B2B Web Sites, Antitrust Concerns, and the Rule of Reason

Michael E. Comerford
B2B WEB SITES, ANTITRUST CONCERNS, AND THE RULE OF REASON

MICHAEL E. COMERFORD†

INTRODUCTION

Recently, there has been a dramatic proliferation of Business to Business (B2B) Web sites.¹ B2B Web sites have been described as electronic marketplaces that utilize the Internet to electronically connect businesses.² The B2B venture brings together otherwise competing firms in order to build electronic exchanges.³ Electronic exchanges are software systems that enable buyers and sellers to purchase goods using industry-wide computer systems.⁴ The sites are formed because

† J.D. Candidate, June 2002, St. John's University School of Law; B.S., Rensselaer Polytechnic Institute.


² See Federal Trade Commission Staff, Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces, October 2000, Introduction, at 1 [hereinafter FTC Staff Report], at http://www.ftc.gov/os/2000/10/b2breport.pdf. Within the FTC Staff Report, B2Bs are defined as “electronic marketplaces . . . [that enable] transactions [to] occur online through the support of the Internet.” Id. pt. 1, at 1. The report, generated by the FTC staff, sought to provide a summary of a workshop held to discuss new B2B technology and also to provide an understanding of how traditional antitrust questions should be answered in the face of new B2B technology. See id. Introduction, at 2.


of the potential savings that will benefit both the participating businesses and the consumers of their products.\(^5\) "Almost every major industry has ventured into creating some type of B2B Internet marketplace . . ."\(^6\) The formation of B2B information exchange sites represents a potentially large part of the new Internet economy.\(^7\) This Note will focus on B2B Web auctions, where industries including automobile, airline, healthcare, and electricity are formulating reverse auctions.\(^8\) Reverse auctions are driven by buyers and allow multiple sellers to bid in order to provide products to individual buyers.\(^9\)

This large investment, by almost every major industry in the B2B Internet marketplace, has raised a number of concerns
within the field of antitrust law. The potential for collusion by B2B participants has been the chief anticompetitive concern addressed by commentators. The antitrust concerns of potential collusive behavior within the B2B marketplace are countered by the large procompetitive benefits that B2B electronic marketplaces bring to the Internet economy. Another potential anticompetitive antitrust concern raised by B2B electronic marketplaces may be characterized as exclusionary practices or limitations on participation. Such limitations on participation can consist of the preclusion of parties from participating in the B2B site, the exclusion of parties who join a B2B site from using other B2B sites, or agreement among competitors as to the manner in which they will deal with prospective B2B participants.

The collaboration to form a B2B site is generally viewed as a joint venture between competitors within a particular industry. As such, B2B Web sites should be viewed as "presumptively lawful." Where a B2B is alleged to have participated in anticompetitive conduct, antitrust analysis should fall under

---

10 See Joseph Guinto, Surging "B2B" Web Deals Draw Antitrust Scrutiny, INVESTOR'S BUS. DAILY, July 13, 2000, at A22 (discussing potential antitrust concern of illegal collusion among B2B participants); Matt Hicks, Fair Exchange? As the Big Boys Form B2B Exchanges, Some Fear Competition May Suffer, EWEEK, July 17, 2000, at 49 (noting that when competitors collaborate there is always the potential for antitrust issues to arise); Robert A. Schwinger, Antitrust Dark Side Lurking On Web? E-Commerce Sites Boon to Many, but What Is Effect on Competition?, N.Y. L.J., June 12, 2000, at S1 (stating that the threat that B2B Web sites may lead to illicit collusion has raised the interest of antitrust regulators).

11 See, e.g., Stoll & Goldfein, supra note 6, at 3, 6 (stating that there are concerns about the potential for formulating collusive price agreements through the instantaneous exchange of cost and price information).

12 See Jeffrey P. Weingart & Jennifer L. Gray, B2B Internet Marketplaces, NAT'L L.J., June 26, 2000, at B11 ("In theory . . . greater price transparency should reduce the costs . . . [of] negotiating . . . and should force firms to bid more aggressively, [thereby] bringing prices to their most competitive levels.").


14 See id.; see also FTC Enforcers, supra note 8, at aai (stating that B2B auctions will receive the same scrutiny from enforcement agencies as joint ventures). A joint venture is defined as "[a] legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit." BLACK'S LAW DICTIONARY 839 (6th ed. 1990).

section 1 of the Sherman Antitrust Act. As interpreted by the United States Supreme Court, section 1 analysis entails review of any alleged anticompetitive restraint to determine whether the "challenged restraint enhances competition." Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The United States Supreme Court's interpretation of section 1 has shaped the application of the Sherman Act within the field of antitrust law. The Supreme Court has developed two methods of analysis for conduct that allegedly violates section 1: a per se rule and a rule of reason. This Note will focus upon rule of reason analysis because its application has been expanded to include many types of business conduct alleged to have anticompetitive effects. Additionally, rule of reason analysis is used in reviewing most of the accusations of anticompetitive restraints that a B2B site might fall prey to under section 1. B2B Web sites are utilized as information exchanges, and one prominent use is the exchange of price and

17 15 U.S.C. § 1 (2000); see also FTC & DOJ, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 2 (Apr. 2000) [hereinafter ANTITRUST GUIDELINES] (explaining that "'competitor collaboration' [which is] comprise[d] [of] a set of one or more agreements ... between or among competitors to engage in economic activity, and the economic activity resulting therefrom [sic]," is to be analyzed under the antitrust guidelines), available at http://www.ftc.gov/os/1999/9910/jointventureguidelines.htm.


