



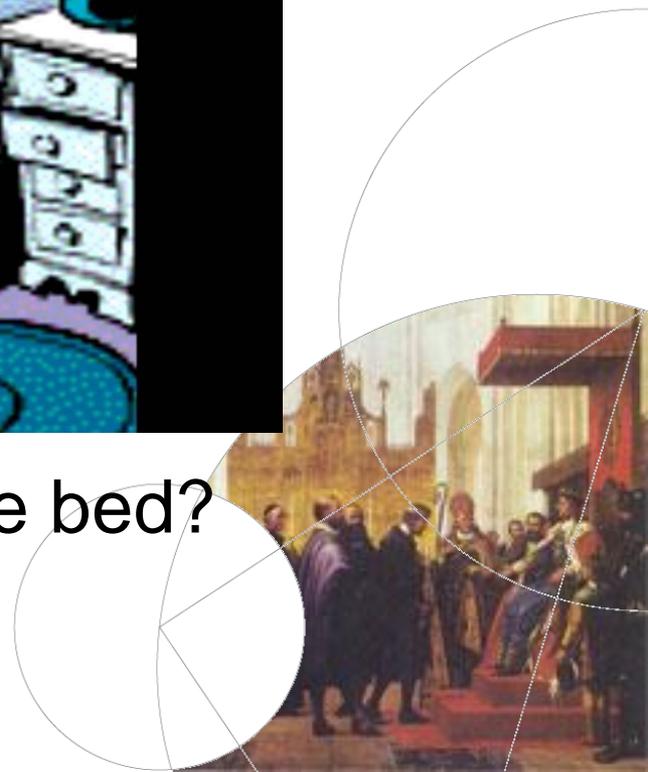
Discriminatory discounts?



Is there still a goblin under the bed?

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By Christian Bergqvist, ph.d.



How to read *Intel*?

- Different readings of *Intel* are possible. However, some are clear:
 4. Recital 139 lists the following:
 1. the extent of the undertaking's dominant position on the relevant market (super dominance?),
 2. the share of the market covered by the challenged practice (de minimis?),
 3. conditions and arrangements for granting the rebates in question (open, transparent, justifiable?),
 4. their duration and their amount (ability to have an effect?)
 5. assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (predatory or malicious intent?)

This echoes the *Enforcement Paper*, recital 20 referring to **i)** the position of the dominant undertaking **ii)** the conditions on the relevant market **iii)** the position of the dominant undertaking's competitors **iv)** the position of the customers or input suppliers **v)** the extent of the allegedly abusive conduct **vi)** possible evidence of actual foreclosure **vii)** direct evidence of any exclusionary strategy.



How to read *Intel*?

- Different readings of *Intel* are possible. Others, are more open:
 1. I find it difficult not to see a link between recital 139 and the *Enforcement Paper*. Moreover, it could also be aligned with *Michelin I*, requiring a need to consider “...*all the circumstances*..”
 2. I would therefore tend to rebut the existence of three forms of discounts, as suggested by the General Court, where one is subject to a per-see prohibition. All are reviewed under an “all the circumstances,” standard, where the AEC-test is one of the criteria
 3. Henceforth, it would not be possible to ignore a submitted AEC-test translating this into a defense



A happy ending?

- Once the dust settles on *Intel* a clear road for the assessment, including self-assessment, might emerge in respect to exclusionary discounts and more broadly on exclusionary conduct



