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Meeting Competition

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ECJ in *Unilever:* Exclusivity clauses in abuse of dominance cases and imputability of antitrust violations in distribution agreements

European Court of Justice with clarifications on the conditions under which conduct of distributors can be imputed to the producer and with helpful guidance as to the assessment of exclusivity clauses and the so-called *as efficient competitor test*

In its recent *Unilever* ruling[1], the ECJ clarifies the conditions for the imputability of conduct implemented by distributors to the producer in the context of abuse of a dominant position under Article 102 TFEU. In addition, the ECJ confirms that its previous effects-based approach as developed in its *Intel*[2] case also applies to the assessment of exclusivity clauses in distribution agreements. Furthermore, the ECJ provides the competition authorities with valuable guidance on the application of the *as efficient competitor test*.

Background and questions referred to the ECJ

Unilever Italia Mkt. Operations Srl ("Unilever") produces and sells packaged ice cream "to go" in Italy through a network of approx. 150 independent distributors in certain sales outlets such as bars, cafés or other leisure sites. In October 2017, the Italian competition authority Autorità Garante della Concorrenza e del Mercato ("AGCM") imposed a fine of approx. EUR 60 million on Unilever for having abused its dominant position, in breach of Article 102 TFEU. The AGCM accused Unilever of pursuing an anti-competitive exclusionary strategy through exclusivity clauses, a wide range of rebates, and commissions. In the AGCM's view, Unilever and its distributors, who had imposed the clauses in question on the sales outlets, were to be regarded as a single economic unit, so that the distributors' conduct had to be imputed solely to Unilever.

Unilever defended itself in the proceedings before the AGCM by referring to the so-called *as efficient competitor test* ("AEC test"). An economic analysis showed that the practices investigated were not capable of excluding an equally efficient competitor such as Unilever from the market. The AGCM refused to examine the AEC test due to the fact that it considered the implementation of exclusivity clauses as *per se* sufficient to establish an abuse of dominance under Article 102 TFEU. On appeal, the Italian Court of Appeal referred two questions to the ECJ for a preliminary ruling:

- Can the conduct of distributors be imputed to Unilever as a producer under Article 102 TFEU based on the concept of a single economic unit?
- Is the authority obliged to verify whether exclusivity clauses have the effect of excluding equally efficient competitors and to examine the economic analysis (such as an AEC test) submitted by a party?

The ECJ's decision

No economic unit of distributors and producer under Art. 102 TFEU

Firstly, the ECJ clarifies that decisions taken in the context of contractual coordination (e.g., in distribution agreements) are, in principle, not *unilateral* conduct as their implementation involves at least the tacit acceptance of all parties. Such decisions, therefore, fall within the scope of Article 101 TFEU. However, this does not rule out the possibility that the conduct of its distributors can be imputed to the producer holding a dominant position within the framework of Article 102 TFEU.

Contrary to AGCM's preliminary question, the ECJ does not refer to the "*concept of undertaking*" as an "*economic unit*" to establish such an imputation. Separate legal entities are considered, especially in the context of infringement decisions and antitrust damages, as one undertaking under antitrust law if the legal entities are

[1] ECJ, decision of 19.1.2023, C-680/20 – *Unilever Italia*.

[2] ECJ, decision of 6.9. 2017, C-413/14 P – *Intel.*

linked to each other by economic, organizational and legal relationships in such a way that they belong to the same economic unit.[3]

Criteria for the imputability of the distributors' conduct to the producer

Instead, the ECJ chooses a more direct way: conduct implemented by the distributors can be imputed to the producer if the distributors' conduct was carried out according to the *specific instructions of the producer* who holds a dominant position and must thus be regarded merely as the *territorial implementation of the commercial policy unilaterally decided by the producer.* The distributors are then *mere instruments* by which the exclusionary practice is implemented. According to the ECJ, this was the case, in particular, where such conduct takes the form of standard contracts with exclusivity clauses, drawn up by Unilever, which the distributors were required to have signed by the sales outlets. In this case, neither an economic unit nor any other hierarchical connection between the undertakings is required for the imputation of the conduct to the producer.

Exclusivity clauses are not per se illegal

With regard to the second question referred, the ECJ confirms its previous case law developed in the *Intel* case: 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. Instead, it is sufficient to establish that the conduct in question had the *ability to restrict* competition on the merits, *despite its lack of effect*. In this context, however, the competition authority is obliged to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking. The ECJ now clarifies that this approach also applies to "pure" exclusivity clauses. Even though exclusivity clauses, by reason of their nature, give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic.

Competition authorities must assess the probative value of a submitted AEC test

The ECJ further clarifies that a competition authority is not obliged to use the AEC test in order to find that a practice is abusive. Since the test is only one of several methods for assessing exclusionary effects, its use is optional. However, if an undertaking submits the AEC test as a defense, the authority is required to assess its probative value and to consider it when evaluating the capability of restricting competition.

Comment

The ECJ correctly refrains from arguing that, in the case of an indirect distortion of competition by a distributor, the distributor's conduct may be imputed to the producer through an "excessive" economic unit of independent undertakings. The ECJ's solution for imputability, which could be described as an "instrument approach", is convincing and corresponds to standard practice in counselling abuse of dominance cases.

The ECJ confirms its previous *Intel* effects-based approach and clarifies that the *Intel* test also applies to "pure" exclusivity clauses. This should finally clarify that there is no *per se* assumption of abusive behavior in cases where the dominant undertaking presents a defense in the administrative proceeding. Compared with (German) procedural law, exclusivity clauses (or, as in the case of *Intel*: rebate schemes), which are implemented by a dominating undertaking (directly or indirectly through its distributors), can be deemed as "*prima facie evidence*" of exclusionary effects. By presenting a defense, such as the AEC test, however, the dominant undertaking can challenge this *prima facie evidence*, whereupon the authority must then prove by clear and convincing evidence the ability of the anticompetitive behavior to restrict competition on the basis of the known criteria[4] developed by case law.

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[3] ECJ, decision of 6.10.2021, C-882/19 – *Sumal*.

[4] See ECJ, decision of 26.1.2022, T-286/09 – *RENV* and ECJ, decision of 12.5.2022 – C-377/20 – ENEL.