Servizio Elettrico Nazionale- Between the "consumer welfare" standard and a unitary theory of abuse: nothing new in the west?

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Introductory note to the reader:

The present contribution, rather than being a mere description of the decision of the judgment identified below, takes the nature of a critical commentary, in which some considerations are made on two themes that have plagued European competition law (without ever losing sight of the ECJ's judgment): The notion of "consumer welfare", as well as the attempt to enshrine a unitary theory of abuse.

I-Facts of the case:

On 12 May 2022, the Court of Justice of the European Union ("ECJ") delivered a judgment in Case C-377/20, originating from a request for a preliminary ruling in the context of disputes between Servizio Elettrico Nazionale SpA ("SEN"), ENEL SpA (parent company) and Enel Energia SpA (sister company) ("EE") and Autorità Garante della Concorrenza e del Mercato ("AGCM") concerning the AGCM's decision to impose a fine for abuse of dominant position on those companies, pursuant to Article 102 TFEU. According to AGCM, ENEL, a company which, until the liberalisation of the energy market in Italy, held a monopoly in the production of electricity, embarked on an exclusionary strategy aimed at transferring customers from SEN, which was the historical manager of the protected market, to EE, which now operates on the free market. To this extent, and according to the AGCM, the behaviour adopted aimed to anticipate a potential risk of massive departure of SEN customers to third-party suppliers. In order to obviate this, SEN obtained, from 2012 onwards, the consent of its protected market customers to receive commercial offers regarding the free market, based on discriminatory practices, given that this consent was requested separately for the companies of the ENEL group and for third parties, leading to the customers contacted opting, overwhelmingly, in favour of the companies of the ENEL group.

II- Between the European and the American Consumer Welfare Standard: What (or whom) should competition law serve?

The first of the questions raised in the judgment is whether art.102 TFEU is intended to protect an effective competition structure or whether its main goal is to

maximize consumer welfare[1]. This is a matter in which there are noteworthy differences between the American and the European system, given that, following the scholarship of Robert Bork[2], the US Supreme Court has propounded, since the 1970s, the idea that the ultimate goal of the antitrust system should be to ensure consumer protection[3], contrary to what happens in the European system, where the idea that the objectives pursued by competition law are multiple is prevalent[4].

The ECJ, while closely following what it had previously argued, namely by stating, in para.44, that art.102 TFEU aims to punish not only practices likely to cause direct harm to consumers but also those that cause them harm indirectly by undermining an effective structure of competition, eventually ended up closer to the so-called "Consumer Welfare Standard" in the US law than one would expect, to the extent that it states, in Paragraph 46, that consumer welfare must be seen as constituting the ultimate *raison d'être* that justifies the intervention of competition law[5] . However, and as LINDEBOOM[6] points out, a deep enough analysis will lead us to the conclusion that the goal of consumer protection, as nuanced in the present case, is only intended to clarify the relationship between the classification of the conduct as an abuse and the possibility of objectively justifying that same conduct.

Besides that, it seems that the decision under comment reproduces a notion (in para.46)- relatively consolidated, not only in the commission's decisions but also in the treaties[7] - of consumer that encompasses, simultaneously, intermediate consumers (which will usually be businesses) and final consumers. This approach, typically known in the literature as the "Chicago Trap"[8], occurs[9] when no distinction is made within the protection of consumer welfare as the ultimate aim of competition law between final consumers and any other buyers, leading to the fact that rather than benefiting the former, it provides a level playing field for companies[10]. It seems to us that there is a need for a

