

Germany

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1 Introduction

Discrimination within the meaning of unequal treatment is neither uncommon nor generally objectionable in free markets. It rather shows that the market is intact and contracts are the result of individual negotiations dependent on the parties' negotiation skills. However, under specific circumstances discrimination can constitute a real threat to competition so that competition law has to intervene. The developments in the digital sector open up new possibilities to discriminate, e.g. individual pricing methods governed by big data applications and/or artificial intelligence to absorb the individual consumer surplus. It is upon competition law practitioners and scholars to narrow down a line between functioning competition and anti-competitive discrimination. This article shall contribute to this difficult task.

The text aims at giving the reader an impression of how relevant discrimination is for EU and German national competition law. It further examines how discrimination is dealt with in both legal regimes and especially where the above-mentioned line between functioning competition and anti-competitive behaviour then being subject to sanctions by competition law is drawn as of today. As competition law relies to great extent on case-by-case analyses in which all facts and circumstances are to be taken into account, the authors will provide examples from case law or the cartel offices' decision practices when adequate.

In order to lay the groundwork for the legal analysis of discriminatory practices, the authors will first of all provide a short overview of the governing competition law. The focus will then shift to the question of which legal boundaries are set to discriminatory practices by competition law. Emphasis will thereby be laid on the abuse of a dominant market position in regard to primary-line and secondary-line discrimination. Nevertheless, the role of discrimination for anti-competitive agreements and in merger control cases will then be covered. As consumers may also be subject of discrimination, this topic will be dealt with afterwards. Finally, the authors will examine whether other rules in business law are of relevance in regard to

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discrimination and an outlook on the future development of German national competition law will be given.

2 Overview of the Governing Law

In the following, a brief overview of the competition law regime applicable in Germany is presented so as to aid the reader's understanding of the legal foundation for the analysis of discriminatory practices.

2.1.1 EU Competition Law and German national

Within the territory of the Federal Republic of Germany two competition laws are applicable. Firstly, there is the national competition law, which is codified in the Act against Restraints of Competition (hereinafter GWB).¹ Secondly, EU competition law as codified in Art. 101, Art. 102 TFEU and Regulation 139/2004 on the control of concentrations between undertakings is, in general, of relevance. Its application however is limited to cases that might have an impact on the European Single Market.² These cases are subject to both national and EU law in a parallel manner.³ In the event that the legal regimes yield different results for the treatment of a particular case, EU law prevails if it entails stricter regulations than national law.⁴ If national competition law produces stricter results, the conflict is solved by Sec. 22 GWB and Art. 3 of EU- Regulation 1/2003. Sec. 22 (2) GWB codifies that in cases of *restriction of competition*, national law may not prohibit a behaviour permissible under EU competition law. However, Sec. 22 (3) GWB states for cases of *abuse of dominant market power*, that stricter provisions imposed by the GWB may still be applied. In *merger control cases* national competition law may not be applied, according to Sec. 22 (4) GWB.

2.1.2 Abuse of Dominant Market Position

Sec. 19 (1) GWB and Art. 102 (1) TFEU prohibit the abuse of dominant market position by one or more undertakings. As distinct from Sec. 19 GWB, Art. 102 (1) TFEU is only applicable if the undertaking has dominant market power on the European Single Market or a substantial

¹ An English translation issued by the Federal Cartel Office can be found here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6. Accessed June 30, 2019.

² H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 55.

³ H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 58.

⁴ H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 59.

part of it. Although the provisions of the two legal systems are often inconsistent to each other, the results regularly are the same due to their corresponding underlying value judgements.⁵

Within the scope of Art. 102 (1) TFEU, *dominant position* is defined as an undertaking's "position of economic strength [...] which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".⁶ With respect to national law, Sec. 18 GWB defines the criterion of dominant market power. In order to strengthen legal certainty, the legislator introduced rebuttable presumptions⁷ of cases constituting dominant market power in Sec. 18 (4) – (6) GWB. According to Sec. 18 (1) GWB, an undertaking has dominant market power as a supplier or purchaser of a certain type of goods or services on the relevant market when it either has no competitors or is not exposed to any substantial competition or has a paramount market position in relation to its competitors. Sec. 18 (3) GWB then contains a non-exclusive⁸ list of factors that have to be taken into account when assessing the market position of an undertaking.

According to the case law of the Court of Justice of the European Union, an *abuse* of market power requires for the undertaking's behaviour to "influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition [...] on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".⁹ That definition can be adopted for the German national law (Sec. 19 (1) GWB).¹⁰ The question whether these criteria are fulfilled has to be answered on a case-by-case basis, taking into account the opposing interests of the affected undertakings and the legislator's

⁵ J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 19 GWB para. 33; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 para. 4. See as an example: Federal Court of Justice, Decision of June 29, 2010, Case No. KZR 31/08 – *GSM-Wandler*, MMR 2010, pp. 786–790; Federal Court of Justice, Decision of March 4, 2008, Case No. KVR 21/07 – *Soda-Club II*, WM 2008, pp. 893–900.

⁶ CJEU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977 1875.

⁷ A. Bardong. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 18 GWB paras. 212 f.

⁸ A. Fuchs and W. Möschel. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, §. 18 GWB para. 124.

⁹ CJEU, case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECR 1979, 461.

¹⁰ A. Fuchs. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 82a; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 13; M. Wolf. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 29.

intention to guarantee free competition and free market access.¹¹ In European law efficiency advantages, for which the burden of proof rests with the dominant market player,¹² have to be considered.¹³ The undertaking therefore has to demonstrate that (a) its behaviour is indispensable to achieve the efficiency advantage, (b) likely negative effects on competition and consumer welfare are compensated by the efficiency advantage and (c) its conduct does not eliminate effective competition (analogous application of Art. 101 (3) TFEU).¹⁴ This so-called *efficiency defence* is not accepted for violations of Sec. 19 (1) GWB.¹⁵ However, efficiency advantages can become one factor of the afore-mentioned case-by-case analysis.¹⁶

Both legislators try to mitigate legal uncertainty by providing lists of non-exhaustive examples of abuse of dominant market power; see Art. 102 (2) TFEU and Sec. 19 (2) GWB. Among them, the example of Art. 102 (2) c) TFEU is of particular significance for cases dealing with discriminatory behaviour. According to this provision, an abuse may consist in “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”. In national law Sec. 19 (2) No. 1 2nd alternative GWB states that an abuse of dominant market power particularly exists “*if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services [...] directly or indirectly treats another undertaking differently from other undertakings without any objective justification*”. Sec. 19 (2) No. 3 GWB extends the list of examples for cases in which the dominant market player “*demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation*” and thereby addresses a specific case of discrimination.

According to Sec. 20 (1) GWB, the rule of Sec. 19 (2) No. 1 GWB is also applicable for undertakings with relative market power (“*if small or medium-sized enterprises as suppliers or purchasers [...] depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist*”). The assessment of the size of an undertaking is

¹¹ J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB paras. 15 f.; M. Wolf. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 34.

¹² F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 2*, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 144.

¹³ CJEU, case C-95/04 P, *British Airways v European Commission*, ECR 2007 I 2331; GC, case T-288/97, *Irish Sugar v Commission of the European Communities*, ECR 1999 II 2969.

¹⁴ European Commission, *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ 2009, C 45, p. 2, para. 30.

¹⁵ J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 19 para. 41; G. Wiedemann. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 23 para. 1.

¹⁶ J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 19 para. 41.

generally performed by horizontal comparison (size compared to other competitors).¹⁷ Sec. 20 (1) GWB covers cases in which small or medium-sized enterprises are dependent on manufacturers of brand products because the market has the legitimate expectation that these products are part of a complete range of products.¹⁸ European law does not provide for a similar rule.

2.1.3 Merger Control

Sec. 35 et seq. GWB govern national merger control. In European law, Merger Regulation 139/2004 is the prevailing source of law. Although there are differences regarding the regimes' scope of application,¹⁹ both aim at preventing anti-competitive effects potentially caused by mergers. Both prohibit concentrations that would significantly impede effective competition on the relevant market;²⁰ see Sec. 36 (1) GWB and Art. 2 (3) EC Merger Regulation. In particular, the creation or strengthening of a dominant market position is prohibited. However, German national law provides exceptions to the prohibition laid out in Sec. 36 (1) s. 2 GWB (i.a. improvements that outweigh the impediment; markets with an annual turnover of less than EUR 15,000,000).

2.1.4 Anti-competitive Agreements

Sec. 1 GWB and Art. 101 (1) TFEU prohibit anti-competitive agreements. Both provisions state that agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited. The law does not, however, define what restriction of competition is.

¹⁷ Federal Court of Justice, Decision of September 24, 2002, Case No. KVR 8/01 – *Konditionen Anpassung*, NJW 2003, pp. 205–208; J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 20 GWB para. 76.

¹⁸ Federal Court of Justice, Decision of May 9, 2000, Case No. KZR 28/98 – *Designer Polstermöbel*, GRUR 2000, pp. 1108–1111; M. Lorenz. In: Berg and Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 3rd ed, Luchterhand 2018, § 20 GWB para. 13 ff.

¹⁹ According to Sec. 35 (1) GWB, the merger control provisions are applicable if the merging undertakings had a combined worldwide turnover of more than EUR 500,000,000 in the last business year or if the domestic turnover of one concerned undertaking was more than EUR 25,000,000 and that of another concerned undertaking was more than EUR 5,000,000.

According to Art. 1 (1), (2) Regulation 139/2004, a merger falls under the Regulation if the combined aggregate worldwide turnover of all concerned undertakings is more than EUR 5,000,000,000 and the aggregate Community-wide turnover of one of them is more than EUR 250,000,000 unless each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover within one and the same Member State. Art. 1 (3) EC Merger Regulation extends the scope of application. National law is not applicable in these cases according to Sec. 35 (3) GWB.

