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Re Udkast til Veileder om prisdiskriminering

First and foremost, I would like to take this opportunity to congratulate Konkurransetilsynet for drafting guidelines on discriminatory abuse (Veileder om prisdiskriminering). There is much confusion surrounding discriminatory abuse, which could predictably lead to wrong decisions and a misallocation of resources across enforcers and undertakings confronted with "unfounded" complaints. With a clear lack of clarity on the scope of abusive discrimination, even plaintiffs will potentially invest time and resources into unfruitful complaints ultimately amplifying the issue. Any attempt to clear up the ambiguities is, therefore, a positive step in the right direction. Moreover, the draft is well crafted and obviously armed with solid and informed considerations.

To the best of my knowledge Konkurransetilsynet's draft is the first attempt from an enforcer to formulate guidelines. In 2005, DG COMP promised[1] to issue a separate paper on discriminatory abuse but never delivered, and in all likelihood, never will, leaving the matter open and unsettled.

Below, I will offer some comments on the presented draft. In general, I have nothing negative to say about the draft, which is why my remarks primarily pertain to what is not included, and in particular the absence of more operative principles for identifying abusive discrimination. I hope Konkurransetilsynet will consider the following commentary in the final version.

1. Konkurransetilsynet's draft guidelines

Konkurransetilsynet has issued a draft paper on abusive (price) discrimination, outlining how the agency plans to approach the matter. As already indicated, this should be considered most welcome. The legal position is currently at best unclear, and there are salient examples of misallocation, at least in Denmark. The otherwise famous EU case *Post*

[1] See Memo/05/486 - *Commission discussion paper on abuse of dominance - frequently asked questions,* press release from EU Commission 19 December 2005.

Danmark I,[2] e.g., originated[3] in a misguided Danish attempt to apply Article 102 TFEU to differences offered in terms, but clearly not capable of thwarting competition. Between the lines of Konkurransetilsynet's draft, I also sense a concern regarding misunderstandings and unfruitful complaints in relation to the retail sector.

In the draft paper, Konkurransetilsynet offers five essential lessons. Firstly, the draft rebuts seeing discrimination in itself as abusive as discrimination often would be benign or pro-competitive.[4] Secondly, the draft[5] refutes seeing dissimilarities in terms offered to large v. small customers as *per se* problematic. This is important, as the concept of discrimination can trace its lineage back to a misguided ambition of protecting smaller companies against the effect of competition,[6] which is why the draft cuts any link to this (false) theory of harm. Thirdly, Konkurransetilsynet's draft[7] explains how (price) discrimination may come in many forms and shades, involving:[8]

a) applying *dissimilar* conditions to *equivalent* transactions, which could involve that some customers get better terms, or

b) applying *equivalent* conditions to *dissimilar* transactions, which could involve all customers offered identical terms regardless of differences, e.g., in the quantum they source.

Fourthly, relying on literature and economic theory, Konkurransetilsynet's draft[9] explains how exclusionary discrimination involves primary and second-line discrimination, where the former is directed at foreclosing a competitor (upstream or downstream), while the latter is directed at thwarting competition downstream (or upstream) and only relevant when the "perpetrator" is not active here. The focus of the draft is second-line discrimination,[10] as first-line discrimination often would be covered by other concepts of abuse, e.g., margin squeeze or refusal to supply. Fifth, and finally, the draft[11] underscores that an anti-competitive effect must be identified, but does not offer anything further on this, including how to evaluate the matter.

Below, I will expand on the latter and other missed opportunities that I hope will be addressed in the final version.

2. The paper is most welcome but falls short of providing a coherent approach

Konkurransetilsynet's draft should be considered most welcome, as abusive (price) discrimination remains the most misunderstood form of abuse, and essential EU cases such as *MEO* and *BdKEP/Deutsche Post AG*[12] are challenging to read and apply. However, the latter is an overlooked jewel (that should be included in the final version of Konkurransetilsynet's paper) when it comes to the matter of discriminatory abuse. E.g., DG COMP (recital 93) uses the opportunity to explain how:

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[2] Case C-209/10 - *Post Danmark mod Konkurrencerådet.*
[3] See e.g. Christian Bergvqist, *Final Curtain or Another around on Post Danmark?*, ECLR 2013 (34) No. 6, pp. 287-290.
[4] *Konkurransetilsynet udkast til Veileder om prisdiskriminering*, Recital 7 and 60.
[5] *Konkurransetilsynet udkast til Veileder om prisdiskriminering.* Recital 43.
[6] Erling Hjelmeng og Lars Sørgaard, *Konkurransepolitikk*, Fagbokforlaget 2014, p. 291.
[7] *Konkurransetilsynet udkast til Veileder om prisdiskriminering*, Recital 5-7.
[8] See also e.g. the EU case COMP/A.36.568/D3 - *Scanlines Sverige AB v. Port of Helsingborg*, recital 276.
[9] *Konkurransetilsynet udkast til Veileder om prisdiskriminering,* 8-10.
[10] *Konkurransetilsynet udkast til Veileder om prisdiskriminering,* Recital 11.
[11] *Konkurransetilsynet udkast til Veileder om prisdiskriminering,* Recital 44.
[12] COMP/38.745 - *BdKEP/Deutsche Post AG.*

> " *The wording* [of Article 102 TFEU] *covers three types of discrimination, the first two of them exclusionary and the last one exploitative: (i) the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) the customer suffers commercially in such a way that its ability to compete in whatever market is impaired. It is obvious that type (i) and (iii) do not require a competitive relationship between the two comparator groups."*

