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REGULATION OF BUSINESS-DISCRIMINATORY PRACTICES IN THE FORM OF ADVERTISING ALLOWANCES, SERVICES, AND FACILITIES UNDER THE ROBINSON-PATMAN ACT

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REGULATION OF BUSINESS—DISCRIMINATORY PRACTICES IN THE FORM OF ADVERTISING ALLOWANCES, SERVICES, AND FACILITIES UNDER THE ROBINSON-PATMAN ACT—With the growth of the chain store system of distribution, massive buying power was often used to exact price concessions, enabling large-scale distributors to undersell smaller concerns and independent retailers.[1] The Robinson-Patman Act,[2] an amendment of section 2 of the Clayton Act,[3] was prompted by this economic development of the twenties. A report by the Federal Trade Commission described several kinds of discriminatory concessions extracted by chain stores and stated that the trend toward final chain store supremacy and dominance was apparently uncheckable.[4] It

[1] See ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937).

[2] 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13. In general on the Robinson-Patman Act see Copeland, "The Problem of Administering the Robinson-Patman Act," 15 HARV. BUS. REV. 156 (1937); Learned and Isaacs, "The Robinson-Patman Law: Some Assumptions and Expectations," 15 HARV. BUS. REV. 137 (1937); McAllister, "Price Control by Law in the United States," 4 LAW AND CONTEM. PROB. 273 (1937); ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937); PATMAN, THE ROBINSON-PATMAN ACT (1938); N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIA (1946, 1947, 1948); Adelman, "Effective Competition and the Anti-Trust Laws," 61 HARV. L. REV. 1289 (1948); Haslett, "Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 (1948); OPPENHEIM, PRICE AND SERVICE DISCRIMINATIONS UNDER THE ROBINSON-PATMAN ACT (1949); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (1950); Fuchs, "The Requirement of Exactness in the Justification of Price and Service Differentials Under the Robinson-Patman Act," 30 TEX. L. REV. 1 (1951); Rowe, "Price Discriminations, Competition, and Confusion: Another Look at Robinson-Patman," 60 YALE L. J. 929 (1951).

[3] 38 Stat. L. 730 (1914), as amended by 49 Stat. L. 1526 (1936) and 64 Stat. L. 1125 (1950), 15 U.S.C. (1946) §§12-17, 15 U.S.C. (Supp. V, 1952) §18.

[4] FEDERAL TRADE COMMISSION, FINAL REPORT ON THE CHAIN STORE INVESTIGATION (1934).

was chiefly to restore equality of opportunity in business that the Robinson-Patman Act was enacted. The act outlaws discriminations in price between competing purchasers in interstate commerce where such differentials cannot be justified by differences in the cost of manufacture, sale, or delivery, resulting from the methods or quantities of sale or delivery.[5] The act singles out three disguised forms of discrimination: brokerage allowances, advertising allowances, and services or facilities granted to the buyers. This comment will deal solely with the last two forms of discrimination prohibited by sections 2(d) and (e) of the Robinson-Patman Act,[6] and will attempt to illustrate the present state of the law and offer a possible alternative construction and method of implementation of these sections. A recent ruling of the FTC in a group of cases[7] appears to be significant with respect to controversial aspects of sections 2(d) and (e), and indicative of the present attitude of the Commission in the search for an adequate standard by which honest businessmen may keep within the confines of the law. These cases will be discussed in relation to past decisions and to an analysis of sections 2(d) and (e), as to their reach, function, and rationale in the overall scope of the act.

[5] "Sec. 2. (a) That 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, . . . 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 the customers of either of them: *Provided,* That nothing herein contained shall prevent 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. . . ." 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(a).

[6] "[Sec. 2.] (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 49 Stat. L. 1527 (1936), 15 U.S.C. (1946) §13 (d) and (e).

[7] Lever Brothers Co., F.T.C. Dkt. 5585 (December 1953); The Proctor and Gamble Distributing Co. and The Proctor and Gamble Co., F.T.C. Dkt. 5586 (December 1953); Colgate-Palmolive-Peet Co., F.T.C. Dkt. 5587 (December 1953). For convenience these cases will be referred to as the Soap Cases.