²⁰ For EU law the common market or a substantial part of it has to be affected.

The objective of the national law aims is to protect the economic freedom of action of all market players.²¹ As a consequence, the assessment is based on the question if and to what extent these freedoms are limited. National law further requires that the restriction is appreciable,²² meaning that it has to be capable of having effects on the relevant market.²³ Whether these criteria are met has to be determined with reference to case law. However, there are exceptions to this rule that are also established by case law.²⁴

On the EU level there neither is a consistent definition of competition nor a clear line drawn by case law. Thus it is harder to determine a restriction of competition within the meaning of Art. 101 (1) TFEU.²⁵ The existing case law permits the conclusion that the commercial freedom of action of the involved market players has to be limited.²⁶ As in national law, such a restriction has to be appreciable.²⁷ In several judgments the CJEU furthermore held that an agreement's impact on third parties²⁸ and on the European Single Market²⁹ also are important factors. Again, case law plays an important role.³⁰

Nonetheless, both legal regimes provide for exceptions to the general prohibition of agreements, see Sec. 2 GWB for national and Art. 101 (3) TFEU for EU law. National and EU law allow agreements between undertakings, decisions by associations of undertakings or concerted practices provided that they contribute to the increase of the production or distribution of goods or the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefits and as long as no restrictions are imposed that are not indispensable to the attainment of these objectives or if it affords such undertakings the possibility of eliminating

²¹ W. Berg and M. Mudrony. In: Berg and Mäscher (eds), *Deutsches und Europäisches Kartellrecht*, 3rd ed, Luchterhand 2018, § 1 GWB para. 53; K. Krauß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 1 GWB para. 124.

²² Federal Court of Justice, Decision of October 14, 1976, Case No. KZR 36/75 – *Fertigbeton I*, NJW 1977, pp. 804–805; W. Berg and M. Mudrony. In: Berg and Mäscher (eds), *Deutsches und Europäisches Kartellrecht*, 3rd ed, Luchterhand 2018, Art. 101 AEUV para. 97 ff.; K. Krauß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 1 GWB para. 184.

²³ Federal Court of Justice, Decision of March 9, 1999, Case No. KVR 20/97 – *Lottospielgemeinschaft*, GRUR 199, pp. 771–775.

²⁴ K. Krauß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 1 GWB para. 144 ff.

²⁵ V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 1*, 5th ed, C.H. Beck 2016, Art. 101 AEUV para. 107.

²⁶ CJEU, case C-306/96, *Javico v Yves Saint Laurent Parfums*, ECR 1998 I 1983: “an agreement intended to deprive a reseller of his commercial freedom”; GC, case T-368/00, *General Motors Nederland and Opel Nederland v Commission*, ECR 2003 II 4491; V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 1*, 5th ed, C.H. Beck 2016, Art. 101 AEUV para. 109.

²⁷ CJEU, case 22/71, *Béguelin Import/G.L. Import Export*, ECR 1971 949; V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 1*, 5th ed, C.H. Beck 2016, Art. 101 AEUV para. 116.

²⁸ E.g. CJEU, case C-279/06, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, ECR 2008 I 6681.

²⁹ E.g. CJEU, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, ECR 1977 1875.

³⁰ C. Grave and J. Nyberg. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 1 AEUV para. 257.

competition in respect of a substantial part of the products concerned. The EU block exemption regulations are applicable in both legal regimes, specifying the blanket clause of Sec. 2 (1) GWB³¹ and Art. 101 (1) TFEU.

3 Discrimination in German and European Competition Law

Based on this brief outline of German and European competition law, the question of how these legal regimes deal with discriminatory practices shall now be explored in detail.

3.1 Abuse of Dominant Market Position

Discrimination cannot be deemed as anti-competitive per se. In a functioning free market, discrimination rather demonstrates the free play of market forces that competition law intends to guarantee. Consequently, both national and European law do not contain general prohibitions of discrimination. Discrimination only becomes a matter of concern when it is conducted by dominant market players, since the actions are then likely to have a significant effect on the markets and its players.

3.1.1 Discrimination against Undertakings

Discriminations against other undertakings shall be the first matter of discussion before shifting focus on discrimination against consumers. Secondary- and primary-line discrimination will be examined separately.

3.1.1.1 Secondary-Line Discrimination

Secondary-line discrimination aims at treating differently trading partners and can thus influence the up- or downstream market.

As mentioned above (see 2.1.2), Art. 102 (2) lit. c) TFEU clearly addresses this problem. Sec. 19 (2) No. 1 2nd alternative GWB constitutes the German national law's equivalent. In the following, the provisions' similarities and differences in handling discriminatory practices will be outlined.

For instance, national and European law differ with regard to the persons protected by the relevant provisions. While the national law speaks of "another undertaking", the European law's wording refers to "trading parties" seems broader. Nevertheless, it is undisputed that preserving competition on the up- or downstream market is Art. 102 (2) lit. c) TFEU's only

³¹ J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), Kartellrecht, 3rd ed, C.H. Beck 2016, § 2 GWB para. 28.

goal.³² The provision aims at hindering the dominant market player from arbitrarily influencing competition on these markets. Accordingly, it covers secondary line discrimination.³³ The German national law shares this goal but is not limited to it.³⁴ Secondary line discrimination however constitutes the most relevant field of application.³⁵ For cases of secondary line discrimination one can therefore conclude that the compared actions (alleged discrimination and “normal” treatment) both have to affect players that compete on the same market.

In both legal regimes the actual existence of a trading relationship between the dominant market player and the action’s addressee is not necessarily required as long as the latter could potentially become a trading partner.³⁶ Thus, the refusal to deal can also be covered by the provisions.³⁷ Art. 102 (2) lit. c) TFEU, as opposed to Sec. 19 (2) No. 1 2nd alternative GWB,³⁸ does not cover indirect discrimination, e.g. actions that aim at making the trading partner discriminate against demanders of their products or services.³⁹ These actions may, however, fall under the blanket clause of Art. 102 (1) TFEU.

A matter of discussion is whether undertakings held by the same corporation are “trading parties” respectively “another undertaking” within the meaning of the provision. For European law, the CJEU held that this was the case with public corporations, thus denying an intra group exemption.⁴⁰ However, it is doubtful that this also applies to private corporations.⁴¹ In German

³² Cf. CJEU, case C-95/04, *British Airways v. Commission*, ECR 2007 I 2331 para. 143; A. Huttenlauch and T. Lübbig. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 203.

³³ T. Eilmansberger and F. Bien. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 1*, 2nd ed, C.H. Beck 2015, Art. 102 AEUV para. 273.

³⁴ U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 39.; K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 106.

³⁵ K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 106.

³⁶ CJEU, case C-40/73, *Suiker Unie v. Commission*, ECR 1975 1663, para. 522 ff.; EU Commission, Decision of June 2, 1971, Case No. IV/26.760 – *GEMA*; F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 2*, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 213. For German national law, the wording leads to this conclusion („another undertaking“ instead of „trading parties“).

³⁷ EU Commission, Decision of October 29, 1981, Case No. IV/29.839 – *GVL*, para. 51.

³⁸ U. Loewenheim In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 42.

³⁹ W. Weiß. In: Callies and Ruffert (eds), *EUV/AEUV*, 5th ed, C.H. Beck 2016, Art. 102 AEUV para. 61.

⁴⁰ CJEU, case C-242/95, *GT-Link v. De Danske Statsbaner*, ECR 1997 I 4449.

⁴¹ F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 2*, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 212.

national law an intra group exemption is granted,⁴² as Sec. 19 (2) No. 1 2nd alternative GWB's telos would require that the undertaking has actual leeway in decision-making.⁴³

3.1.1.1.1 Unequal Treatment of Comparable Cases

In order to examine whether an action meets the criteria of Art. 102 (2) lit. c) TFEU or Sec. 19 (2) No. 1 2nd alternative GWB, the basis of comparison has to be defined first. Both provisions' wordings allow the conclusion that cases have to be comparable rather than identical.⁴⁴ One has to acknowledge the provisions' different (starting) points of reference for the comparability of cases: The German original wording of Sec. 19 (2) No. 1 2nd alternative GWB refers to "equivalent undertakings"⁴⁵ rather than focussing on the comparability of transactions as European law does. That is why the German negative criterion "*without any objective justification*" to some extent constitutes the European law's equivalent to "equivalent transactions".

In European law the cases have to be compared on the basis of the contractual obligations that are offered to the potentially discriminated party and its competitors. Transactions have to be equivalent from the trading parties' point of view.⁴⁶ This is the case when they occur on the same market and the dominant market player's obligations in each transaction are comparable to the extent that they are considered exchangeable in order to meet the demander's needs.⁴⁷ If the quantity of goods differs, the price has to be converted to a price by unit.⁴⁸ In accordance with the concept of a European Single Market, cross-border traffic or different nationalities of the trading parties cannot be a decisive factor. As the European Commission has pointed out correctly, the comparability of cases can only be evaluated on a case-by-case basis.⁴⁹

In national law, the criterion "equivalent undertakings" only serves as a coarse filter. According

⁴² Federal Court of Justice, Decision of October 24, 2011, Case No. KZR 7/10 – *Grossistenkündigung*, NJW 2012, pp. 773–777; J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB para. 83; U. Loewenheim In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 44.

⁴³ J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB para. 83.

⁴⁴ W. Berg. In: Berg and Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 3rd ed, Luchterhand 2018, Art. 102 AEUV para. 69; cf. R. Bechthold and W. Bosch. In: Bechthold and Bosch (eds), *GWB*, 9th ed, C.H. Beck 2018, § 19 GWB para. 41.

