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Regulation of Business - Robinson-Patman Act - A Further Look at Functional Discounts

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COMMENTS

REGULATION OF BUSINESS—ROBINSON-PATMAN ACT—A FURTHER LOOK AT FUNCTIONAL DISCOUNTS—Probably no sphere of governmental regulation of business in the United States has caused more concern or created more confusion than the attempted

regulation of pricing practices.[1] This problem has arisen, in part, because of the peculiar tendencies of certain segments of the American economy toward expansion and vertical integration and, also in part, because of the adoption of ambiguous and prejudicial legislation designed as a cure-all for allegedly harmful pricing practices.[2] In addition, the attitude of the courts and the Federal Trade Commission in this field has been far from consistent over the years, with the result that neither businessmen nor lawyers have been able to predict with any certainty the legal consequences of proposed pricing policies. It is the purpose of this comment to review the effect of governmental price regulation in the context of the so-called "functional" or "trade" discount.

I. *Introduction*

A. *Economic Background of the Problem.* By the beginning of the present century, there had developed a fairly standardized system of distribution from the producer to the consumer. This was, of course, the typical producer-wholesaler—retailer-consumer pattern and it was predicated upon a functional division of the distributive process.[3] It was common practice for the producer or wholesaler to allow price differentials to the purchasers in the next lowest level of this distributive hierarchy by way of recognition of the function performed by the purchaser in the system of distribution. Though few producers sold directly to retail dealers, those that did were careful to protect their wholesale customers by charging the retailer a distinctly higher price for the goods than that charged the wholesaler. The impetus behind this price differential, or "functional discount," was twofold: first, the manufacturer was

1 On the federal level, the most significant legislation focusing on pricing policies has been the Clayton Act, 38 Stat. L. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. L. 1526 (1936), 15 U.S.C. (1952) §§12 to 27. Of course, the broad language of §5 of the Federal Trade Commission Act, 38 Stat. L. 717 (1914), as amended by 52 Stat. L. 111 (1938), 15 U.S.C. (1952) §§41 to 58, must also be reckoned with. A consideration of state regulation in this area is beyond the scope of this comment. State statutes regulating pricing policies are collected in 2 MARKETING LAWS SURVEY—STATE PRICE CONTROL LEGISLATION (1940).

2 For a criticism of the Robinson-Patman Act on substantially this basis, see Shniderman, " 'The Tyranny of Labels'—A Study of Functional Discounts Under the Robinson-Patman Act," 60 HARV. L. REV. 571 (1947).

3 See ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS, c. 1 (1937). There were, of course, variations in this pattern, mainly in the area of the distributive functions performed by the middleman or wholesaler. In some industries, the middleman merely acted as a broker, assuming no risks and receiving a commission based on the quantity of goods "placed" for the manufacturer. More often, though, the manufacturer sold his goods directly to a wholesaler who took title to the goods and assumed all further delivery and credit risks inherent in the distribution. For a further analysis of the development of the distributive process, see Edwards, "The Struggle for the Control of Distribution," 1 J. OF MARK. 212 (1937).

dependent on his wholesalers for the distribution of the bulk of his goods and could not afford to squeeze the wholesaler out of business and, second, the costs of dealing directly with small retailers were considerably more than those incurred in dealing with wholesalers, and so it was only natural to charge the retailer a higher price.[4]

The appearance of large retail buying organizations, such as corporate chain stores, mail order houses and department stores, materially altered this picture. Many factors combined to allow the mass retailer to place goods before the consumer at a price substantially below that of the independent retailer.[5] It was not surprising, therefore, to find that manufacturers and producers felt it advantageous to deal directly with these retailers. Because they were able to perform many of the functions normally associated with the wholesaler, it was even less surprising to find these retailers demanding and receiving from the producer a price approximate to that charged wholesalers buying from the same producer, on the basis that they were performing essentially the same distributive service as that for which the wholesaler got his discount. Despite desperate attempts by independent retailers[6] and wholesalers[7] to stem the tide, or at least avoid annihilation in it, quantity buying and selling at the retail level continued to increase, and at prices substantially below those of the independent retailers.

Thus, by 1929, it had become evident that a continuation of free competition between the chain stores and the independent retailer might well result in the elimination from the market of the lat-

[4] It may be noted, however, that the actions of the wholesalers and retailers in attempting to preserve their exclusive and traditional markets sometimes resulted in federal antitrust action. See, e.g.: Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 34 S.Ct. 951 (1914); Southern Hardware Jobbers' Assn. v. FTC, (5th Cir. 1923) 290 F. 773; Arkansas Wholesale Grocers' Assn. v. FTC, (8th Cir. 1927) 18 F. (2d) 866; United States v. Southern California Wholesale Grocers' Assn., (D.C. Cal. 1925) 7 F. (2d) 944.

[5] On the growth of these organizations, the causes of their advantageous position, and their effect on competition in the marketing area, see ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 7-27 (1937); BURNS, THE DECLINE OF COMPETITION (1936); FTC, "Final Report of Chain Store Investigation," S. Doc. 4, 74th Cong., 1st sess., p. 28 et seq. (1934).

[6] Prominent among the tactics employed by the retailers was the so-called "voluntary chain store." See S. Doc. 12, 72d Cong., 1st sess. (1932). In addition, the retailers sought additional economies through the device of confining their sales activity to a small number of popular brands. See Merrell, "Restriction of Retail Price Cutting with Emphasis on the Drug Industry," in NRA, DIVISION OF REVIEW, Work Mat'ls. No. 57, p. 46 (1936).

