# WHEN DOES PRICE DIFFERENTIATION BECOME DISCRIMINATION? A COMPARATIVE STUDY OF ARTICLE 102(C) TFEU AND SECTION 4(2)(A)(II) OF THE COMPETITION ACT, 2002

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**ABSTRACT**

This paper explores the critical legal distinction between legitimate price differentiation and prohibited discriminatory pricing under Article 102(c) TFEU and Section 4(2)(a)(ii) of the Indian Competition Act, 2002. While price differentiation is often an economically rational business strategy, it triggers regulatory scrutiny when implemented by a dominant undertaking due to the *special responsibility* doctrine. The study analyses the jurisprudential evolution in both jurisdictions. In the EU, the focus has shifted from a formalistic assessment of *unequal treatment* (as seen in *United Brands*) to a substantive, effects based inquiry into whether conduct is capable of producing a *competitive disadvantage*, a transition crystallized in the *British Airways* and *MEO* rulings. Conversely, while the Indian statutory framework is more textually minimalist, the Competition Commission of India has increasingly adopted a substance over-form approach, particularly in Business-to-Business or B2B contexts, which requires evidence of market distortion or downstream foreclosure in cases such as *Grasim Industries* and *Kapoor Glass*. Through a comparative lens, this paper examines key elements such as the equivalence of transactions, the threshold for competitive harm, and objective justifications like *meeting competition*. It concludes by proposing a six-stage unified analytical framework, which encompasses dominance, equivalence, and market distortion; to distinguish benign differentiation from abusive discrimination. The paper argues that both regimes must prioritize the protection of the competitive process over individual competitors to avoid *Type 1* errors that could chill pro-competitive pricing and harm long term consumer welfare.

## I. INTRODUCTION

Airlines, digital platforms, and wholesalers routinely charge different customers different prices as a matter of ordinary commercial reality. Such price differentiation is often economically rational and is driven by variations in quantity, timing, transaction costs, and demand elasticity. It may also reflect differences in geographic location or the relative bargaining position of trading parties. Economists generally view price discrimination as welfare enhancing if it increases total output or aids the recovery of high fixed costs common in digital and high-technology industries.

However, when the undertaking occupies a dominant position, differential treatment transitions from a business strategy into a significant legal concern under Article 102 TFEU or Section 4 of the Competition Act, 2002.[1] After that, the courts have to decide whether and how to draw the line between reasonable commercial price differentiation and discriminatory practices that take advantage of trading partners and/or distort competition. The provisions of Article 102(c) TFEU and Section 4 (2)(a)(ii) are expressly devoted to cases of unfair or discriminatory pricing or conditions by the dominant undertaking.

While both Article 102(c) TFEU and Section 4(2)(a)(ii) target discriminatory treatment, their interpretive trajectories differ. EU jurisprudence has progressively moved from a formal identification of unequal treatment as seen in earlier cases like *United Brands*[2] and *Hoffmann-La Roche*[3] towards a more nuanced, effects-sensitive inquiry into *competitive disadvantage*. Recent rulings emphasize that mere financial disadvantage is insufficient; there must be a potential distortion of the competitive relationship between trading partners. Conversely, Indian jurisprudence, while increasingly attentive to the effects of conduct in cases involving giants like *Grasim Industries*[4] would benefit from a clearer framework distinguishing mere price differentiation from discrimination that actually distorts competition.

## II. PRICE DIFFERENTIATION, DISCRIMINATION AND DOMINANCE

Price differentiation occurs when an enterprise sells the same product or service to different

[1] *Consolidated version of the Treaty on the Functioning of the European Union* [2016] OJ C202/47, art 102; *Competition Act 2002* (India), Act No 12 of 2003, Gazette of India, Extraordinary, Part II, Section 1, No 13, 14 January 2003, s 4.
[2] Case 27/76 *United Brands Company and United Brands Continental BV v Commission* ECR 207
[3] Case 85/76 *Hoffmann-La Roche & Co AG v Commission* ECR 461.
[4] *XYZ v. Grasim Industries Ltd.* (Man-Made Fibre Industries), Case No. 62 of 2016 (CCI).

