Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 9 December 2021 [1]

Case C-377/20

Servizio Elettrico Nazionale SpA,
ENEL SpA,
Enel Energia SpA
v
Autorità Garante della Concorrenza e del Mercato
and interveners
Eni Gas e Luce SpA,
Eni SpA,
Axpo Italia SpA,
Gala SpA,
E.Ja SpA,
Green Network SpA,
Associazione Italiana di Grossisti di Energia e Trader – AIGET,
Ass.ne Codici – Centro per i Diritti del Cittadino,
Associazione Energia Libera,
Metaenergia SpA

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Competition – Dominant position – Abuse – Article 102 TFEU – Opening up of the market for the sale of electricity to competition – Use of commercially sensitive information within a dominant group of undertakings – Imputability of the subsidiary's conduct to the parent company)

I. Introduction

1. This request for a preliminary ruling raises a considerable number of questions concerning the interpretation and application of Article 102 TFEU in connection with exclusionary conduct of dominant undertakings.

[1] Original language: French.

2. In the present case, the conduct at issue in the main proceedings, investigated by the Autorità Garante della Concorrenza e del Mercato ('the AGCM'),[2] took place against the backdrop of the opening up of the market for the supply of electricity in Italy and took the form of an alleged complex abusive strategy implemented by the three companies of the ENEL SpA Group (the incumbent operator) seeking, in essence, to make it more difficult for competitors to enter the liberalised market. More specifically, that strategy allegedly consisted in the discriminatory use of data relating to customers of the protected market which, prior to the liberalisation, were available to Servizio Elettrico Nazionale SpA ('SEN'), one of the companies of the Enel Group, in its capacity as the market operator. The objective pursued was allegedly to use those data to issue commercial offers to the customers of that market in order to transfer those customers within the Enel Group, namely from SEN to the subsidiary of the group active on the free market, namely Enel Energia SpA ('EE'). That was allegedly to prevent the large-scale departure of SEN customers to third-party suppliers, in view of the abolition of that protected market.

3. It is against that background that the referring court asks the Court to clarify certain aspects of the concept of 'abuse' within the meaning of Article 102 TFEU, namely:

– the constituent elements of abusive conduct, allowing a clear line to be drawn between practices which come within the scope of so-called 'normal' competition, on the one hand, and those which come within the scope of distorted competition, on the other;

– more philosophically, the interests protected by Article 102 TFEU, for the purpose of ascertaining the evidence that must be taken into consideration when assessing whether there is abusive conduct;

– the admissibility and the relevance of evidence submitted *ex post* by the dominant undertakings demonstrating the absence of actual effects of allegedly abusive conduct in order to contest the capacity of that conduct to have restrictive effects on competition; and

– the relevance of the intention to restrict competition in the assessment of the abusive nature of particular conduct.

4. Although the existing case-law provides some points of reference for usefully answering those questions, the present case has particular features which make it of particular interest.

5. First of all, the conduct at issue in the main proceedings is, correctly, described by the referring court as 'atypical', in that it does not correspond to the examples of conduct listed in Article 102 TFEU and is not a type of conduct which is systematically analysed in national decision-making practices or decision-making practices of the European Commission. In that regard, I note that the EU Courts have had the opportunity to apply Article 102 TFEU in the context of liberalised markets for the purpose of ensuring equal access for new undertakings on the liberalised market. However, those cases mostly concerned conduct constituting price-related exclusionary conduct implemented by the incumbent operator in the context of cases relating to network

[2] The national authority responsible for upholding competition and the market, Italy.

industries.[3] Accordingly, the present case gives the Court the opportunity to address a wider issue regarding the application of Article 102 TFEU to liberalised markets, namely when the abusive conduct is based on the competitive advantage that an incumbent operator lawfully 'inherited' from its former statutory monopoly, such as the brand image and reputation or the customer base.[4]

6. Next, the present case will allow the Court to confirm its recent case-law arising from the judgments in *TeliaSonera*,[5] *Post Danmark I* and *II*,[6] *Intel*,[7] *Generics (UK)*[8] and *Deutsche Telekom II*, in which the Court showed itself to be open to a less formal approach to the assessment of the abusive nature of particular conduct, based on an examination of the effects and taking account of both the legal characteristics of the conduct in question and its economic context. More specifically, this case gives the Court the opportunity to clarify whether certain principles arising from that recent case-law relating to price-related exclusionary conduct and, in particular, the 'equally efficient competitor' test, can be said to apply in the context of exclusionary conduct not related to pricing, such as that at issue in the main proceedings.

7. Lastly, the present case is of particular interest in that it concerns a type of conduct relating to the abusive use of databases, which is now a very significant indicator of strength on certain markets, even beyond the context of the digital economy. The guidance provided may therefore prove to be useful in the future for assessing, under Article 102 TFEU, conduct relating to the use of data.

II. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

8. The present case arose in the context of the gradual liberalisation of the market for the retail supply of electricity in Italy.

9. In an initial phase of the opening up of the market, a distinction was drawn between, on the one hand, customers that were so-called 'eligible' to choose a supplier on the free market other than their territorially competent distributor and, on the other, so-called 'captive' customers, comprising private individuals and small businesses that, being regarded as incapable of negotiating energy supply contracts in full awareness of the facts or from a position of strength, benefited from a regulated regime referred to as the '*Servizio di maggior tutela*' (Enhanced protection service) – that is to say a protected market under the supervision of a national sectoral regulatory authority in so far as concerned the definition of the conditions of sale.

3 See judgments of the Court of Justice of 2 April 2009, *France Télécom* v *Commission* (C-202/07 P, EU:C:2009:214, 'the judgment in *France Télécom*'); of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, 'the judgment in *Deutsche Telekom I*'); of 27 March 2012, *Post Danmark* (C-209/10, EU:C:2012:172, 'the judgment in *Post Danmark I*'); of 25 March 2021, *Deutsche Telekom* v *Commission* (C-152/19 P, EU:C:2021:238, 'the judgment in *Deutsche Telekom II*'); and of the General Court of 29 March 2012, *Telefónica and Telefónica de España* v *Commission* (T-336/07, EU:T:2012:172), and of 17 December 2015, *Orange Polska* v *Commission* (T-486/11, EU:T:2015:1002). These cases often also concern infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU (see judgments of 25 March 2015, *Slovenská pošta* v *Commission* (T-556/08, EU:T:2015:189), and of 15 December 2016, *DEI* v *Commission* (T-169/08 RENV, EU:T:2016:733)).