⁴⁵ Unfortunately, the official English translation of the GWB does not cover that.

⁴⁶ CJEU, case C-82/01 P, *Aéroports de Paris v. Commission*, ECR 2002 I 9297, para. 115. G.-K. de Bronett. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 22 para. 91.

⁴⁷ F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 2*, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 215.

⁴⁸ Cf. GC, case T-301/04 – *Clearstream v. Commission*, ECR 2009 II 3155.

⁴⁹ EU Commission, Decision of June 2, 1971, Case No. IV/26.760 – *GEMA*.

to the Federal Court of Justice, the criterion is not supposed to establish a high requirement.⁵⁰ In a consistent line of case law, the court has held that the compared undertakings are equivalent within the meaning of Sec. 19 (2) No. 1 2nd alternative GWB if they – from an objective point of view – basically fulfil the same task in relation to the opposite market side which the discriminating player is a part of.⁵¹ It is not necessary that the compared undertakings are subject to the same conditions of competition,⁵² that they are similarly organised⁵³ or of similar size.⁵⁴ It is neither necessary, yet sufficient, that the undertakings are (potential) competitors.⁵⁵ To give the reader an impression of how the courts applied the afore-mentioned general principles, some examples shall be provided. The court found producers and importers of pharmaceuticals⁵⁶ to be equivalent as well as brick and mortar stores to internet sellers⁵⁷. As opposed to this, it ruled that credit intermediaries are not equivalent to banks with respect to inquiries to credit agencies⁵⁸ and that wholesalers and retailers may be treated differently (e.g. with regards to rebates).⁵⁹ Above and beyond, comparability also plays a role for the negative criterion “*without any objective justification*” as differences of the compared cases may justify discriminatory actions. Following the law’s wording, this aspect will be dealt with in the following paragraph (See 3.1.1.1.2).

The comparable cases then have to be subject to unequal treatment. This can arise from offering one undertaking worse conditions than the majority, but also from offering benefits to one

⁵⁰ Federal Court of Justice, Decision of January 31, 2012, Case No. KZR 65/10 – *Werbeanzeigen*, NJW 2012, pp. 2110–2113.

⁵¹ Federal Court of Justice, Decision of January 31, 2012, Case No. KZR 65/10 – *Werbeanzeigen*, NJW 2012, pp. 2110–2113; Federal Court of Justice, Decision of November 4, 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, NJW-RR 2004, pp. 689–690.

⁵² Federal Court of Justice, Decision of October 23, 1979, Case No. KZR 19/78 – *Fersehgeräte II*, GRUR 1980, pp. 180–183.

⁵³ Federal Court of Justice, Decision of October 10, 1978, Case No. KZR 10/77 – *Zeitschriften-Grossisten*, GRUR 1979, pp. 177–180.

⁵⁴ Federal Court of Justice, Decision of July 12, 2013, Case No. KVR 11/12 – *Rabattstaffel*, WuW/E DE-R, pp. 3967–3971.

⁵⁵ K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 2, 5th ed, C.H. Beck 2014, § 19 GWB para. 109. This is in line with the finding that Sec. 19 (2) No. 1 GWB is not limited to second line discrimination, see 3.1.1.1 above.

⁵⁶ Federal Court of Justice, Decision of February 21, 1995, Case No. KVR 10/94 – *Importarzneimittel*, PharmR 1995, pp. 330–338.

⁵⁷ Federal Court of Justice, Decision of November 4, 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352.

⁵⁸ Federal Court of Justice, Decision of November 6, 1984, Case No. KZR 20/83 – *Kreditvermittlung*, GRUR 1985, pp. 321–323.

⁵⁹ Federal Court of Justice, Decision of November 4, 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, NJW-RR 2004, pp. 689–690; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 43.

undertaking others will not enjoy, thereby discriminating the latter group.⁶⁰

In European law the dominant market player has to apply dissimilar conditions (to equivalent transactions). Whether that criterion is met is examined by comparing the value of the opposing parties' counter-performance.⁶¹ The EU Commission for example decided that, despite the fact that the same price was agreed upon, dissimilar conditions were given because the traded good was subject to state subsidies only in one of the compared cases.⁶² The provision also covers loyalty rebates.⁶³ It should be noted that minor differences do not suffice to deem the action discriminatory within the meaning of Art. 102 (2) lit. c) TFEU⁶⁴ as the provision aims at guaranteeing the free flow of market powers on the up- or downstream market that is not seriously affected by minor differences.

As to Sec. 19 (2) No. 1 2nd alternative GWB unequal treatment is determined based on a formal understanding of equality⁶⁵ meaning that one has to ask whether from an objective point of view the dominant player's performance is equal or equivalent taking into account the transactions' context, e.g. the same amount of products for the same price. As opposed to this, there is no equal treatment if the terms and conditions vary even if they can be considered equal from an economic standpoint (this is acknowledged when examining whether there is objective justification for the unequal treatment). The unequal treatment has to be carried out in regard to the same goods or services the allegedly discriminating player offers. It is therefore decisive whether its goods or services are identical from a technical-physical view instead of laying the focus on the substitutability from the demanders' point of view.⁶⁶ Minor modifications are however irrelevant.⁶⁷ Thus, unequal treatment is given if the same product is only offered as a brand-product to one party and only as a no-name product to another party.⁶⁸ Unequal treatment is also given if more units are offered for the same price (e.g. through rebates in kind).

⁶⁰ Federal Court of Justice, Decision of January 30, 1970, Case No. KZR 3/69 – *Tonbandgeräte-Importeur*, GRUR 1970, pp. 200–202; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 41.

⁶¹ G.-K. de Bronett. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 22 para. 92.

⁶² EU Commission, Decision of July 18, 1988, Case No. IV730.178 – *Napier Brown - British Sugar*, para. 73.

⁶³ Cf. G.-K. de Bronett. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 22 para. 95.

⁶⁴ G.-K. de Bronett. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 22 para. 92 citing GC, case T-83/91, ECR 1994 II 755, para. 163 ff.

⁶⁵ U. Loewenheim In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 40; K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 118.

⁶⁶ K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 119.

⁶⁷ Cf. J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB para. 84.

⁶⁸ Example taken from K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 119.

A further point worth of discussion is whether the provisions also cover cases of equal treatment of unequal cases (*argumentum e contrario*). For the national law the German Federal Court decided that unequal undertakings may be handled equally.⁶⁹ Under Art. 102 (2) lit. c) TFEU it is widely accepted that the provision also covers cases in which the discriminating undertaking does not acknowledge that one trading party's obligation is of more worth and still compensates the trading parties equally.⁷⁰ On first view, one would suggest that this marks a gap between the two jurisdictions. Yet, this difference can be traced back to the already mentioned different wording of the provisions: Whereas the German law refers to "equivalent undertakings"⁷¹, the European law refers to "equivalent transactions".

A real gap between both legal regimes can be found when it comes to the effects of the discriminatory action. Although Art. 102 (2) lit. c) TFEU states that the discriminated party (or parties) has to be placed at a competitive disadvantage, the CJEU ruled that proof of actual effects on the discriminated party's market position is not necessary as long as they potentially exist.⁷² It should however be noted that the CJEU's line of judgment establishing this rule is criticised as it partly contradicts the clear wording of Art. 102 (2) lit. c) TFEU. As opposed to this, Sec. 19 (2) No. 1 2nd alternative GWB's wording remains silent on the effects the action might cause. Nevertheless, the Federal Court of Justice postulates that actual effects occur.⁷³ Again, some legal scholars criticise this opinion arguing that it is often impossible to determine the actual effects of an economic action.⁷⁴

3.1.1.1.2 Justification

In both legal regimes discriminatory actions can be justified, although the European law does not explicitly state so like it does in other provisions (see Art. 101 (3) TFEU). In European law

⁶⁹ Federal Court of Justice, Decision of September 27, 1962, Case No. KZR 6/61 – *Treuhandbüro*, NJW 1963, pp. 293–295; K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 2, 5th ed, C.H. Beck 2014, § 19 GWB para. 117.

⁷⁰ Just see: F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar* Band 2, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 211; T. Eilmansberger and F. Bien. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht* Band 1, 2nd ed, C.H. Beck 2015, Art. 102 AEUV para. 277.

⁷¹ Unfortunately, the official English translation of the GWB does not show that.

⁷² CJEU, case C-95/04 P, *British Airways v. Commission*, ECR 2007 I 2331, para. 145: „*In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually.*“

⁷³ Federal Court of Justice, Decision of October 24, 2011, Case No. KZR 7/10 – *Grossistenkündigung*, NJW 2012, pp. 773–777.

⁷⁴ R. Bechthold and W. Bosch. In: Bechthold and Bosch (eds), *GWB*, 9th ed, C.H. Beck 2018, § 19 GWB para. 41; A. Bach, *Gescheiterte Selbstregulierung im Pressegrasso*, NJW 2012, pp. 728–732.

a clear line for (objective) justification has not been drawn yet.⁷⁵ At least, three general categories have crystallised out.

Firstly, *legitimate business interests* can serve as a ground for justification. This defence may apply where the discriminating market player can show that costs for production, transportation, marketing or taxes vary.⁷⁶ These objective differences can however only serve as justification if they totally explain the difference in action.⁷⁷ A sub-form of this is the so-called “meeting competition defence”⁷⁸ that covers cases in which the dominant market player selectively lowers prices to meet competitors.⁷⁹ Secondly, justification can arise from *other objective grounds for discrimination*, e.g. legal differences in the affected member states.⁸⁰ That justification is quite vague and a clear line between the first and the second group cannot be drawn.⁸¹ Thirdly, *efficiencies* can justify discrimination according to the European courts and the EU Commission. In its decision in *Post Danmark* the CJEU held:⁸² “*In that last regard [referring to advantages in terms of efficiency which also benefit consumers], it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition*”. Against the backdrop of this unclear legal situation, clear guidelines should be issued by the EU Commission to strengthen legal certainty for practitioners.

