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Overview of Remarks:

Introductory Legal Perspectives on Possible Anticompetitive Efforts to Restrict Competition on the Internet

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Much of these hearings will be devoted to resolving difficult issues created by tension between government interests in consumer protection and in competition. These are hard issues if only because so much is at risk. Existing channels of distribution have their very livelihood at stake[1] and can be expected to fight vigorously in legislatures and courts, regardless of the public interest. The benefits from more efficient distribution are usually diffuse and somewhat distant; the costs are concentrated and immediate. On the other hand, internet fraud abounds and it is not absurd to reflect on the risks that would be created were, for instance, pharmaceuticals to be distributed substantially through a still nascent channel.

Others will be attempting to identify the appropriate balance. Anything that makes internet commerce more costly or difficult makes less likely its emergence as a robust competitive force: impediments can be anything from laws prohibiting it, to laws imposing expenses or requiring licensing, to the imposition of choice of law or venue rules not imposed on other sellers.[2] The hard questions may be balancing those costs and benefits. If nothing else, the Commission can play an invaluable role by exposing situations where claimed consumer protection justifications are trivial. See Memorandum of Law of Amicus Curiae The Federal Trade Commission, *Powers v. Harris*, CIV-01-445-F (W.D. Okla. brief filed Aug. 29, 2002).

Another challenge is to reconcile, or at least resolve the tension between, the Twenty First amendment and the dormant commerce clause.[3] A half dozen cases are generating precedent on this issue, with no quick, authoritative resolution in sight. *See, e.g., Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

My assignment is easier: to survey the antitrust issues that could arise from efforts to restrict competition on the Internet. This is a bigger assignment than one might think, however, because most if not all of the issues that arise in a typical antitrust course are posed by the Internet and efforts to restrict internet commerce. Distribution issues, which I consider last, are most important, but issues include the following:

Mergers

• Market definition is critical, cf. *Hotjobs*.

• Evaluating competitive effects in an emerging industry is very difficult

• Network effects and their role in evaluating ease of entry

Monopolization/Attempted Monopolization

• Market power issues

• Difficulty of distinguishing between procompetitive innovations that, for instance, improve distribution via the internet, and anticompetitive actions that lessen competition

• Role of intellectual property

Competitor Collaborations

• Orbitz controversy (see David Wessel, *Airlines' Orbitz: Consumers' Friend of Foe?*, Wall St. J., Aug. 29, 2002, at A2). How can one distinguish between procompetitive collaboration to achieve efficient distribution and anticompetitive preventing of consumer-friendly service?

• Tension between over-inclusion and anticompetitive exclusion

Noerr Pennington

• Keeping the line clear between legitimate government petitioning and separate agreements on how to act

• Possible limits on *Noerr*?

Parker v. Brown/State Action

• How clear must be the legislature's expression of an intention to displace competition?

• When is supervision adequate?

Restricted Distribution

Difficult distribution issues always arise when there is an interest in using an alternative channel.

• Manufacturers might refrain from selling over the internet or from listing prices on-line because they desire to preserve strong retailers, or because they believe that their products are best sold in-person, or because they fear retailer retaliation, or because they have been pressured by a dealer cartel.

• Manufacturers might discourage others from selling over the internet for the same mix of motives.

• Retailers might refrain from selling over the internet, or refrain from advertising prices, or refrain from advertising discount prices, because they believe this is in their unilateral best interest, or because they fear manufacturer retaliation, or because they fear the response of rival retailers.

The applicable case law makes a horizontal agreement the touchstone of greatest concern. The Toys R Us case condemned what was found to be a horizontal agreement by manufacturers to disfavor a new channel of distribution. The FTC's Fair Allocation System consent order addressed an alleged illegal agreement among Chrysler dealers to threaten to boycott Chrysler if Chrysler wouldn't restrict the availability of vehicles for a dealer actively using the internet to discount. These represent the classic violations.

Proof of a horizontal agreement is very difficult, however. Mere parallel behavior is not enough. Manufacturers need to be able to anticipate dealer concerns even if other manufacturers may be engaging in the same behavior. Perhaps industry witnesses could suggest factors that help identify when the government should suspect the existence of a horizontal agreement.

Without a horizontal agreement (or, perhaps, monopoly power or resale price maintenance), limitations on distribution are unlikely to be illegal. Thus, the press tells us that Kawasaki Motor Company attempts to keep its dealers happy by restricting internet sales to accessories sold at list price, and paying a dealer each time a sale is made.[4] Yet even if a manufacturer wished it could sell freely on the internet, and refrained from doing so solely out of fear of retaliation, antitrust law is unlikely to find a violation.[5] Query whether one could identify any useful class of cases where the government should be concerned about a non-monopolist internet firm's imposing of a non-price vertical restraint.[6]

Resale Price Maintenance

Vertical pricing issues can arise in at least two contexts. Manufacturers could seek to prevent retailers from undercutting the manufacturers' internet price, and manufacturers could seek to prevent dealers and others from using the internet to undercut suggested retail prices. A group of states recently settled a case in which they alleged that dealers had agreed not to sell a grill for less than the "minimum advertised price," which was "generally identical" to the price the manufacturer charged on television and internet sales. *Utah et al v. Salton, Inc.* Resale Price Maintenance law is controversial: should the federal government bring such cases? Even if it should, there is a great deal a manufacturer could do to prevent undercutting of a web price without violating the law. At what point should the government intervene? Is there anything special about the internet that makes intervention either more or less appropriate?

1. For an example: the largest compact disk chain of stores in Michigan recently went out of business.

2. Conversely, anything that favors internet sales, such as sales tax treatment more favorable than that enjoyed by bricks and mortar stores, is an advantage that encourages (perhaps artificially) internet commerce.

3. See Russ Miller, Note, *The Wine is in the Mail: The Twentyfirst Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 Vand. L. Rev. 2495 (2001); Vejay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353 (1999).

4. Michael Totty, *The Dell Myth: The Middleman Isn't Dead After All*, Wall St. J. R12 (Sept. 16, 2002).

5. GTE Sylvania, Sharp Electronics.

6. Conversely, it has been suggested that dealers have such freedom to punish manufacturers who dare to use the internet to sell directly that the antitrust agencies should signal their willingness not to challenge a horizontal manufacturer agreement to enter into internet selling.