Price Discrimination Laws Outside the U.S.: Comparing Apples to Oranges

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An Overview of Price Discrimination Law in the United States

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The core provisions of the Robinson-Patman Act (15 U.S.C. §§ 13(a)–(f)) prohibit various forms of discrimination by sellers of commodity goods. The legislative history of this Depression-era statute makes clear the intent to protect small retail grocers in competition with then-emerging supermarket chains. With its focus on goods to the exclusion of services and its regard for individual competitors, the Robinson-Patman Act is, on its face, very different from other U.S. antitrust laws.

The Act has been controversial for decades. Prominent antitrust scholars and government-sponsored task forces have attacked it as fundamentally inconsistent with other antitrust laws; they argue that it protects the interests of individual competitors to the detriment of consumers. In an economy in which price-based competition is fierce, U.S. antitrust practitioners frequently find themselves in the position of explaining the complexities of the Act to bewildered clients who cannot understand how it could be illegal to charge lower prices. The Antitrust Modernization Commission not-quite unanimously recommended total repeal of the Act, as set forth in the Commission’s Final Report issued in April 2007 (available at amc.gov). There is no repeal legislation currently pending in Congress, however, and in view of the political obstacles to eliminating laws perceived as “protecting small business,” it appears unlikely that such legislation will be enacted any time soon.

The Act has always been enforced primarily by voluntary compliance and, with mixed results, private litigation. To recover treble damages and attorneys’ fees, a private plaintiff must satisfy Section 4 of the Clayton Act (15 U.S.C. § 15) by proving he has been “injured in his business or property by reason of” the defendant’s unlawful, anticompetitive conduct. It is by no means rare for a Robinson-Patman Act damages case to be dismissed because of the plaintiff’s inability to satisfy this requirement. Efforts to bring class action lawsuits on the Robinson-Patman Act are rare—and rarely successful.

There has been no significant government agency enforcement of the Act for over twenty years. Although there are provisions of the Act that make price discrimination a criminal offense (see 15 U.S.C. § 13a), the U.S. Department of Justice has publicly stated it has no intention of prosecuting such claims.

A. The Elements of Illegal Price Discrimination

The basic elements of a prima facie claim for violation of the price discrimination provisions of the Robinson-Patman Act (15 U.S.C. § 13(a)) are:

(i) at least two
(ii) contemporaneous
(iii) sales of
(iv) commodities
(v) of like grade and quality
(vi) to competing buyers,
(vii) at different prices,
(viii) in interstate commerce
(ix) that may injure competition.
Different prices must have been obtained from two different purchasers unrelated to the seller. The sales must also have been made by the same seller.

Whether sales are “contemporaneous” requires consideration of industry-specific sales patterns and practices and the course of dealing between the parties. Favorable credit terms, and promotional allowances in excess of the value of promotional services rendered by the buyer, may also be viewed as facilitating “indirect” price discrimination in the form of disguised discounts.

The purchasers must both be actual purchasers, not prospective customers, terminated customers, lessees, licensees, parties to swap agreements, or consignees.

The statute does not apply to the sale of services or mixed transactions in which a sale of goods is merely incidental to the sale of services. To determine whether a transaction involving both goods and services falls within the scope of the Act, U.S. courts perform a fact-based analysis of the “dominant nature” of the transaction.

The requirement that commodities be of “like grade and quality” looks only at whether the commodities are sufficiently physically similar and ignores differences in packaging, branding, and warranties.

The competing buyers element focuses on whether the buyers were actually and directly competing for resales among the same group of customers.

The Supreme Court describes the “different prices” element as “merely a difference in price.” A difference is established by comparison of the net prices, after all discounts, for which the subject goods were sold.

The interstate commerce requirement merely requires that at least one of the two sales at issue cross state lines.

The last element, the competitive injury component, can occur at different levels of competition, including the primary line—i.e., in competition between a discriminating seller and its competitors; or the secondary line—i.e., in competition between favored and disfavored buyers of the discriminating seller. There can be claims involving tertiary line violations, i.e., injury to competition between the customers of favored and disfavored buyers, or even fourth-line violations, i.e., injury to competition between the customers of the customers of the favored and disfavored buyers.

Actual harm to competition is not an element of the prima facie violation; only “a reasonable possibility that a price difference may harm competition” is required. As noted above, however, the mere showing of a prima facie violation does not automatically entitle a Robinson-Patman Act plaintiff to recover damages or equitable relief.

B. Defenses to Liability for Price Discrimination

1. Practical Availability

Proof that the allegedly favorable price could realistically have been obtained by the disfavored purchaser, i.e., that it was “practically available,” negates a claim of discrimination. A showing of practical availability requires proof that the disfavored buyer knew of the opportunity
to obtain the favorable price. It also requires proof that the buyer had both a realistic opportunity and ability to purchase at the lower price.

