SECONDARY-LINE PRICE DISCRIMINATION UNDER EUROPEAN COMPETITION LAW – AN ASSESSMENT FROM AN EFFECTS-BASED PERSPECTIVE

AB REKABET HUKUKUNDA İKİNCİL SEVİYE FİYAT AYRIMCILIĞI – ETKİ TEMELLİ PERSPEKTİFTEN DEĞERLENDİRME

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Abstract

Article 102(c) of the TFEU prohibits "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". There is a broad consensus among scholars that this provision is merely directed at secondary-line discrimination, namely discrimination imposed by a non-vertically integrated dominant undertaking on its customers with whom it does not compete with.

Secondary-line discrimination is a common business practice which generally has an efficiency rationale and in most instances welfare improving. Thus, it is widely argued that it should be assessed cautiously.

However, the case law of the European Commission and the European Courts does not provide a clear and consistent framework for assessment of secondary-line discrimination. Besides, it is an omitted field of law in the modernisation process of Article 102 enforcement, i.e. the Guidance Paper, which is aimed at introducing a more effects-based approach to Article 102 enforcement and providing clarity and predictability, does not adress discrimination.

Because of these reasons, the assessment of secondary-line discrimination still stays as an ambiguous area in the Article 102 enforcement. As the intention of the European Commission to adopt an effects-based approach in all areas of competition law is clear, it is thought that secondary-line discrimination cannot be abstracted from such an approach. Therefore, in this study, it is aimed at proposing an analytical framework for the assessment of secondary-line discrimination from an effects-based perspective.

Keywords: *Secondary-line, Price Discrimination, Competitive Disadvantage, Effects-based Approach, Guidance Paper*

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Öz

Avrupa Birliği'nin İşleyişine Dair Anlaşma'nın (ABİDA) 102(c) maddesi, hâkim durumda bulunan teşebbüslerin, ticaret ortaklarıyla yaptığı eşit işlemlere farklı koşullar uygulayarak onları rekabetçi açıdan dezavantajlı konuma düşürmesini yasaklamaktadır. Bu alanda çalışan akademisyenler arasında ABİDA'nın anılan maddesinin sadece ikincil seviye ayrımcılığı yasakladığı yönünde geniş bir görüş birliği bulunmaktadır.

İkincil seviye ayrımcılık, dikey bütünleşik olmayan teşebbüslerin rekabet içerisinde olmadığı müşterilerine yönelik olarak yaptığı ayrımcılık olup, genelde etkinlik sağlayan ve refahı artıran yaygın bir ticari uygulama olarak görülmektedir. Bu nedenle literatürde, bu tür ayrımcılık uygulamalarının her olayın kendine özgü koşulları çerçevesinde değerlendirilmesi gerektiği ve ABİDA'nın 102(c) maddesinin sınırlı olarak uygulanması gerektiği savunulmaktadır.

Literatürdeki bu yaklaşıma karşın, Avrupa Komisyonunun ve Avrupa Mahkemelerinin ikincil seviye ayrımcılık uygulamalarının değerlendirilmesi konusunda net ve tutarlı bir çerçeve çizmiş olduğunu söylemek güçtür. Bunun yanı sıra, amacı 102. madde uygulamasına etki temelli bir yaklaşım getirmek ve açıklık ile öngörülebilirliği sağlamak olan Avrupa Komisyonunun dışlayıcı davranışlara yönelik uygulama önceliklerine ilişkin Kılavuz'da (Kılavuz) da ayrımcılık konusu ele alınmamıştır.

Bu nedenle, ikincil seviye ayrımcılığın ne şekilde değerlendirileceği hususu 102. madde uygulamasında belirsiz bir alan olarak durmaktadır. Çalışmada, bu belirsizlikten yola çıkılarak ve ikincil seviye ayrımcılık uygulamalarının Avrupa Birliği rekabet hukukunun diğer alanlarında uygulanmakta olan etki temelli yaklaşımdan ayrı tutulamayacağı düşüncesinden hareketle ikincil seviye fiyat ayrımcılığının etki temelli yaklaşım çerçevesinde değerlendirilmesine yönelik bir analitik çerçeve sunulması amaçlanmıştır.

Anahtar Kelimeler: *İkincil Seviye, Fiyat Ayrımcılığı, Rekabetçi Dezavantaj, Etki Temelli Yaklaşım, Kılavuz*

INTRODUCTION

Article 102(c) Treaty on the Functioning of the European Union (TFEU) prohibits *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*. There is a broad consensus among scholars that this provision is merely directed at discrimination imposed by a non-vertically integrated dominant undertaking on its customers with whom it does not compete with, so-called secondary-line discrimination.

Secondary-line discrimination is a common business practice which generally has an efficiency rationale and in most instances welfare improving. Thus, it is widely argued in the literature that secondary-line discrimination should be

assessed on a case-by-case basis and the enforcement of Article 102(c) should be limited to certain circumstances.

However, the decisional practice of the European Commission (the Commission) and the case law of the European Courts (the General Court and the Court of Justice of the European Union) have not provided a clear and consistent framework for the assessment of secondary-line discrimination. Besides, the Commission's Guidance on the enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings, which has aimed at contributing to the process of introducing a more effects-based approach to Article 102 enforcement and providing clarity and predictability, has not addressed discrimination.

Because of these reasons, the assessment of secondary-line discrimination still stays as an ambiguous area in Article 102 enforcement. In our opinion, it cannot be abstracted from the effects-based approach that has been applied in all other areas of European Union (EU) competition law. Therefore, the main aim of this study is to propose an analytical framework for the assessment of secondary-line discrimination from an effects-based perspective.

An assessment from an effects-based perspective mainly relies on the welfare effects of discrimination. Thus, the first section of the study will provide a brief overview of the economics of price discrimination in order to explain its welfare effects and elaborate on the underlying reasons behind a need for a case-by-case assessment.

Second section of the study will focus on secondary-line price discrimination in EU competition law enforcement. Firstly, it is aimed at clarifying the position of secondary-line discrimination in Article 102 enforcement. Then, an overview of the decisional practice and the case law on secondary-line price discrimination will be presented.

In the third section, after providing a general framework of the effects-based approach, the decisional practice and the case law to date will be analyzed from an effects-based view. Finally, an analytical framework from an effects-based perspective for the assessment of secondary-line discrimination will be proposed.

1. ECONOMICS OF PRICE DISCRIMINATION

Discrimination is a practice that is prohibited under EU competition law mainly on the grounds of fairness. However, in recent years with the aim of adopting an economic effects-based approach to EU competition law, economists suggested assessing discriminatory practices less in terms of fairness and more in terms of welfare.[1] Some scholars, who share this view, emphasized that a *per se* ban on discrimination was over restrictive and the practice required a case-by-case analysis.[2]

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[1] Economic Advisory Group on Competition Policy (EAGCP) (2005), "An Economic Approach to Article 82",
http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf, Date Accessed: 15.07.2013, p. 32.

[2] GERADIN, D. and N. PETIT (2006), "Price Discrimination under EC Competition Law: Another

The main aim of this section is to provide a brief overview of the economics of discrimination, in particular price discrimination, and explain the underlying reasons behind a need for a case-by-case approach.

1.1. The Concept of Price Discrimination

Basically, discrimination can be defined as the practice of firms treating their similarly-placed customers differently.[3] Customers against whom discrimination is applied may be final consumers or intermediate suppliers.[4] The term includes both price discrimination and discrimination on non-price terms.[5] Since the analysis of non-price discrimination is similar to the analysis of price discrimination[6] and price discrimination is the most obvious[7] and ubiquitous[8] form of discrimination, this study will focus on price discrimination.

It is generally accepted by economists that providing a simple and satisfactory definition of price discrimination is impossible.[9] However, 'the sale (or purchase) of different units of a good or service at price differentials not directly corresponding to differences in supply cost'[10] is seen as a useful starting point to draw a framework for the concept of price discrimination. Such a definition implies that charging different prices for different units to the same customer and/or to different customers constitutes price discrimination.[11] Moreover, price discrimination covers the sale/purchase of different units of a good or service at the same price despite different supply costs.[12] In economics, supply costs are generally considered as marginal costs of supply.[13] Thus, two sales are assessed

Antitrust Doctrine in Search of Limiting Principles?", *JCLE*, No:2(3), p.479.

[3] O'DONOGHUE, R. and A. J. PADILLA (2006), *The Law and Economics of Article* 82 EC, Hart Publishing, p. 556.

[4] O'Donoghue and Padilla 2006, p. 558.

[5] OFT (2004), "Draft Guidelines on Assessment of Conduct", http://www.oft.gov.uk/shared_oft/business_leaflets/competition_law/oft414a.pdf, Date Accessed: 22.06.2013, para. 3.9.

[6] OFT 2004, para. 3.10.

[7] AKMAN, P. (2012), *The Concept of Abuse in EU Competition Law*, Hart Publishing, p. 235.

[8] O'Donoghue and Padilla 2006, fn. 3, p. 558.

[9] SCHERER, F. M. and D. ROSS (1990), *Industrial Market Structure and Economic Performance,* Third Edition, Houghton Mifflin, p. 489; TIROLE, J. (1998), *The Theory of Industrial Organization,* Tenth Edition, The MIT Press, p. 133.

[10] Scherer and Ross 1990, fn. 9, p. 489.

