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Where do we stand on discounts? - A Danish perspective

The dominant undertaking's ability to award discounts and other loyalty inducing considerations are subject to much ambiguity and many unsettled issues. Despite discounts being a commercial requirement, even for the dominant undertaking, it's difficult to draw up clear principles, and while the approach to non-dominant undertaking's restriction of competition has been fundamentally recast over the last 20 years, the appraisal of single company behaviour remains more formal and rigid. However, there have recently been indications that some of the same leniency might have been extended to discounts and single company behaviour. Consequently, an attempt shall be made to provide some guidelines under EU and Danish practice' red.¹ Danish companies would normally be governed by both and the later has been aligned to the former, thus providing general guidance on EU practice.

Across the years it has been difficult, if not impossible, to establish a clear red line on the approach to discounts under Article 102 of the EU Treaty and the Danish equivalent, paragraph 11.² Moreover there is also inconsistency and substantial confusion about the actual enforcements of both regulations. In particular in respect to the underlying economic theories, which are generally favourable to discounts,³ and the much more balanced approach demonstrated in non-dominant undertakings agreements under Article 101 of the EU Treaty and the Danish equivalent, paragraph 6. Differences it's difficult to provide a single and clear explanation for, as the dominant undertakings can share the same need to

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² In contrast has discount in USA traditionally not merited much interest c.f. Note by the United States for the "Roundtable on loyalty or fidelity discounts and rebates", 29 May 2002 OECD. However, lately the discussions have re-emerged, as detailed by Damien Geradin *Loyalty Rebates after Intel: Time for the European Court of Justice to Overturn Hoffman-La Roche*, *Journal of Competition Law & Economics* 2015 (11), section D.

³ For more on the economic approach to discounts see e.g. Francisco Enrique Gonzalez-Diaz & Robbert Snelders *Abuse of Dominance Under Article 102 TFEU*, Claeys & Casteels 2013, pp. 334-347.

conclude, e.g. long term arrangement for product optimizing and planning purposes, as non-dominant undertakings. Nevertheless, so far it is only the later which has benefitted from the more balanced approach enshrined by the new distinction between agreements that per *object* restrict competition and those that only do this by *effect* and therefore warrant further and substantial analysis before condemnation.⁴ While it might be too early to settle the matter, there are nevertheless indicators that some of the same considerations have as of late been extended to Article 102, making certain forms of single company behavior subject to a *per se* prohibition, whilst others only can be condemned following a more substantial *effect* analysis. However, the translation is neither clear nor complete, thus blurring the line between behaviors subject to a rigid and formal analysis and those meriting further considerations.

1. Discounts and competition law

While a complete list of competition law problems related to discounts and other favours extended from the dominant undertaking never can be made, a number of issues of interest can be identified from a practical perspective, including:

- a) The dominant undertaking's ability to award discounts and other advantages in general.
- b) The special problems and challenges in respect to the handling of economics of scale and scope, and the use of discounts for the purpose of securing these.
- c) Horizontal foreclosure of a direct competitor or the creating of artificial access barrier or switching cost for the purpose of retaining market exclusivity including "discriminatory" foreclosure.
- d) Distorting competition downstream by reserving discounts for selected customers ("real" discrimination).
- e) Favours offered to subsidiaries or vertically integrated activities.

Rather than representing different doctrines, the listing would represent situations and potential conflicts that could emerge for the dominant undertakings when they contemplate offering discounts. From a practical perspective a distinction should be made between a, b and c contra d and e, as the latter two are only applicable in relation to the question of discrimination. Nevertheless, an attempt to deal with all of these issues and problems within the same framework shall be attempted. Furthermore, rather than using the words *exclusion* and *exclusionary effect*, the word *foreclosure* is preferred in order to underline how an anti-

⁴ C.f. Richard Whish & David Bailey, *Competition law*, 7. Edition Oxford 2012, pp. 115-136.

competitive effect can emerge without actual exclusion.⁵ The disciplinary effect of e.g. selective discounts can be equally detrimental to the interest of consumers and competition and therefore in need of containment. Furthermore, because Danish undertakings are normally governed by both EU and Danish competition law and the later is aligned with the former, Danish and EU practice are incorporated into the same paper.⁶ Where possible the EU Commission's *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* from 2009, hereafter "*Enforcement Paper*"⁷ is utilized, predominantly in relation to loyalty discounts. Regrettably, the *Enforcement Paper* does not include principles on discriminatory discounts,⁸ but many of its principles can be recycled and guidelines nevertheless be extracted from these. The legal standing of the *Enforcement Paper* is somewhat ambiguous. While the EU Commission has rebutted the analytical framework as neither mandatory nor part of the abuse standard,⁹ the General Court has limited itself by declining a retroactive application for cases predating its adoption.¹⁰ At national level, the Danish Competition and Consumer Authority, which enforces competition law in Denmark, has decided that the paper, despite its many prudent considerations, does not govern national competition authorities and enforcement.¹¹ All of these elements create, by their very nature, a level of uncertainty in respect to the legal standing of the paper. In addition, Danish practice has traditionally been governed by an outdated and negative approach to discrimination, including discounts, which results in the victimizing of small and medium sized companies, indicating a difference compared to EU practice supposedly governing its application.¹² On the other hand, a much more

⁵ C.f. *Enforcement Paper*, recital 68. See also the Danish case *LK A/S grossistaftaler*, Competition Council Meeting den 20. November 2000 and the EU case T-286/09 - *Intel*, recital 150. Both deal with the creation of strategic access barriers through discounts.

⁶ Older Danish practice pre-dating EU alignment has been summarized in *Prisdiskriminering i relation til konkurrenceloven*, Memo from the Danish Competition and Consumer Authority 1998.

⁷ The prior *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse* is incorporated where relevant.

⁸ The Commission originally appears to have intended to issue a parallel paper on discrimination c.f. MEMO/05/486 - Commission discussion paper on abuse of dominance - frequently asked questions.

⁹ See COMP/C3/37.990 - *Intel*, e.g. recital 1002 & 1760.

¹⁰ C.f. case C-549/10P - *Tomra*, recital 81 and case T-286/09 - *Intel*, recital 155.

¹¹ See *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24. June 2009, recital 482, note 96. An issue challenged subsequently and currently part of the questions tabled before the European Court of Justice, as case C-23/14 - *Post Danmark A/S v. Konkurrencerådet*.

¹² As detailed later, there lacks a theoretical framework for condemning discounts victimizing small and medium sized undertakings, making the traditional approach problematic.

relaxed approach has been taken in regards to discriminatory discounts targeting end-users or which incorporate a geographical discriminatory element. Both of these have been very negatively appraised by the EU Commission under EU practice, and have triggered prompt and harsh reactions.

2. Discounts and competition law – doctrines and sub doctrines

From an *academic* perspective, 5 issues of special interest could be identified when dealing with discounts as noted above. But from a more *legal* perspective, these could be narrowed down to 3 situations where discounts can potentially be abusive involving if they are:

- a) Loyalty inducing, replacing a traditional exclusive agreement foreclosing the market for competition (Article 102 (b) and Danish Competition Act paragraph 11 (3) no. 2).
- b) Discriminatory in a manner thwarting competition downstream (Article 102 (c), and Danish Competition Act paragraph 11 (3), no. 3).
- c) Conditioned upon acquiring of complementary products or services (bundling discounts), incorporating a combined exploitation of end-users and foreclosing of competitors (Article 102 (d) and Danish Competition Act paragraph 11 (3) no. 4).

There is a large area of overlap between the three situations and their respective subparagraphs. In the two EU cases *Suiker Unie*¹³ and *Hoffmann La Roche*¹⁴, the discounts infringed both Article 102 (b) and Article 102 (c) due to their combined loyalty inducing and discriminatory effect. Likewise, where a combined discriminatory and bundling element included in the EU case *British Sugar/Napir Brown*,¹⁵ and the Danish *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*.¹⁶ In the first case, customers were denied a discount for self-pickup and in the later awarded a discount subject to using the same shipping company when crossing two separate straights.¹⁷ Furthermore, selective discounts can overlap with predatory pricing. This can happen as either standalone abuse or part of exclusionary discrimination, where discounts are reserved for certain customers. As neither Article 102 nor Danish Competition Act

¹³ United cases C-40-48, 50, 54-56, 111, 113 & 114-73 - *Suiker Unie*, ECR 1975, p. 1663, recital 518-528.

¹⁴ Case C-85/76 - *Hoffman La Roche*, ECR 1979, p. 461, see recital 90.

¹⁵ Case IV/30.178 - *Napir Brown - British Sugar*, O.J. 1988L 284/41.

¹⁶ *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*, Competition Council Meeting den 28. January 1998.

¹⁷ See also case C-85/76 - *Hoffman La Roche*, ECR 1979, p. 461 og T-30/89 - *Hilti*, ECR 1991, p. II.1439 and the Danish *DBC medier as*, Competition Council Meeting 22 June 2005.

paragraph 11 represents an exhaustive list, its not critical to link a discount scheme to one of the subparagraphs. Only the effect should matter.¹⁸

Below, loyalty discounts will be discussed first, followed by the discriminatory. As already indicated, the division is artificial and should not be obscured by overlaps. Further, it's not entirely clear how to approach selective price cuts which provide for some recurrences. Bundling discounts under Article 102, subparagraph d and Danish Competition Act paragraph 11 (3) no. 4 are only treated sporadically and somewhat superficially due to the fact that they have not created much confusion. Further, despite that the wording of Article 101 and older Danish practice indicate that vertical discount arrangements also could be reviewed if they incorporate a discriminatory element, this has not been commented upon. Essentially, it appears to be manifestly wrong¹⁹ to make discounts subject to review under Article 101. From a more practical point of view, an overlap between Article 101 and 102 and their Danish equivalents might nevertheless exist, in particular with respect to vertical or horizontal agreements reserving favourable, and hence discriminatory, conditions for a limited number of companies.²⁰

3. The concept of abuse and discounts

It follows from *Hoffmann-La Roche*²¹ and *AKZO*²² that the concept of abuse is an objective concept, rendering the *effect* the primary, and in principle, the only consideration relevant for appraisal. Furthermore, it is the potential anti-competitive effect, i.e. the ability to directly or indirectly restrict competition, that is subject to review and condemnation. An approach incorporated in a recent Danish case, *TV 2's priser og betingelser*²³, from 2005 disregards the need to identify an actual impediment to competition. It was sufficient that the discounts had as an objective to or effect of restricting competition, which made these dis-

¹⁸ C.f. e.g. case C-95/04 - *British Airways*, recital 58.

¹⁹ It is unclear if the Danish Competition Authority has accepted this. In *Daniscos salg af industrisukker - rabatordninger og terminskontrakt*, Competition Council Meeting den 26. May 2004 and *Fritz Hansen A/S' parteraftale*, Competition Council Meeting den 20. December 2006, where intervention was taken against discounts offered by non-dominant undertakings.

²⁰ See e.g. the Danish cases *Anmeldelse af lægemiddelgrossisternes rabataftale*, Competition Council Meeting den 30. September 1998, *EKKO's klage over diskriminerende fragttillæg*, Competition Council Meeting 27 October 1999 and *Clearing af taxiboner og kontokort i Storkøbenhavn*, Competition Council Meeting 31 May 2006.

²¹ Recital 91.

²² Case C-62/85, *AKZO*, ECR 1991, p. I-3359, recital 69.

²³ *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005 recital 183. See also case T-203/01 - *Michelin II*, ECR 2003, p. II-4071, recital 239 and United cases C-40-48, 50, 54-56, 111, 113 & 114-73 - *Suiker Unie*, ECR 1975, p. 1663 recital 518-528.

counts potentially problematic. Perhaps even more restrictively, it was expressed in *SuperGros' samhandelsbetingelser*²⁴ from 2007, another Danish case in which it was held that, in the absence of an objective reason, (any) discount system would be considered abusive.

As a consequence of the objective nature, any subjective motives, including good faith, should in principle be irrelevant.²⁵ A position taken by the Commission in *PO/World Cup 1998*²⁶ dismissing the need for any advantages for the dominant undertaking.²⁷ On the other hand, subjective elements may nevertheless be relevant. Cost reductions should e.g. be accepted as a valid defense regardless of an anti-competitive effect while malicious foreclosure intent could be considered an aggravating factor.²⁸ However, following *Michelin II*²⁹, a cost reduction defense would only be admissible subject to rigid evidence requirements, making the anti-competitive effect, including the potential effect, the starting point for any appraisals regardless of more subjective motives.³⁰

Practice has only indicated a limited need for a distinction between different sorts of discounts,³¹ condemning advantages as *target discounts*, *bonus*, *forward booking discounts*,³² *cash payment*,³³ *marketing contributions*³⁴ and *selective price cuts*.³⁵ Further, *price differences* have been labelled as a discount³⁶ and it doesn't matter if the discounts are widely offered or limited to a geographical ar-

²⁴ *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recital 140.

²⁵ See case T-271/03 - *Deutsche Telecom*, recital 192 and General Advocate in case C-681/11 - *Schenker*, for some acceptance of good faith as mitigating factor.

²⁶ Case IV/36.888 - *PO/World Cup 1998*, O.J. 2000L 5/55, recital 102.

²⁷ See also case C-549/10P - *Tomra*, e.g. recital 73 disregarded that no loss was endured.

²⁸ C.f. case 549/10P - *Tomra*, recital 20.

²⁹ Case T-203/01 - *Michelin II*, ECR 2003, p. II-4071.

³⁰ See also *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30. August 2007, recital 140-142, indicating limited room for discounts with no objective purpose.

³¹ C.f. *Hoffmann La Roche*, recital 96, case C-95/04 - *British Airways*, recital 68 and case T-203/01 - *Michelin II*, recital 91.

³² See *Daniscos salg af industrisukker – rabatordninger og terminskontrakt*, Competition Council Meeting 26 May 2004 and *LK A/S grossistaftaler*, Competition Council Meeting 20. December 2000, for cases involving advanced booking discounts.

³³ Case T-286/09 - *Intel*, recital 199-207.