20 See James E. Hartley et al., The Rule of Reason, 1999 A.B.A. SEC. ANTITRUST 1 (discussing the development of antitrust law by the United States Supreme Court after the passage of the Sherman Act).

21 See id. at 1 ("[A] rule of reason that examines all the competitive effects of the challenged conduct before the determination of 'reasonableness' is made, and a per se rule that treats certain practices as being so clearly anti-competitive as to be conclusively 'unreasonable.'") (citation omitted).

22 See Thomas A. Piraino, Jr., Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act, 47 VAND. L. REV. 1753, 1754 (1994) ("[C]ourts have grown disillusioned with the absolutism of the per se rule and have been more inclined to consider efficiency justifications for competitive restraints.").

23 See Hartley, supra note 20, at 5 ("The Supreme Court has stated that the rule of reason is the 'prevailing standard of analysis,' and that the rule of reason is 'applied for the majority of anti-competitive practices challenged under section 1 of the Act.'") (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 59 (1977)); see also Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982); Broad. Music, Inc. v. CBS, 441 U.S. 1, 8 (1979).
cost information. Historically, under section 1, exchanges of price and cost information have been evaluated under the rule of reason.

B2B sites are given widespread attention by the media, as well as regulatory agencies, making it likely that allegations a B2B Web site is restraining competition in violation of section 1 will arise. The predominant issue then, is whether antitrust law can effectively analyze anticompetitive restraints under the rule of reason as interpreted by courts and regulatory agencies.

This Note asserts two conclusions. First, the rule of reason analysis is inadequate to review B2B ventures at this time. B2B Web sites are in their infancy and there is very little information on whether their overall economic effect will be procompetitive or anticompetitive. This lack of information is problematic, as rule of reason analysis is premised upon balancing anticompetitive effects on competition against procompetitive effects on competition. Each side requires economic analysis, and unless a court wishes to rely on economic theory and proceed with limited facts, B2B Web sites must be allowed more time to develop. Second, even when B2B Web sites do develop and there is greater certainty as to their economic effect on competition, rule

---

24 See Janet Kidd Stewart, The Middle Marches Toward the Internet; Distributors Add New Services and Create E-Markets to Ensure Survival in Uncertain Times, CHI. TRIB., May 14, 2000, at C1 (stating that prices for supplies will likely fall as cost information becomes transparent and purchasers are able to choose among different bids). The article further discusses how B2B Web sites may lead to the cutting of sales forces, distributors, and buyers. See id. These reductions according to the author will largely be due to reductions in costs related to purchasing. See id. The on-line electronic marketplace will lead to increased automation and the potential for reductions in warehousing as manufacturers become more efficient due to improved technology. See id.

25 See Stoll & Goldfein, supra note 6, at 3, 6 (stating that historically the exchange of price and cost information has been analyzed under the rule of reason when applying the Sherman Act); FTC Staff Report, supra note 2, pt. 3, at 5 (stating that agreements to share information are normally analyzed under section 1 utilizing the rule of reason).

26 The Federal Trade Commission has already completed an investigation into Covisint, the auto manufacturer's B2B Web site. See FTC, Covisint Letter, Sept. 11, 2000, at http://www.ftc.gov/os/2000/09/covisintchrysler.htm ("Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time.") (emphasis added). Although the site has been allowed to continue its operations, the FTC did express reservations about Covisint's future activities. See id.; Christopher Marquis, U.S. Approves Formation of Supply Web Site for Automakers, N.Y. TIMES, Sept. 12, 2000, at C1 (discussing the approval of Covisint by the FTC, but also stating that the FTC is unsure if implementation will cause competitive concerns).
of reason analysis will still be an empty test. This Note asserts that it is essential for the Supreme Court to guide federal courts and regulatory agencies by issuing specific guidelines on how to approach rule of reason analysis. In light of the lack of guidance from the Supreme Court in analyzing accusations of anticompetitive restraints under the rule of reason, determining what constitutes appropriate conduct in forming B2B Web sites remains unpredictable.

Part I of this Note discusses the judicial development of antitrust law over the past one hundred years. The history demonstrates how the Supreme Court has molded analysis of anticompetitive restraints under section 1 so that the prevailing standard is the rule of reason; however, the Court has failed to clearly explain how rule of reason analysis should be conducted.

Part II of this Note explains how the Supreme Court, circuit courts of appeals, Federal Trade Commission (FTC) and Department of Justice (DOJ) currently approach rule of reason analysis. Part III discusses the particular procompetitive benefits that B2B Web sites bring to the new hi-tech economy and how balancing competitive factors under the rule of reason is inadequate when attempting to determine whether an antitrust violation under section 1 has occurred.

I. THE DEVELOPMENT OF ANTITRUST LAW

The language in section 1 of the Sherman Antitrust Act encompasses all contracts, combinations, or conspiracies in restraint of trade. Historically, the Court applied a rule of per se illegality; however, in Standard Oil Co. v. United States, the Supreme Court ruled that section 1 governed only undue restraints of trade. The Court stated:

---

27 See Piraino, supra note 22, at 1754 (opining that the “rule of reason [analysis] has no substantive content”). Piraino states that rule of reason analysis is currently “one of the more vexing problems in antitrust law.” Id. at 1755 (quoting David A. Clanton, Horizontal Agreements, the Rule of Reason and the General Motors-Toyota Joint Venture, 30 WAYNE L. REV. 1239, 1249 (1984)).

