JUDGMENT OF THE COURT (Fifth Chamber)

19 January 2023 (*)

(Reference for a preliminary ruling – Competition – Article 102 TFEU – Dominant position – Imputation, to the producer, of actions of its distributors – Existence of contractual links between the producer and the distributors – Concept of 'economic unit' – Scope – Abuse – Exclusivity clause – Need to demonstrate the effects on the market)

In Case C-680/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 7 December 2020, received at the Court on 15 December 2020, in the proceedings

Unilever Italia Mkt. Operations Srl

v

Autorità Garante della Concorrenza e del Mercato,

intervener:

La Bomba Snc,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, D. Gratsias, M. Ilešič, I. Jarukaitis and Z. Csehi, Judges,

Advocate General: A. Rantos,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 3 March 2022,

after considering the observations submitted on behalf of:

– Unilever Italia Mkt. Operations Srl, by G. Bitonto, S. Borocci, S. Lembo, L. Perfetti, C. Tesauro and C. Thomas, avvocati,

– the Autorità Garante della Concorrenza e del Mercato, by F. Sclafani, avvocato dello Stato,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the Greek Government, by K. Boskovits, acting as Agent,

– the European Commission, by G. Conte, N. Khan and C. Sjödin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 101 and 102 TFEU.

2 The request has been made in proceedings between Unilever Italia Mkt. Operations Srl ('Unilever') and the Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy) ('the AGCM') concerning a penalty which that authority imposed on Unilever for abuse of a dominant position on the Italian market for the distribution of individually packaged ice cream to certain types of businesses, such as beach resorts and bars.

The dispute in the main proceedings and the questions referred for a preliminary ruling

3 Unilever produces and sells mass-market products, including packaged ice cream, marketed under the trade marks Algida and Carte d'Or. In Italy, Unilever distributes individually packaged ice cream intended for consumption 'outside', that is to say, away from consumers' homes, in bars, cafés, sports clubs, swimming pools or other leisure sites ('sales outlets'), via a network of 150 distributors.

4 On 3 April 2013, a competitor company lodged a complaint with the AGCM alleging abuse of a dominant position by Unilever on the market for individually packaged ice cream. The AGCM opened an investigation.

5 During its investigation, the AGCM considered, inter alia, that it was under no obligation to analyse the economic studies produced by Unilever in order to demonstrate that the practices under investigation did not have exclusionary effects vis-à-vis its competitors that were at least as efficient, on the ground that those studies were totally irrelevant where there were exclusivity clauses, since the use of such clauses by an undertaking in a dominant position was sufficient to establish abusive use of that position.

6 By decision of 31 October 2017, the AGCM found that Unilever had abused its dominant position on the market for the sale of individually packaged ice creams intended for consumption away from consumers' homes, in breach of Article 102 TFEU.

7 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. That strategy was based mainly on the imposition, by Unilever's distributors, of exclusivity clauses on the operators of sales outlets, obliging them to obtain supplies 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. Those rebates and commissions, which applied, according to variable combinations and procedures, to almost all of Unilever's clients, were intended to provide them with an incentive to continue to obtain their supplies exclusively from that undertaking, by discouraging them from terminating their contracts to obtain supplies from Unilever's competitors.

8 Two aspects of the AGCM's decision of 31 October 2017 are particularly relevant for the purposes of the present reference for a preliminary ruling.

9 First, although the abusive conduct was materially committed not by Unilever but by its distributors, the AGCM considered that that conduct had to be imputed solely to Unilever on the ground that Unilever and its distributors formed one and the same economic entity. Unilever operated a certain degree of interference in the distributors' commercial policy, so that the distributors did not act independently when they imposed exclusivity clauses on the operators of sales outlets.

10 Secondly, the AGCM considered that, in view of the specific characteristics of the market in question, and in particular the small amount of space available in sales outlets, and the decisive role, in consumers' choice, of how many products were displayed in those sales outlets, Unilever had, by its conduct, excluded, or at least limited, the possibility for competing operators to engage in competition based on the merits of their products.

