BRUSSELS À JOUR

# Sempre Con Te – Always With You

## The European Court of Justice's Judgment in *Servizio Elettrico Nationale* – Merit-based Competition and Non-price Exclusionary Abuses under Article 102 TFEU

Markus Roehrig and Joachim Burger report on the latest developments from the European capital of competition law.

*Intel, Google Shopping, Qualcomm* – Judgments on Article 102 TFEU have recently been raining down on us. Unfortunately, there is yet another instalment to be added to that list. But do not fear, for we are always with you. The same slogan was put forward by Italian ENEL Group in 2017. However, the Italian Competition Authority (AGCM) did not join into this collaborative spirit and imposed a fine on ENEL for abusing its dominant market position. After some procedural back and forth before national courts, the European Court of Justice now had the opportunity to shed light on a far-reaching question in Case C-377/20.[1] What constitutes abusive conduct and in that context, what can be considered competition on the merits? How is merit-based competition related to the as efficient competitor test and how does all of that apply to non-price exclusionary abuses? Pairing these questions with the formerly regulated Italian power market and – at least for EU law aficionados – a known name from an old landmark decision (*Costa v ENEL* rings a bell?), and you have got yourself a recipe for a potential new landmark decision.

### Protectionism vs. Liberalization

Admittedly, the dispute at hand has a rather specific background, revolving around the gradual liberalization of the formerly monopolized Italian electricity market. Under the specific details of the market liberalization, a last cluster of "protected" customers – benefitting from preferential prices – were allowed to access the free market in recent years. To compete for those customers on the liberated market, the former monopolist ENEL Group and incumbent operator for such protected customers via its subsidiary Servizio Elettrico SpA (SEN), set up a private energy company called Enel Energia (EE).

1 European Court of Justice, Judgment handed down on 12 May 2022, Case C-377/20 – Servizio Elettrico Nationale SpA et al. / Autorità Garante Concorrenza e del Mercato et al.

To retain and transfer its former customer base to EE, in March 2017, ENEL launched the *Sempre Con Te* (Always with you) program aiming to make special commercial offers to its existing clients. To that end, SEN reached out to its customers seeking consent to share their data with private energy companies (including EE) so the later could submit such offers to SEN's customers. However, SEN used two physically separated consent forms. The first form sought consent to the customer's data transfer from SEN to EE, whereas the second one asked for consent to transfer the customer's data to privately operated competitors of EE. Given that most customers were familiar with their current provider SEN, they largely tended to give consent to SEN and EE only. As a result, SEN created a comprehensive list of consenting customers and only provided this list to its subsidiary EE and not to other competitors. The other competitors only received the (much shorter) list of costumers having consented for the transfer to other companies.

According to the AGCM, SEN, EE and ENEL (as ultimate parent and coordinator of such practice) had designed the process for obtaining customer consent in a manner that exploited their position as former monopolist to the detriment of privately operated competitors, giving rise to an abuse of dominance under Article 102 TFEU. After subsequent appeal procedures before Italian Courts, the Consiglio di Stato decided to stay proceedings and to refer several questions relating to the interpretation and application of Article 102 TFEU to the ECJ.

### A Textbook Verdict on Article 102 TFEU Abuse Cases

As set out in the introduction, the ECJ used this opportunity to elaborate on the basic principles of Article 102 TFEU, handing down a textbook-like summary of the principles of an abuse of dominance case and the burden of proof incumbent on competition authorities and defendants:

- **Consumer welfare standard.** To start with, the ECJ recalls the main and ultimate objective allocated to Article 102 TFEU, which in the past was not always a question easy to answer, in particular under the "more-economic approach" from the Commission. However, the ECJ did not leave home soil: primary objective of Article 102 TFEU – and competition law in general – is the well-being and protection of consumers.
- **Capacity to restrict competition, efficiency defence.** Following that reminder, the ECJ held that a competition authority "just" needs to prove that the practice of a dominant company, by using resources departing from those of normal competition (more later on what "normal" merit-based competition means), could adversely affect the effective competition structure on the respective market. Unlike AG *Rantos* in his opinion from December 2021[2], the ECJ does not think that is incumbent on competition authorities to demonstrate that an exclusionary practice causes actual or potential harm to consumers. So again, nothing new under then sun and the burden of proof remains the same. Nevertheless, the ECJ, having recourse to AG *Rantos*' opinion and the *Intel* judgment, re-affirmed that dominant companies may escape Article 102 TFEU by establishing pro-consumer benefits beyond prices (e.g. in terms of choice, quality and innovation).

2 Advocate General Rantos, Opinion of 9 December 2021, Case C-377/20 – Servizio Elettrico Nationale SpA et al. / Autorità Garante Concorrenza e del Mercato et al.

- **Lack of actual exclusionary effects.** Furthermore, the Consiglio di Stato sought guidance from the ECJ whether and to what extent the Commission was required to consider concrete evidence put forward by the undertakings involved and proving a lack of anti-competitive effects. According to the ECJ, such evidence, showing that the desired result of an exclusionary practice (here: transfer of SEN's customer base to EE) has not been – fully – achieved, is in itself not sufficient to escape Article 102 TFEU. The ECJ points out that an analysis of Article 102 TFEU is in principle prospective in nature and the authorities thus do not need to establish whether such practice actually restricted competition, but that it is capable of doing so. In other words: Abusive conduct – even if only intended and proven unsuccessful – remains abusive. On the other hand, the Commission cannot simply disregard any evidence countering alleged anti-competitive effects, but has to take this and other supporting evidence into careful consideration. That follows the line taken by the Union Courts in the *Intel* judgments, and referred by the ECJ. If such supporting evidence showing that the alleged conduct was incapable of restricting competition is produced, the competition authority bears the burden of showing that in in fact the practice in question was capable to have exclusionary effects. The fact that particular conduct did not actually have an exclusionary effect, while in and of itself not defence, can be taken as a indicia that the conduct was not capable of having such an effect.
- **Intent to exclude competitors.** Additionally, the ECJ addressed the doubts expressed by the Consiglio di Stato whether it should include the intention of the undertakings involved into consideration when assessing an abuse in accordance with Article 102 TFEU. The requirement to show exclusionary effect of a measure is – without demonstrating any sort of intent towards that effect – by itself enough to qualify as an abuse of a dominant position. However, the ECJ specifies that evidence of such intention is nevertheless a factor that may be taken into account for the purposes of establishing such abuse.
- **Conduct that is permissible outside of the competition law realm.** Finally, the ECJ reaffirmed that the unlawfulness of abusive conduct within the meaning of Article 102 TFEU is unrelated to the classification of this conduct in other areas of law. Therefore, perfectly legal practices in other areas of law can be (and often are) abusive practices.

