Discriminatory abuse - the missing link in the more effect-based approach

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Subject: Competition law. Other related subjects: European Union.

Keywords: Abuse of dominant position; Competition law; Discrimination; EU law; Price discrimination

Legislation:
Treaty on the Functioning of the European Union art.102

Case:

*E.C.L.R. 95 While art.102 indisputably covers discrimination, there has been limited appetite for pursuing cases that clear up its ambiguities. This is not only contradictory to the now-enshrined effect-based approach when it comes to exclusionary abuse, but also provides a foundation for misunderstandings. A troublesome situation, as the Commission has recently indicated renewed interest into discriminatory abuse. Much could be gained if the Commission delivered on its 2005 promise to issue formal guidance on discriminatory abuse, thereby completing the translation to a more effect-based process.

It follows from art.102(c) that it is abusive to apply “… dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”; hence to discriminate. Conceptual discrimination could be price or non-price based and involves either:

a) applying dissimilar conditions to equivalent transactions, which could involve some customers getting better terms, or

b) applying equivalent conditions to dissimilar transactions, which could involve all customers being offered identical terms regardless of differences, e.g. in the quantum they source.

The decisive factor is the non-objective difference placing the trading partners in a position of competitive disadvantage, thus indicating the relevant criteria for evaluating purported discrimination. However, in practice there has been limited interest at the EU level in pursuing discriminatory abuse, which is logical in light of the embedded dilemmas and ambiguities. The theoretical foundation for condemning discrimination is weak, as economic theory generally views price differentiations across markets and customer groups as welfare enhancing or an instrument for recouping large fixed costs. Thereby, in the case of unusual cost structure, the servicing of low-income customers is secured. In concentrated markets prohibiting price differentiation could even promote collusion and thereby be anti-competitive. It should also be noted that historically the prohibition embedded in art.102(c) presumably represents an attempt to protect small and medium-sized undertakings from getting less favourable terms than larger competitors. An objective that should have no place in competition law, as no consumer harm is caused by this. It even remains open what to consider abusive. In isolation price discrimination is benign and practice has underplayed the requirement of an anti-competitive effect, regardless of the reference in art.102(c). A position particularly difficult to align with the effect-based approach endorsed in the Enforcement Paper and now enshrined with Intel when it comes to exclusionary abuse. Hence, strong arguments can be raised against enforcing art.102(c) without some prudence. This is a call the Commission has accommodated with a limited application,
making it less unfortunate that it also appears to have negated on its 2005 promise\(^\text{a}\) for formal guidance, as a supplement, to what is now the *Enforcement Paper*. On the other hand, the Commission in November 2018 submitted a note to OECD on Personalized Pricing in the Digital Era\(^\text{b}\) indicating the availability of *art.102(c)* against attempts to target consumers’ individual willingness to pay, thus potentially a shift in enforcement priorities. Thus, the need to clarify the concept of discriminatory abuse has resurfaced in order to avoid misunderstandings and misapplications and to finalise the translation to a more effect-based application of *art.102*.

**Limited historical interest in condemning real discrimination**

Historically there has been limited interest in applying *art.102(c)*. Most cases involving discrimination are either pursued under other standards or tainted by other priorities, e.g. the Single Market. Examples of the former *E.C.L.R. 96* are predatory pricing cases such as *AKZO*\(^{15}\) and *Tetra Pak II*\(^{16}\) where the prices had been reserved for specific customers, or the margin squeeze case *Deutsche Bahn I/II*\(^{17}\) where the beneficiary was a subsidiary. These cases all de facto incorporate a discriminatory element, but are not pursued as such. Examples of the latter would be *PO/World Cup 1998*\(^{18}\) where French soccer fans were secured preferential access to tickets at the expense of non-domestic fans—a behaviour condemned as a particular heinous form of discrimination by targeting end-users. Even actual discrimination cases such as *Hoffmann-La Roche*\(^{19}\) and *Michelin I*\(^{20}\) are more of exclusionary than discriminatory nature, as the abuse attained to foreclose the markets for direct competitors. Hence, undertakings and national enforcers are void of clear guiding principles potentially leading to misunderstandings. The epic *Post Danmark I*\(^{21}\) originated in a national misapplication of the concept of discrimination, indicating the risk of both over- and under-enforcement as real.