[11] GEHRIG, T.P. and R. STENBACKA (2005), "Price Discrimination, Competition and Antitrust", Swedish Competition Authority (ed.), in *The Pros and Cons of Price Discrimination*, p. 131.

[12] PEEPERKORN, L. (2009), "Price Discrimination and Exploitation", B.E. Hawk (ed.), in *International Antitrust Law & Policy,* Juris Publishing, p. 617; JONES, A. and B. SUFRIN (2011), *EU Competition Law,* Fourth Edition, Oxford University Press, p. 386.

[13] BISHOP, S. and M. WALKER (2010), *The Economics of EC Competition Law: Concepts, Application and Measurement,* Third Edition, Sweet & Maxwell, p. 251.

as discriminatory when they have different ratios of price to marginal costs and thereby provide different rates of return to the discriminating firm.[14]

Price discrimination may occur both in monopolistic markets and relatively competitive markets.[15] Price discrimination in competitive markets is termed as sporadic. This is because in such markets sales would be made at marginal cost and a buyer asked to pay a price above marginal cost would simply buy from another seller who offered a competitive price.[16] However, in the existence of a certain degree of market power it will be difficult or impossible for buyers to change suppliers. Thus, a seller with market power can systematically segment customers and maintain a policy of obtaining different rates of return from them. This is called persistent price discrimination.[17] Since Article 102 TFEU is concerned with discriminatory practices of dominant undertakings that have a certain degree of market power, hereafter the focus of the study will be persistent price discrimination and it will be referred as "price discrimination".

1.2. Conditions of Price Discrimination

In literature it is generally accepted that three conditions should be met for a firm to profitably price discriminate. Firstly, to persistently price discriminate, the firm must have a certain degree of market power.[18] Secondly, the firm must be able to sort its customers according to their demand-related characteristics such as elasticity of demand or reservation price.[19] Thirdly, arbitrage must be infeasible or must be prevented by the discriminating firm via contractual clauses.[20] This is because arbitrage enables favored purchasers to profit by reselling the product to disfavored purchasers and thereby frustrating the price discrimination scheme.[21]

1.3. Types of Price Discrimination

Depending on the way in which the seller segmented customers, three types of price discrimination are identified in the relevant literature. Such an identification is seen important for analysing the effects of price discrimination on welfare.[22]

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[14] HOVENKAMP, H. (1999), *Federal Antitrust Policy The Law of Competition and Its Practice,* Second Edition, West Group, p. 565.

[15] O'Donoghue and Padilla 2006, fn. 3, p. 558.

[16] SULLIVAN, E. T. and H. HOVENKAMP (1999), *Antitrust Law, Policy and Procedure,* Fourth Edition, Lexis Law Publishing, p. 920.

[17] Hovenkamp 1999, fn. 14, p. 566; Jones and Sufrin 2011, fn. 12, p. 387.

[18] Since firms in competitive markets can implement non-persistent price discrimination, existence of market power is not considered as a condition for price discrimination in some studies. See KLEIN, B. (2008), "Price Discrimination and Market Power", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1657202, Date Accessed: 20.07.2013.

[19] Scherer and Ross 1990, fn. 9, p. 489.

[20] GIFFORD D. J. and R. T. KUDRLE (2010), "The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?", *U.C. Davis L. Rev.*, No:43(4), p. 1243.

[21] Sullivan and Hovenkamp 1999, fn. 16, p. 920.

[22] Peeperkorn 2009, fn. 12, p. 617.

Under first-degree price discrimination, known as perfect price discrimination,[23] the seller exactly knows each customer's willingness to pay and charges each customer the maximum possible price that covers its cost of supply.[24] In this situation, the output level would be at the same level as under perfect competition and the entire consumer surplus under perfect competition is transferred to supplier as profits. Thus, perfect price discrimination is generally seen to be as efficient as perfect competition[25].

However, due to incomplete information about individual preferences, perfect price discrimination is extremely rare in practice[26] and just seen as a theoretical benchmark.[27] Instead, in the case of incomplete information sellers can practise imperfect price discrimination.[28]

Under second-degree price discrimination, the implicit way of price discrimination,[29] the seller offers different options to all customers and induces different customers to self-select one particular offer according to their willingness to pay.[30] Most common forms of second-degree price discrimination are volume discounts and two-part tariffs.[31]

Under third-degree price discrimination, the explicit way of price discrimination,[32] the seller charges different prices to different groups of customers distinguished according to some "observable and enforcable" criterion that reflects their willingness to pay such as age, sex, location.[33] The price charged to each group of customers depends on the seperate demand curve of each group[34] and consumers with high elasticity of demand are charged lower prices than those with low elasticity of demand.[35]

1.4. Rationale Behind Price Discrimination

Before analysing the welfare effects of price discrimination it is important to explain why firms engage in price discrimination. Since we are concerned with

[23] Jones and Sufrin 2011, fn. 12, p. 387.

[24] ARMSTRONG, M. (2006), "Price Discrimination", http://else.econ.ucl.ac.uk/papers/uploaded/222.pdf, Date Accessed: 25.7.2013, p. 7.

[25] Hovenkamp 1999, fn. 14, p. 568.

[26] Tirole 1998, fn. 9, p. 135; Bishop and Walker 2010, fn. 13, 251.

[27] Armstrong 2006, fn 24, p. 3.

[28] Tirole 1998, fn. 9, p. 135.

[29] Gehrig and Stenbacka 2005, fn. 11, p. 131.

[30] MOTTA, M. (2004), *Competition Policy Theory and Practice,* Cambridge University Press, p. 492; Bishop and Walker 2010, fn. 13, p. 251.

[31] Bishop and Walker 2010, fn. 13, p. 251.

[32] Gehrig and Stenbacka 2005, fn. 11, p. 131.

[33] O'Donoghue and Padilla 2006, fn. 3, p. 558.

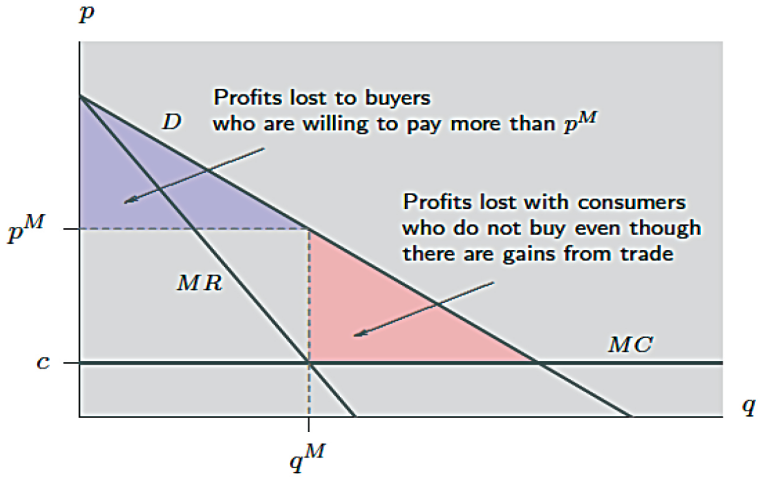
[34] Peeperkorn 2009, fn. 12, p. 620.

[35] Geradin and Petit 2006, fn. 2, p. 483.

price discrimination applied by firms which have a certain degree of market power, explaining pricing behaviour of a monopolist will be useful to give an insight.

The figure below demonstrates the optimal pricing behaviour of a monopolist selling its single product at a uniform price.

Figure 1-Lost Revenue Under Uniform Pricing[36]



As it is known, optimum output level (q^m) of a monopoly is determined by the intersection of the marginal revenue (MR) curve with marginal cost (MC) curve, and the optimal price (p^m) is given by the demand curve (D) and the optimum output level (q^m). The output-price combination (q^m -$p^{m)}$ is the profit maximizing point of a uniform pricing monopolist and it enables the monopolist to make a profit, without considering fixed costs, given by (p^m-c)q^m.[37]

Nevertheless, in this situation the seller is "leaving money on the table" because of two reasons. Firstly, there are consumers, demonstrated with the blue triangle in the above figure, who pay p^m but would be willing to pay more than that. Secondly, there are consumers, depicted by the pink triangle in the figure, who would be willing to pay more than cost c but do not buy at all because their valuation is lower than p^m.[38]

However, it is clear that the ideal case for the monopolist would be to be able to sell every unit to every customer at the maximum price that customer is willing

[36] Armstrong 2006, fn. 24, p. 2.
[37] Armstrong 2006, fn. 24, p. 1.
[38] Armstrong 2006, fn. 24, p. 1.

to pay for that unit and extract the entire consumer surplus as profits.[39] Thus, price discrimination is a way of achieving this ideal to some extent by enabling the seller to capture more consumer surplus than he would if he charged a uniform price.[40]

Besides, in industries that encounter the problem of fixed cost recovery such as new economy or information based industries, since any positive price above marginal cost of production contributes to the fixed costs, price discrimination is a way of remuneration of firms' fixed costs.[41]

1.5. Welfare Effects of Price Discrimination

In economic literature there are many studies analysing welfare effects of price discrimination.[42] One can infer from these studies that the welfare effects of price discrimination are ambiguous and directly related to the structure of the market, demand curvature and elasticity of demand.[43] Besides, welfare effects also depend on the type of the price discrimination implemented[44] and whether the discrimination is applied to final customers or intermediate customers.[45]

Below, the welfare effects of price discrimination will be explained in final markets and intermediate markets respectively. However, it is important to underline that the aim of this study is merely to provide an insight into the ambiguity of welfare effects of price discrimination, not to go into the details of the abundant economic literature in this area.