³⁴ Marketing contributions were revived and condemned in the Danish cases *Arla Foods rabatter og markedsføringsstilsbud*, Competition Council Meeting 30 March 2005, recital 70-73, and *Carlsbergs standardaftaler med horeca-sektoren*, Competition Council Meeting 26 October 2005, recital 167. In the later the contributions amplified other elements.

³⁵ United cases C-40-48, 50, 54-56, 111, 113 & 114-73 - *Suiker Unie*, ECR 1975, p. 1663, recital 513 where the discounts were awarded as price reductions.

³⁶ See e.g. the Danish case *Københavns Lufthavne A/S' terms of use for CPH GO*, Competition Council Meeting 21 December 2011.

ea or to selected customers.³⁷ Hence, the abusive elements of discounts appear to be the price reductions offered without countervailing advantages, for the purpose of creating either a foreclosure (loyalty discounts), discrimination (discriminatory discounts) or an artificial link between products or services (bundling discounts). However, following the EU case *Intel*³⁸, a practical differentiation between **a) quantum discounts**, normally per se legal, **b) loyalty discount**, normally per se illegal and **c) other forms of discounts** subject to further investigation have been introduced. The full range of this is still subject to some uncertainty but does indicate a need to evaluate loyalty discounts, including surrogates separately.

4. Loyalty discounts and surrogates

Hoffmann La Roche, recital 89, established that discounts with the same effects as a formal exclusive agreements are to be treated accordantly, which in particular will be relevant if the discounts are conditional upon sourcing the entirety of the requirements from the dominant undertaking and hence loyalty inducing. From *Intel*³⁹ it follows that exclusivity doesn't have to be explicit. It's sufficient that the customers are given the impression of an exclusivity obligation.⁴⁰ C.f. *Tomra*⁴¹ it is the sum of circumstances which decides if expressions and statements of a decision to become or remain "...preferred, main or primary supplier..." have real and anti-competitive elements, and if the elements of a discount program support this. Likewise, it follows from e.g. *Intel*, that it is immaterial if the initiative for linking discount and loyalty comes from the customers.⁴² The dominant undertaking is subject to a special obligation to not impede competition. Finally, it follows from *Hoffmann La Roche*⁴³ and *Michelin I*,⁴⁴ that other forms of discounts are assessed against:

".... 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..."

³⁷ C.f. case T-228/97 - *Irish Sugar*, ECR 1999, p. II-2969, recital 221.

³⁸ Case T-286/09 - *Intel*, recital 75-78.

³⁹ COMP/C3/37.990 - *Intel* and case T-286/09 - *Intel*.

⁴⁰ See e.g. COMP/C3/37.990 - *Intel* recital 217-218, 235-237, 268, 306, 348-349, 360, 627-658 & 689 for references to the subjective impression of the customers.

⁴¹ Case COMP/E-1/38.113 - *Prokent/Tomra*, recital 114-118. Confirmed with T-155/06 - *Tomra* ECR 2010, II, p. 4361, recital 59.

⁴² C.f. COMP/C3/37.990 - *Intel* recital 920 & 964 with references to further practice.

⁴³ See recital 90.

⁴⁴ Case C-322/81 - *Michelin I*, ECR 1983, p. 3461, recital 73.

However, in practice, progressive retroactive discounts with steps, where the discounts are calculated against the entire sale in the relevant period, and the bonus level increases with each step, have merited particular interest and intervention.⁴⁵ In the Danish case *SuperGros' samhandelsbetingelser*,⁴⁶ from 2007, any loyalty inducing effect was to be specifically assessed against the size of the discounts, the use of discount steps, retroactive element and the reference period.⁴⁷ The loyalty element induced by the use of progressive and retroactive discounts where further enhanced by the linking of two market segments, allowing purchases within one to provide for a scale lift on the other⁴⁸, and a general lack of transparency and clarity in the calculation of the discounts.

In addition to exclusive discounts and surrogates, practice has dealt with target discounts with cumulative retroactive elements,⁴⁹ conditioned upon meeting of predefined (individualized) targets e.g. a 10 % increase over last year's purchases or acquisitions across different product categories. Such discounts have the effect of making it disproportionately expensive to source minor requirements from alternative suppliers, foreclosing these, and have been reviewed and condemned in classic EU cases. In *Hoffmann La Roche* the discounts were offered as target discounts, estimated in advance and subject to an increase in accordance with the level of requirements sourced from the dominant undertaking. In *Michelin I*⁵⁰ the discounts incorporated a variable yearly discount, calculated against a combination of last year's procurements and the meeting of pre-fixed sales targets, also calculated against last year's procurements. When appraising the later, the Court of Justice noted how discounts calculated against a long reference period could place the customers under considerable distress, especially at the end of a year, to meet the defined turnover targets, concluding that:

“Such as situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage. It thus limits the dealers' choice of supplier and makes access to the market more difficult for competi-

⁴⁵ See also ruling of the High Court of Eastern Denmark 22 June 2009, regarding TV 2 prices and conditions, e.g. pp. 124 & 125 noting how the involved company (TV 2) in practice had always secured a basis turnover, calling for the discount to be assessed against its marginal effects and thus in practice being progressive and retroactive.

⁴⁶ *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007. Closed against commitment and therefore in principle undecided on whether there was abuse.

⁴⁷ See recital 144 & 184 - 205.

⁴⁸ See recital 14 & 213 - 215.

⁴⁹ Meaning that the discount is calculated against the entire procurement, including past acquisitions, providing for a negative marginal price for certain acquisitions.

⁵⁰ Case C-322/81 - *Michelin I*, ECR 1983, p. 3461, recital 81-86.

tors. Neither the wish to sell more nor the wish to spread product more evenly can justify such a restriction of the customer's freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discounts system in question, is not therefore based on any countervailing advantage which may be economically justified."

A loyalty discount identical to *Michelin I* was reviewed in the Danish case *Opel Danmarks rabatsystem*,⁵¹ where an annual bonus was conditioned upon meeting predefined turnover figures; not merely in general but within three different product categories and within each of the years quarters. In its appraisal the Danish Competition Council found that the bonus was designed for the purpose of inducing retailers to consolidate their procurements with the dominant undertaking, thus preventing alternative suppliers' access to the market. The foreclosure effects were in particular caused by the use of⁵² a) last year's procurements as a starting point for calculation of this year's sales targets, b) a progressive scale and c) bonuses only being awarded subject to the meeting of all targets, including targets specific to each category and quarter. Following a dialogue with the Danish Competition Council, the dominant undertaking accepted to adjust the awarding, allotting separate discounts in each product category and only for one quarter at a time. A largely identical discount, conditioned upon the expansions of procurement, was appraised and condemned in *Konkurrencebegrænsninger på markedet for ortopædiske sko*⁵³ and the EU case *British Airways*.⁵⁴ However, quarterly bonuses allotted in accordance with a sliding scale with limited progression has been accepted in Danish practice.⁵⁵

A variation on individualized target discounts, with the same effects and subject to the same level of condemnation, is a different form of top-slice discount. Under such a system the discounts are allotted on extras exceeding the basis amount sourced from the dominant undertakings, and thus are potentially sourceable from a third party. Such a system was appraised in the two EU cases *Soda - Solvay*⁵⁶ and *Irish Sugar plc*.⁵⁷ However, top-slice discounts should only be considered

⁵¹ *Opel Danmarks rabatsystem*, Competition Council Meeting 28 November 2001.

⁵² Recital 29-34. See also the Danish case *Skandinavisk Motor Co A/S - ekstrarabatsystem*, Competition Council Meeting 19. June 2002.

⁵³ *Konkurrencebegrænsninger på markedet for ortopædiske sko*, Competition Council Meeting 23 February 2000.

⁵⁴ Case C-95/04 - *British Airways*.

⁵⁵ See e.g. the Danish case *Skandinavisk Motor Co A/S - ekstrarabatsystem*, Competition Council Meeting 19 June 2002, recital 95.

⁵⁶ Case COMP/33.133 - C: *Soda - Solvay*, O.J. 2003L 10/10, recital 64 and 153-160.

⁵⁷ Case T-228/97 - *Irish Sugar plc*, ECR 1999, p. II-2969.

abusive if incorporating cumulative elements, where previous procurements are also taken into consideration or within the context of *predatory pricing*.⁵⁸

A third variation on target discounts and their foreclosure effects was subject to appraisal in the Danish case *LK A/S grossistaftaler*.⁵⁹ Here, the discounts came in the form of advance booking discounts with progressive elements. While the first was conditioned upon the placing of orders for the forthcoming year prior to 30 of November, the later was allotted in a manner that was isolated from any cost reductions by the dominant undertaking. A third discount, which was considered to amplify the effects of the advance booking discounts rather than representing a separate infringement, was a discount offered on extras over the estimation. 'Extras over the estimation that were provided as part of the advance booking system were, however, less advantageous and therefore encouraged the provision of a qualified estimation. The Danish Competition Appeals Board therefore labelled the discounts, especially the booking discount, as having a lock-in effect, specifically because the later couldn't be adjusted and was estimated jointly with the dominant undertakings. Consequently, and in the absence of an economic justification,⁶⁰ the discount functioned as an exclusive agreement,⁶¹ and therefore merited condemnation as abusive.⁶²

A fourth variation on target discounts was reviewed in the Danish case *Post Danmarks direct mail-rabatsystem*,⁶³ involving a standardized discount system. However, following a closer review of the customers entry points, i.e. the systems' effects in practice, a problematic sucking in effect was uncovered encouraging these to retain or expand their procurement. Consequently, while labelled as a standardized system, the applied system nevertheless displayed the characteristics of the individualized target discounts. The Competition Appeals board,

⁵⁸ Accepted by the Commission in *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 168-169, but only partly reflected in *Enforcement Paper*. The consideration might be identifiable in recital 41, 2nd sentence defining the effective price in conjunction with recital 43, finding it abusive to price below AAC.

⁵⁹ *LK A/S grossistaftaler*, Competition Council Meeting den 20 December 2000. Largely confirmed by Danish Supreme Court ruling dated 7 January 2008.

⁶⁰ See in contrast *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 238 and *Daniscos salg af industrisukker – rabatordninger og terminskontrakt*, Competition Council Meeting 26 May 2004, both accepting different forms of cost reduction as defences for the advance booking.

⁶¹ See recital 109-125 and 113.

⁶² However, advanced booking discounts were accepted in *Daniscos salg af industrisukker – rabatordninger og terminskontrakt*, Competition Council Meeting den 26. May 2004.

⁶³ *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 521 – 529.

when reviewing the decision of the Danish Competition Council, could therefore conclude that these discounts mirrored the loyalty discounts because they were calculated based on the aggregated annual trade with a retroactive perspective.⁶⁴ Likewise, the Danish High Court notes that, when reviewing *TV 2' priser og betingelser*,⁶⁵ regardless of their objective and standardized form, the applied discounts did in practice function in an individualized manner.

In accordance with these principles, different forms of marketing contributions and payment were condemned in the EU case *Intel*⁶⁶ and the Danish case *Arla Foods rabatter og markedsføringstilskud*,⁶⁷ while selective price cuts and amalgamate discounts were condemned in the two Danish cases *Post Danmark - adresseløse forsendelser*⁶⁸ and *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*.⁶⁹ In all of these cases, it was the foreclosure effects of the discounts that led to condemnation, regardless of their legal form and name. In *Intel*, some of the contributions had an indirect nature because they targeted the retailers rather than the direct customer,⁷⁰ but were nevertheless made subject to review after the principles laid down for other discounts. Further, confusion and unpredictability has been contemplated as a separate form of abuse, but should instead be viewed as an amplifier⁷¹, as it puts the customers under

⁶⁴ Decision by the Competition Complaint Board 10 May 2010 in *Post Danmark v. Konkurrencerådet*, p. 187.

⁶⁵ High Court of Eastern Denmark 22 June 2009 in *TV 2 priser og betingelser*, e.g. p. 125.

⁶⁶ See e.g. COMP/C3/37.990 - *Intel*, recital 615, 1641 & 1677 – 1681 for a detailing of the payment. Payment referred to as *naked restrictions*.

⁶⁷ *Arla Foods rabatter og markedsføringstilskud*, Competition Council Meeting 30 March 2005, recital 70-73, labeling marketing contributions as non-cost based discounts. See also the Danish case *Carlsbergs standardaftaler med horeca-sektoren*, Competition Council Meeting 26. October 2005, e.g. recital 167, where marketing contributions were held to amplify the effect of an exclusive agreement.

⁶⁸ *Post Danmark - adresseløse forsendelser*, Competition Council Meeting 29 September 2004, essentially overruled by Danish Supreme Court ruling 15. February 2013 following the EU Court of Justices ruling in C-209/10 - *Post Danmark v. Konkurrencerådet*. See also the EU case C-40-48, 50, 54-56, 111, 113 & 114-73 - *Suiker Unie*, ECR 1975, p. 1663, recital 513.

⁶⁹ *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*, Competition Council Meeting den 28 January 1998, where a discount was allotted to customers using Scanlines ferries when crossing two different straights.

⁷⁰ See e.g. recital 179-181. Specifically it was noted how the marketing contribution was not linked to specific marketing activities and therefore appeared as loyalty inducing. See recital 615.

⁷¹ C.f. case IV/34.621, 35.059/F-3 - *Irish Sugar plc*, O.J. 1997 L 258 p. 1, recital 150. In the Danish case *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recital 210, a non-transparent discount system is merely considered an amplifier rather than separate infringement. See also COMP/C3/37.990 - *Intel*, recital 945

pressure to respect the exclusivity.⁷² Finally, it should be noted, as detailed below, that there is no requirement that an anti-competitive effect be caused by the loyalty discounts. In EU cases as *British Airways*,⁷³ *Michelin II*,⁷⁴ and *Intel*⁷⁵, an abuse was identified regardless of indications of lack of effect in respect to inducing loyalty and exclusivity. Loyalty discounts are condemned if *capable* of creating a foreclosure effect regardless of its name or form.⁷⁶ The same approach was applied by the Competition Appeals Board, in the Danish case *Post Danmark - magasinpost II*,⁷⁷ which noted that individualized target discounts and minimum conditions were reviewed against their ability to create an appraisable loyalty effect. Following the Court of Justices decision in *Post Danmark I*⁷⁸ from 2012, the exclusionary effect must, however, be real or at least plausible.