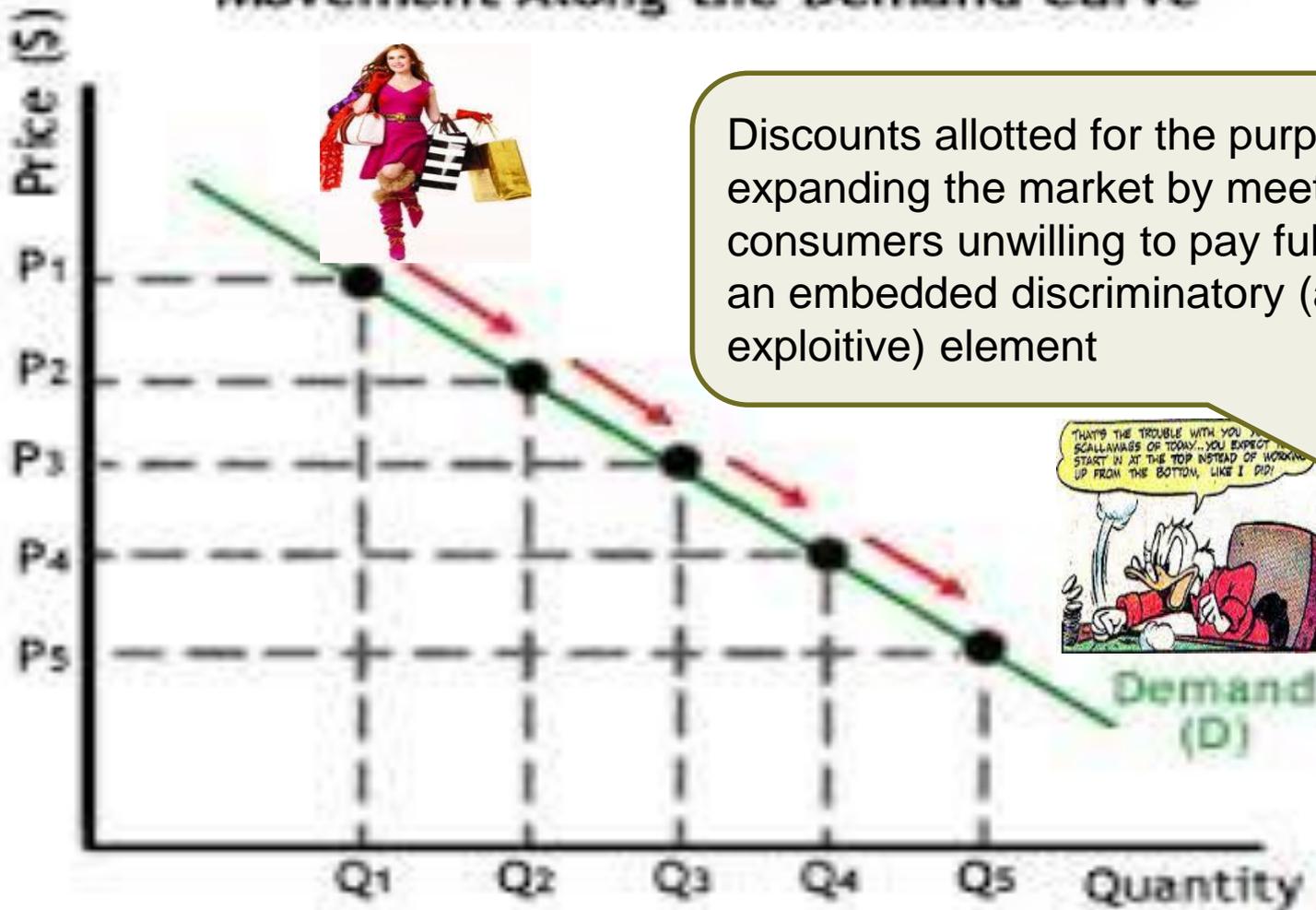
A happy ending?

- Declaring a happy ending is perhaps premature but I feel the approach to exclusionary discounts has become more clear
- However that (re)opens a question on how to treat *discriminatory discounts* and *exploitive discounts*

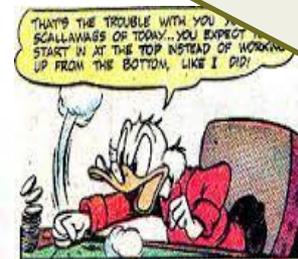


Discriminatory discounts

Movement Along the Demand Curve



Discounts allotted for the purpose of expanding the market by meeting those consumers unwilling to pay full price has an embedded discriminatory (and exploitive) element



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Discriminatory discounts

- *Hoffmann La Roche* and *Michelin I* established the basis for assessing discrimination. In the latter (recital 73), the discounts were also held to be abusive for offering:
 - *“dissimilar conditions to equivalent transaction with other trading parties....”*
- Giving ground to the misperception that dominant undertakings are obligated to offer all customers similar (good or bad) conditions and adjust any discount program accordingly



