

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

PRICE DISCRIMINATION

-- Summaries of Contributions --

29-30 November 2016

This document reproduces summaries of contributions submitted for Item 7 of the 126th meeting of the OECD Competition Committee on 29-30 November 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm*

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PRICE DISCRIMINATION

-- *Summaries of Contributions* --

This document contains summaries of the various written contributions received for the discussion on Price Discrimination (126th Competition Committee meeting, 29-30 November 2016). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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ARGENTINA

Price discrimination is included in Argentina's Competition Act as one conduct that could constitute an abuse of dominant position. Argentina's competition case law has pursued price discrimination cases that have to do with exclusionary and non-exclusionary discrimination and in both issues there are situations in which several firms have been penalized.

Argentina's antitrust authority has analysed several price discrimination cases, consisting of both exclusionary and exploitative kinds of anticompetitive conduct. All the exploitative price discrimination cases represent examples of "third-degree price discrimination", in the sense that different groups of customers are charged different prices for the same product or service. On the other hand, in the exclusionary price discrimination cases, there are some examples of second-degree price discrimination, in the sense that the same customer pays different prices if he or she buys different quantities of the same product or service.

For price discrimination to be taken as an antitrust violation, however, it must be carried out by a firm holding a dominant position in the market and it must be the case that the practice is not justified by reasonable arguments, such as cost differences or seasonal variation. In addition, the CNDC has taken into account in its decisions whether the suppression of the discriminatory conduct would likely harm those customers that were benefiting from the practice.

In general, the CNDC has applied a stricter standard when analysing exclusionary price discrimination cases, as compared to exploitative ones. In fact, in exclusionary price-discrimination cases, the CNDC has never required that actual exclusion had occurred, but only that price discrimination had a potential exclusionary or harmful effect towards competitors of the dominant firm, and that discrimination could not be explained using competitive arguments.

Finally, antitrust law in the price discrimination domain has never been applied using non-economic arguments. In that area, the principle of using the "general economic interest" (established by article 1 of the Argentine Competition Act) as a guideline to evaluate whether a practice is legal or illegal has effectively limited the use of other types of assessments based on non-economic grounds.

BELGIUM

The BCA has had no recent case on price discrimination. Such cases would be addressed under the articles IV.2 Code of Economic Law (CEL) and 102 TFEU prohibiting abuse of a dominant position. It follows from the texts of the articles IV.2, 3° CDE and 102, (c) TFEU that it is prohibited to “apply(...) dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”. Price discrimination can therefore constitute an abuse, regardless whether such abuse would be qualified as exclusionary, exploitative or merely discriminatory.

I suggest, however, that these provisions need to be interpreted having regard to the degree of dominance of the allegedly abusing undertaking.

The obligation to apply similar conditions to equivalent transactions compels in practice dominant undertakings wishing to grant price discounts to apply a tariff based on objective criteria.

Such obligation may well be justified when a dominant undertaking has e.g. a market share on a relevant market of e.g. more than 80%, or when there is strong evidence that the undertaking is indeed able to avoid or sanction undercutting of its prices by non-dominant competitors.

But when undertakings can be deemed to be dominant with market shares of less than e.g. 50%, the rigidity of tariffs may well restrict rather than foster competition. It may also put an unfair burden on undertakings that will be unable to price competitively on a transaction by transaction basis in a market on which the competition may have a combined market share of more than 50%. In the absence of evidence that they can sanction or avoid price undercutting, there are mainly two options in order to avoid the negative impact of a rigid interpretation of the prohibition of discrimination. (1) If the allegedly dominant undertaking cannot avoid price undercutting, it is not able to dictate price levels on that market, and that tends to prove that it is not be dominant – but a general conclusion of lack of dominance also impedes the enforcement in respect of other types of abuse for which the undertaking may well be dominant. (2) To modulate the concept of abuse depending on the degree of dominance.

BIAC

Price discrimination, i.e. the practice of selling the same product to different customers at different prices even though the cost of sale is the same to each of them, is a widespread phenomenon. In the vast majority of cases, price discrimination increases total welfare and, in addition, most frequently benefits consumer welfare. This also applies in the presence of (significant) market power. Accordingly, in most cases, price discrimination or differentiation does not warrant intervention by competition enforcement agencies.