Combined with the Advocate General's Opinion in *Meo,* it becomes apparent that the concept of discrimination not only covers three forms of abuse, of which two are exclusionary and one exploitive, but also that more advanced observations can be provided. These include how Article 102(c) TFEU potentially can be applied to:

a) *Horizontal (exclusionary) discrimination* (referred to as *primary-line discrimination* in Konkurransetilsynet's draft, recital 9), initiated for the purpose of *foreclosing* competitors by targeting actual or potential customers with selective price reductions or other favors. Moreover, this includes foreclosure of upstream and downstream markets secured by preferential treatment of subsidiaries and internal departments of the vertically integrated company. The foreclosure could thus have a vertical element to it, but because the victim is a direct competitor (upstream or downstream), the foreclosure remains horizontal.

b) *Vertical (exclusionary) discrimination* (referred to as *secondary -line-discrimination* in Konkurransetilsynet's draft, recital 10) initiated for the purpose of *twisting* competition in other markets e.g., for the benefit of a preferred trading partner (but not a subsidiary or internal department). While also directed upstream or downstream, the potential abuser has no direct interest in the foreclosure as it remains inactive in any of the affected markets. Hence, the foreclosure is (truly) vertical.

c) *Exploitative discrimination* that in practice involving national based discrimination and henceforth potentially individualized pricing. However, the abuse is essentially exploitive and should not be confused with discrimination but reviewed under the legal standards for exploitation.

Konkurransetilsynet's draft does not spell things out as clearly as done above, but the meaning is clear. Still, the draft does not offer anything further in terms of when to accept horizontal or vertical discrimination as anti-competitive.

Accepting horizontal discrimination as nothing short of a traditional exclusionary practice would make it logical to turn to the most recent practices from the European Court of Justice, including *Intel.*[13] This would command an analysis of all the circumstances, including the ability to foreclose an As Efficient Competitor (AEC). In most cases, this would involve evaluating if the offered terms secured coverage for the dominant undertakings LRIC on the markets affected by the (alleged) abuse. Only then could a preferential treatment of customers lead to the foreclosure of an As-Efficient Competitor, and thus, rightly be held anti-competitive.

Of course, since this has not been cited directly in discrimination cases, it might represent wishful thinking, but would nevertheless represent the next logical evolution of the AEC-test. At least in my opinion.

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[13] Case C-413/14P – *Intel,* paragraph 139-146. See also case C-525/16 - *Meo*, recital 31 where reference is included to *Intel* and the AEC-concept, giving further ground to the suggested approach.

3. How to treat vertical discrimination?

Vertical discrimination covers, as explained in *BdKEP/Deutsche Post AG*, discrimination of downstream trading parties (or upstream suppliers). However, void of elements thwarting the Single Market, e.g., nationality-based discrimination, practice is limited, indicating that it neither has nor should be a priority. This is a logical decision, as the dominant undertaking often lacks an incentive to pursue foreclosure of vertical markets.[14] Even the ability might be lacking, unless in a monopolistic position, as any attempt to pursue a foreclosure could undermine the dominant position and thus be unprofitable in a longer perspective.

Nevertheless, guidance might be found in *Portugal v. Commission*[15] (cited in Konkurransetilsynet draft, recital 42 but not detailed substantially). Here, a linear and quantum discount had *de facto* benefitted domestic air operators, making it abusive. Not because some received better terms, as this was an inherent feature in quantum discounts, but due to high thresholds only attainable by a few particularly large partners, and the up to 30% differences in the offered terms. Embedded in this differential treatment, even if non-objective, is in itself insufficient for identifying an abuse, as selective discounts always will benefit some at the expense of others. Moreover, the disadvantages must be assessed in a tangible manner, which in *Meo* led the Advocate General[16] to recommend looking at the relationship between the levied prices and total costs, making the analysis resemble a margin squeeze test.

4. The logical standard would be a margin squeeze approach

There is some logic to the recommendation of the AG in *MEO*, as vertical discrimination initiated by a vertically integrated operator, directed as favoring downstream group interests, typically would fall within the notion of a margin squeeze. Usually, abusive margin squeeze would require downstream prices that do allow for recovery of the dominant undertakings LRIC[17] thus capable of foreclosing an As-Efficient Competitor. Translated to vertical discrimination, this means that the evaluation in *Portugal v. Commission* should have moved on to demonstrate how the 30% differences accounted for a substantial portion of the downstream costs and thus capable of creating a foreclosure. Essentially, what the Advocate General suggested in *Meo.*

Unfortunately, the Court in neither *Meo* nor *Portugal v. Commission* embraces this, while it might be possible to deduce this from the latter. Not explicitly, but based on the fact that airlines often operate on the margins, making it plausible that even minor discounts would be translated into a competitive advantage in the downstream markets.

5. The draft is also silent when it comes to exploitive discrimination

In addition to the lack of a framework for evaluating exclusionary discrimination, Konkurransetilsynet's draft also refrains from touching upon the matter of exploitive discrimination. Not only in general, but in particular, with respect to perfect price discrimination and whether Article 102 (c) TFEU covers this.

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[14] Massimo Motta, *Competition Policy, Theory and Practice,* Cambridge, 2004, p. 341.

[15] Case C-163/99 - *Portugal v. Commission.* The 30 % is not stated directly but derived from the difference between the 22-30 % discount offered to domestic operators v. the 1-8 % for non-domestic operators.

[16] Opinion of Advocate General Wahl in Case C-525/16 - *Meo*, paragraph 109.

[17] For further see Christian Bergqvist and John Townsend, *Abusive Margin Squeeze: The Frankenstein Monster of Article 102 TFEU?,* (May 7, 2021). Available at SSRN: https://ssrn.com/abstract=3841465

Perfect price discrimination (in economic theory referred to as first-degree price differentiation) is when the price is perfectly aligned with each customer's payment willingness, maximizing the producer surplus at the expense of the consumer. Usually, this is untenable, but the proliferation of the digital economy has provided unprecedented opportunities when it comes to targeting customers.[18] I think DG COMP would see exploitive abuse[19] if confronted with an example of perfect price discrimination, but case law does not support this unequivocally. In, e.g., *United Brands,*[20] the Court appeared willing to accept local prices fluctuation if reflecting differences in payment ability, and in this rebutting perfect price discrimination as abusive *per se*. Naturally, *United Brand* is an old case, that might no longer hold, making it even more unfortunate that the draft does not touch upon the issue. Perhaps this could be remedied in the final version.

