Reflections on the Robinson-Patman Act:

A Review of International Perspectives on Price Discrimination

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The Concept of Price Discrimination under EC and UK Law

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I. PRICE DISCRIMINATION UNDER EC LAW

APPLICABLE LAW

There is no direct legislative equivalent to the US Robinson-Patman Act in EC law.[1] Price discrimination issues arise primarily in EC competition law in the context of an abuse by a dominant undertaking of its position on a relevant market through the practice of discriminatory pricing, contrary to Article 82 EC.[2]

Article 82 EC states that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States'. This article covers a wide range of conduct, including under certain circumstances the practice of price discrimination. Article 82 provides an non-exhaustive list of prohibited conduct, the most important for present purposes being the example set out in paragraph (c) *viz*. the application 'of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Paragraph (b) concerning the limitation of production, markets or technical development to the prejudice of consumers is arguably also of importance when discussing EC law on price discrimination. There are no criminal sanctions under EC law for violation of the competition laws.

OVERVIEW

[1] See Spinks, 'Exclusive Dealing, Discrimination, and Discounts under EC Competition Law', 67 *Antitrust Law Journal* 641, 641. Temple Lang and O'Donoghue submit however that Article 82 (c) EC presents some parallels with the Robinson-Patman Act: 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82EC', 26 *Fordham International Law Journal* 83, at 87.

[2] Article 81 EC does not apply to the unilateral conduct of an undertaking wishing to price discriminate: 'Article [81] (1)(d) of the Treaty prohibits agreements between undertakings … and concerted practices which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The discrimination at which Article [81] (1) is aimed must therefore be the result of an agreement, … or a concerted practice between separate and autonomous economic entities and not the result of unilateral conduct by a single undertaking': *Viho Europe v. Commission*, Case C-73/95P, [1996] ECR I-5457, 5491, [1994] 4 CMLR 419. Article 81 (1)(d) may arguably apply however to a vertical agreement between a supplier and customer in which the supplier agrees to offer its customer more favourable prices than those offered to others: Waelbroeck, 'Price Discrimination and Rebate Policies under EU Competition Law', (1995) *Fordham Corporate Law Institute* 147, at 149. For this short article the authors propose to confine themselves to discussion of price discrimination in the context of Article 82.

Types of Price Discrimination under EC Law

EC law has concerned itself with three main types of price discrimination: primary-line injury price discrimination, secondary-line injury price discrimination, and geographic price discrimination.[3]

Primary-line injury price discrimination refers to discrimination on the part of a dominant undertaking with the objective of excluding rival competitors. Typical examples of this type of discrimination are rebates and selective price cuts.

Secondary-line injury price discrimination involves the charging of different prices to downstream competitors thereby placing one or more of them at a competitive disadvantage relative to others.

Geographic price discrimination occurs when a firm sells the same product at different prices in different Member States. In order for such a practice to be effective—in other words to avoid any arbitrage—it generally requires some facilitating measure(s) to be put in place. This form of price discrimination is a concern of EC competition law as different pricing in different Member States may undermine the objective of market integration.[4]

The use of Article 82

Dominance is not essential for price discrimination to occur. However, dominance is a prerequisite for price discrimination to be prohibited under EC law.[5] In order for a violation of Article 82 to be made out the following elements must be present:

(a) one or more undertakings;

(b) a dominant position;

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[3] According to Geradin and Petit the taxonomy of primary, secondary and third degree price discrimination is only of limited relevance in the competition law analysis context as it tells little about the effects of competition generated by the different forms of price discrimination it distinguishes: Geradin and Petit, 'Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach', The Global Competition Law Centre Working Papers Series, GCLC Working Paper 07/05, College of Europe (Bruges), at 5. Consequently, discussion of price discrimination revolves around the three categories of primary-line injury price discrimination, secondary-line injury price discrimination, and geographic price discrimination.

[4] According to Furse the overriding objective of creating the single market has resulted in greater focus being placed upon price discrimination than would likely be the case in purely national jurisdictions: Furse, *Competition Law of the EC and UK*, Oxford University Press, Fourth Edition, 2004, at 281. See also the case of *United Brands v. Commission,* Case 27/76 [1978] 1 CMLR 429, discussed *infra*.

[5] Subject of course to the caveat in footnote 2, *supra*.