4.1 Pure loyalty discounts

The fundamental criteria established in *Hoffmann La Roche* and *Michelin I* have been retained and subsequently developed and indicate that there is a limited scope for offering discounts if these serve as surrogates for formal exclusivity agreements. That would in particular occur if the discounts are individualized and calculated against a longer reference period, typically more than 3 months,⁷⁹ or only allotted against defacto exclusivity, replacing a formal agreement.⁸⁰ Of relevance would also be if the discount has a retroactive element which is calcu-

⁷² C.f. case C-322/81 – *Michelin I*, ECR 1983, p. 3461, recital 83 and most likely Danish Competition Appeal Boards decision 10. May 2010 in *Post Danmark v. Konkurrencerådet*, p. 187.

⁷³ Case T-219/99 - *British Airways*, recital 293 and the Court of Justices ruling in case C-95/04, recital 92-98.

⁷⁴ Case T-203/01 - *Michelin II*, ECR 2003, p. II-4071, recital 239.

⁷⁵ COMP/C3/37.990 - *Intel*, recital 268, 919 & 922.

⁷⁶ C.f. fx case T-286/09 - *Intel*, recital 103.

⁷⁷ Danish Competition Appeal Boards decision 8. December 2011 in *Post Danmark v. Konkurrencerådet*, p. 24.

⁷⁸ Case C-209/10 - *Post Danmark v. Konkurrencerådet*.

⁷⁹ C.f. the “1990 Coca Cola settlement” (see IP/90/7 – *The Commission accepts a formal undertaking from the coca-cola export corporation regarding its commercial activities in the community soft drinks market*) 3 month reference period has been presumed acceptable. Danish practice has partly picked up on this c.f. *Opel Danmarks rabatsystem*, Competition Council Meeting 28 November 2001. However, in *Skandinavisk Motor Co A/S - ekstrarabatsystem*, Competition Council Meeting 19 June 2002, even quarter discounts were held abusive. The same follows from the EU case T-228/97 - *Irish Sugar* and the Danish case *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005. In recital 143 of the latter it's stated that the acceptable length of the reference period shall be calculated on a case - by - case basis followed by condemnation of a 12 month reference period. See also case T-203/01 - *Michelin II*, ECR 2003, p. II-4071, recital 85.

⁸⁰ See e.g. the Danish Competition Appeal Boards decision of 16 January 2001 in *MD Foods Amba v. Konkurrencerådet*, recital 5.

lated against earlier procurements or is limited to the current procurement. The later could hardly be loyalty-inducing but i.e. be appraised as predatory pricing if it fails to cover the direct incremental costs.⁸¹ After the outlined practice, in particular *Michelin II*, a discount would cover all forms of advantages or considerations of an economic value offered by the dominant undertakings in exchange for loyalty. Furthermore, the effects could be amplified by special market conditions e.g. a large spread in market shares between the dominant undertaking and its competitor⁸² or special rights awarded by law.⁸³

The wideness of the discount concept can be illustrated by EU cases such as *Van den Bergh Foods*,⁸⁴ *Intel*, and the Danish case *Tele Danmark Mobils standard storkundekontrakt*.⁸⁵ In the first case it was considered abusive that the dominant undertaking had reserved the use of freezers, supplied free of charge for its own products,⁸⁶ while the abuse in *Intel* involved cash donations to customers in exchange for stalling the marketing of computers utilizing processors produced by a named competitor.⁸⁷ This named competitor was also victimized by (traditional) discounts. In the latter case, *Tele Danmark Mobils standard storkundekontrakt*, it was held that a bonus convertible to extra acquisitions and allotted if certain targets were met, functioned as a loyalty discount, regardless of its form and name. The wide approach to loyalty-inducing discounts can also be illustrated by the Danish case *EjendomsAvisens annonceaftaler*,⁸⁸ where it was the cumulative effects of a network of loyalty discounts that restricted competition. The case

⁸¹ C.f. case T-203/01 - *Michelin II*, ECR 2003, p. II-4071, recital 85. The Danish case *TV 2's priser og betingelser*, Competition Council Meeting 2. December 2005, recital 143 formulates a presumption of progressive discounts as loyalty-inducing. However, this point was overturned administratively but ultimately upheld by Danish Supreme Court ruling 18 March 2011. Following case C-209/10 - *Post Danmark vs. Konkurrencerådet*, the opinion looks problematic and it would most likely be more correct to disregard selective price cuts as loyalty-inducing unless below costs.

⁸² See e.g. Case C-322/81 - *Michelin I*, ECR 1983, p. 3461, recital 82.

⁸³ See e.g. the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 579 - 590.

⁸⁴ Case T-65/98 - *Van den Bergh Foods*.

⁸⁵ *Tele Danmark Mobils standard storkundekontrakt*, Competition Council Meeting 16 June 1999. The case relates to the Danish equivalent of Article 101 but could reasonably be translated to Article 102 in respect to the example used.

⁸⁶ The EU Commission considered it unlikely that more than one freezer would be squeezed into each retailers shop, thereby de-facto creating an exclusionary effect. See also the Danish case *Carlsbergs standardaftaler med horeca-sektoren*, Competition Council Meeting 26 October 2005, recital 158 and COMP/39.116 - *Coca Cola*, for examples of these principles applied to the supply of beers and soft drinks.

⁸⁷ See recital 1641 - 1681. Despite supporting other forms of abusive discounts the cash contribution was held as separate infringement.

⁸⁸ *EjendomsAvisens annonceaftaler*, Competition Council Meeting 21 June 2000.

was appraised under the Danish equivalent to Article 101, and should consequently be used with some caution. On the other hand, the case does illustrate how a parallel network of vertical agreements could limit competition jointly and merit intervention under Article 101. Transposed onto Article 102, it could create a situation where market conditions outside the control of the dominant undertaking amplify the effect of the allotted discount, creating an anti-competitive effect. Finally, the latest EU cases *Tomra*⁸⁹ from 2006 and *Intel* from 2009 offer notable considerations. In the first case, the Commission links the concepts of *switching cost* and *foreclosure*, identifying an abuse if discounts or other advances increase the cost of switching from the dominant supplier to another supplier.⁹⁰ In the latter case, the perception of the customers was taken into consideration, making it sufficient that they had received the impression that it would have consequences to source requirements from a third party.⁹¹

4.1.1 When to consider foreclosure plausible?

Despite discounts being allotted against the entire procurement, i.e. incorporating a retroactive and cumulative effect, or in another way having a loyalty inducing nature, a discount should not per se be considered able to create a foreclosure and hence abusive. No foreclosure would be rendered from a (very) small discount which is unfit to induce loyalty,⁹² in particular if allotted on procurement that would have been sourced anyway from the dominant undertaking, in accordance with a sliding scale subject to limited progression.⁹³ On the other hand, high thresholds for the allotting of the discounts would involve the “free” part of the market, which is potentially sourceable from a third party, and hence be loyalty-inducing. When appraising the discounts, it would also be relevant to consider if these are awarded on the entire procurement, whilst only a limited part of the market, e.g. due to capacity constraints is contestable.⁹⁴ In such a situation, even a small discount rate in % could have a strong suction effect on the contestable part of the market.

In order to provide guidance, the EU Commission published its *Enforcement Paper* in 2009, suggesting the use of the effective price per unit and a competi-

⁸⁹ Case COMP/E-1/38.113 - *Prokent/Tomra*, recital 329.

⁹⁰ See also case T-286/09 - *Intel*, recital 88, 143-150 and 201.

⁹¹ See i.a. recital 268, 306, 348-349, 627-658 and 689 for references to the subjective impressions of the customers.

⁹² However, c.f. case T-286/09 - *Intel*, recital 116 no *de minimis* defence appears available under Article 102, indicating how even very small discounts could be abusive.

⁹³ C.f. e.g. *Skandinavisk Motor Co A/S - ekstrarabatsystem*, Competition Council Meeting 19 June 2002, recital 95.

⁹⁴ C.f. case C-322/81 - *Michelin I*, recital 81-82; case T-203/01 - *Michelin II*, recital 87-91, and case T-219/99 - *British Airways*, recital 272-273.

tors ability to match this, as a proxy for a foreclosure risk and hence an abuse.⁹⁵ When calculating this, distinctions are made between:⁹⁶

- a) *Incremental discounts*, allotted only on procurements exceeding a defined level, and
- b) *Retroactive discounts*, also allotted against earlier procurements, requiring adjustments if part of the market is defacto locked to the dominant undertaking and therefore uncontestable.

While the effective prices in the first case are calculated only on the specific procurement, in the later they are calculated against the “free market”, otherwise called the *contestable share*. Following these calculations, a presumption test was then formulated and presented in the *Enforcement Paper*. In this presumption test, an effective price covering the dominant undertaking’s *Long Run Average Incremental Cost* (LRAIC) is incapable of leading to a foreclosure, while the reverse is presumed for prices below *Average Avoidable Cost* (AAC). For prices in between this spread, further analyses are stipulated.⁹⁷ Implicit in the presumption test lies the idea that only the foreclosure of an equally efficient competitor should be considered abusive.⁹⁸ Furthermore, the usage of the dominant undertaking’s own costs provides, at least in theory, for self-assessment prior to the launch of a new discount scheme.⁹⁹

The principles laid out by the *Enforcement Paper* represent a significant simplification compared to the principles suggested in the prior *Discussion Paper*,¹⁰⁰ but are not supplemented by practical examples as the principles in the *Discussion Paper* were. Furthermore, the use of a somewhat loosely defined concept as a *contestable share* makes self-assessment in practice complex, if

⁹⁵ See recital 36-45. In the previous *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 155-157 a number of additional approaches utilizing concepts such as *Required Market Share* (RQS) and *Commercially Viable Share* (CVS) were used. It is unclear if these concepts represent a different approach.

⁹⁶ Recital 36.

⁹⁷ Recital 43. The test only establishes a presumption, allowing for intervention despite securing coverage for LRAIC.

⁹⁸ In the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 502-507 it’s noted how the foreclosure of less efficient competitors could be considered abusive.

⁹⁹ In recital 24 the Commission reserves the right to use the competitors cost should it not be possible to calculate the dominant undertakings’.

¹⁰⁰ *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*

not impossible.¹⁰¹ The Commission even reserves the right to intervene in unspecified situations, despite leaving room for an equally efficient competitor.¹⁰² Finally, the competition authority is allowed a somewhat arbitrary assessment when determining the contestable level of the market. In *Intel*,¹⁰³ the EU Commission e.g. limited itself by labeling Intel as an “*unavoidable trading partner*”, and therefore making the contestable market very limited. Consequently, the testing was carried out against a very low market portion, leading to an equally low effective unit price. Some of the same elements can be identified in the Court of Justices approach to *Tomra*,¹⁰⁴ which basically required the entire market to be open for competition.

Regardless of its shortfalls, any attempt to provide an analytical framework for the assessment of discounts, and a move away from the per se condemnation of retroactive discounts should be welcomed. Furthermore, the *Enforcement Paper* actually summarizes the most notable elements of the appraisal, e.g. the market position of the dominant undertaking vis a vis the competitors, the latter’s ability to counter the effect, substantial barriers and the scale of the abuse.¹⁰⁵ It even signals a willingness to consider any efficiency arguments listed in defense of the discounts as a mitigating factor.¹⁰⁶ However, in addition to some general prudence in respect to the many assessments provided for in the suggested analysis e.g. when calculating costs, market shares or a “contestable share”,¹⁰⁷ it may be relevant to recall the Court of Justices ruling in *British Airways*¹⁰⁸ from 2007. Not only were the market shares of the dominant undertaking in decline here, indicating a somewhat unsuccessful attempt to foreclose the competitors,¹⁰⁹ but the discount was also assessed on a case-by-case basis, emphasizing a) their ability to foreclose the market or lock-in the cus-

¹⁰¹ More applicable principles have been suggested by Lars Kjølbye, *Rebates under article 82EC, Navigating uncertain waters*, ECLR 2010, pp 66-80.

¹⁰² See recital 23.

¹⁰³ COMP/C3/37.990 - *Intel*, recital 1010. An indirect analysis can be found in recital 1717 – 1731.

¹⁰⁴ Case C-549/10P - *Tomra*, recital 42.

¹⁰⁵ See recital 20.

¹⁰⁶ See recital 21.

¹⁰⁷ When producing multiple products, the fixed cost should in principle be allocated in accordance with some kind of cost - driver model. The same applies for high initial (start) up costs. Equally difficult for the dominant undertaking, could be to calculate the free market as it would require an understanding of the competitor’s production constraints.

¹⁰⁸ Case C-95/04P - *British Airways*. See recital 68, 69 and 86.

¹⁰⁹ See also COMP/C3/37.990 - *Intel* recital 267-268 for examples of customers switching without forfeiting the discounts, indicating that the loyalty requirement might be less settled.

tomers, and **b**) any objective reasons for the system. Furthermore, in *Tomra*,¹¹⁰ the Court of Justices disregarded the need to apply the principles outlined by the *Enforcement Paper* to cases predating its adoption. This principle was confirmed by *Intel*.¹¹¹

The principles from the *Enforcement Paper* were nevertheless put to use by the EU Commission in *Tomra* from 2006 and *Intel* from 2009, where dominant undertakings had, through i.e. retroactive discounts, foreclosed the market for vending machines and CPU units.¹¹² Likewise, these principles were applied in the Danish cases *Post Danmark – magasinpost I* from 2007,¹¹³ as a supplement, and *Post Danmarks direct mail-rabatsystem* from 2009¹¹⁴ as an integrated part of the abuse analysis. In particular, *Intel* shows the challenges involved in the suggested framework, e.g. the scope of the free market for the purpose of calculating the contestable market share. Here the EU Commission ended up finding this somewhat limited.¹¹⁵ Furthermore, *British Airways* indicates, as already explained, that the need for an effect-based approach might be overemphasized.¹¹⁶ If a discount or discount scheme appears capable of creating a foreclosure, it will be considered abusive, regardless of its actual effect. The same would most likely be applicable to traditional target discounts, allotted against meeting specified sales targets. Principles put into effect in *Tomra*, where the Commission had built its case on a traditional form-based analysis, using the effect analysis from the later *Enforcement Paper*, to rebut lack of foreclosure ability. Neither the General Court nor the Court of Justice had any reservations against this and the later even noted in recital 72, that:

”... *Contrary to what is claimed by the appellants, the invoicing of ‘negative prices’, in other words prices below cost prices, to customers is not a*

¹¹⁰ Case C-549/10P - *Tomra*, recital 81. See also recital 79 for further on the relevance of the principles outlined by the *Enforcement Paper*.

