THE UNILEVER EXCLUSIONARY STRATEGY IN THE IMPULSE PACKAGED ICE CREAM MARKET

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1. INTRODUCTION

On few months after the long-awaited judgment of the European Court of Justice (ECJ) in the Intel case mainly dealing with exclusivity-rebates, the Italian Competition Authority (hereinafter also referred to “ICA” or “Authority”) fined Unilever Italia Mkt. Operations S.r.l. (hereinafter also referred to “Unilever”), the Italian branch of the Anglo-Dutch consumer goods company, for abuse of dominance in the market of impulse packaged ice cream, applying exclusivity purchasing obligations and loyalty rebates to its retail clients. As a consequence of this decision of 31 October 2017, ICA ordered to the company to pay a fine of just over € 60 million and adopt suitable measures to put an end to the anti-competitive practices.

2. THE RELEVANT MARKET

The relevant product market of the alleged infringement was defined as the sale of industrial packaged ice cream to the retailers in the impulse channel, distinct from the scoop ice cream market.

As widely argued in the final Decision, the individually wrapped ice cream products are considered scarcely substitutable with scoop ice cream by both retailers, representing wholesale demand, and consumers. From the retailers’ perspective, the two products present relevant differences in terms of resale margin, labour costs to store up and serve the products and physical space to place the freezer in the outlet. Even from the consumer point of view, the several differences in terms of packaging, prices, brand role in buying decisions and ease and readiness of consumption limit substantially interchangeability between the two products.

1 Italian Competition Authority.

Furthermore, the majority of scoop ice cream is distributed by specialized stores, while packaged products represent a small percentage of the stores’ turnover, as they are generally distributed by points of sale like cafes, recreation areas, swimming pools, beachfront resorts etc., mainly focused on the supply of other products or services.

In light of the above-mentioned evidences, the Authority found that scoop ice cream exercises only limited competitive pressure on the packaged industrial ice cream, which has been defined as a separate market for the purpose of the Decision. Within the market investigation, this conclusion has been confirmed not only by Unilever competitors (like La Bomba, Nestlé and Sammontana) but also by a Unilever internal analysis, which included just the packaged ice cream in the impulse channel.

Furthermore, this distinction is perfectly coherent with previous decisions, both national and by the European Commission and the recent Froneri Decision in particular.

From a geographic standpoint, like in all previous decisions, the Authority determined that the relevant ice cream markets are national in scope due to substantial homogeneity in consumer habit and competitive conditions. Furthermore, even Unilever negotiates sale conditions with customers at national level, without any regional differentiation.

3. **THE UNILEVER DOMINANCE IN THE IMPULSE PACKAGED ICE CREAM MARKET**

The proceedings ascertained that Unilever is in a dominant position in the relevant market on the ground of several factors. From a structural standpoint, the Authority considered the following to be significant: i) a market share above 60%, fourfold compared to its main competitor market share; ii) the Unilever market share increase in the last five years, showing the enterprising capability to maintain and strengthen structural advantage over competitors; iii) greater presence in some areas, channels and points of sale characterised by greater concentration of ice cream sales and lower risks of fluctuations of sales.

Furthermore, as for supply characteristics, ICA considered the following elements as indicative of market power: i) the highest likability and reputation index to consumers of the Algida brand compared to other packaged ice cream brands; ii) the width and depth of range of products; iii) the commercial strength and the specific popularity of some products within the assortment of Unilever ice creams. Finally, Unilever holds a particularly widespread and capillary distribution network, bound by product and area exclusive agreements.

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3 European Commission, Decision of 14 July 2016, Case M.7946, *Pai/Nestle/Froneri*. 

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Altogether, the factors described above enable Unilever to behave to an appreciable extent independently of its competitors, customers and consumers in the market of industrial packaged ice cream sold to retailers in the impulse channel.

4. THE EXCLUSIONARY STRATEGY: CONDUCTS AND ASSESSMENT

4.1 The conducts

The alleged infringement concerning Unilever is a strategy composed by broad use of exclusivity purchasing obligations as well as other commercial conditions and conducts overall aimed at keeping a long-lasting exclusive supply of Algida products at points of sale (e.g. coffee bars, beach resorts, hotels, etc.).

The case stems from a complaint from an Italian niche producer of fruit ice lollies named “La Bomba”, who claimed that Unilever forced retail clients to purchase and resell only Unilever’s ice creams, including through its local distributors.

A preliminary assessment regarded the relationship between the dominant business and its own vertically integrated distribution network. On this aspect, ICA probed all the circumstances where Unilever and its local distributors (concessionaires acting at the wholesale level) behave as a unitary complex. Consequently, the single-branding obligations and rebates applied by distributors to local retail customers were considered part of Unilever’s commercial policy implemented by the distributors at local level.

