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Exclusionary practices in a liberalized market: the European Court of Justice gives a new interpretation of the application of Article 102 of the Treaty on the Functioning of the European Union

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Resume: *With each decision, the Court refines its interpretation of the application of Article 102 of the Treaty on the Functioning of the European Union. This decision was the occasion for the Court to provide a developed interpretation of an abuse in a liberalized market. Thus, beyond the qualification of an abuse, the Court provides us with a new analysis of the means of identifying a so-called abusive practice, in particular through the transposition of the test of "the most efficient competitor" to a non-price eviction practice.*

In this decision, the CJEU put the very definition of abuse of a dominant position back at the heart of the dispute by clarifying the notion of abuse in a general way but also by making it possible to specify the means of identifying an abuse of a dominant position. In his opinion, the Advocate General considered in particular that *"this case gives the Court the opportunity to give a broader ruling on the application of Article 102 TFEU"*[1] .

Italy has been progressively involved in a process of liberalization of the sale of electricity since 1 July 2007. The liberalization of this sector was then segmented in two stages, in the first stage two distinct markets were set up: the "free market" and the "protected market" or "regulated market". The establishment of a "regulated market" allowed users, particularly small and medium-sized enterprises and individuals, to benefit from special price protections. In a second phase, the liberalization of the sector was extended to leave only one market, the free market, opening it up to all users. In this particular context, ENEL, which had a monopoly in energy production and was vertically integrated in the market before 2007, underwent a procedure to dissociate its activities. Thus, the company E-Distribuzione was in charge of the distribution service, the company EE was in charge of the supply of electricity on the free market and the company SEN was in charge of the management of the best protection service i.e. the management of the regulated market.

[1] Conclusion of the Advocate General, December 9, 2021, Case C377-20

In this case, SEN and EE, under the coordination of the parent company (ENEL), implemented a strategy to foreclose competitors on the electricity market. This strategy consisted of drawing up lists containing information on users of the protected market, which were then intended to provide users of the protected market with commercial offers when they entered the free market. The aim of this strategy was to organize the transfer of SEN users from the protected market to EE, which was then in charge of supplying electricity on the free market. In other words, the commercial offers were intended to transfer the users of SEN (manager on the protected market) to EE and thus reduce the outflow of this clientele to third companies.

Following a complaint from the Italian Association of Energy Wholesalers and Traders to the Italian Competition and Market Authority (AGCM), the latter decided to open an investigation in order to verify whether the behaviour of ENEL, SEN and EE constituted a violation of Article 102 of the Treaty on the Functioning of the European Union. The AGCM founds that SEN and EE had violated Article 102 TFEU under the coordination of their parent company, ENEL, and imposed a fine of EUR 93 million on them jointly and severally. ENEL, SEN and EE then lodged appeals before the Regional Administrative Court for Lazio. By judgments dated 17 October 2019, the Court found the abuse of a dominant position but partially upheld the companies appeals regarding the duration of the infringement and the criteria for calculating the fine. Thus, the fine was reduced by the AGCM to EUR 27 million. Separately from these judgements, ENEL, SEN and EE appealed to the referring court. In view of the difficulty of applying and interpreting Article[2] in the context of an exclusionary practice, the Italian Council of State decided to stay the proceedings pending the response of the CJEU to its preliminary questions.

In its first question for a preliminary ruling, the Italian Council of State asks the CJEU to determine the means of identifying and characterizing an abusive practice. In other words, can a practice be characterized as abusive solely on the basis of its potentially anti-competitive effects or does the classification as an abuse of a dominant position also require proof that the practice has been implemented *"by means or resources other than those governing normal competition"*. [3]

In its second question for a preliminary ruling, the Italian Council of State asks the CJEU to determine whether the purpose of sanctioning the abuse of a dominant position

[2] Art. 102 Treaty on the Functioning of the European Union

[3] CJEU May 12, 2022, Case C-377/20

is to maximize consumer welfare or simply to preserve the market structure.

In its third question for a preliminary ruling, the Italian Council of State asks whether a competition authority is obliged to examine the evidence provided by the undertaking showing that its conduct has not produced any restrictive effects on the relevant market.

In its fourth question for a preliminary ruling, the Italian Council of State asks whether the company's intention to restrict competition should be taken into account.

In its fifth question for a preliminary ruling, the Italian Council of State asks the CJEU to determine the conditions for imputing responsibility for the conduct of an exclusionary practice by a subsidiary to the parent company.

These preliminary questions concerned the application of Article 102 of the TFEU in the context of a so-called "atypical" exclusionary practice[4] , and the CJEU had to rule on the interpretation of this article[5] when implementing a practice not listed in it.