4 For an example from national decision-making practice, see Decision No 13 D-20 of 17 December 2013 of the French competition authority concerning practices adopted by EDF in the sector of services for photovoltaic power generation (paragraphs 286 to 293 and 294 to 296).

5 Judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83, 'the judgment in *TeliaSonera*').

6 Judgment of 6 October 2015, *Post Danmark* (C-23/14, EU:C:2015:651, 'the judgment in *Post Danmark II*').

7 Judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, 'the judgment in *Intel*').

8 Judgment of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, 'the judgment in *Generics (UK)*').

10. In a subsequent phase, the 'captive' customers too were gradually allowed access to the free market. The Italian legislature provided for the final step in the transition from the regulated market to the free market – in which the captive customers would be able to choose freely whichever offer they considered best suited to their needs, without any protection – by setting the date from which special price protection would no longer be available. After a number of postponements, the transition date was set at 1 January 2021 for small and medium-sized undertakings and 1 January 2022 for householders.

11. It is in that context that Enel, a vertically integrated undertaking holding the monopoly in electricity generation in Italy and also active in the distribution of electricity, underwent an unbundling process, so as to guarantee transparent and non-discriminatory conditions of access to essential production and distribution infrastructure. As a result of that process, the various stages of the distribution process were assigned to separate undertakings, namely E-Distribuzione, the concession holder for the distribution service, EE, a supplier of electricity on the free market, and SEN, the operator, inter alia, of the 'enhanced protection service', of which E-Distribuzione is the concession holder for the distribution service.

12. The present dispute arose from a complaint lodged with the AGCM by the Associazione Italiana di Grossisti di Energia e Trader (the Italian association of energy wholesalers and traders; 'AIGET') and from information received from individual customers complaining of the unlawful use of commercially sensitive information by operators having access to that information as a result of their belonging to the Enel Group. It was for that reason that, on 4 May 2017, the AGCM opened an investigation into Enel, SEN, and EE in order to establish whether the combined conduct of those companies constituted an infringement of Article 102 TFEU.

13. That investigation concluded with the adoption of a decision on 20 December 2018 ('the contested decision'), in which the AGCM held that, during the period from January 2012 to May 2017, SEN and EE, coordinated by their parent company, Enel, had abused their dominant position, in breach of Article 102 TFEU, on the markets for the sale of electricity to domestic and non-domestic users connected to the low-voltage grid in the areas where the Enel Group managed the distribution activity ('the market in question'). Consequently, the AGCM imposed a fine of EUR 93 084 790.50 jointly and severally on those three companies.

14. The conduct complained of consisted in the implementation of an exclusionary strategy on the market in question, designed to 'transfer' SEN's customer base (SEN being the operator on the protected market) to EE (active on the free market). The objective of the Enel Group had allegedly been, in particular, to prevent the large-scale departure of SEN customers to third-party suppliers, in view of the (forthcoming) abolition of the protected market, which, according to the procedures discussed in draft legislation from 2015 onwards, could entail the reallocation of these customers by means of 'auctions'.

15. To that end, according to the AGCM, SEN had, in the first place, obtained the consent of its customers in the protected market to receive commercial offers in the free market using 'discriminatory methods', consisting in requesting that consent, separately, for the companies of the Enel Group, on the one hand, and for third parties, on the other. In this way, the customers approached tended to give their consent for the companies of the Enel Group, believing that to do so was necessary for, or appropriate to, the management of their contract with their supplier, and refused their consent for other operators. SEN thus placed a quantitative limit on the amount of personal data available to EE's competitors on the free market, since the number of responses giving consent to receive commercial offers also from competing operators represented just 30%

of the total number of responses giving consent. The names of the customers of the protected market who consented to receiving commercial offers were entered on special lists ('the SEN lists').

16. In the second place, that exclusionary strategy was put into effect by means of EE's use of the SEN lists to issue commercial offers to the protected customers (namely, the '*Sempre con Te*' offer), with a view to bringing those customers across from the protected market to the free market. Accordingly, Enel transferred the SEN lists to its subsidiary EE, through the intermediary of SEN, on terms that were not available to competitors. According to the AGCM, the SEN lists were a 'strategic, non-replicable asset', thanks to the otherwise unavailable information they contained concerning users' subscription to the 'Enhanced protection service', which enabled EE to target offers exclusively at that category of customer. In addition, the use of the SEN lists had had a 'potential restrictive effect', inasmuch as it had enabled EE to take from its competitors a significant proportion (more than 40%) of the 'contestable demand' of customers moving from the protected market to the free market.

17. The companies of the Enel Group brought separate actions challenging the contested decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the court of first instance.

18. By judgments of 17 October 2019, that court, while finding that there had been an abuse of a dominant position, partially upheld the actions brought by EE and SEN, in so far as concerned the duration of the alleged abuse and the criteria used to calculate the fine. In compliance with those judgments, the AGCM reduced the fine to EUR 27 529 786.46. By contrast, the court of first instance dismissed the action brought by Enel in its entirety and also confirmed the fine imposed.

19. The three companies have brought separate appeals against those judgments before the referring court, the Consiglio di Stato (Council of State, Italy), seeking the annulment of the decisions imposing the fines or, in the alternative, a further reduction in the fine.

20. In support of their appeals, the appellants argued, in the first place, that there is no evidence of the abusive nature of their conduct or, in particular, of the capacity (potential) of that conduct to have anticompetitive exclusionary effects.

21. First of all, they consider that the mere inclusion of a customer's name on a telemarketing list for the purpose of promoting the services of a subsidiary is not abusive conduct, since it does not entail any commitment regarding supply and does not prevent the customer from appearing on other lists, from receiving advertising or from changing supplier at any moment, even repeatedly.

22. Next, according to the appellants, using the SEN lists was not likely to bring about the rapid transfer of customers *en masse* from SEN to EE. Indeed, between March and May 2017, the two months between the launch of the '*Sempre con Te*' offer and the closure of telephone sales, EE managed to obtain, using the SEN lists, only 478 customers, representing 0.002% of the users of the 'Enhanced protection service' and 0.001% of all electricity users. In addition, the AGCM failed to examine the economic evidence provided by the appellants, which showed that the conduct in question was not liable to produce, and did not produce, restrictive effects on competition. In that regard, the positive results achieved by EE in winning 'Enhanced protection service' customers were due to two perfectly legitimate factors which offer an alternative, more

convincing explanation than that put forward by the AGCM: first, the fact that performance on the free market was better for companies within the Enel Group, which include the distribution undertaking having territorial competence, and, second, the attractive nature of the Enel brand.

23. Lastly, the SEN lists were neither strategic nor non-replicable, since there were similar lists of 'Enhanced protection service' customers available on the market that were more complete and less costly.

