels ne portent atteinte à la concurrence. A mesure que l'accès à large bande prendra de l'importance, il semble également qu'il existe un certain risque de "balkanisation" de l'Internet, risque qui se concrétiserait si les principaux fournisseurs de dorsales décidaient de sacrifier l'accès universel pour obtenir un avantage stratégique dans la prestation de services tels que la téléphonie et la vidéoconférence sur l'Internet.

L'intégration verticale entreprise par les fournisseurs du "dernier kilomètre" de la liaison, c'est-à-dire les opérateurs de télévision par câble et par satellite, ainsi que les prestataires de services téléphoniques fixes et mobiles, a également été un motif d'inquiétude pour les autorités de la concurrence. Lorsque ces opérateurs agissent en qualité de FSI, offrent l'accès à l'Internet par la télévision ou exploitent leur propre "portail" (par exemple, un site web passerelle), ils ont tendance à se réserver un traitement privilégié par rapport aux sociétés rivales ou apparentées. Lorsque les fournisseurs du dernier maillon interviennent dans la fourniture de contenu, le même problème se pose, et dans ce cas, il faut compter avec le risque supplémentaire d'une réduction de la concurrence dans le marché des contenus. Il est fort possible que les autorités de la concurrence doivent de plus en plus procéder à des arbitrages difficiles entre les économies d'échelle et les avantages liés à une plus grande concurrence dans l'accès à l'Internet. Elles devront peut-être également approfondir leur compréhension de l'utilisation possible des logiciels ou des codes à des fins discriminatoires par les divers fournisseurs de produits concurrents.

## 2. Questions concernant les transactions

### 2.1 *De nombreux cadres différents existent pour le commerce électronique, et chacun d'eux pourrait avoir des impacts différents, à la fois proconcurrentiels et anticoncurrentiels, qui ne sont pas encore clairement définis*

La grande distinction se fait entre le commerce électronique entreprises-consommateurs et le commerce électronique interentreprises. A noter qu'un volume non négligeable de transactions s'effectue également sur l'Internet entre consommateurs. S'agissant du commerce électronique interentreprises, qui est plus important et se développe considérablement plus vite que les transactions entreprises-consommateurs, il existe également diverses façons de fixer les prix, notamment au moyen de catalogues, d'enchères ou de méthodes analogues à celles en usage sur les bourses des valeurs ou des marchandises.

### 2.2 *Grâce à ses protocoles normalisés, l'Internet a considérablement réduit le coût de l'échange d'informations entre ordinateurs et, partant, les coûts de recherche et de transaction. Le commerce électronique pourrait donc élargir les marchés des produits et les marchés géographiques et les rendre plus transparents et concurrentiels*

Dans les affaires concernant le commerce électronique, les autorités de la concurrence seront souvent confrontées à l'épineuse question qui consiste à déterminer si le commerce en ligne et le commerce traditionnel se situent sur les mêmes marchés de produits ou sur des marchés différents. La réponse à cette question variera d'un marché à l'autre et, dans une certaine mesure, selon que les entreprises du commerce traditionnel interviennent ou non dans le développement du commerce électronique entreprises-consommateurs et interentreprises (c'est-à-dire des "places de marché électroniques") et le cas échéant, comment, mais elle dépendra aussi de la livrabilité en ligne d'un produit. Cette livrabilité ne sera toutefois certainement pas déterminante, si l'on en juge par certaines des premières affaires concernant la distribution automobile, dans lesquelles les distributeurs traditionnels se sentaient suffisamment menacés par les places de marché électroniques entreprises-consommateurs pour prendre des mesures anticoncurrentielles à leur encontre.

Indépendamment des restrictions anticoncurrentielles, il existe un certain nombre d'obstacles au développement du commerce électronique qui ont tendance à le distinguer des méthodes commerciales traditionnelles, notamment une connaissance insuffisante du support et le manque de confiance dans les systèmes de paiement et de livraison. En outre, il est difficile d'identifier les participants et d'assurer l'accès à des recours adaptés en cas de différend. Il est fort possible que l'on trouve des solutions techniques à certaines de ces difficultés, et que d'autres perdent de leur importance à mesure que l'on se familiarisera avec le commerce électronique. Il ne faut pas non plus perdre de vue que ces obstacles posent moins de problèmes pour le commerce électronique interentreprises que pour le développement du commerce électronique entreprises-consommateurs.

Le commerce électronique devrait normalement élargir les marchés géographiques, mais la dimension mondiale de l'Internet ne suffit pas à elle seule pour créer un cybermarché mondial. Les barrières linguistiques, les embarras fiscaux, les obstacles réglementaires, les problèmes de livraison physique, l'absence de systèmes de paiement sécurisé et la difficulté à identifier les acteurs et à faire respecter les droits contractuels sont autant d'éléments qui entravent la création d'un marché véritablement mondial pour de nombreux produits. Les obstacles réglementaires comprennent notamment les différences de législation nationale concernant par exemple les remises, la publicité comparative, l'imposition du prix de revente et les territoires exclusifs. Encore une fois, ces divers obstacles poseront probablement moins de problèmes pour le commerce interentreprises que pour les transactions entreprises-consommateurs.

Bien que le commerce électronique ne soit pas limité dans le temps et dans l'espace, comme les marchés traditionnels, il est circonscrit de façon moins apparente par les codes informatiques. Par exemple, il existe de nombreux moteurs de recherche informatisés qui promettent aux consommateurs et aux entreprises un accès bon marché à l'information stockée dans les ordinateurs et les serveurs du monde entier. Toutefois, l'accès à ces moteurs de recherche peut être limité de diverses façons, au moyen par exemple d'un code qui empêche ou fausse l'accès à certains sites Web. Dans le cyberspace marchand, les actions anticoncurrentielles peuvent être aussi variées que complexes et imperceptibles. L'exemple le plus simple qui vient à l'esprit à cet égard est celui des affaires concernant l'affichage partiel ou discriminatoire dans les systèmes informatisés de réservation des compagnies aériennes au début des années 90.

**2.3 *Tout porte à croire qu'il existe une dispersion des prix dans le commerce électronique entreprises-consommateurs pour des biens similaires. Une telle dispersion devrait aller en diminuant au fur et à mesure que le commerce électronique se développera et que les consommateurs se familiariseront avec. A long terme, le commerce électronique devrait élargir les marchés et les rendre plus transparents et ainsi réduire la fréquence des cas de puissance sur le marché, ainsi que celle de la dispersion des prix et de la discrimination par les prix***

La dispersion des prix dans le commerce électronique entreprises-consommateurs fait planer un doute sur l'utilité des moteurs de recherche Internet ainsi que sur la capacité actuelle des entrepreneurs et des pouvoirs publics à lever certains des obstacles déjà mentionnés qui entravent le développement du commerce électronique. Cette dispersion soulève également des questions quant aux effets du commerce électronique sur l'élargissement des marchés et la réduction de la puissance de marché. Ces questions revêtent une plus grande importance dans le contexte du commerce électronique, car le cyberspace marchand permet beaucoup plus facilement de différencier les prix en fonction des acheteurs. Cette pratique serait d'autant plus attrayante pour certains qu'il est facile d'utiliser l'information sur les habitudes de consommation pour identifier les consommateurs disposés à payer des prix plus élevés. En outre, le commerce électronique offre aux vendeurs de nouvelles possibilités de tirer avantage de l'importance que les consommateurs à revenu élevé, c'est-à-dire ceux qui ont une plus grande capacité de payer des prix élevés, attachent au facteur temps. On connaît déjà des exemples d'entreprises exploitant deux sites Web différents et offrant des prix plus bas sur le site où la navigation est plus lente.

Avant de pouvoir conclure que le commerce électronique pourrait effectivement favoriser la discrimination par les prix, il convient de ne pas perdre de vue qu'il devrait normalement élargir les marchés et les rendre plus transparents ; malgré ces imperfections, l'Internet permet effectivement d'étoffer l'information sur les prix qui est accessible aux consommateurs. En outre, la pratique du commerce électronique et la confiance qu'on lui accordera ne peuvent que se développer avec le temps et devraient être renforcées par les améliorations techniques qui permettront de garantir des paiements sécurisés pour les achats en ligne.

Des modifications législatives pourraient également réduire les obstacles au développement du commerce électronique en facilitant l'exercice des droits des consommateurs à l'information et au recours. Tous ces éléments auront en général pour effet de réduire la puissance de marché, et par conséquent la dispersion des prix et la discrimination par les prix dans les marchés entreprises-consommateurs, mais aussi dans les marchés traditionnels du fait de la comparaison des prix. Cet effet sera particulièrement sensible en ce qui concerne la discrimination par les prix pratiquée en vue d'éliminer ou à désavantager des concurrents.



**2.4 *Le commerce électronique pourrait réduire considérablement les coûts d'approvisionnement des entreprises et accroître la liquidité des marchés. Il pourrait également engendrer d'autres importants gains d'efficience concurrentiels***

Il est pratiquement assuré que le commerce électronique fera baisser les coûts d'approvisionnement, notamment en réduisant les erreurs dans l'exécution et la transmission des commandes, les coûts de regroupement et d'approbation internes des commandes, les coûts d'appels d'offres multiples et d'organisation d'enchères, ainsi qu'en faisant reculer le favoritisme (s'approvisionner chez des amis plutôt qu'auprès de fournisseurs moins chers). Une autre source de gains, qui est étroitement liée aux effets d'élargissement de marché, mais pas identique, est la plus grande liquidité du marché qui découlera de l'accroissement du nombre de participants. Le commerce électronique devrait permettre aux consommateurs et aux entreprises d'effectuer des transactions plus étroitement alignées sur le prix véritable du marché et de les effectuer plus vite et plus facilement qu'auparavant.

Indépendamment des économies liées aux transactions, d'autres gains d'efficacité peuvent être réalisés grâce à l'extension de la portée du commerce électronique à l'intérieur des entreprises. Les transactions électroniques interentreprises peuvent par exemple aider à mettre en œuvre plus rapidement le suivi des commandes, la réduction des stocks et celle des coûts de contrôle des comptes clients et des comptes fournisseurs, et contribuer à améliorer les prévisions et à accélérer la conception de produits mieux adaptés au goût des consommateurs.

Bon nombre des gains d'efficacité que l'on attend du commerce électronique pourraient se révéler particulièrement bénéfiques aux entreprises qui sont trop petites pour pouvoir supporter les coûts fixes élevés inhérents à la création de liaisons informatiques directes avec d'autres entreprises. En éliminant en outre la nécessité des points de vente physiques, le commerce électronique pourrait ainsi effectivement abaisser les obstacles à l'entrée dans de nombreux marchés, et par conséquent les rendre plus concurrentiels. La baisse des coûts de transactions et des coûts de coordination qui s'y rattachent pourrait également permettre aux entreprises de se spécialiser davantage dans ce qu'elles font le mieux en sous-traitant certaines des fonctions qu'elles exercent actuellement elles-mêmes.

**2.5 *Le commerce électronique pourrait certes se traduire par des gains d'efficacité importants dans de nombreux marchés, mais il pourrait en revanche également engendrer d'épineux problèmes au plan de la concurrence, notamment celui d'une insuffisance de concurrence entre les places de marché électroniques***

La liquidité accrue favorisée par les cybermarchés pourrait être dans certains cas associée à de puissants effets de réseau (l'intérêt de la place de marché augmente avec le nombre de participants). Ces effets sont probablement sensiblement plus forts pour les transactions interentreprises que pour les transactions entreprises-consommateurs car ces dernières comportent forcément une interaction considérablement plus importante entre les participants. Les effets de réseau peuvent être bénéfiques pour les consommateurs, mais ils peuvent également engendrer des problèmes au plan de la concurrence s'ils sont suffisamment forts pour réduire le marché à un seul réseau ou à un petit nombre de réseaux.

En théorie, ce n'est pas parce qu'il y a des effets de réseau qu'il n'y aura qu'une seule place de marché ou un petit nombre de places de marché. Ces effets pourraient au contraire être obtenus au moyen d'arrangements d'interconnexion. Cependant, pour que cette possibilité soit viable, il faudrait que les logiciels utilisés sur les divers cybermarchés soient très largement normalisés. En outre, les réseaux vastes pourraient se montrer réticents à accepter une interconnexion avec des réseaux plus petits même si les uns et les autres pourraient grosso modo en tirer les mêmes avantages à court terme, car à long terme, les réseaux étendus ont davantage à gagner si les petits réseaux s'intègrent à eux.

En usant de leur pouvoir pour lutter contre l'abus de position dominante et/ou la monopolisation, les autorités de la concurrence sont en mesure d'exercer des pressions en faveur de l'interconnexion. Le bien-fondé de cette orientation dépendra des avantages escomptés d'une concurrence accrue entre les places de marché électroniques par rapport aux éventuelles pertes d'efficacité occasionnées, par exemple, par des coûts de coordination plus élevés et une innovation moins dynamique dans la conception des logiciels.

## **2.6 *Les acteurs des places de marché électroniques pourraient être tentés par des accords d'exclusivité susceptibles d'avoir des effets à la fois proconcurrentiels et anticoncurrentiels***

Etant donné que la création d'une place de marché électronique suppose des investissements à fonds perdus considérables (liés à l'élaboration d'un logiciel adapté), ses propriétaires feront probablement tout ce qu'ils peuvent pour atteindre une masse critique aussi rapidement que possible. Ils voudront également tenir les resquilleurs à l'écart. Les incitations à l'exclusivité permettent de faire à la fois l'un et l'autre.

Les entreprises qui souhaitent privilégier l'exclusivité peuvent manier la carotte et le bâton. Elles peuvent par exemple accorder des remises « de fidélité » ou faire en sorte qu'au moins les principaux participants détiennent une participation dans leur place de marché électronique (surtout interentreprises). S'agissant du bâton, les moyens les plus évidents sont les obligations contractuelles de traiter exclusivement avec la place de marché en question ou de s'engager à lui confier un volume minimum, et élevé, d'activités. L'exclusivité peut également être favorisée en augmentant les coûts de transfert d'une place de marché à une autre. Les entreprises peuvent pour cela utiliser des normes propriétaires ou renforcer les effets de réseau en encourageant une plus grande interaction ou indépendance des participants (par exemple, en créant des « salons de discussion » ou en offrant des services de prévision).

Il sera peut-être difficile pour les autorités de la concurrence d'évaluer les effets nets des incitations à l'exclusivité sur la concurrence. La seule règle générale qui soit à peu près applicable à tous les marchés est que plus la puissance de marché détenue par la place de marché électronique est importante, plus les incitations à l'exclusivité sont dommageables. Autrement dit, l'exclusivité risque davantage d'être nuisible lorsque le marché électronique sera parvenu à maturité qu'au cours de la phase de démarrage.

## **2.7 *Autre problème de concurrence possible, le commerce électronique pourrait faciliter la coordination des comportements***

Etant donné que le commerce électronique rend les prix plus transparents et réduit les coûts de modification des listes de prix, les prix pourraient avoir tendance à augmenter dans les marchés où les vendeurs sont très conscients de leur interdépendance (c'est-à-dire dans les marchés oligopolistiques). Les baisses de prix seraient connues plus rapidement des concurrents, qui aligneraient les leurs plus rapidement, mais une entreprise pourrait aussi revenir plus facilement et plus rapidement sur une hausse de prix si ses concurrents ne suivent pas.

Le commerce électronique pourrait également faciliter la collusion pure et simple en offrant de nouveaux moyens d'échange d'informations -- dont le plus évident est le « salon de discussion en ligne » --, qu'il serait pratiquement impossible pour les autorités de la concurrence de retracer et d'utiliser comme élément de preuve. Il existe aussi d'autres méthodes très ingénieuses, telles que celles qui sont illustrées dans l'affaire concernant la publication des tarifs des compagnies aériennes aux Etats-Unis, et qui consistent à révéler les révisions tarifaires possibles aux concurrents mais pas aux consommateurs, et à joindre aux avis de prix une « étiquette » indiquant plus ou moins les conditions selon lesquelles ces

révisions pourraient être annulées. Le commerce électronique pourrait en outre faciliter la détection des tricheurs dans les accords anticoncurrentiels et permettrait donc de recourir à des modifications de prix ciblées pour les punir, ce qui ferait baisser le coût des mesures de rétorsion.

La collusion du côté de l'offre pourrait être plus courante, mais il est également possible que les acheteurs utilisent le commerce électronique interentreprises pour acquérir et exercer un pouvoir de monopsonne. Lorsque le marché se prête à l'exercice de ce pouvoir, le commerce électronique pourrait là encore le favoriser en facilitant la conclusion d'accords et par la suite la détection et l'application de mesures de rétorsion à l'égard des tricheurs.

**2.8 *Indépendamment de divers effets coordonnés, les places de marché électroniques risquent de porter atteinte à la concurrence si elles sont utilisées pour exclure des concurrents ou agir de façon discriminatoire à leur égard***

Le risque d'exclusion ou de discrimination anticoncurrentielle à l'égard de certains participants à une place de marché électronique accroît la puissance de marché du site ainsi que le degré de concentration de son contrôle (entre les mains d'un seul participant ou d'un petit nombre de participants). Bien qu'il puisse être facile de détecter l'exclusion anticoncurrentielle et d'y mettre un terme, il n'en va pas de même pour une foule d'autres moyens plus ou moins dissimulés d'utiliser les codes informatiques pour désavantager un ou plusieurs participants.

**2.9 *Les autorités de la concurrence devraient attentivement examiner ce que cela pourrait impliquer d'autoriser des participants importants à posséder ou à contrôler des places de marché électroniques interentreprises, surtout au-delà de la phase d'établissement***

Il est également possible d'édifier des « pare-feu » pour éliminer, ou tout au moins réduire, le risque de coordination anticoncurrentielle ou de comportement d'exclusion ou discriminatoire sur les places de marché électroniques. Cette solution demeure toutefois imparfaite, dans la mesure où la partie qui installe les pare-feu peut également sélectivement, voire secrètement, les désactiver. Il serait donc préférable que cette partie ne bénéficie pas directement de cette activité et ait plutôt intérêt à faire en sorte que le plus grand nombre d'acheteurs et de vendeurs possibles se rencontrent sur la place de marché. Le succès de la place de marché électronique passe par une transparence et une neutralité strictes à l'égard des acheteurs et des vendeurs ainsi qu'au sein de chacun des deux groupes. Or, il est permis de supposer que le succès serait le seul objectif de propriétaires tiers. Si la place de marché appartient à un tiers, il n'y aura pas, comme cela arrive toujours lorsque les participants sont aussi les propriétaires, de relation exclusive avec la place de marché. En outre, les participants, du fait qu'ils ne seront pas propriétaires, seront privés de l'occasion de partager des renseignements sensibles sous prétexte qu'ils sont nécessaires à la gestion efficace de la place de marché.

12. Il peut arriver que la création d'une place de marché interentreprises soit pratiquement impossible si les principaux participants n'entrent pas dans le capital. Cela ne veut toutefois pas nécessairement dire que les propriétaires doivent intervenir dans la gestion quotidienne de la place ou qu'ils doivent conserver leur participation une fois la place de marché bien établie. En outre, si les participants propriétaires fondateurs savent d'emblée qu'ils perdront leur participation dans un délai relativement court, ils hésiteront peut-être davantage à augmenter artificiellement les coûts de transfert ou à renforcer les effets de réseau pour favoriser leur nouvelle place de marché.

**2.10** *Bien que le commerce électronique ne semble pas soulever de questions véritablement nouvelles ou particulières concernant la concurrence, il se pourrait bien qu'il exige d'ores et déjà une coopération plus étroite entre les autorités nationales de la concurrence ainsi que de nouveaux pouvoirs d'investigation et moyens d'application. Il sera peut-être aussi nécessaire d'étoffer les lignes directrices visant à améliorer la conformité pour que les chefs d'entreprise appréhendent mieux les nouveaux risques que pose le commerce électronique en matière de concurrence et qu'ils soient en mesure de les éviter tout en se livrant une vigoureuse concurrence*

Etant donné que le commerce électronique devrait normalement élargir les marchés géographiques, il aura également tendance à multiplier les affaires de concurrence transnationales. Cela exigera de la part des autorités nationales de la concurrence une coopération plus étroite pour obtenir de l'information et pour coordonner l'adoption des mesures correctives appropriées.

Au cours de la table ronde, il a été souligné que les codes informatiques pouvaient être utilisés pour entraver, voire empêcher l'accès légal à certains éléments de preuve. La question se pose avec moins d'acuité en ce qui concerne les éléments de preuve générés et stockés dans les intranets, par exemple dans les places de marché interentreprises, que ceux qui ne transitent pas par ces intranets. En tout état de cause, même s'il est possible de retrouver les éléments de preuve, de les récupérer et de les produire en bonne et due forme devant les tribunaux, les autorités de la concurrence devront investir dans la formation de leur personnel pour qu'il maîtrise ces techniques. Ce personnel devra également se familiariser avec l'utilisation des logiciels à des fins d'exclusion ou de discrimination à l'égard de certains participants au commerce électronique.



## ISSUES PAPER

### 1. Definition and Introduction

Considering all the publicity surrounding electronic commerce, it is useful to begin by asking what fundamentally is going on. The answer appears to be that the use of ubiquitous electronic networks to quickly transfer digitised information is significantly lowering the costs of finding, using and communicating information, lowering some transactions costs. These developments are expected to affect profoundly how businesses organise themselves and how they relate to other businesses and to final consumers. Faced with such a basic change, commentators have fashioned the somewhat vague label "electronic commerce" (e-commerce) to describe what is not so much an existing phenomenon as a process that will take years to work out.

Many broadly similar definitions have been offered for e-commerce. According to a recent OECD publication, it is:

...concerned specifically with business occurring over networks which use non-proprietary protocols that are established through an open standard setting process such as the Internet. As used here, the term 'business' broadly means all activity that generates value both within a firm (internally) and with suppliers and customers (externally). In this sense it would include internal networks (e.g. intranets) as well as networks that extend to a limited number of participants (e.g. extranets). Some of this activity may result in monetary transaction and some will not. [OECD (1999, 28)]

We adopt that definition but will focus here on Internet centred e-commerce.

The subsequent discussion will begin with a description of the infrastructure and process related to e-commerce, that is, the provision of facilities and services required to access and transmit information and to provide transactional services. Competition issues related to the infrastructure of the Internet have however largely been covered in previous roundtable discussions concerning telecommunications and broadcasting and other discussions on networks such as automatic teller machines. The focus of the paper is thus on "transaction e-commerce", defined as the use of e-commerce channels for the supply of goods and services to consumers and businesses.<sup>1</sup>

It seems safe to assume that e-commerce has the potential to improve market efficiency, particularly if new intermediaries continue to develop in order to simplify information processing and to improve trust (i.e. assuring privacy plus a secure means of payment and reliable delivery). The magnitude of the gains will depend importantly on the degree of competition prevailing both in process and transaction e-commerce, so competition policy has an important role to play in the e-commerce "revolution".

## 2. Infrastructure related to E-Commerce

E-commerce infrastructure cannot be understood without a rough idea of what the Internet is and how it is accessed. At the most basic level, the Internet is a network of networks made possible by the development of standardised protocols allowing any computer to exchange information with virtually any other computer. Most of the costs of providing Internet "backbone" are fixed in nature, provided the network is not congested. This is reflected in network charges in some countries so far being based mostly on access rather than usage. Since few of the backbone providers are able to provide full connectivity, they have arranged to grant access to one another's networks. Access is provided either at zero charge through what are known as "peering" arrangements or in exchange for transit fees. The largest backbone owners (sometimes referred to as Tier 1 IP network providers) rely exclusively on peering. All others make use of both peering arrangements and transit fees, or transit fees alone.<sup>2</sup> (The issue of network interconnection charges has been discussed earlier by the Committee or its Working Parties both in the context of telecommunications and automatic teller machines (ATMs).) Mergers among backbone providers has been an area of concern to competition authorities.<sup>3</sup>

Interactive access to the Internet is provided either directly by the same companies owning the high speed links joining the various networks [i.e. the carrier Internet Service Providers (ISPs)], or indirectly through consumer ISPs who contract with the carrier ISPs for access. In addition to simple Internet connection, ISPs typically offer several other services such as electronic mail and the creation and maintenance of web sites. Competition concerns might arise over joint ownership of ISPs and broadband local access to Internet users, and joint ownership of ISPs and major content providers. (The issue of vertical integration between "pipes" and "content" was also raised in the discussions on broadcasting.)

Most customers currently connect with their ISP over standard telephone lines, thus there can be a concern that there is sufficient competition to provide the "last mile" to the client's premises. But that concern might be reduced where alternative connection is available via wireless telephony, through the cable TV network, or through dedicated broadband connection. These last three forms of connection could become significantly more important in the future. (These issues arise also in the telecommunications context.)

ISPs receive revenues from essentially five sources: a share of charges levied by whatever company is providing the final communications link to the consumer; access fees from their wholesale and retail subscribers; banner advertising; fees for providing live links to various sites; and revenues from any goods or services they themselves offer. The ISPs are competing to be, as much as possible, the main point of reference for their clients' use of the Internet. They compete not just with each other but also with "portals" such as Yahoo! which do not have paying subscribers. So far, few if any of the ISPs have exclusive access to content that is so attractive that consumers would be willing to sacrifice general access to the Internet in order to obtain such content, but that could change. Another development that could change competition among ISPs has to do with the medium used to interact with the Internet. Currently that is overwhelmingly provided through personal computers, but third generation mobile telephony and the use of set-top boxes attached to standard TV sets could significantly erode that edge, and go on to affect the competitiveness of the various ISPs.

Consumer ISPs and portals are considerably less important for business to business (B2B) e-commerce than for the business to consumer variety (B2C). B2B exchanges typically have their own direct broadband access to the Internet, by-passing local loop providers as well as the consumer ISPs.

### 3. Transactions E-Commerce Issues

Transactions e-commerce includes business to business (B2B), business to consumer (B2C), and consumer to consumer (C2C - as in electronic auctions among final consumers). Most of the discussion in this paper will be focused, however, on B2B and B2C.

On the B2B side of things, e-commerce should have a considerable impact on the way companies do business. It will clearly change procurement practices as even small and medium sized enterprises, largely left out of the proprietary Electronic Data Interchange (EDI) systems, increasingly obtain the capacity to sell their wares on-line either directly to other businesses or over one of the new business exchanges. More fundamentally, B2B will affect how companies organise all activities from obtaining raw materials to selling to a final distributor. If things work as smoothly as some commentators expect, e-commerce could lead to a substantial degree of disintegration as companies take advantage of lower communication and co-ordination costs to specialise on what they do best in the value chain. At the same time and for the same reasons, e-commerce could increase the incidence and importance of joint ventures.

Concerning B2C, e-commerce may have its greatest influence on goods and services deliverable over the Internet (e.g. music, video, travel agency services including ticketing and computer software). It may have much less effect regarding goods normally requiring physical inspection before purchase, or for which immediate delivery is important.

Most of the competition issues arising in transaction e-commerce relate to various newly created intermediaries such as the B2B exchanges, B2C retailers, and electronic malls (including portals). There are also important intermediaries providing search and comparison-shop engines to facilitate finding and comparing goods and services on the Internet.

The competition concerns relating to transactions e-commerce and some various suggested questions for discussion are grouped below under three broad headings.

#### 3.1 *Market definition, price discrimination and predation*

The first issue here concerns whether or not e-commerce constitutes a different market from traditional distributor activity. A subsidiary issue concerns the degree to which intermediated B2B competes with B2B over proprietary networks (e.g. EDI). On the B2C side, there is some evidence [see Goolsbee (2000)] that consumers are willing to switch to e-commerce vendors in order to escape sales taxes, suggesting that at least for some products, e-commerce and traditional outlets might be good substitutes for each other. In other products or for some groups of consumers, delivery problems or lack of trust in electronic payment (or simple unwillingness to pay in advance) could effectively divide markets.

Within e-commerce itself, market definitions may be difficult to make because price discrimination could become more widespread and important. This is because e-commerce enables sellers to more easily obtain and use information concerning consumer preferences and willingness to pay.<sup>4</sup> E-commerce also makes it easier to disguise the existence of price discrimination and therefore reduces the probability that buyers could arbitrage among themselves. (On the other hand, it reduces the cost of buyers' arbitraging among themselves, or indeed forming coalitions for joint purchasing.) E-commerce also opens up new avenues for price discrimination such as: quoting different prices to different consumers based either on user supplied information or records of a consumer's previous behaviour; providing different web-site versions (i.e., a simpler, more convenient web site with higher prices could be offered along with a more complex or difficult to access site); and using time-consuming price matching processes or on-line auctions.



Where price discrimination has the effect of increasing quantities sold it may increase consumer welfare, but price discrimination could have a darker side. It could be used to lower the costs of a predation strategy or as a means of raising rivals' costs.

### *3.1.1 Possible Issues for Discussion*

1. What are the important factors determining whether or not e-commerce and traditional outlets (mainly wholesalers and retailers) are in the same market?
2. Since the Internet knows no boundaries, one might expect that e-commerce has or will considerably increase the size of geographic markets with subsequent benefits to competition. To what extent is this natural tendency being restricted because of various regulatory barriers, including regulations preserving inefficient delivery systems (both in telecommunications and in physical delivery)?
3. Some studies have shown that price dispersion in B2C, even for roughly homogeneous goods, is equal to or greater than in traditional distribution. This seems odd given that e-commerce is supposed to reduce search and comparison costs. Why is a significant degree of price dispersion sometimes found in e-
4. commerce and does it indicate a lack of competition? If so, what can or should competition agencies do about it?
5. Why might less well known brands or generic goods likely be better or poorer substitutes for well-known brands in B2C? Why might B2C sellers have more or less negotiating power over suppliers than their bricks and mortar cousins?
6. If price discrimination is being used anti-competitively, why might one expect it to be easier or harder to apply competition law against it in e-commerce compared with traditional markets?
7. Are traditional distributors using anti-competitive means to protect themselves against e-commerce rivals? If so, what special difficulties, if any, have been encountered in bringing competition law to bear against such practices?
8. Have there been many instances of suppliers using both traditional distributors but simultaneously employing B2C and B2B exchanges in which they have an ownership interest? From the competition policy point of view, what new wrinkles, if any, does e-commerce introduce into such tapered vertical integration?
9. Producers sometimes share the costs of distributor web-sites and thereby obtain some control over distributors' prices. In addition, e-commerce outlets potentially compete with sellers located anywhere in the world. How, if at all, do these phenomena create a potential for laws against resale price maintenance and price discrimination to be applied differently in e-commerce compared to traditional markets? Has this potential actually materialised in your jurisdiction? If so, has competition law itself produced a competitive distortion, and if so, what steps should be taken to eliminate that possibility?

### 3.2 *Network dominance*

Network effects are clearly important in B2B exchanges because their value to both buyers and sellers depends on the liquidity they create for participants, which in turn depends on the number of buyers and sellers using the site. It should also be stressed that in B2B exchanges, there is a reasonable potential for two way interaction (i.e. the same enterprise could be acting as both a buyer and seller). Pure network effects could also arise in the B2C context if consumers are able to use the network to share experiences concerning goods and services purchased.

Added to the concentrating power of any network effects, brand recognition and trust advantages could amount to barriers to entry further favouring first entrants, especially as regards B2C. These additional effects could be considerably attenuated if traditional distributors prove able to transfer their brands and reputation to their virtual outlets. So far the evidence on that is mixed even for very able marketers such as Wal-Mart. The first mover advantages in both B2B and B2C could become quite significant if the parties owning them have the power to insist on exclusive arrangements. For example, if all the major buyers in a certain industry set up a B2B exchange and they all agree to buy only on that exchange, they could effectively force suppliers to participate in it. They could then take things a step further by insisting that the suppliers in turn agree to deal exclusively on the exchange. Both types of exclusivity could create a certain degree of market power for the exchange. This problem could also arise presumably outside the e-commerce domain but e-commerce may end up making such exclusivity either more profitable or harder to attack under competition law in instances where it proves to be anti-competitive. Boycotts have been addressed recently in Working Party No. 3, and the role of exclusivity requirements in joint ventures could be addressed in the upcoming Mini-roundtable on Joint Ventures.

In the short term, many players may be hoping to use B2B exchanges to increase either buyer or seller advantage. In the long term, however, participation is more likely to be motivated by opportunities to economise on procurement costs, in part by standardising the process and spreading certain fixed costs over a larger volume of business. Businesses may also save time and money by using B2B exchanges to link their information technology functions with those of other related businesses and simultaneously outsourcing the creation and maintenance of the software needed to do so. Depending on how this is done, the efficiencies reaped may or may not be offset by the negative effects of reduced competition through increased switching costs.

Network effects may make B2B and B2C networks "tippy" in the sense of greatly amplifying the importance of any head start or a small lead in market share, but this need not prove critical for competition provided that switching costs are low, or indeed if one can be a member of multiple networks. One must expect, however, that network owners will try to raise those costs through things like loyalty programs, patented interface design and transaction mechanisms (e.g. Amazon's convenient "one-click" ordering technology which securely stores billing and shipping information); use of proprietary standards; and the application of collaborative filtering tools.<sup>5</sup> The latter are particularly interesting because they raise cross-cutting privacy and competition concerns.

#### 3.2.1 *Possible Issues for Discussion*

1. What steps, including proprietary standard setting and other measures that might reduce interoperability, are being taken by e-commerce networks to increase the potential of network effects and first mover advantages to create and/or strengthen dominant positions? What are the arguments for and against competition offices taking action against such strategies? Do you have the legal tools to take such actions or is your agency basically powerless until after a dominant position, or something analogous, has been created?

2. Should competition agencies seek to influence the breadth of IPR protection being granted in relation to e-commerce? If yes, where does such intervention appear to be most warranted and how do you go about doing it?
3. To what extent can B2B exchanges justifiably insist on exclusive dealing in order to protect themselves against free-riding? How does the competition analysis of such exclusive dealing change, if at all, when ownership of a B2B exchange is restricted to its major participants?
4. Under what circumstances might B2B exchanges owned or controlled by their major participants be used to exclude or disadvantage rival sellers or buyers? Is such ownership/control nevertheless desirable in order to reap important economies of scope and scale? To what extent are such economies substantially limited to the start up phase? If participant ownership/control poses competition problems, could and should competition agencies take action to break such links? Alternatively, should they require third party, independent management of the exchange, or require that ownership/control be spread among participants roughly in accordance with their transaction volumes? Should they instead rely on prohibiting anti-competitive conduct (i.e. become implicated in supervising terms of access), and hope that self-interest will ensure that ownership/control by the major participants will be abandoned in the long term? [The reference to self-interest is based on the presumption that buyers and sellers are more likely to patronise a B2B exchange that is independent rather than one dominated by a sub-set of the participants (especially if those are concentrated on one side of the market).]
5. Many if not most B2B exchanges and B2C retailers appear to be losing money. Has this resulted in complaints of predatory pricing and, if so, were prosecutions launched? Where there have been predatory pricing cases, was it particularly difficult to prove that predation was occurring?

### **3.3 *Enhanced opportunities for co-ordinated effects (i.e. explicit and tacit collusion and oligopolistic parallel pricing)***

Lower cost, more rapid communication is a double edged sword. In theory it permits buyers to be better informed concerning available options, especially if the advantages of the Internet are combined with electronic search and comparison engines (i.e. shopbots). At the same time, these changes make markets considerably more transparent, and as already noted, may facilitate price discrimination. In short, e-commerce may increase the incidence of co-ordinated effects because it affords sellers improved opportunities to detect and punish "cheating". In most markets, especially as regards B2C, sellers will be able to respond to price changes considerably more rapidly than buyers. Frequent price changes could be used as a form of "cheap talk" even though the prices are actually, if only briefly, being offered to buyers. E-commerce may also directly facilitate reaching agreements or at least enhance mutual understanding through the "chat rooms" already functioning in some B2B exchanges. Properly designed, such chat rooms could be very difficult for competition authorities to monitor or investigate.

It is not simply by means of increased transparency in prices and other terms of sale that e-commerce could enhance various forms of collusion. B2B exchanges could afford businesses the ability to more easily track changes in rivals' costs plus actual and planned output levels. Proper design could reduce these risks by restricting what participants could learn about each other and when they receive such information. The risks will be especially great, however, in cases where the exchanges are controlled by just sellers or just buyers.

Finally, where B2B exchanges are controlled by market participants, the need to interact in running the exchanges will afford further opportunities to more widely co-operate.

### *3.3.1 Possible Issues for Discussion*

1. Under what circumstances, if any, should restrictions be placed on B2B and B2C exchanges to reduce the chances they will be associated with a higher incidence of co-ordinated effects?
2. What are the pros and cons of seeking to reduce any e-commerce enhanced co-ordinated effects by applying any or all of the following measures: requiring independent third party management for participant owned exchanges; putting a time limit on participant ownership of B2B exchanges; suppressing chat rooms; otherwise restricting or forbidding direct information exchange within the buyer or seller groups; and erecting Chinese walls to prevent participants learning in a timely fashion about each other's activities.

## NOTES

1. OFTEL/OFT (2000, para. 1.5)
2. As long as the value of a network is proportional to the size of the network, then the value of interconnection to each network's set of subscribers is roughly equal even for very different sized networks. However, both the small and large network owners would like to have a chance to pocket the whole value of the interconnection rather than just an equal share of it. As Varian (1999, 8) put it: "...the threat of not interconnecting can be very valuable, since it can be used to induce another network to merge or be bought out."
3. The WorldCom/MCI merger provides a good example of using merger review to prevent the emergence of a competition endangering dependence differential among backbone network providers. See Robinson (1999, 8).
4. Valentine (2000, n. 4) notes that:  
Cookies technology allows a web site server to place information about a consumer's visits to the site on the consumer's computer in a text file readable only to that web site server. The cookie assigns each consumer's computer a unique identifier so that the consumer can be recognized in later visits to the site.
5. Smith, Bailey and Brynjolfsson (1999, 14, reference omitted) explain this as follows:  
  
Collaborative filtering tools compare a customer's purchase patterns [with those of] other like-minded customers to develop personalised recommendations based on a customer's inferred tastes. Unlike most information used to evaluate homogeneous goods, personalised recommendations are specific to the customer and become more accurate as the customer interacts more with the system. Thus, under the current retailer-owned systems, customers may face a switching cost equal to the decline in the value of the recommendations when switching to another retailer. If the data on a customer's tastes were owned by the customer and were portable from site to site, switching costs would be commensurately lower.

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## NOTE SUR LES QUESTIONS À EXAMINER

### 1. Définition et introduction

Compte tenu de toute la publicité qui entoure le commerce électronique, il est utile de commencer par se demander de quel phénomène il s'agit dans le fond. La réponse semble être que l'utilisation de réseaux électroniques universels, ou presque, pour transférer rapidement de l'information numérisée fait baisser considérablement les coûts de la recherche, de l'utilisation et de la communication de l'information, réduisant par le fait même certains coûts de transaction. Cette évolution devrait avoir de profondes incidences sur l'organisation des entreprises et sur les relations qu'elles entretiennent entre elles ainsi qu'avec les consommateurs. Pour désigner une mutation aussi fondamentale, les observateurs ont proposé l'appellation quelque peu imprécise de "commerce électronique", qui décrit ce qui est en fait moins un phénomène actuel qu'un processus dont l'aboutissement demandera des années.

De nombreuses définitions *grosso modo* similaires ont été proposées pour le commerce électronique. Selon une récente publication de l'OCDE, celui-ci englobe principalement :

(...) les transactions commerciales effectuées sur des réseaux qui utilisent des protocoles non exclusifs établis selon un processus de normalisation ouvert comme Internet. Dans ce contexte, le terme "transaction commerciale" est pris au sens large et désigne toute activité qui génère de la valeur au sein de l'entreprise (à l'intérieur) ou avec ses fournisseurs et clients (à l'extérieur). En ce sens, cela inclut les réseaux intérieurs (tels que les intranets) et les réseaux destinés à un nombre limité de participants (tels que les extranets). Certaines de ces activités peuvent se traduire par une transaction monétaire, d'autres non. [OCDE (1999, p. 32)].

C'est cette définition que nous adoptons, mais nous axerons ici notre réflexion sur le commerce qui s'effectue sur l'Internet (le commerce en ligne ou cybercommerce).

Nous commencerons par décrire l'infrastructure et le processus qui sont liés au commerce électronique, c'est-à-dire la mise à disposition des installations et des services nécessaires pour accéder à l'information et la transmettre, ainsi que pour fournir les services transactionnels. Cependant, les questions de concurrence qui sont liées à l'infrastructure de l'Internet ont été dans une large mesure examinées lors de tables rondes antérieures consacrées aux télécommunications et à la radiodiffusion ainsi que dans le cadre d'autres débats sur les réseaux, notamment sur les guichets automatiques. La présente note sera par conséquent centrée sur le "commerce électronique transactionnel", qui est défini ici comme l'utilisation des moyens de commerce électronique pour la fourniture de biens et de services aux consommateurs et aux entreprises<sup>1</sup>.

Il est permis de supposer que le commerce électronique pourrait améliorer l'efficacité des marchés, en particulier si de nouveaux intermédiaires continuent de faire leur apparition pour simplifier le traitement de l'information et renforcer la confiance (en garantissant la confidentialité et en offrant un moyen de paiement sécurisé et une livraison fiable). L'ampleur des gains dépendra dans une large mesure du degré de concurrence qui s'exercera à la fois dans les activités du commerce électronique qui concernent



les processus et dans le commerce électronique transactionnel, d'où l'importance du rôle dévolu à la politique de la concurrence dans la « révolution cybercommerciale ».

## 2. L'infrastructure du commerce électronique

Pour comprendre ce qu'est l'infrastructure du commerce électronique, il est indispensable d'avoir d'abord une idée générale de ce qu'est l'Internet et de la façon d'y accéder. Au niveau le plus élémentaire, l'Internet est un « réseau de réseaux » qui a pu être constitué grâce à des protocoles normalisés permettant à pratiquement n'importe quel ordinateur d'échanger de l'information avec un autre ordinateur. La majorité des coûts de mise à disposition de la "dorsale" de l'Internet sont fixes, à condition que le réseau ne soit pas encombré, comme en témoignent les frais de réseau dans certains pays, qui sont jusqu'à présent établis essentiellement en fonction de l'accès plutôt que de l'utilisation. Étant donné que peu de fournisseurs de dorsale sont en mesure d'offrir une connectivité totale, ils ont pris les dispositions pour se donner mutuellement accès à leurs réseaux. Cet accès peut être gratuit, dans le cadre d'accords d'interconnexion d'égal à égal (ou « accord d'échange de trafic ») ou être accordé moyennant des redevances de transit. Les plus importants propriétaires de dorsale (souvent appelés « fournisseurs de réseaux IP de premier niveau ») ont recours exclusivement aux accords d'échange de trafic. Tous les autres ou bien panachent ce type d'accord et les redevances de transit, ou optent uniquement pour les redevances de transit<sup>2</sup>. (La question des redevances d'interconnexion a été déjà examinée par le Comité ou par ses Groupes de travail dans le contexte des télécommunications et des guichets automatiques.) Les fusions de fournisseurs de dorsale ont été un sujet de préoccupation pour les autorités de la concurrence<sup>3</sup>.

L'accès interactif à l'Internet est fourni soit directement par les mêmes entreprises, qui possèdent les liaisons à grande vitesse reliant les divers réseaux [c'est-à-dire les fournisseurs de services Internet (FSI) opérateurs], soit indirectement, par les FSI consommateurs qui concluent des contrats d'accès avec les FSI opérateurs. Indépendamment de la simple connexion à l'Internet, les FSI offrent en général plusieurs autres services comme le courrier électronique, ainsi que la création et la maintenance de sites Web. Du point de vue de la concurrence, la copropriété des FSI et l'accès local à large bande aux utilisateurs de l'Internet ainsi que la copropriété des FSI et des principaux fournisseurs de contenu pourraient être une source de préoccupation. (La question de l'intégration verticale entre "les canaux" et le "contenu" a également été soulevée au cours du débat sur la radiodiffusion.)

La plupart des clients sont actuellement raccordés à leur FSI par le réseau téléphonique normal, et l'on est donc en droit de se demander s'il existe une concurrence suffisante pour fournir le "dernier tronçon" jusqu'à l'abonné. Cette préoccupation peut toutefois perdre de son acuité s'il existe d'autres moyens de connexion, par exemple par la téléphonie sans fil, par le réseau de télévision par câble ou par le raccordement spécialisé à large bande, qui pourraient tous trois devenir beaucoup plus importants à l'avenir. (Ces questions se posent également dans le contexte des télécommunications.)

Les FSI touchent leurs revenus essentiellement de cinq sources : une part des redevances perçues par l'opérateur qui fournit la dernière liaison de communication jusqu'au client ; les redevances d'accès qui leur sont versées par leurs clients de gros et de détail ; les bandeaux publicitaires ; les redevances perçues pour la fourniture de liaisons en continu vers divers sites, et les recettes provenant des biens et services qu'ils offrent eux-mêmes. Les FSI se livrent concurrence pour devenir autant que possible le principal point de référence de leurs clients en ce qui concerne l'utilisation de l'Internet. Ils ne rivalisent pas seulement les uns avec les autres, mais également avec les "portails" comme Yahoo!, qui n'ont pas d'abonnés payants. A ce jour, peu de FSI, à supposer même qu'il y en ait, offrent un accès exclusif à un contenu suffisamment attrayant pour que les consommateurs soient prêts à sacrifier leur accès général à l'Internet pour pouvoir profiter de ce contenu, mais les choses pourraient changer. Une autre évolution de nature à modifier la concurrence entre les FSI est celle du support utilisé pour entrer en interaction avec l'Internet.

Actuellement, ce support est très majoritairement l'ordinateur personnel, mais la troisième génération de téléphones mobiles et les boîtiers décodeurs qui s'adaptent aux téléviseurs standard pourraient ouvrir une large brèche dans cette uniformité et se répercuter sur la compétitivité des divers FSI.

Les FSI consommateurs et les portails sont infiniment moins importants pour le commerce électronique interentreprises que pour les relations électroniques entre les entreprises et les consommateurs. Pour leurs échanges entre elles, les entreprises utilisent en général leur propre accès direct sur large bande à l'Internet, contournant les fournisseurs de boucle locale ainsi que les FSI consommateurs.

### **3. Questions relatives au commerce électronique transactionnel**

Le commerce électronique transactionnel comprend les transactions interentreprises, entreprises-consommateurs et interconsommateurs (par exemple, les enchères électroniques entre consommateurs finals). La présente note porte toutefois essentiellement sur les deux premières catégories, c'est-à-dire les transactions interentreprises et entreprises-consommateurs.

S'agissant des transactions interentreprises, le commerce électronique devrait exercer une influence considérable sur le mode de fonctionnement des entreprises. Il modifiera en effet de toute évidence les pratiques en matière d'approvisionnement, dans la mesure où même les petites et moyennes entreprises, qui ont été pour la plupart exclues des systèmes exclusifs d'échange électronique de données, accèdent de plus en plus aux moyens de vendre leurs produits en ligne, soit directement à d'autres entreprises, soit dans le cadre de nouveaux échanges commerciaux. De façon plus profonde, le commerce électronique interentreprises agira sur l'organisation de toutes les activités des entreprises, depuis l'obtention des matières premières jusqu'à la vente à un distributeur final. Si l'évolution est aussi harmonieuse que le prévoient certains observateurs ; le commerce électronique pourrait induire un important phénomène de "dé-intégration", car les entreprises, tirant parti de la baisse des coûts de communication et de coordination, voudront se spécialiser dans le domaine d'activité qu'elles maîtrisent le mieux dans la chaîne de valeur. Dans le même temps, et pour les mêmes raisons, le commerce électronique pourrait favoriser la formation de coentreprises plus nombreuses et de plus grande envergure.

