To Abuse, or not to Abuse: Discrimination between Consumers

by

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Abstract: This paper questions whether discrimination between consumers by a dominant undertaking *can* and *should* constitute an abuse of a dominant position under Article 82EC. By finding that it *can*, the paper challenges the traditional interpretation of the discrimination ban under that provision, namely that discrimination constitutes abuse only when directed against the intermediate customers of the dominant undertaking. As such, the paper seeks to clarify the scope of Article 82EC as regards discrimination, and elaborate on whether discrimination between consumers *should* be abusive. This is done from both a law and an economics perspective, in order to put forward a proposal to ensure that competition law does not prohibit discrimination where economics finds it potentially welfare enhancing.
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A Introduction

The word ‘discrimination’ may quickly set alarms bells ringing for a person brought up in a democratic society believing in the sanctity of ideals such as ‘equality’ and ‘fairness’. Although this may be a natural result of its usually being used in contexts such as racial, sexual or religious discrimination, carried on to the competition law arena, this conception may lead to perverse outcomes. Indeed, ‘discrimination’ may sound benign, for example, to an economist who understands it as a common business practice with ambiguous effects on welfare. One area in which this difference can give rise to tension but has been mostly disregarded so far is the treatment of discrimination between consumers by a dominant undertaking under EC competition law. The questions this paper seeks to answer are thus whether discrimination between ‘consumers’[1] by a dominant undertaking *can* breach Article 82EC and if so, whether it *should* constitute an abuse of a dominant position.

The answers to this query would firstly clarify the scope of the ban on discrimination since to date disputes under that provision have mainly arisen out of business-to-business transactions. Supported by the wording of Article 82(c)EC[2] requiring discrimination to place the dominant undertaking’s ‘trading parties’ at a ‘competitive disadvantage’, particularly in the literature, the prohibition has been understood as confined to discrimination directed at other *undertakings*. This paper challenges the traditional interpretation and seeks to show that discrimination can be an abuse of a dominant position even when directed at consumers. Secondly, the paper questions whether it is appropriate for discrimination between consumers to be an abuse of a dominant position by mainly drawing on results from economics on price discrimination. In other words, it seeks to show how one can ensure that

[1] ‘Consumer’ in this paper is understood as any person who is acting for purposes outside his/her trade, business or profession when entering into a transaction. Equivalent terms would be ‘end-user’ and ‘final customer’.

[2] Article 82EC: 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. Such abuse may, in particular, consist in: … (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; … .

competition law does not prohibit discrimination in cases where economics finds it potentially welfare-enhancing.

Although crucial for the correct interpretation of Article 82EC, these are issues not yet settled in EC competition law. The proposition that discrimination between consumers can constitute 'abuse' has not been argued before the Community Courts so far and the literature has mainly progressed on the premise that Article 82(c)EC applies to discrimination against downstream undertakings, as a result of which the disfavoured undertakings cannot effectively compete with the favoured ones.[3] Whereas in economics, discrimination (particularly price discrimination) by a monopolist is generally examined as practiced between consumers and the welfare effects are studied accordingly,[4] EC competition law is quieter on the matter and its development has depended on the specifics of the cases before the authorities. This potential conflict is one that has to be resolved, not least because of the current desire to adopt an economic effects-based approach to Article 82EC.[5] It is also essential for the undertakings to know the exact scope of Article 82EC with enough certainty while taking price-related decisions.

The implications of a finding that discrimination between consumers is abusive are manifold. It would firstly broaden the ambit of the provision compared to its traditional interpretation and thus increase the obligations of dominant undertakings. In other words, they would then have to refrain from adopting discriminatory practices in their relations with not only other undertakings, but also consumers. Apart from bringing with it the risk of over-intervention into the practices of private law entities, this would directly limit

[3] See for example R Whish *Competition Law* (5th ed Butterworths London 2003) 710; A Jones and B Sufrin *EC Competition Law* (2nd ed Oxford University Press New York 2004) 412.

[4] Nonetheless, price discrimination and its welfare effects have also been studied in the context of intermediate markets. See for example ML Katz 'The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets' (1987) 77 American Economic Review 154 and DP O'Brien and G Shaffer 'The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman' (1994) 10 Journal of Law, Economics & Organization 296.

[5] See European Commission *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (Brussels, 2005) and Report by the Economic Advisory Group (EAGCP) for Competition Policy 'An Economic Approach to Article 82' (2005).

the dominant undertakings' freedom of contract to a greater degree than the status quo and extend their 'special responsibility'[6] as well.

Second, it would also have far-reaching results for both the public and particularly the private enforcement of Article 82EC. This is because discrimination – notably price discrimination – is practiced in many industries[7] and those (dominant) undertakings which deal with consumers directly could face the bringing of numerous legal suits by unhappy consumers arguing that they have been subjected to discrimination. With the great emphasis put on 'private enforcement' by Community institutions and the possibility of class actions, this could immensely change the ambit of the provision. For example, a dominant rail company's charging different ticket prices to a professional and a student sitting next to each other on the same train during the same journey could be challenged as an abuse if other conditions of the provision are met. Other undertakings could include airlines, mobile network operators, petrol stations, supermarkets, postal service providers, pharmaceutical companies, and gas and electricity companies that practice discrimination either by charging uniform national or differential prices to different consumers. Moreover, compared to the enforcement of the provision limited to business-to-business transactions, the enforcement of it including business-to-consumer transactions may prove more complicated and difficult as well. This would mostly occur in cases where some consumers gain and others lose from discrimination, and the competition authority faces a trade-off between the interests of these consumer groups. Finally, another challenge can be to mitigate the possible clash between efficiency and fairness objectives since although the idea of 'treating equals alike and unequals

[6] The concept of 'special responsibility' refers to the duty of a dominant undertaking not to abuse its position; in *Michelin I* the ECJ held that '[a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.' (Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v. EC Commission* [1983] ECR 3461, [57]).

[7] See S Bishop 'Delivering Benefits to Consumers or Per Se Illegal? Assessing the Competitive Effects of Loyalty Rebates' in *The Pros and Cons of Price Discrimination* Swedish Competition Authority 2005, 65 on price discrimination. See also OFT draft competition law guideline for consultation (414a) on Assessment of Conduct April 2004, [3.3] for the argument that price discrimination occurs frequently and in a wide range of industries, including industries where competition is effective. For this last point see also WJ Kolasky 'What Is Competition? A Comparison of U.S. and European Perspectives' [2004] (Spring-Summer) The Antitrust Bulletin 29, 34.

unalike' and prohibiting discrimination can easily thought to be grounded in 'fairness', its dictates may not always be 'efficient'. Thus, these are important concerns that have to be considered while trying to answer whether discrimination between consumers *should* be a type of abuse.

The paper firstly sets out the definition of discrimination relevant for Article 82EC in Section B, along with the possible consequences of different definitions in law and economics. Although the paper considers discrimination under Article 82EC in general, it concentrates on 'price discrimination' as a common and obvious practice of it. Since the current interpretation of Article 82(c)EC limits its scope to business-to-business conduct and this is arguably supported by the wording of the provision, in order to clarify the understanding being challenged, these are dealt with in Section C as arguments against including discrimination between consumers in the provision. Subsequently, Section D explains the arguments for the inclusion of discrimination between consumers in the scope. Section E then elaborates on whether discrimination between consumers *should* be an abuse, attempting to marry law and economics. Section F concludes.

B Definition of Discrimination Relevant for Article 82EC

Discrimination is a practice inherently difficult to define since it is necessary to determine the conditions under which two transactions may be deemed equivalent and thus comparable. In addition, it requires the assessment of the criteria which render the treatment of the two transactions dissimilar. For example, it must be decided whether the sales of two rail tickets to two consumers for the same journey by the same company are equivalent transactions even though the sales occur at different times or even though one of the consumers' willingness to pay is higher than the other's. For the purposes of competition law, the potential tension between law and economics arises straight away with the definition of 'discrimination' and it is perhaps fair to say that so far neither of these disciplines has been able to construe discrimination satisfactorily enough for a consistent application across the board in conformity with legal certainty.

Article 82EC does not define discrimination but bans the application of dissimilar conditions to equivalent transactions with different trading parties, thereby placing them at a competitive disadvantage. This has been interpreted to also include the similar treatment of dissimilar transactions.[8] Hence, when it is determined that two transactions are equivalent (non-equivalent), then the undertaking should treat these transactions similarly (dissimilarly). As for economics, the study of discrimination has mainly concentrated on 'price discrimination', but the definition of it appears to be problematic in this discipline as well. For example, in the EAGCP Report commissioned by the EC Directorate-General for Competition, price discrimination is defined as 'charging different prices for different units and/or to different customers'.[9] A different definition is the ability to set prices so that the difference between average prices and average costs varies between different sales of either the same good or closely related goods.[10] The practice has also been described as making two sales at two different rates of return; two sales are discriminatory when they have different ratios of price to marginal cost.[11] Whereas the EAGCP Report's definition is closer to Article 82(c)EC, the more common approach in economics appears to be treating only the differences that are not due or proportionate to cost differences as 'discrimination'.[12] Thus, in the example above, charging a higher price to the commuter on the train who had the ticket delivered to his home rather than picking it up at the station would not be economically discriminatory so long as

[8] Case 13/63 J *Italian Republic v EC Commission* [1963] ECR 165, [1963] CMLR 289 in the context of ECSC Treaty and Commission Decision *Van Den Bergh Foods Limited* (Case Nos IV/34.073, IV/34.395 and IV/35.436) (1998/531/EC) [1998] OJ L246/1, [76].

[9] EAGCP Report (n 5) 30. It is nevertheless admitted there that this simple definition raises tricky issues when, for example, different customers involve different costs, ibid 30 n 21.

[10] J Church and R Ware *Industrial Organization* (Irwin McGraw-Hill Singapore 2000) 160.

[11] H Hovenkamp *Federal Antitrust Policy: the Law of Competition and its Practice* (3rd ed Thomson/West Minnesota 2005) 572.

[12] See for example Tirole: '… there is no price discrimination if differences in prices between consumers exactly reflect differences in the costs of serving these consumers …' J Tirole *The Theory of Industrial Organization* (9th ed The MIT Press Cambridge Massachusetts 1997) 133-134. 'Price discrimination' can take one of three forms: first-degree, second-degree and third-degree. 'First-degree' (perfect) price discrimination refers to the situation when the firm has perfect information on the willingness to pay of each consumer. Thus, the firm can charge each consumer a price equal to his/her willingness to pay. In 'second-degree' price discrimination, a firm cannot identify the customers between whom it would like to discriminate. By the use of self-select mechanisms, however, the firm may induce consumers to sort themselves in a way that allows additional surplus to be extracted. 'Third-degree' price discrimination or market segmentation is when the firm is aware of willingness to pay across groups, but not within a group and charges different prices to different groups. See in general Church and Ware (n 10) 161-162.

the price difference reflects this cost difference. In the same manner, charging the same price to both commuters regardless of this cost difference would be economically discriminatory.