¹¹¹ Case T-286/09 - *Intel*, recital 155-156.

¹¹² See e.g. recital 131 - 133 and the subsequent analysis in recital 134-270, in particular recital 159-166; recital 180-187; 218-226; recital 234-240 and recital 264-270. See also the provided summary in recital 271-329, in particular recital 314-329. In addition to retroactive discounts, *Tomra* had also applied traditional exclusive agreements c.f. recital 114-130, supported by a discount program.

¹¹³ *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost (Magasinpost I)*, Competition Council Meeting 30 August 2007, recital 335-362. The offered consideration on the marginal price can also be seen in Danish cases as *Skandinavisk Motor Co A/S - ekstrarabatsystem*, Competition Council Meeting 19 June 2002, recital 76 and *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007.

¹¹⁴ *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 482 – 633.

¹¹⁵ COMP/C3/37.990 – *Intel*, recital 1012.

¹¹⁶ See recital 68-69 and recital 293 in the General Court's ruling (T-219/99).

prerequisite of a finding that a retroactive rebates scheme operated by a dominant undertaking is abusive.”

Followed by recital 79 detailing the offered considerations:

“... the loyalty mechanism was inherent in the supplier’s ability to drive out its competitors by means of the suction to itself of the contestable part of demand. When such a trading instrument exists, it is therefore unnecessary to undertake an analyse of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition..”

In accordance with these principles, the EU Commission opens *Intel* from 2009 with a traditional analysis c.f. e.g. *Hoffmann La Roche*, followed by an effect analysis c.f. *Enforcement Paper*.¹¹⁷ The Commission does, however, explicitly maintain neither to be obligated by the later nor to consider it a part of the abuse standard.¹¹⁸ Furthermore, it is even ignored that part of the discounts might have been in vain, as some customers (unpunished) had shifted away from the dominant undertaking and the competitor thus gained market shares.¹¹⁹ The General Court confirmed this approach and the rendered arguments stating that, in light of the discount’s nature, no effect analysis was required.¹²⁰ It was sufficient that third parties’ market access had been disturbed, rebutting actual foreclosure or a negative margin as a requirement for an abuse. For other forms of discounts, which have a less obvious loyalty element, it might be more plausible that a defense capitalizing on lack of appraisable effect will be accepted.

A prudent conclusion, joining the effect based approach tabled by the *Enforcement Paper* with the rigid form based approach from e.g. *British Airways*, might be to consider the effect analysis as a defence, rather than part of the abuse standard. Alternatively, an analytical framework for verifying other analyses and presumptions could be employed, including taking into account that a discount system might be more troublesome than initially presumed. Under the first doctrine, potentially abusive discounts could be legitimized by the same principles as other forms of objective justifications, while the latter could secure condemnation of standardised and innocent looking discount systems, if

¹¹⁷ See recital 920-1001.

¹¹⁸ COMP/C3/37.990 – *Intel*, recital 1002 og 1760. See also *Enforcement Paper*, recital 3 and the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24. June 2009, recital 482, note 96.

¹¹⁹ See e.g. COMP/C3/37.990 - *Intel*, recital 267-268.

¹²⁰ Case T-286/09 - *Intel*, recital 146-150.

these are loyalty inducing and hence anti-competitive.¹²¹ Furthermore, simple discount systems, void of top-slice & individualized elements or other elements of the loyalty discounts trades, might only be condemnable following an effect analysis c.f. *Enforcement Paper*. Support of this could in particular be found in the Court of Justice's ruling in *Post Danmark I*,¹²² as detailed further below in section 5.4. However, *Intel* currently blocks this possibility by dismissing an effect analysis as a precondition for condemning loyalty discounts.¹²³ However, it would be recommendable for plaintiffs and defenders to structure their submissions before the Competition Authority in accordance with the listed effect analysis, including an explanation of how the discount affects competition (negatively).

Support for the suggested conclusion can be found in newer cases such as *Tomra* and *Intel*. In *Tomra*,¹²⁴ the Court of Justice rebutted the need for economic analysis when the discounts, incidentally, could foreclose competitors and it appears that the General Court came to the same conclusions in *Intel*¹²⁵ with its differentiation between a) *quantum discounts* b) *loyalty discounts* and c) *other form of discounts*. While the first was subject to a per se presumption of legality, the opposite was applicable to the second, rendering the third subject to further analysis, perhaps as tabled by the *Enforcement Paper*. However, no legal obligation to apply the *Enforcement Paper* could be identified. Consequently, *Intel* provides for an alternative reading of the *Enforcement Paper*, where this is predominately of relevance outside traditional loyalty discounts, and subject to the per se prohibition, unless objectively justifiable. Under this reading the dominant undertaking must avoid all indications, direct or indirect, of a loyalty obligation attached to the discounts,¹²⁶ but could, subject to this requirement, use top-slide, discriminatory and lock-in discounts, even incorporating retroactive elements.¹²⁷ The review of discounts would then follow a two-step analysis, where the first step involves identifying loyalty elements

¹²¹ See e.g. the Danish case confirmed by the ruling of High Court of Eastern Denmark 22 June 2009 regarding TV 2 prices and conditions, pp. 124 og 125.

¹²² Case C-209/10 - *Post Danmark v. Konkurrencerådet*.

¹²³ C.f. recital 144.

¹²⁴ Case C-549/10P - *Tomra*, recital 79.

¹²⁵ Case T-286/09 - *Intel*, recital 74-78 and 80-89.

¹²⁶ C.f. case T-286/09 - *Intel*, recital 1334, the dominant undertaking can recommend its own product over the competitors in addition to discouraging sourcing from the later, provided its kept in general terms. Furthermore, it follows from recital 1547 that it is not considered evidence of a loyalty inducing purpose that certain words, associated with this, are actively avoided. However, an attempt to conceal this could be held as an indicium.

¹²⁷ On the other hand, the Court of Justice did, in case C-95/04 - *British Airways*, recital 73, label retroactive discounts as particularly capable of creating loyalty, thus meriting some caution.

and void of such a second step appraising the foreclosure risk c.f. the *Enforcement Paper*, including the creation of strategic access barriers.

The matter of whether there is a legal obligation to undertake some kind of effect analysis is currently the subject of consideration before the Court of Justice, and tabled as a preliminary question.¹²⁸ This question originated in the Danish *Post Danmarks direct mail-rabatsystem*,¹²⁹ from 2009. Here the Danish Competition Authority not only rebutted any obligation to apply the principles tabled by the *Enforcement Paper*, but also condemned a discount program which alleged to be standardized, but in reality tailored to have a loyalty-inducing effect. The decision will most likely be available in 2015 or 2016. Furthermore, an appeal has been logged in the *Intel*¹³⁰ case before the Court of Justice, involving the legal standing of the *Enforcement Paper* and its principles. Until these decisions have been delivered it would be most correct to view the *Enforcement Paper* as a supplementary parallel to normal and restrictive practices and to avoid any reference to loyalty as a discount condition.

4.1.2. When size matters – super dominance and quasi-monopolies

The question of whether a super dominance theory involving a more rigid test could be formulated has been contemplated. The Court of Justice specifically rebutted this in *TeliaSonera*,¹³¹ from 2011, dismissing that different layers and degrees of dominance could be identified. However, it then subsequently reintroduced the concept by noting that the abusive behavior could not be reviewed in isolation from the degree of market power. There is therefore a double element to *TeliaSonera*, whilst it at the same time rebuts the existence of a super dominance concept, but then subsequently embraces its core element, the differentiated appraisal of potentially abusive behaviour, pending the market strength. The ambiguities were confirmed and developed further with the Court of Justices rulings in *Tomra*¹³² and *Post Danmark I*,¹³³ both from 2012. In the first it held that:

”None the less, the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.”

¹²⁸ Case C-23/14 - *Post Danmark A/S v. Konkurrencerådet*.

¹²⁹ *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 521 – 529.

¹³⁰ Case C-413/14P - *Intel*.

¹³¹ Case C-52/09 - *Konkurrensverket v. TeliaSonera Sverige AB*, recital 78-81.

¹³² Case C-549/10P - *Tomra*, recital 39.

¹³³ Case C-209/10 - *Post Danmark v. Konkurrencerådet*, recital 23.

While it in the later is stated that:

“When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.”

In light of the problem of aligning the offered considerations with the rebutting of a super dominance theory, it would not be without merit to contemplate if companies in such a position are subject to further limitations in their commercial terms. This appears to have been accepted in Danish practice. In *Post Danmark - Magasinpost II*,¹³⁴ the Competition Appeals board, reviewing the decision of the Danish Competition Council, refused to accept a meeting competition defense in light of the very strong market position (more than 80%) enjoyed by the involved undertaking. This had been articulated more clearly in *Post Danmarks direct mail-rabatsystem*,¹³⁵ involving the same company, where the Competition Appeals board explicitly used the term *super dominance* and applied it in the abuse analysis.

While no super dominance theory can be formulated, it nevertheless appears that companies in such a situation might be appraised under a more rigorous abuse standard, limiting their ability to award discounts even further. This implies that companies in super dominant market positions, in particular if originating from a former legal monopoly, should be cautious in awarding discounts outside the narrow window of pure quantum discounts.

4.2. Mixed bundling

A variation of the loyalty discount is a different form of bundling discount, normally called *mixed bundling*, which is allotted subject to the sourcing of complimentary products or services. In *Hoffmann La Roche*, a special discount was only available if the entire assortment was acquired, and traditionally such discounts have been appraised as a variation of loyalty discount. In the Danish case *DBC medier*¹³⁶ from 2005, a discount was reserved for customers sourcing more than one product, thereby creating a link between those void of economic justifications.¹³⁷ From the later it would follow that mixed bundling could only be accepted if objectively justifiable. However, following the wording utilized in *Intel*, it might be that mix bundling, short of being a traditional loyalty discount, would merit further considerations before being deemed abu-

¹³⁴ Decision by the Competition Complaint Board 8 December 2011 in *Post Danmark v. Konkurrencerådet*, p. 25

¹³⁵ Decision by the Competition Complaint Board 10 May 2010 in *Post Danmark v. Konkurrencerådet*, p. 186.

¹³⁶ *DBC medier as*, Competition Council Meeting 22 June 2005, recital 132-167.

¹³⁷ See also the Danish case *Rukos markedsadfærd*, Competition Council Meeting 19 December 2001, recital 59-64.

sive. These considerations could include e.g. be the effective sale prices and the equally efficient competitor's ability to meet these, as suggested in the *Enforcement Paper*.

4.3. Quantum discounts

As stated by the General Court in *Intel*¹³⁸, separate from loyalty discounts, a category of quantum discounts can be identified, which is normally subject to a *per se* presumption of legality. Here, discounts are allotted on the basis of each procurement, and in accordance with a standardized and proportional scale, representing a presumption of cost reductions for the dominant undertaking. These cost reductions can then be passed onto the customers in order to induce them to assist the process. The considerations can trace their lineage back to *Hoffmann La Roche*, recital 90, separating these from loyalty discounts "...quantity rebates exclusively linked with the volume of purchases from the producers...". A consideration expanded further with *Michelin II*, recital 58 finding how:

"Quantity rebates are deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position."

Consequently, where an objective (economic) explanation can be provided in defense of a discount, a much more lenient appraisal becomes available.¹³⁹ The burden of proof falls with the dominant undertaking.¹⁴⁰ Further, each step or element in the rendered discount system should be explainable.¹⁴¹ From the Danish *Post Danmark - magasinpost II*,¹⁴² it most likely follows that this doesn't involve a cent- per- cent assessment requiring proof of every cent passed onto the customers. In reviewing the case, the Competition Appeals Board accepted that certain savings were available to the customers, criticizing the Competition Authori-

¹³⁸ Case T-286/09 - *Intel*, recital 75-78.

¹³⁹ Normally this would involve a cost reduction. However the Danish case *TV 2's priser og betingelser*, Competition Council Meeting den 21 December 2005, recital 163, provides for broader consideration - including efficiencies. See also the EU case C-163/99 - *Portugal v. Commission* ECR p. 2613, recital 52, referring to added volume and economics of scale. In the Danish case *Nissan Motor Danmark A/S indfører nye rabatbetingelser*, Competition Council Meeting 28 August 2002 it was accepted that converting to weekly orders would represent a cost reduction that could be passed onto the customers.

¹⁴⁰ C.f. case T-228/97 - *Irish Sugar*, recital 188, case T-219/99 - *British Airways*, recital 281 and case T-203/01 - *Michelin II*, recital 107. See also the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 469 with further reference.

¹⁴¹ C.f. case C-163/99 - *Portugal v Commission* ECR p. 2613, recital 56 and *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 140.

¹⁴² Decision by the Competition Complaint Board 8. December 2011 in *Post Danmark v. Konkurrencerådet*, p. 26.

ty for failing to take these into consideration. On the other hand, *Michelin II* recital 95 indicates how even quantity discounts could nevertheless have the “..characteristics of a loyalty-inducing discount system” if the following (three) elements are incorporated:

“..... there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period.....”

