Antitrust Review of New Economy Acquisitions

BY ILENE KNABLE GOTTS AND JOSEPH G. KRAUSS

Yes, it is undeniable and even cliched to say that the United States is enjoying unrivaled prosperity . . . . And at the heart of this prosperity is our leadership in the Internet and in the broad range of the computer and communications fields. Technological advances that our scientists, engineers, and entrepreneurs have spearheaded are transforming the world. Technology that was once found only in our science fiction can now be found on our desktops, in our cars, and in our pockets.[1]

THE LAST FEW YEARS BEAR WITNESS to the exponential growth and transition of the Internet from a conceptual state into an emerging parallel economy that will likely affect every aspect of modern day life. Until recently, very few "new economy" transactions-mergers, acquisitions, or joint ventures between firms relating to Internet products or services-raised antitrust issues, particularly in light of the low entry barriers in the Internet space and the general lack of horizontal overlaps between the parties involved. Many of these transactions were designed to permit an "old economy" firm to enter into the new economy and expand its market opportunities.

As the Internet matures, incumbent new economy firms, hoping to be among the long-term survivors, no doubt will seek to broaden their customer size, product, and service offerings, and achieve efficiencies through mergers or acquisitions. Indeed, this trend has already begun as exemplified by, among others, Healtheon/WebMD's recent acquisition of Medical Manager and its CareInsite Internet site.[2] The new millennium also has seen an explosion of "B2B" Web sites. The antitrust agencies have already had an opportunity to review several B2Bs that have been established among horizontal competitors, including exchanges involving automotive manufacturers, airlines and retail grocers.[3] These B2B exchanges, along with mergers and acquisitions involving new economy firms, will present challenges to antitrust enforcement agencies as they attempt to apply principles of merger analysis, many of which were developed when smokestack industries dominated the U.S. economy, to issues raised by these transactions.[4] This article will discuss the application of that analytical framework to the antitrust implications of these new economy transactions.[5]

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Merger Guidelines Analysis

When the 1992 Merger Guidelines[6] were announced less than ten years ago, the Internet was in its infancy and high-tech companies represented a far smaller proportion of the U.S. economy than they do today. While the economic concepts underlying the Merger Guidelines remain sound, mergers among new economy firms present unique challenges to the enforcement agencies as they attempt to apply these principles to nascent markets.

Section 7 of the Clayton Act requires that the plaintiff (i.e., the Federal Government) assess the impact of the transaction upon future competitive conditions.[7] Consideration of future competitive conditions does not, however, warrant the inclusion of things that might possibly happen sometime in the future.[8] Clayton Section 7 deals with likely probabilities, not "ephemeral possibilities."[9]

Thus, the Merger Guidelines require an analysis of the future impact of a proposed transaction, starting with market definition and ending with the analysis of future efficiencies. All aspects of the Merger Guidelines' analysis are premised on the predicate that likely competitive harm from mergers should be stopped before it occurs. Therefore, the Guidelines' analysis attempts to predict the future effects of a proposed merger based on the probability of fixture competitive harm. Potential competitive developments and forces play an important part in this forward-looking competitive analysis. This type of analysis is speculative by nature, even in evaluating traditional industries that historically have been the subject of substantial investigation and economic study by the enforcement agencies. As the agencies attempt to apply a speculative analysis in the highly dynamic, unpredictable, and evolving Internet economy, these inherent analytical difficulties will only be exacerbated.[10]

Market Definition. Market definition-the first step of the Merger Guidelines analysis-plays a critical role in the analysis of a transaction. (Merger Guidelines § 1.1) While it may appear simple, market definition can be a very difficult task, even in the most traditional of industries. To assess the proper relevant product market, the agencies predict future behavior by consumers, i.e., what consumers would do in the event of a hypothetical price increase. (Id.) The resulting prediction has serious implications for the analysis of competitive effects that flow from the proposed transaction, because how the

agencies define the relevant market will determine whether the parties to a merger should be viewed as competitors or potential competitors. For example, when one party to a transaction provides a particular product or service using traditional old economy distribution techniques, and the other provides the same product or service via the Internet,[11] the two companies may or may not compete against each other, depending on consumer purchasing patterns with respect to those products and services. Even if it is determined that the two do not compete today, they may offer different products or services that may actually or potentially be substituted for each other. Including additional products or services in the relevant market could substantially alter the antitrust implications of a proposed transaction.

