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THE ECJ CLARIFIES THE IMPUTATION OF LIABILITY AND TREATMENT OF EXCLUSIVITY UNDER THE EU PROHIBITION ON ABUSE OF DOMINANCE

In its recent *Unilever Italia* judgment, the European Court of Justice ("**ECJ**") ruled on two important practical aspects of the application of the EU prohibition on abuse of dominance under Article 102 of the Treaty on the Functioning of the EU ("**TFEU**"): (i) abusive behaviour of third parties can under certain circumstances be imputed to a dominant undertaking even if these third parties do not have any corporate links to the dominant undertaking and (ii) competition authorities cannot rely on a "form-based" approach to infer negative effects on competition solely from the nature of exclusivity clauses, without evaluating economic evidence provided by the investigated undertaking.

Key issues

- Dominant undertakings can be liable under Art 102 TFEU for conduct undertaken by their distributors if the distributors did not act independently and merely implemented the commercial policy of the dominant undertaking. This is, in particular, the case if distributors are required to use the dominant undertaking's standard contracts with their customers.
- If a dominant undertaking puts forward the 'as-efficient-competitor' test (**AEC Test**) to prove that the behaviour in question does not have exclusionary effects, the competition authorities must take it into account and cannot rely on the "form-based" approach.

BACKGROUND TO THE CASE

In 2017, the Italian competition authority Autorità Garante della Concorrenza e del Mercato ("**AGCM**") fined Unilever for abusing its dominant position on the market for the distribution and marketing of ice cream to the operators of "out-of-home" sales outlets in Italy. According to the AGCM's findings, Unilever employed exclusivity clauses as well as conditional rebates and payments which applied to virtually all sales outlets. The conditions were employed to a large extent, indirectly, through a network of 150 distributors, with whom Unilever had no corporate ties.

The AGCM claimed that these measures were designed to provide the sales outlets with an incentive to maintain exclusivity and to discourage them from breaking their contracts to obtain supplies from Unilever's competitors. Unilever argued that it could not be held liable for the alleged conduct, as it was implemented by independent distributors, not Unilever. In addition, Unilever submitted economic evidence which purported to demonstrate that the conditions at issue did not have an exclusionary effect as they were not capable of foreclosing an equally efficient competitor. Both arguments were dismissed by the AGCM. As regards the former argument, AGCM found that Unilever constituted a single economic unit with its distributors and the liability of the latter could therefore be attached to Unilever. In relation to the economic evidence submitted by Unilever, the AGCM stated that the exclusivity clauses as such were sufficient to establish an abuse of dominance under Art 102 TFEU. Hence, Unilever's economic evidence was not of any relevance.

After Unilever's unsuccessful appeal to an Italian court and following a further appeal to the Italian Consiglio di Stato the latter requested a preliminary ruling from the ECJ to clarify: (i) the criteria for when contractual relationships between formally autonomous and independent economic operators results in the creation of a single economic entity – specifically in the context of producer/distributor relationships; and (ii) to what extent economic evidence provided by the undertaking in a dominant position must be considered by a competition authority.

FINDINGS OF THE ECJ

Can abusive behaviour be imputed to a dominant undertaking without corporate links?

EU antitrust law allows liability to be imputed to an entity that is different to the one that engaged in an anti-competitive practice, provided they formed part of the same economic "undertaking" at the time of the infringement. Consequently, it is now common for parent companies to be held jointly liable for infringing subsidiaries, over which they exercise decisive influence through their ownership interest.

The novel question posed by the Italian court in the Unilever case was whether it is possible to treat a supplier as forming part of the same economic undertaking as its independent distributors – and therefore to hold the former liable for the anti-competitive conduct of the latter – notwithstanding that the supplier holds no ownership interest in the distributors.

