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The Lessons of Covisint: Regulating B2BS Under European and American Competition Laws

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THE LESSONS OF COVISINT: REGULATING B2BS UNDER EUROPEAN AND AMERICAN COMPETITION LAWS

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I. INTRODUCTION

Facing inexorable pressures to cut costs and operate with ruthless efficiency, businesses today are searching for every conceivable avenue to cut procurement costs while speeding the flow of materials through their supply chains. Turning to the Internet and E-business, businesses are seeking to fundamentally redesign the way they procure supplies by exploiting the economies of scale and instantaneous complete information exchanges potentially offered by Business-to-Business ("B2B") exchanges.[1]

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1. David H. Evans, *B2Bs—A Technical Perspective*, 15 ANTITRUST 45 (Fall 2000); Anthony DiResta, *Antitrust Consideration in E-Procurement and B2B E-Commerce*, 650 PLI/Pat 877, Apr. 23, 2001 ("Business-to-business ('B2B') networks or exchanges are banking on the Internet's instantaneous global reach to build digital marketplaces

B2B growth has exploded in the last five years, from 28 B2Bs worldwide in 1995, to nearly 1100 by July 2000.[2] In Europe alone, the value of B2B online transactions has quadrupled since 1999, to $72 billion[3] today. Economic research predicts that B2B commerce in the United States will exceed $8 trillion annually by 2005.[4] Following this trend, on February 25, 2000 General Motors, Ford, and DaimlerChrysler jointly announced plans to form Covisint, a single global marketplace providing an integrated business-to-business supplier exchange. Renault and Nissan later joined as founding partners, and PSA Peugeot Citroën subsequently joined.[5] Today, Covisint includes more than twenty automotive industry manufacturers.[6] Covisint's stated

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where transactions are quick and efficient and where buyers and sellers who may never have met in the off-line world can gather daily to move vast and growing amounts of the nation's basic goods and services.").

2. In 1999, there were 332 B2Bs worldwide. That number more than tripled in the next six months, and is continuing to increase geometrically. Berlecon-Research, *B2B-Marktplätze in Deutschland*, Berlin, July 2000. "B2B exchanges accounted for approximately $131 billion in sales in 1999 and are expected to grow exponentially, with some estimating that B2B sites will account for between $2.7 trillion and $7.3 trillion by 2004." Harry S. Davis, *To B2B or Not to B2B, That is the Antitrust Question: An Introduction to Antitrust Issues for Companies that do Business on the Web*, 1236 PLI/CORP 91, Mar. 2001.

3. Research by the Gartner-Group. *See Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces*, A Report by the Federal Trade Commission Staff, Oct. 2000, at Introduction p. 1 n.3 [hereinafter FTC Staff Report] (on file with *The Wayne Law Review*). This report can also be accessed online at <http://www.ftc.gov/os/2000/10/index.htm#26>.

4. Morgan Stanley Dean Witter (Stmt) 37: online B2B purchases will reach $1.4 trillion by 200;. Forrester Research: $2.7 trillion by 2004; Gartner-Group: $7.3 trillion by 2004. *See* FTC Staff Report, *supra* note 3, at Introduction p. 1 n.3. B2Bs are not disillusionment free, however. The difficulty of agreeing on the terms for the platform, the dangers that competitors may be able to look into the cards of the users, and the difficulty of finding suitable software have been cited as concerns. *See* FRANKFURTER ALLGEMEINE ZEITUNG, May 3, 2001, at 29. Several B2Bs already have closed. For example, the B2B FreightWise announced on February 9, 2001, that it would close its public logistics exchange effective March 2001. The slowing economy also may impact the rate of B2B growth. Current Federal Trade Commission General Counsel William Kovacic recently quipped: "In Silicon Valley 'B2B' now stands for 'Back to Baltimore'." *Global Competition Review*, Aug./Sept. 2001, at 32.

5. For an insider's view of Covisint's formation, *see* William B. Slowey (General Motors' antitrust attorney), *The Case*, 15 ANTITRUST 6 (Fall 2000).

6. In addition to its founding automobile manufacturer members, Covisint lists as industry participants Arvin Meritor, Inc., Autoliv Inc., BASF, Borg Warner, Inc.,

mission is to harness the power of Internet technology to create visibility within a company's supply chain—transforming the linear chain into a far more productive and efficient networked model.[7] A key objective is to make supply chain transactions "quicker, better and less expensive."[8]

The potential economic efficiencies and consumer savings Covisint and other B2Bs may achieve are being billed as nearly unlimited. Nevertheless, serious antitrust risks arise from such endeavors, which must be addressed not only in the formation and structure of the B2B, but in its day-to-day operations, as well.[9]

In this article focusing on Covisint, we describe how regulatory officials in the United States, Germany, and the European Community have chosen to exercise extraordinary flexibility in allowing Covisint (and other B2Bs) to form and undertake broad industrywide collaborations.[10] Unquestionably, the dazzling efficiencies and procompetitive benefits envisioned as possible through industrywide

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Collins & Aikman Corporation, Dana Corporation, Delphi Automotive Systems Corporation, DENSO International America, Dura Automotive Systems, Inc., Federal-Mogul Corporation, Flex-N-Gate Corporation, Freudenberg-NOK, Johnson Controls, Inc., Lear Corporation, Magna International, Inc., Tower Automotive, Inc., Visteon Corporation, and Yazaki North America, Inc. *See Covisint Membership List* (last visited April 7, 2002) <http://www.covisint.com/membership/>.

7. *See Covisint Solutions* (last visited Sept. 30, 2001) <http://www.covisint.com/solutions/>.

8. *Covisint Solutions, Supply Chain* (last visited Mar. 18, 2002) <http://www.covisint.com/solutions/sc>.

9. *See* David Lancefield, *The Regulatory Hurdles Ahead in B2B*, ECLR 9 (2001); Julian Miezitis & Bill Batchelor, *Issues for B2B Exchanges under EU Competition Law*, 15 ANTITRUST 39 (Fall 2000) (on file with *The Wayne Law Review*); Eric Mahr & Antonio Capobianco, *Making a B2B Competitive*, EUROPEAN LEGAL ISSUES 54, 2 (2001); Gail Levine & Hillary Greene, *Antitrust Guideposts for B2B Electronic Marketplaces*, 15 ANTITRUST 27 (Fall 2000); *see also* ADAM SMITH, THE WEALTH OF NATIONS, 128-29 (Modern Library ed. 1937) (1776). "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." *Id.*

10. In February 2001, EC Commissioner for Competition Policy Mario Monti stated, "We have indeed set-up an internal co-ordination group within the Competition DG to follow developments in the field of B2B exchanges closely." *Interview with Professor Mario Monti, European Commissioner for Competition Policy*, 15-2 ANTITRUST 10, 13 (Spring 2001). He further admitted that "[his] staff had extensive discussions with their counterparts at the U.S. FTC about the likely implications of the Covisint B2B joint venture." *Id.*

technological cooperation argue in favor of creative economic experimentation. Nevertheless, based on Covisint's short history of operations since its approval, we argue that Covisint's promises of good behavior notwithstanding,[11] the risks and temptations of harmful exclusionary and collusive behavior are formidable, especially when the B2B evolves from an E-business exchange to a "global solutions provider," as Covisint is doing.[12]

We contend that shortly after Covisint received its initial regulatory approvals, Covisint lost sight of its originally mandated electronic platform mission, and began undertaking commercial activities that could leverage the combined market power of its partners. Unlike Covisint's originally conceived procompetitive electronic platform mission, such activities could pose a substantial risk to competition in various automotive input products and services markets. We further argue that B2Bs formed by companies with joint market power pose substantially augmented risks of violating European and American competition laws when they venture beyond serving as electronic marketplaces.

As a starting point, in sections II and III we review the myriad antitrust risks potentially applicable to Covisint and other industrywide B2Bs under the European Community's[13] and the United States'

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11. Before allowing Covisint to proceed, the Federal Trade Commission extracted a series of covenants prepared in the form of "Legal Statements" and a 21-page "Antitrust Compliance Policy." *See Covisint Antitrust Compliance Policy* (last visited May 17, 2001) <http://www.covisint.com/info/antitrust.shtml> (on file with *The Wayne Law Review*).

12. Covisint originally described itself as "the world's largest online Business-to-Business exchange." *See* <http://www.covisint.com/info/partners_founding.shtml> (last visited May 17, 2001). As we show, *infra*, however, Covisint has now begun offering products and services in conjunction with a series of 'Best of Breed' suppliers that go far beyond the supply of E-business platform services. In a press release on September 5, 2001, Covisint described itself as "a global solutions provider partnering with the automotive industry." *See Covisint Selects MatrixOne for Collaboration and Sourcing*, PR NEWSWIRE EUROPE LIMITED-UNIVERSAL NEWS SERVICES, Sept. 5, 2001.

13. In this article we will refer to the competition laws of the European Community (hereinafter "EC") rather than of the European Union ("EU"), since the rules regarding competition are set out in the Treaty Establishing the European Community and not in the Treaties Concerning the Union, and pertain only to the EC rather than the EU, the EC being one part of the EU. The competent body within the EC is the Commission of the European Communities ("European Commission"), which under Article 85 EC (ex Article 89 of the EC Treaty) is entrusted with the

competition laws. In section IV we analyze Covisint's initial authorization by the American, German, and European authorities, and we compare Covisint's actual subsequent business activities and performance to its original electronic commerce platform mission.[14] We conclude that, much like trade associations, B2Bs such as Covisint merit ongoing aggressive oversight and enforcement actions where necessary by the regulatory authorities in Europe and the United States, especially when they evolve from electronic trading platforms to competitive providers of industry input products and services.

II. THE ANALYSIS OF B2BS UNDER EUROPEAN COMPETITION LAWS

Under the competition laws of the European Community, B2Bs are subject to potential review under the European Merger Control Regulation ("ECMR"),[15] which became effective in 1990,[16] and the general competition laws set forth in Articles 81 and 82 EC.[17] The

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application of EC competition law.

14. Covisint's founders filed appropriate documents in the United States under the Hart-Scott-Rodino Antitrust Improvements Act in June 2000. The parties also filed a notification under the German merger control regime, Gesetz gegen Wettbewerbsbeschränkungen [hereinafter "GWB"] of Aug. 26, 1998, BGBl. I, 2546 as amended on Dec. 22, 1999, BGBl. I, 2626, and filed for authorization by the EC in Jan. 2001. As is discussed in detail below, both the Federal Trade Commission in the United States and the *Bundeskartellamt* in Germany ultimately allowed the venture to proceed. They noted, however, that they would continue to watch Covisint's day-to-day activities. *See Letter of September 11, 2000* (last visited Mar. 28, 2002) <http://www.ftc.gov/pa/2000/09/covisint.htm> (on file with *The Wayne Law Review*).

15. The ECMR has the form of a Regulation, which means that it is binding in its entirety, and is directly applicable in all Member States (*see* Article 249 EC, ex Article 189 of the EC Treaty)— as opposed to a directive which requires transformation into national law, and which leaves the Member States some room with regards to form and content.

16. *See* Council Regulation on the Control of the Concentration Between Undertakings, 4064/89/EEC, 1990 O.J. (L 257) 13, as amended by Council Regulation, 1310/97/EEC, 1998 O.J. (L 180) 1. The ECMR amendments, which were adopted by the Council of Ministers in June 1997, took effect on March 2, 1998. These amendments "broaden[ed] the [European] Commission's jurisdiction over mergers and joint ventures." Frank L. Fine, *A Practical Guide to EU Merger Control Jurisdiction and Procedure*, 13 ANTITRUST 34 (1998). A merger provision in the Treaty on Steel and Coal (ECSC), April 18, 1951, as amended 1995 O.J. (L 1) 1 in Article 66, is only applicable to specific industries.

17. CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN

ECMR is analogous to Section 7 of the United States' Clayton Act, while Articles 81 and 82 roughly parallel Sections 1 and 2 of the Sherman Act, Section 1 and 19 of the German GWB, and Chapter I and II of the UK Competition Act of 1998.[18]

In Part A of this section, we discuss the review of B2Bs under the ECMR. In parts B and C, we respectively consider the review of B2Bs under Articles 81 and 82 EC.

A. Regulation of B2Bs Under European Merger Control

1. Jurisdictional Issues

The first issue in analyzing a B2B under the European merger control laws is whether the B2B's structure meets the ECMR merger control law jurisdictional requirements. Essentially, a proposed B2B can be reviewed as a merger if it can be classified as a concentration with a community dimension.

B2Bs generally are set-up as joint ventures.[19] Under Article 3 (2)

COMMUNITY, May 1, 1999, O.J. (C 340) 173 (1997) [hereinafter EC TREATY]. This is the Treaty of Rome of 1957, as amended by the Single European Act of 1986, the Maastricht Treaty on the European Union of 1992, and by the Treaty of Amsterdam of 1997. In accordance with the practice of the European Court of Justice, articles of the Treaty as it stands after May 1, 1999 will be cited with "EC," whereas articles of the Treaty before that date will be cited with "of the EC-Treaty."

18. For an excellent discussion of the United Kingdom's Competition Act of 1998, *see* Mark Furse, *The UK: A New, and Potent, Competition Law*, 13 ANTITRUST 41 (Fall 1998). Chapter I, which parallels Article 81 EC, condemns agreements that "may affect trade within the United Kingdom, and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom." *Id.* at 41. Chapter II of the Competition Act parallels § 2 Sherman Act and Article 82 EC. *See id.* at 42-43.

19. *See* Remarks of Commissioner Thomas B. Leary ("the issues in the B2B area are the same kinds of issues that [the FTC has] dealt with in joint venture analysis.") Before FTC Workshop on Competition Policy in The World of B2B Electronic Marketplaces, Washington, D.C. (June 30, 2000), available at <http://www.ftc.gov/bc/b2b/b2blery.htm>; FTC Staff Report, *supra* note 3, at pt. III, p. 2 ("Panelists agreed that B2Bs are subject to traditional antitrust analysis, noting that 'the joint venture analysis and the [Competitor] Collaboration Guidelines are appropriate in this framework.'" (citations omitted)); PURCHASING LAW REPORT, May 2001, at 2 (quoting Bill Blumenthal, "What we're talking about is 'plain old vanilla' joint venture analysis. There is nothing unique about B2Bs, other than the institutional context, and some of those institutional details are specific to the industry . . . . Basically, when you think

ECMR, a joint venture permanently performing all the functions of an autonomous economic entity constitutes a concentration that can be analyzed under the merger laws. Until 1997,[20] the ECMR distinguished between concentrative joint ventures and cooperative joint ventures. The European Commission originally described the details of how to distinguish between the two in a 1994 notice.[21] After the 1997 changes to the ECMR, this notice was replaced in 1998 by a Commission notice on how to identify a full-function joint venture.[22] As a result, European law continues to distinguish joint ventures, but the dividing line is now whether a joint venture is "full-function" or not.[23]

To be considered a concentration, and for that purpose, a full function joint venture, Article 3 (2) ECMR provides that a joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity.[24] In its 1998 Notice on the Concept of Full-function Joint Ventures, the European Commission states that to qualify as "full-function," a joint venture must compete in a market and perform the functions normally carried out by competitors operating in the same market.[25] The joint venture must have a management staff dedicated to its day-to-day operations, and access to sufficient resources to operate on a lasting basis, including finance, staff, and assets.[26] A joint venture is not considered "full-function" if it merely takes over a specific function of the parent companies' business activities.[27]

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through the principles of legality, they are right out of basic joint venture principles.") (on file with *The Wayne Law Review*).

20. Council Regulation 1310/97/EC of 30 June 1997 Amending Regulation on the Control of Concentrations Between Undertakings, 4064/89/EEC, 1997 O.J. (L 180) 1.

21. *See* Commission Notice on the Distinction Between Concentrative and Cooperative Joint Ventures of 31 Dec. 1994, 1994 O.J. (C 385) 1.

22. Commission Notice on the Concept of Full-Function Joint Ventures of 2 Mar. 1998, 1998 O.J. (C 66) 1.

23. *See* Fine, *supra* note 16, at 35.

24. *See* ECMR art. 3(2).

25. *See* Commission Notice on the Concept of Full-Function Joint Ventures, *supra* note 22, ¶ 12.

26. *See also* European Commission, Case IV/M.527, Thomson CSF/Deutsche Aerospace, 1994 O.J. (C 312) 1, 2; European Commission, Case IV/M.560, EDS/Lufthansa, 1995 O.J. (C 91) 11; European Commission, Case IV/M.585, Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd., 1995 O.J. (C 157) 8.

27. *See* Fine, *supra* note 16, at 35 ("the joint venture is not full-function when its activities are limited to R&D, sales, or production. Likewise, where the parents are

In its Notice, the European Commission specifically deals with trading companies that have been set up as joint ventures. A trade market is characterized by both the existence of companies which specialize in the selling and distribution of products without being vertically integrated, and the availability of different sources of supply for the products in question. Although trading companies are not entirely comparable to B2Bs, the relevant passages of the Notice can be applied to them. According to the Notice, where a joint venture is active in a trade market, and performs the normal functions of a trading company, it normally will be considered a full-function joint venture rather than an auxiliary sales agency. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies, but also from other competing sources.[28] Applying this standard, most B2Bs should qualify as full-function joint ventures.

The second requirement for establishing a B2B as a concentration within the meaning of the ECMR is joint control by the parent companies over the B2B. Joint control in the context of the ECMR exists where two or more undertakings or persons have the possibility of jointly exercising "decisive influence" over another undertaking.[29] Decisive influence normally means the power to block actions determining the strategic commercial behavior of an undertaking.[30] Unlike sole control, which confers the power upon a specific

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present in the upstream or downstream markets of the joint venture and this leads to 'substantial' purchases or sales between the parents and the joint venture beyond the start-up period, this is likely to call into question the full-function character of the venture. Joint ventures falling into this category are known as partial-function ventures.") (citing Commission Notice on the Concept of Full-Function Joint Ventures, *supra* note 22, ¶ 14).

28. *See* European Commission Notice on the Concept of Full-Function Joint Ventures, *supra* note 22, ¶ 14 (3); *see also* Case IV/M.788, AgrEVO/Marubeni, 1996 O.J. (L 243) 17.

29. *See* Commission Notice on the Concept of Full-Function Joint Ventures, *supra* note 22; *see also* European Commission, Case IV/M.330, McCormick/CPC/Rabobank/Ostmann, WIRTSCHAFT UND WETTBEWERB (WuW/E EV) 2157, ¶ 17.

30. *See* Commission Notice on the Notion of a Concentration Under Council Regulation (EEC) No 4064/89 of 21 Dec. 1989 on the Control of Concentrations Between Undertakings, 1994 O.J. (C 385) 5, ¶ 19.

shareholder, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions.[31] It follows, therefore, that joint shareholders must reach a common understanding in determining the commercial policy of the joint venture. Traditionally, the European Commission relies on the wording of Article3 (3) ECMR, which refers to "the possibility of exercising decisive influence on an undertaking."[32] Consequently, the *mere possibility* of joint control satisfies the meaning of Article 3 (3) ECMR.[33]

The issue of who actually controls a B2B has proven more difficult to determine in practice than one might suspect. The European regulators' decisions to date provide little practical guidance. For example, in *MyAircraft.com*,[34] the primary shareholders, UTC, Honeywell, and i2, were held to exercise joint control, since they could veto strategic B2B business decisions.[35] On the other hand, the automakers were ruled not to exercise joint control in Covisint despite their substantial holdings and initial sharing of duties in running the B2B.[36]

In our opinion, the European regulators' unexplained decision that there is no joint control over Covisint is highly questionable, and inconsistent with the ECMR standard of "the possibility of exercising

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31. *See id.*

32. ECMR art. 3 (3).

33. *See* Commission Notice on the Concept of Full-Function Joint Ventures, *supra* note 22, ¶ 9; *see also* European Commission, Case IV/M.330, McCormick/CPC/Rabobank/Ostmann, WIRTSCHAFT UND WETTBEWERB (WuW/E EV) 2157, ¶ 17. This seems to strongly conflict with the rather strict view of the Bundeskartellamt, although in Covisint, both authorities seem to have agreed that there was no joint control, and that therefore the German authority should assess the case. It remains to be seen how this conflict will be resolved in the future.

