The Behaviour of Dominant Firms and the Principle of Equal Opportunities: Lessons From the *SEN* Antitrust Saga

Case Comment to the Servizio Elettrico Nazionale Judgment of the Court of Justice of 12 May 2022, Case C-377/20

by

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CONTENTS

Abstract

This commentary concerns the *Servizio Elettrico Nazionale* (SEN) case that stems from the conduct of an incumbent operator – Enel S.p.A. – called upon to confront the liberalization process of the Italian electricity market. In particular, the former legal monopolist allegedly worked to consolidate its dominant position in the electricity production market, by denying its rivals access to a resource that would

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have been non-replicable and of strategic importance to compete in the liberalized electricity distribution market. This ruling is of fundamental importance as the Court of Justice discusses therein the objectives of antitrust law and the notion of exclusionary abuse. Moreover, in light of the practical interpretation of the ruling, it is important to ask whether the CJEU would have developed the same reasoning if the relevant market had not concerned an industry undergoing liberalization, such as the electricity sector. The commentary closes by referencing the more recent *Unilever* case, where the Court of Justice seems to confirm the opportunity of applying the "as efficient competitor test" to non-price practices even, in the absence of a market liberalization process.

Résumé

Ce commentaire concerne l'affaire Servizio Elettrico Nazionale (SEN) qui découle du comportement d'un opérateur historique – Enel S.p.A. – appelé à faire face au processus de libéralisation du marché italien de l'électricité. En particulier, l'ancien monopoleur légal aurait travaillé pour consolider sa position dominante sur le marché de la production d'électricité, en refusant à ses rivaux l'accès à une ressource qui aurait été non reproductible et d'une importance stratégique pour être compétitif sur le marché libéralisé de la distribution d'électricité. Cet arrêt est d'une importance fondamentale car la Cour de justice y discute des objectifs de la législation antitrust et de la notion d'abus d'exclusion. De plus, à la lumière de l'interprétation pratique de l'arrêt, il est important de se demander si la CJUE aurait développé le même raisonnement si le marché pertinent n'avait pas concerné un secteur en cours de libéralisation, tel que le secteur de l'électricité. Le commentaire se termine par une référence à l'affaire Unilever, plus récente, dans laquelle la Cour de justice semble confirmer l'opportunité d'appliquer le test du concurrent aussi efficace aux pratiques non tarifaires, même en l'absence d'un processus de libéralisation du marché.

Key words: liberalization; abuse of dominant position; 102; exclusionary effects; equally efficient competitor.

JEL: K21, K23

I. Introduction

The *Servizio Elettrico Nazionale* (hereinafter: **SEN**) judicial "saga" occurred in the context of the progressive liberalization of the Italian electricity market.[1] The saga comprises its Italian part – the *SEN* decision, issued by the Italian

[1] On the relationship between antitrust law and liberalized markets, see M. Armstrong – D.E.M. Sappington, *Regulation, Competition, and Liberalization*, *in Journal of Economic Literature*, 44, 2006, 325–66.

Competition Authority in 2018, its subsequent appeal to the competent administrative court, TAR Lazio, which upheld the SEN decision in 2019, and a further appeal to the *Consiglio di Stato*. It was the latter that sent, in 2020, several preliminary questions to the Court of Justice – the resulting CJEU *SEN* ruling of May 2022 constituting the EU segment of the saga. The *SEN* case was concluded by the ruling of the *Consiglio di Stato* of December 2022.

In particular, since March 1999, Italian institutions have taken several regulatory actions to open the domestic energy market to competition. They forced the partial privatization of Enel SpA (hereinafter: **Enel**), the former state-controlled statutory monopolist; required the unbundling of its activities, to guarantee transparent and non-discriminatory conditions of access to the essential infrastructures it controlled; and supported the entry of new private competitors (alternative operators) into the markets for power generation and power distribution. At the same time, however, Italian institutions felt that, in the newly liberalized market, some customers, such as households and small and medium-sized enterprises (SMEs), were unable to choose energy supply contracts that were best suited to their needs. Therefore, the Italian authorities decided to design the retail electricity distribution market as follows: on the one hand, large businesses were allowed to purchase energy under market conditions from any distributor active in the free market; on the other hand, households and SMEs – so-called "protected customers" – had to purchase electricity from territorially competent distributors, at a regulated price, and under the supervision of a regulatory authority.

Against this backdrop, the first step of the SEN saga dates to 2018 and the *SEN* decision of the Italian Competition Authority, the AGCM (hereinafter: **NCA**). Enel, as the former legal monopolist, was already integrated into all stages of the energy chain in Italy. The NCA found in its decision that, between January 2012 and May 2017, Enel had abused its dominant position in the electricity generation market by "nudging" protected customers of Servizio Elettrico Nazionale SpA (hereinafter: **SEN SpA**), its operator in the protected market, to migrate toward Enel Energia SpA (hereinafter: **EE SpA**), its operator in the free market.