[7] On some of the marketing practices developed by wholesalers in the face of this challenge, see U.S. BUREAU OF CENSUS, II DISTRIBUTION, WHOLESALE DISTRIBUTION, SUMMARY FOR THE UNITED STATES, 15th census (1930). Boycott practices of some wholesalers in this period are a matter of judicial and administrative record. See, e.g.: Wholesale Grocers' Assn. of El Paso v. FTC, (5th Cir. 1922) 277 F. 657; Atlanta Wholesale Grocers, 4 F.T.C. 466 (1922); McKnight-Keaton Grocery Co., 3 F.T.C. 87 (1920).

ter. It was at about this time that the emphasis in curative attempts shifted from voluntary efforts by the affected parties to legislative remedies. Many states enacted new retail store taxes which were "progressive" in the sense that the tax rate progressed upward with the number of retail stores operated.[8] State antitrust statutes and price discrimination laws were amended to apply more nearly to corporate chain stores.[9] But, due at least in part to the fact that the depression had made the consuming public more price conscious than ever, the chain store movement continued to grow. The overall problem was brought squarely to the attention of the Congress and the general public by the attempted solution to it that was proposed under the National Industrial Recovery Act.[10] In particular, the wholesalers attempted to regain their former position in the stream of distribution through the Codes of Fair Competition set up under the act.[11] However, because of a lack of jurisdiction of the wholesale codes over the manufacturer and retailer[12] and the natural pressure brought by the mass retailers themselves, the codes did not have the desired effect. By the time of the "sick chicken" case,[13] it was evident that the NRA had failed to stimulate rehabilitation of the traditional channels of distribution.[14] It was amid this economic and social confusion that the Robinson-Patman Act[15] was enacted in 1936.

B. *Definition of the "Functional Discount."* Various terms have been used to describe the price differentials involved in this discussion. Such terms as "functional discounts," "trade discounts," "functional prices," and "functional differentials" have been used,

8 See BLOOMFIELD, CHAIN STORES AND LEGISLATION 108 (1939); FTC, "Final Report of Chain Store Investigation," S. Doc. 4, 74th Cong., 1st sess., p. 78 (1934); 80 UNIV. PA. L. REV. 289 (1931); 40 YALE L. J. 431 (1931); 45 YALE L. J. 314 (1935). Cf. Ligget Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481 (1933).

9 FTC, "Final Report of Chain Store Investigation," S. Doc. 4, 74th Cong., 1st sess., pp. 82-84 (1934).

10 48 Stat. L. 195 (1933). See, generally, GASKILL, THE REGULATION OF COMPETITION 125-137 (1936); H. Hearings before the Committee on Ways and Means on H.R. 5664, 73d Cong., 1st sess. (1933).

11 On the codes generally, see ROOS, NRA ECONOMIC PLANNING 14-16 (1937); HANDBOOK OF NRA: LAWS, REGULATIONS, CODES (1933); LYON, THE NATIONAL RECOVERY ADMINISTRATION (1935). On the use of the codes by the "traditional" wholesalers, see ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 32 (1937).

12 However, the NRA approved the use of group boycotts against manufacturers who did not grant a minimum discount to the wholesalers. Some progress was made through the use of such boycotts. ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 32 (1937).

13 Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935).

14 See ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 37 (1937).

15 49 Stat. L. 1526 (1936), 15 U.S.C. (1952) §§13-13b.

at times interchangeably.[16] However, the only important element of confusion has arisen in connection with the distinction, if any, between the functional discount and the trade discount. It has been suggested that the trade discount is the price differential granted to a buyer because of the classification of the buyer by the seller at a particular level of distribution, while the functional discount is the price differential granted to a buyer because of the performance by the buyer of distributive functions which give him greater bargaining power than that possessed by other buyers.[17] It is true, though, that no such subjective distinction has been drawn by the Federal Trade Commission or the courts in this area and that businessmen in general are not aware of the distinction. For these reasons the following definition, taken from the *Report of the Attorney General's National Committee to Study the Antitrust Laws,* will be adopted here:

> "The typical functional or trade discount system provides for graduated discounts to customers classified according to place in the distribution chain—e.g., the seller's schedule may specify percentage reductions to wholesalers, jobbers, and retailers in diminishing amounts. Since such discounts prevail irrespective of the quantities involved in any particular transaction or even of the aggregate volume over a period of time, they reflect rough and long-range estimates by the supplier of the economic advantage of dealing with broad customer classes performing characteristic marketing functions."[18]

II. *The Legal Status of Functional Discounts Prior to 1936*

The first federal legislation aimed directly at price discrimination was the Clayton Act of 1914, the original section 2 of which provided, inter alia, and with certain exceptions, that discriminations as to price between different purchasers from the same seller of goods of like grade and quality are illegal when the effect of the discrimination may be substantially to lessen competition or promote monopoly.[19] Under this section, the functional discount was

16 Even the Federal Trade Commission has been inconsistent in the use and definition of these terms.

17 See Kelley, "Functional Discounts under the Robinson-Patman Act," 40 CALIF. L. REV. 526 (1952). The discount that is often granted to a manufacturer-buyer will be considered here as a functional discount, although it might be argued that a manufacturer does not perform a "distributive function" since he does not resell the goods in the form in which they were purchased.

18 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 202-203 (1955), hereinafter cited as REPORT.

19 38 Stat. L. 730 (1914).

apparently perfectly proper so long as marketing functions remained simple, i.e., so long as buyers continued to perform services at only one level of distribution. Thus, different prices charged to retailers and to wholesalers could not possibly be within this section because the two groups were not in competition with each other.[20] Nevertheless, the Federal Trade Commission had occasion to consider the subject of functional discounts as early as 1922. In *FTC v. Mennen Co.*[21] the commission found that the respondent had classified its customers into two groups, retailers and wholesalers or jobbers, and had published price lists which offered a larger discount to the wholesalers and jobbers than to those classified as retailers. In addition, Mennen had classified as retailers cooperative and mutual corporations formed by retailers and organized for the purpose of buying in wholesale quantities and distributing to retailers.[22] The commission found that this discount policy violated both section 5 of the Federal Trade Commission Act[23] and section 2 of the Clayton Act, and ordered the Mennen Company to

> ". . . cease and desist from discriminating in net selling prices, by any method or device, between purchasers of the same grade, quality and quantity of commodities, upon the basis of a classification of its customers as 'jobbers,' 'wholesalers,' or 'retailers,' or any similar classification which relates to the customer's form of organization, business policy, business methods, or to the business of the customer's membership or shareholders. . . ."[24]

From this order of the commission it is not clear whether the basis of the finding of illegality under the Clayton Act was the price difference between retail and wholesale buyers, or whether illegality was the result of the classification as retailers of those groups that were actually performing wholesale functions. A literal reading of the order would condemn all functional discounts and

[20] The sheltered position of functional discounts under §2 of the Clayton Act is not surprising in view of the fact that large scale buying and complicated marketing functions had not become too widespread at the time the act was first drafted in 1914. Section 2 was originally aimed at the predatory pricing policies of large sellers.

