Measuring Discrimination

A partial integration of competition policy with the contingency protection system, in the fashion outlined above, also raises the technical issue of measuring price discrimination. Most of the literature which has identified the difference in "standards" between contingent protection (most importantly, in anti-dumping actions) has focussed on the differences in the the concept of "injury". Anti-dumping policy has enshrined a "diversion of business" approach, looking solely on the impact on competitors; competition policy, it is suggested, is directed more at the impact of practices at issue on competition. Our proposals above would, if fully implemented, bring competition policy concepts more fully into the contingency protection system. But there remains the issue of defining when price discrimination in actionable, and how to measure it. As we have already noted the scheme of competition policy legislation defining price discrimination in one country, e.g. Canada, is not identical with the scheme in others, e.g. U.S.; in yet other countries e.g. UK, EEC, price discrimination tends to be dealt with under provisions of a more broad and general character, Articles 85 and 86 of the Treaty of Rome; in yet other countries, e.g. France, the definition of discriminatory pricing is much nearer the concept in the anti-dumping system, that is, it is not addressed to such price discrimination as is harmful to competition or which represents the abuse of a dominant position, but at all price discrimination which is not cost-justified.[29] Given these kinds of differences, there are two possible approaches, one more ambitious than the other. The first would be to work to an international agreement, possibly in the OECD, that there should be one agreed set of standards for determining what differences in prices constitute discrimination, to be applied by all industrialized (OECD) countries, and that such rules would apply in regard to domestic price discrimination and to discrimination in import trade. In this context, it is of some relevance that under the auspices of the GATT Anti-dumping Practices Committee there has been detailed discussion of the elements that go into the calculation of the dumping margin; this has brought about a certain impetus toward uniformity as between jurisdictions. Somewhat the same process has been going toward with regard to the identification of countervailable subsidies and the measurement of such subsidies.

It is obvious that a highly unified system such as this would be in apparent contradiction with the fact that most countries allow firms to discriminate when pricing for export, subject, of course, to the requirements of their tax regimes as to transfer pricing.

Moreover, such an ambitious approach could easily get bogged down in negotiations; it is all too easy to launch a negotiation which never reaches a firm conclusion, or which merely arrives at a wisely worded normative statement, more exhortation than obligation.

A less radical approval would be to seek accord that within each jurisdiction that there be only a single set of standards regarding price discrimination.

Aside from dealing with the issue of quantities, and with cost justification, a single set of rules defining price discrimination would have to deal with the question of "unreasonably low" prices, that is, with predatory prices. Is it feasible to agree, at least at the national level, that, if the standard