Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 20 December 2017 [1]

Case C-525/16

MEO — Serviços de Comunicações e Multimédia SA
v
Autoridade da Concorrência

(Request for a preliminary ruling
from the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal))

(Reference for a preliminary ruling — Dominant position — Competition — Abuse of dominant position — Article 102, second paragraph, point (c), TFEU — Concept of 'competitive disadvantage' — Discriminatory prices on a downstream market — Management of rights related to copyright — Pay-TV)

1. May the competition authorities review by reference to Article 102 TFEU the application by a given entity of differentiated prices and, if so, how must they do so? In such a context, is a finding of an abuse of a dominant position within the meaning of that provision subject to a *de minimis* threshold?

2. Those are, essentially, the questions asked in this request for a preliminary ruling, which, more specifically, concerns the interpretation of point (c) of the second paragraph of Article 102 TFEU, in accordance with which 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage', may constitute an abuse of a dominant position.

3. This request for a preliminary ruling was made in the course of proceedings between MEO — Serviços de Comunicações e Multimédia SA ('MEO') and the Autoridade da Concorrência (Competition Authority, Portugal) ('the Competition Authority') concerning the latter's decision to take no further action on MEO's complaint against GDA — Cooperativa de Gestão dos Direitos dos Artistas Intérpretes Ou Executantes (Cooperative for the Management of the Rights of Performing Artists, Portugal) ('GDA') concerning an alleged abuse of a dominant position in the area of the rights related to copyright of performing artists.

4. To my mind, this case presents the Court with an opportunity to clarify that, independently of the existence of a practice of price differentiation, which, taken in isolation, is not problematic from the viewpoint of competition, it is the fact that such conduct distorts competition or affects the competitive position of trading partners that constitutes an abuse of a dominant position. Accordingly, it cannot be assumed that price differentiation practices create a 'competitive disadvantage' without examining all of the circumstances of the case at hand, especially when what is at issue is so-called 'second degree' discrimination.

1 Original language: French.

Legal context

EU law

5. The last sentence of Article 3(1) of Regulation (EC) No 1/2003 [2] provides that, 'where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU]'.

Portuguese law

6. The content of Article 11(1) and (2)(c) of the Novo Regime Juridíco da Concorrência (new rules on competition) [3] is the same as that of point (c) of the second paragraph of Article 102 TFEU.

The case before the referring court, the questions referred and the procedure before the Court

7. GDA is a non-profit-making collecting society which collectively manages the rights of artists and performers. It manages the rights related to copyright of its members and of the members of similar foreign collecting societies with which it has concluded a representation agreement and/or a reciprocal agreement.

8. In that context, GDA's principal activity is to collect the royalties which arise from the use of the related rights and to pay them over to the rights holders. Although it does not have a legal monopoly, it is now the only body entrusted with the collective management of the related rights of artists active in Portugal.

9. Among the undertakings which make use of the repertoires of GDA's members, and of the members of similar foreign bodies with which GDA has concluded a representation agreement or a reciprocal agreement, are entities which provide television signal transmission service offerings, and television content, to consumers against payment of a given sum.

10. The applicant in the main proceedings, MEO, is one such provider. It is a customer of GDA.

11. Between 2008 and 2014, GDA applied three different tariffs to such providers in the context of its wholesale offering. Between 2010 and 2013, GDA applied those tariffs simultaneously.

12. It is apparent from the documents submitted to the Court that the tariff which was applied to MEO resulted from the decision of 10 April 2012 adopted, in accordance with applicable law, by an arbitration tribunal. [4]

13. On 24 June and 22 October 2014, PT Comunicações SA, the predecessor in law of MEO, lodged a complaint with the Competition Authority alleging that GDA had abused its dominant position. MEO argued that GDA had been charging excessive prices for the use of the related rights of its performing artists and, in addition, had applied to it different terms and conditions from those which it had applied to another of its customers, NOS Comunicações SA ('NOS').

2 Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

3 Approved by Lei No 19/2012 (Law No 19/2012) of 8 May 2012.

4 In accordance with Article 7(3) and (9) of Decreto-Lei No 333/97 (Legislative Decree No 333/97), of 27 November 1997, where the parties are unable to reach a negotiated agreement on rights, they must have recourse to arbitration.

14. On 19 March 2015, the Competition Authority initiated an inquiry. By decision of 3 March 2016, it closed the file in the case on the ground that the facts relevant to the subject matter of the proceedings did not constitute sufficiently probative evidence of an abuse of a dominant position.

15. The Competition Authority indicated in particular that, even if GDA did enjoy a dominant position on the relevant market, and even if the conduct at issue could be regarded as the application of dissimilar treatment to equivalent transactions, the differentiation in the tariffs applied to the various providers of retail television access services and the average costs borne by MEO and NOS in connection with the wholesale offering in question did not provide grounds for concluding that any restriction of competition had arisen, in particular, from the weakening of MEO's competitive position.

16. According to the Competition Authority, it could not be concluded that one provider of retail television access services had been placed at a competitive disadvantage in relation to other providers. To interpret mere discriminatory conduct on the part of an undertaking in a dominant position as entailing, in and of itself, an infringement of point (c) of the second paragraph of Article 102 TFEU would be inconsistent with the case-law of the Court.

17. MEO appealed against the Competition Authority's decision to take no further action, arguing that it had misinterpreted point (c) of the second paragraph of Article 102 TFEU, inasmuch as, rather than assessing whether any competitive disadvantage — as interpreted in the case-law of the Court — had been created, it had examined whether there had been any significant and quantifiable distortion of competition.