[21] 4 F.T.C. 258 (1922).

[22] The commission found that this classification by the Mennen Company had been ". . . for the purpose of placing such corporations at a competitive disadvantage as compared with the respondent and with the other concerns classified and designated by it as 'jobbers' or 'wholesalers,' and is used and has been used as an instrument to 'break up' such corporations . . . functioning as distributors at wholesale. . . . Such policy was adopted after protests were made individually and at conventions of the National Wholesale Druggists' Association. . . ." Id. at 278.

[23] 38 Stat. L. 719 (1914), 15 U.S.C. (1952) §45.

[24] 4 F.T.C. 258 at 283 (1922).

would seem to ignore the Clayton Act requirement of injury to competition. However, the position of the commission was made clear less than two weeks later in *FTC v. South Bend Bait Co.*[25] In this case, the respondent had divided its customers into four groups —jobbers, wholesalers, retailers and consumers. The first three groups listed were granted discounts of 50%, 40%, and 33 1/3%, respectively, from the list price offered to consumers. Again the commission found a violation of section 2 of the Clayton Act and entered a cease and desist order similar to that entered in the *Mennen* case. Since in this case there was no issue of faulty classification of buyers, it is clear that the commission had condemned the functional discount as illegal under the Clayton Act. However, this clarity was shortlived because the *Mennen* case was reversed on appeal.[26] The Court of Appeals for the Second Circuit held that the "competition" mentioned in section 2 referred to those in competition with the seller who grants the discount and did not refer to competition with any buyers from the seller.[27] Having decided this, though, the court went on to state (1) that Mennen could refuse to sell to retailers or to wholesalers at all, and that if it did sell to either class of purchasers it could do so on any terms it chose under the doctrine of earlier Supreme Court cases,[28] and (2) that "whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler . . . ."[29] This dictum indicated that the functional discount might be allowed in cases where the classification of customers was predicated on the character of the selling of the customer rather than on the actual function performed by the customer.

The following year the Court of Appeals for the Second Circuit decided *National Biscuit Co. v. FTC.*[30] In this case, the company had established straight quantity discounts for all its customers, but had then computed the quantity purchased by corporate chain stores on the basis of the total purchases of all the branch stores,

25 4 F.T.C. 355 (1922).

26 Mennen Co. v. FTC, (2d Cir. 1923) 288 F. 774.

27 The court also held that the price differentials granted were not an "unfair method of competition" under §5 of the Federal Trade Commission Act on the basis of the Supreme Court decision in FTC v. Gratz, 253 U.S. 421, 40 S.Ct. 572 (1920). Id. at 777.

28 United States v. Colgate and Co., 250 U.S. 300, 39 S.Ct. 465 (1919). Cf. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 42 S.Ct. 150 (1922).

29 Mennen Co. v. FTC, (2d Cir. 1923) 288 F. 774 at 782. The proposition that the classification of a buyer's function was to be made on the basis of the character of his selling had been established originally in Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co., (2d Cir. 1915) 227 F. 46, where it was decided that A & P was a "retailer."

30 (2d Cir. 1924) 299 F. 733.

while refusing to do the same for associations of retail stores buying in large quantities. The court reversed the cease and desist order of the commission on the basis of the definition of "competition" in the *Mennen* case, but then went on to state that ". . . there is no provision in the Clayton Act, or elsewhere, that the price to two different purchasers must be the same if it cost the seller as much to sell to one as it does to the other."[31] Since the court in this case recognized that the independent grocers and the chain stores were in competition with each other, it may well be said that the quoted phrase drained section 2 of the Clayton Act of any meaning at all.[32]

The confusion was cleared up, at least in part, by the decision of the Supreme Court in *Van Camp & Sons Co. v. American Can Co.*[33] Here it was alleged that the petitioner was being offered tin cans by the respondent at a price substantially above that at which the respondent sold to competitors of the petitioner. There was no allegation or showing that there was any effect at all upon competition on the manufacturing level. The Court held that the phrase "in any line of commerce" meant exactly what it said, and refused to consider evidence of the intent of Congress in enacting the statute.[34] The result was that by the time of the enactment of the Robinson-Patman Act in 1936, two propositions were clear as to the legality of the functional discount under the Clayton Act. First, under the *Van Camp* case the competitive sphere to be considered in each case included any line of commerce which might be affected by a given price discrimination; and, second, for purposes of the classification of customers into functional groups, it was the character of the selling of the customer and not the character of his buying which determined his functional level.[35] Beyond this the state of the law was uncertain.

31 Id. at 739.

32 Another illustration of the impotency of §2 may be found in Baran v. Goodyear Tire and Rubber Co., (D.C. N.Y. 1919) 256 F. 571. It was here alleged that the defendant discriminated in price between tire dealers and manufacturers of automobiles in favor of the latter. The court held this to be legal under §2 since there was no competition between the defendant and the dealers, and noted further that since the manufacturers normally purchased in large quantities as compared with dealers the defendant could afford to sell to the former for less. And in S. S. Kresge Co. v. Champion Spark Plug Co., (6th Cir. 1925) 3 F. (2d) 415, the court held that the sale of spark plugs to car manufacturers at *below* cost (the loss being made up through higher prices charged on replacement spark plugs) did not violate §2 because it had no tendency to injure competition.

33 278 U.S. 245, 49 S.Ct. 112 (1929).

