

**Competition Advocacy: The Impact of FTC Staff Reports on  
Barriers to E-Commerce in Contact Lenses and Wine**

by

**Maureen K. Ohlhausen<sup>1</sup>**

**I. Introduction<sup>2</sup>**

The Federal Trade Commission's core mission is to protect consumers

---

---

---

It is often easy to measure the immediate effects of enforcement actions: the advertiser stops making the deceptive claim; the proposed merger is halted or the parties divest their overlapping assets. Sometimes the effect of competition advocacy is similarly easy to measure: the proposed anticompetitive restriction is defeated and the decisionmaker cites to the FTC's advocacy filing.<sup>5</sup> Often, however, the effect of competition advocacy is harder to measure and its impact more diffuse. This paper examines the effect of the FTC's E-commerce workshop<sup>6</sup> and two recent, related FTC staff reports – Possible Anticompetitive Barriers to E-Commerce: Contact Lenses and Possible Anticompetitive Barriers to E-Commerce: Wine – on the issues surrounding online distribution of contact lenses and wine. In the case of contact lenses, the FTC's interest coincided with, and perhaps gave some impetus to, Congressional action affecting

---

Intervenor, before the Connecticut Board of Examiners for Opticians (Mar 27, 2002), at <http://www.ftc.gov/be/v0200007.htm>; Brief of the FTC as Amicus Curiae Supporting Neither Party in *Cleveland Bar Association Relator v. Compmanagement, Inc., et al* (the Supreme Court of Ohio (Case No.: 04-0817)) V040023 (Aug. 3, 2004); Comment of the Staff of the FTC to the FDA on First Amendment Issues (Sept. 13, 2002), at <http://www.ftc.gov/os/2002/09fdatextversion/pdf>.

<sup>5</sup> See, e.g., Comments of the Staff of the FTC to Representative Greg Aghazarian (Sept. 7, 2004), at <http://www.ftc.gov/be/V040027.pdf>; Letter of Governor Arnold Schwarzenegger to Members of the California State Assembly Returning Assembly Bill 1960 Without Signature (Sept. 29, 2004), available at [http://www.governor.ca.gov/govsite/pdf/vetoes/AB\\_1960\\_veto.pdf](http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf) (acknowledging FTC comments in veto statement). Comments of the FTC Staff Before the FDA In the Matter of Obesity Working Group; (Dec. 12, 2003), at <http://www.ftc.gov/be/v040003text.pdf>; *Calories Count: Report of the Working Group on Obesity* (FDA Mar. 2004), available at <http://www.cfsan.fda.gov/~dms/owg-toc.html> (adopting many of the FTC staff recommendations).

<sup>6</sup> Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet ("E-Commerce Workshop"). See Notice of Public Workshop and Opportunity to Comment, 67 Fed. Reg. 48472 (Jul. 24, 2002). The workshop agenda, the participants' written statements, and public submissions are available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.



action doctrine, meaning the Commission could not engage in enforcement, the Commission's

---

---

---







weighed in on the issues raised in many of these matters.

As noted above, several months before the workshop, FTC staff filed a comment in a proceeding in Connecticut. After the FTC workshop but before the issuance of the Contact Lens Report, Congress considered and eventually passed the Fairness to Contact Lens Consumers Act.<sup>19</sup> This Act resolved a number of the issues raised at the workshop, such as requiring eye care practitioners to release contact lens prescriptions to consumers upon the completion of a contact lens fitting. One hotly contested issue at the workshop was whether verification of prescriptions must be active – meaning that the eye care provider must affirmatively respond before the seller can provide the lenses – or passive – meaning that the seller can provide the lenses unless the eye care provider notifies him that the prescription is invalid. Some contact lens sellers were concerned that, under an active verification regime, eye care providers would prevent their patients from patronizing a competing lens seller by not responding to the verification request. Eye care providers were concerned that, under a passive verification regime, patients would too easily receive lenses with expired or incorrect prescriptions. In testimony on the Act, the Commission drew on evidence from the workshop regarding types of prescription verification systems and recommended that Congress specify the type of

---

the court approved in November 2001. As part of the settlement, defendant manufacturers agreed to sell lenses to alternative distribution channels.