11 Consequently, by its decision of 31 October 2017, the AGCM imposed a fine of EUR 60 668 580 on Unilever for having abused its dominant position, in breach of Article 102 TFEU.

12 Unilever brought an action against that decision before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed that action in its entirety.

13 Unilever brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy).

14 In support of that appeal, Unilever submits that the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) should have found that there were defects allegedly vitiating the AGCM's decision of 31 October 2017 as regards, first, the imputability to Unilever of the conduct of its distributors and, secondly, the effects of the conduct at issue which, in Unilever's view, were not capable of distorting competition.

15 The referring court states that it has doubts as to the interpretation to be given to EU law in order to respond to the two complaints referred to above. In particular, as regards the first complaint, it refers to the fact that it is necessary for that court to know whether, and under what conditions, coordination between formally autonomous and independent economic operators is such that it amounts to there being a single decision-making centre, with the corollary that the actions of one may also be imputed to the other.

16 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In cases other than those involving corporate control, what are the relevant criteria for establishing whether contractual coordination among formally autonomous and independent economic operators results in the creation of a single economic entity for the purposes of Articles 101 and 102 TFEU? Specifically, can the existence of a certain level of interference in the commercial decisions of another undertaking, which is typical of cooperative commercial relationships between producers and distribution intermediaries, be deemed [a] sufficient reason to classify those undertakings as part of the same economic unit? Is it necessary for a "hierarchical" link to exist between the two undertakings, identified by the existence of a contract under which several autonomous undertakings "submit" to management and coordination by one of their number, thus making it necessary for the [competent competition authority] to prove that there is a systemic and consistent range of guidelines likely to influence the undertaking's management decisions, namely strategic and operational decisions of a financial, industrial and commercial nature?

(2) In assessing whether there has been abuse of a dominant position implemented by means of exclusivity clauses, must Article 102 TFEU be interpreted as meaning that the [competent] competition authority has an obligation to verify whether such clauses have the effect of excluding equally efficient competitors from the market, and to examine specifically the economic analyses produced by [a] party concerning the actual ability of the alleged conduct to exclude equally efficient competitors from the market? In the case of exclusionary exclusivity clauses or conduct characterised by a large number of abusive practices (loyalty-inducing rebates and exclusivity clauses), does the [competent competition authority] have a legal obligation to base its allegation of a competition offence on the equally efficient competitor criterion?'

Consideration of the questions referred for a preliminary ruling

The first question

Admissibility

17 The AGCM and the Italian Government submit that the first question is inadmissible because the order for reference lacks the necessary details. In addition, that question refers to Article 101 TFEU, whereas that provision was not applied by the AGCM.

18 In that regard, it must be noted that, according to settled case-law, which is now reflected in Article 94 of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and

legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. Those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (judgment of 5 March 2019, *Eesti Pagar*, C−349/17, EU:C:2019:172, paragraph 49).

19 Furthermore, the Court cannot rule on a question referred for a preliminary ruling where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, or where the problem raised is hypothetical (see, to that effect, judgment of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga*, C−164/21 and C−318/21, EU:C:2022:785, paragraph 33).

20 In the present case, as the Advocate General stated in point 19 of his Opinion, first, the information contained in the order for reference, although brief, is sufficient to explain the factual scenario on which the first question is based. Secondly, the fact that the referring court mentions, in the first question, not only Article 102 TFEU, but also Article 101 TFEU, is not such as to call into question the admissibility of the first question as a whole.

21 However, since it is apparent from the grounds of the order for reference that Article 101 TFEU was not applied by the AGCM in the case at issue in the main proceedings, and even though the concept of an 'undertaking' is common to Articles 101 and 102 TFEU, the first question, in so far as it concerns the interpretation of Article 101 TFEU, must be regarded as hypothetical and therefore inadmissible.