(c) the dominant position must be held in the common market or a substantial part of it;
(d) an abuse; and
(e) an effect on inter-State trade.

Discriminatory pricing can infringe Article 82—i.e. it can amount to an abuse as per (d) above—in a number of ways. Price discrimination may facilitate the imposition of excessive prices on some consumers.[6] It may also lead to exclusionary behaviour, for example through targeted predatory prices, margin squeezes (which distort downstream markets), or through fidelity rebates and mixed bundling if they are likely to lead to foreclosure on the market concerned.[7]

Article 82 (c)

The Community authorities usually rely on Article 82 (c) to sanction discriminatory pricing practices. There are two main elements to this provision:

(a) the discrimination ('dissimilar conditions') must relate to 'equivalent transactions'; and
(b) this discrimination must put the downstream customer 'at a competitive disadvantage' vis-à-vis his competitors.

The Commission and the Community Courts generally focus on point (a), i.e. whether there has been discrimination (in applying dissimilar conditions, e.g. price, to equivalent transactions) and whether it can be objectively justified. As a general principle, a dominant undertaking may not discriminate between customers in equivalent transactions except where the discrimination is objectively justified:[8]

[6] See: Jones and Sufrin, *EC Competition Law*, OUP, 2004, at 409.
[7] Temple Lang and O'Donoghue argue that the exclusion of rivals through discrimination in prices offered by a dominant firm is most likely to occur in one of two situations: (i) through predatory pricing; and (ii) where the dominant firm makes a price reduction conditional on the buyer's making all or nearly all of its purchases of the product in question from the dominant enterprise: Temple Lang and O'Donoghue, *op. cit.*, at 90-91.
[8] It should also be noted that the ECJ also considers as an abuse the application of similar conditions to unequal transactions: Geradin and Petit, *op. cit.*, at 8.

> [i]t is not part of the Commission's duties to assess as such the level of prices charged by an undertaking or to decide which criteria should govern the setting of such prices. On the other hand, where different prices are charged for equivalent transactions, *it is appropriate to assess whether such differences are justified by objective factors*.[9]

By contrast, the requirement for the downstream customer to experience a competitive disadvantage seems to be generally overlooked by the Community institutions.[10]

The types of practices to which Article 82 (c) has been applied or implicitly referred to include:

- Rebates (loyalty, target and other forms of rebates);[11]
- Tied and bundled prices;
- Selective price cuts;
- Protectionist price discrimination practices;
- Discriminatory prices for inputs by vertically-integrated operators; and
- Geographic price discrimination and facilitating measures.

Article 82 (b) versus Article 82 (c)

It has been argued that Article 82 (b) should be used to prevent an abuse of a dominant position that involves the imposition of primary-line injury price discrimination, while Article 82 (c) is more appropriate for dealing with secondary-line injury abuses.[12] This argument finds its source in the wording of Article 82 (c). The inclusion of the phrase 'thereby placing them at a competitive disadvantage' seems to suggest that this provision should be confined to those situations where a

[9] *HOV SVZ/MCN* 94/210 (1994) OJ L104/34, at paragraphs 158-9, emphasis added. It is not clear however if this principle applies to all forms of price discrimination. For example, it applies to fidelity and target rebates but not generally to quantity rebates: Spinks, *op. cit.*, at 661.
[10] Spinks, *op. cit.*, at 661. But see also: *Alpha Flight Services/Aéroports de Paris* (11 June 1998), 1998 O.J. (L 230) 10 and *Irish Sugar* (14 May 1997), 1997 O.J. (L 258) 1 at recitals 140 *et seq*. According to Furse 'it is not necessary … to show that any one customer of the discriminating supplier is placed at a competitive disadvantage *vis-à-vis* another': Furse, *op. cit.*, at 283. This may be due to the use of the word 'thereby', i.e. the use of this word may suggest that it is presumed that a competitive disadvantage results from the imposition of 'dissimilar conditions': *ibid*.
[11] See *Hoffmann-la Roche* Case 85/76 [1979] ECR 461; *Michelin II* (2002) 5 CMLR 388; and *British Airways plc. v. Commission* Case T-219/99 (CFI), Case C-95/04 pending before the ECJ.
[12] See Geradin and Petit, *op. cit.*

downstream customer is placed at a competitive disadvantage *vis-à-vis its own competitors* as a result of the discriminatory pricing practice, i.e. it should apply solely to secondary-line injury price discrimination. However, the Community authorities have generally prohibited discriminatory practices—whether of the primary-line or secondary-line injury type—under Article 82 (c) than under other more preferable provisions. To do so they have generally ignored or overlooked the phrase 'placing them at a competitive disadvantage'.[13]