There is consensus among economists that for price discrimination to occur a number of conditions must necessarily be met. In particular, a firm wishing to engage in price discrimination must have (1) some significant degree of market power, have (2) the ability to identify or estimate buyers' individual willingness to pay, and, finally, (3) arbitrage between customers who pay the lower price and those who pay the higher price must be difficult or impossible. These conditions apply to any type of price discrimination. However, even where these conditions are met, price discrimination produces ambiguous effects and should, as a consequence, be subjected to a case-by-case analysis.

BIAC takes the view that the application of competition law should first and foremost be targeted at potentially exclusionary price discrimination adopted by dominant companies that may harm competitors, thereby harming competition and resulting in indirect harm to consumers, i.e. primary line price discrimination. Indeed, BIAC believes that there is only limited room, if any, for the application of competition law to secondary line price discrimination, which by its nature does not involve the foreclosure of competitors, but may only affect customers of the dominant firm.

COSTA RICA

The General Law of Telecommunications, Law 8642, provides that the operation of networks and the provision of telecommunications services are subject to a sectorial scheme of competition and Superintendency de Telecommunications (SUTEL) is the competent authority.

Although competition between and among network operators and telecommunications providers is a dynamic process in which the most efficient parties excel, in conformity with Law 8642, some practices could be illegal and punishable: absolute practices and relative practices.

The national legal system typifies the behaviour of discrimination as the “(...) establishment of different prices or conditions to third parties under similar conditions. (...)” and precisely the legislation establishes the elements to examine it: “ a) That the operator or provider has substantial power in the relevant market, or that a group thereof has acquired such substantial power jointly; b) That the practice has anti-competitive effects”.

Additionally, the review must consider “(...) the elements submitted by the parties to prove the pro-competition effects or the greater market efficiency resulting from their actions, or any other element established in the regulations and which will produce some significant and non-temporary benefit to the end users”.

The interpretation of legislation leads to conclude that the investigation of relative practices is based on the “rule of reason” and in order to provide an assessment methodology, since 2015, SUTEL published the Guide for the Analysis of Anti-Competitive Practices. Therefore, to investigate price discrimination, the Guide instructs to:

- Determine if the behaviour under investigation is practiced by a network operator or a telecommunications service provider.
- Demonstrate the occurrence of the practice typified in paragraph a) of Article 54 of Law 8642.
- Define the relevant market for the product or service subject to the alleged practice.
- Determine the substantial power of the alleged violator in the relevant market.
- Determine which practice aims to, or could, unduly displace other market agents, substantially displaces access thereto, or establishes exclusive advantages in favour of one or several persons.
- Analyse the elements brought by the parties to demonstrate the pro-competitive effects or greater market efficiencies resulting from such actions, and any other element provided in the regulations, that will produce a significant, non-transitory effect on end users.

Price discrimination practices seriously damage the economy and sectorial competition regulations are based on the notion that certain behaviours affect the economy more than others and consequently, fines are imposed in function of the damage. Although, SUTEL has investigated cases involving price discrimination practices no sanctions haven been imposed.

INDONESIA*

Price discrimination constitutes the ability of enterprises to determine price for the same quality goods and services for the different consumers. The rules on price discrimination agreements in Indonesia are set out in Article 6 of the competition law. These apply when at least two competing enterprises agree to discriminate their consumer. The rules on unilateral price discrimination are set out under article 19(d).

A price strategy is prohibited if the following conditions are met: (i) Sellers/producers have market power; (ii) There is separation among markets which does not allow buyers to carry out resale (no arbitrage); (iii) Buyers at different markets have different demand level and elasticity; and (iv) Monopolistic sellers/producers can make use of difference in willingness to pay of each consumer. When those 4 conditions occur and a company applies different pricing for similar goods and services having same quality and quantity for different buyers, the authority will find that the Price Discrimination that is prohibited under Article 6 has been applied.

Not all price discrimination is a violation of Indonesian competition law. For instance, price discrimination due to a different level of competition caused by different level of willingness or ability to pay (purchasing power) between places. Another example is price discrimination caused by differences in the cost structure between different areas. Transactions involving Small-Scale Enterprises can also be considered non-discriminatory if the objective is to increase the sales volume of the enterprise. Cross-country transactions also may not constitute price discrimination.

