

UNITED STATES

1. Introduction

1. There are several distinct pricing practices in business-to-business transactions in which a cumulative purchases. This paper focuses on all-units share-based discounts that reduce the effective price paid on all units purchased if a target level of purchases is made, with the

charged on the first units. Suppliers might prefer loyalty discounts to alternative pricing practices with similar impact because a single schedule of targets and discounts can be applicable to all customers and can give all of them an incentive to increase their purchases from that supplier.

5. Loyalty

exclusionary effect would not necessarily follow because, for example, multiple suppliers could have customers meeting their market-share targets.

3. U.S. Antitrust Framework for Analyzing Loyalty Discounts

10. If a loyalty discount practice injures competition by unreasonably depriving rivals of sales, U.S. antitrust law can be used to challenge it. Section 1 of the Sherman Act prohibits agreements unreasonably restraining trade (and the practice would be seen to employ an agreement between the supplier and its customer); Section 2 of the Sherman Act prohibits monopolization; Section 3 of the Clayton Act prohibits discounts and rebates conditioned on not purchasing from a competitor when the effect may substantially lessen competition; and Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition (including violations of Section 1 and 2 of the Sherman Act).

11. In both form and competitive impact, a loyalty discount practice can resemble exclusive dealing. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods.³ U.S. courts have considerable experience in assessing the competitive impact of exclusive dealing arrangements.⁴

12. The first significant U.S. court decision on single-product loyalty discounts is *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000). The case concerned the pricing of engines used in recreational powerboats. Brunswick was the leading supplier, and for many years, it offered boat builders a loyalty discount of 1-3% depending on the percentage of their purchases satisfied by Brunswick engines. Boat builders filed suit against Brunswick, claiming that the discount program violated Sections 1 and 2 of the Sherman Act. A jury found in favor of the plaintiffs and awarded damages, but the award was set aside. The appeals court held that, under Section 1 of the Sherman Act, the plaintiffs had

de facto
-attribution price-cost test.⁷

23. Experience with loyalty discount practices in the United States has indicated that they can, in some instances, have anticompetitive effects and that the antitrust laws, by focusing on harm to competition, can deal with them. Experience has also indicated that antitrust analysis of any loyalty discount practice requires a thorough understanding of the particular facts. In determining whether to challenge a loyalty discount practice, the Agencies perform a detailed evaluation of actual or likely competitive effects.

⁷ 76 *Federal Register* 13209, 13220 (Mar. 10, 2011).