buyers at different prices, or conversely, charges a uniform price despite variations in the cost of supply.[5] For example, in the Indian telecommunications sector, charging different license fees for the same Standard Essential Patent (SEP) technology based on the price of the handset has been identified as prima facie discriminatory.[6] Similarly, in the airline industry, fares vary significantly based on booking time or passenger class for essentially the same flight.[7]

Economic theory distinguishes between three degrees of price discrimination, each reflected in various competition law precedents. First-degree (perfect) discrimination involves charging each customer their maximum *reservation price*, effectively extracting all consumer surplus, a concept explored in the context of *excessive pricing* where fees have no relation to economic value.[8] Second-degree (imperfect) discrimination allows customers to *self-select* through various packages, such as the tiered commission schemes found in *British Airways*.[9] Third-degree discrimination targets specific groups based on observable characteristics, seen where dominant firms apply different rates to broadcasters versus advertisers, or domestic versus export buyers.

It is a fundamental premise of competition law that not every price differential is unlawful.[10] Price variations often reflect pro-competitive dynamic pricing models or legitimate commercial negotiations where different terms are won through varying bargaining power.[11] Cost differences, such as variations in transportation or delivery, frequently justify price disparities.[12] Furthermore, volume or target discounts can reflect genuine efficiencies and economies of scale, benefiting the consumer through increased output.[13] Courts have clarified that such quantity rebates are not abusive if they are economically justified by cost savings.[14] Strategies may also be influenced by demand elasticity, where a dominant enterprise charges different prices because the operation and use of its service occur in different market

[5] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3rd edn, OUP 2014) 4.889.
[6] *In re: Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 50 of 2013 (CCI).
[7] *Travel Agents Association of India v. Lufthansa German Airlines*, Case No. 14/2009 (CCI).
[8] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para 248.
[9] Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331.
[10] Case C-209/10 *Post Danmark A/S v Konkurrencerådet (Post Danmark I)* EU:C:2012:172, para 22.
[11] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* EU:C:2018:270, para 31.
[12] *Faull & Nikpay* (n 5) 4.890.
[13] *Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd.*, Case No. 22 of 2010 (CCI).
[14] Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-4071, para 58.

conditions.[15] Treating all differentiation as discrimination would risk *Type 1* false-positive errors, potentially chilling aggressive price competition and harming long-term consumer welfare.[16]

The legal assessment shifts significantly when a dominant firm is involved, due to the *special responsibility* doctrine. Under this doctrine, first articulated in *Michelin I*, a dominant undertaking has a duty not to allow its conduct to impair genuine, undistorted competition.[17] While a non-dominant firm's differentiated pricing may simply be a competitive reaction, a dominant firm's conduct can have far-reaching exclusionary or exploitative effects because its trading partners often have limited alternatives. Dominance affords an enterprise the power to behave independently of its competitors and consumers, meaning its pricing strategies are not always disciplined by the market. In India, the Competition Commission (CCI) has emphasized that dominant firms must not implement discriminatory pricing that *disadvantages similarly placed* buyers.[18]

This framework leads naturally into the specific prohibition of discriminatory abuses under Article 102(c) TFEU and Section 4(2)(a)(ii) of the Competition Act, 2002, which seek to prevent dominant firms from placing trading partners at a competitive disadvantage through the application of dissimilar conditions to equivalent transactions.

## III. ARTICLE 102(C) TFEU: FROM UNEQUAL TREATMENT TO COMPETITIVE DISADVANTAGE

### A. THE STATUTORY FRAMEWORK

Article 102(c) TFEU prohibits a dominant undertaking from "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.*"[19] This provision serves as the primary mechanism for regulating secondary-line injury in EU competition law, targeting distortions in the competitive relationship between a dominant firm's trading partners.[20] The analytical test comprises five cumulative

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[15] *Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd.*, Case No. 63 of 2014 (CCI).
[16] Case C-413/14 P, *Intel v Commission* EU:C:2017:632, para 134.
[17] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* ECR 3461, para 57.
[18] *Grasim Industries Ltd. v. CCI*, Appeal No. 11 of 2012 (COMPAT).
[19] Faull and Nikpay (n 5) 4.889.
[20] Alison Jones, Brenda Sufrin, and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019) 550.