I. *The Public Utility Features of the Robinson-Patman Act*

Viewed in its historical setting, the Robinson-Patman Act marked a shift from the general philosophy of other antitrust legislation. The Clayton Act had prohibited price discrimination undermining competition among sellers rather than among buyers.[8] A proviso of section 2 of that act allowed discriminations "on account of differences . . . in quantity in the commodity sold." Thus, by using quantity discounts, sellers could price-discriminate at pleasure. The lesson of the Clayton Act resulted in an effort to avoid loopholes in the new act. The scope of the proscribed practices was broadened to an extent perhaps not wholly realized even by the framers of the Robinson-Patman Act. First, a special relationship was established between sellers and buyers in interstate commerce. Duties were imposed on both sides not only as "between" each other, but "among" them also. This phase of regulation of business could not be said to upset familiar forms of trade regulation. The remarkable innovation in this area was the open condemnation of practices that could be justified on sound economic bases, in order to protect the chances of survival of small business. One example is a provision of section 2(a) empowering the FTC to set quantity limits on commodities where larger purchasers are so few that differentials in price based on quantity sales result in discrimination and are promotive of monopoly.[9] To support the constitutionality of this provision, an analogy was drawn from the field of public utilities, namely transportation, where the Interstate Commerce Commission prohibited special rates for more than one carload, even though a cost saving could be shown.[10] Section 2(c), the "brokerage" clause, in practice proscribes payment or receipt

[8] In one case the Supreme Court took the position that the Clayton Act forbade the lessening of competition among the buyers, too. George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 49 S.Ct. 112 (1929).

[9] Sec. 2(a) provides that the Commission may " . . . fix and establish quantity limits . . . as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials . . . in quantities greater than those so fixed and established. . . ." 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(a). The economic philosophy of the proviso is stated in S. Rep. No. 1502, 74th Cong., 2d sess., p. 6 (1936): "It rests upon the principle that where *even an admitted economy* is of a character that is possible only to a very few units of overshadowing size in a particular trade or industry, it may become in their hands nonetheless the food upon which monopoly feeds, a proboscis through which it saps the lifeblood of its competitors; and that in forbidding its use and foregoing its benefits the public is but paying a willing price for its freedom from monopoly control." Emphasis supplied.

[10] Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U.S. 263, 12 S.Ct. 844 (1892); Anaconda Copper Mining Co. v. Chicago & Erie R. Co., 19 I.C.C. 592 (1910).

of brokerage by either party to a sale, or by their agents or representatives, at least in connection with that sale.[11] In one case, direct buying was held not to warrant a brokerage fee, although the court recognized that such a form of buying may result in a benefit to the seller.[12]

It is apparent that in its protection of competition, the Robinson-Patman Act did not confine itself to a castigation of improper, predatory practices. The act thrust forward into the field of semi-managed economic relations. The elements of protectionism in the above-mentioned sections of the act are present in the legislative history and the language of sections 2(d) and (e) as well.[13] These sections deny the buyer a benefit even though earned through services fully rendered by him, if such benefit is not "available" or "accorded" to competing buyers on "proportionally equal terms." The wisdom of the philosophy of the Robinson-Patman Act in its public utility treatment of commercial intercourse as a departure from a purely competitive approach grounded on considerations of mere economics is not within the scope of this comment.[14]

II. *Vicissitudes of the "Proportionally Equal Terms" Formula*

Under sections 2(d) and (e),[15] the courts and the FTC have held that a seller must tailor his cooperative advertising plan in such a way as to permit all buyers, large and small, to take advantage of some form of an allowance for services.[16] In short, the evil consisting in

[11] Representative Utterback commented on the brokerage clause: "Where sales are made from buyer to seller [sic], in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by either party to the other." 80 CONG. REC. 9418 (1936).

[12] Southgate Brokerage Co. v. FTC, (4th Cir. 1945) 150 F. (2d) 607. See in general as to the brokerage clause, Oppenheim, "Administration of the Brokerage Provision of the Robinson-Patman Act," 8 GEO. WASH. L. REV. 511 (1940).

[13] A House Committee report, referring to these sections of the act, stated that advertising allowances or services can be unjust even in cases where not excessive and given for services actually rendered. See H. Rep. No. 2287, 74th Cong., 2d sess., pp. 15-16 (1936). Normally, even in the case of fiduciaries, the shift to the seller of the cost of advertising of the buyer's own business, when the consideration paid is fair, would be regarded as a legitimate return for services rendered the seller in promoting and advertising his products.

[14] For a comprehensive treatment of this problem in relation to legislation germane to the Robinson-Patman Act, see Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 (1952).

[15] See note 6 supra.

