PRICE DISCRIMINATION, MEETING COMPETITION AND PROMOTIONAL ALLOWANCES*

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The first federal price discrimination law was adopted in 1914 as section 2 of the Clayton Act.[1] That law was designed to deal with price discrimination by a seller that might have an adverse effect on competition with other *sellers*. The problem the law intended to solve was the probably anti-competitive effects stemming from the practice of a company, particularly a large national enterprise, selling at one price in an area where it had little or no competition, and at a lower price in an area where competition was stronger. The expected effect of this discrimination was to weaken or destroy competition, particularly by local sellers, in the latter area.

Subsequent to the adoption of section 2 in 1914, and especially in the 1930's, the focus of legislative attention shifted from the effects of discriminatory selling practices on other sellers to the adverse competitive effect on *buyers* stemming from large buyers, particularly chain stores, inducing and receiving lower prices than their competitors, thereby enabling the large buyers to resell at a lower price. An extensive investigation of chain store buying practices was conducted by the FTC in the 1930's.[2]

Several different practices were deemed inimicable to competition. One was the practice of large buyers inducing and receiving, and sellers granting, lower prices than those charged to smaller buyers. Another was the practice of sellers using brokers to sell their goods. A seller with goods having a unit price of one hundred might use brokers who worked for a commission of five percent. On sales of one hundred units to twenty different buyers, each broker would receive a commission of five percent on the sale of each unit. The price per unit to each customer was one hundred, and the seller's net recovery was ninety-five. A large buyer, who purchased a total of several hundred units at one time, was often able to persuade the

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1 Ch. 323, 38 STAT. 730 (1914)

2 FEDERAL TRADE COMMISSION [hereinafter FTC], FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. DOC. No. 4, 74th Cong., 1st Sess. (1935).

seller not to use brokers in selling to him, on the ground that brokers were unnecessary, and to pass along the unpaid commission to the buyer, with the result that the large buyer paid ninety-five per unit, while the smaller buyers each paid one hundred. Another practice was that of the seller providing promotional assistance to some, but not all, of his customers in the form of allowances, *e.g.*, providing demonstrators for his merchandise at a buyer's place of business, or underwriting all or part of the cost of a buyer's advertising of his product.

The Robinson-Patman Act,[3] adopted in 1936, was intended to deal with the problems of the small buyer created by these practices. Section 1 of the Act amended section 2 of the Clayton Act and broke that section down into six subsections, (a) through (f). Section 2 (a) of the Clayton Act, as amended, makes it unlawful for a seller to discriminate in the price of goods that he sells, where certain adverse effects on competition may result. It also makes provision for the cost justification defense and the changing conditions defense. Section 2 (b) deals with the burden of proof, and more importantly, provides for the good faith meeting of competition defense. Section 2 (c) deals with brokerage, and in very general terms, makes it unlawful for a seller to make payments or allowances as, or in lieu of, brokerage to the buyer in connection with the sale of goods. Sections 2 (d) and (e) make it unlawful for a seller to pay promotional allowances, or to provide promotional services and facilities to a buyer in connection with the buyer's processing, handling, sale or offer of the seller's merchandise, unless such allowances, services or facilities are available on proportionately equal terms to all other buyers competing with the favored buyer. Section 2 (f) makes it unlawful for a buyer knowingly to induce or receive a prohibited price discrimination.

Three points regarding the scope of section 2 are noteworthy. First, in a price discrimination proceeding, under section 2 (a) against the seller or under section 2 (f) against a buyer, it is necessary that the proponent establish not merely the fact of the discrimination in price, but also the probably adverse effect on competition. But in a proceeding involving brokerage under section 2 (c) or promotional payments, allowances or services under sections 2 (d) and (e), no showing of probably adverse competitive effect is required. The reason generally ascribed for this difference is that brokerage and promotional allowances are secret or underhanded forms of discrimination, and are absolutely prohibited in order to force them

3 15 U.S.C. §§ 13, 13a, 13b, 21a (1964).

into the open in the form of price discrimination.[4]

Second, the Act imposes liability on both the seller and the buyer in connection with price discrimination and brokerage. Sections 2(d) and (e), the promotional allowances sections, impose liability only on the seller, not on the buyer. The FTC has decided, however, and has also successfully established in several circuits,[5] that the knowing inducement or receipt of unlawful promotional allowances is a violation of section 5 of the Federal Trade Commission Act,[6] which makes "unfair methods of competition in commerce" subject to FTC cease and desist orders.