34 Thus, the basic premises of the Mennen and National Biscuit cases was rejected.

35 In Western Sugar Refining Co. v. FTC, (9th Cir. 1921) 275 F. 725, the court was faced with the problem of classifying an alleged wholesale grocery concern which had from 250 to 275 retail grocers as customers, but whose stockholders included 75 or 80 of these retail customers. The court upheld the commission's ruling that the concern was a

III. *Functional Discounts and the Legislative History of the Robinson-Patman Act*

The functional discount problem was of some importance in the minds of the framers of the Robinson-Patman Act.[36] The Senate passed a provision to permit price differentials between purchasers based solely on the purchaser's position within the distributive hierarchy.[37] In the House, the Patman bill was reported out with a paragraph to substantially the same effect, but with the added provision that the position of any given purchaser in the chain of distribution was to be determined by the type of selling of that purchaser.[38] There were, however, strong and competing political influences at work. The wholesalers wanted these provisions written in so as to protect themselves from the chain stores, and the agricultural purchasing cooperatives wanted the provisions out of the law so as to protect themselves from having to pay the same prices as other retailers. In the interest of getting some law passed, both the Senate and the House provisions on functional discounts were omitted from the final bill.[39] It is hardly possible to draw from these political maneuvers any indication of legislative intent as to the legality of functional discounts. As enacted into law, the Robinson-Patman Act contains no mention of functional discounts. The relevant portion of the act states:

> ". . . it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce,

wholesaler and not merely a buyers' exchange for retail buyers. One may wonder at what point the switch would take place.

Under this system of classification all corporate chains were, of necessity, classified as retailers despite the fact that they performed most, if not all, of the functions of a wholesaler. However, as a general rule, the chains were granted a discount approximately equal to that of the wholesaler. The lack of litigation on this practice was due to the requirement of §2 that the discrimination must tend to injure competition generally rather than merely to injure individual competitors. The Robinson-Patman Act, of course, attempted to close this loophole. See H. Rep. 2287, 74th Cong., 2d sess., p. 7 (1936).

36 This is not too surprising in view of the fact that the original draft of the bill was written by an attorney for a wholesale grocers' association. See H. Hearings before the Committee on the Judiciary on H. R. 8442, 74th Cong., 1st sess., p. 9 (1935).

37 See 80 CONG. REC. 6428 (1936).

38 See H. Rep. 2287, 74th Cong., 2d. sess., pp. 1-2 (1936).

39 This has led one commentator to state: "Perhaps this omission is fortunate. So much has been written and so many difficulties have been experienced with the Act silent on the subject, that one hesitates to think of what might have transpired if the statute had included some pronouncement with which lawyers, courts and the Commission could have toyed during the past 17 years." Levy, "Functional Pricing," UNIVERSITY OF MICHIGAN SUMMER INSTITUTE ON FEDERAL ANTITRUST LAWS 116 (1955).

where such commodities are sold for use, consumption, or resale within the United States ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them...."[40]

IV. *The Legal Status of Functional Discounts Prior to 1955*

Since the passage of the Robinson-Patman Act there has been no question but that a reasonable discount granted to single-function wholesalers is perfectly proper so long as this discount is granted to all wholesalers on an equal basis.[41] Single-function wholesalers compete only among themselves, and so long as they all receive the same price there can be no adverse effect on competition. However, two problems have remained unanswered since the time the act was passed,[42] and have proved to be the major stumbling blocks to an understanding of functional discounts under the act. The first problem is one of definition or classification, i.e., to what extent can a seller be certain that a purchaser will be considered a wholesaler or a retailer if some dispute arises over the prices extended to this purchaser. The second and more difficult problem is to adapt the law to take account of the varied and complex marketing methods in use today so that a seller may be certain that any given price policy is within the law. This involves recognition of the fact that purchasers often perform two or more marketing functions.

[40] 49 Stat. L. 1526 (1936), 15 U.S.C. (1952) §13(a). This section goes on to exempt price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." Thus it is always possible to justify by cost a differential in price. But since by definition a functional discount is a differential granted to a class of purchasers regardless of the amount purchased, such differentials are not within this exemption.

[41] But see Standard Oil Co. v. FTC, (7th Cir. 1949) 173 F. (2d) 210, revd. 340 U.S. 231, 71 S.Ct. 240 (1951), mod. by the commission, 49 F.T.C. 923 (1953), certified to 7th Cir. March 26, 1953; remanded to the commission for want of jurisdiction (7th Cir. 1954) CCH 1954 Trade Cas. ¶67,727, reconsideration den. by the commission, CCH Trade Reg. Rep. ¶25,303 (1955), petition for review pending in the 7th circuit.

[42] At the time the act was passed there was a flood of literature attempting to predict what its effect would be. See PATMAN, THE ROBINSON-PATMAN ACT (1938); ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937); WERNE, BUSINESS AND THE ROBINSON-PATMAN LAW (1938); 46 YALE L. J. 447 (1937); 31 ILL. L. REV. 907 (1937); Hamilton and Loevinger, "The Second Attack on Price Discrimination; The Robinson-Patman Act," 22 WASH. UNIV. L. Q. 153 (1937); Learned and Isaacs, "The Robinson-Patman Law: Some Assumptions and Expectations," 15 HARV. BUS. REV. 137 (1937); McNair, "Marketing Functions and Costs and the Robinson-Patman Act," 4 LAW AND CONTEM. PROB. 334 (1937); Alexander, "The Wholesale Differential," 9 UNIV. CHI. J. BUS. 314 (1936); Thorpe

In *Bird and Son, Inc.*[43] the commission established the proposition that a one-price policy to both jobbers who supplied retailers and to mail order houses which sold directly to consumers was legal. The basis of this decision was that there was no price discrimination here at all, legal or illegal.[44] However, a one-price system to both wholesalers and retailers has been recognized by the commission to present a situation which might involve a violation of section 2 of the act in cases where the seller controls the wholesaler's resale price and actively solicits retail purchases from the wholesaler. In this event, the retail purchasers from the wholesaler may become "purchasers" of the seller under *Kraft-Phenix Cheese Corp.*[45] But clear as the law may be on this point, it will be a rare case in which a seller wishes to or can afford to adopt a one-price policy to all classes of customers. For this reason the clarity of the one-price doctrine is of doubtful value to sellers in general.[46]

