

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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TELL ME WHERE YOU COME FROM AND I WILL TELL YOU THE PRICE: AMBIGUOUS EXPANSION OF PROHIBITED GEOGRAPHICAL PRICE DISCRIMINATION IN THE EU

JANJA HOJNIK*

Abstract

This article outlines some of the ambiguities arising from the endeavours of EU legislators to tackle the problem of direct and indirect price discrimination based on nationality or residence of the customer – in this article referred to as geographical price discrimination (GPD) under EU free movement law. It is submitted that prohibiting direct and indirect GPD on the sale of goods and services with an unclear system of derogations potentially covers a variety of established pricing practices (including uniform prices and de minimis price differences). While it is submitted that Article 20(2) of the Services Directive should be repealed, a cautious approach towards interpreting and applying Article 4 of the new Geo-Blocking Regulation is suggested in order to avoid disproportional restrictions of parties' contractual freedom, especially in respect of traders with insignificant market power.

1. Introduction: Is your money as good as anyone else's in the EU?

As long as trading has existed, traders have made use of price discrimination in order to maximize their profits. A simplified definition of price discrimination covers situations when the same product or service is sold at different prices to different customers despite identical costs.¹ While the Internet makes access to goods and services easier, digital technology has added an additional element to price discrimination, as traders often have access to detailed data on individual customers' residence and behaviour,

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1. Philips, *The Economics of Price Discrimination* (Cambridge University Press, 1983), p. 5; Jones and Sufrin, *EU Competition Law: Text, Cases, and Materials* (OUP, 2014), p. 368.

making price discrimination a whole lot easier.² As Oren Etzioni put it: “in the age of the Internet, fixed prices are a thing of the past”.³ It thus seems that the common expression “my money is as good as anyone else’s” may no longer be true.⁴ On the other hand, the Internet makes it easier for customers to obtain information on prices of goods and services offered on other geographical markets thereby making it easier to discern practices of price discrimination.⁵

Although economists claim that price discrimination is one of the most prevalent forms of marketing practice,⁶ customers are only comfortable with some of its forms – mostly in situations when they are on the lower price end. More often than not, however, discriminatory prices for distinct groups of customers lead to customer outrage and media scandals.⁷ Due to this highly negative stigma, price discrimination has been raising suspicions for years.⁸ Under political pressure from buyers facing the higher end of discriminatory prices, regulators have tried to respond by categorizing price discrimination as a potentially harmful market activity.⁹

The overriding objective of creating the EU’s internal market has resulted in a greater focus on price discrimination; it was seen as inconsistent with the goal of establishing a perfectly operating market economy, where all purchasers pay the same price for any given product.¹⁰ Historically, drawing upon models provided by US competition law,¹¹ the drafters of the Treaty of Rome prohibited price discrimination that conflicted with the Treaty’s goals in the field of competition law. Price discrimination in international trade was also targeted through anti-dumping provisions. Nevertheless, since the EU internal market lacks full integration, price dispersion and differences in

2. Begg, Fischer and Dornbusch, *Economics* (McGraw-Hill, 2005), p. 138.

3. Angwin and Mattioli, “Coming soon: Toilet paper priced like airline tickets”, *Wall Street Journal* (5 Sept. 2012).

4. Miller, “What do we worry about when we worry about price discrimination: The law and ethics of using personal information for pricing”, 19 *Journal of Technology Law & Policy* (2014), 41, 93.

5. Peppet, “Freedom of contract in an augmented reality: The case of consumer contracts”, 59 *UCLA Law Review* (2011), 676.

6. Varian, “Price discrimination”, 1 *Handbook of Industrial Organization* (1989), 597.

7. E.g. Martinez, “Amazon error may end ‘dynamic pricing’”, *ABC News* (29 Sept. 2000).

8. Papandropoulos, “How should price discrimination be dealt with by competition authorities”, 3 *Revue des droits de la concurrence* (2007), 34, 37.

9. Levine, “Price discrimination without market power”, 19 *Yale Journal on Regulation* (2002).

10. Furse, “Monopoly price discrimination, Article 82 and the Competition Act”, 22 *ECLR* (2001), 149, 153.

11. Clayton Act (ch. 323, para. 2, 38 Stat. 730 (1914)). In 1936 this Act was amended by the Robinson-Patman Act (also known as Anti-Price Discrimination Act, 15 U.S.C. § 13), which has been heavily criticized and rarely applied. In 2007, the Antitrust Modernization Commission called for its repeal. Report and Recommendations, Apr. 2007, p. iii.

purchasing power between Member States remain high,¹² leaving room for price discrimination between regional markets.¹³ The occurrence of price discrimination in the EU extends to both goods' and services' and is occasionally resorted to by both public and private providers in virtually all EU Member States.

From the ECJ's case law it is well known that in the 1970s the Danes paid much higher prices for bananas than the Dutch, while in the 1990s the Germans paid considerably more for VWs and Audis than the Italians.¹⁴ More recently, two British tourists posted a photograph of a bill on Facebook to the amount of almost 10 euros which had been charged to them by a bar at the Croatian seaside for two cups of coffee, whereas the same bar granted locals a price discount.¹⁵ Similarly, Belgian tourists complained about being charged six times more than locals in Venice for the use of public toilets;¹⁶ rafting companies from Hungary and Slovakia complained that Slovenian companies enjoyed cheaper access rights to rivers in Slovenia;¹⁷ a Slovenian newspaper reported an Austrian-based retail chain charging Slovenian customers more than Austrian ones;¹⁸ a Church in Romania charged foreigners twice as much as the locals for monastery entrance fees¹⁹ and German and British customers were charged more than the French when purchasing online tickets to Disneyland in Paris.²⁰ Additionally, Austrian ski lift operators grant discounts solely to Austrians, bus fares in Malta and Estonia are different for locals and tourists²¹ and car rental and airline companies regularly "adjust" their prices to the country of origin of a customer.²²

12. Eurostat, Comparative price levels of consumer goods and services, Dec. 2017.

13. Hassink and Schettkat, "Price discrimination between EU regions", 94 *Tijdschrift voor Economische en Sociale Geografie* (2003), 258, 259.

14. Case 27/76, *United Brands*, EU:C:1978:22 and Case T-83/91, *Tetra Pak*, EU:T:1994:246.

15. Sajovic, "Rovinj: 5 evrov za kapučino in ločene cene za tujce", *RTV SLO MMC* (7 Apr. 2016).

16. Kitching, "Belgian tourist files complaint over 'exorbitant' prices in Venice", *Daily Mail* (12 May 2015).

17. Solvit: Fair treatment for rafting companies in Slovenia, Problems solved, Goods and Services, available at <ec.europa.eu/solvit/problems-solved/goods-services/index_en.htm>.

18. Zemljarič, "Zakaj so cene v avstrijskem Hoferju nižje kot v slovenskem", *Štajerski tednik* (5 Mar. 2018).

19. Solvit: Non-discriminatory entry fees to Romanian monasteries, Discrimination, available at <ec.europa.eu/solvit/problems-solved/discrimination/index_en.htm>.

20. Barker, "High ho! Disneyland Paris faces Brussels pricing probe", *Financial Times* (28 July 2015).

21. Debono, "Discriminatory bus fares for residents: Only in Malta?", *MaltaToday.com* (25 Nov. 2010).

22. European Commission, "Commission presses car rental companies to stop discriminatory practices against consumers", *Press Release 14/917* (11 Aug. 2014);

To combat these practices, the EU legislators recently focused on price discrimination by private traders under free movement law, prohibiting price discrimination of customers, where segmentation is based upon the customers' nationality or their place of residence. Such pricing practices are referred to as *geographical price discrimination* (hereafter GPD). In economic theory this term denotes a specific form of price discrimination that involves charging a separate price to the members of each group of customers based on their geographical compartmentalization.²³ Since nationality and residence in most instances coincide, GPD is used in this article to cover distinct price treatment based on nationality and place of residence of customers – although at some points of the article, price discrimination in respect of the factual market is distinguished from price discrimination in respect of personal circumstances of the customer.

This article outlines some of the ambiguities in respect of broader prohibition of GPD under EU free movement law. The first part of the article illustrates the expansion of EU legal sources prohibiting GPD, most recently under the Geo-Blocking Regulation,²⁴ which clarifies the highly controversial Article 20 of the Services Directive (hereafter also “SD”).²⁵ The article then examines ambiguities related to the scope of the prohibition of direct and indirect GPD under EU free movement law, including the problems of the discriminatory nature of single prices and the relevance of the *de minimis* price difference. The final part of the article focuses on potential objective justifications available to traders accused of GPD.

Although EU free movement law primarily addresses GPD by public authorities, this article focuses on implications of these prohibitions for private traders. In this respect it is submitted that Article 20(2) SD needs to be repealed and a cautious approach to interpreting Article 4 of the new Geo-Blocking Regulation (hereafter “GBR”) is needed. In particular, a broad understanding of GPD in economic theory is not applicable to GPD interpretations under EU free movement law, due to the enforcement difficulties and proportionality concerns. Moreover, since GPD seems to be largely economically unfounded as a barrier to trade on the internal market, it

Commission SWD(2013)208 final, Report on the suitability of economic regulation of the European air transport market and of selected ancillary services, p. 81.

23. Pigou, *The Economics of Welfare*, 1920 (1932, McMillan & Co.) p. 279; Malueg and Schwartz, “Parallel imports, demand dispersion, and international price discrimination”, 37 *Journal of International Economics* (1994), 167.

24. Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, O.J. 2018, L 601/1-15.

25. Directive 2006/123/EC on services in the internal market, O.J. 2006, L 376/36-68.

is submitted that the prohibition of GPD turns out to be a technocratic excuse for the EU's regulatory actions in this field due to its limited competences in the field of contract law. As such, it is a reflection of the EU legislators' efforts to increase distributive justice in the transnational framework, thereby inevitably colliding with differences in purchasing power of EU consumers and deliberations on fairness of prices.

2. Expansion of EU law sources addressing GPD

2.1 *Freedom of pricing as a fundamental element of the EU's market economy*

The starting point for observing regulatory restrictions of GPD is the freedom of pricing.²⁶ It means that sellers ought to be free to choose their own pricing methods, including the right to offer different prices to different customers. As such, freedom of pricing explicitly rejects "just price" theories, according to which goods have an independent and objective fair price.²⁷ When MEP Guoga asked what the Commission was doing to ensure that passengers at Europe's airports were charged fair prices for water, Commissioner Bulc responded that the freedom of pricing was a fundamental element of the EU's market economy.²⁸ Her position is supported by Directive 93/13/EEC on unfair terms in consumer contracts,²⁹ which provides that assessment of the unfair nature of the contractual terms should not relate to the adequacy of the price. Freedom of pricing is further warranted by Article 16 of the EU Charter of Fundamental Rights (hereafter: CFR), guaranteeing the freedom to conduct business and recognizing private autonomy at the EU level.³⁰ The Explanations to the Charter outline that the freedom to conduct business entails the freedom to exercise an economic activity, freedom of contract, and

26. As the Commission noted in respect of Art. 20 SD, companies often refer to contractual freedom: Inception Impact Assessment, cited *infra* note 197. See also proposal of the GBR, COM(2016)289 final, p. 5.

27. Miller, *op. cit. supra* note 4, 68. Cf. Hockett and Kreitner, "Just Prices", 27 *Cornell J. of Law & Public Policy* (2018), p. 17.