34. European Commission, Case IV/M.1969, UTC/Honeywell/i2/MyAircraft, CELEX Document No 300M1969, decision of Aug. 4, 2000 [hereinafter *MyAircraft*]. In the case of *MyAircraft*, UTC, Honeywell and i2 Technologies acquired shares in the joint venture MyAircraft.com whose purpose was to create and operate a B2B for aerospace parts and services available for all aerospace participants.

35. *See id.* ¶ 8.

36. *See infra* at Part IV.A.2. First, the Bundeskartellamt decided that Covisint was not jointly controlled by its founders, and thus effectively decided that the ECMR was not applicable. The European Commission later endorsed this view in its Covisint decision. It is likely that the German Bundeskartellamt closely consulted with the European Commission in reaching its jurisdictional decision.

decisive influence on an undertaking."[37] We believe that in the future the European Commission should apply a liberal test in determining the possibility of joint control, and place a heavy burden on the parties to demonstrate that joint control will not exist. We believe that the Commission should err on the side of finding the possibility of joint control, since it seems difficult to believe that most B2Bs will not ultimately be beholden to their founders.[38] Based on the rulings to date, however, it is difficult to predict whether a given B2B will fully satisfy the ECMR's jurisdictional requirements.

In order to be subject to the ECMR, a collaborative B2B venture must also have a "community dimension" within the meaning of Article 1 (2) ECMR.[39] To meet this standard, the combined annual worldwide turnover of all undertakings concerned must exceed EURO 5 billion ($4.6 billion). Furthermore, European Community wide turnover of at least two subsidiaries must exceed EURO 250 ($230 million).[40] The calculation of the appropriate figures in the case of a new B2B is a little more difficult than the usual scenario where one company takes over another, and the turnover of the buyer and target are simply added. When a B2B is jointly controlled by the parent companies—irrespective of any third undertaking participating in the B2B—the turnover of all the parent companies has to be taken into account.[41] The turnover of the B2B itself from operations with its parent companies is not taken into account.[42] The turnover of the B2B from operations with third

37. Commission Notice on Concept of Full-Function Joint Venture, *supra* note 22, ¶ 9.

38. The issue of who controls Covisint continues to burn brightly. On August 27, 2001, Covisint CEO Kevin English sought to address substantial opinions and talk that Covisint is controlled by its automotive shareholders. *See* Sherri Begin, *Covisint CEO Sets Record Straight*, 22 RUBBER & PLASTICS NEWS 23, 5 (2001).

39. *See* ECMR art. 1 (2).

40. An alternative possibility is if the combined annual worldwide turnover of all subsidiaries exceeds EURO 2.5 billion, at least two subsidiaries have a Community-wide turnover of more than EURO 100 million, the combined turnover in each of at least three member states exceeds EURO 100 million and in each of at least three of these member states there is a turnover of over EURO 25 million for at least two subsidiaries. This reflects the wording of Article 1 ECMR. *See* Fine, *supra* note 16, at 35.

41. *See* Commission Notice on Calculation of Turnover Under Council Regulation (EEC) No 4064/89 on the Control of Concentrations Between Undertakings, 1998 O.J. (C 66), ¶ 22.

42. *Id.* ¶ 36.

parties is apportioned equally among the parent companies, irrespective of their individual shareholdings in the B2B.[43]

2. Competitive Impact Issues

Once the jurisdictional requirements of the ECMR have been met, the European Commission must assess a B2B's potential impact on competition. As in the United States, this requires a determination of the relevant market, which we review in Part a below, and a competitive effects ("dominance") analysis, which we review in Part b, including a review of any ancillary restraints (Part c). According to Article 2 ECMR, a B2B is compatible with the common market if it does not create or strengthen a dominant market position that could significantly impede effective competition.[44] Moreover, to the extent that the creation of a joint venture has as its object or effect the coordination of the competitive behavior of independent undertakings, the coordination must be further analyzed in accordance with Article 81 EC.[45] For joint ventures and thus most B2Bs, the ECMR therefore intertwines merger control and general competition law, and reviews both issues in a single proceeding.

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43. *See* ECMR art. 5 (5) a-b; *see also* Guidance Note II: Calculation of Turnover for Joint Undertakings of 31 Dec. 1994, 1994 O.J. (L 377) 1, II c-d.

44. In a February 2001 interview, European Commissioner for Competition Policy Mario Monti observed:

> "Our rules prohibit mergers that lead to the creation or strengthening of a dominant position, while U.S. law prohibits mergers where the effect 'may be substantially to lessen competition, or to tend to create a monopoly.' While you might think that the application of these seemingly different tests would at times lead to divergent outcomes, that has not been our experience. The main reason why we do not see such divergence, in my view, is that both the UE and U.S. authorities are applying the same analytical framework when examining the competitive effects likely to result from a proposed merger. We share a common understanding of what the correct micro-economic analysis of these operations should be. Where we do reach different conclusions about whether a particular transaction should be allowed to go ahead, this is generally because the effects of the merger are likely to be different in the two jurisdictions."

Interview with Professor Mario Monti, supra note 10.

45. *See infra* Part II.B.1.

a. Market Definition

B2Bs can operate and compete simultaneously in myriad product markets. Consequently, defining the relevant markets constitutes perhaps the most difficult step in competitively analyzing a B2B.[46] "The Commission has recognized that market definition is difficult in such a dynamic industry."[47] Generally, a relevant product market is defined by the European Commission as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices, and their intended use."[48] In analyzing B2Bs under the competition laws, the threshold question arises as to whether the B2B itself provides a new product or service separate and distinct from the products being traded through the venture.[49] An appropriate product market determination is crucial, as it helps identify the real purpose and scope of operations of a B2B.

Unfortunately, rather than directly tackle the tough questions of B2B product markets head-on, the European Commission all too frequently has dodged the issue.[50] For example, in its *MyAircraft*

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46. *See* Ulrich Gassner, *Internet-Handelsformen im Spiegel des Kartellrechts*, MULTIMEDIA UND RECHT (MMR) 140, 143 (2001).

47. Miezitis & Batchelor, *supra* note 9, at 40.

48. Commission Notice for the Definition of the Relevant Market of 9 Dec. 1997, 1997 O.J. (C 372) 5 [hereinafter Commission Notice on Market Definition].

49. In his February 2001 interview, EC Commissioner for Competition Policy Mario Monti noted:

> Market definition—particular attention has to be paid when goods and services are provided by e-commerce as to whether the relevant product market encompasses both the goods and services being provided *off-line* as well as on-line. This will differ from case to case and will depend on factors such as the pricing characteristics, whether the purchaser is different, and whether the on-line product or service is really a substitute for the off-line one. For example, an on-line newspaper is typically free or paid for by subscription to a Website. It is not obvious that removing this facility would lead the reader to go and purchase a paper copy on a daily basis.

Interview with Professor Mario Monti, *supra* note 10, at 10.

50. Similar hedging on product market determinations by the Federal Trade Commission and the Antitrust Division in the United States has been noticed by commentators Robert Lande and James Langenfeld. *See* Robert H. Lande & James Langenfeld, *From Surrogates to Stories: The Evolution of Federal Merger Policy*, 11 ANTITRUST 5, 6-7 (1997). They point to the "many recent attempts by the Federal Trade

decision, the European Commission skirted the question of the relevant product market by simply stating that the market definition could be left open, since irrespective of the market definition chosen, the proposed concentration would not give rise to the creation or strengthening of a dominant position.[51] Similar facile stands were taken by the European Commission in *CFL*,[52] *Chemplorer*,[53] and *emaro*.[54]

The Commission to date seems not to have grasped the crucial distinction, for competitive effects purposes, of separating industry input product and services such as supply chain management from the exchange as an internet platform. The primary service of a B2B should be to provide a platform which can be used by different market participants in communicating and trading. The real potential

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Commission and the Department of Justice to shift the focus of investigations away from market definition, particularly in cases involving unilateral effects . . . . In the extreme, this means forgetting about market definition, market shares, and other surrogates of market power." *Id.* at 6.

51. *See MyAircraft*, *supra* note 34, ¶ 13. The parties in *MyAircraft* submitted that the relevant market included aerospace parts and services, and that e-commerce was but one segment of it. *Id.* ¶ 11. The parties thus emphasized not the services of the B2B, but the goods that were traded by the B2B. Under this analysis, the market would be a very broad one and the share of MyAircraft or any other B2B would be negligible. For an alternative appraisal of the Commission's *MyAircraft.com* product market decision, see Miezitis & Batchelor, *supra* note 9, at 40.

52. *See* European Commission, Case IV/M.2075, Newhouse/Jupiter/Scudder/M&G/JV, CELEX Document No 300M2075, decision of Sept. 1, 2000 [hereinafter *CFL*]. In *CFL*, the parties set up an electronic supermarket for the sale of retail mutual funds through independent intermediaries. The parties argued that the relevant market was the provision of an electronic supermarket or on-line dealing for the sale of Retail Mutual Funds. Here the market definition concentrated on the service provided by the B2C itself, and not on the underlying goods or services traded therein.

53. *See* European Commission, Case IV/M.2096, Bayer/Deutsche Telekom/Infraserv/JV, CELEX Document No 300M2096, decision of Oct. 6, 2000 [hereinafter *Chemplorer*]. In this case, the parties set up at B2B joint venture as a marketplace for the chemical industry.

54. *See* European Commission, Case IV/M.2027, Deutsche Bank/SAP/JV, CELEX Document No 3200M2027, decision of July 13, 2000 [hereinafter *emaro*]. "In any event, given the current state of development of the e-commerce sector, it can be expected that the relevant product markets will in the future undergo significant change in relation to both their definition and relative importance." *Id.* ¶ 18. In *emaro*, the parties set up a joint venture B2B for office equipment suppliers (office furniture, stationary, computer hard- and software etc.). In *Chemplorer*, the parties similarly argued that the relevant product market encompassed electronic marketplaces for the trading of maintenance, repair and operation products ("MROs").

efficiencies of B2Bs come from creating new trading and communication platforms, not from simply creating another provider of goods and services already readily available in the marketplace.[55] As we argue in section IV, B2Bs generally are competitively benign, assuming open access, when competing in the market for electronic marketplaces.[56] However, B2B's present serious anticompetitive risks when they start competing in the product or service markets traded through the B2B, or serve as a mechanism for the participants to collaborate in making such sales or purchases. Therefore, in most cases, a B2B should not become a competitive provider of goods or services themselves. Rather, it merely should provide an efficient platform for others to competitively develop and sell their own goods or services.[57] As a result, regulatory red flags should go up when a B2B starts competing in the sale or provision of input services to the industry it serves.

We believe the starting point of the relevant product market analysis should be the unique platform service that the B2B offers to the industry. Goods and services belong to the same product market if consumers regard them as substitutable in terms of characteristics, prices and intended use.[58] Here, as the European Court of Justice ("E.C.J.") has explained, all aspects of the new service or trading opportunity have to be taken into consideration.[59]

B2Bs are designed to enable their participants to efficiently and

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55. In its decision in *Covisint*, the *Bundeskartellamt*, as we discuss in more detail, *infra* section IV, did not expressly identify the markets, but appears to have understood them to be those of electronic platforms and other means of trade. In two decisions, *RubberNetwork* and *CC-Markets*, the *Bundeskartellamt* identified the relevant markets as: (a) internet market platforms; and (b) the traded goods and services. In another decision, *MB-Portal*, the *Bundeskartellamt* took a step backwards, and again avoided the clear identification of the relevant market, instead concentrating on the potential competition that MB-Portal would face.

56. A possible exception involves "exclusivity practices [that] warrant close attention as potential catalysts for market domination." FTC Staff Report, *supra* note 3, at pt. III, p. 23.

57. *See MyAircraft*, *supra* note 34, ¶ 5.

58. *See* Commission Notice on Market Definition, *supra* note 48, ¶ 7.

59. *See* E.C.J., Case 322/81, NV Nederlandsche Banden-Industrie Michelin v. Commission of the European Communities, 1983 E.C.R. 3461, at 3508; [1985] 1 C.M.L.R. 282 (1985) [hereinafter *Michelin*]; E.C.J., Case 85/76, Hoffmann-La Roche & Co. AG v. Commission of the European Communities, 1979 E.C.R. 461, 516ff.; [1979] 3 C.M.L.R. 211 (1979) [hereinafter *Hoffmann-La Roche*].

quickly trade goods and services. Covisint, for example, was created in part to allow single stop purchases and sales throughout the automotive industry. It is difficult to imagine what other services, especially from the traditional side of trading, could match B2Bs' anticipated performances, especially with respect to the low costs involved in the transactions. Indeed, broad industry wide participation and the low cost per transaction appear to be the most significant aspects for the distinction between B2Bs and other means of trading.[60]

Therefore, we believe that, generally, the relevant product market in question should be interpreted narrowly, and encompass only electronic markets or other on-line dealing systems. In its *CFL* decision, the European Commission seemed to have accepted this narrow definition at least in principle.[61] The question then arises whether to define the relevant market to include all B2B and online commerce facilities, or merely those which service special goods. In the latter case, there could be a market for platforms offering automotive goods, one for platforms offering chemical goods, and so on. In *CFL*, the European Commission did not rule out this possibility, and refrained from reaching a decision because, as it stated, this would be inconsequential to the outcome of the proceedings.[62] In *Chemplorer*, the parties appear to have argued for such a definition when they submitted that the relevant market was electronic market places for chemical MRO-products and related services.[63]

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60. The European Commission has in the past accepted that the price in certain circumstances can play such an important role within a group of products that the products have to be allocated to different markets. *See* European Commission, Case IV/M 31.906, Italian Flat Glass II, 1989 O.J. (L 33/44) 65; Case IV/M 31.043, Tetra Pak I, 1988 O.J. (L 272/27) 33; Case IV/M 26699, Chiquita, 1976 O.J. (L 95/1) 11. The E.C.J. has not expressly referred to prices as the dominant factor for distinguishing products from one another in a market definition analysis. However, the E.C.J. has applied the criterion of high quality (which is after all evidenced by a different price) in a similar way, and arrived at separate markets for high quality products. *See* E.C.J., Case 19/77, Miller International Schallplatten GmbH v. Commission of the European Communities, 1978 E.C.R. 131, 149ff.; [1978] 2 C.M.L.R. 334 (1978) [hereinafter *Miller*] (showing a separate market for expensive sound recordings); E.C.J., Case 86/82, Hasselblad (GB) Ltd. v. Commission of the European Communities, 1984 E.C.R. 883, 902; [1984] 1 C.M.L.R. 559 (1984) (showing a separate market for expensive cameras).

61. *See CFL*, *supra* note 52, ¶ 11.

62. *See id.*

63. *See Chemplorer*, *supra* note 53, ¶ 14. A similar view was submitted by the parties

Assuming open access, defining the relevant product market narrowly should not threaten the formation of most B2Bs.[64] Although defining the relevant product market narrowly could make it seem initially that the position of any individual B2B will be extremely strong, potential supply side substitution and countervailing efficiencies also must be considered in determining the possibility of anticompetitive effects.[65] Furthermore, as we describe for Covisint, most B2Bs will agree to abide by carefully crafted internal rules before their authorization, and the regulators seem to gain comfort from these promises.[66]

To properly assess the relevant market for a B2B, the geographic market in which it will compete must also be determined. The European Commission defines the relevant geographical market as comprising the area in which the conditions of competition are sufficiently homogeneous, and can be distinguished from neighboring areas where the conditions of competition are appreciably different.[67] In *MyAircraft*, the European Commission did not finally decide on the geographical scope of the market because "the assessment of the concentration

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in *CFL*. *See CFL*, *supra* note 52, ¶ 11.

64. One benefit from following the narrow product market definition is that it brings into sharp focus the potentially high concentration levels and network effects that B2Bs can create. This should signal to the regulators the importance of keeping a watchful eye on the B2B, and monitoring it to assure that the internal rules of conduct and antitrust guidelines are closely followed. As we describe in section IV, the regulators essentially have taken the position that B2Bs are entrepreneurial and cutting-edge technologies that should be allowed to operate because of their potential to create dazzling efficiencies. It would be more intellectually honest and appropriate for the regulatory authorities to admit this up front, rather than to try to seek justification through overly broad product market determinations.

65. It may be true that a consumer who buys parts and goods for his business through one B2B cannot simply go to another platform if the one he uses raises prices or simply goes out of business because there might be no other platform which offers the parts he is interested in. But it is also true that the operators of other B2Bs could easily extend the scope of their membership and thus offer the services of other B2Bs. This extension should be possible in the short-term and without incurring significant additional costs or risks.

66. As observed in the FTC Staff Report "some panelists commented that, when antitrust concerns do arise, familiar safeguards may be sufficient to address those issues. Indeed, it appears likely that many potential concerns could be eliminated through well-crafted B2B operating rules." FTC Staff Report, *supra* note 3, at Executive Summary p. 2.

67. *See* Commission Notice on Market Definition, *supra* note 48, ¶ 8.

would be the same regardless of whether the geographical market is world-wide or not."[68] But the European Commission strongly hinted that due to the characteristics of e-commerce in general, and to the worldwide geographic market for aerospace products, the relevant geographical market was likely worldwide.[69]

In its *Covisint* decision, the German Bundeskartellamt,[70] (as will be discussed in section IV)[71] did not expressly address the question of the geographical market, but seemed to believe the relevant market was worldwide, noting that Covisint would compete with B2Bs throughout the world. Similarly, in its decision in *RubberNetwork*,[72] the Bundeskartellamt stated that at least the German market would be relevant, but that there was, from an economical point of view, a strong indication for a European, or even a worldwide market.[73] A similar approach was taken by the Bundeskartellamt in its *CC-Markets*[74]

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68. *MyAircraft*, *supra* note 34, ¶ 16. A similar view was taken by the European Commission in *Chemplorer*. *See Chemplorer*, *supra* note 53, ¶ 17.

69. *See MyAircraft*, *supra* note 34, ¶ 15. A different conclusion could only be reached for goods which have to rely on local serving or depend on local laws. *See emaro*, *supra* note 54, ¶ 16; *see also* European Commission, Case IV/M.45—Bertelsmann/Kooperativa Förbundet/BOL Nordic, CELEX Document 300JV0045, ¶ 15.

70. The Bundeskartellamt (Federal Cartel Office), an independent higher Federal authority located in Bonn, is responsible to the Federal Ministry of Economics. The main task of the Bundeskartellamt is to apply the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschrankungen, "GWB"), which was enacted for the protection of competition and came into force on January 1, 1958. The Act encompasses both merger control, as well as general competition law.

71. *See infra* Part IV.A.1.a.

72. *See* Bundeskartellamt, Case B 3-25130-U-110/00, Goodyear Tire & Rubber Co./Compagnie Générale des Établissements Michelin, decision of Jan. 26, 2001, ¶ 26 (hereinafter *RubberNetwork*). This decision is published in German only and can be obtained from <http://www.bundeskartellamt.de> under "Entscheidungen". Bundeskartellamt is the name of the German antitrust authority.

