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Press and Information

Advocate General's Opinion in Case C-377/20
Servizio Elettrico Nazionale and Others

Advocate General Rantos sets out the criteria for classifying an exclusionary practice as an abuse of a dominant position

An incumbent operator may adopt practices aimed at retaining its customers, even in the context of a liberalisation process, but must not resort to practices which, by exploiting the advantages stemming from the statutory monopoly, are capable of producing exclusionary effects on new competitors considered to be as efficient.

The case has been brought in the context of the liberalisation of the market for the retail supply of electricity in Italy. ENEL SpA, a vertically integrated undertaking which holds a monopoly in energy production in Italy and is also active in the distribution segment, underwent an unbundling process in order to ensure transparent and non-discriminatory access to essential production and distribution infrastructure. Following that procedure, the various stages of the distribution process were assigned to separate undertakings.

The Autorità Garante della Concorrenza e del Mercato (AGCM) conducted an investigation into the alleged strategy implemented by three companies of the Enel group aiming, in essence, to make it more difficult for competitors to enter the liberalised market. Following that investigation, the AGCM adopted a decision finding that those companies had abused their dominant position in breach of Article 102 TFEU. More specifically, under the coordination of the parent company, Enel, Servizio Elettrico Nazionale S.p.A. (SEN) – a company which among other activities is also the operator of the 'enhanced protection service', namely the 'protected market' for the supply of so-called 'captive' customers, made up of private individuals and small undertakings – and Enel Energia SpA (EE) – a supplier of electricity on the open market – allegedly implemented a strategy to foreclose access to the market, consisting in the discriminatory use of data relating to the customers of the 'protected market', which, prior to the liberalisation were available to SEN, enabling commercial offers to be communicated to these customers, with the aim of retaining them within the group, by 'transferring' them from SEN to EE.

As a result, the AGCM imposed on the abovementioned companies jointly and severally a fine, the amount of which was subsequently reduced to € 27 529 786.46 by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

The abovementioned companies of the Enel group brought an appeal before the Consiglio di Stato (Council of State, Italy), which referred to the Court questions on the interpretation and application **of Article 102 TFEU** in relation to exclusionary practices.

In his Opinion delivered today, Advocate General Athanasios Rantos points out, first of all, that the present case gives the Court the opportunity to address a broader issue regarding the application of Article 102 TFEU to liberalised markets, namely in circumstances where the abusive conduct is based on the competitive advantage that an incumbent operator lawfully 'inherited' from its statutory monopoly, such as the customer base. Furthermore, he notes that the Court will be able to crystallise its case-law resulting from the judgments in TeliaSonera, [1] Post Danmark I [2] and II, [3]

[1] Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09.
[2] Judgment of 27 March 2012, *Post Danmark*, C-209/10.
[3] Judgment of 6 October 2015, *Post Danmark*, C-23/14.

Intel [4] and Generics (UK), [5] in which the Court embraced a less formal approach to the assessment of the abusive nature of particular conduct. Lastly, he considers that the guidance provided may prove useful in assessing, under Article 102 TFEU, conduct relating to the use of data.

As regards the concept of **'abuse'**, the Advocate General underlines, first of all, that it is founded on the objective assessment of the capacity of particular conduct to restrict competition, and that the legal classification of that conduct under other branches of law is not decisive. Accordingly, the lawful nature of the alleged conduct under civil and data protection law cannot preclude the conduct from being classified as abusive within the meaning of Article 102 TFEU.

Furthermore, he notes that, in the context of exclusionary practices, the conduct prohibited by Article 102 TFEU is conduct that hinders the maintenance of the degree of competition on the market or its growth. It follows that the capacity to have a restrictive effect on the market, such as an anti-competitive exclusionary effect, is the key factor for classifying conduct as abusive. However, not every exclusionary effect is necessarily detrimental to competition, since, 'competition on the merits' may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient. Therefore, in order for conduct to be classified as abusive, it must be capable of having a restrictive effect on the relevant market. In that regard, Advocate General Rantos states that demonstrating that a dominant undertaking has used methods other than those which are part of 'normal' competition is not an 'additional element of illegality' over and above the requirement to demonstrate an anti-competitive exclusionary effect. In his view, those two requirements form part of a single assessment.

In response to the referring court's request for a clear line to be drawn between practices which are part of 'normal' competition (to which it is necessary to attribute the same meaning as 'competition on the merits') and those which are not, the Advocate General observes that the concept of 'competition on the merits' does not correspond to a specific form of practice and cannot be defined in such a way as to make it possible to determine in advance whether or not conduct comes within the scope of such competition. Consequently, a practice described as 'atypical', such as that at issue in the main proceedings, which does not correspond to a practice listed under Article 102 TFEU, is also capable of constituting an abusive practice. The question as to whether an exclusionary practice is consistent with 'competition on the merits' is closely linked to its factual, legal and economic context. However, common features can be gleaned from the Court's case-law. First, 'competition on the merits' must be interpreted in close correlation with the principle that an undertaking in a dominant position has a 'special responsibility' not to allow its conduct to impair effective competition. In that regard, the Advocate General points out that that 'special responsibility' applies to all dominant undertakings, including incumbent operators that previously held a monopoly, such as Enel. Second, conduct which clearly departs from normal market practice may be regarded as a relevant factor to be taken into account in the assessment of whether or not there is an abuse. Third, without any intention to be exhaustive, the Advocate General notes that conduct which does not fall within the concept of 'competition on the merits' is generally characterised by the fact that it is not based on obvious economic or objective reasons. Fourth, this concept refers, generally, to a competitive situation in which consumers benefit through lower prices, better quality and a wider choice of new or improved goods and services.

