Press and Information

Court of Justice of the European Union
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Judgment in Case C-377/20
Servizio Elettrico Nazionale and Others

The Court of Justice sets out the criteria for defining a dominant position in connection with exclusionary practices on the basis of anticompetitive effects of the conduct of an incumbent operator in the context of the liberalisation of the electricity market

This case has arisen in the context of the progressive liberalisation of the electricity market in Italy.

Although, since 1 July 2007, all users of the Italian electricity network, including households and small and medium sized enterprises (SMEs), have been able to choose their supplier, a distinction was drawn initially between, on the one hand, customers that were eligible to choose a supplier on the free market and, on the other, customers in the protected market, these customers consisting of private individuals and small businesses that continued to be covered by a regulated regime referred to as the 'servizio di maggior tutela' (enhanced protection service), which included special protection of prices in particular. It was only subsequently that customers in the latter category were allowed access to the free market.

For the purposes of that liberalisation of the market, ENEL, an undertaking that, until that point, had been vertically integrated, had held the monopoly in electricity generation in Italy and had also been active in the distribution of electricity, underwent an unbundling of its distribution and sales activities and its trade marks. Following that procedure, the activities relating to the various stages of the distribution process were attributed to separate subsidiaries.

Accordingly, E-Distribuzione was entrusted with distribution services, EE with the supply of electricity on the free market and SEN with management of the enhanced protection service.

Following an investigation conducted by the Autorità Garante della Concorrenza e del Mercato (AGCM) as national competition authority, that authority adopted, on 20 December 2018, a decision in which it held that, during the period from January 2012 to May 2017, SEN and Enel Energia, coordinated by their parent company, ENEL, had abused their dominant position from January 2012 to May 2017 in breach of Article 102 TFEU and consequently imposed a fine of over € 93 million jointly and severally on those companies. The conduct complained of consisted in an exclusionary strategy intended to transfer the customer base of SEN, as incumbent manager of the protected market, to Enel Energia, which operates on the free market, in order to mitigate the risk of a large-scale departure of SEN's customers to new suppliers on the subsequent opening to competition of the market concerned. To that end, according to the AGCM's decision, the customers in the protected market were, inter alia, asked by SEN to give their consent to receive commercial offers relating to the free market using discriminatory methods with respect to the offers of ENEL's competitors.

The fine was reduced to approximately € 27.5 million in compliance with judgments delivered at first instance in the context of actions brought by ENEL and its two subsidiaries against the AGCM's decision. Those companies have brought appeals against those judgments before **the Consiglio di Stato (Council of State, Italy), which has asked the Court questions relating to the interpretation and application of Article 102 in cases relating to exclusionary practices**.

By its judgment, the Court sets out the conditions under which the conduct of an undertaking can be regarded, on the basis of its anticompetitive effects, as constituting abuse of a dominant position when such conduct stems from the use of resources or means inherent to the holding of such a position in the context of the liberalisation of a market. In this judgment, the Court defines the relevant assessment criteria and the scope of the burden of proof on the relevant national competition authority that has adopted a decision under Article 102 TFEU.

Findings of the Court

Answering the questions relating to the interest protected by Article 102 TFEU, **the Court sets out, in the first place, the elements constituting abuse of a dominant position**. To that end, it observes, first, that the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position within the internal market or a substantial part of that market. Therefore, a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could adversely affect, by using resources or means other than those governing normal competition, the effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers. The dominant undertaking concerned can nevertheless escape the prohibition laid down in Article 102 TFEU by showing that the exclusionary effect that could result from the practice at issue is counterbalanced or even outweighed by positive effects on consumers.

Second, the Court recalls that the conduct of an undertaking in a dominant position is to be characterised as abusive only if that conduct is shown to be capable of restricting competition and, in the case in question, of producing the alleged exclusionary effects. However, that characterisation does not require it to be proved that the desired result of such conduct seeking to exclude the undertaking's competitors from the market concerned has been achieved. In those circumstances, evidence produced by an undertaking in a dominant position demonstrating that there are no actual exclusionary effects cannot be regarded as sufficient in itself to preclude the application of Article 102 TFEU. However, that factor can constitute evidence that the conduct at issue is incapable of producing the alleged exclusionary effects, provided that it is supported by other evidence seeking to demonstrate such incapability.

In the second place, as regards the doubts expressed by the national court as to whether the intention of the undertaking in question should be taken into consideration, the Court recalls that the existence of an abusive exclusionary practice by an undertaking in a dominant position must be assessed on the basis of whether that practice is capable of producing anticompetitive effects. It follows that a competition authority is not required to demonstrate that the undertaking in question has the intention of excluding its competitors by means or by making use of resources other than those governing competition on the merits. The Court does, however, specify that evidence of such intention is nevertheless a factor that may be taken into account for the purposes of establishing abuse of a dominant position.

In the third place, the Court provides interpretative guidance requested by the national court for the purpose of applying Article 102 TFEU in order to distinguish, among the practices implemented by an undertaking holding a dominant position which are based on lawful use, outside of the domain of competition law, of resources or means inherent to the holding of such a position, between those which are potentially not covered by the prohibition laid down in that article because they are characteristic of normal competition and those which, by contrast, are to be regarded as 'abusive' within the meaning of that provision.

In that connection, the Court recalls, first of all, that the abusive nature of those practices presupposes that they are capable of producing the exclusionary effects described in the decision at issue. Admittedly, undertakings in a dominant position, irrespective of the reasons for which they have such a position, may defend themselves against their competitors, but they must nonetheless do so by using means of 'normal' competition alone, that is to say, competition on the merits. A practice that could not be adopted by a hypothetical competitor that is as efficient on the market in

question because it relies on the use of resources or means inherent to the holding of a dominant position cannot be regarded as competition on the merits. In those circumstances, when an undertaking loses the legal monopoly it had previously held on a market, that undertaking must refrain, during the entire liberalisation phase of the market, from using means available to it on account of its former monopoly and which, on that basis, are not available to its competitors for the purposes of maintaining, other than by its own merits, a dominant position on the recently liberalised market in question.

That said, such a practice can nevertheless escape the prohibition laid down in Article 102 TFEU if the relevant undertaking in a dominant position proves that that practice was either justified objectively by circumstances external to the undertaking and is proportionate to that justification, or that it is counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers.

In the fourth place, the Court, having been asked by the national court to set out the conditions for imputing liability for the conduct of a subsidiary to its parent company, holds that, when a dominant position is abused by one or several subsidiaries belonging to one economic unit, the existence of that unit is sufficient to regard the parent company as being also liable for that abuse. There must be a presumption that such a unit exists if, at the material time, almost all of the capital of those subsidiaries was held, directly or indirectly, by the parent company. In such circumstances, the competition authority is not required to provide any additional evidence unless the parent company shows that, despite holding such a percentage of the capital of those companies, it did not have the power to define their conduct and those companies were acting independently.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union 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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The full text of the judgment is published on the CURIA website on the day of delivery.

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