

International League of Competition Law - Congress 2019

Question A:

To what extent should competition law be concerned with differences in prices, terms and conditions and quality to different purchasers?

INTERNATIONAL DRAFT REPORT

International rapporteurs: Christophe Lemaire (Partner Ashurst LLP, Senior Lecturer Sorbonne School of Law, University Paris I) and David Sevy (Executive vice-president, Compass Lexecon)

This International draft report deals with Question A of the ILCL Congress 2019: *To what extent should competition law be concerned with differences in prices, terms and conditions and quality to different purchasers?*

It has been prepared on the basis of a questionnaire sent to national rapporteurs and on the contributions received from the following countries: Austria, Belgium, France, Germany, Hungary, Italy, Spain, Ukraine and United Kingdom. An additional report from Japan has recently been prepared. Although it was not possible to integrate it to this draft report, it will be analyzed and integrated to the final international report.

This draft report is divided into the following six main topics:

- I. Introduction
- II. The notion of discrimination in national / regional substantive competition legal framework
- III. The notion of discrimination in practice by competition authorities / courts
- IV. Objective justifications to discriminatory practice
- V. Objectives justifying to prohibit discriminatory practices
- VI. Future of the prohibition of discriminatory practices on a competition law perspective

I. INTRODUCTION

A. General background

The authors of Question A have used the word "differences" and not "discrimination" and their choice is welcome since the word "discrimination" has potentially a more negative sense or meaning than the word "differences".

From a general point of view, differentiation or discrimination can be defined as treating differently people, firms, or goods that are in a similar situation. In that sense, discrimination contraries the core principle of equality, and is therefore usually presented as a behaviour that has to be legally prohibited.

Within the European Union, the sanction of discriminatory practices has become a core principle in the objective of the realisation of an Internal market between Member States. In this perspective, European courts have at many occasions sanctioned Member States for having implemented measures having the effect to discriminate firms on grounds of their nationality. But discriminatory practices have also been encompassed by EU competition law provisions to address discriminatory practices implemented by firms themselves.

From a competition law perspective, discrimination can stem from two different kinds of practices:

- discriminatory practices aimed at excluding rivals (first line or primary line discrimination, which generate indirect harm to customers); and
- discriminatory practices aimed at treating differently customers or trading partners that are in equivalent situations (second line discrimination).

In the former case, the discriminating firm competes with those it discriminates and the discrimination may directly harm rivals. In the latter case, the firm is not present on the relevant market in which the discrimination is deemed to produce negative effects. This category of discrimination will directly harm the customers but not necessarily the competitors. It belongs to the on-exclusionary cases. In this category another distinction may be drawn depending on whether the customers/buyers are acting on a downstream market on which they compete (the discrimination may therefore affect their position on their market) or the customers are not competing between each other (for example because they are final customers).

The effect of discriminatory practices upon competition clearly depends on their nature. Indeed, whilst it is widely recognized that discriminatory practices aimed at excluding rivals are expected to harm the competitive structure of the market (e.g. excluding efficient competitors) and should accordingly be sanctioned and remedied (provided certain conditions are met), there is no equivalent consensus on second-line discriminatory practices aimed at treating differently trading partners that are otherwise in equivalent situations, because their effects are more ambivalent. Indeed, if those discriminatory practices tend on the one hand to be exploitative, appropriating more of the surplus of the consumer to the benefit of the firm and have been

analysed by some jurisdiction as anticompetitive practices, they may also be a factor of economic efficiency and welfare.

According to economic principles, price discrimination can in many circumstances bring significant efficiency benefits and increase social welfare. It does so by increasing total market output, relative to a situation in which discrimination is prohibited, i.e. a situation with uniform pricing in respect of customers in otherwise identical situations, by expanding sales to customers or markets that would not be served under uniform pricing. By expanding output, price discrimination can offer an effective means for a supplier to cover its fixed costs of production. It allows to address customers with a large willingness to pay for the goods or services considered and a limitedly elastic demand but also customers with a lower willingness to pay and highly price elastic demand – while the latter customers may be excluded from consumption under uniform pricing.

We note also that price discrimination can contribute to prevent tacit or explicit collusion between competitors, by making it more difficult to detect deviation from the collusive agreement if firms can offer secret discounts to their customers.

However, it is also the case that discrimination can harm consumer welfare (and harm trading partners) when dominant firms use it to exercise market power by indulging in exploitative conduct through e.g. personalized pricing or when discrimination distorts competition between trading partners in downstream markets.

Therefore, whether and in which circumstances discrimination would represent a competition law infringement and should be prohibited has fuelled an intense debate amongst competition law practitioners and scholars. Discrimination stands at the border between protection of the competitive structure and the protection of trading partners and/or consumers. While the US competition law doctrine has focused mainly on the first aspect, European courts and authorities have also expressed an interest in the second aspect of consumer protection.

B. Selective introduction to the economic analysis of price discrimination

(a) Principles

Economic theory distinguishes three main forms of price discrimination¹:

- *First degree* (or perfect) price discrimination, whereby prices are set at customers' willingness to pay, thus at the highest price that a customer is willing to pay to purchase the product. Perfect price discrimination is implementable only if the supplier knows or is able to learn the customers' willingness to pay.
- *Second degree* price discrimination, whereby a supplier offers a menu of different prices/tariffs amongst which customers self-select. In this framework, customers are usually differentiated based on their use and/or valuation for some attribute of the product or service on offering, as given by their specific consumption profiles, their

¹ See Tirole, J., 1988, *The Theory of Industrial Organisation*, MIT Press, Chapter 3.

preferences for the present (discounting factor), their valuation of quality, their appetite for add-on services, etc. The offerings displayed in the menu differ in those dimensions as well, and customers select the offering that best meet their preferences and needs.

- *Third degree* price discrimination, whereby a supplier offers charges different prices to different groups of customers which are identified based on observable and verifiable customer characteristics, such as age, gender, geographical location, whether this is a first purchase with the supplier (etc.).

While the above notions of discrimination can be understood in a static sense, discrimination can be dynamic as well, for instance when prices are adjusted based on the past history of purchases of customers.

These different forms of discrimination can apply in a variety of settings, namely:

- To market situations in which a supplier holds a monopoly or to the contrary in which several suppliers compete with each other.
- In respect of prices charged to customers that are in competition with the supplier (case of *primary line* discrimination) or to customers that are not in competition with the supplier (case of *secondary line* discrimination).²
- They also apply to (secondary line) situations in which customers are end customers, hence in the context of B2C transactions, or in contexts in which these customers are intermediate customers (B2B transactions) that also compete with each other.

These different notions of price discrimination differ (and apply differently) depending on which customer characteristics are observable or not. In the case of second-degree price discrimination, the transactions are intrinsically different from one individual customer to the other, because some of the product or service attributes, and/or some of the transaction attributes (such as the number of units purchased) will be used as a differentiating dimension in the menu of offerings proposed to customers. In the case of third-degree price discrimination, individual customers differ according to some observable dimension.

Henceforth, the economic notion of discriminatory pricing builds upon product – or transaction – level differences that may not be fully consistent with the legal qualification of discrimination. This is because it does not deal with different prices applied in strictly similar transactions to strictly similar customers, but rather deals with obvious departure from the law of one price that applies in textbook market examples. Economic price discrimination refers to different prices charged to customers that differ in some ways and/or in the context of transactions that have particular characteristics. It is often synonymous of similar items produced at identical marginal costs that are sold at different prices to different customers; conversely, selling different items at different prices when these items have been produced at different costs may not provide evidence of discriminatory behaviour.

² More of a legal than an economic way to characterize discriminatory behaviour.

Notwithstanding the above, the main findings of the economic literature are helpful to understand the welfare properties of discrimination in a legal sense.

There are necessary conditions for price discrimination to be implementable by a supplier.

- This supplier needs to enjoy some degree of market power and not be merely a price-taker in a (perfectly) competitive market: this supplier needs to be able to charge different prices to different customers as part of the normal course of transactions in this market.
- The products and services cannot be resold by one customer to the other, i.e. there cannot be arbitrage in this market because of product characteristics or contractual constraints. This prevents customers paying low prices to purchase on behalf of and resell to customers facing higher prices, thereby defeating the latter.

Discrimination between customers need not be a matter of prices alone. It could pertain as well to non-price dimension of a product or services, for instance if different qualities of products or services can be offered to different customers (at constant price otherwise). Yet, the main insights with regards to price discrimination tend to carry over to situation of transaction and/or competition with non-price variables. We thus mainly discuss discrimination in price terms in what follows.

The economic impact of price discrimination can be measured in terms of social welfare or customer welfare, which both relate ultimately to efficiency, as measured by the level of prices relative to production costs. In this setting, price discrimination enhances efficiency if it brings lower (average) prices and larger output compared to a situation in which discrimination is banned.

(b) Impact of discrimination in a monopoly situation

Taking the example of second-degree or third-degree price discrimination and reasoning in monopoly situation, the overall impact of price discrimination results from two conflicting effects

- A *market expansion* effect, as discrimination allows charging lower prices to customers with a lower willingness to pay, thus enlarging the scope of transactions. It thereby mitigates the usual monopoly inefficiency associated with some customers being excluded from consumption and resulting in a dead-weight loss.
- A *surplus appropriation* effect, as discrimination allows charging higher prices to customers with a large willingness to pay, thereby allowing the supplier to appropriate more of their surplus and potentially curtailing their consumption - in case each of those customers has an own price-elastic demand, as opposed to having a single-unit and/or price inelastic demand.

The overall efficiency effect of price discrimination by a monopolist thus results from the combination of a positive market expansion effect and a negative surplus appropriation effect. Since those effects conflict, the overall efficiency effect of price discrimination is ambiguous.

A decrease in total output, which results from the combination of an increase in the volume purchased by low willingness-to-pay customers and a decrease in the volume purchased by high willingness-to-pay customers is generally considered a symptom of an efficiency-decreasing price discrimination. By contrast, an increase in total output resulting from the same effects, can be, but is not necessarily, a symptom of an efficiency-enhancing price discrimination.

Some relatively recent academic research has clarified the circumstances in which third degree price discrimination increases welfare and output.

- Aguirre, Cowan and Vickers (2009)³ show that this depends on the curvature of the demand. Intuitively, the effects of price discrimination are more likely to be positive when the portion of the demand stemming from high willingness-to-pay customers is concave (so that an increase in prices does not affect very significantly the quantity purchased by those customers) while by contrast the portion stemming from low willingness-to-pay customers is convex (so that a moderate decrease in prices charged to those customers is expected to increase significantly the quantity they demand).
- Cowan (2016)⁴ analyzes further the specific models of demand that are more conducive to an increase in output and consumer welfare under price discrimination between different customer segments. He finds that welfare is higher under discriminatory pricing than it is under uniform pricing when demand functions are derived from logistic distributions with different means, and welfare and consumer surplus are higher with demands derived from a distribution related to the Pareto. He confirms that whether discrimination increases total output depends on demand being more convex in markets in which prices fall with discrimination than in those in which prices rise.

This academic work and related empirical research thus confirm that the impact of price discrimination in a monopoly setting calls for a case-by-case assessment and will depend on specific characteristics of the demand function.

In addition, they show that the impact of discriminatory pricing on *output* is an imperfect indicator of its *welfare* effect, as the circumstances in which discrimination enhances one or the other are not strictly the same.

In principle, there are different instruments and strategies by which discrimination can be achieved. While these may apply unevenly across different sectors, the broad properties of discrimination carry over to them.

Discrimination can be implemented by means of charging different facial prices to different customers or granting them different rebates on the same facial prices. Nevo and Wolfram (1999)⁵ study the role of coupons for breakfast cereals, which is a way to lower prices for certain customers. They find that shelf prices are lower when coupons are available, thus that

3 Inaki Aguirre, Simon Cowan And John Vickers, (2009). Monopoly Price Discrimination and Demand Curvature. *American Economics Review*, Vol. 100, No. 4, pp. 1601-1615.

4 Simon Cowan, (2016). Welfare-increasing third-degree price discrimination. *RAND Journal of Economics*, Vol. 47, No. 2, pp. 326-340.