In addition, the scope of the market definition affects which other companies are included (or potentially could be included) in the relevant market, which affects market concentration concerns and competitive effects theories. Finally, market definition can alter the impact of arguments relating to mitigating factors and purported benefits of the transaction.

For traditional markets, the agencies can rely upon historical investigative and economic study of the particular industry under review, or similar industries, to predict with some confidence consumer reactions to price increases. The agencies can consider whether customers have "switched" from one product to another in the past and whether companies have in fact competed for similar contracts. Even with such evidence, however, defining markets for antitrust purposes is not uncontroversial. Delineating product markets can be even more complex and contentious in an emerging market, particularly in the Internet context, which changes on an almost daily basis. What may have been a separate and distinct product or service today, may tomorrow-due to increased availability at lower prices and changed consumer demand-be a viable competitive alternative for consumers. Clearly, predicting the future in a rapidly changing market place adds layers of difficulty to market definition.

Industry experts rarely are unanimous when predicting future technological developments or consumer purchasing patterns on the Internet. Moreover, no one is quite sure of the time frame in which such changes will occur. Indeed, companies themselves are constantly shifting their own product offerings to address perceived consumer demands in the new economy. To the extent that historical data traditionally are used to determine consumer buying patterns, the track records to date are too sparse in the new economy to offer any reliable guideposts. Yet, as part of the merger review process, the antitrust agencies must make their own forecasts regarding future consumer and supply patterns in order to determine a host of relevant issues, including whether: (1) the parties already are, or are likely to be, competitors, for antitrust purposes; (2) new entrants will pose competitive threats; and (3) and to what extent, distribution of services over the Internet will discipline "brick and mortar" merchants. (Merger Guidelines § 1)

To add to the complexity, once consumers access the Internet, their options suddenly expand dramatically-the new economy provides consumers with many more purchasing options than are generally available in traditional industries.[12] The effect of these expanding options on traditional market definition analysis remains to be seen because there has been little empirical study of consumer shopping habits on the Internet. Thus, attempts to define the parameters of a relevant product market in this new economy are inherently speculative.

Even if the near future were somewhat more predictable, it remains unclear how far ahead the government should look in analyzing the probable effects of a transaction in the new economy. The Merger Guidelines indicate that if a firm could easily and economically participate in the relevant market within one year in response to a "small but significant and nontransitory" increase in price, then the agencies should include the firm in the market. (Merger Guidelines § 1.32) But, the Internet has substantially broken down traditional distribution barriers by allowing suppliers to contact new customers faster and more economically than ever before. Once consumers shift some or all of their purchasing to the Internet, the number of potential suppliers increases due to the ease with which suppliers in a given market can gain access to these customers through the click of a button. It is unclear, however, whether, and to what extent, the agencies are considering these and other dynamics that contribute to making a product market assessment even more unpredictable.

The DOJ's AT&T/MediaOne complaint, which challenged AT&T's acquisition of one of the largest U.S. cable operators, exemplifies the number of critical assumptions that can arise in the review of a yet-to-be solidified new economy market.[13] This case presented the DOJ with the opportunity to indicate how it would reconcile some of the difficulties that new economy cases pose for traditional merger analysis. The complaint, however, leaves many questions unanswered.

First, the Media One complaint states that "the vast majority of residential users of the Internet today access it via "dial-up" modems," (Complaint 13) but asserts that "a rapidly growing number of residential users are accessing the Internet through "broadband networks and technologies." (Id. 14) The complaint states that the entities in which the merger panics have an interest are "positioned to become two of the most important providers of residential broadband content." (Id. 29), apparently ignoring incumbent technology as a potential competitive constraint on new technology. It indicates that "links that will be viewed by the general mass of Internet users-a substantial majority of which today are narrowband users, are not a good substitute for links that will be widely and exclusively viewed by broadband users." (Id. 12) The complaint does not explain why the incumbent technology was not considered a competitive alternative.

Second, the Media One complaint recognizes that digital subscriber lines (DSL), satellite, and fixed wireless services are alternative technologies to cable for distribution of residential broadband content, and that the number of DSL users is growing rapidly. (Id. 17-20) Yet the DOJ asserts that the number of users of these alternatives lags substantially behind cable modem services, and that DSL should not be regarded as a competitive constraint. (Id.) the complaint does not make clear why DSL will be unlikely to close the gap between it and cable modem service in the relevant time frame (i.e., perhaps before the competitive significance of dial-up fades). The complaint states that cable MSO affiliations and contracts make it "unlikely that other providers of residential broadband services will be able to enter and attract comparable numbers of subscribers in the near term." (Id. 29) One must conclude, without more, that the DOJ regarded perceived future competitive dynamics as more significant than current competitive conditions.