6. Other issues that could be addressed in the final version

As a final consideration, I would like to point out two additional matters that could be addressed in the final version.

First and foremost, the draft also indicates to have relevance for discrimination by non-dominant undertakings,[21] but nothing further is offered on this. On the balance, I'm not sure about the purpose or merits of this point. Article 101 TFEU utilizes a distinction between by-object and by-effect infringements, where only the latter is made subject to any form of effect analysis. By including Article 101 TFEU in the draft, Konkurransetilsynet could be read as indicating the relevance of effect considerations for by-object restrictions. Personally, I would like to see this, but case law does not support it.

Secondly, the draft by virtue of the title confines itself to price-based discrimination, excluding non-priced-based practices. Naturally, I understand why the Konkurransetilsynet, for the purpose of simplicity, prefers to limit itself. However, from an economic perspective, this appears unlogical as a price always can be calculated or estimated, which is why all forms of discrimination in principle are price-based. Perhaps the final version could indicate that non-priced-based discrimination, e.g., discriminatory refusal to supply, will also be assessed under an effect-based approach if possible.

7. Next step is the final version of the paper

As stated in the outset, the draft guidelines are most welcome, even if none of my suggestions are incorporated in the final version.

I enclose a copy of my article *Discriminatory Abuse – The Missing Link in the More Effect Based Approach,*[22] where more details are offered. I could also refer to my book *Konkurrenceretten,*[23] pp. 775-803 and Erling Hjelmeng og Lars Sørgaard, *Konkurransepolitikk,*[24] pp. 277-292. In the former, I blend Danish and EU practice and try to provide guidance on discriminatory abuse. The Danish Competition Authority has rendered

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[18] For further see *Personalized Pricing in the Digital Era Background Note by the Secretariat*, OECD November 2018.
[19] See e.g. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse,* recital 141.
[20] Case 27/76 – *United Brand*, paragraph 228. See also, case T-229/94 - *Deutsche Bahn*, paragraph 91 and Case COMP/A.36.568/D3 - *Scandlines Sverige AB vs. Port of Helsingborg*, recital 241.
[21] *Konkurransetilsynet udkast til Veileder om prisdiskriminering.* Recital 2.
[22] Christian Bergqvist, *Discriminatory Abuse – The Missing Link in the More Effect Based Approach* (November 22, 2019). ECLR No 40 (3), 2019.
[23] Christian Bergqvist, *Konkurrenceretten*, DJØF 2019.
[24] Erling Hjelmeng og Lars Sørgaard, *Konkurransepolitikk*, Fagbokforlaget 2014.

some recent decisions that should also be of interest to Konkurransetilsynet. Erling Hjelmeng og Lars Sørgaard expand on the matter and link economy teory and legal practice.

If any of my considerations require further comments, or if I in any way could be of assistance in the forthcoming process, please do not hesitate to reach out.

Best regards,

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Discriminatory abuse—The missing link in the more effect-based approach

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Abuse of dominant position; Competition law; Discrimination; EU law; Price discrimination

While art.102 indisputably covers discrimination, there has been limited appetite for pursuing cases that clear up its ambiguities. This is not only contradictory to the now-enshrined effect-based approach when it comes to exclusionary abuse, but also provides a foundation for misunderstandings. A troublesome situation, as the Commission has recently indicated renewed interest into discriminatory abuse. Much could be gained if the Commission delivered on its 2005 promise to issue formal guidance on discriminatory abuse, thereby completing the translation to a more effect-based process.

It follows from art.102(c) that it is abusive to apply "... dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"; hence to discriminate. Conceptual discrimination could be price or non-price based and involves either[1]:

a) applying *dissimilar* conditions to *equivalent* transactions, which could involve some customers getting better terms, or

b) applying *equivalent* conditions to *dissimilar* transactions, which could involve all customers being offered identical terms regardless of differences, e.g. in the quantum they source.

The decisive factor is the non-objective difference placing the trading partners in a position of competitive disadvantage, thus indicating the relevant criteria for evaluating purported discrimination.[2] However, in practice there has been limited interest at the EU level in pursuing discriminatory abuse, which is logical in light of the embedded dilemmas and ambiguities. The theoretical foundation for condemning discrimination is weak,[3] as economic theory generally views price differentiations across markets and customer groups as welfare enhancing or an instrument for recouping large fixed costs. Thereby, in the case of unusual cost structure, the servicing of low-income customers is secured. In concentrated markets prohibiting price differentiation could even promote collusion and thereby be anti-competitive. It should also be noted that historically the prohibition embedded in art.102(c) presumably represents an attempt to protect small and medium-sized undertakings from getting less favourable terms than larger competitors. An objective that should have no place in competition law, as no consumer harm is caused by this.[4] It even remains open what to consider abusive. In isolation price discrimination is benign[5] and practice has underplayed the requirement of an anti-competitive effect, regardless of the reference in art.102(c).[6] A position particularly difficult to align with the effect-based approach endorsed in the *Enforcement Paper*[7] and now enshrined with *Intel*[8] when it comes to exclusionary abuse. Hence, strong arguments can be raised against enforcing art.102(c) without some prudence. This is a call the Commission has accommodated with a limited application, making it less unfortunate that it also appears to have negated on its 2005 promise[9] for formal guidance, as a supplement, to what is now the *Enforcement Paper*. On the other hand, the Commission in November 2018 submitted a note to OECD on Personalized Pricing in the Digital Era[10] indicating the availability of art.102(c) against attempts to target consumers' individual willingness to pay, thus potentially a shift in enforcement priorities. Thus, the need to clarify the concept of discriminatory abuse has resurfaced in order to avoid misunderstandings and misapplications and to finalise the translation to a more effect-based application of art.102.