1.5.1. Price Discrimination in Final Markets

Short-term (static) welfare effects of price discrimination consist of the misallocation effect and the output effect. Since consumers are charged different

[39] Hovenkamp 1999, fn. 14, p. 567.

[40] Tirole 1998, fn. 9, p. 133.

[41] RIDYARD, D. (2002), "Exclusionary Pricing and Price Discrimination Abuses under Article 82-an Economic Analysis", *ECLR,* No:23(6), p. 287; BISHOP, S. (2005), "Delivering Benefits to Consumers or per se Illegal?: Assessing the Competitive Effects of Loyalty Rebates", Swedish Competition Authority (ed.), in *The Pros and Cons of Price Discrimination*, p. 66.

[42] Economic studies generally analyse effects of price discrimination on total welfare that consist of consumer surplus and producer surplus. In such an approach producer surplus can be thought as a measure of long term consumer surplus, since it induces firms to invest and innovate in the long run (Klein 2008, fn. 18, fn. 21). However, it should be stressed that assessment of the welfare effects depends on the type of welfare standard actually pursued. EU competition law has adopted the consumer welfare standard.

[43] LANGENFELD, J., L. WENQING and G. SCHINK (2003), "Economic Literature on Price Discrimination and Its Application to the Uniform Pricing of Gasoline"*, Int J Econ Bus*, No:10(2), p. 180.

[44] NAZZINI, R. (2011), *The Foundations of European Union Competition Law,* Oxford University Press, p. 81.

[45] PERROT, A. (2005), "Towards an Effects-Based Approach of Price Discrimination", Swedish Competition Authority (ed.), in *The Pros and Cons of Price Discrimination*, p. 161.

prices in different markets, price discrimination causes an inefficient distribution of output. However, in some cases this allocative inefficiency may be weighted by an increase in output.[46] Thus, economic studies of price discrimination in final markets generally concentrate on output effects of price discrimination. [47]

About the output effects of discrimination there is consensus among economists that price discrimination unambiguously reduces welfare only when it does not increase total output,[48] because in such a situation price discrimination merely transfers consumer surplus to the firm without rising output level.[49] However, in all other cases the direction of welfare change is indeterminate. [50]

As mentioned above, welfare effects of price discrimination are related to the type of discrimination implemented. Merely perfect price discrimination is allocatively efficient and maintains output at the perfectly competitive level.[51] However, it transfers the entire consumer surplus to the firm as profits.

The self-selecting mechanism inherent in second degree price discrimination is considered to be likely to cause welfare losses for low type consumers (small, less informed etc), whereas it may be efficiency-improving by increasing output level for high consumption consumers.[52]

In third-degree price discrimination, consumers in low-elasticity markets will pay higher and suffer from welfare losses, whereas consumers in high-elasticity markets will pay lower prices. Discrimination may also enable the firm to serve an entirely new group of customers.[53]

Thus, it is clear that the welfare effects of imperfect price discrimination are indeterminate, unless it allows a firm to supply a group of consumers that would not be supplied in the absence of price disrimination.[54]

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[46] AGUIRRE, I., S. COWAN and J. VICKERS (2010), "Monopoly Price Discrimination and Demand Curvature", *Am Econ Rev*, No:100(4), p. 1601.

[47] SCHAMALANSEE, R. (1981), "Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination", *Am Econ Rev*, No:71(1), p. 242; VARIAN, H. R. (1985), "Price Discrimination and Social Welfare", *Am Econ Rev*, No: 75(4), p. 870; SCHWARTZ, M. (1990), "Third Degree Price Discrimination and Output: Generalizing a Welfare Result", *Am Econ Rev*, No:80(5), p. 1259; NAHATA, B., K. OSTASZEWSKİ and P. K. SAHOO (1990), "Direction of Price Changes in Third-Degree Price Discrimination", *Am Econ Rev*, No:80(5), p. 1254. For a brief summary of these studies see Langenfeld et al. (2003), fn. 43, p. 182-183.

[48] Motta 2004, fn. 30, p. 496.

[49] Perrot 2005, fn. 45, p. 171.

[50] Motta 2004, fn. 30, p. 496.

[51] Hovenkamp 1999, fn. 14, p. 569.

[52] GERARD, D. (2005), "Price Discrimination under Article 82(2)(C) EC: Clearing up the Ambiguities", GCLC Research Paper, http://ssrn.com/abstract=1113354, Date Accessed: 10.7.2013, p. 6.

[53] Gerard 2005, fn. 52, p.7.

[54] Geradin and Petit 2006, fn. 2, p. 484.

Besides the short-term welfare effects of price discrimination it is necessary to evaluate its long-term (dynamic) effects on welfare.[55] In addition to being an efficient way of recovering fixed costs, price discrimination enables firms to make higher profits which are considered as a reward of investments.[56] Such a reward mechanism may improve long-term welfare by modifying firm's incentives to invest and innovate.[57]

1.5.2. Price Discrimination in Intermediate Markets

It is argued that the economic analysis of price discrimination in intermediate markets differs to a great extent from the analysis of price discrimination against final customers.[58] One of the reasons for the difference is the interdependent behaviour of intermediate buyers. Since they compete on a final market, their demand depends not only on the price this particular firm faces, but also on the prices charged to others.[59] Another reason is that their strategic behaviour plays a role in the analysis.[60] Finally, the analysis cannot be limited to the effect on seller and buyer surplus on the intermediate markets. The implications for the downstream markets are also relevant to the assessment.[61]

There are also several studies[62] that examine the welfare and competitive effects of price discrimination on intermediate markets. By relying on these studies, Nazzini suggests that the welfare effects of price discrimination on intermediate markets are directly related to three factors: the first one is the effect of price discrimination on the productive and dynamic efficiency of the intermediate firms. The second factor is whether the output is higher or lower in the absence of price discrimination. The last factor is the impact of a prohibiton of price discrimination on the dynamic efficiency of the discriminating firm both *ex ante* and *ex post*.[63] Thus, one can conclude that both short-term and long-term welfare effects of price discrimination on intermediate markets are directly related to several factors and cannot be predicted *a priori*.

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[55] EACGP 2005, fn. 1, p. 33.

[56] Nazzini 2011, fn. 44, p. 86.

[57] Motta 2004, fn. 30, p. 496.

[58] Nazzini 2011, fn. 44, p. 87.

[59] Perrot 2005, fn. 45, p. 168.

[60] Perrot 2005, fn. 45, p. 168.

[61] Nazzini 2011, fn. 44, p. 83.

[62] KATZ, M. (1987), "The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Market", *Am Econ Rev*, No:77(1), p. 154; DeGRABA, P. (1990), "Input Market Price Discrimination and the Choice of Technology", *Am Econ Rev*, No:80(5), p.1246; P'BRIEN, D. P. and G. SCHAFFER (1994), "The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman", *J Law Econ*, No: 10(2), p. 296; YOSHIDA, Y. (2000), "Third-Degree Price Discrimination in Input Markets: Output and Welfare", *Am Econ Rev*, No: 90(1), p. 240. For a brief summary of these studies see Langenfeld et al. 2003, fn. 43, p. 184-185.

[63] Nazzini 2011, fn. 44, p. 92.

1.6. Consequences of Banning Discrimination

As summarized above, economic studies show that price discrimination is likely to be welfare enhancing where it increases output in comparison with uniform prices. This implies that banning price discrimination may be detrimental to consumers if total output decreases.[64] Output reductions may occur in two situations: Firstly, forcing uniform pricing may lead to raising of prices above the reservation price of some consumers who therefore stop purchasing the good.[65] Secondly, uniform pricing may induce exit of firms from markets serving consumers with low reservation prices in order to serve those consumers who have higher reservation prices. [66]

Since price discrimination is seen as an efficient way of fixed cost recovery, forcing firms to adopt uniform pricing may discourage firms from investing and innovating, and thereby in the long run may be detrimental for consumers.[67]

Banning price discrimination on intermediate markets may also cause detrimental effects for consumers. On intermediate markets, negotiations with suppliers are considered as the key component of competition because of the fact that they lead to decreases in the profits of the suppliers and also bring down the prices for final consumers.[68] Thus, a ban on price discrimination will cause the supplier to reject requests for lower prices and allow it to exploit its market power.[69]

To conclude, it is obvious that there are instances in which it is uniform pricing as opposed to discriminatory pricing that will have negative effects on welfare that cannot be determined *a priori*. This implies that a *per se* prohibition of price discrimination either on final markets or intermediate markets may be detrimental for consumers. Thus, the assessment of price discrimination requires a case-by-case approach that relies on the economic effects of it.

2. EU CASE LAW ON SECONDARY-LINE PRICE DISCRIMINATION

Discrimination is considered as an abuse under EU competition law. Although a clear definition of discrimination has not been provided, Article 102(c) prohibits dominant undertakings from "applying dissimilar conditions to equivalent

[64] Bishop 2005, fn. 41, p. 66.

[65] Bishop 2005, fn. 41, p. 66.

[66] Perrot 2005, fn. 45, p. 162; Armstrong 2006, fn. 24, p. 9.

[67] Ridyard 2002, fn. 41, p. 287.

[68] FLETCHER, A. (2005), "The Reform of Article 82: Recommendations on Key Policy Objectives", Competition Law Forum, Brussels, 15 March 2005, http://www.oft.gov.uk/shared_oft/speeches/spe0205.pdf, Date Accessed: 28.6.2013, p. 2.

