ADVISORY OPINION DIGESTS*

No. 157. Paying advertising allowances in selected trade area.

The Commission rendered an advisory opinion in which it advised a manufacturer of a household product that it would be permissible to pay advertising allowances to all customers in a limited trading area without offering the allowance to all of its customers.

In its opinion, the Commission said that it was a well settled principle of law that if a supplier offers advertising allowances to one customer, he is required by Section 2(d) of the Robinson-Patman Act to make those allowances available to those customers who compete in the distribution of the product for which an allowance is being paid. Under these circumstances, it follows that the supplier can limit the area in which the promotional allowance will be paid, as long as the allowance is made available on proportionally equal terms to all customers who compete in the distribution of the product being promoted.

"This means," the Commission concluded, "that if there are customers located on the periphery of the selected trade area who in fact compete with the favored customers, they must also have the opportunity of participating in the promotional program on proportionally equal terms."

Concluding its opinion, the Commission said:

> Assuming that you selected a reasonable trading area, even though limited, and assuming that you confine the duration of the program within the strict time limits absolutely necessary for you to determine the efficacy or feasibility of the program, we do not believe that your action will run afoul of any law administered by this Commission.

(File No. 683 7035, released Jan. 4, 1968.)

No. 158. Proposed trade association adoption of a pricing manual for common use by electronics servicemen members.

The Commission rendered an advisory opinion with respect to the legality of a trade association preparing and distributing a standard rate and service pricing manual for common use by electronics servicemen in dealing with the general public.

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

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It was represented that a major problem in the industry is the lack of guides by which the public can determine whether prices charged for various repair services are fair and equitable. This lack has led to many customer complaints and to fraudulent operations by unethical repairmen. The association took the position that a standard rate schedule would protect the public and free ethical servicemen from unjust accusations.

The Commission advised that it could not give its approval to the proposed common use of a standard rate and service pricing manual by competing electronics servicemen. While the adoption and dissemination by the association of such a manual may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even though use of such manual be accompanied by disclaimers, there is implicit therein too grave a danger that it will serve as a device through which service rates and fees would become uniform and stable throughout the industry. While adoption of a means likely to create competitive uniformity in terms of service pricing may be a convenience to trade association members, this factor is far outweighed by the benefits to the public of the intense competition between competing servicemen, and it is this competition which the law protects. (File No. 683 7045, released Jan. 4, 1968.)

No. 159. Advertising offering sale of treatment for athlete's foot.

The Commission rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so. (File No. 683 7047, released Jan. 12, 1968.)

No. 160. Advertising promoting sale of information and a product.

The Commission issued an advisory opinion today in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

The initial advertisement offered the sale of information for 20 cents and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

Its opinion concluded with the following statement:

> The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.
>
> This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

(File No. 663 7009, released Jan. 12, 1968.)

No. 161. Advertising promoting sale of information and a product.

The Commission issued its advisory opinion concerning proposed advertising offering for sale for $1 a pamphlet which (1) advises a method for curing athlete's foot and (2) recommends the use of a specific proprietary product for this purpose. The advertiser has no financial interest in the product in question. He does not himself propose to sell the product.

The Commission stated that use of the proposed advertising would be violative of Sections 5 and 12 of the Federal Trade Commission Act in that it implies, contrary to fact, that all cases of athlete's foot can be eliminated or cured by use of the advertised method and product "within a very short time" and with "patience and a little care." The Commission believes that the proposed advertising implies, contrary to fact, that through it some new facts as to the care and cure of athlete's

foot are now available which have hitherto been withheld from the public.

Its opinion concluded with the following statement:

> The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.
>
> This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

Dissenting Opinion

By Elman, *Commissioner:*

He does not agree that selling advice is in the same category as selling a product. Recognizing that a good deal of foolish and worthless advice is being peddled to the American people, and not merely in the field of medicine or health, Commissioner Elman does not believe that Congress intended that the Federal Trade Commission or any other government agency should set itself up as a board of review examining into the validity or worth of ideas, opinions, beliefs, and theories disseminated to the public. (File No. 673 7028, released Jan. 18, 1968.)

No. 162. Exchanging wage rates among association members.

The Commission rendered an advisory opinion in regard to the legality of a trade association's proposed statistical reporting plan.

Specifically, the Commission was asked to rule upon the question of whether it would be permissible for the members of an association to exchange copies of their labor contracts.