Either alternatively or cumulatively, all (verbal or written) contracts between Unilever and its customers—provided for the following: product exclusivity, cabinet exclusivity, invoice fixed discounts, end-year (retroactive) rebates, target rebates, promotional bonuses, range bonuses, target bonuses, mediation bonuses and/or bonuses for affiliated points of sale indications of the range of Unilever products to be bought.

All the above-mentioned contractual conditions were meant to impose or incentivise substantial supply exclusivity for Unilever customers, thereby preventing them from adding ice creams offered by Unilever competitors, so as to reduce consumer choice.

Unilever applied the following conditions and practices to its customers:

i) exclusivity purchasing obligations;

ii) retroactive payments of rebates and bonuses;

iii) use of retroactive payment as reprisal against customer violation of exclusivity clause;
focused application of rebates and bonuses on customers to whom competitors could be more interested in offering their products;

obligation to purchase the weakest Unilever products bound with the strongest ones;

use of the target rebate mechanism;

presence of promotional bonuses independent of any real promotional activity;

payment of bonuses to trade associations with the specific aim to induce them to monitor compliance with of Unilever exclusivity clauses.

Unilever applied various rebates and bonuses to almost all its customers, including the minority that was not obliged by an exclusivity agreement.

In order to hinder or to exclude single-product competitors - i.e. producers offering only ice lollies – Unilever mainly used exclusivity purchasing obligations and fidelity rebates. Instead, in order to exclude competitors from selling their full-range of ice cream products, Unilever also applied conditions to discourage retailers from substituting the whole Unilever ice cream supply, such as: multi-year contracts, target and retroactive rebates and contributions and settlements of economic incentives with credit notes and bonuses not related and/or proportionate with the service provided to customers.

Furthermore, Unilever and its local distributors took focused actions to verify compliance with exclusivity conditions, with special obstinacy in the areas where competitor La Bomba was trying to expand its market presence by offering a product highly appreciated by consumers.

4.2 The assessment

The assessment of the Unilever exclusionary strategy has been based on a theory of harm in line with European case-law, including the ECJ Intel judgment of September 2017.

According to the ECJ, regardless of any economic offset, exclusive purchase agreements granted by business in a dominant position breaks Article 102 TFEU.

The proceedings ascertained that exclusivity provisions have been applied to the majority of Unilever customers (ranging from [60-70]% to [70-80]%). The application of these obligations was diversified by Unilever in relation to the real risk of losing revenue to competitors. The exclusive dealings were able not only to foreclose the single-product competitors but also to hinder the competitors offering the full range of packaged impulse ice creams.

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4 ECJ, judgment of 6 September 2017, C-413/14 P, Intel Corp. v European Commission, paragraph 137.
Unilever objected that the abuse of dominance could have been probed through a quantitative as efficient competitor test, meaning that such a competitor could have been able to reply the Unilever exclusivity obligations and fidelity-inducing rebates. According to the test provided by the dominant supplier, the proportion of customers at potential risk of foreclosure results negligible.

In this respect, ICA observed that many of the alleged conducts are capable of restricting competition independently of the fact that they force Unilever or its competitors to sell below their cost. Fidelity rebates are only a part of the alleged conducts, which included instruments unsuitable to be quantified in a replicability test, such as: contractual obligation to keep exclusivity of purchase, long-lasting contracts, financing of trade associations in order to monitor compliance with exclusive purchasing, packaging the strongest products with the weakest ones, threatening not to give back the bonuses, etc.

Therefore, within this framework, an as efficient competitor test is not suitable for an exhaustive assessment of the restrictive impact of the overall strategy, nor is it required by European case-law in order to ascertain the infringement of Article 102 TFEU.

Indeed, the ICA evaluation is in line with European case-law, even in light of ECJ’s Intel judgment, providing that the assessment of exclusionary capability of such conducts only requires the evaluation of all the circumstances of the context, like the share of the market covered by the challenged practice, conditions of the rebates and contract duration.

Hence, the Italian Authority probed the following: i) Unilever had an important market share and wide presence in the most-profitable areas and among the strategic customers; ii) the dominant business owns brand and single products with the highest market reputation; iii) the exclusivity clauses covered at least 60% of Unilever customers, blocking at least 30%-40% of the market; iv) the percentage of the market in which competition is at least hindered by Unilever exclusionary strategy is above 60%, considering that Unilever behaved as described with almost all its customers, with or without an exclusivity deal; v) the duration of the contracts between Unilever and its retail customers was on average longer than two years; vi) the exclusivity clauses, the incentives to maintain the exclusivity and the actions to monitor their application were targeted at the single customers and specific competitors; vii) the overall strategy was intentionally aimed at hampering its competitors’ presence on the market.

In the end, the Unilever strategy illustrated above prevented competitors from expanding in proportion to the effective appreciation of their products, due to the “forced” purchase of Unilever ice-creams by consumers that don’t find competitors’ products in the stores where the impulse of

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consumption arises. As a consequence, Unilever conducts significantly diminished the ability of competitors to compete on the merits, thus resulting in a restriction of consumers’ choice.