28. Question to the Commission, Rule 130, Antanas Guoga, Cheaper water at airports in the EU, E-003366-17, 16 May 2017.

29. O.J. 1993, L 95/ 29–34, Art. 4.

30. This was explicitly recognized by the ECJ in Case C-283/11, *Sky Österreich*, EU:C:2013:28 and Case C-426/11, *Alemo-Herron*, EU:C:2013:521, para 32. See Babayev, "Private autonomy at Union level: On Article 16 CFREU and free movement rights", 53 *CML Rev.* (2016), 979, 982.

the principle of free competition,³¹ while the ECJ has ruled that the freedom of contract as protected by Article 16 CFR includes “the freedom to determine the price of a service”.³²

As pointed out by Advocate General Kokott in *Alrosa*, “(i)n a Community which must observe the principle of an open market economy with free competition, contractual freedom must be guaranteed”.³³ This reflects the liberal theory that traders should be allowed to carry on their business freely, unless there are convincing reasons to regulate it – or as the French philosopher Alfred Fouillée put it, “qui dit contractuel, dit juste”.³⁴ However, despite the fact that the EU does not (yet) set a “fair price” for water, a series of EU legal instruments seeking to protect other “fundamental elements of the EU’s market economy” restrict traders’ contractual freedom, including their freedom of pricing. As the ECJ held in *Sky Österreich*, freedom to conduct business “may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest”.³⁵ Consequently, this freedom “is not absolute, but must be viewed in relation to its social function”.³⁶ Free competition, the (digital) single market, and endeavours to eliminate all forms of discrimination and ensure a high level of consumer and data protection are put forward by the EU legislators as the welfare goals that justify restraints of the freedom of pricing, including the prohibition of private traders from applying GPD practices. The following subsections refer to various EU legal instruments prohibiting GPD by private traders with a view to protecting these welfare aims in the public interest under EU competition law, free movement law, general EU anti-discrimination law, as well as more indirectly under EU consumer and data protection law.

31. Before the Charter entered into force, the ECJ recognized the freedom of contract as a general principle of civil law, e.g. Case C-277/05, *Société thermale d'Eugénie-les-Bains*, EU:C:2007:440, para 28.

32. Case C-283/11, *Sky Österreich*, para 43, Case C-70/10, *Scarlet Extended*, EU:C:2011:771, para 49, and Case C-426/11, *Alemo-Herron*, para 35. For a comment see Weatherill, “Use and abuse of the EU’s Charter of Fundamental Rights: On the improper veneration of ‘Freedom of Contract’”, 10 *European Review of Contract Law* (2014), 167.

33. Case C-441/07 P, *Commission v. Alrosa*, EU:C:2010:555, para 225.

34. Fouillée, *La Science Sociale Contemporaine* (1880); Abegg and Thatcher, “Freedom of contract in the 19th century: Mythology and the silence of the sources – Sibylle Hofer’s Freiheit ohne Grenzen – Privatrechtstheoretische Diskussionen im 19 Jahrhundert”, 5 *GLJ* (2004), 101.

35. Case C-283/01, *Sky Österreich*, para 46.

36. *Ibid.*, para 45.

2.2 Competition law instruments against GPD

Various pricing practices by private traders are primarily addressed by competition law, in particular by rules prohibiting the abuse of a dominant position. In principle, to be able to price discriminate, one must have the power to be a price maker and not merely a price taker. In a highly competitive market, a seller could thus not sell identical products at different prices, because other sellers would concentrate on the high-price sector until the price in that sector had been driven down to the price in other sectors.³⁷ The theory of perfect competition therefore implies that all goods would be sold at one price (the law of one price).³⁸ Consequently, economists have traditionally noted that price discrimination arises naturally in the theory of monopoly and oligopoly.³⁹ While it is nowadays admitted that price discrimination occurs in competitive markets too,⁴⁰ it tends to be sporadic, so that customers may be in a favoured group today and in a disfavoured one tomorrow.⁴¹

Under EU competition law, Articles 101 and 102 TFEU prohibit undertakings from restricting parallel imports, i.e. a *conditio sine qua non* for the preservation of GPD. Article 101 TFEU applies to vertical agreements between suppliers and customers in which suppliers agree to offer their customers more favourable prices than those offered to others.⁴² Additionally, price discrimination by dominant undertakings among competing customers is potentially vulnerable to attack under Article 102(c) TFEU. The case law of the ECJ indicates that “dissimilar conditions” also include dissimilar prices, thereby bringing price discrimination within the scope of Article 102(c) TFEU.⁴³ It is disputable in legal scholarship, however, whether this is the appropriate legal basis for sanctioning dominant firms practising GPD.⁴⁴ In

37. Dam, “The economics and law of price discrimination: Herein of three regulatory schemes”, 31 *Univ. Chicago Law Review* (1963), 5; Jones and Sufrin, op. cit. *supra* note 1, 387.

38. McAfee, “Price discrimination”, (2008) *Issues in Competition Law and Policy*, 465–466.

39. Varian, op. cit. *supra* note 6, 598.

40. Gifford and Kudrle, “The law and economics of price discrimination in modern economies: Time for reconciliation”, 43 *UC Davis Law Review* (2009), 1235, 1247.

41. Jones and Sufrin, op. cit. *supra* note 1, 387.

42. “Commission fines Volkswagen ECU 102 million following consumer complaints”, IP/98/94, 28 Jan. 1998. See also M. Waelbroeck, “Price discrimination and rebate policies under EU competition law” in Hawk (Ed.), *International Antitrust Law and Policy* (Fordham, Transnational Juris, 1996), p. 149.

43. Case 27/76, *United Brands*, EU:C:1978:22 and Case T-83/91, *Tetra Pak*, EU:T:1994:246. More recently, Case C-23/14, *Post Danmark II*, EU:C:2015:651; Case C-413/14 P, *Intel*, EU:C:2017:632; and Case C-525/16, *MEO*, EU:C:2018:270.

44. Geradin and Petit, “Price discrimination under EC competition law: Another antitrust doctrine in search of limiting principles?”, 2 *Journal of Competition Law and Economics* (2006), 479, 486.

this respect, Geradin and Petit maintain that the ECJ's statement in *United Brands* that discriminatory prices across the Member States are *per se* obstacles to free movement of goods lacked economic logic: if prices of bananas happened to be similar in all Member States, there would not be any cross-border trade in bananas. This means that since the Commission and the EU Courts in *United Brands* (and in *Tetra Pak II*) already banned clauses forbidding resale, prohibiting GPD as a separate infringement was neither desirable, nor necessary.⁴⁵ Ending the practice of partitioning the EU market should therefore have sufficed to bring GPD to an end. Moreover, *United Brands* and *Tetra Pak II* have been criticized because competitive disadvantage for the dominant firms' trading parties had not been analysed when finding that the practice of GPD amounted to abuse of a dominant position. The need for a competitive disadvantage to occur suggests that Article 102(c) TFEU demands that the dominant firm's customers are in competition with each other.⁴⁶ With GPD this is often not the case, since customers operate on distinct geographical markets. In such instances, price discrimination should not be challenged under Article 102(c) TFEU; this should only apply to differential pricing practices within one and the same market.⁴⁷ Notwithstanding these concerns, the limited case law of the EU Courts on Article 102(c) TFEU has proved to eliminate only a very small number of GPD practices by dominant undertakings. The EU legislature has as a result adopted a broader prohibition of GPD under free movement law.

2.3 *Prohibition of GPD under EU free movement law*

In light of the above, GPD is increasingly considered not only as a form of anti-competitive behaviour, but also as a restriction on EU fundamental freedoms, in particular the free provision of services. Challenging GPD under EU free movement law is considerably easier than under Article 102(c) TFEU for two reasons in particular. First, under free movement law a competitive disadvantage does not have to be proved, as is the case with Article 102(c) TFEU. Secondly, while Article 102(c) TFEU addresses private traders in a dominant position, EU free movement law addresses GPD by public bodies, which is its traditional scope, and also GPD by private traders regardless of their market power.

Depending on whether the trader is price discriminating in respect of the factual market or in respect of personal circumstances of the customer, this

45. *Ibid.*, 529.

46. Temple Lang and O'Donoghue, "Defining legitimate competition: How to clarify pricing abuses under Article 82 EC", 26 *Fordham Int. Law Journal* (2002), 83, 115.

47. Geradin and Petit, *op. cit. supra* note 44, 486.

article suggests a distinction between static and dynamic GPD.⁴⁸ When traders, such as Hofer or Volkswagen, enter the buyers' regional market and bring the products to them, but charge different prices for distinct regional markets, the prices for customers in each Member State are still the same for all segments of buyers on the market of that Member State. This form of GPD is thus market dependent and is referred hereafter as *static GPD*. In contrast, when traders, such as a bar in Croatia or Disneyland in Paris, operate on their home Member State markets and customers come to their premises (or contact them online), the traders sometimes set differential prices for distinct segments of customers *on the same regional market* due to their residence. This form of GPD is thus customer dependent and is referred hereafter as *dynamic GPD*. While both forms of GPD lead to the same final result, i.e. residents of distinct regional markets of the EU are charged distinct prices, the prohibition of dynamic GPD establishes circumstances of trade that exist in the trader's Member State for all European customers (the "shop like a local" principle). In contrast, the prohibition of static GPD attempts to establish uniform prices across the entire EU internal market.

In its free movement case law the ECJ has held that GPD "may have an effect on the conditions under which services are provided ..., and may therefore influence the decision of some persons to visit a country".⁴⁹ The ECJ has so far, however, only been asked to examine practices of GPD by public bodies,⁵⁰ especially discriminatory admission fees to the detriment of foreign tourists,⁵¹ leaving it unclear whether GPD by private traders is prohibited under TFEU provisions on free movement. In *Sapod Audic* the ECJ held that an obligation arising out of a private contract "cannot be considered a barrier to trade for the purpose of Article [34 TFEU] since it was not imposed by a Member State but agreed between individuals".⁵² This suggests that voluntarily made contractual terms will not amount to restrictions on trade with goods,⁵³ and that GPD practices by private traders do not conflict

48. This distinction does not correspond to the distinction between static and dynamic price discrimination in economic theory that depends on whether firms adapt their pricing over time or not. Armstrong, "Price Discrimination", MPRA Paper (2006), University College London.

49. Case C-45/93, *Commission v. Spain*, EU:C:1994:101, para 7.

50. Case 263/86, *Belgian State v. René Humbel and Marie-Thérèse Edel*, EU:C:1988:451.

51. Case C-45/93, *Commission v. Spain*; Case C-388/01, *Commission v. Italy*, EU:C:2003:30. This case law has been transferred to Art. 20(1) SD. Based on this provision the Commission has sent a reasoned opinion to Croatia, requesting it to remove measures according to which annual fishing licences were limited to Croatian residents. Commission, "September infringements' package", MEMO 16/3125, 29 Sept. 2016.

52. Case C-159/00, *Sapod Audic*, EU:C:2002:343, para 74. This statement has not been undermined by the ECJ's ruling in Case C-171/11, *Fra.bo*, EU:C:2012:453.

53. Verbruggen, "The impact of primary EU law on private law relationships: Horizontal direct effect under the free movement of goods and services", 22 E.R.P.L. (2014), 201, 210.

with Article 34 TFEU. Conversely, the ECJ has recognized the horizontal direct effect of Article 56 TFEU on the free movement of services. This is, however, predominantly confined to private actors possessing some form of dominance over others, thereby awarding them a capacity to impose conditions on others who have no alternative but to accept them.⁵⁴ Both the principled denial of the horizontal direct effect of Article 34 TFEU and the limited horizontal direct effect of Article 56 TFEU therefore prevent customers from relying on the TFEU provisions on fundamental freedoms to challenge GPD practices by private traders on the internal market.

