Developing Antitrust Policy on the Internet: Lessons from the Airline Industry

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I. Introduction

Is it too early to determine how antitrust laws should be applied to electronic commerce ("e-commerce") on the Internet? Some argue that it is too early to determine how, but also whether antitrust should apply to the Internet at all. Due to the broad reach and complexities of the Internet, developing antitrust policy must seem like a daunting and intimidating task to the parties involved. The search for a model to analyze and apply is a foundational step in developing any policy.

Antitrust policy should be built around a framework whose underlying goals and broad strategies can remain relatively fixed, but flexible enough so that changes can be made as both regulators and e-commerce entities learn more. Some, including the Federal Trade Commission (FTC), have suggested that the computerized reservation systems ("CRSs") from the airline industry may be an appropriate business model to assist in the development of e-commerce antitrust policy. This suggestion is based on the belief that anti-trust enforcement successfully intervened back when the airlines used these CRSs to price fix. Other reasons supporting the use of the airline industry CRSs as an antitrust model include its similarity to the Internet in terms of global reach, the multiplicity of players, the complexity and ever-changing route structures as well as differing fares of diverse carriers.

Antitrust - Friend or Foe?

"Is antitrust enforcement a 'friend' or 'foe' of high-tech? Let's begin at the beginning."[1] The first issue is whether any antitrust guidance or regulation is needed on the Internet. Some think not, given its broad

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1. Orson Swindle, Commissioner, Federal Trade Commission, Address at the Federalist

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reach, its ever-changing essence, its absence of ownership, and it's sheer difficulty in monopolizing. Some policy experts argue that the antitrust analysis provides a framework for prudent enforcement of competition no matter what market is at issue.[2] This position supports antitrust enforcement, since e-commerce is just one more method in a long line of alternative methods of commercial transactions. There is no reason the current antitrust laws should not apply to e-commerce on the Internet. As Charles R. Geisst concluded in Monopolies in America,

> "The history of monopoly in the United States since the early nineteenth century still relies upon a watchful government to keep big business in check. While acknowledging that our watchful government can be influenced or swayed by the political climate, in any period, antitrust oversight is still necessary. Despite whatever successes and failures, applications of the antitrust laws to this day are still very susceptible to prevailing political trends."[3]

The outcome of so many cases supports Geisst's view. One could not argue against the heavy influence of political trends in the United States on antitrust enforcement. Might it be too ethnocentric to assume our country's antitrust enforcement mechanisms have a central place in e-commerce enforcement, when we simultaneously agree that our own political trends provide a heavy influence in the direction or strength of enforcement? Whether or not the U.S. is the key enforcer, there is significant debate as to whether such oversight and guidelines are still needed in *all* areas of business. "Now the catalyst is the new global economy, with instant communication and computer technologies as its spine. [T]here is none of the antitrust crusading of Teddy Roosevelt's day, and little of the populist reaction."[4]

The reason we are not seeing the "antitrust crusading" of earlier days is because such action would be counterproductive in today's rapidly developing business- technology environment. Today, antitrust application, particularly with respect to e-commerce, is on unchartered territory, and territory that is shared with many worldwide players, both private and public. As such, the antitrust enforcers may be more successful if they partner with the business players in an effort, first to learn the potential

Society, North Carolina Research Triangle Chapter (August 31, 2000). (Transcript available at the FTC website), *available at* http://www.ftc.com.

2. David A. Balto, *"Emerging Antitrust Issues in Electronic Commerce,"* Bureau of Competition, FEDERAL TRADE COMMISSION, 1999 ANTITRUST INSTITUTE, Distribution Practices: Antitrust Counseling in the New Millennium, Columbus, OH (November 12, 1999), *available at* http://www.ftc.gov/speeches/other/ecommerce.htm.

3. Charles R. Geisst, *Monopolies in America*, OXFORD UUNIVERSITY PRESS, (2000).

4. Louis Uchitelle, *Who's Afraid Now That Big is No Longer Bad?* N.Y. TIMES, November 5, 2000.

areas for violation, and second, to accept that these very same areas are at the heart of e-commerce success.

In view of this dichotomy, the antitrust risks must be either tolerated or somehow balanced so as not to stifle innovation. To the extent that antitrust policy must be applied to e-commerce, it warrants this precarious balance. Policy must be designed to prevent collusive agreements and the abuse of market power, yet still allow the full force of innovation to proceed at its market-determined pace. Although the growth of the e-commerce market is unprecedented, Federal Trade Commission (FTC) advocates argue that traditional antitrust principles still apply. The FTC itself appears sensitive to this dichotomy yet still believes it has a vital role to play in developing, monitoring and enforcing antitrust policy on the Internet.

Other policy specialists disagree and believe a collaborative approach to the Internet, free from government interference is in order.[5] One point of those who oppose FTC interference is that e-commerce has been successful largely because the government has not had a regulatory role. They then point to taxation and question how the rapid growth in e-commerce could be quickly stifled if users were forced to pay a sales tax.[6] "Antitrust, if it ever were needed, is as obsolete as Windows will soon be."[7] It appears these opponents have not noticed that even the FTC is taking a collaborative approach in catalyzing cooperative discussions be-

5. Lester Thurow, THE ZERO-SUM SOCIETY, (1980). This Massachusetts Institute of Technology Economist wrote that "the time has come to recognize that the antitrust approach has been a failure. The costs it imposes far exceed any benefits it brings." While not considered at all a radical groups, one example sometimes held out as demonstrating that the FTC is not needed to police the Internet, is the Platform for Internet Content Selection (PICS). PICS *available at* http://www.w3.org/PICS. PICS is an industry group dedicated to the development of technologies that give users control over the kinds of material they and their children have access to online. Several Internet Service Providers join together on this platform. PICS standards will use the open and interactive nature of the Internet to rate content in a way that can be used with blocking software and still provide an experience suitable to any audience. The standards will be self-rating, enabling content providers to voluntarily label the content they create and distribute. *Id.*

6. Internet Tax Freedom Act, Pub. L. No. 105-277 (1998). This Act imposed a three-year moratorium, expiring in October 2001, on discriminatory new taxes on the Internet. The law also established a 19-member Advisory Commission on Electronic Commerce (ACEC) to study what type of tax treatment should be applied to the Internet, examining whether states should be allowed to collect sales taxes from companies with no physical presence. The Commission reported to Congress April 2000. The key recommendation included proposals to extend the moratorium on Internet-specific taxes for five years and to make permanent the ban on Internet access taxes.

7. R. Barro, *Why the Antitrust Cops Should Lay Off High Tech*, BUSINESS WEEK at 20 (August 17, 1998). See J. Freedman, Why We don't Want Net Regulation, Tech Central Station Policy Tracks at 1 (July 30, 2000). "A major reason that America's high-tech industry has been so good for consumers and investors is that, for most of its history, Silicon Valley has benefited from Washington's neglect." *Id.*

tween all of the parties involved.[8] The FTC is aiming for a collaboratively developed, workable policy that can serve and protect the consumers and the competition rather then stifle innovativeness.[9] As one of the FTC Commissioners put it, "Antitrust enforcement . . . should be a "friend" of competition and a "foe" of anything that harms competition."[10]

This paper frames the topic by introducing the Internet and e-commerce as a market place. It offers a brief overview of key antitrust regulation and introduces the players involved, mentioning their actions to date as well as their approaches or attitudes with regard to the Internet. The heart of this paper reviews early challenges to electronic information exchanges that involve a distant ancestor of the Internet. This ancestor, the airline CRS, may have been the predecessor of the first e-commerce exchanges.

Before the Internet was in widespread use, airlines were allegedly using electronic means to share fare information, to coordinate prices, and to discourage customer discounts; the Justice Department settled a related landmark CRS case in 1994. This paper analyzes that case to determine whether any of the guidelines from that consent decree can be adapted to provide solutions from a policy perspective for e-commerce on the Internet. Since no analysis should occur in a vacuum, this paper also contrasts several aspects of the traditional airline industry with e-commerce on the Internet. While the author's position is that antitrust laws should become a fundamental cornerstone of national and international e-commerce policy, the conclusion is that the precedents established with respect to CRS within the airline industry offer minimal, but helpful value to developing e-commerce antitrust policy.

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8. An example of this collaborative approach is reflected in the Internet Corporation for Assigned Names and Numbers, known as Icann. Icann is the board that overseas the Internet's addressing system. It was created in 1998 by the Commerce Department to open up the monopoly on registering domain names. It's mission is to ensure that each domain name is unique. This prevents conflicting registration companies from handing out the same address. While Icann reviews recommendations intimately, the new domain requires the approval of the Commerce Department. Chris Gaither, *7 Domains to Compete With .Com*, NEW YORK TIMES TECHNOLOGY, November 17, 2000, *available at* http://www.nytimes.com/2000.

9. A review of the many speeches of the various commissioners of the FTC clearly shows their efforts at learning the Internet needs and possibilities from all parties involved. These speeches can be accessed via the FTC website, *available at* http://www.ftc.gov/speeches.

10. Orson Swindle, Commissioner, Federal Trade Commission, Address at the Federalist Society, North Carolina Research Triangle Chapter (August 31, 2000). (Transcript available at the FTC website), *available at* http://www.ftc.com.

II. Background

A. Airlines and E-Commerce: Strange Bedfellows

The airline industry has a rich history from which to learn and it does share some similarities with the Internet:

(1) The airline industry is global, so U.S. jurisdictional problems and conflict of laws have been addressed.[11] Since the Internet and e-commerce are global in scope, the United States government has been at the forefront of proposing policies through the World Trade Organization. However, creation of policy takes time. Meanwhile, the private sector, national governments, and multilateral organizations will continue to struggle with old public policy issues as well as new issues resulting from this emerging technology. While there may be some helpful comparisons with the airline industry on this matter, those comparisons are not addressed in this paper.[12]

(2) The airline industry's CRSs have been in use for decades. These CRSs offered opportunities for price signaling and boycott in a manner similar to e-commerce on the Internet.

As such, we can be guided by reviewing applicable segments of the airline industry's history.

B. A Brief Overview of the Airline Industry

Some have postulated that the airline industry is an appropriate place to look for guidance on developing front line issues regarding antitrust on the Internet. A quick introduction to the airline industry follows: The airline industry was deregulated in 1978, 23 years ago. At that time, the Civil Aeronautics Board had the authority to create rules governing antitrust within the airline industry. The airline industry was regulated much like the utility industry. The authority of the CAB over the airlines was somewhat comparable to the FTC's authority over antitrust matters of non-regulated industries.