Third, section 2 of the Clayton Act provides only for civil remedies, *i.e.*, a cease and desist order by the FTC, an injunction in a court proceeding brought by the Justice Department (which rarely enforces the section), and the recovery of damages and/or an injunction by a private party. Section 2 contains no criminal penalties.[7]

I. Price Discrimination

The following are required to establish a violation of section 2(a): (1) Discrimination (2) in price (3) of commodities (4) of like grade and quality (5) sold at or about the same time (6) by one seller to two different purchasers (7) where at least one sale is across a state line (8) where both sales are for use, consumption or resale within the United States or territories under its jurisdiction (9) and where the effect of the discrimination may be to injure, destroy or prevent competition with the seller, the buyer, or a purchaser from the buyer.

There are three statutory affirmative defenses: cost justification, good faith meeting of competition, and changing conditions. One of these—the good faith meeting of competition defense—will be discussed below.

A. Sales by One Seller to at Least Two Purchasers

This requirement has several aspects. There must be at least two purchases.[8] Refusals to sell are not covered,[9] although a

4 Rowe, Price Discrimination Under the Robinson-Patman Act, 364-72 (1962).

5 The Grand Union Co., 57 F.T.C. 382, 416 (1960), *modified on other grounds*, The Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

6 15 U.S.C. §§ 41-58 (1964).

7 Section 3 of the Act, 15 U.S.C. § 13a (1964), contains criminal penalties for certain types of price discrimination and for selling at unreasonably low prices with the purpose of destroying competition or eliminating a competitor. This section has not played a significant part in the development of price discrimination law.

8 Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3rd Cir. 1939).

9 Becker v. Safelite Glass Corp., 244 F. Supp. 625, 636 (D. Kan. 1965).

recent decision held that a binding contract of sale constituted a "sale" for Robinson-Patman purposes.[10]

Where a parent and a subsidiary, or two or more affiliated corporations, separately sell the same product to two different purchasers at different prices, the question arises whether the selling entities constitute one seller, and hence fall under the Robinson-Patman Act, or whether there are separate sales by companies that are unrelated for Robinson-Patman purposes. Resolution of the issue turns on whether the selling entities are under common operational control.[11]

Where a company sells merchandise to a third party and also transfers goods to its own subsidiary, branch or division, there is a question whether the related transferee is a "purchaser" for Robinson-Patman purposes. The issue is resolved in terms of control, the question being whether the transferee is sufficiently independent to be considered a purchaser in its own right.[12]

Another problem arises where a company sells merchandise to one class of trade, such as distributors, which in turn resells to another class of trade such as retailers, and the company also sells directly to the retailers through agents. There, the issue is whether the agent is a purchaser, or merely part of the seller. In *Loren Specialty Mfg. Co. v. Clark Mfg. Co.*[13] the court found the agent was not a purchaser where the agent never took title, orders went directly from the customer to the factory, billing was done by the factory, and the factory assumed credit and transit risks.

Where the seller makes sales of merchandise directly to retailers, and also sells to wholesalers who in turn resell to retailers, the issue is whether the retailer buying through the wholesaler is an "indirect purchaser" of the seller. This issue has been resolved in terms of whether the seller deals directly with the indirect buying retailer, and whether the seller determines the prices at which the wholesaler resold to that retailer. When both these conditions exist, the indirect purchasing retailer has been held to be a purchaser from the seller.[14]

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[10] Aluminum Co. of Am. v. Tandet, 235 F. Supp. 111, 114 (D. Conn. 1964).

[11] Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 543 (E.D.N.Y. 1957).