components. First, there must be a dominant undertaking holding substantial market power in the internal market or a substantial part of it.[21] Second, the conduct must involve trading parties, which refers to co-contractors (suppliers or customers) in an intermediate market.[22]

Third, the transactions must be equivalent, meaning they are comparable in terms of product quality, supply costs, and commercial timing, though they need not be identical.[23] Fourth, the undertaking must apply dissimilar conditions, typically manifesting as price variations that lack objective economic justification.[24] Finally, the conduct must place those parties at a competitive disadvantage. This last element is the pivot of the modern assessment; it transforms a formalistic check for price differences into a substantive inquiry into whether those differences distort the downstream competitive process.[25] Unlike Article 101, Article 102 does not provide for a formal individual exemption, though courts have developed an *objective justification* defense that functions as a de facto efficiency test.[26]

## B. UNITED BRANDS AND THE FOUNDATIONS OF ARTICLE 102(C)

The case of *United Brands v Commission* remains a foundational authority for Article 102(c), particularly regarding geographic price differentiation.[27] In this instance, United Brands (UBC) sold bananas of identical quality, from the same points of origin (Bremerhaven and Rotterdam), to various ripeners and distributors at widely varying price levels based on their Member State of origin.[28] The Commission found, and the Court upheld, that these disparities could not be explained by transport costs or objective market conditions.[29]

The critical conceptual contribution of *United Brands* lies in defining what makes two trading partners comparable. The Court looked past the disparate retail market conditions in different Member States to focus on the equivalence of the transaction between UBC and its ripeners.[30]

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[21] Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, para 26.
[22] Faull and Nikpay (n 5) 4.907.
[23] Case T-128/98 *Aéroports de Paris v Commission* (Alpha Flight Services) [2000] ECR II-3929, para 150.
[24] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* EU:C:2018:270, para 25.
[25] Robert O'Donoghue, 'The Quiet Death of Secondary-Line Discrimination as an Abuse of Dominance: Case C-525/16 MEO' (2018) 9(7) *Journal of European Competition Law & Practice* 443.
[26] Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Hart Publishing 2019) 42.
[27] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.
[28] Faull and Nikpay (n 5) 4.900.
[29] *United Brands* (n 9) para 233.
[30] Jones, Sufrin and Dunne (n 20) 554.

Because UBC was not selling directly in the national markets but rather to intermediaries who bore the risks of those local markets, the Court determined that UBC's price differentiation effectively partitioned the internal market along national lines.[31] By charging significantly higher prices to Danish ripeners compared to Irish ones for the same product at the same location, UBC applied dissimilar conditions to equivalent transactions.[32] This finding established that comparability is rooted in the cost of supply and the nature of the product rather than the specific utility or profit margins the customer might achieve downstream.[33]

## C. BRITISH AIRWAYS AND THE EFFECTS QUESTION

The transition from identifying unequal treatment to assessing market effects was significantly advanced in *British Airways v Commission*.[34] This case moved the legal focus from a simple 'A and B received different treatment' model to an inquiry into whether that treatment occurred in *circumstances capable of affecting their competitive position.*[35] British Airways (BA) had implemented a retroactive performance-reward scheme for travel agents, where commissions were calculated based on achieving sales targets compared to the previous year.[36] Because these rebates were retroactive, selling a few extra tickets could have a disproportionate impact on an agent's total commission income.[37]

The Court clarified that Article 102(c) aims to avoid distortions of competition within the internal market.[38] Crucially, it held that for a finding of abuse, it is not necessary to prove an *actual quantifiable competitive disadvantage* for individual undertakings.[39] Instead, it is sufficient to demonstrate that the conduct *tends* to lead to a distortion of competition between trading partners.[40] In *British Airways*, the discriminatory levels of commission were held to distort the ability of agents to compete with one another because their financial resources, necessary to fund promotional expenditure. became dependent on their turnover with the dominant airline rather than their own relative efficiency.[41] This shifted the requirement for

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[31] *United Brands* (n 27) para 232.
[32] Faull and Nikpay (n 5) 4.828.
[33] *Aéroports de Paris* (n 23) para 150.
[34] Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331.
[35] Jones, Sufrin and Dunne (n 20) 555.
[36] *British Airways* (n 34) paras 67–75.
[37] Faull and Nikpay (n 5) 4.428.
[38] *British Airways* (n 34) para 143.
[39] *British Airways* (n 34) para 145.
[40] Faull and Nikpay (n 5) 4.920.
[41] Jones, Sufrin and Dunne (n 20) 533.

