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Amazon Buy Box – Another Secret Jewel on Discrimination

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For unknown reasons, DG COMP persists in hiding the jewels when it comes to discrimination cases. This covers *BdKEP/Deutsche Post AG* from 2004, where DG COMP established (recital 93) how Article 102 TFEU covers three forms of discrimination, two exclusionary and one exploitive. As explained later, these have been referred to as horizontal-, vertical-, and exploitive discrimination, where the first two serve to foreclose either a direct competitor (horizontal) or thwart competition downstream (vertical). In contrast, the last is, in principle, just traditional exploitive pricing govern by the principles for this.

The Amazon Buy Box is another jewel when it comes to discrimination

Another jewel, when it comes to discrimination, is *Amazon Buy Box* from 2022, but not published until March this year. Besides selling first and third-party products, Amazon also provides certain fulfilment services (storage, packaging, and shipping) to third-party sellers, called Fulfillment By Amazon (FBA), in parallel to offering fast and free delivery to customers that have signed up for Amazon's Prime program. Third-party vendors relying on Amazon for fulfilment services were granted preferential treatment by being offered automatic eligibility into the Prime program (Recital 143) and Amazon's Buy Box (Recital 125) in the same manner as Amazon's own offerings (jointly referred to as AFN-sellers in Recital 30). In contrast, traditional third-party vendors had to qualify for this and were often subject to slower delivery promises (Recitals 135 and 136) and, thus, differential treatment (Recital 154-156).

The Buy Box ensured third-party vendors a prominent place on the Amazon marketplace by increasing their visibility and, ultimately, their sales. As most customers appreciate fast (and free) deliveries, access to the Prime program could also influence sales. By virtue of this, Amazon's policy (potentially) twisted competition between its own offerings vis-à-vis traditional third-party vendors (horizontal discrimination) and between two groups of third-party vendors (vertical discrimination). The Decision does not use these concepts and blurs (see, e.g., Recital 219) the line between horizontal discrimination and self-favouring (mirroring *Google Shopping*), but the meaning is clear. Had the case been advanced to a final decision, it would have provided very interesting insights into discriminatory abuse.

Amazon Buy Box was closed against commitments

Amazon offered commitments and the case never matured into a final decision hence dispensing with the obligation to substantiate the effect and behaviour further. Had that not been the case, it would have rested upon DG COMP to establish a non-objectively justified difference in the treatment that presented a foreclosure risk regardless of the direction (horizontal or vertical) of the discrimination. Moreover, the Advocate General's Opinion in *Meo* explained that when it comes to vertically integrated undertakings, the application of discriminatory prices on the downstream or upstream markets will remain horizontal discrimination as it indirectly affects the undertaking's competitors (Recitals 71-75).

To make these principles and concepts more operative, it is possible to make a distinction between:

- *Horizontal (exclusionary) discrimination* (often referred to as *primary-line discrimination)* is initiated for the purpose of *foreclosing* competitors by targeting actual or potential customers with selective price reductions or other favourable conditions. Moreover, this includes foreclosure of upstream and downstream markets achieved by preferential treatment of subsidiaries and internal departments of the vertically integrated company. The foreclosure could, thus, have a vertical element to it, but because the victim is a direct competitor (upstream or downstream), the foreclosure remains horizontal.
- *Vertical (exclusionary) discrimination* (often referred to as *secondary-line discrimination*) is 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 on any of the affected markets. Hence, the foreclosure is (truly) vertical.
- *Exploitative discrimination* that, in practice, involves nationality-based discrimination and, henceforth, potentially individualized pricing. However, the abuse is essentially exploitive and should not be confused with discrimination but should be reviewed under the legal standards for exploitation.

Accepting horizontal discrimination as nothing short of a traditional exclusionary practice, recent cases such as *Intel* (paras 139-146) and *Unilever* (paras 52 and 59) outline the relevant principles for the assessment. The assessment would require an analysis of all the relevant circumstances, including the ability to foreclose an As Efficient Competitor (AEC). This would normally be rebutted when the offered terms secure coverage for the dominant undertakings LRAIC on the markets affected by the (alleged) abuse. Moreover, it follows from *Unilever* that the wisdom of the AEC test also applies to non-price-based abuse.

Translated to horizontal discrimination, the non-objectively justified differential treatment must be of such a scale that an As Efficient Competitor will be foreclosed. This also applies to non-price-based practices with relevant adjustments to reflect the lack of a traditional price.

How to assess vertical discrimination

In contrast to horizontal discrimination, no case clearly outlines how to assess vertical discrimination, but in *Portugal v. Commission* (paras 51-54), it was held to be abusive under Article 102(c) TFEU when a linear quantum discount scheme had *de facto* benefitted domestic air operators. Not because some air operators received better terms, as this is an inherent feature in quantum discounts, but due to the high thresholds only attainable by a few particularly large

partners, which resulted in significant (probably up to 30%) differences in the offered discount.

Embedded in this is that differential treatment, even if non-objective, in itself is insufficient for identifying an abuse, insofar as selective terms always will benefit some at the expense of others. Moreover, the disadvantages must be assessed in a tangible manner to ensure that it's sufficiently significant to thwart competition. Following the logic established by *Intel* and *Unilever,* this would involve considering the (alleged) abuses' ability to foreclose an As Efficient Competitor (AEC) downstream. Translated to vertical discrimination, this means that the evaluation in *Portugal v. Commission* should have moved on to demonstrate how the significant differences in discount accounted for a substantial portion of the downstream costs and that it was, thus, capable of foreclosing a competitor.

It's a shame Amazon Buy Box was closed against commitments

Amazon offered commitments, and the case, therefore, never matured into a final decision, but a pattern is starting to emerge where Article 102 TFEU covers three forms of discrimination. Of these, two are exclusionary, one is exploitative, and the former is only abusive if the non-objectively justified differential treatment is of such a scale that an As Efficient Competitor is foreclosed. In general, this can be rebutted if the pricing ensures coverage of the competitor's LRAIC in the market affected by the discrimination, regardless of whether the discrimination is horizontal or vertical in nature. In contrast, is the exploitive discrimination in principle just a traditional exploitive abuse and reviewed under the standard for this? Regardless of the emerging pattern, it would be desirable if DG COMP advanced a case to conclusions or, in other ways, confirmed the readings outlined above.

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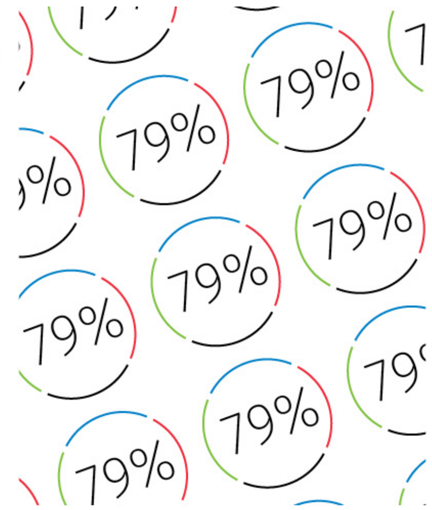

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