**Meo, at first glance a missed opportunity**

In light of the ambiguities, much hope was attached to *Meo*\(^{22}\) when referred to the Court of Justice, as the national court specifically requested clarification on the concept of discriminatory abuse and the required testing for identifying this. In *Meo* a Portuguese TV provider felt victimised by the national copyright collecting society, when this had offered a competitor more favourable tariffs, leading to a dispute. In contrast to other cases, including *Post Danmark I, Hoffmann-La Roche* and *Michelin I*, the victim was a direct customer and not a competitor, offering an ideal opportunity to clear up the ambiguities. The Advocate General even invited the court to do this, offering suggestions for possible approaches as detailed below. However, the court confined itself to two observations: First, that the non-vertically integrated company normally lacked interest in thwarting competition downstream (or upstream), and secondly, that differential treatment would only be abusive if able to distort competition taking all the relevant circumstances into consideration. Hoping for more, and in light of the many considerations by the Advocate General, some commentators\(^{23}\) have referred to the case as providing a quiet death to the concept of discrimination, and thus a partly missed opportunity for setting clear precedence. While this has some merits, the ruling most likely represented what the court was willing to compromise on. If viewed more broadly, including the fact that the court did not distance itself from the Advocate General’s Opinion, more advanced guidance on discriminatory abuse under *art.102(c)* becomes available.

**The Advocate General’s Opinion offers prudent guidance**

In contrast to the Court of Justice, the Advocate General offered a number of observations on the concept of discriminatory abuse.\(^{24}\) This included welcoming the opportunity to clarify this in general and specifically where the alleged victim was a customer, rather than a competitor, and the evidence of an appreciable disadvantage weak. The latter derived from the shift in market shares between the purported victim (from 25 to 40 per cent) and alleged beneficiary (from 60 to less than 45 per cent) in the course of the three years affected by the potential abuse.\(^{25}\) The Advocate General then moved on, stating that an abuse should only arise if the non-objective differences truly placed trading partners in a competitive disadvantage position, which should never be assumed, as price discrimination in itself was unproblematic. Thus, contrary to the wording of *art.102(c)*, the dominant undertaking was not obligated to offer uniform tariffs. However, where the Advocate General truly adds value is by differentiating between\(^{26}\):
Price discrimination practices designed to attract customers of competing operators, such as predatory pricing, differential rates of discount and margin squeezing. This covers every pricing practice designed to foreclose or weaken operators present on the same market and at the same level (vertically speaking) as the dominant undertaking and represents the price discrimination practices that enforcers normally are called to examine.

Price discrimination practices that affect “trading partners” on the market downstream or upstream from the dominant undertaking and thus not in (direct) competition with it. Allowing art.102(c) to *E.C.L.R. 97 cover this should serve 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.

Further, in the case of vertically integrated undertakings, the application of discriminatory prices on the downstream or upstream markets would be covered by the first situation, as it indirectly affects the undertaking’s competitors. Sadly, the Advocate General then starts losing steam, offering no clues to whether the first category of practice is a separate form of abuse and very little on how to decide if a discriminatory practice truly distorts competition. However, the opinion does suggest that the disadvantages must be sufficiently significant before amounting to an abuse, also taking into consideration if the levied prices represent a significant proportion of the total costs by the disfavoured customer.

Three forms of discrimination are embedded in article 102(c)

While both the court and Advocate General left questions open, some can be closed by consulting other cases. In BdKEP/Deutsche Post AG (2004), the Commission was called to evaluate national laws inducing the incumbent mail operator to discriminate mail intermediates in a non-objective manner. Replying to a submission that art.102(c) did not cover this, it was noted how:

"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. It is obvious that type (i) and (iii) do not require a competitive relationship between the two comparator groups."

