How should price discrimination be dealt with by competition authorities?

Droit & économie | Concurrences N° 3-2007 – pp. 34-38

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I. What is price discrimination?

1. The legal definition of price discrimination in Article 82, article c) refers to the application of “dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”. On the one hand, this definition is relatively broad (e.g. how do we define “equivalence of transactions”? but on the other hand, it seems to specifically address (at least in theory) price discrimination which affect the competitiveness of downstream customers (“trading partners”) rather than exclusionary effects on competitors. For economists, price discrimination occurs when a firm charges a different price to different customers for the sale of similar products with similar marginal costs. A wider definition has been proposed by Stigler (1987): “A firm price discriminates when the ratio of its prices is different from the ratio of marginal costs for the goods offered”. The various economic definitions of price discrimination explicitly exclude price differences due to differences in costs (i.e. if cost differences are being passed-on to consumers, there is no price discrimination).

2. There are two main necessary conditions for price discrimination to emerge: first, firms need some degree of market power (under perfect competition, no price discrimination is possible); second, arbitrage should be impossible to defeat resale possibilities between customers which would undermine price discrimination.

3. Under European competition policy, price discrimination constitutes a worry for three different reasons. First, price discrimination by dominant firms may reduce consumer welfare by extracting consumer surplus (without any exclusionary impact on competitors). This is generally referred to as “exploitative” price discrimination. Second, the pursuit of the Internal market objective has given mandate to DG Competition to defeat attempts by private firms to erect barriers to trade between Member States which allows them to price discriminate across countries (the issue of geographic price discrimination is particularly prominent in the area of car sales and pharmaceuticals). Finally, price discrimination can lead to exclusionary effects. Such exclusionary effects can either affect the dominant firm’s rivals (primary line discrimination) or the dominant firm’s downstream customers (secondary line discrimination).

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1 This point is made by Geradin and Pett, “Price Discrimination under EC Competition Law: The Need for a case-by-case approach”, GCLC Working Paper Series 07/05.

2 See Stigler G. J., The Theory of Price, Macmillan Company, New York, 1987. It is easier to make sense of this definition when thinking about “versioning” where slightly different versions of the same product are sold at very different prices (e.g. hardback and paperback for books, providing the same information in real-time or with a delay, or software whose simple version is downloadable for free whereas the premium version is downloadable against a payment).

3 In practice, geographic price discrimination is usually tackled under Article 81 investigations as firms enter into agreements to limit parallel trade and arbitrage possibilities.

4 As pointed out by Geradin and Pett (2005), the wording of Article 82c) is close to the objectives of the US Robinson-Patman Act which was aimed at protecting small buyers against larger buyers in downstream markets.
4. Often, economists refer to Pigou’s classification to characterise the various types of price discrimination: (a) first-degree price discrimination (where each customer is charged a price equal to its willingness to pay); (b) second-degree price discrimination (when customers are offered menus to select from and the unit price paid by each customer will depend on quantities purchased); and (c) third-degree price discrimination (where different prices are charged to groups of customers that can be identified). This classification has generally been useful to analyse the welfare effects of price discrimination in a monopoly setting (i.e. the “exploitative type”).

5. Different classifications have been recently suggested. MacAfee proposes to classify price discrimination into (a) direct price discrimination (where the price depends on customer characteristics) and (b) indirect price discrimination (where a menu of options at different prices is offered and customers self-select). Armstrong (2006) defines (a) static price discrimination to final customers; (b) dynamic price discrimination to final customers and (c) price discrimination to downstream customers by an upstream supplier. Static price discrimination occurs when the conditions characterizing uniform pricing are relaxed. Under uniform pricing, the price is (a) anonymous (i.e. independent from customer identity); (b) there are no intra-product discount (i.e. no quantity discount) and (c) no “inter-product” discount (i.e. discounts offered for purchasing several products). When these conditions are relaxed, Armstrong defines three types of “static” price discrimination: non-anonymous price discrimination (covering first- and third-degree price discrimination), quantity discounts (e.g. second-degree price discrimination) and bundling discounts. Price discrimination can also be “dynamic” when firms adapt their pricing over time. Dynamic pricing can take two forms: inter-temporal price discrimination (when the price of a good changes over time – such as books) and behavioural price discrimination (when the price charged to customers varies according to their purchasing behaviour over time – such as personalized vouchers to supermarket customers).

