Kluwer Competition Law Blog

Much Ado About Nothing? Italy's SEN Antitrust Saga Comes to an End

Laura Zoboli (University of Brescia) · Monday, February 13th, 2023

Facts and court proceedings

Before the start of the liberalization process in 1999 with Legislative Decree 79/1999 ("Decreto Bersani"), the Italian electricity market was run singlehandedly by the *Ente Nazionale Energia Elettrica* (Enel), born with the nationalization of electricity in 1962. As the former Italian legal monopolist, Enel was integrated into all stages of the electricity supply chain, namely its production and wholesale, its transmission, and its distribution to the end-users. The progressive nature of this liberalization initially meant that households and small enterprises were still subject to the former regime of administrated prices, the so-called *regime di maggior tutela*. The idea was to not force the end-users to switch to the free market of electricity, but rather to give them the freedom to do so – while providing a deadline (postponed a few times) – insofar as the regime of administered prices is now scheduled to shut down in 2024.

The "saga" of the *Servizio Elettrico Nazionale S.p.a.* (SEN) case developed in the context of such progressive liberalization and therefore in a scenario with specific complexities, including that incumbents must ensure a level playing field for new entrants (see here and here in this regard). SEN, born in 2008 as *Enel Servizio Elettrico* (it acquired its current name only in 2017, to better distinguish it from Enel) was created to detach from Enel the sale of electricity to customers still in the regime of administered prices. The company is fully owned by Enel.

The first step of the saga dates back to 2018 with the Decision of the Italian Competition Authority (AGCM) determining that, between January 2012 and May 2017, Enel had abused its dominant position in the market of electricity generation by pushing SEN's customers -its operator in the protected market- to migrate to Enel Energia S.p.a. (EE) -its operator in the free market- (the Decision is available here).

Specifically, SEN would have legitimately asked its protected customers to consent to the processing of their personal data to receive commercial offers relating to the free market but did so by requesting two separate consents, one for EE and another for EE's rivals. According to the AGCM, the choice of submitting two separate requests would have given EE a competitive advantage by inducing SEN's customers to give their consent only to EE and, therefore, would have allowed the latter to enjoy *strategic* and *unrepeatable* lists of customers to whom it could offer customized supply contracts that its rivals in the free market could not match.

The second step in the saga can be found in the appeal of Enel Group against the AGCM's decision on the basis that SEN's conduct would not be able to produce any exclusionary effect –an appeal that was rejected in October 2019 by the competent administrative court TAR Lazio (the decision is available here).

The appeal by the companies of the Enel Group then reached the second level of the administrative proceedings, that is the Italian Council of State (Consiglio di Stato), which made a reference for a preliminary ruling to the Court of Justice of the EU in order to clarify what interests does Article 102 TFEU protect and whether monopolistic conduct which produces only potential restrictive effects can be classified as abusive, given that, in the case at hand, the conduct of SEN had neither produced direct harm to consumers nor a real significant impact on the competitive structure of the market.

Following the Court of Justice's ruling of 12 May 2022, the Consiglio di Stato in December 2022 upheld the appeal, and many are the points of interest in these there last two decisions.

Key points of the CJEU's decision

It is important to briefly recall the reasoning carried out by the CJEU, based on the interests protected by Article 102 TFEU and the prohibited conduct (the decision is available here). The premise lies in whether it is necessarily true that 'inheriting' a dominant position does not exclude the need to assume a special responsibility in the market. In this regard, incumbents from the moment they are subject to free competition should also seek to maximize their profits also through the preservation of their customer base (on this point, see the Opinion of Advocate General Rantos available here). However, in line with the opening of this post, incumbents must avoid partitioning the market and adopting behaviour that may preclude efficient competitors.

In concrete terms, the Court states that SEN should have sought not to discriminate between EE and its rivals in seeking the consent of its protected customers. Specifically, the Court makes clear that in markets undergoing a process of liberalization –and which are subject to specific information-sharing obligations, albeit within the limits set by the data protection rules– the means available to the incumbent operator by virtue of its former legal monopoly must be made available to new entrants on an equal footing. Therefore, using such means to favour the companies in their own group over potential competitors does not fall under competition on the merits.

At the same time, however, the Court acknowledges that the information received does not allow to assess whether SEN's conduct was in fact discriminatory. For example, it is not clear whether the separate requests for consent were such because they occurred at different times. Nor is it clear whether the same request for consent concerned all third-party undertakings other than EE indifferently or only some of them, or whether the consent in favour of EE's rivals was conditional on their consent being given in favour of EE.

