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Personalized Pricing, Discrimination and EU Competition Law

1 Introduction

By now, most of us have become used to receive offers and advertising when surfing the web. As soon as we enter into webpages with ads, it is not uncommon that we are offered products that are based on searches or online shopping that we have recently done. Websites and online shops which we visit and in which we are members also keep offering us ads and “special offers” based on our searches and our previous purchase patterns, referred to as *personalized offers* in this paper. While I am certain that many feel a certain annoyance of how quickly companies are tracing and spreading the data that we leave behind, it is also likely that many take advantage of those special offers that are made to them. We benefit from receiving discounts on products that we purchase frequently and from the “good deals” we make on products that we ordinarily cannot afford to buy. Leaving aside the issue of how companies handle our data, which is not the topic of this paper, the question could be asked whether the offers that have been adapted to a person’s specific needs and demand could somehow be harmful. In particular, it could be discussed whether personalized offers constitute a form of illegal differential treatment between different customers. Such an issue seems *prima facie* to concern rules on consumer protection and anti-discrimination.¹ However, differ-

¹ F Zuiderveen Borgesius, ‘Price Discrimination, Algorithmic Decision Making, and European Non-Discrimination Law’ (2020), 31 European Business Law Review 401 (Zuiderveen Borgesius 2020); T de Graaf, ‘Consequences of nullifying an Agreement on Account of Personalised Pricing’ (2019), European Consumer and Market Law (de Graaf 2019).

ential treatment of customers could also potentially be captured by EU Competition Law when a supplier has market power. That is topic of this paper.

Although it is dangerous to make too general statements about the competition rules, a simple description of the scope of competition law is that it mainly deals with *market power*. With market power it is meant that an undertaking to a certain extent may determine market conditions, such as price and output. By contrast, under conditions of effective competition undertakings would normally have to adapt themselves to market conditions in order to survive on the market, being so-called price takers. A dominant undertaking may thus exploit its market power to the detriment of competition, competitors and ultimately the consumers. EU competition law, in particular through Article 102 Treaty of the Functioning of the European Union (TFEU), sets limits for the exercise of market power. While the pro and cons of price discrimination has always been a debated issue, it is in particular in the presence of market power that the potential negative effects of price discrimination may emerge. In cases of market power, customers are normally also not in a position to negotiate the price or other conditions. Normally, in such cases the majority of the customers will be dependent to some extent on the company with market power. In addition, if the product has the character of a must-have product, the dependency of the customers will be greater. For such cases, competition law *may* offer remedies. However, a problem is that it is debatable whether the rules are well designed to handle undertaking's behavior directly directed towards natural persons (hereinafter designated as *end-consumers*), and whether the previous case law and administrative practice give sufficient support and guidance for applying the competition rules to such situations. It may seem ironic that competition law, which is regularly characterized as promoting consumer welfare, is not self-evidently applied to all transactions directly involving dominant undertakings and end-consumers, and which may have a negative effect upon the latter. However, the main thrust of competition law is to regulate companies' behavior on the market towards customers and competitors, which supposedly will *indirectly* benefit end-consumers by promoting more competitive and efficient markets.

Accordingly, this article explores the possibility to apply Article 102 TFEU to personalized prices. Section 2 explains the meaning of personalized prices and their effect on economic welfare. Section 3 describes, in general, Article 102 TFEU and some its elements relevant for this

paper. In Section 4 the possibility to capture personalized offers as illegal price discrimination under Article 102 TFEU is discussed. Finally, in section 5, it is concluded that it is problematic to assess personalized pricing under Article 102 TFEU, as the available tests may either be over or underinclusive. Arguably, it would be a better option to *primarily* regulate such practices with other bodies of rules that are focused on directly protecting end consumers.

2 Data, Algorithms and Personalized Offers

The business model of many of today's tech companies, relies on the collection of data. Online platforms, such search engines, online sales apps, or just any application or website, collect data of individuals regarding searches, location data, purchases, age, gender etc. With the development of new algorithms and data mining, such data is processed in order to create profiles of individuals that are used by online platforms to predict those individuals' behavior. Accordingly, online platforms can use such data to make individually targeted advertising and sales offers with a price only offered to the individual in question, so called personalized pricing.² Personalized pricing is said to consist of two elements. The first element is the practice of discriminating prices to different consumers. The second element is that the offers (normally a price) are adapted based on information of the consumer's personal characteristics and conduct (so-called targeting or profiling). The second element is normally based on the data that has been collected about the consumer.³

On the surface, the effects of personalized offers are ambiguous. It may be doubtful that many consumers would complain that offers are personalized as the design of such offers is adapted to our individualized possibility to pay. It seems also doubtful that many consumers would object to targeted advertising of goods and services that they are interested in. On the contrary, it may be suspected that many of us would see the benefits of such offers. For instance, a would-be customer that has visited

² M Botta and K Wiedemann, 'To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance' (2020), 50 *European Journal of Law and Economics* 381 (Botta & Wiedemann 2020), 382; C Townley, E Morrison and K Yeung, 'Big Data and Personalized Price Discrimination in EU Competition Law' (2017), 36 *Yearbook of European Law* 683 (Townley et al. 2017), 684–685.

³ OECD, 'Personalised pricing in the digital era' (2018), Background Note, DAF/COMP (2018)13 (OECD 2018), 8.

a website looking for a particular product and who has chosen not to purchase, would hardly react negatively if he/she receives an offer a few days later regarding the same product for a “discount” price. Similarly, a consumer may not object to continuously receiving new offers about such goods in the future (at least, until the demand for that good/service has been satisfied). On the other hand, it seems also that individuals may object to that “special offers” are being made to other customers, but not to them.⁴ So, in other words, while we may like personalized offers when we benefit, we may actually dislike companies making such offers when we do not get the same treatment as other customers.

From an economic perspective, the discussion concerns whether a company could use personalized prices to engage in price discrimination that enhances welfare and in particular consumer welfare. According to mainstream economic theory, three conditions need to be met for price discrimination to be feasible. Firstly, there must be market power. Secondly, it must be possible to segment the market according to consumer’s willingness to pay, which also presupposes the capacity to measure consumers’ willingness to pay. Thirdly, it must be possible to prevent arbitrage (which is the possibility for another company to exploit price differences between customers and customer groups by buying goods/services from the low-price paying customer group and selling to the high-price paying customer group). The exact degree of market power necessary to be able to maintain a price discrimination scheme has been subject of discussion, as well as whether market power is necessary at all.⁵ Although this is an interesting discussion, it is not necessary to elaborate further on this issue in this paper as Article 102 TFEU does not apply to situation when there is no or a very limited form of market power.

According to economic theory, there are three types of price discrimination.⁶ Firstly, there is *perfect price discrimination*, also called *first-degree price discrimination*. This means that the supplier would be able to profile and target the willingness to pay of *each* individual customer when such a price is above the marginal cost. In such a situation, the sup-

⁴ Botta & Wiedemann 2020, 388.

⁵ See for instance L Henriksson, *Konkurrensträtsöverträdelser – Ekonomisk analys i den juridiska processen* (Norstedts Juridik, Stockholm, 2013) (Henriksson 2013), 174; Townsend et al. 2017, 698, cross-referencing to M Levine, ‘Price discrimination without market power’ (2002), 19 Yale Journal on Regulation, 1 (Levine 2002).

⁶ R O’Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed., Hart Publishing, Oxford, 2013). (O’Donoghue & Padilla 2013), 782–783.

plier would be able to satisfy demand that could not be satisfied with a uniform market price. The effects of perfect price discrimination are mostly seen as beneficial for welfare. However, while aggregate efficiency may increase, overall consumer welfare may decrease when compared to a uniform market price. Normally, perfect price discrimination is not feasible in real markets. Secondly, *second-degree price discrimination* concerns the situation when suppliers set different prices depending on the quantity purchased by customers. This would correspond to a quantity discount given to customers. The differential pricing is not based on the identity of the purchaser but only the quantity bought. As this type of price discrimination is based on differences in costs, it is generally seen as welfare-enhancing within economic theory. Thirdly, *third-degree price discrimination* refers to the situation when different customer groups are offered different prices depending on their willingness to pay. Normally, a supplier would segment the market depending on different group of purchaser's demand elasticity. Demand elasticity, if explained in a simple and non-economic manner, refers to the sensitivity of customer groups to changes in price (or other economic factors) which affect their demand. If price increases and the demand of a customer group diminishes slightly, or not at all, there is low demand elasticity for that particular group of customers. In a third-degree price discrimination scheme, a higher price is charged to customer groups with low demand elasticity, while a lower price is offered to groups with high demand elasticity. Examples of such price discrimination may e.g. be lower prices offered for a particular service to students or elderly people. Third degree price discrimination may be welfare enhancing, as it would increase output for customers groups with a high demand elasticity. On the other hand, it could also result in higher prices and reduced welfare for customers with low elasticity.