73. In *RubberNetwork*, Goodyear and Michelin set up a B2B by the name of "RubberNetowork.com" as a marketplace for the tire and rubber industry. Goodyear and Michelin each hold 33.3% in the company. Continental holds 13.3% and Cooper, Pirelli and Sumitomo each 6.7%. Since the latter companies hold less than 25%, they were not required to notify the agreement under German merger control rules. Interestingly, the Bundeskartellamt did not elaborate on the combined market share in the tire market of the participating companies, which can be estimated as extremely high.

74. Bundeskartellamt, Case B 3-72303-U-76/00, BASF/Degussa-Hüls/ Henkel/

decision.[75]

Based on the early cases, it seems fair to conclude that the relevant geographic market in most B2B reviews will be viewed as worldwide. This seems to make economic and commercial sense, since most platforms can be used widely, and not just in one country or group of countries.[76]

b. Dominance Determination

Before it authorizes a B2B's operation, the European Commission must determine whether the B2B will dominate the market. The ECMR does not set forth a precise definition for dominance. For its assessment, the European Commission relies on the established case law of the Court of Justice of the European Communities ("E.C.J.") on EC Article 82,[77] which prohibits the abuse of a dominant position. According to the E.C.J., the test for a dominant position is whether the economic strength enjoyed by an undertaking enables it to "prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers."[78]

The most important factor in determining dominance, and whether or not an entity is in a position to act independently of competitors, customers and consumers, is market share.[79] There are no hard and fast

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SAP, decision of Oct. 23, 2000, ¶ 37 [hereinafter *CC-Markets*].

75. In *CC-Markets*, *supra* note 74, the parties set up a joint venture B2B by that name, each holding 25% of the share. The B2B is intended as a trading place for maintenance, repair and operations (MRO).

76. In February 2001, Professor Mario Monti pointed to jurisdictional issues as "[a]n unusual aspect of e-commerce/B2B cases." He explained, "Because users of an e-commerce service may be located in a completely different country from the host server of the site, there are potential problems of jurisdiction which may not arise so much in other economic sectors." *Interview with Professor Mario Monti*, *supra* note 10, at 13.

77. EC TREATY art. 82 (ex article 86).

78. Case 27/76, United Brands Continental BV v. Commission, 1978 E.C.R. 207, 208, [1978] 1 C.M.L.R. 429 (1978) [hereinafter *United Brands*]. The court used the same formula in Case 85/76, *Hoffmann-La Roche*, *supra* note 59, at 520 and has continued to use it in its subsequent jurisprudence.

79. RICHARD WHISH, COMPETITION LAW 153 (4th ed. 2001); *Hoffmann La-Roche*, *supra* note 59, ¶ 41.

rules for market share above which the European Commission identifies dominance in the market. The ECMR itself states that a combined market share of 25% should in all likelihood not impede effective competition,[80] and is thus regarded as compatible with the Common Market. In a number of cases, the European Commission has held that market shares between 50% and 60% are incompatible with the Common Market,[81] and has ruled that under certain circumstances, a share of as low as 44% can be incompatible.[82] On the other hand, the European Commission has approved a concentration with a market share above 80%.[83]

The cited cases show that the sheer market share percentage is not in itself decisive.[84] Instead the European Commission's decision is influenced by a number of other factors, which are viewed in conjunction with the market share. These include superior technology,[85] access to capital,[86] a well-developed distribution system,[87] product differentiation,[88] overall size and strength,[89] conduct,[90] and

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80. *See* ECMR pmbl No. 15.

81. *See, e.g.*, Case IV/M.553, RTL/Veronica/Endemol, 1994 O.J. (L 294) 14; Case IV/M.856, British Telecom/ MCI (II), 1997 O.J. (L 336) 1.

82. *See* Case IV/M.745, Anglo American Corp./Lonrho 1998 O.J. (L 149) 21; *see also* B. Hawk, et al., *Recent Developments in EU Merger Control*, 15 ANTITRUST 24 (2001). These authors state that while "the conventional wisdom among EC practitioners was that a defacto safe harbor existed below 40% . . . [r]ecent ECMR developments suggest that the debate is being won by the advocates of a lower threshold." *Id.* at 24. They particularly point to the Commission's 1999 Report on Competition, which "highlighted ECMR cases where it found dominance to be created or strengthened where the horizontal overlaps resulted in combined-firm shares below 40%." *Id.* (citing European Commission, 29th Report on Competition 54-55 (1999)).

83. *See* Case IV/M.042, Alcatel/Telettra, 1991 O.J. (L 122) 48.

84. In B. Hawk, et al., *supra* note 81, at 24, the authors note that in oligopoly dominance or coordinated market power cases, "the Commission in recent cases is taking enforcement action against transactions resulting in significantly less concentrated post-merger markets, involving industry characteristics traditionally deemed insufficient to support a finding of oligopoly dominance." *Id.*

85. *See United Brands*, *supra* note 78, at 276; *Michelin*, *supra* note 59, at 3536.

86. *See* European Commission, Case IV/M.6.72R, Continental Can, 1972 O.J. (L 7) 25, [1972] C.M.L.R. D11 (1972).

87. *See United Brands*, *supra* note 78, at 276; *Hoffmann La-Roche*, *supra* note 59, at 524.

88. *See United Brands*, *supra* note 78, at 276.

89. *See Michelin*, *supra* note 59, at 3536.

90. *See United Brands*, *supra* note 78, at 277.

performance.[91]

Turning to B2Bs, the collective market shares of the participants have not played much of a role in the European regulators' consistent decisions that B2Bs will not prevent effective competition from being maintained.[92] Instead, the focus has been on the B2B's potential competition with other electronic platforms. For example, in authorizing Covisint, the Bundeskartellamt paid little attention to the founding members' collective shares of automotive sales, and concluded that there were no indications that Covisint would have a dominant position in the market for internet platforms.[93] Similarly, in *MB Portal*,[94] the Bundeskartellamt concluded that the B2B would not have a dominant position in the new market,[95] since there was a separate market for electronic platforms and the market was still in its early stages with several players intending to participate. In *CFL*, the European Commission decided, in a similar fashion to the Bundeskartellamt in *MB Portal*, that CFL would face heavy competition from other B2Bs.[96] Therefore, a dominant position was not expected.[97]

The European regulators' treatment of B2B market shares tips the scales in favor of B2B authorization. This is appropriate given the objective of encouraging economic innovation and the creation of cost-saving efficiencies. Nevertheless, the collective shares and market power of the founders and participants should be kept closely in mind, as a reminder of the need for continuing post-authorization vigilance.

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91. *See* Case IV/F-3/33.708, British Sugar 1999 O.J. (L 76) 1.

92. The Commission has looked at the underlying product market shares of a B2B's founders in holding in several cases that their joint participation in the B2B would not negatively affect competition between them. *See* Miezitis & Batchelor, *supra* note 9, at 41 (discussing MyAircraft.com and Cofunds.com.).

93. *See* Case B5-34/00-U 40/00, *Bundeskartellamt*, Covisint decision, ¶ D.I.4 [hereinafter *Bundeskartellamt*, Covisint decision]. The decision can be viewed at <http://www.bkarta.de/B5-40-00.pdf> (last visited Apr. 5, 2002).

94. Bundeskartellamt, Case B 5-14/01, DaimlerChrysler/DCX.Net/T-Online, decision of Jan. 4, 2001, at B.III. 3, 2001 [hereinafter *MB-Portal*].

95. MB-Portal is a B2B for the sale of cars and car parts, with emphasis on the Mercedes-Benz and Smart brands.

96. *See CFL*, *supra* note 52, at 15ff.

97. The European Commission took a similar view in *emaro*, *supra* note 54, ¶ 18ff.

3. Ancillary Restraints Analysis

Until June 2001, restrictions accepted by the parent companies of the joint venture that are directly related to and necessary for the implementation of the joint venture ("ancillary restraints") are assessed together with the concentration itself.[98] Such restrictions included agreements to abstain from making separate competing offers for the joint venture,[99] restrictions not to compete with the joint venture,[100] and exclusive purchase obligations.[101] As an example, in *CFL*, the European Commission accepted non-compete clauses in the joint venture agreement as necessary and ancillary to the concentration.[102]

On June 27, 2001 the Commission announced a new policy according to which it will no longer analyze ancillary restraints under the merger procedure.[103] These restraints will therefore be dealt with under Articles 81 and 82 EC.[104]

B. Regulation of B2Bs Under Article 81 EC

In Europe, B2Bs also can be reviewed under general competition laws. EC Article 81 (1) sets forth the general prohibition of anti-competitive behavior.[105] The procedures for investigating, prohibiting and clearing B2B agreements are set forth in Regulation 17 of 1962.[106]

The potential importance of EC Article 81 as a tool for regulating today's B2Bs cannot be overemphasized. Over time, we believe that B2Bs are more likely to encounter opposition from the European Commission on the basis of Article 81 EC than from the ECMR's

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98. *See* Commission Notice Regarding Restrictions Ancillary to Concentrations, 1990 O.J. (C 203) 5, No. II.3.

99. *See id.*

100. *See id.* at No. V.A.; *see also* Case IV/M 29.428, GEC/Weir, 1977 O.J. (L 327) 26.

101. *See* Case IV/M 30.437, Rockwell/Iveco, 1983 O.J. (L 224) 26.

102. *See* CFL, *supra* note 52, at 26.

103. *See* Commission Notice on Restrictions Directly Related and Necessary to Concentrations, 2001 O.J. (C 188) 3.

104. *Id.* ¶ 6.

105. EC TREATY art. 81 (1).

106. REGULATION OF 1962 (First Regulation Implementing Articles (81) and (82)), June 10, 1999, 1962 O.J. SPEC. ED. 204, 87 (as amended by Regulation EC 1216 1999, 1999 O.J. (L 148) 5).

merger review process.[107] As we later discuss focusing on Covisint, it is very difficult for the regulatory authorities to predict before a B2B begins operating that it will stray into anticompetitive conduct, and the potential for dazzling efficiencies gives the regulators every incentive to allow the venture to move forward. Moreover, as with Covisint, rules of conduct and antitrust guidelines can be submitted by the B2B's attorneys to give the regulators an initial comfort level. Nevertheless, similar to trade associations and other joint activities between competitors, the real test comes after the initial authorization decision. Therefore, we anticipate that in the not too distant future, investigations of B2Bs and their participants under EC Article 81 will become more numerous and more intensive.

1. Applicability and Procedure

a. Article 81 EC Investigation as Part of the Merger Control Process

ECMR Article 2 (4) provides that when assessing the legality of a merger, the criteria of EC Articles 81 (1) and (3) must be applied to a joint venture if it has as its object or effect the coordination of the competitive behavior of independent companies.[108] Hence, the general rules of competition law in EC Article 81 are applied in a merger investigation. Consequently, it is possible to reach a conclusion that even though no dominant position has been created or strengthened, a B2B is incompatible with the Common Market because the tenets of the general competition laws have been violated. To date, however, no B2Bs have been challenged under such an analysis.

In order to apply EC Article 81 in a merger investigation, and thus justify the exception to the rule that general competition law is distinct from merger control, there must be a causal link between the merger, e.g., the establishment of the joint venture, and the restriction of

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107. One reason why this prominence has not yet surfaced is that EC Article 81 investigations give the European Commission a lot of time, whereas in merger control investigations, time is of the essence. *See* B. Hawk, et al., *supra* note 81, at 26 (stating, "In contrast to its U.S. counterparts operating under the HSR Act, the Commission under the ECMR must reach a decision within relatively rigid (and short) deadlines that cannot be extended, even with the consent of the parties"); Fine, *supra* note 16, at 36-37.

108. ECMR art. 2 (4).

competition.[109] If there is no such link, the relevant coordination of the participants must be assessed in a *separate* proceeding under EC Article 81 (1) rather than as part of the merger control investigation under the ECMR. The ultimate issue is whether the coordination, which is the direct consequence of the creation of the joint venture, affords the participants the possibility of eliminating competition in a substantial part of the products or services in question.[110]

The difference between the two approaches lies in the possible result. An assessment under EC Article 81 as part of the merger investigation can lead to the merger being blocked. Conversely, the "classic" EC Article 81 investigation leaves the concentration untouched, and can only lead to measures by the European Commission to correct the behavior. Another significant difference lies in the time frame for both procedures. Whereas the merger investigation is subject to a very tight time frame (as a rule the European Commission must reach a decision within four months after notification), EC Article 81 investigations are not subject to a time frame and can take years.[111]

b. Separate Article 81 (1) EC Investigation

In a number of cases, including *Covisint*, B2Bs are assessed in an EC Article 81 (1) investigation.[112] For example, if a B2B does not constitute a concentration within the meaning of ECMR Article 3 because there is no joint control, an EC Article 81 (1) investigation may be appropriate. Similarly, general competition law also can be applied in cases of joint ventures that do not have a Community Dimension, and which have as their object or effect the coordination of the competitive behavior of undertakings that remain independent.[113]

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109. *See* ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW 808 (Oxford 2001).

110. It must be noted that ECMR Article 2 (4) not only makes the prohibitions in EC Article 81 (1) applicable to joint ventures in the merger control process, but also the rules for exemptions in EC Article 81 (3).

111. *See* WHISH, *supra* note 79, at 217.

112. In *Covisint*, the merger control decision was reached by the Bundeskartellamt, whereas the European Commission later assessed it under EC Article 81, *see infra* note 103.

113. According to ECMR Article 22 (1), concentrations, whether they are of Community Dimension or not, are exclusively dealt with by the ECMR while the rules of general competition law do not apply. As discussed, *infra* Part IV.A.1.a-b, however,

Commission examination under EC Article 81 does not stop or render invalid parallel investigations by the national authorities. Unlike merger control proceedings, which generally award exclusive competence to the European Commission, national general competition law can be applied alongside Community rules.[114] As a matter of course, the European Commission is not estopped to take on cases which have previously been dealt with by the national authorities, both under general competition law proceedings or under national merger control. This means that Covisint and other B2Bs such as *RubberNetwork* [115]or *CC-Markets*,[116] which have been assessed by national authorities, can still be investigated by the European Commission under Article 81 (1) EC.

Furthermore, the European Commission's initial clearance of a B2B under the ECMR does not stop it from investigating the subsequent behavior of the B2B under EC Article 81. In the merger control proceedings, the European Commission can only look at the underlying agreement and the parties' undertakings at that time.[117] If the B2B's agreements, rules or procedures change, the European Commission is entitled to assess the new rules under EC Article 81 (1).[118]

2. Criteria of Article 81(1) EC

Article 81(1) EC prohibits "agreements . . . , decisions . . . , and concerted practices . . . which may affect trade among the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."[119] Basically, the criteria for testing a possible violation of Article 81(1) EC are the same regardless of whether Article 81 EC is applied directly or in connection with Article 2(4) ECMR. The difference is that Article 2(4)

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there can be an important exception if a B2B is set up as a joint venture. If such a joint venture qualifies as a concentration within the meaning of ECMR Article 3, it can be assessed under general competition laws if it does not meet the turnover criteria for a Community Dimension.

114. *See* Case 14/68, Walt Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1; [1969] C.M.L.R. 100 (1969).

115. *RubberNetwork*, *supra* note 72.

116. *CC-Markets*, *supra* note 74.

117. This is a consequence of the structure of EC law.

118. Again, this is a consequence of the structure of EC law.

119. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 81 (1), May 1, 1999, 1997 O.J. (C 340) 173.

ECMR adds additional considerations that have to be taken into account, most notably the parent companies' positions in the same market as the joint venture.[120]

a. Effect on Trade Among Member States

The interstate clause is more than a requirement for applying Article 81(1) EC. It also defines the boundary between the areas respectively covered by Community law and the law of the member-States.[121] Agreements that have no effect on trade between member-States are not covered by Article 81 EC, and are dealt with exclusively by the national authorities.[122] The basic test of whether or not interstate trade is affected was set forth by the E.C.J. in the case of *Société Technique Minière v. Maschinenbau Ulm.*[123] The E.C.J. held that "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."[124] In the case of B2Bs, the test developed in *Société Technique Minière v. Maschinenbau Ulm* appears to be easily passed due to the nature of the platforms, which operate through

120. *See* European Commission, Case IV/M.2096, Bayer/Deutsche Telekom/*Infra*serv/JV, CELEX Document No 300M2096, decision of Oct. 6, 2000, ¶ 18ff.

121. *See* Case 22/78, Hugin Kassaregister AB v. Commission, 1979 E.C.R. 1869, 1899, [1979] 3 C.M.L.R. 345 (1979); Joined Cases 56 & 58/64, Establissements Consten S.A. v. Commission, 1966 E.C.R. 299, 341, [1966] C.M.L.R. 418 (1966); Joined Cases 6 & 7/73, Instituto Chemioterapico Italiano Spa v. Commission, 1974 E.C.R. 223, 276, [1974] 1 C.M.L.R. 309 (1974).

122. Not surprisingly, the E.C.J. has interpreted the clause rather widely, thus enlarging the applicability of Article 81 and granting the European Commission wide powers of investigation. This approach parallels the practice of the U.S. Supreme Court, which has interpreted the Inter-State Commerce Clause flexibly to give more powers to the federal institutions. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

123. Case 56/65, Société Technique Minière v. Maschinenbau Ulm GmbH, 1966 E.C.R. 338.

124. *Id.* at 249. *See* Joined Cases 56 & 58/64, Establissements Consten S.A. v. Commission, 1966 E.C.R. 299, 341, [1966] C.M.L.R. 418 (1966); Case27/87, Louis Erauw-Jacquery SPRL v. Le Hesbignonne SC, 1988 E.C.R. 1919, 1940, [1988] 4 C.M.L.R. 576 (1988); Case 30/87, Bodson v. Pompes Funèbres des Régions Libérées SA, 1988 E.C.R 2479, 2497, [1989] 4 C.M.L.R. 984 (1989).

the Internet's global interconnections. As long as companies from the Member States participate or can potentially participate in a B2B, that test should be passed easily.

b. Appreciable Distortion of Competition Article 81(1)

EC applies to "agreements . . . which have as their object or effect the prevention, restriction or distortion of competition."[125] The E.C.J. has held that these conditions have to be read disjunctively. First, one has to look at the object, or purpose, of the agreement. Only if it is clear that the object is not to distort competition does the E.C.J. consider whether it might have that effect.[126] When looking at the object of an agreement, the Court does not look at the subjective intention of the parties, but at the objective meaning and purpose of the agreement in the economic context in which it is to be applied.[127] When looking at the effect of an agreement, one must look at its operation in its relevant markets.[128] Consequently, it is necessary to identify the relevant product and geographic markets. The test for a distortion of competition then requires an analysis of how competition would have fared had the agreement in question not been put into effect. If this analysis shows an appreciable divergence from normal conditions of competition, a distortion exists under Article 81 (1) EC.[129]

A number of exceptions to this rule apply. One can argue that although an agreement distorts competition, the distortion is a reasonable one not meriting the application of Article 81(1) EC. This rule-of-reason-like approach is not an exemption to Article 81(1) EC, but merely a reduction of the applicability of Article 81(1) EC by means of interpretation.[130] The European approach is similar, but not identical,

125. EC TREATY art. 81 (1).

126. *See* Case 56/65, Société Technique Minière v. Maschinenbau Ulm GmbH, 1966 E.C.R. 235, 249; Case 45/85, Verband der Sachversicherrer eV v. Commission, 1987 E.C.R. 405, [1988] 4 C.M.L.R. 264 (1988), ¶ 39.

