

B2B Exchanges and the Myth of Perfect Transparency

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(Published in *Gaceta Jurídica de la Unión Europea y de la Competencia*, Madrid, June 2001)

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1. INTRODUCTION

After the explosion of the dot-com bubble, the business to business market has been one of the few e-commerce sectors that have managed to keep investors' interest alive. The reason can be attributed in part to the fact that b2bs are often joint ventures made of companies with large installed client and financial bases in their traditional markets, so that they are viewed as being born with higher prospects of success.

The Internet provides an obvious medium for massive information flows and increased transparency. Access to all information about the market is one of the key features of "perfect competition" in classic economic theory. Nevertheless, the immediate access of companies

to information about the offers of competitors, coupled with the tendency to concentration amongst companies generated by b2bs, result in a big potential for the presence of anti-competitive behaviors.

Resorting to traditional antitrust rules can prevent many of the risks caused by b2b exchanges. This short paper summarizes some of the experience accumulated by the US Federal enforcement agencies (Federal Trade Commission, "FTC" and Department of Justice, "DOJ") and the European Commission, in the field of information exchanges, which may be useful to assess some of the problems encountered in b2bs.

The scope of this paper is limited to one particular aspect of the analysis of b2bs: the increase in transparency resulting from the access that b2b participants may eventually have to information about other competitors. The first part of the paper provides a brief description of the b2b phenomenon and its economic implications. A competitive analysis of information exchanges in the b2b context follows.

2. BUSINESS MODELS OF B2B EXCHANGES.

2.1 Types of Electronic commerce. Economic Importance of B2b Exchanges.

(a) Electronic commerce targeted at consumers ("b2c" and "c2c").

The commercial exploitation of the Internet brought the beginning of electronic commerce targeted at consumers or "business to consumer" (b2c). In the second half of the 90's, electronic commerce of business to consumers was carried to both sides of the Atlantic at a feverish rate. Despite the financial failure of many of these "start ups," we can now look backwards and acknowledge the great contribution of many of these start-ups to the creation of new technologies and ideas.² B2c e-commerce evolved in some cases to "consumer to consumer" (c2c), which serves as marketplace for transactions between consumers (eBay).³

(b) Electronic commerce targeted at companies ("b2b").

B2bs serve as hubs for economic transactions amongst businesses. Recent years have seen a surge in the creation of b2bs in the vast majority of business sectors such as energy, parts, construction, food, transportation, airlines, automobiles and office supplies. The b2b transactions in the United States, the principal home base of the virtual economy, represent today 79.2 % of the spending on electronic commerce, which should rise to 87% by 2004.⁴ These estimations for sectors are encouraging for b2b commerce.

- (c) Electronic commerce targeted at firms that engage in public procurement (business-to-government, "b2g").

Interested firms could log into a b2g site in order to obtain centralized and updated information on public tenders with any administration (European Union and international organizations, States, Independent Communities and even remote municipalities). Another service rendered by b2gs is the "government e-procurement", which objective is the channeling of services or sales of supplies in ways comparable to those taking place between private firms.⁵ According to recent estimations, b2g exchanges will increase their combined turnover from 1.5 million dollars in 2000, to 6.2 million in 2005.⁶

2.2 Types of B2bs.

One frequently used classification distinguishes between horizontal and vertical b2bs. Horizontal b2bs are targeted at a variety of industries (for example, b2bs for sales of aluminum for automotive, aeronautical, and electric companies in all the phases of production and sales). Vertical b2bs are targeted at particular industries (b2b for the sale of automotive parts to automotive assembly plants). Horizontal b2bs tend to be active in a wider field, whereas vertical b2bs normally offer more specialized web page contents.

In the FTC sessions held during the summer of 2000 there was also a mention to diagonal b2bs. These are targeted at a particular type of buyer and product in a variety of industries (for example, the sale of parts of combustion engines made for *(i)* auto repair and maintenance companies *(ii)* airplane repair and maintenance companies and *(iii)* boat repair and maintenance companies).

