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Notes for Concluding chapter:

Conclusion to T&C Chapter

Conclusion:

Several obvious conclusions emerge from the above discussion:

1. Total suppression of intrabrand competition is seldom necessary to achieve any legitimate pro-competitive purpose. Therefore, if intrabrand competition has been completely suppressed, the burden of proof should be on the franchiser to show that no less destructive means is available to achieve a tangible and important pro-competitive end. Good intentions alone are no justification.¹
2. Intrabrand competition is often as important as interbrand competition and should not be traded off for speculative or unimportant gains in interbrand competition. The mere invocation of interbrand competition gains should not be enough to justify the suppression of intrabrand competition.
3. One should be cautious in blandly accepting the free-rider justification for territorial restraints. Only in that (probably small) subset of cases where there is a clear free rider problem, and where there is no other way to prevent the loss of valuable service functions, should the territorial restraint be allowed. Only then is it likely that vertical restraints will improve efficiency.
4. The greater the number of price/quality options facing buyers, the better. Freedom of consumer choice is on a par with efficiency, and is equally or even more likely to maximize consumer welfare, if one has to choose between them.
5. In large measure, the required rule of reason standard now focuses attention on the demonstrated competitive effect of the territorial or customer restraint. This is as it should be. The per se rule was too extreme. Occasionally, there are still some legitimate justifications for non-airtight territorial and customer restraints, but the case should be clearly made. The proposal to automatically allow all vertical restraints on grounds of speculative gains in efficiency or some all pervasive free-rider effect is unwise.
6. Horizontal territorial restraints should not be automatically regarded as illegal per se. They should receive rule of reason analysis.

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END NOTES

¹ Graphic Products Distributors Inc. v. Itek Corp. 1983-2 Trade Cases, ¶ 65,670, 69,426, n.25.

Manufacturers obviously have a clear incentive to adopt distribution policies which maximize product differentiation, even if the necessary vertical restrictions result in higher final prices. Where products are highly differentiated and brand substitutability is low, consumers often behave as though they were tied to the products of specific firms. Thus, even when product differentiation leads to higher than competitive markups by his dealers, the manufacturer will not resist this since he still benefits, provided the additional revenues are used by the dealer to create additional point-of-sale consumer preference for the manufacturer's products.²

In fact given the reinvestment of these additional revenues in product differentiation by the dealer, the higher dealer markup caused by the vertical restrictions may not even result in reduced volume at all. Rather, the product differentiation fostered by the fancier showrooms or additional dealer services, etc. may actually produce a greater volume of sales than would be the case with an undifferentiated product priced at competitive markups. Thus the interest in using market restrictions to increase product differentiation, even if the result is higher dealer markups, is perfectly consistent with the manufacturer's traditional objective of maximizing the volume sold by his dealers after his own selling price is set.³

And since both the manufacturer and the dealer are likely to benefit at the consumer's expense from the higher dealer markups, a motive for restricting competition among a firm's dealers that is completely unrelated to increasing channel efficiency is clearly present.⁴ Manufacturers are just as willing to impose restrictions which result in higher dealer markups as they are to impose restrictions in order to gain distribution efficiencies. And, since the manufacturer is not inalterably opposed to higher dealer markups, his self-interest does not provide an adequate check on higher dealer markups as some would argue.⁵ Moreover, with much reduced interbrand competition and little or no intrabrand competition, the residual competitive control over dealer markups is greatly reduced. This is completely unacceptable when the market share of the brand is significant. It means that the potential customers who have a strong preference for the brand are deprived of the benefit of competitive prices for that brand.

When competitive rivalry is founded on advertising, dealer services or other factors which enhance the differentiation of the product, even those market restrictions which stimulate a desired improvement in the product-service mix offered by the dealer, are likely at the same time to impede the growth of price competition and the movement of prices toward cost.⁶ This is the major objection to allowing vertical restrictions in marketing.

While some measure of product differentiation may be desirable, even though price competition is lessened, the attainment of differentiation is not a sufficient reason for rejecting the normal presumption of antitrust policy in favor of maximum competitive behavior on the part of individual firms.⁷

²[Comanor, p. 1425]

³[Comanor, p.1425].

⁴[Comanor, p. 1426]

⁵[cite Bork]

⁶[Comanor, p. 1437].

⁷[Comanor]