In contrast to this general economic definition, some decisions under Article 82(c)EC imply that it is broad enough to treat *any* difference in treatment of similar transactions as discriminatory. Conduct can then be defended by an 'objective justification' (such as cost differences) by the undertaking. Indeed, the Commission has held in its *Portuguese Airports* decision that '[t]here must be an objective justification for any difference in treatment of its various clients by an undertaking in a dominant position.'[13] Similarly in *Aeroports de Paris* the CFI held with regard to the policy of the airport manager ADP that '… the Commission was justified in inferring from the difference in rates of the fees demanded from the groundhandlers by ADP that ADP was imposing discriminatory fees, unless it justified that difference in treatment by objective reasons.'[14] Moreover, it was found that 'in the event of disparity, it is for ADP to justify the reasons for and correctness of the differences in the rates of fee applied to different groundhandlers operating at Orly and Roissy-CDG airports.'[15] The CFI has also held in *Tetra Pak II* as regards Tetra Pak's differential pricing of machines that '[i]n the absence of any argument by the applicant which might provide objective justification for its pricing policy, such disparities were unquestionably discriminatory…'.[16] Likewise in the US, to prove price discrimination under the Robinson-Patman Act, one needs to show only a 'price difference'.[17]

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[13] Commission Decision *Portuguese Airports* (Case No IV/35.703) (1999/199/EC) [1999] OJ L69/31, [27]. See Whish (n 3) arguing that it seems scarcely possible that, as a matter of law, a dominant undertaking must adduce an objective justification for *any* difference in treatment, irrespective of its impact on competition, 719.

[14] Case T-128/98 *Aeroports de Paris v EC Commission* [2000] ECR II-3929, [201].

[15] *Aeroports de Paris v EC Commission* (n 14) [202].

[16] Case T-83/91 *Tetra Pak International SA v EC Commission* [1994] ECR II-755, [207].

[17] *FTC v Anheuser-Busch, Inc* 363 US 536, 549, 80 S Ct 1267, 1274 4 L Ed2d 1385 (1960): '… a price discrimination within the meaning of that provision is merely a price difference'. The defendant can then claim a 'cost justification' defence to show that the different prices were not discriminatory. Nonetheless, it is noteworthy that unlike EC competition law, the Robinson-Patman Act does not prohibit charging the same price for dissimilar transactions. See Hovenkamp (n 11) for the argument that it is a misnomer to call the Robinson-Patman Act a 'price discrimination' statute since it directly condemns price *differences*, and only indirectly and haphazardly reaches economic discrimination, 581. The ironic result has been to force many sellers to engage in true economic price discrimination by charging the same price to different groups of buyers, even though costs of serving them differ, 587.

This difference in defining discrimination can potentially affect the procedure and, particularly, the burden of proof. 'Objective justification' is a defence possible for any allegedly abusive conduct and the burden of proving it is on the dominant undertaking once the conduct is shown on its face to be an abuse.[18] However, when the economic definition is adopted, the burden to prove that, for example, the difference in prices is not due to a difference in costs and thus *not* objectively justified would be on the Commission since only then would the practice be 'discriminatory'. Under the current interpretation (similar to the Robinson-Patman Act), the burden is on the dominant undertaking to demonstrate that the allegedly abusive different (or uniform) prices are justified and thus should not be prohibited. Therefore, if the undertaking cannot convince the Commission of this justification, the Commission can find abuse on the basis of mere differential (or uniform) pricing without having proved the prices to be economically discriminatory.[19] This is a consequence of the legal test being two-staged in that it firstly asks whether the prices are different and if so, whether this can be objectively justified, as opposed to the single-staged economic test which questions whether the price-cost ratios, ie the profit margins in two equivalent transactions are different.

Nevertheless, the adoption of the economic definition of discrimination may not be desirable for EC competition law since the competition authority may not be able to assess the costs of the dominant undertaking *prima facie*, that is before and without alleging that the differential (or uniform) pricing is abusive. It can only examine the occurrence of differential (or uniform) pricing and cannot know without further investigation whether the differential (or uniform) pricing is economically discriminatory (ie not due or proportionate to cost differences). Since the dominant undertaking would have the relevant cost information, the use of that information as an objective justification by the undertaking may be the more feasible and efficient approach. Moreover,

[18] Jones and Sufrin (n 3) 282. See also EC Discussion Paper (n 5) [77].
[19] See P Loewenthal 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28 (4) World Competition 455, 456 for the argument that none of the EC Courts has ever applied this defence in favour of a dominant undertaking alleged to have infringed that provision by the Commission although the defence has been mentioned in almost all the cases.

asking the Commission to prove that conduct is *not* objectively justified would be asking it to prove something negative which is against the general rules on burden of proof.[20] Yet, this should not mean that the Commission can find an infringement based on the mere observance of differential (or uniform) pricing as this could result in unduly requiring the dominant undertaking to justify its whole pricing policy. The Commission should only challenge such pricing schemes when it has enough evidence to suspect that the differential (or uniform) prices are also economically discriminatory.

In short, bringing together the legal and economic interpretations for the purposes of competition law, 'discrimination' can be defined as the application of dissimilar conditions to equivalent transactions or equivalent conditions to dissimilar transactions without objective justification. This definition clearly hinges on what renders the transactions and the conditions applied to them 'equivalent', and what constitutes 'objective justification'. A systematic framework answering these questions does not currently exist in EC competition law and is out of this paper's scope. Nevertheless, it is worth noting that what is apparent in discrimination cases to date is that it is the criteria relating to the transaction, rather than to the customer engaged in the transaction which is important.[21] Although it has been argued that the Commission should broaden the notion of objective justification under Article 82(c)EC and accept that conditions specific to the buyer could render transactions 'dissimilar',[22] the wording of Article 82(c)EC and the decisional practice focus on 'transactions' being equivalent, and objective justification has so far usually been understood as cost-related justifications. Buyer-specific conditions have therefore generally not been regarded as possible objective justifications.[23] This would imply that the willingness of different

[20] Case T-117/89 *Paul F Sens v EC Commission* [1990] ECR II-198, [20].
[21] M Furse 'Monopoly Price Discrimination, Article 82 and the Competition Act' (2001) 22 (5) ECLR 149, 153.
[22] D Gerard 'Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities' in *Global Competition Law Centre Research Papers on Article 82 EC – July 2005*, 133.
[23] See also Gerard (n 22) 120. In *United Brands* the possible justifications for price discrimination were cited as difference in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies and the density of competition; Case 27/76 *United Brands Co and United Brands Continental BV v EC Commission* [1978] ECR 207, [228]. It is only very recently that the EC Commission has started paying attention to buyer-specific reasons and thus, the buyer's valuation. This can be seen in the arguments of the Commission against the unfair

buyers to pay would not provide justification for their differential treatment. Although it has been argued that the customer and his/her demand function is an inseparable part of the transaction,[24] the law has not made clear to date the extent to which it would be permissible for a dominant firm to discriminate between customers based on their demand for the product or their ability to bargain effectively. The Commission's recent statement conceptualising discrimination between customers by making those customers with a higher willingness to pay and less switching possibilities pay a higher price than others as 'direct exploitation'[25] demonstrates a stance against such a position.

In general, one can conclude that different costs may render transactions dissimilar and provide an objective justification for their different treatment. On the other hand, the nationalities of different parties do not render transactions dissimilar and do not justify their different treatment, as this has been condemned in many cases.[26] Apart from these situations, it is not possible to reach general conclusions on what would and what would not be abusive discrimination under EC competition law as it currently is.

Leaving the arguments for including discrimination in business-to-consumer transactions in Article 82EC's scope to Section D, the following section will examine the arguments against that proposition since the latter also demonstrate the current understanding of Article 82EC which this paper seeks to defy.

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pricing allegations in Commission Decision *Scandlines Sverige AB v Port of Helsingborg* (Case COMP/A.36.568/D3) 23 July 2004.

[24] Furse (n 21) 153. See also Geradin and Petit arguing that it is not clear whether differences in *elasticity of demand* can render transactions non-equivalent under the terms of Article 82(c)EC, D Geradin and N Petit 'Price Discrimination under EC Competition Law: The Need for a case-by-case Approach' College of Europe The Global Competition Law Centre Working Papers Series No 07/05, 8.

[25] EC Discussion Paper (n 5) [141].

[26] See for example Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v EC Commission* [1983] ECR 483; *Portuguese Airports* (n 13); *Aeroports de Paris v EC Commission* (n 14).

C Arguments against Including Discrimination between Consumers in the Scope of Article 82EC

Although the list of practices in Article 82EC is not exhaustive,[27] as discrimination is specifically listed as an abuse in subparagraph (c), the logical starting point for the inquiry is that subparagraph. This is because even if the list is non-exhaustive, discrimination is sanctioned as an abuse in subparagraph (c) and therefore one must first examine whether discrimination between consumers can be included there as that subparagraph sets out the Treaty's understanding of abusive discrimination. Indeed, the arguments against including discrimination between consumers in the scope of Article 82EC can be thought to comprise the interpretation of Article 82(c)EC's scope as limited to business-to-business conduct and the proposition that the wording of the provision literally requires discrimination to put 'trading parties' (understood as 'undertakings') at a 'competitive disadvantage'. These will be dealt with in turn.

In competition law, discrimination is generally thought to result in either 'primary' or 'secondary' line injury to competition. Primary line injury prejudices the dominant undertaking's competitors by having exclusionary effects, whereas secondary line injury impacts on the downstream markets.[28] As such, primary line injury harms competition between the dominant undertaking and its rivals, whilst secondary line injury causes distortion of downstream competition amongst the discriminating undertaking's customers or third parties. In the legal literature, Article 82(c)EC has been interpreted to be directed at discrimination causing secondary line injury.[29] Subsequently,

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[27] Case 6/72 *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] ECR 215**,** [26].

[28] Jones and Sufrin (n 3) 411-2. There is also another type of injury condemned by the Robinson-Patman Act in the US but not mentioned in EC law, namely 'tertiary' line injury. 'Tertiary' line injury refers to the instances where discrimination distorts competition between the customers of the discriminating firm. For example, 'tertiary' line injury can occur if the discriminatory practice of the manufacturer harms competition between the retail customers of the product. The Robinson-Patman Act also recognises 'fourth-line' injury which occurs further down the distributional chain, Hovenkamp (n 11) 581, n 23.