However, this is contrary to the Commission's position that practices by service providers that serve to create artificial borders within the internal market need to be abolished in order to create benefits for service recipients.⁵⁵ The Commission's stance is codified in Article 20(2) SD, which supports services recipients' access to offers available on other Member States' markets by explicitly prohibiting discrimination based on their nationality and place of residence. This *inter alia* encompasses a prohibition of GPD by private traders with dominant and minor market power.⁵⁶ It requires Member States to ensure that "general conditions of access to a service, which are made available to the public at large by the provider do not contain discriminatory provisions relating to the nationality or place of residence of the recipient".⁵⁷ According to the Commission, setting a different price for the service is – in addition to refusing to supply a customer resident in another Member State – one of two main categories of differential treatment, which is prohibited unless "directly justified by objective criteria".⁵⁸ Article 20(2) SD is highly controversial and supports wide-ranging interpretations of service recipients' rights, considering that the term "recipients" refers to natural and legal persons, who use services for professional or non-professional purposes, especially when its scope is understood as covering not only trade in services

54. Babayev, op. cit. *supra* note 30, 1004. Referring to Case C-411/98, *Ferlini*, EU:C:2000:530, para 50. See also De Sousa, *The European Fundamental Freedoms: A Contextual Approach* (OUP, 2015), pp. 200–214.

55. Commission Staff Working Document, With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, SWD(2012)146 final, p. 6.

56. Art. 4 SD and Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, Commission SWD(2016)163 final, p. 147.

57. Helberger, "Refusal to serve consumers because of their nationality or residence – Distortions in the internal market for E-commerce transactions?", European Parliament (2006) Briefing Note 2006–207 iii.

58. Commission SWD, cited *supra* note 55, pp. 4 and 10.

but also trade in goods.⁵⁹ However, despite some initial high hopes in respect of the ability of Article 20 SD to combat discriminatory practices by service providers,⁶⁰ the first decade after its adoption the provision proved to be quite ineffective. It has not reduced legal uncertainty, particularly because of the possibility to justify the differences in treatment and the corresponding difficulties in enforcing it in practice.⁶¹ Consequently, Article 20(2) SD is clarified by the new Geo-Blocking Regulation, which aims to widen customer choice and access to goods and services⁶² by defining certain situations where different treatment based on nationality, place of residence or establishment cannot be justified.⁶³

Adoption of the GBR is closely connected with the recent digital revolution that has introduced new dimensions and challenges to price discrimination. The Internet enables traders to offer each website customer a different price (so-called personalized pricing).⁶⁴ Geographical differentiation of customers is therefore only one of numerous possibilities offered by new technologies for the segmentation of customers. In this respect, the Commission maintains that a dynamic pricing practice, where a trader raises the price of a product after a customer has placed it in his digital shopping bag, could be considered a misleading action under Article 6(1)(d) of the 2005 Unfair Commercial Practices Directive.⁶⁵ Notwithstanding this, however, the European Council considered it necessary to call for further action to “remove the remaining barriers to the free circulation of goods and services sold online and tackle unjustified discrimination on the grounds of geographic location”.⁶⁶ Consequently, on 22 March 2018 the new Regulation 2018/302 prohibiting geo-blocking entered into force.

In contrast to Article 102(c) TFEU, which addresses GPD by dominant undertakings, the GBR addresses discriminatory practices by all market actors. The Regulation has thus transformed EU competition law in the sense

59. Joined Cases C-360/15 & C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort v. X BV* and *Visser Vastgoed Beleggingen BV v. Raad van de gemeente Appingedam*, EU:C:2018:44.

60. Helberger, op. cit. *supra* note 57, iii.

61. Proposal, COM(2016)289 final, recital 3.

62. Ibid., recital 5.

63. Ibid., recital 4 and 6. However, insofar as the GBR conflicts with the provisions of the SD, the GBR prevails.

64. See e.g. Gurley, “A deeper look at Uber’s dynamic pricing model”, *Above the Crowd*, (11 Mar. 2014) and Bell, “Airbnb introduces ‘smart Pricing’ to automate setting rates for hosts”, *Mashable*, (12 Nov. 2015).

65. Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, “Unfair Commercial Practices Directive”, O.J. 2005, L 149/22–39. See Guidance, cited *supra* note 55, pp. 146–147.

66. European Council meeting (25 and 26 June 2015), Conclusions, p. 7.

that it prosecutes practices that are consistent with the latter: while Article 102 TFEU focuses on undertakings with a dominant position, the Regulation addresses traders regardless of their market power. It is provided in the preamble to the Regulation that when traders segment the internal market along internal frontiers, the rights of customers are restricted. In this respect, the term “customers” refers to both EU consumers and undertakings established in the EU that receive services or purchase goods for the purpose of end use. Even though the Regulation restricted its scope in comparison to the Services Directive, it still circumvents the EU’s lack of competence in contract law outside the consumer domain. The Regulation seeks to address direct as well as indirect discrimination, thus also covering unjustified differences of treatment on the basis of other distinguishing criteria which lead to the same result, e.g. on the basis of the IP address used when accessing an online interface, the address submitted for the delivery of goods, the language choice made or the Member State where the customer’s payment instrument has been issued. It is expressly stated that prohibited discriminatory general conditions of access to goods and services *inter alia* include prices.⁶⁷ In contrast to the Services Directive, which addresses dynamic and static GPD, the Regulation seems to only address dynamic GPD.⁶⁸ This form of GPD is of a more personal nature as it primarily concerns the issue of *who* has purchased a commodity, rather than *where* it has been purchased, and as such it more directly affects the customers’ perception of its unfairness.

Although it is foreseen that the Commission will regularly analyse whether the scope of the GBR should be extended to services falling outside the scope of the Services Directive,⁶⁹ the Regulation currently only refers to three trading situations. Firstly, to the supply of goods in circumstances when the trader in its general terms and conditions offers delivery to the Member State of the buyer or when the latter agrees to pick up the goods at a location to which the trader supplies. In this situation the customer should be able to purchase goods under the same conditions as the trader’s home Member State, including price. Secondly, the Regulation applies to electronically supplied services that do not include providing access to copyright protected works (e.g. cloud services), where no physical delivery is needed; and thirdly, to services which are received in the Member State of the trader, usually on the providers’ premises.⁷⁰ Discriminatory prices by the Croatian bar, Disneyland in Paris, Austrian ski lifts and car rentals fall in the last category. The

67. Proposal, COM(2016)289 final, recital 15. On the other hand, terms and conditions that are individually negotiated between the trader and the customers are not considered to be general conditions of access.

68. *Ibid.*, Art. 4(2).

69. *Ibid.*, recital 37.

70. *Ibid.*, recital 23–25; Art. 4.

Regulation adopted an “encouraging” approach to situations, where a trader offers a bundle that combines several services or a bundle of goods combined with services, where some of them fall within the scope of the Regulation while others do not. In such situations, traders are obliged to respect the prohibition of discrimination under the Regulation for the part of the bundle that falls within its scope only, but are encouraged to respect it for the whole bundle.⁷¹

Since international transportation services like transportation of persons and goods by bus, rail, ship or plane, including local transport, taxis and ambulance services are excluded from the Services Directive, it is notable that direct or indirect GPD is explicitly prohibited by several sector-specific pieces of EU legislation in the field of transport services that apply to air transport,⁷² maritime transport⁷³ and bus and coach transport.⁷⁴ Discriminatory bus fares in Malta and Estonia to the detriment of tourists, mentioned in the introduction, are thus contrary to this directly applicable EU legislation. Nevertheless, cable cars, chair lifts and tow lifts with the purpose of transporting persons in tourist areas are not considered exclusively as transportation services and therefore fall under the Services Directive and in certain situations under the GBR.⁷⁵

It follows that although freedom to conduct business is inherently linked with fundamental freedoms,⁷⁶ and that free movement law serves to extend party autonomy across borders and prohibits restrictions on contracts with an interstate element,⁷⁷ free movement law does not always guarantee freedom of contract, and may even restrict it as it embodies both the power to interfere with contractual freedom and contractual freedom itself.⁷⁸ This situation is

71. Ibid., recital 10.

72. Art. 23(2) of Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community, O.J. 2008, L 293/3–20.

73. Art. 4(2) of Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway, O.J. 2010, L 334/1–16.

74. Art. 4(2) of Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport, O.J. 2011, L 55/1–12. It is intended that Regulation (EC) 1371/2007 on rail passengers' rights and obligations (O.J. 2007, L 315/14) will be amended to contain prohibition of discrimination in the near future. See recital 9 GBR.

75. Thereby *inter alia* covering advantageous rates for local residents for taking a cable car in the Tyrolean ski area <europakonsument.at/en/page/advantageous-rates-local-residents>.

76. E.g. in *Sokoll* the ECJ held that Art. 16 refers *inter alia* to Art. 49 TFEU. Case C-367/12, *Sokoll-Seebacher*, EU:C:2014:69, para 22. See also Verbruggen op. cit. *supra* note 53, 202.

77. Grundmann, “Information, party autonomy and economic agents in European contract law”, 39 CML Rev. (2002), 269, 270; Davies, “Freedom of movement, horizontal effect, and freedom of contract”, 20 E.R.P.L. (2012), 805, 808.

78. Schepel, “Freedom of contract in free movement law: Balancing rights and principles in European public and private law”, 21 E.R.P.L. (2013), 1211, 1213.

reflected in the prohibition of GPD, premised upon recipients of services and purchasers of goods, who rely on free movement law when traders use differential prices across the internal market.

2.4 *Prohibition of GPD under EU anti-discrimination law*

The prohibition of GPD under EU free movement law is moreover a category within a more general GPD prohibition under EU anti-discrimination law. Based on the general prohibition of discrimination based on nationality as enshrined in Article 18 TFEU, the ECJ has struck down GPD practices by public bodies directed towards non-residents. The ECJ held that any citizen of the Union, exercising the right to move and reside within the territory of the Member States, may rely on Article 18 TFEU when confronted with discriminatory pricing practices by the host Member States, which runs contrary to dynamic GPD.⁷⁹ Even so, the ECJ's approach towards granting Article 18 TFEU horizontal direct effect has been cautious⁸⁰ and has so far not reached GPD practices by private traders.

Conversely, the freedom of pricing has often been circumvented by private traders, namely by means of other forms of discrimination. The EU Race Equality Directive⁸¹ prohibiting discrimination on the grounds of racial or ethnic origin and aiming to ensure "the development of democratic and tolerant societies"⁸² applies to both public and private persons, *inter alia* in respect of access to and supply of goods and services.⁸³ Charging higher prices for goods or services to customers of a certain race is thus contrary to this directive.⁸⁴ Moreover, Article 21 CFR has been successfully, though controversially, enforced by customers to combat price discrimination. In its judgment in *Test-Achats*,⁸⁵ the ECJ struck down Article 5(2) of Directive 2004/113⁸⁶ which allowed Member States to maintain an exception from the

79. Case C-103/08, *Arthur Gottwald*, EU:C:2009:597; Case C-75/11, *Commission v. Austria*, EU:C:2012:605. See also Case 293/83, *Françoise Gravier v. City of Liège*, EU:C:1985:69.

80. Case 36/74, *Walrave and Koch*, EU:C:1974:140 and Case C-411/98, *Ferlini*, EU:C:2000:530. For a comment see De Mol, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (Unbridled) expansionism of EU law?", 18 MJ (2011), 109, 115–117.

81. Directive 2000/43/EC on the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22–26.

82. *Ibid.*, recital 12.

83. *Ibid.*, Art. 3.

84. See e.g. Ayres, "Fair driving: Gender and race discrimination in retail car negotiations", (1991) *Harvard Law Review*, 817.

