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# Summary of Discussion of the Roundtable on Price Discrimination

## Annex to the Summary Record of the 126th meeting of the Competition Committee

**29-30 November 2016**

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item 7 of the 126th meeting of the Competition Committee on 29-30 November 2016.

More documentation related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm

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# *Summary of Discussion on the Roundtable on Price Discrimination*

By the Secretariat

The **Chair** introduced the topic of the roundtable: price discrimination, a topic where there is not unanimity of views, but one that it is timely to examine given the increasing ability to use big data to price discriminate.

Before starting the roundtable discussion, the Chair thanked the Secretariat for the background paper and introduced two expert panellists: Dennis Carlton, Professor of economics at the University of Chicago, and Damien Geradin, Professor of competition law and economics at Tilberg University and also University College London and a founding partner of Edge Legal.

The Chair explained that the discussion would be organised around five topics: The first one is price discrimination as an exploitative device, which is the most divisive issue. Secondly, price discrimination as an exclusionary mechanism. Thirdly price discrimination as a distortionary practice, a practice that may lead to a distortion of competition in a market other than the one in which the price discrimination is taking place. Fourthly, remedies, and finally a short session on price discrimination in the digital economy.

The Chair started by asking Argentina about the CNDC vs YPF case in which the largest argentine oil and gas producer, YPF, was sanctioned for having discriminated between the domestic and foreign market of liquefied petroleum gas (LPG). In particular, he asked what the difference was between this case and the Cablevision case where the CNDC found that price discrimination was not a competition violation.

**Argentina** explained that the YPF case is the leading about price discrimination case in Argentina. YPF was the dominant firm in the oil sector. It was a former State-owned company. In 2012, it again became State-owned but at that time it was a private company. YPF had a dominant position in LPG and owned two of the three ports that internationally trade LPG. The case involved both price discrimination, and a restriction of supply that prevented arbitrage and allowed the firm to discriminate between its less competitive local market and more competitive foreign markets. CNDC found that prices in the local market were between much higher than export markets. In addition to the fine, one of the recommendations was to give third parties access to the facilities in the ports, in order to facilitate arbitrage by allowing them to import LPG to Argentine markets to make them contestable. In contrast, the second case involved Cablevision, a cable operator that had a monopoly in a city in Argentina, which saw entry by a rival in some areas of the city, and responded by reducing prices in those areas. It was then accused of price discrimination. The CNDC took the view that in this case it was not a restriction of competition. Instead, it was a competitive response to entry by a new company that lead to higher welfare and higher consumer surplus.

The **Chair** then asked Lithuania what the competition issues were in the AB Orlen Lietuva case.

**Lithuania** explained that an oil refinery was accused of charging buyers in Lithuania higher prices than buyers of petrol or diesel in Latvia or Estonia. Following an appeal, the market definition was changed from the Baltic States to a national market. Within that market, the three largest buyers were charged individualised prices based on parity with the prices they could obtain by importing from Nordic countries. These were limit prices that were set equal to or just below the price that the buyer could obtain from an importer. The remaining customers got standardised discounts. The theory of harm was that this excluded importers from the market, and that it distorted competition amongst the downstream buyers who were buying the same product. Where the quantities purchased were comparable the higher prices were considered exploitative. The appeal upheld the infringement.

The **Chair** then asked Russia about a case involving tariffs for Railway carriages, and more generally whether price discrimination in Russia is mostly prohibited because it is seen as being unfair or because it is seen as restricting competition.

**Russia** explained that under Russian legislation the establishment of different prices for the same goods that is not justified economically, technologically or otherwise is prohibited both for economic entities holding a dominant position on the market and for authorities. The example of the Russian railway case is one in which price discrimination was not a result of actions by a dominant company but instead resulted from the decisions of a government authority (the federal tariff regulator). It is a specific feature of the Russian competition law that it covers not only the actions of undertakings but also of authorities as well. The tariff regulator set discounts for certain train wagons that were larger than those for other similar wagons made by different producers. As a result of the discriminatory nature of these rebates, the federal antimonopoly service asked the federal tariff service to cancel these unfair practices. The regulator was abolished during the case, and the federal antimonopoly service became the State authority responsible for tariff regulation.

The **Chair** asked whether a firm that wants to develop its market share and hence gives concessions on prices to some of the customers to attract them from competitors, would be considered to have a valid economic justification or not?

**Russia** replied that such cases would be looked at on a case-by-case basis which looks at why the firms had established different prices for the same commodity on the same market.

The **Chair** then turned to Chile who had three cases of exploitative price discrimination between 2008 and 2009. He asked Chile to tell us a bit about those cases and to tell us how you screen for potential exploitative price discrimination

**Chile** said that one was a case of an airport charging different prices to different couriers that were operating on the airport. Another case was a company charging different prices to different sectors, and the third case was a public company charging different prices to different companies. In each of these cases, there was no relation between the economic value of the product and the amount that was charged. These issues were not based on any relevant question of cost. The cases were accepted because the provision in the law is broad and focuses on fairness. Since these cases there have not been new cases on exploitative discrimination so evidence on whether the discrimination is welfare enhancing or not has not been considered. However, that kind of evidence has played a role in exclusionary price discrimination cases.

The **Chair** then asked Canada to make a short presentation on a recent attempt to increase scrutiny of exploitative price discrimination in Canada through a parliamentary bill that was unsuccessful. He asked whether this was a good thing or a bad thing in light of the increased possibilities of discrimination in the digital economy.

**Canada** described an attempt by the previous government to bring in legislation vis-à-vis price discrimination in 2014 and noted that the new government had not picked up the legislation. From 1930 to 2009, Canada had an explicit price discrimination aspect to its competition act, and a criminal offense, which was removed in 2009 and became subject instead to an abuse of dominance approach. It explained that Canada has regular currency fluctuation and the Canadian Dollar began to rise in the late 2000s. Canadian consumers began to get increasingly agitated by what they saw as discrimination on the basis of geography because Canadian prices did not seem to be reflecting US prices as the currency was appreciating. This is particularly problematic as many products that cross the border into Canadian market have both Canadian and US prices listed. Studies indicated that Canadians were paying 10-20% more for goods than Americans though these studies did not conduct a thorough examination for what the rationales might be. Consumer complaints rose. The Competition bureau did a study to show that there was equivocal understanding of what might be leading to this price discrimination in the Canadian market. A senate committee did a study, which found that the causes of Canadian prices were multiple: import tariffs, government policies, exchange rate fluctuations and the smaller size of the Canadian market. A bill to address the issue, C49, the price transparency act, was introduced in December.

