

I urge the agencies to consider the role of the purchaser in assessing the impact of "conditional pricing". Customers must remain free to negotiate the best possible price from suppliers. In some circumstances that I saw in my 40+ years of practicing antitrust law, conditional prices are sometimes driven and negotiated by customers. One example is a customer shopping for multiple machines or tools for a new factory. Assume there are 10 required. Most suppliers can offer two or three of the ten but one supplier (Company A) can offer eight. Suppose the customer says to company A, "if I order all eight of your tools will you discount the package?" Company A agrees to a 3% discount on the entire order. Company A's discounted prices are above cost. The total amount of the order is \$100 million. Competitors will find it difficult to cut \$3 million from their price(s) because their offerings are more limited. While competitors may be disadvantaged, one would not want to adopt a rule or an enforcement stance that chilled the buyer's ability to drive prices down - or to give the seller an "out" when asked for a discount ("I can't do that for you as the government will sue me"). In other words, please consider the buyer side in assessing the dynamic of this kind of pricing.