[16] Elizabeth Arden Sales Corp. v. Gus Blass Co., (8th Cir. 1945) 150 F. (2d) 988, cert. den. 326 U.S. 773, 66 S.Ct. 231 (1945); Elizabeth Arden, Inc. v. FTC, (2d Cir. 1946) 156 F. (2d) 132; Binney and Smith, 32 F.T.C. 315 (1942); Luxor, Ltd., 31 F.T.C. 658 (1940); United States Rubber Co., 28 F.T.C. 1489 (1939). See especially FELDMAN AND ZORN, ADVERTISING AND PROMOTIONAL ALLOWANCES (1948).

the discrimination against customers who either could supply services or are secretly excluded has been interpreted to have been cured by compelling a seller either to abandon cooperative advertising or to offer to hire all of his competing customers as his advertising agents in some form. Since the granting of equal payments and services would amount to discrimination among buyers of different quantities and buyers differently situated, the act adopts the standard of proportionality. This standard has vexed the courts and businessmen because of its seeming indefiniteness in a field where subjective and objective factors bulk equally large. Several commentators have attempted to define the meaning of "proportionally equal terms." Senator Logan indicated that advertising allowances should be based on the dollar quantity of goods purchased by each buyer.[17] Other commentators have advanced the opinion that subjective factors should be taken into account in formulating a plan of cooperative advertising under the law.[18]

A sensible view as to the meaning and scope of the phrase, and one which seems to be increasingly accepted, was expressed by Representative Patman, when he said that good faith or lack of it in trying to deal fairly with buyers furnishes the best test in a cooperative advertising scheme.[19]

Opponents of the formula have severely attacked the seeming futility of a standard so difficult to evaluate. Professor Oppenheim has branded the "proportionally equal terms" formula a "legislative monstrosity" which "should not be embalmed in the statute because it imposes an unworkable administrative burden on the Commission."[20]

Commenting on sections 2(d) and (e), Congressman Utterback, floor leader for the Patman bill, remarked:

> "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments

[17] 80 CONG. REC. 3231 (1936).

[18] See Smith, "The Patman Act in Practice," 35 MICH. L. REV. 705 at 726-727 (1937); Carter, "Validity of Demonstrator Practice under Section 2(d) and (e)," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 91 (1946); Layton, "Demonstrators on Proportionally Equal Terms," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 38 (1948); Montague, "Proportionately Equal Terms," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 51 (1948).

[19] "But the strongest defense that any seller can offer, to show that his yardsticks have been set up in good faith, is evidence that he has not discriminated between types and classes of customers as well as between customers of the same class. For it was such discrimination, the widespread favoring of chains as against independent buyers, that gave rise to the inclusion in the Act of the particular clause under discussion." PATMAN, THE ROBINSON-PATMAN ACT 141 (1938).

[20] Oppenheim, "Should the Robinson-Patman Act Be Amended?" N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 141 at 146 (1948).

for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves."[21]

It is apparent that the evil sought to be cured was one involving a monetary question only. Since the act was aimed at preventing unjustifiable rebates (monetary in character), it would seem a fair inference that to satisfy sections 2(d) and (e), it would not be necessary to devise a plan which would enable all buyers to give some advertising services. As long as the payments or the services are openly announced and made known to all and the opportunity to participate is given to those wishing to cooperate in the advertising plan, sections 2(d) and (e) are satisfied. A system of compensatory rates (monetary in character) could bridge the gap left open by allotment of payments and services to some and not to others. The difference, if left uncompensated, would be a simple "indirect" discrimination in price, which could be prosecuted under section 2(a), where reasonable possibility or probability of injury to competition must be shown.[22] Thus, a violation of sections 2(d) and (e) would occur and would result in per se illegality only in the cases that actually prompted the enactment of the sections, viz.: where rebates are either secretly extended and so not "available" to others, or where excessive payments are made not reflecting the value of services supplied, or where even though the payments are not excessive, the seller refuses to offer advertising or promotional allowances and services to those who want to and could provide the "same" service on a proportionate basis. In these cases, a mere showing of discrimination would certainly warrant the "illegal per se" brand of sections 2(d) and (e), if we keep in mind the basic philosophy of the act in casting its protective supervision over industry.

A view restricting the proportionality requirement to the same services and to cases where ability to perform services could be shown was expressed by the Senate and House Judiciary Committees in their explanation of "proportionally equal terms."[23] Then sections 2(d) and (e) would be in effect analogous to a disguised penalty to strike at willful improper conduct.

