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EU COURT OF JUSTICE CLARIFIES ANTITRUST PROHIBITION ON PRICE DISCRIMINATION BY DOMINANT BUSINESSES

The EU Court of Justice (CJEU) has ruled that where dominant businesses supply to customers with which they do not compete and charge higher prices to certain customers, they will only be committing a breach of EU antitrust laws if it can be shown that such discrimination causes actual or potential anticompetitive effects, by distorting competition between customers. A mere disadvantage experienced or suffered by some customers is not enough. This clarification will afford dominant businesses considerably greater flexibility to adapt their pricing policies to commercial realities.

Key issues

- When a dominant company supplies to customers with which it does not compete, is it required to apply uniform prices to all comparable customers?
- When is differential treatment allowed, and what factors should be taken into account?
- What are the implications of the CJEU's judgment for dominant companies' pricing policies?

BACKGROUND

Among the various types of "abusive" conduct of dominant businesses that are expressly prohibited by Article 102 of the Treaty on the Functioning of the EU is "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." There is a well-developed set of case law that deals with discrimination by a dominant company in favour of its own downstream division that competes with its other customers. However, where a dominant company does not compete with its customers, there has been very little judicial guidance on the circumstances in which differential treatment of customers - so called "second line" price discrimination - will infringe competition law. In particular, it has been unclear whether any significant difference in the treatment of similar transactions would be deemed to result in a competitive disadvantage for customers subject to higher prices, or whether actual or likely anticompetitive effects must be demonstrated on the basis of an assessment of all the circumstances.

The CJEU's judgment of 19 April 2018 in *Serviços de Comunicações e Multimédia* (MEO) goes a long way to addressing that uncertainty. It arose out of a dispute between GDA, which is the sole collecting society that manages the rights of artists and performers active in Portugal, and MEO, which is a customer of GDA that provides telecoms, internet and television services to consumers. MEO complained to the Portuguese competition authority that GDA has abused its dominant position by applying more favourable pricing tariffs for the grant of licences to its direct competitor NOS between 2010 and 2013. The authority decided not to take action on MEO's complaint, on the basis that the difference in the tariffs was modest in comparison with the average cost, that the tariffs were not therefore such as to undermine MEO's competitive position (its market share having grown significantly during the relevant period) and that MEO was capable of absorbing the difference. MEO appealed that decision to the Competition, Regulation and Supervision Court of Portugal which referred a number of questions to the CJEU.

THE CJEU'S RULING

The CJEU ruled as follows:

- Second line price discrimination by a dominant company is abusive only if it tends to distort competition between the dominant company's customers or suppliers, by hindering their competitive position in relation to the others. A mere disadvantage suffered by some trading partners is not enough.
- The presence of such a distortion must be assessed "having regard to the whole of the circumstances of the case", such as the extent of the company's dominant position, the negotiating power of relevant customers or suppliers, the conditions and arrangements for imposing the prices, their duration and amount, as well as the existence of any strategy to exclude from the market a trading partner that is at least as efficient as its competitors.
- However, it is not necessary to prove an actual quantifiable deterioration in the competitive position of one or more trading partners. It suffices to show that the differential treatment had an influence on the costs, profits or other relevant interest of some customers or suppliers in a way that affects their competitive position. Where the impact on a trading partner's costs, profits or profitability is not significant it can be concluded that there is no such effect.
- In cases of pure second line price discrimination – where the dominant company is not present on the downstream market on which its customers are active – the dominant supplier does not, in principle, have any interest in excluding one of its customers from the market.

In the case before the court, the evidence indicated that the licensing fees paid by MEO amounted to a relatively minor proportion of its overall costs of providing retail television services and accordingly had a limited impact on its profits. In addition, there was no evidence that GDA had pursued an objective of excluding MEO from the market. Accordingly, while it is for the referring Portuguese court to verify those facts and rule on the case, the clear implication of the CJEU's ruling is that GDA's pricing policy did not infringe EU competition law.

IMPLICATIONS

The judgment marks another step in the move towards assessing the conduct of dominant companies by reference to its actual or likely effects, and away from condemning conduct based on its form, following the CJEU's landmark judgment in *Intel* last year. It confirms that dominant companies are not required to apply, in all circumstances and independently of any analysis of the effects on competition of the conduct complained of, uniform prices to all comparable customers. This clarification should afford dominant businesses more flexibility to adapt their pricing policies to commercial realities and, in particular, to implement more effective and efficient pricing policies for large customers for which the supplied product or service accounts for a minor proportion of their overall costs and profits.

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