While the account, so far, has addressed the classical view on price discrimination, which are based on economic models involving a monopolist or undertakings that are close to a monopolist, the assessment of price discrimination in imperfect competitive markets becomes more complicated. Arguably, whether the differential pricing is based upon that certain customers are willing to pay a higher price because they are either loyal to a brand or because of high search costs may have an impact on the welfare effects.⁷ However, it is questionable whether this would have

⁷ Townsend et al. 2017, 691–694.

an impact on the assessment of cases under Article 102 TFEU, as the provision requires that one undertaking dominates the relevant market.

It follows that the welfare effects of price discrimination are ambiguous.⁸ Arguably, the only type of price discrimination that seems to have positive effects with more certainty is second-degree price discrimination. However, in real markets, not even such discrimination is unambiguously beneficial for the market, which is shown by the practice of antitrust authorities regarding rebate systems.⁹ As regards the potential positive effects of price discrimination of the first or third degree, they require a certain degree of information (about the willingness to pay) and that customers could not engage in arbitrage, meaning the possibility to offer goods/services purchased to a lower price to customers that normally pay a higher price.¹⁰ Costs for acquiring the information of the willingness to pay or to prevent arbitrage may result in overall negative welfare effects. It is therefore unclear and case specific whether price discrimination will result in positive welfare effects.

As regards discrimination through personalized pricing, the potential benefits would follow primarily from the possibility to engage in perfect price discrimination. As stated above, it is however generally argued that perfect price discrimination is not possible in real markets. The current literature therefore explores the benefits of personalized pricing in the form of third-degree price discrimination. It seems obvious that the gathering of data has made it possible for companies to acquire enough data in order to better approximate the willingness to pay in a manner that has not been possible before. To which extent this is actually costless is so far not discussed in the current scholarly writing in antitrust law. Speculating, it does not seem obvious that the development of algorithms and data collecting technology as well as their application would be negligible. If that is correct, it may decrease the potential benefits from personalized pricing. In addition, it seems also uncertain to what extent customers, with time, would find it profitable to engage in arbitrage, considering that they (nowadays) also benefit from easy access to online sales channels for “second-hand” products.

⁸ O'Donoghue & Padilla 2013, 782.

⁹ See e.g. Case C-95/04 P *British Airways plc v. Commission of the European Communities* (EU:C:2007:166) (*British Airways*).

¹⁰ M Borreau, A de Streel and I Graef, ‘Big Data and Competition Policy: Market Power, Personalised pricing and Advertising’ (2017), CERRE project report (Borreau et al. 2017), 39.

All in all, the welfare effects of personalized pricing seem to be ambiguous. While algorithms and data collection technology permit companies to easier measure customer's willingness to pay and engage in price discrimination, it is not certain that this could be done costless. Considering that the normal outcome for consumers of price discrimination is not entirely positive, additional costs for collecting data and preventing arbitrage may be problematic for endorsing a positive view on personalized pricing from an economic perspective.

3 EU Competition Law, Abuse of Dominance and End-Consumers

As noted above, the welfare effects of price discrimination and personalized pricing are ambiguous according to economic theory. That factor, as such, could be the basis of an argument against EU competition law intervention in price discrimination cases. This has however not hindered the Commission to have a somewhat harsh stance towards price discrimination, in particular by dominant firms. It is not uncommon for instance that the Commission introduces requirements through soft law of non-discrimination by dominant suppliers or suppliers with some market power when dealing with more specific situations.¹¹ Accordingly, it could be argued that the Commission seems to have made a policy choice that price discrimination is seen as something problematic and which preliminary should be seen as anti-competitive in the presence of market power.

If such a position is taken for granted, it is important to note that it is still not self-evident that the application of EU Competition Law could cover actions directly discriminating consumers such as personalized pricing. Although the Court has consistently made a general statement that Article 102 TFEU cover actions that directly harm consumers,¹² in principle, all cases that come under scrutiny under competition law concern actions that undertakings have taken against other companies,

¹¹ See e.g. Communication from the Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, EUT [2014] C 89/3, para. 261.

¹² Case 6/72 Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities, EU:C:1973:22 (*Continental Can*), para. 26; Case C-52/09 Konkurrensverket v. TeliaSonera Sverige AB, EU:C:2011:83 (*TeliaSonera*).

either competitors, or customers that purchase input goods or services. The case-law is also unclear on whether the more specific prohibition of anti-competitive price discrimination could be stretched to transactions involving consumers. Although there are a number of academics that find support for the application of EU Competition Law directly to supplier-consumer relations, including price discrimination schemes, this is still an unclear issue that needs to be briefly discussed.¹³

Accordingly, in this section, the first subsection introduces Article 102 TFEU briefly, as this publication is partly directed towards non-competition lawyers. The second subsection addresses the original aims of the prohibition of discrimination under Article 102 TFEU (or then Article 86 EEC). Thirdly, the final subsection addresses the applicability of Article 102 TFEU to supplier-consumer transactions.

3.1 An overview of Article 102 TFEU

Article 102 TFEU prohibits abuse by an undertaking in a dominant position. Importantly, dominance requires definition of the relevant markets.¹⁴ This is a complex issue, which requires an assessment of substitutability between different goods and services. The purpose of defining markets is to determine which suppliers of goods and services that exert an immediate competitive pressure on the company that is subject to an investigation under Article 102 TFEU.¹⁵ Suppliers of goods/services that are substitutable exert such a competitive pressure. Once the relevant market has been determined, it needs to be assessed whether the company under investigation is dominant on that market. An assessment is made of the company's market share, the competitive pressure by existing competitors in the relevant market, potential competition that exerts or may exert pressure on the company, as well as whether the company meets customers with market power (buyer power). If an overall assessment indicates that the company can behave to a certain extent inde-

¹³ See e.g. P Akman, 'To abuse, or not to abuse: discrimination between consumers' (2007), 32 *European Law Review* 492 (Akman 2007); I Graef, 'Consumer Sovereignty and competition law: from personalization to diversity', 58 *Common Market Law Review* 471 (Graef 2021).

¹⁴ Case 27/76 *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, EU:C:1978:22 (*United Brands*), para. 10.

¹⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law OJ [1997] C 372/5 (*Relevant Market Notice*), para. 13.

pendently from competitors, customers and ultimately consumers, the company is classified as a dominant undertaking.¹⁶ The power to behave independently could for instance be the possibility to determine price in the market, without having customers and consumers migrating to competitors.

Once the company has been found to be dominant, it is also necessary to find an abuse, as dominance, as such, is not prohibited under Article 102 TFEU.¹⁷ It is only abusive behavior by dominant undertakings that is prohibited, as such behavior constitutes the exploitation of market power to the detriment of competitors, customers and the market. It must be noted that there are no general criteria that are common to all type of abuses under Article 102 TFEU. Abuses may be divided up in three categories: exploitative abuse, exclusionary abuse and abuses that harm the single market.¹⁸ With exploitative abuses it is meant that the dominant undertaking abuses its market power in relation to customers to gain advantages that it could not get under normal market conditions.¹⁹ Exclusionary abuses result in the exclusion of companies from the relevant market(s) which diminishes the competitive pressure.²⁰ This may permit the dominant undertaking, at a later stage, to exploit its market power towards customers and consumers. The category of abuses that harm the single market refers to practices that specifically hinder trade between Member States.²¹

Article 102 TFEU also provides a non-exhaustive list of abuses.²² Article 102(a) TFEU concerns the imposition of unfair prices and unfair trading conditions. Article 102(b) TFEU addresses the limitation of production, markets and technical development to the prejudice of consum-

¹⁶ *United Brands*, para. 65.

¹⁷ See e.g. Case C-209/10 *Post Danmark A/S v. Konkurrencerådet*, EU:C:2012:172 (*Post Danmark I*), para. 21.

¹⁸ R Whish and D Bailey, *Competition Law* (9th ed., Oxford University Press, 2018) (Whish & Bailey 2018), 215–6.

¹⁹ R O'Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed., Hart Publishing, Oxford, 2013) (*O'Donoghue & Padilla*), 214; J Temple Lang, 'Monopolisation and the definition of "abuse" of a dominant position under Article 86 EEC Treaty' (1979), 16 *Common Market Law* 345 (Temple Lang 1979), 345.

²⁰ O'Donoghue & Padilla 2013, 215.