28 See supra notes 18–19 and accompanying text.

29 See Hartley, supra note 20, at 35–36 (“The Court implicitly established a rule of per se of [sic] illegality by rejecting intent as a justification for the agreement ...”). The author was discussing United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the first substantive antitrust case decided by the Supreme Court. Id. at 34.

30 221 U.S. 1 (1911).

31 See id. at 59–60. The Court stated, “[Section 1] under this view evidenced the
It was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.\textsuperscript{32}

*Standard Oil* provided that in future cases courts should determine whether an alleged restraint on competition would be evaluated under the rule of per se illegality or the rule of reason.\textsuperscript{33} Examining the application over the past one hundred years of rule of reason analysis by the Supreme Court under section 1 demonstrates a blending of the per se and rule of reason analyses and indicates a lack of guidance from the Court for conducting a full rule of reason analysis.

In *Chicago Board of Trade v. United States*,\textsuperscript{34} the Supreme Court offered a list of factors to be utilized in rule of reason analysis that remains in use today.\textsuperscript{35} The Court stated that all agreements with respect to trade do restrain; thus, the question becomes whether the restraint promotes competition or suppresses competition.\textsuperscript{36} To determine, under rule of reason analysis, the effect a restraint has on competition, the Court listed the following factors:

[T]he facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. [Additionally,] the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained, are all relevant facts.\textsuperscript{37}

---

\textsuperscript{32} Id.

\textsuperscript{33} See Hartley, supra note 20, at 46 (explaining that *Standard Oil* established both the per se rule and the complete rule of reason test).

This Note focuses upon the rule of reason since most antitrust concerns expressed about B2B sites are likely to be evaluated under the rule of reason. See Stoll & Goldfein, supra note 6, at 3.

\textsuperscript{34} 246 U.S. 231 (1918).

\textsuperscript{35} See Hartley, supra note 20, at 102 ("[C]ourts still cite the original description of the rule of reason found in *Chicago Board of Trade*.").

\textsuperscript{36} See Chi. Bd. of Trade, 246 U.S. at 238.

\textsuperscript{37} Id. at 238.
These factors became guidelines for future judicial decisions when evaluating whether an alleged restraint was anticompetitive in its overall effect. Determining the degree of complexity to be applied under the rule of reason analysis, however, remains difficult.

The Court applied the *Chicago Board of Trade* factors in *Appalachian Coals, Inc. v. United States* using a rule of reason analysis. *Appalachian Coals* involved an allegation of price fixing by over 100 coal producers. The Court concluded that the agreement between the defendants was not an undue restraint on competition. Although *Appalachian Coals* is a clear example of how to apply the *Chicago Board of Trade* factors, the proper amount of analysis to be used in analyzing B2B Web sites accused of restraining competition remains unclear. Furthermore, it is uncertain whether the degree of analysis applied in *Appalachian Coals* is proper in every section 1 antitrust case. After *Appalachian Coals*, there was a period of approximately thirty years in which the Supreme Court focused upon the per se rule as the appropriate mode of analysis.

---


39 See *Clanton, supra* note 27, at 1249 (stating that determining how much analysis is needed under the rule of reason "remains one of the more vexing problems of antitrust law").

40 See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 361 (1933) ("[T]he application of the statute is [a question] of intent and effect, and is not to be determined by arbitrary assumptions."). In applying the rule of reason test, the Court looked at the following factors: the economic conditions within the coal industry, industry practices, defendant's plan for sales, why the sales plan was adopted, and the consequences of carrying out the sales plan on market prices and other factors. See id.

41 See id. at 357–58 (stating that defendants had formed "an exclusive selling agency" through which prices were to be fixed).

42 See id. at 375 (stating that the defendants had "no intent or power to fix prices," that many competitive opportunities remained in the market, and that there was no evidence to show a detrimental effect on competition within the market).

43 See Hartley, *supra* note 20, at 53 ("*Appalachian Coals* was clearly limited in its effect by the series of cases that followed."). After acknowledging *Appalachian Coals*, the author discusses the next prominent antitrust case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which displaced *Appalachian Coals* and provided a conclusive per se approach to judicial analysis during the post-World War II era. See id. at 54.
Rule of reason analysis became more prevalent after the landmark antitrust decision of Continental T.V., Inc. v. GTE Sylvania Inc. Continental T.V. marked the Court's initial willingness to abandon a per se rule that failed to conform to modern economic thinking. Continental T.V. involved a franchise agreement between a manufacturer and a retailer. The Court sought to determine the appropriate analysis under section 1 of the Sherman Act for the imposed restrictions. The specific dispute centered upon a claim that the defendant, Sylvania, was in violation of section 1 because it had entered into and enforced franchise agreements that prohibited the sale of its products from unauthorized locations. The Court revisited its decision in Standard Oil to determine whether antitrust analysis of vertical restraints should be under the rule of reason or under the per se rule. Upon concluding that the appropriate standard

Two decisions by the Supreme Court subsequent to Socony-Vacuum Oil illustrate when per se treatment is appropriate and, conversely, why rule of reason analysis has risen to be the prevailing method of analysis under section 1. In N. Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court established the presumption that there are "certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal." Id. at 5. The Court's statement helped show how a "bright-line test" of per se illegality can be useful where it is obvious that challenged conduct under section 1 is most likely harming competition and offering no benefit to consumers. See Hartley, supra note 20, at 55–56.