24. In the second place, Enel challenged the AGCM's application of a prima facie presumption of parent company liability. It argues in this connection that, from 2014, a major reorganisation of the Enel Group was undertaken, at the conclusion of which decision-making processes were decentralised. Within the new organisational structure the parent company merely had the function of promoting synergies and best practices among the various operating companies, having left behind its decision-making role.

25. According to the referring court, which has joined the three appeals, there is no doubt that the Enel Group holds a dominant position on the market in question. However, the concept of 'abuse', in particular in so far as concerns 'atypical' abuse, such as that at issue in the case in the main proceedings aimed at preventing growth in, or the diversification of, competitors' offers, raises problems of interpretation, in that, on the one hand, Article 102 TFEU does not set out exhaustive parameters for definition and, on the other hand, the traditional distinction between exploitative abuses and exclusionary abuses is not relevant.

26. Indeed, for the purpose of establishing an abuse of a dominant position, the referring court wishes to know, amongst other things, the extent to which account should be taken of the strategy of the Enel Group, as it appears from the documents gathered by the AGCM, to prevent the departure of SEN customers to competitors, or of the fact that the conduct of the group was in itself legitimate, in the sense that the SEN lists were obtained lawfully. The referring court also questions whether it is sufficient that the conduct in question is capable of excluding competitors from the relevant market, given that the group produced, during the course of the investigation, economic studies seeking to demonstrate that its conduct had not actually had any exclusionary effects. Lastly, the abuse of a dominant position by a group of undertakings raises the question of whether it is necessary to adduce proof of active coordination among the various companies operating within the group, or whether the mere fact of belonging to the group is sufficient to establish that a contribution has been made to the abusive practice, even by an undertaking in the group that has not engaged in the abusive conduct.

27. Against that background, being uncertain as to the correct interpretation to be given to Article 102 TFEU, the Consiglio di Stato (Council of State) decided to stay the proceedings and refer the following five questions to the Court of Justice for a preliminary ruling:

'(1) May conduct that constitutes an abuse of a dominant position be completely lawful in and of itself and be classified as "an abuse" solely because of the (potentially) restrictive effect created in the reference market, or must that conduct also be characterised by a specific "unlawful" component, represented by the use of "competitive methods (or means) that are different" from those that are "normal"? In the latter case, what criteria should be used to establish the boundary between "normal" and "distorted" competition?

(2) Is the purpose of the concept of abuse to maximise the well-being of consumers, with the court being responsible for determining whether that well-being has been (or could be) reduced, or does the concept of an infringement of competition law have the function of preserving in itself the competitive structure of the market, in order to avoid the creation of economic power groupings that are, in any case, considered harmful for the community?

(3) In the case of an abuse of a dominant position represented by an attempt to prevent the continuation or development of the existing level of competition, is the dominant undertaking in any case permitted to prove that the conduct did not cause any actual harm, despite its abstract ability to generate a restrictive effect? If the answer to that question is in the affirmative, for the purposes of assessing whether an atypical exclusionary abuse has occurred, must Article 102 TFEU be interpreted as meaning that the Authority has an obligation to examine specifically the economic analyses produced by the party concerning the actual ability of the conduct examined to exclude its competitors from the market?

(4) Must an abuse of a dominant position be assessed solely in terms of its effects on the market (including merely potential effects), without regard to the subjective motive of the [operator], or does a demonstration of restrictive intent constitute a parameter that may be used (even exclusively) to assess the abusive nature of the dominant undertaking's conduct? Does such a demonstration of the subjective component serve only to shift the burden of proof to the dominant undertaking (which would have the burden, at this stage, of providing evidence that the exclusionary effect is absent)?

(5) In the case of a dominant position held by a number of undertakings belonging to the same corporate group, is being part of that group sufficient reason to assume that even those undertakings that have not implemented the abusive conduct have contributed to the infringement, so that [the competition authority] would merely need to demonstrate a conscious, albeit non-collusive, parallel approach by the undertakings operating within the collectively dominant group? Or (as is the case for the prohibition on cartels) is there in any case a need to provide evidence, even indirect evidence, of a specific situation of coordination and instrumentality among the various undertakings within the dominant group, in particular in order to demonstrate the involvement of the parent company?'

28. Written observations have been submitted to the Court by SEN, EE and Enel, the appellants in the main proceedings, by the AGCM, the respondent in those proceedings, by AIGET and Green Network SpA., interveners in the main proceedings, by the Italian and Norwegian Governments and by the European Commission. In their observations, SEN, EE and the Norwegian Government have focused on the first to fourth questions and Enel has addressed the fifth question alone.

29. With the exception of Enel, all of those parties also made oral submissions at the hearing on 9 September 2021. The German Government and the European Free Trade Association (EFTA) Surveillance Authority, which had not lodged written submissions, also presented argument at the hearing.

III. Analysis

A. The first question

30. By the first question it has submitted for a preliminary ruling, the referring court asks whether a practice that is considered 'perfectly legal' outside the context of competition law, and that is implemented by an undertaking in a dominant position, may be classified as an 'abuse', within the meaning of Article 102 TFEU, solely because of its (potentially) restrictive effect, or whether that conduct must also be characterised by a specific element of 'objective unlawfulness', consisting in the use of methods different from methods of 'normal' competition. In the latter case, the Court is asked to indicate the criteria according to which a line may be drawn between 'normal' competition and 'distorted' competition. [9]

31. This preliminary question in reality comprises four parts which are intrinsically linked but which, for simplicity, I shall address separately in the order in which they are raised:

– the first part seeks to establish the relevance of the lawfulness of particular conduct under branches of law other than competition law to its characterisation as an abuse within the meaning of Article 102 TFEU;

– the second part seeks to establish whether particular conduct may be classified as an abuse merely because it produces potentially restrictive effects;

– the third part seeks to establish whether, in order to be classified as an abuse, the conduct must also be characterised by an additional element of unlawfulness, namely the use of competitive methods or means other than those of 'normal competition', and

– the fourth part seeks to distinguish practices which constitute abuse within the meaning of Article 102 TFEU, in that they entail the use of competitive means other than those of normal competition, from practices which do not give rise to abuse.

1. The first part

32. By the first part, the referring court asks whether, for the purposes of Article 102 TFEU, an abuse of a dominant position may be found in respect of conduct which is lawful under branches of law other than competition law.

33. This question is based on the referring court's finding that the methods used to obtain consent for inclusion on the SEN lists were unquestionably lawful under civil law, inasmuch as no complaint has been lodged alleging infringement of the specific rules governing the processing of personal data and EE had acquired the SEN lists at the market price.

