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Strelia Competition Newsflash

February 2023

The Unilever Court Case: national competition authorities can no longer simply disregard evidence submitted by parties allowed to be heard

1. Introduction

On 19 January 2023, the Court of Justice of the European Union delivered a groundbreaking ruling stating that national competition authorities (hereafter, "NCAs") can no longer disregard the "as efficient competitor test" (hereafter, "AEC test") when the undertaking under suspicion puts forward evidence based on this test to dispute the actual ability of an exclusionary practice (in this case, an exclusivity clause) to restrict competition.

This Newsflash highlights the most important aspects of the preliminary ruling and discusses its key consequences. Before getting into the details of the ruling, the facts leading to the case will be briefly explained.

2. Background

The dispute concerns Unilever, which produces and sells packaged ice cream, sold through the brands Algida and Carte d'Or. In Italy, individually packaged ice cream intended for consumption "away from consumers' homes", *i.e.*, in cafés, sport clubs, bars or other leisure sites, is distributed through a network of 150 distributors. Following a complaint by a competitor for abuse of dominant position by Unilever on the market for individually packaged ice cream, the Italian Competition and Markets Authority ("the AGCM") opened an investigation.

The practice under investigation concerned the imposition of exclusivity clauses on sales outlet operators by Unilever's distributors. Those clauses obliged them to obtain supplies exclusively from Unilever for their entire ice cream requirements in return for a wide range of rebates and commission fees. Those rebates and commission fees were designed to give the purchaser an incentive to obtain its supplies exclusively from Unilever and not from its competitors.

During its investigation, the AGCM did not consider the economic studies produced by Unilever to demonstrate that the practices under investigation did not have exclusionary effects toward its equally efficient competitors. The AGCM alleged that exclusivity clauses are *per se* abuses of dominance when they are imposed by an undertaking in a dominant position and therefore no analysis of the effects was necessary.

On 31 October 2017, the AGCM found that Unilever had abused its dominant position on the Italian market for the sale of individually packaged ice creams intended for consumption away from consumers' homes and therefore infringed Article 102 TFEU. Consequently, a fine of 60 668 580 euro was imposed on Unilever.

Unilever appealed the AGCM's decision to the *Tribunale Amministrativo Regionale per il Lazio* (Regional Administrative Court, Lazio, Italy), which dismissed the appeal in its entirety. Unilever appealed that judgement to the *Consiglio di Stato* (Council of State, Italy).

In support of that appeal, Unilever submitted that the *Tribunale Amministrativo Regionale* (Regional Administrative Court) should have found that there were defects allegedly vitiating the AGCM's decision of 31 October 2017 as regards, first, the imputability to Unilever of the conduct of its distributors and, secondly, the effects of the conduct at issue which, in Unilever's view, were not capable of distorting competition.[1]

In order to respond to those complaints, the *Consiglio di Stato* (Council of State) referred two questions to the Court of Justice for a preliminary ruling on the interpretation and application of EU law.

[1] Preliminary ruling of 19 January 2023, Unilever Italia v AGMC, C-680/20, §14.

3. The Court's findings

First, the Court of Justice found that the abusive conduct by Unilever's distributors could be imputed to Unilever if the conduct was not adopted independently by the distributors but formed part of a policy decided unilaterally by Unilever and implemented through those distributors. This was the answer of the Court of Justice to the first question. It is important to note that, in its answer, the Court of Justice limited itself to the application of Article 102 TFEU. It did not consider the part of the question related to the criteria to consider the distributors as forming the same entity as Unilever for the purpose of applying Article 101 TFEU.

Secondly, the Court of Justice investigated whether the AGCM should have examined the economic analysis produced by Unilever concerning the actual ability of the exclusivity clauses to exclude equally efficient competitors from the market.

The Court of Justice stated that abuse of dominant position may be established (i) where the complained conduct has exclusionary effects *vis-à-vis* competitors who are as efficient as the perpetrator of that conduct in terms of cost structure, innovativeness, quality, or (ii) where that conduct is based on the use of means other than those covered by "normal" competition, *i.e.*, competition on the merits.

Competition authorities must prove the abusive nature of the conduct taking into consideration all the relevant factual circumstances surrounding the conduct in question, including those emerging from the evidence put forward by the undertaking in a dominant position in its defense. They do not have to prove that the conduct actually produced anti-competitive effects. It suffices that they establish that the conduct had the actual ability to restrict competition on the merits, despite its lack of effects.

Nevertheless, with regard to exclusivity clauses, it follows from the previous case-law that they constitute by their very nature an exploitation of a dominant position (judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 89). However, the Court of Justice held now that, in this respect, the two clarifications in the judgement *Intel v Commission* (C-413/14) about rebate practices also applied to exclusivity clauses.