Then on January 1, 1985, most of the CAB authority, as well as responsibility for rules administration, were transferred to the Department of Transportation (DOT). On January 4, 1985, the CAB released a Notice of Transfer, Removal and Re-issuance of Regulations to the Trans-

11. The Warsaw Convention generally regulates international air carrier liability. 49 U.S.C. §40105. The Transp. L. J. Symposium edition, Analysis of Aviation Issues and Law, in which this article is published, contains several articles that address the Warsaw Convention and related laws governing air carriage.

12. While there are some similarities between the airline industry and e-commerce on the Internet, this paper does not present or analyze those similarities. This paper focuses exclusively on the CRS similarities.

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portation Department.[13] At that time, the DOT was in the process of consolidating all of the Board's antitrust rules, found in various sections of the Board's rules, into a new Part 303.[14]

The purpose of deregulation was, of course, to make the industry more consumer affordable and competitive. Ever since deregulation occurred, there are "experts" on both sides of the argument, positioning with essentially equal strength, that deregulation has been either a godsend or the downfall of the industry. Generally, prices are down.[15] Frequent and convenient service is available to most all cities.[16] This industry, unlike the Internet, is heavily reactive to and dependent upon the fluctuating price of fuel as well as the burden of volatile union labor agreements.

It appears that the airlines have accomplished some of the goals of antitrust enforcement. Though deregulated, the airline industry and government have worked together to create efficiencies. This cooperation, at least as it appears to those outside the industry, is perhaps a model of the type of relationship that the FTC and e-commerce businesses could look to for guidance. There are airline industry precedents, available to serve as business models for analysis, that date back to 1974.

C. A Brief Overview of Antitrust Legislation

One foundational principle of antitrust is that trusts and monopolies are concentrations of wealth in the hands of a few and that these conglomerations of economic resources are considered to cause injury to both individuals and the public. This is because such trusts and conglomerations are believed to reduce competition in the market place and result in undesirable price controls. As a result, the argument goes, the markets stagnate and sap individual initiative. The loser in this scenario is of course, the consumer. Remember, the proper goal of antitrust law should be to prevent acts and practices that are harmful to "consumer

13. Rules and Regs. Civil Aeronautics Bd., 50 F.R. 451, *available at* 1985 WL 83047 (January 4, 1985). The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.), provided for the gradual transition from an airline industry that was controlled by government regulation to one largely controlled by the marketplace. As a part of the final phase of this process, the CAB ceased to exist on December 31, 1984 and most of its authority transferred to the Department of Transportation. Some of this authority, such as oversight protection, was included in the CAB Sunset Act of 1984.

14. Airline Deregulation Act, Pub. L.No 95-504, 92 Stat.1705 (codified as amended in scattered sections of 49 U.S.C.).

15. U.S. Transp. Sec. Rodney E. Slater, Proposed Guidelines on Unfair Competitive Practices in the Airline Industry, delivered in Washington, D.C. (April 6, 1998) *available from* the U. S. Dept. of Trans., http://www.dot.gov/affairs/1998.

16. *Id.*

https://digitalcommons.du.edu/tlj/vol28/iss2/7

welfare."[17]

To prevent these trusts and monopolies from creating restraints on trade or commerce and reducing competition, Congress passed the Sherman Antitrust Act in 1890.[18] The Sherman Act serves as the pillar of antitrust law.[19] The Sherman Act, under §1, prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations. . ."[20] Such contracts or conspiracies in restraint of trade could apply to mergers and joint ventures. The Sherman Act under §2 prohibits monopolies or attempted monopolies that actually restrain trade.[21] Section 2 also covers price fixing and price signaling.[22] A bit later came the Clayton Act.[23] The Clayton Act, passed in 1914, prohibits mergers or acquisitions that substantially lessen competition or tend to create monopolies. The emphasis of the Clayton Act is on activities that "may tend" to restrain trade.[24]

The third piece of legislation that must be looked to in developing policy for e-commerce is an amendment to the Clayton Act, better known as the Robinson-Patman Anti Discrimination or Price Discrimination Act.[25] The Robinson-Patman Act governs, among other matters, price discrimination.[26] It requires sellers to treat all competing customers on

17. Robert Bork, *The Antitrust Paradox* 89 (1978).

18. 15 U.S.C.§§1-2 (1999).

19. Under §1 of the Sherman Act, business people are required to conduct their business matters and make commercial decisions unilaterally and independently, not in collaboration with their competitors. This is actually at the heart of several airline cases analyzed in this note. An unlawful agreement could be one between two or more competitors or between a manufacturer and its customer. The agreement need not be overt and need not be reduced to writing. An unlawful agreement may be inferred from any written or oral communication that appears to have motivated parties to engage in agreed upon conduct. Even casual conversations or confidential discussions may provide a basis for a §1 claim.

20. 15 U.S.C §1 (1999).

21. "Every person who shall monopolize, attempt to monopolize, combine of conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be . . . guilty of a felony." 15 U.S.C. §2 (1999).

22. Under the Sherman Act §2, it is unlawful to monopolize a market. It is not the result of having a monopoly that is illegal, as this could happen by having superior quality, a better product, marketing, management or luck. 15 U.S. C. §2 (1999).

23. 15 U.S.C. §§12-27 (1999).

24. Some restraints are directly covered by the Clayton Act. Generally, the Clayton Act standard is looser that the Sherman Act. The Clayton Act standard of illegality is where the restraint or merger or acquisition may tend substantially to lessen competition or create a monopoly in any line of commerce.

25. Robinson-Patman Act, 15 U.S.C. §13 (1999).

26. The Robinson-Patman Act also prevents a supplier from charging different prices to competing purchasers of products of like grade and quality where the effect of such price discrimination may be to injure competition. Discrimination in price may take may forms such as cash discounts, volume discounts or rebates, credits, free delivery or freight allowances, favorable credit terms or free merchandise. Alan J. Weinschel, *Antitrust and Cyberspace*, in

the same basis, unless there is some recognized legal justification for different treatment.[27] For example, if two purchasers are traditional brick and mortar businesses in the same neighborhood, their prices as well as promotional support such as advertising and product demonstrators, must be offered on a proportionally equal basis. The rational is that they compete with each other so there must be a level playing field. However, if traditional customers were on opposite sides of the world, they would not logically compete with each other and the above requirement would not apply. Having said that, today, with e-commerce on the Internet, two business on opposite sides of the world can directly compete with each other. E-commerce brings us global competition, as though the businesses are in the same neighborhood. The Robinson-Patman Act offers several affirmative defenses that may be used to justify varying treatment, if such treatment simply reflects the lower costs of doing business with a large customer. Or, for example, if it is necessary to meet other direct competition. However, presumably these defenses would not be acceptable because global e-commerce businesses compete in the same neighborhood.

There are two categories of antitrust offenses, per se and rule of reason. Per se violations include unlawful agreements whose sole objective is to restrain competition and enhance or maintain prices.[28] Rule of reason is the gauge used to judge all other antitrust matters. An early forerunner of the Internet, where the rule of reason was used, is the Chicago Board of Trade case.[29] This case presents the classic sort of initial articulation of the Rule of Reason in antitrust §1 cases.

The antitrust laws that came out of the robber-baron era have not gotten in the way of mega-mergers or other actions related to the Internet. They are enforced, sometimes aggressively so, but the enforcement is selective and flexible. "AOL Time Warner [is] free to dominate their markets, as long as they do not egregiously violate the rules. The chief rule: Do not use market power to manipulate prices or take unfair advantage of competitors."[30] The Commissioner of the FTC responds to this as though he sees it through the eyes of the consumer. "However laudable other policy objectives might be, the proper goal for antitrust enforcement is to preserve and protect the benefits that consumers derive

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Cyberspace Law School 2000 Course Material, Glasser Legal Works, *available at* http://library. Ip.findlaw.co (2000).

27. *See* Robinson-Patman Act, 15 U.S.C. §13 (1999).

28. United States v. Addyston Pipe & Steel Co., 85 F. 271 (1898), aff'd 175 United States 211 (1899).

29. Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

30. Louis Uchitelle, *Who's Afraid Now That Big is No Longer Bad?* N.Y. TIMES, November 5, 2000.

from vigorous competition."[31]

To prepare for the rash of new antitrust questions brought on by the Internet and electronic commerce, the FTC and DOJ must look well beyond the Sherman Antitrust Act. Even the Robinson-Patman analysis must be adjusted to apply to electronic commerce. Since Robinson-Patman prevents discrimination between "competing" customers, for example those in the same geographic area, how will "competing" customers be defined on the Internet? In this sense, the airline industry has been there. All customers of the airlines as well as of e-commerce compete with each other since geographic differences are non-existent. Much like CRSs of the airlines, the Internet creates a national and international marketplace online. It will be more difficult for merchandisers to charge different prices to any party via Internet, unless there is a strong justification for doing so.

III. Antitrust Regulators and Enforcers

Last summer, the FTC took the unusual step of calling a two-day conference to discuss the development of Internet antitrust policy. The FTC invited executives, lawyers and consumer advocates to discuss how to regulate B2B marketplaces.[32] The workshop titled, "Competition Policy in the World of B2B Electronic Marketplaces" attracted more than 500 attendees. It included six separate panel discussions led by FTC staff asking questions regarding the future of electronic marketplaces. Several interesting pieces of information flowed from this gathering.

Clearly, the FTC recognizes that e-commerce offers enormous potential to improve efficiencies and cost-savings as well as the potential to raise antitrust concerns. While they have not yet developed guidelines aimed at this marketplace, it is largely because they want to be careful not to stifle innovation. In the FTC Chairman's opening remarks, he stressed that the FTC intends to study and understand e-commerce before regulating it. The FTC currently has no targets or enforcement policy. They acknowledge that e-commerce offers both efficiencies and potential antitrust problems. They are now looking for insights into how

31. Orson Swindle, Commissioner, Federal Trade Commission, Address at the Federalist Society, North Carolina Research Triangle Chapter (August 31, 2000). (Transcript available at the FTC website), *available at* http://www.ftc.com. David A. Balto, *"Emerging Antitrust Issues in Electronic Commerce,"* Bureau of Competition, Federal Trade Commission, 1999 Antitrust Institute, *in* Distribution Practices: Antitrust Counseling in the New Millennium, Columbus, OH (November 12, 1999), *available at* http://www.ftc.gov/speeches/other/ecommerce.htm.