*competitive disadvantage* into a test of *capability* or *likelihood* of distortion, rather than a requirement for empirical proof of loss.[42]

**D. MEO AND THE MODERN ARTICLE 102(C) FRAMEWORK**

The modern framework for Article 102(c) was crystallized in *MEO – Serviços de Comunicações e Multimédia*, which serves as a center-piece for the shift toward a more economic, effects-based approach.[43] The Court addressed whether discriminatory pricing necessarily produces a demonstrable competitive disadvantage. Reaffirming and refining *British Airways*, the Court held that Article 102(c) does not prohibit *discrimination as such* but only discrimination that *tends to distort competition* in the market.[44]

The *MEO* judgment explicitly rejected the notion that the mere presence of an *immediate disadvantage* (such as a customer paying a higher tariff than its competitor) automatically constitutes an abuse.[45] Instead, a competition authority must examine *all the relevant circumstances* to determine if the price discrimination is capable of producing a competitive disadvantage.[46] Factors to be considered include the dominant undertaking's position, the duration and amount of the tariffs, the negotiating power of the parties, and whether there is an exclusionary strategy against equally efficient competitors.[47]

In *MEO*, the Court noted that the differentiated tariffs represented only a small percentage of MEO's total costs and had a limited effect on its profits, suggesting the conduct was not capable of affecting MEO's competitive position.[48] This marked a decisive move away from formal discrimination toward a requirement of market distortion.[49] Subsequent decisions have interpreted *MEO* as signaling the *quiet death* of pure secondary-line discrimination as an independent theory of harm without evidence of significant impact on parameters of competition like price, innovation, or output.[50] Consequently, the modern Article 102(c) framework is now closely aligned with the *anti-competitive foreclosure* standard seen in cases

[42] Pablo Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 *Common Market Law Review* 141.
[43] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* EU:C:2018:270.
[44] *MEO* (n 43) para 25.
[45] *MEO* (n 43) para 26.
[46] *MEO* (n 43) para 28.
[47] Case C-413/14 P *Intel Corporation Inc v Commission* EU:C:2017:632, para 139.
[48] *MEO* (n 43) para 34.
[49] O'Donoghue (n 25) 443.
[50] Case C-23/14 *Post Danmark A/S v Konkurrencerådet (Post Danmark II)* EU:C:2015:651, para 27.

like *Intel*, requiring a holistic assessment of whether the disparate treatment actually impairs the competitive structure of the market.[51]

## IV. SECTION 4(2)(A)(II): INDIA'S APPROACH TO DISCRIMINATORY PRICING AND CONDITIONS

### A. STATUTORY FRAMEWORK

Section 4(2)(a)(ii) of the Competition Act, 2002, prohibits a dominant enterprise from "*directly or indirectly, imposing unfair or discriminatory... price in purchase or sale (including predatory price) of goods or service*."[52] This provision is the Indian counterpart to Article 102(a) and (c) TFEU, yet it possesses a notable textual economy. Unlike Article 102(c), which explicitly qualifies discrimination through the lenses of *dissimilar conditions, equivalent transactions,* and *competitive disadvantage*, the Indian statute simply proscribes *discriminatory price* or conditions.[53]

This broader phrasing creates a potential for a more formalistic, form-based application, as the Act does not expressly mandate an effects-based test for Section 4 abuses.[54] However, the Indian framework includes a specific statutory Explanation that provides an objective justification defense: a price or condition is not abusive if it is *adopted to meet the competition.*[55] This suggests that while the primary text is broad, the legislative intent was to allow dominant firms some flexibility to respond to market forces.[56]

### B. CCI'S TREATMENT OF DISCRIMINATORY PRICING

The Competition Commission of India (CCI) has developed a robust body of jurisprudence to determine when price differentiation constitutes unlawful discrimination. The foundational requirement is the existence of "similarly placed" or "similarly situated" customers.[57] In *Grasim Industries*, the CCI found that charging different base rates and offering disparate discounts to domestic spinners for Viscose Staple Fibre (VSF) was discriminatory because

