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The MEO ruling: applying Intel to discriminatory pricing

Jakob Dewispelaere (Sidley Austin LLP) · Wednesday, April 25th, 2018

On 19 April 2018, the Court of Justice (CJEU) issued an important ruling in the *MEO* case on the interpretation of Article 102(c) TFEU.[1] Article 102 prohibits, as incompatible with the EU's internal market, any abuse by one or more undertakings of a dominant position in so far as it may affect trade between Member States. Under Article 102(c), one type of dominant firm conduct that may constitute such an abuse is applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

The *MEO* ruling is important because it sheds light on the notion of "competitive disadvantage" under Article 102(c). It is also interesting because the CJEU applied *Intel*[2] as a judgment of general principle. The CJEU's ruling conveys the message that *Intel*'s effects-based principles are clearly not limited to rebate cases, but are applicable by analogy in all cases involving alleged pricing abuses.

The background of the case is as follows. In 2014, Serviços de Comunicações e Multimédia (MEO), a provider of television services in Portugal, lodged a complaint with the Portuguese Competition Authority (the Authority), alleging that Cooperativa Gestão dos Direitos dos Artistas Intérpretes Ou Executantes (GDA), a copyright collecting society, had abused its dominant position in the market for the collection of copyright royalties by discriminating against users of the copyrighted material. MEO argued that GDA had applied differentiated tariffs for the grant of licenses between 2010 and 2013. MEO claimed that, as a consequence, its direct competitor NOS Comunicações (NOS) benefited from more favourable tariffs than MEO during that period and that GDA's differentiated treatment put MEO at a competitive disadvantage in relation to NOS.

The Authority opened an investigation in March 2015 but then closed it without action a year later, stating that it had not found grounds for concluding that the differentiation in the tariffs applied to the providers of television services restricted competition.

MEO appealed the Authority's decision to the Portuguese Competition, Regulation and Supervision Court (the referring court), arguing that the Authority misinterpreted Article 102(c) in deciding to reject MEO's complaint. The Authority had examined whether there had in fact been any significant and quantifiable distortion of competition, but had not found any such actual distortion. MEO argued that the Authority should have also examined whether the conduct at issue was capable of distorting competition even if it had not done so in fact.

The referring court applied to the CJEU seeking interpretative guidance on Article 102(c). The referring court noted that the Authority's decision to take no further action was based, *inter alia*, on

the facts that (i) the difference between the tariffs GDA charged to MEO and NOS was low and (ii) MEO was in a position to absorb the difference. Moreover, MEO's market share in the relevant market for paid television signal transmission service and television content increased during the period when GDA applied the differentiated tariffs. The referring court considered that it was nevertheless conceivable that the tariff differentiation had affected MEO's competitiveness. In that context, the referring court asked the CJEU whether the concept of "competitive disadvantage" in Article 102(c) requires an analysis of the specific effects of the differentiated prices on the competitive situation of the affected undertaking.

In its ruling responding to the referring court, the CJEU recalled that, for Article 102(c) to apply, there must be discriminatory behaviour on the part of the dominant undertaking and this behaviour must hinder the competitive position of some of the customers of the dominant undertaking in relation to others (§25). However, the mere presence of an immediate disadvantage affecting customers who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not mean that competition is distorted or capable of being distorted (§26).

The CJEU observed that a dominant supplier's discrimination between customers who compete with each other in a downstream market may be regarded as abusive only if the discrimination tends to lead to a distortion of competition between those customers (§27). According to the CJEU, it is necessary to examine all the relevant circumstances to determine whether price discrimination either produces or is capable of producing a competitive disadvantage in the sense of Article 102(c) (§28).

The CJEU expressly drew an analogy in this regard with the *Intel* judgment: it ruled that a competition authority or a national court carrying out such an examination is required to take into account all the circumstances of the case submitted to it by the companies concerned, and, in that context, it is open to such an authority or court to assess various factors, including the negotiating powers as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and amount and the possible existence of an exclusionary strategy on the part of the dominant undertaking to exclude a customer which is at least as efficient as the customer's competitors (§31). The CJEU pointed out the rather obvious fact that where the application of differentiated tariffs concerns only the downstream market, the dominant undertaking has, in principle, no interest in excluding one of its customers from the downstream market. The CJEU considered that there was no indication that GDA pursued such an objective (§35).

The referring court had also asked the CJEU a further question assuming there is proof of discriminatory pricing putting MEO at a disadvantage in relation to its competitors. The referring court asked whether, in these circumstances, it should also consider the seriousness of the impact of the disadvantage on MEO's competitive position in deciding whether the discrimination constituted an abuse violating Article 102. In its response, the CJEU referred to existing case law establishing that there is no appreciability (*de minimis*) threshold for determining whether particular conduct constitutes an illegal abuse (§29). For the price discrimination to be capable of creating a competitive disadvantage, however, the CJEU said the discrimination must affect the interests of the operator which was charged higher tariffs compared with its competitors (§30).

The further reasoning of the CJEU suggests that by "*interests of the operator*", it means the customer's competitive position. Indeed, the CJEU explained that where the effect of a tariff differentiation on the costs borne by the customer or on the customer's profitability and profits is not significant, it may "*in some circumstances*" be "*deduced*" that the tariff differentiation is not

capable of having any effect on the customer's competitive position (§34). Unfortunately, it remains unclear what the CJEU meant with "*in some circumstances*".

In conclusion, the *MEO* ruling contributes greatly to the overall coherence of the Article 102 case law by further endorsing an effects-based assessment à la *Intel*. However, it still leaves some questions unanswered.

[1] Judgment of 19 April 2018, *MEO* v *Autoridade da Concorrência*, C-525/16, EU:C:2018:270.

[2] Judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632. For more information on the Intel judgment, see a previous post here.

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