127. *See* Joined Cases 29 & 30/83, Compangie Royale Asturienne des Mines S.A. and Rheinzink GmbH v. Commission, 1984 E.C.R. 1679, 1703, [1985] 1 C.M.L.R. 688 (1985).

128. *See* Case 23/67, Brasserie de Haecht S.A. v. Wilkin, 1967 E.C.R. 407, 415, [1968] C.M.L.R. 26 (1968).

129. *See* Case 42/84, Remia B.V. v. Commission, 1985 E.C.R. 2545, 2571, [1987] 1 C.M.L.R. 1 (1987).

130. *See* BELLAMY & CHILD, COMMON MARKET LAW OF COMPETITION ¶ 2-062

to the rule-of-reason analysis employed in the United States.[131] Leaving aside the debate over the existence and scope of a rule-of-reason in European competition law,[132] for the purpose of this article it should suffice to state that the E.C.J. in a number of cases has held that under special situations certain restrictions have to be tolerated.[133] For example, franchise[134] and licensing agreements[135] and selective distribution systems[136] already have received special consideration. Therefore, the European Commission or ultimately the Court may accept that certain restrictions are reasonably necessary to achieve the purpose of a B2B.

Furthermore, Article 81(1) EC is not applicable where the impact of the agreement on competition is not appreciable.[137] The European

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(Vivien Rose ed., 4th ed. 1993); Alexander Liegl & Stefan Schmitz, *Zentrale Vermarktung von Fernsehrechten im Automobilsport*, WETTBEWERB IN RECHT UND PRAXIS 244, 248 (1998).

131. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1910); Board of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. National Soc'y of Prof'l Eng'rs, 404 F. Supp. 457, 461 (D.C. Cir. 1975); Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272, 1283 (7th Cir. 1983); Richard Hoffman Corp. v. Integrated Bldg. Sys., 610 F. Supp 19, 22 (N.D. Ill. E.D. 1985).

132. *See* THOMAS ACKERMANN, ARTICLE 85 ABS.1 EGV UND DIE RULE OF REASON (1997).

133. *See* Case T-61/89, Dansk Pelsdyravlerforening v. Commission, 1992 E.C.R. II-1931, 1998; Case 56/65, Société Technique Minière v. Maschinenbau Ulm GmbH, 1966 E.C.R. 235, 304. However, in its decision in T-112/99, Métropole télévision (M6) et al. v. Commission, judgement of Sept. 18, 2001, available at <http://europa.eu.int/cj/en/jurisp/index.htm>, the CFI reasoned that these decisions could not be interpreted as establishing the existence of a rule of reason in Community competition law. *Id.* ¶ 76.

134. *See* Case 161/84, Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis, 1985 E.C.R. 353, [1986] 1 C.M.L.R. 414 (1986).

135. *See* Case 27/87, Louis Erauw-Jacquery SPRL v. Le Hesbignonne SC, 1988 E.C.R. 1919, 1939; Case 258/78, Nungesser KG v. Commission, 1982 E.C.R. 2015, 2069, [1982] 1 C.M.L.R. 278 (1982); Case 262/81, Coditel SA v. Cine Vog Films SA, 1982 E.C.R. 3381, 3401, [1983] 1 C.M.L.R. 49 (1983).

136. *See* Case 26/76, Metro SB-Großmärkte GmbH & Co. KG v. Commission, 1977 E.C.R. 1875, [1978] 2 C.M.L.R. 1 (1978); Case 99/79, SA Lacóme v. Etos BV, 1980 E.C.R. 2511, [1981] 2 C.M.L.R. 164 (1981); Case 31/80, L'Oreál NV v. De Nieuwe A.M.C.K. Pvba, 1980 E.C.R. 3775, [1981] 2 C.M.L.R. 235 (1981); Case 107/82, Allgemeine Elektrizitäts Gesellschaft AEG-Telefunken AG v. Commission, 1983 E.C.R. 3151.

137. *See* Case 5/69, Völk v. Ets. Vervaecke, 1969 E.C.R. 295, 312, [1969] C.M.L.R. 273 (1969); Case 1/71, Société anonyme Cadillon v. Firma Höss, Maschinenbau KG,

Commission has outlined how it interprets "appreciable" in its De Minimis Notice of 2001.[138] According to this notice, agreements between competitors who have a combined market share of 10%, or between non-competitors with a combined share of do not appreciably restrict competition within the meaning of Article 81(1) EC.[139]

3. Exemptions

According to Article 81(3) EC, Article 81(1) EC may be declared inapplicable by the European Commission if the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that the restrictions are indispensable to the attainment of these objectives, and the agreement does not afford the possibility of substantially eliminating competition.[140] Applying these criteria, most B2Bs should be able to qualify for an initial exemption.

Companies that fear that either setting up a B2B or operating one may be in violation of Community law may (if the set-up is not subject to the exclusive jurisdiction of the ECMR) apply for an individual exemption[141] under Article 81(3) EC. The process to obtain a declaration that, pursuant to Article 81(3) EC, the prohibition in Article 81(1) EC is inapplicable to a notificed agreement, decision or practice, is called notification.[142] Before deciding to grant an exemption, the

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1971 E.C.R. 351, 370, [1971] C.M.L.R. 420 (1971); Case 19/77, Miller International Schallplatten GmbH v. Commission, 1978 E.C.R. 131, 149ff., [1978] 2 C.M.L.R. 334, 140 (1978); Joined Cases C-215 & C-216/96, Bagnasco v. Banca Popolare di Novara Soc. Coop. arl, [1999] All E.R. (EC) 678, ¶ 34, [1999] 4 C.M.L.R. 624 (1999).

138. *See* Commission Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 81, 2001 O.J. (C 368) 13 [hereinafter Commission Notice on Agreements of Minor Importance] (on file with *The Wayne Law Review*).

139. *Id.* ¶ 7. These thresholds are the law now.

140. *See* EC TREATY art. 81 (3).

141. *See id.* It is also possible that an agreement could qualify for a block exemption. In block exemptions, the Commission establishes criteria that are exempted from Article 81 (1) EC. Agreements within the terms of a block exemption do not need to be notified to the Commission, since they are valid without specific authorization. *Id.*

142. *See* Commission Regulation 447/98, 1998 O.J. (L 61) 1. The parties have to notify the European Commission by completing Form A/B, which is a very lengthy and complicated process. Form A/B includes a complicated set of questions that the

European Commission must publish a summary of the agreement in question in the Official Journal and invite interested third parties to submit their observations.[143]

In most cases, following the notification the Commission will not make a formal decision, but will merely send out comfort letters. These letters state that the European Commission is closing its file and intends to take no further action. A comfort letter can, but need not, give reasons why the notified B2B agreement merits an exemption under Article 81(3) EC.[144] Comfort letters are addressed to the parties concerned and are not published,[145] which makes it more difficult to appreciate the European Commission's position.

If the European Commission grants an individual exemption, the national authorities, which under the case law of the E.C.J. are permitted to carry out parallel investigations,[146] probably cannot invalidate the exemption or prohibit the agreement under their national laws.[147] Nevertheless, comfort letters may give the parties less security than they would like because in contrast to a formal decision, national courts are not precluded from applying Article 81(1) EC to the B2B agreement.[148] The European Commission itself, however, cannot

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applicant must answer. The parties can request the European Commission to declare that their agreement, decision, or practice falls outside EC Articles 81 and 82 altogether. Such a request is considered a negative clearance request under Article 2 Regulation 17. *See* REGULATION OF 1962, *supra* note 105.

143. *See* REGULATION OF 1962, *supra* note 105, at art. 19(3).

144. The European Commission similarly is not required in a Comfort Letter to state whether or why an agreement may fall outside Article 81(1) EC altogether. Comfort letters can thus be the response to either a notification or a request for negative clearance.

145. In some cases, however, a summary of the notification and an indication of the European Commission's intention to deal with it by comfort letter is first published in the Official Journal, C series. In addition, brief summaries of the most important or interesting cases concerned are published in the annual Competition Report.

146. *See, e.g.*, Case 14/68, Walt Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1; [1969] C.M.L.R. 100 (1969), at I.4.

147. There is as of yet no case law to this effect, but see JONES & SUFRIN, *supra* note 109, at 1013; 1 HERBERT SAUTER, KOMMENTAR ZUM DEUTSCHEN UNDO EUROPÄISCHEN KARTELLRECHT VO No. 17/62 art. 9, ¶ 7 (Eugen Langen & Hermann-Joseph Bunte eds., 9th ed. 2001); WHISH, *supra* note 79, at 262.

148. In most cases, the national regulatory authorities will take account of the European Commission's view, and may stay their national proceedings in order to give

reverse its position under the comfort letter unless there are material changes of circumstances or the letter was written on the basis of incorrect information. This could be important for B2Bs that do not live up to their previous promises or who simply change their terms of business. The big advantage of comfort letters is that, while formal decisions can take years, comfort letters can be issued in a comparatively short period of time, usually a few months, as opposed to a number of years. Not surprisingly, most decisions of the European Commission today come through comfort letters.[149]

4. Possible Violations of Article 81(1) EC by B2Bs

European competition law tends to closely parallel antitrust law in the United States.[150] Consequently, it is not surprising that the types of potential anticompetitive conduct by B2Bs Article 81(1) EC reaches tend to closely track the potentially anticompetitive conduct discussed by the Federal Trade Commission in its October 2000 staff report on B2B competition policy.[151]

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the European Commission a chance to make a formal decision.

149. Comfort letters also can be issued in response to a negative clearance request.

150. *See* Holger Fleischer & Thorsten Körber, *Der Einfluss des US-amerikanischen Antitrustrechts auf das Europäische Wettbewerbsrecht*, WIRTSCHAFT UND WETTBEWERB 6 (2001). *But see* James B. Kobak, Jr., *Running the Gauntlet: Antitrust and Intellectual Property Pitfalls on the Two Sides of the Atlantic*, 64 ANTITRUST L.J. 341 (1996). Kobak argues that while "[m]uch is said these days about the convergence of regulatory approaches, and often-though not by any means always—many of the fundamental principles applied by different antitrust authorities do converge on what might be called the macro level. But even when the broad principles seem to be agreed upon, down at the micro level, where deals must be done and clients advised, the finer points differ, sometimes dramatically." *Id.* (citing James R. Atwood & Kingman Brewser, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 4.02-4.03 (2d ed. 1981)); Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What and How?*, 60 ANTITRUST L.J. 593 (1992).

151. *See* Susan S. DeSanti, *The Evolution of Electronic B2B Marketplaces*, Remarks Before the Federal Trade Commission Workshop: Competition Policy in the World of B2B Electronic Marketplaces (June 29, 2000) (on file with *The Wayne Law Review*). The speech can also be viewed at <http.//www.ftc.gov/bc/b2b/b2bdesanti.htm> (last visited April 7, 2002).

a. Anticompetitive Information Exchanges

It has long been understood that many information exchanges between competitors can be efficiency-enhancing and procompetitive.[152] For example, exchanges of historical sales data generally have been perceived as competitively harmless,[153] or even procompetitive because they enable industry participants to adjust their behavior in order to achieve greater efficiencies and reduce costs.[154] On the other hand, it is equally well recognized that sharing sensitive business information may allow competitors to successfully collude or coordinate price increases and output reductions.[155] For example, by sharing their future business moves,[156] competitors can monitor compliance with overt or tacit pricing or output agreements.[157] If such sensitive information is

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152. "The Guidelines make explicit the Agencies' recognition 'that the sharing of information among competitors may be pro-competitive and is often reasonably necessary to achieve the pro-competitive benefits of certain collaborations.'" DeSanti, *supra* note 151; *see also* FTC Staff Report, *supra* note 3, at pt. III, p. 3 n.9 (citing Competitor Collaboration Guidelines § 3.31(b)); HILLS, ANTITRUST ADVISER 500 (3d ed. 1985); SCHWARTZ, FREE ENTERPRISES AND ECONOMIC ORGANIZATION 375-76 (1966); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); Tag Mfrs. Inst. v. Federal Trade Comm'n, 174 F.2d 452 (1st Cir. 1949).

153. *See* Case T-334/94, Sarrió SA v. Commission, 1998 E.C.R. II-1439, 1452; Case IV/33.815, 35.842, Eudim, 1996 O.J. (C 111) 8.

154. In the U.S., agreements to share information are usually judged under the rule of reason, the question being whether the sharing of information among competitors has reasonable justification or whether, on the other hand, it is a tool for price coordination. *See* Dale Hershey, *What the FTC learned about B2B Marketplaces*, THE METROPOLITAN CORPORATE COUNSEL 22, 23 (Dec. 2000); Levine & Green, *supra* note 9, at 27; Miezitis & Batchelor, *supra* note 9, at 41-42, (citing Case COMP/JV.51, Bertelsmann/Mondadori/Bol Italia, 2000 O.J. (C 290) 3, ¶ 19).

155. *See* Sugar Inst. v. United States, 297 U.S. 553 (1936); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); United States v. Container Corp. of America, 393 U.S. 333 (1969); Miezitis & Batchelor, *supra* note 9, (citing Commission Decision 92/157, UK Agricultural Tractor Registration Exchange, 1992 O.J. (L 68) 19) (upheld on appeal by the Court of First Instance ("CFI") in Cases T-34 & 35/92, *Fiatagri and John Deere v. Commission*, (1992) E.C.R. II 905, 957; Cases C-7 & 8/95, *New Holland Ford (formerly Fiatagri) and John Deere v. Commission*, (1998) E.C.R. I 3111).

156. E.C.J., Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-4/73—Suiker Unie v. Commission of the European Communities, 1975 E.C.R. 1663, 1790; European Commission, PVC, 1989 O.J. (L 85) 1, [1990] 4 C.M.L.R. 345 (1990).

157. *See* Hershey, *supra* note 154.

deliberately exchanged by competitors, there can be little question of a violation of Article 81(1) EC.[158]

It generally should be assumed that B2B participants will not disclose such information voluntarily.[159] After all, they remain competitors in their respective markets. But it is certainly possible that a B2B member might foresee from historical patterns what a competitor's future strategy is likely to be. It is questionable if such "accidental" exchanges of information would amount to a violation of Article 81 (1) EC, since this provision appears to require some degree of collusion between the parties. Nevertheless, since one of the objectives of Article 81 (1) EC is to make competitors act independently, it seems logical to identify the agreement to establish or join a B2B as an agreement within the meaning of Article 81 (1) EC. In such cases, the underlying agreement potentially could be held to violate Article 81 (1) EC. [160]

Competition regulators in Europe and the United States consistently have warned that anticompetitive information exchanges could be a potential problem for B2B participants.[161] As a result, the parties to

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158. *See* Commission Decision 77/592, Case IV/312-366, COBELPA/VNP, 1977 O.J. (L 242) 10; Case IV/M 31.128, Fatty Acids, 1987 O.J. (L 3) 17; Commission Decision 92/157, UK Agricultural Tractor Registration Exchange, 1992 O.J. (L 68) 19; Commission Decision 78/252, Case IV/29.176, Vegetable Parchment, 1978 O.J. (L 70) 54; Case IV/M 29.535, White Lead, 1979 O.J. (L 21) 16.

159. *See* Miezitis & Batchelor, *supra* note 9, at 42.

160. *Cf.* Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, [1972] C.M.L.R. 557 (1972).

161. As an example, in an interview on February 2, 2001, EC Commissioner for Competition Mario Monti observed that information exchanges involving B2Bs "could be a problem in a number of scenarios." *Interview with Professor Mario Monti, supra* note 10, at 10. Monti explained:

> Firstly, electronic networks could be used by companies at the same level in the supply chain to communicate and coordinate pricing (whether buying or selling). Such behavior would amount to cartellization through a new electronic medium. Another concern is where the owner of an electronic exchange might be able to intercept information relating to business transactions carried out by his competitors, suppliers, or customers.

Id. at 10, 13; *see also* DeSanti, *supra* note 151, at 6-7 ("Depending on how they are structured, B2B e-marketplaces may also have potential to raise issues regarding information-sharing . . . It all depends on the facts, but I suspect that many potential problems in the information-sharing area can be solved and that a little attention to these issues beforehand might smooth most of the bumps down the road.").

existing B2Bs previously approved by European and American regulatory authorities appear to have taken great pains to prevent competitively sensitive information from being exchanged. For example, before the German authorities approved Covisint, the parties assured the *Bundeskartellamt* that they would maintain the confidentiality of sensitive data.[162] Similarly, in *CFL*, the parties utilized a number of provisions in the joint venture agreement to prevent the disclosure of sensitive competitive information.[163] In *Volbroker*, which was assessed solely under Article 81 EC, the European Commission accepted assurances by the parties that they would not exchange commercially sensitive information.[164]

b. Anticompetitive Joint Purchasing

Joint purchasing agreements can achieve important cost savings and efficiencies that benefit consumers.[165] But where the joint purchasers

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162. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ C.I.6. It must be noted that the Bundeskartellamt accepted this promise as part of the merger investigation and did not really apply questions of general competition law in its decision. It is possible that the *Bundeskartellamt* would have given Covisint the go-ahead even without the assurance because it did not elaborate on this issue in the merits of its decision.

163. *See CFL*, *supra* note 52, ¶ 21.

164. *Volbroker* is a joint venture of Deutsche Bank, UBS, Goldman Sachs, Citibank, J.P.Morgan and NatWest, which will develop and market an electronic brokerage service for trading among banks in foreign currencies. The parties notified the European Commission in April 2000 for clearance and, in July 2000, received comfort letters. *See infra* note 295. For a summary of the parties' commitments to the Commission see Miezitis & Batchelor, *supra* note 9, at 42.

165. The United States Supreme Court has observed that "such cooperative [purchasing] arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.'" Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 295 (1985) (quoting Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 20 (1979)). EC Commissioner for Competition Policy, Mario Monti, similarly has observed that:

> many business-to-business exchanges exist in order to pool purchasing of common items by companies. An example would be airline companies jointly purchasing supplies such as fuel for aircraft or food for on-board consumption. Such aggregation may have procompetitive effects through its countervailing power on potential monopolists further up the supply chain.

Interview with Professor Mario Monti, *supra* note 10, at 13.

have monopsony power, the arrangements can be anticompetitive.[166] In the past, the European Commission has declared that joint purchases are compatible with Article 81 (1) EC if the participants' market power is limited, the purchasing is not exclusively done through the joint operation, the share of goods which are purchased jointly does not mean that the entire purchasing policy is coordinated, and most importantly, the parties remain free to make their own purchases.[167]

The European Commission has published a Notice on Horizontal Cooperation Agreements[168] in which it outlines how it intends to deal with, *inter alia*, joint purchasing agreements. According to the Notice, the starting point for the assessment of a purchasing agreement is the parties' buying power.[169] Buying power can be presumed if a purchasing agreement accounts for a sufficiently large proportion of the total value of a purchasing market, so that prices can be driven below the competitive level or access to the market can be foreclosed to

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166. Monopsony is defined as "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." AREEDA, ET AL., ANTITRUST LAW ¶ 574 (1995). *See generally* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); National Macaroni Mfg. Ass'n v. FTC, 345 F.2d 421 (7th Cir 1965); United States v. Rice Growers Ass'n, 1986-2 Trade Cas. (CCH) ¶ 67,288 (E.D. Cal. 1986). For example, in the United States, the Ninth Circuit has defined monopsony power as a "market situation in which there is a single buyer or a group of buyers making joint decisions. Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side." United States v. Syufy Enters., 903 F.2d 659, 663 n.1 (9th Cir. 1990) (quoting R. LIPSEY, ET AL., ECONOMICS 976 (7th ed. 1984)). In *Syufy*, the court applied the tests relevant to determining monopoly power, including market share, entry barriers, and the power to exclude competition, in determining that Syufy lacked monopsony power. *See id.* at 664-70; *see also* D.O.J. & FTC Horizontal Merger Guidelines § 0.1 (1992, revised 1997); Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297-303 (1991); VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION: DESK EDITION (2d ed. 2001), § 3.02[5].