5 Aviv Nevo And Catherine Wolfram, (1999). Prices and coupons for breakfast cereals. NBER *Working Paper No. 6932*.

both are complementary instruments to target low valuation/price sensitive customers and to increase volumes.

By construction, perfect price discrimination maximizes the profit of firms by extracting the whole surplus of customers. While difficult to achieve, its effects can nevertheless be approached by means of “simple” menus of two-part tariffs. Miravete and Röller⁶ show that, in the early stages of the US cellular telephone industry, a single two-part tariff could already achieve 63% of the potential welfare gains and 94% of the profits of a more complex fully non linear tariff.

Bundling is also a well-known strategy to discriminate amongst customers. When offering both stand-alone and mixed products, a firm can discriminate amongst customers depending on their preference for each product – and bundling is a device to expand market participation while increasing the customer surplus appropriation. A ban on bundling is by the same token an impediment to price discrimination. Crawford and Yurukoglu⁷ have studied the welfare effects of bundling in the US television market. They estimate a TV industry model against the current practice of bundling and simulate the impact of TV companies simply offering stand-alone (à la carte) channels. They show that consumer surplus is negatively affected if bundling is prohibited.

This research confirms that even with a monopolist and irrespective of the particular form a discriminatory strategy may take, it can be welfare enhancing. This conclusion gets starker in an competitive (oligopoly) setting.

(c) Impact of discrimination in an oligopoly situation

A relatively general result is that competition in the presence of price discrimination is more intense than it is without. A straight implication is that competition concerns with price discrimination are more warranted when a supplier holds a dominant position on a market than when several suppliers compete with each other, in which case an intervention against discrimination may be harmful.

A general intuition can be gained with a model of duopoly selling horizontally differentiated products⁸, with a demand made of heterogenous customers, some of whom value more (are closer to) the products sold by one firm while others value more (are closer to) the products sold by the other firm. Absent price discrimination, if both firms set uniform prices applicable to all customers, a firm’s profit maximizing prices trade off (i) large unit margins that can be achieved with customers that have stronger preferences for its products and will purchase from this firm even at high prices, and (ii) the additional volumes that could be achieved if setting more aggressive prices to acquire customers that have stronger preferences for the other firm. The former effect may dominate and lead firms to set prices that exploit their ‘captive’ customers as opposed to try capture customers over their rivals. If price discrimination is

6 Eugenio J. Miravete And Lars-Hendrik Röller, (2004). Competitive Nonlinear Pricing in Duopoly Equilibrium: The Early U.S. Cellular Telephone Industry. *CEPR Discussion Paper No. 4069*.

7 Gregory S. Crawford And Ali Yurukoglu, (2011). The Welfare Effects of Bundling in Multichannel Television Markets. *American Economic Review*, Vol. 102, No. 2, pp. 643-685.

8 Thisse Jacques-François and Xavier Vives, 1988, On the Strategic Choice of Spatial Price Policy, *American Economic Review*, 78: 122-137

allowed, by contrast, firms do compete for each customer separately and can set aggressive individual prices that lead to limited profits for these firms.

The proposition that price discrimination is synonymous of more intense competition can be generalized to many other industry settings and has received both wide theoretical and empirical support.

On markets in which firms do not necessarily perform the same client segmentation, Corts (1998)⁹ also finds that competition can be more intense and, as a result, firms can be worse-off under discriminatory pricing, than they are if price discrimination is not permitted. That means that unilateral commitments not to discriminate (e.g. through everyday low prices or no-haggle policies) can raise firm profits by softening price competition.

Price discrimination is obviously a poaching device, as it enables to charge lower prices to customers of rival firms while maintaining higher prices to its own customers. Discrimination can be achieved through switching inducement. Fudenberg and Tirole (2000) find that short term contracts lead to more and inefficient switching compared to long-term contracts.¹⁰

In B2B transactions involving contracts between e.g. upstream manufacturers and downstream distributors, allowing selective (secret) price cuts, in the form of secret contract renegotiation for instance, intensifies competition.¹¹ By construction, selective price cuts mean that price discrimination can be implemented. Conversely and has shown by Hart and Tirole (1990) and emphasized by Rey and Tirole (2007), vertical integration, insofar as it helps upstream manufacturers committing not to offer those selective price cuts to downstream distributors, can soften competition.

Another manner in which price discrimination can affect competition is through its impact on the likelihood of effective coordination between firms. Liu and Serfes (2007)¹² show that collusion becomes more difficult as the firms' ability to segment consumers improves – hence as third-degree price discrimination can be refined. Again, more price discrimination is synonymous of more intense competition. Helfrich and Herweg also find that collusion is harder to sustain (command a lower discount factor to be sustained) when price discrimination is allowed.¹³

From an empirical standpoint, price discrimination is generally associated with more intense competition. In the US airline industry, Borenstein and Rose¹⁴ show that the most competitive

9 Kenneth S. Corts, (1998). Third-degree price discrimination in oligopoly: all-out competition and strategic commitment. *RAND Journal of Economics*, Vol. 29, No. 2, pp. 306-323.

10 Drew Fudenberg And Jean Tirole, (2000). Customer poaching and brand switching. *RAND Journal of Economics*, Vol. 31, No. 4, pp. 634-657.

11 Hart Oliver and Jean Tirole, 1990, Vertical Integration and Market Foreclosure, Brooking Papers on Economic Activity ; Patrick Rey and Jean Tirole, 2007, Primer on Foreclosure, Handbook of Industrial Organization, Volume 3.

12 Qihong Liu and Konstantinos Serfes. "Market Segmentation and Collusive Behavior" *International Journal of Industrial Organization* Vol. 25 (2007)

13 Magdalena Helfrich and Fabian Herweg (2016) Fighting Collusion by Permitting Price Discrimination, with Magdalena Helfrich, *Economics Letters*, Vol. 145, 148-151.

14 Severin Borenstein And Nancy L. Rose, (1994). Competition and Price Dispersion in the U.S Airline Industry. *Journal of Political Economy*; Vol. 102, No. 4, pp. 653-683.

US airline routes feature larger price dispersion. With regards to medical instruments, Grennan (2013)¹⁵ finds that more uniform pricing works against hospitals by softening competition.

A relatively general presumption is therefore that price-discrimination applied by different firms competing with each other intensifies competition as compared to a situation in which only uniform pricing policies are permitted.

II. THE NOTION OF DISCRIMINATION IN NATIONAL / REGIONAL SUBSTANTIVE LEGAL FRAMEWORK

A. Statutory provisions dealing with discrimination in competition legal framework, as well as soft law provisions relevant for discrimination cases

Although all respondent countries' legislations contain legal provisions prohibiting anticompetitive agreements as well as abuses of dominant practices that are similar, some national legal frameworks present slight particularities, in particular due to editorial differences of legal provisions. In addition, several respondent countries mention in their respective national report the existence of other competition-related statutory provisions dealing with the concept of discrimination. Finally, soft law provisions have been mentioned in only two national reports.

(a) Similarity of all respondent countries' antitrust statutory provisions

As a preliminary point, it should be noted that out of the nine national reports covered by this international report, eight concern Member States of the European Union ("EU"), namely Austria, Belgium, France, Germany, Hungary, Italy, Spain and the United Kingdom.

It is therefore not surprising to find in the legislation of the latter provisions that are equivalent to Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), which respectively prohibit cartels and concerted practices between undertakings and abuses of dominant position¹⁶.

In addition, Ukraine (only respondent country not being a Member state of the EU) also has a legislation containing a prohibition of both anti-competitive agreements and abuses of dominant position¹⁷, namely the Law on protection of economic competition.

In each of the respondent countries, discriminatory practices can be grasped by both competition law provisions prohibiting cartels/anti-competitive agreements and abuses of dominant position, irrespective of whether they are primary line discrimination (aimed at excluding competitors) and secondary line discrimination (aimed at treating differently trading partners that are in equivalent situations) practices.

15 Matthew Grennan, (2013). Price Discrimination and Bargaining : Empirical Evidence from Medical Devices. *American Economic Review*, Vol. 103, No. 1, pp. 145–177.

16 In this regard, it should be noted that where competition authorities or national courts of EU Member States apply national competition law to anti-competitive practices which may affect trade between Member States, they shall also apply Articles 101 and 102 of the TFEU.

17 See Articles 6 and 13 of the Law of Ukraine on protection of economic competition.

In addition, one could note that in theory, these legal provisions are also able to apprehend discriminatory practices directly targeting consumers (even if such cases are rare in practice).

The question of how these practices are grasped by the competition authorities and national courts of the contributing countries will be discussed below.

(b) Editorial particularities of some respondent countries' antitrust statutory provisions

Although dealing with similar conducts, the antitrust statutory provisions of certain respondent countries present slight editorial differences with respect to the concept of discrimination, compared to Article 101 and/or 102 TFEU.

Indeed, while Article 101 TFEU provides a non-exhaustive list of the practices it covers, including in particular the application of "*dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*", the French and German legislations slightly differ as they do not contain such express reference to the notion of discrimination¹⁸.

Conversely, some EU Member States' legislations include details not provided for by Articles 101 TFEU and/or by Article 102 TFEU, thus clarifying the legal framework for the analysis of alleged anti-competitive practices and providing a greater legal certainty to undertakings. As an example, the Hungarian statutory provisions prohibiting anti-competitive agreements and abuses of a dominant position both specify that in relation to such practices, discrimination may include "*the setting of prices, payment deadlines, discriminatory sales or purchase conditions or the employment of methods which cause disadvantage to certain business partners in the competition*"¹⁹.

On this matter, we could also mention the German provision prohibiting abuses of dominant position which slightly differs from Article 102 TFEU as it extends the list of discrimination cases targeted to the hypothesis where "*a supplier or purchaser of a certain type of goods or commercial services [...] demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation*"²⁰. Besides the fact that it addresses a specific case of discrimination, we note that the scope of this German law provision is not limited to the dominant undertaking's trading partner – contrary to Article 102 TFEU –, but rather applies to all "*similar purchasers in comparable markets*" (which we understand as being either a trading partner or a consumer).

(c) Other competition statutory provisions in several respondent countries' legislation

18 See Article L. 420-1 of the French commercial code and Sec. 1 of the German Act against Restraints of Competition (GWB).

19 See Sections 11 (2) g) and 21 g) of the Hungarian Competition Act.

20 See Sec. 19 (2) GWB. One should mention that under German law, such provision can also cover cases of discrimination against consumers.

Some respondent countries competition legislations target wider unilateral practices than the one grasped by Article 102 TFEU, through a specific definition of the concept of dominance. These more stringent rules than those of the EU provision are admitted by the European law itself²¹.

As an example, the Austrian and German legislations respectively enshrine the concepts of "relative dominance"²² and "relative market power"²³, which are considered sufficient for the prohibition of abusive practices to be applied. This broad view of the concept of dominance allows the Austrian and German legislations to consider, in addition to discriminatory practices implemented by an undertaking holding a dominant position on a given market, practices of this nature implemented by an economic operator vis-à-vis one of its suppliers or one of its distributors/customers who depends on it, in the sense that it does not have an equivalent solution to that proposed by the said operator²⁴.

In addition, to deal with such practices, both Belgium and France refer to the concept of the abuse of economic dependence: in Belgium, it allows the enforcement of Article 102 TFEU and its equivalent against non-dominant undertakings with "significant market power"²⁵, in France, such abuse is prohibited where it is likely to affect the competition functioning or structure²⁶.

In this respect, one should note that Spain also sanctions certain cases of abuse of economic dependence (when related to pricing discrimination). However, such sanction is laid down by another body of law than the competition one, namely unfair commercial practices²⁷, as we will see below.

The concept of abuse of economic dependence is thus a perfect demonstration of the fact that discriminatory practices could sometimes be approached from a competition law perspective or from the perspective of other bodies of rules, which could pursue different objectives from those assigned to competition law.

21 See Article 3 (2) of Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty : "*Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings*".

