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The Principles of Article 102(c) TFEU in Cases of Non-exclusionary Secondary Line Discrimination on Grounds Other than Nationality

Case Comment to the Judgment of EU Court of Justice of 19 April 2018 *Meo-Serviços de Comunicações e Multimédia* (C-525/16)

by

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CONTENTS

Abstract

Although the instances of application of Article 102(c) TFEU can hardly be described as rare, to date it has been applied to essentially two sets of diverging situations, namely to discrimination on grounds of nationality on the one hand, and other forms of discrimination on the other. While there is a relatively high number of instances of the former category of applications, and the criteria of the application of Article 102(c) TFEU to such situations seem straightforward, fewer cases exist in which Article 102(c) TFEU was applied to non-exclusionary secondary line discrimination on grounds other than nationality, and the criteria of application are arguably less clear. The judgment in case C-525/16 *MEO* represents a significant, yet not a revolutionary step in its interpretation. While in some respects, it may be seen as bringing some novelty (for example, the delineation of

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the respective scopes of application of Article 102(b) and Article 102(c) TFEU), in others (that is, the notion of competitive disadvantage), it rather confirms the principles which have been previously established. Arguably, the Court's teaching on the elements which the competition authorities and courts across the EU may have at their disposal to establish the existence of *competitive disadvantage*, within the meaning of Article 102(c) TFEU, is open to various interpretations. Yet it does to a certain extent shape the toolkit that these authorities and courts may have at their disposal and leaves some room for reasonable welfare related arguments.

Résumé

Bien que les cas d'application de l'article 102, point c), du TFUE puissent difficilement être considérés comme rares, ils ont été appliqués jusqu'à présent à deux ensembles de situations essentiellement différentes: la discrimination fondée sur la nationalité, d'une part, et les autres formes de discrimination, d'autre part. Si le nombre de cas de la première catégorie de demandes est relativement élevé et si les critères d'application de l'article 102, point c), du TFUE à de telles situations semblent simples, il existe moins de cas où l'article 102, point c), du TFUE a été appliqué à une discrimination secondaire non exclusive fondée sur des motifs autres que la nationalité, et les critères d'application sont sans doute moins clairs. La décision rendue dans l'affaire C-525/16 MEO représente une étape importante, mais non révolutionnaire. Elle peut être considérée, à certains égards, comme apportant une certaine nouveauté (par exemple, la délimitation des champs d'application respectifs de l'article 102, point b), et de l'article 102, point c), du TFUE), mais elle confirme plutôt les principes qui ont été établis antérieurement (i.e., la notion de désavantage concurrentiel). L'enseignement de la Cour sur les éléments dont les autorités de concurrence et les juridictions de l'UE peuvent disposer pour établir l'existence d'un désavantage concurrentiel, au sens de l'article 102, point c), du TFUE, peut sans doute être interprété de diverses manières. Pourtant, elle détermine dans une certaine mesure les instruments dont les autorités et les tribunaux peuvent disposer et laisse une certaine place à des arguments raisonnables liés au bien-être.

Key words: competition law; antitrust; discrimination; competitive disadvantage; discrimination on the grounds of nationality.

JEL: K21; K42

I. Facts of the case

The case at hand was brought by MEO, a Portuguese provider of telecommunication and TV-related services against the decision of the national competition authority (hereinafter: NCA) to reject its complaint against GDA, a collecting society in charge of managing the rights of artist and performers in Portugal. In 2014, MEO lodged a complaint with the Portuguese NCA in which it claimed that GDA infringed the provision of national law, the wording of which is identical to Article 102(c) TFEU. According to MEO, GDA (which is the sole body responsible for the collective management of the aforementioned category of rights in Portugal), applied three different tariffs simultaneously to its customers (that is, providers of pay TV services such as MEO). In particular, according to MEO, GDA charged a different (higher) tariff than the one it applied vis-à-vis MEO's direct competitor, NOS. In 2016, the Portuguese NCA rejected MEO's complaint on the ground that any potential difference in prices applied to MEO and its competitors (such as NOS) were not such as to put MEO at a competitive disadvantage in light of the small proportion of MEO's costs that the fees paid to GDA amounted to. According to the NCA, this fact was confirmed by the growth of MEO's market shares (on the market for pay TV services) in the relevant period in which GDA differentiated between the higher tariffs applied to MEO and lower tariffs applied to its competitors. The decision of the Portuguese NCA was then challenged before the Portuguese competition law tribunal, which referred to the CJEU a series of questions concerning the interpretation of Article 102(c) TFEU.

