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European Court of Justice delivers Unilever Italia judgment

INTRODUCTION

On 19 January 2023, the European Court of Justice (CJ) delivered its judgment in the *Unilever Italia* case. In its judgment, the CJ extends the application of its landmark 2017 ruling in *Intel* and clarifies the evidentiary standard that must be met by EU competition authorities in abuse of dominance cases that relate to exclusivity clauses. The judgment also provides welcome clarity on the circumstances in which a company can be liable for the actions of its distributors.

BACKGROUND

In October 2017, the Italian Competition Authority (AGCM) fined Unilever €60 million for abusing its dominant position in the Italian market for individually packaged ice cream for consumption 'away from home', in breach of Article 102 TFEU. The alleged abuse resulted from conduct materially committed not by Unilever itself, but by independent distributors of its products. Those distributors had been found to have imposed exclusivity clauses on the operators of sales outlets where the products were sold, such as beach resorts. This required the outlets to obtain individually packaged ice creams exclusively from Unilever, which the AGCM considered to be an abuse of dominance.

During its investigation, the AGCM imputed the independent distributors' conduct to Unilever, and considered that the mere use of exclusivity clauses by a dominant company was sufficient to establish an abuse of dominance. As a result, the AGCM declined to consider economic analysis produced by Unilever which purported to show that the practice had no exclusionary effects harming competitors that were at least as efficient as Unilever.

Unilever's first appeal against the AGCM decision was dismissed, but on a further appeal the Italian Council of State referred the case to the CJ for a preliminary ruling. The reference sought clarifications on two key issues:

- In which circumstances can the conduct of an independent and autonomous distributor be attributed to a producer (in this case Unilever) in the context of Article 102 TFEU?
- In assessing whether there has been abuse of a dominant position implemented by means of exclusivity clauses, is the relevant competition authority required to (i) analyse whether the exclusivity clauses in question have the effect of excluding 'as efficient competitors' from the market; and (ii) examine the economic evidence provided by a party in relation to such an analysis?

THE CJ'S JUDGMENT

THE FIRST QUESTION: IMPUTING THE ACTIONS OF A DISTRIBUTOR

The CJ held that abusive conduct by distributors forming part of the distribution network of a producer in a dominant position may be imputed to that producer under Article 102 TFEU in some circumstances. The test, as laid out by the CJ, is whether the distributor acted independently in adopting the actions in question: a dominant producer is

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responsible for the actions of its distributors if those actions "*form part of a policy that is decided unilaterally by that producer and implemented through those distributors*".

On this point, the CJ concludes that a distribution network can constitute an instrument of territorial implementation for a producer's exclusionary practice, if, as was the case here, the distributors are required to have operators of sales outlets sign standard contracts which are supplied by that producer and contain exclusivity clauses for the benefit of its products.

THE SECOND QUESTION: THE EVIDENTIARY STANDARD TO ESTABLISH AN ABUSE OF A DOMINANT POSITION

In its landmark 2017 judgment in the *Intel* case, the CJ endorsed an 'effects-based' approach to Article 102 TFEU for all types of rebates (as reported in a previous briefing). This effectively removed the formalistic exception that the European Commission and the General Court had applied to exclusivity rebates, pursuant to which those rebates were treated as 'per se' abuses of dominance. Importantly, the CJ confirms in its *Unilever Italia* judgment that the same approach applies to exclusivity clauses.

In its judgment, the CJ recognises that a competition authority does not necessarily have to demonstrate that the conduct in question actually produced anti-competitive effects. However, according to the CJ, the competition authority is required to establish that the conduct was "*actually capable of restricting competition on the merits*", and that demonstration must be based on tangible evidence "*beyond mere hypothesis*". This should not be limited to empirical or behavioural studies but also take into account the specific circumstances of the case. The CJ reaffirms that the existence of doubt in that regard must benefit the company which engages in such a practice.

As a result, the CJ finds that the submission, in the course of the investigation, of evidence capable of demonstrating the inability of the conduct in question to produce restrictive effects gives rise to an obligation for the competition authority to examine that evidence. It follows that a competition authority such as the AGCM could not exclude out of hand the analysis submitted by the company in question, which in this case purported to show the exclusivity clauses' lack of exclusionary effects. The CJ concludes that the competition authority has a duty to consider, or provide specific reasons for not considering, the probative value of such analysis. Where that evidence is rejected, the company should have the opportunity to determine the evidence which could be substituted for that study.

Finally, the CJ clarifies that there is no legal obligation on competition authorities to apply the 'as efficient competitor test' when establishing an abuse of dominance. According to the court, that test is only one of a number of methods that competition authorities may use to assess whether a practice is capable of producing exclusionary effects. However, to the extent that the results of such a test are submitted by a company, the competition authority is then required to assess the probative value of those results.

CONCLUSION

The CJ's judgment in *Unilever Italia* provides welcome clarity on the evidentiary standard that must be met by competition authorities in the EU when establishing an abuse of dominance in relation to exclusivity clauses in distribution contracts. The CJ's endorsement of the view that rebates and exclusivity clauses should be on the same footing for this purpose, as both practices are capable of objective justification or of generating efficiencies, represents a long awaited realignment of the case law following the CJ's 2017 judgment in *Intel*.

