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### Your loyalty discounts and rebates may violate antitrust and competition laws

ANTITRUST ALERT  
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Courts and government agencies around the world are struggling to determine the most appropriate antitrust and competition law treatment for loyalty discounts and rebates offered by companies with market power. Indeed, the issue has garnered widespread confusion and controversy.

The International Competition Network (ICN), a well-respected organization with a membership of antitrust enforcers throughout the world, is currently studying this issue and educating its members. DLA Piper is both following and participating in the programs of this influential international-competition organization, so we can best advise our clients on the current thinking of antitrust enforcers throughout the globe.

Loyalty discounts and rebates are ubiquitous, both geographically and across product and service markets. From pharmaceuticals and medical devices to supermarkets and airlines, companies everywhere are taking advantage of opportunities to provide value in the form of price cuts or discounts to their best customers.

But for companies with any sort of market power, **these discounts could create risk of antitrust or competition liability** across multiple jurisdictions.

Companies without market power need not worry too much about offering discounts to loyal customers, but those with market power should understand that antitrust agencies and courts are considering a few different approaches. Most of the controversy surrounds what are often called **market-share discounts**, which are a form of loyalty discounts that customers receive for every item they buy when they purchase a certain percentage of their needs from a particular company.

**The standards governing loyalty discounts and rebates are, unfortunately, unclear and possibly in the midst of an upheaval.** The foundation of antitrust law is the protection of competition, with the goal of encouraging better products and services at better prices. So courts and antitrust agencies have historically been reluctant to prosecute conduct that is, in many ways, the essence of competition: a price cut.

Indeed, there is a lot of support for **applying a straight predatory-pricing test to loyalty discounts** that would only condemn them if they lead to below-cost pricing and there is a strong likelihood that the company offering the discount could recoup these losses once its competition exits the market. **This is the most lenient test under consideration.**

A variation on this test, which is particularly popular in Europe, **divides a particular market into contestable and non-contestable portions.** The non-contestable share derives from the theory that buyers of a product from the monopolist or dominant company have no choice but to purchase a certain percentage of their needs from the company with market power. To account for this "power," this test attributes any discount from the dominant company entirely to the contestable (or competitive) part of the market, even that portion of the discount that went to the non-contestable share of the market.

This test is certainly easy to understand from the perspective of an economic model, but it suffers in administrability, as determining the contestable v. non-contestable share in the real world may in most instances be so difficult that it becomes arbitrary.

Finally, an increasingly popular test, and one supported by FTC Commissioner Joshua Wright, analyzes loyalty discounts under the exclusive-dealing framework as **partial-exclusive dealing contracts.** The theory is that a loyalty discount that rewards customers for purchasing a certain percentage of their

needs from a company is most likely to be anticompetitive – if it is anticompetitive at all – in the same way that an exclusive dealing contract might be anticompetitive: by foreclosing competitors from competing in the market.

The Third Circuit Federal Court of Appeals recently applied this test in a controversial decision in *ZF Meritor, LLC v. Eaton Corporation*. Despite strong urging from many in the antitrust community, the US Supreme Court denied cert.

The bottom line is that if you have market power and want to offer your customers a loyalty discount or rebate in any jurisdiction, you should discuss it with antitrust and competition counsel, so you can better evaluate any risks.

*Jarod M. Bona* (Of Counsel based in DLA Piper's San Diego and Minneapolis offices) recently participated in a debate with high-level officials for the Federal Trade Commission and the European Commission for the International Competition Network to educate its government-enforcement membership on the appropriate antitrust and competition law treatment of loyalty discounts. You can read more about this debate at Mr. Bona's blog, *The Antitrust Attorney*. Reach Jarod [here](#).

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