85. E.g. Tobler, annotation of Case C-236/09, *Test-Achats*, 48 CML Rev. (2011), 2041.

86. O.J. 2004, L 373/37–43.

principled unisex insurance premiums, as this worked against the achievement of the objective of equal treatment between men and women and was as such incompatible with Article 21 CFR. The same Directive may thus be interpreted as prohibiting a number of other price discrimination practices based on sex that may be considered as shielded by private autonomy (e.g. “ladies night out” practice;⁸⁷ more expensive pink razors than blue ones; or gender-based prices in hairdressing salons⁸⁸). What is more, Article 21 CFR could potentially also be relied upon against very common practices of price discrimination based on age. Following the ECJ’s decisions in *Mangold*⁸⁹ and *Kücükdeveci*⁹⁰ it is open to clarification whether Article 21 CFR could be interpreted as prohibiting price discrimination based on age, such as various discounts for students and pensioners. Admittedly, two ECJ cases on discriminatory admission fees to Spanish and Italian monuments guaranteed price discounts only to persons below the age of 21 and over the age of 65 respectively;⁹¹ yet, the ECJ was concerned only with the distinction based on nationality and residence. As both these cases appeared before the ECJ several years before *Mangold*, the effect of the non-discrimination principle based on age on the pricing practices is still uncertain.

This leads to the conclusion that price discrimination is increasingly treated as a conventional form of discrimination, despite Steppe’s point that “whereas the word ‘discrimination’ traditionally bears a negative connotation, the term ‘price discrimination’ should be read neutrally”.⁹² A business ethics scholar Elegido furthermore claims that price discrimination in itself is a morally neutral practice that traders are entitled to use if it advances their morally legitimate interests.⁹³ It is thus impossible to formulate a blanket assessment determining whether price discrimination is desirable or not without looking at the pricing rationale behind it. While prohibition of discrimination based on race promotes tolerance, GPD is usually not a sign of intolerance, but rather a response to the differing competitive conditions on Member States’ markets which traders try to exploit in order to increase their profit. Economically-driven GPD should thus not be considered in the same

87. I.e. a promotional event in a bar or nightclub where female customers pay less than male ones for admission or a drink. In the US, this practice has been troubling federal and State courts for years.

88. On discriminatory prices in German hair salons, see Hofmann, “Neue Studie: Sie zahlt mehr als er – manchmal”, *ZDF.de* (20 Dec. 2017).

89. Case C-144/04, *Werner Mangold v. Rüdiger Helm*, EU:C:2005:709.

90. Case C-555/07, *Seda Küçükdeveci v. Swedex*, EU:C:2010:21.

91. Case C-45/93, *Commission v. Spain* and Case C-388/01, *Commission v. Italy*.

92. Steppe, “Online price discrimination and personal data: A general data protection regulation perspective”, 33 *Computer Law & Security Review* (2017), 768–769.

93. Elegido, “The ethics of price discrimination”, 21 *Business Ethics Quarterly* (2011), 633, 639–641.

way as non-economically driven GPD, even though the latter is easily depicted as the former and *vice versa*, which makes the distinction difficult to evaluate in practice. Nevertheless, as with other aspects of constitutionalization of EU private law, the ECJ's exercise of self-restraint is favoured also with respect to the prohibition of GPD.⁹⁴

2.5 *Consumer law instruments deterring GPD practices*

Moreover, consumer protection as enshrined in Article 38 CFR and in Articles 12 and 169 TFEU sometimes speaks against sellers' freedom of pricing. In *McDonagh v. Ryanair*⁹⁵ the ECJ ruled that Article 38 CFR, which seeks to ensure a high level of protection for consumers, must be taken into account, leading to the conclusion that the restriction of the freedom to conduct business was not unjustifiably restricted.⁹⁶ In this respect EU consumer law *inter alia* also affects GPD practices by private traders. Albeit it does not prohibit GPD directly, a price transparency obligation is an important instrument for indirectly diminishing GPD practices, as it allows consumers to detect such practices more easily and avoid transactions with traders applying GPD.⁹⁷ In many cases advantageous rates for local residents are not officially advertised at ticket offices⁹⁸ and tourists feeling cheated is not due to GPD but due to non-transparent price lists – coupled with the fact that they are not translated into languages tourists are familiar with.⁹⁹

EU consumer law accepts price comparison as a basic element of competition. Although there is no obligation for producers to be transparent regarding the price of the same product in another EU Member State, a series of EU legislative instruments demands that prices are communicated transparently.¹⁰⁰ What is more, transparency in the pre-contractual phase (in addition to a “cooling-off” period within which the consumer is entitled to withdraw from an agreed deal) presents the basis upon which EU consumer

94. Cherednychenko and Reich, “The constitutionalization of European private law: Gateways, constraints, and challenges”, 23 E.R.P.L. (2015), 809.

95. Case C-12/11, *Denise McDonagh v. Ryanair Ltd*, EU:C:2013:43.

96. *Ibid.*, paras. 59–65. More on this in Benohr, *EU Consumer Law and Human Rights* (OUP, 2013).

97. In this respect, the 2013 European Retail Action Plan (COM(2013)36) only stresses the need for consumers to be able to compare prices and not the need to prohibit price discrimination.

98. Advantageous rates for local residents, European Consumer Centre Austria, <europakonsument.at/en/page/advantageous-rates-local-residents>.

99. McGuire, “Tourists call police after Venice restaurant charges them £970 for basic meal”, *The Sun* (22 Jan. 2018); Kington, “Rome ice cream price row reignited as US tourists call police over £33 bill”, *Telegraph* (31 July 2014).

100. E.g. Art. 22 SD; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, O.J. 1998, L 80/ 27–31.

law is premised.¹⁰¹ This contributes to the economics of information, finding that as information is distributed more efficiently, the opportunities for easy profits on the side of the sellers shrink and so does price discrimination.¹⁰² For price discrimination to work, customers have to be unaware of (or indifferent to) this kind of discrimination if sellers want to avoid their outrage and consequential media scandals. Economic studies confirm that the public's dislike of unfairness is a powerful factor in restricting the spread of price discrimination strategies.¹⁰³ Consequently, should EU rules on transparent pricing be consistently enforced, the probability of traders' price discriminating would be reduced – as well as the need for prohibiting GPD.

2.6 Data protection law discouraging GPD practices

Finally, price discrimination based on buyers' demographics, including GPD, may in the future be combated by means of increasing transparency focus upon the issues of privacy and data protection. This is more and more important considering that Big Data analysis technologies give new possibilities for personalized pricing.¹⁰⁴ In this respect, the e-Privacy Directive¹⁰⁵ permits the use of “cookies” only with the users' informed consent. Moreover, traders that track and collect customer preferences (and potentially use them for price discrimination practices) must comply with EU rules on data protection aiming to ensure that processing of personal data takes place fairly, lawfully, and transparently.¹⁰⁶ In line with the ECJ's broad interpretation of the concept of personal data,¹⁰⁷ commentators agree that the requirement to be transparent about the purpose of personal data processing implies that companies inform customers about price adjustment based on

101. Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing, 2013), p. 84.

102. Bakos, “Reducing buyer search costs: Implications for electronic marketplaces”, 43 *Management Science* (1997), 1676; Lewis and Sappington, “Supplying information to facilitate price discrimination”, 35 *International Economic Review* (1994), 309.

103. Odlyzko, “Privacy, economics, and price discrimination on the Internet”, *Proceedings of the 5th international conference on Electronic commerce* (ACM 2003); Edwards, “Price and prejudice: The case against consumer equality in the information age”, 10 *Lewis and Clark Law Review* (2006), 559.

104. A White House report notes that many companies already use Big Data for targeted marketing, including personalized pricing: Council of Economic Advisors, “Big Data and Differential Pricing”, (2015) Exec. Office of the US President, 2–4.

105. Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, O.J. 2002, L 201/37–47.

106. Art. 5(1)(a) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, O.J. 2016, L 119/1–88; Art. 8 CFR.

107. See e.g. Case C-582/14, *Breyer*, EU:C:2016:779, where the ECJ held that a dynamic IP address of a website visitor can be a piece of personal data for a website publisher.

their personal data, although making online price discrimination transparent through the application of data protection law will require a number of legal issues to be cleared in the future.¹⁰⁸

2.7 *Distributive justice in the cross-border context*

This multi-tier prohibition of GPD may be seen as the EU legislators' attempt to respond to customer resentment towards GPD and increasing distributive justice in the cross-border context, thereby restricting certain groups of citizens being disadvantaged.¹⁰⁹ Prohibition of GPD thus establishes equality among customers, so that individuals who receive the same (or similar) commodity should invest the same (or similar) amount of money regardless of their nationality or residence.¹¹⁰ As the Study Group on Social Justice in European Private Law pointed out "(a) modern concern to strike a balance between private autonomy and fairness characterizes the heart of discussions about the appropriate principles of contract law", highlighting that the "project of harmonization of European private law clearly goes far beyond the needs of business to help to facilitate a competitive Internal Market in Europe".¹¹¹ In this respect the Commission focused on assuring "a fairer Single Market" in the Single Market Strategy.¹¹² Despite such a politically attractive goal, demands for social solidarity must be balanced with individual private autonomy as expressed in contractual freedom.¹¹³ As noted by Leczykiewicz, while the EU creates opportunities to incorporate considerations of justice into the regulation of contractual transactions, it also poses threats of over-regulation and over-enforcement, disregarding traditional concerns of contract law, such as legal certainty, parties' expectations and private autonomy.¹¹⁴ A wide-ranging prohibition of GPD under EU free movement law, irrespective of the market power of the trader, opens a number of ambiguities for traders, customers and the judicial system. Due to the principle of proportionality, restrictions on freedom to pursue an economic activity may be imposed "provided that those restrictions correspond to an objective of general interest pursued by the Union and do not

108. Steppe, *op. cit. supra* note 92, 768; Zuiderveen Borgesius and Poort, "Online price discrimination and EU data privacy law", 40 *Journal of Consumer Policy* (2017), 347.

109. Hesselink et al., "Social justice in European contract law: A manifesto", 10 *ELJ* (2004), 653.

110. More on this in Forsyth, *Group Dynamics* (Cengage Learning, 2018), p. 388.

111. Hesselink et al., *op. cit. supra* note 109, 654–656.

112. Commission Communication, Upgrading the Single Market: more opportunities for people and business, COM(2015)550.

113. See also Hesselink et al., *op. cit. supra* note 109, 656.

114. Leczykiewicz in Brownsword, Van Gestel and Micklitz, *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar, 2017), p. 368.

constitute . . . a disproportionate and intolerable interference affecting the very substance of the rights thus guaranteed”.¹¹⁵ Although it may be established from the Treaty and the Charter that free competition, single market, consumer and data protection are such objectives of general interest, prohibition of GPD under the Services Directive and Geo-Blocking Regulation does not always proportionally restrict the freedom of pricing. Moreover, the prohibition of GPD by private traders faces enforcement difficulties due to the unclear scope of this prohibition.

The next section addresses several problems in this respect, such as the complexity of comparing the cost of two products, the unclear scope of direct and (in particular) indirect GPD under free movement law, the question of whether GPD, with respect to trade with goods and services, should be regulated convergently, how to approach the discriminatory nature of single (uniform) prices; and finally, whether even insignificant price differences amount to prohibited GPD.