According to the Court of Justice, therefore, if the referring court were to find that AGCM had in fact proved, on the basis of evidence, that the procedure used by SEN was capable of favouring EE over its competitors, then the referring court would have to conclude that even competitors as efficient as EE were prevented from matching its offer because they were deprived of a strategic and non-repeatable resource. Therefore, given the lack of compensatory positive effects in favour of consumers, SEN's conduct would be abusive, irrespective of any consideration of those

legitimate factors to which the parties referred and that could explain the growth in EE's market share.

The last piece in the puzzle: the decision of the Consiglio di Stato

In light of the elaboration of the CJEU, the Italian Council of State takes a straightforward decision that is hardly surprising (the decision is available here).

First of all, it stresses that the decision and judgment under appeal appear not to have adequately considered and assessed certain factual aspects, which are likely to undermine the AGCM's position, namely that: (i) SEN offered the mentioned lists both to EE and to EE's competitors on the same terms, in compliance with the consent expressed by the physical persons concerned; (ii) the quantity of contacts collected and included in SEN lists was modest –on average about 500.000 per year in the period 2012-2015, in markets with tens of millions of users-; (iii) similar lists of contacts of customers were available on the market; (iv) the allegedly abusive conduct challenged by the AGCM resulted in the acquisition of an insignificant number of competitors when compared to the relevant market identified.

In the context of the first ground of appeal, SEN has argued that leaving the data subjects free to give separate consents (even in favour of third companies or only in favour of companies in the Enel group) is not an inherently discriminatory way of collecting consent, but a lawful way of allowing users to express their preferences as widely as possible.

Considering these factual data and in light of the specific clarification coming from the CJEU, as anticipated, the Italian Council of State upheld the appeals, as the AGCM had not demonstrated on the basis of evidence, such as behavioural studies, that the procedure used by SEN to collect the consents of its customers to the transfer of their data was actually likely to favour EE/SEN.

In other words, the decision of the Italian Competition Authority should have provided evidence as to why SEN's collection of differentiated privacy consent for the purposes of future marketing proposals was discriminatory. Instead, it merely criticizes the choice to require double consent. It follows that the collection of the double data protection consent, in the absence of any investigation into the manner (in the sense indicated by the Court) in which it was collected, cannot constitute proof that the procedure used by SEN to collect the consents of its customers to the transfer of their data was, in fact, likely to favour the lists intended to be sold to EE, and consequently there is no evidence that the conduct was likely to constitute abuse of dominance.

In a sentence, the investigative and motivational deficiencies of the AGCM's case led the Consiglio di Stato to hold that the objective existence of the unlawfulness of the conduct was not proven.

The importance of the SEN saga

The SEN saga is significant not only for its final outcome, which may seem obvious and straightforward to most but because it offered the opportunity to clarify a number of profiles revolving around Article 102 TFEU -one of which may not have been seized upon-.

Looking at the glass half full, the Court of Justice made it clear in its ruling that:

- The protection of the competitive structure of the markets is at the same time a means to protect consumers and their welfare;
- In deference to the principle of the equally efficient competitor, Article 102 TFEU is not intended to protect inefficient and obsolete undertakings even when they are rivals of dominant undertakings, which is why a dominant undertaking can always defend itself by demonstrating the economic reasonableness of its practice;
- The practice of a dominant undertaking is abusive not because of its form, but because of the effects it produces, even when those effects are only potential;
- The ability of a dominant undertaking's conduct to produce exclusionary effects must be assessed at the time the undertaking engaged in that conduct and on the basis of all the circumstances existing at that time;
- Facts such as the intent of the dominant undertaking, the concrete effects of its practices and the possibility that those practices are illegal under rules other than Article 102 TFEU are among those circumstances but are neither sufficient to prove nor disprove the abusive nature of the practices in question – that is, they are mere evidence-.

However, the CJEU decision leaves the open question as to whether the test of replicability of conduct based on equal access to a resource, considered strategic and non-repeatable, is in line with the antitrust tradition, beyond the market framework subject to liberalization. That is to say, it is unclear whether the CJEU's ruling intends to propose a new orientation whereby dominant undertakings would be obliged to grant access to their resources even when they are not essential, in deference to a generic principle of equal treatment, or whether the SEN ruling is based on the scenario of a former state monopolist and a market undergoing liberalization.

In any case, the decision of the Consiglio di Stato would be valid in both cases, moving on the basis of the procedural and evidentiary deficiencies that characterized the proceedings before the AGCM.

This entry was posted on Monday, February 13th, 2023 at 9:00 am and is filed under Source: OECD">Abuse of dominance, Advantage, As Efficient Competitor, Burden of Proof, Competition proceedings, Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences.

Source: OECD">Consumer welfare, Discrimination, Electricity, European Court of Justice, Italy, National competition authorities (NCAs), National court
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.