6. The distinctions between static and dynamic price discrimination as well as pricing to final customers and downstream customers are important in particular to understand the consequences of banning price discrimination (or having a tough policy towards discriminatory pricing). The important distinction between static and dynamic price discrimination is that firms may not be able to commit to future prices in the case of dynamic price discrimination and this has implications for the welfare consequences of price discrimination. A ban on “dynamic” price discrimination offers a commitment device which typically leads to higher prices. The distinction between price discrimination to final customers and downstream firms is also important due to the nature of pricing in supplier / downstream customer relationships. Contracts and pricing structures between upstream and downstream firms most often take the form of personalized (and secret) contracts. A ban on price discrimination would usually lead to overall higher prices to downstream customers (as will be explained in greater detail later on).

II. Why do firms price discriminate?

7. Through price discrimination, firms are able to extract consumer surplus and hence increase their profits. When customers have different valuations for the product or when there are different groups of customers with identifiable sensitivity to prices (i.e. price elasticity), price discrimination allows the firm to exploit these differences to increase profits. One such example can be given by bundling practices which may increase a firm’s profit when its customers have negatively correlated preferences for its products. This means that price discrimination is a profitable strategy that firms will want to implement irrespective of any exclusionary effects on rivals.

8. The degree to which firms will be able to extract consumer surplus will depend on the information available on consumer preferences (the extreme example being first-degree price discrimination in which the firm knows the preferences of each consumer and can extract the entire consumer surplus). The finer the information, the finer the pricing strategies that can be implemented and the larger the scope for extracting consumer surplus.

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6 Such price discrimination is unsurprisingly rather rare as it requires a significant amount of information on each customer. However, it constitutes a useful benchmark to assess the welfare effects of price discrimination in its most “extreme” form.
7 Non-linear tariffs or bundles are examples. Second-degree price discrimination occurs when companies have no information on customer types and induce customers to reveal their type by their choice of menu or purchasing patterns.
8 Preston McAfee, “Price Discrimination”, in Issues in Competition Law and Policy, ABA. The same distinction but with a different terminology is mentioned in the EAGCP Report on Article 82 for the European Commission: price discrimination can either be explicit (based on clear and identifiable characteristics) or implicit (menu of options). See “An Economic Approach to Article 82”, Report by the EAGCP, July 2005 (available on the website of DG Competition).
10 Assume that a software manufacturer offers two products: software to create music and software for financial analysis. The company has two types of customers, the musicians and the financial analysts. Musicians have a high valuation for the music software (say, they all have the same valuation at 100) and low valuation for the financial software (10). Financial analysts have high valuations for the financial software (say 60) and low valuations for the music software (30). Under uniform pricing (and assuming zero marginal cost), the software company would sell the music software at a price 100 to musicians and the financial software to financial analysts at a price of 60. If there are 100 customers of each type, the total profit would be 16,000 and consumer surplus would be zero. However, the software company could do better by bundling the two software and charging a price of 90. All musicians and financial analysis would purchase the bundle. The software manufacturer would make a profit of 18,000 and in fact, musicians would have a surplus of 2,000 (they would have been ready to pay 110 for the bundle but only pay 90). In this case, the manufacturer and the musicians are better off while the financial advisors' surplus remains zero.
9. Price discrimination can also be the manifestation of exclusionary pricing (see the next section for a more detailed discussion). When firms can price discriminate, they can implement "targeted" predatory pricing (e.g. only implement selective and predatory price cuts in the customer segment where the firm faces entry) and mixed bundling or tying strategies become possible. In the context of vertically integrated firms, price discrimination can be a tool to raise rivals' costs and exclude downstream competitors. Through discriminatory pricing, firms may therefore also implement exclusionary strategies and harm consumers.