[21] 80 CONG. REC. 9418 (1936). Emphasis supplied.

[22] FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822 (1948).

[23] "The phrase 'proportionally equal terms' . . . is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities in the quantities specified. Where a competitor can furnish them in less quantity, but of the same relative value, he seems entitled, and this clause is

III. *Recent Case Law on Cooperative Advertising in Commerce*

The foregoing interpretation, however, has not been adopted by the cases. In the *Elizabeth Arden Sales Corp.* case,[24] the court held that the seller, having once elected the services or facilities he will furnish or to which he will contribute, assumes the obligation of extending similar services to all competing purchasers to the extent required by the statute. The furnishing of a service or facility which cannot be proportionalized in such a way as to make it reasonably possible for competing purchasers to avail themselves of it was branded a failure to accord such services and facilities on proportionally equal terms. In other words, the court read an additional requirement into the act, viz., that the services and facilities must not only be available, but also must be suitable to other competing purchasers. This decision was interpreted by one commentator to compel the seller to tailor his demonstrator service plan in such a way that it would be reasonably possible for all his competing customers to participate.[25]

Another strict interpretation of the language of section 2(e) is illustrated by the following passage from the district court decision in *Russellville Canning Co. v. American Can Co.*:

> " . . . the fact that it is impractical, or even impossible, to furnish proportionately equal facilities to all customers cannot serve as a justification for furnishing the facilities to those where it is practical, if the furnishing of such facilities discriminates in favor of those receiving them. In other words, section 2(e) condemns the discrimination, not the furnishing of facilities. And, the condemnation is just as applicable when the facilities

designed to accord him, the right to a similar allowance commensurate with those facilities. To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manufacturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis." S. Rep. No. 1502, 74th Cong., 2d sess., p. 8 (1936).

[24] Elizabeth Arden Sales Corp. v. Gus Blass Co., (8th Cir. 1945) 150 F. (2d) 988, cert. den. 326 U.S. 773, 66 S.Ct. 231 (1945).

[25] Carter, "Validity of the Demonstrator Practice under Section 2(d) and (e)," N. Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 91 at 97 (1946). The result would be so absurd that the FTC issued certain rules for the cosmetics and toilet preparations industry as the outcome of an industry conference, whereby the industry was allowed to offer alternate, rather than the same, services to satisfy the proportionality requirement. FTC Trade Practice Rules for the Cosmetic and Toilet Preparation Industry, 16 Fed. Reg. 11,993, 3 CCH TRADE REG. REP., 9th ed., ¶20,282 (1951). See 65 HARV. L. REV. 1261 (1952).

cannot be furnished to all as when they are not furnished to all."[26]

Sections 2(d) and (e) so far have been construed as complementing each other; a violation of one may well be a violation of the other.[27] By the foregoing construction in the cases, sections 2(d) and (e), conceived as part of an integral plan of legislation against price discrimination, as expressed in section 2(a), have been separated from the latter and read in a vacuum. The proportionally equal terms formula, conceived as a rule of fairness,[28] was given the role of a slide rule.

The recent ruling of the FTC in the *Soap Cases*[29] shows, however, a new outlook adopted by the Commission on the proportionalization problem. The cases where the courts and the Commission had formulated a strict view of sections 2(d) and (e) were cases in which the seller had either refused similar allowances to or kept them secret from competing buyers.[30] In the *Soap Cases*, the sellers set up a detailed, comprehensive plan of cooperative advertising. A genuine effort was shown to comply with the law in graduating the amounts paid per case of the product bought according to numerous and small brackets.[31] In passing on the validity of this cooperative

[26] (D.C. Ark. 1949) 87 F. Supp. 484 at 498.

[27] Elizabeth Arden Sales Corp. v. Gus Blass Co., (8th Cir. 1945) 150 F. (2d) 988, cert. den. 326 U.S. 773, 66 S.Ct. 231 (1945).

[28] "There are many ways in which advertising, sales, and other services and facilities may be either furnished or paid for by the seller upon terms that will at once satisfy the requirement of the bill concerning equitable treatment of all customers and at the same time satisfy the legitimate business needs of both the seller and the purchaser." 80 CONG. REC. 9419 (1936).

[29] See note 7 supra.