Enel, when asking its protected customers to consent to the processing of their personal data, to receive commercial offers related to the free market, SEN SpA did so *separately* for its own EE SpA, and separately for EE SpA's rivals. According to the NCA, this act of submitting two separate requests gave EE SpA a competitive advantage: it induced SEN SpA's customers to give their consent only to EE SpA and, thus, allowed the latter to be privy to *strategic* and *unrepeatable* lists – the SEN lists – of customers[2] to whom it could

[2] Case C-377/20 *Servizio Elettrico Nazionale (SEN)* ECLI:EU:C:2022:379, para. 12.

offer customized supply contracts. Enel's rivals in the free market could not match such tailor-made offers, *because they lacked the aforementioned personal data*. Although the lists were, indeed, available to buy on Enel's website, EE's rivals rarely bought them.

The second step in the saga can be found in the appeal of all three companies of the Enel Group, against the decision of the NCA on the basis that SEN's contested conduct would not have been able to produce any exclusionary effects. They stated that the mere inclusion of customers on telemarketing lists, to promote certain services, did not bind those customers to buy the offer. Nor did it prevent them from appearing on other lists, and receiving advertising from EE SpA's rivals, or changing suppliers at any moment, even repeatedly.

Furthermore, Enel maintained that more comprehensive and lower-priced lists of protected customers were already available on the market so its SEN lists were neither strategic nor non-replicable. In addition, the three companies of the Enel Group showed that, by using these telemarketing lists for launching customized offers between March and May 2017, SEN SpA managed to obtain only 478 new customers, representing 0.002% of the protected customers, and merely 0.001% of all electricity users. Therefore, they argued that the growth of EE SpA's market share was due not to the (abusive) compilation and use of SEN lists, but to legitimate factors, such as the quality of EE SpA's services, and the attractiveness of Enel's brand.

The appeal was rejected in October 2019 by the competent administrative court (TAR Lazio)[3] and then reached the second level of administrative proceedings – the *Consiglio di Stato* (the Italian Council of State), which referred for a preliminary ruling to the Court of Justice of the EU (hereinafter: **the Court** or **CJEU**). The referral was meant to clarify what interests Article 102 TFEU protects, and whether monopolistic conduct, which produces only potential restrictive effects, can be classified as abusive, given that the conduct of SEN has produced neither direct harm to consumers nor actually had a significant impact on the competitive structure of the market.

Following the ruling of the Court of Justice of 12 May 2022 (hereinafter: ***SEN* ruling**), the *Consiglio di Stato* upheld the appeal in December 2022.

The paper aims to analyze the points of interest raised within the SEN saga, which stands out for the relevance of the interpretative questions it produced, regarding the application of Article 102 TFEU to exclusionary practices of

[3] The decision is available at the following link: https://www.giustizia- amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=201902707&nomeFile=201911957_01.html&subDir=Provvedimenti

dominant firms.[4] Among these, the commentary will focus in particular on the possible risks in applying the "as efficient competitor" test ("equally efficient competitor" test) to non-price practices. In doing so, the paper will also refer to the more recent *Unilever* ruling.[5]

II. The EU component of the SEN saga

In the *SEN* case, the CJEU was asked, in essence, to clarify:[6] (*i*) which are the interests that Article 102 TFEU protects and, in particular, whether it shelters the (competitive) structure of the market *and/or* consumers, and their well-being/welfare;[7] (*ii*) what distinguishes normal competition from distorted competition[8], and, in particular, whether a behaviour, otherwise lawful, can be prohibited just because it is likely to produce exclusionary effects; and (*iii*) whether the intent of the dominant firm under scrutiny, and the actual effects of its practice, should matter at all, and, if so, for what purpose.[9]

At first, these questions might sound pedantically theoretical. In reality, establishing the requirements that any exclusionary practice of dominant firms must meet, to be abusive under the provisions of Article102, provides legal certainty and prevents arbitrary application of competition law. Furthermore, as the Italian referring court observed, establishing the legal boundaries

[4] Namely, *Servizio Elettrico Nazionale* does not deal with what makes the exploitative practices that go under Art. 102(a) abusive. On this topic, see P. Akman, *The concept of abuse in EU competition law. Law and economic approaches*, Oxford, Hart Publishing, 2015. On a national perspective see also M. Siragusa, *Italy – new forms of abuse of dominance and abuse of law*, in *Abuse of Dominance in EU Competition Law. Emerging Trends*, P.L. Parcu – G. Monti – M. Botta (a cura di), Edward Elgar Publishing, 2017, 119.

[5] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (Unilever)*, ECLI:EU:C:2023:33.

[6] Case C-377/20 *Servizio Elettrico Nazionale (SEN)* ECLI:EU:C:2022:379.

[7] While reading the French and Italian versions of the ruling, as well as the English translation of the opinion of AG Rantos, one cannot help but come across these three expressions – protection of consumers, protection of consumer welfare, and protection of consumer well-being – used synonymously. This is unfortunate because these expressions do not refer to the same legal interest. Anyway, they can be put together and used as synonyms when opposed to the protection of the competitive structure of the market.

[8] As AG Rantos wrote, over the years, the CJEU has referred to non-abusive competition with different equivalent expressions, such as "fair competition", "competition on the merits" and "competition on the basis of quality" – see Opinion case C-377/20 ECLI:EU:C:2021:998 para. 53 (hereinafter: Rantos Opinion).