²¹ See e.g. joined cases C-468/06 to C-478/06 *Sot. Lélou kai Sia EE and Others v. GlaxoSmithKline AVEE Farmakeftikon Proïonton*, formerly *Glaxowellcome AVEE*, EU:C:2008:504 (*Lélou kai*).

²² *Continental Can*, para. 26.

ers. Article 102(c) TFEU targets discrimination of certain trading partners when compared to equivalent transactions entered by the dominant undertaking, and which puts customers at a competitive disadvantage. Article 102(d) concerns the imposition on customers of the additional obligations unconnected to the main transaction, or so-called tying.

Although Article 102 TFEU does not include an exemption, unlike the provision in Article 101(1) TFEU on anticompetitive collusion, the Court and the Commission have developed the doctrines of objective justification and efficiency defense.²³ Strictly speaking, the possibility of justification is not an outright exemption but constitutes a part of the determination of abuse. However, the way that the Commission structures the assessment of efficiencies does not really differ from the assessment under Article 101(3) TFEU.²⁴

3.2 The origins of Article 102 TFEU and discrimination

While it may seem to be redundant to discuss what the original intent of the founding fathers was with the provision in Article 86 EEC (which today is Article 102 TFEU), it is not uncommon that commentators have tried to interpret such an original intent to draw inferences for the interpretation of the provision today.

Importantly, the Spaak Report of 1956 explained the problem with “monopolies” and dominant undertakings.²⁵ In particular, monopolies and dominant undertakings could obstruct the benefits of dismantling barriers to trade which would follow from other rules in the Treaties. While the elimination of trade barriers would make it harder, if not impossible, for companies to engage in price discrimination (in particular price dumping) between different Member States, a dominant undertaking or a cartel would still have the possibility to engage in such price discrimination.²⁶ In addition, agreements between undertakings sharing markets would reestablish the division between (geographical) markets and could result in the limitation of technical progress. Moreover, the

²³ See e.g. Case C-209/10 *Post Danmark A/S v. Konkurrencerådet* (EU:C:2012:172) (*Post Danmark*), para. 41.

²⁴ Communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ [2009] C 45/7 (Priority Guidelines), para. 30.

²⁵ Spaak Report (1956), available at <https://www.cvce.eu/en>.

²⁶ Spaak Report, 55.

domination of specific product markets would undermine the benefits of a larger market, the use of technology for mass production and the maintenance of competition.²⁷ The focus of the Spaak Report seems to have been foremost the use of competition rules to promote market integration and, in particular, to eliminate price discrimination.

It should be noted that as regards abuses of market power the Spaak Report only went into more depth as regards price discrimination. In the report it is stated that two specific requirements would apply to determine price discrimination.²⁸ Firstly, the purchaser would in practice have to submit to the supplier's conditions. This seems to be based on the notion that the supplier would be an unavoidable trading partner and thus probably a dominant undertaking. Secondly, the discrimination would result in an appreciable harm to competition between purchasers.

In this regard, it may be important to discuss the meaning of "competition" between different purchasers. Currently, the notion of competition between customers would necessarily imply that those customers are found in the same relevant market, as defined today. However, it could be questioned if the Spaak Report was necessarily based on the notion of relevant markets as we know it. It could be speculated whether the notion could be constructed broader, as purchasers of an input product or a reseller could be seen as being "in competition" by the simple reason that they would be engaged in the same sector. Arguably, such a broad notion of "in competition" could be supported by the early ground-breaking case, *United Brands*, that laid out the general framework for the application of Article 102 TFEU.²⁹ The Commission and the Court found price discrimination under Article 102 TFEU even though purchasers were active in different geographical markets and the competitive disadvantages could not possibly distort competition between them. The ruling in *United Brands* has been interpreted as being motivated by market integration aim and that the requirement of competitive disadvantage, in practice, was not given any real meaning. However, it could also be argued that competitive disadvantage would refer to a notion of being disfavored, which would limit the possibilities for these customers to pur-

²⁷ Spaak Report, 55–56.

²⁸ Spaak Report, 55.

²⁹ Case 27/76 *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, EU:C:1978:22 (*United Brands*).

chase more products and the possibilities for them to resell more quantities in their respective markets.

Obviously, such a notion of competitive disadvantage rings false for competition lawyers today.³⁰ However, in a pure “trade context”, it does not seem far-fetched that a competitive disadvantage could be construed when comparing two companies that are not active in the same geographical market. A dominant company that price discriminates customers located in different Member States can contravene the benefits of internal market, which presumedly would gravitate towards an elimination of price differences between Member States. Such price discrimination permits the dominant undertaking to enrich itself by capturing the profit margins each individual Member State can bear. Consequently, the customers’ competitiveness would suffer, including the possibilities to engage in cross-border trade inside and outside of the internal market. From this perspective, the origins of the prohibition against price discrimination, seems to have been intrinsically linked to exploitative abuse and the market integration imperative.³¹

3.3 The application of Article 102 TFEU to transactions between dominant undertakings and end-consumers

It follows from Article 102(c) TFEU that price discrimination may be an abuse. The provision requires that the trading partner that is discriminated suffers a competitive disadvantage. Importantly, the provision is specific to the extent that it specifies that the aggravated party is a “trading partner”. It has therefore been argued that Article 102(c) TFEU, by its wording, does not capture price discrimination practices that are directed at customers that are consumers, as such.³² As stated above, the majority of cases under Article 102 TFEU have concerned transactions between dominant undertakings and customers that have been undertakings, or behavior directed towards other competitors (which naturally have been undertakings). This does not mean that Article 102 TFEU could not apply *at all* to transactions involving end-consumers. In fact,

³⁰ Se e.g. D Geradin and N Petit, ‘Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach’ (2005), The Global Competition Law Centre Working Papers Series 07/05 (Geradin & Petit 2005), 41.

³¹ Temple Lang 1979, 346, 353 and 359.

³² Henriksson 2013, 193.

the Court has stated that Article 102 TFEU may be applied to actions that directly injure consumers.³³ There is also a consistent view among commentators that Article 102 TFEU could apply to such transactions. However, there are only a few odd cases that actually concern behavior directed towards end-consumers. Obviously, for personalized pricing to be considered as an abuse, it is a crucial question whether Article 102 TFEU could be applied to discrimination in transactions between dominant undertakings and end-consumers. If there is no support for such an approach, it would not matter how discrimination is classified as an abuse. Accordingly, this subsection explores when and to which extent the prohibition in Article 102 TFEU applies to transactions involving end-consumers, by particularly reviewing the relevant cases under points (a), (b) and (c) of the provision, which are the points that so far have been applicable to exploitative abuses.

The preliminary question is thus to which extent Article 102 TFEU captures actions directed at consumers. As a starting point, EU Competition Law aims, amongst other things, to protect consumers or consumer welfare.³⁴ However, the use of the concept of “consumers” according to EU Competition Law is ambiguous as it does not refer solely to end-consumers, but includes more broadly users of a good or service, which in many cases concern undertakings acting as customers.³⁵ Importantly, Article 102 TFEU has mostly been used to capture exclusionary conduct, in other words, actions that would restrict competition by competitors to a dominant company. Such behavior mainly falls under Article 102(b) TFEU, the limitation of markets, although some abuses fall under Article 102(a) and (d) TFEU. As competitors are excluded, it may lead (or be presumed) that the dominant company would be enabled to increase prices or to impose unfavorable conditions on consumers.³⁶

However, Article 102(a) TFEU gives support for that the provision can be applied to actions directed at consumers. The provision states that

³³ Continental Can, para. 26.

³⁴ T Eilmansberger, ‘How to Distinguish Good from Bad Competition under Article 82 EC: in search of clearer and more coherent standards for anti-competitive abuses’ (2005), 42 Common Market Law Review 129 (Eilmansberger 2005), 133–134.

³⁵ Commission Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/97 (*Exemption Guidelines*), para. 84.