ISRAEL

In our written contribution we focused on describing two different cases dealt with by the Israel Antitrust Authority (hereinafter: "the IAA"), both of which involve discounts given to certain customers which had an adverse effect on competition.

The first case we discussed deals with an agreed structural remedy the director general reached with Neshet, a cement monopoly, which used a discount policy that had an adverse competitive effect. While the structural remedy does not address the discounts (and their competitive harm) directly, it was intended to reach a better competitive structure that would have a positive influence on competition in both the cement and the concrete markets and hopefully improve the weak competitive situation exacerbated by the problematic discounts. We demonstrated how a monopoly with regulated prices can discriminate between purchasers in order to weaken the threat of its largest customers developing an import alternative, and that this discrimination may lead to uncompetitive prices.

We also demonstrated that the remedy to this behaviour does not necessarily have to deal directly with the discriminating prices; instead, the remedy may focus on finding a different solution that creates a better market structure.

The second case we discussed deals with a draft of recommendations for amending the existing sectoral regulations which the IAA published in order to improve competition in the market for Liquefied Petroleum Gas (LPG) supplied to private households with a central gas system ('Tank'). Among the issues addressed in the draft, the IAA addresses the special prices offered by LPG suppliers to certain customers in order to reduce their incentive to gather their neighbours or get together and switch to a competing supplier. This case demonstrated that "price discrimination" used by firms within an oligopoly can raise switching barriers and block attempts by small suppliers to compete.

We understand that the best way to deal with the obstructive discrimination is to change the sectoral regulations and forbid the discrimination. These recommended changes in regulation should hopefully increase consumers' ability and incentive to switch to competing suppliers, and as a result lead to a better competitive situation.

JAPAN

Basically enterprises are free to set the price of their goods or services. Therefore, price discrimination depending on trade partners does not necessarily result in a violation of the Antimonopoly Act (hereinafter referred to as the “AMA”). However, if competition is restrained due to a price discrimination that is not deemed to be caused by a reflection or a result of competition, this may be problematic under the AMA.

In the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (hereinafter referred to as the “Exclusionary Private Monopolization Guidelines”), the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) clarifies the requirements for Exclusionary Private Monopolization. They provide that, for example, where so-called “margin squeeze” would cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market, the said conduct is regarded as Exclusionary Conduct. The JFTC will comprehensively consider such factors that entire conditions of the upstream market and the downstream market, positions of the enterprise which involves the said conduct and its competitors in the upstream market, positions of the trading customers in the downstream market, period of the conduct and conditions of the conduct, in order to assess whether or not such conduct would cause difficulty in the business activities of the trading customers.

Furthermore, in the Guidelines Concerning Unjust Low Price Sales under the Antimonopoly Act (hereinafter referred to as the “Unjust Low Price Sales Guidelines”), the JFTC also clarifies the basic view of the price discrimination under the AMA. They provide that whether or not an individual act is regarded as Discriminatory Consideration or similar offence under the AMA is determined on a case-by-case basis, by comprehensively taking into consideration the intention of the person who committed the act or the purpose of the act, the extent of difference in the transaction price or transaction terms, the relationship between “the costs required for the supply” and the price, the statuses of the person who committed the act and its competitors in the market, the situation of the other party of the transaction, the characteristics of the goods, and the mode of transaction, as well as considering the harmful effect of the act on the competition order in the market.

LITHUANIA

Article 7 of the Law on Competition prohibits abuse of a dominant position. It states that it shall be prohibited to abuse a dominant position within a relevant market by performing any acts which restrict or may restrict competition, limit, without due cause, the possibilities of other undertakings to act in the market or violate the interests of consumers. Article 7(3) explicitly prohibits application of dissimilar (discriminating) conditions to equivalent contracts with certain undertakings, thereby placing them at a competitive disadvantage. Because Lithuania is a Member State of the European Union, Article 102 of the Treaty on the Functioning of the European Union (hereinafter – TFEU), which prohibits abuse of a dominant position is applicable in Lithuania, as well.

The Competition Council's approach to investigations of abuse of a dominant position under Article 102 TFEU and Article 7 of the Law on Competition is largely the same. Actions of abuse of a dominant position could be distinguished as exploitative or exclusionary. However, the Law on Competition and TFEU do not make any formal distinction between these categories. In practice the Competition Council has also not defined in its decisions within which category the abuse in question would fall. The Competition Council evaluates the impact of the restriction in question on a case-by-case basis.