Limited historical interest in condemning real discrimination

Historically there has been limited interest in applying art.102(c). Most cases involving discrimination are either pursued under other standards or tainted by other priorities, e.g. the Single Market. Examples of the former

[1] See, e.g. Case No. COMP/A.36.568/D3 *Scanlines Sverige AB v Port of Helsingborg* at [276].
[2] For further, see, e.g. Damien Geradin and Nicolas Petit, *Price Discrimination under EC Competition Law: The Need for a case-by-case Approach*, GCLC Working Paper 07/05.
[3] See, e.g. Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), pp.491–511; Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concept, Application and Measurement*, 3rd edn (Sweet & Maxwell, 2010), pp.250–260 and Opinion of Advocate General Wahl in *Meo Serviços de Comunicações e Multimédia v Autoridade da Concorrência* (C-525/16) EU:C:2018:270 at [61]–[65].
[4] Cf. Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 2nd edn (Hart Publishing, 2013), p.249.
[5] See, e.g. Opinion of Advocate General Wahl in *Meo Serviços de Comunicações e Multimédia* (C-525/16) EU:C:2018:270.
[6] Cf. Gunnar Niels and Helen Jenkins, "Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down" [2005] E.C.L.R. 608.
[7] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.
[8] *Intel Corp Inc v European Commission* (C-413/14) EU:C:2017:632 overturning *Intel Corp Inc v European Commission* (T-286/09) EU:T:2014:547.
[9] See MEMO/05/486—*Commission discussion paper on abuse of dominance — frequently asked questions.*
[10] *Personalised Pricing in the Digital Era — Note by the European Union*, 28 November 2018, p.9.

are predatory pricing cases such as *AKZO*[11] and *Tetra Pak II*,[12] where the prices had been reserved for specific customers, or the margin squeeze case *Deutsche Bahn I/II*,[13] where the beneficiary was a subsidiary. These cases all de facto incorporate a discriminatory element, but are not pursued as such. Examples of the latter would be *PO/World Cup 1998*,[14] where French soccer fans were secured preferential access to tickets at the expense of non-domestic fans—a behaviour condemned as a particular heinous form of discrimination by targeting end-users. Even actual discrimination cases such as *Hoffmann-La Roche*[15] and *Michelin I*[16] are more of exclusionary than discriminatory nature, as the abuse attained to foreclose the markets for direct competitors. Hence, undertakings and national enforcers are void of clear guiding principles potentially leading to misunderstandings. The epic *Post Danmark I*[17] originated in a national misapplication of the concept of discrimination, indicating the risk of both over- and under-enforcement as real.

Meo, at first glance a missed opportunity

In light of the ambiguities, much hope was attached to *Meo*,[18] when referred to the Court of Justice, as the national court specifically requested clarification on the concept of discriminatory abuse and the required testing for identifying this. In *Meo* a Portuguese TV provider felt victimised by the national copyright collecting society, when this had offered a competitor more favourable tariffs, leading to a dispute. In contrast to other cases, including *Post Danmark I*, *Hoffmann-La Roche* and *Michelin I*, the victim was a direct customer and not a competitor, offering an ideal opportunity to clear up the ambiguities. The Advocate General even invited the court to do this, offering suggestions for possible approaches as detailed below. However, the court confined itself to two observations: First, that the non-vertically integrated company normally lacked interest in thwarting competition downstream (or upstream), and secondly, that differential treatment would only be abusive if able to distort competition taking all the relevant circumstances into consideration. Hoping for more, and in light of the many considerations by the Advocate General, some commentators[19] have referred to the case as providing a quiet death to the concept of discrimination, and thus a partly missed opportunity for setting clear precedence. While this has some merits, the ruling most likely represented what the court was willing to compromise on. If viewed more broadly, including the fact that the court did not distance itself from the Advocate General's Opinion, more advanced guidance on discriminatory abuse under art.102(c) becomes available.

The Advocate General's Opinion offers prudent guidance

In contrast to the Court of Justice, the Advocate General offered a number of observations on the concept of discriminatory abuse.[20] This included welcoming the opportunity to clarify this in general and specifically where the alleged victim was a customer, rather than a competitor, and the evidence of an appreciable disadvantage weak. The latter derived from the shift in market shares between the purported victim (from 25 to 40 per cent) and alleged beneficiary (from 60 to less than 45 per cent) in the course of the three years affected by the potential abuse.[21] The Advocate General then moved on, stating that an abuse should only arise if the non-objective differences truly placed trading partners in a competitive disadvantage position, which should never be assumed, as price discrimination in itself was unproblematic. Thus, contrary to the wording of art.102(c), the dominant undertaking was not obligated to offer uniform tariffs. However, where the Advocate General truly adds value is by differentiating between[22]:

a) Price discrimination practices designed to attract customers of competing operators, such as predatory pricing, differential rates of discount and margin squeezing. This covers every pricing practice designed to foreclose or weaken operators present on the same market and at the same level (vertically speaking) as the dominant undertaking and represents the price discrimination practices that enforcers normally are called to examine.

b) Price discrimination practices that affect "trading partners" on the market downstream or upstream from the dominant undertaking and thus not in (direct) competition with it. Allowing art.102(c) to