[69] EACGP 2005, fn. 1, p. 33.

transactions with other trading parties, thereby placing them at a competitive disadvantage". In line with the economic definition of discrimination, the Court of Justice of the European Union (CoJ) has broadened this prohibition to the application of similar conditions to unequal transactions.[70] However, in the literature, it is argued that the exact scope of the Article 102(c) is not clear and that EU competition law enforcement does not provide a systematic analytical framework for assessing discriminatory practices.[71]

The main aim of this section is to shed light on the scope of Article 102(c) by considering the relevant literature and to present an overview of the case law on secondary-line price discrimination. In order to do this, firstly the notion of secondary-line price discrimination and its position in EU competition law enforcement will be discussed. Then, the decisional practice and the case law on secondary-line price discrimination will be analyzed.

2.1. Secondary-line Price Discrimination Under EU Competition Law

Price discrimination may take the form of different abusive practices that have different objectives and effects.[72] Under EU competition law, with regard to its objectives and effects, unilateral price discrimination is generally classified as:

- exploitative price discrimination *vis-a-vis* final consumers that reduces consumer welfare by extracting consumer surplus without any exclusionary effect,
- price discrimination that segments markets against the internal market objective,
- exclusionary price discrimination that may either affect the rivals of the dominant firm or the downstream customers or the upstream suppliers of the dominant firm.[73]

Exclusionary price discrimination includes practices of the dominant firm that cause exclusion of its rivals, so-called primary-line discrimination, and

[70] O'Donoghue and Padilla 2006, fn. 3, p. 567 (citing Case 13/63 *Italy v Commission* [1963] ECR 165, para. 6).

[71] Geradin and Petit 2006, fn. 2, p. 480.

[72] Geradin and Petit 2006, fn. 2, p. 489.

[73] PAPANDROPOULOS, P. (2007), "How Should Price Discrimination be Dealt with by Competition Authorities?", *Concurrences*, No:3, p. 34. Since price discrimination *vis-a-vis* downstream customers is a more common practice, hereinafter, such kind of discrimination will be examined. However, all explanations and comments made in the context of this study with regard to discrimination between downstream customers may also adapted to the discrimination between upstream suppliers.

the practices that distort competition between the customers of it, so-called secondary-line discrimination. Primary-line discrimination arises when the discriminating undertaking sets its prices lower in certain markets in order to inflict competitive harm on its competitiors.[74] Secondary-line discrimination occurs when an upstream undertaking sells its products or provides services at different prices to downstream undertakings that compete with one another, and putting the downstream undertaking who received the higher price in a position of competitive disadvantage.[75]

With regard to secondary-line discrimination, it is argued that an important distinction exists depending on whether the dominant firm is vertically integrated.[76] The distinction arises from the fact that price discrimination by a vertically integrated undertaking involves a strategy of leveraging aimed at excluding the rivals of the dominant undertaking's downstream operations.[77]

Since both primary-line discrimination and the discriminatory practices of vertically integrated undertakings aim at exclusion of dominant undertaking's rivals, it is argued in the literature that they raise different legal and economic issues from discriminatory practices of non-vertically integrated undertakings.[78] Thus, in the literature it is generally suggested that, Article 102(c) should only be applied to the circumstances in which a non-vertically integrated dominant firm price discriminates against its customers.[79]

2.2. Case Law on Secondary-Line Price Discrimination

In contrast with the consensus among scholars, the Commission and the Courts applied Article 102(c), also, to cases involving the segmentation of the internal market and to cases dealing with exclusion of the rivals of the

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[74] BEARD T. R., D. L. KASERMAN and M. L. STERN (2008), "Price Discrimination and Secondary-Line Competitive Injury: The Law versus the Economics", *The Antitrust Bulletin*, No:53(1), p. 76.

[75] BULMASH, H. (2012), "An Empirical Analysis of Secondary Line Price Discrimination Motivations", *JCLE*, No: 8(2), p. 365.

[76] Papandropoulos 2007, fn. 73, p. 34.

[77] Geradin and Petit 2006, fn. 2, p. 517.

[78] O'Donoghue and Padilla 2006, fn. 3, fn. 107, p. 205; Nazzini 2011, fn. 44, fn 126. In the context of this study, the term "secondary-line price discrimination" will be used merely to refer discrimination implemented by non-vertically integrated dominant undertakings.

[79] LANG, J. T. and R. O'DONOGHUE (2002), "Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC", *Fordham Int'l LJ*, No:26(1), p. 86; Gerard 2005, fn. 52, p. 17; Geradin and Petit 2006, fn. 2); LAGE, S. M. and R. ALLENDESALAZAR (2006), "Community Policy on Discriminatory Pricing: A Practitioner's Perspective", C. D. Ehlermann and I. Atanasiu (eds.), in *What is an Abuse of a Dominant Position?,* Hart Publishing, p. 340; O'Donoghue and Padilla 2006, fn. 3; PACE, L. F. (2007), *European Antitrust Law,* Edward Elgar Publishing, p. 153; Jones and Sufrin 2011, fn. 12, p. 538; Nazzini 2011, fn. 44, fn. 126.

dominant undertaking. In a limited number of cases concerning secondary-line discrimination, other considerations were at stake besides discrimination between customers. In several of these cases, discrimination was motivated by willingness to favor domestic undertakings, that is to say they involved discrimination on the grounds of nationality.[80] In others, discrimination arose between customers as merely an ancillary effect of the dominant firm's conduct. The main issue in these cases was that the dominant firm's conduct excluded its rivals.[81] Thus, the fact that pure secondary-line discrimination is extremely rarely examined as a stand-alone abuse is regarded as a "striking feature" of the decisional practice and the case law.[82]

The decisional practice and the case law are criticised by scholars for creating confusion by not clearly distinguishing between different types of discriminatory practices[83] and for offering limited guidance on the interpretation of the issues related to the enforcement of Article 102(c).[84] In line with the consensus among scholars that this provision should only be applied to secondary-line discrimination, in the context of this study, the focus of discussion will be on enforcement of Article 102(c) to secondary-line discrimination.

Main issues in enforcement of Article 102(c) to secondary-line discrimination are: the role of incentives in the assessment; evaluation of the equivalence of transactions and the dissimilarity of conditions; interpretation of the competitive disadvantage requirement, and applicable objective justification criteria.

How these issues have been addressed in the decisional practice and the case law will be analyzed below. Although the aim is to present a framework for secondary-line discrimination, due to the limitations of the case law on it, other cases under Article 102(c) will also be mentioned where relevant.

2.2.1. Role of Incentives

One of the most frequently asked questions related to secondary-line price discrimination in the literature is what may be the incentives of a dominant firm to harm competition among its downstream customers.[85]

As explained in Section 1, undertakings, dominant or not, may have an incentive to discriminate between their customers in order to extract more consumer surplus or recover their fixed-costs. However, when it comes to placing customers at a competitive disadvantage which is a requirement under Article 102(c), it is

[80] Geradin and Petit 2006, fn. 2, p. 516.
[81] O'Donoghue and Padilla 2006, fn. 3, p. 555.
[82] O'Donoghue and Padilla 2006, fn. 3, p. 574.
[83] Lage and Allendesalazar 2006, fn. 79, p. 339, 340; O'Donoghue and Padilla 2006, fn. 3, p. 202.
[84] O'Donoghue and Padilla 2006, fn. 3, p. 562.
[85] Bishop 2005, fn. 41, p. 79, Beard et al. 2008, fn. 74, p. 77.

generally argued that a rational non-vertically integrated undertaking would have no incentive to affect the competitiveness of one customer *vis-a-vis* others.[86]

Economic theory suggests that, a non-vertically integrated upstream firm generally benefits from a competitive market since tougher competition at downstream market means more sales for its product.[87] Thus, creating a competitive disadvantage for some of its customers may cause reduction in its sales.[88] Besides, a competitive downstream market is seen as an efficient way of distributing goods. Therefore, insulating the distributor from competitive pressures may negatively affect its efficiency to the detriment of the dominant undertaking in the long term.[89] Placing some of the downstream customers at a competitive disadvantage may also lead to exclusion of disfavored customers and in turn to increase concentration on the downstream market. Concentration, then, increases the countervailing buyer power on the downstream market and limits the market power of the dominant undertaking.[90] As a result, it can be said that the dominant firm has no interest in distorting competition among its customers because it gains no economic advantage from the distortion of downstream competition and may even suffer a disadvantage in doing so.[91]

Although it is obvious that there are no economic incentives for dominant undertaings to distort downstream competition, some non-economic considerations, such as nationality, may motivate firms to favor some customers *vis-a-vis* others. Hence, most of the secondary-line price discrimination cases involved discrimination by state-owned or state-affiliated companies aimed at favoring domestic activities over international or non-domestic ones.[92]

However, the existence or non-existence of an incentive to distort competition or the provision of an advantage was regarded as irrelevant by the Commission and the Courts to condemn a practice as an abuse. For example in *1998 Football World Cup*, the Commission clearly stated that "[w]hile 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".[93] In *Aéroports de Paris*, the General Court (GC) stated that "[…], it should be recalled that the concept of abuse is an objective concept and implies no intention to cause harm" and therefore it found the fact that the dominant

[86] O'Donoghue and Padilla 2006, fn. 3, p. 554.
[87] Bishop 2005, fn. 41, p. 79.
[88] O'Donoghue and Padilla 2006, fn. 3, p. 554.
[89] Geradin and Petit 2006, fn. 2, p. 518.
[90] Geradin and Petit 2006, fn. 2, p. 518.
[91] O'Donoghue and Padilla 2006, fn. 3, p. 554.
[92] Gerard 2005, fn. 52, p. 4; Geradin and Petit 2006, fn. 2, p. 519.
[93] *1998 Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [1999] OJ 2000 L5/55, para. 102.

undertaking has no interest in distorting competition on a market to be irrelevant for establishing abuse.[94]

Thus, it can be concluded that the existence of an incentive to harm downstream competition has not been considered as an essential condition in the case law for an infringement of Article 102(c).