Nonetheless, certain doctrinal issues that arose around 1970 helped lead to the rise of rule of reason analysis. See id. at 61–62. These doctrinal issues focused on the illusory nature of per se rules, since deciding whether a restraint of trade was forbidden under section 1 often required characterization, labeling, and analysis. See id. at 61. These considerations lead to "the question of whether the per se rule and the rule of reason are two separate alternative modes of analysis; or, instead, the ends of a continuum." Id. (citation omitted). "The rise of rule of reason analysis . . . likely is linked to these doctrinal issues." Id at 62.

See Hartley, supra note 20, at 63 (stating that the Supreme Court retained both methods of analysis under section 1, but focused more on the question of whether a restraint would benefit or injure consumer welfare). Future cases raised numerous new questions, such as: "When should anticompetitive effects be presumed? When should defendants be allowed to show that their conduct is not harmful to competition? What justifications offered for a restraint are appropriate in evaluating a Section 1 claim? How detailed should the evaluation of such justifications be?" Id.

See Cont'l T.V., 433 U.S. at 37.
See id.
See id. at 40.
See id. at 49. The Court proceeded to compare the rule of reason and the per se rule, noting, "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." Id at 49–50. Citing Northern Pacific
was the rule of reason, the Court affirmed the decision of the court of appeals. The court of appeals had concluded that, given all the circumstances, the threat of competitive harm was not substantial enough to warrant per se analysis. In affirming, however, the Supreme Court went further and held that per se analysis was only appropriate in vertical restraint cases when "based upon [a] demonstrable economic effect." Continental T.V. has been described as "a watershed opinion" because a new approach to antitrust analysis was formulated, one which is followed to the present day. The opinion reinforced the notion that the rule of reason is the prevailing method of analysis under section 1. Additionally, the Court stated that analysis under rule of reason requires the fact-finder to weigh all the facts of a case to determine whether a restrictive practice imposes an undue restraint on competition. The case illustrated the judicial preference under section 1 for rule of reason analysis but failed to give anything but arbitrary direction on how to complete that analysis.

Judicial preference for rule of reason analysis under section 1 was reinforced by National Society of Professional Engineers v. United States, where the Court reviewed the historical
development of rule of reason analysis. The Court stated that the rule of reason required an analysis of facts relating to the business, the history of the restraint on competition, and why the restraint was imposed. Additionally, the Court stated that "[t]he Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has... been used to give the Act both flexibility and definition." As illustrated in the above cases, however, the rule of reason lacks definition beyond mere words, and questions remain concerning the degree of analysis to be utilized, and the particular factors to be considered, in determining whether a restraint unduly restricts competition.

In the mid 1980s, the Supreme Court reviewed three separate cases that highlight the inherent confusion surrounding analysis of alleged restraints under section 1. Each case was evaluated under the rule of reason. In NCAA v. Board of Regents of the University of Oklahoma, the Court held that the NCAA had unreasonably restrained trade with regards to the televising of college football games. Although the Court acknowledged that horizontal price fixing and output limitations are generally deemed to be per se violations, a per se evaluation was inappropriate in this case. Instead, rule of reason analysis was utilized because the Court felt horizontal restraints on competition were essential to the production of football games.

The Court stated, however, that regardless of whether the per se rule or the rule of reason is utilized, both retain the same

58 See id. at 687–92. The Court stated that under the rule of reason "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Id. at 691.

59 See id. at 692 (noting that these factors help to form a judgment about the competitive significance of the restraint).

60 Id. at 688.


63 Id. at 88.

64 See Bd. of Regents of the Univ. of Okla., 468 U.S. at 100. Horizontal price fixing is defined as "[a]greements between producers, wholesalers, or retailers as to sale or resale prices. Price fixing among businesses on the same level the effect of which is to eliminate competition based on price." BLACK'S LAW DICTIONARY 737 (6th ed. 1990).

65 See id. at 101–03 (describing the nature of college football and how it is governed by the NCAA).
inquiry: "[W]hether or not the challenged restraint enhances competition." The Court also stated that the per se rule and the rule of reason are utilized "to form a judgment about the competitive significance of the restraint." The preceding two statements seem to acknowledge the continued merging of the two initially separate lines of evaluation for alleged antitrust restraints.

Two noteworthy cases decided by the Supreme Court during the 1980s questioned the standard to be applied when analyzing group boycotts. Historically, group boycotts were evaluated under the per se rule. The Court decided, however, that in each case the facts should be analyzed under the rule of reason. Both cases seem to show the continued erosion of per se analysis under section 1 and the continued expansion of categories that fit within rule of reason analysis. Thus, it seems likely that competitive restraints attributed to a B2B Web site will be analyzed under the rule of reason; however, the amount of analysis and what factors should be utilized remains uncertain.

The most recent Supreme Court case to use rule of reason analysis was *California Dental Ass'n v. FTC.* The substantive antitrust issue was whether advertising restrictions adopted by the California Dental Association were unreasonable restraints on competition. The court of appeals held, as a matter of law, that "truncated rule of reason analysis" was sufficient to decide

---

66 Id. at 104. The Court noted that often no “bright line” separates rule of reason analysis from per se analysis because the per se rule may require substantial inquiry into relevant market conditions before a presumption can be formulated that anticompetitive conduct has occurred. Id. at 104 n.26.

67 Id. at 103 (citing *Natl Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

68 See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986); *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985). “Group boycott” is defined as a “concerted refusal by traders to deal with other traders.” *BLACK'S LAW DICTIONARY* 704 (6th ed. 1990). They may occur “when competitors combine to exclude a would-be competitor by threatening to withhold their business from firms that deal with the potential competitor.” Id.


