COMMENTARY

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IN SHORT

The Situation: The Court of Justice of the European Union ("CJEU") has provided guidance in assessing the validity of discriminatory pricing practices under EU competition law.

The Result: The CJEU followed its recent effect-based case law on abuse of dominance and ruled that an analysis of the competitive effects of an alleged abusive discriminatory pricing practice is a prerequisite to the finding of an abuse of dominance.

Looking Ahead: The ruling constitutes another step toward recognizing an effect-based approach in applying Article 102 TFEU (abuse of dominance) and lays the groundwork for future investigations regarding alleged discriminatory pricing abuses.

In April 2018, the CJEU provided guidance in assessing the validity of discriminatory pricing practices under EU rules governing dominant market players, in a preliminary ruling in case C-525/16 *MEO v. Autoridade da Concorrencia*. The central issue—price discrimination—is notoriously contentious in view of scarce case law and strong (opposing) views among scholars and economists.

Undertakings with a dominant position are prohibited under EU competition law (in the Treaty on the Functioning of the European Union or "TFEU") from applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." (Article 102 TFEU).

The CJEU was called upon to interpret the scope of this prohibition following the challenge by pay-television platform MEO to the Portuguese competition authority's decision concerning Portugal's copyright collecting society, the Cooperative for the Management of the Rights of Performing Artists ("GDA"). MEO had contested GDA's rate card, which consisted of three different tariffs. The complaint was rejected by the Portuguese competition authority on the ground that GDA's tariff differentiation had no restrictive effect on MEO's competitive position.

Following the rejection of its complaint, MEO brought a legal challenge in Portugal's Competition, Regulation and Supervision Court, which referred the matter to the CJEU. The referring court sought guidance on whether the concept of "competitive disadvantage," for the purposes of Article 102 TFEU, requires an analysis of the specific effects of differentiated prices and whether the seriousness of those effects must be taken into account.

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Court Ruling

The CJEU's ruling emphasizes that discriminatory pricing is abusive only where the price discrimination "tends to distort competition." A mere disadvantage does not mean that competition is distorted or is capable of being distorted. In this respect, an analysis of the effects of the differentiated pricing is required to find an abusive practice.

Such analysis must take account of "the whole of the circumstances of the case." This includes, for example, the undertaking's dominant position, the parties' negotiating power, the conditions and arrangements for charging tariffs, their duration, and the possible existence of a strategy aiming at excluding trading partners.

Discriminatory pricing can constitute an abuse only where the behavior at stake "has an effect on the costs, profits and any other relevant interest" of one or more of the companies involved. Finding such an abuse, however, does not require proof of "actual, quantifiable deterioration in the competitive situation" of the customer. There is no *de minimis* threshold.

The CJEU's ruling constitutes another step toward recognizing an effect-based approach in applying competition law. It follows an earlier ruling of the Court (*Post Danmark I*), which stated that discriminatory pricing does not alone suggest that an exclusionary abuse exists. In the present judgment, the court goes a step further, indicating that an analysis of competitive effects is a prerequisite for a finding of an abuse of dominance. The ruling is in line with a recent ruling on rebates,

Post Danmark II, where the court ruled that the likelihood of an anticompetitive effect must be shown in order to establish a finding of an abuse of dominance. In further endorsing an effects-based assessment, the ruling is a welcome contribution to the overall coherence of Article 102 TFEU case law (abuse of dominance).

Importantly, the CJEU states that the abusive conduct need not affect the competitive position of the dominant undertaking itself on the same market in which it operates, compared with its own potential competitors. This means that the court does not see vertical integration as a prerequisite for a finding of abusive price discrimination. In this regard, assessing whether the dominant undertaking has an incentive to discriminate still does not appear to be a necessary condition for a finding of abuse. The court nevertheless noted that GDA had no interest in excluding one of its trading partners from the downstream market.

THREE KEY TAKEAWAYS

1. Differentiated pricing is not abusive *per se* and can constitute an abuse of dominant position only where the conduct at stake is "actually capable of distorting competition."
2. The above conclusion does not require proof of "actual, quantifiable deterioration in the competitive situation."
3. The discriminatory pricing practice need not affect the competitive position of the dominant undertaking itself, as vertical integration does not constitute a necessary condition for the finding of abusive price discrimination.

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