³⁶ N Kroes, ‘Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82’ (2005), 29 Fordham Int’l L.J. 593 (Kroes 2005), 595.

an abuse may be the imposition of unfair prices or other unfair trading conditions. In particular, the provision has been used to capture cases on excessive pricing, which concerns prices that bear no reasonable relation to the economic value of the product or service provided by the dominant undertaking. Normally, such conduct could not only be directed at customer that are undertakings, but also end-consumers. In fact, the greatest danger with dominance is that the company would engage in exploitation of market power by e.g. setting excessive prices towards customers, including end-consumers. Moreover, the situations of customers being undertakings or end-consumers are in principle the same, the only difference being that an undertaking would potentially be able to pass on excessive prices to its customers, which could include end-consumers. The case-law is however mainly concerned with the complaints made by traders that are customers of the dominant undertaking. For instance, there is a long line of case law that concerns customers to copyright collective societies paying royalties for use of music.³⁷ In these cases, companies have complained that the royalties have been excessive because the of the calculation method has not reflected the economic value of the service provided by the dominant undertaking. Other cases have concerned traders' complaints about excessive prices in combination with price discrimination.³⁸

An early case that may give some support that the scope of Article 102 TFEU would capture transactions involving natural persons, although not end-consumers, is *BRT II*.³⁹ The Court held that a copyright collective society had abused its position by imposing unfair trading conditions in its contracts with two authors. Importantly, the abuse did not occur in an ordinary supplier-customer transaction. Rather the two authors constituted natural persons that had assigned their copyright, which is an “input” for the copyright collective society. Thus, the abuse concerned the “purchasing” by the dominant undertaking. It could be

³⁷ Case 125/78 *GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, v. Commission of the European Communities*, EU:C:1979:237 (*GEMA*); Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Konkurences padome*, EU:C:2017:689 (*AKKA/LA*); Case C-372/19 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weare-one. World BVBA and Wecandance NV*, EU:C:2020:959 (*Wecandance*).

³⁸ *United Brands*, paras. 234–268.

³⁹ Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior* (EU:C:1974:25) (*BRT II*).

argued that the two authors would be in a similar position as end-consumers, in particular considering the power balance between the parties and the fact that copyright holders may be seen as unsophisticated actors like end-consumers. On the other hand, it is important to note that the two authors would likely to be defined as undertakings under EU Competition Law. The Court never dealt with this particular issue, but the fact that a copyright holder would license its rights in exchange for remuneration means that they were involved in an economic activity. Later case law also supports such a view. So even if there are similarities between an author being a natural person and end consumers, their situations are not the same. Accordingly, the case does not provide a clear example of Article 102(a) TFEU applied to a consumer transaction.

By contrast, *General Motors* concerned in part customers that would classify as end-consumers.⁴⁰ The Court found *prima facie* that the dominant undertaking had charged excessive and abusive prices. However, other circumstances would subsequently exculpate the dominant company. The case concerned prices imposed by a dominant undertaking for certificates that were necessary for imported cars to be used in a Member State. The excessive prices targeted all imports of certain cars, both imported by parallel traders as well as by natural persons. Thus, the case partly concerned the transactions between dominant undertakings and end-consumers. Nevertheless, the excessive prices would also affect traders and would in particular permit the dominant undertaking to obstruct parallel trade.⁴¹ As stated above, the Court ultimately found that the abusive behavior had been temporary and that the company had refunded customers for the excessive prices before the Commission had taken any action. In fact, the court records seem to suggest that the company had made an “honest” mistake when charging excessive prices for the imported cars.⁴² However, as the Court preliminarily classified the behavior as an abuse, the case gives an example of behavior concerning consumers transactions classified as abuse under Article 102(a) TFEU, at least when simultaneously negatively affecting traders and/or parallel trade.

⁴⁰ Case 26/75 *General Motors Continental NV v. Commission of the European Communities* (EU:C:1975:150) (*General Motors*).

⁴¹ *General Motors*, para. 12.

⁴² *General Motors*, paras. 19–23.

In addition, the commitment decision in *Aspen* should be noted.⁴³ In the case, the Commission found that the dominant company had engaged in exploitative conduct through excessive prices and through (temporary) withdrawal of medical drugs from certain member states in order to extract higher prices. The customers in this case were Member States. Member States can hardly be regarded as undertakings that would be negatively affected by excessive prices in their further “trading” with other partners. In fact, the situation between Member States and end-consumers does not differ as neither of them would be negatively affected in the capacity to trade with others. *Aspen* is however an unusual case. The importance and urgency of the case cannot be ignored, considering the costs of medical drugs for the Member States’ budgets. However, the fact that there might have been an immediate and urgent interest for the Commission to intervene in *Aspen*, does not take away the fact that Member States in such a situation are comparable to end-consumers.

As regards the provision in Article 102(b) TFEU, it is generally viewed as allowing the finding of abuse when dominant undertakings engage in actions that may directly or indirectly impact end-consumers, such as the limitation of supplies and markets. Importantly, the provision explicitly states that it captures actions “to the prejudice of consumers”. The schoolbook example would be that a dominant undertaking limits supply of a product that would have the same effects as an excessive price. However, in practice, the provision has mainly been applied in cases on exclusionary abuses and state actions (in conjunction with Article 106(1) TFEU) that reduce competition and that may only have an indirect negative impact on consumers.

The only example of Article 102(b) TFEU being applied to actions directly taken against consumers is the Commission’s decision in *Football World Cup*.⁴⁴ In this case the company had abused its dominant position by discriminating end-consumers located outside a particular Member State hosting a sporting event. In practice, this meant a limitation of cross-border supplies of tickets and thus a limitation of markets under Article 102(b) TFEU. As previous case law on the provision only concerned exclusionary abuse, the company argued that the Commission could not apply Article 102 TFEU to the company’s behavior. The com-

⁴³ Commission Decision, AT.40394 – *Aspen*, C(2021) 724 final, 10.2.2021 (*Aspen*).

⁴⁴ Commission Decision, 1998 Football World Cup, OJ [1998] L 5/55 (*Football World Cup*).

pany did not gain a competitive advantage in relation to other competitors and there were no negative effects on market structure. The Commission rejected both these arguments on the basis that the Court had already stated in *Continental Can* that behavior towards consumers could be captured by Article 102 TFEU, in particular point (b), and because discrimination on basis of nationality was contrary to principles within Union Law.⁴⁵ Importantly, the case was not litigated before the Union Courts, which means that there is no confirmation that the Commission's arguments were correct. It is interesting to note that the Commission applied Article 102(b) TFEU instead of Article 102(c) TFEU, even though the case concerned discrimination. In addition, it seems also as the Commission emphasized the cross-border trade effect of the discriminatory practice.

Turning to Article 102(c) TFEU, it has already been stated above that the provision indicates that discrimination must concern "trading partners" and result in a "competitive disadvantage", which indicates that the provision only addresses practices directed at *undertakings* that are customers to the dominant undertaking. The case law seems also to exclusively concern customers that are undertakings.

However, one case that sometimes is claimed to concern end-consumers under Article 102(c) TFEU is *Deutsche Post – International mail*.⁴⁶ The case concerned international mail delivery, where the undertaking in charge of a statutory monopoly was found to discriminate with surcharges on a group of customers that were sending mail from another Member State. One of the more important issues in the case was, in essence, whether an intermediary (which was not discriminated) between the dominant undertaking and discriminated customers would mean that the customers could not be classified as trading partners under Article 102(c) TFEU as they were not in a direct contractual relationship with the dominant undertaking. This would also be important in cases where the discriminated customers are end consumers, as the presence of an intermediary could potentially break the link between the dominant undertaking and end consumers, meaning that the latter group could never be viewed as trading partners in such cases. The Commission ar-

⁴⁵ *Continental Can*, para. 26.

⁴⁶ Akman 2007, 497–498; Graef 2021, 484; Commission Decision 2001/892/EC of 25 July 2001, *Deutsche Post AG*, COMP/C-1/36.915, OJ [2001] L 331/40 (*Deutsche Post – International mail*).

gued that the senders, in fact, were to be regarded as indirect trading partners that were negatively affected on their respective markets. The fact that those senders did not have a direct contractual relationship with the dominant undertaking did not hinder them from being regarded as trading partners.⁴⁷ Moreover, the company had claimed that certain customers did not suffer a competitive disadvantage. However, the Commission referred to the statement in the decision in *Football World Cup*, that Article 102 TFEU could be applied to actions that would directly prejudice consumers. Moreover, the Commission underlined that the list of abuses under Article 102 TFEU is not exhaustive. The approach could indicate that even if Article 102(c) would not capture the senders at hand because of an absence of a competitive disadvantage, an extensive interpretation of Article 102 TFEU, as a whole and without attributing the abuse to a particular point in the provision, could nevertheless capture exploitation towards customers through an intermediary. While the case could be interpreted as giving support for capturing discrimination against end consumer considering that Commission accepted the lack of direct contractual relationship, the (potential) absence of a competitive disadvantage and the willingness to go beyond the list of abuses, it must be noted that customers, *de facto*, consisted of companies involved in the sending of larger amounts of international mail through the postal services in the home state.⁴⁸ In addition, it is also clear that the case, similar to *Football World Cup*, had a cross-border trade element.