In defense of the operated discounts, Michelin had i.a. referred to different form of economic of scales linked to an expansion of turnover, and therefore indirect cost reductions for the dominant undertaking. The General Court found these too general and unspecified,¹⁴³ indicating that discounts claiming to be quantity rebates, should be allotted in accordance with a simple progressive scale and represent a cent- by- cent savings.¹⁴⁴

Under the same principles as *Michelin II*, a loyalty- inducing quantity discount was reviewed and condemned in the Danish cases *Post Danmarks direct mail-rabatsystem*¹⁴⁵ and *TV 2 priser og vilkår*.¹⁴⁶ Despite being cloaked as a standardized discount system, it was in both held that they could create a lock-in effect through the use of individualized target and retroactive elements calculated over annual reference periods. However, as indicated earlier, an alternative reading of *Intel* could lead to the interpretation that quantity discounts, regardless of any arbitrary or dubious elements, are only condemned following an effect analysis c.f. the principles laid down by the *Enforcement Paper*.

4.3.1. Quantum discounts, economics of scale and quasi- monopolies

As already indicated, it follows from cases such as *Michelin II*, that the actual windows for utilizing discounts for the purpose of securing economies of scale through larger sales are somewhat limited. This is true even in sectors where a large portion of the cost base is fixed and the defense might hold some merits.¹⁴⁷

¹⁴³ See namely recital 108-109.

¹⁴⁴ For further on *Michelin II* and the involved issues see e.g. Christian Roques, *CFI Judgment, Case T-203/01, Manufacture Francaise des Pneumatiques Michelin v Commission*, ECLR 2004, p. 688-693.

¹⁴⁵ *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 521 - 529 and Decision by the Competition Complaint Board 10 May 2010 in *Post Danmark v. Konkurrencerådet*, p. 187.

¹⁴⁶ High Court of Eastern Denmark 22 June 2009 in *TV 2 priser og betingelser*, pp. 124-125.

¹⁴⁷ For an undertaking with falling or low marginal costs and a large portion of fixed costs, it would often be beneficial to expand production for the purpose of securing economies of scale. This could involve discounts and in theory provide for a legitimate explanation.

The *Enforcement Paper*¹⁴⁸ nevertheless makes an attempt to offer some guidelines by summarizing practices, as detailed above, followed by some principles offering guidance henceforth. This involves making a distinction between discounts:

- a) which are granted for every purchase independent of the customers purchasing behavior and hence *unconditional*, even if reserved for certain groups of customers,
- b) which are subject to the meeting of certain requirements and purchasing behaviors, and hence *conditional*, which in particular involves the “problematic” target and retroactive discounts.

Provided the discount is neither selective nor discriminatory,¹⁴⁹ and thereby loyalty-inducing, the *Enforcement Paper* signals a positive approach to discounts unless a foreclosure would be plausible. This situation is unlikely unless it involves a significant portion of customers or customers of particular importance, and the discount represents a substantial reduction over list price.¹⁵⁰ In assessing this, it would be required to take into consideration that:

- a) competitors normally would need to secure a minimum market share (minimum efficiency scale) in order to find it profitable to remain in the market and
- b) the price should not fall below the dominant undertakings LRAIC.¹⁵¹

There is a link between the two considerations as LRAIC would ultimately be conditioned upon the size of the customer base required to support the costs, indicating that the conditions are in reality formulated to secure an efficient competitor market access, and prevent that the securing of economies of scale come at the price of a foreclosure.¹⁵²

¹⁴⁸ See recital 36-45. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, provided for much more detailed guidelines.

¹⁴⁹ A selective discount, reserved for certain customers, would normally serve a strategic objective implying an anti-competitive purpose. However, following case C-209/10 - *Post Danmark v. Konkurrencerådet*, it might be problematic to condemn these unless other elements indicate an abuse.

¹⁵⁰ See, in particular, the general principles outlined in recital 20 in conjunction with recital 36-45, proving comments on the use of discounts.

¹⁵¹ See e.g. *Enforcement Paper*, recital 43-44. In *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 154-157, where a higher standard was suggested by indicating a foreclosure risk if the price failed to cover Average Total Cost (ATC).

¹⁵² See also *Enforcement Paper*, recital 20, referring to different forms of economies of scale as qualifying elements.

Only a few elements can be extracted from practice in respect to economies of scale and discounts. In *Intel*, the Commission determined the competitors to be equally efficient, followed this by a evaluation of their ability to enter the market at a lower output,¹⁵³ which later involved a proportionality test stipulating "... that the legitimate objective pursued by Intel should not be outweighed by the exclusionary effect."¹⁵⁴ Embedded in this appears to be a requirement that the securing of economies of scale shouldn't lead to a foreclosure. The Danish case *Post Danmarks direct mail-rabatsystem* offers further confirmation of this by finding that even the less effective competitors should be secured market access, if it is plausible that it in the long run could be equally efficient.¹⁵⁵ Furthermore, and much more explicit, it's noted that the securing of economic of scale must not lead for foreclosure.¹⁵⁶ This was full incorporated in the Danish case *Post Danmark - magasinpost II*,¹⁵⁷ where the Competition Appeals Board, when reviewing the case, found that in light of the super dominant position (more than 80 % market share), an efficiency defense could only be permissible to a very limited extend.

In addition to the guidelines for exclusionary effects of quantity discounts, the *Enforcement Paper* offers considerations on the availability of an efficiency defence. These considerations are both in general and in respect to the specific terms applicable for discounts,¹⁵⁸ which include showing specifically how this would be secured through discounts or is linked to customer specific investments. Under the latter it would consequently be possible to use a discount, as a surrogate for a formal exclusive agreement, if required to make novel investments profitable or in response to market power downstream.¹⁵⁹

4.4. Selective price cuts and discounts

Despite being subject to the same principles as other loyalty discounts, selective price cuts and discounts nevertheless merit separate comments. Factually, as they are not conditioned upon certain purchases, and legally, as it follows from *AKZO*¹⁶⁰ and *Post Danmark I*,¹⁶¹ that pricing covering AVC/AIC are legal. Fur-

¹⁵³ See e.g. recital 1002.

¹⁵⁴ See recital 1624 with reference to further cases and case T-340/03 - *France Telecom*, ECR 2007, p. II-107, recital 217. While not dealing with discounts, the latter offers some considerations as to what can be considered legitimate objectives.

¹⁵⁵ See recital 502-507 referring to *Enforcement Paper*, recital 23.

¹⁵⁶ See recital 621.

¹⁵⁷ Decision by the Competition Complaint Board 8. december 2011, in *Post Danmark v. Konkurrencerådet*, p. 25.

¹⁵⁸ See recital 45.

¹⁵⁹ Downstream market power should not be confused with buying power.

¹⁶⁰ Case C-62/86 - *AKZO*, ECR 1991, p. I-3359.

ther, *Intel* indicates the availability of a different and more lenient treatment of discounts not conditional upon loyalty. However, as outlined earlier, selective discounts share an overlap with predatory pricing and could, in principle, be viewed as either a variation on or a form of exclusionary discrimination when the discounts are reserved for selective customers. If viewed as the former, abuse would require pricing below AAC c.f. *Enforcement Paper*,¹⁶² while the principles for discrimination would govern the later.

While not articulated explicitly in the *Enforcement Paper*, it appears to view selective price cuts as a form of conditioned discounts subject only to condemnation if, as detailed above section 4.1.1, prices fails to cover LRAIC, and perhaps AAC. The Court of Justices ruling in *Post Danmark I*¹⁶³ from 2012, appears to confirm this. Firstly, by refusing to consider price discrimination as exclusionary per se, and secondly, by rebutting a foreclosure risk when the price, despite being below Average Total Cost, secured coverage of the Average Incremental Costs.¹⁶⁴ While it might be too early to close the book on the matter, it appears that selective price cuts and discounts granted without any loyalty statements are only considered abusive if likely to lead to a foreclosure under the effect doctrine tabled by the *Enforcement Paper*.

4.5. Defensive discounts

It has been accepted that even the dominant undertaking should be allowed to defend its customer base against competitors preying on these, the so-called *meeting the competition defense*. In practice, the Commission appears somewhat reluctant to embracing the defence in respect to discounts. In *Irish Sugar*,¹⁶⁵ intervention was deemed merited against discounts favoring customers geographically located in specific yet marginal areas, most likely to switch to competitors should one of these chose to enter the Irish market. While no actual competitors had been excluded, the pre-emptive foreclosure of the market was held to be abusive regardless of the defensive nature of the discounts. However, in *BPB*,¹⁶⁶ it was accepted that price cuts had been concentrated to areas subject to a level of competition. When reviewing the case, the General Court found it relevant to note that it would not be permissible under this doctrine to entrench the dominant position, indicating a somewhat limited scope

¹⁶¹ Case C-209/10 - *Post Danmark v. Konkurrencerådet*.

¹⁶² C.f. recital 43 and 64.

¹⁶³ Case C-209/10 - *Post Danmark v. Konkurrencerådet*, recital 30 and 37.

¹⁶⁴ The Court might not agree on the utilized methods for calculating incremental costs c.f. recital 32, 33 and 34 but nevertheless accept the involved principles.

¹⁶⁵ Case T-228/97 - *Irish Sugar plc*, ECR 1999, p. II-2969.

¹⁶⁶ *BPB Industries*, O.J. 1989L 10/50, recital 131-134.

for its invocation.¹⁶⁷ Furthermore, in the Danish case *Post Danmark - magasinpost II*,¹⁶⁸ only a limited scope could be accepted for the super dominant undertakings. However, it was accepted in the Danish case *C.K. Chokolades samhandelsbetingelser og bonusaftaler*,¹⁶⁹ on the grounds of buying power.¹⁷⁰ While the meeting competition defence is real, it's actual scope is subject to lacunas and most likely limited to very specific situations,¹⁷¹ perhaps unavailable for undertakings with positions of quasi monopoly.

4.6. Summing up on loyalty discounts and the way forward

While the legal standing of the *Enforcement Paper* and its tabled approach to the review of discounts and foreclosure risk is subject to many lacunas, it has provided a better link between theory and practice. Normally, condemnation should be reserved for discounts capable of creating a foreclosure risk, and it falls upon either the competition authorities to prove this or the dominant undertaking to refute it, depending on one's understanding of subsequent case law. Further, companies with super dominant market positions should be particularly careful before offering discounts outside the window linked to pure quantum discounts, normally considered legal per se.. Perhaps more notable is the distinction introduced by EU cases such as *Tomra* and *Intel*, between discounts subject to a per se prohibition, and those meriting further considerations, as it mirrors the *object* versus *effect* analysis rendered available under Article 101. While it's too early to speak conclusive on the matter, the later would perhaps represent the most important development in regards to single company conduct in recent years.

5. Discrimination

It follows from Article 102(c), and the Danish equivalent, paragraph 11 (3) no. 3, that it's abusive to apply "... *dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*", hence to discriminate. As discounts from a practical point almost always involve a discriminatory element, the provision is of paramount importance for the abil-

¹⁶⁷ Case T-65/89 - *BPB Industries*, ECR 1993, p. II-389, recital 69.

¹⁶⁸ Decision by the Competition Complaint Board 8 December 2011 in *Post Danmark v. Konkurrencerådet*, p. 25

¹⁶⁹ *C.K. Chokolades samhandelsbetingelser og bonusaftaler*, Competition Council Meeting 28 April 1999. The case is related to Article 101 and the Danish equivalent and should thus be used with some caution.

¹⁷⁰ However, in the Danish case *Konkurrencebegrænsninger på markedet for ortopædiske sko*, Competition Council Meeting 23 February 2000, it was not taken into consideration that the buyer most likely held a dominant position on the procurement market.

¹⁷¹ See also COMP/C3/37.990 - *Intel*, recital 1626-1631.

ity to award them. Conceptual discrimination could be price or non-price based and involve either:¹⁷²

- a) applying dissimilar conditions to equivalent transactions, or
- b) applying equivalent conditions to dissimilar transactions.

The decisive factor is the non-objective difference, placing the trading partners in a competitive disadvantage position. As a consequence of the effect-based approach contained in the the *Enforcement Paper*, not to mention the wording of the provisions, some kind of appreciable effects should, however, be required for an infringement to emerge.¹⁷³

5.1. Discrimination and other forms of abuse

Despite being singled out by Article 102 and paragraph 11 as separate abuses, (price) discrimination often forms part of other infringements e.g. excessive or predatory pricing,¹⁷⁴ often targeting a limited number of companies. The price drops in classic EU predatory pricing cases as *AKZO*¹⁷⁵ and *Tetra Pak II*,¹⁷⁶ had e.g. been reserved for a limited number of customers, thereby defacto incorporating a discriminatory element. Conceptually, there is however, no direct link between *price discrimination* and *predatory pricing* save for the simple fact that pricing below cost might only be feasible if possibly limiting its scope to selected customers. Furthermore, as the purpose of a predatory strategy often would be *discipline* rather than actual *exclusions*, a broad application is rarely required. For publically owned companies, where profitability might be of less importance, a strategy of preferential treatment of national or local customers might also be implemented¹⁷⁷ and even private undertakings might find it beneficial to imple-

¹⁷² See e.g. case COMP/A.36.568/D3 - *Scanlines Sverige AB v. Port of Helsingborg*, recital 276, for a recent case reciting this.

¹⁷³ The *Enforcement Paper* offers no guidance on discrimination. However, as detailed below, discrimination often entails foreclosure, making the principles applicable. Further, it would create some confusion by tabling a request for more effect-based enforcement and then limiting it to exclusionary behaviour.

¹⁷⁴ Or even margin squeeze c.f. the EU case AT.39678/AT.39.731 - *Deutsche Bahn I/II*.

¹⁷⁵ Case C-62/85, *AKZO*, ECR 1991, p. I-3359.

¹⁷⁶ Case 333/94P - *Tetra Pak International SA*, ECR 1996, p. I-5951.