[30] Elizabeth Arden, Inc. v. FTC, (2d Cir. 1946) 156 F. (2d) 132; Corn Products Refining Co. v. FTC, 324 U.S. 726, 65 S.Ct. 961 (1945); American Cooperative Serum Assn. v. Anchor Serum Co., (7th Cir. 1946) 153 F. (2d) 907 (excessive payments made); U.S. Rubber Co., 28 F.T.C. 1489 (1939); Lambert Chemical Co., 31 F.T.C. 734 (1940); General Baking Co., 38 F.T.C. 307 (1944).

[31] One of the plans contemplated a "Cooperative Merchandising Agreement" for one year, and a "Cooperative Merchandising Plan" for the customers who did not choose the annual plan. Under the annual contract, the buyer agreed to hold at least nine feature sales of seller's products to be promoted either in a newspaper or by radio or handbill, and to be supported by store displays of seller's product. Payment for services was based on the number of cases of each product bought during the contract period. The amount paid varied with the product and type of advertising, and ranged from 12½ cents to 20 cents per case for newspaper advertising, and from 8 cents to 9 cents for handbill and radio advertising. The alternate agreement was expressly designed to accommodate buyers who did not or could not choose the annual plan; the plan was incorporated with each individual order. The sellers paid 6 cents for each case purchased and the buyer was to supply a feature sale supported by a store display. These buyers were given the option to promote this sale by advertising seller's products through newspapers, radio, handbills, and receive payment at the per case figure of the annual contract.

advertising scheme, the FTC took a negative approach. Instead of making an overcritical scrutiny, it was content first to notice that no elements of secrecy or outright favoritism were uncovered by the evidence. On one phase of the annual contract, even though the construction suggested by the petitioner was plausible, the Commission adopted the construction most favorable to the sellers, simply for lack of evidence that any of their actions substantiated petitioner's contentions.[32] Small differences in discounts between the several brackets of participation were looked upon with favor in connection with alternate services accepted. This suggests a close analogy to the standards used in examining the validity of quantity discounts under section 2(a).[33] Contrary to the drastic language of the court in the *Russellville Canning Co.* case, the FTC in these later cases has shown a tendency toward acceptance of comprehensive plans where one type of services or allowances may clearly be impractical for most customers but where no evidence shows that alternate services or allowances are not within reach of such buyers. A "rule of reason" approach is indicated by a clear statement that the law does not require that a comprehensive plan must be so tailored that every feature of it will be suitable for every customer, so long as the plan is not lopsided.

On the proportionality question, the FTC was again content to notice that no evidence showed payments in excess of cost, or secret advances. No affirmative showing of proportionality or disproportionality was attempted. Higher payments for services of higher cost or value were sanctioned. The recurrence of such words as "good faith," "fair," and "reasonable" in the opinion is striking. The Commission avowed the impossibility of laying down an exact standard of proportionality. Concluding, the Commission announced that the plan must be honest in purpose and fair and reasonable in application. Thus, the attitude of the Commission is reminiscent of the "rule of reason" approach used in enforcing some of the standards of section

[32] One of the contracts referring to newspaper or handbill advertising provided: "Advertising space shall at least be equivalent to that given to competitive products and shall be included in the advertiser's regular consumer advertising." It was argued that as some customers did not do that type of advertising, they could not avail themselves of respondent's offer and consequently the advertising programs were not usable or suitable. The FTC, after pointing out that the phrase might be construed to require advertising of respondent's products in the customer's regular consumer advertising only in the event he did such advertising, adopted the finding of the trial examiner. The finding stated simply that there was no evidence that an isolated advertisement placed by a customer would not be considered as regular consumer advertising.

[33] FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822 (1948); H. C. Brill Co., Inc., 26 F.T.C. 666 (1938).

2(a) of the act. The opinion of the Commission gives the impression that it was perhaps looking for some possible injury to competition, even though disproportionality would suffice for an order of cease and desist.

The objective volume-of-purchase standard in evaluating proportionality seems still to be favored as the only practical one. However, the necessity of working out a plan under which all competing buyers can participate in some form remains unchanged.

While the rulings of the FTC on questions of law are not binding on the courts, they are persuasive authority. Furthermore, they are of great practical importance to businessmen now held back by the fear of inability to meet a rigid application of the proportionality test. The recent ruling seems to open the door to any bona fide rational attempt to comply with sections 2(d) and (e) as interpreted to date.