[1] See, for all, and with references to the theses of MESTMACKER and JOLIET on this subject, PAIS, Sofia Oliveira- *Entre Inovação e Concorrência: Em defesa de um modelo Europeu,* (UCE, 2011*)*, pp.474 e ss
[2] BORK, H. Robert- *Antitrust and Monopoly, The Goals of Antitrust Policy*, The American Economic Review, May, 1967, Vol.57, No.2, pp.243 e ss
[3] LINDEBOOM, Justin- *Towards a Unified Judicial Philosophy of Article 102 TFEU?*, available at EU Law Live, p. 2
[4] PAIS, Sofia Oliveira- *Considerações de lealdade e equidade no Direito da Concorrência da União. Breves reflexões*, Revista de Concorrência e Regulação, 35, p.124 e ss
[5] LINDEBOOM, Justin- *op.cit*, p.2
[6] LINDEBOOM, Justin- *op.cit*, p.2
[7] See, for example, the Dutch, Italian and French versions of Articles 101 and 102 of the TFEU, which use the equivalent to the term "customer". AKMAN, Pinar- *Consumer vs Customer: The Devil in the Detail*, Journal of Law and Society, Vol.37, No. 2, p.322
[8] CSERES, K.J- *Competition Law and Consumer Protection*, (Wolters Kluwer, 2005), p.331
[9] AKMAN, Pinar- *op.cit*, p.323 e CSERES, K.J- *op.cit*, p.332
[10] AKMAN, Pinar-*op.cit*, p.323

shift - which could have been argued in this case - in what concerns the notion of "consumer welfare" in European competition law by focusing the analysis on how commercial practices affect consumer welfare in terms of price, choice and availability and whether measures can be taken to avoid any negative impact on final consumers[11] [12].

III- Replicability Test: chronicle of a death foretold, or is there room for mutation?

Another issue that caught our attention while reading the judgment concerns the first preliminary question (which was decided lastly by the ECJ) and deals with the assumptions regarding "exclusionary abuse" and the notion of "merit-based competition". In this sense, the court, in paras.73-75, determined that for a conduct to constitute an abuse, it would be necessary, on the one hand, that it could produce an exclusionary effect and, on the other hand, that it resulted in competition not based on merits, taking into account that "not all exclusionary effects necessarily jeopardise the game of competition" (para.73)[13].

Later on, the court specifies, although not in an entirely clear way, the cases in which means other than those of a competition based on merit will be used: (1) when there is no economic interest (in the adoption of such conduct) other than to eliminate its competitors, in order to be able to then increase prices[14] or (2) when it adopts a conduct that cannot be replicated by a hypothetical competitor that, although as efficient, does not have a dominant position in the relevant market.

We will now proceed to analyse the second alternative, called the "replicability test". The court, in an unreasonable fashion, ends up stating, in par.79, that this test will be universally applicable: both to pricing and non-pricing practices. As some literature points out[15], the CJEU's attempt to establish a unitary theory of abuse[16], which once again

[11] CSERES, K.J- *op.cit*, p.333
[12] Of particular interest is the proposal, coming from the Neo-Brandeis movement, to abandon the "Consumer Welfare Standard" and consequently adopt the "damage to the competitive process" criterion. KHAN, Lina- *The New Brandeis Movement: America´s Antimonopoly debate*, Journal of European Competition Law & Practice, Volume 9, Issue 3, March 2018, p.131
[13] Judgment 6/9/2017, Intel v Commission, C-413/14P, EU:C:2017:632, paras. 133-134
[14] In casu, and as stated by the court in para.94, such an assumption would not be verified
[15] IBANEZ COLOMO, Pablo- *On case C-377/20, Servizio Elettrico Nazionale (II): does the replicability test really work?,* available at https://chillingcompetition.com/2022/05/18/on-case-c-377-20-servizio-elettrico-nazionale-ii-does-the-replicability-test-really-work/
[16] The replicability test, as nuanced by AG. Rantos in his conclusions (directly imported, albeit with certain specificities, from the merger control pillar) seemed more appropriate, given that it was assumed to be the equivalent of the equally efficient competitor test outside of pricing practices. With the same view, HERRERA, Ignacio/ HANCER, Leigh- *Competition on the merits in liberalized electricity markets: A regulatory reading of AG Rantos' Opinion in Servizio Elettrico Nazionale*, Utilities Law Review, Vol 23, Issue 5 (2022), p.8

seems to have been rather odd, is no longer a novelty. After all, and as pointed out by IBANEZ COLOMO[17], although the court stressed, with regard to non-pricing practices, which are particularly relevant to the case in question, in para. 83, that the *Bronner*[18] case concerns "the possibility for a competitor to create a similar network for the distribution of its own goods", that is, the possibility to replicate the said essential infrastructure[19][20], the undeniable truth is that the *Bronner* judgment (as well as *Magil* and *IMS Health*) refers to indispensability, in the sense that the access to the said infrastructure is indispensable for the regular functioning of competition[21], and not to replicability, as the judgement under commentary seems to erroneously insist[22]. In addition to what appears to be a conceptual misunderstanding (which, in our view, is a real misinterpretation of the CJEU's previous case-law), the extension of the *Bronner* case-law to all cases of abuse - as the cornerstone of a unitary theory of abuse - would inevitably lead to the reduction of the scope of application of Article 102 TFEU[23].