34. It should be noted at the outset that it has been consistently held that the concept of 'abuse' within the meaning of Article 102 TFEU is an 'objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods

[9] For terminological clarification regarding the concept of 'normal' competition, see point 53 of this Opinion.

different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'. [10]

35. It follows that the concept of 'abuse' is founded on the objective assessment of the capacity of particular conduct to restrict competition, without the legal classification of that conduct under other branches of the law being decisive.

36. Accordingly, the Court has held that 'the illegality of abusive conduct under [Article 102 TFEU] is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law. [11]

37. Indeed, if only practices which objectively restrict competition and are at the same time unlawful were regarded as abusive within the meaning of that provision, that would mean that conduct which is potentially harmful to competition could not, merely because it is lawful, be penalised under Article 102 TFEU. Such a result would mean that it might almost never be possible to establish abuse of a dominant position, which would compromise the objective of that provision – that being to establish a system which ensures that competition in the internal market is not distorted. Conversely, conduct which infringes legal rules in a given sector is not necessarily an abuse on the part of the dominant undertaking when it is not liable to cause harm, even potential harm, to competition. [12]

38. It follows that, in the present case, the fact that consent for the SEN lists was lawfully acquired under the rules of civil law cannot preclude the conduct from being classified as abusive within the meaning of Article 102 TFEU. However, it is for the referring court to examine whether, in the light, inter alia, of the regulatory framework governing the processing of personal data, the methods of obtaining the consent could be 'discriminatory', as the AGCM contends. [13] In that regard, the specific legal framework applicable (and conformity with it) may constitute a relevant factor during the overall assessment of the abusive nature of the conduct. [14]

2. The second part

39. By the second part, the referring court asks whether particular conduct may be classified as abusive merely because of the (potentially) restrictive effects it has on the relevant market.

10 Judgments in *Generics (UK)* (paragraph 148) and in *Deutsche Telekom II* (paragraph 41). See also judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, 'the judgment in *Hoffmann-La Roche*', paragraph 91); of 3 July 1991, *AKZO* v *Commission* (C-62/86, EU:C:1991:286, 'the judgment in *AKZO*', paragraph 69); of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, 'the judgment in *AstraZeneca*', paragraph 74); and in *Post Danmark II* (paragraph 26).

11 *AstraZeneca* (paragraph 132). See also Opinion of Advocate General Mazák in *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:293, point 78).

12 See, in that regard, decision of the Bundeskartellamt (Federal Competition Authority, Germany) B6-22/15 of 6 February 2019, by which conduct that did not comply with the legal rules on the protection of personal data was held to also constitute an infringement of competition law (case giving rise to the request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) on 22 April 2021 in Case C-252/21, *Facebook Inc and Others* v *Bundeskartellamt*)

13 See point 15 of this Opinion.

14 See, in that regard, point 115 of this Opinion.

40. In this connection I would reiterate that the concept of 'abuse', described above, implies that the conduct penalised by Article 102 TFEU is conduct which hinders the maintenance of the degree of competition on the market or the growth of that competition.[15] Indeed, it is settled case-law that undertakings holding a dominant position have, pursuant to Article 102 TFEU, a special responsibility not to allow their conduct to impair genuine undistorted competition in the internal market.[16]

41. More specifically, as regards exclusionary practices, such as that at issue in the case in the main proceedings,[17] the Court has held repeatedly, first, that if conduct is to be characterised as abusive, that presupposes that it was capable of restricting competition and, in particular, of producing the alleged exclusionary effects,[18] that assessment having to be undertaken with regard to all the relevant facts surrounding the conduct in question.[19] Second, in order to establish whether such a practice is abusive, that practice must have an anticompetitive effect on the market which is not purely hypothetical,[20] and thus must exist, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors that are at least as efficient as the dominant undertaking.[21]

42. It follows that the capacity to produce a (potentially) restrictive effect on the relevant market, such as an anticompetitive exclusionary (or foreclosure) effect, is the essential factor in the characterisation of conduct as abusive.

43. However, in this connection, it must be emphasised that an exclusionary effect does not necessarily undermine competition and does not, therefore, always equate to a 'restrictive effect in the reference market' (to follow the wording of the question). Indeed, the mere fact that certain conduct has the potential to drive a competitor from the market does not make the market less competitive, still less does it make the conduct abusive within the meaning of Article 102 TFEU. A distinction must therefore be drawn between a risk of foreclosure and a risk of anticompetitive foreclosure, since only the latter may be penalised under Article 102 TFEU.[22]

44. Indeed, as the Court explained in the judgment in *Intel*, 'it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. … Thus, *not every exclusionary effect is necessarily detrimental to competition. 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*.'[23] Accordingly, an undertaking remains at liberty to

15 See point 34 of this Opinion.

16 See, inter alia, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, 'the judgment in *Michelin I*', paragraph 57); in *Post Danmark I* (paragraph 23); and in *Intel* (paragraph 135).

17 Traditionally, a fundamental distinction has been drawn between 'exclusionary practices' (which is to say, unlawful attempts to exclude competing undertakings) and 'exploitative practices' (which is to say, the direct exploitation of consumers, for example, through excessive pricing). On this distinction, see Opinion of Advocate General Ruiz-Jarabo Colomer in joined cases *Sot. Lélos kai Sia and Others* (C-468/06 to C-478/06, EU:C:2008:180, point 74).

18 See judgments in *TeliaSonera* (paragraphs 64), in *Intel* (paragraph 138), and in *Generics (UK)* (paragraph 154).

19 See judgments in *TeliaSonera* paragraph 68), and in *Generics (UK)* (paragraph 154).

20 Judgment in *Post Danmark II* (paragraph 65).

21 Judgment in *TeliaSonera* (paragraphs 64 and 66).

22 See, to that effect, point 19 of the Communication from the Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article 82 [EC] to abusive exclusionary conduct by dominant undertakings' (OJ 2009 C 45, p. 7, 'the Guidelines').

23 Judgment in *Intel* (paragraphs 133 to 134; my italics). See also judgment in *Post Danmark I* (paragraphs 21 to 23 and the case-law cited).

demonstrate that its practice, albeit producing an exclusionary effect, is objectively (economically) justified on the basis of all the circumstances of the case [24] or that the effects are counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. [25] 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. [26]

45. The premiss upon which the Court based that reasoning is therefore that if any conduct having an exclusionary effect (actual or potential) were automatically classed as anticompetitive and, therefore, abusive within the meaning of Article 102 TFEU, that provision would become a means for protecting less capable, less efficient undertakings and would in no way protect the more meritorious undertakings, which can serve as a stimulus to a market's competitiveness.