### The Competition on the Merits Element in Abuse Cases

While *Servizio Elettrico Nationale* in many ways relies on well-established Article 102 TFEU doctrine, the judgment addresses another issues that goes back to first principles, namely whether an allegedly exclusionary practice can amount to an abuse of dominance on the basis of its capacity to bring about anticompetitive effects alone or, as a cumulative element, the Commission must also establish that the conduct as such departs from 'normal' competition on the merits. The latter, the ECJ unambiguously holds.

The notion of competition on the merits taking center stage is quite remarkable, also given the concept had remained somewhat blurry in the Union courts' case law. So did the ECJ give a conclusive definition of what such "normal" competition is? As AG *Rantos* put it that is not an easy task, since competition on the merits is "*abstract, since it does not correspond to a specific form of practices and cannot be defined in such a way as*

*to make it possible to determine in advance whether or not particular conduct comes within the scope of such competition*". Perhaps unsurprisingly, the ECJ chose to focus on defining what is not "normal" merit-based competition, setting out two categories or tests:

- **Anticompetitive object.** The dominant firm's conduct has an anticompetitive object, that is to say the dominant firm has no plausible economic purpose to purse the conduct other than to eliminate competitors and, once it has obtained monopoly power, to raise prices to customers. The most prominent example of such conduct would be predatory pricing, e.g. a pricing below average variable costs. Other examples might be loyalty rebates or margin squeezing, all of which are based on hard facts and can be more easily proven by competition authorities (but – as *Intel* has shown – the devil lies in the details).
- **Conduct cannot be replicated.** A hypothetical equally efficient, but not dominant, competitor is not capable of replicating the dominant firm's conduct because that conduct is enabled by the specific resources and means that come with a dominant position. As the Unions courts have established in previous cases, with respect to price-related conduct, the lack of competitors' capability to replicate the dominant firm's conduct can in principle be established based on the as-efficient-competitor (AEC) test, i.e. by examining whether the same conduct could be implemented by a (hypothetically) similarly strong competitor, i.e. whether that would be economically viable for such competitor. If not, it is assumed that competitors of the dominant undertaking suffer exclusionary effects from such pricing practices, as they cannot – in an economically meaningful way – proceed the same and match the dominant firm's offers. On the other hand, if an as efficient competitor could proceed the same, a dominant companies acts within the ambit of "normal" competition (on the merits). *Servizio Elettrico Nationale* adds that the AEC test equally applied to non-price-related conduct such as, e.g., a refusal to supply.

This, then, is the key takeaway from *Servizio Elettrico Nationale*: Under Article 102 TFEU, a practice constitutes an abuse of dominance only if, in addition to having the capacity to exclude competition, it departs from the competition on the merits, either by (i) having anticompetitive effects or (ii) if it cannot be replicated by an as efficient competitor, regardless whether the practice is price-related or pertains to non-pricing conduct. However, some may take the view that *Servizio Elettrico Nationale* should be read more narrowly. As set out above, the case revolves around the liberalization of a formerly protected market and in its reasoning, the ECJ has had specific recourse to ENEL's unique position as incumbent operator. Contrary to other non-regulated markets, the dominant position of ENEL was not achieved through normal means of competition but by default. No other competitor could enter the market and compete – or replicate – ENEL's practices. So one might argue that the ECJ's findings are limited to the peculiar set of facts that were before it in this specific case. Nonetheless, there is no explicit language in *Servizio Elettrico Nationale* suggesting by any means that the analytical framework that the ECJ sets out for the application of Article 102 TFEU, the AEC test and the unruly track field of "normal" merit-based competition should be limited to regulated markets and (former) monopolies.

### The Future of Article 102 TFEU, Unresolved Issues

It remains to be seen what the Commission will have to say about the application of the principle of competition on the merits and the transposition of the AEC test to non-pricing practices. It can be reasonably assumed that they would not be happy with having to undertake – in a burdensome manner, see again *Intel* – a full-fledged AEC analysis.

In any case, the judgment could prove helpful particularly with respect to non-pricing practices, allowing dominant companies to rely on the AEC test to ascertain whether envisaged practices do not fall under Article 102 TFEU. The case at hand might not be the ideal example, as there are few remaining regulated markets about to be liberalized, but there might be other sectors and specific non-pricing practices where the judgment might come in handy (e.g. in a Big Tech context, one might think of data harvesting and collection).

Finally, some further food for thought… *Servizio Elettrico Nationale* only deals with exclusionary practices, but how about exploitation cases? Can these categories or tests to determine abuse also be transposed to exploitative abuse practices (e.g., sudden and excessive price increases or imposing unfair trading conditions)? Feel free to share your thoughts with us.

In the meantime, don't forget to follow us on LinkedIn for more updates on your favorite EU competition law topics.

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