REFORMING THE ROBINSON-PATMAN ACT

BY JOHN B. KIRKWOOD[1]

1 Professor of Law, Seattle University School of Law; Member, American Law Institute; Chair, Antitrust and Economic Regulation Section, Association of American Law Schools.

CPI ANTITRUST CHRONICLE JANUARY 2023

ROBINSON-PATMAN: HOW DID WE GET HERE? COULD WE GO BACK?
By Steven Cernak & Luis Blanquez

A TRIP TO PINE RIDGE: AN OLD ANTITRUST LAW AND ITS FORGOTTEN PROMISE FOR RURAL AMERICA
By Max M. Miller & Bryce Tuttle

REFORMING THE ROBINSON-PATMAN ACT
By John B. Kirkwood

THE ROBINSON-PATMAN ACT: EVERYONE OLD IS NEW AGAIN
By Patrick A. Bradford

ROBINSON-PATMAN ASCENDANT?
By David Munkittrick & Colin Kass

RESUMED FTC ENFORCEMENT AGAINST PRICE DISCRIMINATION, AND RAMIFICATIONS OF A CONSCIOUS UNCOUPLING OF PRICE DISCRIMINATION FROM ROBINSON-PATMAN
By Lawrence Silverman

Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle January 2023
www.competitionpolicyinternational.com

REFORMING THE ROBINSON-PATMAN ACT
By John B. Kirkwood

The flaws in the Robinson-Patman Act are well known. It protects competitors at the expense of consumers and rarely stops the buyer-induced discrimination it was meant to prevent. This article proposes reforms that would greatly reduce both problems and explains why adopting those reforms would be preferable to repealing the Act altogether.

Scan to Stay Connected!
Scan or click here to sign up for CPI's **FREE** daily newsletter.

I. INTRODUCTION

The Robinson-Patman Act has two fundamental flaws. First, it is a protectionist statute. Passed during the Great Depression, its aim is not to promote competition in order to benefit consumers, but to protect small businesses from competition. Its principal goal is to prevent large buyers from inducing discriminatory price cuts and using the resulting advantage to undermine smaller rivals, depriving them of sales and profits. This behavior, however, frequently benefits consumers because a large buyer normally undercuts its rivals by lowering prices, increasing services, or otherwise making its product more attractive to consumers.[2]

Second, the Act typically fails to prevent the very buyer-induced discrimination it was passed to prevent. In part, that is due to the Act's technical and jurisdictional requirements. But the main reason is the Act's meeting competition defense, which allows a seller to grant a discriminatory price or promotional benefit to a large buyer if the seller believes in good faith that a competing seller is making a comparable offer. This provision, designed to protect innocent sellers, protects large, aggressive buyers as well, since they typically induce concessions by playing sellers off against each other. This gives each seller a meeting competition defense but insulates the resulting discrimination from attack. It is likely, for example, that Walmart and Amazon have obtained preferential terms from many of their suppliers. Yet they have never been successfully sued under the Robinson-Patman Act, almost certainly because of the meeting competition defense.

These flaws can be eliminated by reforming the Act. Congress can alter the Act's injury language to make it impossible to challenge discrimination under the Act without showing harm to competition (and thus to consumers or vulnerable suppliers). Congress can also curtail the Act's two principal defenses, meeting competition and cost justification. Because these defenses have a legitimate purpose, they could be eliminated only in purely equitable actions. In other words, if a plaintiff seeks only equitable relief, the defenses would be unavailable. Alternatively, the defenses could be removed when the plaintiff seeks attorneys' fees but not damages. But whatever option is chosen, neither defense should stand in the way of relief when a plaintiff establishes that a powerful buyer has induced a discriminatory concession that is likely to reduce competition and harm consumers or vulnerable suppliers.

Reforming the Robinson-Patman Act is preferable to repealing it. Many people have called for repeal, including the Department of Justice in 1977 and the Antitrust Modernization Commission thirty years later. But wiping out the Act appears imprudent. Buyer-induced discrimination can harm consumers or vulnerable suppliers in a variety of circumstances, and there is evidence that in some cases powerful buyers have induced concessions that hurt consumers. Repealing the Act would largely, if not completely, eliminate the ability of antitrust law to counteract this threat, since neither the Sherman Act nor the FTC Act are reliable bulwarks against buyer-induced discrimination. Because powerful buyers like Walmart and Amazon exist and are likely to grow in the future, it seems wiser to reform the Robinson-Patman Act than abolish it.