46. In light of the foregoing analysis, in order for conduct, such as an exclusionary practice, to be classified as abusive within the meaning of Article 102 TFEU, it is necessary for it to be anticompetitive with the result that it is capable of having an (actual or potential) restrictive effect on the reference market. However, in order to assess the anticompetitive nature of that conduct it is necessary to establish whether the dominant undertaking used methods other than those of 'normal' competition. It is precisely that assessment that is the subject of the third and fourth parts.

3. The third part

47. By the third part, the referring court asks a question regarding methodology, namely whether the need to show that a dominant undertaking has used methods other than those coming within the scope of 'normal' competition refers to an 'additional element of unlawfulness' over and above the requirement to demonstrate an anticompetitive exclusionary effect, such that 'the capacity to restrict competition' and 'the use of means other than those of normal competition' are separate conditions to be fulfilled in order for abuse to be established.

48. I would note in this regard that the positions of the parties in the main proceedings, of the governments and of the Commission diverge. [27] To my mind, demonstrating that a dominant undertaking used means other than those which come within the scope of 'normal' competition is not a requirement that needs to be assessed separately from the restrictive effect of the conduct.

49. Indeed, as is clear from point 44 of this Opinion, the analysis of the undertaking's conduct plays a decisive role in the classification of its effects as anticompetitive. Thus, those two elements must be addressed in one and the same analysis. More specifically, in order to assess whether the exclusionary effect is (actually or potentially) restrictive of competition, it is necessary also to examine whether the means used come within the scope of 'normal' competition. Similarly, in order to determine whether the means used come within the scope of

[24] See judgment in *TeliaSonera* (paragraphs 75 and 76), and in *Intel* (paragraph 140).

[25] See judgments of 15 March 2007, *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, 'the judgment in *British Airways*', paragraph 86); in *Post Danmark I* (paragraphs 40 and 41); and in *Intel* (paragraph 140).

[26] Judgment in *Intel* (paragraph 140).

[27] In their observations, SEN, EE and the Commission suggest that a (potentially) restrictive effect alone is not sufficient in order for a practice to be classed as abusive within the meaning of Article 102 TFEU and that an additional element of unlawfulness is needed, consisting in the use of means other than those which govern normal competition based on merit. The AGCM, AIGET, Green Network and the Italian and Norwegian Governments are agreed that the concept of abuse of a dominant position does not demand proof of any specific element of unlawfulness in addition to the actual or potential restrictive effect of the undertaking's conduct.

such competition, it is necessary to know whether the practices have the ability to foreclose, which is to say to cause (actual or potential) exclusionary effects in the market. Indeed, the classification of conduct as 'anticompetitive' cannot be part of a separate examination of the effects of that conduct. The two requirements are thus inextricably linked and must be assessed having regard to all the relevant facts surrounding the conduct in question. [28]

50. It may be concluded from this that the ability of a practice to produce an anticompetitive effect, on the one hand, and the use of means that do not come within the scope of normal competition, on the other, are conditions that come under the same assessment, aimed at determining whether that practice is abusive.

51. In the present case, it is apparent from the facts contained in the order for reference that the AGCM is of the view that the conduct of the Enel Group at issue had a restrictive effect on competition, in that the strategy implemented by the appellants sought, in essence, to prevent or make more difficult the entry of EE's competitors into the free market. In the light of the foregoing analysis, it is for the referring court to verify whether the conduct allegedly putting into effect that strategy was capable, at least potentially, of having exclusionary effects on EE's competitors and to assess whether that exclusionary effect was capable of adversely affecting competition, by establishing whether or not that conduct comes within the scope of 'normal' competition.

4. The fourth part

52. By the fourth part, the referring court asks the Court, in essence, to draw a clear line between practices which come within the scope of so-called 'normal' competition and those which do not. This question thus goes to the heart of what constitutes abuse within the meaning of Article 102 TFEU, and seeks to determine whether the conduct at issue in the main proceedings constitutes such abuse.

53. As a preliminary point, it should be observed that, where the national court refers to 'normal competition', it is using terminology repeatedly used by the Court. [29] I would note that the same meaning should be ascribed to the adjective 'normal' as is ascribed to the other expressions used to describe such competition, which include 'fair competition', [30] 'competition on the merits' [31] and 'competition on the basis of quality'. [32] I propose to use the expression 'competition on the merits' from this point onwards. [33] This plethora of expressions is indicative of the objective difficulty of establishing what constitutes abusive conduct. Indeed, formulating rules which allow conduct that is harmful to competition, and therefore abusive, to be clearly distinguished is neither easy

28 See, to that effect, judgment in *Post Danmark II* (paragraph 29), and in *Generics (UK)* (paragraphs 151 and 154).

29 Judgments in *Hoffmann-La Roche* (paragraph 91), and in *Deutsche Telekom II* (paragraph 41).

30 See judgments of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission* (27/76, EU:C:1978:22, 'the judgment in *United Brands*', paragraph 189), and of 1 April 1993, *BPB Industries and British Gypsum* v *Commission* (T-65/89, EU:T:1993:31, paragraph 94).

31 Judgments of 1 April 1993, *BPB Industries and British Gypsum* v *Commission* (T-65/89, EU:T:1993:31, paragraph 113), and of 7 October 1999, *Irish Sugar* v *Commission* (T-228/97, EU:T:1999:246, paragraph 111).

32 Terms initially used by the Court in the judgment in *AKZO* (paragraph 70). See, more recently, judgments in *Deutsche Telekom I* (paragraphs 83, 176 and 177), and in *Intel* (paragraph 135 and 136).

33 The expression '*normal* competition' is potentially confusing because practices which, usually, are lawful, ordinary and consistent with fair market practice and which could therefore be described as 'normal' can, when adopted by an undertaking in a dominant position, nevertheless infringe Article 102 TFEU as a result of the dominant undertaking's 'special responsibility' (see points 58 and 59 of this Opinion).

nor intuitive. That complexity is linked, inevitably, to the objective difficulty of distinguishing in advance conduct which reveals aggressive, but lawful competitiveness from anticompetitive conduct. [34]

54. No doubt conscious of that difficulty, the EU legislature included in Article 102 TFEU an indicative list of abusive practices which does not exhaust all the methods of abusing a dominant position prohibited by EU law, [35] thus allowing the application of that provision to be adapted to different commercial practices over time. Therefore, a practice described by the referring court as 'atypical', such as that at issue in the main proceedings, which does not correspond to a practice listed in Article 102 TFEU, is also capable of constituting an abusive practice. Since the analysis is based on the anticompetitive effects and not the form of the conduct, a competition authority has to conduct careful verification of all the relevant facts, without making the slightest presumption, [36] since whether the conduct is 'typical' or 'atypical' is not decisive.