22 Consequently, the first question is admissible only in so far as it concerns the interpretation of Article 102 TFEU.

Substance

23 It is apparent from the request for a preliminary ruling that, as regards the abusive actions of the distributors, the AGCM penalised only Unilever, on the ground that it had abused its dominant position. In that context, by its first question, the referring court seeks to ascertain under which circumstances the actions of formally autonomous and independent economic operators, namely distributors, may be imputed to another autonomous and independent economic operator, namely the producer of the products distributed by those distributors.

24 In those circumstances, it must be held that, by its first question, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that the actions of distributors forming part of the distribution network of a producer in a dominant position may be imputed to that producer and, if so, under what conditions.

25 In particular, that court asks whether the existence of contractual coordination between a producer, around which that contractual coordination is organised, and various legally independent distributors is sufficient to allow such imputation, or whether it must also be found that that producer has the ability to exercise decisive influence over the commercial, financial and industrial decisions which the distributors are likely to take in connection with the activity concerned, going beyond that which usually characterises the relationship of collaboration between producers and distribution intermediaries.

26 In that regard, it is admittedly true that, in so far as their implementation involves an at least tacit acceptance of them by all the parties, the decisions taken in the context of contractual coordination, such as a distribution agreement, are not, in principle, unilateral conduct, but are part of the relationships which the parties to that coordination have with each other (see, to that effect, judgment of 17 September 1985, *Ford-Werke and Ford of Europe* v *Commission*, 25/84 and 26/84, EU:C:1985:340, paragraphs 20 and 21). Such decisions therefore fall, in principle, within the scope of the law on agreements referred to in Article 101 TFEU.

27 That conclusion does not, however, rule out the possibility that an undertaking in a dominant position may be held responsible for the conduct of the distributors of its products or services with which it has only contractual relations and that that undertaking can, therefore, be found to have committed an abuse of a dominant position within the meaning of Article 102 TFEU.

28 Any dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (judgment of 6 September 2017, *Intel* v *Commission*, C−413/14 P, EU:C:2017:632, paragraph 135 and the case-law cited).

29 As the Advocate General observed in point 48 of his Opinion, such 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 transpires that 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.

30 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.

31 That is the case, in particular, where such conduct takes the form of standard contracts, drawn up entirely by a producer in a dominant position and containing exclusivity clauses for the benefit of its products which the distributors of that producer are required to have signed by the operators of sales outlets without being able to amend them, unless that producer expressly agrees. In such circumstances, that producer cannot reasonably be unaware that, in view of the legal and economic links which it has with those distributors, the latter will implement its instructions and, thereby, its commercial policy. Such a producer must therefore be regarded as being prepared to bear the risks of such conduct.

32 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.

33 In the light of the foregoing, the answer to the first question is that Article 102 TFEU must be interpreted as meaning that the actions of distributors forming part of the distribution network for goods and services of a producer in a dominant position may be imputed to that producer if it is established that those actions were not adopted independently by those distributors, but form part of a policy that is decided unilaterally by that producer and implemented through those distributors.

The second question

34 By its second question, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, the competent competition authority is required, in order to find an abuse of a dominant position, to establish that those clauses have the effect of excluding from the market competitors that are as efficient as the dominant undertaking and whether, in any event, where there are a number of contested practices, that authority is required to examine in detail the economic analyses produced, where applicable, by the undertaking concerned, in particular where they are based on an 'as efficient competitor' test.

35 In that regard, it should be noted that Article 102 TFEU provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

36 That concept is thus intended to penalise the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened because of the presence of the undertaking

concerned, adversely affects an effective competition structure (judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraph 68 and the case-law cited).

37 That said, it is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, on account of its skills and abilities in particular, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. Indeed, not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraph 73 and the case-law cited).

38 However, dominant undertakings, irrespective of the reasons for which they have such a position, are not to allow their conduct to impair genuine, undistorted competition on the internal market (see, inter alia, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 57, and of 6 September 2017, *Intel* v *Commission*, C−413/14 P, EU:C:2017:632, paragraph 135).

