International League of Competition Law - Congress 2019

Question A:

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

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

General background

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

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

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

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

- discriminatory practices aimed at excluding rivals (first line or primary line discrimination) and
- discriminatory practices aimed at treating differently trading partners that are in equivalent situations (second line discrimination).

In the former case, the discriminating firm competes with those it discriminates; in the latter case, the firm is not present on the relevant market in which the discrimination is deemed to produce negative effects.

The effect of discriminatory practices upon competition clearly depends on their nature. Indeed, whilst it is widely recognized that discriminatory practices aimed at excluding rivals are expected to harm the competitive structure of the market (e.g. excluding efficient competitors) and should accordingly be sanctioned and remedied (provided certain conditions are met), there is no equivalent consensus on second-line discriminatory practices aimed at

treating differently trading partners that are otherwise in equivalent situations, because their effects are more ambivalent. Indeed, if those discriminatory practices tend on the one hand to be exploitative, appropriating more of the surplus of the consumer to the benefit of the firm and have been analysed by some jurisdiction as anticompetitive practices, they may also be a factor of economic efficiency and welfare.

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

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

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

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

The following questionnaire will deal with both aspects (protection of competition and protection of customers/consumers), with an aim to understand how these are dealt with in your national legal provisions and by courts and authorities enforcing them. In that perspective we have divided the survey into the following six main topics:

I. The notion of discrimination in national / regional substantive competition legal framework

II. The notion of discrimination in practice by competition authorities / courts

III. Objective justifications to discriminatory practice

IV. Objectives justifying to prohibit discriminatory practices

V. Relevance of other legal "areas" to apprehend discriminatory practices?

VI. Future of the prohibition of discriminatory practices on a competition law perspective

QUESTIONNAIRE

I. The notion of discrimination in national / regional substantive legal framework

In this section we would like you to present the existing legal provisions (statutory provisions or soft law provisions) concerning discrimination in your national or regional legal framework**.**

1. Please identify the statutory provisions concerning discrimination in your competition legal framework, as well as the potential soft law provisions that are relevant for discrimination cases.

2. Which types of discriminatory practices (if any) are specifically mentioned in your competition legal framework?

3. Is there other provisions covering the issue of discrimination in your commercial or business law that do not belong to competition law framework (i.e. provisions that predominantly pursue an objective different from that pursued by Article 101 and 102 of the Treaty on the Functioning of the European Union – thereafter "TFEU")?

Please also indicate for each answer whether the provisions you will present have evolved over time and the reasons for these evolutions.

II. The notion of discrimination in practice by competition authorities / courts

This section will be aimed at having a first look at your national case law and decisional practice regarding discrimination. As we understand the notion of discrimination being a core component of competition law, relevant to all areas of antitrust and merger law, we have divided this section in three parts: abuses of dominance, anticompetitive agreements and mergers.

A. Discriminatory practices sanctioned as abuses of dominance

In the European Union, Article 102 TFEU prohibits discriminatory practices when a dominant firm "*applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*". If this provision quite clearly deals with discrimination between customers (also called "secondary line discrimination", also referred to as exploitative abuses), in practice European courts and authorities have also strongly relied on this provision to sanction discrimination against rivals (also called "primary line discrimination", also referred to as foreclosure abuses).

Identification of cases of discriminatory practices

4. Does your competition courts/authorities have received complaints or investigated on their own initiative both "primary-line" and "secondary line" abusive discrimination conducts?

5. If yes, could you (i) indicate whether they reached any decision and (ii) provide us with figures (or best estimate) of the importance of these cases compared to the number of decisions that have been adopted on the basis of Articles 102 TFEU (or its equivalent under national law) by your national authority (and courts if any)?

6. When your competition authorities or courts have adopted specific decisions, could you indicate:

    - How many decisions give rise to sanctions? Could you distinguish between first line and second line discrimination?

    - Could you indicate the amount of fines that has been applied and whether the authorities/courts are more strict for one type of discrimination compare to the other one?

