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Distribution Networks, Exclusivity Clauses and Abuse of Dominant Position: Recent Guidance From the CJEU in *Unilever v AGCM*

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Can the actions of independent distributors within a producer's distribution network be imputed to that producer?

How must competition authorities address the potential anti-competitive effects of exclusivity clauses in distribution contracts? What is the status of the "as-efficient competitor" test in EU competition law? The Court of Justice of the European Union (CJEU or "the court") has recently provided important clarifications on these questions of interpretation and application of EU competition law on abuse of dominant position, namely Article 102 of the Treaty on the Functioning of the European Union (TFEU).

On 19 January 2023, the CJEU published its ruling in Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* (the "judgment"), which arose from a preliminary reference from the Italian Consiglio di Stato. That court had been tasked with addressing Unilever's appeal against a fine imposed on it by the Italian competition authority, the Autorità Garante della Concorrenze e del Mercato (AGCM), for having abused its dominant position on the Italian market for the distribution of individually packaged ice creams in breach of Article 102 TFEU.

The €60 million fine in question was imposed by the AGCM on 31 October 2017 (the "AGCM's decision"), on the basis that Unilever's distributors imposed exclusivity clauses in their contracts with operators of sales outlets, requiring them to source their entire supply of individually packaged ice creams from Unilever. After Unilever's first-instance appeal before the Tribunale Amministrativo Regionale del Lazio was rejected in its entirety, Unilever appealed that judgment before the Consiglio di Stato. To address Unilever's appeal, that court considered it necessary to ask the CJEU, in essence, the following two questions:

- Under which circumstances can the actions of formally autonomous and independent distributors forming part of the distribution network of a dominant producer be imputed to that producer for the purposes of Article 102 TFEU?
- Where distribution contracts include exclusivity clauses, must the competition authority determine that they have the effect of excluding from the market competitors that are as efficient as the dominant producer to find a breach of Article 102 TFEU? In any event, must the competition authority examine in detail the economic analyses produced by the dominant producer to address that "as-efficient competitor" test?

Actions of Distributors Within a Producer's Distribution Network

During the proceedings that led to the AGCM's decision, Unilever had argued that the actions of its distributors could not be imputed to it, as Unilever and its distributors did not constitute a single economic entity and Unilever's distributors could not be considered to be acting as its agents. The AGCM had dismissed those objections on the basis that Unilever and its distributors' behaviour on the market were unified, since Unilever's distributors acted exclusively for it, responded to its instructions and were controlled in their distribution activities with the common objective of maximising the sale of Unilever products.

Addressing this issue, the CJEU recalled that decisions taken in the context of a distribution agreement, insofar as they involve tacit acceptance by both producer and its distributors, do not, in principle, constitute unilateral conduct, but, rather, coordination between separate entities subject to EU competition law on anti-competitive agreements. However, that starting point does not exclude that a dominant producer can be held responsible for its distributors' conduct. In fact, the court noted that:

- The obligation of a dominant undertaking not to abuse its position on the market extends to conduct implemented by autonomous intermediaries which are required to carry out its instructions
- To that effect, the autonomous intermediaries' conduct is imputable to the dominant undertaking if it was adopted according to its specific instructions and as part of a policy which it had unilaterally decided
- In that case, the dominant undertaking's unilateral decision to adopt the policy makes it the perpetrator of the abuse and its intermediaries, a mere instrument of territorial implementation of that policy

Further, the CJEU added that this would be the case where a dominant producer drafts a standard contract including exclusivity clauses for the benefit of its products, which its distributors will require operators of sales outlets to sign. Applied to the case at hand, these considerations mean that the AGCM's conclusion on the imputability of the exclusivity clauses imposed by its distributors to Unilever was correct as a matter of interpretation of Article 102 TFEU. Indeed, the AGCM's decision on this point relied on Unilever's "significant interference in the decision-making sphere of its distributors", which falls squarely within the court's reasoning.

Distribution Contracts, Exclusivity Clauses and Exclusionary Effects

The AGCM's decision explains that Unilever had argued that the economic analysis conducted by the AGCM did not comply with the CJEU's judgment in Case C-413/14P *Intel v Commission* dated 6 September 2017 (the "*Intel* judgment"). According to Unilever, the *Intel* judgment required the AGCM, in circumstances in which Unilever had adduced evidence that its conduct could not produce exclusionary effects on the market, to consider various factors, including "the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market". Unilever's conclusion was that the economic analysis conducted by the AGCM did not demonstrate the ability of Unilever's conduct to exclude an as-efficient competitor from the market.