S'agissant des relations entre les entreprises et les consommateurs, c'est peut-être au niveau des biens et services livrables sur l'Internet (par exemple, la musique, les vidéocassettes, les services d'agence de voyage, y compris la billetterie et les logiciels) que le commerce électronique pourrait exercer son influence la plus forte. En revanche, son impact pourrait être beaucoup plus faible en ce qui concerne les produits qui exigent normalement une inspection physique avant l'achat, ou dont il est important que la livraison soit immédiate.

La plupart des questions concernant la concurrence qui se posent au sujet du commerce électronique transactionnel sont liées aux divers intermédiaires apparus récemment, tels que les plates-formes d'échanges interentreprises, les « cyberdétaillants » et les galeries marchandes électroniques (notamment les portails). Il existe également d'importants intermédiaires qui fournissent des moteurs de recherche et de comparaison facilitant la recherche et la comparaison des biens et services sur l'Internet.

Les préoccupations que suscitent les transactions de commerce électronique du point de vue de la concurrence ainsi que diverses questions suggérées pour discussion sont regroupées ci-après dans trois grandes catégories.

### 3.1 *Définition du marché, discrimination par les prix et pratiques d'éviction*

La première question qui se pose ici est de savoir si le commerce électronique constitue ou non un marché distinct de l'activité de distribution classique. A cette question vient se greffer celle de savoir dans quelle mesure le commerce électronique interentreprises faisant appel à des intermédiaires est en concurrence avec le commerce électronique interentreprises qui s'effectue sur des réseaux exclusifs (par exemple l'EDI). S'agissant des relations entre entreprises et consommateurs, certaines indications [voir Goolsbee (2000)], donnent à penser que les consommateurs sont prêts à s'adresser à des vendeurs en ligne pour éviter les taxes sur les ventes, et que donc, pour certains produits tout au moins, le commerce électronique et les points de vente traditionnels seraient assez interchangeables. En ce qui concerne d'autres produits ou d'autres groupes de consommateurs, des problèmes de livraison ou un manque de confiance dans le paiement électronique (simplement le refus de payer d'avance) pourraient effectivement diviser les marchés.

A l'intérieur du commerce électronique lui-même, la définition des marchés pourrait être difficile car la différenciation des prix pourrait se répandre et prendre de l'importance, du fait que le commerce électronique permet aux vendeurs d'obtenir et d'utiliser plus facilement l'information concernant les préférences des consommateurs et leur consentement à payer<sup>4</sup>. Le commerce électronique permet également de dissimuler plus facilement la différenciation des prix, ce qui réduit la probabilité d'arbitrage chez les acheteurs. (En revanche, il a également pour effet de réduire le coût de ce même arbitrage, ou du regroupement d'acheteurs pour des achats collectifs.) Le commerce électronique offre également de nouvelles possibilités de discrimination par les prix, par exemple en proposant des prix différents à des consommateurs différents, selon les renseignements fournis par les utilisateurs ou les fichiers dont on dispose sur le comportement antérieur d'un consommateur ; en produisant plusieurs versions différentes d'un site Web (par exemple, un site plus simple et plus commode affichant des prix plus élevés pourrait être offert parallèlement à un site plus complexe et d'accès plus difficile) et en appliquant des politiques compliquées de garantie du meilleur prix ou des enchères en ligne.

Lorsque la différenciation des prix a pour effet d'accroître les quantités vendues, elle peut également accroître le bien-être du consommateur, mais elle n'est pas sans inconvénient. Elle peut en effet être utilisée pour faire baisser le coût d'une stratégie d'éviction ou pour faire augmenter les coûts des concurrents.

#### 3.1.1 *Sujets possibles de discussion*

1. Quels sont les facteurs importants qui déterminent si le commerce électronique et les points de vente traditionnels (essentiellement, les grossistes et les détaillants) font partie du même marché ou non ?
2. Étant donné que l'Internet ne connaît pas de frontière, on serait en droit de s'attendre que le commerce électronique entraîne un élargissement considérable des marchés géographiques, avec les avantages qui en découlent au plan de la concurrence. Dans quelle mesure cette tendance naturelle est-elle freinée par divers obstacles réglementaires, notamment par des dispositions qui protègent des systèmes de livraison inefficaces (dans le secteur des télécommunications, comme en ce qui concerne la livraison matérielle) ?
3. Certaines études ont démontré que la dispersion des prix dans le commerce électronique entreprises-consommateurs, même pour des biens grosso modo homogènes, était la même que dans la distribution traditionnelle, voire plus forte. Cette conclusion étonne si l'on considère que le commerce électronique est censé faire baisser les coûts de recherche et de

comparaison. Pourquoi constate-t-on parfois dans le commerce électronique un degré important de dispersion des prix, et cela est-il révélateur d'un manque de concurrence ? Dans l'affirmative, que peuvent ou doivent faire les organismes chargés de la concurrence pour y remédier ?

4. Pourquoi, dans le commerce électronique entreprises-consommateurs, des marques peu connues ou des produits génériques pourraient vraisemblablement être plus ou moins interchangeables avec des marques bien connues ? Pourquoi les vendeurs en ligne pourraient avoir un pouvoir de négociation plus ou moins fort avec leurs fournisseurs que leurs homologues traditionnels ?
5. Si la différenciation des prix est utilisée de façon anticoncurrentielle, pour quelle raison pourrait-on s'attendre qu'il soit plus facile ou plus difficile d'appliquer le droit de la concurrence dans le cybermarché que dans les marchés traditionnels ?
6. Est-ce que les distributeurs traditionnels ont recours à des moyens anticoncurrentiels pour se protéger contre leurs concurrents du cybermarché ? Dans l'affirmative, quelles ont été, le cas échéant, les difficultés particulières qui se sont posées dans l'application du droit de la concurrence pour faire échec à ces pratiques ?
7. Est-il souvent arrivé que des fournisseurs traitant simultanément avec des distributeurs traditionnels et avec des plates-formes marchandes entreprises-consommateurs et interentreprises dans lesquelles ils avaient une participation ? Du point de vue de la politique de la concurrence, en quoi le commerce électronique perturbe-t-il le cas échéant une intégration verticale aussi bien structurée ?
8. Les producteurs partagent parfois les coûts des sites Web des distributeurs et parviennent ainsi à exercer un certain contrôle sur les prix pratiqués par ces derniers. En outre, les points de vente en ligne sont à même de concurrencer des vendeurs situés n'importe où dans le monde. Comment, le cas échéant, ces phénomènes risquent-ils d'aboutir à une situation où les lois contre l'imposition du prix de revente et la discrimination par les prix seraient appliquées différemment dans le cyberspace et dans les marchés traditionnels ? Cette éventualité s'est-elle concrétisée dans votre juridiction ? Dans l'affirmative, est-ce que c'est le droit de la concurrence lui-même qui a faussé la concurrence, et si tel est le cas, quelles mesures devraient être prises pour éliminer ce risque ?

### **3.2 *Domination du réseau***

Les effets de réseau sont incontestablement importants dans les plates-formes d'échanges interentreprises, car leur valeur à la fois pour les acheteurs et pour les vendeurs dépend de la liquidité qu'ils créent pour les participants, laquelle est à son tour déterminée par le nombre d'acheteurs et de vendeurs utilisant le site. Il importe également de souligner que sur ces plates-formes, il existe une possibilité raisonnable d'interaction bidirectionnelle (c'est-à-dire que la même entreprise peut intervenir à la fois comme acheteur et comme vendeur). Il y a également des effets de réseau purs dans les relations entreprises-consommateurs si les consommateurs sont en mesure d'utiliser le réseau pour mettre en commun leur expérience au sujet des biens et services qu'ils ont achetés.

Outre les conséquences d'éventuels effets de réseau au plan de la concentration, la connaissance de la marque ainsi que les avantages que confère le regroupement pourraient constituer des obstacles à l'entrée qui favoriseraient encore plus les premiers arrivés, surtout en ce qui concerne le commerce électronique entreprises-consommateurs. Ces effets supplémentaires pourraient être sensiblement atténués

si les distributeurs traditionnels étaient capables de transférer leurs marques et leur réputation dans le cyberspace. Jusqu'à présent, la situation à cet égard varie, même pour des entreprises rompues au marketing comme Wal-Mart. Les avantages qui reviennent au premier engagé dans le commerce interentreprises et entreprises-consommateurs pourraient devenir très importants si les parties qui les détiennent ont le pouvoir d'insister sur des accords d'exclusivité. Par exemple, si tous les principaux acheteurs dans un certain secteur d'activité établissent une plate-forme d'échanges interentreprises et s'entendent pour n'acheter que sur cette plate-forme, ils pourraient effectivement forcer les fournisseurs à y participer. Ils pourraient ensuite aller encore plus loin en insistant auprès des fournisseurs pour que ceux-ci consentent à leur tour à traiter exclusivement avec cette plate-forme. Les deux types d'exclusivité pourraient alors engendrer un certain degré de puissance de marché pour la plate-forme en question. On peut également présumer que ce problème pourrait se poser à l'extérieur du domaine du commerce électronique, mais c'est dans le cyberspace que ce type d'exclusivité pourrait en fin de compte devenir soit plus rentable, soit plus difficile à contrer dans le cadre du droit de la concurrence, s'il se révèle anticoncurrentiel. Le boycottage a été examiné récemment par le Groupe de travail n°3, et le rôle des besoins d'exclusivité dans les coentreprises pourrait être étudié lors de la prochaine mini-table ronde sur les coentreprises.

A court terme, de nombreux acteurs souhaiteront peut-être utiliser les plates-formes d'échanges interentreprises pour renforcer leur avantage d'acheteur ou de vendeur. Cependant, à long terme, leur participation sera probablement davantage motivée par la possibilité de réduire leurs coûts d'approvisionnement, en partie en normalisant le processus et en répartissant certains coûts fixes sur un volume d'activité plus important. Les entreprises pourraient également économiser du temps et de l'argent en se servant des plates-formes d'échanges interentreprises pour relier leurs fonctions de technologies de l'information à celles d'autres entreprises apparentées et simultanément sous-traiter la création et la maintenance du logiciel nécessaire. Selon les modalités choisies, les gains d'efficacité réalisés pourraient être ou non neutralisés par les effets négatifs d'une réduction de la concurrence découlant de l'augmentation des coûts de transfert.

Il est possible que les effets de réseau amplifient fortement l'importance d'une légère avance en termes de part de marché dans les réseaux interentreprises et entreprises-consommateurs, sans que cela ne devienne toutefois critique du point de vue de la concurrence tant que les coûts de transfert seront bas, ou qu'il sera effectivement possible d'être membre de plusieurs réseaux. En revanche, il est à prévoir que les propriétaires des réseaux s'efforceront de faire augmenter ces coûts en ayant recours par exemple à des programmes de fidélisation, des interfaces et des mécanismes transactionnels brevetés (comme la technique de commande "à clic unique" d'Amazon, très commode, qui enregistre de façon sécurisée l'information de facturation et d'expédition); en utilisant des normes propriétaires; et le recours à des logiciels de filtrage collectif<sup>5</sup>. Ce dernier moyen est particulièrement intéressant car il soulève des questions à la fois en ce qui concerne la protection de la vie privée et la concurrence.

### 3.2.1 *Sujets possibles de discussion*

1. Quelles mesures, y compris l'établissement de normes propriétaires, ou d'autres mesures susceptibles de réduire l'interopérabilité, sont prises dans les réseaux de commerce électronique en vue de renforcer les effets de réseaux et les avantages des premiers engagés, et ainsi créer et/ou renforcer une position dominante? Quels sont les arguments invoqués pour et contre une intervention des autorités responsables de la concurrence pour faire échec à ces stratégies? Disposez-vous des instruments juridiques permettant ce genre d'intervention, ou votre agence est-elle plus ou moins dans l'impossibilité d'agir tant qu'une position dominante ou une situation analogue ne s'est pas concrétisée?

2. Les agences chargées de la concurrence devraient-elles tenter d'influencer l'étendue de la protection assurée par les DPI en ce qui concerne le commerce électronique ? Dans l'affirmative, dans quel cas cette intervention semble le plus justifié et quelle forme lui donnez-vous ?
3. Dans quelle mesure les plates-formes d'échanges interentreprises sont-elles fondées à insister sur l'exclusivité des transactions afin de se protéger contre les profiteurs ? Comment l'analyse de ce type d'exclusivité du point de vue de la concurrence évolue-t-elle, le cas échéant, lorsque seuls les principaux participants à une plate-forme interentreprises peuvent en être propriétaires ?
4. Dans quelles circonstances les plates-formes d'échanges interentreprises qui appartiennent à leurs principaux membres ou qui sont sous le contrôle de ces derniers peuvent-elles servir à exclure ou à désavantager des vendeurs ou acheteurs concurrents ? Est-ce que ce type de participation ou de contrôle est néanmoins souhaitable pour tirer parti d'importantes économies d'échelle et de gamme ? Dans quelle mesure ces économies se limitent-elles à la phase de démarrage ? Si la participation ou le contrôle des participants pose des problèmes du point de vue de la concurrence, les agences compétentes peuvent-elles et doivent-elles agir pour rompre ces liens ? Ou bien doivent-elles imposer une gestion indépendante de la plate-forme, par un tiers, ou exiger que la structure du capital ou le contrôle soient répartis entre les participants grosso modo en fonction de leurs volumes de transactions respectifs ? Devraient-elles plutôt axer davantage leur action sur une interdiction des pratiques anticoncurrentielles (c'est-à-dire intervenir dans les modalités de supervision de l'accès), en souhaitant qu'au nom de l'intérêt bien compris de tous, l'influence dominante (participation/contrôle) des principaux membres de la plate-forme d'échanges se diluera à long terme ? [L'évocation de l'intérêt bien compris est fondée sur la présomption selon laquelle les acheteurs et les vendeurs seront davantage enclins à être clients d'une plate-forme d'échanges interentreprises indépendante plutôt que d'une autre qui serait dominée par un petit nombre de participants (surtout si ceux-ci sont concentrés d'un seul côté du marché).]
5. Bon nombre de plates-formes interentreprises et de cyberdétaillants, sinon la plupart, semblent être déficitaires. Cette situation a-t-elle donné lieu à des plaintes pour fixation de prix d'éviction, et dans l'affirmative, des poursuites ont-elles été engagées ? Lorsqu'il y a eu fixation de prix d'éviction, les faits ont-ils été particulièrement difficiles à prouver ?

### **3.3 *De plus grandes possibilités d'effets coordonnés (collusion explicite et tacite, et parallélisme des comportements en situation d'oligopole)***

La baisse des coûts et l'accélération des communications constituent une arme à double tranchant. En théorie, elles permettent aux acheteurs d'être mieux informés sur les choix qui s'offrent à eux, surtout si les avantages de l'Internet sont combinés avec des moteurs de recherche et de comparaison électronique (assistant d'achat). Dans le même temps, ces évolutions rendent les marchés considérablement plus transparents, et comme cela a déjà été noté, risquent de favoriser la différenciation des prix. En résumé, le commerce électronique pourrait induire un accroissement des possibilités d'effets coordonnés car il offre aux vendeurs de meilleurs moyens de détecter et de punir les "tricheurs". Dans la plupart des marchés, surtout en ce qui concerne les transactions entreprises-consommateurs, les vendeurs seront capables de réagir aux variations de prix beaucoup plus rapidement que les acheteurs. Des changements de prix fréquents pourraient être utilisés pour faire illusion, bien que les prix soient effectivement offerts aux acheteurs, ne serait-ce que brièvement. Le commerce électronique peut également directement faciliter la conclusion d'accords ou tout au moins faciliter la compréhension mutuelle dans le cadre de "salons de

discussion" dont sont déjà dotées certaines plates-formes d'échanges interentreprises. Si ces salons sont habilement conçus, il pourrait être très difficile pour les autorités de la concurrence de les surveiller ou d'enquêter sur leur fonctionnement.

Ce n'est pas seulement en accroissant la transparence des prix et d'autres conditions de vente que le commerce électronique pourrait favoriser diverses formes de collusion. Les plates-formes interentreprises pourraient en effet permettre aux entreprises de suivre plus facilement l'évolution des coûts de leurs concurrents, ainsi que leur niveau de production effective et prévue. Une conception appropriée permettrait de réduire ces risques en limitant ce que les participants seraient en mesure d'apprendre les uns des autres et les moments dans le temps où ils pourraient recevoir ce genre d'informations. Les risques seront toutefois particulièrement élevés dans le cas des plates-formes contrôlées uniquement par les vendeurs ou les acheteurs.

Enfin, lorsque les plates-formes interentreprises sont contrôlées par les acteurs du marché, la nécessité d'être en interaction dans le fonctionnement des plates-formes améliorera les possibilités de coopération plus large.

### *3.3.1 Sujets possibles de discussion*

1. Dans quelles circonstances, le cas échéant, les plates-formes d'échanges interentreprises et entreprises-consommateurs devraient-elles être soumises à des restrictions pour réduire les risques qu'elles accroissent les possibilités d'effets coordonnés ?
2. Quels avantages et inconvénients y a-t-il à tenter de réduire les effets coordonnés du commerce électronique par l'une ou plusieurs des mesures suivantes : imposer une gestion indépendante par un tiers pour les plates-formes qui sont la propriété des participants ; limiter dans le temps la participation au capital des plates-formes interentreprises ; supprimer les salons de discussion ; restreindre ou interdire d'une autre façon l'échange direct d'informations à l'intérieur des groupes d'acheteurs ou de vendeurs, mettre en place des cloisons étanches pour empêcher les participants de se renseigner en temps opportun sur les activités les uns des autres.

## NOTES

1. OFTEL/OFT (2000, para. 1.5).
2. Tant que la valeur d'un réseau est proportionnelle à sa taille, la valeur de l'interconnexion avec l'ensemble des abonnés de chaque réseau est grosso modo égale, même s'il s'agit de réseaux de tailles très différentes. Cependant, les petits comme les grands propriétaires de réseaux aimeraient avoir la possibilité de s'approprier l'ensemble de la valeur de l'interconnexion, plutôt que seulement une part proportionnelle. Selon Varian (1999, page 8), "la menace de ne pas assurer d'interconnexion peut être très utile, car elle peut servir à inciter à la fusion ou au rachat d'un autre réseau".
3. La fusion WorldCom/MCI fournit un bon exemple de l'utilisation de l'examen d'un projet de fusion pour éviter que ne se forment entre les fournisseurs de dorsale un différentiel de dépendance qui risquerait de porter atteinte à la concurrence. Voir Robinson (1999, page 8).
4. Valentine (2000, n° 4) note ainsi que : La technologie des témoins de connexion permet au serveur d'un site Web de placer de l'information sur les visites qu'un consommateur effectue sur le site sur l'ordinateur de ce dernier sous forme de fichier-texte lisible uniquement par le serveur du site Web concerné. Le témoin attribue à l'ordinateur de chaque consommateur un identificateur unique qui permet de reconnaître le consommateur lors de visites ultérieures.
5. Smith, Bailey et Brynjolfsson (1999, page 14, référence omise) donne l'explication suivante : Les logiciels de filtrage collectif comparent les habitudes d'achat d'un client [avec celles] d'autres clients partageant les mêmes goûts, pour formuler des recommandations personnalisées en fonction des goûts du client déduits de la comparaison. Contrairement à la plupart des renseignements utilisés pour évaluer des biens homogènes, les recommandations personnalisées correspondent spécifiquement au client et se précisent à mesure que progresse l'interaction du client avec le système. Par conséquent, dans les systèmes actuels appartenant aux détaillants, les clients pourraient faire face à un coût de transfert égal à la diminution de la valeur des recommandations lorsqu'ils changent de détaillant. Si les données relatives aux goûts d'un client étaient en possession de ce dernier et pouvaient être transportées d'un site à l'autre, les coûts de transfert en seraient d'autant diminués.



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## AUSTRALIA

### 1. Introduction

Electronic commerce has the potential to enhance competition in many industries. The development of B2C websites offering online shopping facilities may generate new entrants into existing markets (from both domestic and international sources). Further, the potential reforms to supply chain management made possible through the development of B2B exchanges may enable businesses to compete more effectively in domestic and international markets.

However, a number of competition issues may emerge, especially if the current trend towards participant-owned B2B exchanges continues – particularly if regional exchanges develop in small economies such as Australia.

Given that e-commerce is still a developing area, the following views are necessarily of a preliminary nature. Australia welcomes this process as an opportunity to share views and enhance understanding of potential issues.

### 2. Key Issues

The Secretariat's paper raises a wide range of issues, covering both specific competition issues arising in the conduct of e-commerce transactions, as well as the impact e-commerce may have on the analysis of competitive structures of traditional markets. In the Australian context, the key issues appear to be:

- Whether the competitive impact of B2B exchanges will be greater within a small economy such as Australia. As Australian industry is already relatively concentrated by international standards, there may be greater potential for concentrated buying or selling groups to develop through B2B exchanges. This may encourage collusion between participants, raise barriers to entry and enable participants to exert market power against trading partners (particularly on smaller, fragmented suppliers or buyers). The creation of market power may be more likely to be an issue in assessing indirect supply hubs within Australia than in larger jurisdictions. This is because the small size of the Australian economy may not afford opportunities for the diversity of exchanges for indirect goods and services which would be expected to develop in larger economies.
- Whether such “small economy” effects will be mitigated by the potential for Australian businesses to participate as buyers or sellers in international exchanges.
- Monitoring changes in the nature and size of B2B exchanges over time, and to see if exchanges become more concentrated over time due to network effects.
- Dealing with issues of jurisdictional overlap when cross-border e-commerce is at issue.

- The impact of B2B and B2C operations on traditional markets and whether there is potential for anti-competitive behaviour to stymie competitive growth.

### **3. Electronic Commerce in Australia**

While Australia is currently one of the leading countries in terms of Internet usage, only 0.4 percent of Australian retail sales are transacted over the Internet and no measures are currently available quantifying the level of B2B activity in Australia. Approximately 43 percent of Australian adults used the Internet in the year ended February 2000, placing Australia behind only Norway, the United States, Iceland and Sweden. It was anticipated that approximately 36 percent of households would be online by February 2000 and 37 percent of all businesses are connected to the Internet.

Survey information indicates that security issues are the greatest concern of both customers and businesses in engaging in e-commerce.<sup>1</sup>

The national competition enforcement and regulatory agency – the Australian Competition and Consumer Commission (ACCC) - has not made many determinations in relation to competition issues arising from the transactional e-commerce sector (although it is handling increasing numbers of consumer protection and e-commerce infrastructure issues which are beyond the scope of this paper). In recent months the ACCC has noted a growing number of proposals to establish participant-owned B2B exchanges within Australia, and to participate in offshore exchanges. The ACCC is still in the process of developing its understanding of these arrangements before forming any views on such proposals. Two significant examples of B2B and B2C arrangements that have been proposed.

#### **3.1 *Airline Ticketing B2B and B2C Joint Venture***

A number of airlines have proposed the establishment of a joint venture which will operate a B2B site to link airline ticket inventory and other services such as car hire and hotel reservation to one electronic exchange. This site will be linked to a B2C site owned by the joint venturers, but will also be available to travel agents and others wishing to establish a competing B2C. The airlines will provide independently priced products to the venture.

#### **3.2 *B2B Indirect Supplies Exchange***

A number of major Australian businesses have formed an alliance, corProcure, to operate a B2B exchange for the procurement of indirect goods and services. The owners are not direct competitors and include both buyers and sellers of indirect products. The proposal envisages that both suppliers and buyers may use other procurement channels if they wish to do so.

### **4. Infrastructure Related to Electronic Commerce**

Since the focus of the discussion is to be on 'transaction e-commerce' issues no comment will be made on infrastructure issues in this contribution. Nevertheless, it is recognised that infrastructure issues are relevant to the potential for development of transaction e-commerce, the competitive structure and the conduct of e-commerce industry participants.

#### **4.1. Market Definition, Price Discrimination and Predation**

##### *4.1.1 Issue 1: What are the important factors determining whether or not e-commerce and traditional outlets (mainly wholesalers and retailers) are in the same market?*

Given that e-commerce is still in the early stages of development, the ACCC's approach to date has been to assess this question on a case-by-case basis.

The ACCC may be expected to utilise the 'small but significant and non-transitory increase in price' (SSNIP) test<sup>2</sup> to assess whether online businesses are in the same market as traditional outlets. In determining whether a SSNIP from a hypothetical monopolist traditional outlet would result in significant customer swing towards online distribution channels, key underlying considerations will include consumer confidence in relation to privacy and security issues, the comparative cost structures of online businesses against traditional outlets, and access to infrastructure within Australia.

Industry-specific issues also need to be assessed, including:

- Demand preferences to purchase particular types of goods through traditional outlets.
- Access to suppliers and inventory, and consideration of the impact of vertically integrated distribution chains on the potential for independent online competitors to enter a market.
- Delivery costs, including whether import costs may fall as a result of the potential development of global logistics capabilities.

The presence of e-commerce competitors may also impact upon the methodology used to determine markets. Supply side substitution may become a more prominent characteristic of retail markets, as online environments may add different types of products more efficiently than physical outlets. Greater levels of price and product differentiation will need to be dealt with in applying the SSNIP test.

Also, benchmark competition analysis may become more relevant, because although actual online sales may not be large, the greater amount of information available to consumers may increase ability to benchmark prices. Nevertheless, it remains to be seen to what extent prices posted on Internet sites will impact upon prices offered by traditional outlets. For example, within Australia, the ACCC has observed in the recent case of the entry of Impulse Airlines into major domestic routes that the advertising of a limited number of highly discounted airfares on Impulse's own website had a direct impact on prices offered by other airlines – but only, it appears at this stage, on tickets sold over the Internet.<sup>3</sup>

##### *4.1.2 Issue 2: Since the Internet knows no boundaries, one might expect that e-commerce has or will considerably increase the size of geographic markets with subsequent benefits to competition. To what extent is this natural tendency being restricted because of various regulatory barriers, including regulations preserving inefficient delivery systems (both in telecommunications and in physical delivery)?*

The view is supported that e-commerce outlets have the potential ability to overcome some of the issues of geographic isolation – particularly in substantially lowering the costs involved in identification of potential trading partners, relationship-building, transaction negotiation and logistics management. However, physical delivery costs may continue to form barriers to entry to some Australian markets. This may vary on a case-by-case basis.

4.1.3 *Issue 3: Some studies have shown that price dispersion in B2C, even for roughly homogeneous goods, is equal to or greater than in traditional distribution. This seems odd given that e-commerce is supposed to reduce search and comparison costs. Why is a significant degree of price dispersion sometimes found in e-commerce and does it indicate a lack of competition? If so, what can or should competition agencies do about it?*

Australian competition laws do not prohibit price dispersion, or price discrimination as such, except in relation to specific infrastructure services which are subject to an access regime. In other cases, price dispersion will only be prohibited if the conduct is carried out by a person who has market power, and has taken advantage of that market power (to engage in price discrimination) for the purpose of preventing or hindering competition in a market – i.e. predatory pricing by a firm that has existing market power.<sup>4</sup>

The ability of firms to charge different prices to different customers, and prices different from other on-line or traditional competitors may be enhanced in online environments. This could be due to a range of factors, including greater scope for product and service differentiation in on-line environments, and higher search costs involved in ‘surfing’ the Internet than initially anticipated.

Such behaviour is unlikely to justify a regulatory response unless it arises due to the misuse of market power. In the absence of such conditions, the ability to price discriminate is likely to be pro-competitive, and reflective of the ability of online service providers to tailor offers to the individual tastes and requirements of customers and accordingly may increase rather than restrict output.

There have not yet been any cases in Australia where significant market power concerns or predatory pricing have been raised in relation to the conduct of online services. Potential issues which may need to be considered in determining whether some B2C operations could acquire market power may include:

- whether established ‘brands’ in old economy businesses will have a significant competitive advantage over ‘pure plays’ in online ventures because of established trust relationships with customers, ability to provide recourse to physical outlets and potentially lower search costs associated with recognised brand names;
- the effectiveness of ‘infomediaries’ to perform low cost search and price comparison services for consumers and provide trust/security assurance for customers dealing with new or unknown brands (including whether consumers will trust the infomediary itself);
- whether proprietary rights may subsist in key technology components (for example, the ‘one click’ debate) or particular e-commerce standards;
- whether traditional outlets will still constrain pricing of online services.

4.1.4 *Issue 4: Why might less well known brands or generic goods likely be better or poorer substitutes for well-known brands in B2C? Why might B2C sellers have more or less negotiating power over suppliers than their bricks and mortar cousins?*

While having no concluded view on these issues, the following preliminary comments are made:

- Well-known brands may have a competitive advantage in the online world as a brand name search is an effective technique used to locate sites. However, online operators which do not

have the advantage of a brand name to attract consumers to their site may employ other techniques such as positioning their site on search engines, effective utilisation of metatags and keywords on their websites, and building their own brand name to overcome such difficulties.

- Branded products may also be more acceptable to online consumers as the use of a known brand may lend an air of credibility to a website.
- Nevertheless, in particular industries, B2C's appear to be developing 'niche' markets (for example, last minute cheap airfares). In these areas, lower priced less well known or generic goods may have a competitive advantage over more expensive, branded products.
- Relative negotiating power between B2C and bricks and mortar competitors will depend on the level of consumer acceptance of B2C sites and will need to be assessed on a case-by-case basis.

*4.1.5 Issue 5: If price discrimination is being used anti-competitively, why might one expect it to be easier or harder to apply competition law against it in e-commerce compared with traditional markets?*

While there have been no cases in Australia of anti-competitive pricing policies in B2C or B2B operations, the following preliminary comments are offered:

- The relative ease of communication across the Internet may provide greater transparency in transactions, and therefore make anti-competitive practices easier to detect.
- However, as discussed previously, it appears that the sheer volume of information available over the Internet may increase search costs (for both complainants and competition authorities seeking to compare price offers), which may create new challenges in detecting anti-competitive price discrimination.
- In B2B operations, where network externalities and regional issues may limit the number of competing 'hubs', transparency of exchanges may be an issue for users. Instances of anti-competitive behaviour by particular participants or owners may be more difficult to detect due to the geographic disparity between users, and the lack of competing hubs to form a benchmark for comparison.
- Investigation of on-line anti-competitive pricing may require new investigative and evidence gathering skills to be developed to deal with issues such as retrieval and analysis of information held in electronic format.

*4.1.6 Issue 6: Are traditional distributors using anti-competitive means to protect themselves against e-commerce rivals? If so, what special difficulties, if any, have been encountered in bringing competition law to bear against such practices?*

In relation to the delivery of telecommunications services, the ACCC has received a growing number of complaints concerning the conduct of existing network operators and retailers against new entrant Internet Service Providers (ISPs). These matters are dealt with under industry-specific telecommunications access and competition laws.



In other areas of e-commerce this has not yet been a substantive issue, however the ACCC takes the view that as the e-commerce sector continues to grow, competition issues may arise including:

- Exclusive dealing arrangements or Most Favoured Nation (MFN) clauses between traditional distributors and suppliers to constrain entry of e-commerce competitors. This issue is more likely to arise in markets where there are a small number of participants and existing ownership links between suppliers and distributors.
- Exclusive territorial licences may be used to restrict the ability of suppliers or new e-commerce participants to establish online distribution outlets in competition with existing distributors.
- Primary boycott activity against suppliers who deal with e-commerce competitors.
- Establishment of ‘closed’ B2B exchanges and joint B2C operations between traditional distributors, which could be used to tie suppliers to traditional distributors’ e-commerce sites.

These issues will need to be assessed on a case-by-case basis to determine whether the national competition statute, the *Trade Practices Act 1974*, has been contravened. Where such activities occur on a global scale, jurisdictional issues are likely to be complex.

*4.1.7 Issue 7: Have there been many instances of suppliers using both traditional distributors but simultaneously employing B2C and B2B exchanges in which they have an ownership interest? From the competition policy point of view, what new wrinkles, if any, does e-commerce introduce into such tapered vertical integration?*

A number of suppliers have expressed interest in participating in the ownership of B2C and B2B operations, particularly in relation to airline ticketing and indirect supply procurement hubs. These proposals are still in the early stages of development and the ACCC has not as yet formed a view on the competitive effects of such ventures. Such proposals appear to envisage buyers and sellers on B2B exchanges continuing to use other procurement channels and supplying other B2C operations.

- As in any industry, suppliers with vertical links into other areas (in this case B2B and/or B2C operations) may have an economic incentive to discriminate against traditional distributors or on-line competitors. This may occur, for example, through refusals to deal, allocation of exclusive inventory to its own operations, or the implementation of Most Favoured Nation (MFN) clauses.
- There is a risk that a supplier will gain access to commercially sensitive information about its competitors.
- Suppliers may use supply policies to control the potential for traditional and e-commerce distribution outlets to compete on a full range of products in order to prevent the heavy price discounting that can occur when a new distribution channel develops. This may result in e-commerce becoming a complementary rather than competitive outlet.
- However, supplier involvement in e-commerce initiatives may also have competitive benefits, particularly if such ventures are considered ‘too risky’ to proceed without the guaranteed throughput of a particular supplier.

Such issues may need to be assessed on a case-by-case basis, and are more likely to arise where a supplier has a significant degree of market power.

*4.1.8 Issue 8: Producers sometimes share the costs of distributor web-sites and thereby obtain some control over distributors' prices. In addition, e-commerce outlets potentially compete with sellers located anywhere in the world. How, if at all, do these phenomena create a potential for laws against resale price maintenance and price discrimination to be applied differently in e-commerce compared to traditional markets? Has this potential actually materialised in your jurisdiction? If so, has competition law itself produced a competitive distortion, and if so, what steps should be taken to eliminate that possibility?*

Resale price maintenance (RPM) is prohibited and courts have applied significant penalties for contraventions.<sup>5</sup> However, the ACCC may authorise RPM conduct where it is satisfied that in all the circumstances the conduct is likely to result in such a benefit to the public that it should be allowed.<sup>6</sup> It is open to the ACCC to grant authorisation, where appropriate, to reduce the likelihood of competitive distortions that might otherwise arise from the application of the prohibition on RPM to e-commerce outlets.

As discussed above, Australia's competition law only prohibits price discrimination in certain circumstances. Accordingly, if an e-commerce outlet were to price discriminate between different jurisdictions on the basis of local market conditions (possibly cross subsidising prices in one region from profits in another), this would only be likely to raise issues under Australian law if the conduct constitutes a misuse of market power.

## **4.2 Network Dominance**

*4.2.1 Issue 1: What steps, including proprietary standard setting and other measures that might reduce interoperability, are being taken by e-commerce networks to increase the potential of network effects and first mover advantages to create and/or strengthen dominant positions? What are the arguments for and against competition offices taking action against such strategies? Do you have the legal tools to take such actions or is your agency basically powerless until after a dominant position, or something analogous, has been created?*

No B2B proposals have been examined in such detail to identify whether such issues are arising in practice. The adoption of business models which limit interoperability in order to achieve the benefits of network effects may have some public benefits in terms of increasing the attractiveness and viability of exchanges. However, in some circumstances this may lead to the creation of dominant positions, or reduce the potential number of competing exchanges. It is possible that the ACCC may take into consideration whether proprietary standards and restrictions on interoperability are likely to lead to the creation of market power in assessing whether a proposed arrangement or joint venture to create an exchange may result in a substantial lessening of competition in a market and therefore contravention of s 45 of the Trade Practices Act.

4.2.2 *Issue 2: Should competition agencies seek to influence the breadth of IPR protection being granted in relation to e-commerce? If yes, where does such intervention appear to be most warranted and how do you go about doing it?*

While Australian law provides greater protection to holders of IP rights against the operation of competition laws than to other persons<sup>7</sup>, this exemption for IP rights under the Trade Practices Act is currently under review. The ACCC has submitted to the review that IP rights do not warrant an exemption because if IP was made fully subject to the Trade Practices Act, the normal authorisation and notification procedures would enable the public benefits and detriments of arrangements to be assessed on a case-by-case basis. The ACCC considers that under these procedures, a proper balance could be struck between rewarding innovation and protecting the competitiveness of markets. In the context of e-commerce transactions, adopting either too wide or too narrow an approach to IP protection would have critical implications for the development of a competitive infrastructure and transactional e-commerce industry.

4.2.3 *Issue 3: To what extent can B2B exchanges justifiably insist on exclusive dealing in order to protect themselves against freeriding? How does the competition analysis of such exclusive dealing change, if at all, when ownership of a B2B exchange is restricted to its major participants?*

Under the Trade Practices Act, exclusive dealing arrangements<sup>8</sup> will only be prohibited in limited situations<sup>9</sup>. Generally, such arrangements will only be prohibited if they are likely to result in such a degree of foreclosure of a particular market that it will result in a substantial lessening of competition in that or another market. Also, such an arrangement may be prohibited if it constitutes the misuse of market power for the purpose of deterring or preventing competition (i.e. if a supplier has used its market power to require a buyer to enter into an arrangement to buy exclusively through a particular hub which is closed to potential competitors of that supplier).<sup>10</sup>

If a group of competitors agree not to accept goods or services unless the supplier puts those goods and services through a nominated exchange, this could be considered under the primary boycott or third line forcing provisions.<sup>11</sup>

Many exclusive dealing arrangements will not fall into these categories, and in fact may be considered to be part of healthy competition between B2B exchanges to attract buyers and sellers. It may be that exchanges are developed as 'closed' models in order to achieve critical mass, and gradually opened up to increase usage once the exchange is established.

Where competition issues arise, the arrangement may still be permitted under the Trade Practices Act if the parties obtain authorisation from the ACCC. Authorisation may be granted if the ACCC is satisfied that such a restraint on competition is necessary and not excessive in protecting them from freeriding, and the net public benefits of allowing such protection outweigh the competitive detriment.

If the ownership of a B2B exchange is restricted to its major participants, there may be a greater likelihood of competition issues arising, as such owners have greater incentives to use exclusive arrangements to 'lock out' competitors. Participant-owned exchanges may be less likely to 'open' their exchange to attract more customers once critical mass is achieved, and are more likely to be able to sustain exclusive arrangements over time due to the benefits they obtain in their primary markets from engaging in such conduct. Nevertheless, if the owners do not have significant market share, it is unlikely that exclusive dealing arrangements will have a large impact on competition, and are unlikely to be commercially sustainable.

4.2.4 *Issue 4: Under what circumstances might B2B exchanges owned or controlled by their major participants be used to exclude or disadvantage rival sellers or buyers? etc.*

The likelihood of owners of B2B exchanges discriminating against or excluding rivals (buyers or sellers) will depend largely on weighing up the potential costs of exclusion or discrimination (in terms of loss of exchange revenues) against the potential gains in other markets. The fewer available substitutes, the greater the gains to owners in participating in such conduct. Issues which may be taken into account include:

- The strategic significance of the goods and services distributed via the exchange.
- Competitiveness of traditional distribution channels (in particular, taking into account the efficiency gains associated with paperless transactions in a specific industry) to support rivals.
- Degree of ‘buyer/seller stickiness’ and critical mass necessary to operate an exchange. That is, if a large proportion of buyers or sellers in a market are committed to a particular exchange through ownership participation, and/or critical mass is high it becomes more difficult for a competing exchange to attract sufficient throughput to offer viable alternatives to rivals.
- Structure of ownership, taking into consideration potential counter-balancing interests which may arise if the ownership structure includes both buyers and sellers.
- To what extent the rules of an exchange are transparent and guard against discrimination.

Nevertheless, there may be some benefits in participant ownership in a B2B exchange, as this may provide a guarantee of volume necessary to attract investment and achieve economies of scope and scale.

At the same time, in a comparatively small economy such as Australia, this may result in a more concentrated market structure developing with a small number of participant-owned exchanges in each industry sector. Accordingly, the ACCC is particularly interested in discussing the issue of what critical mass is necessary for the viability of an exchange, and whether restrictive measures considered necessary to guarantee throughput in start up phases could be removed once an exchange is established.

In principle, while recognising the difficulties in determining the competitive implications of B2B exchanges, the ACCC believes that it is preferable to find structural solutions to these issues, rather than rely on the operation of anti-competitive conduct rules as and when complaints arise.

4.2.5 *Issue 5: Many, if not most, B2B exchanges and B2C retailers appear to be losing money. Has this resulted in complaints of predatory pricing and, if so, were prosecutions launched? Where there have been predatory pricing cases, was it particularly difficult to prove that predation was occurring?*

Predatory pricing does not yet appear to have arisen to a significant extent in Australia.

### 4.3 *Enhanced Opportunities for Co-ordinated Effects*

#### 4.3.1 *Issue 1: Under what circumstances, if any, should restrictions be placed on B2B and B2C exchanges to reduce the chances they will be associated with a higher incidence of co-ordinated effects?*

Restrictions are more likely to be appropriate where the underlying market characteristics indicate that there is an economic incentive for parties to engage in co-ordinated conduct and there is a substantial risk of competitive harm.

This is more likely to occur when:

- Participants/owners are direct competitors in end product markets and have a significant combined market share in those markets (i.e. vertical exchanges).
- Participants/owners are significant buyers in input markets with significant combined buyer power.
- Goods and services exchanged via an exchange are of strategic significance, are not readily substitutable with other products, and/or involve a significant proportion of input costs.
- There is no independent management to handle data flow and administer confidentiality policies.
- The exchange involves express collective buying or selling rather than independent negotiations or auction mechanisms. Although auction rules would still need to be assessed to identify if there is any potential for ‘manipulation of bids’.
- Alternative distribution channels are not available, or are not price competitive (this reduces the ability for parties to ‘break out’ of a collusive arrangement).

#### 4.3.2 *Issue 2: What are the pros and cons of seeking to reduce any e-commerce enhanced co-ordinated effects by applying any or all of the following measures: requiring independent third party management for participant owned exchanges; putting a time limit on participant ownership of B2B exchanges; suppressing chat rooms; otherwise restricting or forbidding direct information exchange within the buyer or seller groups; and erecting Chinese walls to prevent participants learning in a timely fashion about each other’s activities.*

The following initial reactions are given regarding the measures suggested above:

- Independent Third Party Management may alleviate a number of concerns, but the effectiveness of such a measure is ultimately determined by the degree of independence of management, and its ability to ensure that owners, including participant-appointed Directors, are not in a position to exchange sensitive information.
- Putting a time limit on participant ownership may limit co-ordinated conduct in the future, whilst allowing sufficient commitment from participants in the early stages of the development of an exchange to support initial capital investment. However, in practice it

may be difficult to agree on an appropriate time limit on participant ownership and to find new investors at that time.

- Suppressing chatrooms may reduce the attractiveness of exchanges, and where the incentives of owners are to co-ordinate behaviour, other channels of communication may already be available – for example signalling through auctions, board meetings etc.
- Otherwise restricting flows of information or erecting chinese walls are only effective as long as the parties adhere to the rules, and they can be adequately monitored to ensure compliance.

## NOTES

1. The National Office for the Information Economy, *The Current State of Play – July 2000*.
2. See ACCC *Merger Guidelines*, June 1999 p 31.
3. ‘Qantas and Ansett act on Impulse’ *The Australian Financial Review*, 7 August 2000, p 3.
4. Section 46 of the *Trade Practices Act 1974*.
5. For example, a penalty of \$A500 000 was imposed on a bread manufacturer for contravening the prohibition on resale price maintenance: *ACCC v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36. The maximum penalty for each offence by a corporation is \$A 10 million.
6. See s 88(8A) and s 90(8) of the *Trade Practices Act 1974*.
7. In particular, s 51(3) of the Trade Practices Act exempts conditions of licenses and assignments of intellectual property from the operation of s 45 (agreements that substantially lessen competition), s 47 (exclusive dealing) and s 50 (mergers that substantially lessen competition) to the extent that they relate to the subject matter of the relevant intellectual property.
8. See s 47 of the *Trade Practices Act 1974*.
9. Third line forcing is prohibited *per se*, but may be notified or authorised.
10. See Ss 45 and 46 of the *Trade Practices Act 1974*.
11. See Ss 4D and 47 of the *Trade Practices Act 1974*.

## CANADA

### 1. Introduction

The subject of this roundtable is, indeed, timely. We see every day and through every medium the impact of e-commerce on the "traditional" marketplace. In many ways, it has the potential to supplant - - certainly to supplement -- traditional approaches to conducting business, whether it's with other businesses or with consumers. But this is also a "brave new world" where not only the landscape is shifting but, indeed, the content and context in which people communicate and trade with each other are changing through individual's intervention.

For many businesses -- both new and established -- this is an exciting time, with great potential for new and innovative approaches. But, as with all new approaches, this potential may not see full fruition if businesses are unsure of what is, and is not, permitted in cyberspace. Uncertainty as to the application of a framework law such as Canada's *Competition Act* may lead to missed business opportunities and less-than-efficient market outcomes.

Accordingly, it is incumbent on competition authorities to commence to meet this challenge by, at minimum, endeavouring to understand the nature of cyberspace -- how it can work so as to preserve and enhance competition, but also how it may potentially be abused through anticompetitive conduct.

In applying the *Competition Act*, the work of the Competition Bureau is carried out with five basic principles in mind:<sup>1</sup>

- fairness,
- predictability,
- timeliness,
- transparency, and
- confidentiality.

In regards to e-commerce and competition policy, the principles of fairness, predictability, timeliness and transparency are most immediately relevant. It is important that parties subject to a law be treated fairly by the agency that enforces and administers that law. Similar situations that arise under the law must be dealt with in a consistent manner. Consistency in the application of the law -- providing substantial information on how the law is enforced and administered -- will allow parties to accurately predict the consequences of particular courses of action. Timeliness is important: matters must be dealt with as expeditiously as possible, especially in the case of a law that deals principally with business behaviour.



Addressing the challenges raised by e-commerce vis-à-vis the application of competition laws can appear daunting. Certainly there is a concern about "premature regulation", given the tremendous potential for good that e-commerce represents. But, to ensure that the vast majority of businesses are well-positioned to take advantage of that potential, competition authorities must at least commence to master the medium, even though they may not yet be in a position to come up with concrete views on "solutions" to problems that may or may not arise. If we wait until problems become evident, it may by such a point be too late to start along the road towards solutions.

Accordingly, it is the intention, through this note, to discuss the nature of e-commerce and cyberspace and to raise possible competition policy issues for consideration pursuant to a four-point framework. The framework helps to identify the competition issues most relevant to each particular electronic marketplace, be it a Business to Consumer (B2C) or Business to Business (B2B) marketplace.

The framework is presented in Section II. In Section III the framework is applied to a number of issues.

## **2. The framework**

### **2.1 *Issue No. 1: Peculiarities of the Virtual World***

Many competition issues will remain the same in the virtual marketplace; many improvements will be seen in efficiencies, innovative business practices, and reduced costs. What, if anything, about the electronic medium will warrant the attention of competition authorities?

### **2.2 *Issue No. 2: Exacerbating a Competition Issue***

What kinds of competition issues can be expected to be aggravated by the advent of technology, the increase in speed of a change in the manner in which anti-competitive practices occur?

### **2.3 *Issue No. 3: Detailing the enforcement and compliance scenarios***

Where in cyberspace can competition authorities assist in diminishing competition concerns or take action to halt anti-competitive practices? The Conformity Continuum adopted by Canada assists in considering the options.