Sales to purchasers performing both wholesaling and retailing functions under the Robinson-Patman Act were first before the commission in 1938 in four cases involving the sales of agricultural supplies.[47] The commission, after approving a classification of customers based on the character of the selling of the customers, recognized that a jobber's discount could be given to a jobber who sold to both retailers and consumers on the goods sold to retailers by stating that "where, in fact, jobbing services are rendered ... nothing herein contained shall preclude jobber prices on that portion which is jobbed."[48] The status of the dual function distributor

and George, "A Checklist of Possible Effects of the Robinson-Patman Act," 44 DUN & BRADSTREET 2 (Aug. 1936).

[43] 25 F.T.C. 548 (1937).

[44] Initially, this reasoning may be difficult to accept. This is so because the net effect of charging both jobbers and retailers the same price is to insure that the retailer customers of the jobbers are buying at a competitive disadvantage as compared to mail order houses. This is exactly the sort of discrimination at which the act was aimed. The maxim that treating unequals equally means inequality would seem to apply to this situation. However, in FTC v. Staley Co., 324 U.S. 746 at 757, 65 S.Ct. 971 (1945), the Court stated: "But it does not follow that respondents . . . may not maintain a uniform delivered price at all points of delivery, *for in that event there is no discrimination in price.*" Italics added.

[45] 25 F.T.C. 537 (1937). Cf. Golf Ball Manufacturers' Assn., 26 F.T.C. 824 (1938), and Luxor, Ltd., 31 F.T.C. 658 (1940), for an expansion of this doctrine under §§2(d) and 2(e) of the act. Note also that, in theory, a functional discount might be covered by §2(d) of the act in that the seller is "buying" a distributive service for his product. See Van Cise, "Functional Prices," CCH ROBINSON-PATMAN ACT SYMPOSIUM 89 (1947); General Foods Corp., F.T.C. Dkt. No. 6018 (1956).

[46] Furthermore, there are pitfalls in many systems involving uniform delivered prices even within a single class of customers. See REPORT 209-221.

[47] Agricultural Laboratories, Inc., 26 F.T.C. 296 (1938); Hansen Inoculator Co., 26 F.T.C. 303 (1938); Albert L. Whiting, 26 F.T.C. 312 (1938); Nitragin Co., 26 F.T.C. 320 (1938).

[48] Albert L. Whiting, 26 F.T.C. 312 at 317 (1938).

was further clarified by the commission in *Sherwin-Williams Co.*[49] Here two subsidiaries of the Sherwin-Williams company were found to have allowed functional discounts to distributors who sold some paint products indirectly to consumers through wholly owned retail stores and also to distributors who sold directly to consumers. Both sellers accepted the statements of these distributors as to the percentage of their business transacted with retail dealers, and then granted the wholesaler's functional discount on this percentage of their purchases of paint.[50] The commission found that this resulted in discounts being granted on the purchase of paint products which were in some cases being sold to consumers, and issued a cease and desist order against this practice.[51] Therefore, by 1943, it seemed clear that a functional discount could legally be granted to a distributor who also performed the function of a retailer if the seller could establish that the discount was granted only on goods with respect to which the purchaser actually performed a wholesale function, i.e., goods which were resold by the distributor to retailers.[52]

The problem of the dual function distributor culminated in the decision of the commission in *Standard Oil Co.*[53] in 1945. In this case Standard sold gasoline to four dealers in the Detroit area at a price which was 1½ cents per gallon less than the price charged to regular Standard dealers in the area. The reason for the discount was that the four dealers had large storage facilities and, therefore, were able to purchase large quantities of gasoline. One of these dealers resold this gasoline directly to consumers through its own retail stations, and the other three sold some gasoline directly to consumers and some to independent retail stations. As might have

[49] 36 F.T.C. 25 (1943). The problem had arisen prior to this case, in American Oil Co., 29 F.T.C. 857 (1939), but the recorded findings and order are not clear as to the exact basis of the decision. The case is usually cited for the proposition that discounts allowed to dual function distributors apportioned to the actual resale activities of the distributors are legal under §2 (a).

[50] The parent company, Sherwin-Williams, followed a stricter procedure in demanding a monthly certified statement from distributors stating the amount of paint products resold to retailers. The discount was then computed on this amount through the use of a credit device against future purchases. The commission found that this did not violate §2 (a).

[51] But it is not clear from the case exactly how a seller is to exercise enough control over a dealer-distributor so as to be able to compute the discount properly. One element of the complaint in this case which would have compelled the seller to obtain assurance as to the destination of the goods being sold was dismissed without prejudice by the commission. See also American Art Clay Co., 38 F.T.C. 463 (1944).

[52] At this time there had never been any suggestion that the discount should be varied depending on what percentage of the function was performed by the buyer. Compare REPORT 208.

[53] 41 F.T.C. 263 (1945).

been expected from the previous commission decisions, the commission ordered that Standard cease and desist from discriminating in the price of gasoline,

> "5. By allowing a lower price to any dealer, jobber, or wholesaler on gasoline sold by such dealer, jobber, or wholesaler at retail, than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing activity. . . ."[54]

Many commentators declared that this order bordered on the absurd because it precluded Standard from recognizing, by way of a direct or indirect reduction in price, the distributive functions performed by these four large dealers.[55] However, the commission was not through with Standard; it further ordered that Standard cease and desist from discrimination in the price of gasoline,

> "6. By selling such gasoline to any dealer, jobber, or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such dealers, jobbers, or wholesalers where such dealers, jobbers, or wholesalers resell such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or who directly or indirectly grant to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."[56]

Simply stated, this order meant that Standard was precluded from granting any discount on gasoline sold to actual wholesalers in cases where the wholesalers saw fit to sell to their retailer customers at a price below that offered to retailers by Standard. This blow was softened to some extent by the court of appeals which conditioned liability under this order on the reasonable knowledge of Standard that its jobbers were undercutting Standard's prices in the sale of gasoline to retailers.[57] Under this ruling, it seems that a seller has the option of either obtaining control of the resale prices of his distributors, and thereby risking violation of the Sher-

[54] Id. at 284.