II. Legal context

Already before *MEO*, it was settled-case law that for Article 102(c) TFEU to apply, apart from the need to establish dominance, it was necessary that: (i) there was discrimination (that is the dominant undertaking applied dissimilar conditions to equivalent transactions) and, (ii) such discrimination tended to distort that competitive relationship, that is, it hindered the competitive position of some of the business partners of the dominant undertaking in relation to the others.[1] The Court of Justice also ruled that for a finding of an abuse it is sufficient that, having regard to the whole of the circumstances

[1] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, EU:C:2007:166, para. 144.

of the case, the dominant undertaking's behavior '*tends to a distortion of competition between those business partners'* and it made clear that there is no requirement of proof of an '*actual, quantifiable deterioration in the competitive position of the business partners taken individually*.'[2]

Depending on the circumstances of the case, the Court has been willing to accept a variety of factors relevant for the assessment of the conduct's ability to distort competition in breach of Article 102(c) TFEU. For instance, in *Hoffmann-La Roche*[3], the Court considered that fidelity rebates granted to some customers put other customers in a disadvantaged position. The Court of Justice rejected the argument according to which the rebates at hand were not of such kind as to place those customers who did not receive them at a competitive disadvantage since the ensuing differences in prices could not have an *appreciable effect* on competition. The Court considered that, in light of the importance attached by the dominant undertaking to the rebates in question, it could not be accepted that they were without importance to the dominant undertaking's customers. In *British Airways*[4], it was the fact that:

(i) the dominant undertaking's trading partners competed intensely with each other;
(ii) their ability to compete depended on their ability to offer products suited to their customers' wishes at a reasonable cost (which depended on the conditions under which they obtained inputs from the dominant undertaking) as well as their individual financial resources; and
(iii) the fidelity rebates granted by the dominant undertaking could lead to exponential changes in the revenue of these dominant undertaking's trading partners.

In *Kanal 5*[5], the Court considered that, in order to verify whether the price discrimination at hand would put one category of the dominant undertaking's trading partners in a disadvantaged position compared to the other category, it was necessary to verify whether they were each other's

[2] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, para. 145; judgment of the Court of First Instance of 17.12.2003, Case T-219/99 *British Airways v Commission*, EU:T:2003:343, para. 238.

[3] Judgment of the Court of 13.02.1979, Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para. 122–123.

[4] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, para. 146–147; judgment of the Court of First Instance of 17.12.2003, Case T-219/99 *British Airways v Commission*, paras. 237-238 and 266.

[5] Judgment of the Court of 11.12.2008, Case C-52/07 *Kanal 5 and TV 4*, EU:C:2008:703, para. 46.

competitors on the same market. Finally, in *Clearstream*[6] the General Court found that

> '*the application to a trading partner of different prices for equivalent services continuously over a period of five years and by an undertaking having a de facto monopoly on the upstream market could not fail to cause that partner a competitive disadvantage*.'

In parallel, however, the Court developed another line of case-law in which it did not seem to be too concerned with the existence of a competitive disadvantage. Instead, as soon as discrimination was identified, the existence of a disadvantage (and the ensuing distortion of competition) could also be implicitly assumed to exist[7] or, even, it was not mentioned at all among the conditions for Article 102(c) TFEU to apply.[8] This approach was subsequently adopted by the Commission in a number of specific cases that were mostly concerned with some form of discrimination based on nationality[9], and most of which were addressed to Member States on the basis of Article 106(3) TFEU.[10]

III. The *Meo* judgment

Although the thrust of the case is on the notion of '*competitive disadvantage*', the Court of Justice did not hesitate to start its analysis by developing further the previous case-law on Article 102(c) TFEU concerning the notion of '*other trading partners*' and the relationship between the level of trade at which the dominant undertaking is present and the market on which the abuse takes

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[6] Judgment of the Court of First Instance of 9.09.2009, Case T-301/04 *Clearstream v Commission*, EU:T:2009:317, para. 194.