### **2.4 *Issue No. 4: Machinery of the Continuum***

What tools are available and which, if any, are missing or less effective in the virtual world that will have an impact on the effectiveness of competition law enforcement? What, if anything, needs to be done to improve the situation?

It is clear that rapid changes in technology and markets have been accompanied by considerable media attention and marketing rhetoric that leads us to believe that electronic commerce, and the Internet, are miraculous inventions, so proficient in creating a fiercely competitive environment that it may never be subject to manipulation through anti-competitive activities. As competition authorities, there is a need to be able to see beyond whatever revolution in business models are being touted to what the real economic

forces are behind these market changes and whether competition law, the enforcement tools and the analytical framework of how markets work are adequate to the task.

As businesses find themselves in new circumstances, facing rapid change, they need to know where they stand in terms of the competitive strategies to which they might turn in order to survive and prosper in the electronic marketplace. When faced with the pressures of rapid change, some parties may see competition laws as an impediment to what they view as legitimate business practices. Firms are already requesting guidance with respect to what is permissible under competition laws, and agencies should respond quickly to encourage legitimate conduct and to promote compliance with the law. The framework will help identify what the competition issues are in cyberspace, such that the enforcement agencies can effectively engage the business, academic and legal communities in a dialogue in order to;

- come to common understanding of the nature of the electronic marketplace;
- learn what forms of business conduct are permissible in it, and which are not;
- promote new pro-competitive business arrangements; and
- to foster compliance with the law.

### **3. Application of the Framework**

#### **3.1 *What is peculiar about the virtual world that will challenge how competition laws and policy are administered?***

One very significant difference which appears to exist between traditional bricks and mortar markets and cyberspace markets is that the latter are the product of the computer code. Computer code (along with hardware, but it is mostly the computer code of software) creates the various spaces in cyberspace and in so doing determines what is possible in those spaces. In electronic markets the code defines and regulates<sup>2</sup> how these marketplaces will work.<sup>3</sup>

This kind of regulation differs from regulation by law or by markets. With the law, people have the options of complying or facing the threat of punishment for non-compliance. In traditional markets, incentives for behaviour of one kind or another are provided by price signals. In both cases, people have a choice of how to respond to the regulatory restraints presented. In the case of cyberspace, because of its defining nature, there are few ways to avoid the regulatory effects of the code. While the electronic marketplace, like any computer environment, cannot exist without code, the code can increase or decrease the competitiveness of an electronic marketplace. It is not difficult for an expert in the writing of code to intentionally develop it to have anti-competitive consequences. Code can have an exclusionary, disciplining or predatory effect by making it difficult to find, or denying access to, the business, products or services of competitors in the virtual world. It can eliminate a competitor's advertising; it can exclude a competitor from a bidding process; it can deny a competitor access to lower cost products and inputs; or it can create a screen bias that reduces the ability of competitors to compete for customers on a level playing field.

Just as code can be written to have anti-competitive consequences, any code can be circumvented through new technology and new code. New computer and communications technologies will enable the writing of new innovative code that could totally redefine how these marketplaces will operate. This malleability is an important feature that distinguishes electronic markets from traditional-tangible markets.

The latter are characterised by parameters such as time and geography which cannot be altered. There are few such parameters in electronic marketplaces. In traditional markets competition law and policies are often used to alter the existing “market structures” or effect behavioural remedies within these parameters. In cyberspace competition law and policies may need to address anti-competitive behaviour through affecting the code that defines the electronic marketplace. This ability to apply competition law and policy indirectly by regulating the code is an important difference between applying competition laws in cyberspace and applying it in traditional markets. It is likely to prove to be a powerful instrument for achieving conformity with the law and promoting pro-competitive market structures and conduct and competition agencies will need to determine how best to deal with this new challenge.

Copyright, and how computer code can affect copyright protection over the Internet serves as a further example of how code can alter the effectiveness of the law and illustrates the challenge cyberspace presents to enforcement agencies.

Just as code can increase or decrease the competitiveness of an electronic marketplace, the code that defines what can be done on the Internet can enhance or diminish the protection that intellectual property receives beyond that which was intended by the drafters of the copyright laws. Copyright holders are concerned that costless replication and distribution over the Internet undermines copyright laws. Code that enables free copying of music from the Internet co-opts (takes over) copyright law. It upsets the balance sought by that law (to weigh the private interests of creators to receive adequate compensation for their works against that of the public interest to benefit from those works through their dissemination), too much in favour of dissemination. Yet a technological solution in the form of new code that defines “trusted systems” that facilitates perfect control over the online use and distribution of copyrighted material will soon be available. However, perfect control may undermine fair use rights, tilting the balance towards too much protection and again undermining the intent of the legislated copyright laws to then favour the individual creator at the expense of the public interest.

What this example illustrates is that it will be difficult for competition agencies to ignore the defining attributes of computer code if they are to effectively deal with the competition issues in cyberspace. How code can aggravate anti-competitive conduct (Issue 2) and how competition law can respond to the code to diminish competition concerns (Issue 3) are taken-up in the following subsections.

### **3.2 *What kind of anti-competitive conduct is aggravated in this environment?***

The technologies of cyberspace will create new kinds of anticompetitive activities and new and innovative ways of engaging in traditional forms of anticompetitive behaviour.

Consumer scams - All kinds of new fraudulent business schemes are made possible by the Internet. In part, this is because it is fast and easy to set up a web site (as opposed to bricks and mortar business); to set it up in a jurisdiction which is beyond the reach of the jurisdiction where the victims reside and to shut it down, move or continue under a alternative name in another jurisdiction with a new web site. Operators engaging in familiar forms of telemarketing fraud can be more difficult to apprehend and shut down in the Internet environment, for much the same reasons.

Malicious code - Telnet is a technology that can enable access to, and control of, computers for illegitimate purposes. This could include:

- denial of service attacks which prevent consumers and customers from accessing a competitor’s web site;

- posting disinformation about a competitor on the Internet; and
- sending anonymous threatening e-mails.

New technologies enable these acts at little or no cost to the perpetrator and make it difficult to identify those responsible.

A firm launching malicious code could potentially result in the firm acquiring, maintaining, or exercising market power. This will be especially true if it results in the elimination of one or more vigorous and effective competitors. Such behaviour would likely fall under competition law provisions directed at abusive conduct by dominant firms. The Internet is singularly fast with any effect being felt immediately and with network effects enhancing the importance of first mover advantages in establishing an installed based and enduring market power. Competition agencies may question the fundamental underpinnings of competition policy and contemplate taking action in this electronic age, against firms who do not, at the outset, possess the requisite market power. If the behaviour is designed to eliminate a competitor and if the level of competition in the electronic marketplace can so quickly be affected, then the significance of currently holding market power may not be relevant in cyberspace.

Conspiracy - Certain spaces of the Internet permit private communication or storage of sensitive or incriminating information that is secure from government scrutiny. While competition agencies have always faced the challenge of “smoke filled rooms”, technology could render it more difficult to find and recover evidence in cyberspace. There is a need to assess whether these technologies, if left unmastered or inaccessible by enforcement agencies, could significantly diminish the effective enforcement of conspiracy and price fixing provisions. The G-8 countries, among others are currently considering the issue of how to ensure continued lawful access to, and traceability of, evidence in view of the ability of technology through the code, to render it, in many circumstances, impervious to computer forensic or interception techniques.

Screen Bias - Screen bias became familiar when airlines used their proprietary computer reservation system to place their own flight information at an advantage over competing flight information. There are likely to be many ways of creating screen bias in electronic marketplaces and some, though quite subtle in how they are executed, can have significant anti-competitive effects.

New algorithms in a preferred search engine could realign the relative positions of competing firms. This potentially could be the result of a deliberate attempt to tilt the competitive field in favour of certain competitors. Internet Portals are able to provide different contexts where the closeness of competitors to one another can change the consumer’s impression of a particular competitor or group of competitors that could have significant competitive consequences for these firms. One mouse click, one level in a menu hierarchy, or a few seconds slower appearance time of web-pages, can be sufficient to create screen bias. Or, once consumer patterns become revealed, a subtle change of context through a re-writing of the code, could effectively eliminate a potential competitor from contention.

The significance of the concept of screen bias to competition agencies can only be understood in the context of the ongoing changes in the architecture of the Internet and the recent rash of multimedia mergers.

The Internet was created as an open architecture.<sup>4</sup> Open architecture means the owners of the many telecommunications systems that make up the Internet have no control over the bits that flow through their individual part of the system. The owners of the system can not dictate what Internet services can be provided. No one has to ask permission of the owners to create, sell, or buy things across the Internet. This open architecture was imposed by law and this fundamental feature has determined how

markets have worked in cyberspace. It has allowed the users of the Internet to determine what kind of services would be provided, and this has resulted in many innovations in publishing, content, and applications for commercial, educational and non-profit purposes. Those innovations were a main driver of economic growth online.

New technologies of control could change this. Broadband infrastructures (pipes) are being built that are not required to be open.<sup>5</sup> This will allow the owners of the pipes to transform the public and open architecture into closed, proprietary systems. Being closed and proprietary offers the opportunity to tilt the competitive environment. The integration of infrastructure, content and context under a single ownership or through strategic alliances provides the motive.

Proprietary, integrated multi-media networks will have an incentive to become “dominant portals” on the Internet by tilting the entire Internet to their advantage. They may do this by relegating the dial-up Net to second-class, narrow band service, with only the proprietary content receiving full broadband capabilities. They may make it difficult to even find a portal outside the proprietary environment to the wider Internet, with the result that most people hardly ever venture there.

The ability to discriminate among bits will increase the “stickiness” of dominant Internet portals. Technology which provides the ability to discriminate among bits is, reportedly, well-advanced. Owners of the pipes will be able to impede access to unaffiliated Web sites, while expediting delivery of proprietary material.<sup>6</sup> This would mark a fundamental change to the architecture of the Internet.

Screen bias in an environment of closed, proprietary, broadband Internet will present a difficult challenge to competition authorities. Does proprietary content owe its advantage to superior performance or is it artificially maintained by screen bias? Is the screen bias necessary to bring forth the revenues needed to underwrite the investments required for broadband Internet service?

#### **4. How can a pro-active compliance effort by competition authorities eliminate or diminish some of the potential competition issues**

##### ***4.1 Conformity through education***

The electronic marketplace is new. It has the potential to be the most competitive environment to date. Since most businesses involved in an innovative and vibrant marketplace will wish to comply with all relevant legislation, education often represents a fundamental manner of conveying the elements of compliance. Publications, either in paper or electronic form, webcasts, videos and seminars can explain the means of transacting electronic business without contravening competition legislation.

The regulatory environment influences competition. Competition authorities may also consider their advocacy role, by providing advice on complementary issues to government departments or regulatory agencies tasked with promoting a secure and competitive electronic marketplace or responsible for the development, licensing or implementation of emerging technologies.

##### ***4.1.1 B2B marketplaces***

A pro-active compliance effort is quite possible with regards to the evolving B2B marketplaces. The consensus is that it may be premature to develop detailed guidelines for how B2B marketplaces are to be constructed, particularly some of the larger ones which are still at the conceptual and early stage of development, however a number of broad concepts suggest themselves, as follows:

- who owns/manages the marketplace - whether it is owned/managed by one or more buyers or sellers or by an independent third party;
- whether a B2B marketplace is linked to other B2B marketplaces;
- which buyers and sellers are permitted to participate in a particular marketplace;
- the kind of information that is collected on participants and on the transactions that happen there; how it is collected and what kind of analysis is made of it;
- who has access to the information and in what form, including any analysis and use made of it;
- whether participants are required to deal exclusively with one marketplace;
- the kind of price discovery mechanism that is used.

The challenge will be not to use competition law to usurp the market forces in defining and driving the development of these new innovative markets.

## **4.2 *Facilitating conformity***

Competition authorities may consider both pro-active (monitoring) and specific applications of this principle—by working directly with those conducting business electronically to assist them in voluntarily complying with the law. Monitoring conduct to identify the needs of consumers and business people is one way. Contacts with trade or national associations, major firms can be maintained to remain aware of emerging issues, and to plan targeted seminars when they are required. Voluntary codes are another means of conveying marketplace rules to groups of businesses, and advisory opinions may be provided to individual firms seeking to ensure that their proposed plans do not lead to any anti-competitive conduct or effects.

### **4.2.1 *Voluntary codes for B2C marketplaces***

Anonymity (the identity of persons is not known) is a characteristic of the B2C marketplace of today, making it costly for business to establish their identity and authenticity sufficiently to earn the trust of consumers. This lack of trust, is a friction, that increases transaction costs, limiting the full potential of the Internet as an infrastructure for commerce. B2C trade over the Internet will not reach its full potential unless consumers are able to trust this marketplace. The lack of trust is also a result of the difficulty in enforcing consumer protection laws where transactions cross legal jurisdictions. The legal framework for international co-operation in the application of consumer protection laws will be difficult to achieve and enforcement will be costly and perhaps less than fully effective. The cost of seeking redress may often be far greater than the small value of the transactions.

The proposed remedy is the creation and adoption of some form of voluntary code of conduct for consumer protection. The reach of law is limited, so perhaps the market can protect consumers, by aligning a voluntary code of conduct to market forces such that carrying the marque of a code confers competitive advantage.

New technologies, cryptography and digital certificates are about to be introduced which will in many circumstances, remove the lack of trust as a source of friction. Digital certificates will enable the zoning of spaces,<sup>7</sup> where access is determined by the granting and possession of certificates and regulation by law is made effective because of the existence of those certificates. Certificates can be issued to sellers of products where they meet certain criteria relating to product quality, reliability in service, trustworthiness and other dimensions that would make a carrying a particular certificate win the trust of consumers.

A new approach to ensuring conformity may be required as the code changes, enabling different kinds of behaviour in a market. Where it was once difficult to enforce the law, new code could remove the difficulty. Similarly, new code could alter a situation where compliance was satisfactorily achieved through certain mechanisms to a new situation requiring a different mix of compliance initiatives, involving law, voluntary codes of conduct and regulation of the code itself.

#### *4.2.2 Achieving conformity in B2B marketplaces*

Software that is created and distributed by individuals, hackers, or firms which are located in foreign jurisdictions or outside of any institution of effective control, can be difficult for governments to regulate. But when the users of the software are large firms located under the jurisdiction of a government agency, their use of the software can be regulated, whether they write the software themselves or not. This is how conformity with competition law can be applied to firms under the jurisdiction of a competition agency. Conditions can be set upon which firms may participate in a particular B2B electronic marketplace, based on the broad conceptual principles listed above. For example, a competition agency may adopt a policy to not challenge a B2B alliance if the participants agreed to two conditions:

- their ownership interest in a B2B was managed by a third party which is independent of both the buyer and seller sides, and
- to participate in a B2B only if it utilised a particular form of price discovery; for example, new dynamic price auction technologies can limit feedback to participants so that they do not know where the market cleared, preventing suppliers from learning enough to signal each other in the future.

Thousands of B2B marketplaces have recently sprung up or are being contemplated. There will soon be a period of substantial consolidation of B2Bs, as they seek to acquire the “critical mass” that attractive enough buyers and sellers to become profitable. As B2Bs seek viable business models, competition authorities have a role to play in ensuring that B2Bs do not achieve this critical mass by granting some competitive advantage to one segment of the market over the other.

The challenge will be to deal with the merging of B2B marketplaces which may present unique and unknown competition/merger policy issues. Competition policy has traditionally dealt with the merging of firms that compete in a relevant antitrust market, and not what may be the merging of markets or exchanges.

### **5. Are there any enforcement tools that are missing or inadequate for effectively enforcing competition law in electronic marketplaces?**

The substantive provisions of any competition law must remain relevant in an electronic world. It is, therefore, important that these provisions be technology neutral. If not, they will be rendered ineffective

on a cyclical basis, as the technology changes and new generations of telephony, computers or other digital, satellite, or laser equipment are invented, implemented and then become redundant. With respect to the provisions which afford agencies their enforcement tools, such as search and seizure, interception, and compulsory production orders, it is essential that the means to effect such evidence gathering procedures also continue to be available. Such is the current task of many governments in our global economy, which are grappling with the very real problems involved in the gathering of highly perishable and fragile electronic evidence of competition and other cyber offences, not to mention the significant difficulty of obtaining the software development expertise required to comprehend the computer code alluded to above. A number of these challenges are listed below.

- Acquiring evidence on consumer protection issues: Tracing the location of firms engaged in consumer scams can be difficult over the Internet. Many firms, including Internet Service Providers (ISPs) do not keep records of transactions for very long, which makes gathering evidence on misleading advertising offences difficult. Many jurisdictions are currently studying the potential for legislation obliging ISPs to retain transaction log information for a required period of time.
- B2B marketplaces: In other spaces, so-called Intranets, and B2B marketplaces, identity and authentication have been designed into how those spaces work. People who enter those spaces can be credentialed, limiting access to those who meet certain criteria and their actions can be tightly controlled and monitored.
- Private spaces: The characteristic of anonymity applies to a number of private spaces that offer facilities for engaging in private communication and storing of private or incriminating information. This has implications for the machinery of enforcement. The Internet is actually a heterogeneous “Cyberspace” comprised of many neighbourhoods, each of which serves a specific function and is accessed in a different way. They include the World Wide Web where the B2C and the B2B electronic marketplaces are located, and a host of private spaces which have implications for enforcing competition law in both real space and the electronic marketplaces. Private spaces include the following:
  - Usenet: Usenet is technically a separate network from the Internet in which postings to News groups are almost always anonymous. This places little restraint upon promoting a questionable product, or committing fraudulent scams upon individuals or planting false information or testimonials about products or services.
  - Telnet: Telnet enables expert users to access and control other computers for both legitimate and non-legitimate purposes. Telnet might be used to damage the computers of a competitor; to launch a denial of service attack on a competitor’s web site to stop e-commerce sales; to post disinformation about a competitor on a News group; or to send anonymous threatening e-mail. New protocols and new features are now available, at little or not cost to the user, with more anticipated in the future.
  - Anonymous remailers: Easy to use, anonymous remailers enable a person to hide identity from the recipient of the message. Privacy anonymisers: Privacy anonymisers are designed to protect the identity of the user while communicating on the Internet. While privacy is a valid concern, it impedes enforcement agencies in identifying parties, and in obtaining critical evidence. A balance must be struck.
  - Free data storage servers: Free storage space on servers on the Internet offer 20 megabytes of data storage space to back up files, or equally possible, to hide files, that they do not wish to



have appear on their desktop computers. This is especially useful to conspirators who wish to share the information stored in this space with other co-conspirators.

A number of other enforcement challenges arise when seeking to obtain and handle electronic evidence.

- the increase in quantity and importance of electronic evidence over time;
- the need to train and maintain expert in computer forensic recovery, processing and handling;
- the recovering, safeguarding and handling of perishable and fragile evidence, in a manner that preserves its integrity and admissibility in Court;
- the new encryption and anonymiser products that make it difficult for law enforcement officers to keep up with persons intent on committing crimes;
- emerging technologies such as the new all purpose internet linked cell phones, smart cards, personal organisers, and the new RIM ‘Blackberry’ organisers. Emerging telephone, internet, and application service providers lacking the switches to allow for interception, real time investigations and the ability to execute effective searches;
- the likelihood of the need for extra-territorial reach in computer searches;
- the need for more effective and targeted international co-operation to ensure common ability to require the retention of data and compelling of ISPs to disclose it for the purposes of detecting, preventing and, if necessary, prosecuting crimes. Co-operation, as well, to conduct simultaneous Internet sweeps designed to detect consumer fraud.

## **6. Conclusion**

While we have here briefly discussed a number of important issues related to cyberspace and the electronic marketplace, as agencies, we have even less experience in analysing and examining competition issues in this environment. We have far more questions than we have answers and it will be some time before we fully understand the scope of the Internet, the World Wide Web and alternate systems still to be invented and introduced. For now, agencies have a unique opportunity to take part in the creation of an innovative and potentially highly competitive marketplace in a way that should lead to previously unknown levels of efficiency in the use of global resources. However, it is imperative that we maintain the framework and tools to address competition concerns should they arise.

## NOTES

1. The Competition Bureau has outlined its approach to the administration and enforcement of the *Competition Act*, *Consumer Packaging and Labelling Act*, *Textile Labelling Act*, and *Precious Metals Marketing Act*, in an information bulletin titled, "Conformity Continuum Information Bulletin." The document is available electronically at the following address: ([Http://competition.ic.gc.ca](http://competition.ic.gc.ca)). The document explains the approach the Bureau takes in choosing the appropriate instrument or combination of instruments, ranging from education at one end to voluntary compliance initiatives and to adversarial proceedings at the other end of the continuum, to address the issues raised by any specific situation.
2. "Regulates" in this context refers to the ability of the code to invisibly set the terms and conditions of how the electronic marketplace works.
3. Our discussion draws upon the insights of Lawrence Lessig's work on how the architecture of the Internet, the code, interacts with law, in determining issues related to free speech, intellectual property and other issues. See Lessig's book, *Code and Other Laws of Cyberspace* (Basic Books, 1999). Portions of this book and a number of articles and presentations by Lessig's on code as a 'regulator' of cyberspace can be seen at the web site for the Berkman Center for Internet and Society at Harvard Law School, <http://cyber.law.harvard.edu/lessig.html>.
4. Open architecture here means that the people who own the transmission systems do not control who is allowed to send messages through the system. The owners are referred to as 'common carriers.'" People can communicate with each other, create, sell and buy across the Internet, without having to obtain permission of the owners of the systems that the 'bits' flow through.  
  
 'Bits' are the ones and zeros, that make up computer code. They are the language in which the messages sent through the Internet are expressed.
5. When a network is no longer open, the owner of the network has control over who is permitted to send messages. Cable systems are not common carriers. The owners of the cable control which T.V. programs they carry, subject to broadcast regulations.
6. The development of these architectures of control was described in a recent "White Paper" written by Cisco. For a alarmed look at what this entails, see the article by Jeff Chester at the Center for Media Education at ([http://www.cme.org/access/index\\_acc.html](http://www.cme.org/access/index_acc.html))
7. An example of 'zoning' is the request of the French government that AOL not give citizens of France access to web sites which contain certain kinds of hate literature.



## GERMANY

E-commerce is said to be the fastest growing segment of the economy. Therefore it is only natural to ask if this new form of conducting business displays unique features that might pose new challenges to competition policy. Whereas business-to-consumer transactions (B2C) have been studied quite extensively, the focus now shifts to the digitised interactions between firms (business-to-business, B2B), where a large number of Internet exchanges are currently being established. According to a recent study by the Berlin-based market research institute Berlecon, the number of B2B market exchanges has increased from 332 to 1 100 world-wide in the course of less than a year. However, in the same study it is estimated that out of the 133 German B2B exchanges only 25 percent will survive, due to the need for high transaction volumes. Forester Research, a market research company, expects the number of market exchanges in the United States to drop to less than 200 by the year 2003. According to press publications, "about two thirds of all big US companies" are planning to use not more than one or two exchanges for their purchases. 35 percent of the German companies questioned by BCG (Boston Consulting Group) reported that they intend to use between two and five exchanges for direct goods.<sup>1</sup>

Nevertheless, the exchanges that will survive possess the potential for substantial cost savings and increased information, thus greatly enhancing the efficiency of markets. They might, however, also have restraining effects on competition, in which case the relative benefits and costs of intervention by competition authorities will have to be carefully balanced.

### 1. Market definition, price discrimination and predation

#### *Re. Question 1*

*What are the important factors determining whether or not e-commerce and traditional outlets (mainly wholesalers and retailers) are in the same market?*

Whether or not online sales of goods and services constitute transactions occurring in the same market as their "real-world" equivalents is a question that, like all definitions of relevant markets, has to be answered from the demand side perspective. Viewed from this angle, there are many factors determining the substitutability of on- and offline transactions, including, but not limited to the security of the payment schemes involved and the reliability of shipping. Moreover, the answer to this question will be different depending on what types of goods are being considered: While for goods like computer hard- and software, travel and financial services, music/video and books the advantages of easy access, fast delivery and to a certain extent customised goods seem to more than outweigh any possible disadvantages compared to shopping in stores, for many other goods online shopping might not be considered a substitute for shopping in physical stores.

**Re. Question 2**

*Since the Internet knows no boundaries, one might expect that e-commerce has or will considerably increase the size of geographic markets with subsequent benefits to competition. To what extent is this natural tendency being restricted because of various regulatory barriers, including regulations preserving inefficient delivery systems (both in telecommunications and in physical delivery)?*

Although the Internet is not restricted by any geographic borders, this does not automatically imply that all e-commerce is taking place in a global market. It is possible, for example, to target specific groups (e.g. based on region, language, etc.). While for many products (such as software) the full potential of e-commerce will not be realised unless advantage is taken of the specific characteristics of the global network, goods that still have to be delivered physically might be sold only in certain areas but still marketed over the Internet. Regardless of any regulatory differences, therefore, a differentiated stance towards the tendency of the Internet to generate world markets is warranted.

Regional differences in the regulation of delivery services or, more generally, differences in the costs and availability of those services can be disregarded in the case of goods that are not themselves delivered, i.e. real estate and housing as well as services like airplane tickets or banking, or for goods that are or can be delivered over electronic networks, like computer software, music and film. Those differences do of course play a role in the case of physical goods requiring physical delivery. Differences in the cost of delivery systems and the time they take will certainly affect the use of e-commerce channels for physical goods in different countries. But even where these costs are relatively high, consumers might be willing to incur them in order to save on time, especially if their work hours are long or if shop opening hours are limited (as in Germany). Regional differences in the electronic markets for physical goods may therefore not only depend on regulatory differences in the telecommunications and delivery sectors, but also on the regulatory differences regarding the labour market and shop opening hours.

Regarding the regulatory issues, Germany has recently made significant progress in opening formerly monopolised markets to competition, most prominently in this context the telecommunications sector. The logistics sector has been largely deregulated as well. Remaining regulation does not seem to inhibit retailing over global electronic networks. What could, however, be a reason for concern for national governments is the fact that production, ownership or sale of certain goods or services are legal in some jurisdictions, but illegal in others, raising the issue of control over the cross-border flow of these products in an electronically connected world. However, this is not a problem specific to competition law.

Another issue concerning regulatory barriers in the context of B2C e-commerce was raised when a regional court (Landgericht) found the pricing scheme ("powershopping") of the Swedish company Letsbuyit in violation of a German statute that permits price cuts to final consumers only if they do not exceed three percent. The court of appeal (Oberlandesgericht), however, finally gave permission to Letsbuyit to resume powershopping. The law itself (the law on rebates) has been under attack for a number of years now and the current administration is planning to have it repealed.

**Re. Question 3**

*Some studies have shown that price dispersion in B2C, even for roughly homogenous goods, is equal to or greater than in traditional distribution. This seems odd given that e-commerce is supposed to reduce search and comparison costs. Why is a significant degree of price dispersion sometimes found in e-commerce and does it indicate a lack of competition? If so, what can or should competition agencies do about it?*

One possible explanation for the observed price dispersion in e-commerce is that search costs on the Internet are not as low as is usually assumed. The reason for this may be threefold: First, search engines and online directories do not work perfectly. When looking for particular information or commodities on the Internet search results are often either too broad or too narrow. It is not at all guaranteed - at least for the B2C sector - that searching for products and comparing their prices and qualities over the Internet is really always that much less time-consuming or cheaper than the alternative of searching offline. Second, one has to consider the effects of the limitations placed on human information processing. Even if product-related information is both more plentiful and easier to access on the Internet than in the "real world", there are still problems of choosing the right amount of information, the best way to find "meta-information" (i.e. information about where to find good information) and deciding how to use the vast amount of information. Cheap information that is readily available might just result in an information overload, thus making the options on the market less rather than more transparent. This problem is aggravated by the fact that since consumers and sellers do not enter into a face-to-face relationship and the quality of a product is not easily verified due to the lack of physical inspection, sellers have to build trust by establishing a brand name. Together with the increased switching costs generated by personalised selling processes, this renders otherwise identical products heterogeneous and different prices may be charged (see also the answer to question 4). Third, even advanced software solutions to these problems, like intelligent shopping agents ("shopbots") have their shortcomings. They are both open to deliberate manipulation (being programmed in such a way that they have a built-in preference for certain merchants) and are often known to be actively excluded from some electronic malls and shops by system operators who do not want their prices to be easily compared with those of others. Also, even if shopbots increase price transparency, other important characteristics like quality or delivery time are not that easily compared. Moreover, prices become less transparent as hidden delivery charges or discounts are taken into account.

Another explanation for price dispersion is the easily achieved practice of price discrimination using modern tools of e-commerce such as one-to-one marketing, consumer profiling and so on, enabling sellers to extract consumer surplus from those with a high willingness to pay (provided they can effectively preclude arbitrage on the part of their customers). Usually price discrimination is not a cause for concern from a competition policy point of view, since although it distributes some income to the sellers away from consumers with a high willingness to pay, it also tends to open up markets for the less well-to-do consumers and to increase the allocative efficiency of the market. The prohibition of price discrimination in Germany (Section 20<sup>2</sup> of the Act against Restraints of Competition - ARC) is therefore limited to firms with a considerable degree of market power.

In sum, then, price dispersion on the Internet is not quite as extraordinary as it may seem at first sight. If the explanations offered are correct, it is not a result of a lack of competition and therefore does not call for specific action by the Bundeskartellamt.

#### **Re. Question 4**

*Why might less well-known brands or generic goods likely be better or poorer substitutes for well-known brands in B2C? Why might B2C sellers have more or less negotiating power over suppliers than their bricks and mortar cousins?*

Since e-commerce merchants lack the physical presence of their traditional counterparts and therefore a local customer base, it becomes necessary for them to make themselves seen, i.e. they have to establish a brand name (or transfer an already well-known brand name from the physical world to cyberspace). As noted above (paragraph 6), branding is also necessitated by the importance of establishing a trustworthy reputation. Therefore, there are good reasons to assume that establishing a brand name might become even more important in on-line business than in traditional retailing.

Conducting business and interacting with other market participants via the Internet may create network externalities to the advantage of an e-commerce merchant that are specific to this medium. These network externalities may make it easier for the e-commerce merchant to retain customers won on-line. Although network externalities are more prevalent in the case of B2B exchanges, they can also be introduced to B2C e-shops by means of increased consumer interaction (e.g. book reviews by readers or topical chat rooms). The combined effect of a loyal customer base due to network externalities and access to a larger number of suppliers (increasing the credibility of threats to switch) might give the B2C sellers more negotiating power. They can also act as intermediaries to bundle the demands of their customers, thereby putting their buying power to use for their customers. Powershopping (see paragraph 5) is an example.

***Re. Question 5***

*If price discrimination is being used anti-competitively, why might one expect it to be easier or harder to apply competition law against it in e-commerce compared with traditional markets?*

As noted above, price discrimination by a dominant firm in order to restrain competition (by e.g. making predatory pricing less costly) is prohibited under German law. The application of this law and others will be increasingly difficult on the global electronic marketplace. Not only might it be easier to conceal the fact of price discrimination, but more importantly, it may be unclear which jurisdiction applies, since a firm selling over the Internet has its customers in potentially very many countries. Requiring the firms to abide by every nation's specific and possibly contradictory competition laws would deter a reasonably risk-averse company from offering its goods and services over the Internet. This may make more intensive co-operation among competition authorities and the setting of common approaches or standards in competition legislation all the more important.

***Re. Question 6***

*Are traditional distributors using anti-competitive means to protect themselves against e-commerce rivals? If so, what special difficulties, if any, have been encountered in bringing competition law to bear against such practices?*

The Bundeskartellamt has been dealing with a case where IdentCo., an e-commerce distributor of automotive components that by disintermediation is allegedly able to set prices up to 15 percent lower than competitors, was boycotted by CARAT, the biggest German procurement and marketing co-operative for car parts. Because of the boycott, IdentCo. did not find any suppliers to co-operate with. Moreover, GVA, the industry's lobby organisation, denied IdentCo. membership, arguing that because IdentCo. does not have physical warehouses it cannot be considered an actual merchant. After intervention by the Bundeskartellamt the boycott was ended and its chilling effect on suppliers has presumably vanished. The membership case has not yet been decided.

***Re. Question 7***

*Have there been many instances of suppliers using both traditional distributors but simultaneously employing B2C and B2B exchanges in which they have an ownership interest? From the competition policy point of view, what new wrinkles, if any, does e-commerce introduce into such tapered vertical integration?*

Judging by the experience of the Bundeskartellamt, cases in which suppliers exclusively use the Internet for distribution purposes are rare. Usually more than one form of distribution is used. Depending on the size of the B2B or B2C exchange, it is not unusual for a supplier to also have an ownership interest in it. This is nothing fundamentally new. Even in the "real world" a supplier may make use of traditional distribution via retailers and at the same time operate his own direct distribution channels. Oil companies operating their own lines of gas stations and selling gasoline to independent firms as well might serve as an example. Although there is some potential for distortion of the competitive process, this is not an issue specific to e-commerce, and it does not pose a problem that cannot generally be dealt with under current competition law (but also note the caveat in paragraph 11).

### **Re. Question 8**

*Producers sometimes share the costs of distributor web-sites and thereby obtain some control over distributors' prices. In addition, e-commerce outlets potentially compete with sellers located anywhere in the world. How, if at all, do these phenomena create a potential for laws against resale price maintenance and price discrimination to be applied differently in e-commerce compared to traditional markets? Has this potential actually materialised in your jurisdiction? If so, has competition law itself produced a competitive distortion, and if so, what steps should be taken to eliminate that possibility?*

The Bundeskartellamt has so far not observed any instances of the sort described in the question. There has, however, been the case of an online bookseller in Austria that faced a boycott by German publishing houses and book wholesalers when it announced that there would be no RPM on books sold across the border.

## **2. Network dominance**

### **Re. Question 1**

*What steps, including proprietary standard setting and other measures that might reduce interoperability, are being taken by e-commerce networks to increase the potential of network effects and first mover advantages to create and/or strengthen dominant positions? What are the arguments for and against such strategies? Do you have the legal tools to take such actions or is your agency basically powerless until after a dominant position, or something analogous, has been created?*

The existence of network externalities could favour the emergence of only very few Internet marketplaces, but it is too early yet to assess potential problems that might be the result of this development. Recent experience by the Bundeskartellamt suggests that the product "B2B exchange" is still in an embryonic state and it is still too early to recommend any policy stance towards it.

The problem of networks taking measures to reduce interoperability in order to create dominant positions has so far not presented itself to the Bundeskartellamt. Much to the contrary, providers of network services like B2B exchanges seem eager to implement interoperability whenever feasible. Up to now, the Bundeskartellamt has only been able to notice a budding interest in the development of general standards. The phase of building up the first (mostly sector-specific) proprietary e-commerce exchanges will seemingly be followed by efforts to interlink these and create real compatibility. The Bundeskartellamt will monitor the development closely and assess any competition effects arising.

The importance of keeping markets open does, of course, not only hold for the actual products markets but also for the "market for Internet marketplaces". Raising switching costs can be a strategy for



establishing a standard in Internet exchanges. An established standard has all the features of a natural monopoly and can be immune to price competition (although not to quality competition). In addition, standard-based market power may be transferred to other markets (Microsoft is an example). There is furthermore no guarantee of the best technology becoming the standard. The race to establish a standard can simply be driven by rent seeking behaviour and therefore lead to a premature establishment of an inferior technology as the standard. Regarding this last possibility, there is little competition agencies - or any other authority - can do, because the technical quality of a standard cannot readily be diagnosed and compared. Trying to impose a specific standard would furthermore establish certain market structures or market outcomes, and that is a role that the Bundeskartellamt neither can nor will aim at. The transfer of market power to other markets, on the other hand, is not a new phenomenon and can be dealt with using the traditional instruments of antitrust laws. The market power of a firm successful in establishing an Internet exchange standard can be held in check by requiring it to keep the exchanges open for all participants. The Bundeskartellamt will have to consider each case separately and carefully. It has, however, no way of intervening unless it has been demonstrated that the firm in question already is in a dominant position on that market. The Bundeskartellamt's policy will be guided by the aim of keeping the markets open.

### **Re. Question 2**

*Should competition agencies seek to influence the breadth of IPR protection being granted in relation to e-commerce? If yes, where does such intervention appear to be most warranted and how do you go about doing it?*

The Bundeskartellamt is not usually concerned with questions of IPR protection. However, it should be kept in mind that there is a trade-off between the innovation-spurring incentive of a limited monopoly as granted by a patent and the competition-stifling effects of a monopoly operating in the market. From the point of view of competition policy it is important that the incentive effects outweigh the disadvantages of - temporary - monopoly power. It must be kept in mind that IPR protection may be used in a strategic way in order to foreclose an entire market to (potential) competitors.

German law treats intellectual property as an element in defining the relevant market, especially if the IPR leads to a narrowing of the market. Usually the "market for knowledge" will be assessed in its effects on the markets for the products that are produced with that knowledge. In the contexts of both abuse control and control of concentrations, the property rights of a firm are parameters in the assessment of its position on the market. Gaining new knowledge could thus lead to market dominance. The acquisition of intellectual property can be an "acquisition of ... a substantial part of the assets of another undertaking" (Section 37(1) no. 1 ARC) and constitute a concentration. Concentrations can, however, be cleared subject to obligations (Section 40(3) ARC<sup>3</sup>), requiring for example the licensing of a patent. The abuse of a dominant position (Section 19 ARC<sup>4</sup>) with regard to intellectual property might exist if a firm tries to extend its IPR-based market power to other areas. Section 20 ARC<sup>2</sup> prohibits discrimination and unfair hindrance. This provision may have to be applied if a firm, unlike its competitors, is denied a license for no justifiable reason. More special requirements regarding licenses can be found in Sections 17<sup>5</sup> and 18<sup>6</sup>. Their importance, however, is more or less limited to licensing practices that do not affect international commerce.

**Re. Question 3**

*To what extent can B2B exchanges justifiably insist on exclusive dealing in order to protect themselves against free-riding? How does the competition analysis of such exclusive dealing change, if at all, when ownership of a B2B exchange is restricted to its major participants?*

The possibility for outsiders of a B2B exchange to visit such an exchange in order to take a free ride on the information about prices and other conditions supplied by the exchange, but to conduct their transactions outside of the exchange can be limited by the operators of that market. It seems almost certain that B2B exchange operators will do this. Access to the exchange can be tied to access fees and/or to participation on the exchange. It can even be designed in a way that different "degrees" of membership allow access to different sets of information. These seem to be legitimate measures for preventing free riding.

**Re. Question 4**

*Under what circumstances might B2B exchanges owned or controlled by their major participants be used to exclude or disadvantage rival sellers or buyers? Is such ownership/control nevertheless desirable in order to reap important economies of scope and scale? To what extent are such economies substantially limited to the start up phase? If participant ownership/control poses competition problems, could and should competition agencies take action to break such links? Alternatively, should they require third party, independent management of the exchange, or require that ownership/control be spread among participants roughly in accordance with their transaction volumes? Should they instead rely on prohibiting anti-competitive conduct (i.e. become implicated in supervising terms of access), and hope that self-interest will ensure that ownership/control by the major participants will be abandoned in the long term? [...]*

B2B exchanges are virtual marketplaces to facilitate electronic purchasing or selling between firms. Various forms exist which may change their characteristics, creating new types of exchanges. At least six different categories of B2B exchanges alone have been identified by the Bundeskartellamt: (1) closed communications systems based on the Internet protocol for the bilateral data exchange between businesses (e.g. used in the pharmaceutical industry); (2) purchasing marketplaces (like *Chemconnect*); (3) web auctions, especially for the purchase of raw materials; (4) seller-oriented sales exchanges (e.g. *Omnexus* and *OceanConnect*); (5) demand-oriented purchasing exchanges (e.g. *Chemnit*); and (6) open multilateral exchanges between suppliers and purchasers (e.g. *Covisint*). It is important to recognise the efficiency-enhancing potential these types of exchanges can offer. They can reduce transaction costs by making use of scale economies, reduced warehousing costs etc. and they offer enhanced market transparency and access to buyers and sellers, especially to small and medium-sized enterprises. Reduced input costs increase productive efficiency; better informed participants increase allocative efficiency in the market; rapid diffusion of this cost-saving innovation increases dynamic efficiency.

Purchasing exchanges might be used as a means to pool purchases. This could give rise to monopsony power if the purchases account for a substantial percentage of total market purchases in the industry in question. If the jointly purchased inputs represent a significant element of the competing firms' downstream output costs, this might result in downstream price co-ordination.

The ownership or control of B2B exchanges by competing firms may raise still other competition concerns. If such an exchange is operated by a "neutral" third party, his interest will be to attract as many participants as possible. If, on the other hand, the exchange is controlled by the companies using it, they may have an incentive to exclude competitors from making use of this valuable service (or only allow them

to participate on discriminatory terms). They might also prohibit participating firms from taking part in other exchanges. A purchasing exchange run by the dominant buyers in the industry (and displaying monopsony power by pooling their purchases) might for example succeed in reaching an agreement with their suppliers requiring them to exclusively deal with participants of the exchange, thereby in effect shutting competitors out of the upstream market. In the long run, however, these strategies do not seem to be particularly promising, since the success of the exchange will depend on the number of participants.

Moreover, if the exchange increases transparency for one side of the market, having the effect of an Open Price System, collusion might become a more promising opportunity. This tendency will be magnified if the exchange offers easy and secure communication channels (chat rooms for example). In general, B2B exchanges can potentially facilitate information exchange between competitors regarding their prices, output, products and business partners. The problem will be how to detect and prove co-operation resulting from this data exchange.

There are several ways to tackle problems raised by anti-competitive measures using e-commerce exchanges. One is to use technology to interrupt the flow of information in certain areas (firewalls). Erecting firewalls in B2B exchanges can be in the interest of the participating companies themselves in order to shield valuable information from competitors. For two reasons, however, this kind of technological protection will not suffice. Since the firewalls will have to be operated by the one(s) managing the entire exchange, their security in turn depends on the trustworthiness of the exchange operator. If the participating firms are reluctant to give a third party such power over their information and therefore decide to operate the exchange themselves, the firewalls can just as easily be used to protect internal data flows between the firms from outside snooping. A second way to prevent the abuse of market power by dominant firms in control of an e-commerce exchange is to prohibit them from excluding competitors from participation. Section 19(4) No. 4 of the ARC diagnoses an abuse of a dominant position if a firm "refuses to allow another undertaking access to its own networks or other infrastructure facilities, against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market". By making the firm unable to prevent access to the exchange, the possibility and feasibility of collusion can be diminished. From the point of view of economic analysis, a third and maybe the most promising alternative would be the structural separation of managing and using the exchange. Since an independent third party does not, as an owner of the exchange, have any interest in keeping the number of participants low, any attempt at collusive behaviour will tend to be unstable. On the other hand, an exchange with many participants increases the danger of monopsony power. However, in general German competition law does not empower the Bundeskartellamt to impose a specific structure of undertakings.

### ***Re. Question 5***

*Many if not most B2B exchanges and B2C retailers appear to be losing money. Has this resulted in complaints of predatory pricing and, if so, were prosecutions launched? Where there have been predatory pricing cases, was it particularly difficult to prove that predation was occurring?*

No complaints of predatory pricing have been reported to the Bundeskartellamt so far.

**3. Enhanced opportunities for co-ordinated effects (i.e. explicit and tacit collusion and oligopolistic parallel pricing)**

***Re. Question 1***

*Under what circumstances, if any, should restrictions be placed on B2B and B2C exchanges to reduce the chances they will be associated with a higher incidence of co-ordinated effects?*

The potential dangers to competition cannot be fully removed. The installation of firewalls can attenuate the risk of too much transparency, but technological solutions might also make communication easier and at the same time harder to detect. They furthermore completely depend on the system operator putting them to use. If competitors want to use the forum for information exchange and co-ordination, this will be hard to prevent. The necessity for action in order to prevent co-ordinated efforts by the participants will depend on a variety of factors, including the business purpose of the exchange and its participants, their ability to create monopsony power, the degree to which incentives to compete on the downstream market vanish because of the exchange, and barriers to entry into any market that the exchange might erect.

***Re. Question 2***

*What are the pros and cons of seeking to reduce any e-commerce enhanced co-ordinated effects by applying any or all of the following measures: requiring independent third party management for participant owned exchanges; putting a time limit on participant ownership of B2B exchanges; suppressing chat rooms; otherwise restricting or forbidding direct information exchange within the buyer or seller groups; and erecting chinese walls to prevent participants learning in a timely fashion about each other's activities.*

As noted above, both requiring independent third party management for participant owned exchanges and erecting firewalls to prevent participants learning in a timely fashion about each other's activities are measures considered by the Bundeskartellamt. Suppressing chat rooms, besides being difficult to achieve and monitor, is probably too harsh a measure considering all the other and maybe necessary uses it can be put to. Reducing co-ordination is an important objective, but even in combating collusive behaviour the means have to stay in a reasonable relation to the acquired ends.

## NOTES

1. Frankfurter Allgemeine Zeitung, Sept. 7, 2000.
2. Section 20 of the ARC:
  - (1) Dominant undertakings, associations of undertakings within the meaning of Sections 2 to 8, 28(1) as well as Section 29, and undertakings which set retail prices pursuant to Sections 15, 28(2), 29(2) and Section 30(1), shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.
  - (2) Subsection (1) shall apply also to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient or reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.
  - (3) Dominant undertakings and associations of undertakings within the meaning of subsection (1) shall not use their market position to cause other undertakings in business activities to grant them preferential terms without any objective justification. Sentence 1 shall apply also to undertakings and associations of undertakings within the meaning of subsection (2) sentence 1, in relation to the undertakings which depend on them.
  - (4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market power directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or services not merely occasionally below its cost price, unless there is an objective justification for this.
  - (5) If on the basis of specific facts and in the light of general experience it appears that an undertaking has used its market power within the meaning of subsection (4), it shall be incumbent upon this undertaking to disprove the appearance and to clarify such circumstances in its field of business on which legal action may be based, which cannot be clarified by the competitor concerned or by an association referred to in Section 33, but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which action is taken.
  - (6) Trade and industry associations or professional organisations as well as quality-mark associations shall not refuse to admit an undertaking if such refusal constitutes an objectively unjustified unequal treatment and would place the undertaking at an unfair competitive disadvantage.
3. Section 40(3) of the ARC:

The clearance may be granted subject to conditions and obligations. These shall not aim at subjecting the conduct of the participating undertakings to a continued control. Section 12(2) sentence 1 nos. 2 and 3 shall apply *mutatis mutandis*.
4. Section 19 of the ARC:
  - (1) The abusive exploitation of a dominant position by one or several undertakings shall be prohibited.

(2) An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services, it

1. has no competitors or is not exposed to any substantial competition, or
2. has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the area of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions of sentence 1.

(3) An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it

1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or
2. consists of five or fewer undertakings reaching a combined market share of two thirds, unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors.

(4) An abuse exists in particular if a dominant undertaking, as a supplier or purchaser of certain kinds of goods or commercial services,

1. impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification;
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
4. refuses to allow another undertaking access to its own networks or other infrastructure facilities, against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected.

5. Section 17 of the ARC:

(1) Agreements regarding the sale or licensing of patents or utility models granted or applied for, of topographies or protected seed varieties shall be prohibited insofar as they impose restrictions on the acquirer or licensee in its business activities which go beyond the scope of the protected right. Restrictions pertaining to the nature, extent, technical area of application, quantity, territory or time of exercise of the protected right shall not be deemed to go beyond the scope of the protected right.