[55] See Haslett, "Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 (1948); 49 MICH. L. REV. 261 (1950); Bartenstein, "Functional Discounts under the Robinson-Patman Act," 4 WASH. & LEE L. REV. 121 (1947).

[56] 41 F.T.C. 263 at 285 (1945).

[57] (7th Cir. 1949) 173 F. (2d) 210 at 217.

man Act,[58] or matching the price at which his distributors see fit to sell to retailers.[59] The final outcome of this case is still uncertain at the time of this writing, so that it may be that subsequent developments will influence the Supreme Court to modify further or to reverse entirely the order of the commission.[60]

One further issue deserves mention at this point. It is not unlikely, in view of the mass purchasing power of large-scale retailers, that a seller might be tempted to sell to such retailers at a price lower than that at which the seller offers the same goods to wholesalers. The basis of such discounts to large retailers might be nothing more than the quantity purchased by the retailers. However, the commission has taken the view that a retailer cannot legally receive a lower price than a wholesaler in cases where the retailer is in competition with customers of the wholesaler.[61] This view seems clearly justified in light of the fact that the Robinson-Patman Act condemns discrimination in price between purchasers where the effect may be to injure competition with "any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[62]

V. *The Report of the Attorney General's National Committee to Study the Antitrust Laws, and Subsequent Cases*

The *Report of the Attorney General's National Committee to Study the Antitrust Laws* considers in some detail the law relating to functional discounts.[63] After a review of the law as it stood at the time the *Report* was issued, the committee focused its attention

58 26 Stat. L. 209 (1890) as amended by 50 Stat. L. 693 (1937), 15 U.S.C. (1952) §§1 to 7. See United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 64 S.Ct. 805 (1944); United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S.Ct. 915 (1948). Any agreement between the seller and a distributor where the contracting parties are in competition in sales to retailers would probably be "horizontal" and therefore outside the protection of the McGuire and Miller-Tydings Acts.

59 It is unclear what the seller must do if two of his distributors sell to retailers at two different prices in the same market area in which the seller also sells to retailers directly. In any event, no seller will wish his retail prices dictated by his distributors, and this conscious matching of an independent distributor's price might well be unlawful. See United States v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940).

60 See note 41 supra. Apparently the commission did not rely on ¶6 of the order in the earlier argument before the Supreme Court, and the Court did not pass upon the legality of this part of the order. Standard Oil Co. v. FTC, 340 U.S. 231, 71 S.Ct. 240 (1951).

61 This was established in Morton Salt Co., 40 F.T.C. 388 at 398 (1945), and had been intimated earlier by the commission in C. F. Sauer Co., 33 F.T.C. 812 (1941), and Life Savers Corp., 34 F.T.C. 472 (1941). The Morton Salt case order was set aside and the complaint dismissed by the court of appeals because the commission had failed to show that the quantity discounts were unjustified or that they had any illegal effect, (7th Cir. 1947) 162 F. (2d) 949, revd. 334 U.S. 37, 68 S.Ct. 822 (1948).

62 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13 (a).

63 REPORT 202-209.

on the two problems raised by the *Standard Oil* case, i.e., the control by a seller of resale channels and prices, and discounts granted to dual function distributors. As to the problem of control by the seller of resale prices charged by his distributors, the committee disposed of this problem by stating: "In the Committee's view, imposing on any dual supplier a legal responsibility for the resale policies and prices of his independent distributors contradicts basic antitrust policies. Resale-price fixing is incompatible with the tenets of a free and competitive economy."[64] Further, the committee felt that the result of the legal pressures created by paragraph 6 of the *Standard Oil* order would be to encourage direct manufacturer-to-retailer sales and thus to destroy the beneficial influence on our economy of competition at the distributive level. However, in some industries wholesale distributors are in a position to demand and get a price offer from a seller considerably below that at which the seller sells to retailers. In this event, it may be possible for the distributor to resell the goods so purchased at a price below that at which the supplier sells to retailers and so place the direct buying retailers at a distinct competitive disadvantage. It may be argued that, in such industries, the effect of the commission's order in the *Standard Oil* case would be to encourage suppliers to distribute their goods through wholesale distributors only and thus to foster what the committee felt is the beneficial influence of wholesale competition. This preservation of wholesale marketing functionaries would seem to be in line with the major purposes of the act. But in the final analysis, the problem becomes one of balancing the interest of the seller in being able to quote his own prices to retailers and being able to offer reasonable discounts to wholesalers against the possible adverse effect of such freedom on the competitive position of direct buying retailers. In striking this balance, it should be noted that in this situation the wholesaler and the supplier are in direct competition for the patronage of the retailers, and to use legislative sanctions to insure that both the wholesaler and the supplier offer the retailer the same prices would effectively preclude this competition. The order of the commission in the *Standard Oil* case seems to assume that the retailers would keep on buying directly from the supplier at a higher price rather than switching to the wholesaler who offers a lower price.[65] Such an assumption is hardly warranted. In addition, the order

[64] Id. at 206-207.

[65] In the alternative it may assume that the wholesaler receiving the discount will sell only to a favored group of retailers. It does not seem likely that the wholesaler would refuse such an attractive opportunity to expand operations.

raises the practical problems inherent in attempting to police a customer's resale activities and the problem of possible violations of other antitrust statutes.[66] While the answer is not at all obvious, it would seem that the solution adopted by the committee represents the wisest course.