Compared to that the negative criterion “*without any justification*” in Sec. 19 (2) No. 1 2nd alternative GWB is of higher relevance as it often marks the decisive point in an action’s examination. The criterion opens the floodgates to consider and weigh the interests of the affected parties and competition law’s goal to guarantee the free flow of market powers as well

⁷⁵ A. Huttenlauch and T. Lübbig. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 294.

⁷⁶ EU Commission, Decision of October 21, 1997, Case No. 97/745/EC – *tariffs for piloting in the Port of Genoa*, para. 14 ff.; W. Deselaers. In: Grabitz, Hilf and Nettesheim (eds), *Das Recht der Europäischen Union Band 1*, C.H. Beck 2019, Art. 102 AEUV para. 430 f.

⁷⁷ GC, case T-229/94, *Deutsche Bahn v. Commission*, ECR 1997 II 1689, para. 90.

⁷⁸ For a detailed examination of this defence see C. Simpson, *Dominant firms and selective discounting in the EU: When is „meeting competition“ a defence?*, *European Competition Journal* 2016, Issue 1, pp. 1–27.

⁷⁹ Cf. CJEU, case C-62/86, *AKZO Chemie BV v. Commission*, ECR 1991 I 3359, para. 156.

⁸⁰ Cf. CJEU, case C-95/04 P, *British Airways v European Commission*, ECR 2007 I 2331, para. 69: *It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted.*”

⁸¹ A. Huttenlauch and T. Lübbig. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 296.

⁸² CJEU, case C-209/10, *Post Danmark v. Konkurrenserådet*, para. 41 f.

as the market players' freedom on a case-by-case basis.⁸³

Obviously, the interests of the parties that are directly affected by the dominant market player's actions have to be taken into account therefore. On the discriminated party's side the interest in free market access and the interest in equally competing with others on the up- or downstream market are of great relevance.⁸⁴ Furthermore, interests of third parties being affected by the action⁸⁵ such as purchasers of the goods offered by the discriminated party can be observed. As a further ground rule, it has to be acknowledged on the discriminating party's side that even a dominant market player is in principle allowed to make decisions egoistically and at its own discretion.⁸⁶ An undertaking cannot be forced to act uneconomically despite of its market position. But even if the action is backed by legitimate interests of the discriminating party, it has to be proportionate meaning that there are no means to reach the undertaking's goal while less negatively affecting the impacted party.⁸⁷ Of course the extent of affection plays an important role in the consideration as well (e.g. an obligation to contract or a refusal to deal are very intense). Finally, the courts also acknowledge value judgments enshrined in other legal regimes (e.g. the Act against Unfair Competition (UWG)⁸⁸) including EU law.⁸⁹

This standard of course makes the provision difficult to handle in practice on the one hand, but provides for flexibility on the other. Moreover, practitioners can rely on case groups developed by the courts. As it would go beyond the scope of this article to present all these cases in detail, only some examples shall be presented. Differences in pricing can for example be justified in the case of *functional discounts* on condition that the discounts are reasonable in regard to the discount amount and the conditions for them to be granted.⁹⁰ Such discounts reward demanders for having a function that goes beyond the core of the contract such as warehousing. *Quantity discounts* or *cash discounts* neither violate competition law as they are covered by legitimate

⁸³ Consistent line of case law of the Federal Court of Justice. Just see Federal Court of Justice, Decision of September 27, 1962, Case No. KZR 6/61 – *Treuhandbüro*, NJW 1963, pp. 293–295; Federal Court of Justice, Decision of July 13, 2004, Case No. KZR 40/02 – *Standard-Spundfass*, GRUR 2004, pp. 966–970.

⁸⁴ K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 2, 5th ed, C.H. Beck 2014, § 19 GWB para. 127.

⁸⁵ Cf. Federal Court of Justice, Decision of September 22, 1981, Case No. KVR 8/80 – *Original-VW-Ersatzteile II*, NJW 1982, pp. 46–51; K. Markert. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 2, 5th ed, C.H. Beck 2014, § 19 GWB para. 125.

⁸⁶ Federal Court of Justice, Decision of January 21, 2012, Case No. KZR 65/10 – *Werbeanzeigen*, NJW 2012, pp. 2110–2112.

⁸⁷ Federal Court of Justice, Decision of March 22, 1994, Case No. KZR 9/93 – *Orthopädisches Schuhwerk*, WRP 1994, pp. 549–552.

⁸⁸ J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar* Band 1, 13th ed, Luchterhand 2018, § 19 GWB para. 313.

⁸⁹ J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar* Band 1, 13th ed, Luchterhand 2018, § 19 GWB para. 327 ff.

⁹⁰ Federal Court of Justice, Decision of February 24, 1976, Case No. KVR 3/75 – *Bedienungsgroßhändler*, GRUR 1976, pp. 711–715.

economic interests of the dominant market player. However, the discount conditions have to be set in a non-discriminate way. Proprietors of *standard essential patents* (SEPs) or patents that have become a de facto standard violate Sec. 19 (2) No. 1 2nd alternative GWB if they deny a reasonable request to issue a license.⁹¹ The boundaries set by competition law to terms and conditions for *selective distribution systems* have already been dealt with in a former LIDC publication.⁹²

The efficiency defence is not accepted in national law.⁹³

3.1.1.1.3 Significance in Practice

It is difficult to grasp how many cases have lately been decided by courts, the Federal Cartel Office or the EU Commission on the basis of the afore-mentioned provisions. The EU Commission however gives a hint by pointing out that investigating violations of Art. 102 (2) lit. c) TFEU is not of top priority.⁹⁴ It should be noted that the provision at least partly overlaps with other examples of abuse of dominant market power that are laid down in Art. 102 (2) TFEU (above all Art. 102 (2) lit. a) TFEU) which diminishes the provision's practical significance. The same is true for German national law where discrimination in the sense of Sec. 19 (2) No. 1 2nd alternative GWB is often also covered by other provisions.

Both provisions are above all applied on cases of discrimination on the basis of prices and terms and conditions, especially cases of refusals to deal or terminations of business relationships.

3.1.1.1.4 Relevance of other Competition Law Provisions

In national law Sec. 19 (2) No. 3 GWB can become relevant as well in cases of secondary-line discrimination. According to this provision an abuse can in particular exist if a dominant undertaking “*demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation*”. As distinct from Sec. 19 (2) No. 1 2nd alternative GWB, it derives from the wording that the provision is only applicable in cases in which the dominant undertaking acts as a supplier. The standard of comparison also follows from the

⁹¹ Cf. Federal Court of Justice, Decision of May 6, 2009, Case No. KZR 39/06 – *Orange Book Standard*, GRUR 2009, pp. 694–698; H.-D. Lübbert and M. Schöner. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 23 para. 171.

⁹² T. Hoeren in: Kilpatrick, Kobel, Kellezi (eds), *Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions*, Springer 2018, pp. 157–185 also covering European competition law.

⁹³ J. Busche. In: Busche and Röhlting (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB para. 87.

⁹⁴ EU Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Office Journal of the European Union of February 24, 2009.

wording (“similar purchasers in comparable markets”). Again, the criterion is not supposed to establish a high requirement.⁹⁵ Comparable markets are determined by applying the “comparable market concept”. This test aims at extracting markets that are similar and on which effective competition takes place in order to determine the normal price. For the examination whether the purchasers are similar one has to compare their tasks and economic function in relation to the dominant undertaking.⁹⁶ Based on Sec. 19 (2) No. 3 GWB the German Federal Court of Justice for example found an abuse of dominant market power by Lufthansa.⁹⁷ It therefore compared the prices on the dominated market (flight route Berlin – Frankfurt) to the ones demanded on a similar market on which Lufthansa had to face serious competition (flight route Berlin – Munich) and found that prices on the first market were significantly higher than on the latter.

Justification is governed by the same standard as with Sec. 19 (2) No. 1 2nd alternative GWB (see 3.1.1.1.2 above).⁹⁸ The fact that even higher prices as charged on the comparable market do not cover the original costs justifies the behaviour.⁹⁹ The same is true if low prices are used for market launches.

As distinct from Sec. 19 (2) No. 1 2nd alternative GWB the compared demanders may not engage on the same market as Sec. 19 (2) No. 3 GWB requires a “comparable market”.

3.1.1.2 Primary-Line Discrimination

As opposed to secondary-line discrimination, primary-line discrimination aims at placing the discriminating market player’s competitor at a competitive disadvantage. This usually happens by diminishing the competitor’s sales opportunities by the means of selective pricing. Discrimination is likely to occur on the market on which the undertakings compete as the dominant undertaking may not be willing to offer attractive prices to the whole market. Besides there is the possibility of cross-subsidisation that can lead to discrimination of participants on other markets compared to those who benefit from the subsidisation.

⁹⁵ Federal Court of Justice, Decision of December 7, 2010, Case No. KZR 5/10 – *Entega II*, NJW-RR 2011, pp. 774–779.

⁹⁶ A. Fuchs. In: Immenga and Mestmäcker (eds), Wettbewerbsrecht Band 2, 5th ed, C.H. Beck 2014, § 19 GWB para. 289.

⁹⁷ Federal Court of Justice, Decision of July 22, 1999, Case No. KVR 12/98 – *Flugpreisspaltung*, NJW 2000, pp. 76–79.