18. According to the referring court, the Competition Authority's decision to take no further action on the complaint was based on the fact that the difference in the tariffs was modest in comparison with the average cost, and so the tariffs were not such as to undermine MEO's competitive position, and that MEO was capable of absorbing the difference. Moreover, MEO's market share in relation to retail offerings of subscription television access during the same period had increased. [5]

19. The referring court observes that, in the main proceedings, MEO has provided figures for the costs borne by MEO and NOS respectively. The total costs and the average costs per consumer borne by MEO and NOS respectively are set out in tables, as well as MEO's net income and profitability during the period in question, that is, from 2010 to 2013. [6]

20. According to the referring court, it is not inconceivable that MEO's competitiveness was affected by the differential pricing. It is clear from the case-law of the Court that certain discriminatory conduct toward trading partners may inherently bring about a competitive disadvantage. The referring court nevertheless considers that the Court has not given any firm ruling on the concept of 'competitive disadvantage' for the purposes of the application of point (c) of the second paragraph of Article 102 TFEU.

21. It is in that context that the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) If, in infringement proceedings, there is proof or evidence that an undertaking in a dominant position is applying discriminatory prices to a retail undertaking and that that is putting that undertaking at a disadvantage in relation to its competitors, is it necessary, in order for that

5 According to the Autoridade Nacional de Comunicações (Anacom) (National Communications Authority (Anacom), Portugal), MEO's market share increased over the reference period, from 1 January 2010 to 31 March 2015, from less than 25% to more than 40%, while the NOS group's market share decreased over the same period from more than 60% to less than 45%.

6 The figures are not stated in the order for reference since they are confidential.

conduct to be characterised as *placing the undertaking at a competitive disadvantage*, within the meaning of point (c) of [the second paragraph of] Article 102 TFEU, for the severity, the relevance or the significance of the effect on the undertaking's competitive position and/or competitiveness to be assessed, in particular in so far as concerns its ability to absorb the difference in costs borne in connection with the wholesale offering?

(2) If, in infringement proceedings, there is proof or evidence that the application by an undertaking in a dominant position of discriminatory prices *has very little effect* on the costs, net income and profitability of the retail undertaking concerned, is it appropriate to conclude, in accordance with the proper interpretation of point (c) of [the second paragraph of] Article 102 TFEU and the case-law established in the judgments [of 15 March 2007, *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraphs 146 to 148), and of 9 September 2009, *Clearstream* v *Commission* (T-301/04, EU:T:2009:317)], that there is no evidence of an abuse of a dominant position or of prohibited practices?

(3) Or, on the contrary, is such a circumstance insufficient to preclude the conduct in question from being characterised as an abuse of a dominant position and a prohibited practice, within the meaning of subparagraph (c) of [the second paragraph of] Article 102 TFEU, that circumstance being of relevance only for the purposes of determining the extent of the liability of, or the penalty for the infringing undertaking?

(4) Is the phrase *thereby placing them at a competitive disadvantage* in subparagraph (c) of [the second paragraph of] Article 102 TFEU to be interpreted as conveying a requirement that the advantage arising from the discrimination must equate to a minimum percentage of the affected undertaking's costs structure?

(5) Is the phrase *thereby placing them at a competitive disadvantage* in subparagraph (c) of [the second paragraph of] Article 102 TFEU to be interpreted as conveying a requirement that the advantage arising from the discrimination must equate to a minimum difference between the average costs borne by the competing undertakings in connection with the wholesale offering in question?

(6) May the phrase *thereby placing them at a competitive disadvantage* in subparagraph (c) of [the second paragraph of] Article 102 TFEU be interpreted as conveying a requirement that the advantage arising from the discrimination must, in the context of the market and the service in question, equate to values higher than the differences indicated in … Tables 5, 6 and 7, in order for the conduct to be characterised as a prohibited practice?

(7) If the answer to any of questions 4 to 6 is in the affirmative, how is such a minimum threshold of significance of the disadvantage in relation to the costs structure or the average costs borne by the competing undertakings in the retail market in question to be determined?

(8) If such a minimum threshold has been defined, does the fact that it has not been reached every year rebut the presumption in the judgment, [of 9 September 2009, *Clearstream* v *Commission* (T-301/04, EU:T:2009:317)], according to which it must be held 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*?'

22. MEO, GDA, the Portuguese and Spanish Governments and the European Commission have submitted written observations.

23. A hearing was held on 5 October 2017 in which MEO, GDA, the Kingdom of Spain and the Commission participated.

Summary of the observations submitted to the Court

24. Generally, the interested parties take the view that the questions referred for a preliminary ruling should be taken together. The interested parties focus on the question whether, in order to reach a finding of a 'competitive disadvantage' within the meaning of point (c) of the second paragraph of Article 102 TFEU, it may be assumed that price differentiation is likely to distort competition or whether, on the contrary, the competition authority must demonstrate that the competitiveness of the undertaking placed at a disadvantage has been diminished as a result of the conduct complained of. With reference to that analysis, debate has centred on the facts and matters which must be taken into account and on the possible requirement that the effect (actual or potential, depending on the party's point of view) on competition must be significant.

25. In so far as concerns the concept of 'competitive disadvantage' the interested parties agree that, in accordance with the case-law of the Court, the question whether competition has actually been affected must, generally speaking, be assessed on a case-by-case basis and that there is no threshold or fixed rule for determining whether competition has been affected.

26. However, their viewpoints differ on the question whether, and if so to what extent, an actual anticompetitive effect must be demonstrated or whether it is merely necessary for the existence of a competitive disadvantage to be probable, where an undertaking in a dominant position applies differentiated tariffs to its trading partners in the downstream market.

27. On one hand, *GDA and the Portuguese Government* take the view that it is necessary for account to be taken of the actual effect of the differentiated prices on MEO's competitiveness.

28. The Commission's approach, expressed in several of its reports and communications dating from 2003 onwards, and that taken in the case-law of the Court of Justice and of the General Court of the European Union is that it is necessary for account to be taken of the anticompetitive effects of the alleged abusive conduct on the market. In order for a pricing practice to be characterised as abusive, it is necessary for competition between the providers of the services in question actually to have been distorted and for certain service providers to suffer a competitive disadvantage as a result of that distortion of competition. Accordingly, a 'mere' practice of price discrimination is not sufficient in itself to constitute an abuse within the meaning of point (c) of the second paragraph of Article 102 TFEU.