70 See id. at 458–59 (noting that when the economic impact of a restraint is not immediately obvious, the restraint will be evaluated under the rule of reason); *N.W. Wholesale Stationers*, 472 U.S. at 296–97 (stating that expulsion from a wholesale cooperative does not always indicate anticompetitive effect and applying rule of reason analysis).


72 See id. at 759.

73 “Quick look” or “truncated” rule of reason analysis was introduced by the
whether the advertising restrictions were unreasonable restraints on competition.\textsuperscript{74} The Court, in determining what type of analysis was necessary, stated that the threshold issue was whether price and advertising were "sufficiently verifiable in theory and in fact" such that they fit within the general abbreviated rule of reason.\textsuperscript{75} Justice Souter stated that since each party had plausible competing claims as to the competitive effect of the advertising, abbreviated review was inapplicable.\textsuperscript{76} Based upon the current understanding of how B2B Web sites operate,\textsuperscript{77} abbreviated review would seem similarly inapplicable in this context.

Justice Souter explained, in dicta, some of the inherent difficulties in predicting the application of rule of reason analysis to alleged restraints on competition. He stated, "The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear."\textsuperscript{78} Furthermore, he underscored that "there is often no bright line separating per se from Rule of Reason analysis."\textsuperscript{79} Thus, with the application of either rule, the central inquiry is "whether or not the challenged restraint enhances competition."\textsuperscript{80} Justice Souter emphasized that there is a "sliding scale" nature to "appraising reasonableness" and it is essential that the logic behind a court's decision be explained

Supreme Court as a way to avoid the complicated uncertainty of rule of reason analysis. See Hartley, supra note 20, at 100. The essence of truncated rule of reason analysis was to find a way to streamline full rule of reason analysis. See id.

\textsuperscript{74} See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769 (1999). The Court noted that three prior cases had formed the basis for abbreviated or "quick look" analysis. See id. at 770 (citing Ind. Fed'n of Dentists, 476 U.S. 447 (1986)), NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984), and Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978)). The Court further noted that in each of these cases a person with "even a rudimentary understanding of economics could conclude that the arrangements in questions would have an anticompetitive effect on customers and markets." Id.; see also Hartley, supra note 20, at 101 (stating that truncated rule of reason analysis was recently limited in California Dental to situations where the "great likelihood of anticompetitive effects can easily be ascertained").

\textsuperscript{75} Cal. Dental Ass'n, 526 U.S. at 771.
\textsuperscript{76} See id. at 778.
\textsuperscript{77} See supra notes 1–15 and accompanying text.
\textsuperscript{78} Cal. Dental Ass'n, 526 U.S. at 779.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 780 (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984)).
within the opinion. Justice Souter's statements within *California Dental* exemplify the inherent confusion that surrounds rule of reason analysis. Although Justice Souter addressed the central inquiry under antitrust analysis, the opinion provides little guidance on proceeding with a B2B antitrust analysis. Justice Souter explained the central inquiry by stating that reasonableness should be analyzed with a "sliding scale," a term which is inherently ambiguous.

The preceding Supreme Court cases demonstrate that the prevailing standard of review under section 1 is the rule of reason. It is also clear that the central question under a rule of reason analysis is whether the restraint enhances competition or harms competition. Certainty and predictability for potential litigants appear to end at that point. Since *Chicago Board of Trade*, there has been little, if any, elaboration or innovation on how to analyze a restraint under the rule of reason. The two principal concerns that must be addressed are what factors are to be utilized for rule of reason analysis and how much analysis should go into a particular fact-finder's judgment.

II. DIFFERENT APPROACHES TO RULE OF REASON ANALYSIS

As a recent innovation in the Internet economy, B2B sites have raised concerns among antitrust regulators. If an information exchange is alleged to have facilitated illegal behavior, such as collusion, exclusion, or exclusivity, there are different approaches to antitrust analysis depending upon whether a court or an enforcement agency is reviewing the allegations.

A. Enforcement Agencies

Recently, the DOJ in conjunction with the FTC issued guidelines for collaborations among competitors. Although

---

81 *Id.* at 780 (quoting PHILIP E. AREEDA, ANTITRUST LAW § 1507, at 402 n.15 (1986)).
82 See *supra* notes 10–14 and accompanying text.
83 See ANTITRUST GUIDELINES, *supra* note 17.

This Note views the ANTITRUST GUIDELINES as the best current tool for B2B sites to follow since it is an official report. See FTC Staff Report, *supra* note 2, Introduction, at 1 n.1 (noting that the report only represents the views of the FTC staff and not necessarily the views of the Commission or of any individual Commissioner). The FTC Staff Report seeks to summarize what was learned at a public workshop held on B2Bs and to lay a foundation on how to answer traditional
B2B Web sites are not specifically mentioned, the publication is a useful guide because B2B sites will likely be treated as joint ventures. The publication specifically outlines how and why particular activities will be analyzed under the rule of reason standard. Section 3.3 of the guidelines illustrates the lack of predictability that accompanies rule of reason analysis. The guidelines state that rule of reason analysis focuses upon the state of competition with, for example, a B2B joint venture versus the state of competition without the joint venture. The central question for the FTC and the DOJ “is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.” Then, in an extremely general statement, the guidelines state that rule of reason analysis will entail a “flexible inquiry [that] varies in focus and detail depending on the nature of the agreement and market circumstances.” The guidelines further state that the inquiry will proceed only to the level necessary to make a decision on the overall competitive effect of an agreement, and that no one fact will be dispositive.

