Articles + Publications | September 27, 2023

Bundled Discounts in the FTC's Crosshairs

WRITTEN BY

Barbara T. Sicalides | Kasia Hebda

Recently, the Federal Trade Commission (FTC) has focused on the potential harm that loyalty discounts and bundled prices could cause to competitors and their access to customers. A vendor offers a bundled discount when it offers to sell two or more products for a lower price than it charges for those same items sold separately. Traditionally, such discount programs have been viewed as procompetitive because they often result in lower prices and concerns that overenforcement might chill companies from offering customers the opportunity to reduce their costs. The FTC's position on bundling in private litigation and the proposed merger guidelines suggest that past concerns about chilling such discounts no longer drive agency enforcement priorities.

The FTC recently intervened in private litigation to file an amicus brief in *Applied Medical Resources Corp. v. Medtronic, Inc.*, No. 8:23-cv-00268 (C.D. Cal. July 3, 2023), which it described as "clarifying legal standards that apply" to cases involving bundled discounts.[1] Such bundled discounts may be challenged by competitors that cannot offer similar discounts because they do not sell all the products in the bundle.

In its brief, the FTC criticized the "incremental" price-cost or "discount-attribution" test that courts in the Ninth Circuit apply to determine whether a bundled discount runs afoul of the antitrust laws. Under this test, described in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), the full amount of the discount should be allocated to the competitive product — *i.e.*, the product that is also manufactured by the challenger. If the resulting price is above the defendant's incremental cost to produce the competitive product, then the bundled discount is legal. The discount attribution test does not require the plaintiff to show that it is more efficient than the defendant. Rather, the plaintiff must show that a defendant's bundled discount would exclude a hypothetical equally efficient competitor. The purpose of this test is not to protect less efficient rivals because doing so would be "overly solicitous of small firms and denies customers the benefits of the defendant's lower costs." *Id.* at 907 (quoting Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 749a at 322–23 (Supp.2006)).

The FTC did not offer an alternative test but criticized the discount attribution standard as under-protecting competition. First, the FTC noted that the incremental price-cost test offers no protection to less-efficient rivals, even when the bundling at issue is the reason that the rival cannot achieve the scale necessary to be more efficient. Further, the exclusion of a less-efficient rival may harm competition and lead to higher prices for consumers. Second, the FTC rejected the idea that bundled discounts always lead to lower prices for consumers. Instead, the FTC characterized, such "discounts" as charging a penalty for customer disloyalty; a firm could raise its baseline prices before offering the discount, such that even "loyal" customers do not pay less than they did before. According to the FTC, such penalties for purchasing a rival's products may force the rival to exit the market and give the bundling firm an opportunity to raise its prices.

©2026 Troutman Pepper Locke

Similarly, the Department of Justice and FTC explained in the proposed merger guidelines that, as part of their merger reviews, they will examine whether bundling, tying, or other conduct might "tend to extend" a firm's dominance, even if such vendor programs would not violate Sherman Act, Section 2's monopolization prohibition. The Amgen/Horizon challenge is an example of how the FTC might consider potential bundling in its merger review.

The district court did not address the FTC's criticisms of the discount attribution standard in its opinion denying Medtronic's motion to dismiss. *See Applied Med. Res. Corp. v. Medtronic, Inc*., 2023 WL 5503107 (C.D. Cal. Aug. 2, 2023). Whether in the vendor relationship or merger context, it remains to be seen whether the FTC's skepticism of bundling will gain traction in the courts.

---

[1] Press Release, FTC, FTC Files Amicus Brief to Clarify Antitrust Standards Involving Exclusive-Dealing and Bundling Arrangements (July 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-files-amicus-brief-clarify-antitrust-standards-involving-exclusive-dealing-bundling-arrangements.

RELATED INDUSTRIES + PRACTICES

- Antitrust
- Business Litigation
- Health Care + Life Sciences