An argument can be made, however, that counters the DOJ's conclusions and points to the difficulty of predicting the fixture competitive dynamics of the Internet. At the time the AT&T/MediaOne complaint was filed, there were approximately 30 million narrowband users (25 million for AOL/CompuServe alone), as compared with 2 million cable broadband users and 1 million DSL broadband users. And, industry reports show that DSL broadband use is growing at a rate which is twice as fast as cable broadband.[14]

Entry Analysis. In determining whether entry into the relevant market will be timely enough to prevent anticompetitive effects from a transaction, the agencies use a two-year time period. (Merger Guidelines § 3.0) Two years, however, can represent several generations of Internet technology. New entrants can be up and running within weeks of start-up, and new communications and computer technologies with a multitude of functionalities are being developed continuously. These innovations tend to grow and build off of one another in ways that are hard to predict. It is even more difficult to predict which, and when, new products will achieve success in the market, and when.

Despite how difficult it is to foretell competitive changes in the Internet marketplace in the near term, the agencies appear to be receptive to lengthening the relevant time frame in evolving markets like the Internet, where ongoing changes and innovation decrease the reliability of conclusions about future developments. In the 1995 Federal Antitrust Guidelines for the Licensing of Intellectual Property (IP Guidelines), for example, the agencies indicated that, under certain circumstances or in certain transactions, they may evaluate the impact of a transaction on "technology markets" and "innovation markets."[15] Thus, when analyzing the market shares of the participants in a technology market, the IP Guidelines indicate that they will refer to forecasts using "the best available information" of market acceptance over a two-year period beginning with commercial introduction, even if commercial introduction may be several years away. (IP Guidelines § 3.2.2) Similarly, in connection with innovation markets, the IP Guidelines contemplate considering the effect of the transaction on the development of goods and services that may not yet exist. (Id. § 3.2.3) This approach can extend significantly the time frame for analyzing competitive effects, adding further uncertainty to an already speculative analysis. Identifying the innovation projects of third parties can be quite a daunting task, given that in many industries firms do not disclose information regarding their ongoing R&D efforts. Moreover, parties cannot generally predict all firms that may potentially enter the market, including firms that are not currently participating in the market but which may enter as a result of breakthrough technology.

This uncertainty has not deterred the agencies from pursuing enforcement actions. In 1996 the FTC challenged Ciba Geigy's acquisition of Sandoz.[16] The Commission alleged that the merger would reduce competition in the market for the research and development of gene therapy products, despite the fact that actual competition in these product markets was not expected until four years later. Although the Commission entertained the possibility that as yet unknown competitors could enter the market in the intervening four years, it nevertheless concluded that Ciba Geigy and Sandoz were the only firms with the patent protection and necessary FDA approval and thus would be the first to the market.[17] Applying this standard to industries with long regulatory lead times for development, e.g., industries where FDA approval is required before taking a product to market, may yield more predictability, since the FDA "pipeline" does provide some reliable measure of what products will be available in the future. The Internet, however, has no analogous long product development "pipelines," leaving the landscape of future competition hazy at best.

The fast pace of technological change in the new economy does not mean, however, that there can be no entry barriers at all. Then Assistant Attorney General Joel Klein noted that market forces can generate a strong barrier to entry:

"They can, especially in markets characterized by a so-called positive feed-back loop, either from scale economies or from what economists call 'network effects.' What this fancy jargon means is something we all tend to understand intuitively: in certain circumstances, nothing succeeds like success."[18]

Network externalities arise when the value of a product increases as more people use it. For example, a computer operating system is more valuable if widely used because more software applications will be written for it and more hardware will be produced to run the system. Another benefit from higher market penetration stems from the compatibility and interchangeability of content by end users.