39 Thus, abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, or where that conduct was based on the use of means other than those which come within the scope of 'normal' competition, that is to say, competition on the merits (see, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraphs 69, 71, 75 and 76 and the case-law cited).

40 In that regard, it is for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question (judgments of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 18, and of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraph 72), which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position.

41 It is true that, in order to establish that conduct is abusive, a competition authority does not necessarily have to demonstrate that that conduct actually produced anti-competitive effects. The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, irrespective of whether such practice has proved successful (judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraph 53 and the case-law cited). Accordingly, a competition authority may find that there has been an infringement of Article 102 TFEU by establishing that, during the period in which the conduct in question was implemented, that conduct had, in the circumstances of the case, the ability to restrict competition on the merits, despite its lack of effect.

42 However, that demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice (see, to that effect, judgments of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraph 265, and of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, C−89/85, C−104/85, C−114/85, C−116/85, C−117/85 and C−125/85 to C−129/85, EU:C:1993:120, paragraph 126).

43 Consequently, a practice cannot be classified as abusive if it has remained at the planning stage. Furthermore, a competition authority cannot rely on the effects that that practice might produce, or might have produced, if certain specific circumstances had arisen, but which were not prevailing on the market at the time when that practice was implemented and which did not, at the time, appear likely to arise.

44 Furthermore, although, for the purposes of assessing whether an undertaking's conduct is capable of restricting effective competition on a market, a competition authority may rely on the guidance from

economic sciences, confirmed by empirical or behavioural studies, the taking into consideration of that guidance cannot, however, be sufficient. Other factors specific to the circumstances of the case, such as the extent of that conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the undertaking in a dominant position is, at least, for part of the demand, an inevitable partner, must be taken into account when determining whether, in the light of that guidance, the conduct at issue must be regarded as having had, at least during part of the period during which it was implemented, the ability to produce exclusionary effects on the market concerned.

45 A similar approach must also be followed as regards proof of an anti-competitive intention on the part of the undertaking in a dominant position. That intention constitutes an indication of the nature and objectives pursued by the strategy of that undertaking and, on that basis, may be taken into account. The existence of an anti-competitive intention may also be relevant for the purposes of the calculation of the fine. However, demonstration of the existence of such an intention is neither necessary nor sufficient, in itself, to establish the existence of an abuse of a dominant position, since the concept of 'abuse', within the meaning of Article 102 TFEU, is based on an objective assessment of the conduct in question (see, to that effect, judgments of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraphs 19 and 21, and of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraphs 61 and 62).

46 In that context, with regard more specifically to exclusivity clauses, it is true that the Court has held that clauses by which contracting parties undertook to purchase all or a considerable part of their requirements from an undertaking in a dominant position, even if not accompanied by rebates, constituted, by their very nature, an exploitation of a dominant position and that the same was true of the loyalty rebates granted by such an undertaking (judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 89).

47 However, in the judgment of 6 September 2017, *Intel* v *Commission* (C−413/14 P, EU:C:2017:632, paragraph 138), the Court clarified, in the first place, that case-law in a situation where an undertaking in a dominant position submits, during the administrative procedure, with evidence in support of its claims, that its conduct was not capable of restricting competition and, in particular, of producing the alleged exclusionary effects.

48 In that regard, the Court stated that, in that situation, the competition authority is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (judgment of 6 September 2017, *Intel* v *Commission*, C−413/14 P, EU:C:2017:632, paragraph 139).

49 The Court added, in the second place, that the analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking (judgment of 6 September 2017, *Intel* v *Commission*, C−413/14 P, EU:C:2017:632, paragraph 140).

50 It is true that, in providing that second clarification, the Court referred only to rebate schemes. However, since both rebate practices and exclusivity clauses are capable of being objectively justified or of having the disadvantages which they generate counterbalanced, or even outweighed, by advantages in terms of efficiency which also benefit the consumer, such a clarification must be understood as applying to both of those practices.