22 Pursuant to Section 4 (3) of the Austrian Cartel Act, an undertaking is deemed to be dominant if it has a predominant position in relation to its competitors, customers, or suppliers, which is the case when the latter are obliged to maintain business relations with the dominant company to avoid serious economic disadvantages.

23 According to Sec. 20 (1) GWB, undertakings have a relative market power "*if small or medium-sized enterprises as suppliers or purchasers [...] depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist*". Such provision also covers cases in which small or medium-sized enterprises are dependent on manufacturers of brand products because the market has the legitimate expectation that these products are part of a complete range of products.

24 In this regard, it should be noted that a concept close to the Austrian and German ones is applied in Hungary in the retail sector (see Hungarian Trade Act), where a retailer deemed to hold "significant market power" towards its suppliers (according to several criteria such as the generation of a defined turnover, the holding of a one-side bargaining position vis-à-vis a supplier, market shares, etc.) must not implement certain practices which are prohibited to it, such as undue discrimination. Even if this concept of "significant market power" is not enshrined by competition law, the Hungarian Competition Authority may apply the rules of the Competition Act to such cases

25 See Law of 4 April 2019 amending the Belgian Code of Economic Law.

26 See Article L. 420-2 of the French Commercial Code.

27 In Spain, the most relevant legal framework to sanction discriminatory practices stems from the Spanish Act on Unfair Competition and not the Spanish Competition Act which contains equivalents to Articles 101 and 102 TFEU.

(d) Only two respondent countries with relevant soft law provisions

Regarding soft law, although it could help undertakings to identify and prevent discriminatory practices (as do decisional-making practice and case-law), only two countries mentioned having soft law provisions in their report: Austria, where the Austrian Federal Competition Authority had published a "*Fairness Catalogue for Enterprises – Point of view for Corporate Good Behaviour*" aimed at providing guidance on the way to proceed when facing an unfair business practice, and Hungary, where the Hungarian Competition Authority publishes yearly Position Statements regarding important findings issued in connection to discriminatory practices.

B. Other complementary provisions expressly covering the issue of discrimination with respect to commercial practices

Beyond rules pertaining to competition law, in several respondent countries, discriminatory practices are framed by legislative provisions belonging to other bodies of rules, in particular related to unfair or restrictive practices, as well as to consumer protection.

(a) Statutory provisions related to unfair or restrictive commercial practices

As seen above, in Spain, the notion of abuse of economic dependency is addressed by the Spanish Unfair Competition Act (and not the Spanish Competition Act), which sanctions discriminatory commercial practices that are not covered by the prohibition of anticompetitive agreements or abuses of dominant position. Such Act also apprehends other unfair commercial practices dealing with the concept of discrimination, notably by precluding any unjustified discriminatory treatment of consumers in terms of prices or other sales conditions²⁸.

In several other respondent countries, discriminatory practices are also framed by legislative provisions aimed at protecting fairness in commercial practices. This is notably the case in Austria²⁹, Belgium³⁰, France³¹ and Ukraine³².

In Hungary, the concept of fairness in economic competition has even been set up as a constitutional principle by the Hungarian Fundamental Law, which states that the State shall "*ensure the conditions of fair economic competition*"³³.

28 See Article 16 (2) of the Spanish Unfair Competition Act.

29 See §1 of the Austrian Unfair Competition Act, which includes a general prohibition of unfair commercial practices: "*Anyone who in the course of business resorts to an unfair commercial practice or another unfair practice, which is likely to distort not only insignificantly the competition to the detriment of enterprises [...] may be sued for a cease-and-desist order and in case of fault for payment of damages*".

30 See article VI.104 CEL which prohibits any practice contrary to fair market practices, whereby an enterprise causes harm to the professional interests of one or more other enterprises.

31 See Article L. 442-1 of the French Commercial Code which deals with restrictive practices of competition and tends to protect fairness in business relationships (without expressly stating for non-discrimination). In this respect, please note that this regime has largely been reformed in 2019 (see below).

32 See Article 11 of the Law of Ukraine on protection from unfair competition.

33 The Hungarian constitutional protection against discrimination is further elaborated in the Hungarian Equal Treatment Act.

With respect to France, one should underline that until the entry into force of the Law on the Modernization of the Economy dated 3 January 2008 ("**LME Law**"), the French commercial code contained a *per se* prohibition of unjustified discriminatory practices based on tariffs and/or commercial conditions³⁴. Therefore, any unjustified discrimination against a trade partner was likely to be sanctioned, irrespective of whether it was implemented by a supplier being dominant or having a specific market power.

During the 2000s, various public reports noted that this *per se* prohibition contributed to limiting competition and encouraging price increases. As a consequence, they called for the removal of this prohibition. Such deletion intervened with the LME Law which, in parallel, recognized the principle of price negotiability in commercial relations between a supplier and a distributor.

As from the adoption of the LME Law, discriminatory practices in commercial relations could only be apprehended in the light of Articles 102 TFEU and L. 420-2 of the French commercial code which prohibit abuses of dominant position. In addition, from this date, the French law on restrictive practices of competition was considerably reduced until very recently. Indeed, in April 2019, an order adopted by the French Government refocused the list of restrictive practices on only 3 types of practices (compared to 13 previously), namely significant imbalance, advantage without compensation and sudden termination of established commercial relations³⁵.

Despite such evolution, the issue of how to deal with the concept of discrimination has been recently debated again. In particular, some wonder as to whether this concept could be addressed through one of the remaining restrictive practices, in particular through the notion of significant imbalance. Such evolution cannot be ruled out. Indeed, on 4 September 2019, the Paris commercial court considered that discriminatory practices implemented by Amazon contributed (among other practices) to the qualification of the infringement of significant imbalance stemming from provisions of agreements concluded with marketplace's third-party vendors, for Amazon was fined EUR 4 million.

(b) Statutory provisions on consumer protection with respect to commercial practices

In some respondent countries, national competition authorities are endowed with special powers in order to ensure that commercial practices comply with specific rules protecting consumers against discrimination.

These rules sometimes include reference to unfair commercial practices, in particular those of discriminatory nature. This is the case, for example, in Italy where the Italian Consumer Code contains a series of provisions aiming at protecting consumers against unfair commercial

34 See Order No. 86-1243 of 1 December 1986 regarding the freedom of prices and competition.

35 See Order No. 2019-359 of 24 April 2019 recasting Title IV of Book IV of the French Commercial Code relating to transparency, restrictive practices of competition and other prohibited practices.

practices. In Italy, besides competition law, the Italian Antitrust Authority is also in charge of the application of the Consumer code. In that respect, the Authority has the power to inhibit the implementation of unfair commercial practices targeting consumers, eliminate their effects and impose administrative fines.

In other legislations, consumer protection against discrimination is enshrined in an independent way, without any reference to unfair commercial practices. As an example, in the United Kingdom, consumer protection regulations prohibit certain type of discrimination, such as those based on residence or nationality. Such regulations could be used by CMA (which is also responsible for consumer protection), where competition law rules cannot be effectively applied. On this basis, the CMA decided in October 2018 to launch enforcement action on consumer protection grounds in the online booking sector, after having conduct an investigation on the basis of competition rules.

In addition, one should note that in Germany, since 2017, the Federal Cartel Office has the power to carry out sectoral investigations in "*cases where the Federal Cartel Office has reasonable grounds to suspect substantial, permanent or repeated infringements of consumer protection law provisions which, due to their nature or scale, harm the interests of a large number of consumers*" unless another federal agency being competent³⁶. However, the Federal Cartel Office is not entitled to enforce consumer protection law in the event a violation of its provisions would arise from its investigation.

C. Other rules dealing with the concept of discrimination

Outside the competition and commercial legal frameworks, in many respondent countries, other provisions dealing with the issue of discrimination may have an impact on competition.

First, we note that in several countries including Italy and Hungary, the civil law imposes on undertakings having a monopoly (Italy) or a mere dominant position (Austria, Hungary) for a specific obligation to contract. This obligation sometimes arises explicitly from an obligation of non-discrimination, as is the case in Italy.

In this respect, another notifiable legislation is the Austrian Act on Local Supply, which provides an obligation to conclude for suppliers – even non-dominant – in hypothesis where the failure to supply is likely to threaten local supply or significantly affect the final seller's competitiveness on the market concerned³⁷. In this respect, we understand from the concerned national contribution that despite its title, this Austrian Act does not only concern undertakings involved in local supply.

Second, some national contributions mention the existence of reference to the notion of discrimination in national sectoral regulations. While not all these contributions are equally detailed in that respect, one can affirm that one of the common feature shared by all EU

³⁶ See Ninth Amendment to the Act Against Restraints of Competition by implementing Sec. 32e (5) GWB.

³⁷ See Articles § 1 (1) and § 4 (1) of the Austrian Act on Local Supply.

Member States' concern the rules adopted in the context of the opening up to competition of former monopoly sectors, such as energy and telecommunications.

In this respect, several respondent countries expressly recall that the liberalization of these sectors – implemented with the transposition of relevant EU directives – lead to the adoption of statutory provisions containing various obligations for dominant market players (sometimes identified in national provisions as being market players with significant market power), including non-discrimination towards market new entrants (see Hungarian, Italian and French reports).

Although the use of ex ante regulations has been essential to accompany and complete the process of the opening up of former monopoly sectors to competition, reading the national reports may sometimes suggest that such regulations are likely to show certain limits, and that it must therefore be fully complementary to ex post controls exercised by the competition authorities.

Third, several respondent countries mentioned in their national contributions rules stemming from the transposition of European texts, in particular the Geoblocking Regulation dated 28 February 2018³⁸ (in that respect, see the Austrian, Hungarian and French reports). Indeed, the latter, which refers to the concept of discrimination directly in its title, prohibits direct and indirect discrimination between EU customers based on their nationality, place of residence or place of establishment in cross-border transactions within the Union.

Finally, it should also be mentioned that some reports refer to the prohibition of discriminatory practices in the framework of public entities' interventions. As an example, the Spanish contribution mentions the existence of a national legislation prohibiting discrimination practices which could hinder market integration in administrative actions and public regulations³⁹. The Ukrainian report contains developments related to public procurement and specifically to the non-discrimination principle with which procurement procedures should comply, specifying that "*discrimination practices are one of the most widespread violations in the public procurement*".

In conclusion, we note that the concept of discrimination is apprehended by a multitude of legal provisions of different nature, including rules that are not included in the competition law body of rules. In this respect, it seems to us that while provisions prohibiting cartels and abuses of a dominant position could deal with both primary and secondary line discriminations, as well as with discriminatory practices targeting consumers, there seems to be a trend towards the development of other bodies of rules likely to address discriminatory practices.

38 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

39 See Law 20/2013 of 9 December 2013.

III. THE NOTION OF DISCRIMINATION IN PRACTICE BY COMPETITION AUTHORITIES / COURTS

A. Discriminatory practices sanctioned as abuses of dominance

(a) Identification of cases of discriminatory practices

Before going in the details of which requirements have been considered by competition authorities and courts to grasp discriminatory abuses, and what kind of practices have been sanctioned, the present report tries to propose a first quantitative analysis of discriminatory abuses in the jurisdictions of the respondents of the international report.

For the record, the following questions have been asked to international reporters.

1. *Does your competition courts/authorities have received complaints or investigated on their own initiative both "primary-line" and "secondary line" abusive discrimination conducts?*
2. *If yes, could you (i) indicate whether they reached any decision and (ii) provide us with figures (or best estimate) of the importance of these cases compared to the number of decisions that have been adopted on the basis of Articles 102 TFEU (or its equivalent under national law) by your national authority (and courts if any)?*
3. *When your competition authorities or courts have adopted specific decisions, could you indicate:*
 - *How many decisions give rise to sanctions? Could you distinguish between first line and second line discrimination?*
 - *Could you indicate the amount of fines that has been applied and whether the authorities/courts are more strict for one type of discrimination compare to the other one?*
 - *Did they impose specific injunctions or remedies in addition or in substitution of fines? If yes, could you describe the remedies that have been imposed (what kind of remedies, what was their objectives, etc...)?*

In a nutshell, it first appears from national reports that case law and decisional practice of courts and competition authorities does not contain a lot of cases dealing purely with discrimination. Rather, the cases often rely on different sorts of abuses, and among them, discrimination. But even in that case, the sanction of discriminatory practices seems rather rare in comparison with the sanction of other kind of abuses.