In the last 10 years the Competition Council has had several cases concerning price discrimination. In one case, infringement was established. In other cases, the investigation was closed by adopting commitments and/or applying prioritisation principles. Solving competition problems by adopting commitment decisions can be effective, as at least in the Competition Council's experience cases of price discrimination can use considerable time and human resources. However, the Law on Competition states that commitment decisions can be adopted only when certain conditions are met.

As Lithuania is a Member State of the European Union, the Competition Council can use as guidance the case law of the European Commission and the Court of Justice of the European Union, as well as take into account various relevant publications. The Competition Council has not conducted any ex-post assessment on the impact of investigations into exclusionary price discrimination cases. In Lithuania, the Competition Council has been the agency to challenge price discrimination on economic grounds under competition law. We do not know about any cases where price discrimination would have been challenged under other policy grounds. We are not aware of any developments of price discrimination in the digital economy in Lithuania and of any regulatory actions designed to pre-empt the risk of big data being used to improve the ability of firms to price discriminate.

ROMANIA

Price discrimination practices by an undertaking in dominant position may represent an infringement of the provisions of Romanian Competition Law. In its practice the Romanian Competition Council has dealt mainly with non-exclusionary price discrimination cases. Usually these cases are investigated acting on a complaint by one or several undertakings claiming to be affected by price discriminations practices. According to the circumstances of the cases, some cases are closed by infringement decisions, others by commitment decisions.

RUSSIA

The notion of price discrimination in accordance with the Russian antimonopoly legislation may include setting different prices for the same goods, including monopolistically low and monopolistically high prices, and setting discriminatory conditions, including through granting discounts and other special favourable conditions. Such actions are prohibited for economic entities with a dominant position and the authorities, unless justified economically, technologically or otherwise.

Definition of the notions of monopolistically low and monopolistically high prices is provided in Articles 6 and 7 of the Federal Law of 26.07.2016 №135-FZ "On Protection of Competition" (the Law on Protection of Competition).

Sanctions imposed on violators of the antitrust legislation and namely its clauses on price discrimination may vary in size. Decisions are taken (either by the antimonopoly authority or by court) depending on whether the violator's actions resulted or could result in preventing, restricting or eliminating competition. If the answer to this question is positive, the sanctions envisaged by law are more serious and can include a fine on persons in the amount of 20,000-50,000 roubles or a disqualification for up to three years; a fine on legal entities in the amount of 1-15% (in some cases provided by law 0.3-3%) of their revenue.

While taking decisions in cases on price discrimination, the FAS Russia applies the "rule of reason" approach contained in the Law on Protection of Competition, which requires in each case to carry out market analyses, determine the motives of price discrimination behaviour, and weigh its positive and negative effects. For instance, exemptions envisaged by this Law in relation to economic entities holding a dominant position are applicable if such entities actions on price discrimination cannot eliminate competition, and also if they result or can result in the perfection of production, sale of goods or stimulation of technical, economic progress or increasing competitive capacity of the Russian goods in the world market; in consumers' benefits that are proportionate to the benefits of the economic entities obtained as a result of their actions on price discrimination.

The companies and authorities accused recently by the FAS Russia of price discrimination are the Federal Tariff Service (now abolished), the JSC "International airport Perm", the "Zelenokumsk Elevator" company. The FAS Russia's recommendations for economic entities, in order to avoid risks of price discrimination prosecution when the FAS Russia's suspicions arise in relation to the company's actions, include a creation and publication of relevant documents (trade policies, pricing policies etc.) establishing the working principles applying to contractors, commercial conditions relating in particular to the volume of supply, product range, pricing, payment terms, discounts etc.

The FAS Russia's experience in prosecuting price discrimination, namely with fixing monopolistically high prices and setting discriminatory conditions, also includes numerous cases involving the largest Russian oil companies (2008-2011).

It should be noted at the end that the recent amendments to the Russian antimonopoly legislation have introduced provisions that soften the system of sanctions imposed in cases of price discrimination. In particular, the competition authority is not entitled to bring a case without first issuing a warning to the violator in cases of economically, technologically or otherwise unjustified establishment of different prices by dominant economic entities; creation of discriminatory conditions by dominant economic entities; restriction of competition by authorities (including through the creation of discriminatory conditions and establishment of different prices for the same product).

