SLAUGHTER AND MAY

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Court of Justice provides clarity on the concept of "competitive disadvantage" in its recent MEO ruling

On 19 April 2018 the European Court of Justice (CJ) issued its **judgment** in case C-525/16 *MEO v Autoridade da Concorrência*. The CJ considered the concept of "*competitive disadvantage*" in Article 102(c) of the Treaty on the Functioning of the European Union (TFEU). Under Article 102 TFEU dominant undertakings are prohibited from "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*", insofar as trade between Member States may be affected. The judgment in *MEO* offers guidance on when differential pricing by dominant undertakings is anti-competitive.

Background

The Portuguese Competition, Regulation and Supervision Court (the referring court) requested a preliminary ruling from the CJ following a case before it in which MEO, a pay-TV operator and customer of GDA, a non-profit copyright collecting society, had complained to the Portuguese Competition Authority (PCA) that GDA had breached Article 102. Specifically, that GDA had abused its dominant position by charging discriminatory prices to its customers, meaning MEO had paid higher royalty rates than GDA's other customers against whom it competes.

The dominant undertaking (GDA) is not active on the downstream market that it supplies, and so could not itself benefit from the effects of its pricing terms. This context is important since it raises the question of why GDA would have an incentive to place its customers at a competitive disadvantage or to exclude them from the market.

The PCA ultimately refused MEO's complaint. It reasoned that the extra costs incurred by MEO as against its competitors did not put it at a competitive disadvantage since MEO's financial position meant that it could absorb the higher price and it had, in fact, grown its market share while paying GDA's differential tariff. MEO contested this reasoning, arguing that GDA breached Article 102 as long as its tariff was capable of distorting competition. As a result, the PCA had

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erred in conducting an investigation of whether there had been any actual deterioration in its competitive position.

In light of the referring court's request for the CJ's interpretative guidance on this point, the CJ considered the following questions:

1. whether the concept of "*competitive disadvantage*" requires an analysis of the specific effects of differential prices being applied by a dominant undertaking on the competitive situation of its customers; and
2. whether the seriousness of those effects (if any) should be taken into account.

Advocate General's Opinion

On 20 December 2017 Advocate General Wahl (AG Wahl) delivered his **Opinion**, observing that differential pricing mechanisms can be pro-competitive and will not necessarily breach Article 102. AG Wahl distinguished "*competitive disadvantage*" and "*disadvantage between competitors*", and reached the conclusion that Article 102 is not concerned with the latter. AG Wahl interpreted the former as requiring a sufficiently significant disadvantage that is capable of affecting the commercial position of the customer that was subject to differential pricing, assessed in light of all the circumstances. However, this assessment did not entail a need to prove any quantifiable or *de minimis* deterioration in the customer's competitive position.

Judgment

The CJ followed the opinion of AG Wahl closely in ruling that discriminatory pricing will not constitute an abuse of a dominant position *per se*. A breach of Article 102 requires the price discrimination to actually be "*capable of distorting competition*" on the market by putting one or more competing undertakings at a competitive disadvantage compared to the others.

In relation to the first question from the referring court, the CJ confirmed that determining whether price discrimination produces or is capable of producing such distortion of competition requires an assessment of the effects in all the relevant circumstances of the case. It found that relevant circumstances may include: (i) the extent of the dominant position; (ii) the customers' negotiating power; (iii) the duration and amount of the discriminatory prices; (iv) the conditions and arrangements of the prices; and (v) any potential strategy with the purpose of excluding an 'as-efficient' customer from the downstream market.

The CJ further states that for this assessment to conclude that a distortion of competition has occurred, more than the mere presence of a disadvantage must be found – however, the assessment does not require proof of an actual, quantifiable deterioration in the customer's competitive position to be adduced.

Answering the second question from the referring court, the CJ emphasised that it is not justifiable to fix a *de minimis* or seriousness threshold as a pre-requisite to a finding of an abuse of dominance. However, the CJ specified that the price discrimination must consist in behaviour that has an effect on the costs, profits or any other relevant interest of one or more of the customers that was charged higher prices as compared to its competitors. It follows that it is not the case that all behaviour will necessarily be anti-competitive where it is so small as to not affect the interests of the customer. Where the effect is "*not significant*" it may be found that the price discrimination is not, in fact, capable of having any effect on the customer's competitive position. In other words, the CJ may less readily find that a dominant undertaking has abused its position where the impact of that abuse on the customer's competitive position is insubstantial.