⁹⁸ Federal Court of Justice, Decision of December 7, 2010, Case No. KZR 5/10 – *Entega II*, NJW-RR 2011, pp. 774–779.

⁹⁹ Federal Court of Justice, Decision of July 22, 1999, Case No. KVR 12/98 – *Flugpreisspaltung*, NJW 2000, pp. 76–79.

As already mentioned above, primary-line discriminations are not covered by Art. 102 (2) lit. c) TFEU or Sec. 19 (2) No. 1 2nd alternative GWB.

For EU law discriminatory actions can only violate the blanket clause for the abuse of dominant market power laid down in Art. 102 (1) TFEU. Under this provision selective pricing by a dominant market player cannot be deemed a violation of Art. 102 (1) TFEU per se but only if the “*pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition*”.¹⁰⁰ The court however did not issue guidelines for the application of this standard thereby leaving that problem to practitioners.¹⁰¹ Even in cases in which the dominant player deliberately offers lower prices to competitor’s clients these criteria are not fulfilled as long as the average total costs are covered.¹⁰² The CJEU went even further and allowed a price policy that did not compensate the average total cost but only the average incremental costs.¹⁰³ The EU Commission however points out that selective pricing can be conducted in a way that only those trading parties are offered attractive prices that are crucial for the market entry or expansion of competitors.¹⁰⁴

Primary-line discrimination can also be conducted via rebate systems. Dominant market power is inter alia abused in this regard if the rebates aims at hindering competitors from entering into or expanding within the market. The CJEU for example ruled that loyalty discounts that have as their objective to hold customers from buying at competitors violate Art. 102 (1) TFEU.¹⁰⁵ The standard for justification for violations of Art. 102 TFEU has already been outlined (see 3.1.1.1.2 above).

In German national law Sec. 19 (2) No. 1 1st alternative GWB is the most relevant provision stating that dominant market power can be abused by directly or indirectly impeding another undertaking in an unfair manner. As this example is broadly formulated, case law has evolved to specify rules for selective pricing and other selective methods.

Selective pricing is not prohibited per se but only in exceptional cases. Consequently, courts have shown reluctance to apply Sec. 19 (2) No. 1 1st alternative GWB to low-price policies.¹⁰⁶

¹⁰⁰ CJEU, case C-209/10, *Post Danmark v. Konkurrencerådet*, para. 44.

¹⁰¹ Cf. T. Eilmansberger and F. Bien. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht* Band 1, 2nd ed, C.H. Beck 2015, Art. 102 AEUV para. 535.

¹⁰² CJEU, case C-209/10, *Post Danmark v. Konkurrencerådet*, para. 36.

¹⁰³ CJEU, case C-209/10, *Post Danmark v. Konkurrencerådet*, para. 37.

¹⁰⁴ EU Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Office Journal of the European Union of February 24, 2009.

¹⁰⁵ CJEU, case C-40/73, *Suiker Unie v. Commission*, ECR 1975 1663, para. 510 ff.

¹⁰⁶ U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 para. 31.

According to the Federal Court of Justice it is crucial that the undercutting is aimed at pushing a specific competitor out of the market or totally destroying him.¹⁰⁷ It further held that prices may not be appropriate meaning that they are at least arguable according to commercial principles. In examining cases according to these principles, all objective and subjective characteristics of the case have to be taken into account. Based on this the Higher Regional Court Düsseldorf ruled that Lufthansa violated Sec. 19 (2) No. 1 2nd alternative GWB by repeatedly lowering down prices to its competitor's level thereby making market entry impossible.¹⁰⁸

Similar standards apply to *rebates* offered by a dominant undertaking. High discount may have the same effects as low-price policies. In finding anti-competitive actions, courts lay focus on the question whether rebates have a pull effect on demanders. Quantity discounts usually are not objectionable as long as they are covered by cost advantages.¹⁰⁹ In contrast to this, loyalty discounts are far more problematic and regularly violate Sec. 19 (2) No. 1 1st alternative GWB, as they usually aim at concentrating the demand with the dominant undertaking for a longer period of time thus having a pull effect on demanders.¹¹⁰

The provision also covers *margin squeezes*. If the dominant market player does not only sell products to players on the downstream markets but also engages on that market himself, he acts abusive if the prices offered to competitors are higher than those demanded on the downstream market. If the undertaking is only dominant on the upstream market, it has to be evaluated whether the dominant player would still be efficient, if he would pay the prices he offered.¹¹¹ If the undertaking is dominant on both markets, the actions is abusive per se.¹¹²

When it comes to justification of the behaviour, the same standard applies as with Sec. 19 (2) No. 1 2nd alternative GWB (see 3.1.1.1.2 above). The action can for example be justified if it serves as a means for market entry or by the undertaking's interest in optimising capacity utilisation.¹¹³

¹⁰⁷ Federal Court of Justice, Decision of December 10, 1985, Case No. KZR 22/85 – *Abwehrblatt II*, GRUR 1986, pp. 397–402.

¹⁰⁸ Higher Regional Court Düsseldorf, Decision of March 27, 2002, Case No. Kart 7/02 (V), WuW/E DE-R, pp. 867–875.

¹⁰⁹ See 3.1.1.1.2 above.

¹¹⁰ Higher Regional Court Berlin, Decision of November 26, 1980, Case No. Kart 32/79 – *Fertigfutter*, BB 1981, pp. 1110–1113; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 para. 32.

¹¹¹ Federal Cartel Office, Decision of August 6, 2009, Case No. B7-11/09, p. 17.

¹¹² Federal Cartel Office, Decision of August 6, 2009, Case No. B7-11/09, p. 17.

¹¹³ U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 para. 31.

It has to be noted that cross-subsidisation often plays an important role in this context, as the discriminating undertaking usually has the incentive to compensate the reduced profits or even losses caused by lowering prices selectively. Normally, this requires a dominant market position on the market used for compensation. The mere ability to cross-subsidise shows that the discriminating player acts on a separate market, as the demanders obviously have no possibility to purchase the goods or services elsewhere. According to the CJEU the fact that one group of customers faces a lack of purchasing alternatives whereas the other group does not, leads to the conclusion that the groups are not comparable.¹¹⁴ Consequently, the behaviour does not constitute a case of discrimination in this regard.

However, it is not necessary that the discriminatory action takes place on the market on which the discriminating party is dominant.¹¹⁵ Thus, the dominant market position opening Art. 102 (1) TFEU's field of application may derive from market A whereas discrimination is conducted on market B. Of course, the markets must be connected somehow to make the action abusive. To which extent the markets have to be connected is yet unclear.¹¹⁶ The CJEU ruled that "*the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case*".¹¹⁷ In the same decision the court pointed out that generally Art. 102 (1) TFEU may not be applied to cases in which the action takes place on a market distinct from the dominated market and the effects produced thereby are limited to this market.¹¹⁸ However, it pointed out that application in these cases can be justified by "special circumstances". That was held for cases in which customers in one sector also are potential customers in the second sector.¹¹⁹ Cross-subsidisation can therefore not be deemed as an abuse of dominant market power per se but only if it leads to anti-competitive prices on the market distinct from the dominated market.¹²⁰ The Commission is of the opinion that cross-subsidisation can be deemed an abuse of dominant market power if it is conducted in the context of state-supported monopoly rights.¹²¹ According to that decision a dominant

¹¹⁴ CJEU, case C-62/86, *AKZO Chemie BV v. Commission*, ECR 1991 I- 3359, para. 120.

¹¹⁵ CJEU, case 6/72, *Continental Can Company Inc. v. Commission*, ECR 1973 215; EU Commission, Decision of December 14, 1985, Case No. IV/30.698 – *ECS-AKZO*, para. 85 ff.; EU Commission, Decision of December 23, 1992, Case No. IV/32.448 – *CEWAL*, para. 105.

¹¹⁶ A. Fuchs and W. Möschel. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 1, 5th ed, C.H. Beck 2016, Art. 102 AEUV para. 140 arguing for a broad interpretation.

¹¹⁷ CJEU, case C-333/94, *Tetra Pak International SA v. Commission*, ECR 1996 I 5951, para. 24.

¹¹⁸ CJEU, case C-333/94, *Tetra Pak International SA v. Commission*, ECR 1996 I 5951, para. 27.

¹¹⁹ CJEU, case C-333/94, *Tetra Pak International SA v. Commission*, ECR 1996 I 5951, para. 29.

¹²⁰ T. Eilmansberger and F. Bien. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht* Band 1, 2nd ed, C.H. Beck 2015, Art. 102 AEUV para. 538; A. Fuchs and W. Möschel. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 1, 5th ed, C.H. Beck 2016, Art. 102 AEUV para. 248.

¹²¹ EU Commission, Decision of July 23, 2004, Case No. COMP/A.36.570/D3 – *Sundbusserne v. Port of Helsingborg*, para. 228.

undertaking may not use the income from that market to subsidise its products or services on a free market. The Commission further stated that outside these markets competition would have to be weakened in the subsidised market and that in some cases it would even be necessary to prove that all competition in the adjacent market is eliminated.¹²²

In national law Sec. 19 (2) No. 3 GWB (see 3.1.1.1.4 above) can be violated in cases of cross-subsidisation. The group which is used to subsidise low prices for the other group might act on comparable markets so that the provision's criteria can be fulfilled.

3.1.2 Discrimination against Consumers

Apart from undertakings, consumers can be the subject of discriminatory actions. It has already been mentioned that both Art. 102 (2) lit. c) TFEU and Sec. 19 (2) No. 1 2nd alternative GWB do not apply to discrimination against end customers. For German national law this follows directly from the provision's wording that solely refers to undertakings.¹²³ For European law the provision's limited goal leads to that conclusion, as consumers are not engaging on a (downstream) market.