[12] Reines Distributors, Inc. v. Admiral Corp., 257 F. Supp. 619 (S.D.N.Y. 1965). *granting motion for a separate trial,* 256 F. Supp. 581 (S.D.N.Y. 1966).

[13] 241 F. Supp. 493 (N.D.Ill. 1965), *aff'd,* 360 F.2d 913 (7th Cir. 1966) *cert. denied,* 385 U.S. 957 (1966).

[14] American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962).

B. Like Grade and Quality

The Robinson-Patman Act applies only where the discrimination is practiced as to commodities of "like grade and quality". The chief question in this area has been whether physically similar private label merchandise and branded merchandise are commodities of like grade and quality.

The issue has special significance because the FTC, in the meeting competition area, has taken the position that the meeting competition defense does not permit a seller to lower his prices of branded goods to the level of a competitor's unbranded goods—the rationale being that branded goods have greater consumer acceptance than unbranded goods, and hence that quoting the same price for branded goods as for unbranded goods is beating, rather than meeting, competition.[15]

On this theory, it would seem that physically identical branded and unbranded goods are not goods of like grade and quality. But in *FTC v. Borden Co.*[16] the Supreme Court held that physically identical goods are goods of like grade and quality despite differences in brand and in consumer acceptance. It limited its holding to the like grade and quality question, and expressly reserved decision on the FTC's position on the meeting competition defense. Thus physically identical goods are of like grade and quality despite differences in brand and consumer acceptance. One problem left for decision, however, is what differences must exist between products so that they are *not* of like grade and quality.

Physically different but functionally similar goods may differ in various respects, *e.g.*, raw materials, manufacturing processes, size, design, configuration and packaging, and the decided cases provide no clear answer to the limits of the like grade and quality concept. For example, the FTC's decision in the *Joseph A. Kaplan*[17] case indicates that differences in pattern and design alone are not enough, in the Commission's view, to make goods of unlike grade and quality. At present, the most important cases are *Universal-Rundle*[18] and *Quaker Oats*,[19] where the Commission held that goods having substantial physical differences affecting consumer preferences were

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15 *See, e.g.*, Anheuser-Busch, Inc., 54 F.T.C. 277, 296 (1957), *aff'd*, FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

16 383 U.S. 637 (1966).

17 Joseph A. Kaplan & Son, Inc., TRADE REG. REP. [1963-1965 Transfer Binder] ¶ 16,666 (1963).

18 Universal-Rundle Corp., TRADE REG. REP. [1963-1965 Transfer Binder] ¶ 16,948 (1964).

19 Quaker Oats Co., TRADE REG. REP. [1963-1965 Transfer Binder] ¶ 17,134 (1964).

not of like grade and quality.

The *Universal-Rundle* case involved bathtubs that were sold to the trade under the Universal-Rundle label and to Sears, Roebuck for private label resale. These products had similar raw materials, different amounts of such materials, similar manufacturing operations, differences in height that affected price, differences in enameled area, differences in the features built into the tubs, and differences in design. The Commission found that the differences in the Universal-Rundle branded tub made that product more desirable and hence more marketable than the private label product sold to Sears, Roebuck.

The *Quaker Oats* case involved oat flour. The Commission found that one blend was not of like grade and quality with another blend, where the lower priced blend had a substantially higher hull content than the other blends, required reprocessing by the purchaser, and was generally unacceptable except to one customer.

C. *Injury to Competition*

Assuming there has been the requisite discrimination in price,[20] it must be established that such discrimination may injure, destroy or prevent competition with the seller or the favored buyer.