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[51] Jones, Sufrin and Dunne (n 20) 559.
[52] Competition Act 2002 (India), s 4(2)(a)(ii).
[53] Faull and Nikpay (n 5) 4.889; Aditya Bhattacharjea, 'Predatory Pricing in India' (2022) *CPI Antitrust Chronicle* 2.
[54] Bhattacharjea (n 53) 4.
[55] Competition Act 2002 (India), s 4(2), Explanation
[56] Geeta Gouri, *A Commissioner's Primer to Economics of Competition Law in India* (Springer 2023) 142.
[57] *Study on Economic Standards Used in VR & AoD Cases* (SSRN 4836113, 2021) 180.

these spinners were competitors in the same downstream market and were heavily dependent on the sole domestic supplier.[58] The Commission emphasized that a dominant firm has a *special responsibility* to implement transparent pricing that does not disadvantage similarly placed buyers.[59]

However, differential pricing itself is not sufficient to establish an abuse; the CCI demands evidence that the parties being compared are truly comparable. In *Prasar Bharti v. TAM Media*, the CCI rejected allegations of discrimination, holding that charging higher rates to broadcasters compared to advertisers was justified because they operated in different markets and derived different utility from the audience measurement data.[60]

The CCI's evidentiary threshold typically requires proof of a lack of *intelligible differentia* or rational business justification for the price variance.[61] In *Kapoor Glass*, the CCI scrutinized a target discount scheme that favored a vertically integrated joint venture over independent downstream "converters."[62] The Commission found the discounts to be discriminatory because they were not cost-reflective and effectively squeezed the margins of independent rivals, thereby distorting the downstream competitive construct.[63] While the statute is broad, the CCI increasingly analyzes whether such discrimination causes actual or likely competitive harm, such as the foreclosure of downstream players.[64]

## C. INDIAN JURISPRUDENCE AND THE EFFECTS QUESTION

Indian jurisprudence regarding the "effects" of discrimination is characterized by a dichotomy between Business-to-Consumer (B2C) and Business-to-Business (B2B) cases. In B2C scenarios, such as the *Belaire/DLF* real estate cases, the CCI often adopts a *quasi per se* approach.[65] It presumes that because consumers are "locked-in" or dependent on the dominant enterprise, the imposition of one-sided, unfair conditions inherently causes harm by restricting consumer choice.[66]

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[58] *Informant v Grasim Industries Ltd*, Case No 51 of 2017 (CCI), para 114.
[59] *Grasim Industries Ltd. v. CCI*, Appeal No. 11 of 2012 (COMPAT).
[60] *Prasar Bharti v. TAM Media Research Pvt. Ltd.*, Case No. 16 of 2012 (CCI).
[61] *Informant v Grasim Industries Ltd*, Case No 51 of 2017 (CCI), para 27.
[62] *Kapoor Glass Pvt Ltd v Schott Glass India Pvt Ltd*, Case No 22 of 2010 (CCI).
[63] *Kapoor Glass* (n 62) para 9.41.
[64] *Study on Economic Standards* (n 57) 191.
[65] *Belaire Owners' Association v. DLF Limited*, Case No. 19 of 2010 (CCI).
[66] *Study on Economic Standards* (n 57) 251.

In the B2B context, the inquiry is more aligned with the modern EU effects-based approach. The CCI looks for evidence of foreclosure, harm to trading partners, or a decline in downstream profitability that can be directly attributed to the discriminatory conduct.[67] In *Fast Track Call Cab*, the CCI declined to intervene in *low-cost pricing* strategies, and recognized them as legitimate penetrative tactics in a nascent, dynamic market that actually benefited consumers through network effects.[68] Similarly, in *Bharti Airtel v. Reliance Jio*, the Commission held that short-term free services by a non-dominant entrant to establish identity did not raise competition concerns, even if they pressured incumbents.[69]

While India has not yet fully codified an MEO-style holistic effects inquiry, the NCLAT and the Supreme Court have increasingly pushed the CCI toward a *rule of reason* analysis.[70] The courts have emphasized the need to consider "attendant circumstances" and the "nature of the market" before finding an abuse, moving away from a purely formalistic reading of Section 4.[71]