Mergers that accelerate such network effects can create entry barriers in a number of ways. First, once customers select a particular network, any substantial non-recoupable investment that the individual consumers make can have a "lock-in" effect

that will deter consumers from switching to a rival system, even if that system is superior.[19] Second, a significant combined penetration rate can have a "tipping" effect, causing certain consumers that have not already chosen a network to go with the larger entity.[20] Third, the larger merged firm may alter its willingness to deal with rivals on fair (or any) terms post-merger due to changed ability and incentives to foreclose others from access to customers. As a result, network externalities can weaken competition from incumbent firms and create entry barriers for new competitors.[21] The potential anticompetitive effects from network externalities were the prime reason that the DOJ cleared the WorldCom/MCI transaction only after the parties committed to divest Internet MCI (MCI'S Internet backbone service business) to Cable & Wireless, but blocked the WorldCom/Sprint transaction, even after the parties reportedly offered to divest one of the Internet businesses.

Such network effects are hard to predict in the consumer side of the Internet economy where consumers can switch suppliers by clicking a button. Network effects in the Internet might be possible if suppliers offered "closed" networks, but this seems antithetical to the goal of expanded business opportunities that drive many businesses to the Internet. For example, Covisint, the automotive exchange, has stated that it intends its standards to be open and interoperable, which should be a significant step towards alleviating network effects concerns.[22] Indeed, the FTC recently concluded its investigation of this exchange without challenging or imposing conditions on its operation.[23] On the other hand, network effects may arise in the Internet infrastructure or backbone where the "click of a button" is not a possibility.

Competitive Effects. Because defining product markets and assessing entry barriers is particularly challenging in new economy transactions, analyzing the competitive effects of a proposed transaction is ultimately a highly speculative and difficult task. Technology and innovation are key competitive drivers in the new economy. As recognized by DOJ Director of Operations-Merger Enforcement, Constance Robinson, "curtailing innovation through mergers may have serious anticompetitive consequences to consumers over the long run, and may be even more damaging to them than a price increase or a quality decrease."[24]

In assessing new economy transactions, the government's analysis starts with a characterization of the parties' respective market positions and innovation efforts. This focus derives from an underlying assumption that established industry leaders typically innovate to reinforce their positions or to enhance their core competencies. These market leaders will, therefore, purportedly focus on "incremental innovation" that is designed to maintain their market position, rather than to change the status quo. A market leader also will supposedly be more likely to delay introducing new products or services if it believes that new innovations will cannibalize its existing offerings.[25]

In contrast, new firms are believed to be motivated to explore innovations that will upset the status quo. While such innovations "are more likely to fail, they are also more likely to provide the great technological leap forward that the dominant firm is unwilling to embrace. It is through this 'leap-frog' competition that they are able to establish themselves."[26] These assumptions about the relative innovation efforts of leading firms versus challenging firms underlie the agencies' fear such challengers being swallowed up by market leaders-even if such a combination does not appreciably inflate the proposed acquiror's market share. The agencies are more concerned about the potential reduction in competition than about the possibility that the dominant firm is bolstering its market position.

Judge Posner recently pointed out that network externalities in the new economy actually can promote competition as firms strive to obtain such first mover "monopolies."

Against this theoretical backdrop, the enforcement agencies often will be faced in new economy transactions with firms that owe their success to having been the so-called "first mover," i.e., the first to offer a service. To the extent that such advantages can be quickly eliminated by new firms entering with leap-frog technology, the market power bestowed upon the first mover may be transitory. For example, Healtheon/WebMD seemingly had a significant advantage when it first announced its plans for a healthcare Web site, but that advantage quickly dissipated as other new firms announced plans for that same Internet space.[27] Former Assistant Attorney General Joel Klein acknowledged:

> Lots of businesses enjoy at least some market power, but very few enjoy monopoly power over any significant period of time. Brand loyalty or a first-mover advantage, for example, may give a business the ability to charge prices a bit above the competitive level, but in the absence of stronger barriers to entry than just brand loyalty or a simple first mover advantage, the magnitude of these supra-competitive profits are likely to be quite modest.[28]

Indeed, Judge Posner recently pointed out that network externalities in the new economy actually can promote competition as firms strive to obtain such first mover "monopolies."[29]

Special concerns can exist, however, if the merging parties are the two new entrants competing against each other to achieve first mover advantage or where one of the firms is the entrenched incumbent and the other firm is entering with new technology. The DOJ's Compuware/Viasoft complaint alleged this latter type of anticompetitive effect.[30] Compuware, "the world's dominant producer of 'test/debug software,' [with] no less than 60% of the market" and "fault management software,' with more than 80% of that market," proposed acquiring Viasoft, a new entrant in the fault management software market that was poised to become Compuware's most significant competitor.[31] The DOJ sued to block the transaction on these

grounds, and the parties abandoned the transaction after the filing of the lawsuit.

