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EU Court of Justice Confirms That the Intel Effects-Based Approach Applies to Exclusive Dealing and Clarifies the Narrow Circumstances Under Which The Conduct of Distributors Can Engage The Liability of a Dominant Company

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On 19 January 2023, the EU Court of Justice, answering questions from the Italian Council of State, confirmed that the Intel effects-based approach applies also to exclusive dealing practices and held that competition authorities must duly examine economic evidence produced by dominant undertakings. The court also held that, under certain narrow circumstances, conduct implemented by its independent distributors may be imputed to a dominant supplier.

The request for a preliminary ruling

On 15 December 2020, the Italian Council of State referred two questions to the EU Court of Justice in the matter of *Unilever Italia v. Autorità Garante della Concorrenza e dei Mercati*. The questions concerned a decision by the Italian Competition Authority ("ICA") to impose a fine of approximately EUR 60 million on Unilever, for allegedly abusing its dominant position in the market for the distribution of individually packaged ice cream to certain sales outlets, such as beach resorts and bars. According to the ICA's decision, Unilever included in its contracts with outlet operators exclusivity clauses which obliged them to obtain supplies exclusively from Unilever for their entire individually packaged ice cream requirements. The distributors also obtained a range of rebates and commissions conditional on generating a specific turnover or sales of Unilever products.

Controversially, the ICA imputed the alleged abusive conduct solely to Unilever (albeit it being carried out by the distributors), finding that in light of existing contractual links, Unilever and its distributors constituted the same "*economic unit*". Unilever appealed to the Regional Administrative Court for Latium arguing that: (i) the conduct in question could not be imputed to Unilever, as it was carried out by distributors with no capital links to Unilever; and (ii) the conduct in question was not capable of distorting competition. Unilever had produced economic analyses to that effect, which the ICA dismissed, stating that it was not required to take such evidence into account. Since the first instance court sided with the ICA, Unilever lodged an appeal before the Italian Council of State, Italy's Supreme Administrative Court, which then referred to the EU Court of Justice two questions: (i) whether the "*single economic unit*" concept was appropriate

here; and (ii) whether the competition authority has an obligation to take into account economic analyses produced by the dominant company concerning the ability of the alleged conduct to exclude as efficient competitors from the market and, in particular, whether an "*as efficient competitor*" test had to be carried out.

Imputation of liability for the conduct of distributors under Article 102 TFEU

The first question asked by the Council of State is whether the actions of independent distributors may be imputed to their (dominant) supplier and, if so, under which circumstances. More specifically, the Council of State sought to understand whether the mere existence of a contractual coordination between a supplier and its distributors is sufficient or whether a competition authority must also demonstrate the supplier's ability to exert decisive influence over the distributors' commercial, financial and industrial decisions, going beyond the usual relationship between such two operators.

The EU Court of Justice in effect decided to ignore the referring court's formulation of the question and avoided approaching the question from the angle of the "*single economic unit*". Instead, it adopted a much more direct approach. It held that nothing precludes the possibility of finding a dominant company liable under Article 102 TFEU for the conduct of its independent distributors, if certain circumstances are present, in particular, "*if it transpires that [the conduct] was adopted in accordance with the specific instructions given by that undertaking and therefore as part of the implementation of a policy that was decided unilaterally […] and with which the relevant distributors were required to comply*" (Case C-680/20 Unilever Italia Mkt. Operations, para 29).

The Court recognised that where such conduct is decided unilaterally, effectively without the involvement of the distributors, the dominant undertaking may be regarded as the perpetrator, and thus is solely liable for it.

"*In such a situation, the distributors and, consequently, the distribution network which they form with that undertaking, must be regarded as merely an instrument of territorial implementation of the commercial policy of that undertaking […] that is the case, in particular, where such conduct takes the form of standard contracts, drawn up entirely by a producer in a dominant position and containing exclusivity clauses for the benefit of its products which the distributors of that producer are required to have signed by the operators of sales outlets without being able to amend them, unless that producer expressly agrees. In such circumstances, that producer cannot reasonably be unaware that, in view of the legal and economic links which it has with those distributors, the latter will implement its instructions and, thereby, its commercial policy*" (paras 30-31).

In such circumstances, the Court did not deem it necessary to establish the existence of hierarchical links between the supplier and the producer (for example, by means of "*systemic and consistent range of guidelines given to those distributors likely to influence the management decisions*") to hold the dominant company liable for the conduct of its distributors (para 32).

Duty of competition authorities to take into account economic arguments showing no likelihood of foreclosure

The second question asked by the Council of State is whether the competition authority has an obligation to demonstrate that an exclusive dealing practice is likely to exclude as-efficient competitors from the market and whether that authority is required to examine in detail economic analyses produced by the dominant undertaking during the administrative procedure, suggesting that the practice in question is incapable of producing such exclusionary effects.

First, the EU Court of Justice reiterated 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*". What counts is whether "*the conduct in question […] had, in the circumstances of the case, the ability to restrict competition on the merits, despite its lack of effect*" (para 41).

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*" (para 42).

Second, the court considered whether the *Intel* effects-based approach applies only to rebates or also to exclusive dealing. It emphatically answered this question in the positive; the *Intel* case law clearly applies to exclusive dealing. Beyond the clear text of *Intel*, which included such a suggestion, the Court also explained that "*although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic*" (para 51).

A particular point was whether the "*as-efficient competitor test*" ("AEC test") had a role to play in exclusive dealing cases, apart from rebates. In the case at hand, the ICA had rejected out of hand certain economic studies prepared by Unilever which were inspired by the AEC test. In particular, Unilever had relied on an "*efficient breach of contract*" analysis done by their economists, which sought to attribute a value to each contract and hence check whether the competitors could match that value.

The EU Court of Justice was quite susceptible to such economic evidence, both as a matter of substance and as a matter of the right to be heard and due process. It relied on the *Servizio Elettrico Nazionale* judgment and unequivocally confirmed that "*evidence capable of demonstrating the inability to produce restrictive effects gives rise to an obligation for the competition authority to examine that evidence*" (paras 54-55).

As far as the AEC test is specifically concerned, the Court held that "*competition authorities cannot be under a legal obligation to use the 'as efficient competitor test' in order to find that a practice is abusive*" (paras 57-58).

However, in the court's words: "*A test of that type may prove useful since the consequences of the practice in question can be quantified. In particular, 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* […].

Consequently, where an undertaking in a dominant position suspected of abuse provides a

competition authority with an analysis based on an 'as efficient competitor test', that authority cannot disregard that evidence without even examining its probative value" (paras 59 and 60).

Key takeaways

The actions of distributors forming part of the distribution network of a dominant producer may be imputed to that producer if it is established that those actions were not adopted independently by those distributors, but form part of a policy that is decided unilaterally by the dominant company and simply implemented through those distributors. This, of course, does not mean that the distributors and the dominant company form a "*single economic unit*". Therefore, in those circumstances, Article 101 TFEU continues to apply between the dominant company and its distributors.

The *Intel* effects-based approach applies fully to exclusive dealing. In such cases, for Article 102 TFEU to apply, competition authorities must examine all the relevant circumstances and duly take into account the economic analyses produced by the dominant company. Only then can they prove that the conduct in question has the ability to exclude competitors that are as efficient as the dominant undertaking from the market and therefore is capable of restricting competition.

While the use of the AEC test is optional, 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. In effect, this means that one way or another a competition authority has to engage with that test, whether it decides to run it pre-emptively or it examines it reactively, since it is under the duty to rebut it, if submitted by a dominant company.

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