III. What are the economic effects of price discrimination?

10. The early economic literature on price discrimination has mainly focused on the welfare effects of the different types of discriminatory pricing by a monopolist. Price discrimination typically raises the monopolist’s profits but the effect on consumer welfare can be positive or negative\textsuperscript{11}. A simple example can illustrate this. When a monopolist faces two groups of customers with different valuations for its product (high and low), under uniform pricing it may or may not price below the willingness to pay of the low valuation group (depending on whether a high price and sales to high valuation customers only leads to higher profits than a lower price and sales to both customer groups). If only high valuation customers purchase the product under uniform pricing, price discrimination could also "open" the market to low valuation customers (i.e. by changing a high price to the high valuation segment and a low price to the low valuation segment). However, this strategy and therefore, make it profitable to predate when it does not warrant a \textit{per se} ban.

11. In the case of industries with high fixed costs, price discrimination may lead to efficient pricing using Ramsey-principles (i.e. charge higher prices to customer segments with low demand elasticity and vice-versa)\textsuperscript{12}. If dynamic incentives are taken into account as well, price discrimination may ensure that long-run incentives to invest (e.g. in R&D) are preserved by providing firm with sufficient returns\textsuperscript{13}.

12. Price discrimination therefore has non-strategic justifications. In this context, the "exploitative nature" and the impact on consumer welfare of discriminatory pricing is highly dependent on the characteristics of consumer demand. Moreover, the dynamic implications of price discrimination should be taken into account when considering the overall welfare effects (i.e. all consumers may lose in the future if incentives to invest are negatively affected). This calls for a cautious approach towards price discrimination and certainly does not warrant a \textit{per se} ban.

13. To complicate matters further, the main insights of the economic literature on the welfare effects of price discrimination under monopoly do not necessarily hold in competitive or oligopolistic markets (which are most often investigated by competition authorities). Indeed, when comparing welfare effects with and without uniform pricing, it appears that consumers may more often than not benefit from price discrimination in competitive markets. In fact, price discrimination intensifies competition in some circumstances (as firms’ profits may fall)\textsuperscript{14}. This is the case with "customer poaching" where price discrimination allows oligopolists to target competitors’ customers by offering special deals while maintaining higher margins on existing (more captive) customers. The reason why price discrimination may intensify competition is that with uniform pricing, firms would only compete for "marginal consumers" whereas through price discrimination, firms can compete for all customers, including those with strong loyalty to a competitor’s brand\textsuperscript{15}. At this stage however, most economic models have predominantly considered market structures where firms are symmetric and more research is required to understand the effects of price discrimination on competition in settings with asymmetric firms (such as those considered under Article 82 where a dominant firm competes against a competitive fringe).

14. Similar insights (competition intensification) also arise when firms engage in mixed bundling or bundling though in this case, competition can either be intensified or softened depending on the characteristics of the model (the possibility to be more or less aggressive by bundling depends on the characteristics of consumer demand)\textsuperscript{16}.

15. Price discrimination can also be an instrument to implement predatory pricing. Indeed, it can reduce the costs of the strategy and therefore, make it profitable to predate when it would not be profitable if the dominant firm could not price discriminate. Assume a dominant firm serves two market segments and there is entry on only one of the segments. By selectively offering predatory prices to customers in the segment facing entry, the costs of the strategy would be lower than if the predatory price had to be charged across the board, to both segments. In some instances, the ability to target price


\textsuperscript{12} Ramsey pricing minimizes the welfare loss implied by pricing above marginal costs.

\textsuperscript{13} This is a relevant issue in the area of price discrimination in pharmaceuticals.