32. David Leonhardt, *"Business Exchange Site Raises Questions for Regulators"*, N.Y. Times, *available at* http://www.nytimes.com/library/tech/oo/07/bixtech/articles/07trust.htm (July 7, 2000).

to ensure that e-commerce harnesses these efficiencies, creates competition and operates in a competitive environment.

Another FTC Commissioner, Orson Swindle, spoke later and emphasized that the FTC, politicians and other regulators do not yet have the knowledge required to regulate e-commerce. He believes that regulators must get this right, otherwise they could do terrible harm. He predicted that in the future, e-commerce would no longer involve special innovation, but would be just a cost of doing business.[33] Consistent with the FTC Chairs comments, the panel expressed concern that premature regulation could stifle innovation. Jointly, industries and consumers will be the ones who determine whether emerging e-commerce business models succeed.

The FTC has invested substantial time and energy in looking at technology's impact on both competition and consumer protection and believes traditional antitrust rules apply.[34] E-commerce raises interesting and complex policy issues like privacy, security, and cross-border jurisdiction. Further, Commissioner Thompson emphasized that not just one set of stakeholders, neither the industry, government or consumers, will be able to address the issues alone. Rather, the best policy resolutions will stem from an "interactive approach, where regulators and industries engage in a dialogue and take a critical look at issues, like anti-competitive behavior, and think about how to address the concerns."[35]

Yet another FTC Commissioner, Leary, observed that the antitrust laws have survived and developed over the years even with increased economic sophistication. The issues raised in B2B e-commerce are similar and applicable to those raised in joint ventures:[36]

1. share of market power,
2. size and scope of the deal,
3. essential facility,
4. due process for removal of members,
5. ancillary restraints,
6. price signaling,
7. spill-over effects and
8. least restrictive alternatives apply.

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33. Orson Swindle, Commissioner, Federal Trade Commission, Remarks before Forum for Trust in Online Trade, Princeton Club, New York City (July 19, 2000) (Transcript "Antitrust in the Emerging B2B Marketplace" available at the FTC website) *available at* http://www.ftc.com.

34. Commissioner Thompson, from address at the FTC B2B Conference (July 7, 2000) *available at* http://www.ftc.com.

35. *Id.*

36. Commissioner Leary, from remarks at the FTC B2B Conference (July 7, 2000) *available at* http://www.ftc.com.

He predicted that B2B e-commerce interactions will create winners and losers. As always, when there are losers, there will be litigation.[37]

Public policy implications were discussed and it was agreed that the future of e-commerce hinges on the technology, the market mechanism, the number of participants and the unique requirements of the particular industry. Each interaction requires liquidity and standardization if the consumers are to get the most benefit out of it. Companies need the ability and incentive to participate in a number of e-commerce exchanges, either in a vertical arrangement or in a supply chain network. The number of participants will depend on the degree of standardization of the product offerings. There was overall agreement the market would develop a number of exchanges to meet the needs of customers. The panelists supported the FTC's study of antitrust implications of the B2B e-commerce marketplace.[38]

Information sharing was raised as a hot topic of discussion. Information sharing can lead to collusion or be used to assist customers in their decision making process.[39] Real time reporting of transactions facilitates price signaling, yet it also provides good customer service. The panelist then raised the similarities to the type of price signaling used by the airline computer reservation systems 25 years ago. To protect against this, several present suggested that the FTC look to the United States v. Airline Tariff Publishing Co. decision, as instructive. This case is analyzed later in this paper. While some panelists, for example, Mark Cooper, Research Director of Consumer Federation of America, suggested that the FTC should develop rules, either formally or informally, to protect against anti-competitive information sharing,[40] others, like the representative from the National Association of Manufacturers (NAM) did not see information exchange as a potential problem.[41] His argument posits that information sharing should not be a concern because the information provided is anonymous, so that customers cannot identify which company is posting the pricing data. Since price-source identification is unlikely, collusion seems unlikely as well. Information sharing decreases the transaction costs and increases productivity. The final point is that the suppliers are not likely to share information with their competitors.[42]

37. *Id.*

38. *Id.*

39. It was the exchange of information combined with advanced pricing that was at the heart of the Airline Tariff Publishing case, discussed later in this note.

40. Mark Cooper, Research Director of Consumer Federation of America, Address at the FTC Conference (July 29, 2000) *available at* http://www.ftc.gov.

41. Jerry Jasinowski, National Association of Manufacturers, Remarks from the FTC Conference (July 9, 2000) *available at* http://www.ftc.gov.

42. FTC Workshop summary, *supra.*

A. Role of the Federal Trade Commission

FTC supporters believe the FTC should act as a referee, protecting the process of competition so that competition may occur on its merits. The FTC believes it can make sure innovation in electronic commerce is not compromised by either artificial barriers to entry or by regulatory fiat.[43] The FTC boasts that a century of experience with traditional industries demonstrates that market-based competition is almost always preferable to greater private market power or government regulation. The strongest argument in favor of FTC regulation of e-commerce on the Internet is the vast experience of the FTC.

While not addressed specifically to the FTC, in July 1997, President Clinton issued a "Directive on Electronic Commerce."[44] He set forth a Memorandum for the Heads of Executive Departments and Agencies guiding the government's actions according to the following principles:

1. The private sector should lead in the development of e-commerce
2. Government should avoid undue restrictions on e-commerce.
3. Where government involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.
4. Government should recognize the unique qualities of the Internet.
5. E-commerce over the Internet should be facilitated on a global basis by the private sector and national governments.[45]

Given U.S. policy is to be established in light of these five principles, the FTC's official position over the last few years is on target. It's efforts are more directed at cooperation and learning from the other players, rather then taking a restrictive approach in overseeing electronic commerce over the Internet.

B. Enter the Department of Justice

One year ago, the FTC and the Department of Justice (DOJ) issued a draft, "Antitrust Guidelines for Collaborations Among Competitors." These guidelines summarize and provide a description of the relevant

43. Incumbent competitors sometimes create artificial barriers to entry in an effort to keep more competition out. They succeed at this by impeding the development or growth of the market through exclusionary conduct either collective or unilateral. David A. Balto, "*Emerging Issues . . . supra See* FTC News Release *available at* http://www.ftc.gov/opa/1999/9904/imall (April 15, 1999).

44. President William Clinton, remarks from *Framework for Global Electronic Commerce* (July 1, 1997) *available at* http://www.ecommerce.gov/previous_reports.htm.

45. *Id.*

law.[46] The guidelines cover the following:

1. There is a "safe harbor" for collaborations that account for less than 20% of the market. They are not likely to a face challenge. The majority of strategic Internet alliances will fall under this safe harbor
2. Arrangements that do not meet the safe harbor and fall short of "full integration" will receive rule of reason evaluation.[47] Before, some suggested that the rule of reason was only available where a legal entity was formed of fully integrated joint ventures.
3. When FTC and DOJ agencies apply the rule of reason, they will make an early inquiry as to whether there are likely anti-competitive effects. If none, the joint venture will be quickly approved.
4. Where joint venture members retain the incentive and ability to compete against the venture ("insider competition"), enforcement action may not be warranted where the action may have otherwise been warranted.[48]

This fourth guideline may be the savior for e-commerce. Internet site exchanges create a marketplace for companies in the same business.[49] The sites can compile huge amounts of sensitive data and are often jointly owned by corporate rivals. These very sites also create opportunities for collusion and price-fixing that did not exist before.

Further, in May 2000, the FTC issued a comprehensive report to Congress addressing on line privacy.[50] U.S. companies engaged in e-commerce are already subject to the Federal Unfair and Deceptive Trade Practices Act. This statute governs unfair business practices, but not online privacy specifically. Although the U.S policy has encouraged the private sector to take the lead in self-regulating online privacy, the FTC found that such efforts were inadequate. In its report, the FTC recommended that Congress pass legislation to protect online privacy based on the following four accepted principles: notice, choice, access, and security.[51] Businesses advocating legislation based on widely accepted princi-

46. These guidelines are *available at* http://www.FTC.com.

47. Joint ventures have always been analyzed under the rule of reason. While the rule of reason is reasonable, the problem is that it is difficult to show certain things. For example, to show whether or not the price increased, or the market-produced quantity decreased, one must ask in relation to what? It requires comparing an actual outcome to one that never existed. INLS 310-74: *Seminar on Internet Policies and Future Initiatives*. from ENFORCEMENT AND ADJUDICATION *available at* http://www/unc/edu/-agold/inls/enforcement.htm.

48. *Id.*

49. This was precisely the case in the Airline Tariff Publishing Case.

50. *See*, Privacy Online: Fair Information Practices in the Electronic Marketplace, A F.T.C.Report to Congress (May 2000).

51. One result of this is the Gram Leach Bliley (GLB) Act, which enforces privacy and limits the reuse of personal information. Pub. L. No. 106-102, Title V, Privacy, 15 U.S.C.

ples concerning online privacy point out that U.S. law would be consistent with the E.U. directive and provide consumers with confidence using the Internet for E-commerce.

C. Department of Transportation (DOT)

In 1998, the DOT proposed guidelines on Unfair Competitive Practices for the airline industry. The proposed policy statement below is worth reviewing to determine whether any of it should apply to e-commerce. The policy defines specific kinds of competitive behavior that is unfair and exclusionary. It was, in part, a result of the concern that major carriers were willing to lose money in the short term to drive off competition.[52] The number of very low cost seats can only be viewed as economically viable if the carrier's objective is to force out the competitive start up carriers. Start-ups have voiced this complaint for some time and even the Justice Department is investigating whether the biggest airlines are using anti-competitive practices at hub airports. As is the case in all antitrust policy, the Guidelines on Unfair Competitive Practices are designed, not to protect the individual start-up carriers, but to simply level the playing field.

While the DOT intends to examine possible unfair practices on a case-by-case basis, the policy states three identifiable patterns of behavior that will trigger an investigation. These three triggers are:[53]

1. the major carrier adds capacity and sells such a large number of seats at very low fares that the ensuing self-diversion of revenue results in lower local revenue than would result from a reasonable alternative response,
2. the number of local passengers that the major carrier carries at the new entrant's low fares (or at similar fares that are substantially below the major carrier's previous fares) exceeds the new entrant's total seat capacity, resulting, through self-diversion, in lower local revenue than would be from a reasonable alternative response, or

§§ 6801-6810 and §§6821-6827 (1999). Generally, the GLB Act requires financial institutions and other persons to issue regulations to implement notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties, unless they satisfy disclosure and opt-out requirements and consumer has not elected to opt out of the disclosure. The F.T.C. has been a major player in the development of privacy law. It has already brought six law enforcement cases alleging that the defendants' data collection and dissemination practices violate the FTC Act. D.Reed Freeman, Jr., in *Online Privacy* (2000) *available at* http://www.findlaw.com.