The bill would have allowed the Commissioner of Competition to open a market study to find the reasons for any Canada-US disparities. The Commission would have decided which markets to examine. The government would provide court supervision and allow for information collecting and a public report would have to be issued within a year of the conclusion of the investigation at which point provisions could be re-examined. The bill did not include provisions for remedial measures. There was significant opposition to the bill and strong debates as to what would constitute unjustified price discrimination, and what level of price differentiating particular in a fluctuating currency market would be acceptable. There was also discussion about whether or not the bill would change the nature of the Competition bureau from one considering unfair and unjustified anti-competitive acts and consumer welfare to one of price regulation, and whether or not that was a warranted function. Bill C-49 never concluded the legislative process prior to the dissolution of the government and has not resurfaced under the new government. The Canadian Dollar has also fallen significantly.

The **Chair** asked whether there might be renewed pressure for action against price discrimination as a result of the increasing use of it within the digital economy.

**Canada** said that the abuse of dominance provisions in its competition act are sufficient to allow it to examine price discrimination in digital markets.

The **Chair** then asked Professor Carlton to reflect on the number of exploitative price discrimination cases that had been discussed and how he would approach price discrimination

**Professor Carlton** began by pointing out that the Secretariat background paper is not a guide for attacking price discrimination. It covers non-exclusionary and exclusionary price discrimination and Professor Carlton explained that the US experience of trying to control non-exclusionary price discrimination, leads to one important message: it is a big mistake to try and use competition policy to attack price discrimination that does not harm rivals. In the US there is the Robinson-Packman act which was passed many years ago and the uniform consensus now, or practically uniform, is that that law has been unwise and the recommendation has been that it should either be changed to comport with the exist antitrust laws in the US or should be repealed outright. In contrast, with regard to exclusionary price discrimination, that is a proper topic for competition policy to be concerned about, but only if it is in those limited circumstances in which competition is harmed. Professor Carlton listed three key principles of competition policy.

Firstly, that the process of competition is generally desirable but it is not always perfect. If you look in even the most refined economic textbook describing perfect competition it does not produce outcomes that are perfect. There is no theorem in economics that says that new products get developed in the competitive market in the appropriate way. Now does that mean agencies should intervene? No, not necessarily. It only means that competition, even perfect competition is not producing perfect outcomes. But, what you must avoid from that observation is what is sometimes referred to as at the Nirvana fallacy, that because it is not perfect, it justifies intervention. To provide a convincing case for intervention you have to explain that those circumstances can be reliably identified and that government regulators or economists or judges can fix things, can intervene reliably, better than the market can. Regulators and even economists are not omniscient and they are likely to make mistakes. It is a mistake to try and micromanage prices, price differences or the characteristics of new products as a general matter.

Secondly, in the US, monopoly alone is not a harm to competition that requires a remedy. If there is a static harm to consumers, a deadweight loss from a monopolist charging 10$ why not intervene and force the price down to 5$? An insight from judges is to protect the process of competition. They recognize the dynamic incentive that a competitive market creates in which the prospect of introducing a new product and then being able to charge for it is what motivates firms to create those new products. Now if monopoly profits are ok under the antitrust laws when you are charging a single monopoly price, why should it matter if you are charging two prices to two different groups? It is the same logic.

Thirdly, Nobel laureate Ronald Coase, says: if you see inefficiency, ask why is it that the market does not correct inefficiency? If I charge one person 10$, and another person 5$, that is price discrimination. If I charge one person with a non-linear price schedule (e.g. a quantity discount) that is also price discrimination or can be, because prices are not linear. That is the definition when the product is the same between people. It gets more complicated when the product differs. Let us suppose customer 1 is closer than customer 2 and therefore transport costs are different. Is it price discrimination if the price difference is something other than the price difference or is it the ratio of price to marginal cost? However, you define price discrimination it is frequent. Is non-exclusionary price discrimination good or bad? It is annoying, that is for sure. It is frustrating; it somehow does not seem fair. Well the answer is it can be either. It can be good. Professor Carlton said let us suppose I am a monopolist charging to some group 10$. Cost me only 5$. There are a few other people in the next room. They are willing to pay 6$. I would be willing to sell to them because I make 1$ per person. Well I will not sell for 6$ if I have to lower the price to the first group from 10$ to 6$. So if you do not allow me to charge two different prices, then I will charge 10$ and the people in the next room who will only pay 6$ they get nothing. If you allow to price discriminate output goes up in the economy and those consumers in the other room are better off. If I can price discriminate that means that when I am competing with my rival for every single customer it is a competitive battlefield that can increase competition. It can also make collusion much more difficult because now I have to coordinate not on 1 price but on prices to every single customer.

Professor Carlton added that of course, it can also be bad, price discrimination can lead to less output and society could be worse off. To understand whether society is better off or worse off you would have to ask what is happening to the consumer surplus of group 1 and 2. It is a complicated calculation. Moreover, when there are questions over whether it is not exactly the same product, they are different designs, different advertising, then it becomes an operational nightmare for the economist to figure out 'is this good or bad for society?' and it becomes very difficult to address.

He said that distortionary price discrimination is also non-exclusionary because it does not directly harm a rival. An example would be a manufacturer sells to different retailers at different prices. Papers that are supportive of attacking price discrimination say that it introduces inefficiencies. If you charge retailer 1 higher prices than retailer 2 you will disadvantage the 1st retailer even if he is as efficient as the 2nd retailer. That is an inefficiency. Remember what Ronald Coase said, if there is an inefficiency, the market will try and solve that problem. The point that Professor Carlton wanted to make was not that a clever economist cannot think of situations in which distortionary price discrimination produces inefficiencies. Instead, he wanted to go to the evidence. Look at the Robinson-Packman act in the US: it is preventing distortionary pricing. It was made to prevent certain grocery chains from getting discounts at wholesale compared to smaller grocery stores. He suggested that the consensus view in the US amongst scholars is that that legislation was protectionist, stifled competition, prevented the growth of retailers who are more efficient than others and so several government panels and expert panels over the years have called for its modification and repeal. He said that people always talk about this retailer, the retailer that is going to exploit its power. He said that Walmart, was a big retailer that has the reputation for negotiating tough deals with suppliers. He said that when you look at what happens when Walmart go into an area, do prices go down? Do they stay down? The unambiguous answer is 'yes'. Consumers benefit.

He said there was a privacy concern that comes up in the Secretariat background paper and that he though it deserved attention and in Europe it has received much more attention that in the US. He described the issue: Dennis is on the internet. He is buying things. People are gathering databases about what he is doing. They then sell that database about what Carlton wants to buy to third parties who can use it to price discriminate. There can be benefits from that. People are going to make Carlton aware of products that he may have not been aware of. On the other hand, they may be able to charge me a higher price than they otherwise would have been able to. What is the antidote? The question is who has the property right to that information? Why does Carlton not also have a property right in his own purchase history, in the same way that in the US, he has a property right to his health records? If he has a property right to his own purchase history, maybe he can give that to another third party, and maybe other consumers can give it to third parties and they are going to figure out that someone is trying to charge Carlton this high price for this product he really likes. They might then become an anonymous buying site and they are going to tell Carlton to buy through them. That is, the market might be a good way to correct this problem if you think it is a problem.