\textsuperscript{16} For further details on these models, see Sections 7, 8 and 10.2 of Mark Armstrong (2006).
cuts could reduce the costs of predation enough to be outweighed by the long-run benefits of impeding entry. Hence, there may be situations in which, predation would not be profitable if price discrimination was impossible. Yet, even in this case, it is not price discrimination as such that may lead to anti-competitive effects but the predatory strategy. In the context of an effects-based analysis of targeted price cuts, it is the predatory nature of the price cuts that would cause foreclosure effects. A similar conclusion is warranted in the case of bundling strategies. By charging different prices to different customers (depending on whether they buy one product or more), exclusionary effects may arise if competitors are marginalized and forced to exit when bundling induces customers to purchase less from a new entrant, thus jeopardizing its prospect to reach minimum viable scale (when there are fixed costs to recover). Again, the analysis of the foreclosure effect of bundling practices would consider the market circumstances and the likelihood that entrants or competitors are marginalized to the expense of final consumers. The fact that price discrimination is also an element of the practice should not alter the competitive assessment.

16. Our discussion so far indicates that (a) price discrimination as such has non-exclusionary purposes which suggests that observing discriminatory pricing cannot constitute a filter for identifying exclusionary practices; (b) price discrimination can in fact intensify competition with respect to uniform pricing (absent any foreclosure effects); and (c) whenever foreclosure effects arise in contexts where price discrimination is an element of the exclusionary pricing strategy, an effects-based approach would identify anti-competitive pricing without the need to consider price discrimination as a separate “offence”. Price discrimination can be the expression of an exclusionary practice but does not in itself cause the exclusionary effect.

17. An area in which price discrimination as such can have exclusionary effects relates to the specific situation when a dominant supplier sells to downstream consumers and the issue at stake is the pricing of inputs. This is in fact the situation covered by Article 82 c) – that is, “secondary line price discrimination”. In such circumstances, a crucial distinction arises whether the dominant firm is vertically integrated or not. In fact, whereas price discrimination may constitute a device to exclude downstream rivals by an integrated supplier, the opposite situation arises when the supplier is not vertically integrated. Indeed, a non-integrated supplier would in fact benefit from a ban in price discrimination as pricing to intermediaries is often the result of bilateral negotiations (rather than posted prices). Indeed, if price discrimination is possible in the context of secret negotiations, each downstream firm will ask for secret price cuts. Taking the other contracts as given, the supplier and each downstream firm will maximize their joint profit and this will lead to efficient pricing (as in the case of vertical integration).

With a competitive downstream market, prices to consumers will end up being lower. In this context, price discrimination has the effect of eroding the upstream supplier’s market power as it cannot commit not to offer secret price cuts in bilateral negotiations.

18. When the upstream supplier is vertically integrated, things are very different. Indeed, while vertical integration may lead to efficient pricing (i.e. elimination of double marginalization), a vertically integrated dominant supplier may have incentives to exclude downstream rivals by raising their costs or engaging in margin squeeze. These insights are particularly relevant for the application of Article 82 c). They suggest that price discrimination should primarily be of concern in cases where the dominant firm is vertically integrated whereas price discrimination is considerably less likely to negatively affect competition when the upstream supplier faces a competitive downstream market and is not vertically integrated. A cautious approach is therefore advocated in the latter case.

IV. Why is price discrimination associated with a negative presumption?

19. As our review has shown, the effects of price discrimination are multiple, complex and highly dependent on the competitive environment in which firms operate. In a number of cases, price discrimination has pro-competitive effects, does not derive from strategic (exclusionary) objectives and a ban on price discrimination would in many cases be harmful to consumers. Yet, price discrimination carries a highly negative stigma and has been raising suspicions from competition authorities and the legal community for years. There are several reasons for this (though none is sufficient to justify a priori suspicion). First, from an economic perspective, the early economic analysis of price discrimination was concerned with the impact of price discrimination by a monopolist and hence, price discrimination has been associated with the exercise of market power. Second, price discrimination encompasses a notion of “unfairness” due to the discriminatory treatment of customers given that some customers pay more than others. Finally, as seen above, price discrimination usually leads to higher profits for the monopolist as consumer surplus is extracted to increase firm profits. Hence, it is mostly the “exploitative” aspect of price discrimination that had been given attention in the early economic literature and thus led to authorities being rather strict with respect to price discrimination, implementing in practice a per se prohibition for dominant firms.