For example, in Austria, the cartel court sanctioned only one undertaking in a case referring to discrimination (on a total of 4 decision fining an abuse of dominant position since 2002). The number of cases dealing with discriminatory issues is slightly higher when looking at private

enforcement (defined as proceeding before the Cartel court and the Civil court for which orders can be imposed but not fines) since five cases have been listed.

In France, between 2002 and 2017, decision on discriminatory conducts represented only one quarter of sanction decisions regarding abusive conducts (12 out of 55). Again, in Ukraine, since 2018, the competition authority sanctioned 13 violations of discriminatory abusive conducts out of 216.

It should secondly be noted that among the cases dealing with the notion of discrimination, the segmentation between primary line and secondary line is most often unclear, but in fact, it seems that most cases concern primary line discrimination. For example, in France, among 32 decisions on discriminatory abuses, 28 concerned exclusionary abuses. The same is not always true if we solely rely on complaints. In Belgium, for example, most of the complaints were in relation with the secondary line discrimination.

Third, regarding the amount of the fine, we observe from national reports that discriminatory practices have not been the most severely sanctioned but some authorities have reached higher rates of fines than others. For example, France imposed between 2000 and 2019, a total amount of EUR 270 million (with an average amount of EUR 19 million) – all concerned exclusionary abuses (no fine has been imposed on pure exploitative abusive discrimination) – and the UK, a total amount of GBP 171 million is reported in the national report, for both exclusionary and exploitative discrimination (being notice that the highest fines were for exclusionary discrimination and excessive pricing⁴⁰).

Fourth, we note interestingly that the way to end a discriminatory conduct is not identical in all jurisdictions. For example in France, in Spain and in the UK, many cases gave rise to a sanction (in France 14 out of 32). Most of the sanctions on grounds of discrimination are in fact forms of primary line discrimination. But in other countries (Belgium, Hungary), authorities have been more prominent to impose remedies (where the cases were not terminated). For example in Belgium, out of 16 complaints regarding discriminatory practices, 7 resulted in the imposition of injunction, interim measures or commitments. In France, although the majority of decisions resulted in fines, they usually also contained injunctions imposed on undertakings to modify their behaviour.

The injunctions, interim measures or commitments were most often the following:

- granting access to supply (with non-discriminatory conditions) ;
- ordering not to engage in an abusive behaviour ;
- put an end to an abusive behaviour in particular in withdrawing advantageous contract conditions or establishing a non-discriminatory policy ;

40 CMA, Flynn/Pfizer for GBP 89 million for excessive pricing (decision which has been overturned by the CAT) and GBP 50 million for Royal Mail imposed by Ofcom for exclusionary discrimination (currently under appeal before the CAT).

- enhance transparency and clarify rules and proceedings for conclusion of contract or to suspend contractual relationship ;
- better separation (in particular functional) between downstream services and upstream services to ensure non-discriminatory behaviour ;
- implementation of a competition compliance programme.

(b) Conditions to fulfil to identify a discriminatory abuse

With respect to the condition to fulfil so as to identify a discriminatory abuse, the following questions have been raised to the national rapporteurs :

4. *Under which conditions are discriminatory practices assessed by your national courts and authorities?*
5. *Can you give details on (a) the criteria applied by your national courts and authorities to establish the equivalence of the purchaser situations and transaction conditions (b) the tests used to assess the dissimilarity of transaction conditions? (Does that pertain to the nature of products supplied, their substitutability, the relation of prices to costs etc.)*
6. *Is the analysis of the abuse of discrimination prohibited by itself or do legal provisions and/or case law impose an analysis of the effects of the practice?*
7. *In the second case, do your courts and competition authorities appraise the effects of discriminatory practices?*
 - *Do they look at actual effects or potential effects?*
 - *What are the typical indicators used to demonstrate (actual) effects?*
 - *Has the assessment of the effects of the practice evolved over time?*

In all countries, the conditions to fulfil to identify a discriminatory form of abuse of dominance are threefold : (i) the situations and conditions are equivalent, (ii) these equivalent situations are treated differently and (iii) the unequal treatment results in a disadvantage in competition.

(i) *Similarity / equivalence of the situations / conditions*

It is generally admitted in the literature that the condition of equivalence of situations is assessed with respect with the basic functional or other similarity between the compared services/products, the similar context of the compared transaction or yet the proximity in time of the transactions.

All respondent countries answered in line with this analysis, by explaining that the equivalence is established by examining the comparability of contractual partners and whether services/products offered are comparable, which does not mean that they have to be identical but only comparable.

If it appears, at least in Germany, that it is not necessary that the compared undertakings are subject to the same conditions of competition, that they are similarly organized or of similar size, comparability of services/products seems rather to be assessed with respect with the interchangeability of the services/products from the point of view of the opposite market side which the discriminating player is a part of. The equivalence of transactions takes therefore account of several factors such as product characteristics, product cost, timing, different relevant markets, market structures, types of customers, and, as a consequence, depends largely on the characteristics of each case.

The French and the Belgian reports give some concrete examples of where situation can be considered as comparable or not :

- Situations were considered as comparable in a case where a supplier imposed unequal purchasing conditions to different commercial operators which ordered similar volumes and purchasing ranges⁴¹.
- Situations were on the contrary not considered as comparable in a case where :
 - a supplier of locomotives applied different conditions to commercial operators which contracted different services with the supplier (the rental of locomotives for one, the provision of global services for the other)⁴² ;
 - a supplier applied different conditions to commercial operators depending on whether those operators have to bear social costs⁴³ ;
 - there exists the commercial operators are in a different legal situation⁴⁴ ;
 - the differences in the different relevant markets, with a different market structure and different product mix allows for the application of different price or rebates⁴⁵.

(ii) *Unequal treatment of similar situations*

Once two (or more) situations have been considered as equivalent, the test applicable to identify a discriminatory abuse focuses on whether those situations are treated unequally.

41 French Competition Authority, Decision No. 10-D-39 of 22 December 2010 related to conducts in the sector of vertical road signaling.

42 French Competition Authority, Decision No. 12-D-25 of 18 December 2012 related to conducts in the rail freight transport sector, para 638 et seq.

43 French Competition Authority, Decision No. 09-D-02 of 20 January 2009 related to the request for interim measures by the Syndicat National des Dépositaires de Presse, para 84.

44 French Competition Authority, Decision No. 10-D-32 of 16 November 2010 related to conducts in the pay-TV sector, para 325.

45 Belgian Competition Authority, Decision no. ABC-2015-P/K-09-AUD of 25 March 2015, CONC-P/K-09/0002, Lampiris / Electrabel, paras 132-147; Decision 2011-P / K-15 of 29 April 2011, Freedom / Inbev, paras 39-43.

This assessment includes an analysis in terms of objective standards and essential characteristics of the prices charged and commercial conditions applied. It implies therefore an in-depth fact-specific assessment.

Belgian and French reports provides for some examples of unequal treatment of similar situations, which can be synthesised here as illustrations :

- An unequal treatment can for example be characterized :
 - where the threshold triggering the highest discounts is very high as compared to the average purchases and where there is a non-linear increase in discount rates with quantities ⁴⁶ ; or
 - when the bundling undertaking applies to itself a lower acquisition price for the upstream product than the price charged to competitors⁴⁷.
- However, no difference in treatment can be characterised where :
 - the dominant company invoices both parties on the basis of the same allocation criteria, which was proportional to their utilization rate of the service⁴⁸ ;
 - the dominant company applies different prices to similar transactions depending whether the contractual conditions were the result of a competitive process or not⁴⁹.

(iii) *Competitive disadvantage*

The condition of the existence of a "competitive disadvantage" has often been the most complicated one if one observe the developments of the notion with respect to the case law of the European Court of justice. In fact, the different contributions put into light the complicated issues that the condition of a competitive disadvantage can raise.

(A) Undertakings concerned

In accordance with the case law of the European court of justice, all national rapporteurs indicated that, for a discriminatory abuse to be characterised, the differentiation has to be applied between competitors. This is the case either way for primary line and secondary line discrimination since, in the first case the discriminatory practice occurs where a dominant company, which is also active in the downstream market, and discriminate against its rivals

46 French Competition Authority, Decision No. 10-D-39 of 22 December 2010 related to conducts in the sector of vertical road signaling.

47 French Competition Authority, Decision No. 05-D-58 of 3 November 2005 related to conducts in the sector of drinking water in Ile-de-France.

48 French Competition Authority, Decision No. 12-D-25 of 18 December 2012 related to conducts in the rail freight transport sector.

49 Belgian Competition Authority, Decision no. BMA-2018-V/M-28 of 3 September 2018, MEDE-V/M-18/0027, NV TECO / BVBA ABB Industrial Solutions.

and, in the second case, discrimination is implemented by a supplier to trading parties competing with each other.

Both Hungarian and German reports mention the fact that the actual existence of a trading relationship between the dominant market player and the action's addressee is not necessarily required as long as the latter could potentially become a trading partner. This would be the case for example where markets are opening to competition and where the dominant company is hindering market entry by imposing unfair conditions to new entrants. However, the application of specific provisions of the abusive discrimination to potential competitors does not seem to be consensual between all respondents countries. Indeed, the Austrian courts seems to consider that when a dominant undertaking is discriminating against a potential customer, the specific discriminatory abuse provision does not apply. Rather, such practices seems to be grasped by the general clause concerning abuses (in the EU, Article 102, first sentence)⁵⁰.

The question of whether competition law provisions shall apply to conducts implemented by dominant undertakings to final consumers finds its own limit when asking whether an unequal treatment to similar situations can be considered as abusive. Indeed, there is barely a chance that consumers actually compete with each other, and that they are put at a competitive disadvantage by means of the measure at stake. It seems however that some competition and courts have been led to sanction practices targeted at final consumers (see below).

(B) Competitive disadvantage – an analysis of the effects

The majority of respondents countries indicated that the prohibition of discriminatory abuse relies on an effect-based approach, rather than on a per se prohibition. As a consequence, National competition authorities therefore analyse the actual or likely effects of the abusive discriminatory practice on competition have to carefully weigh conflicting interests, when examining the alleged abusive conduct. Only the German Supreme Court have seem to require the occurrence actual effects (while all other jurisdictions make reference to actual or potential effects).

National legislative provisions does not give any clue of the nature of the effects that have to be demonstrated to sanction an abusive discrimination or the factors that have to be taken into account in the analysis of the effect of the conduct.

One can therefore draw the conclusion that the effect analysis is largely depending on the characteristics of the case at stake but also sometimes neglected, as the Belgian report points it out.

One can yet make reference to a case of the Hungarian Competition Authority, which terminated the case, saying that price discrimination is only prohibited if the business partners

⁵⁰ See Austrian report, case 16 Ok 1/12. The report refers to the refusal to supply towards potential contract partners. If therefore a dominant company has already entered into a contract with others, a discriminatory refusal to supply or enter into a business relationship with a suitable third party may result in an abuse of dominant position.

of the dominant company suffer harm leading to a decrease in consumer welfare⁵¹. In a case AMP, the Belgian Court of Appeal took into account the adverse competitive effects that conducts at stake could have. In particular, the Court considered the likely anti-competitive effects that the discriminatory practice would create between small and larger customers and the detrimental effect on investment and expansion opportunities, and, as a consequence, on the effects on competitiveness. The case seems also to show that a demonstration of an element of intention is not necessary when assessing the effects of the anticompetitive conduct, but also, quite importantly that the effects could not be negligible⁵².

This latter approach is equally shared by the Hungarian and the British reports. This latter point indeed out that, the OFT, in the framework of the discussion paper on Selective price cuts and fidelity rebates dated July 2005⁵³, recommended the application of the effects-based approach in order to consistently identify anti-competitive effects such as foreclosure effect but also, to provide safe harbours, so as to avoid an over intervention by competition authorities.