52. " Competition in the U.S. Airline Industry: The Need for a Policy to Prevent Unfair Practice Revised," DOT white paper (August 1998) *available at* http://ostpxweb.dot.gov/aviation/domav/comp_rev.pdf.

53. *Id.*

3. the number of local passengers that the major carrier carries at the new entrants low fares (or at similar fares that are substantially below the major carrier's previous fares) exceeds the number of low-fare passengers carried by the new entrant, resulting, through self-diversion, in lower local revenue than would be from a reasonable alternative response.

The DOT clarified that this is not an attempt to re-regulate the aviation industry.[54] DOT representatives met with airline management and workers, lawmakers, consumers, leaders, city and state officials and others to discuss these guidelines. One of DOT goals is to expand opportunities to new entrants. Commissioner Slater's remarks emphasize the fact that there were about 600 million passengers flying in 1998, yet by 2010, one billion people are predicted to be flying each year.[55] The DOT emphasizes the importance of working with the industry to maintain competitiveness, safety and economies for consumers.

While instructive with regard to the backdrop of the airline industry's history, the real lessons relative to the Internet concern the airline owned computer reservation systems, where much antitrust litigation has occurred.

IV. Guidance From the Airlines

In the seventies and early eighties, prior to everyday use of e-commerce, large, traditional competitors in the airline industry controlled a vital tool for competition, the CRS. The major carriers were able to handicap innovative rivals by:

1. denying new competitors access,
2. ordering information in a manner that biased the booking of flights on the CRS owners' airline[56] and,
3. conspiring by publishing fares well in advance of effective date.

The Department of Transportation began to regulate these practices, by publishing CSR rules.[57] Their purpose is to assure consumers the benefits of effective competition by keeping the carriers who own distribu-

54. Remarks Prepared for Delivery, U. S. Transportation Secretary Rodney E. Slater, *Proposed Guidelines on Unfair Competitive Practices in the Airline Industry*, Washington, D. C. (April 6, 1998).

55. *Id.*

56. Using the SABRE system, American Airlines was able to bias the presentation of a comprehensive flight listing by giving its own offerings slightly more richness and greater prominence. Evans and Wurster, *Blown to Bits*, 39 (Boston Consulting Group, 2000).

57. The Department of Transportation serves as an antitrust enforcement agency with explicit statutory authority in the transportation industry, comparable to that of the FTC in the rest of the economy. Alfred E. Kahn, from *Summary of Oral Statement Before the Senate Committee*

tion technology from using it to exclude or injure competitors through biasing the presentation of data.

A. Department of Transportation Rules For CSRs

DOT rules for CRSs were established in the early 1980s, to assure consumers the benefits of effective competition by keeping air carriers that own distribution technology from using it to exclude or injure competitors through biasing the presentation of data. The rules require among other things, that a carrier-owner of a CRS must distribute its fares and schedules to all systems to the same extent it participates in the system it owns.[58]

The DOT has a long-pending rulemaking on whether these rules should be updated to expand the definition of CRS to include all reservations made over the Internet, by other travel concerns. DOT has called for updated public comments. While the spirit of wanting to expand the rulemaking to cover the airline ticketing over the Internet is understandable, the actual application may fall far short of what the Internet requires. However, applying the rules to the Internet is a positive first step.

B. Collusion, Information Sharing, Price Signaling

Sadly, these three words are common within the history of the airline industry. Maybe because of the number of lawsuits regarding matters relating to CRS antitrust violations and hidden predatory pricing in the hub and spoke system.[59] Information sharing can be a way of negotiating agreements among sellers to raise prices; it can be a way of facilitating problem-solving that cartels face in how to raise prices or reduce output; and it can also be used as a way to detect and punish deviators.

During the late seventies and eighties, there were a rash of antitrust cases within the airline industry. This may have been in part, a backlash from deregulation in 1978 and from the many start-up carriers trying to become established. While a number of cases dealt with monopoly power and predatory pricing arrangements, this note will attempt to focus exclu-

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on Commerce, Science and Transportation on Antitrust Issues in the Airline Industry (July 17, 2000).

58. The DOT has authority under 49 U.S.C. 41712 to stop unfair exclusionary conduct in the airline industry. This statute authorizes the DOT to prohibit conduct that does not actually amount to a violation of the antitrust laws, but could be considered anticompetitive under the antitrust principles. *See also*, Bill Mosley, *Proposed Statement of Enforcement Policy on Unfair Exclusionary Conduct by Airlines*, U.S D.O.T. News (April 6,1998) *available in* http://www.dot.gov/affairs/1998/dot6398a.htm.

59. While there is a wealth of material regarding predatory pricing within the hub and spoke system, such analysis is beyond the scope of this note.

sively on those cases involving computer reservation systems as those outcomes are most applicable to the Internet.

The much-touted Airline Tariff Publishing (ATP) Case resulted in a consent decree. The FTC is interested in this particular case and decree and this is the case they raised as a topic in the FTC workshop on e-commerce. The FTC asked participants if anything from the consent decree could be applied to the antitrust analysis for the Internet. Quite possibly, the FTC missed the mark here as the CRS rules issued by the DOT[60] in the eighties could have a more effective application to the Internet then most of the ATP case rules. A review of the transcript of the FTC workshop leads one to believe there was little enthusiasm for applying the ATP case lessons to the Internet. Nonetheless, there are some principles that can be extracted from the ATP case and combined with other cases to formulate a foundation for antitrust guidance for e-commerce.

C. Airline CRS Antitrust Case Highlights

(1) *Alaska Airlines v. United Airlines and Northwest v. American Airlines*

In 1974, American Airlines obtained government approval to attempt to persuade the other major airlines to pool their resources and create a jointly owned CRS. The CRS was intended to provide participating travel agents with schedule, fare, and seat availability information for every airline that subscribes to the CRS. Further, a CRS allows travel agents to send and receive airline booking data, book space on flights, and automatically prepare tickets and advance boarding passes. Since the facts of this case provide a useful background to understanding the ATP case, they are summarized below.

The proposed joint project collapsed in 1976 due to insufficient funding. Soon after, United Airlines (UA) announced that it would create a proprietary CRS under the trade name of Apollo. American Airlines (AA) followed suit, by announcing that it would create its own CRS, under the name SABRE. SABRE, was comprised of six IBM mainframe computers that are connected to nearly 100,000 other devices, including computer terminals, ticket printers, and boarding pass printers. More than 11,000 travel agency locations used SABRE to handle airline as well as hotel and car reservations for their clients. SABRE contains schedules for more than 650 airlines and projects more than one year into the future. At that time, SABRE processed over 10 million reservations a month.

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60. *See supra*, note 54.

Other airlines also developed their own CRSs. SABRE (AA) soon became the largest and Apollo (UA) was the second largest. Shortly after these two CSRs began operations, Congress deregulated the airline industry.[61] Deregulation increased the demand for computerized fare and flight availability information, since a substantial percentage of total air passenger bookings were made through CRSs.

The CRSs worked by having the airline pass flight information to them, then the CSRs would provide this information to the travel agents. The travel agents in turn used the information to serve consumers, who naturally desire the lowest airfares and the most convenient flights. The travel agents would pay the CSR nominal fee, if any. However, the CRS charged other airlines a substantial amount for such services. The Civil Aeronautics Board ("the Board") ruled in 1984 that each CRS owner must charge its airline customers a uniform rate.[62]

The CRS market's structure made it resistant to normal disciplinary mechanisms. For example, a CRS's market share[63]might be thought to depend on how many travel agents and how many airlines subscribe to it. However, since all airlines subscribe to all CSRs, the only variable to determine market share was the number of travel agents who subscribed. American charged $1.75 fee to each airline to secure one booking. It was of little consequence because it earned a corresponding multi hundred-dollar fare. Economics tell us that an airline will withdraw from a CRS if the airline's cost exceeds the net revenue gained by the booking.

The plaintiff airlines were each previous subscribers to Apollo and SABRE. They brought this suit under the Sherman Act because they were unhappy about their largest competitors ability to extract substantial booking fees from them. They argued that UA and AA had each violated §2 of the Sherman Act[64] by, among other things: (1) denying plaintiffs reasonable access to their CRS services, which were alleged to be "essential facilities;" and (2) "leveraging" their dominance in the CRS market to gain a competitive advantage in the downstream air transportation market.[65]

The district court granted summary judgment in favor of defendants on both claims. Plaintiffs appealed. At the conclusion of pretrial proceedings in September 1989, two separate CRS cases were ready for trial:

61. Airline Deregulation Act of 1978, Pub. L. No. 95-905 (Oct. 24, 1978).

62. *See* 14 C.F.R. § 255.5(a).

63. The market share of a CRS is the actual proportion of flights that are booked through it.

64. Recall, §2 of the Sherman Act deals with monopolization and attempted monopolization. 15 U.S.C. §2, (1999). The offense of monopoly occurs when an entity with "monopoly power" engages in anticompetitive or predatory conduct to maintain or further that power. An attempt to monopolize requires a specific intent to monopolize along with a dangerous probability that the entities efforts will be successful in achieving a monopoly.

65. Alaska Airlines V. United, 60 USLW 2327, 1991-2 Trade Cases P 69,624.

(1) a suit by Northwest Airlines against American Airlines, and (2) a suit by Alaska Airlines, Midway Airlines, and Muse Air Corporation (now part of Southwest Airlines) against United Airlines. The district court consolidated these cases and tried both of them simultaneously. The District Court for the Central District of California, granted partial summary judgment against plaintiff competitors, and they appealed. The Court of Appeals held that any leverage that airlines gained over competitors through control of computerized systems fell short of power to eliminate competition and thus did not violate antitrust laws. The court of appeals affirmed the lower court.[66]

(2) United Airlines v. Civil Aeronautics Board

While an actual case never arose from this action by United Airlines,[67] it may represent an example of perhaps the largest[68]of the violators attempting to charge the "enforcer" with arbitrary and capricious behavior. The well-known Justice Posner, while still a Circuit Judge, heard a petition to review the rules issued by the Civil Aeronautics Board concerning CRSs that airlines develop and then provided to travelers.