Similarly, in the Primestar complaint, the DOJ alleged that if Primestar, which was owned by the largest cable system operators, were allowed to purchase the direct broadcast satellite (DBS) assets of ASkyB, then Primestar would not use the acquired assets to their optimum value to compete vigorously with cable for subscribers because to do so would cannibalize Primestar's owners' existing cable subscribers.[32] That transaction was also abandoned. In both of these cases, the DOJ challenged effects where the incumbent firm sought to remove a new competitive threat. But the acquisition of an innovator will only have an anticompetitive effect if there are no other firms ready and able to take its place.[33] In the new economy, with so many firms innovating and trying to unseat the incumbent, it will be hard to determine whether there are other firms ready to move into this spot.

Although there may be discrete areas of the Internet, particularly relating to control of the infrastructure, where agency intervention may be appropriate to ensure that there is a level playing field, permitting the marketplace to evolve without government intervention ought to be the preferred course. That Internet innovation can be achieved much faster than in traditional markets, and often represents significant leaps forward, should be accounted for in considering the competitive harm that might arise from new economy transactions. A merger-created dominant position in an Internet space may be easily erased when entry barriers are low and innovation is continuing at a significant pace. Witness the dizzying pace of announcements in B2B exchanges this year, an indication that B2B technology may not be difficult to emulate, And consider Healtheon/WebMD, seen by many as being the "next Microsoft" when it was first established,[34] but now seen as one of many, as other start-ups and new entrants have multiplied in the very space that Healtheon/WebMD was expected to dominate.

Finally, the competitive effects analysis should consider efficiencies that will be achieved as a result of the transaction. (Merger Guidelines § 4) Supportive of the inclusion of efficiencies as a part of the analysis is the recent Heinz decision, in which the district court denied the FTC's motion for a preliminary injunction in a transaction that would combine two of the three major baby food manufacturers, based partly on claimed efficiencies that were unrefuted by the FTC.[35]

The new economy indisputably offers the promise of significant efficiencies. Indeed, the FTC has recognized that B2Bs offer the promise of significant cost savings that may enhance competition.[36] Many of the efficiencies promised by new economy transactions, however, may be unquantified and/or unrealized because of the relative infancy of this economy. Consequently, many of these claimed efficiencies are to a great degree even more speculative than in traditional smokestack industries. Whether such claimed efficiencies can be proven to the satisfaction of the agencies' historical standard remains to be seen.

Conclusion

While application of the Merger Guidelines to new economy transactions will raise significant issues for the enforcement agencies, the Guidelines, as written, are sound and flexible enough to be applied to any industry What is necessary, however, is recognition that caution in applying those Guidelines to mergers in this new economy is warranted. Care must be taken not to block transactions or impose conditions that alter market forces and that slow the development of this dynamic segment of our economy.

[1] William E. Kennard, The Unregulation of the Internet: Laying a Competitive Cause for the Future, Remarks Before the Federal Communications Bar, Northern California Chapter (July 20, 1999), available at http:/www.fcc.gov/speeches/kennard/spwek924.html.

[2] See Healtheon/WebMD, Press Release, Healtheon/WebMD to Acquire Medical Manage and Carelnsite, Feb. 14, 2000 available at http:// www.webmd.com/corporate/lndex.html (acquisition combined two of the leading Internet sites for healthcare Information).

[3] See Ilene Knable Gotts, Antitrust Implications of B2Bs and Other Competitor Collaborations, M&A Law., July/Aug. 2000.

[4] As Judge Posner recently noted:

> Concern has been expressed recently that U.S. antitrust law may not be well suited to regulating the "new economy." Doctrine developed to deal with competition and monopoly in the smokestack industries is not well adapted, it is argued to dealing with the dynamic economy of the twenty-first century. [While new economy industries differ markedly from most of the industries in which modern antitrust doctrine emerged] . . . antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy. The real problem lies on the institutional side: the enforcement agencies . . .do not have adequate technical resources, and do not move fast enough, to cope effectively, with a very complex business sector that changes very rapidly.

Richard A. Posner, Antitrust in the New Economy, ALI-ABA Course of Study, Antitrust Law in the 21st Century at 1 (Sept. 14-15, 2000) hereinafter Posner Speech.

