



2-1-1966

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Recommended Citation

Earl W. Kintner, *Merchandising Allowances and Services: Sections 2(d) and 2(e) of the Robinson--Patman Act*, 41 Notre Dame L. Rev. 364 (1966).

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MERCHANDISING ALLOWANCES AND SERVICES:
SECTIONS 2(d) AND 2(e) OF THE
ROBINSON-PATMAN ACT

*Earl W. Kintner**

The Robinson-Patman Act has often been referred to as the anti-price-discrimination law. If the Robinson-Patman Act prohibited price discrimination alone, many opportunities for evasion and contravention of the basic purpose of the law would be available. Experienced marketing executives know there are many ways in which a supplier can favor one customer over other customers beyond the grant of a concession in price. Think for a moment of all the various types of merchandising assistance that suppliers customarily offer to retailers: advertising and promotional allowances, handbills and signs, window and floor displays and other point-of-purchase display materials, demonstrators and demonstrations, display and storage cabinets, "push money" for sales clerks, special packaging or package sizes, warehouse facilities, return privileges — the list is virtually endless. Congressional spokesmen for the legislation were aware that these types of merchandising assistance could be used to conceal price differentiations. The law when originally drafted was aimed at stamping out the evil of discrimination under the guise of advertising payments and promotional services. After legislative deliberations it became apparent that injury was also caused by advertising allowances to chains for promotional services even when such services were actually rendered because the smaller merchants enjoyed no comparable arrangement.

Thus, when finally enacted, the act contained provisions dealing with discrimination by suppliers in these critical areas. Section 2(d) of the act relates to payments or allowances by the seller to the buyer for promotional services and requires such payments to be made available on proportionally equal terms to all competing customers. Section 2(e) deals with the furnishing of services by the seller to the buyer, requiring such services to be made available to all competing customers on proportionally equal terms. Except for the meeting competition defense, the two sister provisos are much like section 2(c), the so-called brokerage section. Unlike section 2(a), dealing with price discrimination, sections 2(c), (d) and (e) require only a showing that the illicit practice occurred as proof of a prima facie violation. The discrimination in allowances and services declared unlawful is prohibited without regard to resulting injurious effects on competition, as required under section 2(a). Similarly, while section 2(a) permits cost justification for price discriminations it is not a defense under sections 2(d) or (e). This per se approach was adopted because Congress believed that sellers would be forced to confine their discriminatory practices to price differ-

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entials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.¹

It will be noted that these prohibitions are directed only against sellers. The Robinson-Patman Act contains no prohibitions against the inducement and receipt of discriminatory advertising and promotional allowances or services and facilities by powerful buyers. However, the FTC has remedied this omission by holding that the knowing inducement and receipt of discriminatory advertising and promotional allowances by large buyers is an unfair method of competition prohibited by the Federal Trade Commission Act. The Commission's position has been upheld by two United States Courts of Appeals.²

Essentially, sections 2(d) and 2(e) provide that if a seller offers advertising allowances or merchandising payments or services to one customer he must make his offer (1) available (2) to all competing customers (3) on proportionally equal terms.

I. Availability

Section 2(d) requires that a seller who compensates one customer for furnishing services or facilities in connection with the "processing, handling, sale, or offering for sale" of his products must make such payment "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."³

The meaning of the word "available" has created two problems for those interested in adhering to the requirements of the Robinson-Patman Act. First, what must a seller do to ensure that he has, in fact, made payments or services available to all competing customers? Second, assuming that a seller is charged with failing to make payments or services available, what evidence is needed to establish and rebut a prima facie case?

Many definitions of the term "available" are possible. One which has been advanced by some is that the term requires purchasers to seek payments or services from sellers. Only if payments or services are then denied them (and granted others) could it be said that the seller has refused to make such payments or services "available."

The Commission has steadfastly refused to accept this definition of the term.