## D. THE PROBLEM OF SECTION 4'S WORDING

The minimalist wording of Section 4(2)(a)(ii) presents a unique analytical challenge. By mentioning discriminatory price without the qualifiers of equivalent transactions or competitive disadvantage, the Indian statute could theoretically be interpreted as a stricter, more interventionist regime than Article 102(c) TFEU.[72] Some scholars argue this omission allows the CCI to sidestep complex economic assessments of market distortion.[73]

However, a genuinely comparative view suggests that Indian jurisprudence should continue developing an effects-based interpretation notwithstanding these textual differences. Citing the *special responsibility doctrine*, the CCI already imports notions of comparability and market harm into its decisions.[74] To interpret Section 4 as a pure form-based prohibition would risk *Type 1 errors*; chilling aggressive, pro-competitive price differentiation that benefits the broader economy.[75] Just as the CJEU in *MEO* clarified that Article 102(c) does not prohibit

[67] *Study on Economic Standards* (n 57) 192.
[68] *Fast Track Call Cab Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*, Case No. 06 of 2015 (CCI), para 121.
[69] *Bharti Airtel Ltd. v. Reliance Industries Ltd. & Anr.*, Case No. 03 of 2017 (CCI).
[70] *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*, Case No. 13 of 2009 (CCI).
[71] *Uber (India) Systems (P) Ltd. v. CCI*, (2019) 8 SCC 697.
[72] Bhattacharjea (n 53) 3.
[73] *Study on Economic Standards* (n 57) 7.
[74] *Shamsher Kataria v. Honda Siel Cars India Ltd.*, Case No. 03 of 2011 (CCI).
[75] Nikita Koradia and Rohan Dembani, 'Can Non-dominant Entities Behave Dominantly: Revisiting the Grey

discrimination *as such*, the Indian regulator must continue to use Section 4's broad language not as a trap for dominant firms, but as a flexible tool to prevent only those discriminatory practices that truly impair the competitive process.[76]

## V. EU v. INDIA: WHEN DOES DIFFERENTIATION ACTUALLY BECOME DISCRIMINATION?

### 1. ARE THE TRANSACTIONS EQUIVALENT?

The threshold for any discrimination inquiry is whether the transactions being compared are *equivalent*. EU law clarifies that equivalence does not require identity but comparability in terms of product, cost of supply, and location.[77] In *Alpha Flight Services*, the General Court held that equivalence is assessed by looking at the relationship between the dominant undertaking and its customers, rather than the customers' positions in downstream markets.[78] While Section 4(2)(a)(ii) of the Indian Act lacks the explicit equivalent transactions qualifier found in Article 102(c) TFEU, the CCI has imported this requirement through its insistence on comparing "similarly situated" customers.[79] In *Prasar Bharti v. TAM Media*, the CCI held that transactions with broadcasters were not equivalent to those with advertisers because they operated in different market conditions and derived distinct utility from the services.[80] Under both regimes, the burden of proving that transactions are comparable rests on the party alleging the infringement, as equivalence is a constituent element of the abuse.[81]

### 2. IS DIFFERENTIAL TREATMENT ENOUGH?

It is well-established that price differentiation is not synonymous with discrimination. In the EU, the CJEU in *Post Danmark I* stated that the mere fact that a dominant firm price discriminates does not, of itself, suggest an exclusionary abuse.[82] The transition from differentiation to discrimination requires that the disparate treatment be capable of distorting competition.[83] Similarly, Indian jurisprudence has moved away from a purely formalistic

Areas of Predatory Pricing During the Curious 5 Years' Growth of Jio' (2021) 11(2) *GNLU Journal of Law, Development and Politics* 38.

[76] *MEO* (n 43) para 25.

[77] Anthony Arnull and Damian Chalmers, *The Oxford Handbook of European Union Law* (OUP 2015) 621.

[78] *Aéroports de Paris* (n 23) para 150.

[79] *Study on Economic Standards* (n 57) 180.

[80] *Prasar Bharti* (n 60) para 27.

[81] Kalintiri (n 26) 42.

[82] *Post Danmark I* (n 10) para 22.