(2) Subsection (1) shall not apply to commitments restricting the acquirer or licensee.

1. insofar and as long as they are justified by the seller's or licensor's interest in a technically satisfactory exploitation of the subject matter of the protected right,
2. which impose an obligation to exchange experience or to grant non-exclusive licences in respect of inventions relating to improvements or new applications, provided such obligations correspond to similar obligations on the part of the seller or licensor,
3. not to challenge the licensed protected right,
4. to make minimum use of the licensed protected right or to pay a minimum fee,
5. to label the licensed products in a manner which does not exclude the reference to the manufacturer, insofar as such restrictions do not exceed the term of the acquired or licensed protected right.

(3) Agreements of the kind described in subsection (1) may, upon application, be exempted from the prohibition under subsection (1) if the commercial freedom of the acquirer or licensee or other undertakings is not unfairly restricted and if competition on the market is not substantially impaired because of the extent of the restrictions. They shall be exempt from the prohibition under subsection (1) and take effect unless the cartel authority objects within a period of three months from receipt of the application. Section 10(4) and Section 12(2) shall apply *mutatis mutandis*.

(4) Sections 1 to 12 shall remain unaffected.

6. Section 18 of the ARC:

Section 17 shall be applied *mutatis mutandis*

1. to agreements on the sale or licensing of legally unprotected inventions, manufacturing methods, designs, other achievements furthering technology, achievements furthering plant cultivation in the field of plant breeding, insofar as they represent essential business secrets and are identified,
2. to mixed agreements on protected achievements within the meaning of Section 17 and unprotected achievements within the meaning of no. 1,
3. to agreements on the sale or licensing of other property rights such as trademarks, registered designs, copyrights (e.g. to software), insofar as these agreements relate to agreements on protected achievements within the meaning of Section 17, on unprotected achievements within the meaning of no. 1 or to mixed agreements within the meaning of no. 2, and contribute to the achievement of the primary purpose of the sale or licensing of industrial property rights or unprotected achievements, and to
4. agreements regarding seeds of a variety approved under the Seed Trade Act between a plant breeder and a seed multiplier or an undertaking at the seed multiplication level.

## HUNGARY

### 1. Introduction

The competition policy approach towards electronic commerce - as the market is in continuous change - is still developing in Hungary, and therefore it is only possible to give a general overview of the present situation.

Although e-commerce falls under the category of content providing, almost all of the access providers in Hungary are also concerned in e-commerce. It is important to note this, because the rules relating to content providing and access providing are different.

According to the Hungarian telecommunications legislation, content providing is not regarded as a telecom service. Consequently, this service can be provided without licensing. Providing Internet access is, on the contrary, a telecom service and can only be provided with a licence. The Hungarian Communications Authority issued about 40 licences, but there is a significant number of access providers who had started their activity before the system of licensing was introduced and who drive their businesses without a licence. Hence, there is intense competition on the Hungarian market of Internet access providers.

With regard to electronic commerce between undertakings and consumers (B2C e-commerce), two decrees are to be applied: a government decree<sup>1</sup> concerning distance selling and a ministry decree<sup>2</sup> concerning - among others - the commercial activity of mail ordering. The distance selling decree contains rules corresponding to the rules of the relevant EU directive. Furthermore, the act on electronic signature has been drafted, and - according to a resolution of the government<sup>3</sup> - it will assist the transactions concluded through the Internet. Thereby, Internet commerce in general could be escalated, too.

Regarding - inter alia - the above mentioned facts, it is obvious that e-commerce is still evolving in Hungary, although significant legal barriers to entry do not exist. Consumers substantially mistrust electronic payment, and only a few banks offer services that make electronic payment possible.

Regarding electronic commerce between undertakings (B2B e-commerce), the new forms of internet based business, which may face antitrust challenge in the future (i.e. Joint ventures, B2B exchanges), are also in an evolutionary stage. In Hungary, B2B e-commerce substantially takes place through the EDI (Electronic Data Interchange) system which is not based on internet protocol. Since the appearance of the EDI systems in 1996, the number of its users has dynamically increased.<sup>4</sup> Nevertheless, internet based arrangements for B2B e-commerce may become prevailing by 2002. The most significant arrangements can be Web-EDI systems. Currently, there are two providers of Web-EDI services in Hungary, but there has not been any experience accumulated about their operation.

Concomitantly, the Hungarian Competition Office (HCO) has not yet decided in cases related directly to electronic commerce (the only such case so far concerned the registration of domain names - Vj-135/1999.). However, since the competition policy approach towards e-commerce highly resembles the



approach towards traditional businesses, the general practice of the HCO is used as a basis for the presentation of those principles that would be applied in future cases.

## **2. Market definition, price discrimination and predation**

Until September 2000, the HCO has neither received any notifications or complaints concerning directly e-commerce markets, nor has it taken action ex officio. Some cases can be mentioned where the HCO assessed the deceptive nature of advertisements shown on the Internet, but in these cases the definition of the relevant market had no practical significance, since market definition and the assessment of market position only have an important role in antitrust procedures.

Regarding the lack of experience in the field of e-commerce, the former practice of the HCO is summarised here, remarking the issues that may emerge in the market of electronic commerce:

HCO's general practice of market definition will also be applied in the cases concerning e-commerce. The Hungarian Competition Act<sup>5</sup> contains some categories to be taken into account while defining the relevant market: "The relevant market shall be defined by taking into account the goods which are subject to the agreement and the geographical area concerned."

With regard to electronic commerce, the relevant product (the "goods" that can be subject to an agreement) is a special service which shows both the characteristics of Internet services and of traditional trade services. In 1999, the HCO investigated a supposed cartel in the market of Internet services. In this case, the market of the registration of the '.hu' top level domain was concerned from the viewpoint of supply substitutability. When defining the market, the HCO made a distinction between access providing and content providing. Furthermore, it identified several market segments with regard to content providing, and the market of the domain name registration was defined as one of these independent market segments.

In traditional market analysis, the HCO used to differentiate between retail trade markets and wholesale markets. According to us, this separation is not identical in e-commerce, since B2B e-commerce is not necessarily based on the traditional manufacturer-distributor relationship. (However, separating C2C markets from B2C ones is not apparently necessary).

With regard to market definition and concerning the current practice of the HCO, the following must be kept in mind:

According to the Hungarian Competition Act, "In addition to goods which are subject to the agreement, any goods that can be reasonably substitute for them shall also be taken into account. When doing so, the intended use, price, quality and terms and conditions of fulfilment shall be taken into consideration."

While implementing this article, the HCO assesses firstly the trend of prices and, secondly, the conditions under which consumers can acquire the relevant product. Price dispersion might be different in relation to the different products or product groups, but the HCO has not so far received complaints making a grievance of price discrimination. With regard to the term 'same conditions', the legal and customary rules relating to mail ordering and distance selling services must be applied, since sales on the internet must be also regarded as distance selling.

According to the Hungarian Competition Act, "The term 'geographical area' means the territory outside which:

- a consumer is unable to procure the goods or is able to procure them only under considerably less favourable conditions; or
- the seller of goods is unable to sell the goods or is able to sell them only under considerably less favourable conditions.

In the case of Internet, the extension of the relevant geographical market depends upon the interpretation of the term 'considerably less favourable'. In this way, the extension of the market must be assessed on a case-to-case basis, analysing the particular circumstances in each case. In general, the geographical market can be defined as "global" when the relating customs and duties and the transaction (delivery) costs do not together constitute a significant extra cost compared to the cost of purchase at home. Software and low weight products (i.e. books, CDs) typically fall under this category. With regard to these products and to the delivery costs, it is assumable that the geographical market can be extended to the neighbouring countries. Concerning other products and services, it may be justified to define the geographical market as 'national'.

### **3. Network dominance**

As mentioned above, the HCO has not issued decisions concerning directly e-commerce, so the former experience of the office can be referred to when contributing to this issue, but some early progress is already perceivable in the market, and these can be taken into account as well.

According to international experience, the establishment of electronic market places - typically B2B portals - needs relatively large investment, and the barriers to entry stemming from network effects are high. Typically, only determinant actors of the traditional markets may be able to win the large number of customers adequate to operate the market place economically. Therefore, in many cases, larger undertakings likely have significant advantages in competition. This general statement may, however, not always be true, but - while evaluating a given case - the assessment of the referred entry barriers would be regarded as particularly important. Maybe one example is ought to be mentioned in so far as regards barriers to entry: the small number of businesses that possess the adequate infrastructure to operate an internet portal. In the present situation, it could be expected that smaller undertakings will disappear either because they lack capital, or through acquisitions, and in this way the market will be more concentrated. (Nevertheless, these transactions might fall under the M&A rules.)

The establishment of B2B market places may lead to dominant position because of the network effects and the high barriers to entry (these latter might also be created artificially by applying the company's own standard). If the market place is to be established by more than one undertakings, the HCO can observe the formation of the market place *ex ante* and in that way it can prevent the evolving of dominant position. Should the undertakings have the intention to operate the electronic market place in the form of a full function joint venture, the HCO investigates the cases according to the rules relating to mergers. A merger procedure can only be started if the transaction needs approval, that is if the aggregate net turnover of the undertakings concerned exceeds the thresholds defined by the Competition Act. In order to carry out this evaluation, the activities integrated in the joint venture must be determined. The problem arises that it is attached to market definition, since it is necessary to assess whether the performing of a traditional activity could substitute the performing of this activity on-line.

If the new undertaking is not a full function joint venture, but two or more independent undertakings establish the portal by agreement, the HCO applies the rules relating to agreements restricting competition. This kind of agreement must be notified for exemption if the market share of the undertakings concerned exceeds ten percent. In this case, the definition of the market is a significant requirement for

further investigation. (HCO's approach toward market definition has been discussed under the previous subtitle).

Both in the cases of mergers and agreements restricting competition, the HCO analyses the relevant market and the effects on competition. Under circumstances qualified by law, the HCO can approve the merger or exempt the agreement even if dominant position exists or there is some restriction of competition, respectively. In this case, the HCO assesses the advantages and disadvantages stemming from the merger or the agreement. While doing this, the HCO takes only those advantages into account, that could not be reached without the merger or the restriction of competition. These benefits refer basically to efficiencies including not only allocative and productive but also dynamic efficiency. This attitude guarantees that the practice of the office would not inhibit innovation, and that the office would only intervene in the formation of electronic market places in a reasonable extent.

The HCO can impose conditions and obligations upon the undertakings in order to prevent the possible restrictive effects. When applying this alternative, measures that could deter undertakings from investment must be avoided, but it must be also secured that none of the B2B electronic market places restricts other competitors in market action. Consequently, it cannot be stated in general that the operator and participants of a B2B market place must be separated, though the eventual exclusive clauses would face close scrutiny. By assuring transparent operation and reducing exclusive clauses to the necessary level, the possibility of abuse may probably become limited. In other cases, by the application of rules relating to the abuse of dominant position, the HCO might be able to restrict the practices distorting competition.

The situation is completely different when a B2B portal is established by undertakings that are not independent from each other. In this case, the HCO has only limited means for ex ante control, since it can apply only the rules relating to the abuse of dominant position. It is theoretically possible to control ex ante the practice of leveraging, although the Competition Act does not specify it expressly as an abuse.

Regarding the fact, that electronic market places in the Hungarian geographical market are still in an early stage of their development, any experience related to predatory pricing cannot be presented.

#### **4. Enhanced opportunities for co-ordinated effects**

Since there has not been sufficient practical experience gained, only a theoretical approach can be presented, again. Nonetheless, it is held, that it would not be reasonable - at the current level of development - to regulate an emerging and still evolving phenomenon which is based on openness, free access and innovation.

The collusive conduct of the participants of B2B e-commerce will be difficult to prove, since through the use of Internet the exchange of information becomes easier. In that way, it will also be more difficult to collect direct evidence, so the significance of indirect evidence will rise. The exchange of information between businesses can only be restricted by the competition authority if the collusion is highly probable, that is, only in a later stage when the Competition Act will have been infringed by the operation of B2B market places.

In order to reduce the foreseeable challenges (entry barriers for smaller firms, agreement on the fees of access to the market place, agreement on selling/purchase prices etc.), it would be helpful to elaborate a system for monitoring the market (it could be a special responsibility of the task force to be formed shortly to investigate hard core cartels). Instead of the prohibition of chatrooms - which can play a decisive role in collusive practices - it is more reasonable to determine the frames of their operation. The characteristics of the Internet - and thereby that of e-commerce - seem to indicate that self-regulation will

retain its importance also in the future. A code of conduct drawn up by the Internet service providers may constitute an important element of this self-regulation.

## NOTES

1. 17/1999. (II.5.) government decree on distance selling
2. 15/1989. (IX.7.) decree of the Ministry of Commerce on certain commercial activities
3. 1075/2000. (IX.13.) government resolution on the regulatory principles for the act on electronic signature and on the actions to be taken related to it
4. According to last year data, the number of undertakings using the EDI in Hungary was about 400.
5. Act No LVII of 1996 on the Prohibition of Unfair Competition and Restrictive Market Practices

## **JAPAN**

### **1. Emergence of B2B e-marketplace**

Electronic commerce is one of the fastest developing sectors in the Japanese economy, as in other OECD countries. It can be classified into two categories: “business to consumer” (B2C); and “business to business” (B2B). And, in Japan, B2B is increasing its potential importance in business activities and will occupy greater part of electronic commerce.

B2B is, in itself, not a new idea. Since the 1980s, some manufacturers, carmakers for example, have been using computers and networks to share various kinds of information in business activities among affiliated businesses thereby enhancing efficiency in both sales and production. But in the late 1990s, with the fast spread of the Internet and innovations in information technology, a new system has appeared to create virtual markets, i.e. B2B e-marketplaces, where multiple participants can trade with each other at the same time.

The main difference is that the earlier system is closed and only allows “one to one” trade while the Internet based system is open and enables “n to n” trade.

Generally B2B e-marketplaces are classified into two categories, a market for purchasing and another for selling. The former enables multiple manufacturers to present their demand, typically for raw materials and components, to multiple vendors. The latter enables multiple vendors, not only manufacturers but also wholesalers and trading companies, to standardise a variety of products making them easy for users to compare and order.

### **2. Competitive analysis of B2B e-marketplace**

Recently more and more Japanese companies have come to appreciate the benefits of B2B e-marketplaces especially for purchasing. Some companies are planning to bring out B2B e-marketplaces by themselves, but more companies are accessing markets abroad.

Generally, purchasing through B2B e-marketplaces (“Net Purchasing”) will save and reduce various kinds of transactions costs and expand business opportunities. It could also lower output prices, thus making the market more competitive. However, realisation of these benefits depends wholly on how e-marketplaces are organised and operated.

The following are some of the issues in relation to the competitive effects of the B2B e-marketplace, especially that of purchasing.

## **2.1 *Global Market***

In principle, the B2B e-marketplace is global and anyone in the world can participate in any market in the world. This means that many large manufacturers in the world, including Japanese, can participate easily in one market which may bring about a significant effect on competition in related markets.

But in analysing effects on competition, we would have to face the difficult problem of identifying the specific competition and markets affected.

## **2.2 *Joint Purchasing***

Generally, using Net Purchasing, multiple participants can purchase a specific product from a specific supplier at the same time. This means that the B2B e-marketplace can provide good opportunities for participants to practice joint purchasing quite easily.

In some cases, such joint purchasing is expected to be competitive, because it is an effective way to realise scale economies in the purchasing market which could decrease purchasing prices. On the other hand, it could easily turn out to be anticompetitive, if the total volume of the buyers' purchasing becomes so large that it creates monopoly power in the purchasing market ("Monopoly Power"). In this case, the decrease in the purchasing price is not the result of enhanced efficiency but the result of intended restriction of their demand, generally for inputs, below what would have prevailed in the absence of the e-marketplace. Generally, restriction of demand for input is achieved by restricting output with the increase of output price.

This means that, in the Monopoly Power case, the benefits of reducing the input price cannot spread to consumers.

Additionally, when the total joint share of the net purchasers in the downstream market is relatively high, and a large part of the input for each purchaser comes from the same e-marketplace, it tends to make each purchaser co-operative to concert their prices in the downstream market.

## **2.3 *Information Sharing***

One of the prominent benefits of a B2B e-marketplace is that it enables participants to share various kinds of information in their business activities.

In the case of Net Purchasing, the shared information concerns trade among the participants in the market, such as a price, quantity and other information of significance to competition, which the market operator gathers and processes to present to each participant.

If the market had the structure to give participants the same access to information that the operator has, the market could be harmful to competition because the competitive participants in the market could share information in order to assist in restricting competition among them.

To avoid this potential problem, B2B e-marketplaces should incorporate specific mechanisms to prevent information sharing among competing participants.

#### **2.4 *Obligations to use the market***

Network effects are a prominent feature of B2B e-marketplaces because their value to participants critically depends on how many members the market has or will have in the near future. Network effects sometimes make specific markets develop fast enough to crowd out other competing markets and become dominant. But these effects do not necessarily exclude the potential co-existence of competing markets, if interoperability among them is guaranteed and e-marketplaces are not exclusive.

From this point of view, if the market imposes duties on participants, such as a minimum level or percentage of use, or any other requirements affecting the participants' outside use, that imposition could create a complex problem for competition.

In some cases these kinds of impositions will be necessary to produce competitive alternatives to a dominant market and facilitate competition among them.

On the other hand, if one marketplace imposes such duties after it has become dominant that may result in effectively excluding potentially competitive alternatives and thus strengthening a dominant position.

#### **2.5 *Exclusion from a market***

Exclusion from the market also presents a complex problem for competition. In some cases, exclusion could be indispensable to enhance efficient trade in the market. For example, a limit could be necessary to achieve security of trade or to prevent obstructive behaviours by competing outsiders.

On the other hand when, due to network effects, the specific market has become dominant and essential for participants to continue their activities in related markets, arbitrary exclusion of competitors by e-marketplace participants could easily be used to restrict competition in related markets.





## **KOREA**

### **I. Introduction**

E-Commerce has been growing explosively in advanced countries, based on advances in Information Technology as well as advantages in reducing distribution costs and expanding consumer choice. The center of E-Commerce has been shifting from B2C to B2B, and all business sectors are actively moving to maximise their competitiveness by utilising B2B e-commerce. B2B e-commerce is no longer optional. It has emerged as a method of business operation sought by all corporations. Korea has also witnessed the emergence of various e-marketplaces that engage in B2B e-commerce (as of August this year, roughly 170 B2B e-marketplaces are in operation or under construction). The number is expected to go up sharply in future.

The Korea Fair Trade Commission (KFTC) has continued its competition advocacy role in this field, improving relevant regulations in the logistics sector to prevent regulations applied to conventional businesses from posing obstacles to advances in e-commerce. In addition, it has enacted and enforced the Guidelines for Consumer Protection in the Context of Electronic Transactions, reflecting consumer opinions and the OECD Guidelines issued in Dec. 1999. The Guidelines are designed to block consumer frauds, which can easily arise due to the fact that e-commerce does not involve face-to-face interactions.

It is necessary for competition authorities to closely analyse the unique nature of e-commerce, its trend in transactions, market structure and future prospects with a view to actively tackle possible consumer injuries and anti-competitive conduct in this area. The KFTC basically believes that conventional competition law can be applied to e-commerce as well. However, it deems that further studies are in order, clarifying the specific ways to apply competition law, since e-commerce constitutes an emerging market and competition authorities have little experience in this field.

### **2. General Competition Issues**

#### **2.1 *Market Distinction between E-commerce and Traditional Outlets***

While e-commerce is growing fast in Korea, it is still at the fledgling stage. In addition, there are only a handful of competition law enforcement cases in this area. As such, there are no clear standards in distinguishing the two markets. However, the following factors should be taken into account, using the concept of substitutability, when defining relevant markets under competition law.

- reliability of settlement tools in online transactions, including credit cards and electronic cash;
- on the consumer behaviour side, the existence of consumers who are busy and thus have relatively little time to spend in shopping;

- ease or difficulty of Internet access based on age groups.

## **2.2 *Expansion of Geographic Market***

Most online sellers are currently at the stage of installing e-commerce infrastructure including delivery systems, which limits the scope of geographic market. However, the size of geographic markets is expected to increase in future. On the international front, foreign markets could be included in the geographic market, when problems of delivery time and cost, taxation including tariffs, and language barriers are resolved.

Domestically, the concept of relevant geographic market can be divided further into the market from the consumer perspective and the market on the supplier side. For example, the geographic market could be expanded if a consumer makes purchase from Seller B instead of Seller A who is geographically more proximate in spite of price differences, delivery costs or delivery time. In this regard, products in file format are highly likely to see an increase in the size of geographic market, since they can be delivered online. From the supplier side, geographic markets could increase in size if suppliers establish sales websites in various locations. However, problems of price differences, delivery costs or delivery time should first be resolved in this case as well.

## **2.3 *Price Dispersion***

In Korea, the phenomenon of price dispersion has occurred in B2C e-commerce. This seems to result from a lack of information on price, given the initial stage of development on both the supplier and consumer sides, and the priority placed on convenience over price dispersion by consumers using B2C e-commerce. Therefore, the role of competition agencies at the current stage would be to offer sellers incentives to provide information to consumers. This phenomenon is likely to disappear when transparency in price is enhanced, competition is promoted, and asymmetry in information is removed as the B2C e-commerce market takes hold in Korea.

## **2.4 *Cases of Anti-competitive Conducts by Traditional Distributors against E-commerce Rivals***

To date, there have been no cases where the KFTC detected and took steps against anti-competitive conducts of traditional distributors against e-commerce rivals. However, the conflicts between the association of publishers and Internet firms over the fixing of book prices recently sparked heated debates in Korea. In addition, there was a case where a car manufacturer banned its dealers from engaging in transactions with online companies. In this case, the dealers concerned were not independent operators, but were only assigned with management, which is not covered by Korea's competition law. If the dealers had been like those of foreign ones, the KFTC would have rendered a different judgement concerning the case. The KFTC plans to vigorously enforce competition law against conventional distributors or manufacturers obstructing the sales activities of online companies, by conduct such as the suspending product supply in order to discourage discounting by Internet firms.

### **3. Network Dominance**

#### **3.1 *Creation and Strengthening of Dominant Position through Network Effects and First Mover Advantages***

The creation and/ or strengthening of dominant position through network effects and first mover advantages could be governed by Article 3-2 (Prohibition of Abuse of Dominance) of the Monopoly Regulation and Fair Trade Act (MRFTA). In this respect, the KFTC recently commissioned a consulting service on the current situation in essential facility sectors and the need for amending the legal framework in order to introduce the essential facility doctrine under the MRFTA. More specifically, the Commission sought to outlaw the blockage of access to networks by network owners/ operators when these networks constitute an essential element of operation for rival firms.

#### **3.2 *IPR protection***

Article 59 of the Monopoly Regulation and Fair Trade Act stipulates that this Act shall not apply to any acts which are deemed as an exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the Trademark Act. However, the application of this Article is confined to the legitimate exercise of intellectual property rights. If the exercise of an intellectual property right falls within the ambit of an undue exercise or abuse of intellectual property rights, thereby restricting competition, the KFTC can apply Article 23 and/or other related provisions of the Monopoly Regulation and Fair Trade Act. There have been several cases where the KFTC has taken such measures. For example, the copyright contract between "Mincom" and Applied Learning International Inc. of America had a clause stipulating that "Mincom cannot establish sub-agents without the written agreement of Applied Learning International". It was deemed an unfair trade practice and the KFTC ordered a correction of that clause.

In a related move, the KFTC enacted the Guidelines on Review of Undue Exercise of Intellectual Property Rights in August of this year, designed to prevent the abuse of IPRs including business method (BM) patents in the field of e-commerce. The Guidelines provide specific examples of undue exercise of IPRs including BM patents, such as the abuse of dominance, transactions with conditions attached, improper concerted acts, etc.

#### **3.3 *Problems of Free-riding and Exclusive Dealings of B2B Exchanges***

Determining the anti-competitiveness of exclusive dealings by B2B exchanges as an entry barrier to network, and the proper extent of exclusivity for the purpose of protection against free-riding could be governed by the essential facility doctrine. That is, refusal to deal by B2B exchange against a third party could not be justified when the B2B exchange concerned is essential for the business of the third party, there is no other alternative distribution channels, and it is legally or economically impossible to establish a new exchange.

### **4. Enhanced Opportunity for Co-ordinated Effects**

It is a lot easier in B2B markets and exchanges to exchange information on price, production, cost, and strategy formulation and to detect cheating than in the offline environment. This opens the door for increased possibility of strategic cartels. In this regard, the following could influence the creation of

cartels: whether the information exchanged is already available; when the information is exchanged; whether the exchange of information on rival firms could be blocked because of security devices such as firewalls, etc. Given this, further reviews are necessary to find out whether it is technically feasible to suppress chat rooms and erect Chinese walls in order to prevent participants learning in a timely fashion about each other's activity.

## SWEDEN

### 1. Introduction

In many areas technological development can be expected to influence competition conditions. The transparency it brings about can lead to a sharpening of competition and thereby be of benefit to customers. However, transparency can also lead to co-operation between companies which restricts competition by using the new technology such as passwords and firewalls. One area which can be expected to have a substantial impact on competition in many markets is e-commerce. This is the background to the fact that the Swedish Competition Authority is devoting particular attention during autumn 2000 to the issues raised by e-commerce.

### 2. Computer density and computer maturity

The issue is to what extent Swedish consumers and businesses have access to the new technology, knowledge and infrastructure required for e-commerce to be feasible.

Five years ago approximately 1 percent of the Swedish population had access to the Internet at home. In September 2000 every second home in Sweden had access to the Internet. Half of the households with access to the Internet have had it since 1998. In international terms this is a very high proportion. The proportion of Swedes with access to the Internet both at home and at their place of work is, as is the case in Norway and Denmark, also amongst the highest in the world.

Over the last six months, approximately 31 percent of the Swedish population have searched for products over the Internet. Approximately half of these made a purchase. During the first quarter of 2000, sales through e-commerce increased by 30 percent. This trend continued during the second quarter, but the rate of increase declined to 19 percent. However, these increases started from low levels. During the second quarter of this year, e-commerce accounted for barely two percent of total retail sales. Measured in terms of annual turnover this corresponds to SEK 6.2 billion. Although this figure is low, it does put Sweden at ninth place internationally and in per capita terms Sweden ranks among the leaders in the world.

The Swedish mobile telecommunications market is well established. At the end of August 2000, around 65 percent of the Swedish population had a mobile telephone subscription. Within the EU one out of every two individuals has such a subscription. The widespread use of mobile telephones in Sweden may have an impact on the future of e-commerce when Wireless Application Protocol (WAP), a means of communication over the Internet via mobile telephone, is introduced. It is difficult to estimate so far the scope of mobile e-commerce. According to some experts, however, it is the development of digital TV which will create the best conditions for e-commerce in consumer markets. At present digital terrestrial transmissions reach approximately half of the country's inhabitants. The transmission network for digital TV will shortly be extended to provide full coverage. The proportion of households receiving programmes transmitted by satellites is also increasing.

In addition, rapid growth in the broadband network will lead to many more Swedes having high-speed access communication via the Internet. This should promote the use of the Internet still further and also as a result e-commerce. With increased access to broadband, it will be easier to buy traditional products through e-commerce. Communication via broadband will also make it possible to buy completely new types of digital products and services such as computer programs, music and videos and have these rapidly transferred straight into computers.

### **3. What rules apply to e-commerce?**

All trade and commerce is surrounded by rules in order to ensure that it functions as effectively as possible. The buyer-seller relationship is regulated by a system of laws governing rights and responsibilities of the respective partners in the event of delays in payment, faulty goods or late delivery. There is also market legislation, the aim of which is to restrict companies from side-stepping the mechanisms of the market economy by such means as misleading marketing, unreasonable sales conditions or anti-competitive co-operation.

An EC directive on electronic commerce was adopted in June 2000 (2000/31/EC). The directive aims to ensure that information services, in particular electronic commerce, can benefit from the internal market principles. A working group has been formed to implement the directive into Swedish law. In 1997 an EC directive on consumer protection in distance selling was adopted (97/7/EC). The Swedish Distance Selling Act, which entered into force on the first of July 2000, is based on the latter directive.

Otherwise, in all essentials the same rules apply to e-commerce as to other forms of commerce. One exception is, however, trade in products delivered via the Internet straight into the purchaser's computer, where there is no legislation governing the rights of the buyer and seller. There are also general problems in applying rules, which are largely connected to the technology. One example are the difficulties that may occur in e-commerce concerning who has actually ordered a product. Mail order generally requires that the customer sign an order, which is not possible in electronic commerce.

The above applies to purchases within Sweden. But e-commerce creates opportunities for substantial cross-border trade. In such international transactions, the question can arise as to which country's legislation should be applied in the event of a dispute and in which jurisdiction the dispute should be heard.

### **4. Commercial obstacles to e-commerce**

In what follows we shall identify some well-known factors which can impede the development of e-commerce.

#### **4.1 Consumer confidence**

Judging by investigations carried out so far, consumers are in general cautious when it comes to e-commerce despite having good access to the Internet. There may be a number of reasons for this. Payment often takes place in advance in e-commerce. As a result buyers are often deprived of their legal rights of withholding payment as security for possible counterclaims arising from e.g. defects or delays in delivery. The absence of a verbal contact or written agreements or receipts can put the consumer in a weak position in the event of a possible dispute with the seller, or at least there is a risk of this happening. Goods cannot be examined prior to purchase, which can create the risk of unwelcome surprises when they arrive. Another issue concerns the use of credit cards as a means of payment where so far the possibility of

signing for payment via the Internet does not exist, which would of course appear to restrict the development of e-commerce.

#### **4.2 *User friendliness***

Shortcomings in user friendliness may well have a restrictive effect on the development of e-commerce. Apart from access to technology and infrastructure, knowledge is also required on how the technology should be used for e-commerce to be feasible. As mentioned earlier, e-commerce can be expected to make a major breakthrough when digital and interactive TV start to be used on any scale.

#### **4.3 *Lack of competence***

Lack of competence, seems to be another obstacle, at least among pure web shops. Quality, logistics, service and access to justice are examples of important consumer values. Traditional retailers have learned to apply to such values through centuries of merchandising. This knowledge does not seem to have been translated into the new medium of e-commerce. Just providing a new technology that can be used for buying goods and services, and nothing more, will not satisfy customers.

### **5. *E-commerce from a competition perspective***

E-commerce helps to create greater competition. But there are indications that competition related problems can occur as a consequence of an increase in e-commerce. One example is a refusal to supply. Other factors, such as a higher risk of cartel formation are theoretically conceivable, but it is still unclear to what extent such effects may have occurred.

#### **5.1 *Refusal to supply***

The Swedish Competition Authority has received a few complaints about suppliers who have refused to supply goods to e-commerce companies. Refusal to supply constitutes an important reason for a number of e-commerce companies to form their own representative organisation, the Swedish Association for E-commerce.

#### **5.2 *Cartel formation and price discrimination***

For both consumers and companies, e-commerce makes it easier and faster to get access to information about price and product specifications and other purchasing conditions. In theory competition should as a result be promoted. The new e-commerce sites have sometimes been compared with older traditional market places, characterised by good opportunities to examine the range of products available and their purchasing conditions.

Increased transparency may, however, give rise to negative consequences. Transparency can also benefit companies and this can create incentives for price co-operation between them. Technology also makes it easier to check whether a company which is a part of a cartel is following its rules. New technology creates new opportunities for companies to rapidly communicate with each other without the public or its agencies being able to monitor this.



New technology also makes it simpler for companies to get information about their customers' preferences, willingness to pay and buying behaviour. Such information may be used as a basis for differentiated pricing and thus set prices at their maximum when demand and willingness to pay are also at their highest. It thus becomes possible to use price discrimination in order to maximise company income. In the prevailing situation, it is unclear to what extent e-commerce has contributed to an increase in cartel formation or price discrimination on the Swedish market. The issue needs further investigation and needs to be followed up as the market for e-commerce develops and grows.

Self regulation is an efficient way of improving the behaviour of undertakings on different markets. One example, from the area of e-commerce, is the quality certification of e-commerce sites. It is, however, important that self regulation is not used in a way that leads to, or supports, infringements of the Competition Act.

### **5.3 *Network effects***

The issue of the negative consequences of network formation may become increasingly apparent as e-commerce develops. Those who are building up networks for data communication, e.g. e-commerce portals, are in a good position to steer the commerce taking place through the portal. A dominant position can also occur, making it possible to eliminate or refuse entry to competitors.

## **6. Current investigation**

From the consumer viewpoint, it is a matter of priority to carefully monitor the development of e-commerce and not least the effects it has on competition. It is against this background that the Swedish Competition Authority started in September 2000 a pre-study, the aim of which is to describe the effects of e-commerce on competition by studying its impact on different industries. What will be studied is company behaviour and the structural impact that e-commerce may have. In the first instance this will be an exploratory study. Apart from what has been mentioned earlier, it is still uncertain what additional competition problems will be analysed. A subsidiary aim is to try to determine what new demands e-commerce imposes on the Swedish Competition Authority and other bodies promoting competition.

The industries to be studied have been chosen on the basis of the areas which the Swedish Competition Authority is currently giving priority to, namely non-durable goods and the market for building materials. Travel services are the third area selected in order to provide some coverage of the service sector.

## UNITED KINGDOM

### **Aim**

The aim of this paper is to give a general overview of OFT [Office of Fair Trading] thinking on competition issues arising both on the transaction side of e-commerce, to include both business to business and business to consumer transactions, and in relation to the infrastructure and access devices necessary for e-commerce.

### **1. Introduction**

The commissioning paper suggests a focus for discussion not on all the actual or potential competition problems that may arise from e-commerce, but on the competition issues unique to this form of business. In fact, while OFT recognises that e-commerce may require us to apply the tools of competition law in ways which are appropriate to the particular idiosyncrasies of this dynamic channel to market, the competition problems which arise are familiar ones. They are likely however, to manifest themselves in different ways, which may require us to adapt the current tools of analysis to the new environment.

OFT's main consideration is to ensure consumers have choice and value for money in e-commerce markets. This is mainly achieved through policing anti-competitive behaviour. There is a delicate balance to be maintained between the risk of inappropriate intervention (or intervention with only short term goals in sight) and the abuse of powerful market positions distorting developing markets. While we are ready to intervene where necessary to protect and encourage the development of competition, we are also well aware that pre-emptive and ill-judged intervention in dynamic markets of this type can damage competition in the long run and undermine incentives for innovation and investment.

### **2. Background**

While OFT so far has investigated a limited number of cases related to e-commerce, we have carried out a considerable amount of preparatory work in this area, in an attempt to identify those issues which e-commerce is likely to raise, and to consider, looking forward, whether the tools at our disposal are capable of capturing competition concerns which may arise in these markets. This work is being put into practice now, further to requests for individual guidance on various business to business proposals and in relation to complaints about refusal to supply on-line traders. In addition we are closely following and contributing where appropriate to the European Commission's work on pan European business to business and business to consumer ventures.

The Office has engaged in research and consultation on: barriers to competition in the e-commerce infrastructure; e-commerce and its implications for competition policy (at the retail and business to business end) and we plan a further study to examine how to apply the tools of analysis, such as market definition, to these dynamic areas in the most appropriate and effective way.

### **3. Infrastructure**

Our study<sup>1</sup> aimed to identify potential barriers to competition in e-commerce. The terms of reference for the study were focused on 'process e-commerce' – that is developments in the infrastructure and access mechanisms necessary for online merchants to deliver e-commerce services to consumers. The aim of the study was to:

- examine the emergence of new access technologies and devices;
- assess how companies are adapting to take full advantage of these new developments and how markets are likely to develop as a result;
- set the context in which regulatory authorities currently assess competition issues in fast-moving markets;
- consider how any issues identified might be addressed if they arise, and whether the regulatory regime is capable of dealing with barriers to competition in this market.

### **4. Connectivity and Internet Access**

The ongoing introduction of new tariff packages suggests the UK ISP market remains competitive. However, the competitiveness of this market depends heavily on the conditions in the "backbone" market, because connectivity is an essential input for offering Internet access services. Concern about the emergence of a big player capable of dominating the provision of transit and forcing prices up, led the EU, in tandem with the US competition authorities, to block the proposed merger between MCI WorldCom and Sprint. On 28 June the EU Commission ruled against the deal, because it "would have led to the creation of such a powerful force that both competitors and customers would have been dependent on the new company to obtain universal Internet connectivity." This would have allowed the merged company to behave independently of both its competitors and customers "and therefore to dictate conditions and prices in the market to the detriment of consumers around the world and particularly in the 15 European Union states." A similar decision was taken in the US, proving how national barriers are becoming less relevant and co-operation between antitrust authorities more necessary and effective.

### **5. Mobile Access to the Internet**

A number of mobile portals are being launched in the UK. Some come from independent service providers such as iTouch, a subsidiary of Independent Media and News, but most are owned by operators and retailers. BTCellnet already has Genie in place, Vodafone and Vivendi will present their joint portal Vizzavi in August and Carphone-Warehouse, together with NTT Docomo, has recently started Mviva. The rush to launch services is likely to reflect the importance of first-mover advantage and become the gateway through which potentially millions of British mobile users will access the Internet. This is already causing competition concerns because mobile operators can exploit their position in the market to favour their portals, by offering handsets pre-programmed to use their content. These concerns led OFTEL, the NRA, to compel BTCellnet to reveal the code for changing the default portal on its new WAP phone, after receiving a complaint that it was locking-in its customers by setting the handsets so that users would access the Internet only through its Genie portal.

Mobile network operators are extremely interested in the development of m-commerce as this could provide them with alternative revenue sources. Revenues from carrying traffic are expected to decline, as competition keeps pushing prices down, and operators are looking for different ways of boosting their profits. Earning commissions from sales transacted via the Internet or directly by offering a wide range of services that can be accessed anywhere and at any time - charged to the monthly bill, are perceived to be the main opportunities. Moreover network operators can exploit their knowledge of their customer base, and in particular their ability to locate precisely their users, to make personally tailored offers and supply localised services. For example, they can provide users with information on restaurants or cash points situated in the area that they are in. This capacity for personalisation is likely to raise issues related to the extent to which operators should be allowed to use information on their customers, under data protection laws, and to provide it to other companies. It also raises potential competition issues, since access to such customer databases offers a competitive advantage.

While it shows great promise for the future, mobile-Internet is still far from being a success in the UK. Mobile access to Internet has become a reality only very recently through the launch of WAP enabled handsets by BT, Vodafone and Orange and the take-up of around 300 000 has been rather disappointing so far. The slow take-off of m-commerce appears to be the result of a combination of limited availability of services, low awareness among consumers of the services accessible through handsets and the low access speed of current technology. The biggest test for m-commerce will be the launch of new, faster technologies within the next 12-18 months.

## **6. Market Structure**

New technological developments have precipitated a change in the way companies are structured. The drive towards bringing access closer to the customers will encourage operators to expand their networks. Some technologies may become interchangeable, so that companies in previously separate markets will be competing directly against each other. Companies may increasingly provide vertically integrated offerings.

Joint ventures, mergers, take-overs and alliances are announced daily. Some are the result of the pressure felt by "old-economy" companies to transform into "new-economy" ones; whereas others are signals of the consolidation which is taking place in the more mature sectors of the market. Examples of this trend towards consolidation are:

- NTL's take over of Virgin Net's, Virgin ISP, in July. The deal will see NTL's customer base grow up to one million, transforming it into the third biggest ISP in the UK;
- Vivendi's \$29.4 billion purchase of Seagram, the Canadian drinks and entertainment group. The deal is aimed at combining Seagram's entertainment holdings with Vivendi's Internet and telecommunications network;
- Vodafone's agreement with Vivendi for the launch of a joint mobile Internet portal.

These developments may well be beneficial to the development of competition – convergence may lead to increased competition. Competition between middleware and application developers may spur innovation. Expansion and consolidation may enable companies to compete more vigorously than otherwise possible.

However, such concentration is not proceeding unchecked. In July the US Federal Communications Commission pressed AOL and Time Warner to offer a more concrete timetable for

opening access to their cable systems as part of the necessary preconditions for the approval of their merger. In Europe the EU Commission blocked the planned acquisition of Sprint by WorldCom, as it determined that the merger would have created a dominant position in the market for Internet back-bone.

## **7. Competition Issues**

Competition issues may continue to arise where there are players with significant market power and the capability to affect the competitive landscape. These might include:

- vertical integration and bundling of content with services and access;
- refusal to license Intellectual Property Rights;
- potential for emergence of new dominant players in electronic markets where barriers to entry are high;
- leverage of market power position from one market into another.

Abuse of market power in this fast-developing market could, if left unchecked, have a wide-ranging impact in a relatively short space of time. Thus where there is a need for action to correct any anti-competitive behaviour the timescale for assessing the case should reflect the pace of the market. Equally, market power in fast-developing markets might be short-lived, so care is needed when considering regulatory action.

## **8. Transaction e-commerce**

We have also undertaken research into the implications of e-commerce for competition at the business to business and business to consumer end and issued a discussion document on the subject in August<sup>2</sup>.

Our work so far has shown that the dramatic growth in transactions over the Internet may change the nature of e-commerce in a variety of ways. For example in some cases it may simply represent an additional distribution or marketing channel, while in others it may create new marketplaces, such as on-line auctions and exchanges. Many characteristics of e-commerce might be expected to have pro-competitive effects. For example, competition between sellers will tend to be more vigorous when search costs, menu costs and transactions costs are low. However, other characteristics may facilitate certain types of anti-competitive behaviour.

While we are not persuaded at this stage that e-commerce will give rise to entirely new forms of anti-competitive behaviour, or raise issues that cannot be captured by the existing legislative framework, there may be areas that require close monitoring. In particular e-commerce may have implications for the nature, prevalence and monitoring of a variety of forms of anti-competitive agreements and conduct such as excessive pricing, collusion, price discrimination, and refusal to supply.

The very nature of e-commerce may mean that monitoring itself will be inherently difficult and as a result in some cases it may be more difficult to objectively assess alleged breaches. In investigating any such behaviour we should, as always, need to consider the facts of each case on its own merits in relation to the provisions of the legislation and with regard to EC jurisprudence.

## 9. Market definition

B2B or B2C e-commerce is likely to raise the following market definition issues:

- In some cases e-commerce may create new markets for the purposes of competition policy, but on other occasions it may simply constitute a new sales channel, which competes with traditional sales channels, lying within the same market.
- It is unclear whether product markets will narrow as a result of increased scope for price discrimination, or widen as a result of various changes in search costs, switching costs and economies of scale that are expected under e-commerce.
- It is probable that geographical markets will become wider as a result of the reduced importance of geographical location for transactions between buyers and sellers.

The current speed of change in e-commerce markets may have implications for market definition. Such rapid changes may affect the degree to which e-commerce services and traditional services compete, thus affecting the appropriate delineation of the product market, as buyers and sellers alter their behaviour. This may limit the relevance of using past data when analysing current (or future) market definitions. It may also limit the degree to which market participants and competition authorities can rely on precedent when assessing relevant markets. OFT has commissioned further research into the methodological approach to market definition in cases of suspected dominance.

Over the longer term, data may be more readily available to competition authorities, given that transactions are carried out electronically. However, because these data may not be preserved as a matter of course consideration may need to be given to prescribing practices for keeping electronic business records for particular types of e-commerce operation (for example, online marketplaces).

Within the current regulatory framework, it is not just competition authorities that need to be able to define relevant markets. Interested parties also need to do so in order to assess in advance whether their conduct will contravene competition law. In such a fast moving market, companies may need to adopt compliance procedures as a matter of course before bringing product to market to minimise the risk of infringement and to provide for due diligence.

E-commerce could potentially widen geographical markets, as location becomes less of an obstacle to trade between parties. This will raise important jurisdictional issues, and increase the need for co-operation between competition authorities in different countries. For example, given the global nature of e-commerce infrastructure, communications and transactions difficulties may arise from the difference between countries' privacy legislation and general regulatory regimes. Such local characteristics, in addition to language, currency, delivery and taxation differences may limit the definition of global markets for B2C transactions, while the more sophisticated B2B traders will more easily overcome these market boundaries.

## 10. Price discrimination

E-commerce has a number of characteristics that might be expected to facilitate price discrimination, both in the B2C and the B2B arena. The direct one to one nature of many transactions may enable the seller to more easily price to each individual customer at that customer's maximum willingness to pay. The growing use of auctions and exchanges within online marketplaces allows the seller to extract the maximum price offered for a good, without setting a firm price. Third-degree price discrimination may

be facilitated by the use of 'cookies' alongside detailed customer databases, which enable companies to tailor their offerings to different categories of customers. The possibility of price discrimination offered by e-commerce might result in smaller or more segmented relevant markets.

Although price discrimination can be efficient and beneficial for welfare, it may also both distort competition and facilitate excessive pricing. On-line companies are more easily able to gather and even share sensitive information about customers and their shopping habits. Nevertheless, this should only concern competition authorities when there is market power. Market solutions, such as the ability for individuals to conduct searches, will constrain this behaviour.

There is a strong probability that it will be harder to apply competition law on price discrimination to e-commerce. Market segmentation may make the analysis harder, but the main problem is likely to be effective monitoring and market intelligence, and where it facilitates (e.g.) excessive pricing, allocating costs objectively.

## **11. Predation**

It can be difficult to distinguish predatory behaviour from vigorous competition, and this problem may well be exacerbated in e-commerce markets. The core tests for predation are: prices in relation to costs<sup>3</sup>, intention and feasibility; and given that many e-commerce players might price below average total costs (alongside the frequent exit of other players) their behaviour might be inappropriately construed as predatory in some cases.

The dangers of inappropriately assessing predation stem from two main problems in e-commerce markets. The first is determining whether short-term losses are consistent with long term profitability within the new business models that e-commerce demands. An inherent characteristic is the need to invest sunk costs (and short term losses to the extent that prices might even fall below average variable costs) in creating an established brand and consumer loyalty in the face of high uncertainty. In terms of assessing the feasibility of alleged predators to alter the market structure, there is considerable doubt about the applicability of traditional NPV analysis.

The second problem is establishing what the optimal price structure (and the life cycle) should be for companies in new e-commerce markets. This stems from the problem the industry is usually characterised by high fixed costs (and very likely economies of scale) and low marginal costs. In such markets it is difficult identifying costs in the first place and often more difficult allocating costs across different products and markets in a meaningful way.

## **12. Vertical restraints**

The use of vertical restraints is likely to manifest itself in e-commerce as a result of more integration by suppliers into retailing their own products, the development of new intermediaries, increased buyer power for downstream firms, wider geographic markets, and increased ability for suppliers to monitor directly the behaviour of their retailers. The competition analysis issues raised by vertical restraints within e-commerce are familiar and are likely to take the following form:

- Implications of 'first mover' advantages. Short-term foreclosure, achieved through exclusive vertical agreements, can potentially have significant long-term effects where 'first mover' advantages are important, for example where there is an installed customer base.

- Evaluation of selective distribution systems. The most common competition complaint in the e-commerce area currently relates to e-commerce operators being refused supply of products, when they are readily available to distributors in traditional sales channels. Under EC competition law, selective distribution would usually be exempted from Article 81<sup>4</sup> so long as the criteria adopted for choosing distributors are objective and qualitative, and there is no restriction placed upon passive sales by distributors within the system to other distributors' customers. By contrast, restrictions on active sales are considered acceptable.<sup>5</sup>

Differences between e-commerce and traditional commerce raise difficulties for applying the same qualitative criteria to both traditional and e-commerce retailers. In addition, it is far from clear how one would distinguish an 'active' from a 'passive' sale in the context of e-commerce. The conditions employed for assessing selective distribution may therefore require refinement as e-commerce develops as a sales channel.