The law is well established in the secondary, or buyer's, line cases that probable injury to competition may be inferred where a substantial price differential is sustained over a significant period of time in an industry where profit margins are low and competition is keen. The *Morton Salt*[21] case, decided by the Supreme Court in 1948, first established this principle, and the Commission and courts have adhered to it since that time.[22]

The most common primary, or seller's, line case occurs where a seller operating in more than one market has different prices in those markets, the difference in prices usually reflecting the seller's decision on how best to compete in a particular market. Primary line cases present more difficult problems than secondary line cases, because any restriction on the right of a seller to adjust his prices downward in a particular market (where he quotes a single price

20 The Supreme Court has made clear that price discrimination means simply price difference. FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

21 FTC v. Morton Salt Co., 334 U.S. 37 (1948).

22 The law relating to injury to competition at the buyer's level has developed in cases involving goods sold for resale. Where the discrimination involves goods sold for inclusion in a manufactured article, or for use rather than resale, there is a question whether the discrimination may cause an adverse effect on competition. *See* Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. denied*, 344 U.S. 206 (1952).

to all customers) may conflict with the basic policy of encouraging competition expressed in the Sherman Act.

A seller charging different prices in different markets discriminates in price, and the question to be resolved is under what circumstances should the seller be found to have injured, destroyed or prevented competition with another seller in the lower-priced market. While it had long been thought that liability of the seller in this situation depended upon predatory pricing conduct, as indicated directly by expressions of intent and circumstantially by conduct such as sales below cost; and that diversion of business from one seller to another is a competitive fact of life, and is not sufficient to violate the law in the absence of predatory conduct, the FTC's decision in the *Dean Milk*[23] case and the Supreme Court's decision in the *Utah Pie*[24] case cast substantial doubt on the validity of these conclusions.

In the *Dean Milk* case, Dean Milk was found to have violated the statute by injuring competition at the seller's level. The majority opinion expressly rejected the predatory pricing test as the sole basis of injury at the seller's level. Chairman Dixon stated:

> It is the Commission's opinion that a finding of possible substantial competitive injury on the seller level is warranted in the absence of predation where the evidence shows significant diversion of business from the discriminator's competitors to the discriminator *or* diminishing profits to competitors resulting either from the diversion of business or from the necessity of meeting the discriminator's lower prices, provided that these immediate actual effects portend either a financial crippling of those competitors, a possibility of an anti-competitive concentration of business in large sellers, or a significant reduction in the number of sellers in the market . . . .
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> [I]f a large national firm enters a new market with the intent of merely securing a foothold in the market or of wrestling a share of the market from another competitor, either smaller or larger, but, in carrying out this legitimate purpose, utilizes a price discrimination which actually lessens or which may lessen the ability of local firms to compete with it, the requisite statutory injury has occurred.
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> In determining whether or not there is a reasonable possibility that the ability of local firms to compete with the new entrant will be lessened, factors such as . . . the length of time the discrimination is practiced, the severity of the price cut, and the relationship between demand and price in the market, should be

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23 Dean Milk Co., TRADE REG. REP. [1965-1967 Transfer Binder] ¶ 17,357 (1965).

24 Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), *rehearing denied,* 387 U.S. 949 (1967), *noted in* 29 OHIO ST. L.J. 237 (1968).

considered.[25]

The *Utah Pie* case involved the pricing practices of three national frozen pie sellers in the Utah market. Between 1958 and 1961, Pet Milk Co., Carnation Co. and Continental Baking Co. each sold at lower prices in the Utah market than they sold elsewhere, and the Supreme Court found evidence that each had sold below cost or had engaged in the predatory practices. The plaintiff, Utah Pie Co., filed a treble-damage action, and the jury returned a verdict in plaintiff's favor. The facts indicated that Utah's share of the frozen pie market in 1958 was sixty-six percent and that it held forty-five percent at the time it filed its complaint in 1961. The facts further showed that Utah had increased its net sales each year, and that it had also shown profits in each year—it lost 6,000 dollars in 1957, and in the following four years had net income of 7,000, 12,000, 7,600 and 9,000 dollars. The court of appeals reversed the district court, finding that Utah Pie had a near monopoly in 1958 and that its decline in the market position to forty-five percent resulted from proper and healthy price competition.