[83] Faull and Nikpay (n 5) 4.907.

reading. The CCI in *Grasim Industries 2* established a two-pronged test: first, whether buyers within a specific category have been discriminated against, and second, whether such discrimination has an effect on the market.[84] Consequently, a price difference only matures into illegal discrimination when it lacks a rational basis and creates a competitive disadvantage. Both jurisdictions now treat the "dissimilar conditions" requirement not as a formalistic check but as a substance-over-form inquiry into whether the dominant firm has abandoned *competition on the merits*.[85]

## 3. MUST THERE BE ACTUAL COMPETITIVE HARM?

This remains the most critical comparative pivot. Article 102(c) TFEU, as interpreted in *MEO*, does not require proof of an *actual quantifiable competitive disadvantage* or a specific deterioration in a trading partner's competitive position.[86] It is sufficient to demonstrate that the conduct is capable of producing such a disadvantage by affecting the costs, profits, or other relevant interests of trading partners.[87]

India’s approach varies based on the nature of the transaction. In Business-to-Consumer (B2C) cases, the CCI often presumes harm from the very existence of one-sided or unfair conditions, treating dominance as a proxy for consumer dependence.[88] However, in Business-to-Business (B2B) cases, the CCI’s inquiry is more aligned with an effects-based standard. In *Kapoor Glass*, the Commission demanded evidence of foreclosure, finding that discriminatory discounts were abusive because they resulted in a demonstrable decline in the profit margins of downstream rivals.[89] While the EU's capability test is lower than a requirement for empirical proof of foreclosure, India generally demands proof of actual loss or market distortion in industrial settings before a price difference is declared unlawful.[90]

## 4. WHAT COUNTS AS OBJECTIVE JUSTIFICATION?

Both jurisdictions recognize that even a *prima facie* discriminatory price may be lawful if objectively justified. Common justifications include cost differences (e.g., transport), volume

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[84] *Informant v Grasim Industries Ltd* (n 58) para 31.
[85] Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para 91.
[86] *MEO* (n 43) para 27.
[87] *MEO* (n 43) para 37.
[88] *Study on Economic Standards* (n 57) 253.
[89] *Kapoor Glass* (n 62) para 9.41.
[90] Versha Vahini, *Indian Competition Law* (1st edn, 2021) 216.

discounts, and legitimate commercial strategies such as entering new markets.[91] EU law provides a structured efficiency defense, requiring the dominant firm to prove that efficiencies outweigh negative effects and do not eliminate competition.[92] India's Section 4(2) contains an explicit statutory exception for prices adopted to meet the competition, a defense the CCI has applied broadly to allow dominant firms to react to non-dominant entrants.[93] Furthermore, the CCI has accepted "procurer's choice" as a justification in *Deepak Sultania*, noting that tender conditions reflecting genuine needs are not discriminatory.[94] While both jurisdictions scrutinize these justifications, the EU's test is more cumulatively rigorous, whereas the CCI often defers to a firm's *prerogative* if the justification appears rational.[95]

## 5. CONSUMER HARM VERSUS COMPETITIVE HARM

A central tenet of modern competition law is that it protects the *competitive process*, not individual competitors or even individual consumers from every high price. A consumer paying ₹1,000 while another pays ₹800 is not necessarily a victim of an Article 102(c) abuse. As the CJEU clarified in *Continental Can*, the prohibition is aimed not only at direct damage to consumers but also at practices detrimental to them through their impact on an effective competition structure.[96]

The real harm prohibited by discrimination is the distortion of conditions *between trading partners*. If a dominant firm's pricing prevents an equally efficient downstream player from competing, the process of competition on the merits is impaired.[97] While India's Raghavan Committee Report emphasized that the law should focus on whether a practice reduces incentives for rivals to compete aggressively, the CCI sometimes prioritizes *equity and justice* in B2C cases over long-term structural analysis.[98] Ultimately, both Article 102(c) and Section 4(2)(a)(ii) seek to ensure that dominant firms do not use their leverage to pick winners and losers in the downstream market, thereby safeguarding the welfare of the society through an undistorted competitive landscape.[99]

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[91] Faull and Nikpay (n 5) 4.290.
[92] Kalintiri (n 26) 50.
[93] Competition Act 2002 (India), s 4(2), Explanation.
[94] *Mr Deepak Sultania v Security Printing and Minting Corporation of India*, Case No 41 of 2020 (CCI).
[95] *Study on Economic Standards* (n 57) 157.
[96] *Europemballage Corporation and Continental Can Company Inc v Commission* (n 21) para 26.
[97] Jones, Sufrin and Dunne (n 20) 393.
[98] Report of the Competition Law Review Committee (July 2019) 238.
[99] Gouri (n 56) 142.

