INSIGHTS FROM MARKETING AND SUPPLY CHAIN MANAGEMENT: IMPLICATIONS FOR COMPETITION POLICY AND ANTIRUST LAW

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Many areas of competition policy and law intersect supply chain management. Describing recent developments in supply chains and supply chain management, the authors examine their implications for competition policy and law involving resale price maintenance — a controversial vertical restraint affecting $300 billion in U.S. sales annually. Their findings augment economic understanding of resale price maintenance and thereby offer potential to advance competition policy and antitrust law.

I. INTRODUCTION

Competition policy and antitrust law overlap supply chain management (hereafter "SCM") in many areas. In addition to addressing dealings between organizations occupying the same level of a supply chain (e.g., manufacturer to manufacturer), competition policy and antitrust law also addresses dealings between organizations occupying different levels of the supply chain (e.g., manufacturer to retailer). These dealings may involve arrangements with upstream and downstream organizations in a supply chain. In some circumstances, they involve agreements that restrict the ability of one or both organizations to freely compete. Commonly referred to as "vertical restraints" in competition policy and antitrust law, these restrictions include a variety of supply chain-based business practices. Vertical "price" restraints limit the capacity of another organization, operating at a different level in the supply chain, to compete on price (e.g. minimum and maximum resale price maintenance). Vertical "nonprice" restraints limit the capacity of another organization, operating at a different level in the supply chain, to compete through nonprice ways (e.g. customer restrictions, location clauses, etc.). Hybrid restraints incorporate aspects of both price and nonprice restraints.

From the vantage point of competition policy and antitrust law, vertical restraints can encourage competition and may benefit consumers where they lead to a more efficient and/or effective supply chain. However, by definition, vertical restraints limit competition and can harm consumers where they unreasonably restrain trade. Given these complexities, disputes involving vertical restraints in the U.S. require analysis of whether they unreasonably limit competition. Ultimately, determining the reasonableness of a vertical restraint following antitrust law is multifaceted, requiring an in-depth understanding of the nature and effects of the restraint for competition and consumers.

Minimum resale price maintenance (hereafter "RPM") is a common, albeit controversial, vertical restraint. Agreements to engage in RPM establish the price below which a manufacturer's products may not be resold by downstream resellers (e.g., wholesalers, distributors, retailers). RPM impacts in excess of $300 billion in U.S. sales each year and has been found in the sale of a wide variety of products (e.g. stereo equipment, home improvement supplies, clothing and accessories, kitchen appliances, personal care products, etc.). As a supply chain practice, RPM raises challenging issues for competition policy and antitrust law. In this brief essay we describe four developments in supply chains and SCM and examine their implications for competition policy and antitrust law involving RPM.

II. IMPLICATIONS OF DEVELOPMENTS IN SUPPLY CHAIN MANAGEMENT FOR RESALE PRICE MAINTENANCE

Various developments in supply chains and SCM offer potential to impact understanding of RPM in ways that inform competition policy and antitrust law. These include evolving developments in the way supply chains are organized, how they are managed, advances in the technology of supply chains, and changes in the way that supply chain participants interact.

A. Organization of Supply Chains: Impact of Consolidation and Firm Concentration

To fully explain the effects of RPM for competition and consumers, competition policy and antitrust law adopts opposing perspectives of supply chain organization. Procompetitive perspectives, including the free rider thesis, view that typically supply chains are unconcentrated with few barriers to entry and that relative power in these systems generally favors upstream firms (e.g., manufacturers). Checked by market forces, procompetitive explanations for RPM describe how manufacturers are more likely to use RPM for procompetitive purposes. Thus, the free rider thesis explains that RPM is used by manufacturers to procompetitively resolve externalities that result from free riding in the distribution of their products.

In contrast, anticompetitive perspectives, including the forestalling competition thesis, adopt a less certain view of the role of market forces in the organization of supply chains and the ability of these forces to discipline against the abuse of RPM. Possessing market power obtained through consolidation and other factors, anticompetitive explanations describe that RPM is more likely to be used RPM for anticompetitive purposes. Thus, the forestalling competition thesis explains that RPM is forced upon a manufacturer by a more powerful retailer in an effort to preserve the retailer's profits (or willfully adopted by the manufacturer to preserve their profits). Given the contrary perspectives of RPM that exist in competition policy and law, a key question is whether (and to what extent) the organization of supply chains align with either view.

As reported in SCM research, consolidation and other influences have altered many supply chains, leaving them more concentrated than in the past and shifting the locus of power to downstream members of the supply chain (i.e. retailers). For example, research reports that in 2005, the ten largest retailers in the U.S. accounted for over 80 percent of the average manufacturer's business. This compares to only approximately 30 percent two decades prior. This trend is continuing today. Related research documents as well that the greater relative power obtained by retailers has increased their bargaining power over manufacturers. Thus, more retailers now hold power and persuasion over their upstream counterparts. In *Leegin* (2007), the Supreme Court identified this trend and its implications for RPM. As Justice Breyer (writing for the dissent) described:

> "[t]hat change [increased retail concentration and bargaining power], other things being equal, may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share" (*Leegin*, 2007, p. 922).

