



In Response

COMPETITION AND E-COMMERCE

Submission of the Business and Industry Advisory Committee (BIAC) to the OECD to the OECD Joint Group on Trade and Competition

May 30, 2001

General

The Business and Industry Advisory Committee (BIAC) to the OECD, appreciates the opportunity to submit the following comments to the Joint Group on Trade and Competition on issues relating to trade, competition and electronic commerce, for discussion at the May 30, 2001 Roundtable on Electronic Commerce. These comments should be read together with the BIAC Statement submitted to the OECD Committee on Competition Law Policy in October 2000, on issues relating to competition and electronic commerce (attached).

Process E-commerce Issues

The Secretariat's paper identifies a number of significant process e-commerce issues principally relating to the telecommunications infrastructure. Basic telecommunications and value added services provide the necessary infrastructure for the delivery or transport of other goods and services, including via the Internet and e-commerce. BIAC strongly supports continued efforts to ensure effective liberalisation of basic telecommunications and value added services through the WTO. Effective liberalisation of basic telecommunications includes adoption of the WTO Reference Paper in its entirety. It is important to note that the application of the Reference Paper is limited to basic telecommunications and should not be applied to other services. Moreover, BIAC does not support re-opening of the Reference Paper. The best means of promoting increased competition to the local loop is through effective implementation of the WTO Reference Paper.

To that end, BIAC supports that all regulations on access to the local loop between basic telecoms providers be congruent with the international obligations as set forth in the WTO Reference Paper. Accordingly, interconnection to the local loop should be provided:



Business and Industry Advisory Committee to the OECD

Comité Consultatif Economique et Industriel Auprès de l'OCDE

Attachment to BIAC Statement of May 30, 2001

COMPETITION AND E-COMMERCE

Statement of the Business and Industry Advisory Committee (BIAC) to the OECD to the OECD Committee on Competition Law and Policy

October 16, 2000

General

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

Transactional Issues - Exchanges

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

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

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

B2B exchanges allow multiple business buyers and sellers to conduct on-line purchase and sales transactions over the Internet. The benefits of exchanges are clear: B2B e-commerce promises enormous efficiencies through significant reductions in transaction costs and economies of scale, allowing companies to achieve much greater productivity. B2B exchanges are expected to cut costs for buyers and provide more customers for sellers, leading to enhanced competition and lower consumer prices. Efficiencies have likewise been found to result in significantly reduced procurement cycle times.

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

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

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

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

Types of Exchanges:

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

1. *Auction sites* are those in which buyers or sellers bid competitively to buy or sell particular products. Auctions, which may take several forms, including "traditional," where competitive bidding by multiple buyers moves the seller's prices upwards, or "reverse," where sellers bid against each other to sell products to buyers in response to requests for purchase, resulting in price deflation. These sites often serve particular industries. Examples of this type of site include: www.e-steel.com (steel), www.paperexchange.com (paper), www.worldcatch.com and www.gofish.com (fish and seafood).
2. *Catalogue sites* offer a variety of products from multiple vendors in a standardised format so that prospective buyers in different industries can easily compare the available offerings

3. *Aggregator* sites typically allow competing sellers or competing buyers to offer to sell or buy products or services at individually specified prices and, in the case of more complex products or services, allow individual buyers to negotiate specific terms of the transaction. Examples of such sites include: www.e-chemicals.com (industrial chemicals), www.medibuy.com (healthcare supplies), www.commerxplasticsnet.com (plastics), www.metalsite.com (steel and metals).
4. *Trading hubs* typically include buyers and sellers in multiple industries and thus do not necessarily focus on some well-defined set of competing sellers or competing buyers. Examples of such sites include: www.freemarkets.com, www.shop2gether.com, www.energygateway.com, www.axesoenergia.com.
5. *RFP sites* typically permit sellers and buyers to post requests for proposals, and negotiate transactions off-line. Example include: www.catex.com (insurance), www.it-radar.com (computer services), www.mondus.com (business supplies).
6. More generally classified B2B exchanges include buyer exchanges or sourcing networks, supplier marketplaces, and neutral sites or hubs.