Judge Posner's opinion upheld the CAB's anti-bias rule. The court essentially held that unless an airline limits its operations to one small region, it must persuade several of the largest airlines to list its flights in their [CRS] systems if it is to have a fair chance of success.[69] It is thus dependent for an essential facility on what may be its principal competitors. Judge Posner's opinion includes a number of helpful observations.

The Seventh Circuit held, as a matter of administrative law, that the CAB's exercise of rulemaking authority was within the scope delegated by Congress.[70] Under these statutory provisions the CAB is authorized to forbid anticompetitive practices "before they become serious enough to violate the Sherman Act."[71] The court ruled that the CAB's ruling was "plausible, if not compelling, [and its] rules can not be set aside as arbitrary and capricious."[72] The Seventh Circuit did not rule that United's CSR (Apollo) was an essential facility; it merely held that the Board's analysis was not arbitrary and capricious in light of its statutory authority.

66. *Id.* While concerted conduct is subject to sanction under Sherman Act if it merely restrains trade, unilateral conduct is subject to sanction only if it either actually monopolizes or threatens monopolization. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 5, 5(a), 15 U.S.C.A. §§ 15, 16, 16(a).

67. United Airlines v. C.A.B., 766 F.2d 1107 (7th Cir.1985).

68. United is also a frequently named defendant in airline antitrust actions.

69. *See,* United Airlines, *supra.*

70. This delegation occurred through the Federal Trade Commission Act, § 5, as amended 15 U.S.C. § 45, and the Federal Aviation Act of 1958, section 411, 49 U.S.C. App. § 1381.

71. UA v. C.A.B., 766 F. 2d at 1114.

72. *Id.* at 1116.

Thus, the Board has the power to outlaw conduct that may restrain competition.

More interesting, however, are Judge Posner's comments on the CRS market:

> If the owner of a computerized reservation system used the system to weaken competition from other airlines, it is a little hard to see why those airlines would not simply switch their patronage to a competing system that was not biased against them. Competition would (one might have thought) force at least some of the owners of competing systems to offer unbiased listings in order to expand the market for their systems. Even if every airline owner refused, because of the impact on its air transportation revenues, to give equal prominence to a competitor's flights, there is nothing to stop independent companies from offering a computerized reservation system with no such inhibitions—and one does.[73]

The court, however, goes on to state that an airline needs to be listed "at least in the largest" CRSs. "Of course, if the owner of a system charges such a high price that no competing airline will pay it, the owner is hurt. It not only loses revenues from that airline; its system will be worth less to travel agents if it contains less information. But the owner may be able to extract a high enough price from competitors to slow their growth; indeed, that may be the purpose of the high prices."[74]

He concluded that the CRS vendor will charge as high a price as it can without losing participating airlines (and thereby decreasing the attractiveness of its' CRS).

Posner held that the rules were not arbitrary and capricious and he denied the petition.

(3) Air Passenger Computer Reservations System Antitrust Litigation v. American Airlines

In 1988, the U.S. District Court, C.D. California, heard the case of the Air Passenger Computer Reservations Systems Antitrust Litigation v American Airlines.[75] This case involved several carriers against American Airlines (AA) and United Airlines (UA).[76] The many carriers

73. *Id.*

74. *Id.* at 1115.

75. Air Passenger v. American, 694 F. Supp. 1443 (1988) <57 USLW 2194>.

76. The actual parties to this litigation include the following: Continental Air Lines, Inc. and Texas International Airlines, Inc., Plaintiffs v. American airlines, Inc and United Air Lines, Defendants. New York Airlines, Inc., Plaintiff, v. American Airlines, Inc. and United Air Lines, Inc, Defendants. US Air, Inc, Pacific Southwest Airlines, Inc, Aircal, Inc. Ozark Air Lines, Muse Air Corporation, Alaska Airlines, Inc. Midway Airlines, Inc, Northwest Airlines, Inc. and Western Air Lines, Inc. Plaintiffs v. American Airlines, Inc. and United Air Lines, Inc. Defendants. American Airlines, Inc. Counterclaimant, v. USAir, Inc. Pacific Southwest Airlines, Inc., Aircal, Inc. Ozark AirLines, Inc. Muse Air Corporation, Alaska Airlines, Inc. Midway Airlines,

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brought action against AA and UA alleging antitrust violations and attempts to monopolize certain air transportation markets and computerized reservation systems. These charges were brought under §2 of the Sherman Antitrust Act. Recall, §2 prohibits monopolization, attempted monopolization and conspiracy to monopolize.[77] In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[78]

On motion for summary judgment, the District Court held that:

1. Computerized reservation systems do not constitute essential facilities;[79]
2. Monopoly leveraging theory was not available; but
3. Genuine issue of material fact existed with respect to allegations of monopolization and attempted monopolization.

One of the charges was "predatory pricing." Predatory pricing refers to a firm's attempt to drive a competitor out of business, or to discourage a potential competitor from entering the market, by selling its output at an artificially low price. The theory is that, once the rival has been dispatched from the market, predator will be able to reap monopoly profits that will more than pay for the losses incurred during the predatory period.[80]

Inc. Northwest Airlines, Inc. and Western Air Lines, Inc. Counter defendants. Pacific Express, Inc. and Pacific Express Holding Co., Plaintiffs v. United Air Lines, Inc, Defendant. *Id.*

77. 15 U.S.C. §2 1999.

78. This principle is referred to as the Colgate Doctrine. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

79. The essential facilities doctrine imposes on a business the obligation to provide its competitors reasonable access to that facility. Byars v. Bluff City News Co., 609 F.2d 843, 856 (6th Cir.1979). An essential facility is one which cannot be reasonably duplicated and to which access is necessary if one wishes to compete. Fishman v. Estate of Wirtz, 807 F.2d 520, 539 (7th Cir.1986). A refusal to deal in this context violates section 2 because control of an essential facility can "extend monopoly power from one stage of production to another, and from one market into another." MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir.1983). "Essential Facilities," under a monopolistic refusal to deal, is where the supplier refuses to deal in order to control a downstream market. For example, in MCI v. AT&T, the court found (1) Control of an essential facility by a monopolist; (2) Competitor's inability practically or reasonable to duplicate the essential facility; (3) Denial of the use of the facility to a competitor; and (4) Feasibility of providing the facility. MCI v. AT&T, 708 F. 2d 1081, 1132-33 (7th Cir. 1983). The Supreme Court has never held that unlawful refusal to deal can only be established under the "essential facilities" rubric. ITS v. Eastman Kodak, 125 F. 3d 1195 (9th Cir. 1997). Section 2 "prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent legitimate business justification" *Id.* at 1209. The plaintiff need not prove "essential facility" or "necessity." *Id.*

80. 15 U.S.C.A. §2.

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The prosecution showed a dangerous probability of success of UA and AAs attempts to monopolize air travel to and from particular hubs. The evidence demonstrated significant access restrictions to the hub. A powerful showing was evidence that the defendant airline's market share rose from 30% to 63% during the time in question. Also presented was the fact that three different airlines left the market during the same period of alleged anticompetitive conduct.[81]

An inference that the airline willfully attempted to attain or maintain monopoly power with respect to computerized reservation system by tying up its participating travel agents, could also be drawn from the evidence. The evidence was that the airlines contracts with travel agents, as users of its system, were meant to lock in the agents to long term arrangements and high liquidated damage provisions. This way, the airlines could increase display bias[82] of the CRSs without seriously risking loss of subscribing travel agents.[83] The plaintiff airlines alleged that the competing airlines computerized reservations system violated the antitrust laws. They could show the competitor's market power by showing (1) that all the vendors of computerized reservations systems had market power due to vigorous competition in the air transportation market that required all airlines to be carried on all of the reservation systems or (2) by showing that competitor's implementation of coercive contractual provisions raised entry barriers[84] and created or allowed the airline to maintain a monopoly power.[85]

An antitrust plaintiff must prove injury causally connected to the violation of antitrust laws and that the injury is of the type the antitrust laws were intended to prevent. Here, the plaintiffs showed a direct injury caused by monopoly power. The evidence demonstrated that booking fees charged by the airline to the competitors for use of its computerized reservation system were supra competitive and that the revenues which were diverted by the display bias of the system[86] constituted overcharges, showing a direct injury that was caused by monopoly power.

81. Sherman Anti-Trust Act, 15 U.S.C.A.§2 (1999).

82. Display bias is when the airline programs the display to show all of it's own flights first to the city pairs requested. Only after its flights are all displayed would the other carrier's competing schedules come into view.

83. 15 U.S.C.A. §2 (1999).

84. "Raising the entry barriers" is a form of exclusionary conduct. The monopolistic exclusionary conduct is proven by demonstrating the behavior is (1) directed against a competitor, and (2) with the purpose to create or maintain a monopoly. Lorain Journal Co. v. United States, 342 U. S. 143 (1951). However, the monopolist may rebut by establishing business justification. *Id.*

85. *Id.*

86. *See* Display Bias, *supra* note 82.

(4) Orbitz

Orbitz is not a case to study; not yet anyway. Orbitz is a website of the five largest U.S. Airlines.[87] These competitors continue to compete on price and service in their core businesses and in the retailing of their businesses, while collaborating to create an e-commerce purchasing options for passengers. Orbitz's states that its' purpose is to add an online option to existing distribution channels so the public can view of all publicly available schedules and fare options at the same time.[88] Its' objective is to provide more information then has been available before.

Some argue that Orbitz represents a venture that may be used for anticompetitive purposes.[89] The claim is that the airlines would use the Internet with concerted action and competitive advantage (the ability to advertise and sell the lowest fare) only to members of the joint venture. The fear of non-members is that the lowest fares available will be accessed exclusively on the Orbitz system. Antitrust is not designed to protect individual competitors from fair but aggressive competition. Rather, it is to protect the fairness of the competitive process by guaranteeing a level playing field for competitors. Where most competitors in an industry work jointly to the detriment of their non-cooperating competitors, the competitive process is disrupted.

The major concern with the Orbitz type of joint ownership distribution system is boycott, where competitors join to squeeze out the non-members. While Orbitz plans to allow other airlines to obtain the service, it is as a non-equity partner. The marketing arrangements for these non-equity partners are designed to "strongly incentivize" the carriers to pro-

87. Orbitz is an Internet website formed by a coalition of five of the nations largest airlines—Delta, United, Northwest, Continental and American. The website will distribute travel directly to travelers by competing with travel agents. The five owners represent over 80% of the U.S. air transportation market. Additional airlines have joined as non-equity partners. The agreement states that members are not bound to provide all of their fares "exclusively" to Orbitz.