(c) Forms of "primary-line" discrimination prohibited as foreclosure abuse

With respect to primary line cases, the following questions have been raised to the national rapporteurs :

8. *What are the typical foreclosure behaviours that have been grasped under your national provisions (if any) sanctioning discriminatory practices (for example, price discrimination, quantity discrimination, discrimination in the access to an essential facility, etc)?*
9. *If these practices were also identified as specific types of abuses, such as rebates, refusal to deal, predatory pricing, etc, have your courts/competition authorities also relied on the tests applicable to these specific practices or only on the applicable test to discriminatory practices?*
10. *Do you consider that the analysis of the effects of discrimination abuses should follow or match the analysis of the effects of other types of abuses (often stricter)?*
11. *Have you met specific cases in which national courts/competition authorities assessed a discriminatory behaviour yet without resorting to specific discriminatory provisions (possibly resorting to other Art. 102 provisions), for instance because the legal framework was not sufficiently helpful or past case law was too scarce? (for example, in the Google Shopping case, the Commission, although it has considered that Google treated differently its competitors against its own services, did not rely on Article 102 (c) of the TFEU, but rather it sanctioned Google because of the leveraging effect its conduct had on another market).*

As indicated further above, primary line discrimination refers to discriminatory practices aimed at excluding rivals of the dominant company. It concerns therefore typically the case a

51 Hungarian Competition Authority, Case No. Vj-38/2005, *Lake Balaton Shipping*.

52 Court of Appeals Brussels, 29 May 2012, *Standaard Boekhandel / AMP*, *Jaarboek Marktpraktijken*, 2012, 1011, TBH 2012, TBM 2013, afl. 2, p. 194.

53 OFT *Selective price cuts and fidelity rebates*, Economic discussion paper, July 2005.

dominant company is also active on a downstream market and discriminate between its own downstream subsidiary (or equivalent) and the competitors of this latter.

Before going into the detail of the case law and the decisional practice of competition authorities, one should maybe first observe that, in addition to the fact legal provisions do not expressively make a distinction between primary line and secondary line discrimination, the same is applicable to the case law and decisional practice of each of respondent countries. Indeed, it is quite rare that a decision makes an express reference to that wording, but rather, the nature of the discrimination arises from the conduct itself.

In addition to this, one shall underline the fact that a number of decisions are actually dealing with both primary and secondary line practice. The Belgian case *Lampiris/Electrabel* is for example a good illustration of a mix of both first and secondary line discrimination. In this case, Lampiris alleged that Electrabel abused its dominant position by charging discriminatory prices by incorporating the value of gas emission allowance certificates (received for free from the Belgian market regulators) into its prices on the wholesale electricity market and not on the retail market. In addition, Lampiris was claiming that Electrabel was charging excessive pricing. The BCA made therefore an extensive assessment of the alleged price discrimination and excessive pricing as exploitative abuses. The BCA concluded that excessive process was not demonstrated. As regard discrimination between the different categories of clients (wholesale market and retail market) the BCA considered that they were not in an equivalent situation. As regard the discrimination between the prices charged by Electrabel to its subsidiary and to Lampiris, this should not be assessed on the basis of the exploitative abuse (i.e. discrimination) but on the basis of exclusionary abuse (i.e. margin squeeze and its potential exclusionary effects). After analysis the claim was rejected.

But if one wants focus on "pure" cases of first line discrimination, national rapporteurs indeed make reference to, for the decisions in which the alleged abusive conduct is explicitly considered as discrimination, many sort of conducts, the detail of which is given below.

The most current form of primary line discrimination in national case law or decisional practice probably consists in the application of prices, discounts, tariffs and other contractual conditions⁵⁴ (such as economical, technical conditions) structured in such a way as to give preference to certain contractors which are acceptable to the dominant undertaking, since they are linked to it by ties of stable cooperation, supply, group relations, or by means of an association⁵⁵.

54 Italian Competition Authority, A500A – Vodafone/SMS Informativi Aziendali and A500B – Telecom Italia/SMS Informativi Aziendali ; Italian Competition Authority, A357 – Tele2/Tim-Vodafone-Wind ; Hungarian Competition Authority, Case No. 108/2001, *Ócsa Funeral Company* ; Hungarian Competition Authority, TIGA ; Hungarian Competition Authority, Case No. Vj-14/2015, Balatoni Hajózási Zrt; French Competition Authority, Decisions No. 02-D-69, No. 07-D-28, No. 07-D-33, No. 09-D-02, No. 09-D-06, No. 09-D-15, No. 10-D-06, No. 10-D-32, No. 12-D-01, No. 12-D-22, No. 12-D-24, No. 12-D-25, No. 13-D-04, No. 13-D-05, No. 14-D-05 and No. 17-D-13 ; British ORR, EWS; British Ofwat, Bristol Water.

55 Hungarian Competition Authority, Case No. Vj-44/2007, *Industry Association of Győr*

One can observe here that in some cases, the application of worst economic or technical conditions to its internal division than to other player have provoked a margin squeeze⁵⁶, which then highlights the permeability of the first line discriminatory abuse with other types of abuses.

Indeed, the majority of other kinds of abusive discriminatory conducts aimed at excluding rivals actually takes the shape of other well-known types of abuses of dominance, but which are, for the cases at stake, assessed under the provisions of abusive discrimination. On the basis of national reports, one may make reference to:

- refusal to supply, in particular refusal to supply access to "essential facilities" to some competitors or to make the access more difficult to some companies compared with others⁵⁷, such as telephone infrastructures⁵⁸, energy infrastructures⁵⁹, railway infrastructures⁶⁰, areas of airport to carry out handling services, etc.
- margin squeeze⁶¹ or the implantation, by an incumbent operator, of price to its final customers that cannot be replicated by its competitors, due to the costs and the technical environments the latter had to support⁶²;
- rebates systems, such as, for example, discriminatory fidelity rebates when two buyers purchasing the same quantity of the same product pay a different price depending on whether they obtain exclusive supply from the dominant undertaking or diversify their sources of supply⁶³; or quantity rebates based exclusively on the volume of purchases made by its customers thereby resulting in the application to trading partners of different conditions to equivalent services⁶⁴; or discriminatory pricing depending on whether customers were able to hit mail volumes targets, thereby penalizing any competitor on the wholesale market that sought to compete⁶⁵
- tying and bundling⁶⁶;

56 Italian Competition Authority, A500A – Vodafone/SMS Informativi Aziendali and A500B – Telecom Italia/SMS Informativi Aziendali.

57 French Competition Authority, Decision No. 06-D-36 of 6 December 2006 related to conducts by civil undertaking Imagerie Médicale du Nivoret; Decision No. 11-MC-01 of 12 May 2011 related to the request for interim measures by Kiala France and Kiala SA in the parcel delivery sector; Decision No. 14-D-06 of 8 July 2014 related to conducts of Cegedim in the medical information database sector

58 Italian Competition Authority, A351-Comportamenti Abusivi di Telecom Italia.

59 Ukrainian Competition Authority, PJSC Poltavaoblenergo.

60 Hungarian Competition Authority, Case No. Vj-22/2005, *Hungarian State Railways*.

61 Italian Competition Authority, A500A – Vodafone/SMS Informativi Aziendali and A500B – Telecom Italia/SMS Informativi Aziendali.

62 Italian Competition Authority, A351-Comportamenti Abusivi di Telecom Italia.

63 French Competition Authority, Decision No. 07-D-08 of 12 March 2007 related to conducts in the sector of cement supply and distribution in Corsica.

64 French Competition Authority, Decision No. 03-D-09 of 14 February 2003 related to referral by Tuxedo related to conducts in the market for the press distribution on the public airport domain; Decision No. 09-D-04 of 27 January 2009 related to referrals by Messageries Lyonnaises de Presse against conducts of Nouvelles Messageries de la Presse Parisienne Group in the press distribution sector; Decision No. 10-D-39 of 22 December 2010 related to conducts in the vertical road signaling sector; Decision No. 13-D-21 of 18 December 2013 related to conducts in the French market for high-dose buprenorphine marketed in the city.

65 British Ofcom, Royal Mail.

66 French Competition Authority, Decision No. 05-D-58, drinking water in Ile-de-France.

- selective pricing⁶⁷, for example targeted to a specific area where a competitor is present⁶⁸; or
- predatory pricing⁶⁹.

When analysing discriminatory practices that are taking the shape of other kind of abuses of dominance, authorities can be led to apply the specific tests applicable to these specific practices. The French report gives some illustrations. For example, in a decision concerning fidelity rebates⁷⁰, the French Competition Authority selected two criteria showing the discriminatory nature of a rebate scale initially laid down by the Court of Justice of the European Union⁷¹. Further, in a decision concerning bundled rebates, the French Competition Authority assessed elements constitutive of a bundling practice to establish anti-competitive discrimination⁷². In another decision concerning predatory pricing, the French Competition Council recalled that the applicable test is the "cost test", which it therefore applied in this case⁷³.

(d) Forms of "secondary-line" discrimination prohibited as exploitative abuses

With respect to secondary line cases, the following questions have been raised to the national rapporteurs :

12. *What are the typical exploitative abuses that are meant to be captured through your national provisions (if any) sanctioning discriminatory practices?*
13. *What kind of exploitative discriminatory practices has been most analysed and/or sanctioned by your national courts/authorities?*
14. *Would you say that the developments of the digital economy, thanks to which is now easier to discriminate, especially because of the algorithms and prevalent personalized pricing, have added to concerns to discrimination as exploitative abuse? Have your national courts/authorities been more preoccupied or alerted with these behaviours in recent years? Is there any ongoing investigation in relation to this?*

(i) *Forms of secondary line discrimination sanctioned through abuse of dominance provisions*

As indicated further above, secondary line discrimination refers to discriminatory practices aimed at treating different trading partners that are in equivalent situations. As opposed to

67 Higher Court of Düsseldorf, 27,03,2002, Lufthansa.

68 French Competition Authority, Decision No. 00-D-14 of 3 May 2000 related to conducts in the plaster brick sector in West France.

69 British ORR, EWS; British OFT, London Metal Exchange (interim measures 28 February 2008) ; French Competition Authority, Decision No. 07-D-09, GlaxoSmithKline.

70 French Competition Authority, Decision No. 10-D-39, vertical road signs.

71 Case C-163/99, *Portuguese Republic vs Commission* [2001] ECR I-02613.

72 French Competition Authority, Decision No. 05-D-58, drinking water in Ile-de-France.

73 French Competition Authority, Decision No. 07-D-09, GlaxoSmithKline.

primary line discrimination, the dominant undertaking which discriminates is not present on the relevant market in which the discrimination is deemed to produce negative effects.

From a general point of view, and as already mentioned, secondary line discrimination cases have not been the most sanctioned or analysed in most jurisdictions but one can yet identify major categories of secondary discrimination abuses as follows :

- The application of different prices and conditions to identical transactions without justifiable grounds⁷⁴. In this case, the discrimination can be, for example, based on nationality⁷⁵, on the fact that customers are using or not the product/service of a competitor⁷⁶, on the business relationship the customers has or had with the dominant supplier⁷⁷, on the private or public quality of the customers where the dominant company is a public undertaking⁷⁸, or based on the implementation of additional obligations for the customers, which some of them were never compliant with⁷⁹.
- A discriminatory abuse can also arise where the dominant company applies a different policy regarding the conditions its customers have to fulfil before being suspended (absence of transparency of the conditions for some customers for example)⁸⁰.
- Refusal to supply to give access to some customers and not to others⁸¹.
- The application of the price or another condition of purchase for some contractors at a level which could not be possible in a truly competitive environment. This category generally refers to excessive pricing⁸², which can amount to discrimination where some customers are charged excessive prices and other not.

The issue that is raised by discriminatory excessive pricing is the indicators used to characterise whether the price at stake is actually excessive and unfair. In fact, all competition authorities have faced the challenge to assess the price that could have existed in a competitive environment. The thing is not an easy exercise, as underlined by the British Competition Appeal Tribunal (CAT), which, in the now well-known Flynn Parma case, noted that pure unfair prices are difficult to establish, therefore suggesting that price controls are better left to regulators. The CAT yet pointed out that a competition law intervention might be possible, provided the

74 Italian Competition Authority, Decision A11 – Aeroporti di Roma ; Hungarian Competition Authority, Case No. Vj-95/2011, Budapest Airport.