The Supreme Court reversed in a 6-2 ruling. While the Supreme Court pointed out the predation and below cost sales of the defendants, the case goes further than prior law. The Court emphasized that the general price structure in the Utah market had declined drastically—from $4.90 per dozen in early 1958 to $2.85 per dozen in 1961. A key sentence in the opinion reads as follows:

> [The jury] could also have reasonably concluded that a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force.[26]

Implicit in the Supreme Court's decision is that where a national company sells at lower prices in one market than in another (and hence is at least theoretically able to finance lower profits in one market from higher profits in other markets), and where the prices of small, local competitors are forced down substantially over a significant period of time, then despite the continuing profitability and substantial market position of the small local company, the Commission, a court or a jury may properly conclude that competition has been injured or may be injured at the seller's level.

D. Functional Discounts

There is probably no concept that is more difficult for the

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25 Dean Milk Co., TRADE REG. REP. [1965-67 Transfer Binder] ¶ 17,357 at 22,530-31 (1965).

26 Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 699-700 (1967).

ordinary businessman to understand than the FTC's doctrine of functional discounts in price discrimination cases. A functional discount is a lower price extended by a seller to a buyer because of certain functions performed by that buyer and not by others. For example, one buyer may stock merchandise, and another may not; or one buyer may provide designers and architects to work with specification-writing bodies, and another may not. The most common case is that of a wholesaler and a retailer, where there is usually no price discrimination problem because the two classes of trade do not compete. But a problem does arise where an integrated wholesaler-retailer competes with a company selling only at retail.

The FTC's doctrine on functional discounts may be summarized as follows: a seller must charge the same prices to buyers who compete with each other in the resale of merchandise unless the seller can cost justify any difference in price on the basis of his own cost savings, or unless the additional functions performed by the buyer paying lower prices are amenable to treatment under sections 2 (d) and (e) and are so treated.[27] The seller may not compensate the buyer for performing additional functions without complying with sections 2 (d) and (e).

The practical problems stemming from this doctrine are difficult if not impossible to resolve. Some functions performed by buyers simply do not reflect themselves in cost savings to the seller, particularly cost savings allowable under section 2 (a), and some services are simply not amenable to treatment under sections 2 (d) and (e).

Yet it is the fact that buyers often do perform functions in reselling the seller's merchandise that are costly to the buyer, and these costs—legitimate costs of distribution—put pressure on the full-function buyer to raise his prices. But by raising his prices, the full-function buyer may not be able to compete in price with the limited-function buyer who is paying the same price for the merchandise. The effect of the FTC's doctrine—not permitting a price reduction—has led to the seller cutting off the limited-function buyer (at his peril under the antitrust laws), or to the full-function buyer cutting off the seller, or to the abandonment of legitimate and necessary functions by the full-function buyer on the ground that he is unable to perform these functions and remain competitive, or to violation of the law.

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[27] *See* General Foods Corp., 52 F.T.C. 798, 818 (1956); Mueller Co., 60 F.T.C. 120, 125 (1962), *aff'd,* Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964).

One noteworthy aspect of the functional discount issue is the split it has caused between the FTC and the Justice Department, as reflected in briefs filed in the Supreme Court in the *Purolator Products* case.[28] That case involved a charge of a section 2 (a) violation by a seller of automobile replacement filters. The Commission found a violation,[29] and the Seventh Circuit affirmed.[30] Both the Commission and the Seventh Circuit rejected Purolator's defense that certain of its lower prices were charged to certain integrated warehouse distributor-jobber customers to compensate them for performing functions that were not performed by jobbers, who paid the higher price.

Purolator filed a petition for certiorari; the Solicitor General filed a Memorandum as Amicus Curiae, which was signed by the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, urging the Supreme Court to take jurisdiction and asserting its disagreement with the Commission's functional discount doctrine.