### **12.1 Refusal to Supply Access**

Nevertheless, refusal to supply access is likely to have implications for competition in e-commerce markets.

- Access to online marketplaces. Where an online marketplace is owned by a number of the major buyers or sellers in a market, there is a risk of third-party buyers or sellers being denied access to the market, or alternatively being given access only on such bad terms that they are unable to compete effectively.
- Access to portals. Links from portals can play an important role in bringing customers to a given e-commerce site and in encouraging trust in that site. Fair and non-discriminatory access to portals may thus play an important role in the success of e-commerce companies in certain B2C markets.
- Access to software design. For example, Amazon.com is currently engaged in a patent infringement case with BarnesandNoble.com for its 'one-click' software. If successful, Amazon may be able to preclude its competitors from using this feature, which could in turn limit their ability to compete.

## **13. Network dominance**

Many characteristics of e-commerce will tend to lower barriers to entry into both B2C and B2B e-commerce, reducing the potential for players to secure and exploit market power. These include, for example, lower search and selection costs on the buyer side, lower transactions costs, the reduced need for physical assets for many businesses, and the rapid expansion of the market. There is a balance to be struck between not inhibiting innovation, and not leaving intervention so late such that markets may be foreclosed.

There are, then, certain characteristics of e-commerce, and associated patterns of behaviour, that may tend to raise barriers to entry in e-commerce services. The most important of these are the following.

- Sunk costs of establishing customer loyalty. In the absence of a local customer base and physical sales outlets, and in the presence of potentially low buyer switching costs, reputation, branding and customer loyalty may become increasingly important, especially at



the B2C level where customers are relatively small and unsophisticated. These factors are known as 'neural real estate', as opposed to physical real estate. The sunk costs involved in developing such neural real estate may create significant first-mover advantages, and act as a barrier to later entrants.

- 'Tippy' markets. Online marketplaces are often characterised by 'network effects', which occur where a system becomes more useful to its participants, the more participants it has. In such markets, the strong players become stronger and the weak weaker as consumers refine their search for the technology that will ultimately prevail. Such markets are called 'tippy', meaning they can tip in favour of one particular firm, with a potential entrant facing large barriers to entry. These barriers will be particularly high in markets where liquidity is important and exacerbated where market participants are tied into the market via proprietary supply chain management systems.

There are a variety of ways in which these first-mover advantages can be reduced.

- Sunk costs of establishing customer loyalty. The ability of sellers to provide tailored offerings to long-term customers, based on information they have gained about these customers, could be reduced if customers were able to 'port' their own database entries from site to site.<sup>6</sup> At the same time, the importance of brand name for winning customer trust can to some extent be reduced by effective consumer protection legislation, or by other companies playing a quality assurance role.
- 'Tippy' markets. The tippiness of online marketplaces will be strongly affected by the ability of market participants to monitor different marketplaces and to switch easily between them. For example, in the C2C auction environment, biddersedge.com monitors a number of online auction houses on behalf of its users. This reduces the comparative advantage held by the larger auction houses (such as eBay.com) over smaller competitors and may help prevent the market tipping. Such intermediaries could potentially have a similar effect in B2B markets.

In order to carry out such a function, the intermediary will require access to the price information of all auction houses. However, this information is arguably proprietary and, in the US, eBay.com has successfully challenged the rights of biddersedge.com to use its proprietary price information. Such a ruling might be expected to serve to increase tippiness and market power.

Even where first mover advantages persist, they need not imply market power. High barriers to entry for e-commerce operators will not confer market power on incumbents if e-commerce operators compete in a wide product market that includes traditional commerce, and if barriers to entry into the traditional service are low. Likewise, even if the relevant market includes e-commerce operators only, high barriers relating to branding for 'pure-play' e-commerce operators (i.e. companies without any traditional market position) need not imply market power, so long as there are sufficient mix-play operators (such as Tesco Online) that are willing to leverage their existing brand name into an e-commerce context.

Increased buyer power (particularly of businesses) will also tend to limit the extent to which high market shares and barriers to entry will confer market power. E-commerce might be expected to increase buyer power for a number of reasons. First, it facilitates searching by buyers, and thus increases the credibility of threats to switch suppliers. Secondly, it facilitates the creation of buying clubs, often run by an intermediary, whereby purchasers combine their buying needs in order to increase their total buying power with suppliers. Thirdly, buyers may be able to design auctions (and specifically reverse auctions) to their own advantage.

On the other hand, where first-mover advantages do confer market power, they may be of particular concern in rapidly expanding e-commerce markets, since they will tend to result in current market power being maintained and enhanced into the future, rather than being transient as might be expected within such dynamic markets. While it is not an abuse under the Competition Act 1998 for a company to seek to create a dominant position, nor is the existence of that position an abuse in itself, the use of anti-competitive behaviour by dominant companies to foreclose markets to competition or conduct which has the consequence of stifling innovation, may be (for example in predation cases).

The extra difficulty is assessing, in a new and dynamic market, how an agreement is likely to stifle innovation via a dampening of the competitive process. We might know that an on-line exchange agreement produces large cost efficiencies which might give the OFT scope to exempt a given agreement. But such an action carries the possibility of making the market very “tippy” – and might prevent competing exchanges that would have in turn produced even better innovation exceeding the cost efficiencies<sup>7</sup>.

### **13.1 Collusion**

Internet technology could potentially offer an ideal micro-climate for collusion, due to increased communication and transparency in the market, as well as the potential for more frequent market interactions. In particular, collusion concerns may arise with respect to market design and ownership within both online marketplaces and joint Internet sales ventures.

- Information sharing. There are many benefits to interested parties access to some market data. As such, it would be inappropriate for a competition authority to prevent information sharing unless it raised a serious risk of collusion. There may be a role here for competition authorities to indicate the degree and types of information that may be shared. For example, the provision of historical sales data can have less impact on the potential for collusion than the sharing of current sales data.
- Market design. The way in which online marketplaces are designed, and their ownership structure, can have important implications for the ability of participants to collude. For example, where the operation of the market is taken out of the hands of major suppliers participating in the market, the operators will have an interest in enhancing the attractions of dealing in their market by keeping it free from anti-competitive practices.
- Forming Horizontal Agreements. It has been speculated that the increased use of electronic communication associated with e-commerce might make it easier to form or operate cartels. It seems unlikely, however, that undertakings wishing to form cartels have been prevented from doing so by the practical difficulties of meeting for a discussion. For some executives travelling the world to participate in cartel meetings is, until the moment of discovery, enjoyable. If the use of devices such as private chat rooms is to lead to more cartels it will probably be because it offers anonymity but this is not what participants in cartels necessarily want: to make participation in a cartel worthwhile an undertaking needs to know which other enterprises are committed. Chat rooms, in which it is common to assume other identities seem an unlikely forum in which to agree on cartels. As a means of arranging a cartel electronic communications also suffer from being easy to intercept and difficult to destroy. Although participants in cartels may well e-mail each other this is not necessarily associated with electronic commerce and seems no more likely to encourage cartels than the invention of the phone.

- Operating Cartels. Once a cartel has been formed the mechanisms of electronic commerce, through the introduction of greater anonymity and greater transparency may well make it easier to police the cartel and detect cheating. If this is happening then competition authorities may soon start to find examples of such policing in cartels that come to light through the normal mechanisms of whistleblowers or informed complainants. On the other hand we may find that technology develops to remove transparency by enabling suppliers to know their customers and to vary the prices and terms they quote according to what they know of the customer. This is an area that needs to be kept under review but it is probably too soon to start drawing firm conclusions.

Competition authorities may wish to consider how to employ market-monitoring search engine software, which might be used to track prices, sales and conversations in chat rooms, with the aim of detecting evidence of collusive behaviour.

## ANNEX A

### 1. Future work

In order to ensure that barriers to e-commerce remain subject to appropriate regulation the OFT proposes the following activities:

- continued and close liaison and co-operation through OECD and with the European Commission, and regular bilaterals with national competition authorities;
- a study into the nature of new media dynamic markets, including consideration of market definition in fast moving industries;
- continued and close co-operation with OFTEL (and other regulators with an interest in the converging industries) on matters of mutual concern through the Concurrency Working Party and regulatory working groups such as the Group of Three<sup>8</sup>.

## NOTES

1. Competition in e-commerce: A joint OFT/OFTTEL study, April 2000.
2. E-commerce and its implications for competition policy – Frontier Economics for OFT, August 2000.
3. Where prices are below the average variable costs of production, predation should be presumed; but the purpose of the conduct should also be simultaneously considered where prices are above AVC but below average total costs.
4. Under the Block Exemption Regulations, there is a presumption of legality for vertical agreements where the market share of the supplier does not exceed a threshold of 30 percent. Where the agreement contains an exclusive supply obligation, it is the buyer's market share that is relevant.
5. Active sales occur where a supplier makes an active attempt to sell into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer. (Commission Regulation (EC) No 2790/1999, Article 4).
6. Proposals such as the Platform for Privacy Preference (<http://www.w3.org/P3P>) facilitate such portability.
7. Or perhaps, because of liquidity reasons and network effects, one exchange is the optimal solution.
8. OFT, OFTEL and ITC.

## UNITED STATES

### 1. Introduction

Business-to-business electronic marketplaces (“B2Bs”) use the Internet to electronically connect businesses to each other. They have the potential to generate tremendous efficiencies, which can result in lower prices, higher quality, and greater innovation.

The Federal Trade Commission hosted a public workshop on B2B, “Competition Policy in the World of B2B Electronic Marketplaces” in June 2000.<sup>1</sup> Organised by the FTC’s Office of Policy Planning, the event included over 65 panelists, with input from more than 200 sources, and was attended by more than 600 people. Most of the participants were business people either operating or forming B2Bs and antitrust practitioners who have already been working with B2Bs to structure them so as to avoid antitrust problems. As the FTC’s Policy Planning Director Susan DeSanti noted at the workshop, the FTC is “very much in a learning mode.”

There was widespread agreement that just as competition plays a pivotal role in more traditional offline markets, it has an important role to play in the context of emerging online markets. Like other collaborations, B2Bs have the potential to raise antitrust concerns.

The Antitrust Guidelines for Collaborations among Competitors (“Competitor Collaboration Guidelines”), recently issued jointly by the Federal Trade Commission and the Antitrust Division of the Department of Justice,<sup>2</sup> provide a useful starting point for questions that those organizing or participating in a B2B e-marketplace should consider.

This submission reflects several key themes that dominated the FTC’s public workshop. First, there was widespread recognition of the potential for tremendous efficiencies. Second, antitrust practitioners report that when antitrust issues arise, they can generally be solved through practical solutions. Lastly, B2B electronic commerce is still a relatively new phenomenon; business people, attorneys, and regulators should keep abreast of developments.

### 2. Efficiencies

Administrative costs are the costs of effecting the transaction itself. These include the time and energy firms expend for everything from placing an order to issuing a check upon receipt of the goods. Regardless of the industry, these costs are uniformly described as substantial and uniformly thought to be subject to substantial reduction through B2Bs. The current phone and fax method that some firms use takes its toll in time and accuracy. Electronic transmission of such transactions can dramatically reduce both costs. In fact, decreasing administrative costs may be the most immediate and widespread effect of B2Bs.

Price transparency is the ability of buyers to see different prices and the ability of sellers to have their prices be seen by many buyers. By reducing search costs and fostering efficient bidding mechanisms,

B2Bs can increase price transparency. Buyers can save money when B2Bs make it easier to comparison-shop and to find more suppliers, while sellers can profit by having greater and cheaper access to more potential customers. In B2Bs that set their prices through catalogs, buyers can, with a few mouse clicks, compare the prices of several vendors of a given product. In B2Bs that host reverse auctions, a buyer can invite sellers across the globe to bid against each other for its business; likewise, sellers can auction items such as used machinery in B2Bs that allow them to reach more potential buyers – and higher sales prices – than before.

B2Bs can also let suppliers all along the supply chain know what the buyer wants and when, reducing inventory costs and delays. The process can be even more streamlined for businesses with automated inventory systems, which may be connected to a B2B so that the buyer's internal inventory system can more seamlessly convey the buyer's needs as they arise.

Joint purchasing can help reduce transaction costs through scale economies in purchasing and may produce other efficiencies. For example, some participants stated that small purchasers who purchase jointly through a B2B may be able to take advantage of quantity discounts and truckload pricing.

At this relatively early stage of B2B marketplace development, it is important to recognize that while some B2Bs are operational and have achieved certain kinds of efficiencies, many more are in the planning stage, with the potential to realize yet more and different kinds of efficiencies. Thus it may be too early to tell whether all of the promised efficiencies of B2Bs will be achieved.

### **3. Information Exchange**

Several participants were concerned that information-sharing agreements in the context of B2Bs could facilitate price coordination and thereby injure competition in the market for the goods and services traded on the B2B. As one panelist stated, "The Internet is ... an extremely efficient mechanism for exchange of information ... and that's only going to exacerbate the difficulties of identifying when it's collusive."<sup>3</sup>

Participants noted a variety of ways in which such information-sharing agreements through B2Bs could facilitate price coordination. They asked, for example, whether sellers in a concentrated market could agree to a practice that would let them see each other's bids in online B2B auctions, and whether that would allow them to tacitly fix prices or police cheating on a price-fixing agreement. These concerns were not limited to sellers' actions; they also questioned whether buyers could agree, through a B2B, to share information about their purchases of inputs such that each would know the other's cost structures, making it easier for them to collude on their selling prices. They likewise raised the concern that buyers could agree through a B2B to reveal to each other the input purchases they each have made, making it easier for them to police cheating on an output-fixing plan.

Panelists mentioned a variety of factors that would affect the analysis. For example, they noted the importance of market structure, of determining who is sharing information with whom, and of ascertaining the competitive significance of the kind of information being shared.

The panelists also discussed the efficiencies that information-sharing practices may promote and the impact those efficiencies would have on the antitrust analysis. They also discussed less restrictive alternatives, including segmenting online catalogs; restricting the information available to certain participants in online auctions; the use of nondisclosure agreements; and the practice of keeping sensitive information from board members employed by participants. They discussed whether such alternatives would adequately safeguard against competitive harm and whether they would sacrifice other efficiencies.

#### 4. Joint Purchasing

Monopsony is “market power exercised on the buying side of the market,” power that lets a buyer or buyer group “reduce the purchase price by scaling back its purchases.”<sup>4</sup> Thus, the Horizontal Merger Guidelines provide that “[m]arket power ... encompasses the ability of a single buyer (a “monopsonist”), a coordinating group of buyers, or a single buyer that is not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers (“monopsony power”) has adverse effects comparable to those associated with the exercise of market power by sellers.”<sup>5</sup> Under the classical theory of monopsony, a single buyer in the market reduces its purchases of a given input in order to lower the price it must pay.<sup>6</sup>

The workshop record reflects that not all B2Bs facilitate, or anticipate facilitating, joint purchasing. However, some workshop participants expressed concerns that B2B participants with a large enough market share might use the B2B to exercise monopsony power. Workshop panelists posited that the necessary coordination could be achieved expressly, through an agent, through consulting services that permit coordination of input purchases, or perhaps through tacit collusion.

One factor warranting consideration is whether the buying group in question accounts for a sufficient share of the buying market such that its purchases may influence the price of inputs sought. For this reason, workshop participants expressed the view that the joint purchasing of indirect inputs such as those used for maintenance, repair, or operations is generally less likely to raise concerns than joint purchasing of direct inputs.

Panelists emphasised that buyer groups driving prices down through monopsony power are distinct from buyer groups winning better prices through increased efficiencies, such as by enabling their suppliers to save money by selling to the group. In such cases, there may well be savings to suppliers warranting quantity discounts.

#### 5. Exclusion

Workshop participants expressed concern about the potential for disadvantageous treatment of the competitors of the participant-owners of particular B2Bs, which could take various subtle forms short of outright access denials. As examples, participant-owners might receive rebates or fees that are unavailable to their rivals; information might be presented in ways that give preference to participant-owners; and discriminatory operating rules or disadvantageous access to electronic interchange standards could leave rivals with reduced functionality or higher costs. (It should be noted, however, that the workshop record yielded little evidence of current exclusion from B2Bs. To the contrary, several panelists stated that their B2Bs would be open to all comers.)

Workshop participants expressed concern that denying or disadvantaging competitors in their access to a B2B e-marketplace could, in certain circumstances, raise their costs or maintain them above levels that otherwise would prevail. Antitrust scrutiny might be warranted if this harmed competition, not merely competitors.

Workshop participants noted the need to consider carefully the extent of the disadvantage that likely would ensue from denying or limiting access to the B2B, as well as the substitutes to which the disadvantaged firms could turn to avoid or mitigate the disadvantage. In this regard, some panelists stated that any such excluded rivals could readily reach suppliers or buyers through alternative mechanisms at comparable costs; other panelists, however, suggested that strong network efficiencies in an incumbent marketplace B2B might make alternatives unsatisfactory. Workshop participants likewise had mixed views on the ease, and hence the curative power, of entry. Some argued that entry of new B2Bs would



quickly provide ready alternatives for disadvantaged rivals, but others questioned the ease of entry into these markets. These are but a sampling of the factors discussed at the workshop, but they illustrate the nature of the concerns.

Some workshop participants asserted that some differences in treatment may be warranted to discourage free riding by non-owner participants, or as a means of ensuring access only by “qualified sellers.” These participants pointed out that exclusion or other access distinctions may be reasonably necessary to achieve the pro-competitive benefits of a particular B2B.

## **6. Exclusivity**

Finally, several panellists expressed concern that B2Bs may undermine the development of effective B2B competition by improperly requiring or persuading buyers or sellers to deal exclusively with particular B2Bs. They noted that this is an early but potentially critical stage of B2B market development, and that determinations made at the outset may shape B2B competition for years ahead. Of course, to the extent that exclusivity practices also give rise to efficiencies, they may prove on balance to be procompetitive.

Workshop panellists suggested a variety of potential competitive concerns that exclusivity practices can raise in the B2B marketplace. These include: (1) higher prices - some stated a B2B with market power could impose supracompetitive prices for their services; (2) less efficient service - some participants were concerned that a B2B with market power might be able to rest on its laurels and offer less functionality; (3) entry barriers - participants voiced concerns that exclusivity practices could sustain any existing market power over time by making entry more difficult.

In this regard, participants raised concerns about the potentially powerful network effects at work in B2Bs. Some panelists stated that network effects are strong in B2Bs, and several panelists suggested that whether multiple marketplaces develop to serve any one industry will be affected by the nature and magnitude of network effects in B2Bs in that industry. As one participant noted, “The attractiveness of the marketplace to the seller is often a function of the extent to which the marketplace is used by the seller’s major buyers. Sellers who wish to continue their relationships with these buyers will want to participate in the marketplace.”<sup>7</sup> However, others predicted that network effects will not lead to one dominant network in any B2B relevant market.

The FTC has studied network effects in other contexts. In 1995 the FTC conducted extensive hearings concerning competition policy in high-tech markets. Based on the relevant testimony, case law, and analytical literature, the Staff Report noted the pronounced advantage that network effects can give an incumbent operator, and cautioned that conduct that could contribute to achieving dominance warrants heightened scrutiny in settings with prominent network effects and switching costs.<sup>8</sup> Substantial network efficiencies and consumer switching costs might make it difficult for an entrant to start small, compete effectively, and grow to become a significant factor in the market.

## **7. Conclusion**

Antitrust analysis is a highly fact-driven inquiry, and development of federal antitrust policies will be based on the facts of the matters before the antitrust enforcement agencies. One such example is the matter of the B2B venture, called Covisint, formed by five large automotive manufacturers and two information technology firms to provide services for firms in the automotive industry supply chain. Covisint was the first B2B venture that the FTC reviewed following its notification under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). On

September 11, 2000, the FTC closed its investigation of whether Covisint violates Section 7 of the Clayton Act, which prohibits mergers and acquisitions that are likely to substantially lessen competition, and terminated the waiting period under the HSR Act. However, in a public statement accompanying the closing, the Commission stated that because Covisint i) was in the early stages of its development and had not yet adopted by- laws, operating rules, or terms for participant access, ii) was not yet operational, and iii) in particular represented such a large share of the automobile market, the Commission could not say that implementation of the Covisint venture would not cause competitive concerns.

This is an exciting time in the development of new ways of transacting business over the Internet. B2B electronic marketplaces clearly have great potential to increase business productivity and provide consumers with lower prices, higher quality, and greater innovation. Proper attention must be paid to antitrust issues now, and continuing attention must be paid to them as we go forward, in order to help ensure that B2Bs can deliver their promised efficiencies without threatening competition.

**NOTES**

1. Materials from the workshop, including all written submissions, are available on the FTC website at [www.ftc.gov/bc/b2b/index.html](http://www.ftc.gov/bc/b2b/index.html).
2. *Reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,160; also available at [www.ftc.gov/os/2000/04/ftcdojguidelines.pdf](http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf).
3. Transcript of “Competition Policy in the World of B2B Electronic Marketplaces” Workshop (“Workshop Transcript”) at 526 (comments of Harry First).
4. Areeda, Hovenkamp & Solow, *Antitrust Law* (1995), at ¶ 574.
5. DOJ & FTC Horizontal Merger Guidelines (April 2, 1992) at § 0.1.
6. See generally Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 *Cornell L. Rev.* 297 (1991).
7. See Written Submission of energy Leader, Workshop Transcript at 12.
8. 1996 Staff Report, ch. 9 at 13-14, 29 (discussing interface standards); available at [www.ftc.gov/opp/global.htm](http://www.ftc.gov/opp/global.htm).

## EUROPEAN COMMISSION

### 1. Introduction

The nature of the competition rules gives them an important advantage over most other legal rules: the competition rules set out general principles, which can be applied to the factual circumstances of a particular case. The general principles of market definition<sup>1</sup>, for example, are equally applicable to electronic commerce - the task of a competition authority is to determine how those general principles should be applied to the new fact patterns that emerge.

The following discussion of the issues raised in the OECD paper is based on the limited number of cases so far decided by the European Commission. It must, therefore, be tentative. It will require further elaboration and re-examination in the context of individual cases.

The general orientation of the cases is positive. Both B2C and B2B have the potential to increase competition and increase efficiencies, and developing a clear understanding of the possible benefits of B2B/B2C is important. The majority of cases have been unproblematic, leading to positive outcomes either under the merger regulation or Regulation 17.

The most important cases dealt with so far have involved concerns in respect of the infrastructure - particularly telecoms infrastructure - used for electronic commerce. Competition concerns have not focussed on the electronic commerce services themselves.

Examples of infrastructure cases include the Worldcom/MCI<sup>2</sup> and MCI Worldcom/Sprint<sup>3</sup> cases, and more recently, the Vizzavi<sup>4</sup> joint venture. In this latter case, although the concern was the potential creation of dominance over an e-commerce market (that for portals), the source of the concern was the parties' control over infrastructure - the mobile networks of Vodafone and the set top box infrastructure of Canal+.

Those cases where the main issue revolved around the electronic commerce service itself have been non-contentious: as such, it has often been possible to leave open the precise market definition. Such cases are not, therefore, necessarily a reliable guide for the future.

The following remarks on the assessment of transactions e-commerce can therefore only be seen as a preliminary view of the Commission's services. It should also be noted that the following observations are limited to cases where the Commission has taken a decision before 1 October and which are in the public domain.

### 2. Business to Business (B2B) Services

In the area of B2B electronic commerce the number of electronic market places and the volume of transactions are increasing exponentially. The investment bank Dean Witter, for instance, claims to track over 700 B2B sites now and expects this number to reach 2000 by the end of this year and 5000 by the end

of 2002. It estimates the gross online transaction volume to rise from \$ 200 bn in 2000 to more than \$ 1300 bn in 2002.<sup>5</sup>

Despite these impressive numbers, only a few cases have been notified to the Commission. The jurisdictional basis for the assessment depends on the nature of agreement. Some exchanges involve only a limited number of “founders” who will control the exchange. This will then usually constitute a full-function JV notifiable under the Merger Regulation. In addition, a subsequent analysis under Article 81/82 may be necessary even for cases which have been cleared under the Merger Regulation to assess issues which are not directly related to the structural operation creating the electronic market. More open systems with a large number of owners who will not have joint control will fall under Regulation 17 and be subject to an assessment under Article 81/82.

Irrespective of the legal basis, one should, before considering possible competition problems created by B2B electronic market places, not lose sight of the fact that in principle transactions e-commerce can have the potential to increase competition and to improve economic efficiency. One should therefore at this stage of the discussion not only focus on possible competition problems, but also aim at developing a clear understanding of the possible benefits of B2B electronic market places. This is important for two reasons: Firstly, because a clear understanding of the potential benefits can provide an indication of the amount of prudence that is required when stepping in with a regulatory action. And secondly, because an efficiency assessment is required in EC competition law to determine whether or not a restrictive agreement can benefit from an exemption.

## **2.1 Market Definition Issues**

In B2B cases the question whether e-commerce simply creates an additional sales channel seems to be less pertinent than for B2C. In the industrial field customers are often served directly by the suppliers or there are mixed forms of vertical delivery chains where bigger customers are served directly and smaller via wholesalers.

Therefore, the pertinent question for the definition of the product market will be the question whether the electronic market places compete with “normal” bilateral sales or whether they constitute a separate, narrower product market. The former would be likely if the parties used electronic market places only as an additional sales channel, the latter if the exchange offered additional services which clearly differentiated it from other sales forms.

These questions were being discussed in the Commission decision clearing the creation of a MyAircraft, a B2B exchange for airplane parts and service.<sup>6</sup> In this case, the Commission investigated the question whether this online exchange was part of the wider market for airline equipment or whether it constituted part of a narrower market for exchanges (exchanges for airline equipment).

The parties submitted that the relevant product market for this transaction would be the market for aerospace parts and services. E-commerce should only be considered as one segment among the many modalities by which companies transact business. Customers (e.g. including airlines and service providers) would remain free to decide how they want to conduct business with UTC, Honeywell or other suppliers e.g. by using MyAircraft.com, e-mail, fax, telephone etc. The notifying parties further explained that MyAircraft.com would increase the efficiency of communications between aerospace industry participants without changing the way transactions are conducted in the aerospace industry and without having an impact on the definition of underlying markets of aerospace parts and services.

The Commission’s market investigation revealed that third parties in general considered B2B e-commerce as one segment among the many modalities by which companies transact business. Some third

parties seemed to believe that it would not be relevant to distinguish between the general sector of e-commerce and the sub-segment of B2B e-commerce. In any case, third parties considered it premature to draw distinctions between B2B e-commerce in different aerospace parts and services and some even seemed to believe that it would be too early to draw any distinctions between B2B e-commerce in different industry segments.

The Commission also considered whether specific services offered by the exchange constituted product markets in their own right. In this case, the services offered by MyAircraft.com to its customers included supply chain management tools and e-procurement. To a large extent these services were considered to be an integral part of the services offered by MyAircraft.com in order to enable customers of the site to use MyAircraft.com as a purchasing or selling tool. However, some elements of the supply chain management service might seem to go beyond what is normally required by a user of MyAircraft.com in order to use this site to make business. This would in particular be the case for the inventory planning tools and forecasting tools. The market investigation revealed, however, that a majority of third parties considered that these services would be distinct components that may be offered separately or in combination but third parties did not at present consider that they form a distinct product market.

The results of the investigation seem to suggest that the B2B electronic market place constitutes part of a wider market. It should be noted, however, that in this case the precise relevant product market definition was left open since irrespective of the market definition chosen, the proposed concentration did not give rise to the creation or strengthening of a dominant position.

When looking at the definition of the relevant geographic market, the relevant question is likely to be the question whether the geographic market will be widened as geographic location becomes less important for the interaction between buyers and sellers. One can expect that such a widening of the geographic market will indeed be brought about by many B2B electronic market places. In the MyAircraft case, however, this question was largely irrelevant, as even the 'traditional' market for aerospace products and services is likely to be world-wide.

## **2.2 *Competition Issues***

### **2.2.1 *Network Dominance***

Network effects and potential problems of network dominance are more likely to present themselves in the B2B context than with B2C. Network effects are present when the value of a system to the individual user increase with the number of users. They can lead to market 'tipping' and the creation of a dominant position if the network effects are strong enough to induce all market participants to use the same network.

This problem could potentially arise in the context B2B electronic market places as the benefits will often increase with the number of buyers and suppliers which are linked to the same system.

The possible prevalence of network effects in B2B electronic markets creates a dilemma for competition policy. On the one hand, one needs to take account of the fact that a larger network can be the source of substantial efficiencies. The fact that exchanges try to sign up as many industry players as possible should therefore not be considered as a competition problem in itself. On the other hand, competition policy needs to acknowledge that network effects can lead to a 'tipping' effect which will substantially raise barriers to entry and expansion and which could create substantial market power for the owner-operator of the largest exchange.

The likelihood of such ‘tipping’ effects will depend on the value that buyers and sellers put on liquidity. Liquidity is in particular important for B2B electronic market places which operate as true exchanges. Such exchanges are characterised by the interaction of many buyers and sellers and the dynamic setting of a market-clearing price. They therefore require a sufficient amount of liquidity to operate.

It should, however, be noted that most B2B electronic market places do not constitute “exchanges” in the sense of a commodity or stock exchange, as there is no trade in standardised products at a market price in an anonymous transaction using intermediaries. Most B2B electronic market places are rather facilitating devices, which allow buyers and suppliers to engage directly in individual transactions. These transactions could take the form of an auction, a reverse auction or of a vendor catalogue. In all these cases, the critical success factor is not so much the volume of actual transactions, but rather the number of buyers and sellers, which are connected to the system, which actively monitor it and which could thus potentially make an offer. Network dominance will be harder to achieve in such a context. Any operator trying to build a dominant position would need to base this attempt not only on a ‘tipping effect’, but would also need to create other lock-in mechanisms such as exclusivity provisions. Lock-in could also be achieved where market participants are tied into the market via proprietary supply chain management systems. Competition policy should therefore carefully assess the design of the market and any ancillary provisions to ensure that the owner-operator does not try to enhance any existing network effects by contractual or other means.

Another “network issue” which could create competition problems relates to attempts of B2B electronic market places to vertically extend their scope from the tier one supplier-manufacturer relation downstream the supply chain with the aim to oblige tier 2, 3, 4 ... suppliers to use this market place as well (for all or for certain products). Such measures could strengthen the position of a B2B market place and spread it into other sectors.

The Commission’s limited enforcement experience with B2B electronic markets has so far not allowed us to clarify problems related to network effects. The “MyAircraft”-decision, for instance, notes that there are several e-commerce service providers in the market for aerospace part and services and that there would be no barriers to entry if other enterprises in the sector for aerospace parts and services wanted to set up a similar B2B market. A number of new entrants have already been publicly announced (aerospan.com, aviationX.com, Airparts.com, PartsBase.com). In addition, a number of airlines and manufacturers of aerospace parts and services have already launched their own web-sites.

### 2.2.2 *Co-ordinated Effects*

The likelihood of co-ordinated effects has been one of the most discussed features of B2B exchanges. The problem is raised as B2B electronic market places not only increase transparency in the market but also facilitate the exchange of sensitive information between competitors. A recent study for the OFT identifies three aspects of collusion as likely to create the highest uncertainty for business:<sup>7</sup>

- information sharing;
- market design;
- horizontal agreements.

These concerns are of course not new; the question is to what extent these concerns stemming from the “old economy” are valid in the “new economy”.

The first concern, information sharing, relates to the ability of the buyers or sellers to exchange or to discover sensitive information on prices and quantities. It is linked to the design of the system, in particular its openness in terms of individual data originating with other parties.

Whether or not information sharing creates a competition problem depends very much on the nature of the market. In EC competition law the exchange of sensitive and detailed information might as such be caught by Article 81(1) if it takes place in an oligopolistic market. The judgements of the European Courts of 28 May 1998 in the “Tractor” cases<sup>8</sup> and of 11 March 1999 in the “Steel Beams” cases<sup>9</sup> provide useful clarification in this respect.

From these judgements one can deduce that in addition to market structure the following elements need to be taken into account when assessing the potential impact of information sharing: the type of information exchanged, in particular the level of aggregation, the age of the information exchanged, and the frequency of information exchange.

B2B electronic market places are thus less likely to raise concerns if they only provide summary statistics (e.g. on trade volumes) to all market participants while individual data is only accessible to the owner of such data. Similarly, competition concerns are reduced when the system only allows access to historical data.

If access to sensitive data is indispensable for the running of the system (e.g. an auction market where buyers and sellers need to be informed about the current price quotations), the market design should ensure that only the minimum information required is divulged to all market participants.

The second concern, market design, relates to the ownership of B2B electronic market places and the rules governing them. Ownership can raise competition problems in particular where an online market place is controlled by a number of market participants. These owner-participants could then use the rules to exclude certain participants from the most efficient market place, thus putting them at a competitive disadvantage. An issue of both information sharing and discrimination could arise if certain market participants (e.g. the founders) would receive privileged information about transactions in the market.

When assessing problems of market design, one could formulate the hypothesis that online markets set up by a limited number of companies are less likely to create competition problems than exchanges which are set up by a large number of firms from the same industry. If online markets are set up by a limited number of companies they have an incentive to attract outside customers as quickly as possible. This requires that they set up an efficient and non-discriminatory system. This may be less the case for exchanges which are set up by larger parts of an industry. The founders may then actually have an incentive to exclude other competitors from their exchange.

The third concern, horizontal agreements, finally relates to the question of whether or not the participants in an electronic market can effectively bundle purchasing or selling volumes. The answer depends, in principle, on the same set of factors applying in “normal” joint purchasing or joint commercialisation situations. Therefore, the discussion of these questions in the recently published draft Guidelines on the applicability of Article 81 to horizontal co-operation<sup>10</sup> constitutes a good starting point for the assessment under EC law. It is notable in this respect that these draft Guidelines propose a safe haven of 15 percent market share below which a purchasing<sup>11</sup> or commercialisation agreement<sup>12</sup> would be assumed to either not restrict competition or to fulfil the conditions for an exemption. These safe havens would also apply to horizontal agreements involving e-commerce.

These safe havens could be relevant as many B2B electronic market seem to address the possible competition problems of horizontal co-operation by only allowing joint purchasing or commercialisation of



accessory products. An exchange for the widget industry would for instance only provide for joint purchasing of office supplies while the widgets themselves would be bought individually by the member of the exchanges. Such a set-up would reduce the risk of collusion significantly. It would also probably bring the joint buying activities within the boundaries of the safe haven provided by the Guidelines, as producers of widgets together are unlikely to have a market share larger than 15 percent in the buying market for office supplies.

The Commission's limited enforcement experience with B2B electronic markets has so far not found competition problems related to horizontal agreements. This could be due to the fact that the cases analysed so far have been notified under the Merger Regulation. The assessment under the merger rules necessarily has to focus on the market position of the exchange and its founders and the competitive relation between the founders. Additionally, an analysis under Article 2(4) of the Merger Regulation may be necessary to assess the risks of co-ordination between the purchasing/selling activities conducted by the founders within the electronic market place, and those activities remaining outside.

The competitive concerns raised by horizontal agreements, however, go beyond the relation between the founders. They mostly relate to the rules of the market (e.g. do they allow joint purchasing?) and the relation between the users of the systems (e.g. do they agree to engage in joint purchasing?). As these may change over time, it will not be possible to clear them once and for all in a merger clearance as ancillary restraints. Therefore, as with other concentrations, a subsequent analysis of these non-structural elements may be necessary under Article 81/82 for electronic markets which have been cleared under the Merger Regulation.

### **3. Business to Consumer (B2C) Services**

#### **3.1 Market Definition Issues**

##### **3.1.1 Product Market Definition**

Product market definition in electronic commerce cases does not require the elaboration of new principles or re-examining the existing ones. It may be the case, however, that existing tests, such as the hypothetical monopolist test, require data which are not yet available given the rapid changes which the sector is still undergoing. The Commission is considering what additional evidence may be best used in cases where more traditional data are not available.

In a line of cases beginning with *Telia/Telenor/Schibsted*<sup>13</sup>, the Commission distinguished between the following types of Internet content / services markets:

- Internet Advertising;
- Paid for content provision;
- Sales of specific products (e.g. books) via the Internet.

This three fold distinction, while being broadly helpful, will require detailed elaboration in the context of particular cases. Each potentially covers a great many product markets, the third being particularly important.

### 3.1.2 *Sales of Specific Products*

Focussing first on this latter category, the types of products available on the Internet may be classified as follows:

- sales of traditional products using an online medium (online exchanges of traditional goods, online CD and book sales);
- sales of electronic products that have potentially substitutable offline products (e.g. downloadable music, online supply chain management, financial services, information services).

Each of these raises slightly different market definition problems.

Online sales of traditional goods or services: Where products are being sold over the Internet that are also available through more traditional outlets (the first of the above examples), the Commission will need to consider questions such as:

- does the online sale of the product have characteristics different from the offline sale (availability of offline goods, range of goods available, product search, product delivery);
- is it possible to price discriminate between offline and online users of the good (bearing in mind that price discrimination here is being used for market definition, not an indication of anti-competitive activity).

This raises similar issues to those relevant to the distinction between mail order shopping and high street shopping. In a number of cases involving the setting up of Internet bookseller BOL by Bertelsmann and different JV partners<sup>14</sup>, the Commission has been able to leave this question open. No problem arose even on the market definition which was most unfavourable to the parties.

The Commission considered that two product markets could be relevant for the assessment of the operation:

- the market for the distant sales of consumer books (including book clubs, mail order and sales by Internet); and
- the market for the Internet sales of books.

The Commission did not therefore consider to what extent Internet sales of books are competitors to sales through traditional high street outlets. It is important to remember, however, that no competition problems were seen to arise even on the basis of the two narrower market definitions cited, rendering consideration of the wider market definition unnecessary.

In the CD Now case(JV.25), the parties claimed that retail sale to end-consumers of music products and retail sale and rental to end-consumers of home-video products include all forms of retail distribution (from conventional “brick and mortar” music and video stores to Internet sales). This was left open by the Commission.

The BiB<sup>15</sup> case also involved consideration of online and offline sales. This was a joint venture agreement between B SkyB (the UK pay TV operator), BT (the UK telecoms operator), Midland Bank and Matsushita. The object of the joint venture was to provide an interactive television service, in conjunction

with the digital pay television service of BSkyB, and also to subsidise the enhanced set top boxes necessary for that service. The Commission examined the question of whether the BiB service, which would include transactional, informational and entertainment elements, was substitutable for high street retailing, as the parties contended, concluding that it was not:

*(18) Retailing services represent only one part of the typical package of services forming digital interactive television services. E-mail, downloading of computer games, limited Internet access and information services will also form part of the package. There are economies of scope in the provision of such a package of services, because the infrastructure required for each of the individual services is the same. BiB will market this package of services and has entered into an agreement with BSkyB to this end. The promotion of an interactive service brand, distinct from that of the individual content providers, strongly suggests that BiB regards its own services as distinct from those of high-street retailing.*

*(19) The characteristics of the retailing services of the type to be offered by BiB and high-street retailing are markedly different. For example, the range of products or services offered on-line by retailers is likely to be far more limited than what is available in high-street shops. This is most likely to be the case with perishable goods, such as food, or bulky goods where storage and delivery charges would be high. There will be a price difference between goods or services purchased in the high street and those obtained via a package of digital interactive television services, if only on account of the delivery charge. In terms of price, it seems that consumers would be willing to pay a premium for the convenience of home shopping<sup>(10)</sup>.*

*(20) It follows from the above that the market for digital interactive television services is separate from that for the traditional retailing of goods and services in high streets<sup>17</sup>*

Whether the individual transaction based services within the wider BiB service would themselves compete with high street outlets was left open.

Online sales of electronically delivered goods or services: For the second of the above cases – sales of purely online products that are potentially substitutable for offline ones – the above questions related to the characteristics of online sales will still be relevant. In addition, the particular characteristics of the online product itself will also need to be examined.

Perhaps the clearest example of this type of product would be downloadable music. Here, there would appear to be potential substitutability for the sales of traditional CDs (both online and offline). However digitally distributed music as compared to music distributed using traditional media may have different prices, characteristics or intended use. Digital music is more flexible, in that it can be transferred and used in more situations than traditional media, but it also requires different equipment for playback than traditional media. The absence of a permanent medium and lower delivery costs may also lead to lower costs of production of the digital product. Analysis of consumer demand for these characteristics may lead to a conclusion that the markets are separate.

### *3.1.3 Online products having no offline equivalents*

Where online products that have no offline equivalents, market definition becomes more complex.<sup>18</sup> The distinction drawn in the Telia – Telenor – Schibsted line of cases between advertising funded content and paid for (subscription) content in part mirrors the distinction drawn in the television sector between advertising funded (free to air) television and pay television.<sup>19</sup>

Although commercial and single or dual financed public service television broadcasters compete for viewers, they do this having regard to their advertising revenues – the relevant market is therefore that of television advertising. In the television sector, the advertising market may be further subdivisible: different categories of viewers may be non-substitutable from the point of view of advertiser demand – there may, therefore, be narrower markets within the free to air television category depending on the demands of advertisers. Similarly, consumer demand for pay television services may be further distinguishable into separate demands for particular forms of pay television - films, sports, etc. Just as in the television sector, it will be necessary in individual e-commerce cases to look at these broad distinctions in more detail.

The distinction made between sites that offer information free of charge and financed by Internet advertising, and sites where the consumer has to pay for accessing the content is based on the observation that revenues are being earned in different ways and from different sources (advertising is paid for by the advertisers to the providers of web-sites, paid-for content is paid for by the subscribers to the content providers). Therefore, the Commission normally defines these markets as separate.

A complicating factor in e-commerce cases is the relative complexity of revenue models, even for products which would appear to be close substitutes. The Wall Street Journal, for example, charges USD60 per year for access to its website. The Financial Times, which provides a comparable service, is advertising funded. Given the target audience of the two newspapers, the services might be regarded as competing notwithstanding the different revenue models.<sup>20</sup>

Revenue models may be complex combinations of transaction fees, advertising fees, subscription fees, and intermediary fees. Different revenue models (i.e. the combination of these revenue streams) for different products may be an indicator that the products do not compete. However, given the relatively early stage of development of electronic commerce, revenue models may vary, not only from market to market, but also within markets. Which revenue models will be sustainable in the medium to long term is not yet clear, and competing businesses may choose different models.

This suggests that analysing demand and product characteristics and use may be a more useful basis for market definition than relying solely on the revenue model of the product in question. However, it is important to analyse all aspects of demand: a portal service may, for example satisfy both consumer demand for particular types of information, and content provider demand for easy access to consumers.

This is an area where the Commission has little experience to date, and a great deal of further analysis will be necessary.

#### *3.1.4 Geographic Market Definition*

In the BOL cases referred to above this was left open. However, the decision suggests that even the market for online sales of books is national. JV.45 notes that sales are done via national subsidiaries necessary both for purchasing and for distribution because the on-line sales need a national logistic system of storage and next-day delivery. Even for books written in English the geographical market seems to remain national, because there is as yet only limited trade between countries. This may be due to longer terms of delivery and higher costs for the consumer in relation to cross-border payments and exchange rates. The need to physically deliver traditional products even when bought online may therefore be a significant constraining factor to geographic market definition.

This would logically be irrelevant, however, where purely electronic products or services are being provided (given that, under current charging arrangements, use of the Internet is not distance-

sensitive). More generally, however, concern over cross border trade, consumer protection and complaints mechanisms may dissuade consumers from trading cross border, leaving market definitions national.

The relative strengths of these concerns compared to the fundamentally international nature of the Internet will require careful analysis in each case.

### **3.2**      *Competition Issues*

The most important point to bear in mind is that no substantial competition issues involving pure e-commerce services (as opposed to a combination of infrastructure and services) have yet come to the Commission's attention.

Network externalities (discussed in the section on network dominance in B2B services, above) are generally expected to be less common in B2C markets than in other internet-related markets. There are some services – such as auctions (Ebay, QXL) or file-sharing systems (Napster) – where externalities may be relevant: as yet, however, there has been no competition law concern raised in respect of these services.

More generally, the Commission found in the BOL case that barriers to entry are low: the total costs of establishing on-line bookshops are relatively low and there are no legal or regulatory barriers to entry. In addition the online book market segment functions as a completely transparent market and therefore is fiercely competitive. This is due to the availability of so called “meta search-engines” comparing prices for specific books across multiple online bookshops. Similar conclusions were reached in the CD Now case.

#### *3.2.1 Distribution Agreements and Active and Passive Sales*

The Commission has, in the context of the discussions on vertical restraints, examined the impact of the Internet on the traditional distinction between active and passive sales under EU competition law. The block exemption on vertical restraints regards a restriction of the territory into which, or of the customers to whom, a buyer may sell the goods or services as a hard core restriction, subject only to four exceptions. The first of these provides that active sales can be restricted provided that they are designed to protect an exclusive territory or customer group allocated to a distributor. Passive sales cannot be restricted.

The vertical restraints guidelines refer briefly to new questions posed by the use of the Internet for goods distribution. The non-geographic nature of the Internet makes for a difficult relationship between distribution arrangements based on geographic areas and these concepts of active and passive sales. The guidelines indicate that using a web-site to distribute products is in general considered a form of passive selling and that every distributor must be free to use the Internet to advertise and sell products. Clauses preventing a distributor from selling online would only be permissible if a certain specific use of the Internet amounted to active sales.

More generally, the approach adopted distinguishes between taking steps to help customers find an Internet site (active sales) and taking steps to facilitate sales to customers who have already found the site (passive sales).

Illustration of this principle is easiest using an example: a distributor of goods in France, an exclusive distributor in Germany and a customer based in Germany. The following would constitute active sales by the French distributor (and therefore could be prohibited in its distribution agreement):

- sending unsolicited emails to German customers;
- having advertising banners and links on German websites;
- the use of a German (.de) domain name.

The following would generally be regarded as passive sales (and therefore must be permitted in a distribution agreement):

- use of a French (.fr) or generic (currently .com, .org, .net) domain name;
- use of German on the website. (This is analogous to the French distributor speaking German to the German customer on the telephone).

### 3.2.2 *General problems*

Potential problems can, however, be identified. These are not specific to the internet, and neither are they specific to B2C services – most often the competition concern will arise because of problems on infrastructure markets, and the consequent possibility of leveraging dominance on infrastructure markets onto downstream service markets.

These general problems therefore include:

- concentration forming dominant position or oligopolistic market<sup>21</sup>;
- using existing position to impede or prevent developments, in particular those that could threaten the existing position<sup>22</sup>.

More generally the Internet may alter the balance of power between producer/intermediary/consumer, for example by allowing direct producer/consumer relationships, or by lowering barriers to entry for producers or intermediaries. It may also lead to the creation of new forms of players, for example new types of intermediaries. The current market participants may wish to resist these changes. Their response may be to:

- strengthen contractual ties (whose exclusionary effects may be exacerbated by the wider market changes);
- create new barriers to entry (e.g. proprietary file formats, or gateways such as set top boxes).

The Commission must therefore examine closely any attempts by incumbents to economically or technologically prevent the development of more efficient market structures.