The Commission ruled that it had no objection to the proposed plan itself, provided it was not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of milk, or for some other illegal purpose, the Commission stated it would of course have serious objection to the plan. Pointing to the antitrust hazards inherent in such a plan, the Commission said:

> Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk. In essence it is the potential danger

inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

(File No. 683 7051, released Jan. 27, 1968.)

No. 163. Publication of dealer sales standards announcing a policy of not selling to dealers who advertise sale prices.

The Federal Trade Commission rendered an advisory opinion stating its objection to a proposal by a seller of photographic products to announce to the trade its policy to sell only to dealers who advertise in a manner which will not damage the prestige of the seller, avoiding the use of characterizations such as "Sale," "Bargain," "Close-Out," "Clearance" or other similar terminology.

The seller advised that it proposed to implement the standards by delivering a copy to each existing dealer, not for the purpose of terminating any presently unsatisfactory dealers, but to upgrade them to a satisfactory level. This the seller proposed to do by having its representatives work with the dealers to see that they observe the standards and contended that this is permissible since this is simply an advertising restriction, not an effort at resale price maintenance. It was further argued that although the price at which its products are sold is the prerogative of the dealer, the seller has a legitimate business interest in the manner in which its products are advertised by those dealers. The Commission also noted that the standards concluded with the statement that evaluation of the progress of dealers wil be made from time to time and those who are not keeping pace will be discontinued.

The Commission advised that it could not give its approval to this proposal for the reason that its implementation as outlined would be likely to result in an illegal restraint of trade. In the first place, the Commission advised that it could not view the proposal as a simple restriction on advertising apart from the effect which that restriction would have on the price at which those dealers sell. While there is a difference between this and a policy of selling only to dealers who maintain the prices suggested by the seller, in that the dealers are ostensibly left free to sell at any price they choose, still a restriction on their abality to advertise sale prices is certainly a grave handicap on their ability to sell at prices below those suggested. Hence the provision, if not designed to maintain suggested prices, is one which will seriously affect those prices.

The Commission further advised that its view of the present state of the law in this area was that a seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy. However, when the seller's actions, as they would under this proposal, go

beyond a mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his policy, he is in serious danger of having put together a combination in violation of the antitrust laws. Thus, the Commission stated, the line between legal and illegal conduct here is a very narrow one and if the seller chooses to walk that line, he must do so at his peril. (File No. 683 7063, released Jan. 31, 1968.)

No. 164. Premerger clearance: No anticompetitive effects foreseeable.

The Commission issued an advisory opinion on May 14, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a distributor by the manufacturer of products distributed.

A franchised distributor of electrical equipment sought clearance of its acquisition by the manufacturer of products he distributed. The relationship between the firms had existed for many years, was cancellable on 90 days notice, the trend in the line of business involved was to direct sales from manufacturer to purchaser and no substantial adverse competitive effects were foreseeable.

The Commission advised the requesting party that the acquisition would not violate Commission administered law; however, he was advised that the opinion was predicated on the understanding (1) that competing distributors would not be foreclosed from supplies he distributed and (2) that preexisted relationships between him and said supplier would not be altered without prior Commission approval. (File No. 643 7025, released Feb. 13, 1968.)

No. 165. Premerger clearance: Deteriorating financial condition.

The Commission issued an advisory opinion on July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a deteriorating competitor.

A national manufacturer and distributor of consumer goods sought clearance of its proposed acquisition of a smaller manufacturer and distributor of the same products. Most of the business of the smaller firm was in a limited geographical area. The industry involved could be entered with a relatively modest sum of money. The firm to be acquired had experienced declining sales, a deteriorating, nonviable financial situation, personnel problems and had made reasonable but unsuccessful efforts to sell to others.

The Commission advised that basing its belief on the information currently available to it that the proposed transaction, if consummated, probably would not violate any of the laws which the Commission administers. (File No. 653 7003, released Feb. 13, 1968.)

No. 166. Premerger clearance: Declining industry.

The Commission issued an advisory opinion July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing company in a declining industry.

A single-line manufacturer of a byproduct of the cotton industry desiring to be acquired by a multiproduct company in the chemical industry sought clearance of its proposed acquisition. The firms were competitors but demand for the product was declining due largely to wide fluctuations in price. There was also increasing production of competitive products made from wood pulp which could be used for the same purposes, and reasonable, but unsuccessful attempts had been made to sell to others.

The Commission, basing its belief on the information then before it, advised that the proposed sale probably would not violate any of the laws it administers.