On the problem of discounts granted to dual function distributors the *Report* states, ". . . to relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing."[67] The reason for this position is said to be that performance of traditional wholesale functions by a purchaser will be unaffected by the fact that he also performs other functions (such as retailing) and that a legal rule disqualifying such a person from receiving a wholesale discount merely because he sells at retail forces the distributor to perform these wholesale services free of charge. As the committee states, "The value of the service is pocketed by the seller who did not earn it. Such a rule proclaims as a matter of law that the integrated wholesaler-retailer cannot possibly perform the wholesaling function; it forbids the matter to be put to proof."[68]

Thus, the committee recommended that a dual distributor should be allowed a functional discount corresponding to any part of the function he actually performs on that part of the goods sold to him for which he performs it. In short, the buying rather than the selling of the purchaser should determine his qualification for a discount. One dissenting member of the committee stated that only to the extent that a purchaser resells as a wholesaler does he assume the risks and perform the functions of a wholesaler, thus approving the traditional view of the commission. It should be noted that both views agree on the basic premise that a wholesaler should be allowed a discount because of the performance of the wholesaling function. The disagreement, then, must be due to some confusion over the problem of exactly what comprises the wholesaling function, or, restating the problem, exactly who is a wholesaler. In terms of the practical economics of the problem, the solution would seem to lie in the nature of the competitive forces which compel the granting of the functional discount. If a manufacturer is willing to grant a functional discount to a wholesaler because of the services performed by wholesalers in distributing his product to a group of retailers and in assuming the expenses

[66] See note 58 supra and adjacent text.
[67] REPORT 207.
[68] Ibid.

and credit risks of this distribution, then it would seem that the selling activities of the distributor should determine whether or not he is entitled to a wholesaler's discount. However, it is more realistic to state that the manufacturer takes a broader view of the distributive function. He wants to have his product placed before the public in as many selling areas as are feasible. Furthermore, in most cases he is not equipped to make delivery or assume the credit risks involved in so placing his products. In this light, then, the wholesaling function becomes merely one of taking bulk delivery of the manufacturer's product and placing it so that it is offered to the public for sale; this is the marketing function for which the manufacturer is willing to allow a discount. It is absurd to think that a manufacturer is willing to allow this discount only to those traditional wholesalers who distribute his goods via independent retail stores, and is not willing to allow a discount to those, such as corporate chain stores, who perform identical services in terms of distribution of his product, except that the goods are offered to the consumer through a branch chain store. If any such distinction is drawn it must certainly be by virtue of a law and not by virtue of the business judgment of the manufacturer. The discrimination, if any, lies in not allowing the same discount to those who perform the same functions, and for this reason the basic approach of the committee to the dual distributor problem would seem in theory to be a sound one.

However, in practice, the recommendations of the committee will prove to be difficult to administer. First, it must be determined in each case exactly what part of the wholesaling function a given distributor performs. This will involve difficult problems of definition which will vary from industry to industry. In addition, this figure then must be applied to that portion of the goods purchased for which the distributor performs any wholesale function at all in order to determine the amount of the discount which may be allowed to him. In this manner, the committee has effectively changed the nature of the functional discount from one granted to a class of distributors to a discount granted on an individual basis depending on the actual services performed by each distributor.[69] Such standards of legality will place an almost impossible burden on both the commission and businessmen in enforcing the law and

[69] "Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it." REPORT 208. This approaches a theory which would demand a cost justification under §2 (a) of all functional discounts. See REPORT 209.

in justifying price differentials. But regrettable as this may be, it is submitted that the inevitable result of the increase in the number of distributors who perform varying marketing functions is to force any inquiry into the legality of functional discounts onto an individual basis. The manner of accomplishing this change, though, is open to question, and a proposal of an alternative method is presented in the conclusion of this comment.

At this writing it is too early to be certain exactly what influence the committee's report will have on the legal status of the functional discount. Since the *Report* was made public on March 31, 1955, two important decisions have been handed down by the commission bearing on the subject of functional discounts. The first of these was *Moog Industries, Inc.*[70] Here the seller had a standard system of quantity discounts available to jobber customers, but allowed certain groups of jobbers to pool their orders and allowed the quantity discount based on the total quantity purchased by each group of jobbers. The merchandise was shipped directly to the individual members of the groups, but the billing for the goods was presented to the group office. As a result, the commission found that the members of these groups received more favorable prices than jobbers who purchased individually from the seller and who were in competition with the group members. This discount system was the subject of a cease and desist order by the commission. Although the case arose in the context of a quantity discount, the decision is in harmony with the views expressed by the committee. The only distinctly distributive function performed by the jobbers who had grouped their orders was that of receiving billing at the group office, and they assumed no other functions which indicated that they should be placed on a distributive level different from that of the individual jobbers. In this decision the commission seems to have adopted the view of the committee and of the Supreme Court[71] that any classification system of customers for the purpose of determining discounts must be realistic in terms of functional classes within which competition actually exists.

A more recent and more enlightening decision by the commission is the *Doubleday* case.[72] Here the findings showed that the respondent sold books to the so-called "Big Three" jobbers at

[70] F.T.C. Dkt. No. 5723 (1955). See also E. Edelmann & Co., F.T.C. Dkt. No. 5770 (1955).

[71] See FTC v. Ruberoid Co., 343 U.S. 470, 72 S.Ct. 800 (1952), for an example of faulty customer classification.