II. HARM FROM BUYER-INDUCED DISCRIMINATION

Buyer-driven discrimination can reduce competition and harm consumers or vulnerable suppliers in at least ten different settings. The first five describe the ways in which such discrimination can reduce competition upstream, in the market or markets in which the buyer purchases inputs from suppliers. In the second group, buyer-driven discrimination diminishes competition downstream, in the market or markets in which the buyer and its rivals sell their products to consumers.

A. Harm to Upstream Competition

When a buyer exercises countervailing power to obtain discriminatory price cuts or promotional benefits from a supplier with market power,[3] competition among suppliers may be reduced in at least five ways: (1) the buyer's exercise of countervailing power could diminish the returns that suppliers earn from research and development, curbing their incentive to innovate; (2) by depressing suppliers' profits, the exertion of countervailing power may cause suppliers to curtail the variety of products they offer, reducing consumer choice; (3) if the powerful buyer concentrates all its purchases in a single supplier, it could give that supplier monopsony power over small, powerless suppliers further upstream; (4) the exercise of countervailing power may turn into monopsony power if the structure of the supplying tier changes and suppliers

2 See John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, Antitrust Bull. (2015) (discussing the issues addressed in this article in more detail).

3 This essay focuses on the exercise of countervailing power against suppliers with market power — rather than the exercise of *monopsony* power against suppliers without market power — since suppliers without market power cannot ordinarily engage in price discrimination. But when a buyer's behavior creates monopsony power that would not otherwise exist, as in cases (3) and (4) on this list, the resulting injury to vulnerable suppliers is a matter of antitrust concern.

lose their market power; and (5) the powerful buyer's exercise of its power may cause suppliers to collude in response, which may lead to higher consumer prices.

Amazon's power and behavior already have triggered the fifth scenario. Reacting to its below-cost pricing of many e-books, and fearing the exercise of its buyer power, five of the nation's leading book publishers, with Apple's enthusiastic assistance, colluded to adopt a new pricing model for e-books. They imposed the new model on Amazon and other retailers and raised retail prices sharply.[4] Prompted by a complaint from Amazon, the Justice Department challenged the conspiracy, obtaining settlements from all five publishers. Apple insisted on litigating but lost. In an elaborate and sometimes scathing opinion, Judge Cote held that the high-tech giant had collaborated with the publishers to elevate e-book prices, a decision that was affirmed on appeal.[5]

Amazon's buyer power may also hurt consumers in the ways described in the first two scenarios. In other words, Amazon's well-known reputation for tough negotiations may eventually reduce publisher profits to such a degree that it diminishes the number or variety of new books they offer. At this point, there is no systematic evidence that Amazon's exercise of countervailing power has diminished the volume, variety or quality of titles published. Instead, to date Amazon has used its buyer power to produce lower prices and better services for consumers.

But there is reason to fear that Amazon's power may cause consumer harm in the future. Its market shares, already large, are likely to grow as Barnes & Noble struggles and Amazon relentlessly pursues lower costs and greater volume. As Amazon expands, moreover, its demands may escalate, reducing the profits of publishers and the advances of authors. Franklin Foer warns that author advances are "the economic pillar on which quality books rest."[6] Paul Krugman agrees: "By putting the squeeze on publishers, Amazon is ultimately hurting authors and readers."[7]

In short, there is reason to be concerned that buyer power may harm competition upstream and injure both vulnerable suppliers and consumers.