[29] Whish (n 3) 716; Jones and Sufrin (n 3) 412; SM Lage and R Allendesalazar 'Community Policy on Discriminatory Pricing: A Practitioner's Perspective' paper presented in the 8th Annual European Union Competition Workshop, Florence (June 2003) published in CD Ehlermann and I Atanasiu (eds.) *What Is an Abuse of Dominant Position?* (Hart Publishing Oxford and Portland 2006) 341; Geradin and Petit (n 24) 3; Gerard (n 22) 132 argues that primary line injury should be dealt with under Article 82(b)EC; M Waelbroeck 'Price Discrimination and Rebate Policies under EU Competition Law' in *1995 Fordham*

Article 82(c)EC has been understood as banning discrimination between the downstream customers of the dominant undertaking, thereby distorting competition between them.[30] This interpretation first leaves harm to competition at the dominant undertaking's level out of scope,[31] and second, leaves the question of whether consumers who are generally thought not to compete with each other (and thus who cannot be put at a competitive disadvantage) fall within the compass of the provision unanswered.

At first glance, a literal reading of subparagraph (c) requiring discrimination to place some 'trading parties' at a 'competitive disadvantage' could uphold the argument that it is mainly concerned with the protection of downstream competition and requires a distortion of competition between some customers. Together with the requirement of a competitive disadvantage, the term 'trading parties' can be mistakenly understood as 'traders' or other 'undertakings'. Nonetheless, 'trading parties' do not necessarily mean 'traders' or 'undertakings'. If Article 82(c)EC were aimed at protecting other traders or other businesses as opposed to consumers, it could and should have used the term 'undertaking' as done elsewhere in the provision itself and the EC Treaty.[32] A dominant undertaking may trade with consumers directly or through its vertically integrated agents. For example, a mobile phone operator may transact directly with consumers which would be 'trade' without turning the consumer into a 'trader'. Hence, 'trading parties' should be construed to

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Corporate Law Institute International Antitrust Law & Policy (ed) B Hawk (Juris Publishing Inc New York 1996) 160.

[30] Jones and Sufrin (n 3) 412. Support for this can also be implicitly found in *Continental Can* (n 27) where the ECJ held that '[a]s may further be seen from letters (c) and (d) of Article 86 (2), the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty' [26]. In other words, the ECJ interpreted Article 82(c)EC as a provision aimed at the protection of a competitive structure and not direct protection of consumers. However, given the time of the judgment in which the ECJ was trying to clarify that Article 82EC was not limited to exploitative practices, but also covered exclusionary conduct, and that the consequent application of subparagraph (c) does not demonstrate loyalty to this initial holding, it should not be treated as ruling out the inclusion of consumers in the scope of the provision.

[31] It has been argued that the reference to the placing of the dominant firm's 'trading parties at a competitive disadvantage' indicates that the parties Article 82(c)EC seeks to protect are the customers and not the competitors of the dominant undertaking, Geradin and Petit (n 24) 9.

[32] It is worthwhile to note that the ECSC Treaty Article 4(b) prohibited 'measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier' as incompatible with the common market. Thus, not only discrimination between *consumers* was prohibited explicitly under that Treaty, but also there was no requirement of competitive disadvantage.

include all the parties that a dominant undertaking enters into trade with. It should not be conceptualised as meaning 'traders'.

This is in conformity with the holding of the Commission in *Deutsche Post AG – Interception of cross-border mail* where it was found that

> [d]ue to the existence of the postal monopoly in Germany, the term trading partner – which normally refers to a voluntary commercial relationship between two undertakings – must be given a slightly different interpretation. The postal monopoly imposes upon foreign senders a commercial if not directly contractual relationship with DPAG. The sender in the UK that contracts with the BPO to have his mailings sent to Germany knows beforehand that the mail will be delivered by DPAG to German addressees. The actions of DPAG in the German market for incoming cross-border letter mail directly affect the commercial activities of the UK senders. At the very least, there is an indirect relationship between the UK senders contracting with the BPO and DPAG. Under these circumstances, the Commission finds that the senders must be regarded as trading partners of DPAG within the meaning of Article 82 (c).[33]

Thus, the senders of post who included consumers were found to be trading partners of DPAG (the public postal operator of Germany). Although the Commission refers to DPAG's monopoly in its explanation of why 'trading partner' should be understood more broadly than the usual sense, it is hard to see the link between these two findings. In other words, it is not understandable why DPAG's being a monopoly has an importance in defining 'trading partner' since this is better devised as an objective concept. The link the Commission creates between a monopoly situation and the definition of 'trading partner' does not appear to be a legal one. In another decision, namely in *BdKEP – Restrictions on Mail Preparation*[34] the Commission also rejected DPAG's view that 'trading partners' should be construed narrowly as 'contracting parties' - even mere business contacts were considered to be sufficient.

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[33] Commission Decision *Deutsche Post AG – Interception of cross-border mail* (COMP/C-1/36.915) (2001/892/EC) [2001] OJ L331/40, [130].

[34] Commission Decision (not published) *BdKEP – Restrictions on Mail Preparation* (COMP/38.745) 20.10.2004 [92]. Both Germany and Deutsche Post have appealed against this decision and both cases are at the CFI; Case T-490/04 (2005/C 31/54) and Case T-493/04 (2005/C 31/55) [2005] OJ C31/29.

The requirement of subparagraph (c) that discrimination places trading parties at a 'competitive disadvantage' appears to be a stronger argument against including discrimination between consumers in the scope of Article 82EC. Nevertheless, a closer look reveals that it may not be. First of all, as will be seen below,[35] the Commission and the Courts have almost read this requirement out of the provision. Although this can be rightly criticised, it is still the current interpretation. Moreover, one commentator has argued that this part of subparagraph (c) is easily dealt with since in part, the use of 'thereby' suggests that it is presumed that a competitive disadvantage flows from the application of 'dissimilar conditions'.[36] Second, it is not clear what is meant by 'competitive disadvantage' in the provision. If this is comprehended as broad enough to cover 'exploitation' of some trading parties, then discrimination can be thought to place some consumers at a competitive disadvantage when some of them are, for example, paying higher prices compared to others or to what they would pay under non-discriminatory pricing. As a result of such conduct, some consumers may be able to consume less of other products since a bigger part of their income would be spent on purchasing at the discriminatorily high price as compared to similarly placed consumers paying the lower price. Third, the reason that 'competitive disadvantage' is thought to be irrelevant as regards consumers is because they are generally thought not to compete with each other. As such, unlike downstream customers whose demands are interdependent, consumers' demands are usually deemed independent from one another's. Yet, one can argue that this may not always be true.

Some support for this last argument can also be found in economics. After stating that an important assumption of his book's study of second-degree price discrimination is the independence of consumers' demands from those of other consumers, Tirole notes that the quality offered to a consumer may, however, depend on the choices of other consumers.[37] He argues that this is the case when service is ranked by priorities of access because of limited

[35] See Section D.2.
[36] M Furse *Competition Law of the EC and UK* (4th ed Oxford University Press New York 2004) 283.
[37] Tirole (n 12) 152.

capacity (as in the telephone, electric power and air travel industries). He gives the example of an electric utility, with a fixed capacity for a given period of time which faces uncertain demand or supply. During peak load, electricity must be rationed to some consumers. Random rationing generally is not efficient, as some consumers suffer more than others from the interruption of service. A spot market, on the other hand, would allocate the limited capacity efficiently among consumers in each state of nature, as those who would pay the spot price are those who suffer most from an interruption. Such a spot market, however, is generally infeasible because of the high transaction costs of setting it up. As an imperfect substitute for spot markets, the firm may offer priority of service, that is probability of being interrupted. In this case, the interdependence of demands is apparent: if all consumers choose the top priority, no one has any priority. Thus, the firm must adequately compute the tariff for each priority class to match capacity and demand.[38]

Although Tirole's example is related to the quality of the product, when supply is limited at a level below the equilibrium output, for example, due to capacity constraints, even with regard to quantity the demand of consumers could be deemed interdependent. In that case, consumers can be thought to be competing with one another for the product since not all of them can purchase it due to limited supply, even if they all value it above the price. The queues starting early in the morning when a new version of the Microsoft Xbox is released is an example of this. Moreover, some marginal consumers can also be left out of the market depending on the willingness of other consumers, further up the demand curve, to pay.

In sum, the letter of Article 82(c)EC can be interpreted to include discrimination between consumers in its scope.

[38] Tirole (n 12) 152.

D Arguments for Including Discrimination between Consumers in the Scope of Article 82EC

It is not easy to tell why the question of whether discrimination in business-to-consumer transactions is covered by Article 82EC has not been answered so far. It may be due to the loyalty to a strict reading of the provision and the non-existent private enforcement of Article 82EC. It is also plausible that the Commission and the Courts have been refraining from making general statements on the matter as they have not been faced with it directly although their inclination has been implicitly expressed. Indeed, one can find that the EC Commission and the Courts have expressed a tendency towards including discrimination between consumers within the scope of Article 82EC albeit quietly. The remainder of this section will try to explain this stance along with other arguments for why discrimination against consumers by a dominant undertaking can be abusive.

1 Jurisprudence on Discrimination and Consumers

Particularly the late decisional practice of both the Commission and the Courts supports an affirmative answer to the question of whether discrimination in business-to-consumer transactions can be challenged under Article 82EC.

Some of the most obvious expressions can be found in the Commission's *1998 Football World Cup* decision. The dispute there had arisen out of the French organiser CFO's requiring the general public to provide an address in France in order to be able to purchase individual entry tickets and Pass France 98 (which was a package comprising five or six separate entry tickets). The Commission held that

> … the CFO was, as a de facto monopolist, under a *prima facie* obligation to ensure that entry tickets sold in 1996 and 1997 for finals matches were made available to the general public under non-discriminatory arrangements throughout the EEA, even though demand from consumers outside France for certain ticket products may have been relatively small as against the demand from the general public in France.[39]

[39] Commission Decision *1998 Football World Cup* (Case No IV/36/888) (2001/12/EC) [2000] OJ L5/55 [87].