2.2.2. Assessment of Equivalence of Transactions

In the assessment of secondary-line discrimination, determination of whether two transactions are equivalent is regarded as the core test.[95] However, identifying the equivalence of transactions is generally seen as a difficult task, because the components of a transaction are generally complex.[96] The decisional practice and the case law have not provided a definition of a situation in which two transactions are regarded as similar. The only definition of equivalent transactions can be found in a decision under the European Coal and Steel Community (ECSC) Treaty. According to the decision, "transactions are comparable if they are concluded with competing purchasers, involve the same or similar products and their other relevant commercial futures do not essentially differ".[97] However, since every case is very fact specific, this broad definition does not provide adequate guidance in the assessment of equivalance of transactions. The most common factors that were considered in equivalence evaluation will be exemplified below.

Case law demonstrates that physical or functional similarity, that is to say "substitutability"[98] between the supplied products or services and costs of supply are the most relevant factors in assessing equivalence.[99] For example in *United Brands*, where the dominant undertaking's selling of the same bananas at the same ports at different prices to different ripeners who were active in different Member States was considered as infringement of Article 102(c), the CoJ stated that the transactions are equivalent since "bananas sold by UBC are all freighted in the same ships, are unloaded at the same cost in Rotterdam or Bremerhaven and the price differences relate to substantially similar quantities of bananas of the same variety, which have been brought to the same degree of ripening, are of

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[94] Case T-128/98 *Aeroports de Paris v Commission* [2000] ECR II-3933, para. 173.

[95] Gerard 2005, fn. 52, p. 16, GORMSEN, L. L. (2010), *A Principled Approach to Abuse of Dominance In European Competition Law,* Cambridge University Press, p. 105.

[96] Geradin and Petit 2006, fn. 2, p. 487; Jones and Sufrin 2011, fn. 12, p. 538.

[97] O'Donoghue and Padilla 2006, fn. , p. 563 (citing the Decision 30-53 of the High Authority, OJ 1953 L6/111).

[98] *HOV SVZ/MCN* (Case IV/33.941) Commission Decision 94/210/EC [1994] OJ 1994 L104/34, para. 160; *Scandlines v Port of Helsingborg* (Case COMP/A.36.568) [2006] 4 CMLR 1298, para. 257.

[99] O'Donoghue and Padilla 2006, fn. 3, p. 563; WHISH, R. and D. BAILEY (2012), *Competition Law,* Seventh Edition, Oxford University Press, p. 761.

similar quality and sold under the same "Chiquita" brand name under the same conditions of sale and payment ... ".[100]

In the cases that involved provision of services, the equivalence of transactions was assessed by relying on the nature and the cost of the services provided to customers that had different features. For example in *Alpha Flight/Aéroports de Paris*, where it was concluded that Article 102(c) was infringed by imposing discriminatory fees on providers of third party groundhandling services and self-handling services, the Commission took the view that the transactions were equivalent since both groups of customers receive the same management services from the airport operator.[101] In *Clearstream*, where the dominant undertaking on the market for primary clearing and settlement services applied different service fees for cross-border transactions, when assessing the equivalence of transactions the Commission stated that the nature of the services supplied to these customers and the functions of these customers were comparable. Thus, the transactions were found equivalent in terms of Article 102(c).[102]

In *Scandlines*, where it was claimed that the prices charged by the Port of Helsingborg to ferry operators for several port services were discriminatory when compared with the prices charged to certain cargo operators, the Commission concluded that the services provided by the port to ferry and cargo operators were not equivalent since different equipment was used in provision of these services.[103] Thus, after also assessing other conditions, the Commission found that the conduct in question was not an abuse under Article 102(c).

When the products or services supplied are exactly the same, the quantity purchased was considered as a factor in assessing the equivalence of transactions. For example in *Suiker Unie* and in *Hoffman-La Roche*, where the primary objection was the dominant undertaking's exclusivity and requirements contracts, the CoJ concluded that such contracts resulted in customers that purchased the same amounts paying different prices depending on whether they purchase exclusively from the dominant supplier or not.[104] In *Virgin/British Airways*, where the dominant firm paid a bonus commission to travel agents who had increased their sales relative to the sales in a past period, the Commission found that it caused

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[100] Case 27/76 *United Brands v Commission* [1978] ECR 207, paras. 224, 225.

[101] *Alpha Flight Services/Aéroports de Paris* (Case IV/35.613) Commission Decision 98/513/EC [1998] OJ L 230/10; *Aeroports de Paris* (n 94), paras. 206, 214-216; See Case 18/93 *Corsica Ferries v Corpo dei Piloti del Porto di Genovo* [1994] ECR I-1783, Opinion of AG Van Gerven, para. 34.

[102] *Clearstream* (Case COMP/38.096) Commission Decision 2009/C165/05 [2005] 5 CMLR 1302, paras. 307-312.

[103] *Scandlines,* fn. 98, paras. 252, 278, 279.

[104] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" v Commission* [1975] ECR 1663, para. 522; Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para. 90. For a similar approach see Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969.

unlawful discrimination, since two agents selling the same absolute number of tickets would receive different commissions if one agent had increased its sales by a greater proportion of its past sales relative to the other agent.[105] Similarly, in *Portuguese Airports*, the application of different tariff systems for the same number of landings of aircraft of the same type was found discriminatory under Article 102(c).[106]

It is considered essential that the transactions must be reasonably proximate in time, to be identified as equivalent.[107] This does not require the transactions to be concluded exactly at the same time, but the time period between the transactions must not be so long as to allow other factors that affect the undertaking's pricing behaviour such as changes in cost, demand or competitive situation on the market, to render the comparison meaningless.[108] For instance in *British Airways*, the GC considered that identical services "supplied during the same reference period" as equivalent.[109]

It can be concluded from the foregoing that the Commission and the Courts have applied an approach that focused on the features of the product or service concerned, rather than the transaction as a whole. Moreover, it can be argued that buyer-specific issues have been generally neglected when assessing the equivalence of transactions.[110]

2.2.3. Assessment of Dissimilarity of Conditions

Determination of whether the conditions applied are dissimilar relies on the comparison of the terms of the equivalent transactions. In line with the economic concept of discrimination, the core test here is whether the equivalent transactions produce different rates of return for the dominant undertaking.[111] As explained above, applying similar conditions to non-equivalent transactions is also considered as an abuse. Thus, where the compared transactions are not equivalent, the similarity of the terms applied to these transactions may also constitute an abuse, if other conditions of the Article 102(c) are satisfied.

It is accepted that dissimilar conditions include various trading terms which can be translated into a price advantage, thus price discrimination is considered as a suitable proxy for any type of dissimilar conditions.[112]

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[105] *Virgin/British Airways* (Case IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L 30/1, para. 109.
[106] Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, para. 66.
[107] O'Donoghue and Padilla 2006, fn. 3, p. 562.
[108] Peeperkorn 2009, fn. 12, p. 630.
[109] T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 236.
[110] Gerard 2005, fn. 52, p. 16.
[111] O'Donoghue and Padilla 2006, fn. 3, p. 567.
[112] Gerard 2005, fn. 52, p. 16.

Since the application of different conditions is generally obvious from the facts of the case, assessment of dissimilar conditions may be regarded as the least problematic issue in the assessment of secondary-line discrimination.

2.2.4. Interpretation of Competitive Disadvantage

The competitive disadvantage condition is expressly mentioned in the text of Article 102(c). However, the exact meaning and the role of this condition in establishing abuse are highly controversial. This controversy mainly arises from the inconsistency in the decisional practice and in the case law regarding competitive disadvantage. The reason for this inconsistency is different interpretations of competitive disadvantage condition. In the literature, these different interpretations are examined under three groups.[113]

The first group consists of cases in which merely the existence of discrimination was seen sufficient to raise a presumption of disadvantage. For example, in *Suiker Unie* the CoJ considered that the customers of the dominant undertaking are in competition with each other and therefore must have been affected by the different prices that they received without analysing why paying different prices affected competition between customers.[114] Similarly, in *Hoffman-La Roche* and in *Irish Sugar* the Courts held that the conduct of the dominant undertaking is discriminatory without analysing how competition between customers would be distorted by the different prices paid.[115]

In the second group of cases, competitive disadvantage is logically inferred from the total evaluation of the facts of the case. For example in *British Airways*, the GC, by emphasizing the fact that British Airways was at the time an obligatory business partner for travel agents for many routes and agents had no choice but to deal with it,[116] concluded that differences in commission for the absolute amount of ticket sales "naturally" affected competition between agents.[117] In *Clearstream*, the fact that the disadvantaged party had no choice but to deal with the dominant company, because the latter had a de facto monopoly for primary clearing and settlement services with no realistic prospect for new entry,[118] was considered as an indicator of competitive disadvantage by the Commission. In that case the extent[119] and the duration of discrimination (five years),[120] were among the factors

[113] O'Donoghue and Padilla 2006, fn. 3, p. 568-573.
[114] *Suiker Unie,* fn. 104, paras. 522-525.
[115] *Irish Sugar,* fn. 104, para. 188; *Hoffman-La Roche*, fn. 104, paras. 122, 123.
[116] *British Airways,* fn. 109, para. 127.
[117] *British Airways*, fn. 109, para. 238.
[118] *Clearstream,* fn. 102, para. 208.
[119] Clearstream, fn. 102, para. 341. Since it was kept as confidential in the decision, extent of discrimination can be inferred from the fact that 50% reduction was required to terminate discrimination.
[120] Clearstream, fn. 102, para. 194.

that led the Commission to logically infer the competitive disadvantage arising from discrimination.