In its judgment (in Case C-680/20, *Unilever Italia Mkt. Operations*, 19 January 2023), the ECJ concluded that it was not necessary to answer that question. Instead, it ruled that a dominant supplier could *itself* be found to have committed an infringement (such that there was no need to determine whether it was vicariously liable for its distributors' infringements) if it could be shown that the dominant company had effectively instructed its distributors to adopt the anticompetitive conduct in question, i.e., where the conduct:

- was not adopted independently by those distributors; and
- formed part of a policy that the dominant undertaking decided and implemented through the distributors.

The ECJ further stated that this liability is not contingent on proving any hierarchical links between the dominant undertaking and the distributors in question, such as through systemic influence over the decisions of the distributors – in other words, a one-off strategy without consistent influence over the distributors may suffice.

Can competition authorities rely on inferring negative effects for competition solely based on the nature of the conduct?

The ECJ reiterated that a competition authority does not necessarily have to demonstrate that a conduct actually produced anti-competitive effects in order to establish that this conduct is abusive. Since the purpose of Art 102 TFEU is to penalise the abuse of a dominant position, irrespective of whether such conduct has proved successful, a competition authority may find that there is an infringement by establishing that a conduct had the ability to restrict competition (form-based approach).

When assessing whether an undertaking's conduct is capable of restricting effective competition on a market, a competition authority may also rely on economic studies. In this respect, a competition authority can demonstrate that the conduct in question could foreclose competitors that are as efficient as the dominant undertaking in terms of cost structure, capacity to innovate, quality, or where that conduct is based on the use of means other than those of "normal" competition on the merits (AEC Test). However, a competition authority is not under the obligation to conduct the AEC Test.

Having said that, the competition authority must always consider other case specific factors as well, when determining whether the conduct had the ability to produce exclusionary effects, such as the extent of the conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the dominant undertaking is, at least, for part of the demand, an inevitable partner. With reference to its landmark 2017 *Intel* judgement , which related to rebates, the ECJ essentially concluded that where the dominant undertaking imposing exclusivity clauses puts forward evidence during the administrative proceeding which disputes the exclusionary effects of such clauses, the competition authority is under the obligation to consider this evidence, including where the evidence takes the form of the AEC Test. This also applies where there are a number of practices, including non-pricing practices, whose cumulative effects cannot be captured by the AEC Test alone, as the AEC Test may at least be an indication of the effects, or lack thereof, of some of these practices.

PRACTICAL IMPLICATIONS

The ruling of the ECJ generally expands the scope of liability of dominant undertakings. In particular it establishes that dominant undertakings may be found to have abused their dominance in breach of Art 102 TFEU, if they instruct or require an independent third party to engage in anticompetitive conduct. However, the ruling should not be understood as a presumption for an automatic imputation of third parties' behaviour to dominant undertakings. Instead, a case-by-case analysis is required to establish to what extent third parties did not act independently and merely implemented the commercial policy of dominant undertakings.

However, even if dominant undertakings succeed in providing sufficient evidence which excludes their liability under Art 102 TFEU, market dominant undertakings and distributors may still be found liable under the prohibition on anticompetitive agreements contained in Art 101(1) TFEU. In fact, the ECJ noted *obiter dicta* that in principle, where there is tacit agreement between undertakings to implement an anti-competitive strategy, this should, in principle, be caught by Art 101(1) TFEU.

Regarding economic evidence, the ruling transfers the reasoning from the Intel judgement to exclusivity clauses and clarifies that competition authorities must follow an effects-based approach not only in case of loyalty rebates, but also regarding exclusivity clauses. It remains to be seen which impact this ruling will have on the practice of competition authorities in the EU for their investigations under Art 102 TFEU. While it generally provides dominant undertakings with more room for manoeuvre to prove that any exclusivity clauses that they have entered in to do not have exclusionary effects, it remains the case that it will often be difficult to do so, particularly if the financial consequences of a breach of the exclusivity clauses are hard to predict or quantify. Consequently, dominant companies should continue to treat exclusivity clauses that require buyers not to purchase or distribute rivals' products as a significant compliance risk in the EU.

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