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Judgment of the Court in Case C-680/20 | Unilever Italia Mkt. Operations

Abuse of a dominant position: exclusivity clauses in distribution contracts must be capable of having exclusionary effects

The competition authority is obliged to assess that actual capacity to exclude by also taking into account the evidence submitted by the undertaking in a dominant position

By decision of 31 October 2017, the Italian Competition and Markets Authority ('the AGCM') [1] found that Unilever Italia Mkt. Operations Srl ('Unilever') had abused its dominant position on the Italian market for the sale of individually packaged ice cream intended for consumption 'outside', that is to say, away from consumers' homes, at various sales outlets.

The abuse alleged against Unilever resulted from conduct materially committed not by that company, but by independent distributors of its products who had imposed exclusivity clauses on the operators of those sale outlets. In that regard, the AGCM considered, inter alia, that the practices which were the subject of its investigation had precluded, or at least limited, the possibility for competing operators to engage in competition based on the merits of their products.

In that context, it did not find that it was compulsory to analyse the economic studies produced by Unilever in order to demonstrate that the practices at issue did not have an exclusionary effect against its equally efficient competitors, on the ground that those studies were irrelevant where there were exclusivity clauses, since the use of such clauses by an undertaking in a dominant position was sufficient to establish abusive use of that position.

Consequently, the AGCM imposed a fine of EUR 60 668 580 on Unilever for abuse of its dominant position, in breach of Article 102 TFEU.

The action brought by Unilever against that decision was dismissed in its entirety by the court of first instance.

Hearing an appeal, the Consiglio di Stato (Council of State, Italy) referred questions to the Court of Justice for a preliminary ruling on the interpretation and application of EU competition law in the light of the AGCM's decision.

By its judgment, **the Court sets out the detailed rules for the implementation of the prohibition of abuse of a dominant position referred to in Article 102 TFEU in relation to a dominant undertaking whose distribution network is organised exclusively on a contractual basis and the Court clarifies, in that context, the burden of proof borne by the national competition authority.**

Findings of the Court

First of all, the Court holds that **abusive conduct by distributors forming part of the distribution network of a producer in a dominant position, such as Unilever, may be imputed to that producer** under Article 102 TFEU if

[1] Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy).

it is established that that conduct was not adopted independently by its distributors, but forms part of a policy decided unilaterally by that producer and implemented through those distributors.

In such a situation, the distributors and, consequently, the distribution network which those distributors form with the dominant undertaking must be regarded as merely an instrument of territorial implementation of the commercial policy of that undertaking and, on that basis, as being the instrument by which, as the case may be, the exclusionary practice at issue was implemented.

That applies in particular where, as in the present case, the distributors of a producer in a dominant position are required to have operators of sales outlets sign standard contracts which are supplied by that producer and contain exclusivity clauses for the benefit of its products.

Next, the Court answers the question of whether, for the purposes of the application of Article 102 TFEU, in a case such as that at issue in the main proceedings, the competent competition authority is required to establish that exclusivity clauses in distribution contracts have the effect of excluding from the market competitors that are as efficient as the undertaking in a dominant position and whether that authority is required to examine in detail the economic analyses produced by that undertaking, in particular where they are based on 'as efficient competitor test'.

In that regard, **the Court states that abuse of a dominant position may, inter alia, be established where the conduct complained of has produced exclusionary effects in respect of competitors that are as efficient as the perpetrator of that conduct** in terms of cost structure, capacity to innovate or quality, or where that conduct is based on the use of means other than those which come under the scope of 'normal' competition, that is to say, based on the merits. It is, in general, for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question, which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position.

It is true that, in order to establish that conduct is abusive, a competition authority does not necessarily have to demonstrate that that conduct actually produced anti-competitive effects. Accordingly, **a competition authority may find that there has been an infringement of Article 102 TFEU by establishing that**, during the period in which the conduct in question was implemented, **that conduct was**, in the circumstances of the case, **capable of restricting competition on the merits despite its lack of effect**. However, that demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice.

Although a competition authority may rely on guidance from economic sciences, confirmed by empirical or behavioural studies, in order to assess whether an undertaking's conduct is capable of restricting competition, other factors specific to the circumstances of the case, such as the extent of that conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the undertaking in a dominant position is, at least, for part of the demand, an inevitable partner, must also be taken into account in order to determine whether, in the light of that guidance, the conduct at issue must be regarded as having been capable of producing exclusionary effects on the market concerned.

In that context, with regard more specifically to the use of exclusivity clauses, it follows from the Court's case-law that clauses by which contracting parties undertake to purchase all or a considerable part of their requirements from an undertaking in a dominant position, even if not accompanied by rebates, constitute, by their very nature, an exploitation of a dominant position and that the same is true of the loyalty rebates granted by such an undertaking.

In the judgment in *Intel* v *Commission*, [2] however, the Court clarified that case-law by stating, in the first place, that where an undertaking in a dominant position submits, during the administrative procedure, that its conduct was not

[2] Judgment of 6 September 2017, *Intel* v *Commission*, C 413/14 P (see also Press Release 90/2017).

capable of producing the alleged exclusionary effects and puts forward evidence in support of its claims, the competition authority is required, inter alia, to assess whether there is a strategy aimed at excluding competitors that are at least as efficient as the dominant undertaking.

In the second place, the Court added that the analysis of the capacity to exclude is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from a system of rebates, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out only after an analysis of the intrinsic capacity of that practice to exclude competitors that are at least as efficient as the undertaking in a dominant position.

That clarification in the judgment in *Intel* v *Commission* in relation to rebate schemes must be understood as also being applicable to exclusivity clauses.

It follows that, first, where a competition authority suspects that an undertaking has infringed Article 102 TFEU by using such clauses, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market.

Secondly, the competition authority which initiated that procedure is also required to assess, specifically, the ability of those clauses to restrict competition where, during the administrative procedure, the undertaking which is under suspicion maintains that there are justifications for its conduct.

In any event, **the submission, in the course of the procedure, of evidence capable of demonstrating the inability to produce restrictive effects gives rise to an obligation for that competition authority to examine that evidence.**

Consequently, where the undertaking in a dominant position has produced an economic study in order to demonstrate that the practice of which it is accused is not capable of excluding competitors, the competent competition authority cannot exclude the relevance of that study without setting out the reasons why it considers that the study does not contribute to demonstrating that the practices in question were incapable of undermining effective competition on the relevant market and, consequently, without giving that undertaking the opportunity to determine the evidence which could be substituted for that study.

Since the referring court expressly referred, in its reference for a preliminary ruling, to the 'as efficient competitor test', the Court states, lastly, that such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects. Consequently, the competition authorities cannot be under a legal obligation to use that test in order to find that a practice is abusive. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results.

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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