The interpretation of this article then gave rise to a theoretical qualification of an abuse of exclusion (I) and then allowed for a more precise identification of an abusive practice by extending the test of the equally efficient competitor already known for pricing practices (II).

I- The notion of abuse of eviction: an atypical abuse theoretically explained by the Court, allowing its identification

As the behavior of the companies in question was described as "atypical" because it did not correspond to the list in Article 102 TFEU, the second, third and fourth preliminary questions provided an opportunity for the Court to determine and qualify an abuse of predation in the context of liberalized markets.

Indeed, as we have already seen, the second question referred for a preliminary ruling concerns the aims of Article 102 TFEU. In other words, the Court had to determine whether the sanction of the article was intended to repress the infringement of the market structure or whether this sanction had as its consequence the preservation of consumer welfare. In this respect, the Court held, in accordance with settled case-law[6] , that the purpose of Article 102 TFEU was to preserve and maintain a degree of normal competition in order to prevent the conduct of undertakings in a dominant position from having adverse effects on consumers.

[4]Conclusion of the Advocate General, December 9, 2021, Case C377-20

[5] Art. 102 Treaty on the Functioning of the European Union

[6] ECJ Hoffman Laroche, February 13, 1979, Case 85/76

However, practices which have the effect of causing direct harm to consumers, but also practices which indirectly harm consumers, in particular by undermining the structure of the market and competition, are punishable as an abuse of a dominant position. Thus, as the Advocate General has pointed out[7] , the ultimate aim of the article is to protect consumers by prohibiting exclusionary practices, but since the structure of the market may indirectly affect consumers, its protection is necessary. The protection of consumers as the ultimate aim of Article 102 TFEU is easily demonstrated, in particular because the Court considers that anti-competitive effects can then be counterbalanced by positive effects for consumers. Thus, according to the Court, a practice could be qualified as an abuse of exclusionary conduct even if it has no direct impact on consumer welfare, but only if the practice undermines the structure of effective competition on the market.

In its answer to the third question for a preliminary ruling, the Court recalls that a Competition Authority must demonstrate the alleged foreclosure effects, i.e. that the conduct complained of and the abusive nature of that conduct must have the capacity to restrict competition[8] . In other words, the simple capacity to foreclose is necessary to qualify an abusive practice regardless of whether a concrete foreclosure effect is established. However, according to Professor David Bosco[9] , the Court endorses the scope of the Intel judgment[10] by allowing the defendant to show that the conduct did not have the alleged exclusionary effects.

The fourth question referred concerned the intention of the undertaking, and in particular whether the undertaking's intention should be taken into account in the context of a practice of excluding an undertaking in a dominant position. The Court then rightly recalls that *"the abuse of a dominant position, prohibited by Article 102 TFEU, is an objective concept"*[11] . In so doing, the Court recalls, as we have seen previously, that the only element capable of qualifying an exclusionary practice as an abuse of a dominant position is the capacity of the effects to restrict competition.

Thus, the Court gives us a precise interpretation of Article 102 TFEU, answering a seemingly simple question: what is an abuse of a dominant position?

[7] Conclusion of the Advocate General, December 9, 2021, Case C377-20
[8] CJEU, Generics, January 30, 2020, Case C-307/18
[9] D. BOSCO, "The ENEL case: a major ruling on eviction abuses", LexisNexis - Contrats-Concurrence-Consommation n°7, July 2022, comm.121
[10] CJEU, Intel, September 6, 2017, Case C-413/14 P
[11] CJEU May 12, 2022, Case C-377/20

II- Identifying the abusive nature of a practice by assessing its "capacity" to produce a foreclosure effect: the creation of a new test for qualifying the abuse

The Court, having recalled the conditions for determining an abuse of exclusionary conduct as mentioned above, now turns to the means of identifying an abusive practice. The Italian Council of State asked the Court first of all how an abuse of exclusionary conduct should be characterized.

To answer this question, the Court first provides a definition of abusive exploitation as recognized in Hoffman La Roche. Abusive exploitation is defined as *"any practice likely to undermine, by means of resources other than those governing normal competition, an effective competitive structure"*. Subsequently, the Court returned to the notion of "capacity", in fact, it considered that the qualification of abusive practice could be retained when it had the capacity to restrict competition as we have seen previously. This notion of capacity had already appeared previously, in particular in the Intel[12] or Generics[13] judgments, however, the Court now seems to place the concept of capacity at the heart of the qualification, as Professor David Bosco stated at[14] .

The Court then returned to the concept of normal competition, which it linked intrinsically to competition on the merits. Indeed, a practice of eviction could not be qualified as an abusive practice if it falls under competition on the merits. In other words, a less efficient competitor could be driven out of the relevant market by competition on the merits. However, this decision is an opportunity for the Court to clarify once again that an undertaking in a dominant position, and in particular an undertaking enjoying a monopoly on a regulated market, has a particular responsibility to refrain from using abnormal means of competition. In other words, an undertaking with a monopoly on a regulated market must refrain from using means which were available to it under its former monopoly and which are not available to its competitors because they themselves do not have a monopoly on that market.