B. Harm to Downstream Competition

By inducing suppliers to discriminate in its favor, a large buyer can also reduce rivalry in the downstream sale of its products or services, harming consumer welfare and economic efficiency. Like upstream harm, these adverse effects can occur in at least five different settings: (1) the large buyer may induce its suppliers to raise its rivals' costs, enabling it to increase prices or otherwise exploit consumers in downstream markets; (2) the buyer may extract price cuts or other concessions from its suppliers, who may react to the decline in their profits by increasing prices to the large buyer's rivals, allowing it to raise its prices or otherwise harm consumers; (3) the buyer may obtain discriminatory concessions that are so large and long-lasting that they enable it to drive out or greatly diminish the market share of smaller rivals, increasing downstream concentration and making tacit or explicit collusion more likely; (4) even if downstream prices never rise as a result of the elimination of the buyer's rivals, their destruction may deprive consumers of choices they preferred and depress overall consumer welfare; and (5) the discriminatory concessions induced by the buyer may permit it to become less efficient, less dynamic, and less responsive to changing consumer preferences.

The first scenario occurred in Toys "R" Us,[8] where the nation's largest toy retailer induced leading toy manufacturers to refuse to sell popular models to Costco and Sam's Club, then a new and rapidly growing threat to established retailers. By raising the costs of these emerging rivals, Toys "R" Us curtailed their growth and deprived consumers of the option to purchase desirable toys at warehouse club prices. Had the big retailer simply forced the toy makers to charge higher prices to the warehouse clubs — without horizontal or vertical collusion — the Sherman Act would not have been available. A reformed Robinson-Patman Act, however, would have provided a remedy.

The second scenario — what Dobson and Inderst have called the "waterbed effect"[9] — may have taken place during the bookstore wars of the 1990s and early 2000s, when Barnes & Noble and Borders, then the nation's leading bookstore chains, obtained substantial price

4 See John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1, 102 (2014).

5 See *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), aff'd, 791 F.3d 290 (2d Cir. 2015).

6 Franklin Foer, *Amazon Must Be Stopped*, New Republic, Oct. 10, 2014.

7 Paul Krugman, *Amazon's Monopsony is Not O.K.*, N.Y. Times, Oct. 20, 2014.

8 See *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000).

9 See Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 Wis. L. Rev. 331, 333 (explaining that a "waterbed effect" arises when "better supply terms for powerful buyers [lead] to a worsening of the terms of supply for smaller or otherwise-less-powerful buyers").

and promotional concessions from book publishers.[10] In response, the publishers reportedly increased the average list price of their books,[11] causing prices at independent bookstores (who typically sell books at list) to rise. This also made it easier for Borders and Barnes & Noble to raise their own retail prices.

The bookstore wars also exemplified the third scenario. Armed with substantial discriminatory advantages, the national chains gained market share at the expense of independent bookstores, driving literally thousands of them out of business. With independents weakened, retail markets concentrating, and publishers raising list prices, the national chains reduced the discounts they offered consumers.[12] The American Booksellers Association summarized the effect: "Rising list prices combined with disappearing discounts to consumers has meant that the chains have actually ultimately driven higher prices to consumers."[13]

The destruction of thousands of independent bookstores may also have led to the fourth scenario, in which consumer welfare falls, even though prices remain low, because consumers lose the ability to shop at outlets they value highly. An even better illustration of this scenario is the devastating impact that Wal-Mart's entry has had on many local retailers, which has hollowed out the centers of numerous small towns and left them blighted and vacant.[14] Concern over this effect has caused almost three dozen local jurisdictions to vote to prohibit the entry of Wal-Mart (or other big box stores) into their communities.[15] These votes suggest that consumers in these areas valued the preservation of a vibrant community center more than they valued Wal-Mart's low prices.

In sum, the inducement of discriminatory terms by powerful buyers like Amazon, Barnes & Noble, and Walmart has frequently led to the destruction or weakening of smaller competitors. In some instances, the result was higher retail prices. More often, retail prices remained low, but consumers lost the ability to choose among a wide and diverse array of small businesses. This reduction in consumer choice may have outweighed the benefits provided by the powerful buyers' low prices. At a minimum, the historical record suggests that there is a significant risk that buyer-driven price and promotional discrimination may harm not only upstream suppliers but downstream consumers as well. When that is the case, a reformed Robinson-Patman Act would provide a remedy. The other antitrust laws, however, are unlikely to be a reliable bulwark against this injury.