In the last group of cases, evidence of actual or likely competitive disadvantage was sought in order to establish an abuse under Article 102(c). For example in *Soda-Ash-Solvay*, where Solvay was granting rebates to customers who purchased all or the major part of their requirements from Solvay, the rebate system was found discriminatory under Article 102(c) as well as exclusionary. As a result of different prices, disfavored customers of dominant undertaking paid substantially different prices. Since the input concerned was 70% of the raw material batch cost and 13% of the finished product, the Commission concluded that the price discrimination had a considerable effect upon costs of the undertakings affected and therefore it affected the profitability and competitive positions of customers.[121]

A similar interpretation of competitive disadvantage can be found in *Alpha Flight Services/Aéroports de Paris*. By considering the fact that the fees in question were an important part of a supplier's cost structure, the Commission concluded that they had a significant effect on competition on the groundhandling services market.[122] Besides, the Commission took into account that artificial cost differences created via discriminatory fees would be reflected in downstream prices, and thereby affecting competition on the air transport market. Since the groundhandling constitutes a large proportion of the airlines' costs, it was mentioned that the distortion of competition on that market would also be significant.[123]

In a more recent case, *Scandlines*, in its assessment with regard to competitive disadvantage, the Commission first mentioned that the ferry and cargo operators were not competing on the same market for transportation of goods.[124] Second, since the port charges constituted a relatively small part of the costs of shippers who were the customers of transportation services, the Commission stated that difference in port charges would have no effect on shippers' decisions in deciding to use whether ferry or cargo in transportation. Thus, the Commission took the view that alleged discriminatory fees would not distort competition between ferry and cargo operators.[125]

It can be concluded from the given examples that the notion of competitive disadvantage, in many cases, was interpreted broadly by the Commission and the Courts without elaborating on the way how the distortion of competition between

[121] *Soda-Ash-Solvay* (Case IV/33.133) Commission Decision C 91/299/EEC [2003] OJ L10/10, paras. 181-185.
[122] *Alpha Flight Services/Aéeroports de Paris,* fn. 101, paras. 109, 110.
[123] *Alpha Flight Services/Aéeroports de Paris*, fn. 101, paras.125, 126.
[124] *Scandlines,* fn. 98, paras. 257, 284.
[125] *Scandlines*, fn. 98, paras. 255, 285, 286.

customers occurred. However, interpretation of competitive disadvantage condition is given great importance in the assessment of secondary-line discrimination and such an interpretation has been highly criticised by scholars.

2.2.5. Application of the Objective Justification Criterion

A dominant firm may argue that its discriminatory practice is objectively justified or enhances efficiency.[126] The objective justification criterion is considered vital with regard to discrimination because in most cases discrimination has welfare improving effects. Thus, if properly applied, the criterion ensures that the enforcement of Article 102(c) does not lead to anti-competitive results.[127]

However, objective justification criterion has so far been applied narrowly.[128] In most cases, it has been understood as cost-related justifications.[129] In *Clearstream*, the Commission implied that a difference in the costs of serving different customer groups is a valid defence.[130] In line with this approach, discounts and rebates that reasonably reflect anticipated cost savings or economies of scale have generally been regarded as objectively justified. For example in *Brussels National Airport*, where the dominant undertaking on the aircraft landing and take-off services market applied a discount system for landing fees depending on the number of landings, the Commission stated that the discount system could be justified by economies of scale.[131] Also in *Virgin/British Airways*, it was accepted that a dominant supplier can give discounts related to the efficiencies, i.e. discounts for large orders that allow the supplier to produce large batches of product.[132]

Since quantity discounts are deemed to reflect gains in efficiency and economies of scale achieved by the dominant undertaking,[133] it is accepted in the case law that quantity discounts linked solely to the purchasing volume of customers and enabling dominant undertakings to achieve economies of scale are permissible.[134] Thus, difference in quantities bought was considered as a valid objective justification.

Price reductions may also be given by dominant undertakings in return for services provided by the buyer. In case law such discounts are also considered as

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[126] Whish and Bailey 2012, fn. 99, p. 763.
[127] Geradin and Petit, 2006, fn. 2, p. 592
[128] Gerard 2005, fn. 52, p. 28.
[129] Akman 2012, fn. 7, p. 239.
[130] *Clearstream,* fn. 102, para. 313.
[131] *Brussels National Airport*, Commission Decision 95/364/EC [1995] OJ L216/8, para. 16.
[132] *Virgin/British Airways,* fn. 105, para. 101.
[133] Case T-203/01 *Michelin v Commission* [2003] ECR II-4082, para. 58 (*Michelin II*).
[134] Case 322/81 *Michelin v Commission* [1983] ECR 3461, paras. 71, 72; *Michelin II,* fn. 133) para. 58; *Irish Sugar,* fn. 104) para. 173; *Portuguese Airports,* fn. 106, para. 49.

an objective justification. In *Irish Sugar*, for example, "promotional, warehousing, servicing or other functions" performed by the customer were considered among the factors that justify a discount.[135] However, it is clear from the statements of the Commission, the criteria which must be met to qualify the discounts must be objectively defined and be made known to customers in order to objectively justify service discounts or bonuses.[136] Thus, in *Michelin II*, the GC condemned the service bonus provided by Michelin because it was found subjective and thus inevitably led to discrimination.[137]

As it will be understood from given examples above, the assessment of objective justification is in line with the assessment of equivalence of transactions. In other words, in both assessments the Commission and the Courts have concentrated on the factors that are related to the properties of the product or service supplied and costs of supply. Thus, buyer-specific justifications have not played a notable role in the application of objective justification criteria.

A framework for the Commission's and the Courts' approach to the prominent issues in the assessment of secondary-line discrimination was sought to be established above. A broader criticism of this approach will be provided in the next section.

3. ASSESSMENT OF SECONDARY-LINE PRICE DISCRIMINATION FROM AN EFFECTS-BASED PERSPECTIVE

In order to review the policy on abuse of dominance and improve its efficiency and transparency,[138] in 2003, the Commission launched a modernisation process[139] with regard to Article 102. Within this process, in July 2005 EAGCP prepared the Report entitled "An Economic Approach to Article 82".[140] This report argued in favor of an economic and effects-based approach to Article 102. Following that, in December 2005, DG Competition of the Commission published a staff discussion paper on the application of Article 102 to exclusionary abuses by dominant undertakings.[141] The Discussion Paper stated that in applying Article

[135] *Irish Sugar,* fn. 104, para. 173.

[136] *Michelin* (Case IV.29.491) Commission Decision 81/969/EEC [1981] OJ L353/33, para. 45.

[137] *Michelin II,* fn. 133, para. 145.

[138] MONTI, M. (2006), "Speech at 8th EU Competition Law and Policy Workshop, Florence, 6-7 June 2003", C. D. Ehlermann and I. Atanasiu (eds.), in *What is an abuse of a dominant position?,* Hart Publishing.

[139] For the details of the modernisation process see http://ec.europa.eu/competition/antitrust/art82/index.html, Date Accessed: 21.06.2013.

[140] EAGCP 2005, fn. 1.

[141] DG Competition Discussion Paper on the Application of the Treaty to Exclusionary Abuses (Discussion Paper) (2005), http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf, Date Accessed: 21.06.2013.

102, the Commission would adopt an approach that is based on the likely effects of the conduct on the market.[142] Finally in 2009, the Commission issued a Guidance on the enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings.[143]

The Guidance sets out an effects-based approach to exclusionary conduct under EU competition law and outlines the analytical framework that the Commission employs when assessing the most commonly encountered forms of exclusionary conduct.

Exploitative and discriminatory conduct have not been so far dealt with during the modernisation process and not covered in the Guidance.[144] This is interpreted as a lacunae and limitation of the Guidance, since price discrimination is regarded as one of the most confusing and unsettled areas of EU competition law.[145]

The author agrees with this view for several reasons. First, although pure secondary-line price discrimination is an extremely rare practice because of the absence of the incentives of the firms to distort downstream competition, it is obvious that it cannot be disregarded in the presence of the provision of the Article 102(c). Moreover, it is accepted in the literature that, even if it is seldom, occurance of such a practice may harm welfare through reduction of competition.[146] Second, when it is considered that the aim of the Guidance is to provide greater clarity and predictability, secondary-line price discrimination arises as an area in competition law that needs to be clarified because it is an ubiquitous business practice and the case law does not provide enough guidance for its assessment. Thirdly, in the absence of predictability dominant undertakings may refrain from price discriminating with the fear of being accused of breaching Article 102. Since in most cases price discrimination has welfare enhancing effects, this may lead to detrimental outcomes for consumers. Finally, as economics of

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[142] Discussion Paper, fn.141, para. 4.