Professor Carlton said that exclusionary cases are hard for antitrust authorities. An antitrust authority has to distinguish between competition driving out inefficient firms, which is what it would like, vs. a big firm that is dominant driving out its rivals, not because it is more efficient but because it is bigger. He ended with two examples of pricing restrictions that can trigger harmful exclusionary conduct. The first is a pricing contract that is based on market shares. It says to a customer ‘you get a lower price if at least x% (let us say 90%) of your sales are from me’. That is a contract that can produce the same outcome as exclusive dealing. A second example, a little more subtle, was based on a paper that he wrote with Ralph Winter. Assume that a credit card company is dominant and says to retailers: ‘you cannot charge customers more for my card than other cards that they might have.’ What does that do? What that does is it makes it very hard for a rival creed card company to come in and charge a low price to the merchant because the merchant will not be able to pass that low price onto customers and therefore it will impede the ability of a low price strategy by a rival. Those were two examples where he thought it was appropriate to use the antitrust laws, competition policy to address exclusionary conduct. He contrasted those with other cases that he had talked about where rivals are not harmed and rather it is some notion of unfairness that is the motivation to attack non-exclusionary price discrimination. He said for the reasons he had outlined he thought that would be a mistake.

The **Chair** thanked Professor Carlton for a very clear message and noted that in his paper he goes even further and says that ‘if despite what I have said you think your economists are so smart that they can do the relevant calculations, why not also eliminate the ability of the firm to set a uniform monopoly price’. The Chair the pointed out that the UK has a lot of smart economists, and those smart economists have in fact produced an economic framework to assess the effect of non-exclusionary price discrimination in the report on the economics of online personalized pricing. He then asked the UK what that framework is.

The **UK** explained that the Competition and Markets authority (CMA) had devised a framework that is set out in the paper where it looks at the consequences of price discrimination and notes that there are four different potential economic effects: the appropriation effect, the output expansion effect, the intensified competition effect and the commitment effect. It said that the key point is that only the first effect is negative in terms of consumer welfare and the overall effect depends on the particular circumstances of the market. It is an empirical question as to whether price discrimination is or is not a good thing. It can be very much a good thing. There are other reasons to think it is less of a good thing in an online world. But it is an empirical question. The UK agreed with the view that competition law itself is probably not the best vehicle for addressing these questions. Indeed, all of the price discrimination questions that the UK has addressed have not been in that context, but instead in the context of market studies and investigations. For example, the UK’s energy and banking market investigations looked at the question of price discrimination, as does the current market study into legal services. The key point is that price discrimination can be a symptom of a problem rather than a cause. It may result in worse outcomes than uniform pricing in certain cases, but price discrimination itself is not the source of the consumer harm. In general, it is the consequence of profit-maximizing behaviour.

The UK then explained that in the UK energy market, energy suppliers started as regional monopolies and competition took the form of competing outside their former regions. The result was that active customers could get good deals from suppliers outside their local region. But those benefits were not generalized because many customers were very inert. Most regional suppliers therefore continue to have a very large share in their regional market. The consequence is that inert customers are paying a lot more than more active customers. In the UK's view, the answer is not to address the price discrimination, but rather to address the question of how you get customers to be more engaged and more active. The UK noted that the dangers of focussing on price discrimination as a problem are illustrated by events 5 years ago, when the government leant on the UK energy regulator to prevent price discrimination. This prevented the form of competition that had risen and resulted in a diminution of competition and an increase in prices to consumers. One of the key recommendations in the market investigation was therefore to remove that intervention and to work on getting customers to be more engaged.

The **Chair** noted that the UK and others would say: if I see price discrimination, I do not want to abolish it but change the situation that lead to it. He then asked Professor Carlton whether Competition Authorities should try to create a screen for price discrimination because it is too complicated or impossible. Because it seemed the UK has the beginnings of a screen to identify circumstances when it is harmful.

**Professor Carlton** agreed that the UK had many smart economists, and that if we know the demand curve and the prices being charged, we can answer precisely whether price discrimination is good or bad. However he worried that discipline erodes when you do not have the demand curve (which you do not, you have to estimate it) and when the examples are more complicated than what you might write on an exam. Then you are giving people a lot of discretion: how do you interpret this? What are the costs? Are they marginal cost differences? Full cost differences? He said he thought that going down that route would create a lot of uncertainty and therefore empowering economists to use empirical techniques to figure out do you think society is better off or worse off? as a general matter from price discrimination he said his experience would tell him to stay away from it. However, having said that he said he agreed with what the UK said, and that their take on the problem sounded right. In particular the notion that if you see price discrimination - whether it is the Competition Authority solving the problem or some other authority is beside the point - and you think that discrimination is coming about because consumers are misinformed, well the solution might well be to provide better information. He said it reminded him of an experience looking at the banking sector in Israel, where there were a lot of price differences across banks. In that case he said Stan Fischer said the central bank of Israel will publish what each bank is doing so that everyone knows what is going on, and it will eliminate a bit the ability to price discriminate. He said that getting consumers more engaged is the right way around it. How do you get them engaged? Inform them. Whether that is competition authority or consumer protection, that is almost semantics, but he said he did not know if he would use antitrust laws to do it. He said the FTC in the US has consumer protection, and that whether you call that antitrust or consumer protection, he did not know, but you want people engaged and that will make the market more efficient.

Professor Carlton then returned to the point about the market response in the digital economy. He said that if he had a property right (and again he did not know whether it is a role for a Competition Authority or some other authority) and he could sell that to third parties, he thought third parties would develop stuff that will allow anonymous purchase. Some students told him that this exists but he did not think it occurs to the same degree that it would occur if individuals had property rights on their purchase histories and could facilitate the process. That would be the market correction.

The **Chair** said he understood that making consumers more engaged for example would be an appropriate remedy in a case like this, but then the question is 'how does the Competition Authority know that it should try to suggest ways for customers to be more engaged?' The answer to that, he asked, is surely that it has used an instrument that allows the Competition Authority to say 'there is negative, bad price discrimination' - in other words, you need a screen to know that there is a problem that will justify the need for a remedy. Therefore, there may still be a need, like in the UK, to devise some screens.

**Professor Carlton** suggested that the slightly different way of seeing it is to say 'I want consumers informed' and if you can do that at a low cost then do so, regardless of screens. However, he said there is still a need for a screen to identify whether customers are not informed.

The **Chair** then asked Professor Geradin for a European perspective.

