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Commentary

Was the Robinson-Patman Act Sentenced to Death Without a Fair Trial?

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The Antitrust Modernization Commission's Final Report (available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm), recommends that Congress repeal the Robinson-Patman Act in its entirety. The recommendation has received considerable attention, particularly since the Commission determined that most of the other antitrust laws were not in need of any "modernizing" at all, much less total elimination. As expected from the tenor of the AMC's Tentative Recommendations issued last year, the Final Report criticizes the Act as causing significant harm to consumers. Yet many of the individuals and organizations who submitted comments and testified before the Commission did not urge total repeal—and as it turned out, neither did all of the Commissioners.

In recommending repeal, the commissioners found that the Act has "likely" imposed substantial costs on consumers in the form of foregone discounts that presumably would have been passed on to them and higher prices reflecting the costs of RPA compliance borne by sellers. Final Report at 322. According to the Report, such costs include developing and operating compliance systems, training, obtaining legal counsel, and litigation over alleged RPA violations. The Final Report discloses, however, that "estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited."

In fact, "[t]he Commission did not receive any empirical data in response to its request for public comment on the compliance or litigation costs and benefits of the Act's enforcement." *Id.* at 323. This admitted lack of empirical data did not lead the Commission to recommend that someone collect such data and quantify the costs and benefits imposed by the Act. Instead, the majority concluded that "anecdotal evidence and informed judgments" sufficed to make the case for total repeal.

The RPA has had a long history of rough treatment at the hands of governmental commissions and task forces charged with assessing U.S. antitrust laws. Moreover, the lack of empirical data about the Act's true costs or benefits suggests little basis on which to conclude that it is accomplishing any of its legislative purposes. What troubles me, however, is that the AMC's

analysis of the costs that are "likely" imposed by the RPA are based on assumptions that may not necessarily be true.

For example, the Final Report states that "but for the Robinson-Patman Act, there would likely be no need" for a supplier to differentiate products sold to large volume buyers. The assumption underlying that conclusion is that if the Act were repealed, suppliers would dispense with costly liability avoidance techniques such as bulk packaging and special product designs. (As a general matter, the Act permits suppliers to charge competing buyers different prices when the goods sold are not "of like grade and quality.")

Maybe, as the Report states, "costs are added due to unnecessary product differentiation," but it cites no studies quantifying such costs or other evidence that decisions to supply differentiated products to different customers or channels of distribution are really made for no reason other than to comply with the RPA.

The Commission cites compliance costs "that also likely flow to consumers as higher prices" (Report at 323), while acknowledging in the footnotes that "systematic information about RP Act compliance costs is generally lacking, and supporters of the Act further point out that the compliance burdens may be exaggerated." *Id*. at 331 n.93.

One need not be a supporter of the Act to question whether companies would in fact experience a meaningful drop in legal compliance costs if the RPA were repealed. To protect margins, salespeople would doubtless still be required to justify granting discounts with reliable intelligence about the specifics of competitive offers. Antitrust compliance training already encompasses much more than the RPA; how much less expensive would that training really be with one less topic to address? Compliance costs include occasional bills from outside counsel called on to analyze proposed pricing and promotional schemes, but what basis is there to conclude that such costs are so significant that they constitute an undue burden on consumers?

The Report states that litigation of RPA cases "can be lengthy, complex, and expensive," and suggests that significant costs attributed to such litigation may be passed on to consumers in the form of higher prices. While admitting that such costs "are difficult, if not impossible, to quantify," the Report seems to imply that in the absence of the RPA, plaintiffs would be deterred from seeking redress for what they perceive to be unfair discrimination.

As a practical matter, the current state of RPA jurisprudence may already offer sufficient deterrence to would-be plaintiffs. In the total absence of the RPA, however, I do not think it is far-fetched to imagine that disfavored buyers would frame discriminatory pricing allegations to state claims for relief under a variety of alternative legal theories, rather than forgo filing suit at all.

Whether Congress ultimately embraces the AMC's recommendation remains to be seen. The decision to base that recommendation on anecdotes and personal judgments—however well-

informed—rather than on empirical evidence that the costs imposed by the Act outweigh its benefits, does little to aid the cause. Maybe it is noteworthy, therefore, that Chairman Deborah Garza told the House Judiciary Committee Antitrust Task Force, in a hearing on May 8, 2007,

> The one thing that moved me, at least, in agreeing with my fellow commissioners on our recommendation was the fact that it does become difficult to explain to non-U.S. competition authorities what the Robinson-Patman Act does. . . . [I]t becomes very difficult for us to in effect say, well, don't do as we do, do as we say, while we've got the RobinsonPatman Act on the books, but it's really not enforced very much and there are ways to enforce it so it's not as harmful. And it's just—it makes it more difficult for us, basically, to convince other nations that they should not enact similar statutes that really police pricing.

Perhaps this comment reflects that, in the end, a desire for philosophical consistency and a healthy hostility toward price regulation were a lot more persuasive to the AMC majority than its own cost-benefit analysis.

The views expressed in this Commentary are those of the author alone and do not reflect the views of the American Bar Association or the Section of Antitrust Law.

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