88. This is similar to Covisint. Covisint is an e-commerce site which enables auto manufacturers and suppliers to conduct business directly. The manufacturers post their contract needs and the supplier's bid on those posted contracts. In 2000, the FTC investigated whether the Covisint site was a possible §7 violation and concluded it was not. The main reason the FTC reached this conclusion is the fact that Covisint allows unrestricted access-any manufacturer or supplier expressing an interest in joining may do so. This key point differs from Orbitz in that there are some complex rules and costs involved for any airlines outside the five majors to join.

89. On February 16, 2000, in a letter to the Assistant Attorney General, the American Society of Travel Agents (ASTA) requested that the DOJ issue Civil Investigative Demands to all of the partners of Orbitz to determine whether the partnership is consistent with the draft Antitrust Guidelines for Collaboration among competitors. ASTA's contention is that "the U.S. airline industry has begun to operate as a single enterprise, "of which the joint website is just the most recent manifestation."

vide their information "exclusively" to Orbitz. It is this very exclusivity that can become an antitrust violation.

(5) Airline Tariff Publishing Case

This is the case that the FTC raised for discussion in its B2B e-commerce workshop in June 2000. This case began in 1992 the Justice Department filed a complaint against nine of the major U.S. airlines.[90] The complaint claimed violation of §1 of the Sherman Act[91] to prevent and restrain these carriers.

The Airline Tariff Publishing Company (ATP), a corporation that was wholly owned by a group of the defendants, was in the business of collecting and disseminating electronically (and by mail) fare amounts and restrictions from each of the carriers to all of them. Along with each fare submitted to ATP by an airline, is included a fare basis code, the dollar amount and the fare rules. These rules contain specific conditions or restrictions under which a fare can be used or sold. In addition to the rules, an airline can attach up to two footnotes to each fare. Footnotes typically contained further restrictions on the fares. They may contain the first and last ticketing dates.[92] No passengers may purchase a ticket under the fare posted until that date arrives.

Additionally, the carriers often changed the first ticket date to an earlier or later time or withdrew the fare altogether before the date arrives. Similarly, a last ticketing date was often changed to an earlier or later time; if earlier, the airline could withdraw the fare before the last ticket date arrived. By using first ticket dates, the airline could create fares that were not currently available for sale. By changing the dates, they could change the days the fares would become available.

Each of these airlines would submit this type of data to ATP at least once every business day. ATP would then disseminate all of the data to each airline and its' computer reservation system. Many of the carriers employed sophisticated computer programs to sort fare information and generate detailed reports that the airline would use to monitor and analyze each other's fare changes, prospectively.

The complaint charged two violations: price fixing[93] and coordination facilitating device. The price fixing cause of action charged that the leading U.S. airlines had fixed prices using a computer system run by an

90. Information taken from the complaint filed by the Department of Justice, *available at* http://www.antitrust.org/cases/airlinetariff/aircomp.html.

91. 15 U.S.C. §4.

92. A first ticketing date states the first date a fare would be available for sale *if* the fare were ultimately offered to the public.

93. Price Fixing was charged beginning April 1988 and continuing through at least May 1990.

airline joint venture. The government produced evidence that there was much communication among the airlines that amounted to offers, negotiations and acceptances.[94] The judgment applied to United Airlines, US Air, Alaska Airlines, American Airlines, Continental Airlines, Delta Air Lines, Norwest, and TWA. The second complaint accused ATP and the co-conspirators of engaging in a combination and conspiracy in unreasonable restraint of interstate trade and commerce against §1.[95] Specifically, the airlines were accused of taking the following actions:

1. The carriers engaged in a dialogue about future planned or contemplated fare increases, changes in restrictions and the elimination of discounts.
2. The carriers communicated to one another the ties or links between proposed fare changes in city-pair markets
3. They exchanged proposals to change fares and negotiated increases to fares, changes in fare restrictions and the elimination of discounts, using first and last ticket dates, fare codes and footnote designators.[96]

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94. In one historical case of price fixing, a group of firms comprising 90% of corrugated container sales in the Southeastern United States agreed to exchange price information. However, there was no agreement to set prices based on this information. The court decided that this exchange of information served to stabilize prices, albeit in a downward direction. While some price competition remained, generally this exchange of information led competitors to match a previous price discouraging downward price movements. Dissenting justices argued that easy entry into this market made it impractical for any firm to earn monopoly profits even with the exchange of pricing information. They charged the government did not prove that price levels would have dropped at a faster rate in the absence of pricing information exchange. United States v. Container Corp. of Am., 393 U.S. 333 (1969). The dissenting judge had a decent argument. While the ATP case has quite similar facts, the fact that it occurred in an industry with high entry costs, vs. low entry costs as in Container Corp. weakens the application of Container Corp.'s dissent to the ATP case. *See also,* United States v. United States Gypsum Company. This case also involved an exchange of price information. Gypsum board manufacturers exchanged information on contract prices. United States vs. United States Gypsum Co., 438 U.S. 422 (1978). This industry was highly concentrated with an eight-firm concentration ratio of 94% and a 15-firm concentration ratio of 100%. *Id.* The court held that the exchange of price information served to reduce competition and stabilize prices. Further, the court worried that exchange of price information could lead to the development of concerted price-fixing that is per se illegal. The court examined secrecy in auctions and bidding. *Id.* On today's' Internet there is open access, thereby reducing the potential for secret bidding or posting future prices.

95. The Sherman Act, 15 U.S.C. §1.

96. "Footnote designators" are footnotes, identified by alphanumeric codes that contain conditions on the use of the fare. While the footnotes typically contained the first ticket dates or last dates, they also contain other limitations, such as applicable traded periods. An airline can attach the same footnote to more than one fare. After ATP received the fare changes from the airline, it processed the changes, and disseminated information on those changes at least once per week. The airlines employed sophisticated computer programs that sort the fare information received from ATP and produced detailed reports. These reports allowed the airlines to monitor and analyze immediately each other's fare changes, including ticketing dates and the links among fare changes in different markets. *See,* The Complaint of the U.S. of America v. Airline

4. They monitored each other's future intentions regarding fare increases, withdrawal or fare changes lessening uncertainty concerning each other's pricing intentions.[97]

The complaint stated that the offense would continue unless relief is granted.[98]

The DOJ claimed that the combination and conspiracy on the part of the airlines reduced price competition and unreasonably restrained trade causing consumers to be deprived of the benefits of free and open competition. The suit claimed that the effect of the behaviors included:

1. coordinated interaction among the airlines has been made more frequent, more successful and more complete;
2. price competition among the airlines . . . has been unreasonably restrained.
3. Consumers . . . have been deprived of the benefits of free and open competition in the sale of such services.[99]

Ultimately, they settled the lawsuit. The government believed that the way the information was submitted by the airlines, for example with 30 days advance notice, facilitated agreements among the airline competitors, by offering the ability to signal displeasure when one carrier was discounting. The government viewed this as express agreement in violation of the Sherman Act.[100]

E. The ATP Compliance Program

The Airline Tariff Publishing case final settlement agreement was called the Compliance Program. The Compliance Program required each airline to create an antitrust compliance program that included appointing an antitrust compliance officer. The compliance officer would have responsibility for accomplishing the antitrust compliance program agreed to with the final judgment. The officer is required to supervise the review of activities of the airline to ensure that it complies with the final judgment in this settlement. This includes providing a copy of the final judgment to each officer and employee who has responsibility for approving, disapproving, analyzing, monitoring, studying, recommending, implementing any fares, or disseminating fares to ATP, CRS or another airline.

Tariff Publishing Co. (December21, 1992) *available at* http://www.antitrust.org/cases/airlinttarriff/aircomp.html.

97. *Id.*

98. United States v. Airline, Tariff Publishing Co., 1994 WL 502091 (D.D.C.).

99. Paraphrased from the actual complaint filed by the United States in the District Court for D.C. (December 21, 1992) *available at* http://www.antitrust.org/cases/airlinetarriff/aircomp.html.

100. *Id.*

The officer must also provide an annual briefing to each of the officers and employees involved with establishing and disseminating fairs on the meaning and the requirements of the final judgment and the antitrust laws and advising them that the defendant's legal advisors are available to confer with them regarding compliance with the final judgment and the antitrust laws. Further, the officer is required to obtain an annual written statement from each of these employees stating they have read, understand and agree to abide by the terms of the final judgment and that failure to comply could result in conviction for criminal contempt of court.

The judgment also involved quite onerous record keeping requirements to prove the officer annually briefed and obtained written statements from each employee as well as records regarding last fare dates, dissemination dates, copies of all advertisements used with any last ticket dates and other records related to dates, cities and advertisements. These records must be maintained for three years from the first date any advertisement appeared or the first date any such last ticket date appeared in the ATP or a CRS.

Further, the officer is required, upon learning of any past or future violations of the judgment, to take appropriate action to terminate or modify any activity required to ensure compliance with the judgment, and to maintain all records in such a way that they will be readily accessible. To prove this, a duly authorized representatives of the government shall, with written request of the Assistant Attorney General in charge of the Antitrust Division, be permitted to access for inspection and copying all documents in the possession or under the control of the airline.

Finally, the airlines are required to submit their annual plans, with a certification of compliance to the Attorney General each year for 10 years (until 2004). The effect of this final consent order was to prevent the airlines from using various communication methods to engage in quasi-public negotiations about price levels.

V. Airline CRS Lessons Learned: The Obvious and Not So Obvious

The lessons offered by airline litigation which surround CRSs, teach us some matters that are more obvious than others.

It is obvious that predatory pricing and price fixing among competitor airlines or Internet businesses violate §1 of the Sherman Act. Business must make their decisions unilaterally and independently and not in collaboration with competitors. Equally obvious is the fact that combinations of competitors who join to squeeze out competition are engaging in boycotts, also in violation of §1. The airlines attempts around price fixing

by using starting and ending ticketing dates are comparable to the old quantity or territorial dividing as attempts around price fixing.

The ATP case, where the government produced evidence that there was a great deal of communication between the carriers that amounted to offers, negotiations, and acceptances, demonstrates that the Internet enriches the opportunities for communication. It may have actually been this communication that cemented the governments' case.[101] While improving communication, it may also make it more difficult to infer agreements when there is parallel pricing.