Considered together with the logic of the forestalling competition thesis, the prospect exists that RPM may be increasingly used for anticompetitive purposes in the future.

B. Strategy of Supply Chains: Impact of Multi-Channel Systems and Cross-Channel Shopping

Competition policy and antitrust law involving RPM also draws conclusions about supply chains strategy. The free rider thesis presumes that cross-channel shopping (i.e., where a consumer shops in one retail channel but then purchases the product in another retail channel) should be discouraged as it encourages free riding. However, due to changes in the way consumers shop brought about by manufacturers' growing use of multiple retail channels to distribute their products, researchers in SCM report that many manufacturers are reexamining their distribution strategy. Some are continuing to apply strategies that discourage cross-channel shopping. However, others are embracing cross-channel shopping and developing strategies that profit from it. These strategies include monitoring and compensating the contribution that each channel member makes to a final purchase. Accordingly, a significant question regards the consequence of these developments for competition policy and antitrust law involving RPM.

In relation to the free rider thesis, for free riding to occur a consumer must shop across channels on their path to purchasing a manufacturer's product. Thus, as channels of distribution have proliferated, and cross-channel shopping by consumers has increased, so have conditions favorable for free riding. Consequently, to the degree manufacturers view these circumstances as promoting free riding, the more likely they will adopt strategies, including RPM, to discourage cross-channel shopping. Alternately, to the degree manufacturers view cross-channel shopping as beneficial and rely on strategies of distribution to maximize these benefits, the less likely they are to adopt strategies like RPM. This prospect has potential to challenge the basic premise of the free-rider thesis, that cross-channel shopping should be discouraged.

C. Technology of Supply Chains: Impact of Internet Commerce and the Role of E-Commerce Platforms

Competition policy and antitrust law involving RPM may also be limited in its understanding of the technology of supply chains. The forestalling competition thesis was developed well before the advent of Internet technology and the development of e-commerce and e-commerce platforms. Thus, in practice, the explanation has been primarily applied to describe how powerful "brick-and-mortar" resellers use RPM to preserve their own profits through anticompetitive means. However, Internet commerce and the technological advances that led to creation of the Internet have also created opportunities for the development and application of novel forms of RPM. This includes the development of creative mechanisms by which powerful resellers can monitor and enforce the use of RPM. These mechanisms and their effects are only beginning to be understood.

A novel way in which powerful resellers are using information technology and the Internet to monitor and enforce RPM is reportedly under investigation by the U.S. Federal Trade Commission (FTC). According to reports, the FTC is gathering evidence of how Amazon has employed its information technology to monitor rival's prices to determine if they are lower than prices charged by third-party sellers on Amazon's e-commerce platform. This information and Amazon's power is then used to make it more difficult to find and buy the products of the third-party seller, in an effort to influence the third-party seller to raise their prices elsewhere in the seller's supply chain. According to Amazon, a core objective of their strategy is to have a reputation for low prices, and Amazon works to maintain that reputation by ensuring they offer competitively priced products in its store. However, their approach has come under scrutiny because it involves influencing third-party sellers to raise their prices elsewhere - versus lowering their prices on Amazon. Given the rapid growth of e-commerce and the power of many e-commerce platforms, novel forms of RPM represent an important future area of focus for competition policy and antitrust law.

D. Interactions in Supply Chains: Impact of Relational Exchange and Interfirm Relationships

Competition policy and antitrust law also draws conclusions from how members of a supply chain interact. The nature of interactions between manufacturers and retailers is a key consideration in the determination of whether an agreement to engage in RPM exists. In the U.S., an RPM "agreement" generates more concern than where a manufacturer unilaterally announces in advance an RPM policy and then refuses to deal with those retailers that do not comply with their policy. Known as "unilateral price policies" such policies are viewed differently from an RPM agreement. However, in practice distinguishing a unilateral price policy from an agreement to engage in RPM is challenging. Thus, understanding the nature of circumstances that are more likely to result in an agreement can be useful for making such determinations.

Today, few researchers in SCM question that distribution arrangements have trended toward exchange relationships. In contrast to past, where exchange was conducted at arm's length, modern exchange relationships involve much greater collaboration and closer ties between manufacturers and retailers. As extensively described in SCM research, this evolution has impacted manufacturer-retailer interactions making it much more difficult for manufacturers to develop and adopt marketing strategies in isolation from the strategy of their retailers. A consequence is that the form of interaction found in these arrangements is less compatible, if not entirely contrary, to the development and implementation of unilateral price polices. Instead, the greater collaboration and closer ties between manufacturers and retailers is more conducive to the type of interactions that underpins agreements. To the degree these impacts are found they are likely to have a consequential effect on whether an agreement to engage in RPM is found.

III. CONCLUSION

Insights and research on supply chains and SCM have potential to inform the development and application of competition policy and antitrust law in significant ways. This brief essay examined four developments in supply chains and SCM and highlighted their implications for competition policy and law involving RPM. Further study and understanding of developments in supply chains and SCM and their implications for competition policy and antitrust law is encouraged.

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