Another common distinction deals with the ownership structure of the b2b. B2bs may be independent⁷ or owned by the companies that do business in the “non-virtual” market place.⁸ Regarding membership, b2bs might either be closed or open to free admission to all members of a given industry. The latter bear a generally lower level of antitrust scrutiny.

2.3 Tasks undertaken by B2b Exchanges.

The most obvious purpose of the b2b markets is the centralization of information about supply and demand in one unique website regarding:

- (i) Products offered and / or demanded.
- (ii) Prices, terms and conditions.
- (iii) Information about previously made transactions, with access to personal data and or statistics that create the profile of each buyer.
- (iv) Information about discounts and benefits applicable to each specific buyer in accordance with his profile and commercial history.
- (v) Information about existing terms for the transport of the product or the borrowing of its services.
- (vi) Information about the status of orders.

2.4 Efficiency Gains attained through B2bs.

B2b exchanges can substantially improve production and marketing processes and reduce transaction costs. For example, the cost of time and work in identifying the best seller or buyer is reduced drastically with unified access to all or a great portion of the available offer or demand. In the world of b2b, companies need not have employees working full time interacting with other employees of other companies. Demanded products can be processed directly online, substantially reducing search, telephone, fax and transportation costs of salespeople.

Information is thus bound to flow freely within b2bs and between b2bs and their members. To the extent that information works as an

instrument of competitive coordination its exchange also needs to be carefully monitored.

On the other hand, an increase in market power on the demand side can result in efficiencies.⁹ For example, it will be feasible to aggregate several minor orders, allowing larger manufacturers to sell to small companies that get together for the purpose of obtaining quantity rebates.

The issue of the efficiencies is key to the competitive analysis of b2bs. Neither the FTC, DOJ nor the European Commission want to be perceived as obstacles to the substantial economic benefits that are expected of b2b exchanges. Therefore, their decisions are so far permissive of b2b markets, although they leave fundamental questions open in what may be thought to be a move to retain a wide scope for future action.¹⁰

3. TRANSPARENCY, CONCENTRATION AND COMPETITION.

3.1 General Consideration on the Economic Impact of high Transparency.

Information about prices and other conditions such as rebates, sales, transaction costs, terms of sale, etc. can be found in an immediate fashion through access to a b2b exchange. Thus, generally speaking b2b exchanges are bound to increase transparency in the market.

When viewed from the demand side, the increase in transparency is clearly procompetitive. The enhanced access to information gives buyers more choice and increases competition amongst sellers. On the other hand, sellers have sound business motivations to be listed as active sellers in b2b exchanges because they do not want to be left aside from the b2b marketplace.

However, a dramatic increase in transparency can have a negative competitive impact when viewed from the supply side. Any effort to reduce prices or introduce new rebates can easily be duplicated by competitors. The result may be that incentives to execute aggressive pricing policies are substantially diminished.¹¹

In this environment of diminished incentives to price aggressively, incentives to reach price fixing agreements with competitors to compensate the effect of transparency are substantially higher.

One clear example of the effect described can be found in the leading *UK Tractor* case.¹² In this case, the European Commission shows its concern because an exchange of information among competitors (a rise in the transparency on the supply side) can reduce the incentives to competition and increase the desire to create conditions of competition different from those existing in normal market conditions.

3.2 Relationship between Increased Market Concentration and Transparency.

The risks of excessive market transparency, as well as the risks of competitive coordination are clearly higher in concentrated markets.¹³

In concentrated markets, it is much easier for a b2b to aggregate a substantial part of the supply. Additionally, the analysis on incentives and disincentives described in point 3.1 above is significantly altered in fragmented markets. The monitoring costs of ensuring that the members of a cartel comply with the agreement are substantially higher in a fragmented market. In the fragmented market it is normally easier for a given company to sell through alternative channels at cheating prices. In that scenario, fragmented markets are more prone to competition and cartels are bound to be less stable than those in concentrated markets.