75 Austrian Supreme Court, 16 Ok 1/18k, Lufthansa.

76 Austrian Civil Court, 4 Ob 60/09s; Ukrainian Competition Authority, Artemsol.

77 Hungarian Competition Authority, TIGAZ.

78 Ukrainian Competition Authority, Kharkiv.

79 Ukrainian Competition Authority, Artemsol.

80 French Competition Authority, Decision No. 10-D-30 of 28 October 2010 related to conducts in the online advertising sector (Navx/Google case). See also French Competition Authority, Decision No. 19-MC-01 of 31 January 2019 related to an interim measure request from Amadeus (against Google), where interim measures were granted.

81 Court of Appeals Brussels, 29 May 2012, *Standaard Boekhandel / AMP*, *Jaarboek Marktpraktijken*, 2012, 1011, TBH 2012, TBM 2013, afl. 2, p. 194; CAT, *JJ Burges and Sons*; CAT, *Attheraces*.

82 Ukrainian Competition Authority, *Sanofi* ; OFT, *Flynn Parma* ; OFT, *Attheraces Limited v British Horseracing*.

assessment is done correctly, that is by establishing that the dominant undertaking reaps benefits that would not be possible under normal competition and that the prices bears no resemblance to costs.

In that perspective, national case law and decisional practice have brought some elements on this specific matter. In fact, competition authorities and courts have relied on the following elements to characterise (or not) an excessive pricing conduct:

- a comparison of the prices of the dominated market to the one demanded on a similar market on which the dominant undertaking had to face serious competition⁸³;
- a comparison of the price with an abstract model of costs +x%, above which the price is considered as excessive⁸⁴.

While, as afore mentioned, exploitative abuses have not been the most sanctioned practices in the last decades, respondents countries underline that competition authorities are now getting more interested in them considering that the digital economy leaves a wide space for discrimination, which competition might have to deal with, a tone that is also largely influenced by the European Commission. In fact, an important number of competition authorities have announced that the focus will be given to digital markets, in particular with respect to the operation of tech platforms, the use of algorithms and pricing policy, access conditions and the use of data, e-commerce and online advertising⁸⁵. In the UK, the CMA even published in 2018 an economic research paper on the use of algorithms to facilitate collusion and personalised pricing. Some authorities have also initiated proceedings against digital giants such as Google or Amazon for discriminatory practices. In addition, after a first report on data, the French and German Competition Authority are currently preparing a report on algorithms that should be published beginning of November 2019.

(ii) *Forms of secondary line discrimination sanctioned through national specific provision on economic dependency*

Where relevant, competition authorities may also rely on their specific national competition law provisions to sanction discriminatory practices. In Austria for example, where national legal framework contains a specific abuse of economic dependency, the Austrian Competition Authority sanctioned the refusal, by a distributor of films (also vertically integrated and having its own cinemas), to supply or supply too late to third part multiplex cinemas. The sanction was based on § 4 Abs 3 KartG 2005, following which an undertaking, which has a “superior” market position in relation to its customers is also considered to be dominant if, in particular, the customer is dependent on the maintenance of the business relationship in order to avoid serious economic disadvantages⁸⁶.

83 German Competition Authority, Lufthansa.

84 CAT, Flynn Pharma.

85 See in Spain, France.

86 Austrian Competition Authority, Filmverleih, 2006.

(iii) *Forms of secondary line discrimination sanctioned for discrimination between consumers*

Although some legislations require to characterise a discriminatory abuse that the discriminated contractors is a undertaking, some jurisdictions or legislations seem to admit the sanction of discriminatory practices between consumers on the basis of abuse of dominance provisions.

This is for example true for EU Law where article 102, paragraph 1, can in theory be applied to discrimination against customers. In practice there is a very limited number of cases. One could mention the 1998 Football World Cup decision of the EU Commission⁸⁷ in which the CFO had been fined for having abused its dominant position because its behaviour had the effect of imposing unfair trading conditions on residents outside France (the discrimination was based on the nationality or residence of the customer).

There had been a debate at that time as to whether there was a need to demonstrate that the CFO benefited of a competitive advantage by requiring consumers to provide an address in France for ticket sales in 1996 and 1997. The Commission rejected such an argument. According to the Commission, while evidence that a dominant undertaking has secured for itself a financial or competitive advantage as a result of its actions may support a conclusion of abuse, it is not essential to a finding of abuse. The Commission concluded that Article 82 (now 102 TFEU) can properly be applied, where appropriate, to situations in which a dominant undertaking's behaviour directly prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition. It should nevertheless be recalled that this example is rather unique and isolated in the European case law.

Similar sanctions can also be identified in Germany on the basis of Sec. 19 (2) N° 3 GWB. For example, in a decision Entega II, the Federal Court of justice of Germany ruled that relevant provisions on abuse of dominant can be violated if consumers are discriminated by means of price breaks without objective justification. Similarly, in a case VBL-Gegenwert I, the German Federal Court of justice ruled that dominant market players violate provisions on abuse of dominant if they use terms and conditions violating general civil rules on discrimination about the content on business terms and conditions rules.

Another interesting case arose also in Hungary with consumers complaints putting forward that in certain geographical areas the quality of internet service provided by the dominant telecommunications company was lower, while prices were much higher, compared to other areas in Hungary. The HCA investigated the case as an infringement to abuse of dominance provisions. The dominant company finally offered commitments to the HCA and undertook to develop the infrastructure in certain regions, to guarantee a minimum upload and download speed, and to offer prices not higher than the average prices applied in the country for five years.

⁸⁷ See Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 Football World Cup).

B. Identification and description of discriminatory practices pertaining to an anticompetitive agreement (article 101 TFEU and its equivalent under your national law)

With respect to anticompetitive agreements cases, the following questions have been raised to the national rapporteurs :

15. *Have you met (i) cartel, (ii) other kind of horizontal agreements or (iii) vertical restrictions cases dealing explicitly or implicitly with the notion of discrimination? (e.g. geographical discrimination, pricing discrimination, discrimination in the access to an organization or an association, criteria for accessing a distribution network, etc...)*

16. *If yes, what are the typical cases of discriminatory practices dealt with under the provisions related to anticompetitive agreements?*

17. *Could you describe the conditions (the tests) under which such discriminatory practices have been assessed by your national authorities/courts? Do these tests or conditions differ (and to what extent) from the tests and conditions used in relation to the ones used under abuse of dominant position cases (as indicated in your previous answers)? Please be specific and illustrate as far as possible your answer.*

(a) Existence of discrimination practices sanctioned under the provisions related to anticompetitive agreements

The overall picture of the sanction of discriminatory practices as horizontal or vertical restraints is rather patchy. Several countries, such as Spain, Austria and Belgium, did not mention any decision to sanction discriminatory practices under the provisions related to anticompetitive agreements. By contrast, countries such as the United Kingdom, France and Hungary (particularly in the 2000s) have numerous cases of sanctions of anticompetitive agreements that have the object or effect of discriminating.

(b) Typical cases of discriminatory practices dealt with and the test applied (if any)

The most frequent discriminatory practices that were dealt with under the provisions related to anticompetitive agreements relate to vertical restraints (discrimination against online sellers, discriminating selective distribution system, discrimination against competitors of a vertically integrated undertakings) and horizontal restraints (discrimination in the access to a membership). However, it must also be noted that some practices akin to abuses of dominant position were sanctioned as anticompetitive agreements, such as the imposition of the Most Favoured Nation clauses. Finally, interesting questions are raised as to the role that pricing software can play in the implementation of discriminatory practices.

(i) *Discrimination in distribution systems and online sales bans (vertical issues)*

(A) Access and refusal to access to a distribution system

The apprehension of discrimination regarding the selection of distributors has evolved in the European area since the modernisation of competition rules at the end of the 1990s and the entry into force of the so-called new generation exemption regulations. Indeed, whereas in the past, regulations listed clauses (black, grey and white), new regulations are based on a system of presumption of the lawfulness of agreements provided that the parties to a considered agreement have a limited market share (generally less than 30% or 40% according to the regulations) and that the said agreement does not contain any hardcore restrictions.

However, discrimination is not listed among the hardcore restrictions. Thus, for example, a supplier with a market share of less than 30% and which imposes discriminatory conditions for joining its network would not automatically lose the benefit of the exemption regulation (although competition authorities may in certain circumstances withdraw the benefit of it, we have no precedent in the case of discriminatory practices). This does not mean that discrimination has no role. Discrimination first matters in determining whether a selective distribution network can escape the provisions of Article 101(1) TFEU and its equivalent in national law. In this context, it seems that respondent countries apply a test which is similar or identical to the test applied by the European Commission and the European Court of Justice. Thus, Germany specifies that, in accordance to its case law (as well as EU case law), selective distribution systems can only be in accordance with Article 101(1) TFEU respectively Sec. 1 GWB if inter alia the conditions are not applied in a discriminatory manner. The same applies in France.

However, as mentioned above, in practice this issue rarely arises (except in cases where there are hardcore restrictions) because agreements ultimately benefit from the block exemption regulation.

This issue can also be found regarding the approval conditions to fulfil to be integrated in a distribution network. In that respect, there are interesting debates in French law in the automobile distribution sector. A claim of discrimination is often alleged by candidates for membership of vehicle distribution networks or by former members of vehicle distribution networks applying to become authorised repairers and whose applications are withdrawn.

The case law considers that the choice of authorised distributors within a selective distribution network cannot be based neither on negative nor on positive discrimination. While negative discrimination consists in the supplier's refusal to approve a distributor fulfilling all selection requirements, positive discrimination consists in supplying distributors who do not fulfil the selection criteria.

Below 30% market share, complaints for discrimination are dismissed under competition law due to the application of the exemption regulation.

In France, the Paris Court of Appeal tried to overcome this obstacle by considering that, if the discrimination did not disregard competition rules, it violated the principle of good faith applicable in general contract law. According to the Paris Court of Appeal, this obligation required a regular and non-discriminatory application of selection criteria, and therefore a

sufficient motivation in case of refusal to grant an approval. The supplier having failed to provide sufficient motivation, the court held that he did not comply with its general obligation of good faith.

However, this attempt was censured by the Court of Cassation: according to it, the requirement of good faith does not require the head of a distribution network to determine and implement a selection process based on defined, objective and non-discriminatory criteria. The distributor is only required to apply criteria that are sufficiently precise to be verified. The principle of good faith therefore does not require it to rely on objective criteria implemented in an undifferentiated manner.

Above 30% market share, several situations are observed:

- Sometimes complaints for discrimination are dismissed because the practices targeted are considered to be a unilateral acts of companies that are not dominant. The prohibition of anticompetitive agreements therefore does not apply. This position was adopted in France by commercial courts, but was not followed by the Paris Court of Appeal, which considered that the prohibition of anticompetitive agreements should apply because the refusal to enter a distribution network is part of a concurrence of intention and not a unilateral practice.
- At other times, these complaints are dismissed on the basis that, although there is an agreement, its anti-competitive object/effect is not established. The courts seek the refusal's real grounds and in the event these grounds are distinct from the intention to harm competition, then the court may consider that it has no object nor effect to restrict competition.
- Finally, the existence of discriminatory criteria is considered to be likely to exclude distributors and thus to restrict competition. In such circumstances, the court then has censured the conduct considered (the conditions for individual exemption not being met).

(B) Online sales

National reports also mentions some cases in relation to online sales.

First, as to the test to apply in order to detect discriminating selective distribution systems, it seems that respondent countries apply a test which is similar or identical to the test applied by the European Commission.

Second, in relation to online selling or advertising, the UK Office of Fair Trading and the Hungarian Competition Authority dealt with several cases where retailers which tend to sale or advertise the products online were excluded from the distribution of a product, whether directly or through the application of specific conditions that online retailers could not satisfy.