## NOTES

1. See the COMMISSION NOTICE on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9/12/1997,  
[http://europa.eu.int/comm/competition/antitrust/relevma\\_en.html](http://europa.eu.int/comm/competition/antitrust/relevma_en.html)
2. 99/287/EC: Commission Decision of 8 July 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1069 - WorldCom/MCI) (notified under document number C(1998) 1887) (Only the English text is authentic) (Text with EEA relevance), *OJ L 116* , 04/05/1999 p. 0001 - 0035
3. M.1741, Decision of 28 June 2000, not yet published.
4. VODAFONE / VIVENDI / CANAL PLUS, JV.48, decision of 20 July 2000, not yet published.
5. Morgan Stanley Dean Witter, The B2B Internet Report, April 2000.
6. Case M. M.1969 – UTC/Honeywell/i2/MyAircraft.com, Decision not yet published.
7. Office of Fair Trading, E-Commerce and its implications for competition policy, Discussion Paper 1, August 2000, p. 55.
8. Cases C-8/958 P: New Holland Ford and C-7/95 P: John Deere.
9. Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94
10. O.J.C 118 of 27 April 2000, p.3.
11. For purchasing agreements the safe haven is formulated with reference to both the buying and the selling market.
12. It should be noted that the safe haven for joint commercialisation does not apply to agreements involving price-fixing.
13. COMMISSION DECISION of 27/05/1998 declaring a concentration to be compatible with the common market (Case No IV/JV.1 - \* TELIA / TELENOR / SCHIBSTED) according to Council Regulation (EEC) No 4064/89,  
[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=31998J0001](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=31998J0001)
14. BERTELSMANN / PLANETA / BOL SPAIN JV.24, 03.12.1999,  
[http://europa.eu.int/comm/competition/mergers/cases/decisions/jv24\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/jv24_en.pdf)  
  
BERTELSMANN / KOOPERATIVA FÖRBUNDET / BOL NORDIC JV.45, 12.05.2000,  
[http://europa.eu.int/comm/competition/mergers/cases/decisions/jv45\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/jv45_en.pdf)
15. 1999/781/EC: Commission Decision of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty, *OJ L 312* , 06/12/1999 p. 0001 - 0037

16. Paragraphs 18 to 20 of the Decision.
17. Paragraphs 18 to 20 of the Decision.
18. This last category could be seen as a subset of the second – online products where no potentially substitutable offline product has been found. For convenience, however, it may be easier to examine this separately.
19. See 94/922/EC: Commission Decision of 9 November 1994 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.469 - MSG Media Service), OJ L 364 , 31/12/1994 p. 0001 - 0021 and subsequent cases.
20. This analysis leaves to one side the question of whether the online newspapers compete with their offline equivalents.
21. See Worldcom / MCI, MCI Worldcom / Sprint
22. See Vizzavi, and, in the US, US v Microsoft.





## **BIAC**

### **1. General**

The Business and industry Advisory Committee (BIAC) to the OECD, appreciates the opportunity to submit the following comments to the OECD Committee on Competition Law Policy on issues relating to competition and electronic commerce, for discussion at the October 25, 2000 OECD CLP Roundtable on Competition and Electronic Commerce.

### **2. Transactional Issues - Exchanges**

Exchanges have existed since the dawn of civilisation. They are now faster, more efficient, cost effective and more geographically dispersed. But the underlying concepts are rooted in the more efficient trade of goods and services. Today's exchanges are proliferating at a rapid pace. An exchange is simply a portal that links buyers and sellers in an online forum that often in the business-to-business (B2B) context creates an integrated supply chain. Exchanges vary in design, structure, format and size. Therefore, any discussion of these exchanges must give due regard to the specific exchange at hand. Nevertheless, BIAC will address briefly some of the common characteristics of exchanges – specifically focusing on B2B exchanges – and identify both the advantages and the challenges created by exchanges in the context of potential competition law issues.

Exchanges are being created in an attempt to reduce costs, increase efficiency, reduce production time and make business practice easier by eliminating redundancies and increasing integration and collaboration through more timely information flows. They provide a forum where products are bought and sold in volume increasing liquidity in the market, which in turn attracts more participants to the exchange. This liquidity will help buyers and sellers determine a fair price for a product or service. Moreover, it promotes real-time pricing since participants may compare prices among potential suppliers. Simply put, exchanges can promote price competition -- sellers can aggregate their demand and buyers have access to a greater supply with price transparency. All of these potential benefits reduce waste in the production cycle, which can translate into cheaper end products for businesses and consumers.

Exchanges can also increase efficiency and transparency by creating a level playing field for new supplier entrants and can lessen the entrenched advantage that long-time suppliers develop – opportunities may be more visible for potential entrants – to the extent that those advantages are not based on the quality to price ratio of the product or supporting services and reliability.

B2B exchanges allow multiple business buyers and sellers to conduct on-line purchase and sales transactions over the Internet. The benefits of exchanges are clear: B2B e-commerce promises enormous efficiencies through significant reductions in transaction costs and economies of scale, allowing companies to achieve much greater productivity. B2B exchanges are expected to cut costs for buyers and provide

more customers for sellers, leading to enhanced competition and lower consumer prices. Efficiencies have likewise been found to result in significantly reduced procurement cycle times.

Application of antitrust rules to B2B exchanges arise from the possibility to compile, control and quickly disseminate competitive information. Carefully managing the vast amounts of sensitive information that can be generated and shared through B2B technology can be key to avoiding violation of antitrust rules.

Antitrust analysis of B2B e-commerce is made more challenging by the fact that there is no one model for electronic marketplaces as B2B exchanges may be established by:

- a) one company to handle the procurement of input materials and/or sale of its own products;
- b) by neutral third parties who develop proprietary platforms to serve a wide range of industries, such as [www.freemarkets.com](http://www.freemarkets.com) or;
- c) jointly by a consortium of competitors for the purpose of purchasing or selling their products in the most efficient electronic environment. For example, [www.covisint.com](http://www.covisint.com) (GM, Ford and DaimlerChrysler, and other companies have joined such as Renault...), GlobalNetXchange (Sears Roebuck and Carrefour), and [www.e2open.com](http://www.e2open.com) (IBM, Hitachi, Nortel Networks, Seagate Technology, Solectron, Toshiba, LG Electronics and Matsushita Electric) which are owned by buyers ; and [www.orbitz.com](http://www.orbitz.com), (United, Northwest, Continental, Delta and American); [www.metalspectrum.com](http://www.metalspectrum.com) (Kaiser Aluminum, Alcoa, Reynolds Metals, Allegheny Technologies, Vincent Metals, Atlas Ideal Metals, Thyssen), which are owned by sellers.

Moreover, B2B markets may be "vertical", which in this context means they are industry-specific, or "horizontal" in the sense that they facilitate the purchase and sale of many goods and services across industry lines.

## **2.1 Types of Exchanges**

There are a number of organisational models for B2B exchanges, which include those outlined below:

3. Auction sites are those in which buyers or sellers bid competitively to buy or sell particular products. Auctions, which may take several forms, including "traditional," where competitive bidding by multiple buyers moves the seller's prices upwards, or "reverse," where sellers bid against each other to sell products to buyers in response to requests for purchase, resulting in price deflation. These sites often serve particular industries. Examples of this type of site include: [www.e-steel.com](http://www.e-steel.com) (steel), [www.paperexchange.com](http://www.paperexchange.com) (paper), [www.worldcatch.com](http://www.worldcatch.com) and [www.gofish.com](http://www.gofish.com) (fish and seafood).
4. Catalogue sites offer a variety of products from multiple vendors in a standardised format so that prospective buyers in different industries can easily compare the available offerings
5. Aggregator sites typically allow competing sellers or competing buyers to offer to sell or buy products or services at individually specified prices and, in the case of more complex products or services, allow individual buyers to negotiate specific terms of the transaction. Examples of such sites include: [www.e-chemicals.com](http://www.e-chemicals.com) (industrial chemicals), [www.medibuy.com](http://www.medibuy.com) (healthcare supplies), [www.commerxplasticsnet.com](http://www.commerxplasticsnet.com) (plastics), [www.metalsite.com](http://www.metalsite.com) (steel and metals).

6. Trading hubs typically include buyers and sellers in multiple industries and thus do not necessarily focus on some well-defined set of competing sellers or competing buyers. Examples of such sites include: [www.freemarkets.com](http://www.freemarkets.com), [www.shop2gether.com](http://www.shop2gether.com), [www.energygateway.com](http://www.energygateway.com), [www.axesoenergia.com](http://www.axesoenergia.com).
7. RFP sites typically permit sellers and buyers to post requests for proposals, and negotiate transactions off-line. Example include: [www.catex.com](http://www.catex.com) (insurance), [www.it-radar.com](http://www.it-radar.com) (computer services), [www.mondus.com](http://www.mondus.com) (business supplies).
8. More generally classified B2B exchanges include buyer exchanges or sourcing networks, supplier marketplaces, and neutral sites or hubs.

## 2.2 *Benefits of Exchanges*

Exchanges can provide benefits to all of the participants in it, more specifically:

### 2.2.1 *General Benefits*

- Speed-up production processes;
- Reduce cycle time;
- Reduce inventory requirements;
- Reduce carrying costs;
- Economies of scale.

### 2.2.2 *Buyer Benefits*

- Reduced transaction costs;
- Identification of new suppliers -- easier to identify, qualify and measure the performance of new suppliers;
- Faster time to market;
- Improved market transparency.

### 2.2.3 *Supplier Benefits*

- Increased exposure to new buyers and sales opportunities;
- Reduced transaction costs;
- Greater market intelligence;
- More level playing field for all organisations, including SMEs.

These benefits indicate that exchanges are improving market conditions and increasing competition and efficiency. It is important to note that many exchanges have adopted policies deliberately designed to avoid anticompetitive effects. For example exchanges may make participation open to all potential buyers and sellers, provide for anonymous trading, maintain separate purchasing departments,

etc. Depending upon the exact nature and goals of any particular exchange, one or more of these policies may be appropriate both to maximise the exchange's likelihood of success, and to minimise its likelihood of having anticompetitive effects. It should also be noted that the same antitrust concerns that exist in B2B exchanges can also exist in B2C marketplaces, and thus safeguards must address the potential for anticompetitive behaviour in this context as well.

In conclusion, exchanges can promote significant market efficiencies and competition, especially where appropriate safeguards are instituted to prevent any potential anticompetitive results. Given these significant benefits, competition authorities would best serve their constituents if they wait to see how the exchanges work in practice. Exchanges are just being implemented over the Internet and should not be subject to overly burdensome review, reporting or regulation because of the possibility that an antitrust violation *may* occur. To the extent that competition authorities review such practice, they should limit their focus to the potential antitrust concerns that might be likely to arise such as market foreclosure as well as collusion, that is facilitated by price transparency or the exchange of other competitively sensitive information.

### **3. Infrastructure Issues: Joint Ownership of ISPs and Major Content Providers**

Vertical integration in the communications sector is continuing at a rapid pace. Recently, vertical integration between major ISPs and content providers, is raising several issues that business, governments and the competition law community as a whole are currently discussing. The most controversial issues surrounding the joint ownership of major ISPs and major content providers include:

- whether such joint owners will make their content available exclusively to their service while limiting the availability of rival content to which subscribers are permitted access; and
- whether such joint owners will make rival content available on their service but on less favourable or discriminatory terms (both price and non-price related) as compared to the terms on which their content is made available.

Business' views on this complex issue are still evolving. At this juncture there are currently two general views within the business community:

1. one view is that the marketplace will drive major ISP and major content providers that are jointly owned to make the appropriate decisions regarding content access and treatment of rival content and services. Advocates of this view argue that given the functioning of a vibrant marketplace, government scrutiny and mandated merger-specific government conditions on content and service access and discrimination issues are inappropriate. In fact, some merging companies have publicly stated that they will neither undertake exclusionary content arrangements nor treat content of competitors any less favourably. The merging companies have made these public statements because they believe these commitments make sound business sense and that a business strategy that depends on restricting consumer's access to content is doomed to failure in an environment where consumers demand broad choices of content. To the extent that government action is necessary to resolve issues of content and service access and discrimination, such companies argue that these issues are better addressed by generally applicable measures that will not work to the advantage or disadvantage of particular market participants or modes of communication;
2. another view is that mergers between major ISPs and major content providers should be carefully reviewed by regulatory authorities both for potential anticompetitive effects and

potential adverse effects on freedom of speech and expression and consumer choice as a result of the creation and/or strengthening of a distribution bottleneck. Advocates of this view maintain that such joint ownership will lead to exclusionary and discriminatory conduct (both price and non-price related). The advocates of this view believe that joint ownership will exacerbate the operation of a "walled garden." The "walled garden" describes the general practice of luring consumers into an online service through the use of sticky "must-have" features and then steering them towards the content and services of the jointly owned company, to the detriment of its competitors through the use of various contractual and operational restrictions and technological tools -- leading to market foreclosure. To prevent such market foreclosure, the advocates of this view call on regulators to permit such mergers only when conditioned upon legally binding commitments that prevent exclusionary conduct and that guarantee non-discriminatory treatment of competitors.

As no consensus currently exists among the BIAC membership, we refrain at this time on making any specific recommendations concerning these joint ownership issues.

#### **4. Other Comments**

With regard to the OECD Secretariat Issues Paper, BIAC cautions melding business (B2B) and consumer (B2C) exchange issues relating to competition and e-commerce. While certain similar characterisations may exist for both B2B and B2C exchanges, they may present different issues that should be taken into consideration. Thus it is important to examine exchanges in their organisational context, after which similarities may be deduced with further analysis.

#### **5. Additional Issues for Discussion**

BIAC finds the topic of competition and e-commerce to be important and timely in the context of growth and development of the Internet and its use as a platform for exchanges. BIAC strongly encourages continuation of the discussion of competition and e-commerce issues in the OECD CLP. BIAC would appreciate the opportunity to contribute to the development of such an agenda within the CLP, and thanks the OECD CLP for their invitation to make comments from the start of this project.



**ROOM DOCUMENT**

**COMPETITION IN E-COMMERCE:  
A JOINT OFTEL AND OFT STUDY**

*Consultation document*

**April 2000**

**UNITED KINGDOM**

This document is available at the following Web Site:  
<http://www.offt.gov.uk/html/new/e-commerce.htm>





**ROOM DOCUMENT**

**E-COMMERCE AND ITS IMPLICATIONS  
FOR COMPETITION POLICY**

*A Report compiled by the Frontier Economics Group for the Office of Fair Trading*

**August 2000**

**UNITED KINGDOM**

This document is available at the following Web Site:  
<http://www.offt.gov.uk/html/rsearch/reports/oft308.htm>



## AIDE-MEMOIRE OF THE DISCUSSION

The Chairman began by remarking that twelve very substantial contributions had been received for the Roundtable. He noted as well that the contributions were long on speculation and thin on actual case studies. This reflected the fact that this is a new issue which is the very reason the CLP wanted to discuss it.

The Chairman recalled that delegates had chosen an all inclusive format for the discussion. As a result, a substantial number of themes were taken up in the various contributions. First, there was the theme of infrastructure which was touched upon by at least three contributions. Then there was the issue of possible obstacles to the development of electronic commerce. There were also more case oriented themes such as market definition, efficiencies, network dominance, and various potentially troublesome behaviours such as collusion, coordinated effects, exclusion and vertical restraints. Ownership issues were also taken up and one contribution raised the question of whether tools employed by competition authorities are adequate to tackle issues in the electronic commerce area.

### **1. Infrastructure**

The Chairman asked BIAC to describe the business community's two somewhat opposing views of the competitive effects of vertical integration between Internet Service Providers (ISPs) and content providers.

A BIAC delegate stated that within BIAC it is generally believed that although e-commerce presents new circumstances, old principles and methods of competition law are sufficient to deal with them. As for infrastructure problems, and particularly the joint ownership of ISPs and major content providers, BIAC's written submission set out two general views prevailing within the business community. BIAC had intended to have those views presented by prominent market players. Unfortunately, at the last moment, one was obliged to withdraw.

The absent company would have presented the view that the marketplace will drive jointly owned major ISPs and content providers to make appropriate decisions regarding content, access and treatment of rivals' content and services. Given the functioning of a vibrant marketplace, government scrutiny and mandated merger-specific government conditions on content and service access and discrimination issues are inappropriate. Various country submissions noted that some merging companies have publicly stated they will neither undertake exclusionary content arrangements nor treat competitors' content any less favourably. They have made these public statements because they believe such commitments make sound business sense and that a business strategy depending on restricting consumers' access to content is doomed to failure in an environment where consumers demand broad choices of content. Such companies argue that to the extent government action is necessary to resolve issues of content and service access and discrimination, this is best accomplished through generally applicable measures that will not work to the advantage or disadvantage of particular market participants or modes of communication.

The opposing view was presented by an employee of the Disney Corporation who highlighted some of the inefficiencies and scope for abuses inherent in joint ownership of ISP and content provision,

and cautioned against temptations to adopt a purely free-market approach. Faced with rapidly developing nascent markets, the delegate believed it was critical for regulators to analyse vertical ISP/content provision mergers bearing three things in mind. First, she recommended regulators be forward thinking in their analyses. In particular, she suggested that a strict market share analysis based solely on revenues generated in the local or regional territory may grossly understate a company's true market power. Analysts must widen their review to consider things like network effects, switching inertia, and the ability to leverage dominance in one part of the world into other parts of the world. Second, the delegate urged regulators to come to terms with new technology. Today's technology presents a whole new box of tools that can be used to discriminate against competitors in very sophisticated, subtle, and in some cases virtually undetectable ways. They include things like selective caching, restrictive hyper linking, impeded return paths, and preferential placement on electronic programming guides. These might prove even more destructive of competition than an outright refusal to deal with competitors. Third, the delegate urged regulators to put appropriate safeguards in place today to ensure that nascent markets evolve in an orderly and competitive manner and in particular to ensure non-discriminatory treatment by vertically integrated operators of independent ISP service and content providers. If this is not done, the delegate believed that damage to markets may be very difficult to undo later.

The Chairman noted that some of the last mentioned concerns would probably arise again later in the Roundtable and that the CLP had held this event precisely to think ahead about what kind of safeguards might be necessary in emerging e-commerce markets.

The Chairman then turned to Hungary whose contribution stated that in that country ISPs are treated as telecom service providers and therefore must be licensed. The Chairman asked Hungary to provide some description of the licensing criteria as well as to describe what the Hungarian Competition Office (HCO) felt about their anti-competitive potential. The Chairman was also interested in Hungary's reference to a 1999 investigation of "...a supposed cartel in the market of Internet services." The Chairman wanted to know how this was detected, what aroused suspicions, and what was the result of the investigation. He also asked whether there was anything unique about the cartel in this sector.

An Hungarian delegate began by noting that the Hungarian market is quite small. Only about one million persons access the Internet (i.e. a penetration rate of about ten percent). Hungary has only one large B2B, about 15 B2C's, and a few C2C sites. Since 1992, the Hungarian Telecommunications Act has required that ISPs be licensed. The licensing criteria are mostly technical and essentially amount to notification. They do not appear to raise entry barriers and present no problem for competition. To highlight this point, Hungary noted that the number of ISPs in Hungary had grown from 40 when its written contribution was submitted, to close to 60 at the time the Roundtable was held. Entry into content provision is free, i.e. there are no legal rules or entry restrictions except copyright rules. More generally regarding e-commerce, a government decree has, since 1998, offered some degree of consumer protection.

Despite there being competition in Hungary's Internet markets, there have also been some antitrust concerns. For example, an investigation was initiated, *ex officio*, in 1999 against the Hungarian Association of Internet access providers. This Association is a registry delegated by ICANN to designate top level ".hu" domain names. It had special conditions and it did not allow non-members to delegate domain names in the .hu area. It amounted to a kind of market and information sharing or price sharing cartel. According to HCO practice, every type of Internet service constitutes a separate product market and the registry was one of them. The HCO investigated to determine whether the Association increased entry barriers or whether there was information sharing, especially about prices, among members. The investigation included a small survey asking customers and content providers how they delegate their domain names. The survey revealed an unexpected result, *viz.* customers and content providers have their domain names under both ".hu" and generic TLD [top level domain] areas, e.g. ".com" and ".net". The prices and conditions were nearly the same which is why geographic markets were regarded as global and

that the conduct of the Association not considered restrictive. The HCO terminated its investigation after concluding there were no competition concerns regarding price setting and information sharing among members.

Despite closing the cartel investigation, the HCO remained convinced that the Internet made communication among competitors particularly easy. It therefore instituted monitoring of the market and collected information about the operators. It also organised roundtables and informal discussions to improve the competition culture in this sector. The HCO believes that self-regulation is the best solution. It is worth noting that the investigation discussed above resulted in the Association issuing a code of conduct. It also opened its market to the ".hu" area by agreeing to allow non-members to assign domain names.

The Chairman next turned to the United Kingdom and thanked it for generously providing a written submission and two reports [tabled as room documents]. The first of those, by Frontier Economics, deals with behavioural or transaction e-commerce, while the second, by OFT and OFTEL, focuses on structural issues. The Chairman asked the UK delegation to describe the competition issues involved in vertical integration between last mile connection providers and ISPs, with particular reference to mobile telephony and Internet portals designed for mobile access. In particular, he sought information as to whether telecom companies have an inherent advantage over other portal owners, either because they can use information they have concerning customers, or because consumers are concerned about security of payment. In dealing through portals owned by their telephone company they may not have to give credit card information to relatively unknown parties. The Chairman also noted that telecom companies might have an advantage because they can ensure that when the telephone is used to access the Internet, the telecom owned portals are first up on the screen.

A United Kingdom delegate began by pointing out that much of what the Chairman was referring to boils down to access to the local loop and problems arising when combining natural monopoly with service competition. It is important that any upstream market power is not passed downstream. In the UK, market power at the local loop is constrained by price regulation. In addition, the local loop owners operating ISPs are subject to regulation to ensure they do not subject independent ISPs to price squeezes.

The delegate did not think that vertical integration *per se* was the main infrastructure issue as regards e-commerce. The problems have more to do with accidental or perhaps inherited first mover advantages. He referred to three issues here. The first had to do with advantages linked to having an established customer base. If a company like BT for example wants to set up an ISP it begins with having access to a considerable customer base used to dealing with BT. It is important then that certain controls be in place. In the UK, ISPs owned by incumbent operators must be set up as independent businesses having separate accounts and information cannot be passed between the two entities. Secondly, there may be advantages in planning arising from vertical integration. For example, an ISP could be helped by knowing ahead of competitors about a forthcoming non-metered access product. It may not always be good to try to eliminate such advantages since the result could be a lower return to incumbent operator innovations. The delegate's third point had to do with pricing flexibility and billing advantages. The incumbent operator, in regard to both fixed and mobile telephony may be able to restrict ISP pricing flexibility. This no longer appears to be a problem in the UK however thanks to steps taken by OFTEL.

With respect to mobile telephony, the delegate noted that a considerably greater degree of access competition than exists in wired telephony. There could be problems, however, with mobile operators favoring their own portals. For example BTCCellnet offers its own portal and pre-programs handsets to favour it. Concerned about how this might restrict competition, OFTEL forced BTCCellnet to reveal the code for changing the default portal on its new WAP [Wireless Application Protocol] phone.

As to the security of payment issue mentioned by the Chairman, BTCellnet could offer billing capability for the retail arm of BTCellnet. Should this happen and create a significant foreclosure effect, BTCellnet would be required to offer the same billing capability to competing ISPs. As for the wider issue of customer confidence, the delegate stated that one should not underestimate market solutions in this area. For example, there are services which reduce the risks of paying with credit cards over the Internet.

## **2. Obstacles to the development of e-commerce**

The Chairman acknowledged there were difficult issues involving vertical integration in e-commerce, but before delving into that, he wanted to call on Sweden to expand on potential obstacles to the development of B2C e-commerce. He emphasised that, as with other submissions, Sweden's was discussing more potential than actual difficulties.

A Swedish delegate pointed out that in Internet terms Sweden is a very connected country. Roughly 50 percent of Swedish homes have an Internet connection, and in households with children this rises to about 75 percent, i.e. some of the highest connection rates in the world. It is worth noting as well that mobile telephony, digital interactive TV and broadband telephone connections cover practically the whole country. B2B and B2C are both growing in Sweden, although there have recently been some bankruptcies that could slow things down a bit.

Among the obstacles the Chairman was alluding to, mention should be made of consumer confidence. Concerns about payment systems, delays in delivery, difficulties in returning goods, and the absence of written agreements and receipts all make it more difficult for consumers to exert their rights in B2C. There may also be problems concerning user friendliness in e-commerce. Providing quality logistical support has been developed over the centuries by traditional merchandisers, but this knowledge has not been easily transferred to B2C.

As with its counterparts, the Swedish Competition Authority (SCA) still lacks experience in the e-commerce domain. There have been a few complaints from competitors concerning refusals to supply. The SCA is also concerned that e-commerce may facilitate the exchange of commercial information which in turn could lead to greater co-operation on prices, market division etc. There may also be difficulties in defining relevant markets and dominant positions, and price discrimination could become more prevalent. Greater attention may be needed regarding trans-border transactions and there may be a need for greater international harmony in consumer protection rules, taxation, and even competition rules.

The SCA has initiated some studies on e-commerce in several Swedish markets including B2Cs in weightless goods and services, and B2Bs in building materials. The aim is to improve understanding of e-commerce and to prepare for new demands on the SCA. The delegate noted the value of the current Roundtable and hoped it marked the beginning of greater inter-agency exchange of information and experience on e-commerce.

## **3. Market Definition**

The Chairman remarked that the Swedish presentation revealed some structural features of e-commerce that might slow its development. It may also be that competition may not be as perfect in e-commerce markets as is usually imagined including as regards their scope. The German contribution noted that although the Internet is not restricted by any geographic borders, this does not automatically mean that all e-commerce is taking place in a global market. There may be problems with deliveries, regulatory

issues, taxation, language barriers etc. In addition, the German contribution referred to price dispersion on e-commerce markets which again runs counter to what some might have expected.

A German delegate drew attention to the fact that the Internet contains examples of offers being made to specific target groups, such as regional language groups. There are also examples of goods being offered to which delivery is possible only in a limited area. The same is also true for a range of services, such as online classified ads for jobs. Online classified ads are often in direct competition with the relevant pages of regional newspapers, which is reflected in the fact that newspapers are now diversifying into online commerce.

As for price dispersion in e-commerce, the delegate observed that this demonstrated that search costs on the Internet are not as low as is usually assumed. Search engines and online directories do not function perfectly, and searching on the Internet can be very time consuming. The information is not simply there to be looked at. One must actually invest time and money to find it. Another explanation for price dispersion is the way that e-commerce facilitates price discrimination using one to one marketing. Recent press reports reveal that an online bookseller offered first-time customers lower prices than regular customers. The Bundeskartellamt (BKartA) has not yet conducted empirical studies of its own on the degree of price dispersion on the Internet.

Usually price discrimination is not a cause for concern from a competition policy perspective. Although it distributes some income to sellers away from customers with a high willingness to pay, price discrimination also opens up markets for less well to do consumers and increases allocative efficiency. Consequently, Germany's competition statute's prohibition of price discrimination is limited to firms with a considerable degree of market power. So far the BKartA has not encountered price discrimination problems in online business.

The Chairman noted that the European Commission's submission extensively discusses product market definition issues in electronic commerce cases. It also referred to the BiB involving consideration of the substitutability between online and offline sales, a matter touched on as well in the German submission. The Chairman called upon the European Commission to elaborate on its market definition methodology and to comment on the BiB case.

A European Commission (EC) delegate stated that his authority had had very few genuine cases and competition problems in the e-commerce domain. The vast majority of its case work so far has involved very straightforward non-problematic mergers and joint ventures. In most instances, for example in a large number of online book retailing joint ventures, nothing has turned on the market definition adopted so market definition issues were left open.

In one of the early cases, namely Telia/Telenor/Schibsted, concerning a Scandinavian Internet portal, a very broad almost generic three-way distinction was drawn between advertising funded services, subscription funded services, and the sale of specific products over the Internet. Considering the first two categories, there appear to be some parallels in the distinction usually made as regards pay and free TV. In a number of Commission decisions, the fact that a specific group of consumers was willing to pay a subscription while others were not, was taken as evidence of a sufficiently distinct consumer demand that the two services are in separate markets. The problem with applying a revenue model for market definition to e-commerce cases is that clearly competing businesses appear to be using a considerable variety of different revenue streams such as advertising revenues, subscription fees, portal charges for giving placement to third party content or service providers, and portals taking slices of transactions fees. Taking a very narrow, traditional revenue based approach may not work in some difficult cases.



The more important issues, however, concern the third category in the Telia/Telenor/Schibsted decision, i.e. the sale of specific products over the Internet. This is where the BiB case comes in. There may be a parallel with mail order cases where differences in convenience, pricing and client groups indicated that mail order was in a different market than traditional high street retailing. A question that the Commission had to address in BiB was whether a television based interactive home shopping and information service competes with normal high street retailing. The Commission decided that because the interactive service package was branded, not restricted to transactions, and closely tied to pay-TV service, it was not in competition with traditional high street retailing. But the Commission left open the question of whether the individual services, CD or book sales were in competition with traditional retail sales.

In sum, market definition is difficult and the cases are very much under development. Nevertheless, in merger and joint venture cases it is necessary to come to decisions because adopting a laissez faire approach could be just as damaging to the sector as taking a very strict approach.

The Chairman noted that the US has had a case where automobile dealers in some Western states pressured Chrysler to rein in the activities of an Internet distributor. This seems to suggest that at least in the dealers' minds, the Internet distributor was in the same market. He also noted that the German contribution discussed two cases touching on this issue. He found one to be of particular interest, i.e. the IdentCo. case where an Internet distributor of automotive components was subjected to a boycott by CARAT, the largest German procurement and marketing co-operative for car parts. This again seems to indicate that the two kinds of operations are in the same market.

A German delegate said that in the IdentCo. case the Internet distributor was charging prices considerably below the traditional channels, but was hobbled by the boycott the Chairman referred to. Another aspect of the case was that the GVA, the industry's lobby organisation, denied IdentCo. membership arguing that since IdentCo. did not have any physical warehouses it could not be considered an actual merchant. After intervention by the Bundeskartellamt, the boycott call was ended and it is chilling effect apparently vanished. The membership issue is still to be decided.

The Chairman found a similarity between the IdentCo. case and one arising in Korea's auto sector. In Korea too, market actors consider that e-commerce does compete with offline retail. He asked the Korean delegation to develop this further.

A Korean delegate agreed that his country's boycott case [i.e. a car manufacturer banned its dealers from engaging in transactions with online companies] was indeed similar to the one arising in Germany. An important difference, however, was that the case was not covered by Korea's competition law, hence the Korean Fair Trade Commission (KFTC) could not take any measures against the boycott. The main reason was that, unlike in most foreign countries, Korean automobile dealers sell cars on a consignment basis. Sales contracts are between consumers and manufacturers. Korea does not have dealers with sufficient finance to maintain independent dealerships. However, if the dealers had been like those found in other countries, the KFTC would have rendered a different judgement in this case.

The Chairman remarked that in market definition, particularly as regards the substitutability of online with offline providers, the professionals seem inclined to adopt wider definitions than competition authorities. He then advanced to the next topic.

#### **4. Efficiencies**

BIAC's written submission, noted the Chairman, explained that there are considerable efficiency gains to be had in B2B exchanges. He called upon BIAC to develop that theme.

A BIAC delegate began by stating that electronic exchanges can promote significant competition and efficiencies especially where appropriate safeguards are instituted to prevent any potential anti-competitive results. Since the Internet exchanges are just being implemented, they should not be subjected to overly burdensome review, reporting or regulatory requirements merely because antitrust violations may occur. The delegate then asked two representatives of companies very much involved in electronic commerce to present their views.

The first to present, from Oracle, noted that the BIAC document referred to gains in efficiency, and greater transparency creating a reduction in transaction costs and prices. The exchanges may also stimulate the development of quality improvements in products and services. Efficiency effects could vary across the different types of exchanges now being developed. For example, the effects could be quite different in B2B as contrasted with B2C exchanges. Moreover, consumer protection laws are clearly more important in B2C. One should also note that C2C sites are a type of B2Cs, although the applicable legal regulations could differ somewhat. One must avoid falling the trap of treating all exchanges as equivalent, and keep the important B2B and B2C distinction in mind.

A PricewaterhouseCoopers staff member stated that companies involved in B2B marketplaces often benefit from participating in the formation of electronic marketplaces because this acts as a catalyst to transform and re-align their procurement operations, which can sometimes be decentralised and uncoordinated. They are led to consider changes necessary to take full advantage of tools offered by the exchanges such as auctions and more systematic use of catalogues. The result can be lower procurement costs and lower prices to consumers. There are also improvements to market efficiency that flow from bringing companies together than would not normally trade bilaterally.

The Chairman noted that the Federal Trade Commission (FTC) hosted an important public workshop on B2B in June 2000 and has therefore accumulated knowledge that delegates could benefit from. The FTC states that it is in a learning mode, as are all competition authorities. The US written submission states that there was widespread recognition among workshop participants that B2B and B2C exchanges offer tremendous potential efficiencies. He asked for more information about those efficiencies.

A delegate from the United States Antitrust Division of the US Department of Justice (DOJ) noted that there are usually two markets to consider in assessing efficiencies generated by e-commerce. Focusing first on the transactions conducted on an exchange, there are potential efficiencies linked to helping locate suppliers, solicit bids, place orders, track inventory, and handle payments. All these can produce direct cost savings to the participants in terms of lower personnel and paper handling costs, as well as improved accuracy in order processing. Looking next at the underlying markets (i.e. that participants are active in), there are simultaneously potential efficiencies and anti-competitive effects. To begin with there is an efficiency potential in improved access to higher quality, more accurate and timely information. Increased knowledge of supply and demand can lead to more efficient pricing and investment decisions by firms, partly by increasing the number of actors in a market and rendering it more competitive. Improved information flows can also reduce inventory costs by increasing the certainty and speed of responsiveness of supplies. Associated lower transactions costs may also lead to further efficiencies through encouraging firms to specialise more in what they do best and to rely more on other firms for necessary inputs.

It is too early to tell how much of the mentioned efficiencies will actually be achieved since electronic marketplaces are still in their infancy, but there is clearly a potential for significant efficiencies. The efficiencies may in fact prove so significant as to affect how markets are defined for antitrust purposes. The delegate referred to predictions that the costs of transactions could be reduced from levels such as \$100 to \$110 down to just \$five or \$ten. If such savings are realised they would mean that traditional purchasing methods such as FAX, phone or paper may no longer be a reasonable procurement method. So if a dominant exchange emerges, it could simultaneously present both efficiency benefits and

potential competition harms. That is why the entire area of B2B exchanges has been so interesting and probably will be challenging for competition agencies. Simultaneously there is the potential for great efficiencies and real competitive problems.

The Chairman commented that efficiencies leading possibly to dominance and eventual competition problems is something that competition agencies have met with before but might find particularly important in e-commerce. He also underlined the links between structure, market definition and efficiency issues that the Roundtable had examined, and proceeded to open the floor to general discussion.

## **5. General Discussion**

A delegate from Finland noted that one possible way of losing efficiencies in e-commerce involves the method of payment. Transactions can be paid for by direct transfers over the Internet or through the use of cash cards. In many cases, banks and financial institutions have to co-operate in running cash card systems. Finland has been closely monitoring the possibility of the cooperation going too far and adversely affecting e-commerce in the process. If the payment of an e-commerce transaction is not carried out cost-efficiently, there can be a potential risk of losing some of the gains from the e-commerce itself.

The Chairman agreed that e-commerce transactions typically involve more parties than traditional transactions, i.e. banks and telecommunications systems, and that some of the efficiencies in e-commerce can thereby be dissipated. He also noted another theme underlying some of the previous interventions, in particular the one by Germany. It is that efficiencies may be more easily realised in B2Bs than in B2Cs because the former involve professional buyers and sellers who are better able to solve transaction problems than are individual consumers. He also reminded delegates of the obstacles to the development of B2Cs that Sweden had pointed out, e.g. confidence concerning the security of the payment system.

## **6. Network dominance**

The Chairman began this section of the Roundtable by asking the European Commission to explain how network effects, and potential problems of network dominance, arise in both B2B and B2C, and to comment on how exchange owners might be able to reinforce dominance effects through things like exclusivity requirements and standards development affecting interoperability. In addition, he encouraged the EC to comment on whether network effects might become stronger if companies succeed in integrating B2B and B2C e-marketplaces such that customer orders drive the entire procurement process and customers contribute, passively through information on their purchases, to new product design.

A European Commission delegate stated that there are no actual EC cases yet to guide thinking in this area. The possible prevalence of network effects is of course related to the nature of the Internet which could present network externalities in the sense that the value of the network to an individual user could increase with the number of users. However, the fact that the Internet is itself a network with possible network effects, does not mean that all transactions conducted through the Internet necessarily are associated with network effects. Regarding B2Cs for example, customers buying books or downloading music are not interested in how many other users are connected to the same system. So in many B2C cases, the possibility of network effects should be largely discounted unless there is some consumer interaction required as for example in auction sites. B2B systems on the other hand are much more likely to bring about benefits, i.e. gains in liquidity, related to the number of buyers and sellers participating.

While it is true that for most B2B sites network effects exist, their strength could differ according to the market mechanism employed. Some electronic marketplaces operate as true exchanges, analogous to commodity and stock exchanges, with standardised products, market clearing prices, and anonymous transactions. In these markets, liquidity is of prime importance to get an efficient market clearing and network effects are consequently quite strong. Most B2Bs, however, do not operate in this way. Instead, they function as devices facilitating direct exchanges between buyers and sellers. In these cases, it is not so much the actual trade volume which is key to the success of the exchange, but rather the number of buyers and sellers monitoring the system and able to make an offer or a purchase on it. In these situations network dominance based solely on network effects and a capacity to tip a market will be harder to achieve. Operators wishing build a dominant position on such marketplaces would have to bolster network effects with lock-in mechanisms and other ways of raising switching costs, for example by applying exclusivity provisions or by creating standards reducing interoperability between systems. Competition authorities should carefully assess these markets to ensure that owner-operators do not try to enhance existing network effects by contractual or other means.

As to the Chairman's question about how network effects might be affected by integrating B2B and B2C sites, this is certainly not a scenario the EC has so far encountered. Assuming that the Chairman had in mind advantages secured by having exclusive access to consumer information of value in designing new products, the delegate found it difficult to imagine this being a serious problem. This is because network effects are not likely to be strong in B2C sites. It is therefore difficult to imagine how a significant foreclosure effect might arise through a particular B2C acquiring such a large body of highly loyal customers that other sites could not also offer the same advantage of access to useful consumer information.

The Chairman mentioned that the United Kingdom's submission extensively discusses the way in which certain characteristics of e-commerce and associated patterns of behaviour may tend to raise barriers to entry in e-commerce services in particular through first mover advantages. However, the contribution also makes the point that although first movers might benefit from barriers to entry, this need not mean they enjoy market power.

A United Kingdom delegate explained that her country's submission drew on one of the room documents supplied to the Roundtable, i.e. the report by Frontier Economics. She then turned to the question of barriers to entry in e-commerce services, stating that the most important of these seems to be the sunk costs involved in establishing customer loyalty and what the report refers to as "tippy" markets.

In markets where there are potentially low buyer switching costs, reputation and branding are important in terms of building customer loyalty, especially in B2C situations where customers are relatively small and unsophisticated. The UK submission referred to the importance of developing "neural" as opposed to physical real estate. Strong neural real estate can generate significant first mover advantages and act as a barrier to later entrants. There are ways, however, in which first mover advantages could be eroded. For example, the first mover advantage arising through an ability to tailor offerings to long-term customers based on information obtained about customers could be reduced if customers were able to port their own database entries to other sites. Another example could be the power of brand names being offset by effective consumer protection provisions or possibly by third parties playing a quality assurance role.

Regarding tippy markets, this refers to network effects based on a system becoming more useful the more participants there are on the network. The result is that strong players become stronger and weak, weaker. Tippiness could be reduced by the ability of market participants to monitor other markets so they could switch more easily between them. For example, the fact that the "bidders edge" site monitors a number of online auction houses might reduce any market power possessed by the "EBay" site.

As for the point that first mover advantage need not imply market power, the delegate noted there are really two aspects to this. The first has to do with market definition and the second with buyer power. Regarding market definition, the basic question is whether there is simply an e-commerce market or should the market be defined more broadly to include traditional channels. In some cases sellers may be involved in both, Tesco for example as regards grocery retailing in the U.K. As for buyer power, e-commerce could have the effect of increasing it by reducing search costs or making it easier to organise buyer clubs. Increased buyer power could, hence, be used to offset seller market power.

Returning to the point that even if first mover advantages persist they need not imply market power [see paragraph 40 of the UK submission], the delegate noted that her country's submission went on to say that where first-mover advantages do confer market power they may be of particular concern in rapidly expanding e-commerce markets [see paragraph 42].

Continuing with network dominance, the Chairman noted that the Australian submission raised the issue of how this might have a particular effect on smaller countries, measured at least in number of inhabitants. He called on Australia to discuss what the particular effect might be.

An Australian delegate stated that his country has so far dealt with only two e-commerce cases. The first involved sixteen of Australia's largest companies establishing a B2B exchange for the procurement of indirect goods and services, e.g. office supplies. When the exchange was being established the founders were not competitors and they include both buyers and sellers. It is also important that the exchange participants are permitted to use other procurement channels. At first sight this proposal does not appear to raise concerns about co-ordinated conduct. The second case involves a number of Australian and Asian international airlines proposing a joint venture operating a B2B site to link airline ticket inventories and ancillary services such as hotel reservations and car hire. This proposal could generate some competition issues. Why the difference between the two examples? In the airline case, the parties are all direct competitors and involved almost every major airline flying between Australia and Asia. They have very high market shares and probably a very high degree of market power. Any exchange involving direct competitors with large market shares will likely have to be treated with extreme caution. Moreover, where e-marketplace participants are also significant buyers of inputs there could be further competition concerns as could be the case, for example, if the airlines co-ordinated the buying of hotel accommodation.

There is also the question of management of B2B exchanges. Whether the exchange has independent management or not or is instead controlled by the joint venture owners on a day-to-day basis is important. Again in the airline example, direct competitors will be involved in the B2B on a day-to-day basis, giving them all kinds of opportunities for various types of coordinated behaviour which might not exist if the exchange enjoyed a greater degree of independence.

In small economies such as Australia, with high levels of concentration in almost every industry, an exchange involving some form of collective buying is likely to produce competition concerns. The ACCC will be interested in whether or not there are alternative distribution channels available and how competitive they will probably prove to be. This is not likely a problem for the indirect goods exchange mentioned, but it could be in the airlines case.

In sum, the delegate believed competition concerns could certainly arise in situations where there are very highly concentrated industries, exchanges combine all competitors, and the exchange has no independent management plus no mechanism to ensure confidentiality in information flows.

The Chairman added that the Australian written contribution referred to collusion effects and presented a typology, a classification of cases according to expected collusion risk, and discusses a number of remedies.

The Australian delegate explained that the appropriate remedy depends on the nature of the arrangement considered. The ACCC is willing to consider limiting the time over which participants can own or control exchanges. It is also possible that Chinese walls dividing participants might prove helpful in reducing competition concerns. He noted, however, that insisting on an eventual divestiture could raise problems in terms of who an exchange should be sold to, i.e. all or most of possibly interested buyers could already be owners of an exchange. This problem would likely prove more significant in smaller economies such as Australia.

The Chairman reasoned that since the Roundtable had moved from dominance to collusion concerns, it would be good to turn to the German contribution which offers the view that collusion might be facilitated if an exchange offers easy and secure communication possibilities to participants, e.g. chat rooms. The contribution also offers some suggestions on how to tackle the problem.

A German delegate noted that companies should not have complete information on their competitors' costs, prices etc. Collusion could be fostered by creating transparency among members of a cartel. This basic problem is nothing new for competition authorities. However, new means of communication, like the Internet, enhance opportunities for collusion. This potential danger to competition counter balances to a certain extent the efficiency advantages of online exchanges and cannot be fully removed. The installation of fire walls and similar measures can attenuate the risk of too much transparency but such technological solutions might also make communications easier and at the same time harder to detect by outsiders. One must also keep in mind that fire walls etc. completely depend on the system operator putting them to use. Whoever puts them in place can also deactivate them and outsiders cannot easily determine what is going on. Basically if competitors want to use an online forum for anti-competitive information exchange and for coordination, this will be rather hard to prevent.

An important mitigating factor in this context is the interests of exchange participants on the opposite side of the market. Any online exchange can only be successful in the long run if neither side of the market has the impression of being exploited. This introduces a certain check on how far one can tinker with the technology and tends to advance the interests of competition authorities.

The OECD issues paper mentioned the possibility of suppressing chat rooms. Besides being difficult to achieve and monitor, this is probably a rather harsh measure considering possibly necessary uses that chat rooms can be put to. Even though reducing unwanted coordination is an important objective, one has to keep a balance between means and ends.

The Chairman remarked that one can get depressed at the thought that increased information capabilities, greater dominance, important efficiencies and potential buyer power all arise at the same time in electronic commerce, making good solutions difficult to come by. He then called on the United States to discuss both the legitimate and illegitimate reasons B2B participants might have for excluding competing firms from an exchange, and on why participants/owners might opt for exclusivity requirements. He also invited comment on the recent Covisint case.

A delegate from the United States Federal Trade Commission (FTC) stated that Covisint was the first B2B venture examined by the FTC. It is a proposed joint venture that plans to operate an Internet based business to business exchange providing services for firms in the automotive industry. The venture's core offerings will be assistance in product design and in the management of procurement functions performed by manufacturers plus their direct and indirect suppliers. The firms forming the exchange are General Motors, Ford Motors, DaimlerChrysler, Renault, Nissan and two information technology firms -- Commerce One and Oracle. The automobile manufacturers founding the joint venture account for about one-half of worldwide automobile production.

The FTC on September 11th informed the founders of Covisint that it would close its investigation into whether the formation of Covisint violates antitrust laws. In the FTC's public statement, it was noted that Covisint was in the early stages of its development. It has not yet adopted by-laws, operating rules, or terms for participants' access. And because it is not yet operational and its founders represent such a large share of the overall automobile market, the FTC cannot say that the implementation of the Covisint venture will not raise competitive concerns. The FTC reserved the right to take further action as the public interest may require.

The FTC believes that B2B electronic marketplaces offer great promise as a means through which significant cost savings can be achieved, business processes more efficiently organised and competition enhanced. B2Bs have significant potential to benefit both businesses and consumers, through increased productivity and lower prices. But as with any joint venture, B2Bs should be organised and implemented in ways that maintain competition. The antitrust analysis of an individual B2B will be specific to its mission, structure, particular market circumstances, procedures, rules, organisation, and its actual operation and market performance. All this is to say that it is still too early to tell, and the devil will be in the details.

The delegate also announced that the FTC has published its report from last summer's B2B workshop. It will soon be accessible at the FTC web site, i.e. at [www.ftc.gov](http://www.ftc.gov). Several themes dominated that workshop. There was widespread recognition of the tremendous potential efficiencies in B2Bs. However, there was also robust discussion of possible serpents in these gardens of efficiency. Several have already been discussed by Roundtable participants, but the Chairman has asked for particular comment on excluding rivals, raising their costs, and discrimination falling short of outright denial of access. Some panelists stated that excluded rivals could employ alternative mechanisms at comparable costs to reach suppliers or buyers. Others suggested that strong network effects may make alternatives unsatisfactory. Mixed views were expressed on the curative power of entry. It was suggested that there could be legitimate reasons for participants excluding other firms or according them different treatment. They had to do with discouraging free riding by non-owning participants and restricting access to qualified sellers.