[7] See Opinion of AG van Gerven in Case C-18/93 *Corsica Ferries*, EU:C:1994:195, p. 1809 referring to Case 27/76 *United Brands v Commission*, EU:C:1978:22, para. 233 and Case C-179/90 *Merci Convenzionali Porto di Genova*, EU:C:1991:464, para. 18–19.

[8] Judgment of the Court of 17.05.1994, Case C-18/93 *Corsica Ferries*, EU:C:1994:195, para. 43.

[9] Case 95/364/EC *Brussels National Airport*, Commission Decision of 28.06.1995, OJ L 216, 12/09/1995 p. 8, rec. 13; Case IV.35.703 *Portuguese Airports*, Commission Decision of 10.02.1999, OJ L 69/31 (upheld in the judgment of the Court of 29.03.2001, Case C-163/99 *Portuguese Republic v Commission*, EU:C:2001:189, para. 52), Case 2000/521/EC *Spanish Airports*, Commission Decision of 26.07.2000, OJ L 208/36; Case IV.35.767 *Finnish Airports*, Decision of 10.02.1999, OJ L 104/34, p. 24.

[10] The Commission Decision in Case IV.35.767 *Finnish Airports.* Although it was adopted on the same date as IV.35.703 *Portuguese Airports* and it contained almost the same interpretation of Article 102(c) TFEU as the latter, it was contrary to the latter based exclusively on Article 102 TFEU as a whole and addressed to an undertaking, and not a Member State.

place. In *British Airways*[11], the Court stated that dominant undertaking's behavior should not distort competition on the market downstream or upstream (from the market on which the dominant undertaking is present), that is the market on which the suppliers or customers of the dominant undertaking are present. In *MEO*, the Court further clarified[12] that it is not necessary for Article 102(c) TFEU to apply that

> '*the abusive conduct affects the competitive position of the dominant undertaking itself on the same market in which it operates*'.

As far as the notion of '*competitive disadvantage*' is concerned, the Court of Justice started its interpretation by recalling, by reference to *British Airways*[13], the basic two conditions of (i) the existence of discrimination and (ii) its ability to distort competition by hindering the competitive position of some of the business partners of the dominant undertaking in relation to the others (see above).[14] The Court then clarified that the mere existence of such immediate disadvantage does not mean that competition is distorted or capable of being distorted.[15] The Court then once again relied on *British Airways*[16] by recalling that the relevant legal test for the finding of competitive disadvantage remains whether the conduct tends, in light of all the circumstances of the case, to lead to a distortion of competition and that no additional proof of an actual, quantifiable deterioration in the position of the dominant undertaking's trading partners can be required.[17] In particular, the Court clearly rejected any *de minimis* rule in the assessment of the seriousness of the competitive disadvantage.[18]

In relation to the assessment of the conduct's capability of producing a competitive disadvantage, the Court, referring to the judgment in *Intel*,[19] pointed to the faculty (indicating that *it is open for the competition authorities or courts)* of taking into account various elements such as

> '*the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their*

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[11] Judgment of the Court, Case C-95/04 P *British Airways v Commission*, para. 143.

[12] Judgment of the Court of 19.04.2018, Case C-525/16 *Meo – Serviços de Comunicações e Multimédia*, EU:C:2018:270, para. 24.

[13] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, para. 144.

[14] Judgment of the Court, Case C-525/16 *Meo*, para. 25.

[15] Judgment of the Court, Case C-525/16 *Meo*, para. 26.

[16] Judgment of the Court, Case C-95/04 P *British Airways v Commission*, para. 145.

[17] Judgment of the Court, Case C-525/16 *Meo*, para. 26.

[18] Judgment of the Court, Case C-525/16 *Meo*, para. 29.