However, discriminatory actions against consumers can constitute a violation against the blanket clause for the abuse of dominant market power laid down in Art. 102 (1) TFEU.¹²⁴ As far as the authors can see, the CJEU has yet to determine a standard applying to direct discrimination of consumers. Until then an approach presented by legal scholars can be used according to which the undertaking's action is abusive if it firstly charges higher prices for the same products or services on the market it dominates.¹²⁵ Secondly, the discrimination has to be present for a longer period of time so that fluctuations due to price adjustment processes can be ruled out as an explanation.¹²⁶ Most importantly, the practice must be of exploitive nature meaning that consumer surplus is almost completely siphoned off.¹²⁷ Whether the

¹²² EU Commission, Decision of July 23, 2004, Case No. COMP/A.36.570/D3 – *Sundbusserne v. Port of Helsingborg*, para. 229.

¹²³ A. Fuchs and W. Möschel. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht* Band 2, 5th ed, C.H. Beck 2014, § 19 GWB para. 287.

¹²⁴ EU Commission, Decision of July 20, 1999, Case No. IV/36.888, para. 100; Cf. CJEU, case 6/72, *Continental Can Company Inc. v. Commission*, ECR 1973 215, para. 26.

¹²⁵ F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar* Band 2, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 214. Thereby citing L. Peeperkorn. In: Hawk (ed), 2008 Fordham Competition Law Institute, 2009, pp. 611–634.

¹²⁶ F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar* Band 2, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 214. Thereby citing L. Peeperkorn. In: Hawk (ed), 2008 Fordham Competition Law Institute, 2009, pp. 611–634.

¹²⁷ F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar* Band 2, 13th ed, Luchterhand 2018, Art. 102 AEUV para. 214. Thereby citing L. Peeperkorn. In: Hawk (ed), 2008 Fordham Competition Law Institute, 2009, pp. 611–634.

discrimination is based on the nationality of the consumer is of high relevance for EU law.¹²⁸ The standard of justification has already been presented (see 3.1.1.1.2 above).

In national law Sec. 19 (2) No. 3 GWB (see 3.1.1.2. above) can also cover cases of discrimination against consumers. As opposed to Sec. 19 (2) No. 1 2nd alternative GWB the wording does not only cover discrimination against other undertakings.¹²⁹ If consumers are affected by the action, the criterion of similarity of purchasers is regularly fulfilled.¹³⁰ Above that the blanket clause of Sec. 19 (1) GWB can cover other cases of discrimination against consumers.¹³¹ In this case the same standard applies as to comparability and justification as with Sec. 19 (2) No. 1 2nd alternative.¹³² In its decision in *Entega II* the Federal Court of Justice ruled that Sec. 19 (1) GWB can be violated if consumers are discriminated by the means of price breaks without objective justification.¹³³ The court did recognise that price breaks usually fall under Sec. 19 (2) No. 3 GWB but refrained from subsuming under that provision as the price break was conducted on the same market.¹³⁴ It further pointed out that price breaks can be justified by the dominant party's interest in entering a new market that cannot be considered a functioning market (e.g. due to a monopoly).¹³⁵

In another case the Federal Court of Justice ruled that dominant market players violate Sec. 19 (1) GWB if they use terms and conditions that violate Sec. 307 et. seq. of the German Civil Code (BGB) especially if the violation can be considered the very product of the dominant market power.¹³⁶

The possibility to personalise prices via algorithms (using big data technology or artificial intelligence) also raises questions in regard to competition law if the methods are used by a dominant undertaking. At least if the methods are effective, personalised pricing in volume

¹²⁸ Cf. EU Commission, Decision of October 29, 1981, Case No. IV/29.839 – *GVL*, para. 46.

¹²⁹ A. Fuchs and W. Möschel. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 287.

¹³⁰ A. Fuchs. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 19 GWB para. 289.

¹³¹ Federal Court of Justice, Decision of December 7, 2010, Case No. KZR 5/10 – *Entega II*, NJW-RR 2011, pp. 774–779.

¹³² M. Wolf. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 33.

¹³³ Federal Court of Justice, Decision of December 7, 2010, Case No. KZR 5/10 – *Entega II*, NJW-RR 2011, pp. 774–779.

¹³⁴ Federal Court of Justice, Decision of December 7, 2010, Case No. KZR 5/10 – *Entega II*, NJW-RR 2011, pp. 774–779.

¹³⁵ Federal Court of Justice, Decision of December 7, 2010, Case No. KZR 5/10 – *Entega II*, NJW-RR 2011, pp. 774–779.

¹³⁶ Federal Court of Justice, Decision of November 6, 2013, Case No. KZR 58/11 – *VBL-Gegenwert I*, NZKart 2014, pp. 31–35.

markets violate the blanket clauses laid down in Art. 102 (1) TFEU respectively Sec. 19 (1) GWB¹³⁷ as consumer surplus is totally appropriated.¹³⁸

3.2 Anti-Competitive Agreements

Besides the abuse of dominant market power which covers cases in which only one undertaking treats business partners unequally, discrimination can also have its origin in concerted practices of two or more undertakings.

In European law Art. 101 (1) lit. d) TFEU quite clearly addresses this problem area by naming the application of “*dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*” as one of the examples for anti-competitive agreements prohibited by Art. 101 (1) TFEU. Again, no general prohibition of discrimination is codified thereby. The wording congruent to Art. 102 (1) lit. c) TFEU illustrates that both provisions share the same goal: guaranteeing the free flow of market powers on the up- and downstream markets.¹³⁹ One can however see that courts and cartel offices tend to rely on the blanket clause or the examples laid down in Art. 101 (1) lit. a) – c) TFEU rather than addressing the legal examples for discrimination in their decision practice.¹⁴⁰

The provision applies to both horizontal and vertical restraints.¹⁴¹ When it comes to the comparability of the cases the same standard applies as with Art. 102 (2) lit. c) TFEU (see 3.1.1.1.1 above). Discriminatory actions can be justified under the conditions laid down in Art. 101 (3) TFEU. The CJEU has pointed out in various decisions that the context and the aim of the practice have to be taken into account.¹⁴² Above that the CJEU allows for justification for objective reasons.¹⁴³

The EU Commission explicitly applied Art. 101 (1) lit. d) TFEU respectively its predecessor provision Art. 85 (1) lit. d) ECT in only a few cases. It for example found a violation of the provision in a case where different prices were offered to demanders by nine Belgian producers of cement although those parties not enjoying the price benefits which were offered to the other

¹³⁷ Cf. T. Tilmann and V. Vogt, Personalisierte Preise im Big-Data-Zeitalter, VuR 2018, pp. 447–455.

¹³⁸ J. Nothdurft. In: Langen and Bunte (eds), Kartellrecht Kommentar Band 1, 13th ed, Luchterhand 2018, § 19 GWB para. 462 yet refraining from a clear statement as to a violation of competition law.

¹³⁹ S. Zimmer. In: Immenga and Mestmäcker (eds), Wettbewerbsrecht Band 1, 5th ed, C.H. Beck 2012, Art. 101 AEUV para. 247.

¹⁴⁰ P. Stockenhuber. In: Grabitz, Hilf and Nettesheim (eds), Das Recht der Europäischen Union Band 1, C.H. Beck 2019, Art. 101 AEUV para. 197 f.

¹⁴¹ Cf. D. Hengst. In: Langen and Bunte (eds), Kartellrecht Kommentar Band 2, 13th ed, Luchterhand 2018, Art. 101 AEUV para. 288.

¹⁴² Cf. CJEU, case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato*, para. 53 ff.

¹⁴³ Cf. CJEU, case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato*, para. 53 ff.

group could be seen as equally or even more productive than the benefitting parties.¹⁴⁴ The argument that the examined practice had earlier been conducted by the participating undertakings individually did not convince the Commission.¹⁴⁵ In a second case the Commission dealt with a rebate system that was originated by a coalition of Dutch tobacco manufacturers. The system was designed in a way that only specialist traders profited on the condition that they would fulfill specific criteria.¹⁴⁶ The authority decided that this system discriminated against other purchasers such as super markets or grocery stores and thereby violated Art. 85 (1) lit. d) ECT.¹⁴⁷

As opposed to European competition law the German national provision dealing with anti-competitive agreements still relies on a simple blanket clause without providing a legal catalogue of examples. However, this does not allow to conclude that there is a gap between the legal regimes, especially because Sec. 1 GWB corresponds to Art. 101 (1) TFEU to great extent.¹⁴⁸ The national lawmaker simply deleted the passage referring to the impact of trade between EU member states. Nevertheless, the fact that the national lawmaker refrained from totally adopting the EU system raises questions.¹⁴⁹ The government's draft bill for the Seventh Amendment of the Act against Restrictions of Competition argues that the EU examples can be referred to although they have not been taken over to Sec. 1 GWB¹⁵⁰ thereby pointing out that the legal regimes should be totally harmonized. As a consequence, the standard of Art. 101 (1) lit. d) TFEU is also applicable in German national law.

Discriminatory actions can be justified according to Sec 2 GWB. The national lawmaker harmonized national and EU law in this regard as it took over the formulation of Art. 101 (3) TFEU for Sec. 2 (1) GWB. Besides, Sec. 2 (2) GWB makes reference to the EU block exemption regulations issued by the EU Commission even if the practice is not capable of affecting the trade between EU member states. It should be noted that the German lawmaker created a special provision in addition for the justification of cartels between small and medium-sized enterprises in Sec. 3 GWB. According to this provision a concerted practice is justified on the condition that its subject matter is the rationalisation of economic activities through inter-

¹⁴⁴ EU Commission, Decision of December 22, 1972, Case No. IV/243 – *Cimbel*.

