

## **Recommendation of the Public Defender of Rights regarding price differentiation**

Setting different prices of goods and services is relatively common and it pursues various goals. We may come across different prices e.g. at sports events, cultural events, during the providing of accommodation, catering services or the opening of historic and cultural sights. They may appear in the form of discounts or exemption from payments for members of a certain specific group.

From the economic point of view, double prices are an easily accessible instrument to increase revenues and maximize consumer welfare.<sup>1</sup> **As a result, price differentiation is allowed, in essence, with respect to its economic benefit in creating overall prosperity, but it must not be in violation of dignity of individuals.** The requirement of maintaining dignity means respecting people; a person may never be treated only as a means of achieving a goal. Even economically justified double pricing could disrupt broader social goals, e.g. the requirement to include individuals in the life of a society on an equal basis.

**Every price differentiation, if it is to be in compliance with law, has to be reasonably justified.**

The prohibition of discrimination in the area of access to goods and services and the provision thereof is regulated by the Anti-discrimination Act (Act No. 198/2009 Coll., on Equal Treatment and Legal Means of Protection against Discrimination). If any of the prohibited reasons mentioned in the Anti-discrimination Act is used to set different prices,<sup>2</sup> such action could be in violation of the right to equal treatment and the prohibition of discrimination. Discrimination of a consumer is also prohibited by the Consumer Protection Act.<sup>3</sup>

We may come across the application of different prices also in situations when differentiation is not based on a prohibited discriminatory reason. These cases are regulated by economic competition law.

**This recommendation addresses the subject of price differentiation based on reasons prohibited by the Anti-discrimination Act in providing goods and services to the public.** It does not relate to differentiation within the scope of economic competition law or to the conclusion of individual contracts<sup>4</sup> since in a case when goods or services are not offered publicly but privately, it is only up to the individuals to negotiate prices.

---

<sup>1</sup> On the part of a seller, the return on investment is faster and some customers may enjoy goods and services which would remain inaccessible in case of a single price level. See Bejček, J. *Cenová diskriminace a tzv. dvojí ceny v evropském a českém kontextu*. Právní fórum, 2008, No. 5, p. 181 and subseq.

<sup>2</sup> The provision of Sec. 2 (3) of the Anti-discrimination Act, i.e. race, ethnic origin, nationality, gender (including pregnancy, parenthood and sexual identification), sexual orientation, age, disability, religion or belief or opinions.

<sup>3</sup> Act No. 634/1992 Coll., on Consumer Protection, as amended.

<sup>4</sup> An individual contract means for example an agreement between two acquaintances, according to which one sells a car to the other without offering it publicly to an indefinite circle of interested persons.

**Legal entities or other participants in dealings within the scope of economic competition (so-called competitors) cannot be victims of discrimination within the scope of the Anti-discrimination Act. The aim of the anti-discrimination law is to protect the dignity of persons and not business relationships among entrepreneurs.**

### **Prohibited reasons of differentiation**

The Anti-discrimination Act defines discrimination as “an act or a failure to act whereby one person is treated less favourably than another person is or has been or would be treated in a comparable situation”. The application of double prices of goods and services represents less favourable treatment of a person, who is usually obliged to pay a higher price in a comparable situation. It does not mean, however, that all cases of price differentiation are discriminatory and thus prohibited. A disadvantaged group has to be defined by a prohibited discriminatory reason, i.e. **race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion or belief or opinions** and simultaneously the disadvantage must deviate from the admissible forms of differential treatment.<sup>5</sup>

### **Admissible forms of differentiation**

The purpose of the anti-discrimination law is not to “bully” providers of goods and services and require equality at all costs heading towards uniformity and egalitarianism. The sense of the anti-discrimination law consists in the protection of members of certain groups and assertion of their right to full inclusion in the life of a society. It offers protection to individuals who could be excluded from the providing of goods and services on the basis of a suspicious (prohibited) criterion.

Differentiation due to race, ethnic origin and nationality is undesirable in a society and therefore it is practically unjustifiable. Differential treatment on the basis of other reasons defined in the Anti-discrimination Act can be justified in specific cases. Some cases give more room for justifying differential treatment while some cases offer less room. It is always necessary to consider a specific situation and the suitability of using a differentiating criterion. The means used to justify differential treatment need to be always proportionate.

Measures aiming to prevent or counterbalance disadvantages resulting from affiliation of a person to a group defined by any of the prohibited discriminatory reasons are not regarded as discrimination (e.g. ticket discounts for persons with disabilities).

**Unjustified** price differentiation based on a reason prohibited by law constitutes prohibited discrimination, which can be fought by means of the Anti-discrimination Act.