¹⁷⁷ See e.g. case C-18/93 - *Corsica Ferries*, ECR 1994, p. I-1783, recital 45, case 95/364/EC - *Brussels National Airport*, O.J. 1995L 216/8, and Case No IV/35.703 - *Portuguese Airports*, O.J. 1999L 69/31. For Danish cases illustrating the same issues see e.g. *Forespørgsel om lovligheden af takstdifferentiering på færgepriser*, Competition Council Meeting 26 May 1999 and *fastlæggelse af færgetakster*, Competition Council Meeting 16 December 1998.

ment geographical price discrimination.¹⁷⁸ Consequently, there is an overlap between discrimination, other forms of abuse, and the Single Market provisions. Further, even the concept of discrimination contains an overlap, as explained by the Commission in *BdKEP/Deutsche Post AG*¹⁷⁹ from 2004, when noting:

”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.”

When dealing with discrimination, it is therefore relevant to differentiate between:

- ⇒ *Exclusionary discrimination*, sometimes referred to as *primary-line-discrimination*, initiated for the purpose of *foreclosing* competitors by targeting actual or potential customers with selective price reductions or different forms of single branding agreements.
- ⇒ *Exploitative discrimination*, sometimes referred to as *secondary-line-discrimination*, initiated for the purpose of *twisting* competition in another market e.g. for the benefit of a subsidiary.

Despite the textual framing of Article 102 and paragraph 11, referring to “...trading parties [placed] at a competitive disadvantage”, the provisions are not limited to secondary-line-discrimination. Exclusionary discrimination, hence primary-line-discrimination, are included as established with epic EU cases as *Suiker Unie* and *Hoffmann-La Roche*, from 1975 and 1979 respectively, and maintained in newer cases as *Michelin II* from 2003 and the Danish case that ended up as *Post Danmark I* from 2013.¹⁸⁰ Neither could the two forms of discrimination be considered mutually exclusionary and would in practice often overlap. In the EU case *BPB Industries Plc & British Gypsum Ltd*¹⁸¹, a discount was retracted from customers also sourcing products from a new competitor but expanded to those remaining loyal. The General Court noted in recital 119 that:

¹⁷⁸ See e.g. cases as C-27/76 – *United Brands Company*, case 333/94P – *Tetra Pak*, case T-228/97 – *Irish Sugar plc*, ECR 1999, p. II-2969 and case C-226/84 - *British Leyland*, ECR 1986, p. 3263, for examples of geographical price discrimination held to be abusive.

¹⁷⁹ C.f. e.g. COMP/38.745 - *BdKEP/Deutsche Post AG*, recital 93.

¹⁸⁰ *Post Danmark - adresseløse forsendelser*, Competition Council Meeting 29 September 2004.

¹⁸¹ Case T-65/89 - *BPB Industries Plc & British Gypsum Ltd*, ECR 1993, p. II-389.

"Such a practice, by virtue of its discriminatory nature, was clearly intended to penalize those merchants who intended to import plasterboard and to dissuade them from doing so, thus further supporting BG's position in the plasterboard market."

In reality, both primary-line c.f. *supporting BG's position in the plasterboard market* and second-line c.f. *penalize those merchants who intended to import plasterboard* discrimination can be extrapolated by the offered rationale.¹⁸² However, in theory, the focus of Article 102 (c) and paragraph 11 (3) no 3 should be second-line discrimination, as primary-line-discrimination would be covered by Article 102 subparagraph b and paragraph 11 (3) no 3. Furthermore, it is possible to deduce a third form of discrimination involving national based discrimination from EU practice that might be misplaced under Article 102, as detailed later.

5.2. Unclear framework for the analysis

Despite falling within what should be the core of Article 102 and the Danish equivalence paragraph 11, there are many ambiguities in our understanding of the concept of abusive discriminations. E.g. is it accepted (in economic theory) that the ability to price differentiate across markets and customer groups could be welfare enhancing,¹⁸³ or an instrument for recouping large fixed costs and thereby, in the case of unusual cost structure, securing the servicing of low- income customers.¹⁸⁴ In particular, undertakings subject to different forms of Universal Services Obligations might find it beneficial to contemplate price discrimination void of sector regulation and compensation models. Consequently, discrimination would often be a perfectly rational decision, objectively justifiable on business grounds rather than *unreasonable* and *anti-competitive* as the concept might initially indicate. Furthermore, historically, the prohibition embedded in Article 102(c) and the Danish equivalent, paragraph 11 (3) no. 3, might have been to protect small and medium sized undertakings from getting less favourable terms

¹⁸² See also case T-219/99- *British Airways plc*, ECR 2003, p. II-5917 and *Post Danmark - adressedløse forsendelser* Competition Council Meeting 29 September 2004 recital 128-185. The later outlines the two concepts and application.

¹⁸³ C.f. Robert S. Pindyck og Daniel L. Rubinfeld, *Microeconomics, fifth edition*, Prentice Hall 2001, p. 371-381, Simon Bishop & Mike Walker *The Economics of EC Competition Law: Concept, Application and Measurement*, Sweet & Maxwell, 2002, p. 194-205 and Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, p. 491-511.

¹⁸⁴ See Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, p. 495-497 and Derek Ridyard, *Exclusionary Pricing and Price Discrimination Abuses under Article 82 – An Economic Analysis*, ECLR 2002, p. 286-303 for further.

than larger competitors. This is an ambition that might be misplaced under competition law as no consumer harm would be caused by this.¹⁸⁵

In light of the ambiguities, it should come as no surprise that the treatment of abusive discrimination, including discounts, is at best blurred. Furthermore, in concentrated markets, prohibiting price differentiation could promote collusion¹⁸⁶ and thereby be anti-competitive. Following the Court of Justice's ruling in *Post Danmark I*,¹⁸⁷ it might also be that primary-line discrimination isn't a separate infringement but merely exclusionary conduct subject to the principles outlined above in section 4.¹⁸⁸ A presumption particularly strong as the case originated in the Danish case *Post Danmark – adresseløse forsendelser*, identifying both primary- and second-line discrimination as abusive and separate infringements.

5.2.1 The principles can be extracted from the wording

A number of requirements of a legal nature can be extracted directly from the words utilized in Article 102(c) and the Danish equivalent, paragraph 11 (3) no. 3, listing four qualifications before labelling discrimination abusive:

- a) *Applying dissimilar conditions*: The nature of the non-objective differentiated treatment is irrelevant, price or non-price based. Void of an objective explanation, abusive could come in the form of selective discounts,¹⁸⁹ tying,¹⁹⁰ increased or uniformed prices¹⁹¹ or any other advantages with a monetary value. In practice, however, non-cost based discounts with loyalty inducing elements have attracted particular attentions and intervention.

¹⁸⁵ C.f. Robert O'Domoghue & Jorge Padilla *The Law and Economics of Article 102 TFEU*, 2nd Edition Hart 2013, p. 249.

¹⁸⁶ For further see e.g. Damien Geradin & Nicolas Petit, *Price Discrimination under EC Competition Law: The need for a case-by-case Approach*, GCLC Working Paper 07/05, p. 22-23, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* O.J. 2004C 31/5, recital 48 and Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, p. 343.

¹⁸⁷ Case C-209/10 - *Post Danmark v. Konkurrencerådet*.

¹⁸⁸ This was e.g. accepted in the Danish case fx *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost*, Competition Council Meeting 30 August 2007, recital 440.

¹⁸⁹ See e.g. United Cases C- 40-48, 50, 54-56, 111, 113 & 114-73 - *Suiker Unie*, ECR 1975, p. 1663, recital 522 for example of selective loyalty discounts labeled discriminatory.

¹⁹⁰ See e.g. case T-30/89 – *Hilti*, ECR 1991, p. II-1439; case IV/30.178 - *Napir Brown – British Sugar*, O.J. 1988L 284/41 and case IV/34.073, IV/34.395 og IV/35.436 - *Van den Bergh Foods Limited*, O.J. 1998L 246/1 for examples of abusive bundle discounts.

¹⁹¹ Uniformed prices could be abusive by denying quantum discounts to larger buyer or different form of self-service discounts.

- b) *Equivalent transactions*: The concept of discrimination requires the involved undertakings and transactions to be comparable. In *United Brand*¹⁹² and *Tetra Pak II*¹⁹³, geographical price differences were held as abusive through the applying of different conditions to comparable customers.¹⁹⁴ The same conclusion was reached in the Danish case *Afhentning af økologisk mælk på Samsø*,¹⁹⁵ where only organic milk producers were levied a surcharge due to their location in a peripheral area. In contrast, it was accepted in the Danish case *Klage over prisdiskriminering*,¹⁹⁶ that two customers couldn't be compared due to differences in the size of orders and hence the associated costs for serving them. However, embedded in *Afhentning af økologisk mælk på Samsø*, might be that all milk producers (organic or non-organic) could be levied the same surcharge regardless of their geographical location and hence that it would elude condemnation (under Danish practice) to distribute extra cost endured by different universal service obligations; Even if this entails that some undertakings will have to endure higher prices. In addition to prices, preferential treatment e.g. extended credit time, early or preferential delivery in case of deficiency,¹⁹⁷ could be abusive as these have a monetary value. However, discrimination is not merely a question of identical treatment but could also require dissimilar conditions. In the EU case *British Sugar/Napir Brown*¹⁹⁸, the applied conditions didn't allow for that customers could collect directly at the factory, compelling a downstream competitor to pay extra for services he didn't require, eventually putting him in a disfavorable position. It therefore becomes imperative what can be considered *similar* and *comparable* and if any differences are accepted. The later holds some significance, as pricing against willingness to pay and price sensitivity could be welfare enhancing. While geographical price differences were in general held to be abusive in *United Brand*,¹⁹⁹ it was nevertheless accepted by the Court of Justice that "...differences in transport costs, taxation,

¹⁹² Case C-27/76 - *United Brands Company*, ECR 1978, p. 207, recital 234.

¹⁹³ Case 333/94P - *Tetra Pak International SA*, ECR 1996, p. I-5951 and T-83/91 - *Tetra Pak International Sa*, ECR 1994, p. II-755. See recital 170-173 of the later for reference to Article 102 (c).

¹⁹⁴ See also case T-228/97 - *Irish Sugar plc*, ECR 1999, p. II-02969 and case C-226/84 - *British Leyland*, ECR 1986, p. 3263 for examples of discriminatory discounts fragmenting the single market and free movement.

¹⁹⁵ *Afhentning af økologisk mælk på Samsø*, Competition Council Meeting 26 September 2001.

¹⁹⁶ *Klage over prisdiskriminering*, Competition Council Meeting 26 August 1998.

¹⁹⁷ In case C-77/77 - *Benzine en Petroleum Handelsmaatschappij Bv*, ECR 1978, p. 1513, recital 32 some preferential treatment was accepted as non-abusive.

¹⁹⁸ Case IV/30.178 - *Napir Brown - British Sugar*, O.J. 1988L 284/41. No reference to Article 102 (c) is however made.

¹⁹⁹ See recital 228.

customs duties, the wages of the labor force, the condition of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling prices according to the member states.” Embedded in this is not only that prices may vary from market to market for cost reasons, but of much more pivotal consequence, also due to differences in “the density of competition”, and that it thereby might not be abusive to capitalize on (some) customers’ ability to pay a premium. This was more clearly embraced by the General Court in *Deutsche Bahn*,²⁰⁰ considering but ultimately rebutting, that the differences in terms and prices could be attributed to the density of competition downstream.²⁰¹ The same conclusion would appear to stem from the EU case *Scanlines Sverige AB v Port of Helsingborg*²⁰², accepting that demand related conditions could explain (and justify) price differences. This might open more broadly for differences between customers acquired under a tender process and those not, and prices targeted to a consumer’s willingness to pay.

- c) *Trading parties*: Abusive discriminations cover preferential treatment of own interests on a secondary market, as well as those of selected trading partners and have even been expanded to foreclosure of the primary market as initially detailed. However, no abuse could emerge void of at least a potential competition situation between the companies offered different terms.²⁰³ It must therefore be established that the party that benefits from a discount scheme is competing with those placed at a competitive disadvantage position. In *Tiercé Ladbroke*²⁰⁴, no discrimination was identified e.g. as Belgian undertakings, denied a license, was not competing with the Germans who were granted a license, making it imperative to define the market correctly and very clearly.²⁰⁵ The same conclusion was drawn in the Danish case *Klage over taksterne ved lastning af olie ved Fredericia Havn*,²⁰⁶ absent competition between the different ships subject to the discriminatory terms. Concluding that abusive discrimination requires the un-

²⁰⁰ T-229/94 - *Deutsche Bahn AG*, ECR 1997, p. II-1689, recital 91.

²⁰¹ See also case IV/34.621, 35.059/F-3 - *Irish Sugar plc*, O.J. 1997L 258/1, recital 146. Differentiated prices could perhaps be held exploitive c.f *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 141.

²⁰² Case COMP/A.36.568/D3 - *Scanlines Sverige AB vs. Port of Helsingborg*, recital 241.

²⁰³ C.f. case COMP/38.745 - *BdKEP/Deutsche Post AG*, recital 93.

²⁰⁴ Case T-504/93 - *Tiercé Ladbroke*, ECR 1997, p. II 923. See also case COMP/38.096 - *PO/Clearstream (Clearing and settlement)*, recital 311.

²⁰⁵ See e.g. Valentine Korah, *The Ladbroke Saga*, ECLR 1998, p. 169-176 for further.

²⁰⁶ *Klage over taksterne ved lastning af olie ved Fredericia Havn*, Competition Council Meeting 26 March 2003.

dertakings to be active in the same market, an open question emerges when markets convert e.g. for technical reasons.²⁰⁷

- d) *Placing them at a competitive disadvantage*: It follows directly from the wording of the provisions that an appreciable negative effect on competition is required.²⁰⁸ However, implementing this in practice has been complex and does not appear to have attracted much interest of enforcers.²⁰⁹ Significantly, more interest has been shown regarding objective justification,²¹⁰ most significantly in respect to cost reductions.²¹¹ While this might create the same result, there is a significant difference between *thwarting competition* and *objective justification*. However, recent Danish practice might, as detailed below, have corrected this.