3. Ambiguous scope of the prohibition of direct and indirect GPD

3.1 *Different price for the same product or service despite identical costs*

Traders accused of prohibited GPD under Article 20(2) SD and Article 4 GBR, carry a heavy burden of explaining the logic behind two prices, while courts are faced with the burdensome balancing of conflicting interests between traders and customers. Cross-border price comparisons in respect of static GPD are particularly complex and call for detailed considerations by the courts in order to establish the occurrence of GPD. If EU regulators and courts accept a simpler definition of price discrimination limited to the comparison of prices of the *same* products and services, the prohibition of GPD will be difficult to investigate in a cross-border perspective since products and services are seldom absolutely homogenous.¹¹⁶ Even in respect of the “*Big Mac*”, the most (in-)famous result of the economists’ search for truly homogenous products,¹¹⁷ it has eventually been found that the latter’s packaging differs and that in some regions ketchup is included in the price,

115. Case C-283/01, *Sky Österreich*, para 50. See also Case C-5/88, *Wachauf*, EU:C:1989:321, para 18 and Case C-292/97, *Karlsson*, EU:C:2000:202.

116. Hassink and Schettkat, op. cit. *supra* note 13, 258.

117. This led the *Economist* to invent the so-called *Big Mac index* in 1986 as an interactive currency-comparison tool.

while in others it is an extra.¹¹⁸ The prohibition of static GPD in respect of the same products encourages sellers to use different labels, packaging, different trademarks in different EU Member State markets and similar factors that differentiate products in the public mind for the purpose of creating a belief that different products are involved, thereby justifying differential pricing.¹¹⁹ The situation becomes even more ambiguous if a broader definition of price discrimination is adopted, taking *similar* products into account. It is broadly acknowledged that differentiated products can also be sold at discriminatory prices. Consequently, Stigler claims that prices are discriminatory when two or more *similar goods* are sold at prices that are in different ratios to marginal costs.¹²⁰ Implementing such a definition of price discrimination into EU law would however lead to wide-ranging price comparisons not only of the same commodities, but also of those that are (more or less) similar, including different versions of products (such as hardcover and paperback books), placing traders in severe uncertainty when setting prices.

The prohibition of GPD under Article 20(2) SD and Article 4 GBR furthermore places a burdensome obligation upon the courts enforcing this prohibition to ascertain the cost of the product or service for which different prices are charged. In this respect, it is noteworthy that diverse research has shown that customers perceive price discrimination as unfair, because they assume the cost of the two products is the same. However, as they only have limited knowledge and judge the fairness of prices and cost issues spontaneously, they are biased and tend to underestimate the full costs of the seller.¹²¹ The ECJ indicated in *United Brands* that *inter alia* “differences in transport costs, taxation, customs duties, the wages of the labour force . . . may eventually culminate in [a] different retail selling price”.¹²² This reasoning is reflected in the Services Directive under the scope of objective reasons available to a defendant accused of breaching Article 20. Difference in price may accordingly be justified by “additional costs incurred because of the distance involved or the technical characteristics of the provision of the service”.¹²³ While the Services Directive considers cost difference as a justification for discriminatory prices, this is contrary to the

118. Rogoff, “The purchasing power parity puzzle”, 34 *Journal of Economic Literature* (1996), 647.

119. Levine, *op. cit. supra* note 9, 16.

120. Stigler, *The Theory of Price* (Macmillan, 1987), p. 210.

121. Garbarino and Lee, “Dynamic pricing in internet retail: Effects on consumer trust”, 20 *Psychology & Marketing* (2003), 495; Fassnacht and Unterhuber, “Consumer response to online/offline price differentiation”, 28 *Journal of Retailing and Consumer Services* (2016), 137–139.

122. Case 27/76, *United Brands*, para 228.

123. Recital 95 of the preamble to the SD.

established position that when cost differences justify price differences between apparently similar products, one should not speak of price discrimination.¹²⁴ Price discrimination should thus only be spoken of when it is undesirable or illegal.¹²⁵ This position is in line with the principled exclusion of economic arguments as objective justifications for discriminatory trading practices by the ECJ, as well as with the exclusion of objective justifications for price discrimination under the Geo-Blocking Regulation, while it nevertheless recognizes that charging additional delivery costs does not amount to discrimination.

Legal review of the cost component is complex due to the need for an economic analysis that has traditionally been avoided under EU free movement law. The courts need to consider a myriad of different cost components to ascertain whether the cost difference justifies the ultimate price difference. *Prima facie* discriminatory prices need to be corrected for the *transportation and storage costs*. Incremental costs of sales to different purchasers tend to increase with the distance of the purchaser from the point of production because goods must be transported to purchasers. Classic economic studies have shown that products which only vary in *location* are perceived as differentiated,¹²⁶ and the consequent difference in price may therefore not be considered as discriminatory. As Debreu emphasizes, “(a) good at a certain location and the same good at a different location are different economic objects”.¹²⁷ Consequently, as a product in the main shopping street does not come at the same price as in an adjacent street,¹²⁸ buying petrol on a motorway and water at an airport is often more expensive than in shops on high streets.¹²⁹ Moreover, in light of *storage costs* the delivery dates of two products need to be taken into account when assessing price discrimination.¹³⁰ *Service differentiation* is also an important source of price difference for products:¹³¹ a product sold in a stylish shop with exquisite furnishing and professional advisory staff is usually sold at a higher price than the same product in a smaller self-service shop. It could also be argued that differences regarding *the moment* in which sales are made renders two

124. Elegido, op. cit. *supra* note 93, 635.

125. Philips, op. cit. *supra* note 1, p. 17.

126. See e.g. Hotelling, “Stability in competition”, 39 *The Economic Journal* (1929), 41.

127. Debreu, *Theory of Value: An Axiomatic Analysis of Economic Equilibrium* (Yale University Press, 1959), pp. 29–30.

128. Segre, “The Champs-Élysées is no longer the most expensive shopping street in Europe: Here’s the spot that’s taken over”, *Business Insider* (17 Nov. 2017).

129. Steer, “How motorway service stations push up prices”, (4 July 2013); “Are airport newsstands gouging travelers with overpriced water bottles?”, *Fox News* (9 Mar. 2015).

130. Philips, op. cit. *supra* note 1, pp. 5–6.

131. Cao and Gruca, “The influence of pre-and post-purchase service on prices in the online book market”, 18 *Journal of Interactive Marketing* (2004), 51.

transactions non-equivalent thereby majorly impacting prices imposed by sellers (e.g. airline tickets, seasonal commodities and perishable foodstuffs).¹³² Furthermore, legal review of cost rationale for GPD must consider *local costs* that can be attributed to various kinds of distribution costs (e.g. advertising, marketing, servicing, selling costs incurred by importers and dealers, including salaries of sales people, real estate costs etc.).¹³³ In this respect, a study of EU car prices has shown that local costs are estimated to account for between 35 and 40 percent of the price of a car and are presumably comparable to the local distribution costs in other industries.¹³⁴ Moreover, local costs vary significantly across the EU Member States due to distinct organizational structures, management styles, distinct efficiency and quality of production, as well as labour productivity and strength of distribution channels.¹³⁵ The differences due to taxes also play a significant role. Another important aspect concerns *common costs*, such as rent, costs of general management, brand advertising and R&D, costs of operating a network etc., which very often represent a significant proportion of total costs. No unit can be produced without joint input; however, incremental common costs cannot be assigned to any particular product or class of users. Prohibition of price discrimination presupposes perfect separability of costs, something that is often not possible in the real world.¹³⁶ It is clear that these costs must be recovered for the firm to stay in business; it is less clear, however, to which unit of product or service they should be assigned to, and more importantly, how courts can rule on the appropriate part of the common costs to be attributed to a unit of a product under suspicion of being sold at discriminatory prices.

It may thus be concluded that there is sometimes complex economic logic behind *prima facie* discriminatory prices, in particular in respect of static GPD. Challenging such practices in courts puts the latter in a difficult position, especially considering, as claimed by Nagle, that “pricing is an art, which is beyond neither critical judgement nor scientific analysis, and requires talent, but also knowledge of the principles of economics”.¹³⁷ While GBR is clear about not extending its scope to static GPD,¹³⁸ Article 20(2) SD

132. Geradin and Petit, op. cit. *supra* note 44, 486.

133. Goldberg and Knetter, *Goods Prices and Exchange Rates: What have we Learned?*, (NBER, 1996).

134. Goldberg and Verboven, “Cross-country price dispersion in the euro era: A case study of the European car market”, 19 *Economic Policy* (2004), 484.

135. Taušer et al., “Comparative price levels of new EU Member Countries”, 39 *International Journal of Management & Economics* (2014), 9–16.

136. Levine, op. cit. *supra* note 9, 8–17.

137. Nagle, “Economic foundations for pricing”, 57 *Journal of Business* (1984), S3.

138. Regulation 2018/302, cited *supra* note 24, Art. 4(2).

is not so clear, which is one of the main aspects that call for the repeal of this provision.

3.2 *Direct and indirect GPD under EU free movement law*

It is further unclear what “direct and indirect GPD” under EU free movement law entails, which may cause legal uncertainties and a need for interpretation by the EU Courts. In economic theory *direct price discrimination* applies to situations where customers are divided by geography, nationality, age, and purchasing history; in contrast, *indirect price discrimination* refers to a setting where a list of options is offered to all, and customers choose the option that is best for them, taking into consideration quantity discounts, coupons and versioning. On the other hand, direct discrimination under EU free movement law refers to measures that formally, that is explicitly, distinguish by the factor in question (e.g. the buyer’s nationality).¹³⁹ Indirect discrimination, on the contrary, involves requirements which, while apparently nationality-neutral, have a greater impact on nationals of other Member States.¹⁴⁰ Both direct and indirect GPD under EU free movement law thus constitute direct GPD as defined under economic theory (i.e. third-degree price discrimination). Although economic literature on price discrimination is very extensive,¹⁴¹ proposing different nomenclatures, price discrimination in law is therefore not always the same as in economics. In this sense, Dam argued that the two are nothing more than an “unfortunate coincidence of labels”.¹⁴² While later scholars endeavoured to reconcile the two,¹⁴³ such attempts are puzzling, especially when prohibiting GPD outside the realm of competition law. Though delineation between direct and indirect price discrimination in economic theory is often applied in competition law, Article 20(2) SD and Article 4 GBR operate with similar terms but with dissimilar significance. Moreover, EU free movement rules cannot prohibit every aspect of GPD as understood in economic theory, for it would face vast enforcement difficulties and claims of disproportional restrictions on the freedom of pricing.

139. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer, 2003), pp. 10–11.

140. Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP, 2016), p. 219. The ECJ held that “non-residents are in the majority of cases foreigners”. Case C-224/97, *Ciola*, EU:C:1999:212, para 14.

141. Pigou, op. cit. *supra* note 23, Hassink and Schettkat, op. cit. *supra* note 13, 259, McAfee, op. cit. *supra* note 38.

142. Dam, “The economics and law of price discrimination: Herein of three regulatory schemes”, 31 *The University of Chicago Law Review* (1963), 1.

143. Gifford and Kudrle, op. cit. *supra* note 40, 1235.

Although press releases of the EU institutions justify prohibition of GPD at the EU level by pointing out occurrences of direct GPD, the EU Services Directive and the GBR also prohibit indirect GPD, which is considerably more restrictive for freedom of pricing than direct GPD. The application of the ECJ's understanding of indirect discrimination under EU free movement law to the prohibition of *indirect GPD* under Article 20(2) SD and Article 4 GBR could potentially encompass a broad range of pricing practices that are not primarily about nationality or residence; but even so, one segment of purchasers remains under a heavier burden than others.¹⁴⁴ The discriminatory effect of such practices is not saved in situations where only some residents are privileged, while the majority are in the same position as non-residents.¹⁴⁵ Perhaps the most illustrative example of the above concerns higher petrol prices on motorways compared to prices charged at service stations elsewhere in several EU Member States.¹⁴⁶ While locals are familiar with service stations offering the cheapest fuel along their regular work or leisure travel route, non-residents, unfamiliar with the service station network and prices in a host Member State, will usually pay the motorway price albeit petrol could be purchased at a lower price near the motorway exit. If indirect GPD is interpreted consistently with the established free movement case law on indirect discrimination,¹⁴⁷ such pricing practices are prohibited under Article 20 SD. The same applies to higher prices of goods and services during the tourist peak season and at tourist attractions in European cities, targeting non-locals to a greater extent than the locals. Situations when price discounts are only afforded to members of a certain association could also amount to indirect GPD. To save such practices from falling under the GPD prohibition, the GBR provides that traders are free to make specific offers only to a specific territory within a Member State or only for members of a certain association provided that the reasons are unrelated to nationality, place of residence or place of establishment.¹⁴⁸ These derogations, however, only apply to the three trading situations addressed by the GBR and not to all the others that are caught by the Services Directive.