Discriminatory discounts

- *Hoffmann La Roche* and *Michelin I* established the basis for assessing discrimination. In the latter (recital 73), the discounts were also held to be abusive for offering:
 - *“dissimilar conditions to equivalent transaction with other trading parties....”*
- And bad cases as the ill-fated *Post Danmark - adresseløse forsendelser*, Konkurrencerådet 29/9-2004 (*Post Danmark I*), recital 172
 - *“It is therefore the assessment that Post Danmark applies a discriminatory price and rebate system which treats identical trading partners differently, which the company has not been able to explain”* [my translation]



Post Danmark I – a few fact

- In the 2004 the Danish Competition Authority held that the national post incumbent *Post Danmark* had offered discriminatory discounts:
 - Leading to a foreclosure of a named competitor (referred to as primary-line discrimination)
 - Thwarting competition downstream (referred to as second-line discrimination)
 - But priced above AIC (calculated in a novel manor) and thus not engaged in predatory pricing
- Embedded in the decision was thus a misreading of *Michelin I* and the concept of discrimination holding any disadvantages as abusive
- The case ended up before Court of Justice as *Post Danmark I* (and the rest is history)



Discriminatory discounts

- GA Wahl in case C-525/16 – MEO, recital 63
 - *“It should only be possible to penalise price discrimination, either under the law applicable to cartels or under the law applicable to abuses of a dominant position, if it creates an actual or potential anticompetitive effect. The identification of such an effect must not be confused with the disadvantage that may immediately be experienced, or suffered, by operators that have been charged the highest prices for goods or services. Accordingly, the fact that an undertaking has been charged a higher price when purchasing goods or services than that applied to one or more of its competitor undertakings may be characterised as a disadvantage, but it does not necessarily result in a ‘competitive disadvantage’”*
 - The must be **genuine anti-competitive** effect, not to be **confused** with a **disadvantages**



Discriminatory discounts

■ GA Wahl in case C-525/16 – MEO, recital 71-74

71. *Where a price discrimination practice is at issue, the analysis that must be carried out differs substantially depending on whether the discrimination at issue is 'first degree' or 'second degree'.*
72. *First degree price discrimination is that which is practised against competitors of the dominant undertaking. Most often, it refers to price discrimination practices which are designed to attract customers of competing operators, such as predatory pricing, differential rates of discount and margin squeezing. More generally, it covers every pricing practice which is designed to foreclose from the market or weaken the competitive position of operators present on the same market and at the same level (vertically speaking) as the dominant undertaking.*
73. *These price discrimination practices are, because of the immediate exclusionary effects they are capable of creating, the ones which the competition supervisory authorities and the courts are generally asked to examine*
74. *Second degree price discrimination, which is mainly addressed by point (c) of the second paragraph of Article 102 TFEU, is that which affects 'trading partners' on the market downstream or upstream from the dominant undertaking. It includes, in particular, cases where a dominant undertaking decides to charge its customers, that is to say, entities with which it is not in direct competition, different prices. The aim of that provision is to prevent the commercial behaviour of undertakings in a dominant position from distorting competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of such undertakings must not be favoured or disfavoured in the area of the competition which they practise amongst themselves*

- First degree pricing discrimination is essential **foreclosure either horizontal or vertical** while second degree discrimination is rare and involves the **thwarting** of competition up/downstream and is thus also vertical



Discriminatory discounts

- The Court of Justice confirmed GA in *MEO* but didn't added anything substantial
- *BdKEP/Deutsche Post* (2004) where in recital 93 the Commission held that:
 - "The wording [of Article 102] covers three types of discrimination, **the first two of them exclusionary and the last one exploitative**: (i) the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) **the customer suffers commercially** in such a way that its ability to compete in whatever market is impaired"
- Thus, **discrimination & discriminatory discounts** are only condemned if **exclusionary** or **exploitive**
- The exclusionary elements is (according to Wahl) a form for predatory pricing or margin squeeze