Benefits of Exchanges

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

General Benefits:

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

Buyer Benefits:

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

Supplier Benefits:

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

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

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

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

II. Infrastructure Issues: Joint Ownership of ISPs and Major Content Providers:

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

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

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

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

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

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

III. Other Comments

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

IV. Additional Issues for Discussion

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

1. Under non-discriminatory terms, conditions (including technical standards and specifications) and at rates of a quality no less favourable than that provided for its own like services or for like services of non-affiliated services suppliers or other affiliates;
2. In a timely fashion, on terms and conditions (including technical standards and specifications) and cost oriented rates that are transparent, reasonable, having regard to economic feasibility, and are sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and,
3. Upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

It is important to note that the liberalisation of other sectors is important to ensure the continued growth of electronic commerce and the development of the necessary infrastructure for it, and Governments should refrain from imposing barriers on electronic commerce both domestically and in the context of international trade. With this in mind, Governments should review their laws to determine whether they do have a negative effect on electronic commerce, and remove such barriers. The OECD has been playing a positive role in identifying barriers, for instance, to the use of electronic signatures through the Electronic Authentication Expert Group, and similar exercises should be encouraged.

While these telecommunications issues are important, we also note that there are other potentially significant infrastructure issues related to the growth of e-commerce. For example, liberalisation in energy services. In many countries, access to a consistent and reliable supply of energy at reasonable market based prices can affect investment decisions relating to telecommunications infrastructure, and development of exchanges relying upon that infrastructure. Similarly, access to financial capital is a crucial component to research and development of infrastructure.

Finally, the Secretariat's paper asks whether there are sufficient safeguards against vertical anti-competitive arrangements, especially between ISPs and content providers, and what further steps should be taken, including through international trade agreements, to increase such competition. BIAC, in its submission for the October 25, 2000 OECD CLP Roundtable on Competition and Electronic Commerce, presented two general views on this within the business community. Given the complex and evolving nature of this issue, BIAC agrees with the Secretariat that it would be premature to seek new international disciplines to address these concerns at this time.

Transactions E-Commerce Issues

At this stage, it is probably too difficult to discern with any degree of precision, the precise extent to which differences in national competition laws applying to things like discounts, resale price maintenance and exclusive territories affect the growth of e-

commerce transactions. However, as greater attention is brought to this issue by both public and private parties in the analysis of actual transactions it is possible that problems may appear. With respect to exclusive territory contractual agreements, it may be the case that in an on-line setting, these are more difficult to enforce for technological and other business reasons notwithstanding economic arguments about *intra-brand* and *inter-brand* competition. That said, to the extent that a firm decides to use a territorial restraint in the context of on-line commerce, existing conflicts in legal analysis could have a chilling effect on the growth of e-commerce transactions.

A distinction must be drawn between various types of e-commerce transactions. Some involve the sale of physical goods and services that need to be shipped or provided separately. Others involve transactions that take place entirely on-line. It is fair to say that existing regulatory barriers related to taxation, customs clearance, the movement of key people, etc. can have a profound effect on the provision of goods and services in both the B2B and B2C contexts where the logical and physical worlds of commerce intersect. The Secretariat's paper identifies a number of important issues to be addressed to ensure that parcel delivery charges are competitively priced and customs clearance procedures are made more efficient.

Regulatory Barriers

With respect to the issue of regulatory barriers, an issue of importance to this discussion, is the topic of self-regulation. There are numerous market driven self regulatory initiatives relating to e-commerce, which dispense with the need to introduce potentially competition reducing regulation. It is important to consider the positive impact of self regulatory codes and on-line dispute resolution systems with respect to their positive impact against anti-competitive behaviour in the context of e-commerce.

To promote the growth of E-Commerce, governments must co-ordinate relevant supporting policies such as taxation, intellectual property rights protection, the recognition of electronic documents, and adhere to international principles such as transparency and non-discrimination.

Moreover, governments should remove barriers in other areas that inhibit international harmonisation: for example, restrictions on trans-border data flows. In such circumstances, governments should be encouraged to refrain from unduly interfering in the marketplace. Where government intervention is unavoidable, it should be limited to achieve essential, well-defined public interest objectives.

Additional Issues for Discussion

BIAC strongly encourages continuing discussion of competition and e-commerce issues in the OECD CLP, and would appreciate the opportunity to contribute to the development of an agenda for further meetings.