[9] The CJEU was also asked to specify the conditions under which parent liability holds. However, this issue falls out of the scope of this insight.

of the notion of abuse is useful when, like in the *SEN* case, the practice in question neither corresponds to the examples listed in Article 102 itself nor is it a type of conduct that the European Commission and National Competition Authorities have systematically analyzed over the years.[10]

In addition, answering the above questions might, first, clarify if the Court intends to fully endorse the effect-based approach, already adopted in many recent cases, such as *TeliaSonera*, *Post Danmark I* and *II*, *Intel*, *Generics (UK)* and *Deutsche Telekom II*.[11]

Second, in light of the debate about the principle of the "as efficient competitor",[12] it might specify if that approach can be applied to inform and analyze not only price conduct but also non-price behaviours, such as the one originally prohibited in the *SEN* case.

Finally, in its Opinion on *SEN*, Advocate General Rantos remarked that the decision that the Italian referring court will ultimately make in the *SEN* case, based on the Court of Justice's preliminary ruling, will mark a new frontier.[13]

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[10] For a more detailed analysis see L. Zoboli, *Prestazioni e dotazioni iniziali: il rischio di applicare il test del "concorrente altrettanto efficiente" alle pratiche non di prezzo*, in Riv. Dir. Ind., 5/2022, 418 ff.

[11] Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83; case C 209/10 *Post Danmark I* EU:C:2012:172; case C-23/14 *Post Danmark II* EU:C:2015:651; case C-413/14 P *Intel v Commission* EU:C:2017:632; case C-307/18 *Generics (UK) and Others* EU:C:2020:52; case C-152/19 P *Deutsche Telekom II* EU:C:2021:238.L

[12] For an overview of the European debate, see Mandorff and Sahl, "The Role of the 'Equally Efficient Competitor' in the Assessment of the Abuse of Dominance", Konkurrensverket Working Paper Series in Law and Economics, 1/2013; Gaudin and Mantzari, "Google Shopping and the As-Efficient-Competitor Test: Taking Stock and Looking Ahead", 13 *Journal of European Competition Law & Practice* (2022), 125–135; de Ghellinck, "The As-Efficient-Competitor Test: Necessary or Sufficient to Establish an Abuse of Dominant Position?", 7 *Journal of European Competition Law & Practice* (2016), 544–548.

[13] Rantos Opinion delivered on 9 December 2021, Case C-377/20, ECLI:EU:C:2021:998. In a commentary on the opinion, see P. Ibañez- Colomo, *AG Rantos's Opinion in Case C-377/20, Servizio Elettrico Nazionale:* a clean framework capturing the essence of the case law (I) and (II), in *Chilling Competition*, 2021, https://chillingcompetition.com/2021/12/10/agrantoss- opinion-in-case-c-377-20-servizio-elettrico-nazionale-aclean-framework-capturing-the-essence-of-the-case-law-i/ and https://chillingcompetition.com/2021/12/29/ag-rantossopinion-in-case-c-377-20-servizio-elettrico-nazionale-a-cleanframework-capturing-the-essence-of-the- case-law-ii; M. Komninos, *Competition Stories: November & December 2021*, in *Network Law Review*, 2022, https://leconcurrentialiste.com/ competition- stories-nov-dec-2021/; C. Puscas, *AG Rantos: What is the Legal Framework for Analysing Data Leveraging Abuses under Article 102 TFEU?*, in *Kluwer Competition Law Blog*, 2022, http://competitionlawblog.kluwercompetitionlaw.com/2022/01/03/ag-rantos- what-is-the-legal-framework-for-analysing-data-leveraging-abuses-under- article-102-tfeu/; M. Cole – L. van Kruijsdijk – A. Betancor Jiménez de Parga, *Advocate General Rantos Provides Sound Guidance for Non Pricing Abuse of Dominance Analysis (Case C-377/20)*, in *Covington Competition*, 2022, https://www.covcompetition.com/2022/01/advocate-general-rantos-provides- sound-guidance-for-non-pricing-abuse-of-dominance-analysis-case-c-377-20/; I. Herrera Anchustegui, L. Hancher,

The decision adopted by the Consiglio di Stato on 17 November 2022 will be commented on in paragraph IV. As it was in previous cases concerning liberalized markets, the *SEN* decision concerns a former legal monopolist seeking to obstruct the liberalization process by preventing its potential competitors from enjoying the same opportunities as the incumbent. However, the resulting decision does not concern a price strategy related to the use of essential infrastructure that the incumbent controls.[14] Rather, the *Consiglio di Stato* decision in the *SEN* case concerns a non-price strategy related to the use of a database, the essentiality of which cannot be taken for granted.

1. The interests that Article 102 TFEU protects

The question of whether Article 102 TFEU shelters consumers and their well-being/welfare, *and*/*or* the (competitive) structure of the market, gives rise to two deep fears and a misunderstanding among antitrust scholars.

The first fear has to do with the idea that an application of Article 102 focused too much on the protection of consumers, could lead antitrust decision-makers to use Article 102 instead of the rules about contracts, torts, and consumer protection, which are less cumbersome and time-consuming than Article 102. However, this fear underlies the debate about exploitative abuses and, thus, falls outside the scope of the *SEN* case.