Exclusionary discrimination

- i. Horizontal (foreclosure) discrimination, where “...*the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself..*”. The dominant undertaking **is vertically integrated/active downstream**
- ii. Vertical (foreclosure) discrimination, where “...*the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis other customers of the dominant firm*” The dominant undertaking is **not vertically integrated/active downstream**
- iii. Vertical (exploitive) discrimination “...*the customer suffers commercially in such a way that its ability to compete in whatever market is impaired*”



Exclusionary discrimination

- i. Horizontal (foreclosure) discrimination (primary-line discrimination). The dominant undertaking is vertically integrated/ active downstream
- If **vertically integrated** the **upstream pricing** policy would normally be reviewed under a **margin squeeze** standard compelling it to ensure coverage to LRAIC
 - If **not-vertically integrated** the **downstream pricing** policy would normally be reviewed under a **predatory pricing** standard compelling it to ensure coverage to LRAIC



Exclusionary discrimination

- ii. Vertical (foreclosure) discrimination, (second-line discrimination). The dominant undertaking is not vertically integrated/ active downstream
- While recognizing the **need to establish a distortion** neither GA nor Court offered guidance on the matter in case C-525/16 - *MEO*
 - In *Portuguese airports* it was held **discriminatory** when domestic flight operators in average was granted a 22-30 % discount compared to the 1-8 % granted non-domestic operators (app **20 % difference**)
 - As the **AEC-test are applied** to other **price based abuses** it would be the **logical choice** when it came to **discrimination**, requiring upstream prices allowing for coverage to **LRAIC downstream**



$$P > \text{LRAIC}$$

Exploitive discrimination

- iii. Vertical (exploitive) discrimination Unclear what the Commission refers to, allowing for to options:
1. In the decision references (recital 95) are made to cases as *Corsica Ferries*, *GVL*, *United Brands*, *Tetra Pak II* where the discrimination where nationality based perhaps tainting the appraisal
 2. Targeting the individual willingness to pay could be abusive c.f. *Discussion Paper* (2005), recital 141
 - “*The direct exploitation takes places by discriminating between customers and making customers with a higher willingness to pay and less switching possibilities pay a higher price than others*“
 - However, the consideration was not cited in the *Enforcement Paper* nor supported by case law
 - *Deutsche Bahn* (recital 91), *UBS* (recital 228) & *Port of Helsingborg* (241) don't condemn (*per se*) behavior capitalizing on (some) customers' higher willingness to pay, thereby potentially opening a (small) window



Discrimination – *Google Search*

- The notion of discrimination is still somewhat unclear as illustrated by *Google Search* (2017), recital 341:
 - *“The Conduct is Abusive because it constitutes a practice falling outside the scope of competition on the merits as it: (i) diverts traffic in the sense that it decreases traffic from Google’s general search results pages to competing comparison shopping services and increases traffic from Google’s general search results pages to Google’s own comparison shopping service; and (ii) is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services.”*
- Thus, the decision rest upon identifying discriminatory self-favoring as abusive, but is not advanced as such
- However, the case indicates how to treat non-pricing discrimination (review the effect)



A happy ending now?

- I'm pretty confident about how to deal with exclusionary discounts and find it unlikely there is a much willingness to open discriminatory cases
- However, there is a level of legal uncertainty I'm not confident about. Moreover, the Commission (2005) promised to issue a paper on discrimination
- Provided the price allows coverage for LRAIC I see some openings



EU cases cited

- Case C-27/76 – *UBS*
- Case C-85/76 - *Hoffmann La Roche*
- Case T-83/91 – *Tetra Pak*
- Case C-322/81 - *Michelin I*
- Case C-7/82 – *GVL*
- Case 18/93 - *Corsica Ferries*
- Case T-229/94 - *Deutsche Bahn*
- Case C-163/99 – *Portuguese Republic v Commission*
- Case C-209/10 - *Post Danmark I*
- Case C-525/16 - *MEO*
- COMP/38.745 - *BdKEP/Deutsche Post AG*
- COMP/A.36.568/D3 - *Scanlines Sverige AB vs. Port of Helsingborg*
- Case AT.39.740 – *Google Search (Shopping)*



Questions



Or contact me on cbe@jur.ku.dk