The AGCM had dismissed that objection on the basis that the conduct in question in the *Intel* judgment (i.e. exclusivity rebates) was different to that of Unilever in the present case. Furthermore, it recalled that, in that judgment, the court had held that the imposition of exclusivity ties constituted an abuse of a dominant position without the need to demonstrate its exclusionary effects on the market through a specific quantitative test. In any event, according to the AGCM, the multifaceted nature of Unilever's conduct (including exclusivity clauses, as well as rebates and commissions conditional on sales of Unilever products) meant that its exclusionary effects could not properly be appreciated through a quantitative analysis. Therefore, it concluded that the factual circumstances and the economic and legal contexts of Unilever's conduct demonstrated an exclusionary strategy on its part.

The CJEU noted that the competition authority must demonstrate that the conduct in question constitutes an abuse of the undertaking's dominant position on the market, considering all of the circumstances surrounding the conduct, "which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position". However, it also recalled that, to do so, the competition authority must not necessarily prove that the conduct actually had anti-competitive effects on the market, so that it may find that Article 102 TFEU has been breached if "the conduct had, in the circumstances of the case, the ability to restrict competition on the merits, despite its lack of effect". The court added that:

- The determination must rely on "tangible evidence" showing, "beyond mere hypothesis", that the conduct can actually result in anti-competitive effects
- Conduct cannot constitute abuse of a dominant position if it has not gone beyond the planning stage and the competition authority cannot rely on anti-competitive effects "which did not, at the time [the conduct took place], appear likely to arise"
- The competition authority may rely on economic analysis for that determination, which, however, cannot be sufficient in itself and must be supported by "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"

Turning to the relevance of the *Intel* judgment, the CJEU noted that its reasoning in that case regarding rebate schemes was equally applicable to exclusivity clauses. In circumstances in which a dominant undertaking argues that the inclusion of exclusivity clauses cannot have exclusionary effects on the market, the competition authority must determine whether there exists a strategy to exclude competitors that are as efficient as the dominant undertaking from that market. Further, the ability of exclusivity clauses to exclude competitors from the market is not automatic, and the assessment of their exclusionary effects may be relevant in determining whether they may be objectively justified because of advantages in terms of efficiency.

In Unilever's case, this reasoning means that the AGCM was entitled to approach Unilever's evidence on the lack of exclusionary effects of its conduct on the market in the way that it did, and to find an abuse of a dominant position by Unilever.

The "As-efficient Competitor" Test

In answering the Consiglio di Stato's second question, the CJEU also clarified an important point in relation to the so-called "as-efficient competitor" test. During the proceedings that led to the AGCM's decision, the AGCM had dismissed Unilever's economic analysis regarding the inability of its conduct to exclude an as-efficient competitor from the market, in part on the basis that CJEU precedents did not require it to use the "as-efficient competitor" test to demonstrate the exclusionary potential of Unilever's conduct.

The court clarified that competition authorities are not legally obliged to employ the "as-efficient competitor test" in determining whether conduct constitutes an abuse of an undertaking's dominant position on the market. In fact, the "as-efficient competitor" test may not be suitable for considering certain non-pricing practices, as it only takes into account price competition or situations where there are barriers to entry on the market.

However, the "as-efficient competitor" test will often be relevant to an assessment of abuse under Article 102 TFEU, so that, where an undertaking provides a competition authority with an economic analysis addressing it, the authority in question must at least examine its probative value. Otherwise, the "as-efficient competitor" test is optional for the competition authority.

Conclusion

The judgment provides clarity on the imputability of distributors' actions to a producer and the treatment of exclusivity clauses in the context of the prohibition on the abuse of dominant position under Article 102 TFEU. In doing so, the CJEU also expressed some important considerations in relation to the "as-efficient competitor" test and the circumstances in which it must be taken into account by competition authorities.

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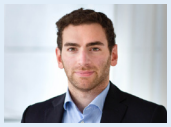

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