29. On the other hand, *the Spanish Government*[7] *and MEO* are inclined to interpret point (c) of the second paragraph of Article 102 TFEU as meaning, subject to slight variations, that the fact that a collecting society which has a de facto monopoly, such as GDA, favours one user over its competitors on the same downstream market by offering it more advantageous conditions is likely to create a disadvantage or a distortion of competition.

30. In so far as concerns the facts and matters to be taken into account in determining whether conduct such as that adopted by GDA in the case in the main proceedings is likely to create an anticompetitive effect, MEO points out that GDA enjoys a monopoly position and that providers of television services are obliged to go through GDA in order to obtain the licences which enable protected works to be distributed. As a result, GDA is in a strong negotiating position. According to MEO, an undertaking which enjoys a de facto monopoly has a special responsibility to ensure that equal terms and conditions are applied to its trading partners. That responsibility entails, according to MEO, an obligation upon GDA to justify its conduct, which GDA has not done. Lastly, it is important, according to MEO, for the duration of the discrimination to be taken into consideration.

7 The Spanish Government has indicated that the Comisión Nacional de los Mercados y la Competencia (National Markets and Competition Commission, Spain) systematically regards the application of discriminatory tariffs as an infringement, unless the body managing copyright and related rights is able to justify them.

31. The Spanish Government emphasises in this connection that, in a case such as this, the disadvantage arises in particular from the fact that the licences granted by the collecting societies are an essential element in the provision of the final services by the users in question.

Analysis

32. To my mind, the questions referred for a preliminary ruling, as formulated by the national court, call for an overall answer, since they principally relate to the issue of whether the concept of 'competitive disadvantage', used in point (c) of the second paragraph of Article 102 TFEU, implies an examination of the effects of certain conduct and/or of the impact of a differential application of prices to the competitive position of the undertaking affected.

33. Before addressing this problem, I would like *first* to touch upon certain questions concerning the applicability of the provisions of Article 102 TFEU in the present case, even though they relate to aspects which the referring court has not specifically addressed.

34. *Next*, I shall set out the essential considerations which must, in my opinion, inform any analysis of a practice of price differentiation that is alleged to constitute an abuse of a dominant position. In that context, I shall indicate whether, and if so under what circumstances, a practice of 'second degree' price discrimination may fall foul of point (c) of the second paragraph of Article 102 TFEU. I shall set out the reasons why it may not be assumed that such a practice constitutes, by its very nature, an abuse of position and why, on the contrary, the anticompetitive effects of such conduct must be specifically demonstrated.

35. *Lastly*, I shall consider, in the light of all of those considerations, the question of the extent to which the application, by an undertaking that is alleged to enjoy a dominant position, of dissimilar conditions to equivalent transactions is likely to create a competitive disadvantage.

General observations on the applicability of Article 102 TFEU to the present case

36. It should be emphasised that the present case concerns a particular set of facts. They may be described as follows.

37. MEO, a provider of television services on the Portuguese market, has challenged before the referring court the Competition Authority's decision to take no further action on its complaint. That complaint concerned the allegedly abusive conduct of GDA, a collecting society which manages rights related to copyright, which consisted in the application, between 2010 and 2013, of differentiated tariffs for the grant of licences.

38. MEO believes that its direct competitor NOS benefited from more favourable tariffs during that period. The complaint which MEO lodged with the Competition Authority thus concerned an alleged abuse of a dominant position resulting from the discriminatory tariffs which GDA charged on the downstream market that is dependent on the collective marketing of the rights related to copyright of performing artists.

39. Nevertheless, as the referring court has pointed out, with the help of supporting data, it appears that the disadvantage which MEO allegedly suffered in terms of the sums it paid in order to make use of works protected by copyright and related rights did not result in any decrease in its market share. Quite the contrary. MEO's market share increased between 2010 and 2013 from approximately 25% to more than 40%. As for NOS's market share, during the same period it decreased from more than 60% to less than 45%.

40. It is also important to note that that price fixing was done, in accordance with national applicable law, by an arbitration decision, GDA having been unable to reach an agreement with MEO.

41. In this case, the referring court appears to proceed on the assumption that the only question which arises is whether, in order to conclude that there has been an abuse of a dominant position resulting from the application of different prices for the same services, it is necessary to give a ruling on the effects on competition of the practice at issue, or whether it may be assumed that such a practice is contrary to point (c) of the second paragraph of Article 102 TFEU.

42. Accordingly, the referring court seems to have reached the conclusion that the other conditions for the application of Article 102 TFEU have been met. In particular, it takes it as given, first, that GDA is an undertaking that enjoys a dominant position and, secondly, that it applied dissimilar conditions to its trading partners in respect of 'equivalent transactions'.

43. However, it seems to me, on reading the case file submitted to the Court, that both the matter of GDA's dominant position on the market that is really relevant and the question whether it charged different prices for 'equivalent transactions' must be treated with caution.

44. The doubts which arise in this regard could render the questions referred hypothetical, since they relate solely to the identification of a 'competitive disadvantage' within the meaning of point (c) of the second paragraph of Article 102 TFEU.

45. First of all, I am of the opinion that there is reason to question whether *GDA is actually in a dominant position* on the relevant market for the wholesale offering at issue in the present case.

46. On this point, it must be observed that GDA has specifically disputed the assumption that it holds a dominant position on the relevant market, even though it is, in point of fact, the only company in Portugal that manages the rights related to copyright.

47. GDA has argued in this connection that it is not in a position to exert any commercial pressure on its main trading partners MEO and NOS. First of all, those undertakings form a powerful 'duopoly'. Next, the determination of the tariffs is subject to national law, which obliges the parties to have recourse to arbitration if they cannot reach agreement. Lastly, since it is not vertically integrated, GDA has no interest in the upstream or downstream markets. On the contrary, if MEO were to be foreclosed from the market or if it were rendered less competitive than NOS, that would be to GDA's disadvantage. That being so, there is no dominant position, still less any abuse of a dominant position.