[143] Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 24.2.2009, 2009/C45/02 (Guidance), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF, Date Accessed: 20.06.2013.

[144] KROES, N. (2005), "Preliminary Thoughts on Policy Review of Article 82", Fordham Corporate Law Institute, New York, 23 November 2005, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en, Date Accessed: 22.06.2013.

[145] GERADIN D. and D. HENRY (2009), "Abuse of Dominance in the Postal Sector – The Contribution of the Guidance Paper on Article 82 EC", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435362, Date Accessed: 23.06.2013, p. 2; GERADIN, D. (2010), "Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569502, Date Accessed: 10.06.2013, p. 8.

[146] Nazzini 2011, fn. 44, p. 80.

price discrimination demonstrates that it is a practice that should be assessed with regard to its effects on welfare,[147] secondary-line price discrimination cannot be abstracted from the application of an effects-based approach that the Commission has adopted in all areas of competition law. Thus, it is thought that a systematic analytical framework should be set out for the assessment of secondary-line price discrimination with an effects-based approach.

The main aim of this section is to propose an analytical framework for assessing secondary-line price discrimination from an effects-based perspective. In order to do this, first, the general framework of the effects-based approach will be presented. Second, the decisional practice and the case law on secondary-line discrimination will be analyzed with an effects-based view. Finally, a framework for evaluating secondary-line discrimination will be suggested.

3.1. General Framework of the Effects-Based Approach to Article 102

The focus of the effects-based approach is regarded as consumer welfare.[148] Thus, the main feature of this approach can be identified as protecting consumers and protecting the process of competition, not protecting individual competitors. When assessing whether the conduct in question actually harms competition, likely effects of the conduct on the competitive process and on consumers are regarded as sufficent by the Commission. Since foreclosure of rivals that are as efficient as the dominant undertaking is seen as the most harmful to consumer welfare, effects-based approach mainly aims at preventing this kind of foreclosure. As a result of the fact that the focus of the approach is on consumers, the conduct in question may be justified by the dominant undertakings on efficiency grounds.[149]

These main features of the effects-based approach are reflected in the Guidance in relation to exclusionary conduct. With the aim of improving consumer welfare, the Guidance states that the Commission will focus on those types of conduct which are most harmful for the consumers.[150] It is also mentioned that the emphasis of the Commission's enforcement activity will be on "safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors".[151] In the Guidance,

[147] Akman 2012, fn. 7, 257.

[148] EAGCP 2005, fn. 1, p. 2.

[149] Press Release IP/08/1877 3 December 2008, http://europa.eu/rapid/press-release_IP-08-1877_en.htm?locale=en, Date Accessed: 20.06.2013.

[150] Guidance, para. 5.

[151] Guidance, para. 6.

anti-competitive foreclosure, that is to say foreclosure leading to consumer harm, is defined as "a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers".[152] Moreover, the aim of the enforcement activity is declared as ensuring that the dominant undertakings do not impair effective competition by foreclosing their rivals in an anti-competitive manner, thereby having a negative impact on consumer welfare. According to the Guidance, such a negative impact may occur in the form of higher prices than would have otherwise been or in some other form such as decreasing quality or limiting consumer choice.[153]

The position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure and the direct evidence of any exclusionary strategy are considered as the relevant factors to the assessment of anti-competitive foreclosure.[154]

With a view to preventing anti-competitive foreclosure, the Commission stated that it will normally intervene only in circumstances in which the conduct in question has led to or is likely to lead to foreclosure of the rivals that are as efficient as the dominant undertaking.[155]

According to the Guidance, in its assessment, the Commission will take into account the justifications claimed by the dominant undertaking. Thus, a dominant undertaking may justify its conduct by demonstrating that it is objectively necessary or it produces efficiencies that outweigh any anti-competitive effects on consumers.[156]

3.2. Assessment of the Case Law From an Effects-Based Approach

As elaborated in Section 2, enforcement of Article 102(c) to secondary-line price discrimination has been limited to date and has been confined mainly to two situations. One is the situation in which a state-owned or state-related firm discriminates between domestic and foreign customers or transactions, and the other is the situation in which secondary-line discrimination occurs as an ancillary

[152] Guidance, para. 19.
[153] Guidance, para. 19.
[154] Guidance, para. 20.
[155] Guidance, para. 23.
[156] Guidance, para. 28.

effect of a conduct that leads to primary-line injury.[157] Since the cases arised under these two situations were not pure secondary-line discrimination cases and issues related to nationality and exclusion of rivals played a significant role in the assessment of the conduct involved in, the precedential value of them for the cases involved pure secondary-line may be seen as questionable.[158] However, within the limitations of the relevant case law, these cases are considered as appropriate resources that enable one to make inferences from the Commission's and the Courts' approach to secondary-line discrimination in the context of this study.

To start with the first condition, "existence of equivalent transactions", required to invoke Article 102(c), it is argued that the Commission and the Courts have generally assumed that transactions are equivalent without much analysis.[159] In particular, the circumstances that are specific to the customers have generally been disregarded when assessing equivalence of transactions.[160] However, economics shows that the customers' demand function is an inseparable element of the transaction.[161] Thus, a superficial assessment of equivalence of transactions does not correspond to economics of price discrimination. Besides, an assumption of equivalence has probably increased the number of the cases of intervention under Article 102(c). When this assumption merges with the superficial analysis of the "competitive disadvantage" condition, that will be explained below, it creates the risk of prohibition of price discrimination that will improve consumer welfare. Since the aim of an effects-based approach is protecting consumer welfare, relying the assessment of equivalence of transactions merely on assumptions cannot be regarded as consistent with the effects-based approach.

The most controversial area of the Article 102(c) enforcement, the "competitive disadvantage" condition, constitutes the second and the most important point of the assessment of the relevant case law. Although it is explicit from the wording of Article 102(c) that price discrimination must lead to a competitive disadvantage between customers, analysis of this point by the Commission and the Courts has been criticised for being "purely formal".[162] The reason for such criticism is the fact that as soon as there are different prices not directly justified by a cost difference the Commission and the Courts have presumed that there

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[157] O'Donoghue and Padilla 2006, fn. 3, p. 573, 574.

[158] O'DONOGHUE, R. (2006), "Over-Regulating Lower Prices-Time for a Rethink on Pricing Abuses under Article 82 EC", C. D. Ehlermann and I. Atanasiu (eds.), in *What is an abuse of a dominant position,* Hart Publishing, p. 377.

[159] Jones and Sufrin 2011, fn. 12, p. 538.

[160] Gerard 2005, fn. 52, p. 16.

[161] FURSE, M. (2001), "Monopoly Price Discrimination, Article 82 and the Competition Act", *ECLR*, No:22(5), p. 153.

[162] Lage and Allendesalazar 2006, fn. 79, p. 341.

is competitive disadvantage. However, the economics of price discrimination provides no support for the presumption that mere price differentials distort downstream competition.[163] As the effects-based approach requires the analysis of actual or likely effects of the conduct, it cannot be argued that such a superficial assessment of competitive disadvantage is in line with the effects-based approach.

However, in several cases the Commission and the Courts have attempted to show the competitive disadvantage. In these cases some related factors such as whether the customers have any other available suppliers, duration of the discriminatory practice, proportion of the product or service supplied by the dominant firm to the disadvantaged customers' total costs, extent of the discrimination have been taken into account as indicators of competitive disadvantage.[164] While considering these factors as indicators of distortion of competition, the actual distortion has never been quantified. In contrast, in *British Airways*, the CoJ stated that it must be shown that the competitive position of business partners is distorted to some extent, although quantification of this deterioration is not required.[165] Such a view is criticised for leading the Commission and the Courts to condemn discrimination where it distorts the competitive position of individual customers.[166] The emphasis of the effects-based approach is on protecting the effectiveness of the competitive process, not protecting individual customers. Thus, such an assessment of competitive disadvantage condition is seen completely in contrast with effects-based approach.

Third point in the assessment is "objective justification". As explained above, a rational dominant undertaking has no incentive to distort downstream competition. Thus, considering secondary-line discrimination as a stand-alone abuse is seen as contrary to economic logic[167] and competition law rationale.[168] This implies the fact that when a dominant firm discriminates between its customers, it is likely to have a valid reason for doing so.[169] However, the notion of objective justification has been narrowly interpreted by the Commission and the Courts, and understood to a great extent as cost-related justifications. Buyer-specific conditions[170] and the reasons why firms engage in price discrimination[171] have generally not been regarded as possible objective justifications. As the concept

[163] Akman 2012, fn. 7, p. 245.
[164] See the text between fn. 116-120.
[165] Case C-95/04P British Airways v Commission [2006] ECR II-2969, paras. 144, 145.
[166] Gormsen 2010, fn. 95, p. 110.
[167] Bishop 2005, fn. 41, p. 79.
[168] O'Donoghue and Padilla 2006, fn. 3, p. 554.
[169] O'Donoghue and Padilla 2006, fn. 3, p. 554.
[170] Akman 2012, fn. 7, p. 239.
[171] Geradin and Petit 2006, fn. 2, p. 505.

of objective justification is directly related to the equivalence of transactions, a similar criticism can be raised here. Such a narrow interpretation of objective justification may lead to banning consumer welfare improving discrimination. Thus, it cannot be regarded as consistent with effects-based approach.