The Agencies start their analysis by examining the nature of the relevant agreement, determining its purpose, and deciding whether the agreement has caused anticompetitive harm. If there is an absence of market power and the nature of the agreement reveals no anticompetitive effect, then the inquiry ends. If there is an indication or likelihood of anticompetitive

antitrust questions. See id. Introduction, at 2. The report indicates the staff's hope that this foundation will serve to create further dialogue to promote both antitrust compliance and the potential efficiencies that B2Bs promise. See id.

See FTC Enforcers, supra note 8, at aai; Donovan, supra note 13, at 1 (stating that the DOJ/FTC guidelines, although not addressing B2Bs directly, are at this time the best source of guidance from the government).

See ANTITRUST GUIDELINES, supra note 17, at 3.

See id. at 10 ("Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.").

Id.

Id.

Id.

Id.

Id. (stating that the nature of the agreement enables the Agencies to determine what types of anticompetitive harms may be of concern).
harm, then the agreement is challenged by the Agencies.\textsuperscript{92} Since B2B Web sites have overriding competitive benefits, any alleged anticompetitive behavior requires a detailed market analysis.\textsuperscript{93} The approach suggested by the DOJ and the FTC is so general in nature that it leaves competitors that form B2Bs with no sense of predictability in a potential inquiry. Competitors do know that any inquiry will likely be completed under the rule of reason analysis. Since the inquiry under the rule of reason is “flexible,” however, B2B joint venturers do not know how to avoid an antitrust violation under section 1. Additionally, there is little predictability concerning the cost of litigation or whether they are likely to succeed on the merits.

B. Courts of Appeals

A second approach is one used quite often by the appellate courts.\textsuperscript{94} This approach requires a prospective plaintiff to show that an agreement, such as a B2B Web site, “had or is likely to have a substantially adverse effect on competition.”\textsuperscript{95} If the plaintiff meets this initial burden of proof, the burden then shifts to the defendant to show potential procompetitive effects of the alleged restraint in violation of section 1.\textsuperscript{96} The courts have acknowledged that valid procompetitive effects include agreements that facilitate the creation of a new product, expand output, or improve consumer choice.\textsuperscript{97} If each party sustains

\textsuperscript{92} See id. at 10–11.
\textsuperscript{93} See id.; see also supra notes 3–6 and accompanying text (discussing the contributions to the economy that B2B Web sites can make and the potential benefit to consumers).
\textsuperscript{94} See Stephen Calkins, California Dental Association: Not a Quick Look But Not the Full Monty, 67 ANTITRUST L.J. 495, 520 (2000) (stating that many courts of appeals utilize a burden-shifting model when analyzing restraints of trade under the rule of reason).
\textsuperscript{95} Id.; see also Hartley, supra note 20, at 104 (stating that a plaintiff can normally show an adverse effect on competition “in one of three ways: (1) by proof of a ‘naked’ restraint, such as price fixing...; (2) proof of an actual effect on competition; or (3) by proof that the restraint will create or contribute to the exercise of market power”). It is problematic that a “full-scale rule of reason analysis requires a detailed and exhaustive examination of the relevant market as a first step in evaluating the competitive effect of the alleged restraint.” Id. at 105. Such an approach would seem to increase the cost of litigation not only for the potential plaintiff, but also for the defendant, at the very outset of rule of reason analysis. Again, this provides a lack of predictability.
\textsuperscript{96} See Calkins, supra note 94, at 520.
\textsuperscript{97} See Hartley, supra note 20, at 117.
their initial burden, a court would then require the plaintiff to show that "the challenged conduct is not reasonably necessary to achieve the stated objective." If the preceding three steps are satisfied, a court would then balance the anticompetitive effects of a B2B Web site against the procompetitive benefits. This approach illustrates the lack of predictability and stability within the body of antitrust law under rule of reason analysis. In addition to the great expense to both parties, there is limited guidance on how the different factors will be balanced under rule of reason analysis.

C. Supreme Court

The third potential approach, as espoused by the United States Supreme Court, makes it clear that there is no true method to the rule of reason. The enunciation of the rule of reason begins and ends with Chicago Board of Trade. From the list of illustrative factors in Chicago Board of Trade, the Supreme Court has stated that a rule of reason inquiry asks "whether the challenged agreement is one that promotes competition or one that suppresses competition." The rule of reason has been viewed as "a vague listing of factors" that fails

---

98 Calkins, supra note 94, at 521. This provides a plaintiff with the "opportunity to demonstrate that there is an insufficient nexus between the restraint and the procompetitive effect." Hartley, supra note 20, at 121.

99 See Calkins, supra note 94, at 521 n.127 ("[T]he harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.") (quoting Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998)).

100 See Hartley, supra note 20, at 125 (pointing out that lower courts are often uncomfortable undertaking this balancing inquiry); see also Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 229–30 n.11 (D.C. Cir. 1986) ("[A]lthough it may be necessary to weigh procompetitive effects against anticompetitive effects, we do not think that a useable formula if it implies an ability to quantify the two effects and compare the values found.").

101 See Hartley, supra note 20, at 125 ("The Supreme Court has not provided practical guidance on how to perform the required balancing, the weight to be given various factors, or the analytical rigor with which the balancing must be done.").

102 See Calkins, supra note 94, at 520 (noting that theoretically, rule of reason analysis can be found in Chicago Board of Trade); see also Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918).