Moreover, in *BdKEP/Deutsche Post*, a case similar to *Deutsche Post – International mail*, the Commission had also found discriminatory pricing between certain major senders of mail and commercial mail preparation firms implemented through a discount system.⁴⁹ The specificities of the case are not so important as statements made by the Commission in response to certain arguments made by the parties. The defendants (Deutsche Post) had objected, *inter alia*, against the finding of abuse under Article 102(c) TFEU arguing that the senders of mail were consumers who could not be classified as trading partners under Article 102(c) TFEU. Moreover, there was no competitive relationship between the two relevant groups of customers, the major senders of mail, and the commer-

⁴⁷ *Deutsche Post – International mail*, para. 130.

⁴⁸ *Deutsche Post – International mail*, paras. 30–67.

⁴⁹ Commission Decision of 20 October 2004, AT.38745 – BdKEP/Deutsche Post AG/Germany (*BdKEP*). Only a draft of the decision is available at the Commission's website.

cial mail preparation firms that acted as intermediaries for other senders of mail. Consequently, there could not be a competitive disadvantage. The Commission responded, firstly, that major senders of mail, *included* business customers. Accordingly, the question if Article 102 TFEU could be applied to discrimination of end-consumers was irrelevant. Secondly, the Commission stated that three types of competitive disadvantage were captured by Article 102(c) TFEU. Customers could be disadvantaged in relation to the dominant undertaking itself or other customers of the dominant undertaking. In addition, a competitive disadvantage would also exist when customer's ability to compete (in which ever market) would be impaired,⁵⁰ supported by the cases on discrimination related to the single market imperative, like *United Brands*. While the Commission's decision reiterates the arguments made in *Deutsche Post – International mail*, it is interesting that the Commission dodged the question whether Article 102(c) TFEU could be applied to transactions with end consumers. Instead, the Commission relied on that undertakings were involved in the case. Moreover, the Commission clearly excluded situations involving end consumers in its list of situations where the requirement of a competitive disadvantage would be met.

Summarizing, while there are few cases under Article 102 TFEU concerning end-consumers, there is support for the application of the provision in such cases. So far, such an application has been very limited in practice. Only *General Motors* and *Aspen* (possibly) provide examples of such an application under Article 102(a) TFEU, which is also the part of the provision that has always been interpreted as being applicable to actions taken against end-consumers. With *Football World Cup*, the Commission also opened up for the possibility to apply Article 102(b) TFEU to consumer cases involving discriminatory practices resulting in harm to the internal market. By contrast, the case-law does not give support for the application of Article 102(c) TFEU to consumer cases and the Commission seems also to have dodged the issue in *BdKEP*. However, it is important to note that the list of abuses under Article 102 TFEU is not exhaustive. Considering that excessive prices towards consumers have been found to be unfair under Article 102(a) TFEU (*General Motors*, *Aspen*) and that discrimination by limiting supplies fall under Article 102(b) TFEU (*Football World Cup*), it does not seem too far of stretch to

⁵⁰ *BdKEP*, para. 93.

argue for that discrimination constituting the imposition of unfair conditions on end-consumers could be captured by an extensive interpretation of the provision as a whole.

4 Personalized pricing and the classification as an abuse under EU Competition Law

4.1 Personalized pricing as prohibited price discrimination under Article 102(c) TFEU

According to Article 102(c) TFEU, the abuse consists of “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”, commonly referred to as a prohibition on *discrimination*. The provision has been used by the Court in cases on exploitative abuses,⁵¹ exclusionary abuses,⁵² and abuses harming the single market⁵³.

It follows from the wording that price discrimination consists of four elements: equivalent transactions; dissimilar conditions; trading partner; competitive disadvantage. As regards equivalent transactions, it requires a consideration of the products or services subject to the transaction as well as the conditions for the transaction.⁵⁴ It is likely that products or services are either identical or must show a certain degree of similarity.⁵⁵ Regarding potential differences in the commercial conditions between transactions, examples given in the literature are differences in the length of contract or the timing of the transaction.⁵⁶ It is mainly cost based factors that will potentially result in two transactions being classified as non-equivalent. While the assessment of equivalency may be quite a complex issue, it is

⁵¹ Case C-179/90 *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA*, EU:C:1991:464 (*Merci*); Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* (EU:C:2018:270) (*MEO*).

⁵² Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* (EU:C:1979:36) (*Hoffmann-La Roche*).

⁵³ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities*, EU:C:1978:22 (*United Brands*).

⁵⁴ D Gerard, ‘Price Discrimination under Article 82(2)(c) EC: clearing up the ambiguities’ (2005), Research Paper on the modernization of Article 82 EC, College of Europe, Global competition Law Centre (Gerard 2005), 16.

⁵⁵ Henriksson 2013, 195–196.

⁵⁶ Henriksson 2013, 197–198.

of less importance for the purpose of this paper as discussed below. Arguably, personalized pricing concerns those situations where the supplier makes a distinction mainly or solely on its data on the customer's willingness to pay (see above, section 2), which is not a cost based factor or any other element that under Article 102(c) TFEU leads to two transactions being non-equivalent. Two customers to a Swedish online platform selling books, located in Sweden, would thus get different prices on the same books depending on the predictions of the customers willingness to pay made with the online seller's algorithms. In such a situation, it does not seem that the equivalent transaction criterion would be problematic for establishing price discrimination. As the willingness to pay is the determining factor for discriminating between different customers or groups customers in price discrimination of the first and third degree, such discrimination would be captured by Article 102(c) TFEU. The only type of price discrimination that could, in theory, fall outside the scope of the provision would be second degree price discrimination on the basis of the decreased cost for the dominant undertaking for purchases that reach over a certain volume. As follows from *British Airways*, this possibility is probably quite narrow. In that case, the dominant undertaking argued that there was no equivalency between those customers that have reached certain sales target with those that had failed to reach the sales targets. The Court held that two customers which had sold the same number of tickets would receive different discounts depending on whether or not they had reached individually set sales targets. Thus, for the conditions of the transaction to determine whether two transactions are to be deemed as non-equivalent, they must be based on objective cost factors that are applied consistently towards all customers.⁵⁷

As concerns dissimilar conditions, it has been claimed that not just any difference would be sufficient to meet the requirement.⁵⁸ It is argued that the requirement is intrinsically linked to the requirement of a competitive disadvantage implying that small differences in treatment are not likely to result in a competitive disadvantage. Differences must also be put in the context of the transactions in question. However, it is uncertain whether the case law gives support for such an interpretation. As explained above, in *British Airways* the analysis focused primarily on

⁵⁷ *British Airways*, paras. 138–139.

⁵⁸ Henriksson 2013, 199–200.

the equivalence of the transactions.⁵⁹ The assessment of equivalence was established, in particular, by looking at the conditions for rebates. As the conditions were not entirely related to an objective difference in costs, as individual customers were rewarded for reaching sales targets and these differed between different customers, the difference in commission rates given to travel agents were enough to constitute dissimilar conditions. Such an approach seems to correspond with the view that the notion of dissimilar must be assessed from the perspective of the trading partner, and not of the undertaking imposing the “dissimilar” conditions.⁶⁰ On the other hand, the Court implied in *MEO* that not any differential treatment would be captured under Article 102(c) TFEU.⁶¹ It should however be noted that the analysis of the differential treatment in the case was analyzed under the competitive disadvantage requirement.⁶² Thus, it seems as the mere differential treatment, in fact, is sufficient to amount to dissimilar conditions. The question whether applied conditions truly constitute dissimilar conditions will partly fall within the assessment of equivalent transaction. And whether those dissimilar conditions are problematic or not is an issue that is ultimately dealt with under the competitive disadvantage condition. Accordingly, it does not seem likely that personalized pricing would fail to meet the requirement of dissimilar conditions.

As concerns the requirement of a trading partner, it has partly been discussed above (section 3.3). To begin with, it appears as that Article 102(c) TFEU has always been applied to transactions involving other undertakings.⁶³ In addition, it follows from *Deutsche Post – International*

⁵⁹ *British Airways*, paras. 133–150.

⁶⁰ Gerard 2005, 16.

⁶¹ Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* (EU:C:2018:270) (*MEO*).

⁶² *MEO*, para. 26.