In its memorandum, the Justice Department stated:

> Not only does the Commission's holding here thus seem unsupportable in theory, but we believe that it would have unfortunate economic consequences. Specifically, the Commission's approach would largely impede the achievement of economies through vertical integration of the steps of the distribution process, where competitive and economic factors might otherwise lead to such integration. In many industries supplies will be distributed more efficiently and economically by an integrated warehouse and jobber than by two separate independent entities....
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> To require a supplier such as Purolator to charge an integrated warehouse-distributor-jobber—or an integrated cooperative—the same price as it charged to an independent jobber who performs no warehousing function would make such integration —and the resulting competition—impossible, for it would give the integrated entity no credit for performing two functions and it would force it to compete with jobbers who pay the same price but perform substantially fewer tasks in the distribution process.
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> In sum, the United States believes that the Robinson-Patman Act was intended to assure only that "businessmen at the same functional level would start on equal competitive footing so far as price is concerned." The Act plainly did not intend

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28 F.T.C. Docket 7850, *cert. denied*, — U.S. — (1968).

29 Purolater Products, Inc., TRADE REG. REP. [1963-1965 Transfer Binder] ¶ 16,877 (1964).

30 Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, — U.S. — (1968).

> to require uniformity of price among purchasers operating at different functional levels, particularly where such uniformity may, as we suggest, significantly impede economies by protecting existing—and possibly antiquated—distribution systems from the normal pressures of competition and distributional innovation.[31]

Although the Supreme Court denied certiorari, the dispute between enforcement agencies over the proper treatment of functional discounts indicates there may be hope for justifying lower prices on a functional basis.

II. Meeting Competition

Section 2 (b) of the Robinson-Patman Act provides:

> [N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser . . . was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.[32]

A seller who complies with the requirements of section 2 (b) has a complete defense, regardless of the fact that the lower price may still cause the requisite injury to competition.[33] A great deal of lore has grown up around the "meeting competition" defense. Probably the most significant aspect of the defense is the requirement of good faith, as indicated in the following quotations from leading decisions on the defense:

> [T]he statute . . . requires the seller . . . to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.[34]
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> The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.[35]

An element of common sense is very helpful in deciding in advance whether a particular price reduction may or may not fall under the defense. For example, a small seller who has lost business and has cut his price to retain an old customer is much more likely to establish the defense than a large seller who has cut his price to gain a new customer.

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31 Memorandum for the United States as Amicus Curiae 20-23, Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965).

32 15 U.S.C. § 13 (b) (1964).

33 Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

34 FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945).

35 Continental Baking Co., TRADE REG. REP. [1963-1965 Transfer Binder] ¶ 16,720 at 21,649 (1964).

When a seller inquires of his lawyer whether he may use the meeting competition defense in a specific situation, two preliminary steps are suggested. First, it should be determined whether the seller's prices are presently lawful in the absence of the meeting competition defense. It often happens that a seller will ask whether a meeting competition defense applies, but upon inquiry it is determined that his *existing* prices are unlawful. Second, if it is determined that seller's existing prices are lawful, inquiry should then be directed to whether the lower price being granted will violate the Robinson-Patman Act in the absence of the meeting competition defense, since the lower prices may not violate the Act in any event. For example, where the sale is for use and not for resale, and there is no possibility of injury to competition at either the seller's or the buyer's level, there is no violation.

Assuming that the seller's prices are lawful and that a lower price extended to a particular customer will violate the Act unless the meeting competition defense can be established, it is necessary to consider the conditions that have been attached to the defense by administrative and judicial decision. The FTC has tended to limit the defense; it has changed its position at times and appeals from its rulings have met with varying results in different circuits. Accordingly, there are difficulties in determining with precision the status of particular elements of the defense at any particular time and place.

With the foregoing in mind, the more important elements of the meeting competition defense can be reviewed:

(1) The FTC has ruled that the lower price must be granted in an individual competitive situation, not in response to a general pricing system.[36] While this standard was relaxed somewhat in the *Callaway Mills* case,[37] in which a seller was permitted to adopt a quantity discount schedule designed to meet a comparable schedule of a competitor, it is advisable to grant the lower price only in an individual competitive situation.