III. OTHER ANTITRUST LAWS UNLIKELY TO FILL THE GAP

The Sherman Act and the FTC Act are not protectionist statutes. Their goal is to prevent anticompetitive conduct that harms consumers, not insulate small business from competition.[16] But despite their purpose and their breadth, these statutes rarely halt anticompetitive discrimination induced by a powerful buyer like Walmart or Amazon. On the contrary, many courts have stated that the Sherman Act does not apply to buyer-driven discrimination, and the FTC has shown no interest in challenging such discrimination for almost forty years.

A. Sherman Act

Section 1 of the Sherman Act prohibits agreements in restraint of trade. In theory, that prohibition would reach a discriminatory price cut induced by a powerful buyer that is likely to harm competition upstream or downstream. The discriminatory price would be embodied in an agreement — the contract of sale between the supplier and the buyer — and if the discrimination was likely to harm competition, the agree-

10 See Bruce V. Spiva, Comments Of The American Booksellers Association To The Antitrust Modernization Commission Robinson-Patman Act Panel 4–10 (2005).

11 See *id*. at 15 ("[I]n response to the chains' demands for ever larger discounts, publishers have gradually raised the average list prices of new books, particularly hardcovers, in order to maintain their own profitability.").

12 See *id*. at 14–15 (citing David D. Kirkpatrick, *Quietly, Booksellers Are Putting an End to the Discount Era*, N.Y. Times, Oct. 9, 2000).

13 *Id*. at 15.

14 See e.g. Robert B. Reich, *Don't Blame Wal-Mart*, N.Y. Times, Feb. 28, 2005, at A1 (declaring that Wal-Mart turns "main streets into ghost towns by sucking business away from small retailers."); Peter Applebome, *Who Killed This Little Bookstore? There Are Enough Suspects to Go Around*, N.Y. Times, Mar. 22, 2009, at A24 ("A store shutting down these days isn't exactly startling news. You drive around any suburban downtown these days, and you see the yawning, empty storefronts; ghosts of better days."

15 See *Store Size Caps*, Inst. For Local Self-Reliance (Mar. 15, 2012) (identifying twenty-eight cities and five counties that have "enacted zoning rules that prohibit stores over a certain size"). In addition, community protests have stopped Wal-Mart from opening hundreds of stores. See Paul Ingram, Lori Qingyuan Yue, & Hayagreeva Rao, *Trouble in Store: Probes, Protests, and Store Openings by Wal-Mart, 1998–2007*, 116 Am. J. Soc. 53, 53 (2010) ("[T]he principal obstacle to the expansion of Wal-Mart has been protests by local activists. During the period starting from 1998 and ending in 2005, Wal-Mart floated 1,599 proposals to open new stores. Wal-Mart successfully opened 1,040 stores. Protests arose on 563 occasions, and in 65% of the cases in which protests arose, Wal-Mart did not open a store.").

16 The Sherman Act and FTC Act also protect suppliers when the case challenges anticompetitive conduct that creates monopsony power.

ment would restrain trade. There are many reasons, however, why section 1 would not be an adequate safeguard against anticompetitive discrimination.

First, the courts have never upheld its use for this purpose. Section 1 clearly reaches a conspiracy of competing buyers to force a supplier to engage in price discrimination. But if the discriminatory price is contained in a purely vertical contract between the supplier and the buyer, and that contract does not require the supplier to discriminate against other buyers — the price in the contract is simply lower than the price charged competing buyers — the courts have been very reluctant to find a violation. Indeed, no case has ever held that a vertical, non-exclusionary contract containing a discriminatory price offends section 1.

Some decisions have implied that such a contract could never offend section 1. A Tenth Circuit opinion declared, "We do not think section one of the Sherman Act requires the manufacturer to offer the same price to all its customers."[17] A Ninth Circuit decision stated that "the courts have held that such an agreement, without proof of an arrangement to exclude others from the buyer's market does not give rise to a section 1 claim."[18] A Third Circuit panel, after noting that "price discrimination simpliciter ... is usually not a Sherman Act violation,"[19] suggested that a violation could be found only if the discrimination had been induced by a group of conspiring dealers.[20]