    - Did they impose specific injunctions or remedies in addition or in substitution of fines? If yes, could you describe the remedies that have been imposed (what kind of remedies, what was their objectives, etc…)?

Conditions to fulfil to identify a discriminatory abuse

In EU law and more generally, it is necessary to identify dissimilar conditions imposed to equivalent transactions that create a disadvantage in competition, in order to characterize and possibly sanction discriminatory behaviour.

7. Under which conditions are discriminatory practices assessed by your national courts and authorities?

8. Can you give details on (a) the criteria applied by your national courts and authorities to establish the equivalence of the purchaser situations and transaction conditions (b) the tests used to assess the dissimilarity of transaction conditions? (Does that pertain to the nature of products supplied, their substitutability, the relation of prices to costs etc.)

9. Is the analysis of the abuse of discrimination prohibited by itself or do legal provisions and/or case law impose an analysis of the effects of the practice?

10. In the second case, do your courts and competition authorities appraise the effects of discriminatory practices?
    - Do they look at actual effects or potential effects?
    - What are the typical indicators used to demonstrate (actual) effects?
    - Has the assessment of the effects of the practice evolved over time?

Forms of "primary-line" discrimination prohibited as foreclosure abuse

As mentioned above, the letter of Article 102 (c) of the TFEU addresses exploitative abuses. However, this provision has essentially been referred to by the European Commission and by the European Court of Justice to sanction foreclosure abuses. This could potentially be the case since it was easier to sanction anticompetitive practices aimed at foreclosing competition under the test provided for discriminatory practices than under the tests provided for specific types of abuses such as rebates, refusal to deal, predatory pricing, etc.

11. What are the typical foreclosure behaviours that have been grasped under your national provisions (if any) sanctioning discriminatory practices (for example, price discrimination, quantity discrimination, discrimination in the access to an essential facility, etc)?

12. If these practices were also identified as specific types of abuses, such as rebates, refusal to deal, predatory pricing, etc, have your courts/competition authorities also relied on the tests applicable to these specific practices or only on the applicable test to discriminatory practices?

13. Do you consider that the analysis of the effects of discrimination abuses should follow or match the analysis of the effects of other types of abuses (often stricter)?

14. Have you met specific cases in which national courts/competition authorities assessed a discriminatory behaviour yet without resorting to specific discriminatory provisions (possibly resorting to other Art. 102 provisions), for instance because the legal framework was not sufficiently helpful or past case law was too scarce? (for example, in the Google Shopping case, the Commission, although it has considered that Google treated differently its competitors against its own services, did not rely on Article 102 (c) of the TFEU, but rather it sanctioned Google because of the leveraging effect its conduct had on another market).

Forms of "secondary-line" discrimination prohibited as exploitative abuses

15. What are the typical exploitative abuses that are meant to be captured through your national provisions (if any) sanctioning discriminatory practices?

16. What kind of exploitative discriminatory practices has been most analysed and/or sanctioned by your national courts/authorities?

17. Would you say that the developments of the digital economy, thanks to which is now easier to discriminate, especially because of the algorithms and prevalent personalized pricing, have added to concerns to discrimination as exploitative abuse? Have your national courts/authorities been more preoccupied or alerted with these behaviours in recent years? Is there any on going investigation in relation to this?

<u>B. Identification and description of discriminatory practices pertaining to an anticompetitive agreement (Article 101 TFEU and its equivalent under your national law)</u>

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

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

20. Could you describe the conditions (the tests) under which such discriminatory practices have been assessed by your national authorities/courts? Do these tests or conditions differ (and to what extent) from the tests and conditions used in relation to

the ones used under abuse of dominant position cases (as indicated in your previous answers)? Please be specific and illustrate as far as possible your answer.

C. Discrimination in mergers analysis

21. Can you think of any circumstances in which discrimination has been discussed or taken into account in the competitive analysis of mergers?