[11] *AKZO Chemie BV v Commission of the European Communities* (C-62/85) EU:C:1991:286.
[12] *Tetra Pak International SA v Commission of the European Communities* (C-333/94 P) EU:C:1996:436.
[13] *Deutsche Bahn I/II* (AT.39678/AT.39.731).
[14] Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 — *1998 Football World Cup*) [1998] OJ L5, see recital 102.
[15] *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) EU:C:1979:36 at [80].
[16] *Nederlandsche Banden Industrie Michelin NV v Commission of the European Communities (Michelin I)* (C-322/81) EU:C:1983:313 at [71]–[74].
[17] *Post Danmark v Konkurrencerådet* (C-209/10) EU:C:2012:172 at [8]. For further on the national case, and its embedded misunderstandings, see Christian Bergqvist, "Final Curtain or Another Round on Post Danmark" (2013) 6 E.C.L.R. 34.
[18] *Meo Serviços de Comunicações e Multimédia* (C-525/16) EU:C:2018:270 at [5]–[20] (background) and [30]–[37] (principles).
[19] See, e.g. Robert O'Donoghue, "The Quiet Death of Secondry-Line Discrimination as an Abuse of Dominance: Case C-525/16 MEO" (2018) 9(7) *Journal of European Competition Law & Practice* 443–445.
[20] Opinion of Advocate General Wahl in *Meo Serviços de Comunicações e Multimédia* (C-525/16) EU:C:2018:270 at [4] (unique opportunity), [39] (development in market shares), [60]–[64] (no presumption of abuse), [6]–[7] (uniform tariffs), [71]–[93] (concept and principles), [97] (sufficiently significant) and [109] (costs).
[21] In principle, shouldn't market shares be used for the purpose of establishing an effect cf. *British Airways Plc v Commission of the European Communities* (C-95/04) EU:C:2007:166? Here the Court of Justice refused the relevance of declining market shares, falling from 46 per cent to 40 per cent, thereby indicating limited effects.
[22] The Advocate General uses in recital 71–75 the terms first-degree and second-degree price discrimination. However, this differs from the economics meanings cf. Bishop and Walker, *The Economics of EC Competition Law: Concept, Application and Measurement*, 3rd edn (2010), p.251.

> cover this should serve to prevent the commercial behaviour of undertakings in a dominant position from distorting competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking.

Further, in the case of vertically integrated undertakings, the application of discriminatory prices on the downstream or upstream markets would be covered by the first situation, as it indirectly affects the undertaking's competitors. Sadly, the Advocate General then starts losing steam, offering no clues to whether the first category of practice is a separate form of abuse and very little on how to decide if a discriminatory practice truly distorts competition. However, the opinion does suggest that the disadvantages must be sufficiently significant before amounting to an abuse, also taking into consideration if the levied prices represent a significant proportion of the total costs by the disfavoured customer.

Three forms of discrimination are embedded in article 102(c)

While both the court and Advocate General left questions open, some can be closed by consulting other cases. In *BdKEP/Deutsche Post AG*[23] (2004), the Commission was called to evaluate national laws inducing the incumbent mail operator to discriminate mail intermediates in a non-objective manner. Replying to a submission that art.102(c) did not cover this, it was noted how:

> "The wording [of Article 102] covers three types of discrimination, the first two of them exclusionary and the last one exploitative: (i) the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) the customer suffers commercially in such a way that its ability to compete in whatever market is impaired. It is obvious that type (i) and (iii) do not require a competitive relationship between the two comparator groups."

Combined with the Advocate General's Opinion in *Meo*, it becomes apparent that the concept of discrimination not only covers three forms of abuse, of which two are exclusionary and one exploitive, but also that more advanced observations can be provided. These include how art.102(c) potentially can be applied to:

a) *Horizontal (exclusionary) discrimination*, normally referred to as *primary-line-discrimination*,[24] initiated for the purpose of *foreclosing* competitors by targeting actual or potential customers with selective price reductions or other favours. Moreover, this includes foreclosure of upstream and downstream markets secured by preferential treatment of subsidiaries and internal departments of the vertically integrated company. The foreclosure could thus have a vertical element to it, but as the victim is a direct competitor (upstream or downstream) the foreclosure remains horizontal.

b) *Vertical (exclusionary) discrimination*, normally referred to as *secondary-line-discrimination*,[25] initiated for the purpose of *twisting* competition in other markets, e.g. for the benefit of a preferred trading partner (but not a subsidiary or internal department). While also directed upstream or downstream, the potential abuser has no direct interest in the foreclosure as it remains inactive in any of the affected markets. Hence, the foreclosure is (truly) vertical.

c) *Exploitative discrimination* that in practice involved national-based discrimination[26] and henceforth potentially individualised pricing. However, the abuse is essentially exploitive and should not be confused with discrimination but reviewed under the legal standards for exploitation as explained later.

Despite the textual framing of art.102(c) referring to "... trading parties [placed] ... at a competitive disadvantage", the provisions are not limited to vertical discrimination. Neither could the forms be considered mutually exclusionary.[27] Nonetheless, should the focus of art.102(c) be on vertical discrimination, as horizontal discrimination would be covered by art.102(b) and exploitative discrimination by art.102(a). Moreover, *incentive* and *ability* are not the same, and even the vertically integrated undertaking might be unwilling to discriminate for the purpose of foreclosing upstream or downstream markets as it would impede turnover.[28] Regardless, all of the three forms of discrimination are developed below, starting with horizontal discrimination.