The Commission added that the opinion should not be construed as in any way affecting any other matter involving the requesting party or the purchaser which the Commission was then or might thereafter investigate. (File No. 643 7036, released Feb. 13, 1968.)

No. 167. Premerger clearance: Deteriorating industry.

The Commission issued an advisory opinion on August 18, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor.

One of the larger manufacturers of industrial clay products sought clearance to acquire a smaller manufacturer of the same product. The smaller manufacturer did not have as extensive a product line as the larger company. The companies partially competed in a limited geographical area; however the smaller firm had been unable to replace key personnel and the trend in its financial condition was downward. Further, its employees, comprising about 20 percent of the work force in a small community, faced loss of jobs if the smaller company went out of business. Lastly, the other party was the only available purchaser.

Basing its belief on the information then before it, the Commission advised the proposed sale probably would not violate any of the laws which it administers. (File No. 653 7005, released Feb. 13, 1968.)

No. 168. Premerger clearance: Imminent insolvency.

The Commission issued an advisory opinion on October 27, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor in financial distress.

A firm in a local service business requested clearance to merge with a competitor, with whom it was aligned in its activities, and to form a new corporation. The service firm had experienced declining earnings for the past eight years and there was strong competition from other service businesses in the area in which both did business. The requesting party had experienced an increase in operating costs and expenses in relation to sales, was in a critical financial condition and apparently could not long continue to operate as a solvent and going concern. A national chain was the only other possible purchaser.

The Commission basing its belief on the information then available to it advised that the transaction would not violate any of the laws which it administers. (File No. 653 7025, released Feb. 13, 1968.)

No. 169. Premerger clearance: Financial distress.

The Commission issued an advisory opinion on May 26, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of an integrated competitor in poor financial condition.

A large diversified manufacturer of closures with less than 3 percent of its total sales accounted for by a specialty closure product, sought to acquire the second largest integrated manufacturer of such products, in an industry dominated by another fully integrated company. The first four firms in the industry accounted for about 55 percent of the market. The company to be acquired was in poor financial condition, and it was doubtful whether its credit standing could support the new financing necessary for plant improvement and extension of product lines which were needed to improve its competitive position.

The Commission basing its opinion on the information available to it advised (1) that it would not challenge the acquisition if consummated, but (2) that such advice was given without prejudice to the right to reconsider in the event anticompetitive effects causally connected to the acquisition were manifested in the future. (File No. 653 7058, released Feb. 13, 1968.)

No. 170. Premerger clearance: De minimis competitive effect.

The Commission issued an advisory opinion on June 8, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a competitor's unprofitable operating division.

A large manufacturer of a diverse line of aeronautical supplies sought Commission approval for the disposition of one of its operating divisions which was an unprofitable part of its total business. The proposed purchaser was another diversified corporation also engaged to a small degree in the same line of commerce. It was evident that although

these two companies ranked high in market shares, there were many others in the business, and that restrictive licenses were often used by customers to exercise an effective consumer-control of the survey market. The total dollar value of the business being sold was small and it appeared there would be a liquidation of the assets if the sale was not made.

The applicant was advised that based on the available information a proceeding would not be initiated by the Commission to challenge the acquisition. The Commission added that the advice was being given without prejudice to its right to reconsider the questions involved in the event substantial anticompetitive effects attributable to the acquisition were manifested in the future. (File No. 653 7060, released Feb. 13, 1968.)

No. 171. Premerger clearance denied: Adverse competitive effects probable.

The Commission issued an advisory opinion on June 10, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was denied because of the existence of probable adverse competitive effects.

A manufacturer/retailer of consumer leather goods requested clearance for its proposed acquisition of a major regional retailer of products produced by the manufacturer. The horizontal and vertical implications of this proposed merger were similar to those which were declared unlawful in the case of *United States* v. *Brown Shoe*, 370 U.S. 294 (1962). However, the market shares were smaller and probable adverse competitive effects somewhat less than were present in the *Brown Shoe* case.

The Commission advised there existed a substantial probability that the proposed acquisition would be a violation of the Clayton and Federal Trade Commission Acts. The application for premerger clearance was denied.

Thereafter, the acquisition was consummated. A complaint issued and a consent settlement effected whereby the acquiring company agreed to make no further acquisitions of retailers or manufacturers of the product involved for a period of several years without prior Commission approval. (File No. 653 7051, released Feb. 13, 1968.)

No. 172. Premerger clearance: Adverse competitive effects not discernible.

The Commission issued an advisory opinion on July 23, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was given limited approval because it did not appear that the acquisition would result in the requisite adverse competitive effects.