1 See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 68 (1959), where the Court described these sections in the following language:

Unlike § 2(a), none of them [Sections (c), (d), (e)] requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect upon competition. Similarly, none has any built-in defensive matter, as does § 2(a) . . . In allowing a "cost justification" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings. *Biddle Purchasing Co. v. Federal Trade Comm'n*, 96 F.2d 687, 692 (C.A. 2d Cir. 1938). And, with respect to the absence of competitive injury requirements, it suffices to say that the antitrust laws are not strangers to the policy of nipping potentially destructive practices before they reach full bloom. Cf. *Klor's, Inc., v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

2 *Giant Food, Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir.), cert. denied, 371 U.S. 824 (1962).

3 This requirement, despite the lack of identical phraseology, has been read into § 2(e).

Simply put, the Commission has required the seller to make payments or services available by *offering* them to all competing customers.⁴

The Commission's 1960 Guides for Advertising Allowances and Other Merchandising Payments and Services explicitly adopted this definition of the term by noting in Rule 8 that: "The seller should take some action to inform all his customers competing with any participating customer that the plan is available."⁵

Of course, the Commission cannot dictate the manner by which an offer must be made. However, prudence dictates that a seller use a method which enables him to verify that all competing customers have been informed. This protects not only his customers but also the seller if the availability of his plan is challenged.

It is very risky to rely on word of mouth to satisfy this requirement; it is *not* met by merely requesting salesmen to inform customers of the availability of a plan:

A showing here not only that respondent's sales representatives had been "advised" of its policies with respect to special promotional allowances and "instructed to inform respondent's customers thereof," *but also that they had carried out such instructions*, would have met the Commission's definition of the statutory standard.⁶ (Emphasis added.)

The best method of ensuring availability is, therefore, to adopt a written plan which clearly defines the requirements of participation and which the seller can *prove* has been sent to all customers.⁷

However, the seller has not fully complied with the availability requirements of sections 2(d) and 2(e) by offering his plan to all competing customers if the plan itself limits participation to only a few of these customers. In the words of the Second Circuit, "a promotional allowance is not 'available' to all customers if it has been 'denied' to some."⁸

Denial may take many forms. At one end of the spectrum it may take the form of secret allowances to a favored customer.⁹ Implicit in such secrecy is the lack of an offer to other customers and, consequently, a lack of availability.

At the other end of the spectrum, lack of availability may be the result of what the seller feels to be the unsuitability of certain customers to fulfill the requirements of his promotional plan. The seller may be perfectly willing to broadcast to all customers the terms of his plan (and in that sense he has "offered" it to them). However, he waters down the availability of its terms by placing restrictions on participation. He may require that customers purchase

⁴ Most Commission cease and desist orders spell out this requirement by the following language: ". . . unless such services or facilities are offered or otherwise made available. . . ."

⁵ 1 TRADE REG. REP. ¶ 3980 (F.T.C. May 19, 1960). This definition of the term received the judicial stamp of approval in *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962).

⁶ *Vanity Fair Paper Mills, Inc. v. FTC*, *supra* note 5 at 485.

⁷ One could say all "competing" customers. This is, however, not an easily definable term. Rather than trying to decide which of his customers compete, the seller would be prudent to make his plan available to all customers. See, e.g., *Fred Meyer, Inc.*, 3 TRADE REG. REP. ¶ 16368 (F.T.C. March 29, 1963) (change in the definition of "competing customers").

⁸ *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 485 (2d Cir. 1962).

⁹ See, e.g., *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95 (1954).

a minimum dollar amount of his goods or he may require that customers use the payments in ways which are not feasible for them. In either case such plans do not satisfy the availability requirement.¹⁰

Assuming that a seller is charged with having failed to make a payment available to certain customers, what are the proof requirements of the prima facie case? They are surprisingly sparse. According to two decisions, the Government need only establish that one customer received a payment and that another, competing customer, did not. In *Vanity Fair Paper Mills, Inc. v. FTC* the court held that proof of this fact "sufficed to shift the burden of producing evidence of 'availability' to respondent. . . ."¹¹ In *R. H. Macy & Co. v. FTC*¹² the court held that once the Commission established that special payments had been made only to Macy's, respondent (in this case, the buyer) had the burden of coming forward with evidence that similar payments were available to Macy's competitors.