According to Professor David Bosco[15] , this decision suggests that the Court intended to implement a general test for qualifying as an abuse, which would be called the "replicability test[16] ". This test would be in line with the equally effective competitor test found in various decisions[17] . As a reminder, the equally efficient competitor test is an economic test whose objective is to prohibit the practices of an undertaking in a dominant

[12] CJEU, Intel, September 6, 2017, Case C-413/14 P
[13] CJEU, Generics, January 30, 2020, Case C-307/18
[14] D. BOSCO, "The ENEL case: a major ruling on eviction abuses", LexisNexis - Contrats-Concurrence-Consommation n°7, July 2022, comm.121
[15] Ibid.
[16] Conclusion of the Advocate General, December 9, 2021, Case C377-20
[17] CJEU, Intel, September 6, 2017, Case C-413/14 P

position when competitors are considered to be at least as efficient as the undertaking in a dominant position. Thus, in the context of the equally efficient competitor test, the Court must ask itself "whether it would be rational for an undertaking to adopt such a strategy"[18] , if this is not the case then an anti-competitive practice can be detected.

This test of the most efficient competitor has been implemented in the context of pricing practices, however, the Court had never ruled on the implementation of a similar test for non-tariff practices. This seems to have been done in this decision and according to some authors, this test seems to have a general scope[19] for the future. Thus, in the context of a non-price practice, an undertaking with a legal monopoly in a regulated market must refrain from using the means at its disposal because these means are not available to its competitors and thus an equally efficient competitor could not use them. In this case, the Court considered *"that such conduct would necessarily be unacceptable* to *a hypothetical competitor of equal efficiency, since, given the position* occupied *by SEN in the* protected market *following the abolition of the legal monopoly formerly held by ENEL, no competing undertaking could have a structure capable of providing the contact data of customers in the* protected market *in such large numbers".*

Thus, the Court recalls in this decision that an exclusionary practice may be considered abusive when it is not based on competition on the merits. The effective competitor test, which is now applicable to non-tariff practices, therefore seems to be a major tool enabling state courts to detect abusive exclusionary practices in the future.

Conclusion

As the behavior of the companies in question was particularly atypical for the Italian referring court, this decision was an opportunity for the Court to revisit fundamental concepts of competition law by interpreting Article 102 TFEU.

The Court firstly answers the second, third and fourth questions for a preliminary ruling. These answers make it possible to return to the concept of abuse in the context of a non-tariff eviction practice not listed in Article 102 TFEU. This notion of abuse must be qualified when the practice in question generates or has the capacity to generate exclusionary effects, damages the structure of the market or the well-being of consumers, regardless of the intentional element of the undertaking.

[18] D. BOSCO, "The ENEL case: a major ruling on eviction abuses", LexisNexis - Contrats-Concurrence-Consommation n°7, July 2022, comm.121

[19] Ibid.

In its answer to the first question for a preliminary ruling, the Court returned to the concrete means of identifying such an abusive practice. To this end, it considers that an undertaking with a monopoly has a particular responsibility: the responsibility to have recourse to normal competition, i.e. competition on the merits. To this end, taking up the test of the equally efficient competitor, the Court extends this test to non-tariff exclusionary practices. Thus, an undertaking benefiting from a monopoly on a regulated market must refrain from practices that cannot be implemented by a competitor that is at least as efficient as it. Thus, it would be interesting to consider the notion of "equally efficient competitor" because if a regulated market were to become an open market, it is legitimate to ask whether new players on the open market would be as efficient competitors as a player who had a legal monopoly on a regulated market.

The fifth question concerned the liability of the parent company for an exclusionary practice committed by its subsidiaries. This question has not been detailed in this article, however, we can state on this issue that the Court has held that where a dominant position has been exploited by the subsidiaries, the concept of a single unit is sufficient to consider the parent company liable for the practice.

Thus, as we know, competition law is a praetorian law requiring the interpretation of the courts on a regular basis and in particular the interpretation of the CJEU. The abuse of a dominant position is constantly evolving, in particular because the Treaty has drawn up a non-exhaustive list of practices that can be qualified as abusive. Thus, a new practice is an opportunity for the Court to interpret this article and to specify the behavior that is harmful to markets and competition. In particular, this decision was the occasion for the Court to determine a new test based on the equally effective competitor test: the replicability test[20] . This test would seem to be all the more interesting as it was taken up more recently in a new case[21] concerning a foreclosure practice.

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[20] Ibid.

[21] CJEU, Unilever, September 26, 2000, Case C443-98