[19] Judgment of the Court of 6.09.2017, Case C-413/14 P *Intel v Commission*, EU:C:2017:632, para. 139.

amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors.'[20]

In the circumstances of the case, the Court pointed in particular to:

(i) the existence of a certain negotiating power of MEO (and NOS) vis-à-vis GDA (as a factor relevant in the assessment of abuse and the negotiating power);[21]
(ii) the fact that parties may have had recourse to arbitration in setting the tariffs (and that *in casu* GDA may have simply applied tariffs set by the arbitrators);[22]
(iii) the price differences represented *a relatively low percentage* of MEO's total costs, so that this difference seemed to have had an only limited effect on its profits; and
(iv) the fact that GDA had no interest in excluding one of its trading partners from the downstream market.[23]

IV. Comment

First, in relation to the clarification concerning the notion of '*other trading partners'*, while the case-law to date appeared relatively clear, it left the possibility open for some to argue that the discrimination under Article 102(c) TFEU (albeit happening at different levels of trade, that is, upstream or downstream) would only be abusive if the dominant undertaking itself was a vertically integrated entity also active on the upstream or downstream markets in question. Such approach would obfuscate the delineation between non-exclusionary secondary-line discrimination abuses under Article 102(c) TFEU and exclusionary abuses dealt with under Article 102(b) TFEU (Gonzalez Diaz, Snelders, 2013, p. 581). Against this background, the fact that the Court ruled in *MEO* that the abuse does not need to affect the competitive position of the dominant undertaking on the market in which it operates, could be interpreted as delineating the respective scope of the application of Article 102(b) and Article 102(c) TFEU.

Second, as far as the interpretation of the notion of '*competitive disadvantage*' is concerned, the judgment in *MEO* should be seen as a confirmation of earlier case-law (and the judgment of the Court of Justice in *British Airways* in particular) rather than as a revolutionary step. Indeed, the Court not only

[20] Judgment of the Court, Case C-525/16 *Meo*, para. 31.
[21] *Ibidem*, para. 32.
[22] *Ibidem*, para. 33.
[23] *Ibidem*, para. 35.

anchored its reasoning predominantly in *British Airways*, but also clarified the key concepts that the latter judgment contained. In particular, while reaffirming that the discrimination should only tend to distort the competitive relationship between the dominant undertaking's trading partners[24], and that there is no need for an actual, quantifiable deterioration in their competitive position, the Court specifically added that there is no *minimum threshold (de minimis)* below which such deterioration (that is the disadvantage) could be considered as not abusive.[25] The latter point appears to be a logical consequence of the former, that is if there is no need to measure the actual, quantifiable disadvantage, there is no need either (and in most cases, no possibility) of verifying whether such disadvantage falls short of or goes beyond certain threshold.[26] Moreover, the significance of the fact that, in *MEO*,[27] the Court referred to a number of facultative factors – which largely correspond to those enumerated in the *Intel* judgment[28] in relation to the conduct's capability of producing the alleged foreclosure effects – is to be verified in practice. The Court's own approach in the present case, and the fact that it relied only on some selected, *case specific* factors[29], suggests that the list is to be seen as an open-ended one, and that the relative importance of particular factors invoked by the Court should not be exaggerated (see for instance Ritter, 2013, p. 273, where the author points out that the transplantation of the As-Efficient-Competitor test from Intel in the context of Article 102(c) TFEU is ill-conceived).

The inclusion of a non-exhaustive list of factors, which competition authorities and courts across the EU may use in their assessment of the capability of the dominant undertaking's conduct of putting some of its trading partners at a disadvantage compared with others, also addresses to a certain extent the long-dated criticism according to which the enforcement

[24] Judgment of the Court, Case C-95/04 P *British Airways v Commission*, para. 145; judgment of the Court, Case C-525/16 *Meo*, para. 27.

[25] Judgment of the Court, Case C-525/16 *Meo*, para. 29.

[26] In that context, the fact that when enumerating various factors, which the competition authorities or courts may take into account (Judgment of the Court, Case C-525/16 *Meo*, para. 31), the Court indicated that they can be used in the assessment of whether the price discrimination at hand produces or is capable of producing a competitive disadvantage, does not put into question the starting premise according to which a proof of actual effects is not required. Indeed, it appears that just as with the facultative nature of the factors to which the Court referred (i.e. 'it is open to such an authority or court…'), the Court also considered it to be open to competition authorities and courts to rely on such actual effects (while this is certainly not a formal requirement).