Further requirements can be extracted from the general principle of an appreciable effect on competition, e.g. that a product or service *essential* for access to the downstream market²¹², representing a *substantial part* of the value of the final products must be involved.²¹³ A recent example of the latter can be seen in the Danish case *CPH GO*²¹⁴ from 2011, where a discount reserved for certain operators in Copenhagen Airport amounted to between 34 % and 43 % of the profit

²⁰⁷ See *Notice on the application of the competition rules to access agreements in the telecommunications sector - Framework, relevant markets and principles*, O.J. C 1998 265/2, recital 121 for further on this.

²⁰⁸ In case COMP/38.096 - *PO/Clearstream (Clearing and settlement)*, recital 302 the Commission notes "The existence of discrimination therefore presupposes that the condition be dissimilar, that transactions – in this case, the services provided – be equivalent, and the through its behaviour the dominant undertaking places trading parties at a competitive disadvantage."

²⁰⁹ C.f. Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, Oxford 1999, p. 176, Damien Gerardin, *Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities*, GCLC Research papers on Article 82 EC, p. 122-123, and Gunnar Niels & Helen Jenkins, *Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down*, ECLR 2005, p. 608.

²¹⁰ Damien Gerardin, *Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities*, GCLC Research papers on Article 82 EC, p. 123-125.

²¹¹ See e.g. *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*, Letter dated 23 March 1999 to the plaintiff and *Nissan Motor Danmark A/S indfører nye rabatbetingelser*, Competition Council Meeting 28 August 2002. In the latter it was e.g. accepted that use of weekly orders represented a cost reduction that could justify a discount.

²¹² See e.g. case COMP/38.096 - *PO/Clearstream (Clearing and settlement)*, recital 224 & recital 226-227 for what looks like an acceptance of this by the labeling the abuser as "... an unavoidable trading partner".

²¹³ See e.g. case IV/35.613 - *Alpha Flight Services/Aéroports de Paris*, O.J. 1998L 230/10 - recital 109 for what looks like an acceptance of this.

²¹⁴ *Københavns Lufthavne A/S' terms of use for CPH GO*, Competition Council Meeting 21 December 2011, recital 485.

margin and was therefore distorting. Furthermore, as part of the essentiality discussion, the presence or absence of barriers to the primary market should be contemplated for the purpose of considering the ability to counter any abuse.²¹⁵ Notable would also be the use of progressive steps beyond the insignificant. The Danish case *SuperGros' samhandelsbetingelser*,²¹⁶ was e.g. closed with a commitment agreement providing for some steps indicating that mathematic equality is not required.

A somewhat cryptic phrase was offered in the Danish case *Klage over prisdiskriminering*²¹⁷ by labeling it abusive that a discount system had been designed with the effect that only large purchaser could benefit from it. Only a short press release is available on the case, limiting the conclusions to be extracted. A possible reading is, however, that the Danish enforcer finds that all undertakings should be secured access to a discount system. On the other hand was it accepted in the Danish case *Prisdiskrimination på Århus Sporvejes abonnementskort*,²¹⁸ that discounted transportation tickets could be reserved for local residents. In support of this conclusion, it was stated that geographical discrimination created neither a loss of welfare or twist of competition. Embedded in this might be that only discrimination targeting *undertakings* are abusive, while discrimination of consumers normally would elude condemnation. A somewhat different approach was demonstrated by the Commission in *PO/World Cup 1998*²¹⁹ where discrimination of consumers was singled out as a particular heinous form of abuse. Some remarks on this issue will be offered later.

5.3. Primary-line-discrimination - foreclosure of the primary market

The dominant undertakings' ability to target customers with attractive (and selective) offers for the purpose of retaining or gaining their loyalty, hence primary-line-discrimination, falls within the core of abusive discrimination. Furthermore, this also covers different forms of pre-emptive foreclosure, where no actual competitor has accessed the market, but this might be eminent as demonstrated by the EU case *Irish Sugar*.²²⁰ Here the discount had been reserved for customers in boarder areas and hence those most likely to switch to a non-domestic suppli-

²¹⁵ See e.g. the Danish case *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*, Letter to Plaintiff dated 23 March 1999, rebutting an abuse in the absence of entry barriers.

²¹⁶ *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recital 263, 266 & 270.

²¹⁷ *Klage over prisdiskriminering*, Competition Council Meeting den 26 August 1998.

²¹⁸ *Prisdiskrimination på Århus Sporvejes abonnementskort*, letter to Århus Sporveje dated 9. February 1999.

²¹⁹ I case IV/36.888 – *PO/World Cup 1998*, O.J. 2000L 55/5, see recital 102.

²²⁰ Case T-228/97 - *Irish Sugar*, ECR 1999, p. II-2969.

er, should this decide to enter the Irish market. In reality, a clear line can be traced from early practice as *Suiker Unie* and *Hoffmann-La Roche* to newer cases as *Compagnie Maritime Belge Transports*²²¹ and *Michelin II*, in the condemnation of non-cost based discounts under Article 102 (c). The anti-competitive effect of selective and discriminatory discounts with a loyalty - inducing elements were identified already with *Hoffmann-La Roche*, making the Court of Justice align loyalty discounts with a formal exclusive agreement, as detailed above section 4. Utilizing the same principles, discounts conditioned upon meeting predefined turnover figures (target discounts) were held as discriminatory, and hence abusive, in *Michelin I*. Abusive discrimination was also identified in *Compagnie Maritime Belge Transports* from 2000,²²² where selective price cuts fell short of the concept of predatory pricing, but nevertheless had targeted a named competitor, and therefore merited condemnation in the opinion of the Commission. In contrast to the Commission, neither the General Court nor the Court of Justice referred to Article 102 (c) and it remains unknown if this was done intentionally.²²³

The framework for analyzing discriminatory discounts 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"

Additional to the foreclosure risk, the absence of cost based justification appears to have motivated the critique of the offered discounts. However, following *Post Danmark I*²²⁴ from 2012, this might have been mitigated. Here, the Court of Justice refuses to label primary-line-discrimination as exclusionary and pricing below Average Total Cost as abusive per se, solely based upon the discriminatory element. Void of other loyalty - inducing elements, *Post Danmark I* might have reserved condemnation of selective price cuts to prices failing to cover Average Avoidable Cost and embedded in this that primary-line discrimination is not a

²²¹ United cases C-395/96P & C-396/96P - *CMB*, ECR 2000, p. I-01365.

²²² Selective price cuts targeting a competitor were also used in case T-30/89 - *Hilti*, ECR 1991, p. II-1439. While labeled discriminatory, no reference is made to Article 102 (c).

²²³ See case IV/32.448 & IV/32.450: *Cewal, Cowac, Ukwal*, O.J. 1993L 34/20, recital 83. In *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 129 this is labeled a form of predatory pricing.

²²⁴ Case C-209/10 - *Post Danmark vs. Konkurrencerådet*, recital 30 & 37.

separate abuse. A position accepted in Danish practice with *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost*²²⁵ from 2007, noting how primary-line discrimination was a form of exclusion not involving a separate abuse.

5.3.1 A narrow window if foreclosure is plausible

Recent practice has followed the path laid down with *Michelin I* requiring a cost explanation for discounts. In *Michelin II* from 2003, the use of discounts to incentivize retailers to invest in the presentation of products and services was held to be abusive discrimination infringing Article 102 (c)²²⁶, void of an objective justification. In *Wanadoo*²²⁷ from 2003, a defense involving economic of scale and scope was rebutted against allegations of predatory pricing. While not involving discrimination, the case indicates that production optimizations arguments are only permissible if involving clearly identifiable cost reductions. The restrictive approach has been confirmed by *British Airways*²²⁸ from 2007, where the Court of Justice refused the relevance of declining market shares falling from 46 % to 40 % and thereby potentially a limited effect. However, *Michelin II* might have been over interpreted if presumed to preclude all non-cost based discounts. Despite criteria which appear objective and transparent, the General Court nevertheless noted the actual awarding of discounts as discretionary and able to create a pressure on the retailers to meet predefined sales targets which might have tainted the outcome. In recital 140 the Court notes that:

"The granting of a discount by an undertaking in a dominant position to a dealer must be based on an objective economic justification (Irish Sugar v Commission, cited at paragraph 54 above, paragraph 218). It cannot depend on a subjective assessment by the undertaking in a dominant position of the extent to which the dealer has met his commitments and is thus entitled to a discount. As the Commission points out in the contested decision (recital 251), such an assessment of the extent to which the dealer has met his commitments enables the undertaking in a dominant position to put strong pres-

²²⁵ *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost*, Competition Council Meeting 30 August 2007, recital 440.

²²⁶ For more on the case and the restrictive principles applied see e.g. Denis Waelbroeck, *Michelin Ili: A per se rule against rebates by dominant companies*, Journal of Competition Law and Economics 1 (1), 2005, p. 149-171.

²²⁷ Case COMP/38.233 - *Wanadoo Interactive*. See recital 309 noting that *"Thus, while the search for scale economies and learning effects may be included among the rational justifications for predatory behaviour, it may not serve to legitimise that practice from the point of view of competition law since it has the effect of conferring a more favourable cost structure on the dominant undertaking to the detriment of its competitors."*

²²⁸ Case C-95/04 - *British Airways*.

sure on the dealer ... and allow[s] it, if necessary, to use the arrangement in a discriminatory manner.”

This is followed by recital 244, concluding how the applied discounts defacto had created a loyalty effect and artificial entry barriers for competitors and recital 108-109 rebutting general references to economic of scale and cost reductions. Rather than concluding that only cost reductions are admissible in defense of discriminatory abuse allegations, it would be more plausible to read the ruling as requiring more firm evidence in support of such claims. The same conclusion would most likely stem from *Wanadoo*, where the Commission had used the opportunity to not only rebut the presented arguments of economic of scale and scope, but also to point out that other, less anti-competitive instruments had been available had the interest been genuine.²²⁹ It sounds plausible to presume that the outcome of the cases was influenced by these considerations.

Cases such as *Michelin II*, *Wanadoo* and *British Airways* have indicated a very narrow window for discounts and selective discounts not directly linked to quantum, reflecting a cent - by - cent cost reduction if discriminatory.²³⁰ However, accepting that primary-line-discrimination is another word for foreclosure, the principles developed earlier should be applied, reserving condemnation to discriminatory discounts able to foreclosure an equally efficient competitor. In particular, *Post Danmark I*²³¹ from 2012 is supportive of this by refusing to label primary-line-discrimination as exclusionary merely on the grounds of pricing below Average Total Cost. A standardized discount system void of arbitrary and subjective award criteria, as in *Michelin II*, might be permissible unless the effective price falls below AAC regardless of any discriminatory elements.²³²

5.3.2 Sectors with unusual cost structures

As detailed earlier, it might be welfare - enhancing to allow undertakings with a large portion of fixed costs to implement different forms of price discrimination for the purpose of creating an incentive, also to service low income groups.²³³ Regardless of the embedded discrimination of those compelled to pay a higher

²²⁹ See recital 306-309.

²³⁰ *Michelin II* stands out as very restrictive by requiring an actual cost reduction. In the Danish case *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 163, broader efficiency gains were accepted, and in the EU case C-163/99 - *Portugal v. Commission*, ECR p. 2613 recital 52, increase of turnover and economic of scale was accepted.

²³¹ Case C-209/10 - *Post Danmark v. Konkurrencerådet*, recital 30 and 37.

²³² However, such a system might be reviewed and condemned under the principles relating to review of second-line discrimination.

²³³ For further information see Derek Ridyard, *Exclusionary Pricing and Price Discrimination Abuses under Article 82 – An Economic Analysis*, ECLR 2002, p. 286-303.

price, no consumer welfare losses are created by this per se. Consequently, even undertakings void of competitors might have an objective reason for price discrimination e.g. in the form of selective discounts that should not be ignored. However, no cases have so far emerged involving this “defense”.

5.4 Second-line-discrimination

Second-line-discrimination covers, as explained by the Commission in *BdKEP/Deutsche Post AG*, two forms of anti-competitive behavior:

- a) Discrimination of downstream trading parties, which, in the absence of a better word, could perhaps be labeled as “real discrimination” or “exploitive discrimination”.
- b) Discrimination in favor of vertically - integrated or group - affiliated downstream interests, which essentially is a foreclosure.

While in principle second-line discrimination covers both forms of behavior, it would make some sense to reserve the concept to the first, as the second should follow the principles laid out for foreclosure and primary-line-discrimination. Furthermore, void of elements thwarting the Single Market, e.g. nationality based discrimination, second-line-discrimination might not be considered abusive by the Commission unless it takes the form of exploitation.²³⁴ In contrast, a number of cases have been decided in Danish practice on the matter, which often condemn any dissimilarities in the offered terms and conditions. Therefore, from a practical perspective, different forms of second-line-discrimination could be held abusive regardless of the unclear theoretical framework for accepting this.

5.4.1 Discrimination of downstream trading parties

Discrimination in favor of vertically integrated downstream interests has, from a practical perspective, attracted special interest under Article 102 and the Danish equivalent, paragraph 11. In the EU case *Portugal v. Commission*²³⁵, it was held to be abusive under Article 102 (c) when a linear and quantum discount had de facto benefitted national air operators. This was not because some got better terms than others, as this is inherent in quantum discounts, but was due to high thresholds that could only be met by a few particularly large partners and the absence of linear progression in the increase of the quantity discounts. Of interest is also *British Airways*, where only travel agencies that had increased sales and met defined sales targets were allotted special discounts. In defense of this it was ar-

²³⁴ C.f. e.g. case COMP/38.745 - *BdKEP/Deutsche Post AG*, recital 93 and *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 141.