However, and notwithstanding the criticisms already pointed out, it is relevant to note that the decision can be of great help, especially if the replicability test is applied contextually, i.e., limited to hypotheses that have to do with a refusal to provide data - then, and only with regard to such cases - it can be applied universally, as LINDEBOOM seems to argue[24] [25]. In this sense, and bearing in mind the replicability test in light of that formulated by AG. Rantos[26] , and having verified the assumption that the data may confer an effective competitive advantage to the company in a dominant position (an element that will have to be assessed on a case-by-case basis[27]), it will be necessary to investigate,

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[17] IBANEZ COLOMO, Pablo- *op.cit*
[18] Judgment 26/11/1998, Oscar Bronner GmbH, C-7/97, EU:C:1998:569
[19] Regarding *Bronner*, see TEMPLE LANG, John- *The principle of essential facilities in European Community Competition Law- The position since Bronner*, Journal of Network Industries 1, 2000, pp.379 e ss.
[20] The literature does not provide a unanimous answer to the question of whether access to certain data should be considered 'indispensable' for the purposes of applying the case-law on refusal to supply. For a particularly sceptical view, and therefore contrary to ours, TUCKER, C., *Digital Data, Platforms and the Usual Suspects: Network Effects, Switching Costs, Essential Facility*, Review of Industrial Organization, Springer, Vol.54, p.12
[21] JONES, Alison/SUFRIN, Brenda- *EU Competition Law: texts, cases and materials*, (OUP, 2019), p.496
[22] IBANEZ COLOMO, Pablo- *op.cit*
[23] LINDEBOOM, Justin- *op.cit*, p.5
[24] LINDEBOOM, Justin- *op.cit*, p.5
[25] After all, and as pointed out by MARCO GAMBARO, the access to certain data, as it happens in our case, may result in a competitive advantage over other competitors, and those data might function as real barriers to entry. The existence of barriers to entry, together with the existence of a dominant position, means that these types of conducts are of particular concern and therefore attract the attention of competition authorities. GAMBARO, Marco- *Big Data Competition and Market Power*, Market and Competition Law Review, 2(2), p.109
[26] Par.80 of the AG conclusions
[27] PUSCAS, Carmen- AG Rantos: *What is the legal Framework for Analysing Data Leveraging Abuses Under Article 102 TFEU?,* available at

at a further level of analysis, whether such data may be replicable, not in the sense that there are alternative sources of data, but rather that competitors may commercially exploit such alternative sources, so as to be able to compete with the undertaking in a dominant position. We consider, therefore, that such conformation of the replicability test (which should also have been followed by the court) may be of great interest as a criterion to assess a possible abuse of dominant position by refusal to supply data[28].

IV- Conclusion

In conclusion, it seems to us that the ruling in question, while fulfilling a clarifying function with regard to the intersection between the sectoral regulation of energy and competition law[29], was a missed opportunity to reformulate the notion of consumer welfare within European competition law, as well as to establish a potential test to assess the abusive nature of a refusal to provide data, in light of Article 102 TFEU.

https://competitionlawblog.kluwercompetitionlaw.com/2022/01/03/ag-rantos-what-is-the-legal-framework-for-analysing-data-leveraging-abuses-under-article-102-tfeu/

[28] On the importance of data in structuring modern economies (which may lead to more frequent cases similar to this one than one might think), WARK, McKenzie*, Capital is dead: Is this something worse?*, (Verso Books, 2019)

[29] SETARI, Alice/ SIRAGUSA. Mario- *Recent EU and Italian trends in the energy sector: Failure to provide information as abusive conduct*, in "The Interaction of Competition Law and Sector Regulation", (Edward Elgar, 2022), pp.152 e ss