The second fear instead underpins the debate about exclusionary abuses and thus lies at the heart of this *insight*. This fear is rooted in the idea that an application of Article 102 that focuses too much on the protection of market structures, could lead to the sheltering of competitors from competition and, hence, to the preservation, on the market, of competitors that are less efficient and innovative than the dominant firm. This was probably the case in the past.[15]

However, in *SEN*, as well as in its most recent rulings,[16] the CJEU has repeatedly specified that Article 102 TFEU cannot punish the practices of dominant firms that, while producing exclusionary effects, and thus undermine market structure, also cause effects in terms of price, choice, quality, and innovation that are *beneficial to consumers*, and that can offset those

Competition on the Merits in Liberalised Electricity Markets: a Regulatory Reading of AG Rantos' Opinion in Servizio Elettrico Nazionale, Utilities Law Review, 2022.

[14] Case C-202/07 P *France Télécom v Commission* EU:C:2009:214; case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603; case T-336/07 *Telefónica and Telefónica de España v Commission* EU:T:2012:172; and case T-486/11 *Orange Polska v. Commission* EU:T:2015:1002.

[15] Rantos Opinion cit. para. 93.

[16] See, e.g., *Post Danmark* cit. paras 41–42; *Intel* cit. paras 134 and 140; and *Generics (UK)* cit. para. 165.

exclusionary effects.[17] In other words, the CJEU is crystal clear in affirming that protecting market structure does not mean protecting inefficient and obsolete competitors, even if they are rivals of dominant firms. Rather, the aim of Article 102 is to prevent dominant firms from undermining the *structure of effective competition*[18] or – to use the expression that the *Consiglio di Stato* used in its referral – *the competitive structure of the market*.

Finally, the misunderstanding that the above question builds upon is the idea that the protection of the competitive structure of the market is something detached from the protection of consumers and their interests. It is not: EU competition law has always been based on the premise that the protection of the competitive structure of the internal market serves the protection of consumers. This is so because competitive markets – that is, markets selecting efficient and innovative firms – are expected to produce economic growth and prosperity for the good of the whole society, including consumers.[19] True, protecting market structures could be detrimental to consumers, if Article 102 was to be used to shelter inefficient and obsolete competitors, just because they are rivals of dominant firms. However, according to the most recent rulings of the CJEU – protecting market structures means preventing dominant firms from harming the structure of effective competition – it means protecting the *competitive* structure of the market. Thus, such a goal is not independent from, or alternative to, the goal of protecting consumers and their welfare/well-being.[20] Indeed, the CJEU confirms in the *SEN* ruling that Article 102 sanctions, not only practices that may cause *direct* harm to consumers, that is exploitative practices,[21] but also those that harm consumers – both intermediate and final ones[22] – *indirectly*, that is exclusionary practices that undermine the structure of effective competition.[23]

The clear ruling that Article 102 TFEU protects consumers and their welfare/well-being, by protecting the competitive structure of markets, rather than inefficient and obsolete rivals of dominant firms, affects both what marks the exclusionary practices of dominant firms as abusive, and the evidence necessary to show it.

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[17] *SEN* cit. paras 45–46, 48 and 73.

[18] *SEN* cit. paras 44 and 68.

[19] *SEN* cit. paras 41–43 and, to this effect, cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* EU:C:2008:504 para. 68; *TeliaSonera Sverige* cit. paras 21–22; *France Télécom* cit. para. 103; *Deutsche Telekom* cit. paras 170 and 180.

[20] Rantos Opinion cit. paras 93–100 and 103.

[21] Rantos Opinion cit. para. 89.

[22] *SEN* cit. para. 46.

[23] *SEN* cit. para. 44 and, in this sense, Case C-95/04 P *British Airways v. Commission* EU:C:2007:166 paras 106–107 and *TeliaSonera Sverige* cit. para. 24.

2. The "evil" that distinguishes abusive conduct from normal, merit-based competition

Courts, authorities, and scholars have always been struggling with the notion of abuse, that is, with the need to draw a clear line between dominant firms' practices which come within the scope of normal, merit-based competition, and those that do not and should, therefore, be prohibited.[24]

In this regard, the CJEU makes three clear statements in its *SEN* ruling.[25] First, in light of established case law, the notion of abuse cannot depend on whether dominant firms' practices are compliant with rules other than Article 102 TFEU.[26] This provision would have no legal autonomy if it banned automatically only those practices that other laws already qualify as illegal. Second, under the economic-based approach embraced over the last 30 years, the illegality of dominant firms' practices does not depend on the *form* they take,[27] but on their *effects*. Third, the notion of abuse is objective and does not depend on the intent of dominant firms,[28] albeit their intent may serve as a piece of evidence of abuse.[29]

In *SEN*, the CJEU seeks to offer a single notion of what abuse is – unfortunately, the long and complex sentences used are not known for their clarity.[30] However, by putting together different passages of the judgment, it emerges that in *SEN*, the CJEU considers an exclusionary practice to be abusive when it is (*i*) *capable* of producing (*ii*) *exclusionary effect*s that are (*iii*) *not counterbalanced* by effects that are beneficial to consumers in terms of price, quality, variety and innovation – the variables, on which consumer welfare indeed depends.

Going in order, following previous case law,[31] the CJEU confirms that Article 102 TFEU shall find application even when the restrictive effects associated with the conduct at stake are merely *potential*.[32] To enforce

[24] For a neutral definition, see Akman, *The concept of abuse in EU competition law. Law and economic approaches* (Bloomsbury, 2015).