The analysis of the administrative practice of the European Commission confirms that the concern related to the increase in transparency is restricted mainly to highly concentrated markets.¹⁴ B2b exchanges are likely to increase concentration in the market. Firms that jointly participate in b2bs are more likely to discover synergies and other business motivations for concentration. The growth of concentration in the distribution sector will be quicker if the b2bs are set up as purchase or sales joint ventures with exclusive dealing obligations. If the forecasted gains in efficiency are realized, the success of b2b exchanges will generate a substantial transfer of sales from the traditional channels of sale to b2b markets, and from the b2bs with less traffic to those with more traffic. B2b exchanges generate network externalities that attract more clients to those b2bs that already have a bigger client base. Therefore it is rational to expect a general dual trend in market concentration, derived from (i) the channeling of the sales through b2b rather than through traditional means, and (ii) consolidation into a reduced number of exchanges.

High barriers to entry represent another factor to be taken into account in the competitive assessment of information exchanges. Even if the entire supply of a particular market were channeled through a single B2b, the reasons for concern would be much lower if barriers to entry are low. If barriers are low, the firms that are participating in the b2b are aware that if their prices are supracompetitive, new competitors will immediately appear, ready to sell at a competitive level. On the contrary, if barriers to entry are high, members of the b2b exchange would be isolated from potential competition and could charge supracompetitive prices in an unchecked manner.

The practice of the European Commission in the matter of information exchanges permits the identification of the following entry barriers:

- (i) High fixed costs. Frequently initial investments are sunk, so that new entrants must face investments already incurred by incumbents.
- (ii) Overcapacity. The existence of overcapacity reduces notably the incentives of new competitors to enter the market.¹⁵
- (iii) High brand fidelity.¹⁶ When it exists it will be more difficult for new companies to find clients, who will be prepared to pay much higher prices as long as they remain bound to traditional providers.
- (iv) Market for the replacement of older products as opposed to market for new products. In the Decision *UK Tractors* the Commission made clear that clients in the relevant market buy with the purpose of replacing old tractors. The market of first time buyers is reduced.
- (v) In the *UK Tractors* Decision the Commission is concerned that the information exchange arrangement acts in itself as a barrier to entry. The Commission's concern stems from the fact that the information sharing allowed participants to identify potential entrants and adopt measures against them.
- (vi) Distinct regulatory environments may be a considerable, although rarely insurmountable barrier.

4. INFORMATION EXCHANGES IN THE CONTEXT OF B2B EXCHANGES. WHICH EXCHANGES ARE PERMISSIBLE AND WHICH SHOULD BE AVOIDED.

Fluid exchange of information is one major commercial attractive of b2b exchanges. An assessment of particular information exchanges as analyzed by the European Commission follows, seeking to provide some guidance on the kind of information exchanges that have posed concerns to the EU competition authorities.

4.1 Exchanges of Information Analyzed by the European Commission.¹⁷

4.1.1 *Information of abstract character versus individualized information.*¹⁸

Information exchanges and processing of general production and sales statistics are permitted, provided that the resulting statistics do not allow firms to identify individual competitors.

The company in charge of managing the b2b exchange may collect data for the gathering of general statistics provided that the companies members of the b2b exchange are barred from accessing the individual information provided by the rest of companies members of the b2b.¹⁹

4.1.2 *Actual versus historic information.*

The exchange of historic information that no longer reflects the competitive behavior of the competitors is permitted. When the information is historical, the European Commission even allows the exchange of data with a high level of detail permitting the identification of specific competitors. The Commission considers information that is more than one year old to be historic.²⁰ Nevertheless, the Commission has also declared that the exchange of historic information combined with other shared information permitting the identification of current competitive behavior of parties is forbidden.²¹

Thus, exchanges of current abstract information or historic information that does not permit the identification of current market positions or strategies of the parties seem to be permitted.