48. I would reiterate that GDA is a non-profit-making entity which manages the collective rights of artists. Its mission is to exercise and manage the rights related to copyright of the persons it represents and of the members of similar foreign entities. Its main customers include providers of retail subscription television access services in Portugal, including MEO and NOS, which, over the course of the relevant period, together formed a duopoly.

49. In that context, it appears that DGA depends to a great extent on the remuneration which it receives for the services it provides to those two undertakings.

50. Moreover, as is apparent from the documents before the Court and as the Competition Authority stated in its decision, there is evidence that providers of subscription television access services have a certain negotiating power that can counterbalance that of GDA. That evidence, which according to my understanding of documents in the file, has not been disputed by MEO,[8] consists in particular in communications between GDA and the providers of retail offerings for subscription television access the aim of which was to determine the tariff that GDA was to apply to them from 1 January 2014 onwards in respect of its wholesale offering.

51. Furthermore, although GDA is currently the only society in Portugal that manages the collective rights of performing artists, that fact does not mean that it is actually in a dominant position, since it does not enjoy such market power as would permit it to act independently of its trading partners.

52. It is well established that the aim of Article 102 TFEU is to provide a check on the market power that undertakings may have. It is not sufficient, in order for the position of an undertaking to be characterised as dominant, to refer to the market share it has on a clearly identified market. It is necessary to refer also to the economic power it has as a result of its position.

53. A dominant position is thus defined as a position of economic strength which affords one or more undertakings the power to behave to an appreciable extent independently of competitors and customers and ultimately of consumers.[9] Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.[10]

54. Moreover, one might wonder what interest, from a competition point of view, GDA could have in imposing discriminatory prices with a view to foreclosing one or other of its customers or weakening its competitive position. Since it has no interest in defending itself on the downstream market on which MEO and NOS have been active, its only interest would seem to lie in boosting its income by setting prices that are negotiated individually and bilaterally with those service providers.

55. If there is any entity that derives an advantage, from a competition point of view, from discrimination on the downstream market, it is the operator that has benefited from the supposedly lower prices, which is NOS in this case. On the other hand, I find it difficult to see how such price differentiation could benefit GDA, directly or indirectly. I shall discuss this point in greater detail further on.

56. Secondly, and following on from those considerations, I wonder if the present case really does involve 'equivalent transactions' on 'dissimilar conditions', within the meaning of point (c) of the second paragraph of Article 102 TFEU — and thus 'discrimination', rather than objective 'differentiation' — in the context of the licensing of related rights to MEO and NOS.

8 See the documents placed on the national case file that are mentioned in the Competition Authority's decision.

9 This definition was adopted by the Court very early on (see judgments of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraph 65, and of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 38). It has been constantly reiterated in the case-law, including in recent case-law (see, in particular, judgments of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 170, and of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 23 and 79).

10 See Commission Notice 97/C 372/03 on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

57. As is clear from the case-law, account must be taken of all of the prevailing conditions on the market in order to determine whether transactions are equivalent.[11] Those conditions will include, among other things, a temporal aspect, inasmuch as the price set for the provision of a particular service may vary over time, depending on *market conditions and the criteria applied in setting that price*. In other words, the fact that a service may be provided at different times may render transactions non-equivalent.[12]

58. In addition, it is apparent from the information submitted to the Court that the determination of the prices and of the other contractual terms associated with the related rights which GDA markets is subject to the law, which obliges the parties to have recourse to arbitration if they cannot reach agreement. In such a situation, GDA will, as it did with the prices it charged MEO, merely apply the price established by the arbitration decision. In my opinion, the prices which GDA applied to MEO and NOS respectively were therefore set under circumstances that were a priori different.

59. In short, it seems that there are a number of uncertainties regarding the applicability of Article 102 TFEU to the case in the main proceedings which go beyond the issue of the identification of a 'competitive disadvantage'. In particular, it would appear highly problematic to penalise an undertaking for an abuse of its supposed dominant position on the ground that it has applied differentiated prices to its trading partners on the downstream market when it is not even active on that market and benefits directly from the competition that exists between those trading partners. These uncertainties call for particular care to be exercised when examining the differential pricing practices at issue.

A differential pricing practice will constitute an abuse of a dominant position only if it creates a competitive disadvantage, which implies that the effects of the practice must be examined in the light of all the relevant circumstances

60. Even if it may be inferred from the facts of the case, first, that GDA enjoys a dominant position on the wholesale market in question and, secondly, that the conduct at issue must be regarded as dissimilar treatment of equivalent transactions — which are matters for the referring court to verify — it would appear imperative for the competition supervisory authority to establish that certain trading partners are suffering, as a result of that distortion of competition, a *competitive disadvantage*. The existence of a competitive disadvantage can in no case be presumed. It implies, in every case, and especially where there is 'second degree' price discrimination, an examination of the practices at issue in the light of all of the circumstances of the particular case.

11 See, in particular, judgments of 9 September 2009, *Clearstream* v *Commission* (T-301/04, EU:T:2009:317, paragraphs 169 to 190), and of 7 October 1999, *Irish Sugar* v *Commission* (T-228/97, EU:T:1999:246, paragraph 64).

12 See, in particular, to that effect, O'Donoghue, R., and Padilla, J., *The Law and Economics of Article 102 TFEU*, 2nd edition, Hart Publishing, Oxford, 2013, p. 795, and Geradin, D., and Petit, N., 'Price discrimination under EC competition law', *The Pros and Cons of Price Discrimination*, Konkurrensverket, 2005, p. 23 (http://www.konkurrensverket.se/en/research/seminars/the-pros-and-cons/price-discrimination).