167. *See* Case IV/M 29.011, Rennet, 1980 O.J. (L 51) 19; Case IV/M 27.958, National Sulphuric Acid Ass'n, 1980 O.J. (L 260) 24; *see also* E.C.J., Case 61/80, Coöperative Stremsel-en Kleuselfabriek v. Commission. of the European Communities, 1981 E.C.R. 851, 868, [1982] 1 C.M.L.R. 240 (1982).

168. *See* Commission Notice on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements of 6 Jan. 2001, 2001 O.J. (C 3) 2 [hereinafter Commission Notice on Horizontal Cooperation].

169. *See id.*

competing buyers.[170] There is no absolute threshold which indicates that a purchasing cooperative possesses some degree of market power, and thus falls under Article 81 (1) EC. In most cases, it is unlikely that market power will exist if the parties to the agreement have a combined market share below 15% in the purchasing or selling markets.[171] At the same time, a market share above this threshold does not automatically indicate that a negative market effect is caused by the cooperation. Reaching such a conclusion requires a more detailed assessment of the joint purchasing agreement, involving factors such as the market concentration and possible countervailing power of strong suppliers. If the parties have a market share significantly above 15% they are likely to come under Article 81 (1) EC.[172] Nevertheless, the purchasing agreement still can pass muster if the efficiencies it creates outweigh the restrictive effects.[173]

Even if a joint purchasing arrangement violates Article 81 (1) EC, it is possible to obtain an individual exemption under Article 81 (3) EC.[174] In the past, the European Commission has granted individual exemptions in light of the economic benefits associated with joint purchases.[175] Lower prices and savings in transportation and storage costs are benefits which can generally contribute to the improvement of the distribution of goods, while resulting in lower prices to consumers. The European Commission is likely to approve the agreement if the restrictions are indispensable to the attainment of such benefits.[176] The European Commission has denied the indispensability in cases where 25% or more of the purchases have to be placed by means of a joint purchase,[177] although this strict barrier was not included in the recent notice on horizontal cooperation. In addition, an individual exemption will not be granted if the power acquired through joint purchasing can

170. *See* cases and sources cited *infra* note 175.

171. *See* Commission Notice on Horizontal Cooperation, *supra* note 168, ¶ 130.

172. *See* Commission Notice on the Agreements of Minor Importance, *supra* note 142.

173. *See* Commission Notice on Horizontal Cooperation, *supra* note 168, ¶ 131.

174. EC TREATY art. 81.

175. *See* Case IV/M 29.011, Rennet, 1980 O.J. (L 51) 19; Case IV/M 27.958, Natural Sulphuric Acid Ass'n, 1980 O.J. (L 260) 24.

176. *See* Commission Notice on Horizontal Cooperation, *supra* note 168, ¶ 133.

177. *See* Case IV/M 26.602, Frubo, 1974 O.J. (L 237) 16; European Commission, Case IV/M 29.011 Rennet, 1980 O.J. (L 51) 19.

lead to a substantial elimination of competition.[178]

In theory, joint buying through B2Bs should not present major competitive concerns. First, joint purchasing is generally not part of a B2B's original objective[179] and the notifying parties usually give assurances to the competition authorities that no joint purchasing will occur.[180] It is therefore unlikely that a B2B's authorization will be rejected due to fears of anticompetitive joint purchasing. Nevertheless, where a B2B's founders have collective market power, the temptations to engage in conduct that is tantamount to joint purchasing may be great. As discussed in Section IV, *infra*, Covisint's recent decision to collaborate and form exclusive relationships with certain "best-of-breed technology providers" in areas such as supply chain management applications looks a lot like joint purchasing. Since Covisint's principals account for more than one-half of the world's automobile sales, and approximately 80% in the United States, serious competitive effects questions arise.[181] EC Competition Commissioner Monti has noted that the "aggregation of purchasing power can . . . have anti-competitive effects by obliging suppliers to discriminate against other purchasers not involved in the exchange."[182] Such aggregation also can lead to discrimination against suppliers who are not selected by the B2B. Therefore, post-authorization conduct that can be characterized as joint purchasing should receive very close scrutiny, and may well be challenged under Article 81 (1) EC.

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178. *See* Commission Notice on Horizontal Cooperation, *supra* note 168, ¶ 134; Case IV/26.623, International Chinin Cartel, 1969 O.J. (L 192) 18.

179. In the June 29-30, 2000 FTC Workshop on Competition Policy in the World of B2B Electronic Marketplaces, "several participants also voiced concerns that B2Bs could allow the exercise of monopsony power." FTC Staff Report, *supra* note 3, at pt. III, p. 13. The Report noted, however:

> By no means do all B2Bs facilitate joint purchasing. Indeed, group buying is difficult to execute, some panelists stated. Perhaps because of this, many B2Bs merely enable participants to purchase parts individually, a practice that is no more controversial than firms using the same telephone network to purchase parts today.

Id. (citations omitted).

180. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ C.I.4; *RubberNetwork*, *supra* note 72, ¶ 39; *CC-Markets*, *supra* note 74, ¶ 20.

181. *See* Slowey, *supra* note 5; Miezitis & Batchelor, *supra* note 9, at 42.

182. *Interview with Mario Monti*, *supra* note 10, at 13.

c. Anticompetitive Joint Selling

As with joint purchasing, B2Bs are not generally conceived or technically designed for joint selling.[183] Any joint selling then would seem to occur outside the designed scope of a B2B, and potentially could be viewed as an abuse of the approved platform. Consequently, anticompetitive joint selling is more of a question of problematical joint conduct than of the inherent competitive legality of B2Bs. Nevertheless, the temptation for an approved B2B to begin exploiting its shared market power through conduct tantamount to joint selling and exclusionary behavior is great, and must be carefully monitored by the regulators.[184]

The competition law impact of joint selling is generally more severe than for joint purchasing. The European Commission stated in its Notice on Horizontal Cooperation that agreements limited to joint

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183. The Antitrust Guidelines for Collaborations Among Competitors ("Competitor Collaboration Guidelines"), which were issued by the Federal Trade Commission and the U.S. Department of Justice in April 2000, note that:

> competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

Id. at 14. The European and American competition enforcement authorities are likely to question skeptically the need for a B2B to engage in joint selling apart from the provision of joint electronic platform trading services. As we discuss in Part IV, *infra*, when a B2B ventures outside of the "market for marketplaces," red flags immediately should go up.

184. For example, as we discuss in Part IV, *infra*, Covisint's offering of supply chain management software and other solutions bears indicia of joint selling.

selling between competitors[185] have as a rule the object and effect of coordinating the pricing policy of competing manufacturers.[186] In many cases, the joint selling could lead to a partial or even a total elimination of price and terms competition between the participants within the framework of the system for allocating orders.[187] Such a danger can exist even where the agreement is non-exclusive and allows the parties to freely sell products outside the agreement. As with joint purchases, joint sales agreements are only subject to Article 81 (1) EC if the parties have some degree of joint market power. The European Commission assumes that no such market power exists if the parties to the agreement have a combined market share below 15%,[188] provided however, that the agreement does not involve price fixing, which always constitutes a violation of Article 81 (1) EC.

It has been suggested that in cases of joint selling where price fixing is indispensable to the operation of the exchange, an exemption may be possible under Article 81 (3) EC.[189] But the Commission has consistently held that a price fixing agreement falls into the category of a manifest infringement of Article 81 (1) EC that cannot be exempted under Article 81 (3) EC.[190] This view has been upheld by the E.C.J.[191] Although it is true that despite this robust view[192] the European Commission has on rare occasions and in the service sector accepted

185. If the parties are not competitors, the agreement cannot create competition problems of a horizontal nature. It can, however, lead to problems of a horizontal nature if it contains additional restraints like restrictions on passive sales, resale price maintenance, etc.

186. *See* Commission Notice on Horizontal Cooperation, *supra* note 168, ¶ 144.

187. *See* Case IV/M 26.186, Central Stikstof Verkoopkantoor, 1978 O.J. (L 242) 15; Case IV/M.29.672, Floral, 1980 O.J. (L 39) 51.

188. *Id.* ¶ 149.

189. Mietzis & Batchelor, *supra* note 9, at 43 (citing European Commission decisions on the operation of several commodity exchanges, Case IV/27.590, London Sugar Futures Market, 1985 O.J. (L 369) 25; Case IV/30.439, Petroleum Exchange of London, 1987 O.J. (L 3) 27; Case IV/31.614, London Meat Futures Exchange, 1987 O.J. (L 19) 30).

190. *See* European Commission, Case IV/26.623, International Chinin Cartel, 1969 O.J. (L 192) 5; Dyestuffs, 1969 O.J. (L 195) 11; Case IV/30.350, Zinc Producer Group, 1984 O.J. (L 220) 27; *see also* Xth Report on Competition Policy 115 (1980).

191. *See* Case 41/69, ACF Chemiefarma v. Commission of the European Communities Comm'n, 1970 E.C.R. 661; Case 48/49, I.C.I. v. Commission, 1970 E.C.R. 619.

192. JONES & SUFRIN, *supra* note 109, at 649.

some restrictions,[193] B2B exchanges are very unlikely to obtain a price fixing exemption from the European Commission under Article 81 (3) EC.[194]

d. Anticompetitive Exclusion of New Participants

Anticompetitive exclusions will be a constant source of concern for B2Bs. It has long been recognized that exclusionary conduct can lead to liability.[195] In Covisint, the notifying parties assured the regulators that

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193. In *Uniform Eurocheques*, Case IV/30.717, 1985 O.J. (L 35) 43, the European Commission granted an individual exemption to an agreement whereby commissions for the cashing of cheques were fixed, observing that the consumers knew they would be charged the same amount throughout the Community. The exemption expired in 1990, and the Commission was reluctant to renew it. In *Eurocheque: The Helsinki Agreement*, Case IV/30.717, 1992 O.J. (L 95) 50, the European Commission imposed fines on the participating banks, where the participating banks entered into an agreement whereby competition between them was eliminated and the consumer was charged for the service.

194. In the cases quoted by Mietzis & Batchelor, *supra* note 9, at 43, the European Commission did not exempt price fixing. The agreements provided for an obligation to charge "a" fee for business transactions conducted at the Exchanges—without reference to the rate. The Commission held that this obligation did not restrict competition and that complete freedom to negotiate the actual rate existed.

195. An extraordinary body of cases and literature discussing exclusionary conduct is available. *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery, 472 U.S. 284, 294 (1985) ("[Boycott] cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle'") (quoting L. SULLIVAN, LAW OF ANTITRUST, 261-62 (1977)); *see also* G. Werden, *Antitrust Analysis of Joint Ventures*, 66 ANTITRUST L.J. 701, 726-33 (1998); FTC Staff Report, *supra* note 3, at pt. III, p. 16-22; VON KALINOWSKI, *supra* note 166, § 2.03[4][c][i].

Under German law (section 33 in connection with section 21 GWB) the victim of boycott measures is entitled to damages. *See* BGH, WIRTSCHAFT UND WETTBEWERB (WuW/E BGH) 2603, 2607—Neugeborenentransporte, judgement of Oct. 10, 1989; BGH, WIRTSCHAFT UND WETTBEWERB (WuW/E BGH) 2341, 2344—Taxigenossenschaft, judgment of Dec. 16, 1980.

European law itself does not have its own rules of civil liability for anti-competitive behavior. It is still debated whether or not the laws of the Member States must give redress to individuals whose rights under Community law have been infringed. The E.C.J. has stated that national courts must ensure that remedies are available to individuals, which are sufficient to ensure real and effective protection of their community rights. In the case of *Francovich v. Italy*, Cases C-6 & 9/90, 1991 E.C.R.

the platform will not be a closed shop, and will be open to all interested parties.[196] Similar assurances were given to the European Commission in *Supralift*.[197] While other B2Bs have not provided such assurances in writing, this does not automatically mean that their memberships will be limited. Generally, it is in the interest of B2Bs to remain open, since greater participation creates greater network efforts that can lead to greater efficiencies and reduced costs.[198]

As with the other competition issues discussed, serious questions begin to arise when a B2B gains a dominant position in the market. In that case, the refusal to let other parties participate in the platform could amount to an abuse of a dominant position within the meaning of Article 82 EC. Article 81 (1) EC also may be infringed when membership in a B2B is unreasonably refused, and the platform controls access to some important economic activity. The European Commission generally requires the rules of membership to be based on objective criteria with proper appeal procedures in the event of rejection or expulsion.[199] Similarly, the refusal to select an input supplier as a

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I-5357, [1993] C.M.L.R. 66 (1993), the E.C.J. decided that a Member State must make reparation for losses arising in consequence of the Member State's breach of Community law. European law thus acknowledges a claim in vertical violations. In cases of boycott, however, the State is usually not the perpetrator but another private entity. It is therefore debatable (and is debated) whether the *Francovich* principle should be extended to horizontal relations and thus whether the national courts should be compelled under European law to make available remedies for breach of Community competition law. *See* BELLAMY & CHILD, *supra* note 129, ¶ 10-041. So far, English courts have not awarded damages for infringements of Articles 81 and 82 EC. Damages were awarded, however, in Germany (OLG Düsseldorf, Case U (Kart) 6/88, decision of Dec. 20, 1988—Metro/Cartier, WIRTSCHAFT UND WETTBEWERB (WuW/E OLG) 4407) and in France (*Euro Garage v. Renault, Cour d'appel de Paris*, decision of Mar. 23, 1989).

196. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ C.I.5.

197. *See* European Commission, Case IV/M.2398—Linde/Jungheinrich/JV, decision of Apr. 26, 2001, Press Release IP/01/611, [hereinafter *Supralift*]. The Supralift joint venture is intended to serve as a B2B (and Business to Consumer "B2C") trade in mainly second-hand industrial trucks.

198. *See* Pamela Jones Harbour, *B2B Basics and Antitrust Issues*, 631 PLI/Patents 649, 661-66 (Jan. 2001).

199. *See* Commission, Eighth Report on Competition Policy (1978), ¶ 35ff—Sarabex; Case IV/27.590, London Sugar Futures Market Ltd., 1985 O.J. (L 369) 25; Case IV/30.439, Petroleum Exchange of London Ltd., 1987 O.J. (L 3) 27. It is unlikely that an individual exemption will be granted in cases where the condition to admission is neither reasonable nor objective. *Cf.* Case IV/28.948, Cauliflowers, 1978 O.J. (L 21)

"best-of-breed technology provider" could effectively foreclose a supplier from selling to B2B members. Again, Article 81 (1) EC would be violated only if the exclusion had an appreciable impact on competition.[200]

e. Anticompetitive Exclusivity of Use

Another possible violation of EC competition law could occur if users were compelled to use the B2B exclusively. Exclusivity can have both vertical and horizontal competitive effects.[201] To the extent that a B2B forecloses its participants from using competitive channels, it harms horizontal competition, raising the possibility of a violation of Article 81 (1) EC. On the vertical side, exclusivity also could harm the market position of the users of the B2B if their recourse to other sources for buying or selling is unnecessarily limited. Such exclusion is covered by Article 82 EC.

It should be recognized that for a limited period of time and during a B2B's start-up period, a tie-in of participants might competitively help a B2B establish itself in the market, and thus add to the market's diversification. New investors and new users of a B2B need to see that a B2B will attract enough trading volume to keep it in business. To achieve this one might tie-in the first users.[202] It is therefore not unlikely that the Competition authorities will treat this behavior rather leniently

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200. The American authorities similarly require an adverse impact on competition—not just competitors. *See, e.g.*, FTC Staff Report, *supra* note 3, at pt. III, p. 20, noting:

> These inquiries are likely to be highly fact-specific in application. Indeed, exclusionary incentives will not be present in many settings. A B2B owned and operated by firms or individuals independent of those who buy or sell through that marketplace may lack any incentive to exclude or disadvantage any participants.

Id. The FTC staff adds, however, that "[i]n contrast, other B2Bs, such as those owned or operated by consortium of industry members may have incentives to exclude." *Id. See generally* D. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 ANTITRUST L. J. 659, 675 (2001). Carlton argues "even where theory suggests the possibility of competitive harm, the difficulty in identifying such harm and in distinguishing a harm to competition from a harm to competitors suggests caution." *Id.*

201. *See* Hershey, *supra* note 154.

202. *Cf.* Levine & Greene, *supra* note 9, at 29.

in order to enable new players to enter and stay in the market.[203]

C. Applying Article 82 EC to B2Bs

1. General Overview

Article 82 EC is not mentioned in Article 2 (4) ECMR as another criteria in the merger control investigation for establishing whether or not a joint venture is compatible with the Common Market. This is because the coordination of the parent companies is so closely connected with the setting up of the joint venture that it must be dealt with in the same proceeding. The abuse of a dominant position, which can take place at any time, is a different matter. It is therefore assessed in a distinct Article 82 EC procedure.

Article 82 EC requires an enterprise to hold a dominant position before the issue of abuse arises.[204] Article 82 EC lists a number of acts as examples of abusive behavior.[205] These include the imposition of unfair terms, discrimination, or tie-ins. Other abusive behavior can be subsumed under the general clause in Article 82 EC as a catchall clause.[206] Among the behaviors qualifying for an abuse is the refusal to supply.[207] The European Commission[208] and E.C.J.[209] have in the past consistently held that if such a refusal cannot objectively be justified, it

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203. *Cf.* Gassner, *supra* note 46, at 144.

204. By contrast, German law only requires superior market power vis-a-vis small- and medium-sized competitors. *See* GWB, *supra* note 14, § 20 (4).

205. It should be noted that the examples given in Article 82 EC are only exemplary and not preclusive. *See United Brands*, *supra* note 78, at 246. It could be concluded, however, that the abuse of a dominant position only pertains to an abuse in connection with the supply of goods or services.

206. Since the first sentence serves as a catch-up clause, the threshold for qualifying as an abusive behavior is higher than for the examples given in sentence 2. *See* 1 DIRK DIRKSEN, KOMMENTAR ZUM DEUTSCHEN UNDO EUROPÄISCHEN KARTELLRECHT art. 82, ¶ 167 (Eugen Langen & Hermann-Joseph Bunte eds., 9th ed. 2001).

207. E.C.J., Case 6,7/73, Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309 (1974), ¶ 25.

208. *See* European Commission, Case IV/M 29.132, Hugin/Liptons, 1978 O.J. (L 22) 23; Case Polaroid, Thirteenth Report on Competition Policy ¶ 157 (1983); Case IV/M 32.279, BBI/Boosy & Hawkes, 1987 O.J. (L 286) 36; Case IV/M 30.178, British Sugar/Napier Brown, 1988 O.J. (L 284) 41.

209. *See United Brands*, *supra* note 78, at 286.

constitutes a violation of Article 82 EC.[210] In theory, the decision of a B2B to limit its membership might not be caught by Article 82 EC because this prohibition is primarily concerned with the refusal to supply goods or services. A refusal to allow access to the B2B is evaluated in an earlier stage.[211] The E.C.J.'s adoption of the essential facilities doctrine has overcome this potential shortcoming in the applicability of Article 82 EC.