Several panelists expressed concern that B2Bs may undermine the development of effective competition by improperly requiring participants to deal exclusively with a particular B2B. They noted that we are at an early but potentially critical stage of B2B market development and that determinations made at the outset may shape competition for years ahead. Of course, to the extent that exclusivity is linked to achieving efficiencies, it might be pro-competitive.

The Chairman commented that another possible negative effect of e-commerce which had already been alluded to, is the fact that it could create buyer power. Such power could be counter-vailing and beneficial in nature, but it could also be anti-competitive and negative in its effects. Buyer power was touched on in the Japanese submission and the Chairman invited further comment.

A delegate from Japan noted that especially over the past year, B2B markets have become more popular in Japan, and plans are afoot for large companies to build B2Bs. Some are intended to facilitate input purchases by large manufacturing companies directly from global suppliers. Some companies have approached the Japan Fair Trade Commission (JFTC) asking for advice about the possible anti-competitive effects of their projects. Reviewing their plans leads to the conclusion that each case could have different effects depending on market conditions. It is too early to make generalisations about the effects of e-commerce.

As to joint purchasing involving B2Bs, there are various ways in which this could, but not necessarily would produce anti-competitive effects. The actual effects depend on the market mechanism

used and various other factors. The delegate referred to the classic text book example of how joint purchasing, if it confers monopsony power, could be detrimental to economic efficiency, i.e. the case where buyers take advantage of an upward sloping supply curve by reducing their purchases in order to lower prices. Because this behaviour could also lead to reduced supply in the markets buyers sell into, it could produce higher prices for consumers. Buyer co-ordination in reverse auctions on e-marketplaces could be used to acquire and exercise monopsony power. On the other hand, joint purchasing could be pro-competitive because it can be an effective way to realise scale economies in purchasing.

The delegate also noted that buyer power could produce inefficiencies because it could lead to lower quality and innovation on the part of affected sellers. It could also cause those suppliers to raise prices charged to buyers lacking buyer power.

More cases are needed in order to get a clearer perspective on the possible anti-competitive effects of B2Bs.

The Chairman commented that vertical restraints have been alluded to as a possible problem associated with e-commerce. In particular, the Canadian contribution notes that B2Cs may open up many subtle ways in which vertically integrated firms can disadvantage rivals. He asked Canada to elaborate on whether potentially anti-competitive vertical restrictions affecting e-commerce can be effectively monitored and cured by competition agencies.

A Canadian delegate stated that Canada has been exploring e-commerce issues by looking at what is peculiar to cyberspace to help guide where competition agencies should concentrate, what they need to learn, and what tools they will require. The main problems for competition agencies will arise when cyberspace is exclusively used as a means to conduct business activities. This will grow over time and affect industries at different paces.

B2B and B2C individual sites and exchanges have the potential to facilitate anti-competitive acts. This risk is linked to the design of the underlying software code which is invisible to those using the site. Through controlling that code, one or more firms can engage in exclusionary, disciplinary or predatory acts which could prevent or reduce competition. This can be done at the design or development stage and also remotely after the fact without the knowledge of those using or owning the site -- a bit like when software developers leave back doors known only to them which allow access without requiring pass words. Using code, it is possible to eliminate a competitor's advertising, create dis-information or mis-information, skew the results of a search to reduce or eliminate the likelihood that a user will land up at a particular site, and/or exclude bidders in auctions. Mouse clicks can be programmed to restrict knowledge or links to certain products or services, and this can be arranged to occur intermittently so as to create the illusion that it is not part of a pre-conceived plan. Other measures can be openly designed on a site to make available or better accessible a product in return for a "shelf management fee". Screen bias, an example of what can be achieved by code, was well illustrated in the early 1990s airline computerized reservation cases. Such instances are relatively easy to handle compared to bias introduced through remotely manipulating sites using telnet technology for example.

Faced with these challenges, competition agencies will need to acquire code language expertise, plus new forensic and evidence handling skills. Many countries' law enforcement agencies are engaged in dialogues with the high technology industry to find ways to deal with the technology and assist competition authorities in doing their jobs. When one gets together with some of the firms involved, it is clear that some of their software engineers are also being hired by individual private firms to create malicious code. They are quite open about the fact that this is happening. Canada's Competition Bureau hopes to take a close look at these issues over the next few months in order to find a way to solve problems without hindering innovation.



Another issue is whether the market is going to discipline this particular problem. Insofar as software and hardware are being developed with, to industry's knowledge, flaws in it, there may be a way of reducing risks through adopting appropriate standards. If this does not happen, the market may discipline the suppliers.

The Chairman then moved on to the ownership issue. Ownership by participants may result in both efficiencies and anti-competitive effects. Australia in particular referred to chinese walls as a possible solution to this dilemma. He asked Australia to expand on the pros and cons of participant ownership, and on what kind of chinese walls would be advisable to prevent anti-competitive acts.

An Australian delegate stated that allowing suppliers to own B2B and B2C exchanges in the establishment phase is probably necessary. In a fairly small market, many of these exchanges might not be established unless suppliers are somehow involved. It is probably also appropriate that owners commit to buying a certain percentage of their requirements through an exchange at least during the start-up phase. The delegate noted that e-commerce can create significant scale and other economies especially in countries like Australia where there are separate regional markets.

On the other hand, it may be that the long-term ownership of electronic exchanges is neither necessary nor desirable nor even wanted by suppliers. However, it may be difficult for the competition authority to determine the appropriate time limits. Further, given proposals before the ACCC involve a large number of Australian companies, there are issues of finding appropriate owners, who do not generate competition concerns especially in markets already highly concentrated. Also the sale of B2B operations implies profit from the B2B, and sale may defeat the original purpose of direct links between buyers and sellers and lower costs.

The delegate noted that there may be situations where suppliers wish to own exchanges simply to prevent the development of new competing channels of distribution. They may wish to ensure that B2Bs and B2Cs function more as complements than competitors to existing distribution systems.

The delegate reiterated that especially as regards higher risk ventures in smaller countries like Australia, electronic exchanges may not be established unless suppliers are permitted to be involved. The ACCC will have to be very cautious, bearing in mind the American delegate's view that the devil will be in the details. For example, approvals of B2B arrangements involving joint purchasing by exchange owners will have to be very specific. Otherwise, the arrangements may tend towards joint purchasing of direct inputs by important competitors and lead to concerns about buyer power. Problems could also arise when exchanges draw together basically all competitors and tend to facilitate collusion among them.

The chinese walls solution is perhaps a bit unrealistic. Probably the better long-term solution is some form of independent management of electronic exchanges, particularly in cases where all the major participants are involved. Independent ownership may not be required in situations where there is completely independent management of B2Bs and there is a mechanism to block the transfer of sensitive information.

The Chairman next turned to the German contribution which also raised the ownership issue. He called on Germany to explain its scepticism about chinese walls as a means to solve the problems. The German contribution also gets into details about the probability that ownership of B2Bs by participants could lead to anti-competitive exclusion or systematic discrimination against non-owning rivals. In addition to touching on those issues, the Chairman invited Germany to discuss the Covisint case.

A German delegate underlined that security of information is a sensitive issue for both competition agencies and companies participating in on-line platforms. As Australia has pointed out, the

risk of using an Internet platform for anti-competitive purposes may be greater if the operator of the platform is involved in the underlying market. In the Covisint case, the point was made that companies not involved in the technical set up of the platform have no means of controlling whether their information is kept confidential and no insight into the actual flow of information. That was a very important concern to companies consulted by the BKartA.

Fortunately, since Covisint wishes to attract further participants to its exchange, it has an interest in convincing them that their information is secure and that the exchange will adhere to its stated rules. It is in Covisint's self interest to have effective fire walls and an effective encryption technology. However, there are real problems in enforcing Chinese walls etc., and this contributes to an understandable uneasiness among participants and those interested in preventing anti-competitive conduct.

Concerning possible discrimination among competitors, this problem is probably aggravated when exchanges are owned by companies active in the underlying markets. This is another issue that surfaced in Covisint case. There are safeguards in Covisint's set up that are meant to tackle this problem. Covisint was established as an open platform with non-discriminatory access to all producers and suppliers. In addition, there is no obligation to deal exclusively via Covisint. All participants are free to deal conventionally or through another Internet platform. There is of course a certain fear by suppliers joining the exchange that Covisint might be dominated by the car manufacturers, and its governance is designed to reduce those fears. Whether Covisint's rules and structure will in fact prove adequate to meet these challenges cannot easily be assessed - time will tell.

The Chairman's last call was addressed to Canada. He asked for more information on how e-commerce impacts on the ability of competition agencies to detect and eradicate anti-competitive practices.

A Canadian delegate explained that this question is related to topics she discussed earlier. Whether or not competition agencies will remain relevant in cyberspace will depend on their ability to detect and eradicate the effects of certain behaviours. Current evidence gathering techniques will need to be improved to allow recovery and processing of electronic evidence. Many competition agencies are now trying to ensure that their enforcement tools are adequate to the new challenges and that they are sufficiently able to share information with counterpart agencies in transnational cases. Whether competition agencies have the ability to recover electronic evidence depends on the language of compulsory powers provisions contained in pertinent legislation, including privacy legislation. It is also affected by ISP data retention requirements, and international co-operation mechanisms such as mutual legal assistance treaties (MLATs).

An example of where improvement is needed concerns arises in the Canada-US. MLAT. Currently the MLAT does not apply to interceptions. Under the Canadian Criminal Code, an interception in Canada can only take place if an inquiry is underway in Canada. Therefore, an interception cannot be executed in Canada on behalf of the US (or other country), absent a domestic inquiry, contrary to the situation for documentary search and seizure under the MLAT. Such an asymmetry is not workable in the 21st century. Competition agencies must ensure that all provisions relating to accessing evidence are technology neutral. The delegate also noted that forensic search teams need training in how to access electronic media.

Competition agencies also need to look at their compliance programs and decide what additional guidelines should be provided in respect of B2B or B2C exchanges. The UK Trust is a good example of how B2C issues can be addressed. In addition, competition agencies might wish to consider encouraging self-regulation including standards created under the auspices of trade associations. Businesses should be urged to more effectively monitor the use of chat rooms, e-mail, etc., and should be made aware of the fact that there is storage space available in cyberspace whose use cannot be detected. This provides an easy

way to access information relating to price agreements etc. Once firms know of these possibilities, perhaps they will adopt appropriate compliance policies.

In closing, the delegate suggested that there may be considerable time before agencies have extensive case experience relating to electronic commerce. They must nevertheless begin working today to ensure they will have appropriate enforcement tools when needed tomorrow.

At this point the Chairman briefly mentioned what the Roundtable had covered and opened the floor to general discussion for additional points of view or comments on what had been said.

A French delegate believed the discussion had clarified that this was a topic worth re-visiting. It also became increasingly evident that electronic commerce increases the need for co-operation among national competition agencies. The Canadian delegate alluded to this, and the United States and Germany have both discussed a cross-border case, i.e. Covisint. The delegate asked whether the U.S. relied in that case on bilateral co-operation agreements with other agencies. He thought it might be time to think about improving on existing bilateral co-operation agreements.

A delegate from the United States (FTC) said that indeed the Covisint case was an instance when co-operation between competition authorities worked very well and produced a desirable outcome. In any such case, US competition authorities would be talking with other competition authorities at a general level about concepts, market definitions, etc. In this case, however, the joint venture participants were, interestingly, all represented by the same law firm, one appearing quite frequently before the agencies. It is relatively "enlightened" and was willing to waive confidentiality so that the respective competition agencies could discuss what they were thinking about the deal. That led in turn to a more expeditious resolution of the issues, which is obviously very important in high-tech industries like this.

A BIAC delegate returned to what the U.S., Australia and Germany had said about the ability to detect collusion. This involves an issue of maintaining a proper balance between being reactive and proactive and between promoting competition and innovation. Repeating the words of the US delegation, the devil is in details. It is up to the companies' advisers to communicate very clearly what the operating protocols are and how exchanges will be managed. The perspective and objectives of an independent marketplace might be different from those of an owner-led marketplace.. It may not be in the long term interest of owner-led marketplaces to facilitate collusion given their desire to bring new suppliers and buyers into the market and thus increase the benefits flowing from their exchanges. Returning to the chat room issue, a lot of the documents the BIAC delegate has so far seen considered chat rooms as devices to share ideas about product development rather than price information, and what there is of the latter has been at a very aggregate level. Remembering the importance of innovation and the stage of development of B2B marketplaces, it may be much too early to take a pro-active policy towards electronic marketplaces. Already, commentators, particularly in the United States, are talking about consolidation of the indirect and direct B2Bs into "meta exchanges". It will take some time yet before one can assess the degree to which hoped for efficiency gains from e-commerce will in fact materialise.

A delegate from the United States (FTC) added that participants in the FTC workshop on electronic commerce found the various demonstrations of electronic marketplaces particularly interesting. While there has been legitimate concern about potential for collusion and anti-competitive information sharing, what is also extraordinary is the extent to which technology can also be used to prevent precisely that. If all competition agencies work together we will see a greater effort by the private sector in terms of setting up internal operating rules that prevent the very sort of conduct competition agencies are concerned about. One of the auction sites was fascinating to watch. The parties submitted bids and each knew whether it was the lowest bidder, but not what the lowest bid was. It was like watching people groping in the dark and heading downhill. There was no undue sharing of information lending itself to anti-

competitive use. It was really a very well run auction and indicated that there will be savings and efficiencies on the procurement side.

A European Commission delegate returned to the ownership issue and Australia's suggestion that larger firms be allowed to own only in the initial start up phase, with the exchange eventually being controlled by an independent owner manager. The delegate asked what legal instruments would be used for such approach. Would an undertaking be required as part of a clearance decision, or would it be necessary to wait and establish abuse of dominance before taking action?

An Australian delegate stated that under Australian law it may be possible to establish legally enforceable undertakings as a condition for approval. The problem, however, is that one is trying to establish a pre-set time limit for divestiture without really knowing when that should be. A possible alternative, as suggested by the EC delegate, would be to wait until the arrangement led to a dominant position in the market and an abuse thereof, and then take action after the fact. This latter approach might be more difficult to implement.

The Chairman summed up by noting the "good news" that no competition authority is much behind the others in electronic commerce. The bad news is that the reason for this is that no one has a clear idea how to handle potential problems. At another level, what delegates said was absolutely classic and perhaps expected. They were talking about information on the one hand and networks on the other. Competition officials are well aware that improvements in information technology can lead to both efficiency and collusion. This is the oligopoly problem concerning what happens when there is a lot of information in a fairly restricted environment. As for networks, based on discussing deregulation in many sectors over the last few years, competition officials know that networks are likely to lead to dominance and exclusion as well as to efficiency. When globalization is added to improved information technologies and network effects, competition officials are led to the co-operation matter discussed at the end of the Roundtable.

The Chairman also remarked on a possible difference of opinion which may not have much to do with electronic commerce but instead reflect a deeper division of opinion. BIAC and the US emphasised very strongly the efficiency aspects of e-commerce. Some other delegations were perhaps a bit more worried about the possible misuse of the situation and therefore tended to emphasise anti-competitive effects.

The Chairman thought that basically delegates ended up formulating the issues in terms of problems they were already familiar with. He believed that competition agencies must acquire additional vocabulary and visualise things in a different way than would apply say to a shop at a given location. The new situation is slightly more abstract, but the Chairman was unsure whether it brings any truly new issues except for a greater need for enhanced co-operation, as France had pointed out, and for acquiring additional tools as Canada has urged. The rest comes down to having to take a case-by-case approach and trying to determine things like whether efficiencies outweigh exclusionary effects. The US delegate rightly pointed out that the devil is in the details.

The Chairman believed that progress regarding understanding competition issues in the e-commerce domain would be expedited by considering actual circumstances and comparing case analyses and remedies adopted. More electronic commerce cases will surely appear, even though not as fast as some might have thought. The Chairman felt it would be wise to postpone for six months to a year the planned May 2001 second roundtable on electronic commerce. In this way, there will be more real cases to discuss and delegates will avoid repeating the same thing in the abstract.



## **AIDE-MÉMOIRE DE LA DISCUSSION**

Le Président ouvre la séance en notant que douze contributions très approfondies ont été reçues pour la table ronde. Il observe également que la réflexion et la spéculation occupent une part beaucoup plus large dans ces travaux que les études de cas proprement dites. Cette répartition pourrait traduire le fait qu'il s'agit là d'un domaine très nouveau, ce qui d'ailleurs a poussé le CLP à y consacrer un débat.

Le Président rappelle que les délégués ont choisi de faire porter le débat sur l'ensemble de la question. Par conséquent, les différentes contributions abordent un grand nombre de thèmes. Le thème de l'infrastructure d'abord, est traité dans au moins trois contributions. Citons ensuite la question des obstacles éventuels au développement du commerce électronique ; enfin, d'autres thèmes se rapportant plus précisément aux études de cas, comme les collusions, les comportements concertés, l'exclusion et les restrictions verticales. Les problèmes de propriété sont également abordés et une contribution soulève la question de savoir si les outils des autorités de la concurrence sont adaptés aux problèmes relevant du commerce électronique.

### **1. Infrastructure**

Le Président demande au BIAC de décrire les deux visions quelque peu antagonistes qui coexistent dans le monde des entreprises quant aux conséquences pour la concurrence du mouvement de concentrations verticales entre les fournisseurs d'accès Internet (FAI) et les fournisseurs de contenu.

Un délégué du BIAC déclare que le BIAC estime généralement que, bien que le commerce électronique donne lieu à des situations nouvelles, les principes et les méthodes traditionnels du droit de la concurrence suffisent à les régler. S'agissant des problèmes d'infrastructure, et en particulier du contrôle conjoint de certains FAI et de grands fournisseurs de contenu, la contribution écrite du BIAC expose les deux grands courants d'opinion qui prévalent parmi les entreprises. Le BIAC prévoyait que ces vues seraient présentées par d'importants acteurs du marché. Malheureusement, l'un d'eux a été contraint de se désister au dernier moment.

La société qui n'a pu être présente devait faire valoir l'idée selon laquelle le marché va pousser les groupes qui sont à la fois FAI et fournisseurs de contenu à faire les choix appropriés en ce qui concerne le contenu, l'accès et leur attitude face aux contenus et aux services concurrents. Étant donné la vitalité qui caractérise le fonctionnement du marché, un étroit contrôle étatique et un strict encadrement par les pouvoirs publics des conditions applicables en cas de fusion en matière de contenu, d'accès au service et de discrimination n'apparaissent pas indiqués. Dans leurs contributions, plusieurs pays signalent qu'un certain nombre de sociétés fusionnées ont déclaré publiquement qu'elles n'entreprendront pas de manœuvres d'exclusion et n'appliqueront pas un traitement moins favorable au contenu de leurs concurrents. Si elles ont fait ces déclarations, c'est qu'elles estiment que de tels engagements sont dans leur intérêt : une stratégie commerciale reposant sur la restriction de l'accès de leurs clients à certains contenus serait vouée à l'échec, dans un contexte où les clients veulent justement avoir un large choix de contenus. Ces sociétés font valoir que, si tant est que l'intervention des pouvoirs publics est nécessaire sur les questions de contenu, d'accès au service et de discrimination, cette intervention doit prendre la forme

de mesures d'application générale qui ne risqueront pas d'avantager ou de désavantager certains acteurs du marché ou certains modes de communication.

Le point de vue opposé est défendu par une représentante de la société Disney, qui souligne certains facteurs d'inefficacité et certains risques d'abus inhérents au contrôle conjoint de FAI et de fournisseurs de contenu, et met en garde contre la tentation d'une approche purement libérale du marché. Devant le développement rapide de marchés nouveaux, il importe, à ses yeux, que les autorités de réglementation gardent à l'esprit trois éléments dans leur analyse des concentrations verticales entre FAI et fournisseurs de contenu. En premier lieu, elle note le caractère crucial d'une vision dynamique du problème. En particulier, elle note qu'une simple analyse des parts de marché fondée sur les chiffres d'affaires générés dans des territoires géographiques plus ou moins étendus peut conduire à sous-évaluer considérablement la véritable puissance de marché d'un groupe. Il convient de tenir compte dans l'analyse d'un certain nombre de facteurs tels que les effets de réseau, l'inertie des clients à changer de fournisseur, et la possibilité de propager dans les autres régions une position dominante acquise dans une partie du monde. En deuxième lieu, la déléguée a enjoint les autorités de réglementation à mieux répondre à l'évolution technologique. La technologie d'aujourd'hui offre tout un éventail d'outils nouveaux qui peuvent permettre une discrimination contre les concurrents par des moyens complexes, subtils et parfois presque indécélables. Citons parmi ces dispositifs, l'utilisation sélective de la mémoire cache, les restrictions sur les hyperliens, le blocage du retour d'information et le référencement préférentiel sur les guides électroniques de programmes (EPG). Ces pratiques peuvent s'avérer plus anticoncurrentielles encore que ne le serait un refus pur et simple de traiter avec des concurrents. En troisième lieu, la déléguée estime qu'il est essentiel que les autorités de réglementation mettent en place les garde-fous nécessaires dès maintenant, afin que ces marchés naissants évoluent d'une manière ordonnée et concurrentielle, et en particulier qu'elles veillent à prévenir le traitement discriminatoire des FAI et des fournisseurs de contenu indépendants par les opérateurs intégrés verticalement. Si les précautions nécessaires ne sont pas prises, il sera, selon cette déléguée, très difficile de réparer les dégâts causés aux marchés.

Le Président note que certaines des inquiétudes qui viennent d'être soulevées seront probablement évoquées à nouveau au cours de la Table ronde, et que c'est précisément pour réfléchir en amont aux garde-fous nécessaires dans les marchés émergents du commerce électronique que le CLP a organisé cette discussion.

Le Président s'adresse ensuite à la délégation de Hongrie qui, dans sa contribution, note que dans ce pays, les FAI sont considérés comme des fournisseurs de services de télécommunications et doivent par conséquent obtenir une licence. Le Président demande à la Hongrie quels sont les critères d'attribution des licences et comment l'office hongrois de la concurrence envisage les risques d'effets anticoncurrentiels. Le Président souhaiterait également obtenir des précisions sur la mention faite par la Hongrie d'une enquête de 1999 sur « une présomption d'entente dans le marché des services Internet ». Le Président aimerait savoir comment cette entente a été décelée, ce qui a causé les soupçons et quelle a été l'issue de l'enquête. Il demande également si cette entente présentait une caractéristique spécifique dans ce secteur.

Un délégué de la Hongrie note d'abord que le marché hongrois est de taille relativement modeste. Seules un million de personnes ont accès à l'Internet, soit un taux de pénétration d'environ dix pour cent. La Hongrie ne possède qu'un seul grand site B-to-B (business to business), une quinzaine de sites B-to-C (business to consumer) et quelques sites C-to-C (consumer to consumer). Depuis 1992, la loi hongroise sur les télécommunications impose que les FAI soient titulaires d'une licence. Les critères d'attribution des licences sont essentiellement techniques et reviennent à peu de chose près à une simple notification. Ils ne créent pas de barrières à l'entrée et ne présentent aucun danger pour la concurrence. A l'appui de cette assertion, la Hongrie note que le nombre de FAI en Hongrie est passé de 40 à l'époque où sa contribution a été soumise, à près de 60 au moment de la table ronde. L'entrée sur le marché de la fourniture d'accès est libre, c'est-à-dire qu'il n'y a pas de règles juridiques ou de restrictions à l'entrée, hormis les règles relatives

au copyright. Plus généralement, s'agissant du commerce électronique, un décret gouvernemental offre depuis 1998 un certain niveau de protection au consommateur.

Bien que la concurrence existe dans les marchés de l'Internet en Hongrie, il faut également signaler quelques motifs d'inquiétude au regard de la législation antitrust. Par exemple, en 1999, une enquête a été diligentée d'office contre l'Association hongroise des fournisseurs d'accès Internet. Cette association est une unité d'enregistrement déléguée par l'ICANN (Internet Corporation for Assigned Names and Numbers) pour l'attribution des noms de domaines de premier niveau dans la zone .hu. Elle imposait des conditions particulières et interdisait aux non-membres d'attribuer des sous-domaines dans la zone .hu. Ce système pouvait être assimilé à une forme d'entente sur le partage des marchés et de l'information ou d'entente sur les prix. Selon la pratique de l'office hongrois de la concurrence, chaque forme de service Internet constitue un produit distinct sur le marché, l'unité d'enregistrement étant l'un d'eux. L'office de la concurrence a mené une enquête pour déterminer si l'Association accentuait les barrières à l'entrée et s'il y avait partage d'informations, particulièrement en matière de prix, entre ses membres. Cette enquête comprenait un bref questionnaire adressé aux clients et aux fournisseurs de contenu, leur demandant comment ils déléguaient leurs noms de domaine. La conclusion, inattendue, de l'enquête, fut que les clients et les fournisseurs de contenus utilisaient des noms de domaines en .hu, mais également des noms de domaines de premier niveau des zones génériques (comme .com et .net) et ce pour des prix et des conditions presque similaires, ce qui a conduit à conclure que les marchés géographiques sont mondiaux et que la pratique de l'association n'était pas de nature restrictive. L'office de la concurrence a mis un terme à l'enquête après avoir conclu qu'il n'y avait pas de problèmes de concurrence relevant d'ententes sur les prix et de partage d'information entre les membres de l'Association.

Malgré la fin de l'enquête, l'Office de la concurrence demeurait convaincu que l'Internet rendait particulièrement facile la communication entre concurrents. Il a par conséquent institué un dispositif de surveillance du marché et de collecte d'informations sur les opérateurs. Il a également organisé des tables rondes et des débats informels pour favoriser une « culture » concurrentielle dans ce secteur. Selon l'Office hongrois de la concurrence, l'autodiscipline reste la meilleure solution. Il faut souligner que l'enquête évoquée précédemment a donné lieu à la publication par l'association d'un code de conduite. Celle-ci a également ouvert son marché de la zone .hu en autorisant des non-membres à attribuer des noms de domaines.

Le Président se tourne ensuite vers la délégation du Royaume-Uni, qu'il remercie d'avoir généreusement préparé une contribution écrite et deux rapports (distribués sous forme de documents de séance). Le premier, rédigé par *Frontier Economics*, traite des comportements anticoncurrentiels liés aux transactions de commerce électronique, et le second, émanant de l'OFT (Office of Fair Trading) et de l'OFTTEL (Office of Telecommunications) porte sur les aspects structurels. Le Président demande à la délégation du Royaume-Uni de décrire les problèmes de concurrence que posent les concentrations verticales entre les fournisseurs d'accès « du dernier kilomètre » et les FAI, particulièrement en ce qui concerne la téléphonie mobile et les portails Internet destinés aux services mobiles. Il souhaiterait notamment des éléments qui pourraient aider à déterminer si les sociétés de télécommunications possèdent un avantage inhérent sur les autres opérateurs de portails, soit parce qu'elles peuvent utiliser les informations qu'elles détiennent déjà sur leurs clients, soit parce que ceux-ci craignent pour la sécurité de leurs paiements. En passant par les portails de leur opérateur téléphonique, ils peuvent en effet parfois éviter de donner les coordonnées de leur carte bancaire à un tiers qu'ils connaissent moins. Le Président note également que les opérateurs de télécommunications peuvent être avantagés parce qu'ils peuvent faire en sorte que lorsque la ligne de téléphone est utilisée pour accéder à l'Internet, leur portail apparaisse toujours à l'écran lors de la connexion.

Un délégué du Royaume-Uni souligne d'abord qu'une grande partie des questions évoquées par le Président concernent en fait l'accès à la boucle locale et les problèmes qui se posent lorsque l'on



combine un monopole naturel avec des services concurrentiels. Il est important de veiller à ce qu'une puissance de marché existant dans l'amont ne se propage pas dans l'aval. Au Royaume-Uni, la puissance de marché sur la boucle locale est limitée par des prix réglementés. En outre, les propriétaires de la boucle locale qui exploitent également des FAI sont soumis à une réglementation qui les empêche de pratiquer vis-à-vis des FAI indépendants des prix d'éviction.

Selon ce délégué, l'intégration verticale en elle-même n'est pas le principal problème de l'infrastructure du commerce électronique. Les difficultés ont plutôt trait aux avantages, fortuits ou hérités, au premier entrant. Il évoque à cet égard trois aspects. Le premier porte sur les avantages liés à la possession d'une base de clientèle établie. Si une société comme British Telecom (BT), par exemple, décide de créer un FAI, celui-ci a d'emblée accès à une base de clientèle considérable qui est habituée à traiter avec BT. Il est donc important que certains contrôles soient en place. Au Royaume-Uni, un FAI possédé par un opérateur historique doit être une entreprise distincte avec une comptabilité séparée, et l'information ne peut pas être transmise entre les deux entités. En deuxième lieu, l'intégration verticale peut procurer des avantages dans la planification. Par exemple, un FAI peut être favorisé s'il est informé avant ses concurrents de la création prochaine d'un produit d'accès non facturé à la durée. Il n'est pas forcément souhaitable de tenter d'éliminer ces avantages car il pourrait en résulter une plus faible rentabilité des innovations de l'opérateur historique. Le troisième point développé par le délégué concerne la souplesse de la tarification et les avantages au niveau de la facturation. L'opérateur historique, en téléphonie fixe et mobile, peut être en mesure de restreindre la souplesse de tarification des FAI. Il semble toutefois que ce problème ne soit plus d'actualité au Royaume-Uni grâce aux mesures prises par l'OFTTEL.

S'agissant de la téléphonie mobile, le délégué note que l'accès à ce marché est beaucoup plus concurrentiel que celui de la téléphonie fixe. Des problèmes pourraient toutefois se poser lorsque les opérateurs de mobile favorisent leurs propres portails. Par exemple, BTCellnet offre son propre portail et des téléphones pré-programmés qui le favorisent. Conscient de cette entrave potentielle à la concurrence, l'OFTTEL a contraint BTCellnet à révéler le code permettant de changer le portail par défaut sur son nouveau téléphone WAP (Wireless Application Protocol).

S'agissant du problème de la sécurité des paiements évoqué par le Président, BTCellnet pourrait assurer la fonction de facturation pour le compte de la branche commerciale de BTCellnet. Si tel était le cas, il pourrait s'agir d'une mesure d'éviction flagrante, et BTCellnet se verrait contraint d'offrir le même service aux FAI concurrents. S'agissant du problème plus vaste de la confiance des clients, le délégué estime qu'il ne faut pas sous-estimer les solutions provenant du marché. Il existe par exemple des services permettant de réduire les risques associés au paiement par carte de crédit sur l'Internet.

## **2. Obstacles au développement du commerce électronique**

Le Président convient que l'intégration verticale dans le commerce électronique pose des problèmes complexes mais, avant de se pencher sur ceux-ci, il souhaite demander à la délégation de la Suède d'exposer les obstacles potentiels au développement du commerce électronique B-to-C. Il souligne d'abord que la contribution de la Suède, tout comme un certain nombre d'autres, décrit des difficultés plus potentielles que réelles.

Un délégué de la Suède souligne que l'Internet est particulièrement développé dans son pays. La moitié environ des foyers suédois bénéficie d'une connexion, proportion qui se monte à 75 pour cent chez les foyers avec enfants. C'est l'un des taux de connexion les plus élevés au monde. Il convient de noter en outre que la téléphonie mobile, la télévision numérique interactive et les connexions téléphoniques à large bande couvrent la quasi totalité du pays. Le B-to-B comme le B-to-C progressent, malgré quelques faillites récentes dans le secteur qui pourraient ralentir quelque peu le mouvement.

Parmi les obstacles auxquels faisait référence le Président, il faut citer la confiance des clients. Les inquiétudes concernant les systèmes de paiement, les retards de livraison, la difficulté à renvoyer les produits et l'absence de contrats écrits et de reçus rendent encore plus difficile l'exercice des droits des consommateurs. Le commerce électronique laisse aussi peut-être à désirer en termes de convivialité. Les distributeurs traditionnels ont développé au fil des siècles un soutien logistique de qualité, mais ce savoir-faire n'a pas été transféré automatiquement dans le B-to-C.

Comme ses homologues d'autres pays, l'Autorité Suédoise de la Concurrence (ASC) manque encore d'expérience dans le domaine du commerce électronique. Un petit nombre de plaintes a été enregistré concernant le refus de vente par des concurrents. L'ASC craint que le commerce électronique ne rende plus facile l'échange d'informations commerciales, lequel pourrait permettre une concertation sur les prix, les partages de marchés, etc. Il pourrait aussi être difficile de définir le marché pertinent et les positions dominantes, et la discrimination sur les prix pourrait s'accroître. Il faudrait mener une réflexion plus approfondie sur les transactions transnationales, et rechercher une plus harmonisation internationale sur les règles de protection des consommateurs, la fiscalité et même les règles de concurrence.

L'ASC a lancé un certain nombre d'études sur le commerce électronique dans quelques marchés suédois, dont le B-to-C dans les produits et services immatériels et le B-to-B dans les matériaux de construction. L'objectif est d'améliorer la compréhension du commerce électronique et de préparer l'ASC aux nouveaux défis auxquels elle risque d'être confrontée. Le délégué exprime sa satisfaction quant à la qualité de la présente table ronde et espère qu'elle marque le début d'un meilleur échange d'informations et d'expériences sur le commerce électronique entre les agences.

### **3. Définition du marché**

Le Président remarque que la présentation de la Suède fait état de caractéristiques structurelles du commerce électronique qui pourraient ralentir son développement. Il se pourrait aussi que la concurrence ne soit pas aussi parfaite qu'on l'imagine généralement dans les marchés du commerce électronique du fait de leur portée. La contribution de l'Allemagne rappelle que, bien que l'Internet ne soit pas restreint par les frontières géographiques, cela ne signifie pas automatiquement que tout le commerce électronique se déroule dans un marché global. Les problèmes de livraisons, de réglementations, de fiscalité, de barrières linguistiques, pour n'en citer que quelques uns, ne sont pas à négliger. L'Allemagne évoque en outre la disparité des prix que l'on observe sur les marchés du commerce électronique, contrairement à ce qu'on aurait pu attendre.

Un délégué de l'Allemagne attire l'attention sur le fait qu'on trouve sur l'Internet des exemples d'offres ciblant des groupes spécifiques, notamment des groupes régionaux linguistiques. On trouve aussi des produits dont la livraison ne peut être assurée que sur une zone déterminée. Il en va de même de toute une gamme de services, comme les petites annonces d'offres d'emploi. Les petites annonces en ligne sont souvent en concurrence directe avec la presse régionale, comme en atteste le fait que certains organes de presse se lancent dans le commerce en ligne.

S'agissant de la dispersion des prix dans le commerce électronique, le délégué observe que cela prouve que les coûts de recherche sur l'Internet ne sont pas aussi faibles qu'on le considère généralement. Les moteurs de recherche et les annuaires en ligne ne fonctionnent pas parfaitement, et une recherche sur Internet peut s'avérer très coûteuse en temps. L'information ne se présente pas tout simplement à qui en a besoin. Il faut véritablement consentir un investissement en temps et un investissement financier pour la trouver. Autre explication de la dispersion des prix, la manière dont le commerce électronique facilite la discrimination sur les prix par le biais d'un marketing individualisé. D'après des articles parus récemment dans la presse, une librairie en ligne pratiquait des prix plus bas aux nouveaux clients qu'aux clients

habituels. Le Bundeskartellamt (BKartA) n'a pas encore effectué d'études concrètes sur le degré de dispersion des prix que l'on trouve sur l'Internet.

Généralement, la discrimination sur les prix n'est pas considérée comme un problème d'un point de vue de la politique de la concurrence. Certes, elle entraîne un gain de revenu pour les vendeurs au détriment d'acheteurs consentant à payer un prix élevé, mais elle permet aussi d'ouvrir des marchés à des clients moins aisés et accroît l'efficacité allocative. Par conséquent, l'interdiction, au regard de la loi sur la concurrence, de la discrimination sur les prix ne concerne que les entreprises dotées d'une puissance de marché considérable. Jusqu'à présent, le BKartA n'a pas rencontré de tels problèmes de discrimination dans le commerce électronique.

Le Président note que la contribution de la Commission européenne examine de manière approfondie les problèmes de définition du marché dans certains cas de commerce électronique. Elle évoque aussi l'affaire BiB, aussi évoquée dans la contribution de l'Allemagne, qui pose la question de la possibilité de substitution entre la vente en ligne et de la vente traditionnelle. Le Président demande à la Commission européenne d'expliquer sa méthodologie en matière de définition du marché, et de présenter ses vues sur l'affaire BiB.

Un délégué de la Commission européenne déclare que son autorité a rencontré très peu de cas et de problèmes de concurrence authentiques dans le commerce électronique. La grande majorité de ses travaux jusqu'à maintenant concernaient des cas de fusions et de coentreprises qui ne posaient pas de difficulté. Dans la plupart des cas, par exemple dans de nombreuses coentreprises de librairies en ligne, rien ne soulevait le problème de la définition du marché, et ces questions n'ont pas été traitées.

Dans l'une des premières affaires, Telia/Telenor/Schibsted, concernant un portail Internet scandinave, une première distinction générique a été tirée entre trois grandes catégories : les services financés par la publicité, les services financés par les abonnements, et la vente de produits sur l'Internet. S'agissant des deux premières catégories, il semble qu'il existe des parallèles avec la distinction généralement envisagée entre la télévision avec et sans péage. Dans un certain nombre de décisions de la Commission, le fait qu'un groupe spécifique de clients soit prêt à payer un abonnement, contrairement à d'autres, est considéré comme attestant une demande suffisamment distincte pour que les deux services constituent des marchés séparés. Le problème de l'application d'un modèle de revenu pour la définition du marché dans les affaires de commerce électronique est que des entreprises concurrentes peuvent utiliser une grande variété de flux de revenus : recettes publicitaires, abonnements, frais prélevés par les portails pour référencer des tiers fournisseurs de contenu ou de services, et commissions perçues par les portails sur les transactions. Une approche traditionnelle et très étroite fondée sur les sources de revenus peut s'avérer inadaptée dans certains cas particulièrement délicats.

Mais les problèmes les plus importants concernent la troisième catégorie définie dans la décision Telia/Telenor/Schibsted, c'est-à-dire la vente de produits spécifiques sur l'Internet, comme c'est le cas dans l'affaire BiB. Il peut exister un parallèle avec les affaires concernant la vente par correspondance, où des différences de commodité, de prix et de groupes de clients indiquent que la VPC constitue un marché très différent de la distribution classique. L'une des questions dont la Commission a eu à connaître dans l'affaire BiB est de savoir si un service interactif de téléachat et d'information est en concurrence avec la distribution traditionnelle en magasin. La Commission a statué que, attendu que le service interactif était assuré sous une marque, qu'il n'était pas limité aux transactions, et qu'il était étroitement lié à des chaînes de télévision à péage, il n'était pas en concurrence avec le commerce traditionnel. Mais la Commission a laissé en suspens la question de savoir si les services eux-mêmes, vente de disques compacts ou de livres, étaient en concurrence avec la vente classique.

En somme, la définition du marché est un point très délicat et la jurisprudence en la matière est en phase d'élaboration. Toutefois, dans les affaires de fusions et de coentreprises, il est important de prendre des décisions, parce qu'une attitude par trop laxiste pourrait être aussi dommageable au secteur qu'une approche trop stricte.

Le Président note que les États-Unis ont connu une affaire dans laquelle des concessionnaires automobiles de certains États de l'Ouest avaient exercé des pressions sur Chrysler pour que le constructeur mette un frein aux activités d'un distributeur sur l'Internet. Cette affaire semble suggérer que, du moins dans l'esprit des concessionnaires, le distributeur Internet était sur le même marché. Il note aussi que la contribution de l'Allemagne évoque deux affaires de même nature. L'une d'elles lui a paru particulièrement intéressante : celle d'*IndentCo*, dans laquelle un distributeur Internet s'était vu boycotter par CARAT, la première coopérative allemande d'approvisionnement et de commercialisation de pièces détachées automobiles. Ce cas semblait indiquer que les deux types d'activité opéraient bien sur un même marché.

Un délégué de l'Allemagne note que dans l'affaire *IndentCo*, le distributeur sur Internet pratiquait des prix considérablement plus bas que les canaux traditionnels, mais se trouvait gêné par le boycott évoqué par le Président. Autre aspect de cette affaire, le GVA, le groupe de pression de ce secteur, avait refusé d'accepter *IndentCo* parmi ses membres, au motif que, n'ayant pas d'entrepôt physique, elle ne pouvait être considérée comme un véritable distributeur. Après intervention du Bundeskartellamt, le boycott a été levé et ses effets inhibiteurs ont, semble-t-il disparu. Mais la question de la qualité de membre reste à trancher.

Le Président constate une certaine similitude entre l'affaire *IndentCo* et une affaire survenue dans le secteur automobile coréen. Dans ce pays, les acteurs du marché considèrent que le commerce électronique est bien en concurrence avec la vente traditionnelle. Il demande à la délégation de la Corée de développer ce point.

Un délégué de la Corée convient que l'affaire de boycott survenue dans son pays [un constructeur automobile qui avait interdit à ses distributeurs de traiter avec des acteurs de l'Internet] est semblable à l'affaire allemande. Différence notable toutefois, cette affaire ne relevait pas du droit de la concurrence de la Corée, et la Korean Fair Trade Commission (KFTC) ne pouvait pas prendre de mesures contre le boycott. La principale raison à cela était que, à la différence de ce que l'on observe dans la plupart des autres pays, les distributeurs ne jouent qu'un rôle d'intermédiaire. Contractuellement, les ventes se font directement du producteur au consommateur. Il n'existe pas en Corée de distributeurs automobiles ayant la surface financière nécessaire pour avoir des concessions indépendantes. Mais si les distributeurs avaient été dans la même situation que dans la plupart des autres pays, la KFTC aurait rendu un jugement différent.

Le Président remarque que dans la définition du marché, particulièrement concernant le caractère substituable des fournisseurs en ligne et les fournisseurs traditionnels, les professionnels tendent à adopter des définitions plus larges que les autorités de la concurrence. Il passe ensuite au point suivant.

#### **4. Gains d'efficience**

Dans la contribution écrite du BIAC, note le Président, les échanges B-to-B donnent lieu à des gains d'efficience appréciables. Il demande au BIAC de développer ce thème.

Un délégué du BIAC commence en déclarant que les plates-formes d'échange électroniques peuvent susciter une vive concurrence et ainsi que des gains d'efficience, particulièrement lorsque les garde-fous adaptés sont mis en place pour écarter le risque d'effets anticoncurrentiels. Comme ces plates-formes d'échange sur l'Internet n'en sont qu'à leurs débuts, il faut veiller à limiter le fardeau des impératifs

d'examen, de reporting ou de réglementation qui leur sont imposés en raison des risques de violation de la législation antitrust. Le délégué demande ensuite à deux représentants de sociétés très actives dans le commerce électronique d'exposer leur point de vue.

Le premier, qui représente Oracle, note que le document du BIAC évoque les gains d'efficience et la plus grande transparence, qui permettent une réduction des coûts de transaction et des prix. Ces sites peuvent aussi stimuler le développement d'améliorations de la qualité des produits et des services. Les effets sur l'efficience peuvent varier selon les types de plates-formes élaborées actuellement. Par exemple, ils pourraient être très différents dans le commerce B-to-C et dans le commerce B-to-B. De plus, les lois de protection du consommateur sont indéniablement plus importantes dans le B-to-C. Il convient aussi de noter que les sites C-to-C ne constituent en fait qu'une catégorie de sites B-to-C, même si les dispositions légales applicables varient quelque peu. Il faut toutefois éviter le piège consistant à traiter tous les sites sur un pied d'égalité, et garder à l'esprit la distinction importante entre B-to-B et B-to-C.

Un employé de Price Waterhouse Coopers observe que les entreprises qui participent à la formation de places de marché B-to-B en retirent souvent un avantage car cela sert de catalyseur et les conduit à remettre à plat leurs opérations d'approvisionnement, souvent décentralisées et rarement coordonnées. Ces entreprises sont incitées à envisager les changements nécessaires pour tirer pleinement parti des outils offerts par ces places de marché, comme les adjudications et l'utilisation plus systématique des catalogues. Cela peut permettre de baisser les coûts d'approvisionnement, et donc les prix pour le consommateur. De plus, le marché est rendu plus efficace par la rencontre entre des entreprises qui auraient eu peu de chances de commercer ensemble autrement.

Le Président note que la Federal Trade Commission (FTC) a organisé un grand atelier public sur le B-to-B en juin 2000 et a donc accumulé des connaissances qui seraient intéressantes pour les délégués. La FTC se dit en phase d'apprentissage en la matière, comme d'ailleurs toutes les autorités de la concurrence. Comme le précise la contribution écrite des États-Unis, les participants à l'atelier sont nombreux à reconnaître que les plates-formes B-to-B et B-to-C offrent des potentiels énormes d'économies d'échelle. Il demande des précisions sur ces gains d'efficience.

Un délégué de la Division antitrust du Département américain de la justice observe qu'il y a généralement deux marchés à examiner pour évaluer les économies d'échelle générées par le commerce électronique. D'abord, au niveau des transactions effectuées sur les places de marché, il existe des économies potentielles dans la localisation des fournisseurs, les appels d'offres, la commande, le suivi d'inventaire et le traitement des paiements. Tous ces éléments permettent aux participants de réaliser des économies directes sur les coûts, grâce à des frais de personnels et de traitement des documents réduits, ainsi qu'à une plus grande exactitude dans le traitement des commandes. Si l'on s'intéresse ensuite aux marchés sous-jacents (ceux où opèrent les participants), il existe tout à la fois des possibilités de gains d'efficience et d'effets anticoncurrentiels. Pour commencer, les gains d'efficience passent par un accès amélioré, plus précis et plus rapide à des informations de meilleure qualité. Une meilleure connaissance de l'offre et de la demande permet aux entreprises de pratiquer une meilleure tarification et d'optimiser leurs décisions d'investissement, notamment en accroissant le nombre des intervenants présents sur le marché et en rendant ce marché plus concurrentiel. Ces flux d'information améliorés permettent de réduire les coûts d'inventaire, grâce à une plus grande certitude et une plus grande réactivité dans l'approvisionnement. La diminution des coûts de transaction qui en découle peut conduire à de nouvelles économies d'échelle, encourageant les entreprises à se spécialiser plus sur leurs points forts, et à faire davantage appel à d'autres entreprises pour se procurer les intrants nécessaires.

Il est trop tôt pour dire lesquelles de ces économies d'échelle seront effectivement réalisées car les places de marché électroniques n'en sont qu'à leurs débuts, mais il existe sans aucune doute un potentiel important en la matière. Ces économies pourraient s'avérer si importantes qu'elles conduiraient à

modifier la définition des marchés aux fins de l'application de la législation antitrust. Le délégué évoque des prévisions selon lesquelles les coûts de transactions pourraient être considérablement réduits, passant de niveaux de l'ordre de 100 à 110 dollars à seulement 5 à 10 dollars. Si de telles économies sont effectivement réalisées, cela pourrait sonner le glas des méthodes classiques de passation de commande comme la télécopie, le téléphone et le courrier postal. Si une place de marché devenait dominante, elle pourrait simultanément représenter des gains d'efficacité potentiels et des risques pour la concurrence. On comprend aisément que le domaine des places de marché B-to-B intéresse autant les autorités de la concurrence. Elles représentent tout à la fois la promesse d'importantes économies d'échelles et des menaces réelles pour la concurrence.