Moreover, loyalty rebates for regular customers and those collecting coupons could potentially also be considered a form of indirect GPD under

144. Cf. Case 261/81, *Walter Rau Lebensmittelwerke*, EU:C:1982:382.

145. Cf. Case 127/75, *Bobie Getränkevertrieb GmbH v. Hauptzollamt Aachen-Nord*, EU:C:1976:95.

146. Website Jerrican.eu offers information on cheapest service stations located on main roads for travellers across Europe.

147. See e.g. Case 152/73, *Sotgiu v. Bundespost*, EU:C:1974:13 and Case C-237/94, *O'Flynn*, EU:C:1996:206, para 20.

148. Recital 27 of Regulation 2018/302.

Article 20(2) SD and Article 4 GBR, considering that these in most instances will be granted to local customers who regularly attend traders' premises. Rather than guaranteeing price discounts to local customers, the bar owner at the Croatian seaside could resort to a system of coupons that would award price privileges to local customers, thereby avoiding accusations of direct GPD. The same result of price favouring would thus be achieved indirectly. In the same way, prices of short-term (daily or weekly) tickets, admission fees and licences that are disproportionate to the price of the annual ones also burden non-local purchasers to a far greater extent than the locals who tend to obtain annual tickets and permits. Assumptions that such practices could amount to prohibited GPD under Article 20(2) SD and Article 4 GBR are substantiated by the fact that the Commission has recently proposed a new approach to national road toll laws, where time-based user charges would gradually be replaced by distance-based charges.¹⁴⁹

Additionally, as online and offline traders are no longer separated and multi-channel retailing is becoming a popular business model with numerous retailers using both conventional retail stores and the Internet to sell their products and services, sellers are deciding whether to price at parity across channels or to sell the same product at different prices in different channels.¹⁵⁰ However, in line with the ECJ's reasoning in *DocMorris*,¹⁵¹ channel-based price differentiation could be considered as a form of indirect GPD under Article 20(2) SD and Article 4 GBR in cases where online prices are higher than offline ones. In *DocMorris* the ECJ held that for pharmacies not established in Germany, the Internet provides a more significant way to gain direct access to the German market than for German pharmacies for whom the online method only represents an extra method of accessing the end consumer in addition to their dispensaries.¹⁵² *Mutatis mutandis*, online selling is also a more important method of gaining access to the products sold by traders for *buyers* from other EU Member States, who thereby escape the need to travel to the Member State where the particular product is sold offline. Applying the *DocMorris* interpretation of indirect discrimination to such pricing practices could thus mean that (higher) online prices affect foreign buyers more than domestic ones, even in situations where they do not discriminate on the basis

149. Stupp, "15 EU countries will be forced to change road toll laws under draft rules", *EURACTIV*, 30 May 2017.

150. Fassnacht and Unterhuber, "Consumer response to online/offline price differentiation", 28 *Journal of Retailing and Consumer Services* (2016), 137.

151. Case C-322/01, *DocMorris*, EU:C:2003:664.

152. *Ibid.*, para 74. The same reasoning was confirmed in Case C-148/15, *Deutsche Parkinson*, EU:C:2016:776.

of the buyers' residence.¹⁵³ While such practices in principle fall within the scope of the Services Directive, the Geo-Blocking Regulation expressly excludes such situations from its scope, setting forth that it does not preclude freedom of traders to offer different prices in different points of sale, such as shops and websites.¹⁵⁴

Finally, it is unlikely that private GPD practices could escape EU free movement law on the basis of the concept of reverse discrimination, i.e. discrimination where an unexpected group is favoured,¹⁵⁵ such as the practice of Volkswagen that was selling cars in Italy for a lower price than in Germany or where offline prices are higher than online. This pricing practice is often employed when traders enter new geographical markets and supports the claim that the main motivation for GPD is not intolerance to foreign customers, but economic purposes stemming from different competitive conditions on distinct regional markets in the EU.

Traditionally, in situations that are purely internal, i.e. local persons and goods are in a worse position than their competitors from across the border, the persons or products involved do not benefit from EU law.¹⁵⁶ This concept is, however, hardly applicable to private traders that discriminate with a view to maximizing profit and not to enhance free movement of goods and services across the borders of the EU Member States. This implies that the logic behind the very concept of reverse discrimination is at odds with private traders. As noted by Tryfonidou, reverse discrimination is "termed 'reverse' since it is exercised by Member States against some of their own nationals",¹⁵⁷ which suggests that reverse discrimination cannot be exercised by private entities. This is further supported by the fact that prohibition of discriminatory practices under the Services Directive, as well as under the GBR suggest that any discrimination based on the nationality or residence of the buyers is targeted. As the Commission announced in its Single Market Strategy, it "aims to fight comprehensively all forms of unjustified discriminatory treatment for purchasers based in different Member States, . . . regardless of

153. Fedoseeva, Herrmann and Nickolaus, "Was the economics of information approach wrong all the way? Evidence from German grocery r(E)tailing", 80 *Journal of Business Research* (2017), 63.

154. Recital 27 of Regulation (EU) 2018/302.

155. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer, 2003), p. 19.

156. Case 355/85, *Cognet*, EU:C:1986:410, para 11. For criticism see Shuibhne, "Free movement of persons and the wholly internal rule: Time to move on?", 39 *CML Rev.* (2002), 731; Maduro, "The scope of European remedies: The case of purely internal situations and reverse discrimination", in Kilpatrick, Novitz and Skidmore (Eds.) *The Future of Remedies in Europe* (Hart Publishing, 2000), p. 117.

157. Tryfonidou, "Reverse discrimination in purely internal situations: An incongruity in a citizens' Europe", 35 *LIEI* (2008), 43, 46.

the way they take place or the technology used”.¹⁵⁸ The sellers’ nationality and residence seem irrelevant in this respect – they may even be established in third countries.¹⁵⁹

This supports the claim that a classic understanding of (direct and indirect) discrimination under EU free movement law should not fully apply to practices of GPD by private traders, where on the one hand pricing practices that are not primarily about nationality or residence are prohibited, while on the other hand private traders are prevented from relying on the safe haven of reverse discrimination.

3.3 *Convergent prohibition of GPD on trade with goods and services*

Another relevant issue in respect of prohibited GPD under EU free movement law concerns the question to what extent rules that primarily address trade with services also apply to trade with goods. In this respect it is submitted that while differential treatment of GPD with regard to trade with goods and services may make sense from the proportionality point of view, such a divergent approach would bring severe enforcement difficulties due to the increasing servitization of manufacturing.¹⁶⁰

It could be argued that a distinction between GPD prohibition with respect to trade with goods and services is relevant when observed through the lens of the principle of proportionality. Economists point out that sufficiently high costs of cross-border trade with goods that prevent resale (or arbitrage) are the prerequisite for the examination of price discrimination.¹⁶¹ Arbitrage occurs when customers in the low-priced market resell in the high-priced market, eventually bringing the price levels of different markets to the same level, thereby eroding the profitability of discriminatory selling. This means that if customers can arbitrage price differences, any attempt to charge higher prices to one group would be defeated by resale.¹⁶² Hence, arbitrage turns price discrimination into offering a single price and as such gives impetus for the economic law of one price.¹⁶³ The EU free movement and competition law, prohibiting restrictions on cross-border trade, improve conditions for resale

158. Commission Communication, Upgrading the Single Market: more opportunities for people and business, COM(2015)550 final, p. 11.

159. Recital 4 of Regulation 2018/302.

160. More on this in Hojnik, “The servitization of industry: EU law implications and challenges”, 53 CML Rev. (2016), 1575.

161. Verboven, “International price discrimination in the European car market”, (1996) *The RAND Journal of Economics*, 240.

162. McAfee, op. cit. *supra* note 38, 465–466.

163. Miljkovic, “The law of one price in international trade: A critical review”, 21 *Review of Agricultural Economics* (1999), 126.

and therefore approximate price differences and reduce the possibilities for price discrimination – and thereby also the need for the prohibition of GPD. It follows that a well-integrated EU internal market is a natural enemy of GPD, not *vice versa*. As pointed out by Geradin and Petit, the outright condemnation of GPD runs contrary to the central goal of attaining a single market, thereby claiming that the existence of price differentials among Member States is the main driver for the emergence of patterns of parallel trade within the EU, which in turn ensures that prices across Member States converge towards the lower prices.¹⁶⁴ GPD is therefore not a barrier to trade in itself, but an indicator of other trade restrictions that support it. Traders may be interested in preventing resale in order to maintain different prices, thereby partitioning the market. Only these practices should legally be challenged and not GPD as such.

If arbitrage functions as a natural enemy of GPD, however, this only seems to be true in the field of trade in goods, while in the field of service provision GPD functions in a somewhat different way. Although Article 56 TFEU prohibits any restriction on free movement of services, parallel importation of services from markets with lower prices to markets with higher prices is more difficult to imagine compared with goods. As Rathmell points out, goods can be owned and the ownership can be transferred – services, on the other hand, refer to an act, which is paid for by the buyer and cannot be traded.¹⁶⁵ If a Slovenian painter paints facades in Austria for a higher fee than in Slovenia, his Slovenian customers cannot resell this cheaper service to Austrians. Moreover, even when resale of services would in principle be possible, traders often have means to prevent it, such as by making bus and ski tickets, booking a flight, a hotel room or car rental non-transferable. In these cases, parallel trade will not abolish GPD, therefore making legal intervention more justified than with regard to goods, especially in respect of GPD practised by public entities and by those private services' providers that have certain market dominance, such as city bus services.

Conversely, it is evident from the ECJ's case law that delimitation between goods and services is uneasy. This also applies to the prohibition of GPD. *Does a Croatian bar sell goods or services or a combination of both? When charging foreigners more than locals, was it the goods or the services part of the price that was discriminatory?* The price of a product inevitably reflects not only the cost of the physical commodity but also the cost of the related services. As Stigler notes, "stores sell more than canned beans or mink coats: it supplies also pleasant quarters, attentive salespeople, possibly generous

164. Geradin and Petit, *op. cit. supra* note 44, 524–525.

165. Rathmell, "What is meant by services?", 30 *Journal of Marketing* (1966), 32.

return privileges etc., and these carry their own implicit prices”.¹⁶⁶ Consequently, applicability of the Services Directive in respect of prohibiting GPD can hardly be limited to “pure services”. Contrary to the position of scholarship that selling goods should in general be excluded from the Services Directive because “the corollary of the fact that the Directive applies to services is that it does not apply to goods”,¹⁶⁷ the Commission advocates that the Directive also applies to the retail and wholesale of goods.¹⁶⁸ This is practically very important since consumers complain more frequently when faced with GPD in respect of goods than services.¹⁶⁹ In this respect, a request for a preliminary ruling by the Dutch Council of State was lodged in early 2016,¹⁷⁰ questioning whether retail falls within the scope of the Services Directive. Advocate General Szpunar concluded in the affirmative,¹⁷¹ pointing out that with the arrival of the Internet retail not only consists of merely selling a product, but also of advising, counselling and offering follow-up services and that as such, it is not an activity which is merely ancillary to a product.¹⁷² According to him, Bristol BV, a firm wishing to establish a retail outlet for its shoe and clothing discount chain, is therefore a service provider which can rely on the provisions of the Services Directive. The Grand Chamber of the ECJ has confirmed that the Directive applies to the retail sector. This indicates that Article 20(2) SD prohibits not only GPD in respect of selling services but also goods, when services attached to the goods are not purely ancillary. Moreover, the GBR addresses both restrictions on free movement of goods and services. As the latter clarifies Article 20 SD, it adds support to the argument that the EU legislators intended Article 20 SD to apply to both goods and services.

