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ECJ sets dominance record straight: price discrimination not all bad

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Introduction
Facts
Decision
Key takeaways

Introduction

Discriminatory pricing as an abuse is a little-deployed area of EU antitrust law and there has been no recent enforcement at the European Commission level. The few existing cases concern extreme facts, involving natural or statutory monopolies such as airports or copyright collecting societies.

In theory, the requirement in Article 102(2)(c) of the Treaty on the Functioning of the European Union (TFEU) that no dominant firm discriminate sets an impossible bar. For example, it is difficult to think of even the most powerful company being able to stand firm against any price concessions for:

- strong buyers;
- customers in special circumstances (eg, fare concessions for the elderly or junior travellers); or
- different use applications (eg, public sector versus commercial applications).

Further, given the development of the *Intel* case law around loyalty rebates (which involve inherently discriminatory pricing based on subjective volume targets), it would be invidious to find a company's rebate scheme to be legal under the *Intel* foreclosure standard but unlawfully discriminatory under Article 102(2)(c).

The European Court of Justice's (ECJ's) judgment in *MEO v Autoridade da Concorrência* therefore offers welcome clarification of the case law. It starts with the premise that not all price differences are illegal – the key question is whether they cause material harm by competitively disadvantaging one company in contrast to its rivals.

Whether a competitive disadvantage exists requires a contextual analysis to determine:

- whether the customer has countervailing negotiating power;
- the conditions and arrangements for charging prices;
- the duration and level of prices;
- the effects of prices on customers' costs and profits;
- whether there is a regulatory remedy for allegedly unfair prices; and
- whether the dominant company could have a strategy to foreclose a customer.

Facts

MEO Serviços de Comunicações e Multimédia (MEO) needed to clear the use of copyright-related rights with Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes (GDA) to provide its paid TV signal transmission and content services.

MEO was unhappy with the tariffs GDA imposed on it for the use of copyright-related rights. MEO lodged a complaint with the Portuguese Competition Authority, accusing GDA of abusing its allegedly dominant position by applying different tariffs to MEO than to NOS Comunicações SA (NOS), one of MEO's largest competitors. Under Article 102(2)(c) of the TFEU, applying different conditions to equivalent transactions with trading parties, thereby putting a trading party at a competitive disadvantage, may qualify as abusive conduct.

The Portuguese Competition Authority did not pursue the investigation due to a lack of evidence that the tariff differentiation that GDA had had a restrictive effect on MEO's competitive position. This led to MEO filing an appeal with the Portuguese Competition, Regulation and Supervision Court, which asked the ECJ to issue an opinion on the interpretation of the concept of competitive disadvantage under Article 102(2)(c).

Decision

The ECJ clarified that merely finding that the behaviour of a dominant company is discriminatory is inadequate to constitute an infringement of Article 102(2)(c) of the TFEU. The ECJ stated that:

> *there must be a finding, not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to... hinder the competitive position of some of the business partners of that undertaking in relation to the others.*

The ECJ recognised that charging MEO a higher price than NOS for an equivalent service indicated the existence of a disadvantage for MEO. However, the ECJ noted that this did not necessarily put MEO at a competitive disadvantage. All relevant circumstances had to be assessed to determine whether the price discrimination against MEO could put it at a competitive disadvantage. The following circumstances were particularly relevant in this case:

- As one of GDA's main customers, MEO had a certain negotiating power with GDA.
- The prices that GDA charged MEO were dictated by an arbitration decision, in line with Portuguese law.
- The prices charged:
  - were applicable only for four years;
  - represented a low percentage of the total costs borne by MEO in providing its services; and
  - had a limited effect on MEO's profits.
- There was no proof that GDA had an interest in excluding MEO from the downstream market. The ECJ stated that:

  > *where the application of differentiated tariffs concerns only the downstream market, the undertaking in a dominant position, in principle, has no interest in excluding one of its trade partners from the downstream market.*

Key takeaways

The ECJ's ruling provides much-needed guidance as regards the extent to which a company with market power need not discriminate in its commercial dealings with trading partners. Some of the key takeaways are as follows:

- To conclude that discriminatory conduct constitutes abusive conduct, competition authorities must conduct an effects assessment rather than make presumptions. This approach follows close on the heels of the *Intel* judgment earlier this year (for further information please see "*Intel* rewrites rebates rules: ECJ requires economic assessment"), which ruled against the existence of a *per se* illegal category of loyalty rebates. Despite not concerning a rebate scheme like *Intel*, *MEO* is also a welcome clarification of the legal assessment of rebates. Historically, volume-linked discounts were found to infringe EU antitrust rules both as illegal discriminatory pricing and illegal loyalty rebates. With its *MEO* judgment, the ECJ closes the circle: it confirms that rebate schemes must be assessed on their effects, regardless of the theory of harm involved.

- Not every disadvantage resulting from discriminatory treatment has an anti-competitive effect. Competition authorities must examine the practices at hand, in light of all of the circumstances of the particular case, to reach the conclusion that a trading partner is competitively disadvantaged.
- Where price discrimination concerns an input sold by a dominant company and that input constitutes only a small part of the overall costs of the end product sold by the trading partner, an abuse is less likely to occur. This may prove to be particularly relevant as regards disputes arising in the Internet of Things value chain – for example, where an allegedly dominant technology licensor charges different prices to manufacturers of the same connected product. *MEO* implies that, if the value of the final connected product is so high that the cost of the technology licence represents only a small proportion of the total manufacturing cost, then arguments around discriminatory treatment may not hold.
- The competitive position of the dominant company itself on the market in which it operates need not be affected for discriminatory pricing to be abusive. However, where the dominant company is not vertically integrated, competition authorities are likely to be more cautious in finding an abuse. They will examine what interest the dominant company may have in excluding one of its trading partners from the market in which it operates.

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