(2) In addition, a seller should grant the lower price only when he knows *in advance* that a competitor is offering a lower price to a given customer, as attempts to justify lower prices extended without such prior knowledge have not always met with success. Although the FTC's decision that the seller must establish that he had knowledge of the competitor's identity and price was re-

[36] *See, e.g.,* C. E. Niehoff, & Co., 51 F.T.C. 1114, 1146 (1955), *aff'd,* 241 F.2d 37, 41 (7th Cir. 1957), *vacated on other grounds,* 355 U.S. 411 (1958).

[37] Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966).

versed on appeal,[38] the safest course is to obtain as much information as possible short of calling competitors to obtain price information from them, and to keep a record of such information.

(3) The Supreme Court has stated that the lower price may meet, but not beat, the competitor's price.[39] The FTC has taken the position that the offering of premium goods at the same price as a competitor's non-premium goods is beating, not meeting, competition.[40]

(4) While the FTC had taken the position that the defense may be used to keep existing customers but not to obtain new ones,[41] its decision on this issue was reversed on appeal.[42] It does not appear that the FTC has abandoned its position, however.[43]

(5) It has been held that a seller may not use the defense to meet another seller's lower price that is itself unlawful because it is discriminatory.[44] While expression of this rule has varied, it seems to come down to this: a seller may not use the meeting competition defense if the facts reasonably available to him indicate that the price he is meeting is unlawful because it is discriminatory.[45]

(6) The Supreme Court has held that a seller may lawfully grant a lower price to meet his own competition, but that he may not lower his price to permit his customer to meet the latter's competition unless his customer is trying to meet the competition of an integrated company, or unless the customer's competitor has received assistance from his supplier.[46]

(7) While the FTC has held that the seller must establish that the goods of the competitor whose price he is meeting are the same as his own,[47] this decision was reversed on appeal.[48] The court of appeals held that the comparison between products is not the like

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38 Forster Mfg. Co. Inc., TRADE REG. REP. [1961-1963 Transfer Binder] ¶ 16,243 (1963), *vacated,* 335 F.2d 47, 55-56 (1st Cir. 1964).

39 Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

40 Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948), *rev'd on other grounds,* 191 F.2d 786 (7st Cir. 1951), *cert. dismissed,* 344 U.S. 206 (1952). *See* Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 237 (2d Cir.), *cert. denied,* 279 U.S. 858 (1929).

41 Sunshine Biscuits, Inc., 59 F.T.C. 674 (1961).

42 Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962).

43 FTC Release, Nov. 23, 1962, TRADE REG. REP. ¶ 3,345.52 (1965).

44 Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).

45 *See* Knoll Associates, Inc., TRADE REG. REP. [1965-1967 Transfer Binder] ¶ 17,668 at 22,958 (1966).

46 FTC v. Sun Oil Co., 371 U.S. 505 (1963).

47 Callaway Mills Co., TRADE REG. REP. [1963-1965 Transfer Binder] ¶ 16,800 (1964).

48 Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966).

grade and quality test of section 2 (a), but is a practical market test of saleability.

III. Promotional Allowances

Sections 2 (d) and (e) deal with different aspects of the same problem. Essentially they provide that if a seller extends promotional assistance to one customer, such assistance must be available on proportionately equal terms to other customers who compete with the favored buyer in distributing the seller's product. A great body of law has developed on sections 2 (d) and (e), and the balance of this article will cover four particular problems.

A. Types of Services and Facilities Covered

A summary of what services and facilities the FTC has said are covered is: any kind of advertising, handbills, catalogs, window and floor displays, storage cabinets, warehouse facilities, "push money", demonstrators, collecting of orders from individual stores, furnishing complete distribution of seller's line, display materials, special packaging or package sizes, acceptance returns for credit, prizes or merchandise for conducting promotional contests.[49]

B. Identifying the Favored Buyer's Competitors

Once a seller extends promotional assistance to a buyer, the next step is identification of that buyer's competitors, both geographically and functionally. Geographically, the test is a practical market one. A retail shoe store in downtown Dayton competes with other downtown retail shoe stores. It probably competes with suburban retail shoe stores but not with Columbus retail shoe stores. Identification of competitors geographically becomes acute where the product involved is sold by dealers who cover a substantial territory, perhaps as much as two or three states. In these instances, any one dealer will probably compete with two or three other dealers, and the grant of promotional assistance to any one dealer will probably result, because of dealer overlap, in creating obligations to every dealer in the country.