Enforcement

The European Commission is the supranational European body entrusted with enforcing competition law at EC level.[14] Its decisions can be appealed on points of law and fact to the Court of First Instance; judgments of this court are appealable on a point of law to the European Court of Justice.

Since 1 May 2004 both Article 81 and 82 EC are also enforceable in their entirety by the authorities of the Member States.[15] Furthermore, private enforcement of EC competition law within the national courts of the Member States is currently being encouraged by the European Commission.[16]

IMPORTANT CASES

There have been cases various cases at EC level dealing with the concept of price discrimination. The authors propose to deal with the most pertinent.

In *United Brands Co. v. Commission*[17] a prominent supplier of bananas in the EEC was accused of charging discriminatory prices to its different distributors in the different Member States, contrary to Article 82 (c) EC. On the facts of the case, prices for bananas were considerably higher in certain Member States (e.g. Denmark

[13] See footnote 5 *supra*.
[14] Article 85 EC.
[15] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, entered into force 1 May 2004 (hereafter 'Regulation 1/2003').
[16] See *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, Brussels, 19 December 2005, COM (2005) 672 final, SEC(2005) 1732, available online at the following website: http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html.
[17] *Op. cit.*

and Germany) compared to others (e.g. Ireland and the Benelux countries).[18] UB argued that these differences in price were due to the commercial reality of the market place; they had made these pricing decisions based on their analysis of what the market could bear. The Community authorities held that the differences in price were not due to any differences in customs duties or transport costs as these were borne by the distributor or the ripener involved, i.e. there was no objective justification for the price differences. Both the Commission and the ECJ held that a company can make a commercial decision as to what the market can bear when deciding its pricing policies, but only if that company takes a substantial risk on the local market concerned such that market forces within that local market are likely to impact it directly. So in order for companies to be able to decide what the local market can bear as regards price it must be 'involved' to some degree in the local market.[19] Such was not the case here.[20]

Another case that can be mentioned is *Tetra Pak II*.[21] Here the Commission held, in a decision upheld by the CFI,[22] that TP had violated Article 82 of the Treaty by charging different prices for both milk cartons and milk packaging machinery within different Member States of the EC. The Commission believed that these differences in price could not be objectively justified. It reasoned that as the raw materials for the cartons represented 70% of their cost and as the geographic market was defined as Community-wide there could be no explanation 'in economic terms' for the differences in price.[23] As for the machines, the Commission believed that their 'transport costs … [were] quite negligible in relation to the market value of the product'.[24] It was thus held that the price discrimination involved in this case was a deliberate act designed to compartmentalise the relevant markets for packaging and packaging machines.

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[18] The price differentials were maintained through contractual mechanisms that ensured that resale other than to the end user would not be a practical possibility.
[19] The ECJ left uncertain what it meant exactly by 'involvement'. See Goyder, *EC Competition Law*, Fourth Edition, at 290, where he suggests that UB might have had a stronger case had the discriminatory pricing arisen from pricing pressures in the individual countries, i.e. market led pressures, rather than from UB's (apparent) ability to increase price due to the absence of competition on the market concerned.
[20] UB sold its product to all its distributors at Rotterdam and as a result did not bear the risk of individual national markets.
[21] *Tetra Pak II* 92/163 (1992) OJ L72/1.
[22] Tetra Pak did not appeal the point on geographic price discrimination to the ECJ.
[23] *Ibid* at paragraph 154.
[24] *Ibid* at paragraph 160.

In *Napier Brown v. British Sugar*[25] the Commission held that British Sugar had breached Article 82 by maintaining a margin between the price at which it sold raw materials to Napier Brown and the price it sold its product to its own end users. This margin ensured that Napier Brown was unable to profitably convert the industrial sugar into packets suitable for the retail market. In the *Irish Sugar* case[26] the Commission found that IS had committed an abuse contrary to Article 82 in that it:

(i) offered discriminatory prices to those industrial customers who agreed to export their sugar rather than competing with IS on the Irish market;
(ii) offered discriminatory prices to competing packers who agreed to sell their sugar in retail packs not in competition with IS; and
(iii) offered special rebates to retail purchasers in the border areas of Ireland in order to protect itself from competition from cheaper suppliers in Northern Ireland.