2. Essential Facilities Doctrine

An essential facility is a facility or infrastructure owned or controlled by an undertaking to which other undertakings need access in order to provide products or services to customers.[212] An essential facility is thus sometimes also called a "bottleneck monopoly."[213] The essential facilities doctrine was first widely developed in the United States as a result of the Supreme Court's decision in *United States v. Terminal Railroad Association*.[214] The European Commission has adopted and further

210. It is necessary to distinguish comments for Article 81 (1) EC where the agreement to set up a B2B or the practice to not allow other parties to join and to maintain a closed shop was the subject of review (and would have been declared void). Here it the decision not to supply an interested party may be declared abusive. Article 81 EC also does not require dominance, but merely an agreement between the parties to arbitrarily keep others out.

211. *See* JONES & SUFRIN, *supra* note 109, at 386 n.202. Differentiate between the refusal to supply (Article 82 EC) and the refusal to deal (Essential Facility).

212. *See, e.g.*, WHISH, *supra* note 79, at 615.

213. Gassner, *supra* note 46, at 143.

214. 224 U.S. 383, 411 (1912). In *Terminal Railroad*, the Court held that owners of the only railroad bridges crossing the Mississippi River and terminal facilities in the St. Louis area had to be made available to all potential users equally and on reasonable terms. For a superb discussion of *Terminal Railroad* and other essential facilities cases, *see* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1195-1211 (May 1999); *see also* VON KALINOWSKI, *supra* note 166, § 3.02[3][c][ii]. As noted by von Kalinowski, the essential facilities doctrine has roots in a long line of Supreme Court decisions. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945) (commenting on AP's discriminatory admission policy allowing members to veto admission of rival newspapers violated Section 1; Court did not reach issue of whether AP was obligated to admit new members); United States v. Griffith, 334 U.S. 100, 107 (1948) (stating that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful"); Otter Tail Power Co. v. United States, 410 U.S. 366, 380-381 (1973) (commenting that a monopoly owner of electric transmission lines refusal to supply

developed the essential facilities doctrine in European law primarily based on cases of access to port facilities.[215] The E.C.J. has accepted the existence of essential facilities in a number of judgments,[216] but has, like the U.S. courts,[217] drawn a fairly narrow scope of applicability.[218]

The examples given in Article 82 EC, which concentrate on the supply of products or services, do not technically apply to the abuse of an essential facility.[219] Indeed, the essential facility concept is not mentioned in Article 82 EC. Rather, the European Commission's adoption of the essential facilities doctrine closed this gap in the effectiveness of Article 82 EC. Under the current essential facilities doctrine in Europe, to refuse competitors access to such a facility or to grant access to competitors on unfavorable or discriminatory competitive terms, can amount to an abuse of a dominant position and thus infringe Article 82 EC.[220]

A B2B could well qualify as an essential facility under certain circumstances.[221] An example might be a B2B that achieves network effects allowing for significant cost reductions and efficiencies that could not be achieved individually. Indeed, access to a B2B may become essential to transacting business with customers and suppliers in a given

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or "wheel" power from other suppliers to its resale customers violated Section 2 without discussion of essential facilities doctrine).

215. *See* European Commission, Case IV/M 26.294, Port of Rødby, 1994 O.J. (L 55) 52; European Commission, Case IV/M 35.388, Port of Roscoff, [1995] 5 C.M.L.R. 177 (1995); Case IV/M 34.174, Port of Holyhead, [1992] 5 C.M.L.R. 255 (1992). German competition law had an essential facilities doctrine inserted into the GWB in 1998. Section 19 (4) No. 4 GWB states that it shall be an abuse of a dominant position to refuse access to one's own networks or other infrastructure facilities. The German lawmakers aimed this provision specifically at the owners of cable networks, e.g. in the electricity, energy, and telecommunications industry. *See* GWB, *supra* note 14, § 19 (4) No. 4.

216. *See, e.g.,* E.C.J., Case C-241 & 242/91P, Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission, 1995 E.C.R I-743, [1995] 4 C.M.L.R. 718 (1995); E.C.J., Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-Und Zeitschriftenverlag GmbH & Co., 1998 E.C.R. I-7791, 7806, [1999] 4 C.M.L.R. 112 (1999).

217. *Cf.* Lipsky & Sidak, *supra* note 213, at 1195-1211.

218. *Cf.* Fleischer & Körber, *supra* note 149, at 6, 10.

219. *See supra* note 211.

220. *See* European Commission, Case IV/M 34.174, Port of Holyhead, [1992] 5 C.M.L.R. 255 (1992).

221. *See* Hershey, *supra* note 154; Miezitis & Batchelor, *supra* note 9, at 43.

line of commerce if the B2B achieves substantial network effects.[222] We anticipate that B2Bs will provide a fertile ground for further development of the essential facilities doctrine under both European competition and American antitrust law in the coming decade.

3. Monopoly Leveraging

Monopoly leveraging "involves the use of monopoly power in one market to gain competitive advantage in another market."[223] In Europe, a violation of Article 81 EC by a dominant company can violate Article 82 EC as well, as an abuse of dominance.[224] Unlike the essential facilities

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222. In its October 2000 Report, the FTC highlighted an earlier 1996 Staff Report cautioning "that conduct that could attribute to achieving dominance warrants heightened scrutiny in settings with prominent network effects and switching costs. Substantial network efficiencies and consumer switching costs make it difficult for an entrant to start small, compete effectively and grow to become a significant factor in the market." FTC Staff Report, *supra* note 3, at pt. III, p. 28 (citing 1996 FTC Staff Report, ch. 9 at p. 13-14, 29 (discussing interface standards)); *see also* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 190 (1999) ("Let there be no doubt: building your own base of users for a new technology in the face of an established network can be daunting"); Carl Shapiro, *Exclusivity in Network Industries*, 7 GEO. MASON L. REV. 673, 678 (1999) ("exclusivity provisions can interact with network effects to create substantial barriers to entry."). The District of Columbia Circuit noted this point in its recent decision in *United States v. Microsoft*, 253 F.3d 34, 49 (D.C. Cir. 2001). ("In markets characterized by network effects, one product or standard tends towards dominance, because 'the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.'") (quoting Michael L. Katz and Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985)).

223. VON KALINOWSKI, *supra* note 166, § 3.02[3][c], p. 3-73; United States v. Griffith, 334 U.S. 100, 108 (1948); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979). The court stated in part that "a firm violates [the Sherman Act] section 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize, the second market." *Berkey Photo*, 603 F.2d at 275. The Second Circuit has subsequently retreated from their position, however, and it has been subject to intensive criticism. *See, e.g.*, AD/SAT v. Associated Press, 181 F.3d 216, 230 (2d Cir. 1999); Twin Labs, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990); VON KALINOWSKI, *supra* note 166, § 3.02[3][c]; *see also* Roger D. Blair & Amanda Esquitel, *Some Remarks on Monopoly Leveraging*, 40 ANTITRUST BULLETIN 371 (Summer 1995).

224. *See* James S. Venit, *EU Competition Law-Enforcement and Compliance: An Overview*, 65 ANTITRUST L.J. 81, 85 (1996); Cases 40-48/73, Suiker Unie v. Commission of the European Communities, 1975 E.C.R. 1663, 1999; Case 66/86, Ahmed Saeed

doctrine, monopoly leveraging does not require control of an infrastructure. In the United States, the current case law and literature reflect a substantial and serious debate over whether monopoly leveraging can occur unless an entity holding monopoly power in one market "has either monopolized [a] second market or obtained sufficient market power in it to be liable for attempted monopolization."[225]

On August 30, 2001, the European Commission initiated additional proceedings against Microsoft, including allegations that Microsoft "may have violated European antitrust rules by using illegal practices to extend its dominant position in the market for personal computer operating systems into the market for low-end server operating systems."[226] The European Commission alleged that "Microsoft may have withheld from vendors of alternative server software key interoperability information that they need to enable their products to 'talk' with Microsoft's dominant PC and server software products."[227] The European Commission added that "Microsoft may have reinforced this strategy of extending its dominance from the PC to the server through the operation of an abusive licensing policy for Windows 2000."[228] Competition Commissioner Mario Monti was quoted as stating, "Server networks lie at the heart of the future of the Web and every effort must be made to prevent their monopolization through illegal practices."[229]

Although Microsoft is hardly a B2B, the European Commission's new dominance leveraging allegations may signal a willingness in the

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Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewecrbs Commission, 1989 E.C.R. 803, 849, [1990] 4 C.M.L.R. 102, 133 (1990). *See generally* the relationship between Article 81 and 82; Case 6/72, Europemballage and Continental Can v. Commission of the European Communities, 1973 E.C.R. 215, 244, [1973] C.M.L.R. 199 (1973).

225. VON KALINOWSKI, *supra* note 166, § 3.02[3][c].

226. European Commission Press Release of Aug. 30, 2001, Doc IP/01/1232.

227. *Id.*; *see also* Venit, *supra* note 223, and European cases cited therein holding that a refusal to grant a license under intellectual property rights can violate Article 82, including joined cases C-241 & 242/91, Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission of the European Communities, 1995 E.C.R. 743, 824; Rosa Greaves, *Analysis: Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission*, 1995 EUR. COMPETITION L. REV. 244.

228. European Commission Press Release of Aug. 30, 2001, *supra* note 226.

229. *Id.*

future to seriously consider claims that a B2B is exploiting and leveraging its founders' and participants' collective market power to gain dominance in another product or service market. Such dominance leveraging becomes especially relevant when the B2B, seeking to gain revenues beyond merely charging transaction or user fees, extends its mission beyond providing a joint electronic trading platform. As a B2B begins seeking to provide new goods, services, and "business solutions," the temptation to exploit the founders' and participants' collective power could become irresistible. In such cases, the B2B could begin riding its founders' collective buying power to encourage, pressure, or even coerce the B2B's members and their suppliers to use the B2B's new products, services or solutions rather than those already available to the industry.

As we argue below, the European Commission should be alert to such possibilities, and prepared to intervene where necessary against B2Bs and their founders to prevent collective leveraging.

III. THE ANALYSIS OF B2BS UNDER AMERICAN ANTITRUST LAWS

The analysis of B2Bs under American antitrust laws is discussed at length by numerous commentators[230] and in an October, 2000 report by the Federal Trade Commission Staff.[231] Rather than attempt to duplicate

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230. *See, e.g.*, Robert B. Bell & William F. Adkinson, Jr., *Antitrust Issues Raised by B2B Exchanges*, 15 ANTITRUST 18 (Fall 2000); Anthony E. DiResta, *Antitrust Considerations in E-Procurement and B2B E-Commerce*, 650 Practicing L. Inst./Patents, Copyrights, Trademarks, and Literary/PAT 877 (Apr. 23, 2001); Anthony E. DiResta et al., *Antitrust Law Meets the Internet*, 637 Practicing L. Inst./Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series/PAT 499 (Feb. 2001); Michael R. Rickman, *Antitrust Considerations in E-Procurement and B2B E-Commerce: A View From the Frontlines*, 650 Practicing L. Inst./Patents, Copyrights Trademarks, and Literary Property Course Handbook Series/PAT 845 (May 21, 2001); Alan J. Weinschel, *E-Commerce Antitrust Issues*, 631 Practicing L. Inst./Patents, Copyright Trademarks, and Literary Property Course Handbook Series/PAT 691 (Jan. 2001).

231. This report resulted from an intensive two-day workshop hosted by the FTC on June 29 and 30, 2000, to examine "[c]ompetition [p]olicy in the [w]orld of B2B [e]lectronic [m]arketplaces." FTC Staff Report, *supra* note 3, at 1. The workshop was:

> Organized by the FTC's staff of Policy Planning with input from more than 200 sources, the workshop included 65 panelists and had an attendance of over 600 people. Participants included entrepreneurs who have been operating or forming B2Bs and antitrust practitioners, economists and legal scholars who have been working with or studying B2Bs. Approximately 30

the previous commentators' and the FTC staff's superb efforts and analyses, we will simply highlight the issues potentially most germane to Covisint's post-authorization activities.[232]

A. Relevant Market Analysis

The FTC appropriately recognized that B2Bs can "affect competition in two types of broadly defined markets: the markets for goods traded on B2Bs (or derived from those traded on B2Bs) at both the seller and the buyer levels, and the market for marketplaces themselves."[233]

1. Market For Goods Bought And Sold On B2Bs

The three principle antitrust concerns identified by the FTC under the American antitrust laws include information-sharing agreements,[234] monopsony,[235] and exclusion.[236] The FTC Report discussed both the possibility that B2B information sharing agreements could injure competition in the market for goods traded by facilitating coordination on price or other competitive terms and the potential for B2B buyer groups driving prices down through monopsony power.[237] In general, the potential for enforcement against potentially anticompetitive activities by B2Bs in each area under the United States' antitrust laws closely parallel those previously discussed under the European

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statements were submitted in response to the FTC's request for comments. *Id.*

232. We further recommend David Bailey, *Antitrust Implications of B2Bs: Covisint—A Competitive Collaboration?* (May 1, 2001), also available at <http://www.ftc.gov/opp/ecommerce/comments/index.htm>.

233. While these dual relevant product markets are simple enough to describe, we have noted the difficulties encountered by the European regulators in actually identifying and describing the relevant product markets in their B2B authorization decisions. Similarly, we note that Covisint was essentially authorized in both Europe and the United States based on a determination that it would operate in the market for electronic marketplaces. The real antitrust concerns created by Covisint, however, arise from its active and growing participation as a seller of various goods and services.

234. *See* FTC Staff Report, *supra* note 3, at pt. III, p. 3.

235. *See id.* at pt. III, p. 13.

236. *See id.* at pt. III, p. 16.

237. *See generally* FTC Staff Report, *supra* note 3.

Community competition laws.

2. The Market For Marketplaces

The FTC Report discussed at length the possibility that "B2Bs may undermine the development of effective B2B competition by improperly encouraging or requiring buyers or sellers, including those holding B2B ownership interests, to deal with them to the exclusion of others."[238] Once again, the treatment of such possibilities under both the European Community competition and American antitrust laws is substantially similar.

B. The Potential For Joint Exclusionary Dealings, Reciprocal Dealings, and Monopoly Leveraging

In *United States v. Microsoft Corp.*,[239] the District of Columbia Circuit Court appropriately observed that

> [w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be especially difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.[240]

Although the FTC staff's discussion on exclusion is fairly detailed and thorough, it fails to address sufficiently the possibility that a B2B could be jointly exploited by its founders, assuming they possess collective market power in a relevant product market, as a way to leverage their power into new product or service markets beyond the "market for marketplaces."[241]

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238. *Id.* at pt. III, p. 23.

239. 253 F.3d 34 (D.C. Cir. 2001).

240. *Id.* at 58.

241. David Bailey argues that "[a]lthough Covisint's creation valorized concerns regarding the primary market dominance of its founders being 'levered' online, it is submitted that it is misplaced for two reasons." Bailey, *supra* note 232, at 9. Bailey explains, "First, the Chicago school critique of market leverage has all the more reason

As we argue in detail below, B2Bs like Covisint, which are set up as putatively independent ventures expected to generate a profit,[242] may well find that simply collecting fees for e-commerce transactions through the B2B do not generate substantial profits, or even cover their costs of operation.[243] In such circumstances, the possibility of leveraging the B2B founders' combined purchasing market power into the sales of other products and services may be viewed as an economically attractive option.[244] Such activity could create the dangers of anticompetitive exclusionary dealings,[245] reciprocal dealings,[246] or the leveraging of

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to apply in this context because the existing collective dominances of Covisint's parents offline does not change when e-commerce is introduced to the supply chain." *Id.* He adds:

> Second, the leverage theory tends to assume a profit maximization conception of firm behavior. This diminishes the significance of alternative theories of the firm, which instead may elucidate their e-commerce strategy and whether Covisint was conceived on the basis that parts competition should be suppressed or whether the real emphasis was on promoting a dynamic electronic marketplace.

Id. at 10 (citing Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 552 (1985)).

We note in response that the "existing collective dominances" change dramatically when the jointly dominant firms are permitted to come together as a single entity. The new entity, whether a B2B, trade association or cartel, can hold itself out as representing the joint interests of its individual members. Consequently, with a powerful new economic voice backed by the combined shares of its members, the B2B is in an excellent position to quickly bring market power to bear. Second, although it is unlikely that any B2B would be "conceived on the basis that parts competition should be suppressed," the economic reality, as shown by Covisint, is that the newly formed B2B may well find it lucrative and propitious to move in such a direction. Bailey, *supra* note 232, at 9. The United States Supreme Court consistently has taken such threats to competition seriously. *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery, 472 U.S. 284, 293-94 (1985); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1533, 1563-65 (1982).

242. *See* Symposium, *Defining the Role of Antitrust in the High Technology Revolution*, 9 GEO. MASON L. REV. 559 (2001); Slowey, *supra* note 5, at 6.

243. *See, e.g.*, David Welch, *Can Covisint Climb Out of a Ditch?*, BUS. WK., May 21, 2001, at B128; D. Sedgwick, *Covisint's Rough Start: The Big 3's Net Exchange Faces Multiple Challenges*, 75 AUTO. NEWS, Feb. 12, 2001, at 42.

244. *Cf.* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 702 (1998) ("Joint ventures can permit the realization of economies of scale (and scope), for example . . . by jointly developing and promoting a new brand.").

245. Former FTC Chairman Robert Pitofsky observed, "[a]t one point, I counted

monopoly power.[247]

By tying competitors together through the benefits of network efforts, a B2B makes anticompetitive conduct more likely and economically attractive than would be the case if the competitors had to get together through an independent conspiracy, since it can be done under the guise of a separate entity.[248] In effect, the B2B can become a facilitator for anticompetitive conduct, and disguise its joint efforts as part of an efficiency-enhancing venture. Industrywide standards and exclusionary relationships can be established through joint "best-of-breed" solutions. Consequently, as we argue in more detail below, using Covisint as an example, close post-authorization regulatory scrutiny

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almost a dozen Supreme Court cases that provided that a monopolist cannot engage in exclusionary conduct that is likely to have an adverse effect on competition without a good business justification." *Roundtable Conference with Enforcement Officials*, 67 ANTITRUST L.J. 453, 457 (1999) [hereinafter *Roundtable Conference*].

246. *See* VON KALINOWSKI, *supra* note 166, § 2.04[6][a]. As described by von Kalinowski, reciprocal dealing or reciprocity is an agreement where two parties face each other as both buyer and seller and one party agrees to buy the other party's goods on condition that the second party buys goods from it. Reciprocity consists of two basic elements: (1) an agreement, express or tacit between two parties; and (2) the use of purchasing power of one firm to promote sales to a second firm looking to establish the first firm as a customer. There is very little case law on the issue of reciprocal dealing, perhaps because of the FTC's apparent success in achieving voluntary dismantlement of corporate policies which exploited opportunities for reciprocity.

In the case of a B2B that begins offering products or services beyond e-platform services, one can imagine scenarios where the B2B's founders make their purchases from suppliers using the B2B's new products or services. Indeed, even without overt pressure, the suppliers may feel subtly pressured to purchase the B2B's wares in order to maintain good relationships with the B2B's principals. The likelihood is exacerbated where many of the suppliers also are members of the B2B.

247. Former U.S. Assistant Attorney General for Antitrust Joel Klein stated in 1999, "I think people say there are not such things as network effects, and therefore the concerns about market power and leveraging into adjacent markets and so forth are illusory. I think those people are misguided." *Roundtable Conference*, *supra* note 245, at 462.