¹⁴⁵ EU Commission, Decision of December 22, 1972, Case No. IV/243 – *Cimbel*.

¹⁴⁶ EU Commission, Decision of July 15, 1982, Case No. IV/29.525 – *SSI*, para. 99 ff.

¹⁴⁷ EU Commission, Decision of July 15, 1982, Case No. IV/29.525 – *SSI*, para. 99 ff.

¹⁴⁸ R. Bechthold and W. Bosch. In: Bechthold and Bosch (eds), *GWB*, 9th ed, C.H. Beck 2018, § 1 GWB para. 1; S. Zimmer. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 1 GWB para. 5.

¹⁴⁹ According to R. Bechthold and W. Bosch. In: Bechthold and Bosch (eds), *GWB*, 9th ed, C.H. Beck 2018, § 1 GWB para. 1 it shows that legal examples are of subordinate relevance in competition law.

¹⁵⁰ Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen as of August 12, 2004, BT-Drucks. 15/3640, p. 23.

firm cooperation, competition on the market is not significantly affected and it serves to improve the competitiveness of small or medium-sized enterprises. As this stands in contrast to EU competition law, the provision in question becomes only relevant if the concerted practice is not suited to affect the trade between EU member states within the meaning of Art. 101 (1) TFEU.¹⁵¹ In the opinion of the EU Commission concerted practices between small and medium-sized enterprises regularly do not go beyond this pale.¹⁵²

For both legal regimes *selective distribution systems* are the most relevant field of application. An earlier LIDC publication has already dealt with this topic in detail.¹⁵³ According to CJEU¹⁵⁴ and national case law¹⁵⁵ selective distribution systems can only be in accordance with Art. 101 (1) TFEU respectively Sec. 1 GWB if inter alia the conditions are not applied in a discriminatory fashion so that aspects of discrimination are an important factor. According to the Higher Regional Court Berlin a selective distribution system is applied in a discriminatory way if sales via certain third-party platforms (e.g. eBay) are prohibited to protect the product's image while the products are being offered at a discount store at the same time.¹⁵⁶ It is thereafter sufficient that the grounds justifying the prohibition are disregarded in a different context.

With regards to personalised pricing methods unexpected problem can arise if undertaking use the same data base (most likely provided by a third-party supplier) as this will lead to the point that every undertaking will eventually demand the same price. The CJEU has already ruled that concerted practices can be presumed if undertakings use the same IT-systems that govern the action in question.¹⁵⁷ Based on this, Art. 101 (1) TFEU and Sec. 1 GWB are violated in these cases.¹⁵⁸

¹⁵¹ Cf. S. Wimmer-Leonhardt, Zur zwischenstaatlichen Bedeutung von Mittelstandskartellen, WuW 2006, pp. 486–492.

¹⁵² EU Commission, Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, Office Journal of the European Communities of December 22, 2001, p. 13.

¹⁵³ T. Hoeren in: Kilpatrick, Kobel, Kellezi (eds), Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions, Springer 2018, pp. 157–185.

¹⁵⁴ Settled case law since CJEU, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, ECR 1977, 1875; CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence*, ECR 2011 I 9419.

¹⁵⁵ Higher Regional Court Frankfurt a. M., Decision of July 12, 2018, Case No. 11 U 96/14 (Kart) – *Coty*, CR 2018, pp. 663–668; Higher Regional Court Berlin, Decision of September 19, 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, NZKart 2014, pp. 72–75.

¹⁵⁶ Higher Regional Court Berlin, Decision of September 19, 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, NZKart 2014, pp. 72–75.

¹⁵⁷ CJEU, case C-74/14, *Eturas*.

¹⁵⁸ T. Tilmann and V. Vogt, Personalisierte Preise im Big-Data-Zeitalter, VuR 2018, pp. 447–455.

3.3 Merger control

In German national and in EU competition law discrimination also plays a role in merger control when it comes to the definition of the relevant market and the effects the merger might have on it.

3.3.1 Definition of the Relevant Market

The ability to discriminate against other market players can already be taken into consideration when defining the relevant market.¹⁵⁹ The definition of the relevant market is governed by the demand-oriented market concept. According to this approach, market players are acting on the same market, if their products (or services) are replaceable from the demander's point of view.¹⁶⁰ Consequently, separate markets exist if one can identify specific customer groups imposing different requirements on the product or service.¹⁶¹ If one market player is able to set different terms and conditions and strategies for each group, two markets exist regardless of the fact that the same product or service is offered.¹⁶² In other words, if one market player is able to price discriminate, separate markets exist as this shows that the demanders are not ready to avoid the discriminatory treatment.¹⁶³

3.3.2 Anti-Competitive Effects

As merger control aims at preventing anti-competitive effects in the future, the cartel offices have to conduct a prognosis of how the market will react on the undertakings' fusion.¹⁶⁴ Thus, possible developments of the market have to be taken into consideration, e.g. it has to be considered that a dominant market position or alternative products or services may take some

¹⁵⁹ Just see EU Commission, Decision of October 30, 2001, Case No. K(2001) 3345 – *Tetra Laval/Sidel*, paras. 188: “*In the light of the specific characteristics of the ‘sensitive’ products and the ability for price discrimination, it is further concluded that separate relevant markets exist [...]*”.

¹⁶⁰ Federal Court of Justice, Decision of November 11, 2008, Case No. KVR 60/07 – *E.ON/Stadtwerke Eschwege*, WRP 2009, pp. 85–93; EU Commission, Commission Notice on the definition of relevant market for the purposes of community law, Office Journal of the European Communities of December 9, 1997, para. 7; A. Riesenkampff and S. Steinbarth. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 2 FKVO para. 13; B. Richter and T. Steinvorth. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 36 para. 16.

¹⁶¹ EU Commission, Commission Notice on the definition of relevant market for the purposes of community law, Office Journal of the European Communities of December 9, 1997, para. 43; S. Thomas. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 36 GWB para. 84.

¹⁶² Federal Court of Justice, Decision of June 24, 1980, Case No. KVR 5/79 – *Mannesmann/Brueninghausen*, NJW 1980, 2583–2586; Higher Regional Court Berlin, Decision of June 28, 1991, Case No. Kart. 25/89, WuW 1992, 333; EU Commission, Decision of July 31, 1991, Case No. IV/M012 – *Varta/Bosch*, para. 12 ff.; B. Richter and T. Steinvorth. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 36 para. 20.

¹⁶³ EU Commission, Decision of October 30, 2001, Case No. K(2001) 3345 – *Tetra Laval/Sidel*, para. 188; B. Richter and T. Steinvorth. In: Wiedemann (ed), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 36 para. 20; S. Thomas. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, 5th ed, C.H. Beck 2014, § 36 GWB para. 84.

¹⁶⁴ J. Schütz. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 4*, 1st ed, Carl Heymanns Verlag 2013, Art. 2 FKVO para. 208; G. Kallfaß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 36 GWB para. 49.

time to develop after the merger has taken place.¹⁶⁵ The leading question is whether the expected market structure still allows market forces to deploy despite of the merger. In the course of that, the European Commission¹⁶⁶ and the German Federal Cartel Office¹⁶⁷ both also examine whether the merged entity would be able to discriminate against other market players, as the following examples show.

When analysing the merger's potential effects, the German Federal Cartel Office examines the effects on the upstream or downstream market(s). In the case of a merger between hospital operators of which one also engaged in the market of medical supplies and equipment as a supplier (upstream market), the cartel office for example examined whether the merger might cause negative effects on the market for medical treatments (downstream market).¹⁶⁸ It held that there was no danger of foreclosure abuse by the means of price discrimination on the latter market as medical supplies and equipment were not crucial for the consumer's choice of hospital and had no effect on the pricing as this was subject to flat-rate payments.¹⁶⁹ Dealing with a merger between two manufacturers of sheet folding machines, the Federal Cartel Office once more mentioned price discrimination.¹⁷⁰ After having conducted an economic examination, the cartel office found that the merged entities could use the machines' interfaces to discriminate against competitors and customers. Firstly, the interface information being solely controlled by the merged entities was crucial for upcoming digitalising processes. Secondly, coupling boxes only offered by the merged entities were necessary to ensure the machines operability with other machines. Based on that, the cartel office stated that the merged entity would be able to deny customers or competitors the supply of these boxes or at least discriminate against them.¹⁷¹ It pointed out that discrimination could happen by extended periods of delivery (condition discrimination) or customized pricing (price discrimination). The German Federal Cartel Office also takes into consideration whether the merged entities might have motivation to actually discriminate.¹⁷²

¹⁶⁵ G. Kallfaß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 36 GWB para. 54.

¹⁶⁶ EU Commission, Decision of October 30, 2001, Case No. K(2001) 3345 – *Tetra Laval/Sidel*, para. 182 f.

¹⁶⁷ Federal Cartel Office, Decision of February 14, 2014, Case No. B 3-109/13, p. 117 ff.; Federal Cartel Office, Decision of May 6, 2019, Case No. B5-185/18, p. 154.

¹⁶⁸ Federal Cartel Office, Decision of February 14, 2014, Case No. B 3-109/13, p. 117 ff.

¹⁶⁹ Federal Cartel Office, Decision of February 14, 2014, Case No. B 3-109/13, p. 117.

¹⁷⁰ Federal Cartel Office, Decision of May 6, 2019, Case No. B5-185/18.

¹⁷¹ Federal Cartel Office, Decision of May 6, 2019, Case No. B5-185/18, p. 154.

¹⁷² Federal Cartel Office, Decision of February 14, 2014, Case No. B 3-109/13, p. 120 holding that there was no incentive to perform price discrimination.