The airline experience clearly teaches e-commerce enterprises not to publish future prices with coded messages indicating how long the particular future price would remain effective and whether the business would change it's mind if competitors did not join in the price range. Competitors may not agree on actual prices they will charge or pay in the future for a product or service. In defining price fixing, the Supreme Court stated, "price fixing includes more than the mere establishment of uniform prices. . . prices are fixed if the range within which purchases or sales will be made is agreed upon. They are fixed because they are agreed upon."[102]

More recent court decisions reflect a higher burden in presenting a successful prima facie case under §1, where competitive harm cannot be demonstrated. As we move more and more away from the per se rule[103] towards the rule of reason,[104] the defendants appear to be gaining an advantage.

Contrast the courts approach to antitrust with that of the FTC. While the FTC (probably because of the high volume of investigations required) are using a "quick look," by considering the presumption of competitive harm and the ability of the defendant to rebut that presumption, the courts must allow a full analysis and rely on either the per se rule or the rule of reason.

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101. In the ATP case, it was not enough to show that competitors just engaged in parallel behaviors, such as charging the same prices. To be illegal, there had to be evidence of something more. The communication was a decisive factor in the courts view. *See* Jonathan B. Baker, "*Identifying Horizontal Price Fixing in the Electronic Marketplace,*" 65 ANTITRUST LAW J. 41-55 (Fall 1996).

102. All Care Nursing v. High Tech Staffing, 135 R. 3d 740 (1998).

103. The per se rule is used on those restraints of trade that are absolutely unreasonable, making it unnecessary to inquire into their effects and without requiring proof of adverse effects on competition. The restraints that fall under a per se analysis include price fixing, quantity fixing, divisions of customer or territory among competitors and boycott. Per se violations are criminal.

104. The rule of reason under §1 of the Sherman Act makes unlawful contracts, combinations or conspiracies that restrain trade. Much of antitrust jurisprudence for the last 110 years has been using the rule of reason to establish a dividing line between "reasonable" and "unreasonable" actions.

Given the nature of the e-commerce, market power will rarely be present as entry is easy and the ability to charge very competitive prices will be extremely rare. The bottlenecks that may occur on the Internet will be far more rare then anything that has occurred in the airline industry. Further, the impact of restraints we saw in the airline cases are in the context of a relevant product market and relevant geographic market. The Internet does not necessarily create relevant product markets and because of the global nature of the Internet, a geographic market is almost irrelevant.

It is unlikely that a price increase of one product on the Internet will cause customers to substitute another product. Therefore it will be unusually difficult to determine whether there are constraints on the ability of a hypothetical monopolist to raise prices.

A. Differences: Airline vs. Internet

The culture of the Internet differs significantly from that of the airline industry. The Internet is collaborative and cooperative. Unlike the cutthroat competition that has distinguished the airline industry and the airline cases, the e-commerce establishments on the Internet may be more analogous to a trade union, business association, coalition, or certified group of workers. The cooperative trade unions of the past were charged with §1 violations comparing prices. In Maple Flooring, members of a trade union met and prices were discussed however, the prices discussed were current and past prices and the court found this acceptable.[105] The court found that where trade associations or combinations of persons or companies openly and fairly gather and disseminate information as to the cost, volume of production, past actual prices, stocks of merchandise on hand and approximate cost for transportation is information shared without reaching any agreement or engaging in any concerted action with respect to prices or production or restraining competition.[106] The price sharing on the Internet is less like the airlines-which shared future prices-and more like the Maple Flooring trade members. What we know from the airline cases is that sharing future prices is tantamount to price fixing. It is an illegal violation to discuss future prices.

We know from the airline industry cases that the industry is either "imperfect competition" or, in the more recent decade, arguably, an "oligopoly." This is unlike the Internet, which actually has the potential to achieve "perfect competition" if the balance between the innovative ground breaking culture is gently balanced with rules and regulations.

The airline industry developed in an extremely competitive and al-

105. Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925).
106. *Id.*

Transportation Law Journal, Vol. 28 [2000], Iss. 2, Art. 7

most cutthroat environment. This is in contrast to the Internet. From inception the Internet's primary focus is to exchange and share information. The environment seems to want to share in an unrestricted manner. The keys to the future may very much depend on whether this climate takes a turn towards the cutthroat culture of the airline industry, which is not likely.

If price sharing is open and reflective of current prices, rather then exclusive and secret, there will likely be no real problems with antitrust. It is highly unlikely that electronic commerce businesses will try to post future prices as a signal to price fix. Such behavior would only cause confusion among consumers.

It is also interesting to note that many of the executives in the airline industry were almost trained in antitrust techniques in the better business schools around the country; whereas the Internet executives are often Ivy league dropouts who may be somewhat more idealistic, risk-takers who never got far enough along in college to understand the lucrative possibilities from illegal antitrust action. The airlines staffs tend to be on the large side, as is generally required when specialists are involved. In e-commerce concerns, there tend to be relatively small if any internal staffs. E-commerce concerns are more likely to rely on consultants and independent contractors then on building large internal staffs.

Moving finally to operations, there is another striking difference. The airlines are historically structured vertically and there is generally, in-depth specialized knowledge within each carrier. The e-commerce companies are more horizontal. E-commerce concerns tend to cross markets and span industries, relying more on joint ventures for synergies.

B. Future Battles

The Internet, much like the whole field of antitrust, and much like the airline industry, is ever-changing. The ten-year running on the ATP consent decree was not obvious. Perhaps this time limit was agreed to because the industry is evolving so rapidly. Its expiration allows time for both sides to reevaluate and make adjustments as necessary. Since e-commerce on the Internet is also evolving rapidly, maybe it is worth taking incremental measures with short fixed timeframes to also allow for reevaluation of the Internet evolution and its' needs.

Now that we have considered the middle ground, where are the real battles likely to occur? In reviewing the airline industry, much of the litigation involves mergers and monopoly pricing (related however, more to the hub and spoke structure and the covert pricing it allows then within the CRSs). In addition, the airline industry is experiencing many suits related to inadequate customer service, although not analyzed in this

note. Then, of course on the Internet, there is the Microsoft type of legislation, which should not be seen again at this magnitude.

What we did not learn is how courts will resolve the difficulty of identifying and characterizing cartel or association activity. It remains difficult in the airline industry, as it will be with e-commerce, when there is no evidence of any explicit agreement, yet parallel pricing by competitors occurs. Most likely the courts will not require explicit agreement. As with the airlines, agreements may be proven by evidence of an inference of tacit collusion, such as the combination of voluntary price moves, with signaling and acceptances.

Despite the amount of talk and review of the ATP case, little of the actual written consent decree may be of use regulating e-commerce on the Internet for the reasons outlined below:

(1) Airlines, even after deregulation[107]still have a relatively sizable headcount, particularly on the administrative side, so they could withstand a bit more administrative work. A reading of the final judgment from the ATP case, specifies that a senior level attorney must act as the Compliance Officer and several individuals from the attorney's staff must build and monitor the compliance program. They would need to devote a chunk of time to create the program and provide oversight, communication and reporting. While most airlines have enough staff to meet this burden, many e-commerce businesses are not adequately staffed; and many have no in-house counsel. More often, they are individual entrepreneurs with little or no support staff. One reason for the influx of business involved in electronic commerce is the ability to do much with little. The Internet may actually attract individuals who may be otherwise opposed to traditional structure, bureaucracy and adherence to rules.

(2) The final judgment, as drafted, requires paper intensive monitoring. While the consent decree is as recent as 1994, business have still come a far way from maintaining paper files and records. Today, most of the electronic business records are maintained electronically. Certainly the final judgment would need to be modified to eliminate the paper requirements and replace them as necessary and feasible with computer files.

(3) If these rules were implemented for all e-commerce businesses, how would the FTC or the DOJ ever enforce compliance? Given the number of e-businesses affected, the burden of monitoring adherence to the rules would be impossible, or cost prohibitive to meet.

107. Prior to deregulation, airlines were able to overstaff as any need arose. The pay levels were high and as staffing needs increased, the airline could just apply for approval of a rate increase to cover the additional staff. Back then, they were less concerned about having higher fares because as soon as one carrier received approval for a rate increase, the others would follow suit. Under their regulated period, airline prices seemed to continue on a steady increase.

(4) Further, it must be determined whether the regulations would only apply to U.S. Internet based companies. If so, the additional headcount and effort would certainly put U.S. concerns at a competitive disadvantage with overseas entities right from the start.

(5) Of all the requirements, I suspect the annual briefing, if done properly could provide the most value, especially if a serious component of the briefing included the explanation, identification, and implementation of the least restrictive alternative to accomplish the legitimate goals of each Internet exchange. Importantly, this internal briefing effort can be far more effective in preventing violations then attempting to follow the antitrust guidelines in the consent decree from the Airline Tariff Publishing Case. Nonetheless, many of the concepts behind the ATP consent decree can be of use to e-commerce, and are heavily relied on below to develop a framework for e-commerce.

VI. Internet Policy Framework

In discussing application of airline antitrust policy to e-commerce, it is important to keep certain considerations in balance. Before recommending a framework, it is worth summarizing some earlier points in this note and fusing them with the balancing considerations. First, in framing policy discussions, it is important to remember that Antitrust oversight or enforcement efforts should not prematurely or aggressively stifle the continuing evolution of electronic commerce on the Internet. Nor should antitrust efforts ignore the potential to seriously harm the competitive process. Collaboration is one foundation upon which the Internet has been built. It is more difficult to infer an agreement to mirror prices if pricing information is openly shared among rivals, as it often is in electronic commerce.

Antitrust efforts will require a detailed review of subtle ways of sharing and using information about competitors pricing, to identify potential problems and techniques for minimizing these problems. At the same time, care must be taken to ensure that consumers' privacy is maintained.

Antitrust policy for e-commerce entities can be developed within the framework of a series of ten questions generated largely from the airline experience. Using what was learned in the airline antitrust CRS cases, these questions provide guidance in evaluating any e-commerce Internet transaction for possible antitrust abuse and in establishing official policy. The following ten questions provide the framework:

(1) Where is the information going?

