Case C-377/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 July 2020

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

21 May 2020

Applicants and appellants:

Servizio Elettrico Nazionale SpA

ENEL SpA

Enel Energia SpA

Defendant and respondent:

Autorità Garante della Concorrenza e del Mercato

Subject of the action in the main proceedings

Three appeals before the Consiglio di Stato (Council of State, Italy) seeking to have varied three judgments of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio), which had confirmed that the defendants were guilty of an abuse of a dominant market position under Article 102 TFEU as identified by the Autorità garante per la concorrenza e il mercato (Italian Competition and Markets Authority, AGCM) ('the Authority').

Subject matter and legal basis of the reference

Interpretation of EU law, and in particular Article 102 TFEU, in accordance with Article 267 TFEU

Questions referred

1. May conduct that constitutes an abuse of a dominant position be completely lawful in and of itself and be classified as 'an abuse' solely because of the (potentially) restrictive effect created in the reference market, or must that conduct also be characterised by a specific 'unlawful' component, represented by the use of 'competitive methods (or means) that are different' from those that are 'normal'? In the latter case, what criteria should be used to establish the boundary between 'normal' and 'distorted' competition?

2. Is the purpose of the concept of abuse to maximise the well-being of consumers, with the court being responsible for determining whether that well-being has been (or could be) reduced, or does the concept of an infringement of competition law have the function of preserving in itself the competitive structure of the market, in order to avoid the creation of economic power groupings that are, in any case, considered harmful for the community?

3. In the case of an abuse of a dominant position represented by an attempt to prevent the continuation or development of the existing level of competition, is the dominant undertaking in any case permitted to prove that the conduct did not cause any actual harm, despite its abstract ability to generate a restrictive effect? If the answer to that question is in the affirmative, for the purposes of assessing whether an atypical exclusionary abuse has occurred, must Article 102 TFEU be interpreted as meaning that the Authority has an obligation to examine specifically the economic analyses produced by the party concerning the actual ability of the conduct examined to exclude its competitors from the market?

4. Must an abuse of a dominant position be assessed solely in terms of its effects on the market (including merely potential effects), without regard to the subjective motive of the agent, or does a demonstration of restrictive intent constitute a parameter that may be used (even exclusively) to assess the abusive nature of the dominant undertaking's conduct? Does such a demonstration of the subjective component serve only to shift the burden of proof to the dominant undertaking (which would have the burden, at this stage, of providing evidence that the exclusionary effect is absent)?

5. In the case of a dominant position held by a number of undertakings belonging to the same corporate group, is membership of that group sufficient to assume that even those undertakings that have not implemented the abusive conduct have contributed to the infringement, so that the supervisory authority would merely need to demonstrate a conscious, albeit non-collusive, parallel approach by the undertakings operating within the collectively dominant group? Or (as is the case for the prohibition on cartels) is there in any case a need to provide evidence, even indirectly, of a specific situation of coordination and instrumentality among the various

undertakings within the dominant group, in particular in order to demonstrate the involvement of the parent company?

Provisions of EU law cited

Article 102 TFEU

Provisions of national law cited

Article 3 of legge n. 287/1990 (Law No 287/1990): 'Any abuse by one or more undertakings of a dominant position within the national market or a substantial part of it shall be prohibited …'.

Outline of the facts and the main proceedings

1 Since the electricity market in Italy was liberalised, the phases of generation and sale have been opened up to competition, whereas the transmission and distribution networks are still operated under a monopoly system on the basis of a ministerial concession, because the structures are limited and cannot be replicated. To guarantee neutral operation of those networks for the benefit of operators and users, the vertically integrated former monopoly undertaking in the sector – Enel – was, therefore, required to separate the various components of its electricity generation chain and hive off, in particular, the non-competitive segment from the activities opened up to free competition among operators. That process concluded with the creation of the following three companies:

Enel Energia (EE), electricity supplier for the deregulated market, **Servizio Elettrico Nazionale (SEN)**, supplier of the 'enhanced protection service', and **e-distribuzione**, concessionaire for electricity distribution activities.

The 'Enhanced (price) Protection Service' (EPS) means the supply of electricity to small end users that have not yet chosen a seller in the free market and will be served, under the law, by a company connected to the distributor under contractual and financial conditions determined by the authority responsible for the sector.

SEN is currently the undisputed operator for the EPS, since it is present in the areas in which electricity distribution is undertaken by e-distribuzione, namely approximately 85% of Italian territory. The second best operator does not even cover 5% of that market. According to statutory provisions, the EPS will be phased out in January 2022, with all electricity supply activities then being subject to free market operations.

2 The present proceedings stem from complaints made to the Authority about the illegal use of commercially sensitive information by Enel Group operators to transfer customers from SEN to EE, in view of the announced market change,

avoiding a block transfer of those customers to free market offers from competing operators.

According to the Authority's reconstruction of events, SEN obtained the consent of users under the EPS to receive commercial proposals 'in a discriminatory manner', involving a request for initial authorisation for processing of personal data by companies within the Enel Group and a second request in favour of third-party operators. The customers usually gave the initial consent, believing that this was necessary for managing the existing relationship with their supplier, while they usually refused the second consent, intended for other operators. Indeed, consent for third-party operators was only given in 30% of cases.

