Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

26-Oct-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 21 October 2016

ROUNDTABLE ON "PRICE DISCRIMINATION"

--Note by Belgium--

29-30 November 2016

This document reproduces a written contribution from Belgium submitted for Item 7 of the 126th 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

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [E-mail: Antonio.Capobianco@oecd.org].

JT03403717

Complete document available on OLIS in its original format

BELGIUM

1. 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.

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

3. 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.

4. 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.

5. 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:

- 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.

- To modulate the concept of abuse depending on the degree of dominance.