**Professor Geradin** focused on two types of price discrimination, those that Dennis considers to be big mistakes except in limited circumstances, which are exploitative price discrimination and distortionary price discrimination. There is a lot of confusion, at least in EU case law between the two types of price discrimination and it is unfortunate because they should be submitted to different legal tests.

On exploitative price discrimination, the goal is not to exclude competitors but to exploit consumers and very often this is helped by so-called facilitating practices. So, in the EU there is a provision to prohibit exploitative conduct, article 102a of the treaty. Whereas in many other jurisdictions such as for example in the US, exploitation or exploitative prices are not seen as abuse of dominant position although excessive pricing might be subject to other legal provisions such as price gouging laws. So while exploitative practices may breach competition rules, the same can also be said of these facilitating practices which are generally designed to prevent arbitrage by partitioning markets.

Example 1 price discrimination combined with territorial restrictions. Of course, a big difference between US and EU competition law is that there is a great focus in the EU on preventing restrictions to intracommunity trade and this example is linked to that. If there is a dominant firm that would sell its products in different prices in different geographic market with steep price increases if there is a strong demand for its products in a given market. So let us say there is a price for France but there is suddenly much more demand in Germany for the given product and so the firm will increase its price in Germany. Well if the product can be traded across border, that effort to price discriminate will be defeated because products will flow from France to Germany. But of course the dominant firm can try to prevent that by imposing territorial restrictions on its distributers preventing for example the French distributors to sell in Germany or to accommodate requests from consumers coming from Germany, so called passive sales. From a competition law standpoint, this conduct could be dealt with in two different manners. The prices could be considered as excessive for instance in my example in Germany, and the European commission or a national competition authority could use article 102 as a basis. Now the difficulty with these sorts of claims is to demonstrate that a price is excessive. Excessive compared to what? Of course, if you have different prices in different jurisdictions for exactly the same product, it may be easier to use as a benchmark to decide that a price is excessive. Of course, there might be good economic reasons for why you have different prices in different jurisdiction: price of labour may be different, real estate costs and so on and so forth but you have a bit of a benchmark to work out whether a price is excessive. In the EU however, the focus will likely be on trying to prevent the territorial restrictions or the facilitating measures that partition markets. However, to return to excessive pricing, Professor Geradin noted that although there is a specific legal provision for excessive pricing in the EU it is not very often used, there are very few cases. Although commissioner Vestager mentioned in a recent speech that one should also pay attention to exploitation and of course that triggered questions from practitioners as to whether it was signalling that the commission would prosecute more excessive pricing cases in the future.

Another example is geo-blocking. Think about a dominant online digital content provider that sets different prices across different countries, with price variations of up to 10%, so not super significant but significant enough to incentivise consumers in high price countries to try to buy subscriptions in low price countries. Now if you try to do that the website in question will either refuse to take your credit card details or will re-route you to the subscription website of your own country. Now what can you do from a competition law standpoint? He thought that small price variations will be too small to develop an excessive pricing claim. Although if you look at the United Brands case, the problem was not just the level of the price but the presence of facilitating practices, so what may be a problem here is not so much a 10% price difference but the fact that you are automatically rerouted elsewhere. Of course, the issue is that the abuse of dominance case law, article 102a will only apply if you have dominant companies. So what happens when companies are not dominant, and the majority of actors in these fields are not dominant. In that case, he thought that if you consider that the practice is improper you need to intervene through regulation and in preparing this presentation he had come across a European commission proposal for a regulation on addressing geo-blocking and other forms of discrimination based on the customer's nationality or place of residence.

A third example is that websites will collect information about your buying patterns, age and location, taste and preferences and so on and so forth. Through data mining they will then be able to distinguish between different categories of buyers based on their anticipated income and they might wish to charge a higher price to those customers they believe are high income consumers. There is then a situation that Dennis mentioned, where Dennis is going to pay 10$ for a product whereas his neighbour will pay 5$. So is that bad in itself? He said he agreed with Dennis that it depends on the circumstances and perhaps the key question is whether the conduct increases output. If it does, it is likely to be pro-competitive. If it does not, then there might be an issue. He feared however that there is little that can be done from a competition law standpoint unless the retailer is dominant and high-income consumers are exposed to excessive pricing but that these sorts of cases would be very difficult to run.

Turning to distortionary price discrimination, Professor Geradin said that in the EU, there is a provision that specifically deals with this type of secondary line injury cases which arise when a supplier discriminates between customers which compete with each other. Article 102c of the treaty says that it is an abuse of dominance to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. So there are two conditions for that provision to be triggered. The first one is that the measure in question applies dissimilar prices to equivalent transactions and here a difficultly may be to determine whether two transactions are equivalent or not. Secondly, that it places the dominant firm's trading parties at a competitive disadvantage. So the philosophy of this provision is a bit the same as the Robinson-Packman act. It is a provision that has been used very often compared to article 102a but it has been used in many cases not actually to fight distortionary price discrimination, but in fact exclusionary price discrimination, because the legal standard is actually quite weak, or weaker to the one you would have to show to prosecute an exclusionary pricing case. Now the big question of course is why would a dominant firm engage in distortionary price discrimination? The circumstances in which it would like to do that are limited for a number of reasons. The first is that the upstream firm will benefit from a competitive downstream market for distributing its products; so why it would distort competition downstream is not entirely clear. Particularly because if the distortion creates concentration downstream then that may give rise to countervailing buyer power.

As an example, if a dominant firm is facing 2 different types of customers with different purchasing power: large supermarket vs small retail outlets and it discriminates in favour of the larger supplier then that is the sort of case that falls into article 102c. But you have to be careful about prosecuting the upstream firm because in fact the reason why the larger downstream firm may get a better price is because it has buyer power. In that case, he did not see why the supplier should be prosecuted for an outcome that results from downstream buyer power. Now, one circumstance in which we have seen a few cases of distortionary price discrimination is when there is discrimination on the grounds of nationality which is of course a greater issue in the EU than it would be in the US. Classic example relates to landing fees in airports where for instance the Brussels Airport gave discounts to operators based on the number of landing they would do in Brussels. But of course it gave competitive advantage to the former national flight carrier. It was seen as an infringement of article 102c because there was no justification for that discrimination where transactions had equivalent landing and the companies were competing with each other.

The final example is price discrimination in the shadow of litigation. So as you know there have been a number of cases involving standard essential patents and there is a fair amount of litigation and arbitration all over the world regarding the determination of FRAND rates (Fair, Reasonable and Non-Discriminatory rates). So let us think, if you have a standard essential pattern, you have to make a FRAND commitment whereby you will charge rates that are inter alia non-discriminatory. If you are the patent holder and your standard rate is 2%, all things being equal. But you litigate with firm B (you are firm A) because they don ot want to pay 2% and you eventually settle for a rate of 1.5%, but then you go after firm C and you ask 2%. So in theory article 102c can apply, because the transactions are equivalent, there are no economies of scale in licensing and firm C could be put at a competitive disadvantage. That is one area where article 102c can apply. Should it apply or not? That is a big question. You can at least make a case that it should apply. One issue of course is whether there is a real competitive disadvantage because sometime the difference in rates might not be significant enough to distort competition in the downstream market.