Although the decision blurs the issue by stating that 'the CFO abused its dominant position on the relevant markets because its behaviour had the effect of imposing unfair trading conditions on residents outside France which resulted in a limitation of the market to the prejudice of those consumers'[40] and thus referring to Article 82(a) and (b)EC, it condemns the effect of the requirement to provide a postal address in France. The effect is deemed to discriminate specifically against the general public resident outside France, given that those resident in France were significantly better placed to meet the requirement. [41] The effect of CFO's behaviour was described as 'to discriminate against residents outside France, which indirect*(ly)* amounted to discrimination against those consumers on grounds of nationality, contrary to fundamental Community principles.'[42] Furthermore, the Commission stated that

> … [w]hile the application of Article 82 often requires an assessment of the effect of an undertaking's behaviour on the structure of competition in a given market, its application in the absence of such an effect cannot be excluded. Consumers' interests are protected by Article 82, such protection being achieved either by prohibiting conduct by dominant undertakings which impairs free and undistorted competition or which is direct*(ly)* prejudicial to consumers. Accordingly, and as has been expressly recognised by the Court of Justice *(citing Continental Can)*, Article 82 can properly be applied, where appropriate, to situations in which a dominant undertaking's behaviour direct*(ly)* prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition.[43]

Thus, it is obvious that this decision found discrimination between different groups of consumers, even without an effect on competition, to be an abuse of dominant position under Article 82EC. Nonetheless, as this decision has not been appealed, and the ECJ judgment to which Commission refers actually held that subparagraph (c) was an example of Article 82EC not being limited to behaviour directly harming consumers,[44] it is not possible to know whether it would have been upheld by the Courts. Moreover, the Commission

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[40] *1998 Football World Cup* (n 39) [88].
[41] *1998 Football World Cup* (n 39) [90]. This discrimination is found to amount in practice to an imposition by CFO of unfair trading conditions on residents outside France and result in a limitation of the market to the detriment of those consumers, ibid [91].
[42] *1998 Football World Cup* (n 39) [102].
[43] *1998 Football World Cup* (n 39) [100].
[44] *Continental Can* (n 27) [26]. See note 30 above.

in a later decision refrained from disclosing an *explicit* view on the matter by stating that '[t]he question whether discrimination against end consumers is caught by Article 82 *(cit omit)* is of no relevance to the case at hand' and therefore, the issue remains a valid question.[45]

Another important example is the *Deutsche Post AG – Interception of Cross-border Mail* decision by the Commission. In that case, DPAG was found to treat differently incoming cross-border letter mail which it considered to be 'genuine' international mail on the one hand, and incoming cross-border letter mail which it considered to be virtual A-B-A remail[46] on the basis of the inclusion of a reference to an entity residing in Germany on the other. In both cases, DPAG performed exactly the same service.[47] The BPO (British Postal Operator) alleged that DPAG had repeatedly delayed the release of contested mailings and that DPAG's refusal to deliver cross-border mailings unless a surcharge[48] was paid constituted an abuse of a dominant position.[49] The Commission found that DPAG was behaving in a discriminatory manner by charging different prices for equivalent transactions and the different tariffs charged could not be justified on a basis of economic factors.[50] Similar to its holding in *1998 Football World Cup*, the Commission stated that Article 82EC might be applied even in the absence of a direct effect on competition between undertakings on any given market. It held that this provision may also be applied in situations where a dominant undertaking's behaviour causes damage directly to consumers. The Commission expressed that the senders of the disputed mailings were consumers of postal services and due to the behaviour of DPAG, these consumers were affected negatively by

[45] *BdKEP – Restrictions on Mail Preparation* (n 34) [92].
[46] 'Genuine' international mail was considered to be letter mail without any references to entities residing in Germany. In A-B-A remail, letters come from State A but are posted in State B for delivery in State A, Cases C-147/97 and C-148/97 *Deutsche Post AG v Gesellschaft fur Zahlungssysteme mbH and Citicorp Kartenservice GmbH* [2000] ECR I-825, [12].
[47] The service consisted of collecting bags of incoming cross-border letter mail at a reception point, then transporting the mail to a sorting centre where it is sorted, forwarded and delivered to addressees in Germany *Deutsche Post AG – Interception of cross-border mail* (n 33) [121].
[48] The surcharge corresponded to the difference between the full German domestic tariff and the terminal dues payable for delivering cross-border mail, *Deutsche Post AG – Interception of cross-border mail* (n 33) [3]-[4]. Under the terminal dues system, the receiving public postal operator is remunerated for the delivery of cross-border mail by the sending public postal operator and these delivery charges are called 'terminal dues', ibid [8].
[49] *Deutsche Post AG – Interception of cross-border mail* (n 33) [4].
[50] *Deutsche Post AG – Interception of cross-border mail* (n 33) [127].

having to pay prices for these services which were higher than those charged to other senders, and by having their mailings delayed significantly. In the same manner, the German addressees were to be regarded as consumers who were affected in a negative manner by the behaviour of DPAG especially due to the delays.[51] The Commission concluded that DPAG's conduct had direct negative effects on consumers who were the senders of disputed mailings and/or the German addressees. DPAG's behaviour thus constituted an abuse of Article 82EC and in particular subparagraph (c) of its second paragraph.[52] Hence, it is clear that discrimination in business-to-consumer transactions was found abusive under Article 82EC in this decision.

Apart from these obvious examples where consumers have been the subjects of the decision, other decisions – not necessarily on discrimination – also show that Article 82EC has been interpreted to include business-to-consumer transactions in the assessment, at least for comparison purposes. In other words, the transactions that the dominant undertaking entered into with consumers have, in many instances, been used as a benchmark to assess its transactions with other undertakings. One example of this is the *Deutsche Telekom AG* decision where the Commission compared the prices that Deutsche Telekom AG charged to its competitors and its end-users (ie consumers) for access to the local networks, and reached the conclusion that Deutsche Telekom AG abused its dominant position by applying a margin squeeze.[53] Another example is *British Leyland* where the Commission found that British Leyland (a British car manufacturer) had abused its dominant

[51] *Deutsche Post AG – Interception of cross-border mail* (n 33) [133].
[52] *Deutsche Post AG – Interception of cross-border mail* (n 33) [134]. Deutsche Post was fined €1000 and the decision was not appealed, thus the Courts were not faced with the issue.
[53] Commission Decision *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) (2003/707/EC) [2003] L263/9 [4], [57]. Cf *Lycon, Inc v Juenke* 250 F.3d 285 (5th Cir), cert denied, 534 US 892, 122 S Ct 209 (2001) where the US Supreme Court held that different prices paid by end users and wholesale distributors of the same gas lift equipment did not breach the Robinson-Patman Act since end users who buy directly from the manufacturer do not compete with the wholesale distributors for resale at any level, 289. It must be noted though that the Robinson-Patman Act prohibits discrimination '… where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them…'. Thus, its language requiring discrimination to 'injure, destroy, or prevent competition *with* any person' is different than that of Article 82(c)EC. See for example *Volvo Trucks North America, Inc v Reeder-Simco GMC, Inc* 546 US 164, 126 S Ct 860 (2006), 866 where it was held that the Robinson-Patman Act centrally addressed price discrimination in cases involving competition between different purchasers for *resale* of the purchased product.

position by charging a different fee for the provision of certificates of conformity depending on whether the customer was a trader or an individual (or an independent dealer).[54]

In the same manner, although not taking a formal decision due to reaching an agreement with the undertaking, the Commission found Deutsche Telekom AG's business customer tariffs discriminating in favour of its business customers vis-à-vis residential customers and hence potentially abusive.[55] The Commission thus required Deutsche Telekom AG to offer trial rebates to domestic customers before the new business customer tariffs entered into force. As such, residential customers were expected to benefit from rebates introduced in parallel with the rebates for business customers. The Commission argued that while competition was growing in the recently liberalised markets such as business and data services, other areas such as access to end customers would mostly remain closed for a while and in this period, there was a risk that incumbent telecommunications operators might restructure tariffs to exploit the difference between the different price elasticities in these different markets.

Similarly, in *Ahmed Saeed* the ECJ held that imposition of tariffs by a dominant air carrier on other air carriers could constitute an abuse of dominant position. Such an abuse might be held to exist in particular where such imposed tariffs had to be regarded as unfair trading conditions of transport with regard to competitors or with regard to passengers.[56] Thus, the conduct directed to passengers – which in this case would have surely included consumers – was deemed capable of being an abusive practice.

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[54] Commission Decision *British Leyland* (Case IV/30.615) (84/379/EEC) [1984] OJ L207/11 Article 1. Registration of vehicles in Great Britain is subject to an approval system under which the manufacturer of a vehicle must apply to the Secretary of State for Transport for a British national type approval (NTA) certificate recording the fact that the vehicle complies with the relevant type approval requirements and specifying the permitted variations from the type vehicle. Furthermore, the manufacturer may issue, on the basis of the NTA certificate, certificates of conformity stating, in respect of each vehicle manufactured by itself, that it conforms to the approved type vehicle.

[55] 'Commission Reaches Agreement with German Authorities Concerning Conditions for DT's New Business Customer Tariffs' Press Release IP/96/543 25.06.1996.

[56] Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reise Buro GmbH v Zentrale zur Bekampfung unlauteren Wettbewerbs eV* [1989] ECR 803, [42].

To summarise, the late decisional practice demonstrates either directly or indirectly that a dominant undertaking can be found to have abused its position by way of conduct directed towards consumers. As regards Article 82(c)EC, notably the application of it by the Commission shows a tendency to include consumers in that subparagraph. Nonetheless, this has not been directly argued before the Courts so far. All in all, it can be concluded from the interpretation of the provision by the EC Commission and Courts to date that discrimination between consumers is likely to be found abusive under Article 82EC if challenged before one of these authorities.

2 Removal of the 'Competitive Disadvantage' Requirement in Practice and Non-Exhaustiveness

Another argument for the proposition that discrimination between consumers can fall within the scope of Article 82EC can again be derived from the decisional practice of the Commission and Courts. As seen above,[57] one of the arguments against this proposition is that consumers do not compete with one another and thus cannot be put at a competitive disadvantage, as required by subparagraph (c). Even though that subparagraph bans the application of dissimilar conditions to equivalent transactions by a dominant undertaking with other trading parties 'thereby placing them at a competitive disadvantage', this requirement appears to have been effectively read out of the provision.[58] Hence, there is relatively little analysis in the case law of what constitutes meaningful competitive disadvantage between customers. [59] Although this can most legitimately be explained by the non-exhaustive nature of the list of practices in Article 82EC,[60] such an explanation has not usually been made by the Commission or the Courts. As such, the practice has progressed in a way that has almost removed the requirement since it has rarely been attended to.

[57] See text around n 35.
[58] Jones and Sufrin (n 3) 418, Whish (n 3) 716; Waelbroeck (n 29) 160.
[59] JT Lang and R O'Donoghue 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82EC' (2002) 26 Fordham International Law Journal 83, 115.
[60] *Continental Can* (n 27) [26].

In *United Brands*,[61] for example, the practice was found discriminatory although the ripeners/distributors from different Member States were not in competition with one another and 'greengrocers in Ireland certainly did not compete with those in Germany'.[62] Indeed, once the markets were partitioned across national lines, different prices could no longer create a competitive disadvantage among distributors/ripeners since these traders could not compete with each other internationally due to the partitioning.[63] The ECJ appears to have *assumed* that the different prices would place certain ripeners/distributors at a competitive disadvantage.[64] Similarly, in *Corsica Ferries I* the operator of the port of Genoa was found to have abused its dominant position by applying dissimilar tariffs to maritime transport undertakings depending on whether they operated services between Member States or between national ports (insofar as trade between Member States were affected).[65] It has been rightly argued that in that case, the domestic and international shipping lines were not competing with each other.[66] In the same vein, very little or no attention has been paid to the requirement of 'competitive disadvantage' by the Commission and/or Courts in *1998 Football World Cup,*[67] *Deutsche Post – Interception of Cross-border Mail,*[68] *Portuguese Airports*,[69] *Hoffmann-La Roche,*[70] *Tetra Pak II*,[71] and *Alpha Flight Services/Aéroports de Paris*[72] decisions.