4.1.3 *Frequency of the information exchanges.*

The more frequent the information exchanges, the higher the antitrust risk. Particularly, the exchange of current information every four months, in combination with the exchange of historic information, has been considered illegal because it would permit the identification of individual firms.²²

4.1.4 *Information concerning prices and contractual terms.*

Information on prices and contractual terms is considered sensitive. Its exchange remains completely prohibited unless it is historical. This heading includes information related to price policies, price lists, discounts, sale conditions, general and particular conditions of sale.²³

Likewise, information exchanges relative to production costs are forbidden.²⁴

4.1.5 *Information related to production, sales and stocks.*

The exchange of information related to individual and current data about production levels of competitors will normally be considered illegal because it provides a good picture of the competitive status and foreseeable strategy of the firm. The prohibition includes the following types of information: products and amounts produced, level of inventories, production forecasts, purchase orders, predictions or estimates regarding the expected demand, production costs, sales figures, exported quantities, supplies.²⁵

4.1.6. *Information concerning market positions, investments and business secrets.*

The current exchanges of information related to client preferences, market shares, market positions, production plans, commercial strategies, management, research and development, and in general the exchanges of sensitive information about products and markets, should be considered prohibited.²⁶

4.1.7 *Information Exchanges related to Public Tenders.*

No exchange of information should disclose to competitors whether or not a firm intends to participate in a public tender. Likewise, the exchange of information about sealed conditions offered by competitors in a tender is prohibited.²⁷

This particular type of information exchanges is especially relevant to the formation of b2g markets.

4.1.8 *Vertical information exchanges.*

Information that flows from below to above (e.g. from distributor to supplier) rather than horizontally (between competitors) has been subject to scrutiny. The European Commission has shown concern that these information flows help suppliers to impose resale conditions or to implement market partitioning strategies contrary to the general common market policy goals. Thus, in spite of the fact that suppliers and distributors are not competitors, the following information exchanges should be carefully reviewed:

- (i) Obligation on the part of resellers (when buying firms are not end users) to provide information about resale prices and conditions. Therefore the introduction of an electronic field on the web page of a b2b soliciting from the distributor information about resale conditions could amount to a high antitrust risk.²⁸
- (ii) Obligation on the b2b exchange to share with member companies information provided by downstream firms. Careful assessment is required because, even if suppliers and distributors are in a vertical relationship, the information could be used by suppliers to adjust their competitive behavior or to implement market forbidden geographic restrictions.²⁹

4.2 Information Exchanges under US Antitrust Law.

Antitrust analysis of information exchanges should be somewhat more benign in the US under the effect of the rule of reason, often more flexible than the sometimes rigid category approach traditional in the EU. The use of the rule of reason leaves a wider scope for a permissive assessment of certain information exchanges.³⁰

The legal assessment of particular types of information exchanges in the US does not differ substantially, however, from that applied in the EU. The reason seems to lie in the fact that US case law on information exchanges has normally dealt with exchanges of very sensitive information in concentrated markets, making it difficult to distinguish the information exchange itself from a naked cartel.

The US Supreme Court has authorized exchanges of abstract information in order to elaborate statistics or historic information and has prohibited information exchanges which ultimate purpose is the execution of price fixing agreements.³¹ The Health Care Statements provide a good example of the DOJ and FTC's practice.³² In the *Health Care Statements*, the agencies subject information exchanges related to tariffs to the following conditions, which as can be seen, bear considerable resemblance to those required by the European Commission:

- (i) The collection is managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association).
- (ii) The information regarding tariffs that is supplied to competitors should be at least three months old (the European Commission requires one year, section 4.1.2, above)
- (iii) For any information that is available to the providers furnishing data, there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than 25 percent on a weighted basis of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

5. AVOIDING TROUBLE WITH COMPETITION AUTHORITIES. SOME PRECAUTIONS.

Electronic commerce, and in particular b2b commerce, generates a substantial increase in transparency in the markets. As has already been observed, however, perfect transparency in concentrated markets may cause serious competitive risks. Therefore, a key question lies in how to structure the creation of b2b markets within concentrated markets in order to avoid potential anticompetitive situations while maintaining the efficiencies derived from b2bs.