It is now up to the referring court to determine in this particular case whether GDA's differential pricing was capable of placing MEO at a competitive disadvantage.

Implications

While *MEO* does not provide a bright-line test for when a dominant firm's discriminatory pricing will breach Article 102, dominant undertakings, their competitors and their customers alike should welcome the useful framework that the CJ has provided. A key take-away from the judgment is that where a dominant undertaking is supplying the downstream market it need not charge uniform prices for equivalent transactions to its customers to comply with Article 102, so long as its pricing terms are not capable of distorting competition amongst those customers.

More generally, *MEO* seems to confirm that the effects-based approach laid down in recent cases applies broadly in abuse of dominance cases. Case C-209/10 ***Post Danmark***, judgment of 27 March 2012, endorsed the effects-based approach when considering whether predatory pricing may be anti-competitive. In case C-413/14 ***Intel Corporation Inc v Commission***, judgment of 6 September 2017, the CJ extended this principle to exclusivity rebates cases. In explicitly relying on both cases in its judgment, the CJ in *MEO* may be signalling that the effects-based approach applies to all cases of pricing abuses.

In conclusion, *MEO* clarifies that the concept of "*competitive disadvantage*" for the purposes of Article 102(c) requires differential pricing that is capable of distorting competition between customers, although actual or quantifiable proof of such distortion is not necessary. Whether it is capable requires an assessment in light of all the circumstances, meaning not all discriminatory pricing imposed by dominant undertakings, or received by customers, will be *per se* anti-competitive.

Other developments

Merger control

European Commission hits Altice with gun-jumping fine

On 24 April 2018 the European Commission **announced** that it had imposed a €124.5 million fine on Altice NV, a multinational cable and telecommunications company based in the Netherlands, for implementing

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its acquisition of PT Portugal, a Portuguese telecommunications operator, before notification or approval by the Commission.

In December 2014 Altice agreed to acquire sole control of PT Portugal from Oi, a Brazilian telecommunications operator. Altice notified the Commission of its plans to acquire PT Portugal in February 2015 and received conditional clearance from the Commission on 20 April 2015. Clearance was subject to the divestment by Altice of its Portuguese subsidiaries, ONI and Cabovisão (competitors of PT Portugal in the Portuguese telecommunications services market).

In May 2017 the Commission issued a Statement of Objections to Altice, alleging it had implemented its acquisition of PT Portugal before the Commission's approval, and in some instances, even before notification. In its infringement decision the Commission confirmed its preliminary view and found that:

- certain provisions of the purchase agreement between Altice and Oi resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example by granting Altice veto rights over decisions concerning PT Portugal's ordinary business;
- on certain matters Altice actually exercised decisive influence over aspects of PT Portugal's business, for example by giving PT Portugal instructions concerning a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.

In setting the level of the fine, the Commission considered two aggravating circumstances: (i) that Altice breached both the notification and the standstill obligations – breaches the Commission considers serious; and (ii) that Altice was aware of its obligations under the EU Merger Regulation, which made the breach "*at least, negligent*". Based on these factors, the Commission concluded that a fine of €124.5 million was proportionate and would have a deterrent effect.

In the announcement, Competition Commissioner Vestager is quoted as saying: "*Companies that jump the gun and implement mergers before notification or clearance undermine the effectiveness of our merger control system*". She went on to say that the fine "*reflects the seriousness of infringements and should deter other firms*".

In a **statement** released on 24 April 2018 Altice announced that it "*fully disagrees with the Commission's decision*" and that it would appeal the decision to the General Court.

Antitrust

German metal packaging probe referred to the European Commission

On 27 April 2018 Germany's national competition authority, the Bundeskartellamt, **announced** that it had referred its ongoing cartel proceedings against metal packaging manufacturers to the European Commission. On 3 May 2018 the Commission **announced** that it had "*carried out unannounced inspections in several Member States at the premises of companies active in the metal packaging sector*". Crown Holdings, a maker of metal packaging, confirmed in an investor filing that: "*In April 2018, Commission* *officials conducted unannounced inspections of premises of several metal packaging manufacturers, including Company subsidiaries in Germany, France and the UK*".