The Commission elaborated on this issue in *BdKEP – Restrictions on Mail Preparation* and found that Deutsche Post's interpretation of the concept of

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[61] *United Brands* (n 23).
[62] Jones and Sufrin (n 3) 418.
[63] Geradin and Petit (n 24) 39.
[64] *United Brands* (n 23) [233].
[65] Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto do Genova* [1994] ECR I-1783, [45].
[66] Jones and Sufrin (n 3) 418; Whish (n 3) 721.
[67] *1998 Football World Cup* (n 39).
[68] *Deutsche Post – Interception of Cross-border Mail* (n 33).
[69] *Portuguese Airports* (n 13).
[70] The ECJ circumvents Hoffmann-La Roche's proposition that the fidelity rebates do not put customers at a competitive disadvantage by arguing that under the circumstances, it cannot be accepted that the rebates are not of importance to customers and that since the structure of competition on the market is already weakened due to the existence of a dominant undertaking, any further weakening of the structure of competition may constitute abuse; Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [122]-[123].
[71] *Tetra Pak II* (n 16).
[72] Commission Decision *Alpha Flight Services/Aéroports de Paris* (Case IV/35.613) (1998/1417/EC) [1998] OJ L230/10.

'competitive disadvantage' was too restrictive.[73] It held that the wording of Article 82(c)EC covered three types of discrimination, the first two being exclusionary and the last one exploitative. Accordingly, the customer of the dominant firm may be placed at a competitive disadvantage either vis-à-vis the dominant firm itself; or in relation to other customers of the dominant firm; or the customer suffers commercially in such a way that his or her ability to compete on whichever market is impaired. The first and third possibilities do not require a competitive relationship between the two comparator groups.[74] Moreover, as regards the exploitative type of abuse covered by Article 82(c)EC, the Commission remarked that

> numerous precedents demonstrate that both the Commission and the Courts apply a broad interpretation of this provision, condemning dominant undertakings for exploitative discrimination between customers who are not competing on the same market.[75]

Thus, once it is accepted that there is no need for a competitive relationship between the undertaking's customers for discrimination to be abusive, it would follow that discrimination between consumers can also fall under Article 82EC as an instance of 'exploitative discrimination' without demonstrating a competitive disadvantage.[76] Furthermore, as seen above,[77] under certain circumstances consumers can indeed be thought to be competing with one another. Finally, since the list of practices in Article 82EC is not exhaustive, such conduct can constitute exploitative abuse under the general prohibition in any case.

To summarise, it can be concluded that discrimination between consumers may infringe Article 82EC and the ultimate issue appears to be the removal of the 'competitive disadvantage' requirement from subparagraph (c) in the practice. This removal nevertheless causes both economical and legal concern since it broadens the scope of a prohibition that is deemed to deserve

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[73] *BdKEP – Restrictions on Mail Preparation* (n 34) [93].
[74] *BdKEP – Restrictions on Mail Preparation* (n 34) [93].
[75] *BdKEP – Restrictions on Mail Preparation* (n 34) [95].
[76] See similarly Gerard arguing that discrimination among final consumers who do not compete with each other may also give rise to an issue of exploitation; Gerard (n 22) 122, n 68. Nonetheless, he further notes that the EC Commission should make clear that price discrimination might constitute an abuse under Article 82(c)EC only to the extent that it results in a distortion of competition among the dominant firm's trading parties, ibid 107.
[77] See text around n 37.

limited enforcement, if at all.[78] This concern will be dealt with in the following section.

E Should Discrimination between Consumers Be an Abuse under Article 82EC?

After finding that discrimination between consumers *can* be abusive under the current law, the important question becomes that of whether it *should* be so. This question arises because according to economics, discrimination is a practice with ambiguous effects on total and consumer welfare. As such, it is argued that the welfare effects of discrimination require a case-by-case analysis and a blanket prohibition of it is not justified.[79] Nonetheless, as Article 82EC has so far been interpreted as banning discrimination in business-to-business transactions, it remains to be answered whether such a ban is also unjustified when it is applicable to business-to-consumer transactions since the effects of discrimination in intermediate markets are not the same as those in final markets.[80] For example, the concern that a ban on discrimination would prevent buyers from individually negotiating better deals with the seller and hence hinder price competition,[81] would not apply in the case of discrimination between consumers since almost all consumer contracts are today standard and non-negotiable. Thus, this section seeks to assess whether a ban on discrimination between consumers is justified, what its implications are and how these can be reconciled with the findings of economics.

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[78] See for example R O'Donoghue and AJ Padilla *The Law and Economics of Article 82 EC* (Hart Publishing Oxford and Portland 2006) 602 arguing for a limited enforcement. See also O'Brien and Shaffer (n 4) 298 arguing that forbidding intermediate price discrimination leads to higher prices for all buyers and thus the Robinson-Patman Act reduces welfare.

[79] D Ridyard 'Exclusionary Pricing and Price Discrimination Abuses under Article 82-An Economic Analysis' (2002) 23 (6) ECLR 286, 291; Lang and O'Donoghue (n 59) 111; M Armstrong 'Recent Developments in the Economics of Price Discrimination' October 2005 Econ Working Paper can be found at http://129.3.20.41/eps/io/papers/0511/0511004.pdf forthcoming in *Advances in Economics and Econometrics: Theory and Application: Ninth World Congress* (eds) Blundell, Newey and Persson (Cambridge University Press) 3.

[80] Katz (n 4) 155, O'Brien and Shaffer (n 4) 297.

[81] O'Brien and Shaffer (n 4) 297-298.

1 An Effects-Based Approach to Article 82EC and a Consumer Welfare Standard

Although it is still not unambiguous what the welfare standard under 82EC is, at least the current tendency appears to be one towards 'consumer welfare'. This can mainly be seen in recent documents such as the EAGCP Report[82] and the Discussion Paper[83] prepared by DG Competition itself. Particularly in the former which recommends the adoption of an economic and effects-based approach to Article 82EC, the focus is explicitly on the improvement of consumer welfare.[84] As such, the standard for assessing whether a conduct is legitimate competition or anticompetitive should be derived from the effects of the practice on consumers.[85] Similarly, in the EC Discussion Paper, the objective of Article 82EC with regard to exclusionary abuses is expressed as the 'protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[86] Therefore, if it is accepted that consumer welfare is the standard that Article 82EC serves, then it should follow that a dominant undertaking's direct discrimination between consumers should also be scrutinised. Since discrimination between consumers would have more immediate and direct effects on consumers - if found abusive - than that between the firm's downstream customers, it should *a fortiori* be subject to an assessment.

According to economics, discrimination can both reduce and increase consumer welfare and thus its effects on welfare are ambiguous.[87] This would imply that the practice should be assessed with regard to its effects even when it is found in business-to-consumer transactions. In other words, what matters should not be the type of downstream agents to whom discrimination

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[82] EAGCP Report (n 5). The EAGCP Report emphasises the need to concentrate on the effects of conduct, rather than its form, ibid 3.
[83] EC Discussion Paper (n 5).
[84] EAGCP Report (n 5) 2.
[85] EAGCP Report (n 5) 7-9.
[86] EC Discussion Paper (n 5) [4], [54]. The Discussion Paper concentrates on exclusionary abuses and leaves out discriminatory practices which it appears to deem as neither exclusionary nor exploitative, ibid [3].
[87] See for example M Armstrong and J Vickers 'Price Discrimination, Competition and Regulation' (1993) 41 Journal of Industrial Economics 335, 336; Gerard (n 22) 105; A Perrot 'Towards an Effects-based Approach of Price Discrimination' in *The Pros and Cons of Price Discrimination* Swedish Competition Authority 2005, 168.

applies (consumers or firms that compete on a downstream market) but the effects it conveys.[88]

Moreover, the recent tendency regarding the application of Article 82EC shows that the emphasis is on consumer welfare, even if not exclusively. In other words, it is quite clear that if conduct actually or potentially harms consumers it will fall foul of Article 82EC. Thus, under a consumer welfare standard the discriminatory conduct of an undertaking in a dominant position should be scrutinised with regard to its effects even when observed in business-to-consumer conduct as it may have negative effects on consumer welfare.

2 Fairness

Admittedly, fairness does not fall squarely under the arguments for covering discrimination between consumers under Article 82EC. This is because whether discrimination is unfair or not depends on one's understanding of 'fairness'. Since there is not a universal definition of 'fairness' or 'unfairness', the assessment of discrimination hinges on the interpretation of the 'fairness' concept. When 'fairness' is understood as the equal treatment of equals (and the unequal treatment of unequals), the EC ban on discrimination described as 'applying dissimilar conditions to equivalent transactions' appears fair and, thus, legitimate.[89] Therefore, as regards price discrimination, fairness understood as 'equality'[90] would result in uniform prices for equivalent purchases. In the train example, different prices paid by the professional and the student for the same journey would be discriminatory and unfair so long as the purchases can be deemed equivalent. Whether or not the different status of the commuters render the transactions non-equivalent is a different question, but once the focus is on the transaction rather than the parties and it is thus decided that the transactions are equivalent, then the different prices would be unfair. If, however, fairness is understood from a distributional

[88] Perrot (n 87) 163-4.
[89] For the argument that a standard such as the equal treatment of parties in similar positions is not helpful for antitrust since '[i]f the parties are really equally situated, the market will treat them equally, for that will be the most profitable way to treat them' see RH Bork 'The Goals of Antitrust Policy' (1967) 57 (2) The American Economic Review 242, 253.
[90] See P Westen 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537 for the argument that 'equality' is meaningless as a benchmark.

perspective, it would be 'fair' for the commuter with the lower income to pay a lower price for the ticket than the one with the higher income.

Although it cannot be denied that 'fairness' as an objective has played a prominent role in the adoption of Article 82EC due to the ordoliberal influences at the time,[91] and that Article 82EC's prohibitions of unfair pricing, unfair trading conditions and discrimination are undoubtedly related to fairness, this may not be deemed appropriate any more.[92] Nonetheless, it is noteworthy that the ban on discrimination is quite different from the other types of 'unfair' conduct prohibited by Article 82EC. This is because the other types of unfair behaviour described there cannot even be objectively defined and thus their prohibition poses a greater risk to legal certainty and freedom of contract than the ban on discrimination.[93] Moreover, particularly the bans on 'unfair pricing' and perhaps 'unfair trading conditions' – which are reflections of a substantive fairness ideal in competition law – remain as almost unenforceable pieces of law for the competition authority as well.