248. California's Senior Assistant Attorney General Thomas Greene noted that "if interactivity and interconnectivity are the name of the game in the 21st century, the one who controls that aspect of e-commerce and data transfer will have an enormous effect on the shape, scope, and nature of the American economy." *Roundtable Conference*, *supra* note 245, at 460; *see also* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS L. REV. 941, 949. (discussing how competitors "jointly manipulate[ ] the rules of competition . . . because of the legal strictures against collusion. . . .").

under both the European competition and American antitrust laws is merited in situations where the B2B founders and participants possess collective market power in a relevant product or service market. Special attention and concern is warranted where the B2B begins competing in product and service markets separate from the market for electronic platform services.

IV. APPLYING EUROPEAN COMPETITION AND AMERICAN ANTITRUST LAWS TO COVISINT

Covisint understandably is the most visible and highly publicized B2B in existence today. The extraordinary collective sales and power of its founders, and its high hopes for achieving dazzling efficiencies while virtually transforming the ways in which business is done, have made Covisint the B2B most carefully scrutinized by competition regulators in Europe and the United States to date. As a result, we have chosen to carefully review the regulators' initial authorizations of Covisint in Part A of this section. In Part B, we analyze Covisint's subsequent business activities and performance against the backdrop of the European and American regulatory regimes discussed above.

A. The History of Covisint's Initial Authorization

Covisint's founders envision a joint E-business trading exchange that will provide "original equipment manufacturers ("OEMs") and suppliers the ability to reduce costs in their respective supply chains and bring efficiencies to their business operations."[249] Each year, General Motors, DaimlerChrylser, and Ford spend more than $250 billion procuring supplies.[250] The companies calculate that the cost of each of their 100,000 annual purchase orders average $125. A primary goal is to cut the procurement costs of each member manufacturer and "shave up to $3,000 off the price of a new car."[251] Through Covisint, they hope to cut their procurement costs per order to approximately $10, allowing a

249. <http://www.covisint.com/info/pr/bundeskartellamt.shtml>.

250. *See* Jeffrey Rita & Laura Yens, *Business B2B Marketplaces and Antitrust Law: Conducting Triage on the Deals*, 17 E-COMMERCE 4, 1 (2000).

251. Welch, *supra* note 243, at B128.

savings of $1,000 to $3,000 on each car they manufacture.[252]

Covisint was established as a joint venture with an independent corporate identity and its own employees. Daimler Chrysler, Ford, and General Motors each initially held 27% of Covisint's shares, Renault/Nissan held 5%, and CommerceOne and Oracle each held 2%. The remaining 10% of Covisint's shares were set aside for employees and other businesses outside the automotive industry.[253] Covisint's corporate structure dictates that the automotive manufacturers not have a majority of seats on the Board.

Proactively recognizing the serious antitrust risks posed by such a venture, on August 30, 2000, during the course of the Federal Trade Commission's and *Bundeskartellamt*'s investigations, the manufacturers signed a supplemental Memorandum of Understanding ("MOU") in which they set out a series of business rules seeking to minimize the risks of anticompetitive activities or results.[254] For example, the founders pledged discrimination-free access to the platform.[255] Covisint is to be open for new users, regardless of whether or not they hold an interest in the company.[256] Covisint also is to employ open interface standards, so that it can be used by all data processing programs.[257]

To head off potential allegations of price fixing in the purchase of supplies, the founders declared that they would not use Covisint to make joint purchases.[258] Covisint also installed firewalls and state-of-the art encryption to ensure that the automotive manufacturers do not gain

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252. Goldman Sachse estimated the cost savings at just over $1,000 per vehicle, or about 6% of the manufactured costs. A more recent study by Deutsche Bank Alex Brown and Roland Berger, the consultancy firm, also puts the figure at $1,188, although it stresses that this will only follow fairly significant investment by the auto industry. *See* Technical hitch stalls 'Big Three' trading site, FIN. TIMES, June 14, 2000. Covisint's current chairman has estimated savings of $3,000 per vehicle. *See* Welch, *supra* note 243, at B128.

253. A public offering raising as much as $10 billion has been predicted by Covisint's chairman. *See* Welch, *supra* note 243, at B128.

254. David Bailey appropriately notes: "The FTC decision in *Covisint* seemingly reveals the importance of affirmatively presenting the pro-competitive aspects of a B2B venture during an antitrust appraisal, rather than merely being used as a secondary justification." Bailey, *supra* note 232, at 4-5.

255. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ D.I.5

256. *See id.* ¶ D.I.5.b.

257. *See id.* ¶ C.I.7.

258. *See id.* ¶ D.I.5.

information about their competitors' purchases.[259] To ensure member privacy, Covisint requires User IDs and passwords.[260]

1. The Authorization Decision in Germany

On August 2, 2000 DaimlerChrysler, Ford, and GM notified the *Bundeskartellamt,* that they were forming Covisint.[261] Under German merger control laws, after notification, the *Bundeskartellamt* has one month to decide whether to initiate an examination proceeding.[262] Within a period of four months after notification, the *Bundeskartellamt* must decide whether to clear a B2B.[263] In Covisint, the *Bundeskartellamt* informed the parties on August 22, 2000, that it initiated main examination proceedings.[264] On September 25, 2000, the *Bundeskartellamt* reached a decision authorizing the joint venture.[265]

a. Jurisdiction of the Bundeskartellamt

Under German merger control regulations, the government must approve a merger or the establishment of a joint venture if the combined aggregate worldwide turnover of the participating undertakings is more than DM 1 billion (about $ 465 million), and the domestic turnover of at least one participating undertaking is more than DM 50 million. The founding of a joint venture qualifies as a merger if one or more undertakings acquire 25% or more of the capital or voting rights of the new company.[266] Where several parties acquire or create another company, for the purpose of calculating the annual combined

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259. *See id.* ¶ C.I.6.

260. *See id.* ¶ C.I.7.

261. The other parties to Covisint were not required to notify the German authorities because their share was lower than 25%, which is the threshold for the application of the merger control regime under the German Competition Code. *See* GWB, *supra* note 14, § 37(1) No. 3 (b).

262. *See* GWB, *supra* note 14, § 40 (1).

263. *Id.* Most parties receive a letter of no objection within the first month, and only a handful of cases enter the second stage.

264. *See Bundeskartellamt,* Covisint decision, *supra* note 93, ¶ B.5.

265. *See Bundeskartellamt,* Covisint decision, *supra* note 93.

266. 1 HANS-JÜRGEN RUPPELT, KOMMENTAR ZUM DEUTSCHEN UNDO EUROPÄISCHEN KARTELLRECHT § 37, ¶ 42 (Eugen Langen & Hermann-Joseph Bunte eds., 9th ed. 2001).

turnover, German law provides that the acquisition is to be treated as if these parties have merged.[267]

In Covisint, the required combined annual turnover, which was necessary to establish jurisdiction of the *Bundeskartellamt*, was easily met.[268] But passing the necessary threshold under German law did not automatically give the *Bundeskartellamt* jurisdiction. Under the rules of the ECMR, as well as under Section 35 (3) GWB, German law is inapplicable if a merger is caught by the ECMR. The threshold for establishing exclusive jurisdiction of the ECMR, as was shown,[269] is a combined annual worldwide turnover of all undertakings concerned in excess of EURO 5 billion ($4.6 billion) *and* the European Community-wide turnover of each of at least two subsidiaries is more than EURO 250 ($230 million). On the face of these figures, the merger should have been caught by the ECMR. But the ECMR also requires *joint control* by the acquiring parties over an undertaking. Here the ECMR differs from German law, which only requires the acquisition of more than 25% of the capital or the voting rights.[270]

The *Bundeskartellamt* did not elaborate on this point in much detail, but merely stated that there was no joint control over Covisint, and thus no exclusive Community jurisdiction. It seems that the *Bundeskartellamt* based this finding on Covisint's Board structure where the appointees of the automotive manufacturers must be a minority. Hence, the *Bundeskartellamt* appears to have concluded that the participating automotive companies in question would not be in a position to control the behavior of Covisint. We find this conclusion to be highly questionable[271] even though it was endorsed by the European

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267. *See* GWB, *supra* note 14, § 37 (1) No. 3, 3rd sentence.

268. In the years preceding the merger, DaimlerChrysler had a worldwide turnover of around $150 billion, Ford had $162 billion and General Motors had $156 billion. All three also had turnover well in excess of the required DM 50 million in Germany: DaimlerChrysler, DM 55.5 billion; Ford, DM 25.9 billion; and GM, DM 32 billion. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ A.2.

269. *Cf. infra* p.13 and note 40.

270. Acquisition under German law encompasses not only the takeover of another firm, but also the formation of a new company. *Cf.* RUPPELT, *supra* note 266, § 37, ¶ 42.

271. *See* Thomas J. Horton & Dr. Stefan Schmitz, *More Questions Than Answers: Behind the Bundeskartellamt's Surprising Approval of Covisint*, THE EUROPEAN LAWYER, Oct. 2001, 8-9. The steering of the company not only depends on the provisions for the board, but also on the powers of the shareholders and the power of the founders. As

Commission in its Covisint decision of July 2001.[272]

In a single sentence, the *Bundeskartellamt* touched upon the question of whether Covisint would have the requisite effect on the German market within the meaning of Section 130 (2) GWB.[273] According to this provision, German law applies and the *Bundeskartellamt* has jurisdiction if Germany's economy will be affected by the B2B.[274] The *Bundeskartellamt's* affirmative conclusion that Covisint would impact

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has been mentioned, Covisint made representations that after 18 months, the founding members would be in a minority. But the *Bundeskartellamt* made its decision before the venture started, and it is possible that the terms of the MOU could be changed. Moreover, even as a minority, it is difficult to believe that the major automotive manufacturers would not be in a position to steer Covisint, much as Bill Gates has steered Microsoft even though he owns a minority interest. Indeed, as the primary purchasers and users of Covisint's electronic trading platform, the automotive manufacturers and their major suppliers are in a position to make whatever changes in policy they desire.

272. *See* Press Release IP/01/1155. It is likely that the *Bundeskartellamt* did not reach its jurisdictional conclusion without prior close consultation with the European Commission.

273. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ B.4

274. The GWB has thus adopted a modified effects doctrine. This doctrine poses an exception to the public international law rule that States must not pass judgment upon acts that take place in another state, since this is the sovereign right of that state. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW ch. XIV(3d ed. 1979); VAUGHAN LOWE, EXTERRITORIAL JURISDICTION 54 (1983); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECEUIL DE COURS 122 (1964). In the U.S. the possible application of the Sherman Act to non-nationals who are engaged in anti-competitive behavior outside the United States was outlined in 1945. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795-96 (1993); Timberlane Lumber Co. v. Bank of America, 549 F.2d 608 (9th Cir. 1976); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). In Europe, the E.C.J. in its early case law on the matter had originally and for a long time rejected the idea of the effects doctrine. Instead, the Court took the view that the question must be asked where an agreement is "implemented." *See* Åhlström Osakeyhtiö v. Commission of the European Communities (Wood Pulp), E.C.J. Cases C-89, 104, 114, 116, 117 & 125-29/85, 1988 E.C.R. 5193, 5217. Advocate-General Warner argued for the adoption of "direct, substantial and foreseeable effect," arguing that the Community was entitled to use the effects doctrine under public international law. *See id.* at 5227. Recently, the CFI recognized that public international law allows for an effects doctrine, but still adhered to the criterion of "implementation." *See* Gencor Ltd. v. Commission of the European Communities, C.F.I. Case T-102/96, 1999 E.C.R.II-753, 784-85. In effect, however, it appears that the Community authorities apply an effects doctrine in all but name.

Germany's economy was not a surprise, since the founding companies produce cars in Germany.

b. Creation of a Dominant Position

German law prohibits an increase in market concentration, which is expected to create or strengthen a dominant position unless the participants prove that the concentration will also lead to improvements in the conditions of competition, and that these improvements will outweigh the disadvantages of dominance.[275] The German provision parallels that of Article 2 (1) ECMR and of Article 81 (3) EC in providing for an appraisal of the impact of the dominance,and a balancing between the positive and the negative aspects of the increase in concentration. But unlike the EC and American laws, where the question of dominance is not defined, German law sets express levels of market share at which an undertaking is rebuttably presumed to be dominant.[276] Under the German rules, a company is presumed to be dominant if it has a market share of at least one-third.[277] In the case of two or three companies, a combined market share of more than 50 percent results in a presumption of dominance.[278]

In the Covisint decision, the *Bundeskartellamt* looked at the market positions of the new joint venture and of the parent companies, but the *Bundeskartellamt* did not take the expected step of first identifying the relevant product and geographic markets. It decided that in view of the rapid development of internet markets, it was difficult to identify the relevant markets.[279] Therefore, the *Bundeskartellamt* decided to consider "all relevant trends."[280]

The *Bundeskartellamt* initially examined how and where Covisint

275. *See* GWB, *supra* note 14, § 36 (1).

276. *See* GWB, *supra* note 14, § 19 (3). The Department of Justice's and Federal Trade Commission's Merger Guidelines in the United States set forth the HHI test for measuring concentration. United States Dep't of Justice & the Fed. Trade Comm'n Horizontal Merger Guidelines, § 1.5 (issued Apr. 2, 1992, revised Apr. 8, 1997).

277. *See* GWB, *supra* note 14, § 19 (3).

278. *See* GWB, *supra* note 14, § 19 (3) No. 1 & 2.

279. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ D.I.4.

280. In the two later decisions *RubberNetwork*, *supra* note 72, and *CC-markets*, *supra* note 74, the *Bundeskartellamt*, albeit in a different decision panel, followed a different approach by adhering to the standard procedure of identifying the relevant markets first.

would compete.[281] It identified as potential competitors a number of other B2Bs specializing in the automotive industry and several general trading platforms offering products not directly linked to the automotive industry.[282] The *Bundeskartellamt* further estimated that Covisint would compete with software tools, which are already used by the automotive industry for planning, quality checks, costs control, and purchase administration.[283]

It appears that the *Bundeskartellamt* held the relevant market to be that of electronic trading in various forms, not just specific automotive platforms. Indeed, the *Bundeskartellamt* explained that it looked at the "relevant market of Internet platforms"[284] in evaluating the issue of dominance. The *Bundeskartellamt* did not additionally look at the markets for the goods in question[285] or examine whether these markets were distinguishable because the goods were automotive-specific or tradable via the Internet.[286] Thus, the *Bundeskartellamt* ruled that, for the time being, there was no indication that Covisint would hold a dominant market position.[287]

The *Bundeskartellamt* also did not envision the parent companies of

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281. Among the specialized B2Bs, the *Bundeskartellamt* identified platforms which are to be set up by VW and BMW, as well as existing platforms such as supplyOn, which is set up by supply firms such as Bosch and Continental, TruckXchange and IstarXchange; the steel industry platforms eMetra, eSteel, MetalSite and MetalSpectrum; the rubber/tire industry platform RubberNetwork.com; and the plastic industry platform PlasticsNet. *Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ D.I.2.c.

282. The *Bundeskartellamt* also identified potential competition with a number of B2Bs which are not specializing in the automotive industry, but functioning primarily as a trading place for goods of all kinds. These include Freemarkets, VerticalNet, My-SAP.com, BizBuyer, and TradeOut.

283. The *Bundeskartellamt* did not address the question of whether in competing with software service solutions, Covisint might be entering into a product market separate and distinct from electronic platform trading services, or whether Covisint would then be competing directly against numerous existing and future potential suppliers to its members. We believe the *Bundeskartellamt's* omission highlights the danger in B2B analysis of confusing the market for products and goods sold with the market for marketplaces.

284. *See Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ D.I.4.

285. *Compare Bundeskartellamt*, Covisint decision, *supra* note 93, *RubberNetwork*, *supra* note 72, ¶ 18ff., *and CC-Markets*, *supra* note 74, ¶ 24ff.

286. *Compare Bundeskartellamt*, Covisint decision, *supra* note 93, *RubberNetwork*, *supra* note 72, ¶ 21 *and CC-Markets*, *supra* note 74, ¶ 32.

287. *Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ D.I.4.

Covisint gaining a dominant position through their participation in the platform. Because of the size of the parent companies, which control about one-third of the European automobile market, the *Bundeskartellamt* saw a danger of a possible bottleneck for other suppliers and manufacturers. This danger would not, however, become relevant as long as participation in Covisint was open and non-discriminatory, there was no requirement to purchase goods exclusively through the B2B, and there was no joint purchasing.[288] All these conditions were, in the view of the *Bundeskartellamt*, taken care of by the agreements establishing Covisint.

It seems that the *Bundeskartellamt* tested Covisint's legality under the standard of a potential abuse of a dominant position within the meaning of Section 19 (1) GWB, which parallels Article 82 (1) EC and Section 2 of the Sherman Act. Based on its analysis, the *Bundeskartellamt* concluded that the competition among the founding members of Covisint and other automotive manufacturers would not be negatively affected by the joint venture. Instead, the *Bundeskartellamt* concluded that lower manufacturing costs could create substantial economic benefits without distorting the competitiveness of the market.[289]

c. General Competition Law

The *Bundeskartellamt's* Covisint decision on the merits did not meaningfully address the general prohibition of cartels as laid down in Section 1 GWB.[290] According to this provision, agreements by competitors, decisions by associations of competitors, and concerted

288. The *Bundeskartellamt* did not examine the issue of whether partnerships between Covisint and chosen suppliers to jointly market the suppliers' products or services constituted "joint purchasing." We believe this omission resulted from Covisint not presenting its subsequently formed intention "to move away from transaction fees," and begin selling "subscriptions for more advanced products and services, such as collaborative-engineering software, logistics, finance, and bid-management tools." David Welch, *supra* note 243, at 128B. As we argue below, we believe such an offering of "collaborative new products and services" simulates joint purchasing and joint selling under the European competition and American antitrust laws.

289. *Bundeskartellamt*, Covisint decision, *supra* note 93, ¶ D.I.6.

290. In Germany, general competition law concerning restraints of trade is still covered by two different provisions of the GWB, depending on whether the restraint is horizontal (§ 1 GWB) or vertical (§ 16 GWB).

practices having as their intent or effect the prevention, restriction or distortion of competition are prohibited. The *Bundeskartellamt*'s failure to directly address Section 1 GWB's prohibitions is surprising, since, as discussed above, questions of potential exchanges of competitively sensitive information, horizontal product design collaborations, and exclusivity raise serious competition questions. Strangely, the issue of sensitive information exchanges between competitors was raised by the *Bundeskartellamt* in the introduction to its Covisint decision,[291] but never referred to in the merits of its decision. Either the *Bundeskartellamt* considered it sufficient to state in the introduction and statement of facts that the installment of state-of-the-art firewalls would ensure that no sensitive data about the purchases of one user could be used by another or it decided that it dealt with a merger notification and ignored general competition issues.[292]

2. The Authorization Decision by the European Community

As described above, the European Commission did not assume merger control jurisdiction ostensibly because the parties did not exercise joint control over Covisint as required by the ECMR. Consequently, the German authorities exercised their merger control power of review. Since the European Commission was barred from exercising a merger control review,[293] it reviewed Covisint under Article 81 EC's general competition law.

