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Dominant firms cannot use their own pre-existing data when competing in a newly liberalised (or adjacent) market?

Carmen Puscas (Clifford Chance LLP) · Tuesday, May 17th, 2022

On 12 May 2022, the European Court of Justice delivered its preliminary ruling in response to a number of questions referred to it by an Italian court tasked to assess whether the use of customer data (legitimately collected by the ENEL group during a legal monopoly position) to target offers to those same customers once the Italian energy market was liberalised amounted to an abuse of a dominant position contrary to Article 102 TFEU (Case C-377/20). This comes a few months after Advocate General ("**AG**") Rantos delivered an extensive and very thorough Opinion on the case in December 2021, on which you can read my comments here.

The Court of Justice largely follows AG Rantos' Opinion, though there are a number of nuances in how the Court sets out its steer for the referring court. The case provides a useful restatement of Article 102 TFEU case law, concluding that the use of data by a dominant firm may be considered abusive where that use (i) is capable of producing an anticompetitive exclusionary effect and (ii) is based on the use of means other than competition on the merits. The Court recalls that a dominant firm may nonetheless escape an Article 102 prohibition by putting forward arguments that establish that the practice in question was either objectively justified (and the conduct was proportionate to the relevant justification), or counterbalanced or even outweighed by pro-competitive effects. Not much new here, but the real discussion for our purposes turns on how the Court seeks to square off dominant firms' data use with the concept of competition on the merits.

During market liberalisation (or when competing in an adjacent market), a dominant firm must refrain from using data to which it has access by virtue of its dominant position, otherwise its conduct falls outside competition on the merits

In paragraph 92, the Court of Justice states that where an undertaking loses its legal monopoly, it must refrain, throughout the market liberalisation process, from using means or resources (including data) that were at its disposal during its monopoly and which – as such – are not available to competitors.

Helpfully, the Court of Justice did not lean too heavily on references to "normal" competition. As I had commented in relation to the Opinion, while AG Rantos commented that it seems entirely "normal" that a firm would seek to retain customers (paragraphs 65 ff), the Court took the (better) view that the frame of reference has less to do with the end goal of retaining customers (here,

considered legitimate), and more to do with the means used to achieve that end (see paragraphs 47, 65, 68, 75, which refer to “resources or means” that govern normal competition).

Here, as was the case in the Opinion, although not explicitly considered by the Court, these principles arguably must also apply where data is used to leverage a dominant firm’s position into an adjacent market. This is because the Court agrees that how the firm came to enjoy a dominant position, i.e., whether as a result of a legal monopoly or otherwise, does not change the fact that they need to avoid abusive conduct is the result of the special responsibility that encumbers dominant firms (see paragraph 74).

Where does data replicability fit in?

In his Opinion, AG Rantos’ suggested that data replicability is the appropriate test for determining whether a dominant firm’s use of data is abusive under Article 102 TFEU because it mirrors the underlying logic of the as-efficient-competitor test (which has so far been relevant in the context of pricing abuses only). The Court nods to that line of argument but ultimately takes a different direction. Although the Court says that this question of whether a hypothetical, as-efficient, competitor can replicate the conduct at issue is found in the case law for both pricing and non-pricing abuses, in the case of non-pricing abuses, the Court seems to suggest that replicability goes more to the question of objective justification (see paragraph 86).

The Court says that when considering whether a hypothetical as-efficient competitor would have been able to replicate the conduct at issue in this case, the answer must be a resounding “no”. This is because the conduct concerns the exploitation of means or resources that were inherent to the dominant firm. It’s not so much that the data was only known to the dominant firm (and that no third parties on the market were selling similar data sets), but that no competing company could have a structure capable of providing the same volume of contact data for customers of the protected market (see paragraph 101).

This “nuance” is significant because, in essence, this flips the frame of reference that AG Rantos had suggested. In other words, a competition authority does not bear the burden of assessing the importance of the relevant data to the competitive process and the extent to which competitors can make use of any available alternative data sources in a way that enables them to compete on an equal footing with the dominant firm. Instead, a dominant firm could seek to mount a justification for its conduct that points to competitors’ ability to replicate data.

But what if the dominant firm gives competitors access to (a subset of) that data?

In this case, the ENEL Group sought customers’ consent to compile customer data into lists (consistent with GDPR rules), and while one of the ENEL Group subsidiaries purchased the entire list for the purpose of targeting offers, a list containing a subset of customer data was made available to competitors for purchase.

The Court of Justice notes that according to the information provided by the referring court, to avoid the transfer of competitive advantage, sectoral regulations only authorised the transfer of commercially sensitive information between companies selling on the protected market and those

active on the free market only if the information was provided in a non-discriminatory manner. Here, the Court of Justice notes that the materials before it were insufficient for it to comment on the suggestion that customer consent may have been obtained in a discriminatory and non-transparent manner that sought to make it more likely that customers would consent to their contact details being used within the ENEL Group, but not by competitors. However, the Court states that if it is established that such customer consent was sought in a discriminatory way, then that would fall outside competition on the merits and thus (still) be capable of constituting an exclusionary abuse.

The Court notes that part of the special responsibility placed on a dominant firm when it comes to seeking customer consent in the context of anticipating competitors' requests for access to such data requires it to avoid creating a bias when seeking that consent. If an abuse were found because of a bias in the way that customer consent was obtained, this in itself would support a finding of abuse because such conduct would be capable of producing an anticompetitive exclusionary effect. The Court says that whether competitors had access to similar data that they could have purchased is entirely irrelevant (see paragraph 102).

Final thoughts

Dominant firms' access to, and use of data, have been in the public eye for some time now. This seminal preliminary ruling is sure to be a key reference point for understanding how the Court of Justice views data use in the context of Article 102 TFEU. Although the ruling is short, it is dense and is likely to be the subject of further need for clarification, rather than the be-all and end-all on this question.

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