51 Moreover, in addition to the fact that such an interpretation appears to be consistent with the first clarification provided by the Court in that judgment of 6 September 2017, *Intel* v *Commission*

(C−413/14 P, EU:C:2017:632, paragraph 139), it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic, as, moreover, is illustrated by the Communication from the Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7, paragraph 36).

52 It follows that, first, where a competition authority suspects that an undertaking has infringed Article 102 TFEU by using exclusivity clauses, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market.

53 Secondly, the competition authority which initiated that procedure is also required to assess, specifically, the ability of those clauses to restrict competition where, during the administrative procedure, the undertaking which is under suspicion, without formally arguing that its conduct was incapable of restricting competition, maintains that there are justifications for its conduct.

54 In any event, the submission, in the course of the procedure, of evidence capable of demonstrating the inability to produce restrictive effects gives rise to an obligation for the competition authority to examine that evidence. Respect for the right to be heard, which, according to settled case-law, is a general principle of EU law, requires competition authorities to hear the undertaking in a dominant position, which means that they must pay due attention to the observations thus submitted by that undertaking, examining carefully and impartially all the relevant aspects of the individual case, and, in particular, the evidence submitted by that undertaking (see, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraph 52).

55 It follows that, where the undertaking in a dominant position has produced an economic study in order to demonstrate that the practice of which it is accused was not capable of excluding competitors, the competent competition authority cannot exclude the relevance of that study without setting out the reasons why it considers that the study does not contribute to demonstrating that the practices in question were incapable of undermining effective competition on the relevant market and, consequently, without giving that undertaking the opportunity to determine the evidence which could be substituted for that study.

56 As regards the 'as efficient competitor' test, to which the referring court expressly referred in its request, it should be noted that that concept 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. That ability is generally determined in the light of the cost structure of the undertaking in a dominant position itself.

57 A test of that nature may be inappropriate in particular in the case of certain non-pricing practices, such as a refusal to supply, or where the relevant market is protected by significant barriers. Moreover, such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects; moreover, that method takes into consideration only price competition. In particular, the use by a undertaking in a dominant position of resources other than those governing competition on the merits may be sufficient, in certain circumstances, to establish the existence of such an abuse (see, also to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C−377/20, EU:C:2022:379, paragraph 78).

58 Consequently, the competition authorities cannot be under a legal obligation to use the 'as efficient competitor test' in order to find that a practice is abusive (see, to that effect, judgment of 6 October 2015, *Post Danmark*, C−23/14, EU:C:2015:651, paragraph 57).

59 Nevertheless, even in the case of non-pricing practices, the relevance of such a test cannot be ruled out. A test of that type may prove useful since the consequences of the practice in question can be quantified. In particular, in the case of exclusivity clauses, such a test may theoretically serve to determine 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 in order to switch supplier, or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts (see, by analogy, judgment of 25 March 2021, *Slovak Telekom* v *Commission*, C−165/19 P, EU:C:2021:239, paragraph 110).

60 Consequently, where an undertaking in a dominant position suspected of abuse provides a competition authority with an analysis based on an 'as efficient competitor test', that authority cannot disregard that evidence without even examining its probative value.

61 That fact is not called into question by the existence of a number of practices at issue. Even if the cumulative effects of those practices cannot be understood by such a test, the fact remains that the result of a test of that nature may nevertheless constitute an indication of the effects of some of those practices and, therefore, be relevant in order to determine whether certain classifications may be made with regard to the practices at issue.

62 In the light of the foregoing considerations, the answer to the second question is that Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition. The use of an 'as efficient competitor test' is optional. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 102 TFEU must be interpreted as meaning that the actions of distributors forming part of the distribution network for goods and services of a producer in a dominant position may be imputed to that producer if it is established that those actions were not adopted independently by those distributors, but form part of a policy that is decided unilaterally by that producer and implemented through those distributors;**

2. **Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition. The use of an 'as efficient competitor' test is optional. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results.**

[Signatures]

* Language of the case: Italian.