⁶³ Case T-301/04 *Clearstream Banking AG and Clearstream International SA v. Commission of the European Communities*, EU:T:2009:317 (*Clearstream*); Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* (EU:C:2018:270) (*MEO*); Case C-95/04 P *British Airways plc v. Commission of the European Communities* (EU:C:2007:166) (*British Airways*); Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities*, EU:C:1978:22 (*United Brands*); Case C-179/90 *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA*, EU:C:1991:464 (*Merci*); Case T-83/91 *Tetra Pak International SA v. Commission of the European Communities* (EU:T:1994:246)

mail that a trading partner does not require a direct contractual relation with the dominant undertaking. It is sufficient that a dominant undertaking imposes conditions indirectly through an intermediary on the customer for it to be considered as a trading partner.⁶⁴ In the literature, it is commonly argued that in light of the competitive disadvantage requirement, it is not possible to stretch the wording of the provision to transactions directed towards end-consumers. However, *Akman* has argued that consumers could sometimes be in “competition” when their demand is dependent on other consumers’ demand and when not every consumer could purchase a product as there are limited supplies.⁶⁵ Such an interpretation means that also an end consumer could be classified as a trading partner. Without getting into the merits of the economic models providing support for such a view, it seems far-reaching to claim that the provision intended to capture “competition” on the demand side of a market at the level of and in between end-consumers.⁶⁶ As discussed above on the Spaak Report, it seems as Article 102(c) TFEU originally targeted distortions of competition that would harm the single market. Additionally, it follows from cases such as *British Airways* and *MEO* (discussed below) that the prohibition in Article 102(c) TFEU is supposed to capture distortions of competition in upstream markets (suppliers of input product/services to the dominant undertaking) and downstream markets (customers or trading partners). Such a standpoint does not give room for end-consumers being classified as trading partners under Article 102(c) TFEU.

The requirement of a competitive disadvantage has been interpreted as meaning that the prohibition in Article 102(c) TFEU is aimed only at so-called secondary-line injury, in other words harm caused solely to the customers to the dominant undertaking.⁶⁷ As mentioned above, both the Court and the General Court have stated that Article 102(c) TFEU is aimed at capturing distortion of competition in upstream and downstream markets caused by the dominant undertakings discrimination.⁶⁸

(*Tetra Pak II – CFI*); Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* (EU:C:1979:36) (*Hoffmann-La Roche*).

⁶⁴ *Deutsche Post – International mail*, para. 130.

⁶⁵ Akman, Pinar, ‘To abuse, or not to abuse: discrimination between consumers’ (2007), 32 *European Law Review* 492 (Akman 2007).

⁶⁶ Townsend et al. 2017, 741.

⁶⁷ Geradin & Petit 2005, 9.

⁶⁸ *MEO*, para. 24; *British Airways*, para. 143; *Clearstream*, para. 192.

This should be distinguished from first-line injury which refers to cases when the injured party is a competitor, as e.g. when a dominant undertaking discriminates customers through a rebate system with the effect of excluding competitors.

In the literature, the common view appears to be that a competitive disadvantage cannot be derived from the smallest differential treatment, but the older cases are ambiguous. In fact, what could be read out from the case law is a development where the Court has gone from a very “light” assessment of competitive disadvantage to a more detailed and stricter assessment. As discussed above, the Court found in *United Brands* that discrimination of customers in certain Member States was captured by the provision without making an analysis of the competitive relation between customers located in different Member States. A similar assessment was also done in other cases, such as *Tetra Pak II*, which also concerned price differences between different Member States.⁶⁹ As also pointed out above, the rationale behind the judgment in *United Brands* may be that the competitive relation at that time was not determined by notions such as the relevant market. Rather, the judgment implies that companies that would be involved in the same economic activity, as the resales of bananas, could on a general level be seen to be in a competitive relation with one another. In addition, the Commission’s interpretation of competitive disadvantage in *BdKEP* (see above, section 3.3) indicated that it is not necessary to show a competitive disadvantage in relation to the dominant undertaking itself or customers of the dominant undertakings. It would be enough that the trading partners’ competitiveness would be affected in any market when the discrimination would harm the internal market in cases such as *United Brands* and as implied by the Spaak Report. The very purpose of Article 102(c) TFEU would thus be to prohibit discrimination of customers in different Member States, as such exploitative behavior made possible by the market power of a dominant undertaking would eliminate the benefits of having one single market.

By contrast, in later case law, such as *British Airways*, which mainly dealt with an anticompetitive rebate system resulting in primarily-line injury, the Court seems to have taken a narrower view of competitive disadvantage. In the case, it was found that competition among trading partners (travel agencies) was determined by two factors, the ability to

⁶⁹ Case T-83/91 *Tetra Pak International SA v. Commission of the European Communities* (EU:T:1994:246) (*Tetra Pak II – CFI*), paras. 160–173.

provide suitable flight seats to a reasonable price and the travel agencies individual financial resources. The problematic parts of the rebate system led to exponential changes in revenue with a negative impact on the trading partners' financial resources and thus their competitiveness.⁷⁰ Arguably, the Court seems to have considered, at least implicitly, whether the trading partners were active in the same relevant market and how the rebate system would impact their capacity to compete. None the less, the Court seems not to have engaged in any form of a more detailed assessment of effects. However, later in *MEO*, the Court made its most far-reaching statement on the requirement of a competitive advantage.⁷¹ The case concerned a collective society that had a monopoly on the managing of its members' rights. It applied different tariffs towards different customers and the question arose whether there was illegal price discrimination under Article 102(c) TFEU. It follows also from the facts of the case that the price difference was low when compared to the average costs of the customer, meaning that it was uncertain whether the price difference would have any appreciable impact on the customer's competitiveness. The Court held that the notion of distortion of competition under Article 102(c) TFEU encompassed "to hinder the competitive position of some of the business partners of that undertaking in relation to the others".⁷² While there is no *de minimis*-threshold, a mere disadvantage because of differences in tariffs would not be sufficient. The Court also held that it is not necessary to demonstrate any *actual* effects of trading partners being disadvantaged toward its competitors. Referring to *Intel*,⁷³ the Court stated that an overall assessment of a competitive advantage should include "the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors".⁷⁴ Apart from the assessment of the duration and the amount of the tariffs, it is not self-evident that the enumerated factors are relevant to determine a potential competitive disadvantage. The last part of the statement by the

⁷⁰ *British Airways*, paras. 146–148.

⁷¹ Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* (EU:C:2018:270) (*MEO*).

⁷² *MEO*, para. 25.

⁷³ Case C-413/14 P *Intel Corp. v. European Commission* (EU:C:2017:632) (*Intel*).

⁷⁴ *MEO*, para. 31.

Court seems particularly odd. Even if the dominant undertaking would pursue to eliminate one of its trade partners, it does not seem relevant that the assessment should be focused on whether the behavior has the capacity to eliminate an as-efficient-competitor. Such a standard follows from case law on exclusionary abuses, as e.g. rebate systems that may lead to primary-line injury. If the Court's statement is correctly understood, the standard for finding a competitive disadvantage would differ depending on the trading partner that is discriminated. The threshold for finding illegal discrimination would be higher when the dominant undertaking aims at excluding a trading partner than when the dominant undertaking simply wants to discriminate. Such a difference in standard does not make sense. A strategy to exclude through discrimination a trading partner that is not an as-efficient competitor in the relevant market where it operates, would still distort competition in the downstream market. Leaving aside this particular statement by the Court in *MEO*, it seems clear that the judgment makes the assessment of competitive disadvantage considerably stricter.

It follows that the case law on competitive disadvantage is not entirely consistent. Commentators have criticized the inconsistencies, in particular the differences in the assessment between cases such *United Brands/Tetra Pak II* and *British Airways/MEO*. However, the evolution in the case law could also be simply viewed as the development of stricter standard with time. Alternatively, the case law is not necessarily inconsistent, but rather expresses the protection of different interests. Cases such as *United Brands* concern the single market imperative, where the competitive disadvantage is interpreted as a broader notion (see above, section 3.2–3.3). By contrast, cases such as *British Airways* and *MEO* concern distortions of competition between traders that are located in the same relevant market, while not causing harm to the internal market, and which therefore requires a more detailed analysis.

As found above, it is doubtful whether personalized pricing directed towards end consumers could meet the requirement of “trading partner”. In addition, irrespectively of which interpretation of the requirement competitive disadvantage is accepted, it follows that it cannot be easily applied to personalized pricing. End consumers cannot suffer a competitive disadvantage as they are not active as undertakings on any market. However, similar to the situation of undertakings in different Member States being discriminated, they may be exploited through price differences. Thus, potentially, an analogy could be made between these two

situations when discrimination involves and is based on end consumers being located in different Member States, as in *Football World Cup*. However, personalized pricing does not concern such situations, but rather discrimination based on the consumers' willingness to pay irrespective of their location.