Some undertakings tried to argue that their online sales ban policy was necessary and thus objectively justified to achieve a genuine commercial aim of promoting in-store custom fitting, but such arguments were disproven where, for instance, the supplier itself was selling its products online, or where the online sales ban was not applied to retailers in other countries.⁸⁸ In other cases, it was sufficient, to demonstrate discrimination, to show that the grounds justifying the prohibition were disregarded in a different context (for e.g. where sales on certain third-party platforms like eBay are prohibited to protect the product's image while the products are being offered at a discount store at the same time).

Some online sales bans were also detected in the imposition of discriminatory contractual conditions that only physical sellers could fulfil. In a case that the Hungarian Competition Authority dealt with, the healthcare arguments raised by the supplier were refuted considering the fact that such conditions were not previously imposed and were, by their extent, above what was necessary to alleviate these alleged concerns.⁸⁹

(ii) *Discrimination in the access to a membership (horizontal issues)*

When looking at discrimination in horizontal agreements, it can be observed that many decisions concern the discriminatory conditions of access to an association, organization or economic group.

In particular, a series of decisions concerned the taxi transport sector in France. Principles were established in decisions dealing with a refusal of a candidate to join an Economic Interest Grouping ("EIG") of taxi drivers. The conducts of the grouping aimed at imposing non-objective and discriminatory criteria on new members by applying a high entry fee to new candidates who do not succeed a member of the grouping. The French Competition Council considered that there was discrimination due to the sponsorship requirement, the absence of objective selection criteria and the discretionary nature of the EIG's decision, which contrasted with the absence of entry condition applied to operators who succeed to a member of the group.⁹⁰

More recently, in 2019, the French Competition authority found that the conditions for access to the EIG were non-objective, non-transparent and discriminatory since there were a condition of sponsorship by at least two members of the EIG, the need to obtain unanimous agreement from all members of the EIG (which entails a risk of arbitrary discrimination) and the possibility to apply an entry fee the method of calculation of which was not objective and transparent.

⁸⁸ See 1279/1/12/17 Ping Europe Limited v Competition and Markets Authority before the Competition Appeal Tribunal.

⁸⁹ The Contact lense case, Case No. Vj-55/2013, which has however recently been annulled by the "Curia", who ordered the Competition authority to repeat the investigation.

⁹⁰ Competition Council, Decision No. 01-D-32 of 27 June 2001 related to referral of M. Henri Faraud concerning conducts in the Saint-Laurent-du-Var taxis sector.

The bailiff sector has also been concerned by this type of discrimination.⁹¹

Similar practices were found, as well, in the field of the collective quality approach. It occurred in France in relation to the access to a certification system (NF certification) which is almost indispensable to penetrate certain markets.⁹²

Thus, in France, it results from the settled case law that the conditions for membership of a professional association may affect free competition if, on the one hand, such membership is a condition for access to the market or if it constitutes a competitive advantage and if, on the other hand, these conditions for membership are defined or applied in a non-objective, non-transparent or discriminatory manner.⁹³ This test is also applied concerning quality labels or professional certification systems, where it is also pointed out, in some cases, that the criteria set to obtain a label must not go beyond what is strictly necessary.⁹⁴

(iii) *Discrimination towards competitors in vertical agreements*

Discrimination also seem frequent within vertical relations, in particular in cases where vertically integrated undertakings seek to exclude undertakings which do not belong to their own network. While this is often the case of dominant undertakings, the Italian Competition Authority sanctioned, for instance, companies who (horizontally) agreed to coordinate their commercial policies in order to strictly regulate the vertical commercial relationships they have with independent companies (retailers or maintainers).⁹⁵ The Hungarian authority also sanctioned a similar practice, in the Easter Ham cartel, and found that it was not necessary to assess the effects of the practice since it was a by object infringement.⁹⁶ However other similar cases before the Hungarian competition authority were sanctioned under other types of infringement, such as price fixing.

(iv) *The Most Favoured Nation clause*

In the UK's reply, Most Favoured Nation clause were described as discriminating "by their very nature". Sanctions against Most Favoured Nation clauses were taken in the online booking sector.

(v) *Pricing software and discrimination*

91 Competition Authority, Decision No. 19-D-13 of 24 June 2019 related to conducts in the bailiffs sector; This decision can be appealed.

92 Competition Authority, Decision No. 12-D-26 of 20 December 2012 related to conducts in the sector of production, marketing, installation and maintenance of extinguisher.

93 Paris Court of Appeal, 27 May 2003, RG No. 2002/1860, reforming the Competition Council Decision No. 02-D-60 related to conducts by Chambre syndicale des entreprises de déménagement and Association française de déménageurs internationaux; See also Competition Authority, Decision No. 10-D-15 of 11 May 2010 related to conducts by EIG "grouping of Amiens and metropole Taxis".

94 Competition Council, Decision No. 00-D-84 of 8 February 2001 related to professional identification given by the Fédération nationale des travaux publics (FNTP).

95 IAA's decision no. 7115 – A248 FORNITURA PEZZI DI RICAMBIO CALDAIE A GAS.

96 Case No. Vj-64/2000.

The UK CMA pointed out the utilisation of the same data base (most likely provided by a third-party supplier), as this could lead to the point that every undertakings will eventually demand the same price to one customer. Although it is not clearly said in the UK's reply, it seems that this situation may cause the application of a single price to a certain undertaking or category of undertaking, which could for example be higher than the price imposed to other players. In that sense, the use of a single data base to fix prices may create discrimination.

C. Discrimination in mergers analysis

With respect to merger cases, the following questions have been raised to the national rapporteurs :

- 18. Can you think of any circumstances in which discrimination has been discussed or taken into account in the competitive analysis of mergers?*
- 19. For example, in the framework of the economic analysis of mergers, have you met circumstances where your national authorities have taken into account the ability of the merged entity to price discriminate (for the definition of relevant markets, the analysis of the market power of firms and the assessment of the effects of the merger, claimed efficiencies etc)?*

The majority of the national reports dealt with the specific question of discrimination in merger analysis.

First, it is observed that the ability to discriminate against other market player can be taken into consideration when defining the relevant market. If one market player can price discriminate it may constitute an indication of the existence of separate markets between the categories of customers that are discriminated.

Second, national authorities take into consideration the potential discriminatory effects of a merger in particular where the merger results in a difference a treatment between undertakings on the market. It may be the case in relation to horizontal merger but even more in relation to non-horizontal merger (in particular vertical integration).

Authorities usually intervene when there is a risk of foreclosure of an upstream or downstream market and impose remedies to guarantee the absence of discrimination post merger.

It is also interesting to observe that the risk of discrimination, in particular in vertical merger, is usually dealt with behavioural remedies rather than structural remedies (with commitments to grant access to a good or a service, to adopt conditions of access which are transparent and non-discriminatory).

IV. OBJECTIVE JUSTIFICATIONS TO DISCRIMINATORY PRACTICES

With respect objective justifications to discriminatory practices, the following questions have been raised to the national rapporteurs :

20. Under European law, some justifications to price discrimination are admitted (costs reduction and volume discounts, price reductions in return for services rendered (with conditions), new products and new markets (when a firm is launching a new product or entering a new market is represents a short term effort to increase demand for the new product), fixed costs recovery, charges according to intensity of use or value in use, price reductions for "special customer status", etc.).

Do your national provisions or case law recognise that any such factor, alone or in combination with others, could justify discriminatory practices?

21. Did it happen that your national courts/authorities did not sanction discriminatory practices under investigation, because those practices were shown to be objectively justified on one of the above grounds?

22. If yes, can you please give details on the legal and economic effects analysis that has been undertaken to assess these positive effects?

In all respondents countries, anticompetitive practices can be exempted in case an objective justification exists. This is the case for example where there are business legitimate interests or in case the conduct is bringing efficiencies on the market and contribute to the economic progress. In addition, the practice must be indispensable and proportionate to the objective allegedly pursued by the dominant undertaking.

Regarding discriminatory practices, it stems from national legal provisions, case law and decisional practice that discriminatory conducts can be justified :

- Because of public policy reasons such as health, security, protection of the environment, preservation of natural resources, maintenance of employment;
- Because substantial efficiencies outweigh any anticompetitive effect on consumers, for example an improvement of production, distribution, purchase or sale of a product; promotion of technical, technological and economic progress, reduction of purchasing price, the development of small and medium enterprises⁹⁷; in Ukraine, we note also three other more singular sort of efficiencies such as the optimisation of the export and import of products, the elaboration and application of unified technical conditions or standards for products; the rationalisation of production; in Germany, the national report specifies that efficiency defence is not accepted in national law.
- Because of the differences in the time of performance, in the costs⁹⁸, in the quality, in purchasing volumes⁹⁹;
- Where price discrimination is consistent with demand patterns, costs and profitability relating to the launch of a new product¹⁰⁰;

⁹⁷ We note quite interestingly that while in EU law, an abusive practice can be justified on grounds on the efficiencies that are given by the conduct, such a defense seems not to be accepted in German law.

⁹⁸ Ofiel, case BT UK-SPN calls services, 2003.

⁹⁹ Belgian Competition Authority, Demol/Esso.

¹⁰⁰ Office of Fair Trading, case Association of Licensed Multiple retailers: price discrimination by retailers, 2004.

- In the case the undertaking refuses to supply because the good is not available in sufficient quantities;
- In the case the lower pricing by a dominant company to smaller retailers than to larger retailers consisted in a preferential treatment in favour of smaller retailer because they had to provide a larger coverage¹⁰¹;
- In case the undertaking refuses to supply because of insolvency, belated payments, serious breaches of contractual obligations or business damaging behaviour combined with a loss of trust.
- In case the discounts are reasonable in regard to the discount amount and the conditions for them to be granted;
- Where the complainant conduct is illegal¹⁰² .

We note that it stems from national reports that competition authorities and courts have barely not sanctioned a conduct because it was objectively justified.

In addition to these justifications, in some countries such as Spain or Ukraine, legal provisions provides that the competition authority or the cabinet of ministers might, after a specific procedure, adopt a declaration of inapplicability to discriminatory practices, where the "*public interest so requires*"¹⁰³.

V. OBJECTIVES JUSTIFYING TO PROHIBIT DISCRIMINATORY PRACTICES

With respect to the objectives justifying to prohibit discriminatory practices, the following questions have been raised to the national rapporteurs :

23. *Has the sanction of discriminatory practices been used as a tool to restore an effective competitive structure in a given market, i.e. sanctioning dominant operators that were excluding equally efficient rivals or even less efficient competitors that the incumbent operator?*
24. *Has the sanction of secondary line discrimination also been used as tool to open market to competition, for instance by enabling market entry on customer segments that would have been targeted with low prices if discrimination had been possible?*
25. *Is fairness a defined objective of your competition policy? Or do you think that the re-establishing of fair situation between competitors/trading partners was somehow a side effect of the sanction of a practice which was anticompetitive in itself?*

101 Belgian Competition Authority, AMP.

102 Competition Appeal Tribunal 18, Floe Telecom Ltd v. Office of Communications, 2004.

103 Article 1 and 2 of the Spanish Competition Act

26. *In this latter case, do you think that the prohibition of discrimination, which is aimed at sanctioning the treatment differences between partners in equivalent situations under competition law, introduces an implicit objective of fairness in the scope of your competition policy?*

27. *Has the notion of fairness already been used in the balancing between the procompetitive and anticompetitive effects of a discriminatory practice?*

There is usually a distinction that is made between the objectives behind the intervention of competition authorities against primary line discrimination and secondary line discrimination. Primary line discrimination is more a question of efficiency since the discrimination will harm competition and exclude rival. At the opposite secondary line discrimination is more a question of fairness since the authorities are mainly focussing on the existence of a disadvantage for the undertaking concerned. But not all disadvantages result in a damage for competition in terms of efficiencies.

As far as the national reports are concerned, they haven't identified defined objectives justifying to prohibit discriminatory practices other than to restore an effective competitive structure in the market concerned by the practices at stake.

Generally, national competition authorities haven't either shared their objectives when sanctioning discriminatory practices. Hungarian respondent to the report has pointed out that the Hungarian Competition Authority is safeguarding consumer welfare in its investigations of unlawful discrimination.