The ban on discrimination is different from the ban on unfair pricing or unfair trading conditions because 'discrimination' can at least be defined to a greater extent than the latter. Although it is not always easy to assess which transactions, conditions and/or parties are equivalent, once (or if) this is determined, the ban on discrimination can be operationalised. In other words, the current understanding of discrimination as the unequal treatment of equals (and the equal treatment of unequals) can be enforced with more certainty than a ban on 'unfair pricing'. Surely, this requires the authority to decide what renders the transactions non-equivalent and when the different treatment of

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[91] See in general DJ Gerber 'Fairness in Competition Law: European and U.S. Experience' presented at a Conference on Fairness and Asian Competition Laws on March, 5 2004 Kyoto, Japan available at http://www.kyotogakeun.ac.jp/~o_ied/information/fairness_in_competition_law.pdf accessed on 12 October 2005, 6.

[92] See for example N Kroes 'Preliminary Thoughts on Policy Review of Article 82' Speech at the Fordham Corporate Law Institute New York 23 September 2005, 3.

[93] For example, even though 'unfair' pricing by a dominant undertaking is a potentially abusive practice, the application of the provision has so far not been able to define what an 'unfair' price actually is. This inability is not even limited to competition law; 'fair price' has been quested ever since the middle ages without success. A body of law much older than competition law, namely contract law, has failed to answer the question of what an unfair price is and therefore has rightly ceased asking it. In general, see for example R de Roover 'The Concept of the Just Price: Theory and Economic Policy' (1958) 18 (4) The Journal of Economic History 418 and BW Dempsey 'Just Price in a Functional Economy' (1935) 25 (3) The American Economic Review 471 for an examination of 'just price'.

equivalent transactions is acceptable. Whether this is desirable depends again to a great degree on how one understands 'fairness' and includes it in competition law.

The best example of this can be found in price discrimination. Since price is seen as a tool by which the dominant firm exploits its power to earn more profits, price discrimination is also considered to be 'unfair' because some people pay more for the good in question than others. Moreover, economic analysis has put a lot of weight on the exploitative effects of price discrimination allowing the dominant firm to earn more profits. Economic analysis has also stressed that distribution of output across consumers tends to be inefficient if different consumers pay different prices and presumably put different valuations on the last units they purchase.[94]

Furthermore, if people's fairness conceptions depend on interpersonal comparisons as suggested in the literature,[95] then a different price paid by another person in an equivalent transaction could result in an unfairness perception and this may cause a loss of utility for the consumer who has paid the higher price. For price comparisons, when the degree of similarity between the comparative transactions is relatively high, buyers have little differential information to explain a price discrepancy.[96] Thus, the consumers expect or believe that they are entitled to equal prices, and they are likely to judge the price discrepancy as unfair.[97] Hence, a high degree of transaction similarity leads to a high perception of price unfairness.[98] For example, if a commuter on the train finds out that the person sitting next to him/her has paid a much lower price for exactly the same journey, the following feeling of having been treated unfairly may lead him/her to switch to another type of transport instead; this may or may not be socially desirable and/or efficient depending on the circumstances.

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[94] EAGCP Report (n 5) 31; M Armstrong and J Vickers ''Competitive Price Discrimination' (2001) 32 (4) RAND Journal of Economics 579, 582.
[95] See for example L Xia KB Moore and JL Cox 'The Price Is Unfair! A Conceptual Framework of Price Fairness Perceptions' (2004) 68 Journal of Marketing 1, 6.
[96] Xia Moore and Cox (n 95)3.
[97] Xia Moore and Cox (n 95) 4.
[98] Xia Moore and Cox (n 95) 4.

The fairness assessment of discrimination is a markedly peculiar issue due to the perception of 'fairness' as 'equality'. For example, universal service obligations tend to insist on 'equal treatment', according to which all consumers should be offered the same price even in spite of possible large cost differentials.[99] In other words, although the costs differ and thus the obligation of, for instance, national pricing in universal services requires discrimination in economic terms, this is not condemned by law due to other social policy objectives.[100] An equally interesting example is postal services, since even though it would cost more to run a post office in a rural area, charging a higher price reflecting the higher costs to the consumers in the rural area compared to the price of the same service at urban branches would probably be perceived as unfair at least by the consumers in the rural area.

Although 'equality' and 'equal treatment' may be more easily acceptable in policy and law than differential treatment, from an economic point of view, uniformity can also constitute discrimination. Indeed, 'fair price' may actually *require* discrimination. This can be derived from the model of Rabin, as well as that of Fehr and Schmidt.[101] The key insight from both models is that the 'fair' price would depend on the consumer's valuation of the product.[102] The result of this is that since consumers' valuations of the same product would in most cases be different, the 'fair' price would also differ from one consumer to another depending on the consumer's valuation. Hence, there is not a single 'fair' price but there are different individually fair prices. This necessitates different prices to be offered to different people for the same product – namely discrimination. In other words, these economic models would mean that the 'fair' price is actually 'discriminatory' in competition law terms. For EC competition law, the implication is a Catch-22: a dominant undertaking can comply with either subparagraph (a) or (c) of Article 82EC but not both since

[99] EAGCP Report (n 5) 30 n 21.
[100] See EC Universal Service Directive (2002/22/EC) [2002] OJ L108/51.
[101] M Rabin 'Incorporating Fairness into Game Theory and Economics' (1993) 83 (5) The American Economic Review 1281; E Fehr and KM Schmidt 'A Theory of Fairness, Competition and Cooperation' (1999) 114 (3) The Quarterly Journal of Economics 817.
[102] For a discussion of both models see P Akman 'Fairness and Unfair Pricing in Article 82EC' (on file with author).

only discriminatory prices can be 'fair' if these economic models are accepted. If the undertaking does not discriminate and complies with Article 82(c)EC, then its prices may inevitably fall foul of Article 82(a)EC.[103]

Moreover, the notion that two customers should pay the same price, regardless of their degree of preference for the product, as marked by the price they are willing to pay (ie elasticity), and regardless of their bargaining power on 'fairness' grounds, has been criticised as having nothing to do with competition or the efficient allocation of resources.[104] Economic analysis has shown that in some circumstances price discrimination can increase total welfare and even consumer welfare – notably when it permits a significant expansion of output.[105] Therefore, such considerations have led economists to be sceptical about using notions of 'fairness' or 'unfairness' to assess price discrimination. It has been noted that prohibiting price discrimination on the grounds of unfairness to those consumers who have to pay a higher price may end up making these very consumers worse off.[106] Furthermore, it has been argued that the fairness or unfairness of price discrimination is necessarily based on a local assessment of distributive effects and there is no way of telling whether such local assessment is consistent with global concerns for distribution. Such global concerns can hardly be made the subject of antitrust proceedings under a rule of law and therefore it seems advisable to assess price discrimination less in terms of fairness and more in terms of procompetitive and anticompetitive effects.[107] All in all, it is particularly unclear whether fairness arguments support uniform prices or discriminatory price schemes with individualised prices.[108]

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[103] Although this conclusion depends on whether the difference between the valuations of consumers would render the transactions non-equivalent and thus out of scope of Article 82(c)EC, that question has not been answered. In other words, whether customer-specific reasons would provide an objective justification for the ban on discrimination is not yet clear but as so far construed, it is the criteria relating to the transactions rather than the customer that matters. See text around n 21.

[104] Lage and Allendesalazar (n 29) 344.

[105] EAGCP Report (n 5) 31. For example, when discrimination expands output so that customer segments that would otherwise be excluded are served, it might stimulate profits so as to enable investment projects that would not otherwise be taken; returns from discrimination may encourage firms to invest more, etc; TP Gehrig and R Stenbacka 'Price Discrimination, Competition and Antitrust' in *The Pros and Cons of Price Discrimination* Swedish Competition Authority 2005, 134.

[106] EAGCP Report (n 5) 32.

[107] EAGCP Report (n 5) 32.

[108] Gehrig and Stenbacka (n 105) 3.

Therefore, 'fairness' supports equivocal conclusions depending on the interpretation of the concept as regards the inclusion of discrimination between consumers under the prohibition of discrimination in Article 82EC. However, this discussion is not limited to discrimination between consumers, but is related in general to the question of whether Article 82EC should ban discrimination at all.

3 Implications of Prohibiting Discrimination between Consumers under Article 82EC

Once it is realised that discrimination between consumers can also be scrutinised under Article 82EC, this would increase the obligations of dominant undertakings compared to the status quo. They would then have to refrain from entering into discriminatory transactions not only with other undertakings, but also with consumers. Apart from bringing with it the risk of over-intervention into the practices of private law entities, this would directly limit their freedom of contract to a greater degree than under the current interpretation in the literature.

Moreover, modern economics shows that discrimination can both increase and decrease welfare. The economic studies – generally concentrated on price discrimination – find that the welfare effects depend mainly on whether discrimination causes output to increase or decrease.[109] For example, in industries with fixed and common costs, such as airlines, hotels and cinemas, discrimination can be beneficial as it can lower the price to all users of the service due to the costs being spread over more customers.[110] However, as put by Motta, '[e]conomic theory shows that price discrimination unambiguously reduces welfare only when it does not raise total output, whereas the sign of welfare change is ambiguous in all other cases.'[111] Accordingly, depending on the informational and strategic context, the various

[109] See R Schmalensee 'Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination' (1981) 71 American Economic Review 242 and HR Varian 'Price Discrimination and Social Welfare' (1985) 75 American Economic Review 870, 871 for the argument that in general, output and welfare may increase or decrease when price discrimination is allowed, although an increase in output remains a necessary condition for welfare increase.

[110] P Muysert 'Price Discrimination – An Unreliable Indicator of Market Power' (2004) 25 (6) ECLR 350, 353; Kolasky (n 7) 34.

[111] M Motta *Competition Policy: Theory and Practice* (Cambridge University Press Cambridge 2004) 496.

forms of price discrimination may have very different impacts on consumers' surplus, as well as on firms' surplus.[112] Hence, the welfare effects of price discrimination require a case-by-case analysis.[113] Furthermore, economics also shows that in some cases the effects of discrimination between consumers are not easily determined and may boil down to an assessment of the curvature of total demand for the products. An example can be found in spatial price discrimination.