55. The concept of 'competition on the merits' is therefore abstract, since it does not correspond to a specific form of practices and cannot be defined in such a way as to make it possible to determine in advance whether or not particular conduct comes within the scope of such competition. Indeed, the Court has excluded the idea of an 'abuse in itself' (or an abuse per se), which is to say the existence of a practice that is inherently abusive, independently of any anticompetitive effect it may have. [37] The concept of 'competition on the merits' thus expresses an economic ideal the background to which is the current trend in EU competition law to favour an analysis of the anticompetitive effects of the conduct ('effects-based approach') rather than an analysis based on its form ('form-based approach'). [38]

56. It follows that the question as to whether an exclusionary practice is a means consistent with competition on the merits is closely linked to the factual, legal and economic context of that practice. Indeed, the material scope of the dominant undertaking's special responsibility must be considered in the light of the specific circumstances of each case. [39]

57. Despite the abstract nature of the concept of 'competition on the merits', some common elements may be gleaned from the case-law of the Court. Without prejudice to the assessment of the conduct at issue in the main proceedings, which it is for the referring court to perform, I believe that the following considerations could be useful.

58. In the first place, I note that 'competition on the merits' must be interpreted in close correlation with the equally settled principle of the case-law of the Court that an undertaking in a dominant position has a 'special responsibility' not to allow its conduct to impair genuine

34 For example, the charging of very low prices could eliminate a competitor, but it would be consistent with the free play of competition because it is to the consumer's advantage. However, in some cases, the prices charged could be so low as to be predatory and so potentially harmful to the consumer in the long term, after the competitor has been ousted.

35 Judgments in *Continental Can* (paragraph 26), in *Deutsche Telekom I* (paragraph 173), and in *TeliaSonera* (paragraph 26).

36 To my knowledge, the only type of conduct in respect of which there is a rebuttable presumption of restriction of competition giving rise to an inversion of the burden of proof is that of exclusive loyalty rebates, that is to say, discounts conditional on the customer obtaining, whatever the quantity of its purchases, all or most of its requirements from the undertaking in a dominant position (see judgment in *Intel*, paragraph 137).

37 See, to that effect, judgment in *AstraZeneca* (paragraph 106)

38 For a general overview of the application of the 'effects-based approach' in competition law, see Bourgeois, J. and Waelbroeck, D., *Ten years of effects-based approach in EU competition law: state of play and perspectives*, Bruylant, 2013, and Ibáñez Colomo, P., 'Anticompetitive Effects in EU Competition Law', *Journal of Competition Law & Economics*, vol. 17, No 2, 2021, pp. 309 to 363.

39 Judgments of 14 November 1996, *Tetra Pak* v *Commission* (C-333/94 P, EU:C:1996:436, paragraph 24), and of 16 March 2000, *Compagnie maritime belge transports and Others* v *Commission* (C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 114).

undistorted competition in the internal market.[40] However, that 'special responsibility' cannot deprive an undertaking in a dominant position of its right to take account of its own commercial interests.[41] To that effect, the reference to 'methods other than those which come within the scope of competition on the merits' serves to clarify the content of that 'special responsibility' incumbent on a dominant undertaking and to define the scope of action that is permitted.

59. The logical consequence of this 'special responsibility' is that conduct that is acceptable when adopted by an undertaking not in a dominant position could be characterised as abusive when adopted by an undertaking in a dominant position, on account of the effect that that conduct has on the relevant market. Indeed, a practice that is generally followed or business conduct which normally contributes to an improvement in the production or distribution of goods and which has a beneficial effect on competition may restrict such competition where it is engaged in by a dominant undertaking.[42]

60. In that regard, in the present case, I note that the 'special responsibility' applies to all dominant undertakings – including incumbent operators that previously held a monopoly, such as Enel, and operators with a public service obligation, such as SEN. As the Court has stated, 'a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, *irrespective of the reasons for which it has such a dominant position*, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.'[43] Accordingly, in the context of the liberalisation of the market, the Enel Group is subject to Article 102 TFEU and, in particular, the 'special responsibility', just as all other undertakings.

61. In the second place, as is apparent from point 55 of this Opinion, the form or type of conduct that is adopted by a dominant undertaking is not decisive in itself. What matters is whether the conduct tends to restrict competition or is capable of having that effect.[44] However, if conduct clearly departs from normal market practice, that may be considered a relevant factor to be taken into account in the assessment of whether there is abuse (in the same way as, for example, proof of intention).[45]

62. In the third place, and without claiming to be exhaustive, I note that conduct that does not come within the concept of 'competition on the merits' is generally characterised by the fact that it is not based on obvious economic reasons[46] or objective reasons.[47] Examples of competition on the merits, therefore, would include conduct which reduces the costs of the dominant undertaking by increasing efficiency in some way and which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of

40 Judgments in *Michelin I* (paragraph 57); in *Post Danmark I* (paragraphs 21 to 23); and in *Intel* (paragraph 135).

41 Judgment in *United Brands* (paragraph 189).

42 See judgments of 30 September 2003, *Atlantic Container Line and Others* v *Commission* (T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraphs 1124 and 1460), and of 23 October 2003, *Van den Bergh Foods* v *Commission* (T-65/98, EU:T:2003:281, paragraph 159).

43 Judgment in *Michelin I* (paragraph 57, my italics).

44 Judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, 'the judgment in *Tomra*', paragraph 68).

45 See point 128 of this Opinion.

46 Judgments in *TeliaSonera* (paragraph 88), and in *AKZO* (paragraph 71).

47 See, to that effect, judgment in *AstraZeneca* (paragraph 130).

the goods already on offer. By contrast, if there is no justification for the conduct other than to harm competitors, that conduct will necessarily not come within the scope of competition on the merits. [48]

63. In the fourth place, I note that 'competition on the merits', in the context of the application of Article 102 TFEU to exclusionary practices, refers, generally, to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. [49]

64. In the present case, the very purpose of the liberalisation of the energy market is to open that market to competition precisely in order to achieve for consumers the beneficial effects of the competitive process, whether in relation to price, quality or choice of the services offered. Accordingly, in the context of such a process, the actions of the incumbent operator must not be of a nature to prevent or make more difficult the entry into the liberalised market of competitors, which must be able to operate on the free market on an equal footing. Indeed, the Court has stated that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators. [50]

65. Against that background, the question arises as to whether the Enel Group, which had the monopoly on the customers of the protected market, may legitimately wish to keep those customers within the group, despite the process of liberalisation of that market. It seems to me that that question should be answered in the affirmative.