An "anonymous" b2b design, similar to a securities market, would avoid most of the concerns related to information flows. Potential buyers and sellers would interact anonymously, without disclosing the identity of specific supplier or buyer. This model could be suitable for commodities markets provided the potential buyers are not interested in the identity of the supplier.

Where the identity of suppliers is relevant, some technical barriers (software design) and legal safeguards (confidentiality clauses) could be established to ensure that information exchanges comply with the antitrust requirements.

(i) Corporate Firewalls and other electronic measures.

Included in this category are the technical measures that protect the commercial data of the b2b, so that only certain accredited, previously identified buyers can access these data, rather than anyone accessing the webpage. These electronic measures guarantee that sensitive information concerning commercial offers cannot be easily accessed by competitors.

Technical measures included in this heading include access codes and user recognition software.

Another measure aimed at elimination of unwanted information leaks is to ensure that participating companies do not give out software or technology codes used by the b2b. For this purpose it may be convenient to assure that the software has been developed by an independent company which is barred from sharing that software with unauthorized parties.

(ii) Confidentiality obligations.

- Letters of confidentiality of negotiations held for the creation of the b2b.
- Confidentiality obligations binding the workers employed in the b2bs, especially when the workers are working on the b2b on temporary assignment from the parent companies.
- Confidentiality agreements between the b2b company and the parent companies relating to the nature of information supplied to the participating companies. In particular if the b2b is expected to reach a substantial share of the relevant market, it may be convenient to tailor information exchanges taking into account the guidelines and practice of the agencies.

Washington, D.C., April 2001

Annex: Estimated B2b Sales

INDUSTRY	2000	2001	2002	2003	2004	Online Sales as a Percentage of Total Sales, 2004
Hardware and Electronic Products	230.2	343.3	427.3	506.2	592.9	40%
Motor Vehicles	35.1	90	190.2	311.5	411.5	26%
Petroleum and Derivatives	27	53.9	103.2	184.5	299.2	17%
Electricity, Gas, Water, Telecommunications	29.9	56.5	101.3	170.1	266.4	17%
Paper, Office Supplies	14.4	33.7	73.9	143.5	235.3	24%
Consumption Products	13.2	28.1	58.5	116.5	216.5	13%
Food	22.5	41.2	73.9	128.1	211.1	12%
Construction	6.3	15.1	34.6	74.2	141	10%
Medical and Pharma Products	4.3	10.7	26.2	60.2	124	14%
Industrial Goods and Supplies	7	13.1	23.8	41.9	70.3	7%
Transports and Storage	4.6	10.5	22.4	42.5	68.1	20%
Aeronautic and Defense Sector	9.1	15.8	23.1	29	32.9	15%
Heavy Industries	2.6	4.8	8.6	15.3	26.5	3%
TOTAL	406.2	716.6	1166.9	1823.4	2695.5	17%

Source: Wall Street Journal, 17 April 2000. Figures indicate US \$ Billion.

¹ Attorney, Arnold & Porter, Washington, D.C. I am grateful to Robert Mascola, of Arnold & Porter, for his comments in the revision of this paper.

² The efforts to achieve the best technology gave rise to legal controversies of considerable importance. For example, there has been an ongoing discussion about business patent models (the first legal decision in which the validity of these patents is confirmed is *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* US Federal Court of Appeals, Federal Circuit, 1998, 149 F. 3d 1368, 47 USPO 2d 1596), consisting of the possibility of patenting a method of business (*single click* of Amazon, *reverse auction* of Priceline). These patents have been much criticized because they bestow upon their owners an exclusive right which has been considered by some people too broad and difficult to justify by sufficient inventive effort. Think also about controversies such as the "open source", privacy in the Internet and so many others which study should provide topics of legal scholarship for years to come.