Combined with the Advocate General’s Opinion in Meo, it becomes apparent that the concept of discrimination not only covers three forms of abuse, of which two are exclusionary and one exploitive, but also that more advanced observations can be provided. These include how art.102(c) potentially can be applied to:

a) Horizontal (exclusionary) discrimination, normally referred to as primary-line-discrimination,\textsuperscript{24} initiated for the purpose of foreclosing competitors by targeting actual or potential customers with selective price reductions or other favours. Moreover, this includes foreclosure of upstream and downstream markets secured by preferential treatment of subsidiaries and internal departments of the vertically integrated company. The foreclosure could thus have a vertical element to it, but as the victim is a direct competitor (upstream or downstream) the foreclosure remains horizontal.

b)
Vertical (exclusionary) discrimination, normally referred to as secondary-line-discrimination, initiated for the purpose of twisting competition in other markets, e.g. for the benefit of a preferred trading partner (but not a subsidiary or internal department). While also directed upstream or downstream, the potential abuser has no direct interest in the foreclosure as it remains inactive in any of the affected markets. Hence, the foreclosure is (truly) vertical.

c) Exploitative discrimination that in practice involved national-based discrimination and henceforth potentially individualised pricing. However, the abuse is essentially exploitive and should not be confused with discrimination but reviewed under the legal standards for exploitation as explained later.

Despite the textual framing of art.102(c) referring to "... trading parties [placed] ... at a competitive disadvantage", the provisions are not limited to vertical discrimination. Neither could the forms be considered mutually exclusionary. Nonetheless, should the focus of art.102(c) be on vertical discrimination, as horizontal discrimination would be covered by art.102(b) and exploitative discrimination by art.102(a). Moreover, incentive and ability are not the same, and even the vertically integrated undertaking might be unwilling to discriminate for the purpose of foreclosing upstream or downstream markets as it would impede turnover. Regardless, all of the three forms of discrimination are developed below, starting with horizontal discrimination. *E.C.L.R. 98

**Horizontal discrimination—Foreclosing competitors**

The dominant undertaking’s ability to target customers with attractive (and selective) offers for the purpose of retaining or gaining their loyalty, hence horizontal discrimination falls within the core of abusive discrimination. Moreover, this covers two forms of anti-competitive behaviour:

a) discrimination of downstream trading parties for the purpose of securing an upstream foreclosure, targeting a direct competitor, and

b) discrimination in favour of vertically—integrated or group—affiliated downstream interests, for the purpose of securing a downstream foreclosure.

Consequently, the beneficiary of any discrimination could also be a subsidiary or vertically integrated division giving the foreclosure a vertical nature. Additionally, the concept also covers different forms of pre-emptive foreclosure, where no actual competitor has accessed the market, but this might be eminent as demonstrated by Irish Sugar. Here, discounts had been reserved for customers in border areas and hence those most likely to switch to a potential new supplier. The framework for analysing discrimination was established by the Court of Justice in Michelin I, recital 73, noticing that the appraisal should:

"... consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transaction with other trading parties or to strengthen the dominant position by distorting competition."

Abusive discrimination was also identified in Compagnie Maritime Belge Transports, where selective price cuts fell short of the concept of predatory pricing, but nevertheless had targeted a named competitor and therefore merited condemnation. In contrast to the EU Commission, neither of the courts referred to art.102(c) and it remains unknown if this was intentional. Horizontal discrimination
had also been identified and condemned by the national competition authority in Post Danmark I, referring to it as primary-line-discrimination. But as the Court of Justice in its reply to the referring court appeared unwilling to see an abuse, horizontal discrimination might be a variation of traditional exclusionary conduct rather than a separate category of infringements.

**A broad concept not confined to direct competitors**

Horizontal discrimination is not limited to a direct competitor or pre-emptive foreclosure, as it also covers preferential treatment of affiliated undertakings and interests upstream or downstream. In Deutsche Bahn, it was held abusive when the offered terms (intentionally) favoured the group’s own downstream activities. Furthermore, investments in infrastructure had been directed at lowering costs on the routes used by them, making invoking lower costs as a defence artificial. The concept of horizontal discrimination is not even confined to markets upstream or downstream and with a vertical link. In Clearstream, an attempt to offer favours to group-affiliated undertakings was found discriminatory, as this, in light of Clearstream’s monopoly position and the timespan (five years), could not "fail to cause that partner a competitive disadvantage".