22. For example, in the framework of the economic analysis of mergers, have you met circumstances where your national authorities have taken into account the ability of the merged entity to price discriminate (for the definition of relevant markets, the analysis of the market power of firms and the assessment of the effects of the merger, claimed efficiencies etc)?

III. Objective justifications to discriminatory practices

As explained in the introduction, discrimination can also enhance economic efficiency and welfare. This section will therefore be aimed at identifying how these efficiencies have been taken into account in the analysis of discriminatory practices.

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

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

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

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

IV. Objectives justifying to prohibit discriminatory practices

In section I to III, we put into light how is discrimination defined in your legal provisions, what kind of practices are prohibited and why they could be objectively justified. Now we would like to understand the policy grounds justifying the intervention of competition authorities against discriminatory practices.

We observe that the prohibition of discriminatory practices can find numerous objectives: protection of competition, market liberalisation, fairness, equal treatment, etc…

As regards fairness, it is an objective that has somehow been largely debated as being – or not – in the scope of competition law objectives. Brice Allibert, the deputy head of the antitrust unit of the European Commission DG competition reckoned that competition law "*somehow directionally go[es] towards more fairness on the market but not because that's your*

objective. It is because you're abiding the law and as a side effect, you rectify something that was not in line with competition law".

26. Has the sanction of discriminatory practices been used as a tool to restore an effective competitive structure in a given market, *i.e.* sanctioning dominant operators that were excluding equally efficient rivals or even less efficient competitors that the incumbent operator?

27. Has the sanction of secondary line discrimination also been used as tool to open market to competition, for instance by enabling market entry on customer segments that would have been targeted with low prices if discrimination had been possible?

28. Is fairness a defined objective of your competition policy? Or do you think that the re-establishing of fair situation between competitors/trading partners was somehow a side effect of the sanction of a practice which was anticompetitive in itself?

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

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

V. Relevance of other legal "areas" to apprehend discriminatory practices?

As seen in section IV, the prohibition of discrimination in competition law can sometimes follow objectives that are not intrinsically part of the objectives of general competition law policy. In this section, we would like to get your opinion on whether other areas of law seem more appropriate to deal with the issue of discrimination.

31. Do you have in your legal framework provisions under which courts and authorities would be able to sanction some discriminatory practices that are sometimes grasped by competition authorities (restrictive practices, consumer protection, data protection, distribution law, IP law etc.)?

32. If yes, do you think that these legal provisions are more efficient and appropriate?

33. Have your sectoral regulators intervened on an *ex ante* basis to impose an incumbent operator certain obligations necessary to open the market to competition (access to infrastructures regulations, unbundling, etc.) and prohibited it to discriminate against new entrants?

34. If yes, how do think that *ex ante* regulation and *ex post* control of anticompetitive practices should interact with each other?

VI. Future of the prohibition of discriminatory practices on a competition law perspective

Now that we have a good understanding of what your legal framework provides for the sanction of discriminatory practices in business relationship and how it has been implemented

by our national courts/authorities, we would like your opinion on the future of the enforcement of competition law regarding discriminatory practices.

35. Exploitative abuses are coming back in the decisional practice of the European commission. Did your national practice experience the same evolution? Did your national competition authority or national courts give specific reasons for this evolution or could you identify specific reasons?

36. Have you identified specific sectors/behaviours that could trigger discrimination cases issues in the future? For example, many competition authorities are now concerned with digital sectors. Do you think this will a particularly relevant area to analyse and possibly prevent new types of discriminatory practices?

37. The European Commission is currently thinking about the adoption of specific regulations applicable to the digital sector (e-commerce and geo-blocking)? Do you think that such a regulatory tool will be more adapted that competition law rules to deal with discriminatory conduct in the digital sector?

38. How do you think that the developments of digital sectors will impact the economic analysis of market power (either in the framework of mergers or of abuses of dominance) of firms active in the digital economy, e.g. by making discriminatory (price and non-price) behaviour more suspicious and more prone to be sanctioned?