A price discrimination practice is not in itself problematic from the point of view of competition law

61. On a general note, it is important to bear in mind that discrimination, including discrimination in the charging of prices, is not in itself problematic from the point of view of competition law. The reason for that is that price discrimination is not always harmful to competition. On the contrary, as is evidenced in particular by the (vain) official attempts made in the United States to repeal the provision in the Robinson-Patman Act of 1936[13] which prohibits such discrimination, purely and simply prohibiting price discrimination may prove injurious to economic efficiency and the well-being of consumers.

62. Indeed, it is well established that a practice of discrimination, and a differential pricing practice in particular, is ambivalent in terms of its effects on competition. Such a practice may have the consequence of increasing economic efficiency and thus the well-being of consumers. These are goals which, to my mind, should not be overlooked in the application of the rules of competition law, and they are, in any event, quite distinct from considerations of fairness. As the Court has repeatedly held, the rules of competition law are designed to safeguard competition, not to protect competitors.[14]

63. It should only be possible to penalise price discrimination, either under the law applicable to cartels or under the law applicable to abuses of a dominant position, if it creates an actual or potential anticompetitive effect. The identification of such an effect must not be confused with the disadvantage that may immediately be experienced, or suffered, by operators that have been charged the highest prices for goods or services. Accordingly, the fact that an undertaking has been charged a higher price when purchasing goods or services than that applied to one or more of its competitor undertakings may be characterised as a disadvantage, but it does not necessarily result in a 'competitive disadvantage'.

64. Therefore, even where an undertaking is charged higher prices than those applied to other undertakings and, as a result, suffers (or considers that it suffers) discrimination, the conduct in question will be caught by Article 102 TFEU only if it is established that it is likely to restrict competition and diminish the well-being of consumers.

65. In the law applicable to abuses of a dominant position, a practice of price discrimination will enable an undertaking in a dominant position to offer its goods and services to a greater number of consumers, including for example consumers with less purchasing power. Similarly, customers of an undertaking, even a dominant undertaking, will, in principle, have an incentive to sell more in order to benefit from a 'loyalty' discount and, in order to do that, will in turn be encouraged to lower their prices and consequently reduce their margins, which will ultimately have positive repercussions for the consumer. In that context, it must be emphasised that the ability of operators to use their negotiating power to obtain the best tariff conditions and reduce their costs is an important parameter of competition.[15] In short, price differentiation may be an important means of stimulating competition.

13 See, in particular, US Antitrust Modernisation Commission, Report and Recommendations (2007), Chapter IV, Section A: 'The Robinson-Patman Act', available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm. In 2007, the Antitrust Modernisation Commission (United States), also proposed, without success, that the provision should be repealed. For a more recent analysis, see also Kirkwood, J.B., 'Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers', *The Antitrust Bulletin*, Vol. 60, No 4, 2015, pp. 358 to 383.

14 See, to that effect, with reference to practices concerning rebates, the Opinion I delivered in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, point 41).

15 Any obligation upon an entity to treat all its trading partners equally is therefore likely to result in anticompetitive effects (see Bulmash, H., 'An Empirical Analysis of secondary line price discrimination motivations', *Journal of Competition Law & Economics*, Vol. 8, No 2, 2012, pp. 361 to 397).

66. As regards, more specifically, the question of whether the application by an undertaking of a price discrimination practice to its 'trading partners', which will most often be its customers on the downstream market, is likely to constitute an abuse of a dominant position, I would reiterate that point (c) of the second paragraph of Article 102 TFEU expressly prohibits undertakings in a dominant position from applying dissimilar conditions to equivalent transactions with those trading partners, 'thereby placing them at a competitive disadvantage'.

67. Contrary to what a superficial analysis might suggest, point (c) of the second paragraph of Article 102 TFEU does not compel monopoly holders or dominant undertakings to apply uniform tariffs to their trading partners.

68. It is clear from the very wording of that provision that price discrimination exercised by a dominant undertaking with regard to its trading partners may come within the scope of the prohibition of abuses of a dominant position *if and only if competition between those trading partners is distorted* by that discrimination.

69. In short, rigorous application of that provision requires, first, that it be established that there is a competitive relationship between the trading partners of the dominant undertaking and, secondly, that it be shown that the conduct of the dominant undertaking is actually likely to distort competition between the undertakings concerned.[16] I shall discuss these points in greater detail further on.

A practice of second degree price discrimination may be found to infringe point (c) of the second paragraph of Article 102 TFEU only after it has been examined in the light of all of the circumstances of the case

70. In both the decision-making practices of the competition supervisory authorities and the most recent case-law of the Court,[17] the rule has progressively developed that, where the conduct of an undertaking is examined by reference to Article 102 TFEU, the existence of a restriction of competition cannot be presumed. In order to conclude that there is such a restriction, it is necessary in every case to examine the actual or potential effects of the measure complained of, having regard to all of the circumstances of the case.

71. Where a price discrimination practice is at issue, the analysis that must be carried out differs substantially depending on whether the discrimination at issue is 'first degree' or 'second degree'.

72. *First degree price discrimination* is that which is practised against competitors of the dominant undertaking. Most often, it refers to price discrimination practices which are designed to attract customers of competing operators, such as predatory pricing, differential rates of discount and margin squeezing. More generally, it covers every pricing practice which is designed to foreclose from the market or weaken the competitive position of operators present on the same market and at the same level (vertically speaking) as the dominant undertaking.

73. These price discrimination practices are, because of the immediate exclusionary effects they are capable of creating, the ones which the competition supervisory authorities and the courts are generally asked to examine.