Second, courts have argued that price discrimination should rarely, if ever, be challenged. For example, then-Judge Breyer declared for the First Circuit: "If suppliers must cut prices to all competing dealers or to none, if they cannot decide to favor a single dealer, ... they may well decide not to cut prices at all, perhaps to the benefit of the dealers, but certainly to the detriment of the Sherman Act's ultimate beneficiary, the consumer."[21] For this reason, several other courts have declared that price discrimination furthers the aims of the Sherman Act.[22]

Finally, some courts have stated that section 1 does not bar discriminatory price cuts offered to meet competition. In Zoslaw, a Ninth Circuit panel stated that "the Sherman Act is intended to encourage ... competition between sellers," and thus, if sellers are competing for the business of a large buyer, section 1 does not apply.[23] In *AAA Liquors*, the Tenth Circuit noted that Congress created defenses for meeting competition, cost justification, and changing conditions in the Robinson-Patman Act. This shows, the court declared, that "Congress considered price discrimination to be reasonable in at least these circumstances."[24] If this means that a discriminatory price cannot be an unreasonable restraint if it was granted to meet competition, it would largely eliminate Sherman Act enforcement, since large buyers commonly induce preferential benefits by forcing suppliers to compete for the buyer's business.

B. FTC Act

Like section 1 of the Sherman Act, section 5 of the FTC Act is broad enough to reach many categories of buyer-induced price discrimination. Over forty years ago, the FTC successfully established that buyers who induce discriminatory promotional benefits engage in unfair methods of competition.[25] But like section 1, section 5 is unlikely to serve as a solid bulwark again anticompetitive buyer-driven discrimination.

In the first place, the FTC may refuse to pursue any concessions given to meet competition, which would remove most buyer-induced discrimination from challenge. In addition, the Commission may refuse to pursue price discrimination on the ground that it is generally procompetitive. This attitude has increasingly typified the agency's approach to Robinson-Patman enforcement, which has now withered to the point of non-existence. Its last Robinson-Patman case was filed twenty-two years ago, and it was targeted at exclusionary behavior by a seller, not

---

17 *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982).

18 *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 886 (9th Cir. 1982).

19 *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 248 (3d Cir. 1999).

20 *Id.* at 249. There are exceptions. See e.g. *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989) (Breyer, J.) (indicating that a violation of the Robinson-Patman Act could constitute a Sherman Act offense if the plaintiff demonstrated injury to competition, not just injury to competitors).

21 *Monahan's Marine*, 866 F.2d at 527-28.

22 See e.g. *Zoslaw*, 693 F2d at 886 ("[T]he Supreme Court has recognized that the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act").

23 *Id.* at 885.

24 *AAA Liquors*, 705 F.2d at 2107 n.5.

25 See e.g. *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962).

discrimination induced by a powerful buyer.[26] The last time the Commission attacked buyer-driven price discrimination was in 1988, when it sued six publishers for favoring Barnes & Noble and Borders over independent bookstores. It eventually dismissed all six cases, however, without obtaining relief.[27] Even if the Commission were willing to sue, the deterrence effect of a section 5 action is modest, since it does not result in treble damages, fines, or attorneys' fees. And neither the Justice Department nor private parties can enforce section 5, further diminishing its deterrent effect.[28]

In short, if the Robinson-Patman Act were repealed, it would be risky to rely on the other antitrust laws to stop anticompetitive buyer-driven discrimination. While some cases might proceed, many would not because of concerns about discouraging procompetitive discrimination and inhibiting meeting competition. If Congress wants to prevent protectionist Robinson-Patman enforcement, but preserve a weapon against harmful buyer-driven discrimination, it should reform, not repeal, the statute.

IV. REFORMS

Congress should make three principal changes to the Clayton Act: the competitive injury language added by the Robinson-Patman Act should be removed, the meeting competition defense should be eliminated in certain actions, and the cost justification defense should be similarly restricted.