66. Indeed, as has been noted in point 44 of this Opinion, Article 102 TFEU in no way aims to prevent an undertaking from achieving or maintaining, on its own merits, the dominant position on a market. It follows that even incumbent operators, from the moment they are subject to free competition, should seek to maximise their profits inter alia by means of retaining their customer base. Indeed, winning customers is an essential element of normal competition. Thus, the Enel Group is surely fully allowed, even expected, to implement practices that seek to improve its goods and services in order, inter alia, to remain competitive and retain its customer base. It therefore seems to me to be entirely in accordance with normal competition that a dominant undertaking, such as Enel, should wish to retain its customer base, even in the context of liberalisation. Accordingly, the implementation of a 'strategy' to retain customers cannot, in itself, constitute an abuse within the meaning of Article 102 TFEU.

67. In that respect, it seems to me that data collection in the context of the customer relationship remains, in principle, an entirely 'normal' operation in a standard competitive process. However, in the context of such an operation, precisely on account of the fact that it is dominant, Enel has a 'special responsibility' to adopt practices of competition on the merits which do not lead to compartmentalisation of the market. Thus, Enel must not adopt practices which, by exploiting the advantages stemming from the statutory monopoly, are capable of having exclusionary effects on new competitors considered to be as efficient as it is itself. [51]

48 Judgment of 18 November 2020, *Lietuvos geležinkeliai* v *Commission* (T-814/17, EU:T:2020:545, paragraphs 292 to 299.)

49 See, to that effect, the Guidelines, paragraph 5.

50 Judgment in *Deutsche Telekom I* (paragraph 230 and the case-law cited). This is why, in the context of the procedure of unbundling the incumbent operator, it is essential to carry out a strict separation of the activities connected to the monopoly and those connected to the free market, that separation having to be legal, material, financial, commercial and relating to accounting.

51 Judgment in *Intel* (paragraph 136).

68. It is in this connection that it is necessary, in my view, to assess, in the fifth place, the ability of competitors to imitate the conduct of the dominant undertaking. This assessment is relevant in order to determine whether the practice at issue comes within the scope of competition on the merits and, accordingly, whether or not it restricts competition.

69. Indeed, the case-law of the Court, in my view, confirms that exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitors does not represent, in principle, conduct that may lead to anticompetitive foreclosure and therefore comes within the scope of competition on the merits. [52]

70. First, in the context of price-related exclusionary conduct – such as loyalty rebates, low-pricing practices in the form of selective prices or predatory prices and margin squeeze [53] – such a possibility of replication is assessed, as a general rule, but not necessarily, on the basis of the so-called 'equally efficient competitor test' ('EEC test'). [54] The particular modalities of that test vary depending on the type of practice in question, but the common factor consists in examining whether a pricing practice is economically viable for the competitor of a dominant undertaking, using as a point of reference, primarily and as a general rule, the dominant undertaking's price/cost ratio. [55] In other words, that test consists in identifying whether that conduct can be replicated by an equally efficient competitor by placing the dominant undertaking in the place of the equally efficient competitor to ascertain whether the latter would suffer exclusionary effects from the practice in question. That test is consistent with the general principle of legal certainty in that it allows a dominant undertaking to assess in advance whether particular conduct is lawful on the basis of its own costs. [56]

71. Second, as regards exclusionary practices not related to pricing – such as, for example, refusal to supply – the case-law seems to confirm the relevance of the test as regards the possibility of replication, inasmuch as a dominant undertaking's decision to reserve for itself its own distribution network does not constitute a refusal to supply contrary to Article 102 TFEU when a competitor is able to create a second distribution network of a comparable size. In other words, there is no abuse if inputs refused by the dominant undertaking can be duplicated by equally efficient undertakings by purchasing them from other suppliers or developing them themselves. [57] Similarly, in the context of tying and bundling practices, whether it is possible to replicate a product is particularly relevant in establishing whether there is potential or actual anticompetitive foreclosure. [58]

52 This rule is not, however, absolute, since there are situations in which, on the one hand, conduct which cannot be reproduced by an equally efficient competitor still comes within the scope of competition on the merits (see, for example, the refusal to provide essential input to a customer who would be unable to pay for it adequately, or research and development activities which allow an undertaking to patent and exploit a unique and non-replicable invention). On the other hand, in some cases, conduct which can be replicated by an equally efficient competitor does not necessarily come within the concept of competition on the merits (see, for example, making misrepresentations to the public authorities (judgment in *AstraZeneca*, paragraph 18)).

53 Judgment in *Post Danmark II* (paragraph 55 and the case-law cited).

54 See, to that effect, the Guidelines, paragraphs 23 to 27. The Court has established that there is no legal obligation to systematically base a finding that a practice is abusive on the EEC test, that test being regarded as one tool amongst others. Indeed, that test is of no relevance when the structure of the market makes the emergence of an as-efficient competitor practically impossible, as in the context of a market, on the one hand, in which the holder of a statutory monopoly has a very large market share and, on the other hand, access to which is protected by high barriers (judgment in *Post Danmark II* (paragraphs 57 to 61)).

55 Judgment in *Post Danmark II* (paragraph 53). However, the costs and prices of competitors on that same market may be relevant when it is not possible, in view of the circumstances, to refer to the dominant undertaking's prices, in particular where cost structure of the dominant undertaking is not identifiable for objective reasons (judgment in *TeliaSonera* (paragraph 45)).

56 Judgment in *TeliaSonera* (paragraphs 42 to 44).

57 Judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraphs 44 and 45).

58 See the Guidelines, paragraphs 54 and 61.

72. In the present case, the conduct at issue in the main proceedings does not, according to the AGCM, concern a pricing practice, but a complex, unlawful strategy characterised by the exploitation of data to which the Enel Group had access on account of its former statutory monopoly. It would therefore seem that that practice is not connected to a theory of price-related foreclosure and that, on account of the statutory monopoly, it was objectively impossible, before the liberalisation of the market, for competitors to replicate the strategy attributed to the appellants. It follows that the EEC test is certainly not the most appropriate test to assess the ability of equally efficient competitors to imitate the conduct of the dominant undertaking.

