

Unclassified

DAF/COMP/WD(2016)70

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

02-Nov-2016

English - Or. English

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

DAF/COMP/WD(2016)70
Unclassified

ROUNDTABLE ON "PRICE DISCRIMINATION"

--Note by Indonesia--

29-30 November 2016

This document reproduces a written contribution from Indonesia 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*

JT03404237

Complete document available on OLIS in its original format

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1. Rules on Price Discrimination

1. Price discrimination constitutes the ability of enterprises to determine price for the same quality goods and services for the different consumers. Price discrimination must be distinguished from Price Differentiation. From the economic point of view, Price Differentiation is also technically defined as the sale of same commodities to the different buyers at a different price. In its implementation, a company may apply price strategy techniques which are identical to techniques applied in the Price Discrimination.

2. Price discrimination rules by Article 6 of Indonesian competition law, the Law No. 5/1999. It stipulates that,

“Business actors shall be prohibited from entering into agreements forcing a buyer to pay a price which is different from that of payable by other buyers for the same goods and or services”.

3. Article on price discrimination interacts with other articles in the law. The first article is on Price Fixing (Article 5). Agreement as intended in Article 6 is an agreement between the parties involving in vertical relationship, such as between producer and buyer, distributor and retailer. It means that Article 6 does not cover agreement entered into between any producer and its competitor or its potential competitor (horizontal agreement). Such horizontal agreement is covered by Article 5 paragraph (1). Accordingly, if two business competitors agree that they will treat a specific buyer differently in relation to the price, Article 5 (1) can be applied.

4. The second article is on Discriminatory Practices rules by Article 19 point d (Market Control through Discriminatory Practices). Price Discrimination as referred to in Article 6 is the price discrimination agreed. Arbitrary price discrimination (without agreement) is provided for in Article 19 point d. Such arbitrary price discrimination can be practiced if the business actors determining such different price have dominant position. Practically, it is possible that the business actors violate two Articles, namely Article 6 and Article 19 point (d). In this case, double supervisory measures can be implemented, namely the behaviour of the person concerned can be overseen through the implementation of both Article 6 and Article 19 point (d).

2. Price Discrimination Practices

5. In its implementation, there are several price discrimination practices known by the competition authority. The first practice or form of price discrimination is Rebate (discount). This is where a rebate (payment discount) applied to a seller by a certain buyer which does not given to other buyers. Rebate is classified as price discrimination since the buyers receiving rebate pay a cheaper price compared to the other buyers purchasing the same goods.

6. At least, there are three categories of rebate, namely (1) Quantity rebate (Price discount based on purchase quantity volume); (2) Fidelity rebate (a discount offered to buyers who have bound to the seller so that the rebate is given for both large and small volumes); and (3) Target rebate (rebate given to business counterparts whose sales target is higher than that of in the previous periods).

7. The second practice is Selective Price Cuts. This price discrimination is applied when sellers selectively cut price for a specific buyer at a certain market segment which is not given to buyers at other market segment. This selective price cut is normally given to the buyers at the market who have good opportunity to switch to other competitors. Other buyers at different market remain to pay higher price.

8. The third practice is Tying and Bundling, where a company sells commodities at a cheaper price if a buyer purchases two types of commodities in a package compared to the price of two types of commodities purchased by buyer individually.

3. Assessing Price Discrimination

9. A price strategy applied by a company is classified as prohibited Price Discrimination behaviour in case the following conditions are met, namely (1) Sellers/producers have specific monopolistic power (market power) in at least a market; (2) There is separation among markets which does not allow buyers to carry out resale (no arbitrage); (3) Buyers at different markets have different demand level and elasticity; and (4) 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, Price Discrimination prohibited by Article 6 must have been applied.

10. This is similar to the Price Discrimination adopted by other countries. Prohibition of Price Discrimination in Europe indicates conditional price discrimination, namely discrimination applied by market actors holding dominant position, namely (Article 82 (c) of the European Competition Law, which reads as follows: “one or several firms holding dominant position applying dissimilar condition to equivalent transaction with other trading parties, thereby placing them at a competitive disadvantage”. This practice constitutes a misuse of dominant position in the market, in which the dissimilar condition includes dissimilar price as described in the explanations (Geradin and Petit, 2005). Similarly, if we refer to the 1994 UNCTAD (United Nation Conference on Trade and Development) Covenant, Vertical Price Discrimination is only prohibited if it constitutes a misuse of Dominant Position in the Market.

11. The main focus for price discrimination in Indonesia is the existence of agreement between competing parties. Pursuant to Article 1 Point 7, agreement is defined as follows, namely the action of one or more business actors for binding themselves to one or more other business under whatever name, either in writing or not in writing. Furthermore, since Article 6 constitutes the element of Part Two of Law No. 5/1999 providing for the Price Determination, Price Discrimination as referred to in Article 6 is the price discrimination agreed, while price discrimination (without agreement) is provided for in Article 19 Point d. Other aspects of the agreement as intended in Article 6 include vertical agreement between the different parties such as between producers and buyers, distributors and retailers. It means that the agreement concerned is not between producers and their competitors or potential competitors as provided for in Article 5 paragraph 1.

12. Considering that written agreements which may harm the fair competition and consumers can be used as evidence before the court, the business actors have therefore strong incentive not to draw up the agreements. On the other hand, business actors will enter into verbal agreements in the form of coordination and other mechanisms constituting tacit collusion. From the economy point of view, verbal agreements are harder to prove and will only be effective if they are followed with a credible punishment system and mechanism so as to discourage the business actors to violate the usual practices.

13. In order to optimally implement the coordination and mechanisms, the following requirements must be met, like (1) there is regular cycle in performing price adjustment; (2) there is a company which becomes a price leader; (3) there is public announcement concerning plan for price changes; (4) it is possible to draw up articles of contract allowing producers to give special treatment to a specific business actor; and (5) there is a uniform delivery price practice for all business actors.

4. What Constitutes a Non-Price Discrimination?

14. It is noted that not all price discrimination is a violation of competition law. There are several acts that may not be considered as an infringement of the law. For instance, price discrimination due to difference level of competition caused by different level of willingness or ability to pay (purchasing power) between places. The other example is when the price discrimination caused by the cost structure between different areas (places). Transactions involving Small-Scale Enterprises also can be considered a non-discriminatory as long as the objective is to increase sales volume of the small and medium-scale enterprises. Other type of non-discriminatory practice is when buyers receive different benefit values of products/services consumed so that business actors may charge different price. Lastly, cross-country transaction and those including in the exclusion as referred to in Articles 50 and 51 of Law No. 5/1999 also may not constitute price discrimination.

5. Conclusion

15. Article on price discrimination in Indonesia rules by Article 6 of the competition law, as part of the prohibited agreements. It means that, it should be applied when at least two competing enterprises agreed to discriminate their consumer. Having said, price agreement between parties also considers as cartel, and discriminatory practice also rules by other article, the provision on price discrimination may overlap with other articles. Sometime, some infringements may use other articles instead of the article on price discrimination. Applying article on price discrimination should be done in a prudent manner, since not all price discrimination can constitute as the violation of the law. For a price discrimination can affect market competition, at least, four conditions shall be met, namely (1) the existence of monopolistic power (market power); (2) no option for resale (no arbitrage); (3) the markets have different demand level and elasticity; and (4) the sellers/producers can make use of difference in willingness to pay of each consumer.