If personalized prices nevertheless would be found to constitute prohibited price discrimination under Article 102(c) TFEU, there is always a possibility for justification, also on efficiency grounds. As stated above, even though Article 102 TFEU does not include any exemption, the Court and the Commission have accepted objective justifications and an efficiency defense. Arguably, the latter would be primarily interesting for arguing the positive effects of price discrimination. The dominant undertaking would be required to demonstrate an economic benefit that outweighs negative effects on efficiency and consumers; the indispensability of the abusive conduct; that the abuse does not eliminate competition in the relevant market.⁷⁵ While there are cases on justification of second-degree price discrimination (exclusionary rebate systems), it seems that the Court has not yet analyzed the possibility to justify schemes regarding first and third-degree price discrimination. What may be said is that the Unions Courts have been quite restrictive in accepting justifications. In most cases, dominant undertakings have failed to establish, as a matter of evidence, that the abuse produce the claimed efficiencies.⁷⁶ What follows from above (section 2) is that the dominant undertaking would need to proof the increase in output permitted by the personalized pricing and that such increase outweighs the effects of the higher prices charged to other customers or customer groups.

All in all, it is submitted that there is no support for finding personalized pricing as an abuse under Article 102(c) TFEU in the light of the Court's case law and the Commission's previous decisions. While the conditions of equivalent transactions and dissimilar conditions could be met, it would require a far reaching reinterpretation of the conditions of trading partner and competitive disadvantage to fit with cases on personalized pricing. Would personalized pricing, *prima facie*, still be captured by Article 102(c) TFEU, under the current state of the law, there exist a possibility for the dominant undertaking to invoke the positive effects of

⁷⁵ Priority Guidelines, para. 30.

⁷⁶ Case T-219/99 *British Airways plc v. Commission of the European Communities* (EU:T:2003:343) (*British Airways – CFI*), paras. 290–291.

price discrimination as a efficiency defense, even though such an argument would have difficulties to succeed.

4.2 A consumer welfare approach to personalized pricing under Article 102(c) TFEU

It was argued above that the effects of price discrimination through personalized pricing on welfare and consumers are ambiguous. Commentators have therefore argued that an assessment of personalized pricing should be adapted to adequately only target price discrimination that would result in negative effects on welfare and consumers, or a so-called effects-based approach. For instance, as argued by *Townsend et al.* and *Akman*, an abuse should only be found once it is demonstrated that price discrimination would not lead to an increased output (for those customers that would otherwise not be served) in an individual case.⁷⁷ Obviously, it has already been concluded in this paper that Article 102(c) TFEU cannot be applied to price discrimination through personalized pricing (see above, section 4.1). None the less, as the discussion in the doctrine still revolves around the possibility to apply an effects-based approach under Article 102(c) TFEU to personalized pricing, it is interesting to explore whether Article 102(c) TFEU, in theory, could give room for such an effects-based assessment.

Addressing more specifically the general criteria for finding a prohibited price discrimination in Article 102(c) TFEU, it seems as they give little room for engaging in such an effects-based analysis. The problem is that there is no criterion under Article 102(c) TFEU that gives room for making any type of estimation of effects on total welfare or consumer welfare. Naturally, price discrimination could fall outside the provision completely, if transactions with two different customers that have different levels of willingness to pay are classified as not equivalent. However, such a result would be problematic, since the effects on total welfare and consumer welfare are ambiguous and case specific. A rule that completely excludes price discrimination based on different customers' willingness to pay is too lenient, while a rule that always captures price discrimination is too strict. It seems as the only type of price discrimination that could possibly be excluded through the equivalence requirement is second-degree price discrimination, which is not relevant for the discussion on

⁷⁷ Akman (2007), 511–512; Townsend et al. (2017), 738–744.

personalized pricing in this paper. Moreover, the criteria of trading partner, dissimilar conditions and competitive disadvantage have not been designed to make a balancing of effects. In particular, to read-in an assessment of effects under the criterion of competitive disadvantage seems far-reaching. The purpose of the criterion is to measure whether the economic power of the dominant undertaking is capable of doing harm to the competitive process in the upstream and downstream markets, but by measuring *harm to its trading partners* and not the aggregate effects on the market or the collective of customers.

It follows that the type of effect-assessment of price discrimination as propagated by *Akman, Townsend et al.*, and others, would require a dramatic re-interpretation of the wording of Article 102(c) TFEU. Alternatively, price discrimination through personalized pricing could be deemed to always fall under Article 102(c) TFEU, if for instance, the requirement of trading partner would be given a wide interpretation and the condition of competitive disadvantage would not be applied to personalized pricing, similar to the cases on harm to cross-border trade.

It may be debated whether such an outcome would be desirable. Importantly, the prohibition against discrimination has not been designed to capture every differential treatment that constitutes discrimination. It has been argued above that the prohibition against discrimination seems to have been based on mainly two rationales: protection of the integration of the single market and distortions of competition in upstream and downstream markets because of the dominant undertaking's exploitative behavior. Irrespective of whether these two rationales are viewed as legitimate or not, what follows is that the threshold for classifying discrimination as abuse is higher than mere discrimination. Accordingly, some price discrimination schemes are not captured by Article 102 TFEU, even in the presence of market power, because there is no harm to a protected interest under EU Competition Law. Unless there are policy reasons why the threshold should be lower for cases concerning discrimination of end-consumers, it is no way self-evident that price discrimination in such cases should be found abusive.

Would such an approach however be accepted, it would open up for a balancing test through the efficiency defense based on the increased output following the price discrimination scheme. The increased output directed towards a particular group of customers could, in theory, be seen as an economic benefit that may be balanced against the higher prices for other customers. Likewise, it could be argued that the differential pricing

would be indispensable to cover demand from the benefitted customers. The difficulty for the dominant undertaking would be to show indispensability and that the positive effects would outweigh the negative effects. In addition, the costs for discovering the willingness to pay and hindering arbitrage would also have to be taken into account. While an efficiency defense would permit, in theory, of a proper balancing test that would determine the effects on welfare and consumers of personalized pricing, the possibilities for dominant undertaking to defend themselves with objective justifications and an efficiency defense, in practice, seems difficult.

It follows that it is unlikely that an effects-based approach could be integrated in the application of Article 102(c) TFEU.

4.3 Personalized pricing as a non-listed abuse under Article 102 TFEU

An alternative approach, as suggested by *Townsend et al.*, is to capture personalized pricing as a non-listed abuse. As stated above, the Court has been reluctant to claim that an abuse explicitly falls outside the non-exhaustive list of abuses in Article 102 TFEU. However, such an approach has the benefit that the Court is free to design a test for a specific type of abuse, unburdened by the listed examples of abuses in Article 102 TFEU and/or its previous case law.

Arguably, this is what the Commission already did, in practice, in *Football World Cup*, when the Commission viewed the discriminatory behavior as limitation of markets with prejudice to consumers under Article 102(b).⁷⁸ In *Football World Cup*, the use of Article 102(b) TFEU seems logical considering that practice purported to sell less tickets or to limit supplies to residents outside a particular Member State. However, the circumstances in *Football World Cup* are peculiar, as normally an undertaking would have little incentive to want to stop sales to a particular customer group for reasons unrelated to competition or parallel trade. Moreover, the single market aspect of the decision should also not be ignored. In response to the claim that the dominant undertaking had not gained a commercial advantage through its behavior, the Commission pointed towards that the behavior constituted discrimination on basis

⁷⁸ Commission Decision, 1998 *Football World Cup*, OJ [1998] L 5/55 (*Football World Cup*).

of nationality.⁷⁹ Accordingly, the behavior by the dominant undertaking was harmful to the single market as it hindered cross-border sales of tickets. Consequently, the behavior in this case did also not merely constitute discrimination between end-consumers as the finding of abuse also required the single market element.

By contrast to the approach chosen in *Football World Cup*, the main alternative is an effects-based approach. Price discrimination is abusive only insofar it does not result in an increase of output that outweighs negative effects. There are two possible approaches to design such a rule. The first alternative would be to *prima facie* classify all discrimination through personalized pricing as abusive, but opening up an analysis of the effects on consumer welfare through objective justification. Such an approach corresponds to applying Article 102(c) TFEU to personalized pricing without requiring the proof of a competitive disadvantage and keeping a wide interpretation of the notion of a trading partner. In practice, one could imagine that a competition authority/claimant would be required to show that the dominant undertaking in a consistent and systematic manner has used tracing technologies and algorithms that collect and process data to determine individual consumers willingness to pay, which is subsequently used in the design of personalized offers that result in differential pricing. It should also be noted that this approach would, in essence, have as starting point that dominant undertakings must charge a uniform price towards all end-consumers.

One objection to such an approach would be that it opens up the floodgates to challenges by consumers under EU Competition Law. However, such an effect should not be exaggerated. Firstly, personalized pricing could only be targeted when there is a dominant undertaking. Secondly, considering the complexity of these cases in the gathering and the analysis of evidence, it seems unlikely that there would be room for much private enforcement, even by larger organizations representing consumers' interests. Thirdly, it seems also unlikely that competition authorities would prioritize such cases.