[5] The focus of this article is U.S. antitrust enforcement. The preconsummation review of many new economy transactions, however, is not limited to the United States; as with old economy industries, such transactions are frequently subject to myriad reviews by competition authorities abroad. Nor should the impact of these reviews be ignored. For example, press accounts indicated that EU Commissioner Monti interacted with U.S. authorities In the MCI WorldCom/Sprint transaction recently abandoned by the parties due to antitrust challenges. See John Borland, DOJ Files to Block Worldcom-Sprint Merger, CNET-News.com (June 27.2000). Moreover, the parties recently withdrew their EU notification in the time Warner/EMI transaction due to EU objections, and agreed to certain undertakings in order to obtain EU approval of the AOL/Time Warner transaction.

[6] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992, revised 1997), reprinted in 4 Trade Reg. Rep. (CCH) 113,104 [hereinafter Merger Guidelines].

[7] 15 U.S.C. § 18. See United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321,362 (1963); United States v. Ford Motor Co., 286 F. Supp. 407, 422-23 (E.D. Mich. 1968); United States v. Times Mirror Co., 274 F Supp. 606, 616 (C. D. Cal. 1967), aff'd, 390 U.S. 712 (1968).

[8] See, e.g., Ford Motor Co., 286 R Supp. at 423.

[9] See Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962); see also United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957) (mere possibility not enough); Ekeo Prods. Co. v. FTC, 347 F.2d 745, 752 (7th Cir. 1965) (same); State of New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995) (same).

[10] Others have identified similar difficulties in applying the Merger Guidelines analysis to innovation markets in traditional industries. See, eg., Dennis A. Yao & Susan S. DeSanti, Innovation Issues Under the 1992 Merger Guidelines, 61 ANTITRUST L.J. 505 (1993).

[11] See, e.g., Fair Allocation System, Inc., Analysis to Aid Public Comment, 63 Fed. Reg. 43,182 (FTC 1998) (organization of automobile dealers attempted to curtail car sales and advertising on the Internet).

[12] These increased buying opportunities would also suggest that there may be instances in which under a rigid application of the Merger Guidelines the relevant geographic market would be limited to the United States, or perhaps North America, although from a potential competition standpoint, the market should be larger.

[13] United States v. AT&T Corp., Complaint, No. 1:00CV01176 (RCL) (D.D.C. May 26, 2000), available at http://www.usdoj.gov/atr/cases/f4800/4840.htm. The purported new economy market in this case consisted of providers of aggregation, promotion, and distribution of residential broadband in the continental United States.

[14] John Edwards, DSL on the Heels of Cable, UPSIDETODAY, Oct. 10, 2000, 2000 WL 4725962; Cable Modems Retain Market Lead but DSL Is Growing Faster, COMMUNICATIONS DAILY, Aug. 2, 2000, 2000 WL 4695929.

[15] U.S. Department of Justice & U.S. Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (1995), reprinted in 4 Trade Reg. Rep. (CCH) 113,132. See generally Ilene Knable Gotts, The "Innovation Market:" Competitive Fact or Regulatory Fantasy, 44 PRAC. LAW., Jan. 1998, at 79; Joshua A. Newberg, The Emergence of Technology Markets in Antitrust Analysis, ANTITRUST, Fall 1999, at 13.

[16] Ciba Geigy, Ltd., 62 Fed. Reg. 409 (FTC 1997).

[17] Id. at 410-12. The Commission's action in Ciba Geigy represents an important facet of merger analysis in the new economy. In the case of relatively uncharted waters, the tendency to afford first movers with some sort of impenetrable market power may overstate the level of comfort such first movers actually enjoy in new markets. Underestimating potential competitive threats seems particularly ill-suited to innovative technology markets, especially in the case of Internet markets in which new entrants continually spring up.

[18] Joel L. Klein, Rethinking Antitrust Policies for the New Economy, Remarks at the Haas/Berkeley New Economy Forum (May 9, 2000), available at http://www.usdoj.gov/atr/public/speeches/4707.htm [hereinafter Klein Speech].

[19] See A. Douglas Melamed, Deputy Assistant Attorney General, Antitrust Division, Network Industries and Antitrust, Address Before the Federalist Society (April 10, 1999), available at http://www.usdoj.gov/atr/ public/ speeches/2428.htm.