The names of the customers consenting to provide information to Enel were included in lists created for that purpose. On the basis of those lists, EE launched offers dedicated exclusively to EPS customers, most recently the 'Sempre con te' offer.

The EPS status of the customers was information that was otherwise unobtainable, which made SEN's lists a strategic, non-replicable asset. Because they did not in turn have access to that information, the other operators lost 40% of demand subject to competition for the reference period (2014-2017) (potential restrictive effect).

Despite the restructuring process, at the very least the top management of the Enel Group continued to exchange information and to make integrated decisions.

3 The Authority therefore imposed a penalty on EE and SEN and also on the parent company Enel for abuse of a dominant position (Article 102 TFEU). The objections were upheld by the first-instance court against each of the three companies, although with a reduction in the penalty for the first two, on account of the more limited duration of the infringement and an error in the basis used to calculate the fine. All three appellants have lodged separate appeals before the Council of State, requesting that the decision be annulled in full or the penalty further reduced.

Principal arguments of the appellants in the main proceedings

4 There is no evidence of the abusive strategy or evidence of the potential exclusionary power of the conduct, because:

– entering a name in a telemarketing list did not remove the consumer from competition, did not imply any supply obligation or commitment and did not prevent a consumer who had given consent from appearing in other lists, receiving other commercial communications, or choosing or changing supplier at any time, even more than once;

– the SEN lists were insignificant in quantitative terms given the size of the market and SEN's customer base. Moreover, other more comprehensive lists with lower prices were available – and were used – in the market;

– in particular, the use of the SEN lists in the two months between the launch of the 'Sempre con te' offer and the decision to close the associated sales channel generated only 478 customers, namely 0.002% of SEN users and 0.001% of electricity users;

– the Authority did not take into consideration the evidence offered to demonstrate that the conduct being challenged was not even able to generate restrictive effects on competition, and did not, in fact, produce such effects.

5 Furthermore, since 2014 the holding company Enel has transitioned from a centralised model to one in which the parent company simply promotes synergies and best practices among the various operating companies, without any further decision-making role. The parent company should not, therefore, be penalised, still less more severely than its operating companies.

Succinct presentation of the reasons for the request for a preliminary ruling

6 The relevant market is the market for retail sale of electricity to small domestic and non-domestic end customers in the areas where the Enel Group has a monopoly for electricity distribution. Enel's dominant position is demonstrated by the permanent market share it holds in the reference market and its control of non-replicable infrastructures, the connection between the various segments involved and the financial strength of the vertically integrated structure. The conduct being contested is an atypical exclusionary abuse compared to the examples provided in Article 102 TFEU, in that it was intended to prevent the growth or diversification of supply by competitor undertakings.

7 The principal question is whether the conduct of the dominant undertaking is able to achieve the intended outcome of excluding the other operators present in the free market by draining the EPS customer base. During the course of the antitrust proceedings, the parties produced economic analyses intended to demonstrate that their conduct did not actually generate exclusionary effects. The Authority collected investigative material to demonstrate the existence of a strategic intent on the part of the group to reduce the disadvantage resulting from the phasing-out of the EPS.

8 The points thus established create a number of questions for the referring court. Because Article 102 TFEU and the Italian provision transposing that text are both silent on the point, the court asks, first, (*first question referred*) whether the prohibited situation of 'abuse of a dominant position' must necessarily involve market conduct which is objectively unlawful or whether such abuse is represented by the restrictive or potentially restrictive effect of any conduct, even where completely legal, which the dominant undertaking implements for the

purpose of strengthening its own position. In fact, the conduct implemented by the Enel Group is in itself legal (in terms of civil law), in so far as no complaint has been made of an alleged infringement of any specific provision governing personal data processing and the SEN lists appear to have been purchased at market price.

9 By the *second question*, the referring court asks what economic effect is actually being prevented by the prohibition on abuse of a dominant position: the reduced well-being of consumers (for example, because of price rises; Commission Communication 2009/C 45/02) or a change to market structure, variety, quality and innovation, as emerges from important case-law of the Court.

10 While it is true, on the basis of established case-law guidance, that an infringement of competition law may even consist merely of an attempt to prevent continued competition in the market or development of that competition, the referring court is uncertain whether evidence that no restrictive effect has actually occurred is, in any case, admissible, in the case of conduct that is merely capable in the abstract of producing restrictive effects. If the answer is in the affirmative, the question then arises as to whether the Authority has an obligation to verify specifically any evidence provided by the undertaking concerned to demonstrate that the conduct being contested is not actually able to exclude competitors from the market (*third question*).

11 From another standpoint, there is a need to understand the relevance of the motive in assessing the abuse. Is the unlawful intent in fact not relevant, with evidence of the (real or potential) effects being sufficient, or – conversely – is it relevant to the point that it can in and of itself impute the alleged anticompetitive effects to the agent's conduct, or does it serve merely to shift the burden of proof to the dominant undertaking, which must demonstrate that the exclusionary effect is in fact absent (*fourth question*)?

12 The issue of evidence also arises in the *fifth* and final *question*, which raises the issue of how to determine the liability of legally independent undertakings that nonetheless service the market as a collective, joint enterprise: can the individual undertakings be charged with an infringement simply because they form part of the group, with the Authority therefore required merely to demonstrate that they operate in parallel with the others, or is there a need for evidence, even indirectly, of a specific situation of coordination and instrumentality, relating to the parent company in particular?