Covisint's founders notified their agreement to the European Commission in January 2001, requesting an exemption from Article 81

291. A number of observers quoted by the *Bundeskartellamt* in its decision also mentioned this possibility.

292. The *Bundeskartellamt*'s later decisions in *RubberNetwork*, *supra* note 72, and *CC-Markets*, *supra* note 74, follow similar, but slightly different tacks. In *CC-Markets* the *Bundeskartellamt*, under a separate heading for § 1 GWB, argued that the platform was a mere forum for transactions on which the participants would trade independently of each other, so there was no reason to apply scrutiny other than the merger control provides. In *RubberNetwork*, the *Bundeskartellamt* repeated this statement. It saw no reason for initiating further proceedings outside the merger control regime because of certain undertakings made by the parties to the joint venture. The *Bundeskartellamt* held that none of the participants had a share of more than 1% in the relevant market. In both cases, however, the *Bundeskartellamt* reserved the right to investigate the practice of the platforms at a later date.

293. *See supra* Part II.A.1.

(1) EC. The European Commission published this information in a notice on February 15, 2001,[294] and subsequently carried out "a thorough investigation."[295] As a response to their notification, the members of Covisint received comfort letters. As mentioned before, comfort letters state that the European Commission is closing its file and intends to take no further action. This means that the European Commission cannot reverse its position towards Covisint unless there are material changes of circumstances or if the Commission issued the comfort letters based on incorrect information.

Since the comfort letters were addressed only to the parties concerned and were not published, it is difficult to appreciate the European Commission's position vis-à-vis Covisint. In a press release on its decision, the European Commission stated that the notified agreements contain provisions eliminating any potential competition concerns.[296] In particular, the European Commission concluded, "the agreements show that Covisint is open to all firms in the industry on a non-discriminatory basis, is based on open standards, allows both shareholders and other users to participate in other B2B exchanges, does not allow joint purchasing between car manufacturers or for automotive-specific products, and provides for adequate data protection, including firewalls and security rules."[297]

From the statements released to the public it appears that, like the *Bundeskartellamt* and the FTC before, the European Commission has taken a wait-and-see position. Although the European Commission states that it carried out a "thorough investigation," it must not be overlooked that this investigation could only have concentrated on the papers submitted by the parties, since there had been no significant practices upon which the European Commission could have based its decision. This also means that the subsequent practices of Covisint may well be subjected to further investigation by the European Commission and that the European Commission could find that those practices are not wholly consistent with the parties' promises and agreements.[298]

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294. Case COMP/38.064/F2;—Daimler Chrysler AG/Ford Motor Co./General Motors Corp./Nissan Motor Co. Ltd./Renault SA-Covisint, 2001 O.J. (C 49) 4.

295. Press Release, European Commission (July 31, 2001) (IP/01/1155).

296. *See id.*

297. *Id.*

298. *See also* the decision in *Volbroker*, *supra* note 163, the first B2B which was examined by the European Commission in accordance with Article 81 (1) EC.

3. The Authorization Decision by the Federal Trade Commission in the United States

The timing of Covisint's MOU strongly suggests that its founders felt the need to allay concerns expressed by the Federal Trade Commission staff during their investigation. Although it issued a press release noting its termination of the HSR waiting period, the FTC's comments were cryptic and thin. In authorizing Covisint's operation, Chairman Pitofsky was quoted as saying simply:

> B2B electronic marketplaces offer great promise as means through which significant cost savings can be achieved, business processes can be more efficiently organized, and competition may be enhanced. B2Bs have a great potential to benefit both businesses and consumers through increased productivity and lower prices. Of course, as is the case with any joint venture, whether in the traditional or new economy, B2Bs should be organized and implemented in ways that maintain competition. The antitrust analysis of an individual B2B will be specific to its mission, its structure, its particular market circumstances, procedures and rules for organization and operation, and actual operations and market performance.[299]

The Federal Trade Commission further hedged its bets in its closing letter to counsel for the founders, observing:

> This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a

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Volbroker is a B2B established by six major banks as a platform for electronic brokerage service for trading among banks in foreign currency options. The parties notified the agreement for a negative clearance. The European Commission sent a comfort letter in accordance with Article 85 (3) EC indicating that in its view the agreement would benefit from exemption, but that the European Commission did not intend to proceed to a formal decision. *See* Press Release, European Commission (July 31, 2000) (IP/00/896).

299. Press Release, Federal Trade Commission, *FTC Terminates HSR Waiting Period for Covisint B2B Venture*, (last visited April 8, 2002), *reprinted at* <http://www.ftc.gov/opa/2000/09/Covisint.htm>.

> violation has occurred. Because Covisint is in the early stages of its development and has not yet adopted bylaws, operating rules, or terms for participant access, because it is not yet operational, and in particular because it represents such a large share of the automobile market, we cannot say that implementation of the Covisint venture will not cause competitive concerns.[300]

In view of the undeveloped status of Covisint, the Commission reserves the right to take such further action as the public interest may require.

The FTC's press release and closing letters, coupled with the timing of the MOU, strongly suggest that the Commission is eager to see the hoped-for efficiencies achieved, but is wary of the day-to-day operations of the venture.[301]

B. Covisint's Changing Objectives And Business Activities

Despite the enthusiasm and fever-pitch excitement Covisint initially generated, the initial reports about its actual performance have been decidedly disappointing. As observed by *Business Week* on May 21, 2001, "[t]o put it tactfully, Covisint hasn't lived up to all the hype."[302] On February 15, 2002, analyst John Schnapp opined: "we can assume that Covisint, with large fixed costs and insufficient business volume, is losing its shirt."[303]More ominous from a competition perspective than

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300. Letter from Federal Trade Commission (last visited Feb. 6, 2002) <http://www.ftc.gov/os/2000/09/covisintchrysler.htm>.

301. Recognizing this wariness, Covisint published a 21-page Antitrust Compliance Policy for its employees. Covisint affirms that: "This policy also implements the commitments made to antitrust agencies during the review of the formation of Covisint." *Antitrust Compliance Policy* (last visited May 17, 2001) <http://www.covisint.com/info/antitrust.shtml> (on file with *The Wayne Law Review*).

302. Welch, *supra* note 243, at 128B. Similarly, on August 31, 2001, *Information Week Daily* reported that "slow adoption of the exchange by automakers for critical business processes such as supplier collaboration and supply chain management has hampered its success." *See also* Ralph Kisiel, *Supplies Remain Uncertain about Covisint*, AUTO. NEWS, at 20D (Aug. 27, 2001) ("Some supplier executives still question the basic Covisint business model. Revenue from online auctions is unlikely to be enough to support the organization. Its success may be linked to supply chain management and collaborative engineering tools.")

303. John Schnaap, *Motown Finds a Net Advantage Difficult*, Special to the Detroit

the reports of Covisint's underperformance, however, are the reports of its evolving business plan.[304] If these reports are true, Covisint could be headed in the direction of anticompetitive activities that fall outside the scope of its original planned stated objectives.

As an example, Covisint has begun "[l]aunching a raft of new products and services."[305] Covisint also has announced a series of "exclusive provider agreements" with companies offering supply chain, document, workflow, and routing management software and services.[306] Through its launch of new products and product collaborations, "Covisint hopes to move away from transaction fees. Instead, it will sell subscriptions for more advanced products and services, such as collaborative-engineering software, logistics, finance and bid-management tools."[307]

Indeed, Covisint recently announced that it has sold 1,500 subscriptions for supply chain management tools and 500 subscriptions for quote management and collaborative product development tools.[308] This metamorphosis represents a significant shift from Covisint's original plan to earn revenue by charging small fees for each transaction.[309] As a supplier of automotive products and services,

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News (last visited Feb. 18, 2002), <http://detnews.com/2002/editorials/020215/all-416978.htm>.

304. *Business Week* noted that "Even now, there are no clear technical standards governing advanced activities on the site. And the business plan is a moving target." Welch, *supra* note 243, at 128B.

305. *Id.*

306. *See, e.g.*, Press Release, Covisint, *Covisint Selects Matrixone for Collaboration and Sourcing* (Sept. 5, 2001) <http://www.newscome.com/cgi_bin/prnh/20010322/DETH002LOGO>; Press Release, SupplySolution, *SupplySolution, Inc. Signs Exclusive Provider Agreement with Covisint.* (Mar. 15, 2001) <http://www.supplysolution.com/newsroom/news_press01_0315.htm>.

307. Welch, *supra* note 243, at 128D.

308. Ironically, a breakdown of Covisint's business for its first six months of operation reveals that in terms of its use as B2B platform, Covisint has been quite successful. One thousand seven hundred suppliers and automakers registered to use Covisint and 420 auctions were held accounting for $36 billion worth of transactions. Two hundred catalogs with approximately 2.5 trillion items were posted by suppliers, and over 20,000 catalog transactions were consummated. *See How the Auto Industry is Using Covisint*, AUTO. NEWS EUR. 20, Aug. 27, 2001, at 20. Much of the criticism actually seems directed at Covisint's financial performance and its inability to turn a profit.

309. *See* Schnapp, *supra* note 303: "Covisint charges suppliers a fee to register for

Covisint could evolve from being a supplier of a unique new high-tech trading and collaboration platform to a competitor of numerous companies seeking to sell input products and services to Covisint's founders and their key suppliers.

Covisint's new marketing activities shift the relevant product market in the competitive analysis from unique B2B services to participation in the various basic automotive input products and services. Once this shift occurs, the tremendous combined market power of Covisint's automobile manufacturers and their joint purchases through Covisint of competitive products and services for resale could become highly problematic under European and American competition laws. At a minimum, one suspects that the European, German, and American competition authorities would have had far more serious questions and reservations had Covisint been presented to them as a venture whereby a dominant group of automakers would choose a series of "best-of-breed" suppliers to collaborate with in jointly marketing products to automotive suppliers. As discussed above, the European, German, and American competition authorities that authorized Covisint have raised serious questions about joint purchasing and selling by B2Bs, as well as monopoly leveraging, exclusivity, and the denial of an essential facility. Covisint was approved based in part on its express representations that it would not conduct joint purchasing or selling and would have an open platform. Yet, in choosing to enter into exclusive relationships with a limited group of suppliers whose products are qualified as "best-of-breed" and jointly marketed, Covisint potentially is engaging in both joint purchasing and selling on behalf of the founding automakers and limiting the use of its critical platform.[310]

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the privilege of participating in this computerized fleecing and a commission on every successful bid." *Id.*

310. *See generally* Richard M. Steuer, *Retailing on the Internet*, 12 ANTITRUST 50, 51 (Summer 1998). Steuer notes the potential for discrimination against certain retailers by internet providers, as well as issues of foreclosure:

> Retailers have begun partnering with Internet providers to encourage Internet sales . . . . Which retailers will be featured in a promotion of this kind and which, if any, will be excluded, may well become the subject of dispute.
>
> Retailers also have made arrangements for special placement with on-line services and Web guides . . . . [I]f one retailer were to foreclose too many distribution alternatives, such conduct could become vulnerable to legal challenge.

Id. at 51.

As a competitive supplier, Covisint is likely to have an unfair advantage. Covisint could potentially exploit its founders' market power to force automotive suppliers working with the major automakers to purchase their input products and services from Covisint. Both Ford Motor Company and Delphi Automotive Systems Corporation recently announced that suppliers must join Covisint if they want to do business with them.[311] Requiring suppliers to purchase Covisint's "best-of-breed" solutions looms as a possible next step.[312]

Had Covisint's automotive manufacturing founders informed the FTC, the *Bundeskartellamt*, and the European Commission that they planned to get together and dictate to the industry that they would only accept certain suppliers' goods, which they would jointly market to their suppliers, their prospects for authorization would have been dubious at best. Yet Covisint is perilously close to that in choosing "best-of-breed" partners.[313] It is possible that Covisint's chosen "best-of-breed" partners could be those suppliers who agree to give Covisint the largest percentage of their sales revenues.[314]

Although Covisint presents its activities as cutting-edge and efficiency-enhancing, substantial harm to consumers could result. First, suppliers could be forced to pay supracompetitive prices for Covisint's

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311. *See* Ralph Kisiel, *Covisint to Get Ford's Supplier Portal*, AUTO. NEWS, Sept. 3. 2001, at 46 ("Ford Motor Co. suppliers must join Covisint if they want to do business with the automaker online, starting next year"); Ralph Kisiel, *Delphi: Use Covisint or Lose Our Business*, AUTO. NEWS, Aug. 27, 2001, at 20F ("Delphi Automotive Systems is requiring its 5,000 global suppliers to join Covisint in order to do business with the Tier 1 supplier.").

312. *See* James L. Langenfeld & Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L.J. 653, 655 (1991). ("Anticompetitive agreements or restraints under the raising own costs theory involve placing restrictions on the colluding group itself (or its customers).").

313. On January 4, 2001, ChoiceParts filed an antitrust suit against General Motors, Ford, and DaimlerChrysler asserting multiple violations of the Sherman Act. ChoiceParts is seeking relief from alleged concerted anticompetitive efforts aimed at blocking ChoiceParts from providing its customized electronic automotive parts locator/transaction system to automobile retailers and repair shops nationwide. *See* Press Release, ChoiceParts (last visited Feb. 5, 2001) <http://www.choiceparts.com/html/news/casesummary.htm>.

314. *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1002 (9th Cir. 1972) (claiming that hotel competitors illegally conspired through a local convention association "to give preferential treatment to suppliers who paid their assessments, and to curtail purchases from those who did not.").

chosen "best-of-breed" solutions.[315] Supracompetitive pricing could be enforced through a refusal to purchase from suppliers not using business solutions and programs sanctioned and sold by Covisint. The paradoxical impact could be an increase in the ultimate cost of automobiles.[316]

Second, such actions run the risk of replacing innovative competition with jointly dictated single standards for software and other systems used by suppliers and automakers.[317] As a competitive supplier,

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315. On August 17, 2001, AMR, an industry analyst, reported with respect to one recently announced Covisint exclusive supplier relationship: "[a]t the Tier 1 supplier level, executives will grumble about pricing with SupplySolution and the fear that it won't scale up well, but they admit that SupplySolution has the inside track because of the Covisint relationship." Press Release, AMR (Aug. 17, 2001) <http://www.aamr@amrresearch.com>.

316. It has long been argued that collusion on input costs is economically efficient because it drives down the ultimate prices to consumers. Such arguments, however, have been cooly received by the courts, most recently by the Ninth Circuit in *Kneuelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000). *See* Jesse Markham, *B2B Caution: Buyer Price-Fixing Prohibition Affirmed*, ORRICK ANTITRUST HIGHLIGHTS (Apr. 2001).

317. In an August 17, 2001 AMR report, *Alert on Manufacturing*, Kevin Prouty penned an article entitled *Automotive Industry Outlook: The SupplySolution Bandwagon Is Starting To Get Full* (Aug. 17, 2001) <http://www.aamr@amresearch.com>. Prouty writes:

> The more important aspect of SupplySolution has to do with its relationship to Covisint and automotive OEMs. While SupplySolution by itself was doing well, the Covisint relationship almost guarantees that doors will be open to it at the executive level of OEMs and suppliers. I have been a fly on the wall at two OEM discussions about SupplySolution and, even with all the hand-wringing about limited functionality in comparison to the needs of an OEM, a senior OEM executive stood up and declared that Covisint and SupplySolution would be on the short list in every selection around supply chain execution. In both cases, the executives went on to say that Covisint was a large software investment and SupplySolution/Covisint are already becoming an industry standard . . . .

Id.

So where does this leave the rest of the automotive SCE market? In North America, SupplySolution's relationship with Covisint has partially frozen the market out to at least into 2002.

On August 31, 2001, *Information Week Daily* reported that "Insiders say Ford, DaimlerChrysler, and GM are nearing agreements with Covisint to use the SupplySolution offering." *Information Week Daily*, Aug. 31, 2001. Kevin Prouty noted that "wide adoption of Covisint's supply-chain offerings by suppliers is unlikely until an automaker agrees to use the offering." *Id.* By agreeing with Covisint to use its

Covisint could be in a unique position to restrain competition in the development, manufacture, and installation of safety, gas mileage, or emissions technologies that the automotive industry may not necessarily view as in their collective short-term interests.[318] Presented as a "best-of-breed supply chain strategy," Covisint's decisions as to which suppliers it will collaborate with and the performance standards it will unilaterally set could dramatically reduce the innovations and new technological developments likely to occur in an open marketplace.[319]

Third, in formulating exclusive joint marketing relationships with a few key automobile suppliers, Covisint is in a position to restrain competition by denying an essential facility to competitors and to leverage its collective automotive supplier market power into various input products and services.[320] Potential adverse impacts on consumers could include higher prices, reduced innovation, and fewer choices.[321]

Covisint's shifting business plans highlight the anticompetitive dangers B2Bs can create even where they are carefully crafted and closely reviewed before authorization. The temptations to exploit a B2B's founders' collective market power necessitate rigorous day-to-day regulatory oversight and quick and tough enforcement of the applicable competition laws against B2Bs straying outside of their initially authorized competitive boundaries. In effect, in seeking to move way from transaction fees and become a products and service supplier to the

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competitive service, the automakers are in a position to virtually dictate that Covisint's competitive software and supply chain management products will become the industry standards. Indeed, *Business Week* has reported that, "Much as Microsoft's Windows environment galvanized personal computing, Covisint will set one standard for software systems used by suppliers and automakers." Welch, *supra* note 243.

318. *See, e.g.*, Renee Boucher Ferguson, *Covisint Crafts XML Schema*, (last visited Nov. 15, 2002), *reprinted at* <http://www.eweek.com/article/0,3658>. According to the article, Arvin Meritor Inc.'s CIO, Perry Lipe "is concerned that one exchange backing an industry schema might not be viewed as an open standard." *Id.*

319. *See, e.g.*, United States v. Motor Vehicle Mfrs. Ass'n, 643 F.2d 644 (9th Cir. 1981) (discussing consent decree restricting automotive manufacturers from exchanging information or jointly working on pollution control efforts).

320. *See* Christopher Koch, *Motor City Shakeup*, DARWIN MAGAZINE, Jan. 1, 2002, (last visited Jan. 7, 2002), *reprinted at* <http://www.darwinmag.com/read/010102/shakeup.html> ("Fear of Covisint, both specific and in the abstract, continues among suppliers and with good cause.").

321. *See* Lande & Marvel, *supra* note 248, at 993 ("Many Type III cartels also decrease consumer welfare by lowering the quality or variety of products consumers would have received if the market had been operating normally.").

automobile industry, Covisint today is in danger of transforming itself from a neutral efficiency-enhancing B2B that facilitates communications and collaborations between individual carmakers and their suppliers to a collection of large automakers that jointly sets industry-wide standards, chooses a few suppliers while freezing out others, and collectively receives a percentage of the chosen suppliers' sales revenues. As seen, such a transformation is likely to draw intense interest from the European and American competition authorities.

V. CONCLUSION

B2Bs like Covisint have the potential to inject massive efficiencies and cost savings into the global marketplace. Competition authorities in the United States and Europe have appreciated this and appropriately tipped the scales under both their merger and general competition analyses in favor of allowing B2Bs like Covisint to proceed. But B2Bs formed by companies with joint market power may pose substantial augmented risks of crossing the boundaries set by European and American competition laws if they seek to venture beyond serving as electronic marketplaces. Regulators will have to watch warily B2Bs' subsequent performances to ensure that they continue to focus on their basic missions of providing industry-wide communications platforms, and do not become facilitators of joint anticompetitive conduct.

Covisint's post-authorization shift in focus highlights that the regulatory authorization of B2Bs, which as we have seen will rarely result in an initial challenge, is only a first step. B2Bs whose members have collective market power must be watched carefully. Post-authorization B2B shifts in focus from serving the market for marketplaces to competing in the sale of industry input goods and services should immediately raise red flags for the European competition and American antitrust regulators.