## VI. TOWARDS A UNIFIED ANALYTICAL FRAMEWORK

Drawing on the synthesized jurisprudence of the CJEU and the CCI, a unified six-stage analytical framework is proposed to distinguish benign price differentiation from prohibited discrimination.

Step 1: Establish Dominance; under both Article 102 TFEU and Section 4 of the Indian Act, dominance is the non-negotiable threshold.[100] A position of strength enables an undertaking to act independently of market constraints which makes its pricing strategies a matter of regulatory concern.[101]

Step 2: Identify the Trading Partners; the inquiry must isolate the specific co-contractors (suppliers or customers) receiving disparate treatment to determine if the dominant firm is *picking winners* in the market.[102]

Step 3: Establish Equivalence; transactions must be genuinely comparable. While the Indian statute lacks the explicit "equivalent" qualifier, the CCI has consistently imported this via the *similarly situated* standard, requiring comparison of products similar in quality and supply costs.[103]

Step 4: Identify the Differentiation; the specific price or condition variance must be isolated and demonstrated through actual data rather than mere projections.[104]

Step 5: Establish Competitive Disadvantage; this is the analytical pivot. Following the *MEO* standard, the differentiation must be shown to be capable of distorting competition between trading partners.[105] A mere financial disadvantage or *immediate* higher cost is insufficient; there must be a potential or actual impairment of the downstream competitive process.[106]

Step 6: Examine Objective Justification; finally, the dominant firm must be permitted to demonstrate a legitimate economic basis, such as meeting competition, reflecting volume-

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[100] Kalintiri (n 26) 42.
[101] *United Brands* (n 27); Competition Act 2002 (India), s 4, Explanation (a).
[102] *MEO* (n 43).
[103] Faull and Nikpay (n 5) 4.908; *Informant v Grasim Industries Ltd* (n 58).
[104] *Transparent Energy Systems Pvt Ltd v TECIL*, Case No 37 of 2010 (CCI), para 23.
[105] *MEO* (n 43) para 25.
[106] *Study on Economic Standards* (n 57) 192.

based cost savings, or protecting intellectual property rights.[107]

The central proposition of this study is that price differentiation should be treated as a competition-law problem only when it crosses the additional threshold of discriminatory treatment capable of producing a competitive disadvantage, subject to legitimate objective justification. This framework provides the legal certainty necessary to prevent Type 1 errors that chill aggressive, pro-competitive price competition.[108]

## VII. CONCLUSION

Neither Article 102(c) TFEU nor Section 4(2)(a)(ii) of the Competition Act, 2002, prohibits price differentiation as such.[109] The fundamental competition-law concern arises only when differentiation becomes a mechanism through which a dominant undertaking distorts the competitive position of its trading partners.[110] EU jurisprudence, particularly its sophisticated development from a formalistic assessment of *unequal treatment* toward a substantive inquiry into *competitive disadvantage*, provides useful guidance for the Indian regime.[111] However, India should not merely copy the EU. Instead, India should leverage its flexible statutory language and evolving jurisprudence to develop a clearer, domestic effects-based methodology.[112] Such an approach must account for the distinct institutional context of the CCI, ensuring that the *special responsibility* of dominant firms does not devolve into a prohibition of aggressive, efficiency-enhancing pricing that ultimately benefits the consumer.

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[107] Competition Act 2002 (India), s 4(2), Explanation; *Aéroports de Paris* (n 23) para 150.
[108] Jones, Sufrin and Dunne (n 20) 393.
[109] *Post Danmark I* (n 10) para 22.
[110] *British Airways* (n 34).
[111] O'Donoghue (n 25) 443.
[112] Gouri (n 56) 142.