None of these discriminatory pricing policies were found to be objectively justified.[27]

A final group of cases concerns the issue of landing fees at airports.[28] In these cases the Commission has usually found discrimination that cannot be objectively justified contrary to Article 82 (c). In *Portuguese Airports*[29] for example airlines paid different landing fees depending on their point of departure. The Commission believed that the services being purchased (i.e. the use of the airport and its facilities) were the same irrespective of the point of origin of the aircraft involved. As a result this practice was held to be discriminatory; in other words the respective landing fees represented 'equivalent transactions'. As no objective justification could be found for the different fees the price discrimination in question was held to have violated Article 82 (c).

[25] [1988] OJ L284/41; [1990] 4 CMLR 196.
[26] *Irish Sugar plc v. Commission* [1999] ECR II-2969, [1999] 5 CMLR 1300.
[27] The decision in *Irish Sugar* was upheld on appeal to the CFI; the CFI's judgment was also upheld on appeal to the ECJ.
[28] See for example: *Deutsche Bahn AG v. Commission* [1997] ECR II-1689, [1998] 4 CMLR 220; *Aéroports de Paris v. Commission* [2000] ECR II-3929, [2001] 4 CMLR 611; *Spanish Airports* [2000] OJ L208/36.
[29] *Portuguese Airports* 1999/199 (1999) OJ L69/31, on appeal *Landing Fees at Portuguese Airports v. Commission* case C-163/99 [2002] 4 CMLR 31.

II. PRICE DISCRIMINATION UNDER UK LAW

APPLICABLE LAW

National Law

Price discrimination issues under UK law arise primarily in the context of Section 18 of the Competition Act 1998, i.e. in the context of a Chapter II prohibition.[30] This section prohibits an abuse by an undertaking of its dominant position on a market if such an abuse affects trade within the UK. Section 18 (2) provides a non-exclusive list of examples of the type of conduct prohibited under Chapter II. Of particular interest for present purposes is Section 18 (2)(c); according to this provision an abuse may be committed where an undertaking applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.[31] One type of 'dissimilar condition' is of course price.

In the absence of an abuse of a dominant position there is no general provision of UK law which prohibits discriminatory pricing; in order words, the UK does not have an equivalent of the US Robinson-Patman Act which prohibits unilateral price discrimination by an undertaking irrespective of the presence of monopoly power.[32] Further, although UK law does provide for criminal sanctions in the context of the 'cartel offence' there are no equivalent sanctions for breach of the UK competition laws relating to price discrimination.

Relationship with EC Law

[30] It is possible that price discrimination concerns may arise in relation to the Chapter I prohibition of the Competition Act 1998. This would however require more than the unilateral behaviour of the seller, i.e. an agreement between undertakings, a decision by associations of undertakings or a concerted practice. See footnote 2 *supra*.

[31] This type of abuse is a 'secondary line injury abuse', as explained *supra*. 'Primary line injury price discrimination' is also provided for in UK law. See Section 18 (2) (b) of the Competition Act 1998 for example. See also Geradin and Petit, 'Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach', The Global Competition Law Centre Working Papers Series, GCLC Working Paper 07/05, College of Europe (Bruges),where the authors argue that Article 82 (b) EC should be used to prohibit 'primary line injury price discrimination' under EC law. Section 18 (2)(b) of the Competition Act is identical to this provision of the EC Treaty.

[32] There are however systems of price regulation for certain aspects of the regulated industries e.g. basic voice telephony and the transmission of gas and electricity. See Whish, *Competition Law*, 5th Ed., at 934ff.

Section 18 of the Competition Act draws heavily on the text of Article 82 EC. In fact the wording of Section 18 (2)(c) of the Competition Act is identical to that of Article 82 (c) EC.