[25] In this regard, see also A. Komninos, *A Steady Course Towards the Effects-Based Approach: Case C-377/20 Servizio Elettrico Nazionale*, Journal of European Competition Law & Practice, 2023, 292; J. Lindeboom, *Towards a Unified Judicial Philosophy of Article 102 TFEU? Servizio Elettrico Nazionale SpA* (C-377/20), EU Law Live, 6 June 2022.

[26] *SEN* cit. paras 67 and 103 and, to this effect, case C 457/10 P *AstraZeneca v. Commission* paras 74 and 132.

[27] *SEN* cit. para. 72 and Rantos Opinion cit. para. 55.

[28] *SEN* cit. paras 60–62.

[29] *SEN* cit. paras 63–64.

[30] See, e.g., *SEN* cit. para. 68.

[31] *TeliaSonera* cit. para. 64; *Intel* cit. para. 138 and *Generics (UK)* cit. para. 154.

[32] *SEN* cit. paras 50–51, 53, 69 and 71. See, in addition, Rantos Opinion cit. para. 42 stating that "the capacity to produce a potential restrictive effect on the relevant market,

Article 102, antitrust authorities and judges shall not wait for competitive harm to occur. They are entitled to apply the prohibition even when the restrictive effects of dominant firms' practices have not yet taken place.[33] Otherwise, Article 102 could not be applied when the restrictive effects of the contested conduct are purely hypothetical. As exemplified by the CJEU, this may be the case when, in fact, the dominant firm did not carry out the practice in question, or when the occurrence of the practice's restrictive effects would depend (or would have depended) on the occurrence of specific circumstances that, at the time of the implementation of the practice, were unlikely (or did not occur).[34]

Furthermore, the CJEU is clear in affirming that any assessment of the capability of a dominant firm to produce exclusionary effects must be done at the moment in which the firm puts the contested conduct in place, and in light of all the relevant circumstances existing at that point.[35] The absence of actual restrictive effects may be one of the relevant circumstances demonstrating the inability of the conduct in question to produce restrictive effects.[36] However, it cannot, alone, exclude the application of Article 102. Even if a long time has passed since the contested conduct occurred, the fact that it did not produce actual restrictive effects cannot *conclusively prove* its lawfulness, if the conduct was found to have been capable of restricting competition at the time when it was implemented. After all, the absence of actual restrictive effects may result from causes other than the anti-competitive nature of the conduct under assessment, for example, it may be due to changes in the market, or due to the dominant firm's inability to fully implement a strategy that it has put in place.[37]

Turning to the notion of exclusionary effects,[38] while going through previous case law on price and non-price practices,[39] the CJEU makes clear in several paragraphs of its ruling that antitrust authorities and judges must focus on the exclusionary effects that occur in detriment to competitors *as efficient as* the dominant firm,[40] also when they deal with non-price practices. The Court is

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such as an anticompetitive exclusionary (or foreclosure) effect, is the essential factor in the characterization of conduct as abusive".

[33] Rantos Opinion cit. para. 110 stating that, "it would be contrary to the *ratio* of [Art. 102 TFEU], which is also preventive and forward-looking in nature, if it were necessary to wait for the anticompetitive effects to occur in the market before a finding of abuse could lawfully be made".

[34] *SEN* cit. para. 70 and, to this effect, *Post Danmark II* cit. para. 65.

[35] *SEN* cit. para. 72.

[36] *SEN* cit. para. 58 and, to this effect, case C-538/18 P, *České dráhy*/*Commissione*, para. 70.

[37] *SEN* cit. paras 54–55.

[38] *SEN* cit. paras 50, 55 and 61.

[39] *SEN* cit. paras 80–82 and 83, respectively.

[40] *SEN* cit. paras 71, 76, and 78–79.

clear in affirming the principle that there is no competitive merit in excluding rivals that are as efficient as the dominant firm. Moreover, in relation to non-price practices, the CJEU argues in paragraph 78 that to exclude equally efficient rivals, a dominant firm can only exploit its market position, and the assets it holds because of this position. Otherwise, its rivals would be able to match the offerings of the dominant firm, by resorting to resources equivalent to those of the dominant firm.[41] At the same time, however, the Court also specifies that the "as efficient competitor" test is only one of the possible tools that antitrust authorities and judges can use to identify harmful exclusionary effects.[42] Indeed, the CJEU mentions other possible tests, including the "no economic sense" test where a dominant firm abuses its position when it implements a (price) practice whose sole justification is the exclusion of competitors.[43]

Finally, the Court affirms that a dominant firm's practice that can produce exclusionary effects is not abusive if it is also capable of producing effects that are beneficial to consumers. The reader will not find this specification surprising. Consistent with what it said about the interests that Article 102 TFEU protects, the CJEU confirms that Article 102 is by no means intended to disincentivize efficiency gains and the innovations that dominant firms may realize based on their own merits. It is also not meant to ensure that less efficient competitors remain on the market.[44] Therefore, under Article 102, dominant firms are allowed to compete fiercely, even by adopting practices that yield exclusionary effects, if, and only if, such practices also produce *countervailing advantages* in terms of price, choice, quality, or innovation.[45] In sum, for the CJEU, if the practices of dominant firms increase, on balance, consumer welfare, then they can be seen as proper means of normal, merit-based competition, and, thus, do not constitute an abuse of their dominant position.[46]

Therefore, for the Court, the "evil" distinguishing abusive conduct – from normal, merit-based competition – has to do with the exclusion of equally efficient rivals, as well as with the inability of the conduct at hand to produce countervailing effects that are beneficial to consumers.