Thus, once the Government has established the fact of lack of availability it need not establish the reason therefor. Consequently, the requirement that a seller establish *and police* his plan is very important. The Commission's requirement in this regard is based on the hope that such a plan will permit all customers to participate. However, the existence of a plan is all important to the seller. Assuming that the plan's terms provide for the availability of some type of payment, its very existence and the *fact of its publication* is important evidence that the seller is attempting to treat all customers fairly. Proof of its existence and its publication may go far to rebut the easily established prima facie case. For example, if a customer has not received a promotional payment, his failing to remember the reason therefor does not injure the Government — for it has established its case by proving that the payment was not made. Given the same set of facts, proof by the seller that the purchaser, who did not receive a payment, received a copy of the plan may rebut the prima facie case by casting doubt on the reason for nonpayment.

II. Competing Customers

Any promotional plan developed by a supplier must cover all customers who compete with any customer participating in the plan. Coverage of all competing customers must be tested in two ways. The first test is essentially geographical: What stores actually compete for the same business? A supplier is required to offer promotional assistance only to those customers who compete in the distribution of the promoted product with any customer who is participating in the promotion. Suppose that a manufacturer sells to ten retail stores in New York City and ten retail stores in San Francisco. The manufacturer can lawfully develop a program of promotional assistance which includes only the New York

10 In *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831, 839 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959), the court said that "an offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer at all." See *Atlantic Prods. Corp.*, 3 TRADE REG. REP. ¶ 17192 (F.T.C. Dec. 13, 1963) (minimum purchase requirement).

11 311 F.2d 480, 486 (2d Cir. 1962).

12 326 F.2d 445 (2d Cir. 1964).

City retail stores since they do not compete with the San Francisco retail stores. However, caution must be used in defining the area of effective competition. Suppose that a manufacturer sells to ten retail stores in Manhattan, ten retail stores in Brooklyn and ten retail stores in the Bronx. A promotional assistance program limited to the Manhattan customers would be illegal if the Brooklyn and Bronx retail stores compete for the same business as the Manhattan retail stores. It is the seller that has the duty to make whatever inquiry necessary to establish whether customers, in fact, compete.

In a recent case the Commission found that Flotill, a West Coast canner, discriminated against certain customers in the Boston area by granting advertising allowances to two favored chain store customers in that area.¹³ Flotill argued that it was unaware that two disfavored chains to whom it made no payments or offers of promotional allowances were Flotill customers in the Boston area because purchases for the Boston area by these disfavored companies were made in San Francisco through the customers' buying offices on the "California Street." Flotill also argued that they lacked knowledge that two other disfavored customers were competing in the Boston area because their purchases were made through the Topco Company, a buying organization.

The Commission ruled that:

. . . [Flotill could not] avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and non-favored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.¹⁴

The Commission has recently departed from its traditional view that a supplier who sells to retailers directly and also to wholesalers who sell to competing retailers *does not* have to make promotional allowances available to such wholesalers when they are given to the direct buying retail customers.¹⁵ This change in position was presaged by the district court's decision in *Krug v. International Tel. & Tel. Corp.*,¹⁶ where it was stated that "violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer." After *Krug*, the Commission had the question presented in the *Liggett & Myers* case, but because of the absence of factual proof refused to decide "whether a seller need make its promotional allowances available only to those of its customers who are competing at the same functional level."¹⁷

13 Flotill Prods., Inc., 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964).

14 *Id.* at 22042.

15 See *Atalanta Trading Corp.*, 53 F.T.C. 565, 566, 573 (1956), where the Commission adopted the hearing examiner's reasoning that promotional payments to a retail grocery chain did not require comparable treatment for "wholesalers who resold to retailers and were therefore not in competition with" the chain.

16 142 F. Supp. 230, 236 (D.N.J. 1956).

17 *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221, 252 (1959).