20. Moreover, in Europe, the achievement of the Single Market is a major objective of the European Union. In that context, discriminatory practices by firms on the basis of customer location which lead to different prices being charged...
across Member States have been severely monitored and fined. This particular European situation has given rise to further suspicions against price discrimination.

21. As can be seen, none of the above justifications for treating severely price discrimination find their origin in the conclusion that price discrimination leads to systematic consumer harm or exclusionary effects. Moreover, as the previous section has argued, banning price discrimination may in fact allow firms to exert more efficiently market power and in oligopolistic markets, price discrimination can in fact intensify competition between firms. Hence, the negative presumption towards price discrimination is not warranted and a per se prohibition is not a desirable policy.

Conclusion:
How should competition rules deal with price discrimination?

22. The treatment of price discrimination raises rather complex issues and the economic analysis of the effects of price discrimination does not provide general and simple conclusions. The competitive implications of price discrimination cannot be generalized. Yet, our discussion and review allows for a number of policy recommendation regarding the treatment of price discrimination. Overall, there are no grounds for prohibiting price discrimination and there are many circumstances in which such ban would in fact allow dominant firms to exert their market power.

23. Identifying the circumstances in which price discrimination has “exploitative” effects would require a very thorough review of consumer demand and the economic models which focus on these effects are based on the assumption that the firm is a monopolist (rarely a market circumstance that competition authorities have to deal with). Moreover, there may be dynamic effects relative to investment incentives that should be taken into account in addition to the static welfare comparison of uniform vs. discriminatory pricing.

24. In the context of oligopolistic markets, the impact of price discrimination (relative to uniform pricing) may in fact benefit consumers and the conclusions arising in monopoly settings can be entirely reversed in that firm profits may fall and consumer welfare increase (absent exclusionary effects). These insights call for extreme caution relative to cases where the sole concern is the “exploitative” nature of price discrimination as an overly restrictive policy may deprive consumers from efficient pricing and long-term investments.

25. These conclusions should also be relevant for the Commission’s policy regarding geographic price discrimination and the pursuit of the Internal Market. Yet, in this context, the Commission has mostly condemned practices by firms to limit arbitrage in order to allow the implementation of price discrimination (through Article 81) rather than the resulting discriminatory prices. Economic theory would suggest a cautious approach to assess the ultimate effect of price discrimination based on geography. However, there may be grounds to adopt a severe policy towards attempts by companies to build barriers to trade in the context of a broader policy aimed at building and protect an integrated market. While not condemning discriminatory prices as such, it may be prudent to ensure that firms do not systematically engage in practices aiming at limiting arbitrage opportunities and assess such attempts on a case-by-case basis (taking into consideration potential long-run dynamic effects as well).

26. The treatment of price discrimination in exclusionary contexts should be an integral part of effects-based approach towards exclusionary pricing. Yet price discrimination is most often a tool or a manifestation of exclusionary pricing rather than the cause (i.e. price discrimination does not in itself lead to exclusion). No specific or separate analysis of price discrimination seems warranted in such context (usually covered by Article 82 b)). Yet, a policy geared towards condemning pricing leading to foreclosure effects through selective price cuts or bundling should be firmly implemented.

27. Finally, in the case of Article 82 c) cases (secondary line price discrimination), economic theory calls for great suspicion when the dominant firm is vertically integrated (in which case it may have incentives to exclude downstream rivals). However, price discrimination in the pricing of inputs is most likely than not to benefit consumers when the dominant supplier is not vertically integrated. Great caution should therefore be the norm when considering the condemnation of price discrimination in such circumstances.

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