

Unclassified

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United States

1. Introduction

1. The U.S. Federal Tr

4. Suppliers use a variety of methods to extend sales from their primary products to aftermarket goods typically are complements; therefore selling the two goods together (or at least obtaining an agreement to purchase both) can enhance efficiency. The methods by which companies attempt to influence aftermarket sales are varied, and this paper does not attempt to catalog all of them. For the sake of clarity, however, the antitrust agencies use the following definition for purposes of the discussion in this paper: aftermarket restrictions (whether by sale, lease, license or other form of agreement or transaction) limits the freedom of its customers to obtain aftermarket items.⁶ Such restrictions may arise in a number of ways. For example, the OEM may design the technical characteristics of its product to allow replacement of aftermarket items only of a predetermined type or from one or more specified suppliers (the OEM itself, in some cases). Other examples may include conditioning the supply of a product on the customer's agreement to obtain aftermarket items or warranty service only from the OEM or from sources it approves. Sometimes the characteristics of the product or other relevant circumstances may render switching to a different source of aftermarket products or services prohibitively expensive or inconvenient for the customer. Such restrictions may also relate to the price, territory or field of use, or quality or other characteristics of the aftermarket products or services in question. This paper focuses only on the competitive effects of such unilaterally imposed restrictions. For completeness, however, the antitrust agencies note that other conduct and transactions have the potential to harm competition in aftermarkets and thus can trigger antitrust liability, such as mergers between aftermarket parts providers,⁷ price-fixing,⁸ or other collusion between such providers.⁹

5. In recent years, the U.S. antitrust agencies have not challenged OEM use of unilateral aftermarket restrictions on products or services, in the absence of actual lessening of competition for locked-in customers. This approach aligns with jurisprudence in the United States, which has narrowed the scope of liability for aftermarket restraints since the U.S. Supreme Court's recent consideration of aftermarket issues in its 1992 *Kodak* decision, as discussed in detail below.¹⁰

⁶ See Bauer, *supra* n.2 at 32.

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or attempted monopolization.²¹ Defining markets and assessing the market positions of competitors also are frequently important in understanding the competitive dynamics that provide the background for assessment of allegations of other types of anticompetitive conduct. A relevant market has both product and geographic dimensions, each of which must be proven before reaching the question of whether monopoly power exists.

12.

relevant markets. This test asks whether a profit-maximizing hypothetical monopolist would likely impose at least a small, but significant and non-transitory, increase in price candidate market is a relevant product market then the market should expand to include the next most effective substitute product or products. An analogous procedure is followed to determine the relevant geographic market. The result is a defined relevant market, consisting of those products and the associated geographic area that satisfy both criteria.

policy, injuring customers who are locked in and thus cannot switch to the primary market product sold by a different OEM. Second, aftermarket will not be analyzed independently from primary markets absent a compelling reason to do so, such as the ability to exercise market power in the aftermarket without fear of offsetting commercial consequences in the primary market. The discussion below highlights some cases in which U.S. courts have construed *Kodak*.

21. The Third Circuit Court of Appeals explained in *Brokerage Concepts v. United States Healthcare*³¹ that switching costs can be an important avenue for exploration when determining relevant markets in an aftermarket case. In *Brokerage Concepts*, the court rejected the argument that the market was limited to a single brand members of defendant because the plaintiff failed to demonstrate that a pharmacy had high enough switching costs to lock it in to using the health care plan.³²

22. The First Circuit Court of Appeals narrowly applied *Kodak's* holding in 1999 disciplined aftermarket pricing.³³ The court noted that reputation is important to firms that ermarket parts or service can influence purchases in the primary market.

support its contention that the defendant had market power, a contention not supported by market realities.⁴⁰ These two factors combined to lead the Fifth Circuit to affirm the law.⁴¹

24. The Third Circuit again weighed in on an aftermarkets issue in 2006 when it affirmed a district court grant of summary judgment for the defendant, finding that a seller of hot air balloons and aftermarket replacement fabric permissibly restricted the sale of aftermarket replacement fabric to its own brand.⁴² Importantly, however, the Third Circuit last year clarified its interpretation of *Kodak* and its own previous caselaw when it held that it interprets *Kodak* firms operating in a

their conduct in related aftermarkets; and (2) that exploitation of locked-in customers is one theory that courts will recognize to justify such⁴³

Court considered the issue in *Kodak*, which evolution the antitrust agencies have described in this paper.

33. Consumer demand, whether revealed through market demand or complaints to companies about their aftermarket policies, also can change supplier behavior. For example, the coffee maker company Keurig altered its policies and sales practices due to consumer complaints that its redesigned coffee makers were incompatible with previously existing aftermarket coffee pods.⁵⁷ Moreover, common law in U.S. states may offer remedies to consumers harmed by conduct. For example, in appropriate circumstances a consumer or a company might bring a private action that alleges breach of contract or tortious interference in state court.

34. Other laws in the United States may apply to unilateral conduct related to aftermarkets. For example, most U.S. states have unfair competition laws that may be broader than the federal antitrust statutes, and state attorneys general may enforce those laws related to conduct in their own states.

35. Policymakers also should be mindful that the regulatory process may be used to establish rules limiting aftermarket competition, sometimes in response to the influence of financially interested market participants. They should be cautious of regulatory approaches that impose overly broad restrictions on aftermarket competition, or that are not narrowly tailored to address legitimate public policy concerns.

⁵⁷ See <http://www.consumerreports.org/cro/news/2015/05/after-consumer-backlash-keurig-brings-back-my-k-cup/index.htm>