103 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978). The Court then stated that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Id. (quoting Chi. Bd. of Trade, 246 U.S. at 238).
to guide courts or litigants. The factors listed in *Chicago Board of Trade* generally lead to higher litigation costs since the rule of reason is normally applied in cases that have high financial stakes. Moreover, discovery can become ceaseless due to the very realistic chance of an unpredictable outcome. Faced with the apparent uncertainty surrounding Supreme Court precedent, the status of B2B Web sites remains unclear.

III. B2B WEB SITES UTILIZED AS INFORMATION EXCHANGES

This Note specifically focuses on the B2B Web site receiving the most attention from the FTC, Covisint. Three competitors in the automobile industry, Ford Motor Company, General Motors Corporation and DaimlerChrysler AG, announced the formation of the exchange in February of 2000. Each manufacturer had been planning to open its own individual proprietary trade exchanges when they decided to operate a single trading site. Given the amount of money involved, it seems reasonable for these competitive companies to join forces. In addition to the potential revenues that Covisint will generate, efficiencies will be found in price, service, and delivery.

The auto trade exchange has a stated two-pronged goal of primary concern: cutting costs through streamlining the purchasing process while letting suppliers leverage the auto-makers buying power for additional discounts. When viewing the auto trade exchange through an antitrust lens, procompetitive benefits are readily apparent, whether they are

104 Piraino, supra note 22, at 1754–55; see also Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12 (1984) (stating that the factors forming the basis for a rule of reason inquiry are empty formulations). Easterbrook states that when all factors are relevant “nothing is dispositive.” *Id.* Any factor might outweigh another, or one factor could outweigh all others. *Id.*

105 See Easterbrook, supra note 104, at 12–13 (stating that rule of reason formulations offer no help to a business planning its conduct and, therefore, can lead to ceaseless discovery within the course of litigation).

106 See Hicks, supra note 10, at 56 (stating that the auto-industry B2B marketplace, Covisint, is facing scrutiny).

107 See id.

108 See Paul, supra note 5.

109 See id. (estimating that when the joint venture goes public it will have a potential market capitalization of between $30 billion and $40 billion with annual revenues of around $3 billion).

110 See id.

111 See id.
for supply companies or individuals purchasing automobiles.\textsuperscript{112} Supplier savings have been estimated at $695 per car, while auto manufacturers project a savings of $368 per vehicle.\textsuperscript{113}

The B2B arena as a whole is certainly within its infancy. Very little is known about the long-term implications of the e-marketplace on competition.\textsuperscript{114} The FTC’s fixation on the B2B marketplace can be attributed to a variety of factors.\textsuperscript{115} These include the fact that a number of B2Bs represent big business and that a large number of B2B ventures “involve collaborative arrangements between horizontal competitors.”\textsuperscript{116} In addition, B2Bs are a new Internet-based platform, which is largely uncharted territory for regulators.\textsuperscript{117}

A. \textit{Present Developments of B2B Sites}

Currently, the FTC, DOJ, and other enforcement agencies should leave B2B information exchanges alone and proceed with an open mind.\textsuperscript{118} As stated earlier, a first step under rule of reason analysis is to define the relevant market through a detailed and exhaustive examination.\textsuperscript{119} It is highly unlikely that an enforcement agency or private plaintiff would be able to complete this type of evaluation since B2B Web sites are in their infancy and nobody has ever tried to define such a market. One initial question that might arise is whether the market should be defined by looking at the collaborating competitors or whether the B2B Web site should be the relevant market. The most important question is how B2B Web sites should be evaluated

\textsuperscript{112} See id. (noting that General Motors believes that the time it takes to produce an online car order can be reduced from forty-five days to ten days and that fast communication regarding the availability of and need for parts will ultimately lower costs).

\textsuperscript{113} See id.

\textsuperscript{114} See Schwinger, \textit{supra} note 10, at S1 (stating that the Internet and World Wide Web have been a “boon from an antitrust perspective” due to enhanced competition and new markets, but that concern has also arisen over whether B2B marketplaces may implicate antitrust laws).

\textsuperscript{115} See Jones Day, \textit{supra} note 1, at 2.

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} See id. (“In sum, the B2B buzzword is not a unitary concept, and it is simply not susceptible to ‘one-size-fits-all’ antitrust analysis.”). Based upon the results of the B2B public workshop hosted by the FTC and summarized in the FTC Staff Report, \textit{supra} note 2, enforcement agencies seem to be willing to wait and see how B2Bs develop before pressing forward with new regulations or litigation.

\textsuperscript{119} See \textit{supra} note 95 and accompanying text.
under section 1 of the Sherman Antitrust Act when there is greater economic certainty with respect to their effect on competition.

B. Future Concerns Regarding B2B Sites

One must first presume that a private plaintiff or enforcement agency will allege that a B2B Web site, such as Covisint, is engaging in behavior that restrains trade, thereby restraining competition, in violation of section 1. Such behavior would probably entail an allegation of either collusion or some type of limitation on participation within the particular B2B site. In the most recent decision from the Supreme Court, California Dental, the Court listed three methods for analysis under section 1, namely "per se," "quick look," and the "rule of reason." The Court recognized that "there is often no bright line separating per se from Rule of Reason analysis," because both may require a substantial inquiry into market conditions. As discussed, this Note starts from the premise that perceived restraints involving B2B Web sites will be analyzed under the rule of reason.