Differentiation due to race, ethnic origin and nationality is completely unjustifiable.

---

<sup>5</sup> That is, if differential treatment is not “*objectively justified by a legitimate goal, provided the means to achieve the goal are proportionate and necessary*”. See the provision of Sec. 6 and Sec. 7 of the Anti-discrimination Act.

## Price differentiation in the area of access to goods and services

In the area of providing goods and services, we may come across discrimination mainly in the form of denying goods or services or refusing to provide certain goods (e.g. refusing to serve the Roma people or the Vietnamese due to ethnicity, restricting access for a blind person accompanied by a guide dog to a restaurant, banning children in a café). Differentiation in the form of not providing a service to a certain group of consumers is mostly unjustifiable but there are cases when aiming at a certain group of consumers can represent legitimate differentiation (e.g. setting special visiting hours for a sauna or an indoor pool for women and excluding men during these hours).

Price differentiation is in principle possible and allowable but some of its forms may show signs of discrimination. In some cases, it could eventually lead to the exclusion of a certain group of consumers. An exorbitantly high price is sometimes also used as a tool to deny a service to an unwelcome group of consumers.

Discounts and reduced prices intended for certain defined groups of consumers are usually set for the following target groups:

- 1) A discount is given to members of a group of **persons insufficiently represented among consumers**. The aim is to expand the group of customers by members of a group that is using the service in a smaller degree.
- 2) Discounts are aimed at a **group of usually lower-income customers** or customers who have higher living costs than others do. This group includes students, old-age pensioners, disabled persons or other low-income persons.

In both cases, a provider tries to attract as many consumers as possible. A provider will also acquire consumers who would not be otherwise interested in the goods or services. It is assumed that consumers who pay the full price will use the goods or services even without a discount. The legitimate goal of double prices is to attract consumers and to achieve the maximization of profits. A higher price is typically used in case of customers who are assumed to be more willing to pay for the goods or services.<sup>6</sup>

However, it is unacceptable if a higher price obviously serves to discourage members of a certain specific group of consumers who are not welcome among the recipients of goods or services.<sup>7</sup> In these cases, a lower price is not set for consumers with lower interest in the goods or services in order to attract them but for all customers who do not belong to undesirable customers.

It is not discrimination if a different price serves to increase the number of customers, or to bring the number of members of certain groups to the same level, if achieving a balance is justifiable.

---

<sup>6</sup> It is therefore legitimate to offer free tickets for football matches to women or children. Men form a traditional football fan base and it is not necessary to support their participation in any way. It is also legitimate to set prices in order to achieve a balanced number of men and women in dance classes where dancing in pairs is taught.

<sup>7</sup> For example, when an entrance fee for members of an ethnic minority or minority sexual orientation is set at CZK 400.00 while others pay an entrance fee of CZK 50.00. The purpose of the disproportionately high price is to discourage unwelcome visitors.

Providers of goods and services generally have a right to concentrate on customers from whom they expect the highest profit. However, if their intention is to exclude members of a certain group, their action may be in violation of the anti-discrimination law.

### **Double prices for foreigners**

A specific case of price differentiation, which is however not discrimination within the Anti-discrimination Act,<sup>8</sup> is the setting of different prices for foreigners. In these cases, a different price is charged for the same service depending on whether a consumer speaks Czech or not. Foreigners are charged a higher price, which is explained by stronger buying power of tourists, meaning that even a higher price is still attractive for them. The purpose is to set a maximum price that specific consumers are willing to pay.<sup>9</sup>

Double prices appear during the providing of hotel accommodation, the providing of catering services in restaurants, with respect to taxi services or entrance fees to historic buildings. If no special service is linked to a higher price (e.g. tour in a foreign language), such price setting cannot be considered legitimate. In relation to citizens of Member States of the European Union, different price setting is not possible because it would be in violation of the EU law.<sup>10</sup> A criterion of permanent residence could be a hidden reason for differentiation due to state citizenship.<sup>11</sup>

Within the EU, citizens of all Member States have to be guaranteed the same conditions when using services and purchasing goods.

---

<sup>8</sup> The Anti-discrimination Act does not recognize state citizenship as a discriminatory cause of differentiation.

<sup>9</sup> The Municipal Court in Prague 6 recognized in a judgment of 13 January 1999, ref. No. 6 C 209/98-30 that the application of double prices is contrary to good manners pursuant to the provision of Sec. 424 of Act No. 40/1964 Coll., the Civil Code, as amended, and awarded the right to damages to the petitioner.