The UK law on price discrimination applies when discriminatory pricing affects trade within the UK. However, the relevant authorities must also apply Article 82 EC when the price discrimination in question amounts to abusive conduct that affects trade between Member States.[33] Further, in the application of the Chapter II prohibition the OFT is required to ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Courts or any relevant decision of the European Courts; it must also have regard to any relevant decision or statement of the European Commission.[34]

OVERVIEW

Definition

Paragraph 4.14 of the Office of Fair Trading's *Guideline on Chapter II Prohibition*[35] states that price discrimination involves 'applying different conditions (normally different prices) to equivalent transactions'. According to the OFT it can take two basic forms:

(a) charging different prices to different customers, or categories of customers, for the same product—where the differences in price do not reflect the quantity, quality or any other characteristics of the items supplied.[36]
(b) charging the same price to different customers, or category of customers, even though the costs of supplying the product were very different.

[33] Article 3 (2) of Regulation 1/2003, *op. cit.*, is of relevance here. According to this article 'Member States shall not…be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'.
[34] See Section 60 of the Competition Act 1998. See also Article 16 of Regulation 1/2003, *op. cit.*
[35] Available at: www.oft.gov.uk. It should be noted that the OFT guidelines are not binding on a court. They do however offer a unique insight into how the UK authorities will deal with certain conduct under the competition laws.
[36] The pricing structure would not be considered discriminatory where there were 'objective and proportionate' reasons for the different prices, e.g. where there were different transport costs: paragraph 4.14 of the OFT's *Guideline on Chapter II Prohibition*, *op. cit.*

Treatment

Price discrimination is not considered a *per se* abuse by the UK authorities. In fact, according to the OFT there are many areas of business where it is a 'usual and legitimate' commercial practice.[37] In particular the practice may be objectively justified in industries that have high fixed costs and low marginal costs.[38] Under UK law, price discrimination in such industries will not be an abuse if it leads to higher levels of output than could be achieved by an undertaking charging every customer the same price.[39]

Price discrimination is only likely to constitute an abuse under UK law where:

(a) it leads to the imposition of excessive prices; or
(b) it significantly reduces competition.[40]

In relation to the first point, excessive prices are defined as a price that has no reasonable relation to the economic value of the product supplied.[41] Point (b) relates to the exclusion of competitors from the market because, for example, the discriminatory pricing practice was predatory or because it involved a discount designed to foreclose the market.[42]

Enforcement

Enforcement of UK competition law is primarily the responsibility of the Office of Fair Trading, although sectoral regulators such as Ofcom also have enforcement powers in relation to their respective sectors. Decisions of these authorities may be appealed to the Competition Appeal Tribunal.

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[37] *Ibid* at paragraph 4.15.
[38] *Ibid.* 'In most markets undertakings are normally expected to set prices equal to their marginal cost, but in industries with high fixed costs an undertaking which did so might never be able to recover its fixed costs. It may therefore be more efficient to set higher prices to customers with a higher willingness to pay.'
[39] *Ibid.*
[40] See paragraph 3.2 of OFT Guideline 414 *Assessment of Individual Agreements and Conduct*.
[41] These are the words of the ECJ in Case 27/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429. They are quoted with approval in the OFT's *Guideline on Chapter II Prohibition*, *op. cit.*, at paragraph 4.7
[42] See: OFT's *Guideline on Chapter II Prohibition*, *op. cit.,* at paragraph 4.16.

Abusive pricing practices may also be investigated by the Competition Commission under the Enterprise Act 2002 as a result of a market investigation reference.[43] Further, under Section 13 of the Competition Act 1980 the Secretary of State may ask the OFT to investigate prices 'of major public concern'. This section remains in force, although it has never been used.

The Competition Act may be enforced by private parties before both the ordinary civil courts and the specialised Competition Appeal Tribunal.[44]

IMPORTANT CASES

The concept of price discrimination has not been subjected to the same degree of scrutiny under UK competition law as it has at EC level; this may be due to the added objective of market integration that is consistently pursued by European competition law.[45]

One of the most important UK cases that dealt with price discrimination was the *Napp* case.[46] Napp Pharmaceutical Holdings produced sustained release morphine tablets (MST) and distributed its product to both the hospital and community sector of the market. Hospital usage was the 'trigger' for prescription by doctors in the (much larger) community sector. Napp distributed its product to hospitals at a 90% discount from the list price in the wider community.[47] This discount—a form of price discrimination—was held by the OFT to be an abuse of a dominant position as it served to strengthen the dominant position of Napp in such a way that the degree of dominance reached by this undertaking substantially fettered competition in the market for MST.[48]

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[43] See Sections 131 to 138 of the Enterprise Act 2002.