The Court of Justice decided first that when a competition authority assumes that an undertaking infringed Article 102 TFEU by using exclusivity clauses, and the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that those clauses are not capable to exclude equally efficient competitors from the market, that authority must assure, 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, when the suspected undertaking maintains during the administrative procedure that there are justifications for its conduct (*i.e.*, objective justifications or counterbalancing efficiencies) without formally arguing that its conduct was incapable of restricting competition, the competition authority is also obliged to assess the ability of those clauses to restrict competition.

When evidence capable of demonstrating the inability to produce restrictive effects is submitted during the administrative procedure, the NCA is obliged to examine that evidence in order to respect the right to be heard protected under Article 41 of the Charter of the Fundamental rights of the EU.

Consequently, competition authorities must take into account the economic study produced by undertakings in a dominant position in order to prove that the practice of which it is accused was not capable of excluding competitors when they assess exclusivity clauses. The competent competition authority cannot exclude the relevance of that study without stating the reasons for such an exclusion and, consequently, without giving that undertaking the opportunity to determine the evidence which could be substituted for that study.

The role of the "as efficient competitor test" in such an assessment is clarified. The Court of Justice states that the test is only one of a number of methods to assess whether a practice is capable of producing exclusionary effects. The Court of Justice determined that this type of test aims at *"assessing the ability of a practice to produce anti-competitive exclusionary effects by reference to the ability of a hypothetical competitor of the undertaking in a dominant position, which is as efficient as the dominant undertaking in terms of cost structure, to offer customers a rate which is sufficiently advantageous to encourage them to switch supplier, despite the disadvantages caused, without that causing that competitor to incur losses"* (*Unilever Italia v AGMC,* C-680/20, §56). As this test may be inappropriate in the case of non-pricing practices, significant barriers or the use of resources other than those governing competition on the merits, a competition authority has no legal obligation to apply that test. However, *"in the case of exclusivity clauses, such a test may theoretically serve to determine whether a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay in order to switch supplier, or the losses which*

they would suffer after such a change following the withdrawal of previously agreed discounts (see, by analogy, judgment of 25 March 2021, Slovak Telekom v Commission, C-165/19 P, EU:C:2021:239, paragraph 110)" (*Unilever Italia v AGMC,* C-680/20, §59).

4. Key consequences

In its preliminary ruling, the Court of Justice confirmed that *Intel v Commission* does not only apply to rebate schemes but also to exclusivity clauses. Consequently, exclusivity clauses imposed by a dominant undertaking can no longer be established without examining the AEC test where an undertaking in a dominant position provided a competition authority with an analysis based on this test.

Moreover, this clarification with respect to the application of the AEC test does not only concern exclusivity clauses but also the duty for all EU competition authorities (*i.e.*, including all NCAs), when applying Article 102 TFEU, to examine such a test, during the administrative procedure, where the suspected company provided an analysis based on this test.

Indeed, in the *Intel* case, the Court of Justice heavily relied on the fact that the Commission carried out, on its own, an AEC test in the administrative procedure and set out the results of this test in its decision to conclude that the practice of the dominant company was capable of having foreclosure effects on equally efficient competitors. Based on the significant role played by this test during the administrative procedure, the Court of Justice concluded that the General Court was required to examine all the arguments of the dominant companies concerning this test during the judicial review of the Commission's decision.

In the Unilever case, the question related to the duty of a NCA to examine the AEC test during an administrative procedure where the suspected company provided, as a defense argument, an analysis based on this test. In this respect, it is important to note that the competent competition authority was under no obligation to carry out such a test. The AEC test is indeed "optional" as recalled by the Court of Justice in its answer to the question and, contrary to the EU Commission, the NCAs are not subject to the "Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings" (OJ 2009, C 45). This Guidance "requires" the Commission to assess exclusionary practices in light of the AEC test, and the corresponding obligation to apply this Guidance under the principle of legitimate expectations. Therefore, the Court of Justice relied on an EU fundamental right to require NCAs to examine the AEC test where it is brought as an argument by the suspected company: the right to be heard. As this fundamental right is wider than the rights of defence, the duty of the NCA does not only apply to evidence submitted by the suspected company, but also to evidence submitted by third parties (such as a complaining party).

This clarification is very welcome and provides a clear message that NCAs should comply with the right to be heard (Article 41 of the Charter). Given the significant asymmetry of powers which exists between NCAs and the suspected companies (or any other third party such as a complaining party), it is crucial that the competent authorities are required to examine carefully all the arguments brought to them (even though they can be highly complex). Otherwise, there is a significant risk that competition authorities would have a complete freedom to disregard any evidence that would not fit into the decision they intend to take.

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