2. Meeting Competition

The Act permits price differences when a seller is acting “in good faith to meet an equally low price of a competitor.”1 Courts have rejected the argument that general “market conditions” may justify a price discount to certain customers. The dilemma posed by this defense is that, while the seller must have a good faith basis on which to offer a discount that will “meet but not beat” competition, it may not ask its competitors about their offers without running afoul of the constraints against horizontal price-fixing. There are several factors that courts may view as relevant in determining the seller’s “good faith,” including whether the seller: (1) received reports of similar discounts from customers; (2) was threatened with termination of purchases if the discount was not met; (3) made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data; and (4) had past experience with the buyer.

3. Cost Justification

The Act expressly allows price “differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.”2 The so-called “cost justification defense” is difficult to prove, but is a complete defense to liability. The seller cannot merely argue that delivering commodities in larger quantities is cheaper than delivering the same commodities in smaller quantities. There must be actual cost differences, established with some rigor, arising from differing methods or quantities in which the commodities in question are sold or delivered.

4. Functional Discounts

A non-statutory defense related to but distinct from cost justification is the so-called “functional discount” doctrine recognized by the Supreme Court in its 1990 Texaco, Inc. v. Hasbrouck decision.3 “Functional” discounts are granted to customers based on their distributional function (e.g., wholesalers as opposed to retailers) or other services performed for the seller (e.g., inventory storage or control). The caveat is that “all competing purchasers are treated equally.”4

Unlike the cost justification defense, the amount of a functional discount does not have to be related to specifically quantifiable measures of the value of the “functions” performed. A functional discount simply has to be a “reasonable reimbursement for the purchaser’s actual marketing functions.”5

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3 496 U.S. 543, 561-562 (1990)
5 Hasbrouck, 496 U.S. at 571.
5. Changing Conditions

Different prices may be charged to competing buyers when the seller is responding to “changing conditions affecting the market for or the marketability of the goods concerned, such as, but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.” Changing market conditions must fall within any of the enumerated conditions identified in the statute or be sufficiently similar as to fall within its scope.

C. Discrimination in Providing Monetary and Non-Monetary Promotional Benefits Related to Resale

The Act prohibits a seller from paying different allowances or furnishing different levels of benefits or services in connection with promoting the resale of the seller’s product. This does not include claims based on allegedly discriminatory allocation or delivery practices. With regard to promotional funds and benefits governed by the Act, there is no liability if they are offered to all competing buyers on “proportionally equal” terms. And although the “meeting competition” defense does not expressly extend to discrimination in promotional funds and benefits, the FTC’s interpretive rules make clear that a seller may offer promotional payments, services, or facilities in a good faith effort to match payments, services, or facilities offered by competitors.

In contrast to price discrimination, discriminatory promotional practices are per se violations of the Act that do not require any showing of actual or potential harm to competition. Cost justification is also not available as a defense.

D. Buyer Liability for Inducing Unlawful Price Discrimination

The Robinson-Patman Act prohibits buyers of goods from knowingly inducing or receiving unlawfully discriminatory prices. A buyer is not liable for obtaining a discriminatory price, however, if the price differential is justified by any available defense.

E. Sham Brokerage and “Commercial Bribery” Claims

The Act makes it unlawful “to pay or grant, or to receive or accept, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary . . . .”

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7 See, e.g., Comcoa, Inc. v. NEC Tels., Inc., 931 F.2d 655, 661 (10th Cir. 1991) (permitting discount offered as a result of certain telephone systems becoming obsolete and difficult to sell); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. 680, 691 (S.D. Ind. 1988) (allowing perishability defense where eggs were perishable commodity with short shelf life), aff’d on other grounds, 881 F.2d 1936 (7th Cir. 1989).
Historically, this provision was enacted to prohibit so-called "dummy brokerage" arrangements, under which large buyers receive discounts disguised as brokerage fees or commissions without providing any real services. Liability is strict; none of the statutory defenses (e.g., cost justification, meeting competition) may be invoked. The only exception arises when a defendant can show that the allegedly unlawful payments were "for services rendered."

II. Price Discrimination Under State Law

Only a handful of states (for example, Connecticut, Idaho, Oklahoma, Utah, and Wyoming) prohibit the same types of discriminatory conduct as the Robinson-Patman Act. Some state price discrimination statutes apply to sales of services as well as commodities when the seller engages in “locality discrimination,” i.e., selling services or commodities at prices that discriminate against buyers in certain towns or cities in the state. Examples of such statutes can be found in Arkansas, California, Colorado, Maryland, Mississippi, New Mexico, Oregon, Virginia, and Wisconsin.

The ability to bring private lawsuits under these statutes varies from state to state. Although such claims sometimes appear alongside claims under the Robinson-Patman Act, they are not a significant, independent font of private litigation. State regulators have authority to enforce these laws, but there is little civil or criminal enforcement activity in this area.

There are state anti-discrimination laws that apply to specific industries. For example, almost every state has enacted laws to protect new motor vehicle “franchisees” from discriminatory wholesale pricing and a number of states have detailed restrictions against discrimination with respect to promotional and incentive programs. In private litigation, remedies for the violation of such provisions often authorize recovery of multiple damages, attorney’s fees, and costs. By eliminating some of the more difficult elements of federal Robinson-Patman Act claims—such as potential harm to competition—these laws offer more protection to individual competitors than does the Robinson-Patman Act.

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