[44] A claim before the ordinary civil courts is based on the common law. Section 47A of the Competition Act provides for an express claim of damages before the Competition Appeal Tribunal. See *Private Antitrust Litigation 2006—Getting the Deal Through*, Global Competition Review, at 24—32.

[45] See: Furse, *Competition Law of the EC and UK*, OUP, 2004, at 283. It should also be noted that price discrimination may be more difficult to maintain in a smaller market where customers can react to pricing differences: *ibid*.

[46] *Napp Pharmaceutical Holdings Ltd* CA98/2/2001 [2001] UKCLR 597, on appeal *Napp Pharmaceutical Holdings Ltd v. The Director General of Fair Trading* [2002] CompAR 13.

[47] It is important to note that the highest discounts were offered by Napp when it faced a direct competitor: *ibid* paragraph 182 (OFT); furthermore, higher discounts were also offered when Napp expected to win the sole contract for a particular region: *ibid* paragraph 183 (OFT).

[48] *Ibid,* paragraph 144 (OFT). The findings of the OFT on this issue were upheld by the CAT on appeal.

Another important UK case on price discrimination is the *ABTA/BA* case.[49] This case concerned air travel agency services in the UK. BA cut booking payments it made to travel agents for short haul flights[50] in June 2002. As a result, ABTA (the Association of British Travel Agents) complained to the OFT that BA had thereby infringed Section 18 of the Competition Act, as *inter alia*:

(i) BA was making excessively low booking payments that did not allow travel agents to cover their own costs, i.e. they were being exploited; and

(ii) if travel agents charged customers an additional service fee, customers would be encouraged to book their tickets themselves through BA's website. It was argued that this amounted to a form of price discrimination, as tickets through the travel agents cost more than they did through the BA website due to the additional service fee.

The OFT held that there was no practice of price discrimination, as there existed a significant difference in service between the online service and the service of the travel agent; the tickets sold through the BA website were not a sufficiently prefect substitute for tickets obtained through an agent that they need to be sold at identical or very similar prices.[51] In any case there was also an 'objective justification' for the differences in price: the use of the Internet to book tickets was more efficient, thus it provided a cheaper service than that available through a travel agent.[52]

Two cases concerning BT may also be noted here. In both cases Oftel (succeeded by Ofcom) concluded that there was no abuse contrary to the UK competition laws. In *BT/BSkyB Broadband Promotion*[53] Oftel held that there was no material effect on competition as a result of any discrimination on BT's part in relation to the promotion of its broadband services. In *BT TotalCare*[54] Oftel rejected an allegation by Energis Communications Ltd that BT discriminated towards it concerning the provision of certain broadband services.

[49] *Association of British Travel Agents and British Airways plc.*, 11 December 2002, available at: www.oft.gov.uk.
[50] ABTA estimated that BA ticket sales accounted for around 18% of a travel agent's turnover.
[51] *ABTA/BA* decision, *op. cit.*, at paragraph 42.
[52] *Ibid* at paragraph 44.
[53] Oftel Decision, 19 May 2003, available at: www.oft.gov.uk.
[54] Oftel Decision, 10 June 2003, available at: www.oft.gov.uk.

Another regulatory body, Ofgem, has also dealt with complaints concerning price discrimination. In the *London Electricity* case[55] for example, Ofgem held that London Electricity plc had not committed an abuse contrary to Section 18 of the Competition Act when it made offers to consumers who had switched to its competitors in order to persuade them to return. This was held to be the case despite the fact that LE had offered prices that were substantially different than those charged to its existing customers. According to Ofgem 'price discrimination is only an abuse under the Act if it has an anti-competitive effect'.[56] This was not the case with the conduct in question as there was 'a severely limited take up of [LE's] offer'.

[55] *The Gas and Electricity Market Authority's Decision under the Competition Act 1998 that London Electricity plc has not infringed the Prohibition imposed under s. 18 (1) of the Act with regard to a 'win back' offer*, [2004] UKCLR 239.
[56] *Ibid* at paragraph 34.