Nonetheless, subsequent cases might have modified some of these principles. In the EFTA case Sorpa, discounts had been reserved for the owners of a waste disposal company, thereby potentially placing them in a competitive advantageous situation over their competitors. Yet, void of a direct competition situation the court suggested it to be less likely that competition could be thwarted in an abusive manner. Further, in Post Danmark I, the Court of Justice expressed some hostility towards the concept of primary-line-discrimination and pricing below Average Total Cost as abusive per se, solely based upon the selective, and thus discriminatory, element. Embedded in this might be that horizontal discrimination is not a separate abuse, but merely exclusionary abuse. Presuming this to be correct, horizontal discrimination should then be reviewed under all the circumstance-standard established with Michelin I and galvanised by Intel, including how the non-objective difference is able to place an As-Efficient Competitor in a disadvantageous position. It might even be possible to E.C.L.R. 99 move beyond that, as the applicable frame tabled by Intel mirrors the Enforcement Paper and thus makes it relevant to review if the offered terms secured coverage for the dominant undertaking’s LRIC on the markets affected by the (alleged) abuse. Only then could a preferential treatment of customers lead to the foreclosure of an As-Efficient Competitor and thus rightly be held anti-competitive. Of course, as this has not been cited directly in discrimination cases, it might represent wishful thinking, but would nevertheless represent the next logical evolution—and thus advance the more effect-based process further.

**Vertical discrimination—foreclosing customers**

Vertical discrimination covers, as explained in BdKEP/Deutsche Post AG, discrimination of downstream trading parties (or upstream suppliers). However, essentially this involved "real discrimination", as the dominant undertaking does not benefit from this in an exclusionary manner. Consequently, should the concept be avoided for discrimination in favour of vertically—integrated or group—affiliated downstream interests as this essentially is a foreclosure following the principles laid down for horizontal discrimination as detailed above? Furthermore, void of elements thwarting the Single Market, e.g. nationality based discrimination, practice is limited, indicating that it neither has, nor should be, a priority. This is a logical decision, as the dominant undertaking often lacks an incentive to pursue foreclosure of vertical markets. Even the ability might be lacking unless in a monopolistic position, as any attempt to pursue a foreclosure could undermine the dominant position and thus be unprofitable in a longer perspective.

Nevertheless, a few cases have emerged, giving some indication of the frame for assessing vertical discrimination. In Portugal v Commission, it was held abusive under art.102(c) when a linear and quantum discount had de facto benefited domestic air operators. Not because some got better terms, as this was an inherent feature in quantum discounts, but due to high thresholds only attainable by a few particularly large partners and the up to 30 per cent differences in the offered terms. Embedded in this is that differential treatment, even if non-objective, in itself is insufficient for identifying an abuse, as selective discounts will always benefit some at the expense of others. Moreover, the disadvantages must be assessed in a tangible manner to ensure that, as later articulated by the Advocate General in Meo, they are sufficiently significant. Of interest is also United Brands where the Court of Justice accepted differences in levied prices due to differences in costs and "... the density of competition". A most pivotal observation, as it rebuts viewing pricing capitalising on (some)
customers’ ability to pay a premium as abusive per se. This was more clearly embraced by the General Court in Deutsche Bahn,\textsuperscript{43} considering, but ultimately rebutting, that the differences in terms and prices could be attributed to the density of competition downstream. The same conclusion would appear to stem from Scandlines Sverige AB v Port of Helsingborg,\textsuperscript{44} accepting that demand-related conditions could explain (and justify) price differences and rebut allegations of exploitive abuse.

**Possible principles for reviewing vertical discrimination**

While the Advocate General in Meo suggested a test where the disadvantage had to be sufficiently significant and evaluated in light of the costs, the court confined itself to referring to an assessment taking all the relevant circumstances into consideration. While the latter are conceptually broader than the former, there is no direct conflict between them. It should be self-evident that the disadvantages must be more than trivial to thwart competition upstream or downstream, and that it rests with the enforcer (or the plaintiff) to substantiate this. The essential questions thus become how many differences are acceptable and how to evaluate these.