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[41] Also, *SEN* cit. paras 83 and 91. Therefore, it is possible to argue that in speaking of replicability, the CJEU is not referring to the replicability of dominant firms' practices, but to the replicability of their assets.

[42] *SEN* cit. para. 81.

[43] *SEN* cit. para. 77 and, to this effect, case C-62/86 *AKZO v. Commission* EU:C:1991:286 para. 71.

[44] *SEN* cit. paras 84–86.

[45] *SEN* cit. paras 45 e 73.

[46] *SEN* cit. para. 75.

III. Indications for the Italian Referring Court

In light of the interests that Article 102 protects, and of the conduct it prohibits, the CJEU gives some guidelines to the Italian *Consiglio di Stato*. It specifies that, while collecting the consent of its protected customers, SEN SpA should have sought not to discriminate between EE SpA and its rivals. The CJEU indeed clarifies that in markets that are undergoing a liberalization process – and that are subject to specific information-sharing obligations, although within the limits fixed by data protection rules[47] – the means available to the incumbent because of its former statutory monopoly must be available to newcomers on equal footing.[48] Therefore, in such markets, an incumbent that uses those assets to favor the firms of its corporate group – against their potential rivals – does not compete on merits.[49]

At the same time, however, the Court acknowledges that the information provided in the discussed referral does not enable the CJEU to understand whether SEN SpA's conduct was, in fact, discriminatory. For example, it is not clear whether the *separate* requests for consent were separate because they occurred at different times, or because they were placed in different parts of the same document. Nor is the referral clear whether the same request for consent covered all third-party firms, other than EE SpA, in a non-discriminatory way, or only some of them individually. The referral is also not clear whether the consent to EE SpA's rivals was conditioned on the consent to EE SpA.[50]

According to the CJEU, therefore, if the referring court were to find that the Italian NCA, the AGCM, has indeed demonstrated, based on evidence such as behavioral studies, that the procedure used by SEN SpA was capable of favoring EE SpA against its rivals (a self-preferencing case?), then the referring court would have to conclude that even EE SpA's rivals were as efficient as EE SpA were prevented from matching EE SpA's offer *because they were deprived of a strategic and non-replicable resource*.[51] Therefore, granted the lack of countervailing positive effects for consumers, SEN SpA's conduct would be considered abusive, regardless of any considerations of legitimate factors that may explain the growth of EE SpA's market share.[52]

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[47] *SEN* cit. paras 88 and 95.
[48] *SEN* cit. paras 91–93.
[49] *SEN* cit. para. 96.
[50] *SEN* cit. para. 97.
[51] *SEN* cit. para. 101.
[52] *SEN* cit. para. 102.

IV. Final decision of the Italian referring Court

In light of the elaboration of the CJEU, the *Consiglio di Stato* takes a straightforward decision that is hardly surprising.[53] First of all, it stresses that the decision and judgment under appeal appear not to have adequately considered and assessed certain factual aspects of the case, which are likely to undermine the views of AGCM, namely that: (i) SEN SpA offered the mentioned lists both to EE SpA and to its competitors on the same terms, in compliance with the consent expressed by the individual concerned; (ii) the number of contacts collected and included in SEN lists was modest – on average about 500,000 per year in the period 2012–2015 – for markets with tens of millions of users; (iii) similar customers contact lists were available on the market; and that (iv) the allegedly abusive conduct challenged by the AGCM resulted in the acquisition of an insignificant number of customers when compared to the size of the relevant market identified. It should also be mentioned that SEN SpA, in the context of the first ground of appeal, has argued that leaving the persons concerned free to give separate consents (even in favor of third companies or only in favor of companies in the Enel group) is not an inherently discriminatory way of collecting consent, but a lawful way of allowing users to express their preferences as extensively as possible.

Considering these factual data, and in light of the specific clarification coming from the CJEU, the *Consiglio di Stato* upheld the appeals as anticipated. In its view, the AGCM had not demonstrated on the evidentiary basis, such as behavioral studies, that the procedure used by SEN SpA – to collect the consent of its customers to the transfer of their data – was likely to favor EE SpA/SEN SpA. In other words, the decision of the Italian Competition Authority should have provided evidence as to why SEN SpA's collection of differentiated privacy consents, for future marketing proposals, was discriminatory. Instead, it merely criticizes the choice to require double consent. In the absence of an investigation into the manner (in the sense indicated by the Court) of collecting consent, the collection of two privacy consents cannot, therefore, constitute proof that the procedure used by SEN SpA was, in fact, likely to favor the lists intended to be sold to EE SpA. Consequently, there is no evidence that the contested conduct was likely to constitute abuse of dominance. Essentially, the investigative and motivational deficiencies of the decision issued by the NCA led the Consiglio di Stato to hold that the objective existence of the unlawfulness of the contested conduct had not been proven.

