Insight

FTC to Use Robinson-Patman Act as an Antitrust Tool to Target Large Retailers

JEFFREY WESTLING | OCTOBER 11, 2022

Executive Summary

- The Federal Trade Commission (FTC) appears poised to renew enforcement of the Robinson-Patman Act (RPA) of 1936, which aims to protect competition by prohibiting price discrimination among large retailers.
- The FTC has not brought a claim under the RPA in over 20 years, in accordance with the longstanding consumer welfare standard—the purpose of which is to protect the interests of consumers, not competitors.
- Under the RPA, the FTC can find that buyers of wholesale goods, such as marketplaces like Amazon and Walmart, are in violation of the law if they receive lower prices from sellers; by using this law to protect competitors, the FTC would essentially force wholesalers to sell at higher prices to large firms, thus increasing prices for consumers.

Introduction

Federal Trade Commission (FTC) Commissioner Alvaro Bedoya recently called for renewing enforcement of the Robinson-Patman Act (RPA) to target price discrimination among large retailers, potentially including technology giants such as Amazon or Walmart. Congress passed the RPA in 1936 to prevent price discrimination among purchasers of commodities in an effort to protect small firms from larger, more efficient rivals. Antitrust analysis has largely shifted away from this protectionist approach over the last half-century, however, as protecting individual competitors can come at the expense of efficiency and lower costs to consumers. As a result, the FTC has not brought a claim under the act in over 20 years.

The call from Commissioner Bedoya, and similar sentiments echoed by Chairwoman Lina Khan, highlights the FTC's growing skepticism of industry concentration regardless of competitive effects. The RPA, a bill designed to look primarily at protecting smaller competitors, could present the FTC an opportunity to target concentration in online marketplaces. This primer explains what the RPA does, how a claim under this law might proceed against a large online retailer, and the potential effects of additional enforcement actions under the RPA.

The Robinson-Patman Act

The RPA outlaws price discrimination among purchasers of commodities of like grade and quality when such discrimination has a prohibited effect on competition.

Congress passed the RPA in 1936, primarily in response to the growth of large grocery chains that essentially eliminated middleman wholesalers used by smaller competitors. As a result, these large firms were able to buy goods directly from the sellers in large, predictable quantities. When a large firm went directly to the seller, it was able to negotiate for bulk-purchase prices that smaller firms who relied on the middleman wholesalers could not match. Much in line with the prevailing understanding of competition policy at the time, Congress passed the Robinson-Patman Act to make it easier for the "mom-and-pop" shops to compete with the larger retailers on price.

To help prevent harms to smaller firms, the RPA takes a broader approach than most current antitrust jurisprudence, which looks at the harms to competition generally, rather than to individual competitors. For example, while the RPA requires plaintiffs to prove a competitive injury, the Supreme Court has allowed for an inference of competitive injury from evidence of prolonged price discrimination over time. As a result, establishing a case for an RPA violation is much easier than through traditional antitrust claims.

Courts generally consider two different kinds of competitive harms under price discrimination. Primary-line harms occur when the seller uses low prices to undermine direct competitors. Secondary and tertiary-line harms occur in downstream markets when a seller's lower price to a favored customer allows the favored customer or the favored customer's customer to undersell competitive rivals. Plaintiffs often fail to succeed under primary-line claims, as proving this type of price discrimination under the RPA tracks closely with predatory pricing under existing Sherman Act jurisprudence and requires proof that the defendant plans to increase prices above competitive level. Secondary-line cases, however, only require plaintiffs to show that they were charged a higher price over time, and as a result these cases have a much better chance of success.

Finally, even if a plaintiff can establish a cause of action under the act, defendants can assert two affirmative defenses: 1) The price difference was justified by different costs; or 2) the price difference was a concession to meet a competitor's price. These affirmative defenses highlight that even if a small firm doesn't obtain the same discounts as a rival, courts will consider some procompetitive justifications for the action.

Potential Case Against Online Marketplaces

Calls for increased use of the RPA to target price discrimination in online marketplaces focus on secondary-line transactions (i.e., a wholesaler providing a firm such as Amazon lower prices than other retailers). Rather than going after the wholesaler, the FTC could in theory bring a claim against an online marketplace for *receiving* lower prices from the wholesaler: The law contains a provision under which a buyer could be held liable for receiving lower prices if the buyer induces that lower price. The Supreme Court, however, has made clear that inducement constitutes a violation of the act when the buyer correctly anticipates that it will disrupt competitive processes in the secondary market. This means a buyer can violate the act for simply seeking out lower prices when buying goods for retail.

For example, if a wholesaler offers a widget to both Walmart and another retailer, a plaintiff could establish a claim if it can show that Walmart receives a lower price for the widget over a sustained period of time. If, however, the lower price would not actually undermine "competitive processes" in the buyer's market, then a plaintiff's case against a rival buyer will likely fail.

Yet even in this hypothetical example, Walmart could still assert one of the affirmative defenses outlined above. Walmart may pay a lower price for the widget because production and shipping in bulk lowers the wholesale retailer's costs, and the other retailer may not be able to purchase the same bulk orders. These cost savings for the wholesaler are, in part, passed onto Walmart and eventually the consumer. Courts generally will not hold a buyer liable in such a case.

Taken together, an RPA claim against a retailer with a large online marketplace could certainly succeed, even a law such as the RPA allows for firms to defend their actions using procompetitive justifications. These justifications, however, are more limited under the RPA than under other federal antitrust laws.

Implications of Expansion of the Robinson-Patman Act

Many critics of the consumer welfare standard see the Robinson-Patman Act as a valuable tool to target concentration in online markets. Without the need for an in-depth competitive analysis of a given purchase or practice, regulators can more easily target large firms if they receive lower prices than their smaller rivals from wholesalers. Thus, proponents of major reforms to current antitrust law could use the RPA to protect individual competitors, theoretically addressing some of the non-competition-based harms that could come with increased concentration in markets (such as labor rights or privacy risks).

Congress should be aware, however, that expansion of the use of the RPA as an antitrust tool could have major implications for consumers. An RPA claim may ignore the efficiencies firms generate that come with scale, as well how lower prices at the wholesale level can lead to lower prices for consumers at the retail level. Returning to the above hypothetical example, while the RPA would theoretically prevent Walmart from receiving a lower price than its competitor, and therefore both retailers would offer the widget to the consumer at roughly the same price, this price will likely be higher than what Walmart would offer if it could receive the lower wholesale price. Undoubtedly, this would make it easier for Walmart's competitor to compete, but consumers could be stuck with higher prices for their goods.

What's more, a buyer seeking lower prices from wholesalers could violate the RPA, allowing the FTC to bring enforcement actions against the buyer. In a competitive market, firms should seek to obtain the lowest prices from sellers. When firms seek lower prices, they reduce their costs, and those cost savings can be passed onto consumers in the form of lower prices. If enforcement of the RPA dissuades this negotiation process, consumers will likely pay higher prices.

Conclusion

The RPA is a relic of a bygone antitrust age in which regulators were primarily concerned with the size of firms, rather than the effect that practices have on the competitive process. While courts have largely embraced the consumer welfare standard, the more rigid RPA remains valid law. Proponents of a return to a "big is bad" antitrust regime will view the RPA as a valuable tool, but its use could come with significant costs to consumers who may have to deal with higher prices in online marketplaces.