SWEDEN

Price discrimination is a common practice used by firms as a profit-maximising strategy when facing differences in demand in different segments of the market. Price discrimination is often an exploitative practice used by firms to increase profits, at the same time either increasing or decreasing output. But price discrimination can sometimes also have anti-competitive effects by excluding efficient rivals. This submission describes the pro- and anti-competitive aspects of price discrimination, and under what circumstances such discriminatory practices are prioritised for enforcement by the Swedish Competition Authority (SCA).

CHINESE TAIPEI

With the degree of a firm's market power, its price discrimination may be subject to the Article 9 or Subparagraph 2 of Article 20 of the Fair Trade Act (FTA). Only when price discrimination used unjustly by a firm likely results in an anti-competitive effect, may it violate the FTA. The Article 26 of the Enforcement Rules of the FTA sets out some examples of "just cause" and the considerations for assessing anti-competitive effect.

In practice, the following factors may be taken into account by the Fair Trade Commission(FTC): (1) practices and trading manner of the specific industry; (2) opinion of the industry's competent authority regarding the fee rate; (3) if specific enterprises are subjected to discriminative treatment; (4) pricing standard; (5) distribution channel structure and trading volume; (6) business risk and cost; (7) quantity and characteristics of the product in the market; and (8) if the enterprises are at the same competition stage.

To address competition issues in the electronic marketplaces, the FTC established the "Explanation of the Fair Trade Commission of Regulations on Electronic Marketplaces" to regulate the activities in the relevant market. The Explanation is based on two principles: "maintaining fair and reasonable market competition order in e-commerce" and "not going against the nature of network technology and not obstructing its development potential," and its purpose is to increase awareness of competition law regarding electronic marketplaces.

In the abuse of monopoly power case against the TIPC, the sole port operator in Chinese Taipei, the FTC found that there was no justification for the TIPC to lease the buildings to downstream stevedores at different prices. Considering these buildings were essential to stevedores, differentiated treatment by the TIPC resulted in restraining competition in the stevedoring market and constituted a violation of the FTA.

Another case is price discrimination implemented by Chung Hwa pulp corporate. Chung Hwa set different prices in different areas for cultural paper. After investigation, the FTC concluded that given that Chung Hwa's limited market power and the extent of inter-brand competition, the pricing setting was not likely to restrain competition in the cultural paper market. However, price differences between areas may result in insufficient trading liquidity across areas, potential risk of consumer harm in certain areas, and limiting intra-brand competition. The Commission has thus warned Chung Hwa to take note of relevant provisions of the FTA.

UK

The focus of the UK Competition and Market Authority's (CMA) submission is *non-exclusionary* price discrimination. The consumer welfare impacts of price discrimination are ambiguous and in general complex to determine. As a result, it is important to consider the impact of price discrimination on a case-by-case basis. The Office of Fair Trading (a predecessor body of the CMA) has previously published research identifying certain characteristics that make price discrimination more likely to be harmful and considered how they may apply to online markets.

Price discrimination has been a relevant factor in several recent CMA market studies and investigations, in particular banking, energy and legal services. The focus of these cases has been on weak customer engagement and the interaction between the pricing behaviour of suppliers and the ability of consumers to drive competition. In these cases, the CMA has tended not to consider price discrimination as the primary source of consumer harm in its own right, but rather primarily as a mechanism employed to exploit demand side issues which limit competition, such as weak customer engagement. However, it has also noted that the pricing behaviour of the firms in question has affected customer behaviour directly, for example where it involves complex or opaque pricing structures that reduce the ability of customers to compare offers and drive competition.

In these cases, where the CMA has imposed remedies, it has tended to focus on addressing the underlying demand side issues rather than on the pricing behaviour of suppliers. The UK experience in the energy market in particular illustrates the risk that interventions seeking to restrict the pricing behaviour of suppliers can have unintended adverse consequences for competition.

UNITED STATES

Price discrimination is common in many markets. In many instances, price discrimination enhances market competition. In the United States, price discrimination is often viewed as efficient. In certain limited circumstances, price discrimination might feature as an aspect of an exclusionary strategy meant to enhance or protect market power. Intervention should be limited to preventing these exclusionary abuses.