IV. *An Alternative Construction and Method of Implementation*

From the legislative history of the act and its aims, the inference seems inescapable that the advertising and services sections are but ancillary to the main purpose of the act, i.e., prevention of price discrimination, embodied in section 2(a). The proportionality test is easily criticized for its vagueness and difficulty of implementation, but it is hard to see how such a concept can be eliminated or defined. Had the Congress attempted to establish a ratio, there is no doubt that such ratio might well lend itself to abuses because of the impossibility of precise evaluation of factors in this field. Even if the words were struck from the books, proportionality would probably be just as necessary to ensure conformity with the aims of the act.

The real mischief in the current interpretation and administration of the Robinson-Patman Act consists in an unnecessary compulsion placed on suppliers to strive to convert all customers into advertising agents. The keynote of the statute is "price discrimination." Even though only a few can afford it, when all competing purchasers are given an opportunity to enter any plan, sections 2(d) and (e) should be held to be complied with.[34] The concept enabling the FTC to limit quantity discounts has been needlessly imported by analogical inference into sections 2(d) and (e). Thus, on the analogy of large

[34] While this view is squarely opposed to the position taken by the few court decisions on the subject, the Supreme Court has never passed on the validity of a system allowing freedom of choice of advertising means to the sellers as a part of an integrated plan including possible rebates in the nature of compensation for those unable or unwilling to participate in cooperative advertising.

quantity discounts as promotive of discrimination even if economically justifiable, it is felt that large advertising discounts afforded only by few are similarly deleterious to competition, even if granted as a fair consideration for services rendered. One basic difference is not recognized. The quantity limits provision is an exception intended to cover a practice not only otherwise unimpeachable under any provision of the act, but expressly sanctioned by the savings justification clause of section 2(a). An advertising plan, on the other hand, conceived and patterned to suit only the types of customers a seller believes best qualified for the kind of services he wants, may meet the standard of sections 2(d) and (e) if "available" or "accorded" to all alike, but still may be reached as a plain form of indirect price discrimination under section 2(a). Under section 2(a), potential or actual injury to competition is a prerequisite to successful prosecution. The correction of this discrepancy would restore the act to its original function of protecting buyers against injury to competition, and not against differential treatment.

Advertising and services allowances are but one element (the same as shipping expenses, overhead, production cost, etc.) in computing what a customer will be charged. Then, except where such allowances or services are used as devices to evade section 2(a) as to price discrimination (secret deals, excessive payments, refusal to willing buyers), the real question is: as a matter of economic reality, to what extent does an allowance or service granted reduce the actual price paid by the circuitous route of intangible advertising benefits to the buyers themselves? There is no need to become entangled in the "proportionally equal terms" maze. At this point the problem involves the application of section 2(a), which calls for absolute equality in price where no savings can be shown.[35] Competing buyers here do not have to be able or willing to render any services of any kind. Nowhere does the act command blind mass production of advertising. The nuances and complexities of effective advertising, the diversity of policies and needs for different kind of products should be apparent to all.[36] The elimination of subjective appraisals is not only unrealistic,

[35] See note 5 supra.

[36] "The prestige or advertising value of certain names in the retail trade is such that it would justify paying them an allowance for the use of their services and facilities to demonstrate our goods even if we did not sell any goods in that store. The psychological and economic reason for this assertion is very simple: a great number of stores make a policy to sell only high quality merchandise, and, to a large extent, only high priced goods. However, Coty makes it a policy to sell the highest quality of goods but at moderate prices. Therefore, the association of the Coty name with names of stores reputed to sell high quality and high priced merchandise is of inestimable value, because

but a serious, needless obstacle to honest enterprises. The freedom enjoyed by a seller before the Robinson-Patman Act was curtailed only to the extent that an advertising scheme must be open to all who are capable of using it and willing to do so. Consequently, a seller, taking into account subjective factors, should be able to tailor his plan to make it feasible only for a category of customers he regards as best suited to his purposes. This means that a smaller store favorably located may command a proportionately higher allowance than a larger store, buying more, but in a less favorable location.[37] But this satisfies only sections 2(d) and (e). The question remains whether such allowances constitute "indirect" price discrimination under section 2(a).