[23] Case No. COMP/38.745 — *BdKEP/Deutsche Post AG* at [64]–[66] (abuse) and [93] (the concept of discrimination).
[24] See O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 2nd edn (Hart Publishing, 2013), pp.247–249.
[25] See O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 2nd edn (2013), pp.247–249.
[26] Case No. COMP/38.745 — *BdKEP/Deutsche Post AG* at [95] refers to how nationality based discrimination has been condemned in *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* (C-18/93) EU:C:1994:195; *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* (C-7/82) EU:C:1983:52; *United Brands Co v Commission of the European Communities* (C-27/76) EU:C:1978:22 and *Tetra Pak International SA v Commission of the European Communities* (T-83/91) EU:T:1994:246.
[27] See, e.g. *BPB Industries Plc v Commission of the European Communities* (T-65/89) EU:T:1993:31 and *British Airways Plc v Commission of the European Communities* (T-219/99) EU:T:2003:343 covering both horizontal and vertical discrimination.
[28] Cf. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6 at paras 40 and 68.

Horizontal discrimination—Foreclosing competitors

The dominant undertaking's ability to target customers with attractive (and selective) offers for the purpose of retaining or gaining their loyalty, hence *horizontal discrimination* falls within the core of abusive discrimination. Moreover, this covers two forms of anti-competitive behaviour:

a) discrimination of downstream trading parties for the purpose of securing an upstream foreclosure, targeting a direct competitor, and

b) discrimination in favour of vertically—integrated or group—affiliated downstream interests, for the purpose of securing a downstream foreclosure.

Consequently, the beneficiary of any discrimination could also be a subsidiary or vertically integrated division giving the foreclosure a vertical nature. Additionally, the concept also covers different forms of pre-emptive foreclosure, where no actual competitor has accessed the market, but this might be eminent as demonstrated by *Irish Sugar*.[29] Here, discounts had been reserved for customers in border areas and hence those most likely to switch to a potential new supplier. The framework for analysing discrimination was established by the Court of Justice in *Michelin I*, recital 73, noticing that the appraisal should:

> "... consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transaction with other trading parties or to strengthen the dominant position by distorting competition."

Abusive discrimination was also identified in *Compagnie Maritime Belge Transports*,[30] where selective price cuts fell short of the concept of predatory pricing, but nevertheless had targeted a named competitor and therefore merited condemnation. In contrast to the EU Commission, neither of the courts referred to art.102(c) and it remains unknown if this was intentional.[31]

Horizontal discrimination had also been identified and condemned by the national competition authority in *Post Danmark I*,[32] referring to it as *primary-line-discrimination*. But as the Court of Justice in its reply to the referring court appeared unwilling to see an abuse, horizontal discrimination might be a variation of traditional exclusionary conduct rather than a separate category of infringements.

A broad concept not confined to direct competitors

Horizontal discrimination is not limited to a direct competitor or pre-emptive foreclosure, as it also covers preferential treatment of affiliated undertakings and interests upstream or downstream. In *Deutsche Bahn*[33] it was held abusive when the offered terms (intentionally) favoured the group's own downstream activities. Furthermore, investments in infrastructure had been directed at lowering costs on the routes used by them, making invoking lower costs as a defence artificial. The concept of horizontal discrimination is not even confined to markets upstream or downstream and with a vertical link. In *Clearstream*[34] an attempt to offer favours to group-affiliated undertakings was found discriminatory, as this, in light of Clearstream's monopoly position and the timespan (five years), could not "fail to cause that partner a competitive disadvantage".

Nonetheless, subsequent cases might have modified some of these principles. In the EFTA case *Sorpa*,[35] discounts had been reserved for the owners of a waste disposal company, thereby potentially placing them in a competitive advantageous situation over their competitors. Yet, void of a direct competition situation the court suggested it to be less likely that competition could be thwarted in an abusive manner. Further, in *Post Danmark I*,[36] the Court of Justice expressed some hostility towards the concept of *primary-line-discrimination* and pricing below Average Total Cost as abusive per se, solely based upon the selective, and thus discriminatory, element. Embedded in this might be that horizontal discrimination is not a separate abuse, but merely exclusionary abuse. Presuming this to be correct, horizontal discrimination should then be reviewed under *all the circumstance-standard* established with *Michelin I* and galvanised by *Intel*,[37] including how the non-objective difference is able to place an As-Efficient Competitor in a disadvantageous position. It might even be possible to

[29] *Irish Sugar Plc v Commission of the European Communities* (T-228/97) EU:T:1999:246.
[30] See Case Nos IV/32.448 and IV/32.450 *Cewal, Cowac, Ukwal* [1993] OJ L34/20 at [83]. Ultimately upheld with *Compagnie Maritime Belge Transports SA (CMB) v Commission of the European Communities* (C-395/96 P & C-396/96 P) EU:C:2000:132. In *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse* at para.128 the behaviour is rebranded as predatory pricing.
[31] Selective (and discriminatory) price cuts, targeting a competitor, was also used in *Hilti AG v Commission of the European Communities* (T-30/89) EU:T:1991:70. While labelled discriminatory, no reference is made to art.102.(c).
[32] *Post Danmark v Konkurrencerådet* (C-209/10) EU:C:2012:172 at [8].
[33] *Deutsche Bahn AG v Commission of the European Communities* (T-229/94) EU:T:1997:155 at [85]–[94].
[34] *Clearstream Banking AG v Commission of the European Communities* (T-301/04) EU:T:2009:317. In the underlying case, COMP/38.096 — *PO/Clearstream (Clearing and settlement)* at [224]–[227], the abuser was viewed as "... an unavoidable trading partner", indicating that foreclosure was plausible.
[35] Judgment of the Court of 22 September 2016 in *Sorpa bs. v Icelandic Competition Authority* (E-29/15) [2017] 4 C.M.L.R. 21 at [112]–[115].
[36] *Post Danmark v Konkurrencerådet* EU:C:2012:172 at [30] and [37].
[37] *Intel* (C-413/14) EU:C:2017:632 at [139]–[146].

move beyond that, as the applicable frame tabled by *Intel* mirrors the Enforcement Paper[38] and thus makes it relevant to review if the offered terms secured coverage for the dominant undertaking's LRIC on the markets affected by the (alleged) abuse. Only then could a preferential treatment of customers lead to the foreclosure of an As-Efficient Competitor and thus rightly be held anti-competitive. Of course, as this has not been cited directly in discrimination cases, it might represent wishful thinking, but would nevertheless represent the next logical evolution—and thus advance the more effect-based process further.