Moreover, even though GPD in respect of services has traditionally been more personal than in respect of goods, considering that static GPD has been linked to trade with goods and the problems of dynamic GPD were limited to

166. Stigler, *The Theory of Price* (Macmillan, 1987), p. 17.

167. Barnard, “Unravelling the Services Directive”, 45 CML Rev. (2008), 323, 335.

168. Commission’s Handbook on the implementation of the Services Directive refers to “distributive trades (including retail and wholesale of goods and services)”. Office for Official Publications of the EC, 2007, point 2.1.1.

169. ECC-Net, “Enhanced Consumer Protection – the Services Directive 2006/123/EC” (2013), 6.

170. Joined Cases C-360/15 & C-31/16, *X and Visser Vastgoed*.

171. Opinion of A.G. Szpunar in Joined Cases C-360/15 & C-31/16, *X and Visser Vastgoed*, EU:C:2017:397, paras. 80 and 105, referring to the drafting history of the Directive, which reveals that the European Parliament initially attempted to remove the reference to “distributive trades” during the first reading, while the Council reinstated such a reference in the draft, which stayed until the adoption of the Directive, see para 72.

172. Ibid., para 102. More on this in Luzak, “Time to let go of the services/goods distinction? – CJEU in *X* (C-360/15 & C-31/16)”, Blog *Recent developments in European Consumer Law* (1 Feb. 2018).

situations where recipients of services came to the premises of the service providers (e.g. to bars in Croatia, buses in Malta, Disneyland in France, or to monuments in Italy), this no longer holds true. The distinction between static and dynamic GPD is reflected in the GBR, which does not address prices that differ between Member States or various locations within a Member State as long as they are offered to customers on a non-discriminatory basis.¹⁷³ While dynamic GPD is thus prohibited, static GPD is not. This means that a retail chain is free to set different prices for products sold in Slovenia and Austria; it may not, however, restrict Slovenians from buying cheaper products in its Austrian store. Moreover, the Regulation permits traders to operate different versions of websites targeting customers from different Member States (e.g. *online-shop.it* and *online-shop.de*), as long as customers may access them all.¹⁷⁴ Regardless of this, shops do not have an obligation to deliver their products outside the Member State of establishment. Although the Regulation under the “shop like a local” principle only prohibits dynamic GPD, it is thus evident that this form of GPD can arise both in respect of trade with goods and services and that with the rise of online selling of goods the distinction between static and dynamic GPD is increasingly unconnected to the goods’ and services’ distinction. Static GPD is no longer limited to trade with (physical) goods, much the same as dynamic GPD is not restricted to trade with services.

It may be concluded that even though the principle of proportionality advocates distinct approaches towards prohibiting GPD in respect of goods and services, due to the increased servitization of manufacturing – with combinations of goods and services that are offered in bundles – this no longer seems practical. Additionally, due to the rapid development of technology, services can now be provided in a way similar to goods, including being produced in one State and exported to another.¹⁷⁵ As shown in *UsedSoft*,¹⁷⁶ digital goods can also be subject to resale and are thus sometimes considered to be closer to physical goods than services. Besides, as resale in practice does not always respond to discriminatory prices of goods, it seems unreasonable to

173. GBR, Art. 4(2). The Council pointed out in this respect that unlike price discrimination, price differentiation is not prohibited, so traders are free to offer different general conditions, including prices, and to target certain groups of customers in specific territories. See Consilium, “Geo-Blocking: Council agrees to remove barriers to e-commerce”, Press Release 692/16 (28 Nov. 2016). See also recital 26 of Regulation 2018/302, which distinguishes situations when traders pursue activities in the consumer’s Member State and when they do not.

174. Regulation 2018/302, recital 20.

175. More on this in Hojnik, “Technology neutral EU law: Digital goods within the traditional goods/services distinction”, 25 *International Journal of Law & IT* (2017), 63.

176. Case C-128/11, *UsedSoft GmbH v. Oracle*, EU:C:2012:407.

restrict the freedom of pricing for service providers more rigorously than for traders of goods.

3.4 *Single prices as a form of discriminatory pricing*

What is even more striking is that if EU authorities are serious about removing *direct and indirect* GPD across the EU, advocating prices that reflect the actual cost of the product, they cannot disregard the fact that also single (or uniform) prices are often just a form of discriminatory pricing.

Economic studies show that despite claims of overwhelming problems with GPD in the EU, traders in most cases offer products for single prices across Europe, regardless of geographical distance and the corresponding transportation costs, different labour costs, cost of space rental etc.¹⁷⁷ Dam explains that traders select single prices even though they might not yield the theoretically maximum total profit in order to avoid inconvenience in quoting prices, protests of unfairness by customers as well as liability under certain price discrimination statutes.¹⁷⁸ This means that traders absorb various price differentials with the aim of offering customers a single price for a given product.¹⁷⁹ For instance, *freight absorption*, in which the trader does not charge for transportation, is often pointed out as a specific example of GPD, as all customers pay the same price regardless of their location, which favours customers located further from the trader's workshop.¹⁸⁰ Since the GBR entitles traders to charge consumers additional costs for postage, transport and assembly,¹⁸¹ if the former decide not to charge these additional costs, does this amount to the prohibited GPD?

In economic theory, it is unequivocal that where incremental costs differ, single prices signal the existence of price discrimination.¹⁸² Consistently, early on in the context of the ECSC Treaty the ECJ extended the notion of abuse from "applying dissimilar conditions to equivalent transactions" to the converse situation of applying similar conditions to unequal transactions.¹⁸³ This is reflected in its later case law, where the ECJ consistently held that "comparable situations must not be treated differently and different situations

177. Cavallo et al. found that single prices are set for tens of thousands of goods sold by Apple, Ikea and H&M across the Eurozone. Cavallo, Neiman and Rigobon, "Currency unions, product introductions, and the real exchange rate", 129 *The Quarterly Journal of Economics* (2014), 529, 13.

178. Dam, op. cit. *supra* note 37, 6.

179. Rotemberg, "Customer anger at price increases, changes in the frequency of price adjustment and monetary policy", 52 *Journal of Monetary Economics* (2005), 829.

180. Philips, op. cit. *supra* note 1, pp. 5–6.

181. Regulation 2018/302, recital 28.

182. Dam, op. cit. *supra* note 37, 6.

183. Case 13/63, *Italy v. Commission*, EU:C:1963:20.

must not be treated in the same way unless such treatment is objectively justified”.¹⁸⁴ In *Post Danmark*, the ECJ adopted the same approach in respect of price discrimination under Article 102 TFEU, defining it as “charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ”.¹⁸⁵ Nevertheless, considering the wide-ranging occurrence of single price practices by large European retailers, it is ambiguous whether EU law outside the realms of Article 102 TFEU also aims to tackle single prices for customers for whom supply costs differ. Under the US RPA, a seller cannot be held to have discriminated in price where he charges the same price to different customers even though the costs involved in the two sales are different.¹⁸⁶ Similarly, the European Commission’s documents touching on the problem of GPD under the SD and the GBR do not mention the single prices issue, even though supporting single prices with differential costs, while prohibiting differential prices with uniform costs, is entirely at odds with the economic notion of price discrimination.¹⁸⁷

Prohibiting GPD could thus have very broad implications for pricing autonomy in the EU that have possibly not been anticipated by the EU legislators, unless single prices (at least some of its segments) are saved from the ambit of the EU free movement law under the concept of reverse discrimination, which is rather unlikely in private contracts.

3.5 *De minimis* GPD: substantially v. slightly different price

Another important challenge facing the prohibition of GPD under EU free movement law is the determination of how significant the cost differences should be in order for two transactions to be considered non-equivalent and consequently how significant price differences should be to amount to prohibited GPD. Indeed, if all price differences, however small, were to be taken into consideration, very few transactions would be considered legal. In respect of the US RPA, Edwards claimed that “it seems inappropriate to require that every cost difference is reflected in a price difference”.¹⁸⁸ In *FTC v. Morton Salt Co.*, the US Supreme Court held that under the RPA it needs to

184. Case 106/83, *Sermide SpA v. Cassa Conguaglio Zuccheri*, EU:C:1984:394, para 28; Case C-311/97, *Royal Bank of Scotland*, EU:C:1999:216. For a comment see De Witte, Hanf and Vos (Eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001), pp. 313–314.

185. Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, EU:C:2012:172, para 30.

186. See e.g. *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (at 353–354) (E.D.N.Y., 1960).

187. Dam, op. cit. *supra* note 37, 11.

188. Edwards, *The Price Discrimination Law: A Review of Experience* (Brookings Institution, 1959), p. 615.

be proven that “the competitive opportunities of certain merchants were injured when they had to pay . . . substantially more for their goods than their competitors had to pay”.¹⁸⁹ Similarly under Article 102 TFEU, *United Brands* and *Tetra Pak II* dealt with *substantially* different prices across the EU Member States. This does not mean, however, that the magnitude of the price difference will also matter under the EU free movement rules.

While in the field of EU competition law the intensity of the restrictive effect on competition is of vital importance, the ECJ has ever since *Van de Haar*¹⁹⁰ refused to apply the *de minimis* rule in the field of the EU internal market.¹⁹¹ In *Corsica Ferries*, the ECJ even made a general statement claiming that “the articles of the . . . Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited”.¹⁹² Commentators have thus concluded that when establishing restrictions in EU free movement law, the ECJ will not give any relevance to the magnitude of the restrictive effect.¹⁹³ The *de minimis* defence is in principle therefore not acceptable for GPD in the field of free movement law and even the slightest price difference is prohibited. This further accentuates the broad implications of GPD prohibition on the freedom of pricing under the EU’s free movement law.

Nevertheless, an important reason for refusing the *de minimis* rule entry into the field of free movement law was that the internal market freedoms predominantly concern the measures of Member States and not those of private entities, as is the case with competition law. It is the public bodies who must carry a greater responsibility for the functioning of the internal market than private entities. In this respect, Barents observed years ago that “State interventions on the market may be said to have an appreciable effect by their very nature”.¹⁹⁴ Krenn recently proposed a more convergent approach towards public and private intervention on the market, arguing in favour of introducing the horizontal direct effect of Article 34 TFEU, accompanied by a recognition of the *de minimis* rule in order to prohibit only those barriers of

189. 334 US 37 (1948) at 49.

190. Joined cases 177 & 178/82, *Jan van de Haar*, EU:C:1984:144.

191. See e.g. Case 269/83, *Commission v. France*, EU:C:1985:115.

192. Case C-49/89, *Corsica Ferries France*, EU:C:1989:649, para 8. See also Case C-67/97, *Ditlev Bluhme*, EU:C:1998:584, para 22 and Case 126/91, *Yves Rocher*, EU:C:1993:191, para 21.

