Servizio Ellettrico Nacionale v. Autorità Garante della Concorrezza e del Mercato (Case C-377/20): a contribute to exclusionary practices

Maria Luísa Bruges

I. Background

In *Servizio Ellettrico Nacionale v. Autorità Garante della Concorrezza e del Mercato* (Case C-377/20), the Court of Justice of the European Union (hereafter CJ) returned to the analysis of the notion of abuse of a dominant position, clarifying the criteria under which the conduct of an undertaking may be abusive in matters of exclusionary practices.

The case context is the liberalization process of the electricity sales market in Italy. Until then, ENEL, together with its subsidiaries – SEN and EE – held the monopoly in the production of electricity in Italy. With the liberalization of this market, ENEL underwent a process of unbundling, being the different activities related to the various stages of the distribution process assigned to different companies: SEN started to operate with the management of the enhanced protection service, while EE started to operate with the supply of electricity on the free market. The purpose was that after the market liberalization, customers could choose the new supplier. However, according to the Autorità Garante della Concorrenza e del Mercato (AGCM), SEN, in anticipation of the risk of losing customers to third-party suppliers, transferred its customers to its sister company, EE, under the coordination of their parent company (ENEL). Based on those conducts, AGCM found that the companies abused their dominant position by means of an exclusionary strategy, having imposed a fine of EUR 93.084.790,50 jointly and severally on those companies.

II. Exclusionary practices

Exclusionary practices by dominant companies are characterized by a conduct in which the dominant position of a company is used to make it more difficult for new firms to enter the market or to limit competition from incumbent companies.

According to the European Commission's guidelines on its enforcement priorities in applying Article 102 TFEU to exclusionary conduct by a dominant company[1], the Commission identifies some of the factors it takes into account in the analysis of such practices: (i) the position of the dominant undertaking, (ii) the conditions on the relevant market, (iii) the position of the dominant undertaking's competitors, (iv) the position of the customers or input suppliers, (v) the extent of the allegedly abusive conduct, (vi) the possible evidence of actual foreclosure and (vii) and direct evidence of any exclusionary strategy.

However, the case under analysis prefigures a distinct situation that is very specific and has different contours from those that the CJ has analyzed.

a) **The "as efficient competitor"**

Specifically, the conduct in question concerns the abusive use of customer lists that SEN acquired during the period in which it held the monopoly in this market. Thus, SEN customers were asked whether they wished to receive commercial offers from the ENEL group, which allowed EE to use those lists as targeted advertising. In this way, there was an exploitation of resources available to ENEL due to the monopoly situation it was in, which was not available to its competitors. Considering this conduct, the CJ held that "although undertakings in a dominant position may defend themselves against their competitors, they must do so by using means which come within the scope of 'normal' competition, that is to say, competition on the merits[2]." Thus, as underlined by MIGUEL MOURA E SILVA, a company in a dominant position must not exclude its competitors based on resources other than the so-called standard competition procedures, even if such conduct aims to promote its commercial interests[3].

[1]Available at https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX%3A52009XC0224%2801%29.

[2] Cf. *Servizio Ellettrico Nacionale c. Autorità Garante della Concorrezza e del Mercato* (Case C-377/20), n.º 75

[3] MIGUEL MOURA E SILVA, *Direito da Concorrência*, AAFDL, p. 922. In line with this understanding, see the *Compagnie Maritime Belge* case, where the Court stressed that " Whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, **such behavior cannot be allowed**

b) The Competition Authorities' burden of proof

The judgment also addressed the long-standing question of whether article 102 TFEU is intended to maximise the well-being of consumers or whether the infringement is aimed at preserving an effective competition structure on the relevant market. Considering its previous case-law, the CJ reaffirmed that the well-being of consumers "must be regarded as the ultimate objective warranting the intervention of competition law to penalise abuse of a dominant position within the internal market or a substantial part of that market" (§ 46). The Court, in an interesting way, related this issue to the burden of proof that a Competition Authority is charged with. It concluded that it is only necessary to show that the conduct of a dominant undertaking is capable of affecting an effective competition structure unless the dominant undertaking shows that the exclusionary effect that may result from this practice is counterbalanced or even outweighed by positive effects for consumers in terms of price, choice, quality and innovation.

Furthermore, the CJ analyzed the need for a dominant undertaking to prove that the conduct was considered inappropriate and whether a Competition Authority must scrutinize the evidence produced by the undertaking. Thus, the CJ, crystallizing existing case law on this point, held that the abusive nature of a conduct presupposes that it could restrict competition and produce exclusionary effects on the market[4]. As observed by the Advocate General in his opinion (point 107), article 102 TFEU, in the

if its purpose is to strengthen this dominant position and thereby abuse it"(emphasis added). Thus, the CJ concluded that when an undertaking with exclusive rights, such as a statutory monopoly, uses resources that are, in theory, unavailable to a hypothetical competitor who is equally effective but does not hold a dominant position for the purpose of extending the dominant market position it currently holds as a result of those exclusive rights on another market, that use must be regarded as use of means outside the purview competition on the merits. This shows that the abusive conduct is drawn from a factual reality and as regards the present case, can be based on the use of information acquired without merit.

[4] See Judgment of 17 February 2011, Case C-52/09, TeliaSonera Sverige; Judgment of 30 January 2020, Case C-307/18, Generic, paragraph 154. This decision clarifies the standard of proof required to show an abuse of a dominant position in the context of foreclosing a competitor in the market. In particular, the CJEU highlighted that, in order to establish an abuse of a dominant position, it is necessary to prove not only the existence of a common infrastructure, but also the existence of an actual restriction of competition - which can prove unduly burdensome for regulators to demonstrate that a specific conduct constitutes an abuse of a dominant position.

context of abusive exclusionary practices, is of a prospective and preventive nature and does not consider only the materialized anti-competitive effects, so that the qualification of an undertaking in a dominant position as abusive does not require it to be shown that the result of exclusion has been achieved, but rather aims to sanction abusive exploitation regardless of whether the conduct has been successful[5]. At the same time, the Court reinforces, in the light of what has already been established for predatory pricing[6], that the intentional element is not required for the classification of a conduct as abusive.

III. Final considerations

The Court has clarified the criteria for classifying a conduct of an undertaking in a dominant position as abusive in the context of abusive exclusionary practices.

Therefore, the following guidelines should guide the national courts:

i. The use of own resources/means inherent to the condition of dominant position cannot be considered in a competition based on merit since it cannot be adopted by a hypothetical competitor equally effective. Thus, unless the company can show that this practice was objectively justified by external reasons and outweighed by gains that also benefit consumers, a company should not use means that are not available to its competitors to maintain its dominant position, even if these means are lawfully obtained.

ii. The parent company is responsible for the conduct of its subsidiaries so that economic utility is presumed, and the Competition Authorities do not have an additional burden of proof to prove the parent company's involvement in abusive conduct.

We conclude that this decision is of unavoidable importance for competition law itself, as the Court analyzed the circumstances in which the conduct of a hitherto monopolistic company may abuse of its previously dominant position, in a market where competition is fragile due to its recent liberalization.

[5] Similarly, in TeliaSonera, the CJEU held that although the exclusion of competitors had not been effective, this did not prevent the qualification of conduct as abusive.
[6] See the Opinion of Advocate General Mazak of 25 September 2008, Case C-202/07, France Télécom SA v Commission.