Vertical discrimination—foreclosing customers

Vertical discrimination covers, as explained in *BdKEP/Deutsche Post AG*, discrimination of downstream trading parties (or upstream suppliers). However, essentially this involved "real discrimination", as the dominant undertaking does not benefit from this in an exclusionary manner. Consequently, should the concept be avoided for discrimination in favour of vertically—integrated or group—affiliated downstream interests as this essentially is a foreclosure following the principles laid down for horizontal discrimination[39] as detailed above? Furthermore, void of elements thwarting the Single Market, e.g. nationality based discrimination, practice is limited, indicating that it neither has, nor should be, a priority. This is a logical decision, as the dominant undertaking often lacks an incentive to pursue foreclosure of vertical markets. Even the ability might be lacking unless in a monopolistic position, as any attempt to pursue a foreclosure could undermine the dominant position[40] and thus be unprofitable in a longer perspective.

Nevertheless, a few cases have emerged, giving some indication of the frame for assessing vertical discrimination. In *Portugal v Commission*[41] it was held abusive under art.102(c) when a linear and quantum discount had de facto benefited domestic air operators. Not because some got better terms, as this was an inherent feature in quantum discounts, but due to high thresholds only attainable by a few particularly large partners and the up to 30 per cent differences in the offered terms. Embedded in this is that differential treatment, even if non-objective, in itself is insufficient for identifying an abuse, as selective discounts will always benefit some at the expense of others. Moreover, the disadvantages must be assessed in a tangible manner to ensure that, as later articulated by the Advocate General in *Meo*, they are sufficiently significant. Of interest is also *United Brands*,[42] where the Court of Justice accepted differences in levied prices due to differences in costs and "... the density of competition". A most pivotal observation, as it rebuts viewing pricing capitalising on (some) customers' ability to pay a premium as abusive per se. This was more clearly embraced by the General Court in *Deutsche Bahn*,[43] considering, but ultimately rebutting, that the differences in terms and prices could be attributed to the density of competition downstream. The same conclusion would appear to stem from *Scandlines Sverige AB v Port of Helsingborg*,[44] accepting that demand-related conditions could explain (and justify) price differences and rebut allegations of exploitive abuse.

Possible principles for reviewing vertical discrimination

While the Advocate General in *Meo* suggested a test where the disadvantage had to be sufficiently significant and evaluated in light of the costs, the court confined itself to referring to an assessment taking all the relevant circumstances into consideration. While the latter are conceptually broader than the former, there is no direct conflict between them. It should be self-evident that the disadvantages must be more than trivial to thwart competition upstream or downstream, and that it rests with the enforcer (or the plaintiff) to substantiate this. The essential questions thus become how many differences are acceptable and how to evaluate these.

As vertical discrimination remains exclusionary, it would not be unfair to seek guidance in the evaluation of traditional forms of exclusionary (vertical) abuse and tests applicable to these. Different approaches then become available. In *Clearstream*[45] the court concluded that in light of the facts, including the presence of a legal monopoly and a practice spanning four years, the discriminatory behaviour "... could not fail to cause that partner a competitive disadvantage". Moreover, the abuser had been viewed as "... an unavoidable trading partner", indicating that foreclosure was plausible in a longer perspective. The case involved horizontal discrimination, but the consideration could reasonably be transferred to vertical discrimination, allowing for identifying vertical discrimination where it is obvious that a competitive disadvantage is imposed. Moreover, this would be unlikely, unless: a) the involved products or services were essential for the downstream activities, or b) the levied

[38] *Intel* (C-413/14) EU:C:2017:632 at [139] cites considerations identical to those listed in Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings at [20].
[39] In *Sorpa* [2017] 4 C.M.L.R. 21, the issue attracted some attention, thus indicating the line to be somewhat blurred.
[40] Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), p.341.
[41] *Portugal v Commission of the European Communities* (C-163/99) EU:C:2001:189 at [11] (the discounts) and [51]–[54] (assessment). The 30 per cent is not stated directly but derived from the difference between the 22–30 per cent discount offered to domestic operators versus the 1–8 per cent for non-domestic operators. See also Commission Decision of 28 June 1995 relating to a proceeding pursuant to Article 90 (3) of the Treaty (95/364/EC — *Brussels National Airport*) [2005] OJ L216/8 at [13] and Commission Decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 — *Alpha Flight Services/Aéroports de Paris*) [1998] OJ L230/10 at [109]–[110].
[42] *United Brands Co v Commission of the European Communities* (C-27/76) EU:C:1978:22 at [228].
[43] *Deutsche Bahn AG v Commission of the European Communities* (T-229/94) EU:T:1997:155 at [91].
[44] Case No. COMP/A.36.568/D3 — *Scandlines Sverige AB v Port of Helsingborg* at [241].
[45] *Clearstream* (T-301/04) EU:T:2009:317 at [194 and COMP/38.096—*PO/Clearstream (Clearing and settlement)* at [224]–[227].

prices represented a significant proportion of the total costs by the disfavoured customer. Devoid of these, a twisting of competition downstream (or upstream) would appear somewhat implausible, explaining why the Advocate General in *Meo* suggested considering the relationship between the levied prices and total costs. Moreover, option b) was applied in *Alpha Flight Services/Aéroports de Paris*[46] against (another) example of vertical discrimination favouring domestic air operators. Regrettably the levied fees are undisclosed. However, the Commission does clearly conclude "...that a supplier paying the highest rate cannot offer competitive prices whilst maintaining the same profit margin". The supplier would then start losing customers or reduce his profit and gradually be foreclosed.