Le Président observe que les autorités de la concurrence ont déjà eu à connaître de situations où des gains d'efficacité pouvaient conduire à une position dominante et à terme à des problèmes de concurrence, mais que, dans le domaine du commerce électronique, ces mécanismes suscitent une attention toute particulière. Il souligne aussi les liens existant entre les questions de structure du marché, de définition des marchés et d'efficacité qu'a examinées la table ronde, et propose de passer au débat général.

## **5. Débat général**

Un délégué de la Finlande note qu'une source possible de déperdition des gains d'efficacité réside dans la méthode de paiement. Les transactions peuvent être réglées par le biais de transferts directs via l'Internet ou grâce à l'utilisation de cartes de paiements. Dans de nombreux cas, les banques et les établissements financiers doivent coopérer dans le traitement de systèmes de cartes de paiement. La Finlande examine avec attention les risques que cette coopération aille trop loin, portant tort au commerce électronique. Si le paiement d'une transaction de commerce électronique n'est pas traité de manière économiquement efficace, une partie des gains liés au commerce électronique risque d'être perdue.

Le Président convient que les transactions de commerce électronique supposent généralement plus d'intervenants que les transactions traditionnelles (banques et systèmes de télécommunications) et qu'une partie des gains d'efficacité que permet le commerce électronique risquent d'être absorbés. Il revient aussi sur un autre thème évoqué dans les précédentes interventions, notamment celles de l'Allemagne : les gains d'efficacité sont plus faciles dans le B-to-B que dans le B-to-C car le premier type de commerce se fait entre des acheteurs et des vendeurs professionnels, plus à même que les consommateurs individuels de résoudre au mieux les problèmes de transactions. Il rappelle aussi aux délégués les obstacles au développement du commerce B-to-C énumérés par la Suède (notamment le problème de la confiance quant à la sécurité du système de paiement).

## **6. Position dominante sur le réseau**

Le Président lance le débat sur cet autre thème de la Table ronde en demandant à la Commission européenne d'expliquer comment les effets de réseau et les problèmes qu'ils sont susceptibles d'entraîner en termes de position dominante sur le réseau peuvent jouer aussi bien dans le commerce électronique B-to-B que dans le commerce B-to-C, et comment les propriétaires de places de marché électroniques pourraient amplifier ces effets de réseau par des moyens comme des clauses d'exclusivité et le développement de normes influant sur l'interopérabilité. Par ailleurs il encourage la Communauté à donner son point de vue sur le fait de savoir si les effets de réseau pourraient être amplifiés si les entreprises parvenaient à intégrer des places de marché B-to-B et B-to-C, de telle manière que ce soient les commandes des clients qui commandent l'ensemble du processus d'achat et que la clientèle contribue, de façon passive, à travers les informations relatives à ses achats, à la conception des nouveaux produits.

Un représentant de la Commission européenne indique que la Communauté n'a pas encore été saisie de cas réels susceptibles de guider la réflexion dans ce domaine. L'éventualité d'effets de réseau est liée bien entendu à la nature de l'Internet, lequel peut présenter des externalités de réseau dans la mesure où la valeur du réseau pour un utilisateur donné pourrait augmenter avec le nombre des utilisateurs. Toutefois, le fait que l'Internet soit lui-même un réseau avec de possibles effets de réseau ne signifie pas pour autant que la totalité des transactions réalisées via Internet s'accompagnent nécessairement de tels effets. Sur les sites B-to-C par exemple, les personnes qui achètent des livres ou téléchargent de la musique ne se soucient guère de savoir combien d'autres utilisateurs sont reliés au site. Ainsi, dans de nombreuses affaires de B-to-C, la possibilité d'effets de réseau devrait être dans une large mesure écartée, à moins qu'il y ait dans une certaine forme d'échange entre consommateurs, comme par exemple sur les sites d'enchères. Les systèmes B-to-B, en revanche, sont davantage susceptibles de procurer des avantages, en termes de liquidité, en fonction du nombre des acheteurs et vendeurs qui y participent.

S'il est vrai que des effets de réseau jouent pour la plupart des sites B-to-B, l'importance de ces effets diffère selon le mécanisme de marché utilisé. Certaines places de marché électroniques fonctionnent comme de véritables bourses, à l'instar des bourses de produits ou de valeurs, avec des produits standardisés, des prix d'équilibre du marché et des transactions anonymes. Sur ces marchés, la liquidité est capitale pour un équilibre efficient de l'offre et de la demande, et les effets de réseau sont donc assez forts. La plupart des places de marché B-to-B ne fonctionnent cependant pas de cette manière. Elles fonctionnent plutôt comme des mécanismes facilitant les échanges directs entre acheteurs et vendeurs. Dans ces conditions, ce n'est pas le volume réel des transactions qui est la clé du succès de la place de marché, mais plutôt le nombre d'acheteurs et de vendeurs qui observent en continu le système et sont en mesure d'y effectuer une offre ou un achat. Dans ce contexte, il sera plus difficile d'acquérir une position dominante sur le marché basée uniquement sur les effets de réseau et de pouvoir faire basculer le marché. Les opérateurs souhaitant acquérir une position dominante sur ces places de marché devront amplifier les effets de réseau par des mécanismes de verrouillage des utilisateurs et autres moyens de renchérissement des coûts de changement de systèmes, par exemple en introduisant des clauses d'exclusivité ou en créant des normes qui réduisent l'interopérabilité entre systèmes. Les autorités chargées de la concurrence devraient évaluer avec soin ces marchés pour s'assurer que les propriétaires-opérateurs n'essayent pas d'amplifier les effets de réseau existants par des moyens contractuels ou autres.

En ce qui concerne la question du Président sur le fait de savoir si l'intégration des sites B-to-B et B-to-C pourrait avoir une incidence sur les effets de réseau, il est certain qu'à ce jour la CE n'a encore jamais observé un tel scénario. Si le Président a en tête des avantages acquis par le fait de disposer d'un accès exclusif à des informations utiles sur les consommateurs pour la conception de nouveaux produits, le délégué voit mal comment cela pourrait représenter un problème sérieux. En effet, il est peu vraisemblable que les effets de réseau soient importants sur les sites B-to-C. On voit donc mal comment il pourrait y avoir un effet significatif d'exclusion car il faudrait qu'un site B-to-C donné capte un tel volume de clientèle hautement loyale que les autres sites ne soient plus en mesure de proposer les mêmes avantages en termes d'accès à des informations utiles sur les consommateurs.

Le Président signale que dans sa communication le Royaume-Uni examine de façon approfondie la façon dont certaines caractéristiques du commerce électronique et des modes de comportement associés peuvent rehausser les barrières à l'entrée dans les services de commerce électronique, notamment par les avantages conférés aux premiers arrivés sur le marché. Toutefois cette contribution fait également observer que si les premiers arrivés sur le marché sont susceptibles de bénéficier d'une certaine protection par des barrières à l'entrée, cela ne signifie pas pour autant qu'ils disposent d'un pouvoir de marché.

Un délégué du Royaume-Uni explique que la communication de son pays s'appuie sur l'un des documents de séance présentés à la Table ronde, à savoir le rapport de Frontier Economics. Elle aborde ensuite la question des barrières à l'entrée dans les services de commerce électronique, et signale que la

plus importante semble être les coûts fixes irrécupérables engagés pour fidéliser la clientèle et qui caractérisent ce que le rapport appelle des marchés "basculants".

Sur des marchés où les coûts de changement de système sont potentiellement faibles pour les acheteurs, la notoriété et l'image de marque sont importantes pour fidéliser la clientèle, notamment dans les systèmes B-to-C caractérisés par de petits clients et peu avertis. La communication du Royaume-Uni mentionne l'importance de la création d'une présence sur le réseau, par opposition à une présence physique. Une forte présence sur le réseau peut procurer d'importants avantages pour les premiers arrivés et agir comme une barrière à l'entrée vis-à-vis des concurrents arrivés plus tardivement. Ce type d'avantages peut toutefois être érodé de diverses manières. Ainsi, l'avantage dont bénéficient les premiers arrivés du fait qu'ils peuvent adapter leurs offres à leurs clients de longue date en s'appuyant sur les informations recueillies sur la clientèle pourrait disparaître, si les clients étaient en mesure de transférer sur d'autres sites les données recueillies à leur sujet. De même, le pouvoir de l'image de marque pourrait être contrebalancé par des dispositions efficaces de protection des consommateurs, voire éventuellement par des fonctions d'assurance qualité assurées par des tiers.

S'agissant des marchés "basculants", l'expression fait référence aux effets de réseau associés au fait que l'utilité d'un système augmente avec le nombre de participants sur le réseau. Dès lors, les acteurs puissants deviennent encore plus puissants, et les faibles encore plus faibles. Ce phénomène de bascule pourrait être atténué si les participants sur le marché ont la possibilité d'observer d'autres marchés, pour pouvoir passer plus facilement de l'un à l'autre. Ainsi, le fait que le site de Bidder's Edge suive l'activité d'un certain nombre de sociétés d'enchères en ligne est susceptible de contrebalancer tout pouvoir de marché que pourrait posséder le site d' Ebay.

Quant à savoir si les avantages associés au fait d'être parmi les premiers sur le marché n'impliquent pas pour autant un pouvoir de marché, la Déléguée note qu'en réalité il y a deux aspects à la question, d'une part la définition du marché, et d'autre part le pouvoir de l'acheteur. En ce qui concerne la définition du marché, la question fondamentale est de savoir si l'on considère simplement le marché du commerce électronique ou si le marché devrait être défini de façon plus large, pour y inclure les canaux traditionnels. Dans certains cas, les vendeurs peuvent intervenir sur les deux, comme Tesco pour ce qui est de la vente d'épicerie au détail au Royaume-Uni. Quant au pouvoir de l'acheteur, le commerce électronique pourrait avoir pour effet de le renforcer en réduisant les coûts de recherche et en facilitant l'organisation de clubs d'acheteurs. Le renforcement du pouvoir de l'acheteur pourrait donc être utilisé pour contrebalancer le pouvoir de marché du vendeur.

Revenant à la remarque selon laquelle même si les avantages procurés par le fait d'agir le premier persistent, cela n'entraîne pas nécessairement l'acquisition d'un pouvoir de marché [voir paragraphe 40 de la communication du Royaume-Uni], la Déléguée note que la communication de son pays poursuit en précisant que lorsque ces avantages se traduisent effectivement par un pouvoir de marché, ils peuvent être une source particulière de préoccupation sur des marchés de commerce électronique en expansion rapide [voir paragraphe 42].

Poursuivant l'examen de la question de la position dominante sur les réseaux, le Président note que la communication de l'Australie s'interroge sur l'effet particulier que cela pourrait avoir dans les petits pays, ou du moins ceux qui sont peu peuplés. Il invite l'Australie à préciser quel pourrait être cet effet particulier.

Un délégué de l'Australie indique que son pays n'a eu pour le moment à examiner que deux cas en relation avec le commerce électronique. Le premier concernait 16 des plus grosses entreprises australiennes qui avaient créé un site B-to-B pour l'achat de biens et services intermédiaires, en l'occurrence des fournitures de bureau. Au moment de la création du site, les fondateurs n'étaient pas



concurrents et parmi eux figuraient aussi bien des acheteurs que des vendeurs. Il faut également noter que les participants au site sont autorisés à utiliser d'autres canaux d'approvisionnement. A première vue, ce projet ne semble pas présenter de risque de pratiques concertées. L'autre affaire concernait un certain nombre de compagnies aériennes internationales australiennes et asiatiques qui proposaient de créer une coentreprise pour l'exploitation d'un site B-to-B couplant la gestion de stocks de billets d'avion et celle de services annexes tels que réservations d'hôtel et locations de voiture. Ce projet serait susceptible de poser quelques problèmes de concurrence. Pourquoi une telle différence entre les deux exemples ? En ce qui concerne le site des compagnies aériennes, les entreprises participantes sont toutes des concurrentes directes et le site réunit la quasi-totalité des grandes compagnies aériennes assurant des vols entre l'Australie et l'Asie. Celles-ci disposent de très grosses parts de marché et sans doute d'un très fort pouvoir de marché. Toute plate-forme associant des concurrents directs disposant de fortes parts de marché devra sans doute être traitée avec la plus extrême prudence. De plus, lorsque les participants à une place de marché électronique sont également d'importants acheteurs de biens intermédiaires, d'autres problèmes de concurrence peuvent se poser comme cela serait le cas, par exemple, si les entreprises se concertaient pour leurs achats de services d'hôtellerie.

Se pose également la question de la gestion des plates-formes B-to-B. Il est important de savoir si la plate-forme est gérée ou non de façon indépendante, ou si sa gestion quotidienne est assurée par les participants à la coentreprise. Pour reprendre l'exemple des compagnies aériennes, des concurrents directs interviendront quotidiennement dans la gestion de la plate-forme B-to-B, ce qui leur donnera toutes sortes de possibilités pour divers types de comportements concertés, qui ne seraient pas possibles si la plate-forme bénéficiait d'une plus grande indépendance.

Dans de petits pays comme l'Australie, où les niveaux de concentration sont élevés dans pratiquement toutes les industries, une plate-forme impliquant une quelconque forme d'achat collectif est susceptible de poser des problèmes de concurrence. L'ACCC voudra savoir s'il existe ou non d'autres canaux de distribution utilisables et dans quelle mesure ceux-ci seront susceptibles d'être effectivement compétitifs. Cela ne posera sans doute pas de problème pour la plate-forme de biens intermédiaires mentionnée plus haut, mais ce pourrait être le cas pour celui associant les compagnies aériennes.

En résumé, le délégué pense que des problèmes de concurrence pourraient certainement se poser lorsque les industries sont fortement concentrées, les plates-formes d'échange réunissent l'ensemble des concurrents ou lorsque ces plates-formes ne sont pas gérées de façon indépendante, surtout s'il n'existe pas de mécanismes assurant la confidentialité des flux d'information.

Le Président ajoute que la contribution écrite de l'Australie fait référence à des effets de collusion et présente une typologie, une classification des cas selon le risque de collusion escompté, ainsi qu'une analyse d'un certain nombre de solutions à ce problème.

Le délégué de l'Australie explique que la solution dépend de la nature du mécanisme examiné. L'ACCC est disposée à envisager une limitation de la durée pendant laquelle les participants peuvent posséder ou contrôler des plates-formes d'échange. Un autre moyen utile de limiter les problèmes de concurrence serait de mettre en place des murailles de Chine entre les participants. Il note toutefois que le fait d'imposer à terme une cession d'actifs pourrait créer de nouveaux problèmes quant à savoir à qui vendre la plate-forme, du fait que la totalité ou la quasi-totalité des acheteurs potentiels pourrait être déjà propriétaire d'une plate-forme. Ce problème risque de se poser avec encore plus d'acuité dans de petits pays comme l'Australie.

Le Président considère que puisque la Table ronde est passée des problèmes de position dominante aux problèmes de collusion, il conviendrait d'examiner la contribution de l'Allemagne, qui considère que la collusion pourrait être facilitée lorsque la plate-forme d'échange propose aux participants

des moyens commodes et sûres de communication, par exemple des salons de discussion en ligne ("chat rooms"). La contribution avance également certaines suggestions sur la façon d'aborder le problème.

Un délégué de l'Allemagne note que les entreprises ne devraient pas disposer d'informations complètes sur les coûts, prix, etc. de leurs concurrents. Le fait de faciliter la transparence entre les membres est susceptible d'encourager la collusion. Ce problème fondamental n'est pas nouveau pour les autorités chargées de la concurrence. Toutefois, les nouveaux moyens de communication, comme Internet, augmentent les possibilités de collusion. Ce danger potentiel pour la concurrence contrebalance dans une certaine mesure les avantages au niveau de l'efficacité procurée par les plates-formes d'échange en ligne, et il ne peut être totalement éliminé. L'installation de pare-feu et autres dispositifs similaires pourrait aider à limiter les risques d'une trop grande transparence, mais ce type de solutions technologiques peut aussi faciliter les communications et rendre dans le même temps celles-ci plus difficiles à déceler par des intervenants extérieurs. Il ne faut pas non plus oublier que les pare-feu et autres dispositifs sont totalement tributaires de la décision du responsable du système de les utiliser ou non. Quiconque les met en place peut aussi les désactiver, alors que les observateurs extérieurs ne peuvent aisément savoir ce qui se passe. Fondamentalement, si des concurrents souhaitent utiliser un forum en ligne pour un échange d'informations et une concertation anticoncurrentiels, cela sera assez difficile à empêcher.

Un important facteur pouvant limiter les abus dans ce contexte est l'intérêt réciproque des participants à la plate-forme d'échange. Une plate-forme en ligne quelle qu'elle soit ne peut fonctionner durablement de façon efficace que si aucun intervenant, acheteur ou vendeur, n'a le sentiment d'être exploité. Cela introduit un certain contre-pouvoir, qui limite les possibilités d'utilisation abusive de la technologie et agit dans le sens de la mission des autorités de concurrence.

Le document de l'OCDE sur les questions à examiner mentionne la possibilité de supprimer les salons de discussion. Outre le fait que cela soit difficile à réaliser et à surveiller, c'est sans doute une mesure un peu trop brutale, si l'on considère que ces salons-ci pourraient avoir des utilisations indispensables. Même s'il est important de limiter les comportements concertés, il faut trouver un juste milieu entre la fin et les moyens.

Le Président fait observer que l'on peut éprouver un sentiment de découragement à la pensée que le commerce électronique peut entraîner le développement tout à la fois des possibilités d'information, des positions dominantes, des gains d'efficacité et du pouvoir de l'acheteur, ce qui rend difficile la recherche de solutions satisfaisantes. Il invite ensuite un représentant des Etats-Unis à indiquer quelles sont les raisons aussi bien légitimes qu'illégitimes pour lesquelles les participants à une plate-forme B-to-B pourraient vouloir exclure des entreprises concurrentes, et celles pour lesquelles les participants/propriétaires pourraient opter pour des clauses d'exclusivité. Il l'invite également à commenter le cas récent de la plate-forme Covisint.

Un délégué de la Commission fédérale du commerce des Etats-Unis (FTC) indique que la plate-forme Covisint a été le premier site B-to-B examiné par la FTC. Il s'agit d'un projet de coentreprise d'exploitation d'une plate-forme d'échange offrant des services aux entreprises du secteur automobile. Les principaux services proposés concernent l'aide à la conception des produits et à la gestion des fonctions d'approvisionnement assurées par les constructeurs, ainsi que leurs fournisseurs directs et indirects. Les entreprises constituant la plate-forme sont General Motors, Ford Motors, DaimlerChrysler, Renault, Nissan et deux entreprises d'informatique, Commerce One et Oracle. Les constructeurs d'automobiles fondateurs de la coentreprise représentent environ la moitié de la production mondiale d'automobiles.

Le 11 septembre 2000, la FTC a informé les fondateurs de Covisint qu'elle allait clore son enquête sur la question de savoir si la formation de cette plate-forme violait les lois antitrust. Dans le communiqué public de la FTC, il est noté que la Covisint n'en est qu'à ses premiers stades de

développement. Ni ses statuts, ni ses règles de fonctionnement, ni les modalités d'accès des participants n'ont encore été définis. Et comme cette plate-forme n'est pas encore opérationnelle et ses fondateurs représentent une part tellement importante du marché global de l'automobile, la FTC ne peut dire si la mise en œuvre du projet Covisint ne soulèvera pas des problèmes de concurrence. La FTC se réserve de droit de nouvelles initiatives, si l'intérêt du public l'exige.

La FTC pense que les places de marché électronique B-to-B sont très prometteuses en termes de réductions de coûts, de gains d'efficacité dans l'organisation des opérations des entreprises et de consolidation de la concurrence. Elles offrent des avantages significatifs aussi bien pour les entreprises que pour les consommateurs, grâce aux gains de productivité et aux baisses des prix. Mais comme pour toute entreprise conjointe, ces plates-formes d'échange devaient être organisées et mises en œuvre dans des conditions qui assurent le maintien de la concurrence. L'examen antitrust d'une plate-forme B-to-B, quelle qu'elle soit, sera fonction de sa finalité, de sa structure, des conditions particulières du marché, de ses procédures et règles, de son organisation ainsi que de son fonctionnement effectif et de ses performances sur le marché. En d'autres termes, il est encore trop tôt pour se prononcer, et comme chacun le sait, le diable se niche dans les détails.

Le délégué annonce également que la FTC a publié son rapport sur l'atelier B-to-B organisé l'été dernier. Le document sera bientôt consultable sur le site Web de la FTC, à l'adresse [www.ftc.gov](http://www.ftc.gov). Plusieurs thèmes ont dominé cet atelier. Les possibilités considérables de gains d'efficacité offertes par les plates-formes B-to-B ont été largement reconnues. Toutefois, il y a eu également un débat animé sur de possibles effets pervers, dans ces Edens d'efficacité. Plusieurs ont déjà été commentés par des participants à la Table ronde, mais le Président a demandé que soit abordée plus particulièrement la question de l'exclusion des concurrents, soit par une augmentation de leurs coûts, soit par des formes de discrimination pouvant presque aller jusqu'au refus d'accès pur et simple. Certains participants à la Table ronde font valoir que les concurrents exclus pourraient avoir recours à d'autres mécanismes à des coûts comparables, pour toucher les fournisseurs ou les acheteurs. D'autres considèrent que du fait de l'importance des effets de réseau, ces solutions de remplacement pourraient ne pas être satisfaisantes. Des opinions contrastées sont avancées quant aux effets correctifs de l'arrivée de nouveaux concurrents. Certains font valoir qu'il peut exister des raisons légitimes pour lesquelles les participants pourraient exclure d'autres entreprises ou leur accorder un traitement différent. On peut notamment penser à cet égard au souci de décourager les comportements parasites émanant de participants n'ayant pas financé le système, ou à la restriction de l'accès aux seuls vendeurs qualifiés.

Plusieurs participants à la Table ronde craignent que les plates-formes B-to-B empêchent le développement d'une concurrence efficace en imposant de façon abusive aux participants qu'ils traitent uniquement par l'intermédiaire d'une plate-forme spécifique. Ils notent que l'on se situe à un stade précoce mais particulièrement critique de développement du marché B-to-B, et que des décisions prises très tôt peuvent encadrer les conditions de concurrence pour les années à venir. Bien entendu, dès lors autant que l'exclusivité conditionne la réalisation de gains d'efficacité, elle peut jouer dans le sens de la concurrence.

Le Président indique qu'un autre effet négatif possible du commerce électronique, déjà évoqué, est que celui-ci est susceptible de renforcer le pouvoir de l'acheteur. Un tel pouvoir peut faire office de contrepoids et être bénéfique, mais il peut aussi avoir des effets anticoncurrentiels et négatifs. Le pouvoir de l'acheteur a été abordé dans la communication présentée par le Japon et le Président sollicite d'autres commentaires.

Un délégué du Japon note qu'en particulier au cours de l'année écoulée, les marchés B-to-B sont devenus plus populaires au Japon et que de grandes entreprises ont en projet l'édification de plates-formes B-to-B. Certaines sont destinées à faciliter les achats de facteurs de production par de grandes entreprises manufacturières, directement auprès de fournisseurs internationaux. Certaines

entreprises ont pris contact avec la Japan Fair Trade Commission (JFTC) pour solliciter son avis quant aux possibles effets anticoncurrentiels de leurs projets. L'examen de ces projets conduit à la conclusion que chacun pourrait avoir des effets différents, selon les conditions du marché. Il est trop tôt pour formuler des généralisations sur les effets du commerce électronique.

En ce qui concerne l'achat en commun via une plate-forme B-to-B, il existe diverses façons selon lesquelles cela pourrait avoir, mais pas nécessairement, des effets anticoncurrentiels. Le résultat dépendra en pratique du mécanisme de marché utilisé et de divers autres facteurs. Le délégué mentionne le cas d'école classique selon lequel l'achat en commun, s'il confère un pouvoir de monopsonne, peut être préjudiciable à l'efficacité économique, quand les acheteurs tirent avantage du fait que l'offre progresse en réduisant leurs achats pour faire baisser les prix. Comme un tel comportement peut également entraîner une réduction de l'offre sur les marchés approvisionnés par les vendeurs, cela peut entraîner des prix plus élevés pour le consommateur. En se concertant dans les enchères descendantes sur les places de marché électroniques les acheteurs pourraient acquérir et utiliser un pouvoir de monopsonne. D'un autre côté, l'achat en commun pourrait être propice à la concurrence car ce peut être un moyen efficace de réaliser des économies d'échelle au stade de l'achat.

Le délégué note également que le renforcement du pouvoir de l'acheteur pourrait créer des inefficiences en conduisant à une baisse de la qualité et de l'innovation de la part des vendeurs concernés. Cela pourrait aussi amener ces fournisseurs à augmenter les prix demandés aux acheteurs qui disposent d'un pouvoir moins important.

Il convient d'étudier davantage de cas pour se faire une idée plus précise des possibles effets anticoncurrentiels des plates-formes B-to-B.

Le Président note que parmi les problèmes possibles évoqués à propos du commerce électronique figurent les mesures de restriction verticale. La contribution du Canada, en particulier, mentionne que les sites B-to-C pourraient créer de nombreux moyens subtils, pour les entreprises intégrées verticalement, de désavantager leurs concurrents. Il invite le Canada à préciser si les organismes chargés de la concurrence sont en mesure de surveiller et de prévenir efficacement les restrictions verticales susceptibles d'affecter la concurrence dans le commerce électronique.

Une déléguée du Canada indique que son pays examine les problèmes du commerce électronique en s'appuyant sur les spécificités du cyberspace pour déterminer les points sur lesquels les organismes chargés de la concurrence devraient se concentrer, ce qu'ils devraient apprendre, et de quels outils ils auraient besoin. Les principaux problèmes pour les organismes chargés de la concurrence se poseront lorsque l'activité sera conduite exclusivement sur des réseaux. Cette pratique va se développer avec le temps, mais son influence ne se fera pas au même rythme selon les branches.

Les sites et plates-formes d'échanges B-to-B et B-to-C sont susceptibles de faciliter les pratiques anticoncurrentielles. Le risque tient à la conception du code logiciel sous-jacent, qui est invisible pour les utilisateurs du site. En contrôlant ce code, une ou plusieurs entreprises peuvent s'engager dans des pratiques d'exclusion, de discipline ou de prédation, de nature à empêcher ou restreindre la concurrence. Cette action peut intervenir au stade de la conception ou du développement du logiciel, et aussi plus tard à distance, à l'insu des utilisateurs ou propriétaires du site -- un peu comme lorsque des développeurs de logiciels laissent une trappe dérobée, connue d'eux seuls, qui leur donne accès aux logiciels sans mot de passe. En exploitant les failles du code, il est possible de faire disparaître la publicité d'un concurrent, de créer des informations erronées ou de nature à induire en erreur, de fausser les résultats d'une recherche de manière à réduire ou éliminer la possibilité qu'un utilisateur aboutisse sur un site donné, et/ou exclure des soumissionnaires dans des enchères. Les clics de souris peuvent être programmés pour ne donner accès qu'aux informations ou aux liens concernant certains produits ou services, et le programme peut être conçu

de manière à agir de façon intermittente pour ne pas donner l'impression qu'il s'agit d'un plan préétabli. D'autres mesures peuvent être ouvertement conçues sur un site pour rendre disponible ou plus facilement accessible un produit, en contrepartie d'un "droit de référencement". La "manipulation" des affichages sur écran, permise par certains programmes, a été largement illustrée au début des années 90 par différentes affaires relatives à des systèmes informatisés de réservation de billets d'avion au début des années 90. Ces cas sont relativement faciles à gérer, comparés aux distorsions introduites par une manipulation des sites à distance, au moyen de programmes de type telnet par exemple.

Face à ces défis, les organismes chargés de la concurrence devront acquérir une maîtrise de la programmation informatique, ainsi que de nouvelles compétences en matière d'expertise juridique et de traitement des éléments de preuve. Dans de nombreux pays, les services de police et de justice sont en contact avec les industries de haute technologie pour trouver des moyens de maîtriser les nouveaux systèmes et d'aider les autorités de concurrence à faire leur travail. Lorsque l'on rencontre certaines entreprises concernées, il apparaît clairement que certains de leurs ingénieurs logiciels sont également embauchés par certaines entreprises privées pour créer des programmes malveillants. Celles-ci sont tout à fait franches quant à la réalité de la situation. Le Bureau de la concurrence du Canada espère examiner de près ces questions dans les prochains mois pour trouver un moyen de régler les problèmes sans entraver l'innovation.

Une autre question est de savoir si le marché va pouvoir régler lui-même ce problème particulier. Dans la mesure où l'industrie développe en connaissance de cause des matériels et logiciels qui comportent des failles, un moyen de réduire les risques pourrait être l'adoption de normes adéquates. En cas de manquement, le marché pourrait sanctionner les fournisseurs indéliçats.

Le Président passe ensuite à la question de la propriété. La propriété des sites par les participants peut se traduire à la fois par des inefficiences et par des effets préjudiciables sur la concurrence. L'Australie mentionne notamment l'édification de murailles de Chine comme solution possible à ce problème. Il invite l'Australie à préciser les avantages et inconvénients de la propriété par les participants et le type de muraille de Chine qu'il conviendrait de conseiller pour prévenir les actions anticoncurrentielles.

Un délégué de l'Australie indique qu'il est probablement nécessaire d'autoriser les fournisseurs à posséder des plates-formes B-to-B et B-to-C lors de la phase de mise en place. Sur un marché relativement étroit, nombre de ces plates-formes risqueraient de ne pas voir le jour, si les fournisseurs ne pouvaient pas d'une manière ou une autre y être associés. Il est sans doute normal également que les propriétaires s'engagent à acquérir une certaine proportion de leurs besoins via une plate-forme d'échange, du moins dans la phase de démarrage. Le délégué note que le commerce électronique peut procurer d'importantes économies d'échelle ou autres, notamment dans des pays comme l'Australie où il existe des marchés régionaux distincts.

En revanche, il se peut que la possession à long terme de plates-formes d'échange électroniques ne soit ni nécessaire ni souhaitable, ni même voulue par les fournisseurs. Mais les autorités chargées de la concurrence pourraient avoir des difficultés à déterminer les délais adéquats. De plus, comme les projets dont est saisie l'ACCC impliquent un grand nombre d'entreprises australiennes, il peut être difficile de trouver des propriétaires satisfaisants, avec lesquels ne posent pas des problèmes de concurrence, notamment sur des marchés déjà très concentrés. Par ailleurs, la vente de sites B-to-B implique un profit, et cette vente peut donc aller à l'encontre du but initialement recherché de l'établissement de liens directs entre fournisseurs et acheteurs et d'abaissement des coûts.

Le délégué note qu'il peut exister des situations dans lesquelles les fournisseurs souhaitent posséder des plates-formes d'échange simplement pour empêcher le développement de nouveaux canaux

concurrents de distribution. Ils peuvent souhaiter faire en sorte que les plates-formes B-to-B et B-to-C fonctionnent davantage comme des compléments que des concurrents par rapport aux systèmes de distribution traditionnels.

Le délégué rappelle qu'en ce qui concerne notamment les projets à haut risque dans de petits pays comme l'Australie, les plates-formes d'échange électroniques risquent de ne pas voir le jour, si les fournisseurs ne sont pas autorisés à y participer. L'ACCC devra être très prudente, en gardant à l'esprit la remarque du délégué des Etats-Unis selon lequel le diable se niche dans les détails. Ainsi, l'autorisation de systèmes B-to-B pour des achats communs par les propriétaires de la plate-forme devra être très spécifique. Faute de quoi, ces mécanismes risqueraient d'évoluer vers des achats en commun de facteurs de production directs par d'importants concurrents, et créer des problèmes de pouvoir de l'acheteur. Des difficultés pourraient également surgir lorsque les plates-formes d'échange attirent la quasi-totalité des concurrents et tendent à faciliter la collusion.

Le système des murailles de Chine est peut-être un peu irréaliste. La solution la meilleure à long terme est sans doute une forme ou une autre de gestion indépendante des plates-formes électroniques, notamment lorsque tous les grands participants sont impliqués. En revanche, une propriété indépendante n'est peut-être pas indispensable quand la plate-forme est gérée de façon totalement indépendante ou quand un mécanisme permet de bloquer le transfert de données sensibles.

Le Président aborde ensuite la contribution de l'Allemagne qui évoque également la question de la propriété. Il demande à un délégué de l'Allemagne d'expliquer son scepticisme à l'égard des murailles de Chine. La contribution allemande analyse également en détail la probabilité que le fait que les plates-formes B-to-B appartiennent aux participants puisse conduire à une exclusion anticoncurrentielle de concurrents non-propriétaires ou une discrimination systématique à leur égard. Outre ces questions, le Président invite l'Allemagne à évoquer le cas Covisint.

Un délégué de l'Allemagne souligne que la sécurité de l'information est une question très sensible aussi bien pour les organismes chargés de la concurrence que pour les entreprises participant à des plates-formes en ligne. Comme l'Australie l'a fait observer, le risque d'utilisation d'une plate-forme Internet à des fins anticoncurrentielles est plus grand si l'opérateur de la plate-forme intervient également sur le marché concerné. L'affaire Covisint a montré que les entreprises qui ne sont pas impliquées dans la mise en place technique de la plate-forme n'ont aucun moyen de contrôler si leurs informations sont tenues confidentielles et elles n'ont aucune information sur la circulation effective de l'information. Cette question constitue un sujet de préoccupation très important pour les entreprises consultées par le BkartA.

Heureusement, comme la plate-forme Covisint souhaite attirer d'autres participants, il est de son intérêt de les convaincre que leurs informations sont bien gardées et qu'elle respectera les règles énoncées. Il est dans l'intérêt bien compris de la Covisint de mettre en place des pare-feu et des techniques de chiffrement efficaces. Toutefois, il existe de réels problèmes pour faire respecter les murailles de Chine et autres dispositifs, et cela créé un malaise bien compréhensible parmi les participants et ceux soucieux de prévenir les comportements anticoncurrentiels.

En ce qui concerne les risques de discrimination entre concurrents, le problème est sans doute plus aigu lorsque les plates-formes d'échange appartiennent à des entreprises actives sur les marchés desservis. C'est là un autre problème qui est apparu avec l'affaire Covisint. Des garanties ont été prévues lors de la création de Covisint pour y remédier. La Covisint a créé une plate-forme ouverte, accessible sans discrimination par tous les producteurs et fournisseurs. De plus, il n'y a aucune obligation de traiter exclusivement via la Covisint. Tous les participants sont libres de traiter de façon traditionnelle ou par l'intermédiaire d'une autre plate-forme Internet. On note bien sûr une certaine crainte de la part de fournisseurs rejoignant la plate-forme quant au risque que le site de Covisint soit dominé par les

constructeurs d'automobiles, et sa structure de gestion est conçue pour apaiser ces craintes. On ne peut pas encore dire précisément si les règles et la structure de la Covisint se révéleront en pratique suffisantes pour répondre à ces défis -- seul le temps le dira.

Le dernier intervenant auquel le Président demande de prendre la parole est celui du Canada, qu'il invite à donner davantage d'informations sur la façon dont le commerce électronique influe sur la capacité des organismes chargés de la concurrence de déceler et d'éliminer les pratiques anticoncurrentielles.

Une déléguée du Canada explique que cette question est liée aux thèmes qu'elle a déjà abordés. Pour que les organismes chargés de la concurrence conservent leur pertinence dans le cyberspace, ils devront être en mesure de déceler et d'éliminer les effets de certains comportements. Les techniques actuelles de recueil des éléments de preuve devront être améliorées pour permettre la récupération et le traitement des preuves électroniques. Nombre d'organismes de concurrence s'efforcent actuellement d'adapter leurs instruments d'action aux nouveaux enjeux et d'être suffisamment en mesure de procéder à des échanges d'informations avec leurs homologues d'autres pays, dans les affaires transnationales. La capacité dont disposeront les organismes chargés de la concurrence pour recueillir les preuves électroniques dépendra de la formulation des dispositions relatives aux obligations légales dans la législation applicable, notamment celle sur la vie privée. Elle dépendra aussi des obligations imposées au FAI en matière de conservation des données, et des mécanismes de coopération internationale tels que les traités d'entraide juridique.

Le traité d'entraide juridique entre les Etats-Unis et le Canada est un exemple d'instrument qui doit être amélioré. Actuellement, ce traité ne s'applique pas aux interceptions de communication. Selon le Code criminel du Canada, il ne peut être procédé à une interception au Canada que si une enquête est en cours sur le territoire. Par conséquent, une interception ne peut être réalisée au Canada à la demande des Etats-Unis (ou d'un autre pays), s'il n'y a pas d'enquête au plan intérieur, contrairement à ce qui se passerait dans le cas de la recherche et de la saisie de documents en vertu du traité d'entraide. Une telle asymétrie n'est pas viable au 21<sup>ème</sup> siècle. Les organismes chargés de la concurrence doivent faire en sorte que toutes les dispositions concernant l'accès aux preuves sont neutres vis-à-vis de la technologie. La déléguée note également que les équipes d'enquêteurs judiciaires doivent être formées aux méthodes d'accès aux médias électroniques.

Les organismes chargés de la concurrence doivent également revoir leurs programmes de contrôle et décider des lignes directrices supplémentaires qu'il conviendrait de promulguer à l'égard des sites B-to-B ou B-to-C. Le Trust britannique est un bon exemple de la façon dont les problèmes des sites B-to-C peuvent être pris en compte. De plus, les organismes chargés de la concurrence voudront peut-être promouvoir l'autorégulation, notamment via des normes créées sous les auspices des associations professionnelles. Les entreprises devraient être invitées à surveiller plus étroitement l'utilisation des salons de discussion, du courrier électronique, etc., et sensibilisées au fait qu'il existe dans le cyberspace des espaces de stockage dont l'utilisation ne peut être décelée, ce qui offre un moyen aisé d'accéder à des informations concernant les ententes sur les prix, etc. Lorsque les entreprises auront eu connaissance de ces possibilités, il se peut qu'elles adoptent des politiques adéquates en matière de respect des règles.

Pour conclure, la déléguée estime qu'il faudra sans doute un temps considérable avant que les organismes disposent d'une expérience suffisamment poussée des affaires liées au commerce électronique. Ils doivent néanmoins commencer à travailler dès maintenant pour faire en sorte qu'ils disposeront des instruments adéquats lorsqu'ils en auront besoin demain.

A ce stade, le Président fait un bref rappel des points déjà abordés par la Table ronde et il ouvre le débat général pour l'examen d'autres points de vue ou commentaires sur ce qui a été dit.

Un délégué de la France considère que la discussion a montré clairement que le thème justifiait un réexamen. Il est également de plus en plus évident que le commerce électronique renforce le besoin de coopération entre organismes nationaux chargés de la concurrence. La déléguée canadienne y a fait allusion, et les délégués des Etats-Unis et de l'Allemagne ont l'un et l'autre évoqué une affaire transfrontière, celle de Covisint. Le délégué demande si pour cette affaire les Etats-Unis se sont appuyés sur des accords de coopération bilatérale avec d'autres organismes. Il estime qu'il serait peut-être temps de penser à améliorer les accords de coopération bilatérale en vigueur.

Un délégué des Etats-Unis (FTC) indique qu'effectivement l'affaire Covisint a été un cas dans lequel la coopération entre autorités chargées de la concurrence a très bien fonctionné et donné les résultats escomptés. Dans tout cas de ce type, les autorités chargées de la concurrence aux Etats-Unis prendraient contact avec leurs homologues pour discuter au niveau général des concepts, des définitions de marché, etc. Dans le cas présent, toutefois, les participants à la coentreprise étaient, ce qui est intéressant, tous représentés par le même cabinet d'avocat, lequel apparaît assez fréquemment devant les autorités. Celui-ci est relativement "compréhensif" et il était prêt à renoncer à la confidentialité afin que les différents organismes chargés de la concurrence puissent discuter de ce qu'ils pensaient de l'affaire. Cela a permis un traitement plus rapide des problèmes, ce qui est manifestement très important dans les industries de haute technologie comme celle-ci.

Un délégué du BIAC revient sur ce que les Etats-Unis, l'Australie et l'Allemagne ont dit sur la capacité de déceler la collusion. Il s'agit en fait de trouver un bon équilibre entre réaction et prévention, et entre concurrence et innovation. Pour reprendre l'expression de la délégation des Etats-Unis, le diable se niche dans les détails. Il revient aux conseillers des entreprises de préciser très clairement ce que sont les protocoles opérationnels et comment les plates-formes d'échange seront gérées. Le point de vue et les objectifs d'une place de marché indépendante pourraient être très différents de ceux d'une place de marché appartenant à ses opérateurs. Il n'est peut-être pas dans l'intérêt à long terme des places de marché gérées par leurs propriétaires de faciliter la collusion, étant donné leur volonté d'attirer de nouveaux fournisseurs et acheteurs sur le marché, et donc d'accroître les gains procurés par leurs plates-formes d'échange. Pour en revenir à la question des salons de discussion, beaucoup de documents que le délégué du BIAC a consultés à ce jour considéraient ces salons de discussion comme des moyens d'échange d'idées pour le développement de produits, plutôt que d'informations sur les prix et qu'en ce qui concerne ce dernier cas de figure, les cas observés se situaient à des niveaux très agrégés. Compte tenu de l'importance de l'innovation et du stade de développement des places de marché B-to-B, il est peut-être un peu prématuré d'engager une politique volontariste à l'égard des places de marché électroniques. Déjà, des commentateurs, notamment aux Etats-Unis, parlent de regroupement de sites directs et indirects B-to-B au sein de "méta plates-formes". Il faudra encore un certain temps avant que l'on puisse évaluer dans quelle mesure les gains d'efficacité attendus du commerce électronique se matérialiseront effectivement.

Un délégué des Etats-Unis (FTC) ajoute que les participants à l'atelier de la FTC sur le commerce électronique ont trouvé particulièrement intéressantes les diverses démonstrations de places de marché électroniques. S'il est légitime de s'inquiéter des risques de collusion et de partage d'informations anticoncurrentielles, il est également extraordinaire de voir dans quelle mesure la technologie peut être utilisée précisément pour empêcher cela. Si tous les organismes chargés de la concurrence unissent leurs efforts, le secteur privé se préoccupera davantage de mettre en place des règles de fonctionnement interne qui empêchent le type même de conduite qui préoccupe les organismes chargés de la concurrence. L'un des sites d'enchères est fascinant à observer. Les parties font des offres et chacun sait s'il est le mieux disant, mais il ne connaît pas le montant de l'offre la mieux disante. C'est comme de regarder des gens descendre à tâtons une pente dans le noir. Il n'y a pas d'échange indu d'informations susceptibles d'être exploitées à des fins anticoncurrentielles. Il s'agit en fait d'un système d'enchères très bien géré qui devrait procurer des économies et des gains d'efficacité aux acheteurs.



Un délégué de la Commission européenne revient sur la question de la propriété et de la suggestion australienne selon laquelle les grosses entreprises ne devraient être autorisées à participer au capital que dans la phase initiale de démarrage, la plate-forme d'échange devant être contrôlée à terme par un gestionnaire propriétaire indépendant. Le délégué demande quels seraient les instruments juridiques utilisés pour cela. La procédure d'autorisation comporterait-elle la prise d'un engagement dans ce sens, ou faudrait-il attendre et établir l'abus de position dominante avant de pouvoir agir ?

Un délégué de l'Australie indique qu'en droit australien il est possible d'associer aux conditions d'agrément des engagements juridiquement contraignants. Le problème toutefois est que l'on cherche à établir un délai préétabli pour la cession d'actifs, sans savoir réellement à quel moment celle-ci devra intervenir. Une autre solution envisageable, comme le propose le délégué de la CE, serait d'attendre jusqu'à ce que le système conduise à une position dominante et d'abus sur le marché, pour agir a posteriori. Mais cette dernière méthode pourrait être plus difficile à mettre en œuvre.

Le Président résume en notant la "bonne" nouvelle selon laquelle aucune autorité chargée de la concurrence n'est très à la traîne par rapport aux autres dans le commerce électronique. La "mauvaise" nouvelle est que cela s'explique par le fait que personne n'a une idée claire de la façon d'aborder les problèmes potentiels. A un autre niveau, ce que les délégués ont dit est absolument classique, et peut-être attendu. Ils parlent d'information d'une part et de réseau d'autre part. Les responsables de la politique de la concurrence sont très conscients du fait que les progrès des technologies de l'information peuvent conduire à la fois à des gains d'efficacité et à des phénomènes de collusion. C'est un problème d'oligopole lié à ce qui se passe quand une grande masse d'informations est disponible dans un environnement relativement restreint. En ce qui concerne les réseaux, compte tenu des débats sur la déréglementation dans de nombreux secteurs ces dernières années, les responsables de la politique de concurrence savent que les réseaux sont susceptibles de déboucher sur des phénomènes de domination et d'exclusion, en même temps que sur des gains d'efficacité. Lorsque la mondialisation se conjugue avec les progrès des technologies de l'information et les effets de réseaux, les responsables de politique de concurrence sont amenés à parler de coopération, comme cela a été fait à la fin de la Table ronde.

Le Président attire également l'attention sur une divergence possible d'opinions qui ne concerne peut-être pas vraiment le commerce électronique mais traduit plutôt un clivage plus profond. Le BIAC et les Etats-Unis ont très fortement insisté sur les aspects du commerce électronique liés à l'efficacité. Un certain nombre d'autres délégations sont peut-être un peu plus soucieuses des risques d'exploitation abusive de la situation et ont eu donc tendance à insister plutôt sur les effets anticoncurrentiels.

Le Président pense que fondamentalement les délégués ont formulé les questions en se référant aux problèmes qu'ils connaissent déjà. Il lui semble que les organismes chargés de la concurrence doivent élargir leur vocabulaire et envisager les choses d'une façon différente de celle qui s'appliquerait, par exemple, pour un magasin en un lieu donné. La nouvelle situation est un peu plus abstraite, mais le Président n'est pas certain qu'elle soulève des questions véritablement nouvelles, si ce n'est un besoin accru de coopération renforcée, comme la France l'a fait observer, et l'acquisition d'outils supplémentaires, point sur lequel le Canada a insisté. Le reste revient à aborder les questions au cas par cas et à essayer de déterminer certaines choses comme le fait de savoir si les gains d'efficacité l'emportent sur les effets d'exclusion. Comme le délégué des Etats-Unis l'a fait observer à juste titre, le diable se niche dans les détails.

Le Président estime que la compréhension des questions de concurrence dans le commerce électronique serait facilitée par l'examen de situations réelles et la comparaison d'analyses de cas et des solutions trouvées. De nouvelles affaires de commerce électronique vont certainement apparaître, même si cela ne se fait pas aussi rapidement que certains auraient pu penser. Le Président pense qu'il serait sage de retarder de six mois à un an la deuxième table ronde sur le commerce électronique prévue pour mai 2001.

On disposerait ainsi d'un plus grand nombre de cas réels à examiner, et cela éviterait aux délégués d'avoir à reprendre les mêmes considérations abstraites.