[20] A related issue is whether post-merger, due to "tipping effects," access to the network will be essential to compete, i.e., whether the network will be deemed an "essential facility." See generally Donald I. Baker, Compulsory Access to Network Joint Ventures Under the Sherman Act, Rules or Roulette, 1993 Utah L. Rev. 999 (1993) (historical overview of the essential facilities doctrine); Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989) (same). An essential facility is one that competitors cannot practically duplicate and that is otherwise unavailable. See image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1210 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998). Denial of access to an essential facility is not, in and of itself, an antitrust violation; rather, it is used to form a factual basis in a Sherman Act § 2 case to establish attempted or actual monopolization. The essential facilities test has been successfully applied in the telecommunications industry. See, e.g., MCI Communications Corp v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983).

[21] See Constance K. Robinson, Network Effects in Telecommunications Mergers: MCI/WorldCom Merger; Protecting the Future of the Internet, Remarks Before the Practicing Law Institute (Aug. 23, 1999), available at http:// www.usdoj.gov/atr/public/speeches/3889.htm.

[22] See Covisint Open Access Statement, available at http:// www.covisint.com/info/legal2.shtml#2.

[23] FTC Terminates Waiting Period for Covisint B2B Venture, FTC Press Release (Sept. 11, 2000).

[24] Constance K. Robinson, Leap-Frog and Other Forms of Innovation: Protecting the Future for High Tech and Emerging Industries through Merger Enforcement, Remarks Before the American Bar Association (June 10, 1999), available at http://www.usdoj.gov/atr/public/speeches/2482.htm [hereinafter Leap-Frog Speech]. See also Daniel Rubinfeld, Competition, Innovation and Antitrust Enforcement in Dynamic Network Industries, Address Before Software Publishers' Association (Mar. 24, 1998), available at http:// www.usdoj.gov/atr/public/speeches/1611.htm.

[25] See Robinson, Leap-Frog Speech, supra note 24, at 4 & n.7 (discussing distinctions between competence-enhancing and competence-destroying innovation).

[26] Id.

[27] See Dean Foust, Man in a Hurry, BUS. WK., July 24, 2000, at 64.

[28] Klein Speech, supra note 18, at 28.

[29] Posner Speech, supra note 4, at 4-5 (The prospect of the first mover advantage "should accelerate the rate of innovation . . . [and] the successful monopolist is likely to be a firm that initially charges a very low price for the new product is has created. The less capital investment the creation of a substitute network involves, the less secure the network monopolist's monopoly is. Because of the extraordinary rate of innovation..., the extraordinary amount of capital that is available worldwide for investment in new enterprises, and the rapidity with which new networks that are primarily electronic can be put into service, the networks that have emerged in the new economy do not seem particularly secure against competition. The gale of creative destruction that Schumpeter described, in which a sequence of temporary monopolies operates to maximize innovation that confers social benefit far in excess of the social costs of the short-lived

monopoly prices that the process also gives rise to, may be the reality of the new economy.").

[30] See United States v. Compuware Corp., Complaint, No. 1:99CV02884 (D.D.C. Oct. 29, 1999), available at http://www.usdoj.gov/atr/cases/ f38OO/3883.htm.

[31] Id. at 2-3.

[32] See United States v. Primestar, Inc., No. 1:98CV01193 (JLG), 86 (D.D.C. May 12, 1998), available at http://www.usdoj.gov/atr/cases/ f1700/l757.htm.

[33] Compare this to the recent decision in FTC v. H.J. Heinz Company, Civ. No. 00-1688 (JR) (D.D.C. Oct. 18, 2000), 2000 WL1597573, where the district court rejected the FTCs request for a preliminary injunction blocking the merger of two baby food manufacturers based, in part, on the finding that the merged firm would be able to "make serious efforts to innovate," even though the court could point to little historical evidence of innovation in this market. The court concluded that it "appears more likely than not" that the mere prospect of innovation would increase competition in the future. However, the court of appeals recently ordered an injunction pending the FTC's appeal because the FTC has demonstrated "a substantial probability of success on the merits." FTC v. H.J. Heintz Co., No. 00GV01688 (D.D.C. order flied Nov. 8, 2000).

[34] See MICHAEL M. LEWIS, THE NEW THING, A SILICON VALLEY STORY (1999).

[35] See FTC v. Heinz, supra note 33, slip op. at 18-20.

[36] See generally Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces, A Report by Federal Trade Commission Staff (Oct. 26, 2000), available at www.ftc.gov/opa/2000/10/ b2breport.htm.