<sup>19</sup> 15 U.S.C.A. §§ 7601-7610. When the Commission issued a Notice of Proposed Rulemaking seeking comment on a proposed “Contact Lens Rule” to implement the Fairness to Contact Lens Consumers Act, *see* 69 Fed Reg. 5440 (Feb. 4, 2004), it also issued a notice regarding the completion of the regulatory review of the Eyeglass Rule. 69 Fed Reg. 5451 (Feb. 4, 2004). The Commission issued the Final Contact Lens Rule in 2004. 69 Fed. Reg. 40481 (July 2, 2004) (to be codified at 16 C.F.R. Part 315).





resulting effect on consumers and competition; 4) the impact of the FTC Eyeglass Rule on

---

---

---

instead.

#### **IV. Wine**

The 21st Amendment to the U.S. Constitution, which repealed Prohibition, gives states special authority to regulate alcohol. As a result, all 50 states required wine to pass through a wholesaler and bricks-and-mortar retailer before reaching consumers. In recent years, however, the Internet has become a popular avenue to buy wine. Consumers can buy literally thousands of varieties over the Internet directly from the winery, often at lower prices than elsewhere. Perhaps not surprisingly, some traditional firms perceived the Internet as a significant threat. They successfully lobbied a number of state legislatures to prohibit wineries from shipping directly to consumers, largely on the theory that underage drinkers could buy wine online. Seven states even made it a felony to ship wine directly.

At the workshop, FTC staff heard testimony from all sides of the wine issue, including wineries, wholesalers, and state regulators. The staff also gathered evidence from package delivery companies, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), and regulators in states that allow direct shipping. In addition, FTC staff conducted the first empirical study of a wine market in a state that banned interstate direct shipping. The study examined the wine market in McLean, Virginia, and compared the prices and choices that consumers could find in area stores to those available online.

The Wine Report,<sup>24</sup> which considered the workshop testimony, the empirical study, and other evidence, concluded that, through the direct shipment of wine, states could significantly

---

<sup>24</sup> FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

enhance consumer welfare by increasing consumer choice and reducing wine prices. Using the *Wine and Spirits* list of the “Top 50 Wines” in America, the FTC staff’s empirical study found that 15% of a sample of wines available online were not available from retail wine stores within ten miles of McLean.<sup>25</sup> Given that the wines studied are the most popular wines of many of America’s largest wineries, it is likely that the wines of less-popular or smaller wineries are even more difficult to locate in wine retailers. Moreover, the same study suggested that, if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than \$20 per bottle, and an average of 20-21% on wines costing more than \$40 per bottle.<sup>26</sup> Less expensive wines may be cheaper in bricks-and-mortar stores, given that fixed shipping costs will be proportionately larger for less-expensive wines.

At the workshop, some parties expressed concern and offered anecdotes suggesting that interstate direct shipping might have the unintended effect of increasing underage access to alcohol or undermining tax compliance. To determine whether these concerns were factually-grounded, FTC staff contacted numerous officials from states that allow direct shipping to gather systematically information about whether these problems have occurred. The Wine Report stated that, in general, state officials report that they have experienced few, if any, problems with direct shipments of wine to minors, especially when compared with the problem of underage access to alcohol through traditional distribution channels.<sup>27</sup> In addition, several states that permit interstate direct shipping have adopted various procedural safeguards and enforcement

---

<sup>25</sup> *Id.* at App. A 28.

<sup>26</sup> *Id.* at App. A 27.

<sup>27</sup> *Id.* at 31.

mechanisms to prevent sales to minors. These include such precautions as requiring labeling of packages containing wine and requiring an adult signature at the time of delivery. For example, New Hampshire developed penalty and enforcement schemes in coordination with its enforcement agencies. Notably, the National Academy of Sciences recommended that states allow direct shipping but “tighten access” through these safeguards, rather than ban interstate direct shipping altogether.<sup>28</sup>

The Wine Report also found that some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes. Most of these states reported few, if any, problems with tax collection.