The products of spatial competitors are differentiated in their physical location or in their products' attributes.[114] In an important class of spatial models and many real-world markets, the consumers to whom one firm would like to raise price – its strong market – are another firm's weak market to which it would like to lower price ('best-response asymmetry').[115] When this asymmetry exists, the equilibrium outcome of spatial competitors reacting to each other's discriminatory price reductions may be lower prices for all consumers and lower profits for all firms, compared to an equilibrium in which all firms offer uniform pricing to all consumers.[116] A necessary condition for 'competitive spatial price discrimination' (CPSD) to obtain is that each firm's strong market is at least one other firm's weak market and vice-versa. Thus, CPSD should be distinguished from another common sort of price discrimination that arises when firms agree on which consumer groups are strong markets and which are weak markets ('best-response symmetry'). This latter results in discrimination in the form of pricing strategies, such as movie discounts for students, early-bird dinner specials, or higher airfares for business travellers, and does not necessarily result in more intense competition than uniform pricing. Thus, when firms agree on which customers are strong markets (and

[112] Perrot (n 87) 168. See also Lowe who argues that while some consumers will pay a higher price and others will pay a lower price, collectively consumers will have to pay more to finance the extra profits obtained by the supplier and to cover the extra costs of supporting the price discrimination scheme. Therefore, consumer welfare will in general decline unless it can be clearly shown that otherwise the lower priced market(s) would not be served at all and that therefore the price discrimination will lead to an undisputable increase of output. It is only in the latter case that consumer welfare may actually increase; P Lowe 'Current Issues of E.U. Competition Law: The New Competition Enforcement Regime' (2004) 24 Northwestern Journal of International Law & Business 567, 583.
[113] Geradin and Petit (n 24) 5; Lage and Allendesalazar (n 29) 17.
[114] JC Cooper L Froeb DP O'Brien and S Tschantz 'Does Price Discrimination Intensify Competition? Implications for Antitrust' (2005) 72 Antitrust Law Journal 327, 328.
[115] Cooper Froeb O'Brien Tschantz (n 114) 328.
[116] Cooper Froeb O'Brien Tschantz (n 114) 328-329.

which are weak markets), all firms have an incentive to offer higher prices to the same group of customers.[117]

When firms agree on which markets are weak and which are strong, the effects of price discrimination are harder to determine. Since firms agree on the customers to whom they raise and lower price, competitive reactions to rivals may reinforce the initial responses of higher and lower prices. The net overall effect of price discrimination on welfare is determined by the degree to which prices increase for strong-market consumers and fall for weak-market consumers which in turn depends on the curvature, the own-price elasticity, and the cross-price elasticity of demand.[118]

From a competition law and policy perspective, apart from the possible incapability of competition authorities and courts to sufficiently assess the relevant parameters, such a situation would also bring the necessity to make trade-offs between different consumer groups. Even if all the price elasticities can be estimated accurately enough and, thus, the aggregate welfare effect of discrimination found to be positive because the negative effects on some consumers are outweighed by the positive effects on other consumers, economics and public policy may still be at odds. For example, if the welfare of the poorer consumers in a Member State or the welfare of one of the poorer Member States of the EC is reduced and this is outweighed by an increase in the welfare of richer consumers or a richer Member State, allowing discrimination under such circumstances may be much more controversial than the contrary scenario. Bearing in mind that the EC does not merely pursue economic objectives but also social ones, this may cause problems. Moreover, it must be remembered that guaranteeing ‘fair competition’ has been recognised as one of the aims in the preamble of the EC Treaty alongside steady expansion and balanced trade. In any case, this goes back to the question of whether competition law should merely aim at enhancing efficiency or can also aim to achieve other aims, such as ‘fairness’.

[117] Cooper Froeb O’Brien Tschantz (n 114) 329.
[118] Cooper Froeb O’Brien Tschantz (n 114) 343.

Although 'fairness towards consumers' is perhaps the most easily acceptable understanding of 'fairness' under Article 82EC within a 'consumer welfare standard', [119] it may clash with the objective of efficiency in certain circumstances. For example, the most extreme case of price discrimination, namely 'perfect price discrimination' being as efficient as perfect competition in maximising output and total welfare, nevertheless minimises consumer surplus as the producer reaps the whole surplus.

This possible conflict between efficiency and fairness has been argued in front of the UK Competition Commission during its investigation regarding the 'termination charges' of some mobile network operators (Vodafone, O2, T-Mobile and Orange).[120] The UK Competition Commission did not agree with Vodafone's argument that efficiency considerations had to be elevated above those of equity.[121] In the investigation, the termination charges of the named operators were found to be excessive and 'unfair'. Moreover, the alleged use of Ramsey pricing (which is an example of price discrimination in that prices are set in relation to elasticities rather than costs), where higher termination charges were used to subsidise customer acquisition costs and the (cheaper) price of outbound mobile phone calls, was deemed to produce adverse distributional effects.[122] It was found unfair that fixed-line customers who call mobiles should subsidise mobile phone subscribers. [123] The Competition Commission held that Ramsey pricing [124] might be thought to lead to

[119] Fairness in competition law can be interpreted as 'fairness to competitors', that is, fair behaviour towards one's competitors [e.g. Kroes (n 92) 3]. It can also be understood to mean 'fairness to customers', that is, the protection of customers from unfair treatment by the dominant firm (J Kallaugher 'Recent Developments under Article 82' Speech at IBC Brussels 7 November 2003 can be found at http://www.lw.com/resource/publications/_pdf/pub867_1.pdf, 18). A third view is that fairness in competition law appears in both horizontal and vertical relations and thus includes competitors and customers/consumers [Gerber (n 91) 2].

[120] 'Vodafone, O2, Orange and T-Mobile: Reports on References under section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O2, Orange and T-Mobile for terminating calls from fixed and mobile networks' 2003 can be found at http://www.competition-commission.org.uk/rep_pub/reports/2003/475mobilephones.htm#full. A 'termination charge' is a wholesale charge made by one telecommunications operator to another for connecting calls to a phone on its network, ibid [2.2].

[121] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.514].

[122] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.400].

[123] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.399].

[124] Although economic theory states that in competitive markets, prices will be set equal to marginal costs, it is also recognised that where there are fixed or common costs to be recovered, setting price equal to marginal cost would leave firms making losses. To cover these costs, prices need to rise above marginal costs and one approach is to require less price-sensitive customers or products for which demand is less elastic to bear a greater proportion of the common costs and more price-sensitive customers or products for which demand is more elastic to bear a smaller portion of these costs. This

distributional unfairness since fixed-to-mobile and off-net callers – whose demand is thought to be relatively price-inelastic – would pay for mobile call termination well in excess of the costs which their calling activity causes the mobile network operators to incur.[125] This is not only an instance of the practice of discrimination between consumers being scrutinised by the competition authority of a Member State and being found against public interest,[126] but also an example of fairness considerations playing a prominent role in such a case.

Moreover, it also points out the trade-off issue. One of the arguments of the mobile network operators in that case was that because most people had a mobile phone, what they lost in high termination charges they gained in low access and outgoing call charges.[127] OFTEL countered that although these people may be the same in some cases, there was a significant number of people for whom the adverse effect could be important.[128] Even if the proportion of the population adversely affected was quite modest, for example around 10%, this would be a large amount of people (around 5 million). Moreover, OFTEL believed that the people most adversely affected were those without a mobile phone – around 15% of the population – and this group had a disproportionate number of elderly and low-income people in it. The Competition Commission held that it was not necessary to decide whether fixed line-only or mobile-only customers would be the more advantaged or disadvantaged by a price control on termination charges.[129] All those who have both a fixed line and a mobile phone would suffer a detriment to the extent that they use their fixed line instead of their mobile phone to call a mobile phone or make more off-net calls to mobiles than they receive. The group of payphone users who called mobiles but did not own mobile phones

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pricing structure is sometimes referred to as 'Ramsey pricing'; Vodafone, O2, Orange and T-Mobile Report (n 120) [2.214].

[125] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.510]. In any case, the Competition Commission found that the mobile network operators currently did not [2.434] (except possibly for time-of-day variations) and would likely not [2.446] set Ramsey prices as regards termination charges.

[126] Each mobile network operator was found to have a monopoly of call termination on its network; Vodafone, O2, Orange and T-Mobile Report (n 120) [2.147].

[127] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.390].

[128] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.391].

[129] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.399].

themselves were also found to contribute unfairly to funding the mobile network operators' customers through high termination charges.

The Competition Commission explicitly held that although the investigated pricing structure may, in theory, be an efficient way to recover fixed and common costs, there are other considerations that it believed necessary to take into account in assessing whether a particular pricing structure operated in the public interest.[130] One of these other considerations was whether the pricing structure was *equitable* as among different telecommunications users.[131] What would have been the outcome of this case had it occurred in the EC remains debatable but there is a high probability that it would have been different under an approach excluding 'fairness' as an objective.

In a similar case, the Czech Republic Supreme Court affirmed the national competition authority's decision of fining Eurotel – the third largest Czech mobile operator – around €1.6 million for charging its mobile phone users a higher price for calls made to Èeský Mobil (CM) than T-Mobile.[132] Even more interestingly, the Swedish Competition Authority lodged an action against TeliaSonera – the Swedish incumbent telecoms operator – for abusing its dominant position by selectively targeting customers who have left the company for a competing operator by offering them advantageous terms if they returned to TeliaSonera. The terms aimed at enticing customers back to TeliaSonera included a reduced reconnection fee and reduced prices on low-cost calling plans.[133]

In another case, the UK Competition Commission found the practice of geographical price discrimination of some supermarkets which consisted of

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[130] Vodafone, O2, Orange and T-Mobile Report (n 120) [2.402].

[131] Nevertheless, the Competition Commission found that the data is insufficiently robust by itself to support conclusions leading to action as regards the distributional arguments. Yet, it held that the fixed network operators' customers unfairly bore the costs of the distorted pricing structure and this was an important element of the argument that action should be taken to reduce the termination charges; Vodafone, O2, Orange and T-Mobile Report (n 120) [2.428]. For the judicial review judgment upholding the Competition Commission's decision see *R (on the application of T-Mobile, Vodafone, Orange) v The Competition Commission* [2003] EWHC 1566 Admin, particularly [120]-[124].

[132] P Nosek I Šimeček and KŠ Balaštík 'Current Developments in Member States: Czech Republic' (2006) 2 (1) European Competition Journal 195, 198.

[133] M Johnsson 'Current Developments in Member States: Sweden' (2006) 2 (1) European Competition Journal 253, 255.

charging lower prices to consumers in some localities to be against public interest.[134] As another example of scrutiny of discrimination between consumers, the practice of varying prices in different geographical locations in the light of local competitive conditions, such variation not being related to costs as carried on by some supermarkets was found to distort competition.[135] The conduct, when carried out by Safeway, Sainsbury and Tesco, who had market power, operated against public interest because their customers tended to pay more at stores that did not face particular competitors than they would if those competitors had been present in the area.[136] The practice distorted competition in the retail supply of groceries in that it tended to focus some element of price competition into localities where particular lower-priced competitors were present and away from other areas, and contributed to the position that a majority of grocery products were not fully exposed to competitive pressure.[137] The Competition Commission held that

> [t]o the extent that consumers who shop in each of these supermarket fascias pay more for their groceries in some areas than in others, and to the extent that cost variations do not account for the differences, the practice has obvious adverse effects because it discriminates between different consumers. Some consumers pay more than they otherwise would, but only because certain competitors are not present in their area.[138]

It is striking that the Competition Commission reached this decision despite its recognition that some prices were set in response to regional and local factors such as average local incomes or local customer price sensitivity.[139] In other words, lower prices in the low-income areas were nevertheless found to be against the public interest merely because they did not reflect costs,

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[134] 'Supermarkets: A Report on the supply of groceries from multiple stores in the United Kingdom' 2000 [1.6] can be found at http://www.competition-ommission.org.uk/rep_pub/reports/2000/446super.htm#full

[135] Supermarkets (n 134) [1.6].