[53] *Consiglio di Stato*, Sixth Section, Decision 10571/2022, ECLI:IT:CDS:2022:10571SENT. The decision is available at the following link: https://www.giustizia-amministrativa.it/

V. A quick look at the *Unilever* case

Less than a year after the CJEU's *SEN* ruling, the Court of Justice delivered another ruling on 19 January 2023 that concerns, once again, questions raised by the *Consiglio di Stato*. This procedure follows Unilever's appeal against the decision of the Administrative Court of Lazio, which upheld the decision of the Italian Competition Authority wherein the appellant was condemned for an abuse of its dominant position. In particular, Unilever is alleged to have abused its dominant position on the Italian market for the marketing of ice cream in individual packs, intended for consumption in certain commercial establishments (that is, "outside" of what is considered as the "home" environment), such as swimming pools or bars, through exclusivity clauses and discount practices adopted by its distributors. Those practices were seen by the NCA, and by the Italian Administrative Court, to have anti-competitive effects. In their view, the contested practices have prevented, or severely restricted, competing operators from competing with Unilever on the merits of their products. This was caused by the specific characteristics of the relevant market, such as, for example, limited space available in the relevant points of sale, and of the decisive role, when it comes to consumer choices, of the extent of Unilever's offer in those points of sale. In doing so, AGCM – and consequently the Italian Administrative Court – failed to take into account studies provided by Unilever showing that the practices in question did not foreclose "equally efficient" competitors.[54]

The Unilever ruling of the CJEU is of significance in several respects, such as, in attributing liability for the conduct of distributors to the dominant firm, based on the theory of indirect liability, instead of relying on the single economic unit doctrine.[55] In this commentary, however, we will only comment on its relevance concerning the abovementioned SEN debate.

Indeed, in responding to the questions raised, the Unilever ruling also addresses the matter of the "as efficient competitor" test. It states that in assessing the infringement of Article 102 TFEU, the national authorities can use that criterion on an optional basis – unless it is used by the defendant to prove that the practices in question do not have anti-competitive effects. In such a case, the NCA itself must adopt this test, as in the present case.

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[54] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (Unilever)*, ECLI:EU:C:2023:33.

[55] M. Maggiolino, *When an ice cream case provides antitrust experts with food for thought: Unilever Italia*, 60 Common Market Law Review, 2023, 1447.

Moreover, in certain circumstances, this test may also be applied to non-price practices, as recently stated in the context of the *SEN* case.[56]

In doing so, the *Unilever* judgment specifies that the "as efficient competitor" test refers "to various tests which have in common the aim of assessing the ability of a practice to produce anti-competitive exclusionary effects by reference to the ability of a hypothetical competitor of the undertaking in a dominant position, which is as efficient as the dominant undertaking in terms of cost structure, to offer customers a rate which is sufficiently advantageous to encourage them to switch supplier, despite the disadvantages caused, without that causing that competitor to incur losses."[57]

The CJEU does not fail to note later that such a criterion, although focused on the cost-price relationship – as an expression of the more economic approach – may only in some cases be relevant to non-price practices. That is, for example, in the case of the exclusivity clauses adopted by Unilever's distributors, where this criterion may be used to establish whether "a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay to switch supplier or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts".[58]

Moreover, the assessment of exclusivity clauses, and other possible non-price conduct, in the light of the "as efficient competitor" test, is not only necessary when it is the defendants that base their defence on the application of this test. More generally, the use of this test is desirable in all those cases where the use by a dominant undertaking of means other than those proper to competition on the merits. The test may be sufficient, in certain circumstances, to indicate the existence of such an abuse. In this sense, the *Unilever* ruling seems to confirm that authorities may consider the initial assets enjoyed by an undertaking in a dominant position, even in cases where they do not derive, as in the *SEN* case, from a previous position of a legal monopoly, but are the result of investments made by the company.[59]

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[56] For a review of the debate on the mandatory nature of the criterion, see Gaudin, Mantzari, *Google Shopping and the as-efficient-competitor test: Taking stock and looking ahead*, 13 JECLAP, 2022, 125 ss.; De Ghellinck, *The as-efficient-competitor test: Necessary or sufficient to establish an abuse of dominant position?*, 7 JECLAP, 544 ss. On the applicability of the criterion to non-price practices see de Cominck R., *The as-efficient competitor test: Some practical considerations following the ECJ Intel Judgement*, 4 Competition Law & Policy Debate, 2018, 73 ss.

[57] *Unilever*, para. 56.

[58] *Unilever*, para. 59.

[59] M. Maggiolino, *When an ice cream case provides antitrust experts with food for thought: Unilever Italia*, cit.

VI. Food for thoughts

As mentioned at the beginning of this *insight*, the *SEN* ruling – in its EU component – is notable for the interpretive issues it clarifies.

It establishes – hopefully once and for all – that: (*a*) the protection of the competitive structure of markets is a means to protect consumers, and their welfare/well-being; (*b*) Article 102 TFEU is not intended to protect inefficient and obsolete firms, even when they are rivals of dominant firms, which is why a dominant firm can always defend itself by proving that its conduct has produced countervailing positive effects in terms of prices, quality, variety, and innovation; (*c*) a dominant firm's practice is abusive not because of its form, but because of the effects it produces, even when these are only potential; (*d*) the ability of a dominant firm's conduct to produce exclusionary effects must be assessed at the time the firm engaged in that conduct, and on the basis of all circumstances existing at that time; (*e*) facts such as the intent of the dominant firm, the actual effects of its practices, and the possibility that such practices may be illegal under rules other than Article 102 TFEU, are among these circumstances, but they can neither prove, nor disprove the abusive nature of the practices at hand in a conclusive way – their standing is only as pieces of evidence; (*f*) antitrust authorities and judges may rely on the criterion of the hypothetical "equally efficient competitor" when dealing with both price and non-price practices, and, as a result, there may be exclusionary effects that are not anti-competitive, and thus unlawful, because they are not detrimental to rivals that are as efficient and innovative as the dominant firm.

