

# Price Discrimination under EC Law: The Need for a Case-by-Case Approach



Damien Geradin  
University of Liège and Tilburg Law and Economics  
Centre (TILEC)  
Of Counsel, Howrey LLP

Nicolas Petit  
University of Liège

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# Objectives of the paper

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- Clarifying the scope of Article 82(c) EC
- Offering an analytical framework to classify the various forms of price discrimination
- Reviewing the case-law on price discrimination
- Assessing whether this case law is in line with basic economic theory



# Definition of price discrimination

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- Price discrimination occurs whenever two sales of the same product produce two different rates of return, i.e. when the ratio of price to marginal cost is different for one sale than it is for the other.
- Conditions:
  - (i) Market Power
  - (ii) Ability to sort consumers depending on their willingness to pay
  - (iii) Ability to prevent resale

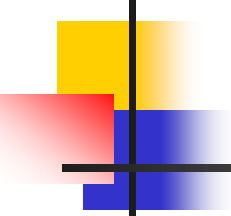


# Primary vs. Secondary line discrimination

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It is of crucial importance to distinguish between:

- Primary line injury price discrimination occasioned by the dominant firm to its competitors by applying different prices to its own customers
- Secondary line injury price discrimination which is imposed on one of several customers of the dominant firm as against one or several other customers
- Article 82(c) is concerned with secondary line price discrimination. Primary line discrimination should be assessed under Article 82(b)



## Types of practices to which Article 82(c) has been applied or implicitly referred to

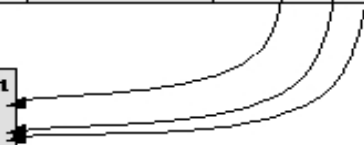
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- Rebates (loyalty, target and other forms of rebates)
- Tied and bundled prices
- Selective price cuts
- Protectionist price discrimination practices
- Discriminatory prices for inputs by vertically-integrated operators
- Geographic price discrimination and facilitating measures

# Table I

PRIMARY LINE INJURY ABUSES			SECONDARY LINE INJURY ABUSES		GEOGRAPHIC PRICE DISCRIMINATION AND FACILITATING MEASURES	
Rebates	<u>Loyalty/Fidelity Rebates</u>	<i>Suiker Unie Hoffman- La Roche British Airways</i>	Price discrimination by a non vertically-integrated operator	<i>Corsica Ferries Portuguese Airports Spanish Airports, Lmaibulatos /Luftfarsverket Aéroports de Paris</i>	Geographic Price Discrimination	<i>United Brands Tetra Pak II</i>
	<u>Target Rebates</u>	<i>Michelin I Irish Sugar</i>				
	<u>Other Forms of Rebates</u>	<i>Irish Sugar (Border and Export rebates)</i>	Price discrimination by a vertically integrated operator	<i>Deutsche Bahn ITT Promedia Deutsche Post AG Clearstream BdKEP</i>	Facilitating Measures	<i>British Leyland Irish Sugar (Border and Export rebates)</i>
Tying and Bundling	<i>Digital Van den Bergh Foods</i>					
Selective Price Cuts	<i>Irish Sugar Compagnie Maritime Belge</i>					

Foreclosure/Leverage/Extension of a Dominant Position Abuses



# Table II

PRIMARY LINE INJURY ABUSES			SECONDARY LINE INJURY ABUSES		GEOGRAPHIC PRICE DISCRIMINATION AND FACILITATING MEASURES	
<b>Rebates</b>  <b>82(b)</b>	<u>Loyalty/ Fidelity Rebates</u>  <i>Suiker Unie</i> <i>Hoffman- La Roche</i> <i>British Airways</i>	<b>Price discrimination by a non vertically-integrated operator</b>  <b>82(c)+86</b>	<i>Corsica Ferries</i> <i>Portuguese Airports</i> <i>Spanish Airports</i> <i>Lmailulaitos /Luffarsverket</i> <i>Aéroports de Paris</i>	<b>Geographic Price Discrimination</b>  <b>No control needed</b>	<i>United Brands</i> <i>Tetra Pak II</i>	
	<u>Target Rebates</u>  <i>Michelin I</i> <i>Irish Sugar</i>					
	<u>Other Forms of Rebates</u>  <i>Irish Sugar (Border and Export rebates)</i>	<b>Price discrimination by a vertically integrated operator</b>  <b>82(b)</b>	<i>Deutsche Bahn</i> <i>ITT Promedia</i> <i>Deutsche Post AG</i> <i>Clearstream</i> <i>BdKEP</i>	<b>Facilitating Measures</b>  <b>81</b>  <b>82(b)</b>	<i>British Leyland</i> <i>Irish Sugar (Border and Export rebates)</i>	
<b>Tying and Bundling</b>  <b>82(d)</b>  <i>Digital</i> <i>Van den Bergh Foods</i>						
<b>Selective Price Cuts</b>  <b>82(b)</b>  <i>Irish Sugar</i> <i>Compagnie Maritime Belge</i>						

**Foreclosure/ Leverage/ Extension of a Dominant Position Abuses**





# Key observations

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- Unjustified extension of the scope of Article 82(c)
- Weakening of the requirements imposed by Article 82(c)
- Little economic analysis in the case-law
- Excessively rigid approach - *Per se* rule should be avoided
- Need for a case-by-case assessment of price discrimination practices
- Need for an effects-based approach