²³⁵ Case C-163/99 - *Portugal v. Commission* ECR 2001, p. 2613. See recital 51-53.

gued, with no success, that travel agencies meeting defined sales targets had a higher value for the dominant undertaking and should not be compared with those failing to do this.²³⁶ An interesting consideration was rendered in the EU-case *PO/World Cup 1998*²³⁷ labeling (national) discrimination of consumers as a particularly aggressive form of discrimination under Article 102 not subject to a requirement of effect on the structure of competition. These principles have been applied in Danish cases. In *Song Networks*²³⁸ from 2004, the use of progressive increases was held to be abusive for its ability to discriminate between large and small customers and impose a competitively disadvantageous position on the latter in the form of higher costs. Without challenging the conclusion, the offered rationale might have missed a central element of *Portugal v. Commission*, reserving condemnation for discounts with a selective element, making it insufficient that some get better terms. Consequently, the translation into Danish practice has been somewhat troublesome.

5.4.1.1 The requirements follow the general conditions

Preferential treatments of customers are abusive subject to the general criteria listed above in section pkt. 5.2.1, requiring that a product or service be essential for market access downstream, representing a substantial part of the value of the final product and void of objective justifications. A number of Danish cases can further illustrate this.²³⁹ In *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*²⁴⁰, differences in the underlying costs for servicing rural areas v. cities could explain the offered differences in terms and prices while no such explanation was found in *CPH GO*.²⁴¹ Further, in *Klage over taksterne ved lastning af olie ved Fredericia Havn*,²⁴² no discrimination was identified void of competition between the different ships subject to the “discriminatory” treatments. In *Klage over prisdiskriminering*,²⁴³ it was held to be abusive when a discounts system (intentionally) was limited to larger customers precluding minors.

²³⁶ See recital 136-141.

²³⁷ Case IV/36.888 – *PO/World Cup 1998*, O.J. 2000L 55/5, recital 102 and 227.

²³⁸ *Song Networks’ klager vedr. Erhvervstelemarkederne*, Competition Council Meeting 28 April 2004, recital 226-228.

²³⁹ In contrast, the matter has attracted little interest in EU practice unless part of other forms of abuse as exclusionary discounts c.f. case C-95/04 - *British Airways* or national based discrimination c.f. case C-163/99 - *Portugal v. Commission*.

²⁴⁰ *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*, Letter dated 23. March 1999 to plaintiff.

²⁴¹ *Københavns Lufthavne A/S’ terms of use for CPH GO*, Competition Council Meeting 21 December 2011, recital 505-562.

²⁴² *Klage over taksterne ved lastning af olie ved Fredericia Havn*, Competition Council Meeting 26 March 2003.

²⁴³ *Klage over prisdiskriminering*, Competition Council Meeting 26 August 1998.

Only a short press release is available, but the case does indicate that under Danish practice, all must be secured access to a discount system. More explicit are *Song Networks*²⁴⁴ from 2004, condemning discounts favouring large customers, while this also appears to emerge from *Knud Wexøe A/S' vilkår for levering af kabelkanaler*.²⁴⁵ In this case, a somewhat selective policy for granting of a wholesale discount was determined to be discriminatory. No formal discussion was rendered following an adjustment of the discount policy, also allowing minor wholesalers access to the discount program. In *Tele Danmark Mobils standard storkundekontrakt*²⁴⁶, an *ober dictum* is offered, indicating that it could be abusive to apply a discount system with high turnover figures. This consideration was followed through in *LK A/S grossistaftaler*,²⁴⁷ where an advanced ordering discount was held to be discriminatory as it could lead to different prices for comparable customers and orders.²⁴⁸

The cited Danish cases indicate that the Danish enforcer perceives that all customers, void of an objective justification, must be offered equal access to a discount system.²⁴⁹ In particular would it be abusive if, c.f. *Song Networks* large customers are offered better terms than small customers. If this perception is solely based on the ambition of protecting small and medium sized undertakings, lacking the bargaining power of larger competitors, it might be misplaced in competition law.²⁵⁰ However, practice is not consistent. In *Klage over ændrede forhandler vilkår for Nilfisk støvsugere*,²⁵¹ it was held to be acceptable that a discount was conditioned upon the meeting of minimum turnover figures. More importantly is that the rendered conclusions not are comparable with the principles derived from the EU case *Portugal v. Commission*, reserving condemnation to discounts with a selective element, making it insufficient that some gets better

²⁴⁴ *Song Networks' klager vedr. Erhvervstelemarkedene*, Competition Council Meeting 28 April 2004, recital 226-228.

²⁴⁵ *Knud Wexøe A/S' vilkår for levering af kabelkanaler*, Competition Council Meeting 30 August 2000.

²⁴⁶ *Tele Danmark Mobils standard storkundekontrakt*, Competition Council Meeting 16 June 1999.

²⁴⁷ *LK A/S grossistaftaler*, Competition Council Meeting 20 December 2000, recital 111.

²⁴⁸ In the Danish case *Nissan Motor Danmark A/S indfører nye rabatbetingelser*, Competition Council Meeting 28 August 2002, it was accepted that the adoption of weekly orders could merit a discount.

²⁴⁹ See also *TV 2's priser og betingelser*, Competition Council Meeting 29 November 2000 recital 4 and *Håndværksrådet har trukket sin klage over PBS Multidatas gebyrstigninger tilbage*, Competition Council Meeting 24 September 2003.

²⁵⁰ C.f. Robert O'Domoghue & Jorge Padilla *The Law and Economics of Article 102 TFEU*, 2nd Edition Hart 2013, p. 249.

²⁵¹ *Klage over ændrede forhandler vilkår for Nilfisk støvsugere*, Competition Council Meeting 25 February 1998.

terms. *KMD' prisdifferentering overfor kommunal kunder*²⁵² from 2013, might have corrected this by refuting that it is per se discriminatory that larger customers get better terms than small and medium sized customers. Furthermore, improvements have been made through *CPH GO*²⁵³ from 2011, where the Danish Competition Council determined it to be discriminatory that a discount accounting for between 34 % to 43 % of the (profit) margin had been reserved for selected customers. This is a most important rationale, as it makes it clear that only discrimination which is able to twist competition downstream should be condemned as abusive. However, accepting this, the cited Danish cases predating *KMD' prisdifferentering overfor kommunal kunder* and *CPH GO* might no longer be valid.

5.4.2. Preferential treatment of own interest

In contrast to the uncertainty clouding the non-integrated undertakings interest in discriminating between customers, a level of consensus has emerged on the need to prevent favorable treatment of own affiliated undertakings.²⁵⁴ In particular, the implementation of a vertical integration should not be accepted as a loophole allowing circumvention of the discrimination prohibition.²⁵⁵ However, the basic requirement detailed above must still be met, requiring a product or service essential for downstream access and representing a (large) portion of the final products value. Furthermore, as detailed earlier, *incentive* and *ability* are not the same and the vertically integrated undertaking might not always find it interesting to discriminate.

In practice, different forms of discrimination in favour of affiliated undertakings have been condemned in EU cases such as *Deutsche Bahn*²⁵⁶ from 1997 and *Clearstream*²⁵⁷ from 2004. While neither of these relate to discounts, they nevertheless show how Article 102 (c) can be used against price policies which favour group - affiliated undertakings. The Danish case *Song Networks*²⁵⁸ from 2004,

²⁵² *KMD' prisdifferentering overfor kommunal kunder*, informal statement 3 April 2013.

²⁵³ *Københavns Lufthavne A/S' terms of use for CPH GO*, Competition Council Meeting 21 December 2011, recital 485.

²⁵⁴ C.f. EU cases as 33.941 - *HOV SVZ/MCN*, O.J. 1994L 104/34, recital 245–247 and case C-260/89 - *Elliniki Radiophonia*, ECR 1991, p. I-2925, recital 36-38.

²⁵⁵ See e.g. John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities*, Fordham Corporate Law Institute, 1994, p. 280 and Damien Geradin and Nicolas Petit, *Price Discrimination under EC Competition Law: The need for a case-by-case Approach*, GCLC Working Paper 07/05, p. 33. The latter suggest the use of Article 102 (b) as an alternative.

²⁵⁶ Case T-229/94 - *Deutsche Bahn AG*, ECR 1997, p. II-1689.

²⁵⁷ Case COMP/38.096 - *PO/Clearstream (Clearing and settlement)*.

²⁵⁸ *Song Networks' klager vedr. Erhvervstelemarkederne*, Competition Council Meeting 28 April 2004, recital 221.

involved discounts favoring larger customers, of which the largest “accidentally” happened to be a vertically integrated subsidiary.

5.5. National based discrimination

As noted earlier, a practice has emerged in EU cases condemning national based discrimination, including different forms of discounts reserved for national or local undertakings. This practice can be seen in cases such as *Corsica Ferries*,²⁵⁹ where the local association of harbor pilots had reserved the most favorable tariffs for ships under the Italian flag. This was held to be abusive and discriminatory by the Court of Justice. Other examples can be seen in EU cases such as *Brussels National Airport*²⁶⁰ and *Portuguese Airports*,²⁶¹ where tariffs for the use of airports had been designed with the purpose of securing better terms for domestic operators. Essentially the same issue was involved in the two Danish cases *forespørgsel om lovligheden af takstdifferentiering på færgepriser*,²⁶² and *fastlæggelse af færgetakster*²⁶³, where the offered tariffs for the use of ferries had favoured locals undertakings by awarding these a special discount. A case of reverse national discrimination can be seen in the Danish case *Aalborg Portlands cementpriser*²⁶⁴ Here it was held to be discriminatory when domestic customers were levied a higher price than non-domestic.

A particularly aggressive form of discrimination in EU practice is discrimination of end users c.f. *PO/World Cup 1998*.²⁶⁵ Here, French football fans were secured preferential access to a number of tickets not accessible to non-domestic fans. The Commission found this policy so heinous that it was not required to identify an anticompetitive effect. This is interesting, as Danish practice has not embraced this. In *Prisdiskrimination på Århus Sporvejes abonnementskort*,²⁶⁶ it was accepted that discounted transportation tickets could be reserved for local residents, as it neither thwarted competition nor created a welfare loss. Under Danish practice, only discrimination by undertakings which are able to twist competition would be abusive, in contrast to EU practice. While national based discrimination and preferential treatment of local undertakings often would hamper the sin-

²⁵⁹ Case C-18/93 - *Corsica Ferries Italia Srl*, ECR 1994, p. I-1783, see recital 45.

²⁶⁰ Case 95/364/EC - *Brussels National Airport* O.J. 1995L 216/8.

²⁶¹ Case IV/35.703 - *Portuguese Airports*, O.J. 1999L 69/31.

²⁶² *Forespørgsel om lovligheden af takstdifferentiering på færgepriser*, Competition Council Meeting 26 May 1999.

²⁶³ *Fastlæggelse af færgetakster*, Competition Council Meeting 16 December 1998.

²⁶⁴ *Aalborg Portlands cementpriser*, Competition Council Meeting 17 June 1998 and 28 October 1998.

²⁶⁵ Case IV/36.888 – *PO/World Cup 1998*, O.J. 2000L 55/5, see recital 102.

²⁶⁶ *Prisdiskrimination på Århus Sporvejes abonnementskort*, letter to Århus Sporveje dated 9 February 1999.

gle market, and the single market project, placing these under Article 102 (c) might be less obvious.²⁶⁷ Consequently, Danish practice might be right when reserving condemnation to situations where there is a clear thwarting of competition.

5.6. The somewhat unclear approach on discriminatory discounts

Despite the outlined principles indicating how discrimination could be appraised and held abusive, there are still a number of troublesome uncertainties making it unclear how to view discriminatory discounts.

- a) Firstly, it is not evident that price discrimination in the form of selective discounts should be held abusive. For non-dominant undertakings it is welfare maximizing to price differentiate between customers and markets, targeting the individual customers' willingness to pay. Case law opens a window for the dominant undertaking's ability to pursue the same price strategy,²⁶⁸ and economic theory takes a much more positive view on this. In particular, in sectors with large fixed costs and a need to recoup these, price discrimination could be an instrument for securing universal service in the absence of sector regulation and direct compensation models. Furthermore, in sectors prone to collusion and uniformed pricing, prohibiting price differentiation and (secret) discounts could entrench this. Regrettably, it is difficult to draw a clear red line through case law, which unifies it with the economic theory supposedly governing competition law.
- b) Secondly, cases decided under Article 102 (c) and Danish Competition Act paragraph 11 (3) no. 3, have in contrast to other provisions not embraced a requirement of an anti-competitive effect. This is regardless of the utilized wording of the provision actually citing such a requirement. In particular (older) Danish practice disregards this, condemning discounts favouring larger customers almost per se, while on the other hand, EU practice shows little understanding for national based discrimination favouring domestic customers. Both could therefore benefit from a re-thinking of practice requiring an anti-competitive effect.
- c) Thirdly, the concept of abusive discrimination has been developed beyond the wording of the provisions by also regulating exclusionary conduct and national based discrimination. Consequently, it is not only difficult to estab-

²⁶⁷ For further see Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, p. 493 and Damien Gerardin, *Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities*, GCLC Research papers on Article 82 EC, p. 132.

²⁶⁸ See e.g. case C-27/76 - *United Brand*, recital 228 and case T-229/94 - *Deutsche Bahn*, recital 91.

lish a coherent practice, but other forms of abuse, failing to meet the defined standards, might be pursued under Article 102 (c) and the Danish Competition Act paragraph 11 (3) no. 3. Predatory pricing, loyalty discounts, margin squeeze and refusals to supply are not only abuses in their own right, but also sharing an overlap with (pure) discrimination, making it attractive to pursue them as such if failing to meet the defined standards. Case law demonstrates several examples of this as detailed above.

- e) Fourthly, the theoretical foundation for condemning discrimination is somewhat unclear. Moreover, there are even indications of a non-alignment between Danish and EU practice, and an EU approach void of a clear link to the economic theory supposedly governing competition law. Consequently, it not only unclear what to condemn but also how to view discrimination; Either as a non-objective differential treatment or a form of exploitive practice.

In light of the many problems of establishing a clear coherent approach to discrimination, it would be much appreciated if the Commission would table it's guidance paper on discrimination as promised in 2005.²⁶⁹ Regrettably, there are no indications of any such interest.

²⁶⁹ C.f. MEMO/05/486 - Commission discussion paper on abuse of dominance - frequently asked questions.