One way to distinguish between legitimate business exchanges versus bad exchanges is to consider where the information is going. The airline

cases teach us that if the information is mainly an exchange among rivals, it may be suspect. Further, an exchange of information that occurs more rapidly between rivals than between sellers and buyers may also be suspect. Generally, in exchanges on the Internet, the information is given to consumers at the same time it is given to rivals. While rivals could exchange information first with rivals via email, this is unlikely as it offers a "smoking gun" to the DOJ and the FTC who would ensure that those emails be put into evidence. To address this question, possibly the FTC should publish guidelines regarding the announcement of upcoming "sales" of items over the Internet. Where the primary information exchanges are among the buyers of an item only, price signaling is not an area of concern.

(2) What type of goods or services and terms are being discussed?

Legitimacy may also depend on what kind of goods are being dealt with and what kind of exchanges are occurring. For example, are all of the terms of the exchange published? Secrecy regarding the terms, or a comment indicating that the terms are to be negotiated is a red flag. One could charge different customers different prices for identical goods and services by offering extended payment terms. If there is any suspicion about the possibility of hidden communication, the attorney should suggest a more straightforward, more prudent way to conduct the exchange.

(3) What is the legitimate business purpose behind the exchange?

This should be asked whenever there is any question as to why an exchange occurred in a certain manner. If the parties involved are given proper antitrust education, counseling and awareness, those involved in legitimate business exchanges usually do not need to disclose any information to each other that could be dangerous from a competitive standpoint.[108] If there is no logical business purpose, cease the exchange.

(4) Are any of the published prices contingent?

The ATP case involved price signaling. The airlines were putting a contingent price out to be viewed by their rivals, and they had the opportunity to pull those prices back if their rivals did not respond in a certain way. This is different then when rivals on the Internet put prices out for basically instantaneous transactions. It is then difficult if not impossible to collude.

108. Mr. Krattenmaker, from Remarks FTC Conference: Competition Policy in the World of B2B Marketplaces, Panel 6 (July 30, 2000) *available at* http://www.ftc.gov.

(5) What is the timing of the prices being offered?

Consider whether the price offered currently available or only offered in the future. A major issue involved in the ATP case was timing. The prices were posted many days before the effective date. The consent decree restricted the posting of prices to those that are currently in effect.

(6) Is there more information offered then that required by customers?

If so, review the information to determine why it might be included. A key issue from the ATP case was the use of footnotes for direct signaling. The footnotes contained information that was not demanded by the customers. This created an opportunity to signal another airline by using codes. The codes indicated that if the other airlines did not raise the fare in this city pair, the flagging airline would lower its' price in one of the key markets of the competing airline. On the Internet, footnotes could take many forms including things such as free shipping on particular "window" dates. Where footnotes offer extra information, the FTC should enforce a mandate that such "future miscellaneous information" be carried out and not withdrawn. However, this sort of flagging competitors is less likely via the Internet due to consumer protection rules.

(7) How adequate is the businesses firewall?

The exchange of information internally via the Internet has become a must for business. However, it is equally important to ensure the firewall protecting unauthorized internal and external exchanges is sufficient so as to prevent against collusion. While the author does not know how firewall security is technically evaluated, perhaps an Internet association group could create a checklist for companies to self-evaluate the security of their firewall and internal security environment. Possibly this could be developed into an accepted standards certification program. Those in non-compliance or receiving only a low certification could be "hack-tested" by the FTC and fined or otherwise penialized if they do not adequately perform.

(8) Does the exchange represent a group boycott or concerted refusal to deal?

When most competitors in an industry work jointly with the purpose or effect of damaging their non-cooperating competitors, the competitive process is improperly disrupted. Airlines learned that they need to be subtler in the way they share and use information about their competitors' pricing. Reverse types of boycotts are becoming popular and should not be cause for antitrust concern. A "plain vanilla" reverse boycott is where the buyer is actually putting the squeeze on the seller of the goods.

Many tout such exchanges as ways for people in an industry to get together and essentially knock down the price of important inputs in their business. Consider Walmart, the world's largest retailer, who required suppliers to sell through their automated system. Walmart has been a master at squeezing low prices out of suppliers, using its own market clout.[109] While generally a reverse boycott actually increases competition and should benefit the consumer, there is a potential variation on the traditional boycott that could be used to squeeze out the competition. The problem is where businesses use the Internet exchanges as a way to boycott "non-players." An example of this could result if Orbitz is approved.[110] Orbitz is proposed to be established with equity and non-equity partners. The proposed agreement between the carriers states that the member airlines are not bound to provide all their fares exclusively to Orbitz, however all of the non-equity members are required to provide annual marketing support having what could reach a multimillion-dollar value.[111] There is a list of optional activities that can be counted as marketing support. Most on this list require out of pocket expenditures that could cost millions of dollars. However, one attractive option on this list offers the potential of avoiding all charges.[112] As a possible incentive to achieve exclusivity, full credit is given on the difference between the dis-

109. *See* N.Y. Times, (October 2000) *available at* http://www.nytimes.com/2000/.

110. Orbitz is the proposed computer reservation joint Internet website owned jointly by five of the largest U.S. airlines-Delta, United, Northwest, Continental and American. Its' purpose is to distribute travel directly to travelers. As a result, they will compete directly with both online and brick and mortar travel agents.

111. "Section 2.2 of the Agreement titled "Marketing Support," provides the following: (a) Airline shall provide Company with In-Kind Promotions (a) during the initial twelve month period of this Agreement, with a dollar value equal to Airline's Market Share multiplied by _ million U.S. dollars; and (b) in each subsequent twelve month period in an amount equal to _ percent of Airlines Travel Revenue during the immediately preceding twelve month period not to exceed __ million U.S. dollars during any twelve month period following the initial twelve month period. . . Airline's In-Kind Promotions shall be implemented in accordance with the valuation methodology set forth in Exhibit B. Company and Airline shall mutually determine the timing and value of each In-Kind Promotion by mutual agreement of the parties. If either party proposes In- Kind Promotions that are not listed in Exhibit B, the parties shall work together in good faith to value such In-Kind Promotions." *Expert from*: Comments of the American Antitrust Institute Relating to Orbitz and the D.O.T.'s C.R.S. Rulemaking, American Antitrust Institute (September 18, 2000) *available at* http://www.antitrustinstitute.org.

112. "Exhibit B of the Agreement describes six categories of In-Kind Promotions and their valuation method. These include (1) company name/logo included in advertisements; (2) Company name/logo included on in-flight collateral; (3) company name/logo included in direct mail; (4) Affinity program supplements; (5) Passenger database information; and (6) Special promotions. There are three categories of Special promotions: (1) Exclusive promotions or fares available only on Company Site; (2) Promotions or fares available only on Company Site or airline site; and (3) Other. . . If an airline makes its promotional fares available only to Orbitz, the value is determined by multiplying the value of the discount to the next lowest published fare by the number of discounted transactions booked through Orbitz; . . ." *Id.*

counted fare and the next lowest published fare, for all fares booked by Orbitz *where Orbitz is the exclusive recipient* of the relevant data (italics added). The lowest fares in the marketplace could then be *exclusively* on the Orbitz system. This arrangement is the type of possible boycott that could potentially violate the Sherman Act. Another similar arrangement is the Covisint buyers website run by the major auto manufacturers.[113] It is quite possible that the only way to evaluate this question is by a very detailed review of any such agreements to determine whether a boycott is a potential.

(9) What level of antitrust knowledge and interest does the entity's management demonstrate?

This draws directly from the ATP case regarding internal antitrust education and peer pressure regarding compliance. While I do not think it is feasible to require the tremendous amount of paperwork and record keeping required by the consent decree, the spirit of the decree is worth encouraging and considering when investigating antitrust compliance.

(10) If applicable, is the entity complying with the CSR rules developed by the DOT in the eighties?[114]

The intent is to review the entities' distribution system. Ensure that all of the information (fares and schedules) is being communicated to all systems to the same extent it provides information via the system it owns. This is simply to assure consumers the benefits of effective competition by keeping owners of Internet distribution systems from using it to exclude or injure competitors through biasing the presentation of data.

The panel discussing this issue at the FTC Workshop seemed largely to agree that Internet exchanges will deliberately attempt to put themselves together in a way that does not raise antitrust concerns, (i.e. to shield information flow to their rivals). This is an important factor to keep in mind in developing e-commerce policy and hopefully we will see the result of this over time.

VII. Conclusion

Currently, there are no firm antitrust rules dealing with e-commerce on the Internet. It has been operating much as a free distribution channel. Overall, the competitive analysis of e-commerce on the Internet is more familiar than it is strange. This antitrust analysis for the Internet

113. Covisint is an e-commerce site to allow auto manufacturers and suppliers to conduct business directly. The manufacturers post their contract needs and the supplier's bid on those posted contracts. *See supra*, note 88.

114. *See supra* note 58 and accompanying text.

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will use the traditional tools of antitrust, because they are known. The facts of any specific agreement, the purpose and market of any exchange and the actual behavior challenged will determine the outcome. Unfortunately, much of the ATP agreement on its face, is far too impractical to apply to such a dynamic, evolutionary and diverse industry as e-commerce for the reasons discussed above.

Antitrust policy should be built around a framework whose underlying goals and broad strategies can remain relatively fixed, but within which changes in application can be made as both regulators and e-commerce entities learn more. New global applications will continue to develop and others will change. This means the underlying policy framework needs to be flexible and to embody a workable process by which experience and new information can adjust and further enhance policy or reduce controls over time as experience and operational feasibility dictate.

Much of the ATP litigation and settlement essentially resulted in internal self-enforcement. This concept of self-enforcement is the most useful element the ATP case has to offer e-commerce. Self-enforcement should be the framework for e-commerce policy.

Finally, in developing antitrust policy for e-commerce, great care should be taken to avoid mechanical or formulaic approaches that, whether intentionally or not, effectively "lock" us into particular regulations long after they become outmoded. We should be planning for the long pull, not developing near-term quick fixes. The airline CRS self-enforcement and reporting is only for a period of ten years. The airline CRSs have been operating without undo antitrust concern for the last six years. However, the ten-year period is due to expire in 2004. Then what?

It would be no real surprise if the airline industry returns to aggressive experimentation in ways to signal pricing, monopolize selected routes, combine in mega mergers and generally work to scare away new entrants. Simultaneously, it is quite possibly we will find that the e-commerce companies have effectively monitored themselves and for the most part avoided antitrust violations on the Internet. The author's suspicion is that whether or not this occurs in the airline industry, the e-commerce companies will not follow suite. The short history and experience of e-commerce leads one to believe that e-commerce entities will continue to value and imitate successful business models that rely on cooperation and synergies in a friendly, yet competitive environment.

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