Following this logic, the abusive behaviour resembles a margin squeeze, which also would have been the choice had the (dominant) undertaking in *Meo* been vertically integrated and the discrimination directed to favour downstream group interests.[47] Normally, abusive margin squeeze requires downstream prices failing to secure cover for the dominant undertakings LRIC thus capable of foreclosing an As-Efficient Competitor.[48] Translated to vertical discrimination, this means that the evaluation in *Portugal v Commission* should have moved on to demonstrate how the 30 per cent differences accounted for a substantial portion of the downstream costs, and thus capable of creating a foreclosure—essentially what the Advocate General suggested in *Meo* and appears to have been undertaken in *Alpha Flight Services/Aéroports de Paris*. Unfortunately, the court in neither *Meo* nor *Portugal v Commission* embraced this, while it might be possible to deduce this from the latter[49]; not explicitly, but based on the fact that airlines often operate on the margins, making it plausible that even minor discounts would be translated into a competitive advantage on the downstream markets.

Exploitative discrimination

Regardless of *BdKEP/Deutsche Post AG* identifying a form of *exploitative discrimination*, it remains somewhat unclear how this would manifest itself. The Commission refers in recital 95 to *Corsica Ferries*,[50] *United Brands*,[51] *GVL*[52] and *Tetra Pak*,[53] and how they all involved discrimination directed at nationality. That would downgrade the concept to national discrimination incompatible with the Single Market objective and thus provide some explanation for why art.102(c) is applied to this in the first place.[54] However, it would be more logical to look outside this and consider other cases and considerations.

As detailed earlier *United Brands*,[55] *Deutsche Bahn*[56] and *Scandlines Sverige AB v Port of Helsingborg*[57] have (potentially) opened a window for capitalising on (some) customers' ability to pay a premium. This is an important opportunity, as each customer is perceived to have an individual willingness to pay, providing for the negative relationship between price and sold quantums.[58] Targeting each customer's individual price, referred to as *perfect price discrimination* or *first degree price discrimination*,[59] would maximise the producer surplus at the expense of the consumers, and thus be attractive from the perspective of the former. While economists are normally averse to considering this abusive,[60] as no welfare is lost, the legal assessment might differ, or at least be unclear.[61] Moreover, in 2005[62] the Commission did reserve the right to intervene against discrimination directed at customers with a higher willingness to pay and fewer switching possibilities as this could be exploitative. While no cases have materialised and the consideration has not been recited, and thus potentially abandoned, it would be natural to see a link to *BdKEP/Deutsche Post AG*. In particular, perfect price discrimination is normally seen as unattainable,[63] as it would require an unrealistically high level of knowledge about each consumer. However, with the emergence of internet-based platforms and the concept of big data, the available information has increased, exponentially giving ground for much more individualised pricing.[64]

[46] Commission Decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 — *Alpha Flight Services/Aéroports de Paris*) [1998] OJ L230/10 at [109]–[110].
[47] An example can be found in *Deutsche Bahn I/II* (AT.39678/AT.39.731).
[48] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings at [80].
[49] In *Meo Serviços de Comunicações e Multimédia* (C-525/16) EU:C:2018:270 at [31] reference is included to *Intel* and the AEC-concept giving further ground to the suggested approach.
[50] *Corsica Ferries* (C-18/93) EU:C:1994:195.
[51] *United Brands* (C-27/76) EU:C:1978:22.
[52] *GVL* (C-7/82) EU:C:1983:52.
[53] *Tetra Pak* (T-83/91) EU:T:1994:246.
[54] For further see Geradin and Petit, *Price Discrimination under EC Competition Law: The Need for a case-by-case Approach*, GCLC Working Paper 07/05.
[55] *United Brands* (C-27/76) EU:C:1978:22 at [228].
[56] *Deutsche Bahn AG* (T-229/94) EU:T:1997:155 at [91].
[57] Case No. COMP/A.36.568/D3 — *Scandlines Sverige AB v Port of Helsingborg* at [241].
[58] For further see N. Gregory Mankiw, *The principles of microeconomics*, 8th edn (Cengage Learning, 2016), pp.39–43.
[59] Bishop and Walker, *The Economics of EC Competition Law*, 3rd edn (2010), p.251.
[60] Motta, *Competition Policy, Theory and Practice* (2004), pp.493–494.
[61] OECD, *Personalised Pricing in the Digital Era Background Note by the Secretariat*, November 2018, pp.28–30.
[62] *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse* at para.141.
[63] Bishop and Walker, *The Economics of EC Competition Law*, 3rd edn (2010), p.251.
[64] For further see OECD, *Personalised Pricing in the Digital Era Background Note by the Secretariat*, November 2018.

Has the Commission embraced the concept of exploitative discrimination?

With the danger of speculating, perhaps even fabulating, it would be plausible to see a link between the concept of perfect price discrimination and the November 2018 submission to OECD on Personalised Pricing in the Digital Era.[65] In this submission, the Commission, although only briefly, indicates that art.102(c) could be used against companies attempting to target consumers' individual willingness to pay. While only a short comment, it fails to respect that *exploitative discrimination* is more *exploitative* than *discrimination* and thus only abusive if meeting the requirement of art.102(a). However, as we are short of clear legal precedence, the matter remains unsolved making it even more regrettable that the Commission never delivered on the original ambition of a separate paper[66] on discrimination and discriminatory abuse. Not only to clear up the ambiguities, but also to supplement the Enforcement Paper and thus complete the more effect-based approach embarked upon in 2005.

[65] *Personalised Pricing in the Digital Era — Note by the European Union*, 28 November 2018, p.9.
[66] See MEMO/05/486 — *Commission discussion paper on abuse of dominance - frequently asked questions.*