In conclusion, Professor Geradin said that price discrimination is a complicated area of competition law and it is critical to determine which kind of price discrimination you are facing. Is it exploitative, distortionary or exclusionary because the legal test that you might want to apply may be different. In the EU he said there is a legal basis to deal with exploitative and distortionary price discrimination. There are also the tools to deal with exclusionary price discrimination but, there has been a fair amount of confusion between the different types of discrimination and a sort of misuse in the legal basis that should have been applied. In other jurisdictions, you may not have any specific legal basis but typically abuse of dominance law is sufficiently flexible to address most cases that need to be addressed and in all dominance cases, Competition Authorities must base their findings on sound economic principles rather than emotion or impressions.

The **Chair** then turned to Belgium and asked about their suggestion that perhaps there should be a difference in the way that exploitative price discrimination is treated depending on the importance of the dominance of the firm.

**Belgium** said that, in the context of EU legislation, whether an abuse is exploitative or exclusionary or a separate category is not so relevant because discrimination is listed as a specific type of abuse of dominance. What is relevant is whether an appeal judge would allow an abuse by discrimination as an effect based infringement or as an infringement by object. It said that its suggestion is not concerning discrimination based on nationality or discrimination based on territory or discrimination combined with territorial restrictions. Instead, for dominant firms with discount schemes, it may be justified to require a non-discriminatory tariff for discounts if the dominant firm has 70-80-90 per cent of the market. In contrast, for dominant firms with less than 50 percent of the market there is a risk that requiring such non-discriminatory tariffs would stifle competition rather than protect it. Those firms that are dominant by their own merits should not be restrained in their way of competing unless they are seriously dominant.

**Professor Geradin** said that he was sceptical of whether the degree of dominance should be relevant. He considered that you either have market power or you do not.

**Belgium** replied that it wanted to try to avoid no longer being able to use the prohibition on abuse of dominance. It said that instead it would prefer to modulate the concept of abuse than to cease using the prohibition on abuse of dominance simply because it may have negative effects if a firm is not sufficiently dominant.

The **EU** said that distortionary discrimination would in most cases be either exclusionary or exploitative, and in that area noted that there is currently a preliminary reference from the court that would look at on these issues on 102c which is a Portuguese case, c5-5.16. On exploitative discrimination, it said that there is a different picture from that described by the secretariat's background paper and the paper by Dennis Carlton and the economics literature, which are very wide definitions of price discrimination. The EU would not see it as discrimination to sell neighbouring seats in the theatre at different prices, because they are not the same product. Renting the same holiday house in August and October, is discrimination according to the definition of the secretariat paper and this of course gives a wide idea that a lot of things are discriminatory, a lot of discrimination happens in competitive markets and therefore we should be very careful in addressing this. However, the EU said that in practice, price discrimination is very limited. It preferred to use a definition that price discrimination is selling *exactly* the same product at the *same* time to different customers at different prices. Given that definition, the test is what the effect on output is. For example, you could have a situation where without discrimination a particular market would not be served at all. In that case, discrimination will increase output. But in most cases, goods are sold everywhere in different markets. Very specific assumptions about demand functions are then necessary to have a significant increase in output. So in most cases you can conclude that it will not be beneficial for consumers. Then the question is: what to do? This is what Professor Carlton called the nightmare of enforcement. But there is a big difference between unilateral price discrimination where enforcers you risk becoming a price regulator, and price discrimination that is supported or enforced by restrictions, where the remedy might be to simply prohibit the restriction. Therefore, the EU said we should look at how the discrimination comes about. Therefore EU policy is to be much more interventionist and to address retail restrictions, and to be less interventionist when it concerns unilateral conduct.

**Professor Geradin** noted that the EU has a monopolisation gap where anticompetitive conduct can only be triggered when a firm already has market power, not while it is acquiring it. One way to fill that monopolisation gap is to take some excessive pricing cases. There are limited examples however and so he did not suggest there should be many such cases.

**Professor Carlton** said that the point made by the EU about seats in the theatre illustrated his point. Even though 2 seats look identical and one may be 10 inches apart, they may not sell at the same price and it would be very hard to know how to adjust. Because it is not about the cost of the seat, it is the scarcity value of that particular product. He said that illustrates how hard it is to figure out. He said the EU says you can eliminate that problem by focussing only on *exactly* the same product. However, Professor Carlton said that it is very hard to put that into effect. He explained why. Suppose he is a supplier and he is selling to person A and person B. Person A has slightly different credit terms and credit history than person B. Therefore, he charges them different prices. Are they different products? Two buyers can buy exactly the same product at the same time but one is a regular purchaser. One is someone who buys intermittently. So even though at the same time they are buying the same product, they have a different purchase history and a different projected future. Are they the same? Businesses would say no. It is not easy to define the 'same product'. He said that someone referred to economists being smart in the UK, well lawyers are smart everywhere. In the Robinson-Packman act you have 'same product, same economy', you have lawyers explaining why nothing is the same when they get charged with price discrimination (that is the same product, sold at the same time, using the same form of payment, in the same location, to different buyers in the same location). Professor Carlton said he was involved very early on in the famous Ethanol case. They had most-favoured-nation clauses saying 'you cannot charge different prices to a different customer of like substance'. During the testimony, it became clear that they had lawyers explain that nothing is the same. He therefore did not think you could operationalise it, and even if you could, firms would find ways around it. They would start distinguishing products. If they cannot sell the exact same product because the commission is going to label it discrimination, they will make one blue and one red.

He added that it is not correct to say that 'it is just a special case of demand curves that have the property that you can show that output goes up or that welfare more importantly goes up'. Whether welfare goes up or down will depend on the shape of the entire demand curve, which is very hard to estimate, and depends on infra-marginal purchases. He said it is not easy to figure out and he could guarantee that if you ask 10 economists to figure out whether it is good or bad you are going to get a disagreement. Nothing is simple even if you limited your case to identical products. He said he therefore really did think it would be an operational nightmare to focus on exploitative abuse and he would therefore recommend agencies focus on preserving the process of competition.

The **Chair** then turned to the US which stated in its contribution that it is not really pursuing exploitative price discrimination, but is quite interested in exclusionary practices. He asked for the US view on how one should look at loyalty rebates, and in particular, which are the specific circumstances that would allow us to screen loyalty rebates that would be anticompetitive from the ones that would not be.