The respondent to the report for the UK underlined that in a report related to price discrimination in financial services dated July 2018, the Competition and Market Authority looked at the extent price discrimination prevents consumers from getting the best deals. The paper distinguishes between procedural fairness (that is the firm conduct vis à vis consumer) and distributive fairness (the fairness of some consumers paying more than others). Although the traditional approach was more focusing on the procedure fairness, it is recommend to shift this approach in order to pay more attention to distributive fairness.

As regard UK it should also be mentioned the fact that in October 2018 the CMA has announced the creation of a data unit that in November 2008 it announced that it will look at the practise of price discrimination by retailers and the extent to which price discrimination prevents consumers from getting the best deals.

In most jurisdictions observed, fairness is not identified as a defined objective justifying to prohibit discriminatory practices. Nevertheless, fairness may be taken into account by competition authorities to assess the practices. As an illustration, the Austrian Supreme Cartel Court accepts that dominant undertakings take decisions deemed to be necessary to safeguard their interests, provided that they are fair and proportionate. Moreover, the Austrian Supreme Cartel Court considers that abuse might be assessed on the basis of fairness. However, the Austrian jurisdiction doesn't communicate further explanations to assess fairness.

Fairness appears as an explicit objective of the Competition Act in Hungary that prohibits undertakings in dominant position from imposing unfair prices. Moreover, the Hungarian Competition Authority brings certain discrimination cases under Section 21 a) of the Competition Act, where fairness is one of the objectives. Finally, the Hungarian Trade Act also explicitly says that large retailers cannot apply unfair conditions to its suppliers.

It may be noted that the notion of fairness has been raised in France with respect to the opening up to competition of different sectors such as the rail sector. In this context, the French Competition Authority has underlined the importance to create conditions of competitive equity between the different operators in order to ensure an effective competition.

VI. FUTURE OF THE PROHIBITION OF DISCRIMINATORY PRACTICES ON A COMPETITION LAW PERSPECTIVE

With respect to the future of the prohibition of discriminatory practices on a competition law perspective, the following questions have been raised to the national rapporteurs :

28. *Exploitative abuses are coming back in the decisional practice of the European Commission. Did your national practice experience the same evolution? Did your national competition authority or national courts give specific reasons for this evolution or could you identify specific reasons?*
29. *Have you identified specific sectors/behaviours that could trigger discrimination cases issues in the future? For example, many competition authorities are now concerned with digital sectors. Do you think this will be a particularly relevant area to analyse and possibly prevent new types of discriminatory practices?*
30. *The European Commission is currently thinking about the adoption of specific regulations applicable to the digital sector (e-commerce and geo-blocking)? Do you think that such a regulatory tool will be more adapted than competition law rules to deal with discriminatory conduct in the digital sector?*
31. *How do you think that the developments of digital sectors will impact the economic analysis of market power (either in the framework of mergers or of abuses of dominance) of firms active in the digital economy, e.g. by making discriminatory (price and non-price) behaviour more suspicious and more prone to be sanctioned?*

A. Tendency of discrimination

Although we have not identified through the national reports an increase in decision on abuse of exploitation and on discrimination in particular, all reports agree that this may change in the future. More precisely, all reports indicate that national competition authorities are concerned by the potential discriminatory practices that may occur in the digital sector in particular as a result of the concentration of the market and the existence of largely dominant players.

Apart from this main tendency other risks of discrimination were also mentioned. They may occur, for instance, through the growing tendency to set up selective distribution networks, other than the traditional ones observed in the luxury sector, practices of geo-blocking, and refusal of access to essential facilities.

Besides, Italy's response rightly pointed out that discrimination issues may increase in the telecommunications sector as well. Their competition authority, which has always been active in the sanctioning of discriminatory practices in that sector, may further focus on it due to the development of 5G networks.¹⁰⁴

B. Problems to catch issues of discrimination

When the focus is on discrimination, and more specifically on discrimination in the digital sector, respondent countries find it very difficult to tackle these practices, and for several reasons.

They mention problems related to the criteria for qualifying the practice. Ukraine stresses the need for more precise criteria on discrimination, and Hungary explains that, when discriminatory practices are at stake, the competition authority do not necessarily use the qualification of discrimination to impose a sanction for abuse of dominant position. The UK Competition Appeal Tribunal ("CAT") further noted that pure unfair price cases are very rare in competition law and difficult to establish, so that price controls are better left to sector regulators, which brings us to the second major obstacle to the sanction of discriminatory practices.

Indeed, the prosecution of discriminatory practices seems also hampered by debates on the legitimacy of competition law to deal with this type of practice. The UK CAT is not alone in considering that such practices should be reserved to a regulatory body. In Hungary, the issue is the subject of considerable debate in the competition law community and, although they acknowledge the great flexibility of competition rules, they do not consider them fully appropriate for enforcing, for example, non-discriminatory obligations in digital sectors. In this respect, it should be mentioned that in Hungary, it is a consumer protection body, and not the competition authority, that has been appointed for the application of the geo-blocking regulation.

As a result of this debate on the legitimacy of competition law, there is a wide diversity of means discussed in the reports to counter abusive practices in the digital sector, and in particular discriminatory practices.

C. How countries have dealt with these problems so far

(a) Competition authorities

First of all, some competition authorities do not hesitate to use their traditional competition law tools. Italy has recently opened two important investigations against Google and Amazon which both related to discriminatory practices against competitors. Amazon is suspected of discrimination of third-party sellers based on whether or not the sellers adhere to the Amazon logistics service. Google is suspected of discrimination against an application in the access to

¹⁰⁴ For e.g. risk of refusal to access to the network, that Ilyad already pointed out to the Italian authority in order to protect its new position in the Italian telecommunications market.

Android Auto.¹⁰⁵ It must be noted that both cases concern alleged discriminatory practices against businesses, and not against consumers.

However, to deal with issues which do not directly relate to antitrust law, European competition authorities have undertaken various techniques.

Although it raised a lot of critics and has been challenged by the court of appeal, the German Federal Cartel Office took the initiative to examine practices that are usually outside the scope of competition law. For example, it decided that Facebook abused its market power by setting privacy policies that allowed Facebook to bring together user data of several Facebook-products without the user's consent, in violation of the GDPR.

In Spain, the competition authority has established a new economic intelligence unit aimed at fostering *ex-officio* investigations based on statistical techniques and data analysis.

Other authorities, instead, have found ways to bypass the limits of their power. In the UK, when authorities suspect unfair practices, they often use market studies to address issues that may have a negative impact on competition, as they provide quite a lot of flexibility to authorities in terms of what they can say. Though recommendations like this are not binding, they can have a significant impact on markets.¹⁰⁶

On the other hand, countries such as Belgium and Hungary note that there is no trend towards an increase in cases of discrimination. The Hungarian Competition Authority has however already conducted several investigations against the GAFAs, launched a market analysis procedure to assess the functioning of digital comparison tools and adopted a mid-term digital strategy specifically focused on the digital economy from a consumer protection perspective.

(b) Legislators

Legislators also have also taken significant steps. The Federal Cartel Office¹⁰⁷ became competent in 2017 to conduct sector inquiries in cases where it suspects infringements of consumer protection law harming the interests of a large number of consumers. This provision however does not allow the cartel office to enforce consumer protection law as such. The Federal Cartel Office made immediate use of this new power in launching a sector inquiry for internet comparison portals.

In addition, a commission has been established by the Ministry of Economy in order to propose amendment to the Act Against Restraints of Competition (GWB), so that it better takes into account current issues such as the digitalization and the relation between competition and consumer protection law.

¹⁰⁵ Android Auto allows owners of Android smartphones to easily and safely use certain apps when driving a vehicle.

¹⁰⁶ ORR's Market Study into the supply of automatic ticket gates and ticket vending machines, Final report 13 March 2019.

¹⁰⁷ In the course of the Ninth Amendment to the Act Against Restraints of Competition by implementing Sec. 32e (5) GWB.

Besides, the Austrian legislation already includes provisions on "good business behaviour" which prohibits discriminations and refusal to supply even if the undertakings concerned are not dominant. The effects of the prohibition has however been mitigated, partly due to the influence of the EU "by-effect" approach on Austrian courts.

(c) Necessary changes ?

As to the question what future action can be taken, the respondents provided the following answers.

In terms of legislative changes, respondent countries are quite divided.

Spain considers that competition law should not be changed, but it would be useful to have specific regulations on digital sectors adapted to deal with discriminatory conducts.

Some authorities such as the UK CMA consider that, generally speaking, the existing competition and markets tools are effective at tackling conducts that give rise to competition concerns in the digital market. However, the UK CMA increasingly wants to use its consumer protection powers, and it has gone as far as to propose a raft of changes to the UK regime in order to increase its ability to protect consumers. This may be a beginning of a trend to expand competition enforcement, including in relation to issues such as discrimination, by looking at consumer issues.

As to Belgium, it has introduced recently the prohibition of "abuse of economic dependency". Although there is no indication on the scope, it may include discrimination practices, especially as the President of the Belgian competition authority has announced that it will pay close attention to vertical abuses created by dependence on Internet platforms.

Apart from a legal framework amendment, other tools have been contemplated. For instance, recently, the Furman report suggested "light-touch regulation" of the sector with a voluntary code of conduct.¹⁰⁸

* *
*

108 Unlocking digital competition, Report of the Digital Competition Expert Panel
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf .

TABLE OF CONTENTS

I. <u>Introduction</u>	2
A. <i>General background</i>	2
B. <i>Selective introduction to the economic analysis of price discrimination</i>	3
(a) <u>Principles</u>	3
(b) <u>Impact of discrimination in a monopoly situation</u>	5
(c) <u>Impact of discrimination in an oligopoly situation</u>	7
II. <u>The notion of discrimination in national / regional substantive legal framework</u>	9
A. <i>Statutory provisions dealing with discrimination in competition legal framework, as well as soft law provisions relevant for discrimination cases</i>	9
(a) <u>Similarity of all respondent countries' antitrust statutory provisions</u>	9
(b) <u>Editorial particularities of some respondent countries' antitrust statutory provisions</u>	10
(c) <u>Other competition statutory provisions in several respondent countries' legislation</u>	10
(d) <u>Only two respondent countries with relevant soft law provisions</u>	12
B. <i>Other complementary provisions expressly covering the issue of discrimination with respect to commercial practices</i>	12
(a) <u>Statutory provisions related to unfair or restrictive commercial practices</u>	12
(b) <u>Statutory provisions on consumer protection with respect to commercial practices</u>	13
C. <i>Other rules dealing with the concept of discrimination</i>	14
III. <u>The notion of discrimination in practice by competition authorities / courts</u>	16
A. <i>Discriminatory practices sanctioned as abuses of dominance</i>	16
(a) <u>Identification of cases of discriminatory practices</u>	16
(b) <u>Conditions to fulfil to identify a discriminatory abuse</u>	18
(c) <u>Forms of "primary-line" discrimination prohibited as foreclosure abuse</u>	22
(d) <u>Forms of "secondary-line" discrimination prohibited as exploitative abuses</u>	25
B. <i>Identification and description of discriminatory practices pertaining to an anticompetitive agreement (article 101 TFEU and its equivalent under your national law)</i>	29
(a) <u>Existence of discrimination practices sanctioned under the provisions related to anticompetitive agreements</u>	29
(b) <u>Typical cases of discriminatory practices dealt with and the test applied (if any)</u>	29
C. <i>Discrimination in mergers analysis</i>	34
With respect to merger cases, the following questions have been raised to the national rapporteurs :	34
IV. <u>Objective justifications to discriminatory practices</u>	34
V. <u>Objectives justifying to prohibit discriminatory practices</u>	36
VI. <u>Future of the prohibition of discriminatory practices on a competition law perspective</u>	38
A. <i>Tendency of discrimination</i>	38
B. <i>Problems to catch issues of discrimination</i>	39
C. <i>How countries have dealt with these problems so far</i>	39
(a) <u>Competition authorities</u>	39
(b) <u>Legislators</u>	40

(c) Necessary changes ?

41