Lastly, the Advocate General considers that, in the present case, since incumbent operators are subject to free competition, they must be able to maximise their profits like any other operator on the market. Thus, Enel is allowed, and even expected, to put in place practices aimed at retaining its customers. However, on account of its 'special responsibility', it must not resort to practices which, by exploiting the advantages conferred by the statutory monopoly, are capable of producing exclusionary effects on new competitors that are regarded as equally efficient. It is therefore relevant, according to the Advocate General, to assess the ability of competitors to imitate the conduct of the dominant undertaking and, in particular, to ascertain whether, on the basis of the information presumably known to Enel, competitors could have had access, in an economically viable way, to data comparable, as regards its usefulness, to Enel's data on the customers of the

[4] Judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 (see PR no 90/17).
[5] Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18 (see PR no 8/20).

‘protected market’. This may help ascertain whether or not Enel’s conduct is potentially capable of producing foreclosure effects and, therefore, whether or not that conduct conforms with ‘competition on the merits’.

As regards **the interest protected** by Article 102 TFEU, the Advocate General states that Article 102 TFEU must be interpreted as being intended to prohibit not only exclusionary practices which may cause direct damage to consumers, which is the ultimate objective of that provision, but also conduct which may adversely affect consumers indirectly as a result of its effect on the structure of the market. It is for the competition authorities to show that such an exclusionary practice undermines the effective competition structure, while at the same time verifying that it is also liable to cause actual or potential harm to those consumers.

In order to **establish the existence of an infringement** of Article 102 TFEU, the Advocate General considers that a competition authority is required to show, in the light of all the relevant circumstances, and having regard in particular to the evidence relied on by the dominant undertaking, that the conduct of that undertaking was capable of restricting competition. In that regard, it would be contrary to the inherent logic of that provision, which is also preventive in nature, to have to wait for anti-competitive effects to occur on the market in order to establish the existence of abuse. Accordingly, evidence put forward ex post by an undertaking in order to show the absence of anti-competitive effects cannot serve to exonerate the undertaking or to transfer the burden of proof to the competition authority in such a way that it is obliged to demonstrate that harm did actually result from the conduct complained of. However, from a procedural point of view, such evidence must be taken into account by a competition authority. The probative value of that type of evidence varies according to whether the theory of harm is based on a risk of foreclosure having actual or potential effects, the lack of actual effects on competition being less relevant in the second scenario. Moreover, the absence of actual effects is capable of corroborating an argument that the practice in question was not of such a nature as to harm competitors, even theoretically, with the result that the theory of harm proves to be purely hypothetical, in particular where the conduct at issue is long-standing and ends before the investigation.

Furthermore, the Advocate General observes that the abuse of a dominant position is an objective concept, in the absence of any fault, and that, for the purposes of its application, there is no requirement to establish the existence of an **anti-competitive intent** on the part of the dominant undertaking. In his view, in order to classify a dominant undertaking’s exclusionary practice as abusive, it is not necessary to establish its subjective intention to exclude its competitors. That intention may nevertheless be taken into account, as a factual circumstance, in particular, in order to establish that this conduct is capable of restricting competition. Although the competition authorities may use that type of evidence to corroborate the existence of an abuse, the undertakings concerned must also be able to use internal documents in support of the absence of an intention to drive out competitors. Such evidence, which is negative in nature, is difficult to adduce and, even if established, cannot, in itself, prove the absence of abuse.

Lastly, as regards **whether liability for the conduct of a subsidiary may be imputed to the parent company,** the Advocate General recalls that the fact that a parent company belongs to a corporate group consisting in particular of wholly owned subsidiaries which have engaged in abusive conduct, within the meaning of Article 102 TFEU, is sufficient basis to presume that that parent company has exerted a decisive influence on the subsidiaries’ policies, such that a competition authority may impute to it liability for that conduct, without having to produce evidence of the latter’s involvement in the abusive practice. The presumption may be rebutted by the parent company, by adducing sufficient evidence to show that the subsidiaries acted independently on the market. In such a case, the authority will be under a duty to explain adequately why the evidence put forward was not sufficient to rebut that presumption, unless it considers it manifestly irrelevant, unimportant or clearly ancillary.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in the context of a dispute before them, to refer questions to the Court about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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