<sup>10</sup> The provision of Article 18 and 56 of the Treaty on the Functioning of the European Union. Discrimination on the basis of state citizenship is subsequently forbidden also by the provision of Sec. 12 of Act No. 222/2009 Coll., on Free Movement of Services, as amended. The inadmissibility of price differentiation was also addressed by the Court of Justice of the European Union in a case of so-called *tourist prices*. See a judgment of 15 March 1994, in case C-45/93, *Commission v. Kingdom of Spain* [1994] ECR I-00911, and a judgment of 16 January 2003, in case C 388/01, *Commission v. Italy* [2003] ECR I-00721.

<sup>11</sup> The Supreme Administrative Court found unlawful differentiation due to permanent residence committed by municipalities or organizations established by municipalities. See the judgment of the Supreme Administrative Court of 16 March 2007, ref. No. 4 As 63/2005-69, the judgment of the Supreme Administrative Court of 20 December 2006, ref. No. 1 As 14/2006-68, and the judgment of the Supreme Administrative Court of 6 February 2008, ref. No. 3 As 67/2007-54.

## **Conclusion**

- 1. Setting different prices and discounts for certain groups of consumers is in principle possible and allowed with respect to economic goals.**
- 2. When setting a price it is legitimate to pursue the aim of profit maximization.**
- 3. If goods or services are offered to the public, the price must not unjustifiably disadvantage a group of consumers defined by a reason stipulated in the Anti-discrimination Act.**
- 4. As regards price differentiation, it needs to be justified by a legitimate goal and the means to be used to achieve the goal need to be proportionate and necessary.**
- 5. Providing discounts is legitimate for those groups of consumers that are insufficiently represented in the total number of consumers.**
- 6. Setting a higher price must not be directed at excluding members of a group of consumers who are regarded as not welcome due to reasons beyond their influence.**
- 7. Price differentiation based on state citizenship, if it concerns citizens of Member States of the European Union, is in violation of European law.**

JUDr. Pavel V a r v a ř o v s k ý  
Public Defender of Rights

## **Annex – examples of price differentiation**

### ***Different retirement age and discounts for old-age pensioners***

Prior to 1990, the retirement age in Great Britain was 60 years for women and 65 years for men. When Mr. James and his wife, both aged 61, visited a swimming pool, Mr. James had to pay an entrance fee while his wife did not because the operator of the swimming pool had decided to provide free services to persons in the retirement age. Mr. James therefore claimed discrimination based on gender. The House of Lords decided that price differentiation cannot be reasonably justified in this case and that it is discrimination on the basis of gender.<sup>12</sup>

### ***Racial discrimination in providing home loans***

During the 1980s and 1990s, it became practice in the United States of America that banks provided home loans under varying conditions depending on whether the client was white or a member of a minority. There were cases, for example, that Afro-Americans had to pay higher interest rates on loans.<sup>13</sup> In another case,<sup>14</sup> a bank charged Indians a higher interest rate and refused to provide funding for property located in Indian reservations. All led to a series of lawsuits as a result of which banks had to give up this practice and introduce a fairer system of providing loans.

### ***Tourist prices***

The Court of Justice of the European Union dealt with the issue of so-called tourist prices in several cases. The cases<sup>15</sup> related to the setting of more favourable entrance fees to museums and historic buildings for citizens and persons residing in countries where the sights were located while citizens of other Member States of the European Union could not claim similar privilege. The Court of Justice of the European Union found that it is inadmissible discrimination based on state citizenship, in violation of European law.

### ***Double prices for foreigners in the Czech Republic***

A case settled by the District Court in Prague<sup>16</sup> related to an entrance fee to visit the area of Troja chateau, a part of the City Gallery Prague. For Czech speakers, the entrance fee was set at CZK 50.00 and for foreigners at CZK 100.00. An above-standard service which would correspond to the higher fee was neither provided nor offered to foreign visitors. The entrance fee for Czech speakers was marked “reduced” or “discount”. The court found that the application of double prices is contrary to good morals and awarded a claim for damages to the plaintiff. The entrance fees were adjusted already during the court proceeding.

---

<sup>12</sup> *James v Eastleigh Borough Council* [1990] 2 AC 751

<sup>13</sup> *United States v. First National Bank of Vicksburg, Mississippi*, 1994, No. 5:94 CV 6(B)(N)

<sup>14</sup> *United States v. Blackpipe State Bank, Martin, South Dakota*, 1994, Civ. Act. No. 93-5115

<sup>15</sup> A judgment of the Court of Justice of the European Union of 15 March 1994, in case C-45/93, *Commission v. Kingdom of Spain* [1994] ECR I-00911; a judgment of the Court of Justice of the European Union of 16 January 2003, in case C 388/01, *Commission v. Italy* [2003] ECR I-00721.

<sup>16</sup> A judgment of 13 January 1999, ref. No. 6 C 209/98-30.