In this context, and while the judgment does not tie the hand of competition authorities as regards the economic test they must apply, the CJ makes it clear that competition authorities are required to consider the evidence that is submitted to them in relation to the effects of the conduct in question – even if that conduct relates to a non-pricing practice such as exclusivity clauses. This will be significant for the Commission's ongoing investigations as well as for its past abuse of dominance decisions that are currently under appeal.

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OTHER DEVELOPMENTS

MERGER CONTROL

CMA UNWINDS DOUGH DEAL BETWEEN CÉRÉLIA AND JUS-ROL

On 20 January 2023, the UK Competition and Markets Authority (CMA) published the final report on its Phase 2 investigation into the completed acquisition by Cérélia Group of the Jus-Rol business of General Mills.

Jus-Rol is the largest supplier of branded dough-to-bake (DTB) products to grocery retailers in the United Kingdom, while Cérélia is the largest supplier of own brand DTB products, making these items on behalf of some of the UK's largest grocery retailers.

The CMA found that the merger involves the two largest suppliers in the market by a considerable margin, with DTB products supplied by Cérélia and Jus-Rol accounting for nearly two-thirds of all such products sold to grocery retailers in the UK.

The CMA's investigation also found that the two businesses face very limited competition, with all other market suppliers being substantially smaller, and many lacking the capabilities held by the merging businesses. Furthermore, the CMA considered it unlikely that any supplier would enter the market, or expand its existing activities, to address the loss of competition brought about by the merger.

According to the CMA, its findings are based on evidence which shows that Jus-Rol products compete with grocery retailers' own-brand products (supplied by Cérélia) for the same space on many supermarket shelves. Also, evidence from grocery retailers shows that retailers view the companies' products as important alternatives to one another – in particular because there are few alternative suppliers of either branded or own-brand products. According to the CMA, grocery retailers' ability to trade off Jus-Rol and Cérélia when purchasing DTB products enables them to obtain a better deal for customers.

The CMA has therefore concluded that the merger gives rise to a substantial lessening of competition in the market for the supply of DTB products to grocery retailers in the UK. The CMA concluded that the only acceptable remedy was an asset divestment involving the sale of the entire Jus-Rol business to an independent buyer, akin to an entire unwinding of the merger.

ANTITRUST

CJ JUDGMENT IN LITHUANIAN RAILWAYS CLARIFIES THE ESSENTIAL FACILITIES DOCTRINE

On 12 January 2023, the European Court of Justice (CJ) largely upheld an earlier ruling of the General Court (GC), which had affirmed a European Commission decision to impose a fine on Lithuanian Railways for abusing its dominant position under Article 102 TFEU. The case emerged out of Lithuanian Railways' decision to remove a short section of railway track running to the Latvian border. This track removal was controversial because it effectively prevented one of the rail operator's principal customers, Orlen, from switching to Latvian Railways for the rail transport of Orlen's oil products. In its 2017 decision, the Commission fined Lithuanian Railways €27 million, finding that the track removal had the effect of foreclosing competition on the downstream market for the rail transport of oil products. The Commission's decision was affirmed on appeal to the GC in 2020, although the GC ruled that the fine should be reduced by circa €7 million.

The principal thrust of Lithuanian Railways' appeal before the CJ was that both the GC and the Commission had erred in applying the law relating to the "essential facilities doctrine", as set out in the *Bronner* case (Case C-7/97). This case establishes the principle that the refusal, by a dominant undertaking, to grant a competitor access to a service will constitute an abuse of dominance when three conditions are met: (i) the service in

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question is indispensable to market access; (ii) the refusal is incapable of being objectively justified; and (iii) the refusal is likely to eliminate all competition on the market.

The CJ held that the essential facilities doctrine, as set out in *Bronner*, was not applicable to this case. In the first place, the *Bronner* case related to a "refusal of access" situation whereas the present case could not be analysed as a refusal of access since the removed track became unusable by competitors but also by the dominant undertaking itself. Moreover, the removal related to only one section of the Lithuanian rail network and did not prevent Lithuanian Railways' potential competitor from gaining access to the network by another route. Second, the *Bronner* criteria relate to a denial of access to infrastructure owned by the dominant undertaking and that it has developed for the needs of its own business. In this case, however, Lithuanian Railways did not own the relevant stretch of track but, rather, was obliged to maintain the track using public funds. Third, the CJ held that the *Bronner* criteria are not applicable in cases, like the present case, where the dominant undertaking is subject to a regulatory obligation not to deny competitors access to relevant infrastructure.

Lithuanian Railways further argued that the GC had erred in law by classifying the track removal as abusive. The rail operator also argued that the track removal had been wrongly categorised as "capable of restricting competition". The CJ, however, rejected all of these arguments and dismissed the appeal.

HONG KONG COMPETITION COMMISSION REVISES MODEL "NON-COLLUSION CLAUSES" FOR PROCUREMENT PROCESSES

On 17 January 2023, the Hong Kong Competition Commission (HKCC) published a revised set of model "Non-collusion Clauses" for procurers to incorporate in their invitation to bid documents and contracts, following the first set of model clauses released in 2017.

In the new clauses, bidders are required to disclose their beneficial owners, which will give procurers the ability to determine the actual relationship between bidders that appear to be submitting independent and competitive bids and identify potential anti-competitive conduct.

The update comes after the HKCC observed instances where a number of businesses with common beneficial owners misleadingly submitted coordinated bids disguised as independent bids. While not in itself a contravention of the Competition Ordinance, the HKCC considers the revised clauses an appropriate way of curtailing this behaviour in future.

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