[27] Judgment of the Court, Case C-525/16 *Meo*, para. 31.

[28] Judgment of the Court of 06.09.2017, Case C-413/14 P *Intel v Commission*, EU:C:2017:632, para. 139. For a detailed comparison of the language used by the Court in *MEO* with the approach taken in Intel, see: Ritter, 2019, p. 259–274.

[29] Judgment of the Court, Case C-525/16 *Meo*, para. 32–35.

of Article 102(c) TFEU to date has not taken sufficient account of the welfare effects of price discrimination (Gerard, 2005, p. 7-8). According to those critics, the only type of price discrimination, which the enforcement of Article 102(c) TFEU should aim to target, is the one which causes some disadvantage to the dominant undertaking's customers competing against one another (Gerard, 2005, p. 8), or that its application should be limited only to cases in which consumer harm is demonstrated (Temple Lang, 2008, p. 6). The need to demonstrate the conduct's capability of distorting competition (with the exception of cases concerning pure discrimination based on nationality and/or discrimination aimed at partitioning of the internal market – see below), is generally correct and the Court's judgment in *MEO* does reaffirm the existence of such a need. It is also hard to argue that the judgment at hand and the elements enumerated by the Court, which may be used to establish the existence of competitive disadvantage, totally ignore the aforementioned criticism concerning the Court's earlier agnosticism on the welfare effects of price discrimination.

Finally, some criticism has been expressed in the past towards the policy of applying Article 102(c) TFEU to discrimination based on nationality (Gerard, 2005, p. 26–27). At the same time, some argue that *MEO* would generally raise the enforcement threshold (O'Donoughue, 2018, pp. 443–445). However, it is submitted that *MEO* is unlikely to have an impact on cases based on the discrimination on the grounds of nationality. Indeed, the Court of Justice seems to have previously confirmed that the interpretation of Article 102(c) TFEU, when it comes this type of discrimination, is a realm in which other – market integrationist – values prevail.[30] The continued need for efficient enforcement tools to combat various forms of discrimination on the grounds of nationality, and measures aiming at partitioning the internal market along national borders, are all the more evident in the (renewed) wake of protectionism.[31] Indeed, the original purpose of prohibiting discrimination under Article 102(c) TFEU may well have been the willingness to prevent dominant undertakings[32] from discriminating in favoring companies in their

[30] Judgment of the Court of 29.03.2001, Case C-163/99 *Portuguese Republic v Commission*, para. 52; Judgment of the Court of 17.05.1994, Case C-18/93 *Corsica Ferries*, para. 43.

[31] See for instance: Case AT.40461 DE/DK Interconnector, Commission Decision C(2018) 8132 final of 07.12.2018; Case AT. 39351 Swedish Interconnectors, Commission Decision of 14.04.2010.

[32] This can be easily imagined in particular in relation to state-controlled undertakings or undertakings in which the state holds significant shares. In such cases, Article 102(c) TFEU has often been applied in combination with article 106 TFEU in the context of decisions addressed to Member States (there are however, exceptions to this rule: see Commission Decision in Case IV.35.767 *Finnish Airports* or Commission Decision in Case AT.40461 DE/DK Interconnector).

own Member States (Temple Lang, 2003, p. 250).[33] Paradoxically, case-law such as *MEO* (and the earlier *British Airways* judgment) make it clear that Article 102(c) TFEU may find application also to discrimination on grounds other than nationality. In such cases, however, the additional requirement of 'competitive advantage' could be seen as a logical additional criterion (which otherwise would not need to be fulfilled due to the market integrationist purpose of the Treaty) and *MEO* makes it clear that the application of this criterion in such cases is not a matter of pure formality.

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[33] This is further confirmed by the wording of Article 60 of the Treaty establishing the European Coal and Steel Community which specifically targeted discriminatory practices based 'in particular on the nationality of the buyer'.