[72] F.T.C. Dkt. No. 5897 (1955).

prices below those at which it sold the same books to other customers on the same distributive level. At the hearing the respondent offered proof that these discounts were, in fact, given as payment for services rendered by these jobbers to the respondent. The trial examiner excluded this evidence, but the commission reversed the examiner. The majority opinion adopts the view set forth by the committee[73] in stating that this evidence was relevant and that the respondent should have been allowed to show what actual functions were performed by these favored customers. This is a direct reversal of the long-established commission view that the character of the selling of the purchaser alone determines his qualification for a functional discount.[74] Therefore, it now appears that, by a margin of three to two, the commission is willing to listen to a justification of functional discounts based on actual functions performed by the customer. But, having established this proposition, the commission went further, examined the evidence, and found it to be insufficient as a justification for the discounts allowed. In this regard, the commission made the following statement bearing on the practical enforcement of this new theory:

> "[The offered evidence] . . . failed to establish any reasonable relation between the amount of discounts allowed and the value of services or facilities furnished by the Big Three. Furthermore, the preferential discounts allowed the Big Three were enjoyed by them for as long as twenty-five years without any effort on respondent's part to determine what services were in fact rendered or how the benefit or savings, if any, inured to the respondent. From the record it appears that the Big Three as well as respondent treated the higher discounts as price reductions and not payments or allowances for services rendered."[75]

In the light of this statement it seems that a manufacturer, in order to justify a functional discount granted to a dual function distributor, will at least have to fulfill the following requirements in regard to each such distributor:

(1) Establish a "reasonable relation" between the amount of the discounts granted and the services or facilities furnished by the distributor;

[73] It is interesting to note that, in many places, the commission's majority opinion is a direct quotation of the REPORT, although no mention is made of the REPORT in the opinion.

[74] The concurring opinion of Commissioner Secrest, however, follows the old view, citing Southgate Brokerage Co. v. FTC, (4th Cir. 1945) 150 F. (2d) 607, a case arising under §2 (c), as authority. The concurring opinion of Commissioner Mead also takes this view.

[75] F.T.C. Dkt. No. 5897 at pp. 5-6 (1955).

(2) Make periodic reappraisals of the value to the seller of these services or facilities and adjust the amount of the discounts granted accordingly;

(3) Avoid any indication that the discounts granted are considered as price reductions rather than as payment for services or facilities furnished.[75a]

These requirements, of course, are vague and useful only as guideposts until further clarification by the commission is forthcoming. However, one thing is clear; the rule that the functional classification must be based on the character of the selling of the customer has yielded to a more realistic approach.[76]

VI. *Conclusion*

In discussing the legislative history of the act, it was noted that both the House and Senate versions of the bill had specific provisions dealing with functional discounts. It is submitted that Congress should at this time take the initiative in clarifying the law on this phase of our economy by way of an amendment to section 2 of the Clayton Act. Certainly functional discounts are as important to our system of distribution as are the cost justifications expressly allowed by section 2 or the right to select customers, also expressly granted by section 2. Such an amendment should adopt the basic approach suggested by the Attorney General's National Committee by providing that a seller may legally grant a functional discount to a purchaser when the amount of the discount is determined by that percentage of the distributive function which is

[75a] [Since this comment was written, the FTC has handed down its decision in General Foods Corp., F.T.C. Dkt. No. 6018 (1956). In that case the respondent had granted a 10% discount to Institution Contract Wagon Distributors (ICWDs) who sold respondent's "institution pack" products directly to hospitals, hotels, schools, etc., and also had granted the ICWDs a 2% per pound discount on coffee. The discounts were not granted to the conventional institution wholesalers. The commission agreed with the hearing examiner that the effect of the discounts was to give the ICWDs a competitive advantage over the wholesalers, and, thereby, to lessen competition. The respondent attempted to defend the discounts on the basis of the particular contractual arrangements it had with the ICWDs, under which the latter agreed to perform their reselling services in certain specific manners. Though this case did not involve a dual function distributor, it is relevant to this comment in that it holds (1) that §2(d) cannot be used as a basis for sustaining a discount where there is no showing that the services contracted for were ever actually performed by the individual distributors and when, in fact, the discounts were granted only for "willingness . . . to perform certain services" (at p. 6) and (2) that §2(a) does not permit a functional discount to be granted to one distributor which is not granted to another distributor who occupies the same position in the distributive hierarchy simply because the first distributor has contracted to perform his reselling in a particular manner. To hold otherwise, said Chairman Gwynne (at p. 7), "would be to read Section 2(d) out of the Act."—Ed.]

[76] But see E. Edelman & Co., F.T.C. Dkt. No. 5770 (1955).

performed by the purchaser on those goods for which the function is performed.

However, as also noted above, this solution presents practical difficulties because the problem must be approached on an individual basis. In order to make the standards set forth by the committee workable, it is necessary to focus attention on the broad picture of the effects of the discounts on competition. It is proposed that the clause in section 2 (a) of the act—"or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . "—be made inapplicable to functional discounts. This would leave as illegal only those functional discounts which might substantially lessen competition or tend to create a monopoly in any line of commerce.[77]

The actual form of this proposed amendment would be of far less importance than the content. However, the following clause is set forth as one possibility to be considered in amending section 2 (a).

> *Provided Further,* That nothing herein contained shall preclude the granting of discounts to a purchaser in any case where the discount granted bears a reasonable relation to functions performed or services or facilities furnished by the purchaser where the benefit of such functions or services of facilities inures to the benefit of the person granting the discount, unless the granting of the discount may tend substantially to lessen competition or tend to create a monopoly in any line of commerce.

This amendment would foster competition in the distributive process without any substantial lessening of protection against the predatory tactics which might be attempted by powerful buyers.[78] At the same time sellers would be free to classify their customers in any way that seemed economically sound without being forced to justify this classification under the doctrine of the *Doubleday*

[77] The REPORT takes the view that this approach can be followed without statutory amendment on the basis of Minneapolis-Honeywell Regulator Co. v. FTC, (7th Cir. 1951) 191 F. (2d) 786, cert. dis. 344 U.S. 206, 73 S.Ct. 245 (1952), and Automatic Canteen Co. v. FTC, 346 U.S. 61, 73 S.Ct. 1017 (1953). In view of the obvious meaning of the statutory language and the philosophy expressed in Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 49 S.Ct. 112 (1929), this position seems somewhat optimistic. In addition, it has never really been clear whether a price discrimination which can be justified as a functional discount must also face the injury-to-competition tests of §2 (a). See Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1202 (1952).

[78] It must be remembered that the Sherman Act and §5 of the Federal Trade Commission Act, together with the revised Robinson-Patman Act, would be available in this area.

case or being prohibited from making the classification at all under the *Standard Oil* case. Illegality would then turn on the practical economics of each situation rather than on an arbitrary definition of terms.

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