The practicality of this approach to the problem must be considered in the light of two important developments. First, while the present attitude of the FTC may be characterized as wise in the face of an insurmountable administrative burden, it must also be recognized as a retreat from accurate and comprehensive administration of this part of the act. Secondly, frequent, systematic, unpunished violations of the Robinson-Patman Act have been denounced by competent commentators in the business world.[38] Dealing with the problem as one of indirect price discrimination under section 2(a)[39] leaves the question still one of painful evaluation, but freed on the one hand of the burden placed on sellers and manufacturers by the practical necessity of employing almost all their competing customers as advertisers, and on the other of the threat of suppression for speculative infractions without corresponding actual or potential injury to competition, deplored almost unanimously by writers.[40]

in the minds of people high quality is usually associated with high prices. The mere fact that stores with a policy of featuring only high quality goods display, sell, and advertise Coty products serves to defeat any doubt in the minds of the people that our products may not be of first class high quality simply because they are sold at moderate prices, much lower than the same products of other brands and of similar quality." Brief for Respondent Coty, Inc., pp. 25-26, in Coty, Inc., F.T.C. Dkt. 4435.

[37] "So far as the Act is concerned, the value of services and facilities, rather than the size of the order or volume of purchases, is a more correct basis for a definition of 'proportionally equal terms'." PATMAN, THE ROBINSON-PATMAN ACT 141 (1938).

[38] See, e.g., Cumming, "Whatever Became of Mr. Patman and Mr. Robinson?" SALES MANAGEMENT 37 (Feb. 1950).

[39] Authority is not altogether lacking for the view that advertising allowances can be an indirect price discrimination. In a case where a seller was charged with granting advertising rebates to some and not to others, the court held that such rebates only lowered the purchase price and therefore violated §2(a) of the Robinson-Patman Act. American Cooperative Serum Assn. v. Anchor Serum Co., (7th Cir. 1946) 153 F. (2d) 907 (1946).

[40] Oppenheim, "Should the Robinson-Patman Act Be Amended?" N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 141 (1948). Rowe, "Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman," 60 YALE L. J. 929 (1951).

It cannot become known until an accounting period has elapsed to what extent a practice has been violative of the policy of the act. The parties could be induced to evaluate their approximate position of advantage or disadvantage under an openly announced "available" plan, and the FTC could pass in disputed cases on the claims of buyers for retroactive compensation by the sellers to equalize the prices. This hindsight approach would permit redress where a true menace to competition is created and would enlist the cooperation of the real parties in interest in the effectuation of the policies of the act. A seller could freely pursue his advertising policies subject only to possible compensation to excluded parties in case the reasonable probability of injury can be shown. The possibility of retroactive liability would foster the will of the seller to resist the exorbitant demands for reductions or allowances of mass-buying concerns. The system might even discourage such demands, inasmuch as prospective compensation to excluded buyers would lessen the advantage to be derived from special concessions. If the idea of responsibility to buyers savors of managed economy, it cannot be denied that the core of the act is in keeping with this philosophy.[41] Such a retroactive plan would add elasticity to the administration of the act and to the interplay of competition. A non-cooperating buyer could feel confident of his ability to prove his claim and compete effectively meanwhile. More important, sellers, aware of some buyers' disadvantageous positions, could grant tentative rebates to them as part of their comprehensive plan or settle by compromise, and the case would never be litigated.

It is true that advantages bestowed on some might reach such proportions that a compensatory rate would have to be such as to imperil a seller's profits in some cases. But a question of policy presents itself at this point: is the seller to be allowed to injure competition by choosing one or more of his customers as his advertisers? Should the seller's freedom of choice in promoting his products be more valuable than the right of retailers to be free from discriminatory practices injurious to competition? The Robinson-Patman Act seems to provide ample answer to these questions.

V. *Conclusion*

The Robinson-Patman Act cannot be said to look upon cooperative advertising either with favor or disfavor. The practice has, how-

[41] See part I of this comment.

ever, brought about a threat to competition, chiefly where it is used to conceal price discrimination. Today a strange situation exists because of the construction placed by the courts on sections 2(d) and (e). The anomaly has been somewhat mitigated in the *Soap Cases* by the attitude adopted by the Commission, which now permits "good faith" attempts to meet the requirements of the law. As a result, the FTC and the courts, before finding violations of the act, may tend to look for injury to competition more than the language of sections 2(d) and (e) would warrant under present construction. This is in keeping with the goal sought by the suggestions outlined above. It is, however, only the outcome of helplessness in trying to comply with the proportionality rule, rather than the outcome of a consciousness of the rule's immateriality in certain cases. Relief from the necessity of flooding the country with retailers engaged in the advertising business, under penalty of renouncing cooperative advertising, is still nowhere in sight.

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