As vertical discrimination remains exclusionary, it would not be unfair to seek guidance in the evaluation of traditional forms of exclusionary (vertical) abuse and tests applicable to these. Different approaches then become available. In Clearstream,\textsuperscript{44} the court concluded that in light of the facts, including the presence of a legal monopoly and a practice spanning four years, the discriminatory behaviour "... could not fail to cause that partner a competitive disadvantage". Moreover, the abuser had been viewed as "... an unavoidable trading partner", indicating that foreclosure was plausible in a longer perspective. The case involved horizontal discrimination, but the consideration could reasonably be transferred to vertical discrimination, allowing for identifying vertical discrimination where it is obvious that a competitive disadvantage is imposed. Moreover, this would be unlikely, unless: a) the involved products or services were essential for the downstream activities, or b) the levied *E.C.L.R. 100* prices represented a significant proportion of the total costs by the disfavoured customer. Devoid of these, a twisting of competition downstream (or upstream) would appear somewhat implausible, explaining why the Advocate General in Meo suggested considering the relationship between the levied prices and total costs. Moreover, option b) was applied in Alpha Flight Services/Aéroports de Paris against (another) example of vertical discrimination favouring domestic air operators. Regrettably the levied fees are undisclosed. However, the Commission does clearly conclude "...that a supplier paying the highest rate cannot offer competitive prices whilst maintaining the same profit margin". The supplier would then start losing customers or reduce his profit and gradually be foreclosed.

Following this logic, the abusive behaviour resembles a margin squeeze, which also would have been the choice had the (dominant) undertaking in Meo been vertically integrated and the discrimination directed to favour downstream group interests.\textsuperscript{52} Normally, abusive margin squeeze requires downstream prices failing to secure cover for the dominant undertakings LRIC thus capable of foreclosing an As-Efficient Competitor.\textsuperscript{45} Translated to vertical discrimination, this means that the evaluation in Portugal v Commission should have moved on to demonstrate how the 30 per cent differences accounted for a substantial portion of the downstream costs, and thus capable of creating a foreclosure—essentially what the Advocate General suggested in Meo and appears to have been undertaken in Alpha Flight Services/Aéroports de Paris. Unfortunately, the court in neither Meo nor Portugal v Commission embraced this, while it might be possible to deduce this from the latter,\textsuperscript{45} not explicitly, but based on the fact that airlines often operate on the margins, making it plausible that even minor discounts would be translated into a competitive advantage on the downstream markets.

**Exploitative discrimination**

Regardless of BdKEP/Deutsche Post AG identifying a form of exploitative discrimination, it remains somewhat unclear how this would manifest itself. The Commission refers in recital 95 to Corsica Ferries,\textsuperscript{93} United Brands,\textsuperscript{91} GVL,\textsuperscript{96} and Tetra Pak,\textsuperscript{46} and how they all involved discrimination directed at nationality. That would downgrade the concept to national discrimination incompatible with the Single Market objective and thus provide some explanation for why art.102(c) is applied to this in the first place.\textsuperscript{54} However, it would be more logical to look outside this and consider other cases and considerations.

As detailed earlier United Brands,\textsuperscript{55} Deutsche Bahn,\textsuperscript{56} and Scandlines Sverige AB v Port of Helsingborg\textsuperscript{57} have (potentially) opened a window for capitalising on (some) customers’ ability to pay
a premium. This is an important opportunity, as each customer is perceived to have an individual willingness to pay, providing for the negative relationship between price and sold quantums.\cite{54}

Targeting each customer’s individual price, referred to as \textit{perfect price discrimination} or \textit{first degree price discrimination},\cite{54} would maximise the producer surplus at the expense of the consumers, and thus be attractive from the perspective of the former. While economists are normally averse to considering this abusive,\cite{60} as no welfare is lost, the legal assessment might differ, or at least be unclear.\cite{61} Moreover, in 2005\cite{58} the Commission did reserve the right to intervene against discrimination directed at customers with a higher willingness to pay and fewer switching possibilities as this could be exploitative. While no cases have materialised and the consideration has not been recited, and thus potentially abandoned, it would be natural to see a link to \textit{BdKEP/Deutsche Post AG}. In particular, perfect price discrimination is normally seen as unattainable,\cite{63} as it would require an unrealistically high level of knowledge about each consumer. However, with the emergence of internet-based platforms and the concept of big data, the available information has increased, exponentially giving ground for much more individualised pricing. \textit{E.C.L.R. 101}\cite{64}