Still, there are a few issues that still need to be clarified.

First, the CJEU argues that the "as efficient rival" test and the "no economic sense" test can both be used to figure out whether a practice is likely to produce exclusionary effects, to the detriment of consumers, that are greater than their possible pro-competitive effects. However, the two tests operate in different ways. The "equally efficient rival" test focuses on whether the contested practice can exclude even a hypothetical firm that is "as good as the dominant firm" at keeping costs low. Thus, using the "as efficient rival" test, the anti-competitive nature of the practice in question is inferred from the characteristics of the "ideal" rival of the dominant company that would be excluded by that practice. In contrast, the "no economic sense" test shows that the conduct in question will never produce pro-competitive effects, because it can have no pro-competitive justification. In other words, this test derives the anti-competitive nature of the practice from the effects it is expected to produce.

Second, the Court asks to balance the anti-competitive and the pro-competitive effects of SEN SpA's practice. At first, this seems correct. However,

is it possible that the application of the "as efficient rival" test already selects the exclusionary effects that are *also* anti-competitive, that is, detrimental to consumers? Suppose in other words, that an antitrust plaintiff – be it public or private – demonstrates exclusionary effects occurring at the expense of equally efficient rivals. Will the dominant firm really be able to show that its behaviour is nonetheless capable of producing countervailing benefits in terms of price, quality, variety, and innovation? Once an authority or a judge has applied the "equally efficient rival" test, isn't testing the potential pro-competitive effects of the practice at hand redundant? This is the case, with price practices where antitrust decision-makers are satisfied with showing that the price at hand is lower than a certain level of costs. Why is it not the same with non-price practices? Should it be?

Third, the CJEU is right in stating that Article 102 TFEU must punish dominant firms that are successful in outperforming their rivals by resorting to anything other than their market position. Moreover, the Court is correct in establishing that this *principle* must apply to both price and non-price behaviours. However, if antitrust authorities and judges apply the "equally efficient" *test* in relation to a price practice, they compare the *performance* of the dominant firm with that of its (hypothetical) rivals. Differently, as the *SEN* ruling shows, if antitrust decision-makers apply the "equally efficient" test about a non-price practice, they end up comparing the *initial endowments* of the dominant firm with those of its (hypothetical) rivals. Indeed, the *SEN* case focuses on the non-replicable nature of a resource – the SEN lists – that the dominant firm makes hard to access for its competitors. The conduct of SEN SpA is "evil" because depriving EE SpA's rivals of a strategic and non-replicable resource does not guarantee that they have the same competitive *opportunities* as EE SpA enjoys. Therefore, one should be aware that applying the same test in two different scenarios means focusing on two different features – performance *vs* initial endowments – pertaining to the world of the dominant firm.

While the duty of equal treatment is perfectly consistent with the rationale underpinning liberalization processes, traditional antitrust law is not very familiar with such duty. More correctly, beyond the very recent self-preferencing cases the duty of equal treatment only arises in essential facility cases. Therein, the notion of "essentiality" grasps precisely the idea that the resource at hand must be shared, specifically because it gives the dominant firm a competitive advantage that even its "as efficient and as innovative rivals" could not match. Thus, had *SEN* not been a case about an incumbent in a de-regulated market, the CJEU would have reached the same conclusion only by ruling that SEN lists were an essential facility – a fact that would have been difficult to prove.

Thus, in applying the "equally efficient rival" test to non-price practices, antitrust decision-makers must bear in mind that traditional competition law does not intend to guarantee equal opportunities to market players – at least not outside the scope of the essential facility doctrine. However, the Unilever ruling seems to confirm the possibility of applying the "equally efficient competitor" test about non-price practices also in liberalized markets.

Finally, one should consider the recent revision of *the Article 102 Guidelines* by the European Commission in March 2023.[60] First, the Guidelines now clarify that, as has emerged from the Commission's enforcement practice and clarifications provided by CJEU case law, the "as efficient competitor" test is only one of several methods to assess, together with all other relevant circumstances, whether a scrutinized conduct is capable of producing exclusionary effects. In other words, the use of the "equally efficient competitor" test is optional, and such a test may be inappropriate depending on the type of practice at hand, or the dynamics of the relevant market.[61] Moreover, the Commission recognizes in its new *Guidelines* that in some circumstances a "less efficient competitor" may also exert a constraint that should be considered when assessing whether a particular price-based conduct of a dominant firm leads to anti-competitive foreclosure.

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[60] Communication from the Commission, Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 31.03.2023, C-116/1.

[61] In particular, the Communication recalls the following decisions: Judgment of 3 July 1991, *AKZO Chemie v Commission*, Case 62/86, EU:C:1991:286, para. 72; judgment of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, para. 194, upheld on appeal by the Court of Justice (see judgment of 14 October 2010, *Deutsche Telekom AG v Commission*, C-280/08 P, EU:C:2010:603); judgment of 6 September 2017, *Intel Corp. v Commission*, C-413/14 P, EU:C:2017:632, para. 134, and judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, para. 37.

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