193. Jansson and Kalimo, “De minimis meets ‘market access’: Transformations in the substance – and the syntax – of EU free movement law?”, 51 CML Rev. (2014), 523, 530.

194. Barents, “Measures of equivalent effect. Some recent developments”, 18 CML Rev. (1981), 271, 287.

private entities that *significantly* hinder access to the market.¹⁹⁵ This argument, if adopted by the ECJ, could dissuade countless potential claims by customers paying only a few euro cents more for a product of a non-dominant seller than customers from other EU Member States, thereby avoiding an extensive burden for courts and traders. It should thus be reconsidered whether prohibition of GPD in private contracts under EU free movement law should be supplemented by the *de minimis* rule in order to prevent slightly different prices by non-dominant traders from being challenged in courts, especially when price differences stem from established trading practices that are local friendly, such as loyalty rebates and various coupon schemes. In case this is not approved by the ECJ, it is to be hoped that consumer associations and national agencies challenging GPD practices will pick only the most significant cases, while avoiding trivial ones, and that individual consumers will not get into the habit of challenging practices of *de minimis* GPD before courts across Europe.

4. Ambiguous objective justification for GPD

A cautious approach to prohibiting GPD by private traders is further supported by the fact that justifiability of such practices either under the express public interest derogations laid down in the TFEU or under the so-called “mandatory requirements” or “overriding reasons of public interest” introduced by the ECJ is unclear. The complexity of the justification process has been admitted by the Commission in its proposal for the GBR, where it noted that the provision of Article 20(2) SD had not been fully effective, “particularly because of the possibility to justify the differences in treatment for which it allows and the corresponding difficulties in enforcing it in practice”.¹⁹⁶ Moreover, the Commission noted that Article 20 SD prohibits all types of unjustified territorial restrictions, but sets only general principles which have not always prevented discriminatory practices on the ground. According to the Commission this gives rise to arbitrary (and changing) justifications, in particular because there is neither a shared understanding what “objective criteria” means, nor is it clear how to assess and enforce it.¹⁹⁷

195. Krenn, “A missing piece in the horizontal effect ‘jigsaw’: Horizontal direct effect and the free movement of goods”, 49 CML Rev. (2012), 177.

196. Explanatory memorandum and recital 3 of the Proposal, COM(2016)289 final. See also recital 4 of Regulation 2018/302.

197. European Commission, Proposals to address unjustified geo-blocking and other discrimination based on consumers’ place of residence or nationality, Inception Impact Assessment, p. 4.

In line with Adam Smith's observation that "(e)very man is, no doubt, by nature, first and principally recommended to his own care",¹⁹⁸ it is thus neither reasonable nor realistic to expect that private traders will attempt to invoke public interest grounds to justify decisions in pursuit of their own private interests of an economic nature. In addition to limited public interest defences, economic defences for discriminatory prices are just as uncertain. In a series of cases concerning the fundamental freedoms, the ECJ reiterated that economic aims "cannot constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty".¹⁹⁹ This was confirmed by the ECJ in respect of GPD practices.²⁰⁰ The ECJ's reluctance to accept reasons of economic nature to justify restrictions on free movement is particularly worrying with respect to the intrusion of EU public law into private legal relations.²⁰¹ Economic objectives present the core rationale for prohibited discriminatory pricing practices. Considering that the fundamental purpose of GPD is the pursuit of profit and not intolerance towards certain segments of customers who end up paying more,²⁰² the prohibition of GPD inevitably brings the need for the courts to examine the economic rationale behind the prices concerned. For example, in a Member State with higher local costs, firms may have an incentive to partly absorb the higher cost by adjusting their mark-ups downwards. This behaviour is known as *mark-up adjustment* or *pricing to market*²⁰³ and explains the low pre-tax prices in the high tax Member States.²⁰⁴ While it is common in price economics that manufacturers set a very low pre-tax price in the high tax Member States, it remains unclear if mark-up adjustments to tax and other local costs will be accepted by EU courts as justified grounds for GPD.

Furthermore, sellers accused of GPD might also resort to the relevance of differing competitive conditions to price discrimination. In some cases, price discrimination may permit the production of goods which would otherwise

198. Smith, *The Theory of Moral Sentiments* (Penguin, 2010), p. 82.

199. E.g. in Case 7/61, *Commission v. Italy (Pork)*, EU:C:1961:31 and in Case C-398/95, *SETTG v. Ypourgos Ergasias*, EU:C:1997:282. Although interests of an economic nature are in fact often recognized in the ECJ's case law – see Arrowsmith, "Rethinking the approach to economic justification under the EU's free movement rules", 68 *Current Legal Problems* (2015), 307; Oliver, "When, if ever, can restrictions on free movement be justified on economic grounds?", 41 *EL Rev.* (2016), 147.

200. Case C-388/01, *Commission v. Italy*, para 18.

201. Schepel, "Freedom of contract in free movement law: Balancing rights and principles in European public and private law", 21 *E.R.P.L.* (2013), 1211, 1216. See also Hartkamp, "The effect of the EC Treaty in private law: On direct and indirect horizontal effects of primary Community law", 3 *E.R.P.L.* (2010), 527.

202. As Philips highlights, "(i)f you can (price) discriminate, it is profitable to do so". Philips, op. cit. *supra* note 1, p. 18.

203. Krugman, *Pricing to Market When the Exchange Rate Changes* (NBER, 1986).

204. Goldberg and Verboven, op. cit. *supra* note 134, 492.

not be produced at all and it may even encourage a greater degree of price rivalry between firms on a market with few sellers than would otherwise be likely.²⁰⁵ As Corts emphasized, competitive price discrimination may intensify competition by giving firms more weapons with which to wage their war. Allowing firms to set market-specific prices breaks the profit implications of aggressive price moves that may restrain price competition when firms are limited to uniform pricing.²⁰⁶ The competition defence reflects the fact that not all traders function on the entire EU internal market, as some may only operate on certain regional markets. Multinational sellers thus compete with regional and local sellers, resulting in a situation whereby any regional or local price reduction by multinational sellers may give rise to a charge of price discrimination.²⁰⁷ The ECJ in *United Brands* held that “the density of competition may eventually culminate in [a] different retail selling price”,²⁰⁸ while the preamble to the Services Directive listed different market conditions, including pricing by different competitors, among the objective justifications for discriminatory practices by service providers. Due to a lack of relevant case law, it is as yet unclear to what extent GPD is objectively justified under the Services Directive in cases where sellers quote lower prices in one market merely to meet competition from another seller.²⁰⁹ In contrast, the GBR disregards the competition defence altogether, as it is responding to the problem of justifiability of GPD under the Services Directive by providing for three trading situations when justifications of discriminatory business practices are altogether excluded.²¹⁰ Without this defence, however, the prohibition of GPD would mean that traders are obliged to offer products and services across Europe at the lowest price offered anywhere on the EU internal market, thereby spreading potential price war conditions from smaller regional markets to the whole internal market.

5. Final remarks

The application of the principle of equality in the realm of commercial transactions is highly controversial and often seen as a “significant intrusion in the activities of business people and their ability to pursue otherwise

205. Dam, op. cit. *supra* note 37, 8–9.

206. Corts, “Third-degree price discrimination in oligopoly: All-out competition and strategic commitment”, (1998) *The RAND Journal of Economics*, 306, 321.

207. Dam, op. cit. *supra* note 37, 40.

208. Case 27/76, *United Brands*, para 228.

209. The competition defence is well established in US law. Klock, “Unconscionability and price discrimination”, 69 *Tennessee Law Review* (2001), 317, 364.

210. Art. 1(1) of Regulation 2018/302.

perfectly legitimate interests”.²¹¹ The GPD topic is controversial from the perspective of both contractual parties: while customers are shocked to discern such practices, traders are equally unhappy with regulatory prohibitions of GPD that restrict their freedom of pricing. With the increasing standards of protection of the former under EU secondary legislation – not only when it comes to consumers, but also undertakings – the freedom of pricing of the traders is increasingly constrained. EU consumer law and policy are among the most developed in the world, which in itself means that the weaker party protection restricts contractual freedom. Nevertheless, the consumer *acquis* as enshrined in directives regulating contractual transactions does not interfere with the freedom of pricing to the same extent as the Services Directive and the Geo-Blocking Regulation. Although it is true that under discriminatory prices some citizens are disadvantaged, efforts to achieve social justice through regulatory price intervention inevitably collide with considerable differences in wage levels and purchasing power of EU consumers, thereby risking egalitarianism. Moreover, deliberations on fairness of GPD will often lead to considerations of fair prices that are hard to subject to judicial review. Buyers and sellers have conflicting economic interests and consequently also contradictory views on what amounts to a fair price,²¹² which is the reason for Elegido to state that “there is no such thing as a fair price”.²¹³ In contrast to price discrimination based on race, GPD is usually a reflection of distinct competitive conditions on EU geographical markets and traders’ efforts to make money on this account. Prohibition of GPD thus does not contribute to development and tolerance in the EU, but rather to unrestrained consumer freedom to shop.

Although price discrimination is primarily a competition law concept, a further shift from challenging such practices under Article 102(c) TFEU to challenges under EU free movement law may thus be expected, due to less stringent conditions for application of the latter. Several ambiguities pointed out in this article could lead to undesirable legal and market uncertainties, which speaks in favour of self-restraint by the European courts when interpreting and applying Article 20(2) SD and Article 4 GBR. It is maintained throughout the article that Article 20(2) SD should be repealed, as it is still part of binding EU law and enables far-reaching restrictions on the

211. Elegido, op. cit. *supra* note 93, 647. Cf. Marcoux, “Much ado about price discrimination”, 9 *Journal of Markets & Morality* (2006), 58–61.

212. The so-called *dual entitlement* suggests that in an economic transaction the buyer is entitled to a fair price and the seller to a fair profit. Kahneman, Knetsch and Thaler, “Fairness as a constraint on profit seeking: Entitlements in the market”, (1986) *American Economic Review*, 728, 729–730.

213. Elegido, op. cit. *supra* note 93, 654.

freedom of pricing, despite being declared a “mainly symbolic provision”.²¹⁴ A number of enforcement difficulties also speak against future recognition of the horizontal direct effect of Article 34 TFEU so as to prohibit GPD in private contracts, as well as against broader interpretation of Article 56 TFEU to the same end – unless this were to be outweighed by the recognition of the *de minimis* rule and by reverse discrimination derogation for private traders. Prohibition of static GPD, which aims to establish mandatory uniform prices across the internal market, should in particular be beyond the scope of any EU free movement provision, as it leads to price comparisons among EU regions and requires complex evaluations of the costs behind them. It should thus remain in the domain of EU competition law. Article 4 GBR, as a directly applicable prohibition of GPD not foreseeing any objective justifications for such practices, is expected to be more effective than Article 20(2) SD. Nevertheless, a cautious approach to its interpretation is suggested when prohibiting GPD. This is not to say, however, that all private GPD practices should escape such a prohibition. Instead, a more differential approach towards these practices than currently foreseen by the SD and the GBR should be adopted, taking traders’ market power into consideration. EU free movement rules, consumer law on transparent prices, and data protection legislation protect the interests of the buyers, albeit not necessarily removing all occurrences of GPD. Provided that free competition is assured and that EU rules on transparent prices are observed, discriminatory prices by a supplier that is one among many should not be seen as a considerable barrier for the establishment of a single EU internal market. In practice, a lot will thus depend on common sense on the side of the (public and private) entities challenging GPD practices in courts across Europe and whether or not they pick only those cases that are inconsistent with EU orientation towards tolerance and respect, while disregarding the trivial ones.

214. European Parliament, DG for Internal Policies, *Discrimination of Consumers in the Digital Single Market* (2013), p. 48.

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