74. *Second degree price discrimination*, which is mainly addressed by point (c) of the second paragraph of Article 102 TFEU, is that which affects 'trading partners' on the market downstream or upstream from the dominant undertaking. It includes, in particular, cases where a dominant undertaking decides to charge its customers, that is to say, entities with which it is not in direct competition,

16 See, to that effect, Opinion of Advocate General Kokott in *British Airways* v *Commission* (C-95/04 P, EU:C:2006:133, points 104 and 105).
17 See, inter alia, judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, paragraphs 133 to 147).

different prices. The aim of that provision is to prevent the commercial behaviour of undertakings in a dominant position from distorting competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of such undertakings must not be favoured or disfavoured in the area of the competition which they practise amongst themselves. [18]

75. In so far as this latter type of price discrimination is concerned, the exclusionary effect and the effect of restricting the competitive process are not always immediately obvious. On the contrary, an undertaking operating upstream will, in principle, benefit fully from competition on the downstream market.

76. To my mind, and as has been pointed out in a good number of analyses in legal literature, when examining price discrimination, such as that at issue in the present case, for the purposes of the application of point (c) of the second paragraph of Article 102 TFEU, a distinction must immediately be drawn between undertakings that are vertically integrated and will therefore have an interest in displacing competitors on the downstream market and those that have no such interest.

77. In the case of vertically integrated undertakings, the application by a dominant undertaking of discriminatory prices on the downstream or upstream market is in reality similar to first degree price discrimination which indirectly affects the undertaking's competitors. Such discrimination may have the effect of weakening the competitors of the dominant undertaking on the downstream market.

78. The case which gave rise to the judgment in *Deutsche Bahn* v *Commission* [19] offers a good illustration of the restrictive effect on competition that may be caused by price discrimination, both first degree and second degree, practised by a vertically integrated undertaking. By applying different rates to container transporters operating on 'western journeys' in respect of equivalent services connected with the use of railway infrastructure, Deutsche Bahn AG had unquestionably placed those trading partners at a *disadvantage in competition with itself and its subsidiary*. [20]

79. On the other hand, where the undertaking in a dominant position is not vertically integrated, and leaving aside situations in which the conduct of public bodies which creates, more or less directly, the effect of geographical partitioning or of discrimination on grounds of nationality is at issue, [21] it is reasonable to wonder what benefit such an undertaking might hope to derive from discrimination aimed at placing one of its trading partners on the downstream market at a disadvantage. Indeed, such an undertaking has every interest in that market being highly competitive, so that it can maintain its negotiating power in its capacity as seller of the goods or services in question. If, as in the main proceedings, the undertaking in a dominant position is not in competition with its customers on the downstream market, it is not easy to determine the reasons which might lead that undertaking to apply discriminatory prices, other than the direct exploitation of its customers. It would therefore seem somewhat irrational for it to reduce the competitive pressure which exists among its trading partners on the downstream market.

80. That very certainly explains why cases concerning 'pure' *second degree discrimination* — that is to say, situations in which the dominant (non-vertically integrated) undertaking has no *prima facie* interest in foreclosing its trading partners from the downstream market — such as the case in the main proceedings, are extremely rare. [22]

18 See judgment of 15 March 2007, *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 143).

19 Judgment of 21 October 1997 (T-229/94, EU:T:1997:155), confirmed by the order of 27 April 1999, *Deutsche Bahn* v *Commission* (C-436/97 P, EU:C:1999:205).

20 Judgment of 21 October 1997, *Deutsche Bahn* v *Commission* (T-229/94, EU:T:1997:155, paragraph 93).

21 See, on this point, judgments of 29 March 2001, *Portugal* v *Commission* (C-163/99, EU:C:2001:189, paragraphs 46 and 66), and of 17 May 1994, *Corsica Ferries* (C-18/93, EU:C:1994:195, paragraphs 43 to 45).

22 See the cases cited in footnote 21. See also judgment of 11 December 2008, *Kanal 5 and TV 4* (C-52/07, EU:C:2008:703).

81. It must also be observed that, in its examination of the cases which the Court has been asked to deal with, the Court's reasoning regarding the applicability of point (c) of the second paragraph of Article 102 TFEU has been particularly laconic and does not, in any event, disclose any clear interpretative guidelines on the identification of a 'competitive disadvantage' within the meaning of that provision.

82. The judgment in *Kanal 5 and TV 4*,[23] which concerned a situation very similar to that in the present case, is worth mentioning in this connection. That case concerned a dispute between Kanal 5 Ltd and TV 4 AB and Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa (the Swedish organisation which collectively manages copyright in music) concerning the remuneration model which STIM applied in relation to the television broadcasting of musical works protected by copyright.

83. Asked to determine whether the fact that a copyright management organisation calculated the royalties demanded as remuneration payable for the television broadcasting of copyright-protected musical works differently depending on whether the broadcasting company was commercial or public constituted an infringement of point (c) of the second paragraph of Article 82 EC (now point (c) of the second paragraph of Article 102 TFEU), the Court did not, strictly speaking, give a ruling on the link between that price discrimination and any possible competitive disadvantage that might be observed on the downstream market. Moreover, it pointed out that it was for the referring court to carry out a certain number of checks before applying that provision.

84. It must also be pointed out in this connection that the approach taken by the Commission and by the European Union judicature often amounts to applying that provision to situations involving first degree price discrimination, that is to say, where no 'competitive disadvantage' is proven. That has certainly excited a certain amount of academic criticism, in the hope that the conditions expressly laid down in the provision will be applied more rigorously.[24] Certain commentators have called for a stricter approach to price discrimination as referred to in point (c) of the second paragraph of Article 102 TFEU or recommend a case-by-case examination of all the relevant circumstances.[25]

85. Moreover, when called upon to clarify the scope of the requirements for finding a competitive disadvantage within the meaning of that provision, the Court, in *British Airways* v *Commission*,[26] which is the judgment of reference for the examination of discriminatory pricing practices in the light of point (c) of the second paragraph of Article 102 TFEU, emphasised that, 'in order for the conditions for applying subparagraph (c) of the second paragraph of Article [102 TFEU] to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others'.