³ Soon new variants of b2c and c2c were born: the "aggregators", consolidating the offer of several b2c, c2c or b2b sites. See, for example, www.agentbuilder.com/Documentation?appnote?buyerSeller.html and www.rusure.com. *Bots* raised concern amongst some e-commerce operators such as eBay, who feared free riding on the part of these new websites, and gave way to new legal battles. Some argued that displaying of prices contained in e-commerce sites might be a breach of the IP rights. This argument was soon dismissed, though, because it does not seem that mere prices may be entitled to IP protection in the absence of a specific presentation or a layout in the form of a database. Some tried to make an analogy comparing the retrieval of price data from e-commerce sites for comparison with other price data, to unauthorized intrusion and the right of exclusion of an owner of a shop with respect to his clients (*Mosher, appellant v. Cook United, Inc. Hudson Food Warehouse Corp.*, Appellee et al. No. 79-1129, 62 Ohio St. 2d 316).

⁴ E-commerce Times Newsletter, January 5, 2001.

Salomon Smith Barney, a business bank, estimates that the b2b sector could reach between 1 and 2 trillion (European billions) of American dollars in stock-market capitalization. The new quoted b2b companies will fit into 4 categories: (i) Internet companies that employ a virtual method for developing new forms of business; (ii) Internet companies that reemploy traditional intermediaries or eliminate their necessity; (iii) traditional companies that translate their business models into a virtual method; (iv) companies specialized in satisfying the new demand for informed applications for the b2b (b2b E*Commerce, a Vertical and Horizontal Perspective. A White Paper on the b2b e*Commerce Industry. Salomon Smith Barney, January 18, 2000). See also attached table at the end of this paper.

⁵ Government could benefit of the efficiency gains attained by electronic marketplaces. However, rather inflexible public procurement rules existing in a variety of countries would have to be revised in order to take account of the new electronic means of transaction.

⁶ The Gartner Group, Itxpo 2000 symposium, San Diego.
<http://www.office.com/global/O,2724,800-18748,FF.html>

⁷ Examples of independent b2b markets: www.freemarkets.com, www.verticalnet.com (applications with ties to multiple b2bs, offering simultaneously software solutions and logistics for b2b markets); www.e-steel.com (industrial materials); www.guru.com; www.freelance.com (market of independent professional services).

⁸ www.buyproduce.com (perishable products); www.myaircraft.com (aeronautical industry); www.covinsint.com (automotive industry)

⁹ Excess concentration of market power in the demand side could give rise to monopsony problems. But these are outside of the scope of this paper.

¹⁰ For example, Commission Decisions of July 13, 2000, *Emaro*, case IV/2027, August 4, 2000, *Myaircraft.com*, case IV/M.1969 and from October 6, 2000, *Chemplorer*, case IV/M.2096. In the United States, the FTC has investigated, among others, the automotive sector b2b *Covisint* and has declared that, at least for the time being, the operation is permissible. Nevertheless the FTC declared that, in sight of the economic importance of the participants, they could not ensure that the operation was free of anticompetitive risks, leaving the door open for possible future action (FTC press release, September 11, 2000).

¹¹ B2b exchanges often deal with commodities, such as raw materials, parts, supplies and replacements, so that most often the main concern will be price competition, rather than competition on factors other than price.

¹² Commission Decision of February 17, 1992, OJ L68, confirmed by Decision of the Court of Justice of the EU of October 27, 1994, case T-34/92, ECR (1994) p. II-905.