Determination of geographic competition between purchasers at the same functional level is often a difficult question. The problems are even more difficult where different functional levels are involved. This issue is raised in the *Fred Meyer* case,[50] which in-

49 Guides for Advertising Allowances and Other Merchandising Payments and Services (1960), 16 C.F.R. 240, Trade Reg. Rep. ¶ 3,980 (1967).

50 Fred Meyer, Inc., Trade Reg. Rep. [1961-1963 Transfer Binder] ¶ 16,368 (1963), *modified and affirmed*, 359 F.2d 351 (9th Cir. 1966), *cert. granted*, 386 U.S. 907 (1967).

volved an FTC charge that Meyer violated section 5 of the Federal Trade Commission Act by knowingly inducing allowances that were not made available to a wholesaler who resold to retailers competing with Meyer. The Commission found a violation of section 5, but the Ninth Circuit affirmed only after a modification to limit the scope of the cease and desist order, on the ground that the two purchasers (Meyer and the wholesaler) were at different functional levels. The case was recently argued in the Supreme Court, and decision is expected shortly.*

C. The Requirements of Making Promotional Assistance "Available"

Determination that a seller has extended promotional assistance to a buyer and not to his competitors triggers the seller's obligation to make such assistance "available" to such competitors on proportionately equal terms. Making such assistance "available" means letting competing buyers know that promotional assistance that they can use is available, and being able to prove it. For example, it has been stated that:

> A seller who has paid a special promotional allowance to some customers and not to others does not avoid the proscription of §2 (d) merely because payment *might have been* 'available . . .'; he avoids it only if such payment 'is' available.[51]
>
> [Payment] . . . 'is' available to a customer, whether on 'proportionately equal' terms or otherwise, only if the customer knows about it . . . . the crucial factor is not the particular formalities by which [the customer] acquired [knowledge], but the information actually possessed by the customer—particularly his knowledge of the seller's *willingness* to grant him the allowance.[52]

D. The Requirement of "Proportionately Equal"

The FTC's view of "proportionately equal" is

> Payments or services must be proportionalized on some basis that is fair to all customers who compete. No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified time.
>
> Example: A seller may properly offer to pay a specified part (say 50%) of the cost of local newspaper advertising up to an amount equal to a set percentage (such as 5%) of the dollar

51 Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 487 (2d Cir. 1962).

52 House of Lord's, Inc., TRADE REG. REP. [1965-1967 Transfer Binder] ¶ 17,437 (1966).

*Su. Ct. held that supplier must see that all *retailers* get the allowances, including those buying through wholesalers. 88 Su. Ct. 907 (1968).—ED volume of purchases during a specified time.

Example: A seller may properly place in reserve a specified amount of money for each unit purchased, and use it to reimburse customers for newspaper advertising when they prove they have advertised.[53]

The Attorney General's National Committee suggested three ways in which this requirement can be met:

> (1) payment of a dollar allowance per unit of promotional service rendered by each buyer, up to a uniform maximum percentage of his dollar volume; (2) a simplified plan, granting each buyer a set dollar allowance per unit of merchandise bought, on condition that he perform a specified minimum quantum of promotional services; (3) the seller's direct furnishing of promotional services to the buyer, worth a uniform percentage of each buyer's volume.[54]

IV. Conclusion

As we have seen, the Robinson-Patman Act constitutes a large portion of the modern antitrust picture. Recent cases have extended the scope of the prima facie case considerably; and the defenses are relatively narrow and difficult to prove. Therefore, the practicing attorney should attempt to see that pricing and promotional decisions of his client are carefully scrutinized in light of the Act before being implemented.

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53 Guides for Advertising Allowances and Other Merchandising Payments and Services (1960), 16 C.F.R. 240, TRADE REG. REP. ¶ 3,980 (1967).

54 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 189 (1955).