86. Although, as the Court stated, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive, it is still necessary to establish that the behaviour of the undertaking in a dominant position tends, 'having regard to the whole of the circumstances of the case', to lead to a distortion of competition between those business partners.[27]

23 Judgment of 11 December 2008 (C-52/07, EU:C:2008:703).

24 See, in particular, Perrot, A., 'Towards an effects-based approach to price discrimination', *The Pros and Cons of Price Discrimination*, op. cit., especially p. 166 et seq.

25 See the article cited in the previous footnote. See also Geradin, D., and Petit, N., 'Price Discrimination under EC competition law: The Need for a case-by-case approach', *Global Competition Law Centre Working Paper* 07/05, pp. 45 and 46.

26 Judgment of 15 March 2007 (C-95/04 P, EU:C:2007:166, paragraph 144).

27 Judgment of 15 March 2007, *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 145).

87. In other words, point (c) of the second paragraph of Article 102 TFEU cannot be interpreted as requiring an undertaking in a dominant position on a given market to apply, in all circumstances and independently of any analysis of the effects on competition of the conduct complained of, uniform prices to all its trading partners.

88. The need for account to be taken of 'the whole of the circumstances of the specific case' thus appears to be fundamental in the assessment of discriminatory pricing practices. It can certainly not be inferred from point (c) of the second paragraph of Article 102 TFEU that such a practice results in every case in a situation of 'competitive disadvantage'.

89. As regards the judgment in *Clearstream* v *Commission*,[28] to which the referring court expressly referred in its question, I would point out that, in that judgment, the General Court chose to restrict its examination to the specific case before it. As is clear from paragraph 192 of that judgment, the General Court recalled the principle that, 'in order for the conditions for applying subparagraph (c) of the second paragraph of Article [102 TFEU] to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, *but also that it tends to distort that competitive relationship*' (my emphasis).

90. In any event, even if it could be inferred from that judgment of the General Court that it established a presumption that price discrimination is likely to give rise to such a disadvantage, it must be observed that that judgment of the General Court, which moreover has not been confirmed by the Court of Justice, no appeal having been brought, is somewhat out of date.

91. To my mind, that judgment related to a period when the type of approach — that is to say, by object (formalistic) or by effects — that must be taken to examining conduct on the part of undertakings which is alleged to constitute an abuse of a dominant position was still open to debate.

92. Finally, I think it important to clarify that demonstrating the existence of a competitive disadvantage is a separate matter from evaluating the probability that conduct on the part of an undertaking that is inherently likely to create exclusionary effects will actually create a restriction of competition and, in particular, produce the alleged foreclosure effects.[29] The purpose of this requirement, for the purposes of the application of point (c) of the second paragraph of Article 102 TFEU, is to ensure that a price discrimination practice followed by an undertaking with regard to its trading partners, which is not in itself problematic from the point of view of competition, actually results in the creation of a competitive disadvantage.

93. As I have already had occasion to emphasise,[30] generally speaking, examining price discrimination practices by reference to Article 102 TFEU does not lend itself to formalism and systematisation. In particular, analysing whether price discrimination on the part of an undertaking in a dominant position on a given market is likely to have a real impact on competition on a downstream or upstream market is, and must remain, an exercise that is eminently casuistic.

28 Judgment of 9 September 2009 (T-301/04, EU:T:2009:317, paragraph 194). The General Court held that, 'in the present case, 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'.

29 See, on this point, judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, paragraphs 138 to 141).

30 See, in particular, the Opinion I delivered in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, point 73 et seq.).

In order to reach a finding of the existence of a competitive disadvantage it is necessary specifically to establish, in addition to the discrimination suffered, the existence of a competitive disadvantage

94. Contrary to what the position taken by MEO in the present proceedings might suggest, I am of the opinion that price discrimination is not necessarily accompanied by a 'competitive disadvantage' within the meaning of point (c) of the second paragraph of Article 102 TFEU.

95. To my mind, MEO's view arises from confusion between the assessment of the existence of a 'competitive disadvantage' and the existence of 'disadvantages between competitors', or even of a disadvantage pure and simple.

96. In order for a 'competitive disadvantage' within the meaning of point (c) of the second paragraph of Article 102 TFEU to be found, the practice in question must, in addition to the disadvantage caused by the price discrimination taken in isolation, have a specific effect on the competitive position of the undertaking suffering the alleged discrimination.

97. In other words, it is necessary for the disadvantage suffered to be sufficiently significant as to have consequences for the competitive position of the undertaking discriminated against. It is therefore necessary to establish that the discriminatory prices have a tendency to distort the competitive relationship between the trading partners on the downstream market.

98. Such an analysis requires the competition supervisory authority to take all of the circumstances of the case submitted to it into account. A price discrimination practice places the customers of a company in a dominant position in a disadvantageous competitive situation when it is actually capable of having a negative effect on competition on the market in which its customers operate. In order to identify a distortion of competition in that context, it is therefore not sufficient merely to evaluate the impact of the discriminatory practice on a specific trading partner.

99. In particular, it is necessary to examine whether the price discrimination at issue is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured.

100. Admittedly, as the Court has held in its case-law, it is not required that proof be adduced that the conduct of the dominant undertaking has resulted in an actual quantifiable deterioration in the competitive position of one or more trading partners [31] or that it be established that the anticompetitive effect on the market on which the trading partners compete is 'appreciable' — fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position not being justified. [32]

101. However, the fact remains that, at the risk of disregarding the conditions that are clearly stated in point (c) of the second paragraph of Article 102 TFEU, a mere 'disadvantage' resulting from the discrimination itself must not be confused with the 'competitive disadvantage' which must materialise on the market on which the trading partners of the dominant undertaking operate, which in this case is the downstream market for the rights related to copyright.

31 See judgment of 15 March 2007, *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 145).

32 See judgment of 6 October 2015, *Post Danmark* (C-23/14, EU:C:2015:651, paragraph 73).

102. It seems to me that a distinction must be drawn between anticompetitive conduct which, because of its intrinsic harmfulness, implies a restriction of competition, and conduct, like the second degree price discrimination practices followed by a non-vertically integrated dominant undertaking, the actual repercussions of which must be examined more thoroughly if a finding is to be made that there is a restriction of competition.