The Bundeskartellamt initiated its investigation into metal packaging manufacturers in March 2015 after receiving an anonymous tip-off which raised suspicions that competition laws had been violated over a number of years. The Bundeskartellamt carried out dawn raids in 2015 on certain production sites of manufacturers of steel and aluminium cans for food or chemicals, and vacuum seals for jars. The Bundeskartellamt stated that, as investigations continued, "*there was increasing evidence that the alleged offences were not limited to German markets but also affected a number of other EU Member States.*"

A further reason for the referral to the Commission is that the Bundeskartellamt was concerned that some of the companies concerned had carried out restructuring measures to take advantage of a now closed loophole in German law which still applies to cases opened before mid-2017. If these restructurings removed the corporate entity that the Bundeskartellamt considered to be liable for the infringement, it would be difficult or impossible for the Bundeskartellamt to levy any fines. The Commission, by contrast, can find the entire corporate group to be liable.

As a result of the referral is it likely that fines imposed by the Commission will exceed any fines that may have been imposed by the Bundeskartellamt. This is because, due to the broader scope of the investigation, the Commission is likely to take into account sales in more territories.

Regulatory

CMA publishes annual concurrency report

On 30 April 2018 the UK Competition and Markets Authority (CMA) published its **annual concurrency report** (the Report). This is the fourth report of its kind (the first being published in April 2014). The CMA is required to report annually on the operation of the concurrency arrangements and the use of concurrent competition powers of certain sectoral regulators (for example, in airport operation and air traffic services, communications, electricity and gas). The Report reviews how the concurrency arrangements between the CMA and sectoral regulators have worked over the past financial year (to 31 March 2018) and assesses progress since the last report.

The Report notes that sectoral regulators launched more competition cases in the 2017/18 financial year than in either of the two preceding years. Namely, four new cases were launched during the period:

- The CMA launched an investigation into suspected breaches of competition law in relation to facilities at airports under Chapter I of the Competition Act 1998 (the Act). The Civil Aviation Authority (CAA) assisted the CMA's assessment which led to the investigation and agreed that it was appropriate for the CMA to be the investigating authority with support from the CAA.
- Ofgem opened an investigation into a potential infringement of Chapter II of the Act and Article 102 TFEU relating to a possible abuse of dominance by an undertaking providing services to the energy industry. Ofgem is being supported by the CMA.

- The Payment Systems Regulator (PSR), closely supported by the CMA, has carried out investigations under warrant at several business premises throughout the UK.
- The CMA opened an investigation into suspected breaches of Chapter I of the Act and Article 101 TFEU through the use of certain retail MFN (most favoured nation) clauses by a price comparison website in relation to home insurance products. The CMA is working closely with, and receiving support from, the Financial Conduct Authority (FCA).

The Report also noted that, as a result of its investigation into anti-competitive agreements and concerted practices concerning the sharing of information in the asset management sector, the FCA issued a statement of objections to four firms.

According to the Report, save for two regulators (the Northern Ireland Authority for Utility Regulation and NHS Improvement), all of the sector regulators have opened a competition case since obtaining their concurrent competition powers. At the time the Report was published, there were seven ongoing cases being carried out by sectoral regulators, namely:

- the four cases opened during the last financial year (see above);
- the investigation by the FCA into the asset management sector (see above);
- Ofcom's investigation into prices, terms and conditions offered by Royal Mail for access to certain letter delivery services; and
- Ofgem's investigation into a potential infringement of Chapter I of the Act concerning anti-competitive agreements and concerted practices affecting the energy sector.

The CMA considers that there has been continued progress in the effectiveness of the operation of the concurrency regime, both in terms of an increase in cases being opened and ongoing cooperation between the CMA and sectoral regulators (and between the sectoral regulators themselves). This increase in cooperation is evidenced by: greater levels of engagement between regulators; the sharing of know-how, innovation and expertise; and the provision of support by the CMA to sectoral regulators on procedural and substantive issues.

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