However, the main objection to such an approach, is that there is no specific factor that is identified as a *prima facie* harm under EU Competition Law that triggers the need for the dominant undertaking to justify its behavior. As stated above, cases concerning Article 102(c) TFEU have partly relied on harm to the competitive process through the competi-

⁷⁹ *Football World Cup*, recital 102.

tive disadvantage requirement. Cases concerning Article 102(b) and (c) have partly relied on harm to the single market caused by limitations to cross-border trade. Cases on Article 102(a) TFEU have relied on the imposition of excessive prices enabled by the market power of the dominant undertaking. However, personalized prices could only *potentially* cause harm by limiting supplies to certain groups of end-consumers. Importantly, by contrast to *Football World Cup*, cases on personalized pricing would require the establishment of the limitations of supplies to certain groups of end-consumers because of the higher prices imposed on them. This may be empirically difficult to proof in individual cases, unless a higher price (compared to prices by other customers) is *presumed* to cause such an effect, in which case personalized pricing would always be viewed as limiting output.

For lawyers that do not work with competition law, it may seem strange that there may be some hesitation in applying competition law to cases where at least some consumers may be harmed by paying higher prices than others, particularly if competition law aims at protecting consumer welfare. However, from a competition law perspective, differential pricing at the level of individual consumers, as such, is not obviously viewed as a form of harm that would legitimize intervention against dominant undertakings. While in the literature it has been argued that competition law could consider the vulnerability of certain groups of customers to personalized offers,⁸⁰ such a notion is also unconnected to the interests protected under EU Competition Law mentioned above. Such types of considerations are arguably more connected to rules on direct consumer protection and possibly anti-discrimination law. Rules providing direct consumer protection seem to be preoccupied with the information given to consumers or the lack thereof in connection to a transaction. Moreover, they also consider how the design of a commercial message or the content of a contract may create an unjustified imbalance between the parties enabled by information asymmetries and the imbalance between the parties' bargaining power. In addition, anti-discrimination rules are focused on the protection of certain groups of individuals based on grounds such as gender, ethnicity, sexual orientation, religious belief etc. from unequal treatment. However, EU Competition Law does not target undertakings' behavior towards consumers that exploit information

⁸⁰ I Graef, 'Consumer Sovereignty and Competition Law: From Personalization to Diversity' (2021), 58 Common Market Law Review 471.

asymmetries, general differences in bargaining power or the predisposition of certain groups of individuals. It is mainly concerned with the exploitation of market power and harm which is normally attributable to the presence of market power, such as e.g. the excessive prices that a monopolist would impose in a market. Naturally, a dominant undertaking could also engage in e.g. unfair commercial practice such as misleading consumers with advertising. And obviously it could be argued that the negative consequences of such behavior may be aggravated if the majority of consumers could not choose another supplier because the dominant undertaking *de facto* offers a must-have product. Still, it could be argued, that EU Competition Law would and should not apply to such a case. The problem with misleading advertising, namely the exploitation of the information asymmetry between the dominant undertaking and the consumer, is not a problem addressed by EU Competition Law.

It appears as there are problems with identifying a particular interest under EU Competition Law that is harmed when discrimination towards end-consumers occurs in cases unrelated to the single market imperative, distortions of competition or the exploitation through excessive prices. This may give the impression that the direct protection of consumers is somewhat unprioritized under the competition rules. That is probably true, as protecting competition mainly afford benefits *indirectly* to the *collective of consumers* through lower prices and better quality which follows from competitive markets. However, it must be remembered that also Article 102(a) TFEU may afford consumers a certain degree of protection, including cases on personalized pricing. Unfair prices and conditions may be established in cases of excessive prices as demonstrated by cases such as *General Motors* and *Aspen*. The provision would also apply in cases of personalized prices when prices charged to a particular customer group of end-consumers are excessive. Moreover, in the *German Facebook Case*,⁸¹ the German Competition Authority also applied the provision in German competition law corresponding to Article 102 TFEU to data collection which was contrary to data protection law and therefore could be viewed as unfair. While the Union courts have not confirmed that the approach in *German Facebook Case* is a viable alternative under EU

⁸¹ Bundeskartellamt, Case B6-22/16, Facebook, see press release at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=A82BB51FC236DE99DEDBBF794E961517.1_cid378?__blob=publicationFile&v=4 (*German Facebook Case*).

Competition Law, it constitutes a possible way to deal cases concerning the imposition of conditions related to data and end-consumers. Considering the value of data for undertakings, arguably, an analogy could be made to the imposition of excessive prices under Article 102(a) TFEU as the dominant undertaking could be seen as *enriching* itself by extracting excessive amounts of data from individuals. The key issue then becomes how to define “excessive” in such a context. This indicates the problem with making analogies between personalized pricing and the *German Facebook Case* is that in the latter case there was a standard set by the data protection rules on what should be classified as unfair conditions. In cases on price discrimination through personalized prices, it would be required to determine under EU Competition Law what kind of price discrimination that is deemed as unfair. Such an approach only takes us back to the effects-based approach to make a determination of positive and negative effects of personalized pricing.

The second approach to personalized pricing is to require the competition authorities to make an explicit balancing exercise in the light of consumer welfare before establishing a *prima facie* abuse. Such an approach may be beneficial as it may provide a reasonable opportunity for the dominant undertaking to be successful in cases regarding output-increasing price discrimination as the burden of proof would be on the claimant/competition authorities. The current application of the objective justification/efficiency defense has arguably been too strict towards dominant undertakings because of the burden of proof. At the same time, such an approach would still provide no quarters for dominant undertakings in cases where the behavior results in none or a very small increase of output (as arguably was the situation in *Football World Cup*). Naturally, the drawback of such an approach is that the analysis may become too complex for a claimant/competition authority and that it would be inconsistent with the common structure applied to other abuses and other restrictions of competition. Normally, a claimant or a competition authority is not required to engage in full scale calculation of total welfare and consumer welfare effects to prove a restriction of competition or an abuse. Not even the so-called effects-based approach as regards exclusionary abuses requires such a full calculation of welfare effects, but only that the behavior has the capability of eliminating as-efficient competitors, which in turn would permit it to engage in future exploitative abuse. It could be speculated whether a full-scale investigation of welfare effects would in effect exclude private claimants, as they would not have the resources and

the investigative tools (available to competition authorities) for gathering data to prove their case. Moreover, the regular approach under the competition rules is that the claimant/competition authority identifies *prima facie* harm to a particular interest, such as market structure, the single market and/or the competitive process, while it is up for the defendant(s) to prove those efficiencies that may follow from the investigated conduct. There is a logic behind this structure in the sense that it is the defendant that is in the best place (as a matter of burden of proof) to present and explain the efficiency rationale behind its conduct.

It follows that neither of the two proposed rules above are optimal. The two alternatives risk either over- or underenforcement of Article 102 TFEU. Considering that data protection rules deal with the purposes and extent of data collection and processing, and that other rules on consumer protection deal with the information and advertising directed to consumers regarding e.g. services provided through an app, it would perhaps be a better option to regulate such aspects of transactions involving personalized pricing through such rules and not competition law.

5 Conclusions

It has been found that the welfare effects of personalized pricing are ambiguous. Personalized prices may increase output directed towards certain group of consumers that would otherwise not be served. On the other hand, such benefits may come to a cost for other consumers groups that would pay higher prices. To which extent EU Competition Law can be applied to price discrimination with negative welfare effects is also unclear. There is clear support for that Article 102 TFEU may be applied to conduct by dominant undertakings towards consumers. It is however not so clear whether Article 102 TFEU can be applied to cases on price discrimination involving personalized pricing when there is no connection to harm to the internal market. There seems not to be support for the application of Article 102(c) TFEU to such cases. Nevertheless, in theory, a wide interpretation of Article 102 TFEU, may include cases on personalized prices. The problem with such an application is that it is difficult to find a clear competitive harm in cases on personalized prices that is recognized under the current rules. If the negative effects on certain consumer groups would be deemed as competitive harm, it would require the competition authorities to engage in a full-scale assessment of welfare effect for finding an abuse. In the alternative, Article 102 TFEU

could be interpreted as always requiring uniform pricing by dominant undertakings towards consumers, unless the dominant undertaking could present an efficiency defense. Arguably, as the effects of personalized pricing are ambiguous and the possibilities to present an acceptable efficiency defense are probably narrow, it could prevent behavior by dominant undertakings, which at the end of the day are not necessarily so bad for consumers.