In 1963 the Commission squarely ruled in the *Fred Meyer* case¹⁸ that manufacturers who give advertising allowances to their direct-buying retail chain store customers must also make "proportionally equal" allowances available to wholesalers whose retailer-customers compete with the chain stores.

The doctrine was further implemented by the recent *Sunbeam Corp.*¹⁹ holding that retailers purchasing from wholesale customers of Sunbeam, were "customers" of respondent within the meaning of the statute.²⁰ In that case, Sunbeam itself granted the advertising and promotional allowances to customers of the wholesalers. The Commission stated that "even though the latter [retailers] purchased respondent's merchandise from wholesalers, the wholesalers played no significant part in the transactions alleged to violate Section 2(d)."²¹

III. Good Faith Meeting Competition Defense

For a number of years there was a great deal of confusion as to whether the "good faith" defense permitted under section 2(b) was available in cases where a seller was charged with making discriminatory advertising payments. The Commission had asserted that the good faith meeting of competition authorized under section 2(b) could be utilized to justify a seller's discriminatory furnishing of promotional services or facilities under section 2(e) but not the seller's disproportionate payments for a customer's promotional services or facilities under section 2(d).²² The Commission based its distinction between the two sister sections on the fact that the language in 2(b) related the defense only to "discrimination in price or services or facilities," but not to "payments." However, in 1961, the District of Columbia Circuit in *Exquisite Form Brassiere, Inc. v. FTC* flatly rejected the Commission's position and held that the good faith meeting competition defense was clearly available to any seller charged with violating section 2(d) or 2(e).²³

Since the defense was not believed to have been available in section 2(d) cases, there has been little opportunity to test it in cases arising under sections 2(d) and (e). However, the defense has been offered in a number of 2(a) price discrimination cases. In those cases the Commission has applied a strict test and has limited the defense to those instances where a discriminatory allowance was given to a purchaser only as a good faith response to a competitive situation.

18 *Fred Meyer, Inc.*, 3 TRADE REG. REP. ¶ 16368 (F.T.C. March 29, 1963).

19 3 TRADE REG. REP. ¶ 17178 (F.T.C. Jan. 11, 1965).

20 *Id.* at 22254.

21 *Ibid.* Previously, the Commission had ruled that a course of dealing by a manufacturer with his wholesaler's customers could make those customers his own "indirect" purchasers entitled to proportionally equal treatment. However, before such "indirect" customer relationship could be found it was necessary to show that the manufacturer exercised such a substantial degree of control as to be deemed to stand in the shoes of the wholesaler. Control usually is indicated by the manufacturer fixing the prices and terms and conditions of sale directly with the retailer even though the goods pass through the wholesaler. *American News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962). However, mere "missionary" activity to wholesalers' customers on the part of the manufacturer or supplier had been held not to make those retailers "indirect" customers entitled to proportional equality. *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221 (1959).

22 *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1549 (1956).

23 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

After *Exquisite Form* was remanded to the Commission for consideration of the 2(b) defense, the Commission rejected the defense. The Commission held that the respondent had failed to demonstrate that the various discriminatory allowances were made in response to individual competitive situations. The Commission felt that the questioned payments were part of an over-all plan devised by the respondents to combat the plan of competitors.²⁴ Upon review of the Commission's decision, the court agreed that under the *Staley*²⁵ test the use of the plan or a system to meet or combat another plan or system of a competitor cannot be permitted under the good faith proviso.²⁶ It appears that the court in this instance has adopted the strict test advocated by the Commission limiting the good faith defense to those individual situations where a seller grants a disproportionate allowance to individual customers in order to meet the competition of a competitor.

24 3 TRADE REG. REP. ¶ 16753 (F.T.C. Jan. 20, 1964).

25 FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945).

26 *Exquisite Form Brassiere, Inc. v. FTC*, 5 TRADE REG. REP. (1965 Trade Cas.) ¶ 71491 (D.C. Cir. July 2, 1965), *affirming* 3 TRADE REG. REP. ¶ 16753 (F.T.C. Jan. 20, 1964).