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Imputation to a dominant supplier of actions of its independent distributors. Competition law implications

The Court of Justice of the European Union confirmed that abusive conduct by independent distributors of a dominant supplier may be imputed to that supplier, if such conduct forms part of a policy decided unilaterally by that supplier and implemented through the distributors.

Imputation to a dominant supplier of actions of its independent distributors

A very recent and ground-breaking case has been approached by the Court of Justice of the European Union (the “CJEU”) that will change the paradigm of analysis antitrust cases with respect to the vertical relationships across all production-distribution-retails chains where dominant entities are present.

In its decision of October 31, 2017, the Italian Competition and Markets Authority (the “AGCM”) found out that Unilever abused its dominant position on the Italian market for the sale of individually packaged ice cream for consumption at sales outlets. It is apparent from that decision that Unilever pursued, on the market in question, an exclusionary strategy likely to hinder the growth of its competitors by imposing to its distributors exclusivity clauses that they had to transfer downstream, on the operators of sales outlets (obliging them to supply exclusively from Unilever for their entire individually packaged ice cream requirements). In return, those operators received a wide range of rebates and commissions, the award of which was subject to conditions relating to the turnover or sale of a specific range of Unilever products.

Although the abusive conduct was factually committed not by Unilever but by its distributors, the AGCM considered that the conduct had to be imputed solely to Unilever because Unilever operated a certain degree of interference in the distributors’ commercial policy, so that the distributors did not act independently from an economic stand of view when they imposed exclusivity clauses on the operators of sales outlets.

As such AGCM found imposed a fine of EUR 60,668,580 on Unilever for having abused its dominant position, in breach of Article 102 TFEU. As Unilever appealed AGCM’s decision, the competent court of law addressed CJEU for a preliminary ruling.

On the 19th of January 2023, the CJEU issued a preliminary ruling confirming the rationale behind AGCM’s decision to sanction Unilever as an abuse dominant entity for the actions of its independent distributors.

The CJEU had a fresh and paradigm shifting approach towards the case at hand. Firstly, while admitting that that implementation of a distribution agreement, is not, in principle, an unilateral conduct and therefore should fall in principle, within the scope of Article 101 TFEU with respect to agreements, it has concluded that an undertaking in a dominant position may be held responsible for the conduct of its distributors within the meaning of Article 102 TFEU.

Agreeing with Advocate General’s Opinion, the CJEU stated that an obligation is aimed at preventing not only infringements of competition caused directly by the conduct of the undertaking in a dominant position, but also those caused by conduct the implementation of which has been delegated by that undertaking to independent legal entities, which are required to carry out its instructions.

Thus, where the conduct of which the undertaking in a dominant position is accused is actually implemented by an intermediary forming part of a distribution network, that conduct may be imputed to that undertaking if it was adopted in accordance with the specific instructions given by that undertaking and therefore as part of the implementation of a policy that was decided unilaterally by that undertaking and with which the relevant distributors were required to comply.

In such a scenario, given that the conduct of which the undertaking in a dominant position is accused was decided unilaterally, that undertaking may be regarded as being the perpetrator of that conduct and, therefore, where appropriate, as being solely liable for it, for the purposes of the application of Article 102 TFEU. In such a situation, the distributors and, consequently, the distribution network which they form with that undertaking, must be regarded as merely an instrument of territorial implementation of the commercial policy of that undertaking and, on that basis, as being the instrument by which, as the case may be, the exclusionary practice at issue was implemented.

That is the case, in particular, where such conduct takes the form of standard contracts, drawn up entirely by a supplier in a dominant position and containing exclusivity clauses for the benefit of its products which the distributors of that supplier are required to have signed by the operators of sales outlets without being able to amend them, unless that supplier expressly agrees.

Finally, in such a situation, the imputability to the undertaking in a dominant position of the conduct implemented by the distributors forming part of the distribution network for its goods or services is not conditional either on the demonstration that the relevant distributors are also part of that undertaking, for the purposes of Article 102 TFEU, or even on the existence of a ‘hierarchical’ link resulting from a

systemic and consistent range of guidelines given to those distributors likely to influence the management decisions which they adopt as regards their respective activities.

The CJEU direction is quite clear, and it aims to protect the vulnerable when dealing with dominant entities, as any dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market. The impact of this judgment will start to show in the future, as the parties meet to negotiate or extend the distribution/supply agreements for the next year. Dominant players should pay more attention to the vertical restrictions they are imposing to their down-stream partners and should always perform a specialised competition law assessment before implementing any vertical restriction that could affect the market.

For further questions regarding the aspects mentioned in this alert, please contact us.



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