A. Competitive Injury

Section 2 of the Clayton Act has three effects tests. Price discrimination may be illegal if the "effect of such discrimination may be" (1) "substantially to lessen competition"; or (2) to "tend to create a monopoly"; or (3) "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[29] The third test was added by the Robinson-Patman Act, and it is this test that allows section 2 to be enforced in a protectionist manner. Unlike the first two tests, which require an impact on market wide competition, the third is satisfied simply by showing that the challenged discrimination made it harder for the disfavored customer to compete with the favored customer. Eliminating the third test would harmonize the Robinson-Patman Act with the other antitrust laws by making harm to competition, rather than injury to a competitor, the ultimate test of liability. It would mean, in the ordinary Robinson-Patman case, that a violation could be established only by showing that the challenged discrimination threatened to harm consumers.[30]

B. Meeting Competition Defense

The rationale of the meeting competition defense is understandable. When a large buyer tells a supplier that it will lose the buyer's business unless it meets the price a competing supplier has offered, the supplier often has no choice but to comply. But the meeting competition defense is another example of the Act's protectionism. In this instance, the protected party is a supplier, not a small competitor of a large buyer, but it is protectionist, nonetheless. It insulates discrimination from Robinson-Patman attack even if the discrimination reduces market-wide competition and consumer welfare.

To control harmful buyer power more effectively, therefore, the meeting competition defense needs to be cut back. It does not make sense to eliminate it entirely. There are legitimate reasons to protect a supplier from treble damages and attorneys' fees when a large buyer demands that it meet a competitor's offer. If the demand is credible, the supplier faces a significant loss of business if it does not match the competitor's offer. And it cannot realistically predict, during a time-sensitive negotiation, whether the concession is more likely to reduce rather than promote competition. It would be unfair, therefore, to penalize a supplier with treble damages and attorneys' fees if it decides it has to meet competition and the concession turns out to diminish competition.

26 See *McCormick & Co.*, FTC Dkt. No. C-3939 (Apr. 27, 2000).

27 See e.g. *Harper & Row Publishers, Inc.*, 122 F.T.C. 113 (1996).

28 The FTC's recent policy statement on the scope of Section 5 identifies price and promotional discrimination as practices that may constitute unfair methods of competition, but does not suggest that these practices have any enforcement priority. The statement identifies many practices that may violate Section 5. See Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

29 15 U.S.C. § 13(a).

30 In two kinds of cases, described in the third and fourth scenarios in Part II.A, a violation could be shown by demonstrating threatened harm to suppliers without market power. In both scenarios, the suppliers are injured by the exercise of monopsony power.

To avoid this unfairness, the meeting competition defense could be eliminated only in purely equitable actions. In other words, if a supplier establishes the defense, it would not be exposed to treble damages or attorneys' fees. This approach has a significant drawback, however; without the prospect of treble damages or attorneys' fees, the incentive of private plaintiffs to bring Robinson-Patman actions would be sharply reduced. One alternative is to allow the recovery of attorneys' fees but not damages where the plaintiff demonstrates harm to competition and the defendant establishes the meeting competition defense. But whatever approach is chosen, it is essential to curtail the meeting competition defense. Otherwise, the Robinson-Patman Act will remain a largely ineffective instrument for combatting buyer-induced discrimination.

C. Cost Justification Defense

Whatever option is chosen for the meeting competition defense, the cost justification defense should be treated similarly. While the cost justification defense frequently fails, as Professor Hovenkamp has documented, it "has been accepted numerous times."[31] And when it is accepted, it could insulate anticompetitive buyer-driven discrimination from attack.

V. CONCLUSION

Critics have condemned the Robinson-Patman Act for decades because its goal is to protect small competitors from discrimination induced by large buyers, even when that discrimination benefits consumers, as it frequently does. The Act also fails to stop the worst forms of buyer-driven discrimination. For example, when powerful buyers induce discriminatory prices that drive out so many smaller rivals that the buyers can raise prices to consumers, the buyers are typically entitled to the meeting competition defense, which insulates them from liability even though consumers are injured.

These two flaws can be eliminated by requiring plaintiffs to show harm to competition, not just individual competitors, and by severely curtailing the Act's meeting competition and cost justification defenses. These reforms would rehabilitate the Robinson-Patman Act, turning it into a statute whose goals are identical to those of the other antitrust laws. More importantly, the reforms would enable the FTC and private plaintiffs to halt powerful buyers like Amazon and Wal-Mart when they induce discriminatory concessions that are likely to hurt consumers or vulnerable suppliers.

31 Herbert Hovenkamp, Antitrust Law 174 n.8 (3d ed. 2012).

CPI COMPETITION POLICY® INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.