A diversified processor, wholesaler and retailer sought clearance for its proposed acquisition of an independent food supplier which sold a major portion of its products to a subsidiary of the acquiring company. The isolated transaction did not appear to have the requisite substantial adverse competitive effects called for by the statute, but in view of pending investigations of additional acquisitions by the acquiring company, an unrestricted clearance could not be approved by the Commission.

The Commission advised that it would take no action solely as to the proposed transaction if it was consummated. The Commission added that it conditioned its advice on assurances that by accepting and acting upon the opinion, the acquiring company would not use the opinion as precedent or argument in the investigation, or in the formal or informal hearings, of any matter involving the acquiring company then pending or which might come before the Commission or any other court or agency.

The Commission added that if at some future date the acquiring company was required to divest the subsidiary which was actually taking over the independent company, the parent company would not object to divestiture of the independent food supplier on terms set by the Commission or other court or agency. (File No. 653 7057, released Feb. 13, 1968.)

No. 173. Premerger clearance denied: Lack of competitive information.

The Commission issued an advisory opinion on October 29, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was denied for lack of competitive information concerning competition in the line of commerce involved.

A leading manufacturer of dispensing machines sought approval of its proposed purchase of a smaller, family held manufacturer of dispensing machines which were complementary to the product line of the acquiring company.

The Commission declined to render an opinion because of (1) the paucity of competitive information concerning competition in the line of commerce with which the acquired company's machine was identified, and (2) the short time period available between the date of the request and the closing date agreed upon between the parties. This short time precluded a more complete investigation and analysis. (File No. 663 7014, released Feb. 13, 1968.)

No. 174. Premerger clearance denied: Vertical merger would raise questions.

The Commission issued an advisory opinion September 8, 1966, in which a request for premerger clearance from liability under Sec-

tion 7, amended Clayton Act, was denied because the competitive implications of the acquisition would raise economic questions resolvable only by investigation.

A leading construction material producer applied for clearance of its proposed acquisition of a diversified company having a large share of a regional market in the sale of raw materials such as sand, gravel and stone, which were complementary to its principal product line. The requesting party offered to dispose of certain producing plants now operated by the company, and to continue appropriate leases of other such plants as the company owned.

The Commission advised the requesting party that the competitive implications of the integration of construction material distributors with sources of raw materials were such that an investigation to assess the economic effects of the acquisition, if it was consummated, would be necessary. (File No. 673 7004, released Feb. 13, 1968.)

No. 175. Interpretation of request for premerger clearance: Declining industry.

The Commission issued an opinion October 8, 1965, in connection with a request for advice by two respondents as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting them from, among other matters, uniting facilities so as to eliminate competition.

One respondent, a small company in the coin operated machine business, desiring to be acquired by the other, a larger company in the same industry, applied for clearance of the proposed acquisition under Commission established procedures. It was reported that the smaller respondent was in financial difficulties to the point where it was approaching failure. Further reasons advanced to support the proposed merger were that demand for the product was on the decline, the industry easy to enter, and reasonable efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission advised that if the smaller respondent sold its business to any company, the Commission did not intend to initiate proceedings with regard to such sale. (File No. D-6124, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 176. Premerger clearance: De minimis competitive effects.

The Commission issued an advisory opinion on November 29, 1966, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company in financial distress.

A dairy products processing company in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The companies competed to a limited extent; however, the applicant had losses for a number of years, could not obtain long term financing and had made numerous unsuccessful attempts to sell to others.

The requesting party was advised that, relying on his representations as to the hopeless financial condition and unsuccessful efforts to sell, the Commission would not challenge the proposed acquisition if it were consummated. (File No. 671 0615, released Feb. 13, 1968.)

No. 177. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion February 14, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small company manufacturing food products applied for clearance of its acquisition by a larger producer engaged in operations in the same product line. The larger producer was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both producers competed in the same general trading area. It was presented that the smaller company was in imminent danger of insolvency and that it had exhausted every possibility of locating another purchaser without success.

On the basis of available information, but primarily because of the equities affecting the smaller company's position in the industry, the Commission gave its approval to the proposed acquisition. (File No. D-6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 178. Compliance interpretation of request for premerger clearance: Denied, other purchasers available.

The Commission issued an opinion April 2, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large company in the food products field applied for clearance, of its proposed acquisition of a smaller company engaged in operations in the same product line. The larger company was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both companies were in substantial competition in the same general trading area. It was determined that other prospective purchasers were