103. This does not imply sorting restrictions of competition into those that are minor and those that are not — which would justify the fixing of a *de minimis* threshold, which Article 102 TFEU does not, in principle, permit. It is, rather, a question of identifying the existence of an actual restriction of competition in addition to, and quite distinct from the price discrimination.

104. Therefore, the fact that one of the trading partners is charged a higher price may, at most, have an effect on the costs borne by that undertaking and, quite hypothetically, on the profitability and net income which that undertaking hopes to achieve. However, that does not imply that the level of competition on the downstream market is affected by the price discrimination in question. As GDA quite rightly pointed out in its written observations, profitability and competitiveness are two very different things.

105. It therefore follows, in my opinion, that possible differences in treatment which have no impact, or only a very minor impact on competition cannot constitute an abuse of a dominant position within the meaning of point (c) of the second paragraph of Article 102 TFEU. [33]

106. In order to establish the existence of a competitive disadvantage it is necessary to examine the actual or potential effects of the practice complained of in the light of *all the relevant circumstances*, in relation to the transactions at issue and the characteristics of the market on which the trading partners of the dominant undertaking operate.

107. In this examination of a distorting effect on competition or exclusionary effect of a price discrimination practice, attention must first of all be paid to the reality and relative significance of the price differentiation at issue.

108. Next, importance must also be attached to examining how much the goods or services supplied by the dominant undertaking cost in relation to the total costs borne by the allegedly disadvantaged trading partner or partners.

109. If the price charged by the dominant undertaking represents a significant proportion of the total costs borne by the disfavoured customer, the price discrimination may have an impact not only on the profitability of the customer's business, but also on its competitive position. [34]

110. On the other hand, if the relative significance of the prices charged by the dominant undertaking is minimal, those prices will not be such as to affect the competitive position of the disfavoured customer.

111. Turning now to the case at hand, the Competition Authority found that the costs were not significant. Paragraph 67 of the Competition Authority's decision indeed states that, on the basis of the information provided by MEO on 23 June 2015, it had to be concluded that, between 1 January 2010 and 31 December 2013, the sums which MEO paid annually to GDA in respect of the wholesale

33 See, on this point and on the reconciliation of the various conflicting approaches in this area, O'Donohue, R., and Padilla J., *The Law and Economics of Article 102 TFEU*, op. cit., pp. 802 and 803.

34 See, in particular, the Commission's analysis in its Soda-Ash — Solvay decision (Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda-ash — Solvay, OJ 1991 L 152, p. 21, recital 64), in which it was concluded that the price discrimination had had a considerable effect on the competitive position of the undertakings affected, inasmuch as soda-ash accounted for up to 70% of the raw material costs of manufacturing glass. The price paid for that raw material therefore affected the profitability and competitivity of glass manufacturers.

service in question represented only a small percentage of the costs borne by MEO in making available its retail subscription television access service and a tiny proportion of MEO's profits from that retail service. Since the relative significance of the price of the related rights charged by GDA was, in the Competition Authority's opinion, negligible, it is difficult to see how, as a result of its magnitude, the price differentiation applied by GDA could have affected MEO's competitive position and thus created a competitive disadvantage.

Closing remarks on the role of competition authorities when dealing with complaints

112. In the present case, and while it is ultimately for the referring court alone to assess, having regard to all of the circumstances of the case, in what way the price differentiation at issue might have created a competitive disadvantage, it therefore seems to me that the Competition Authority did not err in analysing whether, from an economic viewpoint, the price differentiation applied to MEO and to NOS was capable of influencing MEO's competitiveness by comparison with NOS.

113. Moreover, and by way of a final remark, it seems to me important to point out that, when the competition supervisory authority is seised of a complaint alleging the existence of an abuse of a dominant position resulting from second degree price discrimination such as that at issue in the present case, the role of that authority is to examine carefully *the factual and legal considerations brought to its notice by the complainant* in order to decide, in principle within a reasonable time, whether it must initiate the procedure for establishing the infringement, reject the complaint without initiating the procedure or decide not to pursue the matter. [35]

114. A decision to take no further action on the complaint must be based on the rejection of the matters specifically put to the competition authority. On the other hand, the competition authority cannot be criticised for identifying, in absolute terms and in the absence of hard evidence of the existence of a restriction of competition, the reasons for which the impugned conduct might possibly constitute an abuse.

Conclusion

115. In light of all the foregoing considerations, I propose that the questions referred by the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) for a preliminary ruling should be answered as follows:

In the absence of any objective justification, the application by an undertaking in a dominant position of higher prices to some of its licence holders than the prices which it charges to other licence holders constitutes an abuse of a dominant position within the meaning of point (c) of the second paragraph of Article 102 TFEU, but only if that practice causes the former a competitive disadvantage by comparison with other licence holders with which they are in competition.

Trading partners of a dominant undertaking will suffer a competitive disadvantage within the meaning of point (c) of the second paragraph of Article 102 TFEU where the application of dissimilar conditions to equivalent transactions undermines the competitive position of certain trading partners by comparison with others and where, as a result, it distorts competition between the favoured trading partners and the disfavoured trading partners.

In order to find the existence of a competitive disadvantage, it is necessary to establish a distortion of competition between the parties concerned on the relevant market distinct from any mere difference in treatment that may be established. The recommended analysis must be more than a merely formal

35 See, by analogy with the Commission's role, the judgment of 19 May 2011, *Ryanair* v *Commission* (T-423/07, EU:T:2011:226, paragraph 53).

exercise of automatic inference based on factual assumptions or legal presumptions and must involve a specific examination of all of the circumstances of the case. Amongst other things, account may be taken of the type of price differentiation at issue and its significance and of the cost structures of the undertakings concerned.