\textbf{Has the Commission embraced the concept of exploitative discrimination?}

With the danger of speculating, perhaps even fabulating, it would be plausible to see a link between the concept of perfect price discrimination and the November 2018 submission to OECD on Personalised Pricing in the Digital Era.\cite{65} In this submission, the Commission, although only briefly, indicates that \textit{art.102(c)} could be used against companies attempting to target consumers’ individual willingness to pay. While only a short comment, it fails to respect that exploitative discrimination is more exploitative than discrimination and thus only abusive if meeting the requirement of \textit{art.102(a)}. However, as we are short of clear legal precedence, the matter remains unsolved making it even more regrettable that the Commission never delivered on the original ambition of a separate paper\cite{66} on discrimination and discriminatory abuse. Not only to clear up the ambiguities, but also to supplement the Enforcement Paper and thus complete the more effect-based approach embarked upon in 2005.

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\textit{E.C.L.R. 2019, 40(3), 95-101}

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1. See, e.g. Case No. COMP/A.36.568/D3 Scanlines Sverige AB v Port of Helsingborg at [276].
5. See, e.g. Opinion of Advocate General Wahl in \textit{Meo Serviços de Comunicações e Multimédia (C-525/16)} EU:C:2018:270.
7. Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.
9. See MEMO/05/486—Commission discussion paper on abuse of dominance — frequently asked questions.


15. F Hoffmann La Roche & Co AG v Commission of the European Communities (85/76) EU:C:1979:36 at [80].


17. Post Danmark v Konkurrencerådet (C-209/10) EU:C:2012:172 at [8]. For further on the national case, and its embedded misunderstandings, see Christian Bergqvist, "Final Curtain or Another Round on Post Danmark" (2013) 6 E.C.L.R. 34.

18. MEO Servicos de Comunicacoes e Multimédia (C-525/16) EU:C:2018:270 at [5]–[20] (background) and [30]–[37] (principles).


21. In principle, shouldn’t market shares be used for the purpose of establishing an effect cf. British Airways Plc v Commission of the European Communities (C-95/04) EU:C:2007:166 ? Here the Court of Justice refused the relevance of declining market shares, falling from 46 per cent to 40 per cent, thereby indicating limited effects.


23. Case No. COMP/38.745 — BdKEP/Deutsche Post AG at [64]–[66] (abuse) and [93] (the concept of discrimination).


31. Selective (and discriminatory) price cuts, targeting a competitor, was also used in Hilli AG v Commission of the European Communities (T-30/93) EU:T:1991:70. While labelled discriminatory, no reference is made to art.102 (c).

32. Post Danmark v Konkurrencerådet (C-209/10) EU:C:2012:172 at [8].


34. Clearstream Banking AG v Commission of the European Communities (T-301/04) EU:T:2009:317. In the underlying case, COMP/38.096 — PO/Clearstream (Clearing and settlement) at [224]–[227], the abuser was viewed as "... an unavoidable trading partner", indicating that foreclosure was plausible.


37. *Intel* (C-413/14) EU:C:2017:632 at [139]–[146].

38. *Intel* (C-413/14) EU:C:2017:632 at [139] cites considerations identical to those listed in Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings at [20].

39. In *Sorpa* [2017] 4 C.M.L.R. 21, the issue attracted some attention, thus indicating the line to be somewhat blurred.


42. *United Brands Co v Commission of the European Communities* (C-27/76) EU:C:1978:22 at [228].


44. Case No. COMP/A.36.568/D3 — Scandlines Sverige AB v Port of Helsingborg at [241].


47. An example can be found in *Deutsche Bahn I/II* (AT.39678/AT.39673) [2001] OJ L230/10 at [109]–[110].

48. Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings at [80].

49. In *Meo Serviços de Comunicações e Multimédia* (C-525/16) EU:C:2018:270 at [31] reference is included to *Intel* and the AEC-concept giving further ground to the suggested approach.


52. *GVL* (C-7/82) EU:C:1983:52.


55. *United Brands* (C-27/76) EU:C:1978:22 at [228].


62. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse at para.141.


64. For further see OECD, *Personalised Pricing in the Digital Era Background Note by the Secretariat*, November 2018.


66. See MEMO/05/486 — Commission discussion paper on abuse of dominance - frequently asked questions.