Case C-680/20

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:

15 December 2020

Referring court:

Consiglio di Stato (Council of State, Italy)

Date of the decision to refer:

7 December 2020

Appellant:

Unilever Italia Mkt. Operations Srl

Respondent:

Autorità Garante della Concorrenza e del Mercato

Subject matter of the action in the main proceedings

Appeal against the judgment of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed the action brought by the appellant against the penalty measure imposed on it by the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority) for abuse of a dominant position in the national market for the distribution and marketing of packaged ice creams to resellers.

Subject matter and legal basis of the reference

Interpretation of Articles 101 and 102 TFEU, pursuant to Article 267 TFEU

Questions referred

(1) In cases other than those involving corporate control, what are the relevant criteria for establishing whether contractual coordination among formally autonomous and independent economic operators results in the creation of a single

economic entity for the purposes of Articles 101 and 102 TFEU? Specifically, can the existence of a certain level of interference in the commercial decisions of another undertaking, which is typical of cooperative commercial relationships between producers and distribution intermediaries, be deemed sufficient reason to classify those undertakings as part of the same economic unit? Is it necessary for a 'hierarchical' link to exist between the two undertakings, identified by the existence of a contract under which several autonomous undertakings 'submit' to management and coordination by one of their number, thus making it necessary for the Authority to prove that there is a systemic and consistent range of guidelines likely to influence the undertaking's management decisions, namely strategic and operational decisions of a financial, industrial and commercial nature?

(2) In assessing whether there has been abuse of a dominant position implemented by means of exclusivity clauses, must Article 102 TFEU be interpreted as meaning that the competition authority has an obligation to verify whether such clauses have the effect of excluding equally efficient competitors from the market, and to examine specifically the economic analyses produced by the party concerning the actual ability of the alleged conduct to exclude equally efficient competitors from the market? In the case of exclusionary exclusivity clauses or conduct characterised by a large number of abusive practices (loyalty-inducing rebates and exclusivity clauses), does the Authority have a legal obligation to base its allegation of a competition offence on the equally efficient competitor criterion?

Provisions of EU law cited

Articles 101 and 102 TFEU

Provisions of national law cited

Article 3 of legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato (Law No 287 of 10 October 1990 – Provisions for the protection of competition and the market): 'Abuse of a dominant position within the national market or a substantial part of it by one or more undertaking shall be prohibited …'

Brief outline of the facts and the main proceedings

1 Unilever Italia Mkt. Operations Srl ('Unilever') is an undertaking active in the development and sale of fast-moving consumer goods. It covers a range of well-known brands, with those in the ice cream sector including Algida and Carte d'Or. La Bomba snc is a company producing ice lollies that is active in certain regions in central Italy.

2 In a complaint submitted to the Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority) ('the Competition Authority'), La Bomba alleges that, over the last few years, Unilever ordered the operators of beach resorts and bars operating as its resellers not to sell ice lollies of the La Bomba brand alongside its own products but, rather, in separate refrigerated counters, threatening to no longer apply the agreed rebates or to terminate the sales agreements and also imposing penalty payments.

3 The Competition Authority held that Unilever had adopted a strategy that excluded competition on merit. It therefore imposed a financial penalty and ordered that the conduct considered to be unlawful cease, on the basis of the following conclusions: (a) Unilever holds a dominant position in the relevant market; (b) Unilever's 150 local distributors ('the concessionaires') are not independent undertakings and their commercial practices are attributable to Unilever; and (c) the actions by Unilever and its concessionaires in the market, consisting in particular in the imposition of product exclusivity obligations and the application of rebates and payments contingent upon the achievement of sales targets, represent an abuse of a dominant position under Article 102 TFEU.

4 Unilever brought an action against that measure before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio). An appeal against the decision given by that court dismissing that action is pending before the referring court, the Consiglio di Stato (Council of State, Italy).

The essential arguments of the appellant in the main proceedings

5 The appellant alleges, in particular, methodological errors in the definition of the relevant market (deemed to include bulk ice cream as a product that could be substituted for packaged ice cream) and of the geographical market (not deemed to include the entire country but, rather, only the local market) and a breach of several aspects of Article 102 TFEU. It claims that: (a) Unilever does not have a dominant position; (b) its local concessionaires are responsible, each within its own area, for the sale of Unilever products, and the effects of their conduct cannot therefore be attributed to Unilever; and (c) the Competition Authority did not determine the extent to which the conduct attributed to Unilever was actually able to exclude equally efficient competitors from the market (the exclusivity agreements between Unilever and the resellers cover just 0.8% of the total number of sales outlets active in Italy, compared to 8% covered by the exclusivity agreements concluded by the concessionaires with their customers) and did not weigh the allegedly anti-competitive effects against the pro-competitive effects represented by the increased distribution of products and the reduced prices for operators and consumers.

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

6 In this case, the abusive conduct alleged by the Competition Authority, despite having been actually implemented not by Unilever but by its concessionaires, has been attributed solely to Unilever on the basis that Unilever and its concessionaires can be classified as a single economic entity. Notwithstanding the fact that it is, in fact, the responsibility of the national courts to determine the nature of the contractual relationship between Unilever and its concessionaires, there is a legal need to clarify the notions of 'undertaking' and 'economic agent' in competition law and the criteria for subjective attribution of the offence. In particular, it is necessary to clarify in what circumstances coordination among formally autonomous and independent economic operators is such as to represent a single decision-making centre, with the consequence that the conduct of one could also be attributed to the other.