The **US** replied that loyalty rebates satisfy the definition of price discrimination because they reduce the cost that a customer pays on marginal units below the price that the customer pays infra-marginally. The question is whether or not they are anticompetitive. The way that the US thinks about that is in the context of how close they are to exclusive dealing such that they foreclose competition in some meaningful way.

The **Chair** then asked Professor Carlton whether any kind of discount that is based on the share of the purchase of the firm is likely to be anticompetitive.

**Professor Carlton** said that they are likely to raise concerns that you want to look at. However of course you have to entertain any possible efficiency justifications for what firms may put forward. He said that what he would say is that pricing contracts that have the characteristic that they reduce the scale of arrival in markets where there are economies of scale, and especially contracts that have the property that they tell, say a retailer how to price another person's product - those make him nervous. Market share contracts have that characteristic that the buyer's price depends on not how much he is buying, but how much he is buying from a rival. He said you have to be careful to preserve the possibility that the efficient manufacturer wins and that he will have the lowest price and will drive out the inefficient manufacturer. But generally, pricing contracts that are making references to how someone is pricing a rival's product do raise antitrust competition policy concerns. He said you obviously always have to ask 'are there any offsetting efficiencies'.

The **Chair** noted that these fidelity rebate cases are live in Europe at the moment. He then asked Japan about the interpretation of some of the wording in its Antimonopoly Act. For example, when does a pricing scheme become a difficulty for a business that would be a violation of the law and what is the threshold for significance and substantiality in order to separate what is illegal and what is legal?

**Japan** explained that the act stipulates that a conduct of unjustly and continuously supplying goods in a discriminatory manner thereby tending to cause difficulties to other enterprises' business activities may fall under unfair trade practices. For example, if an influential enterprise cuts prices only in a particular area where it competes with other enterprises so as to eliminate them and impede competition. It is determined on a case-by-case basis whether price discrimination may cause difficulties to other enterprises' business activities and thereby it may be suspected as unfair trade practices. JFTC comprehensively takes into consideration the firm's intention, the extent of the discrimination, the relationship between the cost and the price, the position of the firm and its competitors in the market, and the characteristic of the goods. At the same time, Japan examines the effect of the discrimination on the competition on the market itself.

**Professor Carlton** said that when anyone cuts price, it creates difficulty for rivals because they are not making as much money. Therefore, it is dangerous if what is being attacked is price cuts because consumers benefit from price cuts and generally, when you prevent those, consumers are going to be worse off. He said he is always nervous when he sees such provisions. It does not mean that they are always bad, will not be properly interpreted and avoid the problem, but whenever he hears words like 'unjustly' and 'businesses harm', 'rivals harm', he thinks that rivals are harmed by competition. That is the difficult problem with exclusionary conduct and it is the trap that you do not want to fall into, because it hurts consumers when you use competition policies to inhibit competition.

**Japan** said that it takes into account the possibility that in the long run rivals might be driven out of the market which could lead to a loss for consumers.

The **Chair** asked Cost Rica firstly whether there was a ban on price discrimination for telecom operators, and if so does this reduce price competition? secondly he asked what methodology SUTEL is using to deal with these issues.

**Costa Rica** replied that in the case of the general law of telecommunications the establishment of different prices or conditions to third parties under similar conditions is an anticompetitive action. It is therefore quite flexible and can deal with different types of price discrimination. SUTEL applies the rule of reason and therefore takes into consideration market power, market conditions, the ability of competitors of the company with substantial power to respond to the behaviour, the affected customers, the scope of the allegedly abusive conduct, the actual effects of the conduct and also whether there is evidence of a strategy of foreclosure. It then analyses the pro-competitive effects and efficiencies that are put forward and only prohibits price discrimination if the net effect is negative.

The **Chair** turned to Romania and Sweden, each of which had similar cases of exclusionary practices involving post services.

**Romania** said that Posta Romana was investigated on a number of anticompetitive activities, including excessive prices, and discriminatory strategy on two markets on which it held a historical dominant position. It said that Posta Romana was an unavoidable trading partner that refused to grant the same discounts to intermediaries as it did to senders, and that this excluded intermediaries from competing to get contracts with major companies. It said the price difference was large, persistent, and increased over time and was part of a wider strategy that involved other actions taken against the same intermediaries.

**Professor Geradin** said you need to be careful with cases where there is discrimination in the discounts offered to large companies and intermediaries. In Belgium there was a case where discounts were not offered to intermediaries because the intermediaries did not generate any volume themselves, they simply aggregated existing volume, so there was no logic to offer a rebate. He said that what you want is to offer rebates to stimulate volumes, whereas aggregators are simply seeking to arbitrage.

**Romania** said that these intermediaries did not simply aggregate, they prepared the post which was a more complicated activity.

**Sweden** explained that its prioritisation policy says that the most important factor is whether conduct harms competition *and* consumers and so it prioritizes conduct that is capable of excluding firms that are able to exercise competition pressure. Exclusionary price discrimination and distortionary price discrimination, which could be exclusionary on a lower level of the market, are therefore prioritised while exploitative practices such as non-exclusionary price discrimination are not.In the Postnord case there was a complaint from an intermediate aggregator against the former Swedish monopolist in the postal service, Postnord. The core of this case was understanding the different levels of the market, and understanding where the complainant, Mailworld, was active. Mailworld was an aggregator who collected and sorted large shipments from different customers in order to reach large scale volume rebates. In this kind of service it was active on a downstream level compared to Postnord, but it was not active on the same market level as Postnord’s customers. Since the complainant and the customers were not active on the same level of market, there was no distortionary effect. Furthermore, this behaviour from Postnord applied similarly to different kinds of aggregators. It was not treating different aggregators in different ways, so it was not discriminatory in this market level either. The authority did not therefore find exclusionary effects on downstream level. To some extent, Postnord, was acting at the same level as Mailworld, but the authority found no reason to priorities the case as a form of anticompetitive or exclusionary price discrimination.

The **Chair** then turned to Chinese Taipei and asked them to explain what its warehouse case was about, what the determination was, and what the competition issue was that they were trying to solve?

**Chinese Taipei** said that the case was about the warehouse rental business in a harbour area. In this kind of warehouse rental business, there is a vertical structure - in the upstream there is the warehouse supplier, in the downstream level there is the freight forwarder who need to rent the warehouses for their products. Due to the commercial law, the State-owned warehouse supplier is a monopolist within each harbour. In 2012, the agency received a complaint from a new entry freight forwarder who had tried to enter the warehouse rental business. The reason for this complaint was that the monopoly supplier set out different rental fees, so the new entrant had to pay almost 200% higher prices compared to the incumbent forwarder in this business. The investigation asked the monopoly supplier why they set up different prices, and they said that the forwarder had 10 years ago cooperated with the supplier to construct the warehouses, and that is the reason they received a price discount. However, the agency did not consider that this explained such large differences and instead considered it third degree price discrimination. From a legal categorization, it said the case could be considered as a secondary line injury distortionary case. The decision was not to impose a fine, but to ask the monopoly supplier to cease discriminating, and to set a uniform. The agency is aware of different opinions on the decision, but is satisfied and considers that it is always a challenge to impose law changes on State-owned enterprises.