To summarize, it can be said that although there has been limited efforts to analyze the effects of discrimination on downstream customers, the enforcement policy generally has resulted in protecting particular customers rather than protecting the competitive process. Besides, a broad interpretation of equivalence of transactions and the narrow interpretation of objective justification carry the risk of prohibiting pro-competitive discrimination. Thus, it can be argued that the enforcement policy implemented so far is not in line with the effects-based approach.

3.3. An Analytical Framework for the Assessment of Secondary-Line Price Discrimination

As it is clearly stated in the above-mentioned policy documents of the Commission, the core of the effects-based approach is consumer welfare. Thus, it is obvious that the effects-based assessment of secondary-line price discrimination should focus on whether the dominant firm's conduct in question causes consumer harm, that is to say whether it enables the favored downstream customer to profitably increase prices, decrease quality or limit consumer choice.

Since the aim of the effects-based approach is protecting effective competitive process and not protecting individual competitors, the notion of "competitive disadvantage" in the wording of Article 102(c) should be interpreted as requiring that competition be distorted by the discriminatory conduct of the dominant undertaking rather than customers be merely disadvantaged.[172] That means merely a decrease in a customer's market share or exit of it without harming competition should not be seen adequate for existence of competitive disadvantage. Rather, whether the conduct has led to actual or is likely to lead to potential anti-competitive foreclosure effects, thereby harming consumers should be analysed.[173] Since the concept of foreclosure relates to the market as a whole, not to any particular customer,[174] such an analysis necessitates the determination of the relevant market in which a competitive harm occurs.[175]

Since it is accepted within the effects-based approach that only the foreclosure of the rivals, which are as efficient as the dominant firm, leads to consumer harm,

[172] Gerard 2005, fn. 52, p. 28.
[173] Akman 2012, fn. 7, p. 266.
[174] Bishop 2005, fn. 41, p. 82; Beard et al. 2008, fn. 74, p. 85, 86.
[175] Perrot 2005, fn. 45, p. 167.

as efficiency criterion should also be considered in the assessment of secondary-line discrimination. However, in this situation, the dominant undertaking is not appropriate as an efficiency benchmark since it does not operate in the market where the foreclosure occurs. Instead, the efficiency benchmark should be the customers benefiting from the discriminatory practice.[176]

The Guidance provides several factors to be considered in the assessment of anti-competitive foreclosure. In our opinion, these factors should also be taken into account in the assessment of secondary-line discrimination. For example, the position of the dominant undertaking and other factors related to its degree of dominance such as the existence of entry and expansion barriers, the position of its competitiors, customers and suppliers may demonstrate whether the dominant undertaking is an unavoidable trading partner or customers have available alternative suppliers. Also factors related to the extent of conduct may give an idea about the possible foreclosure effect on the downstream market. If the discrimination has prevailed for a sufficient time, evidence of actual foreclosure should also be evaluated.

Within the framework of the effects-based approach, as stated in the Guidance, objective necessity and efficiency defence are considered as possible justifications of the anti-competitive conduct. For both of them, it is required that the allegedly abusive conduct must be indispensable. Besides, for the efficiency defence to be applicable the conduct must cause likely harm to consumers.[177] At first glance, it may be thought that this approach to objective justification should be implemented for secondary-line price discrimination as well. However, in the literature it is argued that this understanding is not a suitable tool for assessing secondary-line price discrimination for two reasons.[178] First, since a dominant undertaking can always charge non-discriminatory prices, price discrimination will be indispensible only in extremely rare circumstances. Secondly, as price discrimination that improves consumer welfare would not be likely to cause consumer harm and therefore would not be anti-competitive, efficiency defence which firstly requires the conduct to be anti-competitive is not appropriate for secondary-line discrimination. Thus, it is suggested that such an assessment should be done in the stage in which the abuse is established.[179]

Following this view and also considering the absence of the economic incentives of undertakings to harm downstream competition, it is thought that

[176] Nazzini 2011, fn. 44, p. 222.
[177] Guidance, para. 28.
[178] Akman 2012, fn. 7, p. 263.
[179] Akman 2012, fn. 7, p. 263.

under the effects-based approach, the notion of objective justification, which greatly overlaps with equivalence of transactions, should be interpreted with a broad perspective when assessing whether the conduct is anti-competitive.

To conclude, it can be said that the effects-based approach that is elaborated for exclusionary conduct in the Guidance should be adopted for secondary-line discrimination as well. Similar to exclusionary conduct, the focus should be on the effects of the allegedly abusive conduct on the effective competitive process and consumer welfare. Thus, as put forward in Section 1, a case-by-case analysis of secondary-line discrimination will be appropriate from an effects-based perspective to abuse of dominance.

CONCLUSION

Article 102(c) TFEU prohibits dominant undertakings from "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". Prohibition of discrimination under EU competition law mainly relies on fairness grounds. However, in recent years, with the aim of adopting an effects-based approach to EU competition law, it has been suggested by some economists to assess discrimination, in particular price discrimination, less in terms of fairness and more in terms of welfare.

The underlying reason behind such a suggestion is the ambiguity of the welfare effects of price discrimination. Economic studies show that the welfare effects of price discrimination are primarily related to its output effects. It is accepted by the economists that price discrimination is welfare reducing if it does not increase output. However, in other cases the direction of the welfare change is indeterminate and depends on several factors, i.e. structure of the market, demand curvature, elasticity of demand, type of the price discrimination implemented, whether the discrimination is applied to final customers or intermediate customers and its effects on dynamic efficiency.

Ambiguity of welfare effects implies that a per se prohibition of price discrimination may be detrimental for consumers. Thus, economics clearly demonstrates that the assessment of price discrimination, be it primary- or secondary-line, requires a case-by-case analysis relying on the economic effects of it.

With regard to price discrimination under EU competition law, it is widely argued in the literature that enforcement of Article 102(c) should be limited to secondary-line discrimination, that is to say to the cases in which a non-vertically integrated dominant undertaking price discriminates against its customers with whom it does not compete. However, review of the decisional practice and the

case law shows that the Commission and the Courts have applied Article 102(c) also to the cases that dealt with primary-line injury and segmentation of the internal market. In several cases that involved secondary-line discrimination, other considerations such as nationality and exclusion of rivals were at stake besides secondary-line injury. Thus, it can be argued that pure secondary-line discrimination cases are extremely rare in practice.

The reason underlying this rarity is the absence of incentives of a rational dominant undertaking to distort downstream competition among its customers. Since a dominant undertaking gains no economic advantage from such a distortion, it is generally argued in the literature that considering secondary-line discrimination as a stand-alone abuse is contrary to economic logic and competition law rationale. However, the wording of the provision of Article 102(c) is clear. Besides, the Commission and the Courts have not considered the existence of an incentive to harm downstream competition as an essential condition for an infringement of Article 102(c). Thus, it is obvious that in certain circumstances, secondary-line price discrimination may constitute an abuse under EU competition law.

Having said that, the decisional practice and the case law to date do not provide adequate guidance on the circumstances in which secondary-line price discrimination constitutes an abuse. Moreover, secondary-line discrimination was left outside the modernisation process and has not been addresed by the Commission's Guidance that adopted an effects-based approach to Article 102 enforcement. These facts make secondary-line discrimination an unsettled area of EU competition law.

Given that providing clarity and predictability has been considered among the aims of modernisation process, the fact that an analytical framework for the assessment of an ubiquitous business practice has not been set out can be regarded as a lacunae in the Article 102 enforcement. In our opinion, secondary-line price discrimination cannot be abstracted from the effects-based approach and a systematic analytical framework for the assessment should be set out with an effects-based perspective.

In the context of this study, an analytical framework adopted from the Commission's Guidance on exclusionary conduct is proposed for the assessment of secondary-line discrimination from an effects-based perspective. According to this proposal, since the core of the effects-based approach is consumer welfare, an effects-based assessment of secondary-line discrimination should concentrate on whether the conduct in question causes consumer harm via higher prices, lower quality or limited consumer choice. As the aim of the effects

based approach has been declared as protecting an effective competitive process rather than protecting individual competitors, the "competitive disadvantage" condition required to invoke Article 102(c) should be interpreted as distortion of competition in the relevant downstream market, not merely as particular customers being disadvantaged. Such an interpretation requires analysing whether the conduct of the dominant undertaking has led to or is likely to lead to potential anti-competitive foreclosure of downstream customers. As it is accepted under the effects-based approach that only the foreclosure of as efficient rivals of dominant undertaking leads to consumer harm, foreclosure of as efficient rivals of the advantaged customer should be sought as a necessity for establishing an abuse in the effects-based assessment of secondary-line discrimination.

One point of the proposal that differs from the assessment presented by the Guidance is the application of the objective justification criteria. Under an effects-based approach, application of objective necessity and efficiency defence requires the conduct to be indispensible and anti-competitive. Since price discrimination will rarely be indispensible and anti-competitive such a requirement cannot be adopted with regard to secondary-line discrimination. Thus, by also considering the fact that discrimination generally has an efficiency rationale, it is suggested that the objective justification criteria should be taken into account in the stage in which the abuse is established.

In our opinion, such an assessment of secondary-line discrimination adopted from the Guidance will also be consistent with the case-by-case approach that is suggested by economics.

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