[136] Nonetheless, recognising that it is unusual, the Competition Commission did not recommend any remedies for the identified adverse effects of this practice in the light of the overall finding that the market is generally competitive; Supermarkets (n 134) [1.8].

[137] Supermarkets (n 134) [2.406].

[138] Supermarkets (n 134) [2.407]. The Competition Commission found that only those supermarkets having the largest market shares at the national and regional levels, and with a large number of stores of significant size, were likely to have sufficient market power such that their actions would be capable of operating against the public interest. Thus, the practice was found to clearly operate against the public interest when practiced by a major party; ibid [2.328], [2.408].

[139] Supermarkets (n 134) [2.403].

although uniform prices would have resulted in low-income groups paying higher prices.[140]

What these national cases signify is that, once it is realised that Article 82EC is also applicable to business-to-consumer conduct, similar cases are bound to occur at the EC level as well, bringing with them the risk of prohibiting discrimination which may actually be welfare enhancing. In other words, telecommunications operators, supermarkets, transport operators, petrol stations and so on may be challenged by consumers who believe to have been disadvantaged by their discriminatory pricing structures. Indeed, a condemnation of Ramsey pricing, for example, has already occurred at the EC level in *British Leyland* where it was held that the different fees charged by British Leyland for conformity certificates allegedly depending on whether the applicant was a dealer or a private individual was abusive.[141] The difference was not based on the cost, but on the consideration that the trader who was carrying out a transaction for gain could be required to pay a higher fee. In other words, British Leyland was charging a different fee depending on the willingness to pay of the customers, that is, the elasticity of demand. However, this was not deemed legitimate by the ECJ.

Another implication of including consumers in the scope of Article 82EC is a possible increase in the enforcement of the provision. Not only could there be a rise in the complaints to the EC Commission or national competition authorities by consumers, as the national examples above hint at, but a possible increase in private litigation is also very likely. Unhappy consumers being discriminated against may instigate cases against seemingly big companies in search of damages. The reason that such enforcement has not yet occurred could be that, reinforced by the lack of class actions, private enforcement has so far not been an important part of EC competition law enforcement in general. On the contrary, the enforcement of the US

[140] The Competition Commission states elsewhere in the Report that '[i]f costs vary on a regional basis, then uniform pricing implicitly entails consumers in low-cost areas cross-subsidizing consumers in high cost areas. This may imply a socially undesirable redistribution of income from low- to high-income areas (if low-cost areas coincide with low-income areas).'; Supermarkets (n 134) [7.129].
[141] Case 266/84 *British Leyland plc v EC Commission* [1987] 1 CMLR 185, [29].

Robinson-Patman Act, for example, has mainly been by way of private actions.[142] For example, one wonders what would have been the outcome if the UK consumers claimed from Tesco damages consisting of the difference between what they paid at the higher-priced stores and what they would have paid at the cheaper-priced stores. The consequences and welfare effects of such increased litigation would mainly depend on the merits of the cases and may result in socially wasteful over-intervention. Moreover, given that economics demonstrates ambiguous welfare effects and these effects may be dependant on demand characteristics, it may not be possible for the courts to overcome the technicalities involved to reach a decision in conformity with an effects-based approach.

4 Reconciliation with Economics

When taking everyday price-related decisions, undertakings should be able to assess whether their practices fall foul of Article 82EC with sufficient certainty. After finding that discrimination in business-to-consumer transactions can breach Article 82EC as the law currently is and there are some legitimate reasons for it to do so, the ultimate concern appears to be the reconciliation of this with economics. This is because an outright ban on discrimination between consumers is not justified without a consideration of its effects on welfare. In other words, it must be ensured that competition law only forbids discrimination that is harmful to consumer welfare and does not prevent discrimination that is welfare-enhancing.

At first glance, the most plausible way of doing this appears to be the 'objective justification' defence by which the dominant undertaking can prove that its conduct does not constitute abuse. Moreover, as mentioned above,[143] in many cases the Commission and the Courts have implicitly or explicitly stated that any *differential* treatment of trading parties should be objectively justified by the dominant undertaking to escape the prohibition of Article 82EC. Nonetheless, the understanding of this defence in the EC Discussion Paper raises problems for such a finding. This is because the EC Discussion

[142] WE Kovacic 'The Modern Evolution of U.S. Competition Policy Enforcement Norms' (2004) 71 Antitrust Law Journal 377, 413-414.
[143] See text around n 13.

Paper – which is the only Community document elaborating on the issue in detail – states that there are two types of objective justification; first, the 'objective necessity defence' and second, the 'meeting competition defence'.[144] For the first type of objective justification, based on objective factors that apply to all undertakings, conduct must be necessary in that without it the products concerned cannot or will not be produced or distributed in the market.[145] In other words, conduct must be indispensable. As for the second type of objective justification, conduct should be a response to low pricing by others; the aim should be to minimise short run losses resulting directly from competitors' actions.[146] Conduct must again be indispensable.

The implication of this is that if the Commission adopts the same understanding of objective justification for discriminatory abuses as well, discrimination between consumers by a dominant undertaking can hardly be defended by an 'objective justification', since it will seldom be 'indispensable'; the undertaking can always price uniformly.[147] The perverse result of this can be that although discrimination could increase consumer welfare as opposed to uniform pricing, the undertaking would not be able to defend such a practice merely because it was not an 'indispensable' action. Thus, objective justification as interpreted by the Commission would not save welfare-enhancing discrimination from the prohibition of Article 82EC.

Another possible defence elaborated on by the Commission in the Discussion Paper is the 'efficiency defence'; the undertaking can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition.[148] The dominant undertaking must be able to show that the efficiencies brought about by the conduct outweigh the likely negative effects on competition resulting from the conduct and therewith the likely harm to consumers that the conduct might otherwise have.[149] Nevertheless, the

[144] EC Discussion Paper (n 5) [78].
[145] EC Discussion Paper (n 5) [80].
[146] EC Discussion Paper (n 5) [81].
[147] One exception to this can be thought as geographical price discrimination in cases where the different conditions in different geographical areas objectively necessitate different terms to be applied in order for all markets to be served.
[148] EC Discussion Paper (n 5) [77].
[149] EC Discussion Paper (n 5) [79].

efficiency defence understood as such does not serve the purpose here either since for the defence to be applicable, conduct must first of all cause likely harm to consumers. The defence is not appropriate since discrimination which arguably enhances consumer welfare would not be likely to harm consumers.

What the inapplicability of these defences shows is that the types of discrimination found to be potentially consumer welfare-enhancing according to economics should not be found abusive to begin with. In other words, the assessment should be done in the definition and finding of 'abuse'. For example, if price discrimination increases output by sales to consumers who would have been left out of the market under uniform pricing, and on aggregate consumer welfare is increased as a result, then this should not be an 'abuse'. This should be deemed 'legitimate' or 'normal' competition and the undertaking should not be punished for increasing both consumer and total welfare merely because its practice was not 'indispensable'.[150] The same would be true for discrimination aimed at covering fixed and common costs of the undertaking by expanding output. Thus, the dominant undertaking should be able to prove that discrimination increases output as this is the minimum (necessary but not sufficient) condition for discrimination to increase consumer welfare. The comparative benchmark would be the case under uniform pricing.[151] Since a dominant undertaking discriminating between consumers must be doing this knowingly and for a purpose, it must have a strategy that it can prove not to be welfare-decreasing when faced with an allegation of abuse. Even when it has no purpose other than maximising its profits, so long as this does not cause a loss of consumer welfare compared to uniform pricing (and does not have foreclosure effects), it should not be deemed abusive.

[150] For the argument that *efficiencies* should be included in the assessment of whether competition is 'normal', that is 'competition on the merits' or not eee E Rousseva 'The Concept of "Objective Justification" of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?" (2006) 2 (2) The Competition Law Review 27, 68-69.

[151] According to the CFI, in order to be lawful, the protection of the commercial position of an undertaking in a dominant position must be based on criteria of economic efficiency and consistent with the interests of consumers; Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, [189].

Although this approach to an extent ignores the abovementioned[152] trade-off issue in that *some* consumers may be paying higher prices than they would under uniform pricing as a result of discrimination, the only objective assessment in conformity with legal certainty is to look at consumer welfare in the aggregate. If discrimination results in *some* consumers being exploited and these are consumers worthy of more protection than the ones benefiting from discrimination, then that protection should be provided by other means, such as regulation. Thus, the trade-off problem is solved by choosing the welfare of the consumers in general. This is because if the undertaking's conduct is on the whole not harmful to consumers, then it should not be punished for having caused harm to *some* consumers. On the other hand, if its discrimination merely results in some consumers being exploited as compared to uniform pricing with no off-setting benefits to consumers as a whole, then this can be found abusive. Nonetheless, as long as there are no foreclosure effects, whether or not this is a problem that should be dealt with by competition law rather than, for example, consumer protection law or regulation, is debatable.

F Conclusion

This paper has sought to demonstrate that the ban on discrimination under Article 82EC is not limited to business-to-business transactions, but also covers direct discrimination in business-to-consumer transactions. Hence, a dominant undertaking applying dissimilar conditions to equivalent transactions which it enters into with different consumers can abuse its position and be punished for it if other conditions of Article 82EC are met.

Nonetheless, the implications of this finding cannot be easily categorised as desirable or undesirable from a policy point of view. One consequence of it is broadening the scope of Article 82EC and thus, the special responsibility of dominant undertakings. This brings along a serious possibility of over-intervention into the practices of private law entities threatening their freedom of contract, particularly because the practice is one with ambiguous welfare

[152] See text around n 118 and n 127.

effects according to economics. On the other hand, it is again this ambiguity that may justify the ban of discrimination exploiting some consumers. As a result, the competition authority may have to not only choose between fairness and efficiency, but also make trade-offs between the interests of different consumer groups. The middle ground – that discrimination is not to be found abusive when the undertaking can prove that it increases output compared to uniform pricing, increases aggregate consumer welfare and the authority cannot prove exclusionary effects – appears to be the appropriate solution.

With the reform of Article 82EC on the way, its reach must be recognised properly, and a coherent framework should be adopted to cover its whole scope accordingly. Realising that discrimination between consumers can also give rise to an abuse and elaborating on an approach in conformity with economic findings on discrimination would be a step towards such an application for the EC authorities, and as such increase legal certainty for the undertakings.

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