

To Abuse or not to Abuse: Discrimination between Consumers

BACKGROUND

- The ban on discrimination by a dominant undertaking which is required by Article 82 of the EC treaty is understood traditionally in relation to other businesses. This paper challenges that interpretation and shows that discrimination between consumers can, legally, also constitute an abuse of a dominant position under the same legislation. The notion that discrimination between consumers can constitute an abuse has not been argued before the Community Courts.
- The paper clarifies the scope of article 82 with regard to discrimination and whether it should constitute an abuse by examining the issues from both a law and economic perspective. The aim of the paper is to put forward a proposal which would ensure that the perverse does not happen - that discrimination which is welfare-enhancing is deemed abusive and therefore prevented, and that public and private enforcement action does not become socially wasteful over-intervention.
- Article 82(c) of the EC Treaty bans discrimination by requiring that a dominant undertaking does not provide different treatment for similar transactions.
- Literature looking at the issue of Article 82(c) has interpreted it as applying discrimination to downstream undertakings of a dominant supplier who, as a consequence of the discrimination, is unable to compete effectively. Economic studies have generally treated only the differences that are not due or proportionate to cost differences as discrimination and have focused on understanding its welfare effects. However, competition law and its analysis have been quieter on this issue and have depended on the specifics of cases before authorities.

POLICY ISSUES

- Establishing a common, accepted definition of discrimination has proved difficult. Neither economics nor competition law has been able to construe discrimination satisfactorily for a consistent application across the board with legal certainty. This needs to be resolved, especially because of the current desire to adopt an economic effects-based approach to Article 82. This need for more certainty is important also for undertakings who need to be able to comply with the law.
- The Commission and the Courts have quietly expressed a tendency towards including discrimination between consumers within the scope of Article 82. The 1998 World Cup decision¹ demonstrated that discrimination between different groups of consumers constituted an abuse of dominance even without causing competitive disadvantage, the latter having been all but read out of the provision. This causes some legal and economic concern since it broadens the scope of the prohibition in an unintended manner.
- Economic analysis demonstrates that discrimination has ambiguous welfare effects and that it should therefore be dealt with on a case by case basis. However, if the letter of Article 82 can be interpreted as including discrimination between consumers in its scope, then it is clear there is the potential for banning action which may have positive welfare benefits. The Commission is moving towards consumer welfare as the objective of Article 82 - in effect the competitiveness or otherwise of an action would be determined by its impact on consumer welfare. Therefore what matters should not be the downstream agent to whom discrimination applies but its effect - if it actually or potentially harms consumer welfare it should fall foul of Article 82.
- There are implications for both the dominant undertaking and society if it is the case that discrimination between consumers by a dominant undertaking is banned under

¹ Commission Decision 1998 *Football World Cup* (Case No IV/36/888) (2001/12/EC) [2000] OJ L5/55 [87]

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Article 82. First, it increases the obligations placed on the dominant undertaking. For example it limits the ability of the undertaking to contract. It also increases the potential for over-intervention by both public and private authorities.

- The recent EC discussion paper² suggests that there are two types of objective justification - the objective necessity defence and the meeting competition defence. Both types of conduct must be indispensable - i.e. without it the product concerned will not or cannot be produced or distributed in the market. If the Commission adopts this same defence for discriminatory abuses as well, a dominant undertaking's discriminatory pricing cannot be defended by objective justification, since it will seldom be "indispensable" as the undertaking can always price uniformly. The result would be that although discrimination could increase consumer welfare as opposed to uniform pricing the undertaking would not be able to defend such a practice merely because it was not an indispensable action.
- The question of discrimination is often a cause for concern for those interested in issues of equality and fairness. Fairness, of course, in the context of legislation which is required to be enforceable, is impossible to define objectively since it is a function of interpersonal comparisons and perceptions. The issue of requiring the competition authority or court to determine which consumers should or should not benefit from welfare benefits from discrimination would be solved if consumer welfare is looked at in aggregate. So if the dominant undertaking can prove that its discriminatory act increases output by sales to consumers who would not otherwise have received the product, this should not constitute an abuse. If it results in some consumers being exploited and we believe that they are worthy of more protection than the ones benefiting from discrimination then that protection should be provided by other means such as regulation.

POLICY CONCLUSIONS

- The ban on discrimination under Article 82 is not limited to business to business but also covers direct business to consumer transactions. Therefore, according to the law as it stands, a dominant undertaking which applies dissimilar conditions to equivalent transactions offered to different consumers could constitute an abuse even if it provided welfare benefits.
- The middle ground, that discrimination is not to be found abusive when the undertaking can prove that it increases output compared to uniform pricing and increases aggregate consumer welfare, and the authority cannot prove exclusionary effects, appears to be the appropriate solution.
- With the reform of Article 82 underway these issues need to be properly recognised and a coherent and accepted framework developed to cover its whole scope. This will improve both the enforcement and compliance with EC competition legislation.

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ABOUT THE AUTHOR

- **Pinar Akman** is a PhD student whose research interest is the interface between competition and fairness, focusing on the Article 82 EC regulating the abuse of a dominant position.

² European Commission DG Comp Discussion Paper on the *Application of Article 82 of the Treaty to Exclusionary Abuses* (Brussels 2005)