Finally, the Report uncovered little actual evidence to support the distinction found in several states that permit intrastate direct shipment of wine but prohibit interstate shipment.

---

---

significant attention from the press. The Report also impacted the policy debate. The U.S. House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection held a hearing devoted specifically to the Report's findings, at which the Commission testified about the Report.<sup>30</sup>

State policymakers also asked for the Commission's views on the direct shipping. In response to requests from three New York state legislators, the FTC staff provided comments on three bills that would allow out-of-state vendors to ship wine directly to New York consumers if the vendors comply with certain regulatory requirements.<sup>31</sup> According to the staff comments, the bills would promote e-commerce and give New York residents access to a greater variety of wines at lower prices, while allowing the state to satisfy its other public policy goals, such as

ID 8vg9sCIDs1 Tf0(winld es at o sstate ) ote e-com Yoth cewhiarisat1(nts, the )JTJ0.00121 Tc -0.00

---

---

---

Second and Sixth Circuits, regarding the direct shipping question. The Sixth Circuit held that Michigan’s regulatory scheme violates the Commerce Clause because it “treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state.”<sup>32</sup> The court further held that Michigan’s regulatory scheme is not saved by the 21st Amendment because it does not “further[] any of the concerns” of the 21st Amendment, and any interest Michigan has in the regulation of direct shipments to consumers could be served by “reasonable non-discriminatory means.” In contrast, the Second Circuit held that New York’s law implicates a 21st Amendment concern because New York’s requirement that out-of-state wineries establish a “physical-presence” in the state “ensures accountability” and facilitates inspection of records and products to be sold, thus reflecting “valid regulatory concerns in this unique area of commerce.”<sup>33</sup> In addition, the Second Circuit concluded that the discriminatory nature of the law was irrelevant to its constitutional analysis because the 21st Amendment authorized New York “to regulate alcohol traffic within its borders” regardless of the “normal operation of the Commerce Clause.” In the court’s view, the Commerce Clause limits a state only when it seeks “to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government.”

In their petitions for *certiorari* and briefs on the merits, advocates of direct shipping have cited the Wine Report to bolster their argument that the discriminatory bans on interstate direct shipping do not further any of the 21<sup>st</sup> Amendment’s “core concerns,” such as preventing sales to

---

<sup>32</sup> *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S.Ct. 2391 (2004).

<sup>33</sup> *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir.), *cert. granted*, 124 S.Ct. 2391 (2004).

minors or collecting taxes.<sup>34</sup> Although it remains to be seen whether the Court will rely on the Report in reaching its decision, it certainly provided the parties more empirical evidence than existed previously.

## **V. Concluding points**

The Contact Lens and Wine Reports are examples of effective competition advocacy, which complements the Commission's enforcement agenda and provides an inexpensive and effective way to discourage the enactment of anticompetitive laws and policies. Oftentimes, policymakers' expertise lies in other fields and they have not fully considered the competitive effect of their proposals. Thus, impact of these Reports also highlights the importance of gathering empirical evidence in evaluating issues of public policy. In general, competition advocacy has been particularly effective in influencing policy when it includes empirical evidence regarding the impact on consumers, which gives competition advocacy filings more credibility with the public, the courts, and policymakers. In the debate over a particular policy, empirical evidence helps to counter the arguments of those who seek to limit competition for their own self-interest. Thus, competition advocacy performs both an educational and a persuasive function.

The contact lens and wine issues have implications for competition in general and e-commerce in particular. Anticompetitive state regulations can insulate local suppliers from competition, such as online suppliers, and deprive consumers of lower prices and greater

---

<sup>34</sup> Brief of the National Alcohol Beverage Control Association and the National Conference of States Liquor Administrators as Amici Curiae in Support of Petitioners, 2004 WL 389419 (Appellate Petition, Motion and Filing) (Feb. 26, 2004); Brief of Amicus Curiae Wine Institute in Support of Respondents, 2004 WL 2190366 (Appellate Brief) (Sep. 23, 2004).