Initially, one must consider whether a court would utilize "quick look" rule of reason analysis or conduct a more detailed inquiry. Analysis utilizing "quick look," "truncated," or "abbreviated" rule of reason would be unlikely within the context of a B2B information exchange. This is a fairly safe conclusion due to the overwhelming consensus that B2B information exchanges offer economies of scale to the participants and therefore benefit consumers through cost savings. Because any anticompetitive concerns would face competing procompetitive benefits, a full rule of reason analysis involving a

---

120 See supra notes 10–11 and accompanying text.
122 See id. at 779.
123 Id.
124 See supra notes 22–25 and accompanying text.
125 See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999) (stating that when each party has competing plausible claims as to the competitive effects of an alleged restraint, abbreviated review under the rule of reason is inapplicable); see also supra notes 73–77 and accompanying text.
126 See Foster, supra note 6, at B3 (stating that federal regulators have not issued guidelines for exchanges to follow as they are fearful of stifling procompetitive behavior); see also supra notes 4–9 and accompanying text.
balancing test would be required.\textsuperscript{127} Based upon the decision in \textit{California Dental}, review under the rule of reason falls back to the essential inquiry: "[W]hether or not the challenged restraint enhances competition."\textsuperscript{128} In order to determine whether a restraint enhances competition, the Court would likely apply a heightened examination approaching a full rule of reason analysis.\textsuperscript{129}

As noted within Part II of this Note, the Supreme Court, courts of appeals, and the enforcement agencies, fail to present a uniform method of applying the rule of reason that would allow these types of analyses to have predictability and uniformity in terms of inquiry or outcome. Rule of reason analysis, therefore, seems filled with ambiguity and does not provide a solid foundation to combat restraints on competition.

The Supreme Court, in \textit{California Dental}, unanimously determined that a sliding scale approach to rule of reason analysis should be used.\textsuperscript{130} The overriding question, however, is how one predicts the outcome when employing rule of reason analysis based upon a sliding scale. Courts may follow Justice Breyer's dissenting opinion in determining whether a restraint violates section 1 of the Sherman Act.\textsuperscript{131} Justice Breyer suggested courts should ask "four classical, subsidiary antitrust questions: What is the specific restraint at issue? What are its likely anti-competitive effects? Are there offsetting procompetitive justifications? Do the parties have sufficient market power to make a difference?"\textsuperscript{132}

There are other innovative ways in which structure can be added before undertaking full rule of reason analysis.\textsuperscript{133} Easterbrook recommends using presumptions called filters.\textsuperscript{134} The first two filters would require a plaintiff to show that the

\textsuperscript{127} See Hartley, supra note 20, at 124 (stating that when the plaintiff has proven anticompetitive effects and the defendant has shown procompetitive benefits, the competing claims must be balanced).

\textsuperscript{128} \textit{Cal. Dental}, 526 U.S. at 780.

\textsuperscript{129} See id. at 779–81.

\textsuperscript{130} See Calkins, supra note 94, at 557 (pointing out that Justice Breyer, in his dissent, agreed with the majority that antitrust should employ a sliding scale for rule of reason analysis).

\textsuperscript{131} See id.

\textsuperscript{132} \textit{Cal. Dental}, 526 U.S. at 782.

\textsuperscript{133} See Easterbrook, supra note 104, at 14 (suggesting that courts should utilize simple presumptions as a way of adding structure to an antitrust inquiry).

\textsuperscript{134} See id.
defendant has market power and has the opportunity to enrich himself by harming consumers. If the court moved beyond the first two filters, the third filter would require the court to ask whether competitors in the industry utilized different methods of production and distribution. An answer in the affirmative to the third filter question would demonstrate that there was adequate competition. If not, the court would move to the fourth filter. The fourth filter would require the court to ask whether the evidence indicates a reduction in output. The fifth and final filter would require the court to ask whether the party that brought the lawsuit was a business rival, in which case, it could be inferred that the practice benefits consumers. Although these filters would not replace the need for a full rule of reason analysis in all cases, if applied, they would offer needed structure to the inquiry and thereby help eliminate uncertainty. Whether following the thoughts expressed in Justice Breyer's dissent in California Dental or using a filter approach, guidance is needed when attempting to evaluate the competitive effects of a restraint under rule of reason analysis.

CONCLUSION

B2B Web sites present a wonderful opportunity for the continued development of the American economy. There are estimates that B2B sites will generate trillions of dollars within the Internet economy over the next five years. In addition, business will be completed in an increasingly efficient way, forming the basis for a stronger free market economy. Increased efficiency promotes increased competition.

It is imperative that enforcement agencies and courts adopt structured principles when reviewing practices that restrain

---

135 See id. at 17–18. This would shift the focus initially towards an examination of whether the defendants had incentives to act in an anticompetitive way. See id. at 18.

136 See id.

137 See id.

138 See id. This inquiry would require determining whether there were changes in the output after the alleged practice was adopted and also whether the defendants' market share had been reduced or increased with the use of the practice. Id.

139 See id. (asserting that the fifth filter "uses the identity of the plaintiff to infer something about the consequences of the defendants' conduct").

140 See id. (noting that filters will lead to savings in litigation costs and will allow courts to focus attention on the more important issues).
competition under antitrust law. This Note asserts that whether or not a B2B site is restraining competition in violation of antitrust law, current analysis under the rule of reason is inadequate to determine the ultimate effect of the restraint. The Supreme Court should offer, at its earliest opportunity, meaningful guidance on how to employ rule of reason analysis. This will enable businesses to properly set up practices that do not violate antitrust law and decrease the huge sums of money spent litigating antitrust cases under the rule of reason.