¹³ A numerical definition of concentration level can be found in the 1992 Horizontal Merger Guidelines of the DOJ and the FTC, revised in April 1997. In these guidelines, the DOJ and the FTC use the Herfindahl-Hirschman index, that is calculated by adding the squares of the market quotes of the companies participating in the market. The market is a monopoly if the resulting sum equals 10000. If the resulting sum is greater than 1800, the market is very concentrated. If the resulting sum is less than 1000, the market can be regarded as not very concentrated. For example, a market with twenty competitors, each one having 5% of the market share, would have an HHI of 500, and would be considered a minimally concentrated market. On the other hand, a market with three competitors, two of which have 40% of the market share and one of which has 20%, would have an HHI of 3600, and would be considered a very concentrated market.

¹⁴ For example, Commission Decisions of May 11, 1973, *Kali un Salz*, OJ L217, May 15, 1974, *IFTRA Glass Containers*, OJ L160 July 27, 1994, *PVC*, OJ L239.

¹⁵ Commission Decision in the *PVC* case, cited.

¹⁶ *UK Tractors* Decision, cited.

¹⁷ The decisions referred to in this part are decisions ex article 81 (formerly article 85) of the EC Treaty. In the framework of concentration control it is expected that information exchanges may receive a benign character. However, when the exchanges have as their object sharing information of a sensitive character, they are likely to be barred by the Commission. The analysis described in this section, referred mainly to exchanges of "sensitive information" should be good for merger cases.

¹⁸ Paragraph 61 of the *UK Tractors Decision*, cited.

¹⁹ *UK Tractors*. In the United States there is a similar politic of tolerance with the exchange of abstract information.

²⁰ Paragraph 50 of the *UK Tractors* Decision, cited.

²¹ Paragraph 37 of Commission Decision of December 2, 1986, *Fatty Acids*, OJ L3.

²² Commission Decision of December 2, 1986, *Fatty Acids*, previously cited.

²³ Commission Decision of May 15, 1974, *IFTRA Rules on Glass Containers*, OJ L 160, paragraph 40; Commission Decision of July 15, 1975, *COBELPA*, OJ L 242, paragraph 29; Commission Decision of December 15, 1986, *X/Open Group*, OJ L 35.

²⁴ Commission Decision of July 15, 1975, *IFTRA rules – Virgin Aluminum*, OJ L 228.

²⁵ Commission Decision *Kali und Salz*, previously cited; Commission Decision on the *COBELPA* case, previously cited; Commission Decision on the *PVC* case, previously cited.

²⁶ Commission Decision of December 5, 1984, *Fire Insurance*, OJ L 35; Commission Decision on the PVC case, previously cited.

²⁷ Commission Decision of February 5, 1992, *Construction Industry in the Netherlands*, OJ L 92, paragraph 24. In this decision, the Commission considered the exchanges of information related to competing companies that weren't members of the information system anticompetitive.

²⁸ Commission Decision of June 12, 1982, *Hasselblad*, OJ L 161 and Decision of December 15, 1992, *Ford Agricultural*, OJ L20. Likewise, see Commission Decision of October 29, 1997, *Uniwold*, paragraph

²⁹ See *Hasselblad*, cited.

³⁰ The flexibility and business analysis applied by US courts is well illustrated by landmark cases such as *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 US 1. The US Supreme Court authorized joint marketing and joint pricing by music authors under "blanket licenses". The reasoning of the Supreme Court decision may be applied to certain types of "naked" or *a priori* restrictive information exchange agreements.

³¹ US Supreme Court in *United States in American Column and Lumber Co. v. United States*, 257 US 377 and *Maple Flooring Manufacturers Association v. United States*, 268 US 563. In the latter, the Supreme Court gave great weight to the competitor's intent. If the intention is not price fixing, the agreements are allowed. In *Maple Flooring* the agreements permitted are those which do not allow the identification of specific operators, a position essentially similar to that in existence under EC law. Information Exchanges intended to allow price fixing between competitors have been banned (*United States v. Container Corporation of America*, 393 US 333 and *American Column and Lumber Corporation v. United States*, 257 US 377).

³² DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care, 1993, revised.