In its decisions in *Tetra Laval/Sibel*¹⁷³ and *MAERSK/PONL*¹⁷⁴, the EU Commission examined whether the merged entities would be able to perform price discrimination as well. And as the German cartel office the Commission also took into account whether there is an economic incentive to actually price discriminate.¹⁷⁵

4 Other Legal Provisions Governing Discrimination

Preventing discrimination in business contexts is not an objective limited to cartel law.

When it comes to discrimination against consumers for example, the German General Act on Equal Treatment (hereinafter AGG)¹⁷⁶ implementing several EU guidelines into national law, can be violated.¹⁷⁷ The AGG's scope is narrowed by two factors. On the one hand, according to Sec. 1 AGG, the act only applies to discrimination on the basis of "*race or ethnic origin, gender, religion or belief, disability, age or sexual orientation*". On the other hand, the field of application is limited as to the (potential) object of individual agreement according to Sec. 2 (1) AGG, however including *„access to and supply of goods and services which are available to the public“*. Price discrimination due to personal pricing via algorithms only violates the AGG if the algorithm uses the above-mentioned forbidden criteria to set the price.¹⁷⁸ In reality it will be nearly impossible to prove that this is the case without a legal duty to disclose the criteria being imposed on the provider.¹⁷⁹ The AGG relies on private enforcement by individuals.

The German Act Against Unfair Competition (UWG) can also become relevant in regard to discriminatory practices. However, the UWG only has an indirect effect deriving from the nature of its Sec. 3a UWG. According to this provision violations of other statutory provisions can also constitute an unfair commercial practice on the condition that the provision *„is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors“*. Accordingly, violations of special laws aiming at prohibiting discrimination can become relevant in the UWG's context as well. According to Sec. 8 (3) UWG inter alia competitors and qualified entities such as consumer associations can claim to remove and to

¹⁷³ EU Commission, Decision of October 30, 2001, Case No. K(2001) 3345 – *Tetra Laval/Sidel*, paras. 182 f.

¹⁷⁴ EU Commission, Decision of July 7, 2005, Case No. COMP/M.3829 – *MAERSK/PONL*, paras. 129, 160.

¹⁷⁵ EU Commission, Decision of October 30, 2001, Case No. K(2001) 3345 – *Tetra Laval/Sidel*, para. 359.

¹⁷⁶ An official translation can be found here: http://www.gesetze-im-internet.de/englisch_agg/index.html. Accessed June 30, 2019.

¹⁷⁷ Cf. J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 19 GWB para. 276.

¹⁷⁸ T. Tilmann and V. Vogt, *Personalisierte Preise im Big-Data-Zeitalter*, VuR 2018, pp. 447–455.

¹⁷⁹ T. Tilmann and V. Vogt, *Personalisierte Preise im Big-Data-Zeitalter*, VuR 2018, pp. 447–455.

cease and desist the violation. Competitors can also sue for compensation of damages according to Sec. 9 UWG.

Discrimination also plays a role in pure contractual law. German contract law relies on the principles of contractual freedom and private autonomy of the parties which are protected by Art. 2 (1) of the German constitution.

Sec. §§ 307 ff. of the German Civil Code (hereinafter BGB) however set rules for the use and the content of general terms and conditions (GTC) presented by one party. Whereas Sec. 309 and Sec. 308 BGB's scope of application is limited to consumer contracts, Sec. 307 BGB can also be applied to contracts between undertakings. The blanket clause of Sec. 307 (1) BGB states that "*provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user*". In order to examine whether a term is contrary to good faith respectively unreasonably disadvantages someone it can be crucial to compare the terms and conditions to those that would normally be used in a comparable case.¹⁸⁰ This examination is not limited to the actions of the GTC's user but rather takes into consideration the behaviour of competitors. Consequently, this situation cannot be identified as a typical situation of discrimination. However, one can imagine situations in which the user uses two sets of GTC for comparable groups of trading partners thereby violates Sec. 307 (1) BGB and discriminates against one group.

As already mentioned above (See 3.1.1.1.2), the value judgments of other legal regimes are considered by courts and the Federal Cartel Office when examining whether a discriminatory action is justified.

Above that, the German Federal Cartel Office has found a way to contribute to the enforcement of laws that cannot be ascribed to the field of competition law. It decided on the basis of Sec. 19 (1) GWB that a dominant market position can also be abused by using terms and conditions that violate Sec. 307 ff. BGB.¹⁸¹ The court argued that an agreement violating these civil law provisions can be the very product of the dominant market power. Logically, this decision opened the floodgates to investigations and sanctions by the Federal Cartel Office (see 5.).

¹⁸⁰ Cf. W. Wurmnest. In: Säcker and Rixecker and Oetker and Limperg, Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2, 8th ed, C.H. Beck 2019, § 307 BGB para. 40.

¹⁸¹ Federal Court of Justice, Decision of November 6, 2013, Case No. KZR 58/11 – *VBL-Gegenwert I*, NZKart 2014, pp. 31–35.

5 Outlook on the Development of German Competition Law

For the national law it is likely that competition law's focus will shift to matters of consumer protection in the digital environment.

A first step towards this has already been taken in the course of the Ninth Amendment to the Act Against Restraints of Competition by implementing Sec. 32e (5) GWB. According to this provision sector inquiries can be conducted by the Federal Cartel Office in “*cases where the Federal Cartel Office has reasonable grounds to suspect substantial, permanent or repeated infringements of consumer protection law provisions which, due to their nature or scale, harm the interests of a large number of consumers*” unless another federal agency is competent to enforce the law in the specific case. For German law that relies on civil enforcement instead of public enforcement of consumer protection law, the mere competence to conduct such inquiries is a novelty.¹⁸² Unsurprisingly, it did not take the Federal Cartel Office a long time to make use of its new power by starting a sector inquiry for internet comparison portals.¹⁸³ The provision however does not allow the cartel office to enforce consumer protection law as such even if it comes to the result that it is violated.

One can also recognize that the Federal Cartel Office on its own discretion started to enforce laws with purposes other than those central to competition law by means of competition law. It for example decided that Facebook Inc. abused its market power – thus violating Art. 102 (1) TFEU – by setting privacy policies that allow Facebook to bring together user data of several Facebook-products without the user's consent as this violated GDPR-provisions.¹⁸⁴ Cases like these lead to the yet unanswered question of how the clash of competence between the cartel office and other authorities is to be solved, given the fact that the sword of competition law often is sharper than other law's means of enforcement. Some legal scholars strongly criticise the cartel office's decision for applying competition law beyond its scope.¹⁸⁵

Meanwhile, the national lawmaker plans to amend the Act Against Restraints of Competition (GWB). The German Federal Ministry of Economy established the “Commission Competition Law 4.0” that will make proposals as to current issues of competition law including the requirements of digitalisation and the relation of competition and consumer protection law.

¹⁸² Cf. J. Bornkamm and J. Tolkmitt. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 13th ed, Luchterhand 2018, § 32e GWB para. 15 ff.

¹⁸³ The report of the now completed inquiry can be found here: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Vergleichsportale_Bericht.pdf?__blob=publicationFile&v=7. Accessed June 30, 2019.

¹⁸⁴ Federal Cartel Office, Decision of February 6, 2019, Case No. B6-22/16.

¹⁸⁵ S. Louven, *Kartellrecht als Hebel für die Durchsetzung des Datenschutzrechts?*, CR 2019, pp. 352–358.

Results are likely to end up in an amendment which is not expected before 2020. Some legal scholars preemptively point out that further tries to enforce consumer law through competition law would erode the legal principle that “competition is the best consumer protection”.¹⁸⁶

6 Conclusion

Based on these findings, one can conclude that EU and German national competition law are very similar but not totally congruent in handling discriminatory practices.

In regards to the abuse of a dominant market position, the differences (e.g. the starting point of reference for the comparability of cases) between EU and national competition law do not lead to different results regularly. Especially, an actual effect of the discriminatory action has not to be proven. A gap between the two legal regimes was discovered in regards to intra group exemption that is granted in national but denied in European law. Both legal regimes cover discrimination against consumers to some extent. Whereas EU law has to rely on the blanket clause for abuse of dominance, the example for price breaks in German national law can also be applied to consumers. However, in both legal regimes the actions must be of exploitive nature.

As regards anti-competitive agreements both legal regimes prohibit concerted practices aiming at discriminating players on the up- or downstream market and thereby influencing these markets.

In merger control cases the ability to price discriminate serves as an indicator for defining the relevant market in both legal regimes. When examining whether mergers might cause anti-competitive effects both cartel offices examine the possibility and the incentive of the merged entity to price discriminate.

Reading between the lines, one can also conclude from these findings that there is no general objective of fairness in European or national competition law beyond specific provisions forbidding discrimination.¹⁸⁷ Both legal regimes strongly rely on the belief that the free flow of market power that is to be guaranteed by competition law finally and automatically ensures fairness in competition.¹⁸⁸ However, the authors have the impression that European law is more open to arguments based on the general thought of fairness than the national law.

¹⁸⁶ H. Satzky, *Missbrauchsaufsicht und Verbraucherschutz im GWB*, NZKart 2018, pp. 554–560.

¹⁸⁷ Cf. A. Heinemann, *Fairness*, NZKart 2018, pp. 389–390.

¹⁸⁸ Cf. A. Heinemann, *Fairness*, NZKart 2018, pp. 389–390.

German national law also provides for other laws prohibiting discrimination like the General Act on Equal Treatment (AGG) and Sec. 3a of the Act Against Unfair Competition (UWG) in conjunction with specific provisions that aim at banning discrimination. Discrimination can also be relevant in regard to general terms and conditions under Sec. 307 ff. of the German Civil Code (BGB).

Consumer protection will most likely become more relevant for German national competition law which will cause conflicts not only in parliament but among legal scholars as well.