The **Chair** then asked Iceland to make a presentation on a discrimination case it had in the Milk sector.

**Iceland** said the provision applied is identical to article 102 in the EU on abuse of a dominant position in the form of price discrimination. The product in question is non-pasteurized cow milk, that is to say, raw milk, the basic raw material in the production of all dairy products. In Iceland there is a vertically integrated dairy market where there is a dominant firm, MS which is by far the largest collector of milk, the only wholesale vendor of raw milk, and by far the largest producer for end markets. In the downstream market there is a small competitor, KU, which relies on its competitor for a supply of raw milk.

In the upstream market, there is the dominant party, MS, which is in close ownership relationship with KS, which then owns the third company. What is peculiar with the market is that special laws on dairies in Iceland exempt them from the article 101 ban on collusion. They are also not subject to merger review and this has led to heavy concentration in the market. The only upstream competitor is a small firm, KU whose complaint triggered the investigation. The owner of KU accidentally received an invoice for raw milk for MS intended for his former company (which he had sold to MS due to the high price of raw milk). He realized that MS had lowered the prices after the sale of the company, much lower than his new company had to pay. He complained to the ICA which investigated found a 50-70% price difference between KU and MS's downstream firm. So MS, who is the only wholesale vendor and the largest end producer, sold raw milk at a lower price to related companies and collaborators compared to the price it charged its competitor in the downstream market. When it acquired that competitor, it then started to increase prices for consumers. MS was fined for price discrimination. The case was appealed and was annulled on the basis that the exemptions from the ban on collusion allowed the company to discriminate irrespective of the harm to competition. The ICA has announced that it will appeal the case before the Courts .

The **Chair** turned to BIAC whose contribution states that this kind of price discrimination does not merit antitrust intervention.

**BIAC** said that its position is not that price discrimination never merits antitrust intervention but that they are very critical of decisions to prosecute distortionary price discrimination. There may be many reasons why upstream firms would like to price differentiate and charge different prices to their downstream distributors. In most cases, BIAC believe that those price differences are motivated by efficiency reasons. BIAC believe that charging those different prices would not automatically result in negative effects. In many cases, price differentiating would be output and welfare enchaining. There may be exceptional circumstances, but in many cases, the matter would essentially be either an exploitative pricing case or an exclusionary pricing case and should be treated according to the standard applied to those practices. If there is a case of distortionary price discrimination, at minimum there are a number of necessary conditions that must be met. There should be significant market power, significant price differences and evidence that those price differences affect downstream competition which then results in negative prices for consumers. This is a very difficult task. That is not to say that it would never happen but BIAC caution that agencies should not too quickly step into these cases and should consider if they are not in fact exploitative or exclusionary pricing.

BIAC noted that the background paper asks the question ‘why do we see so many of these distortionary pricing cases?’ BIAC said it would be concerned if there were cases where agencies prefer to prosecute a case as a distortionary pricing case when the case is actually about exclusion. It noted that Professor Geradin also mentioned the notion of FRAND terms; the obligation in some cases of holders of IP monopolies to charge non-discriminatory terms. BIAC said that if it is believed that price differentiation may in many cases be welfare enhancing and efficient then the question may arise why an obligation to charge non-discriminatory royalty rates for the use of intellectual property would in all circumstances be efficient?

The **Chair** asked Professor Carlton what he thought of the Icelandic case.

**Professor Carlton** said he was hesitant to discuss a case he was not familiar with. He noted however that the rival was relying on the dominant firm for some supply, and that supply was essential in some cases. He said that if someone is already supplying something that is essential, then it is a monopolist and it already has market power. So to think that it is going to get additional market power from exclusionary behaviour raises other difficult questions. It is already a monopoly position. So it is very unclear that there can be a benefit. He said that he would like to reserve judgement until he had looked at the details.

**Professor Geradin** said he would have supported the Icelandic Competition Authority. But that he thought it was an exclusionary case of vertical foreclosure not a distortionary case. He said this was a classic case of an exclusionary case based on article 103c which is the provision in treaty for distortionary price discrimination cases.

**Professor Carlton** said that you remain a monopolist whether or not you exclude downstream, therefore it is not clear that you gain any market power by excluding downstream. As an authority you are not going to get rid of that market power in any way by attacking what is happening downstream. That also applies not just to a case like this but to tie-in sales. In the US there has been a lot of confusion on this and it arises from the simple proposition that if you are the monopolist of A and you can expect to remain the monopolist of A, you gain nothing in market power by tying B. It may mean that you get to price discriminate, but it does not mean you are going to adversely affect competition, not going to adversely affect your rival in the sense that you will harm the process of competition. He said that he has a paper on this where he applies it to the Microsoft case where he shows that it can be a harm under certain circumstances. But he did think it is really important to stress what Professor Geradin was saying: if it is an essential facility, red flags should go off in your mind and say ‘do I really gain something by the action that is being attacked if you remain the monopolist of the essential facility?’

The **Chair** then asked the UK’s Financial Conduct Authority to make a presentation on their paper on price discrimination in financial markets which discusses different remedies to price discrimination.

The **UK** explained that the Financial Conduct Authority (FCA) is a financial services regulator with a competition objective, and the powers to enforce competition law, but also a consumer protection objective and a market integrity objective. So when it acts it considers all three objectives and the overall objective is to make markets work well. The FCA might address price discrimination in the context of market studies and competition law enforcement.

The FCA prepared this paper because there was a discussion about whether, and if so when, it should intervene when there are issues of price discrimination. It has a number of interventions particularly focussing on disclosure and behavioural nudges. It is not typically a price-setting organization. There is one specific case that is high interest pay-day loans where it was given a specific duty by government to set a price cap but it does not typically use that as a tool. It noted that its concerns are about whether the market was working well, whether competition was working effectively in the market, but also about cross subsidies and the distribution of outcomes in those markets where some people might be getting a very poor deal and as a result others might be getting a very good deal in those markets. Price discrimination in financial markets is largely behaviour-based price discrimination, which means people get charged different prices depending on how they behave. For example, people who are shopping around and buying an insurance product for the first time will get charged much less than someone who is automatically renewing each year. With cash savings the FCA found relatively high interest rates for time-limited offers but then those rates revert to a very low price afterwards. Similarly, for things like contingent charges, depending on how a customer uses their overdraft or their banking facility they might incur additional charges for over-limit fees or late payment fees which increase the price paid.