7 The referring court first cites the settled case-law of the Court of Justice in relation to the identification of a single decision-making centre with respect to the phenomenon of groups of undertakings, focusing on the need to prove specifically that the decisive influence of the parent company was actually exercised over its subsidiary (judgments in *Areva and Others*, Joined Cases C-247/11 P and C-253/11 P; *Schindler Holding Ltd*, Case C-501/11; *Dow Chemical*, Case C-179/12 P). It then indicates that, in Italian commercial law, in situations of de facto or de jure shareholder control, the party responsible for the management and coordination of companies is presumed by law, whereas if that responsibility is allocated on the basis of a contract concluded with the companies concerned or clauses in their articles of association, it must be proven (codice civile (Italian Civil Code), Article 2497-sexies and -septies, Article 2359).

8 With reference to cases involving contractual coordination, such as the case at issue in the main proceedings, the referring court notes that all cooperative commercial relationships, including those – of relevance here – underlying the sales concession, are characterised by a certain degree of interference by the principal in the procedures used by the intermediary to perform the service. However, these do not necessarily result in management activities being carried out, and could in fact merely regulate a particular form of division of labour between large undertakings and small and medium-sized enterprises. Independence does not have to be absolute, for example when the concessionaire encounters constraints in certain instructions received but this does not call into question the contractor's commercial and decision-making independence and direct responsibility for the costs and risks associated with its specific activities. Indeed, in the classical hypothesis, a sales concessionaire does not merely bring together the parties concluding a sale, as would an agent, who facilitates the conclusion of future contracts between customer and third parties. Rather, the sales concessionaire itself buys from the principal and resells to third parties, having the obligation to promote the goods and collecting the difference between the purchase price and the resale price.

9 On that basis, by its first question, the referring court asks, in essence, what structural link must exist, in abstract, between the producer and its intermediaries for those parties to be classified as a single economic entity under competition law. Is normal interference in those commercial relationships sufficient or is there a need for real control of one or more undertakings by another, demonstrated by formal documents (such as decisions or contractual agreements) or by simple guidelines (instructions, behavioural rules, service orders), which are likely to significantly influence the management decisions made by the commercial intermediary?

That point is all the more relevant because the financial penalty in question is also a 'criminal' sanction (being 'punitive' because of its total amount) for the purpose of Article 7 ECHR and may therefore only be imposed in the cases and for the periods stipulated by law.

10 The second doubt as to interpretation, raised by the referring court in the second question, relates to the objective aspect of the offence and, specifically, to the standard of proof incumbent on the competition authorities in order to determine the existence of exclusionary abusive conduct. As in Case C-377/20, currently pending before the Court of Justice, the Council of State is asking whether – despite the fact that there is behaviour that, in abstract terms, is liable to produce restrictive effects – the court can nonetheless admit evidence from the undertaking being sanctioned that there was, in fact no restrictive effect.

11 In order to establish the importance to be attached to the current or potential impact on competition in the assessment under Article 102 TFEU, the referring court makes particular reference to the *Intel* judgment (Case C-413/14 P). According to the Commission, Intel, leader in the computer processor market, operated a system of rebates and payments in order to exclusively supply computer manufacturers and exclude a competitor from the market for those goods. Considering those behaviours to be intrinsically anti-competitive, the General Court asserted that, in determining whether the conduct was abusive, there was no need to assess the current or potential impact of that conduct on competition in the light of all of the circumstances of the case. Conversely, the Court of Justice reversed that position and concluded that it was necessary to take into consideration the arguments raised by Intel aimed at highlighting certain alleged errors made by the Commission in analysing whether the system of loyalty-inducing rebates in question was actually able to foreclose the market to competitors that were at least equally efficient ('the as-efficient-competitor (AEC) test').

12 Invoking the abovementioned *Intel* judgment, the appellant alleges that the Competition Authority did not carry out any analysis of the actual effects of Unilever's conduct (and thus of the absence of exclusionary effects in respect of its equally efficient competitors) and of the corresponding pro-competitive effects (demonstrated by the study commissioned by Unilever from a respected economic consultancy firm). The Competition Authority asserts, however, that the principles

stated in the *Intel* judgment do not apply to this case, since they apply only to abuses committed using loyalty-inducing rebates. The Court of Justice merely pointed out a 'formal error' made by the General Court, which did not rule on the allegations made by the applicant in relation to the AEC test. In any case, no test would be capable of analysing a large number of abusive practices at the same time.

13 On that basis, the referring court would like to know whether – as the appellant asserts – the principles laid down in the *Intel* judgment can be extended to cover exclusivity clauses or conduct involving multiple abusive practices and, if appropriate, in what cases or under what conditions the relevance of the AEC test or of the studies and in-depth analyses produced by the undertaking can be discounted. In particular, it would like to know whether an assessment by the Competition Authority that considers irrelevant the AEC test and the studies serving the same function in cases of conduct such as that in this case is lawful in the light of the *Intel* judgment.