It said that a lot of these are markets where competition is focussed on an upfront, headline price, and then there are other components of the price that are less obvious to some customers. The question is whether the active and sophisticated customer – those who understand that there are other components to the price, and that if they want the best deal they have to keep shopping around and not auto-renew - if these customers gain at the expense of inert, inattentive, unsophisticated customers. There is a framework that comes from literature in behavioural economics in industrial organisation to understand how markets work when consumers behave in relatively unsophisticated ways. Traditionally without discrimination, the active consumer is going to protect in some ways the unsophisticated consumer because firms have got to cater for both of those groups. But with price discrimination it is easier to differentiate between the active and the inert and their interests might diverge. The sophisticated might benefit from the existence of unsophisticated consumers who face some sort of rip-off as it were.

This is not to suggest that in all these cases there is harm. There is no assumption that harm exists or remedies are needed. It is necessary to look at the market situation and of course markets can self-correct, so obviously the larger the size of the rip-off, the bigger the incentive to become sophisticated, become active, become informed. But the FCA does observe situations where there are high price differences and it thinks about whether there is anything it can do to try and solve that. It comes back to a point that Dennis Carlton made earlier about providing information to consumers and activating them. The question is whether rival firms have an incentive to activate them or not and it is not clear in a number of cases that firms do have an incentive to do that, because they cannot provide a price profile that will attract sophisticated or unsophisticated consumers by offering them both a better deal to them. In some sense the low headline price and the high hidden price is the only stable price in some situations, and the firms and regulators have limited ability to active those unsophisticated consumers. It would be very nice if the FCA could provide consumers with more information and they act in sophisticated ways, but financial services are replete with disclosure requirements which people ignore and do not take note of. Therefore, it is a difficult challenge as to whether those consumers can be activated and what can be done if they cannot.

Some examples of interventions were then discussed. For example, in insurance renewal it had the idea that if people have their renewal price and they also see what they paid last year then it will be clear to the customer if the price has increased substantially. So it ran a randomised controlled trial to see the effect of disclosing that to consumers. It found a small increase in the consumers who were activated by that and so it introduced that change, but it noted that this did not solve the overall market problem. An interesting case is set out in an article from John Vickers from 4 years ago when he looked at contingent charges and overdraft charges, and asked the question when do you say we are going to cap the high price that is hidden? The instance where the FCA decided to do that was in high cost short term credit, also known as pay-day loans to most people. There was a high headline price, to the extent that the government said 'you have got to do that' but what the FCA also chose to do was to place a cap on the additional fees where people get into financially difficulties and lead to a debt spiral.

The **Chair** then turned to Israel for their presentation of a case in which they applied structural remedies to a price discrimination case.

**Israel** made a presentation about a case in which it gave instructions to a monopoly cement manufacturer to divest one of its factories because of its discriminatory pricing policies. It said Israel was too small for a competing factory to be founded and the only competition possibility was import. There was only one importer, importing cement from Turkey. In addition, they imported cement which was inferior. Cement is the main ingredient of concrete. There are a few concrete manufacturing firms. The two largest are Hanson and Readymix. Both are owned by huge international cement producers, Cemex owns Readymix and Heidelberg Cement owns Hanson. Other concrete manufacturers are significantly smaller. Nesher is declared by the Director General as a monopoly in supplying cement. A monopoly in Israeli law is defined as a company holding more than 50% of market share. It is not defined by market power. The director general may instruct a monopoly in two case. Firstly if competition is harmed as a result of the existence or behaviour of a monopoly. Secondly if there is a risk of substantial harm to competition as a result of a behaviour of a monopolist. The decision in this case does not specify if there was actual harm to competition or just a substantial risk of harm. The law does not limit the director general to deal with behaviours that violate the law. They may instruct even on the basis of the existence of a monopolist. The range of instructions that can be given is very wide. The Director General can give any instruction that would prevent the harm.

The prices of cement sold by Nesher are regulated. The price control sets a maximum price and maximum profit which should not exceed 12%. Because of the maximum profit regulation, Nesher cannot charge its maximum regulated price and so it provides discounts to its customers. The regulations are flexible enough to allow Nesher to provide heavy discounts and special credit terms to large concrete manufacturers, terms significantly better than those provided to their smaller competitors. Nesher feared that its large customers, which are related to large cement manufacturers will import cement and so it granted Readymix and Hanson special discounts and preferred terms. The influence of these discounts was on both the concrete and cement sector. In the cement sector, the discount affected Hanson and Readymix's interest in developing a better cement import alternative or even to import cement themselves. In the concrete sector, the favourable terms lead the large manufacturers to choose to earn high profits instead of competing with one another and offering competitive pricing in order to enlarge their market share. Competing concrete firms paid much more for cement and so were not able to offer competitive prices that would disrupt this ccoridnation. The outcome was: a) a monopoly of cement supplying about 90% of market share in cement, b) a supra-competitive pricing equilibrium in the concrete sector driven by the largest concrete manufacturers. Israel suggested that the intuitive solution to price discrimination is to prohibit such discrimination, and such prohibition would then lead to a lower average cement price and lead to competition in the concrete industry. It might also lead to an additional import alternative. The authority had planned to prohibit discounts exceeding 4%. However, after discussions with Nesher and collaboration with the ministry of economics and the ministry of finance, the authority agreed a different remedy, to instruct Nesher to sell one of its three cement plants to an unrelated company which would compete to produce cement. This structural solution creates a local manufacturer to compete with Nesher in the cement industry and its pricing policy may lead to competition in the concrete market too. The authority hopes that its remedy in this price discrimination case will lead to more competition in both the cement and the concrete market.

**Professor Carlton** said that the structural solution creates competition and that seems great, but that you would not want to go around breaking up monopolies because it would force you to create dis-incentives for firms to become large. He recognised that might be a different question in a small country. He asked how Nesher came to be a monopolist and suggested the conversation continue another time.

The **Chair** concluded the roundtable by summarising some of the main points emerging from the discussion. Firstly, the idea that price discrimination can have different effects on welfare, so it is going to be complicated. Secondly, the fact that sometimes there is not a clear distinction made between: a) what is the consumer welfare impact of those price discrimination, b) issues with fairness, and c) and the idea of excessiveness. Thirdly, that it can be useful to specify what kind of price discrimination is being looked at - exploitative, exclusionary, or distortionary - since that will determine the test that should be used. Fourthly, it appears there is little time spent looking at the possible efficiency benefits in price discrimination cases. There had been a suggestion that this was because firms do not put forward good reasons, which might be because firms believe authorities do not listen to these explanations or might be because firms do not have a good rationale for what they are doing.