73. However, the underlying logic of the EEC test – which seeks, in essence, to estimate whether a dominant undertaking was in a position in which it was able to foresee, on the basis of data known to it, whether a competitor could, despite the conduct in question, have stayed competitive on the market operating in an economically viable way – to my mind remains relevant. Thus a test based on the logic of that test would consist in assessing whether, on the basis of information presumed to be known to the dominant undertaking, competitors could have had access, in an economically viable way, to lists that are comparable as regards their usefulness to the SEN lists. That approach also coincides with the significance attributed to the ability-to-replicate test in the context of eviction practices not related to pricing.

74. Accordingly, I am of the view that the objective impossibility for competitors to replicate exactly the same strategy as Enel does not preclude an examination of the actual ability of equally efficient competitors to replicate, in reasonable economic conditions and within acceptable timeframes, the practices of the dominant undertaking, for example by making use of lists that were undeniably available on the market and which contained data similar to that on the SEN lists. That examination may, to my mind, indicate whether or not Enel's conduct is capable of producing anticompetitive exclusionary effects and, therefore, whether or not it is consistent with competition on the merits.

75. In the context of such an examination, which is to be carried out by the referring court, the following points are of particular relevance.

76. First, and with some caution, the importance of the SEN lists from a competitive point of view should be determined. In that connection I note that there is particular interest in access to data on customers in the context of a liberalisation process, both in abstract terms, in that it allows a better understanding of the market to be gained, and in practical terms, in that it allows those customers to be 'captured' by presenting them with offers before other providers. However, the importance of that data must also be nuanced since it must not be forgotten that the possibility to contact a customer in order to, where appropriate, make that customer an offer, does not necessarily mean that those customers will be 'captured' since, on the one hand, those customers will not necessarily subscribe to such offers [59] and, on the other hand, there is nothing preventing those customers from subscribing to offers from other providers at a later stage, particularly when the first contract does not engage customers for a specific period. I recall that anticompetitive effects must have a causal link with the practice at issue, in that they must be imputable to the dominant undertaking and must not be purely hypothetical. [60]

[59] Indeed, in the present case, using the SEN lists allowed EE to obtain barely 0.002% of the users of the protected market (see point 22 of this Opinion).

[60] Judgment in *Post Danmark II* (paragraphs 47 and 65) and point 41 of this Opinion.

77. Second, the referring court will inevitably have to clarify whether the SEN lists were made available to competitors in a discriminatory manner, both at a practical level and regarding price, which, if they were, would constitute, in essence, a practice favouring EE. In that same respect, it seems to me relevant to assess whether the request for consent had been made by SEN in a non-discriminatory manner which was transparent as to the material consequences, in particular from the point of view of maintaining the existing supply relationship and the possibility of receiving supply offers from EE's competitors. If discrimination was found to exist, that could corroborate the AGCM's position that Enel's conduct was not in accordance with competition on the merits, in that equality of opportunity was not secured as between the various economic operators. [61]

78. Third, I am of the view that, independently of the analysis of the discriminatory nature of the conduct, the referring court will also have to assess whether it was possible to replicate the SEN lists. Although, indeed, the exact content of those lists cannot be replicated by EE's competitors, since those lists were compiled in the context of SEN's public service mission, it is apparent from the case file that lists with similar content were also available on the Italian market, where a large number of undertakings are in the business of producing telemarketing lists. If the existence of alternative lists is proven, they would have effectively enabled EE's competitors to make targeted offers for the supply of energy to customers of the protected market. In such a case, I am of the view that the referring court would have to compare those alternative lists to the SEN lists, as regards their availability, their price, their content and their geographic extent, in order to ascertain whether a competitor, even one much smaller economically than the Enel Group, through use of such lists, would actually have been able to compete effectively with EE, in an economically viable way, in respect of the same part of the contestable customer base of the protected market.

79. If the referring court takes the view that those alternative lists were capable of offering the same opportunities as the SEN lists, assuming that Enel must have been aware both of the existence of those alternative lists and of their content, it seems to me that it could be concluded that any potential risk of foreclosure of the relevant market was due not to Enel's actions but to the negligence of its competitors, which did not act competitively in order to capture customers of the protected market. In other words, the SEN lists would not have been capable of conferring on the Enel Group the significant competitive advantage observed by the AGCM on account of their ability to be replicated. In such a case, the ability of the conduct at issue to restrict competition could be proven, with the result that the conduct at issue in the main proceedings would come within the scope of competition on the merits.

80. By contrast, if it appears from the national court's analysis that the potential for commercial exploitation of those alternative lists was minimal and that only the SEN lists enabled, for example, a customer of the protected market to be immediately identified, the (potential) exclusionary effect would be principally attributable to Enel, which, if it were held that it acted in a discriminatory and non-transparent manner, would have effectively acted in a manner that is not covered by competition on the merits. Moreover, it should be borne in mind that the fact that competitors can limit or obviate the effects of Enel's conduct through the use of alternative lists does not, in the light of Enel's market power, prevent the conduct at issue from being just as capable of having anticompetitive effects. In other words, the fact that alternative lists exist is certainly relevant, but is not, in itself, decisive.

[61] See point 64 of this Opinion.

81. In the light of the foregoing considerations, I suggest that the answer to the first question should be that a practice adopted by an undertaking in a dominant position, irrespective of its lawfulness under branches of law other than competition law, may not be characterised as abusive within the meaning of Article 102 TFEU solely on the basis of its exclusionary effect in the relevant market, since such conduct should not be equated with a restrictive effect on competition unless it is shown that the undertaking has employed methods or means different from those which come within the scope of competition on the merits. In principle, an exclusionary practice which can be replicated by competitors in an economically viable way does not represent conduct that may lead to anticompetitive foreclosure and thus comes within the scope of competition on the merits.

B. The second question

82. By its second question, the referring court asks the Court, in essence, to clarify whether Article 102 TFEU is intended to protect consumers or to protect the competitive structure of the market and, depending on the answer to that question, to determine the scope of the evidence that is needed in order for an exclusionary practice to be classed as abusive.

1. Admissibility

83. AIGET disputes the admissibility of this question on two grounds. First, the answer is clear from the settled case-law of the Court. Second, the question is not relevant to the resolution of the dispute, given that the conduct in question affected both the structure of the market, namely the competing suppliers, and consumers, namely the customers of the protected market, who found themselves prevented from choosing from among the services provided on the free market.

84. Those objections – should the Court decide to address them expressly, in the absence of a formal claim for a finding that the question is inadmissible – should, in my view, be dismissed.

85. Indeed, first, it should be recalled that even when there is case-law resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so.[62] Thus, the fact that the Court has interpreted Article 102 TFEU in the past cannot in itself cause the questions referred in the present case to be inadmissible. Moreover, the referring court claims that the answer is not obvious, since diverging opinions have been expressed by the Commission, according to which Article 102 TFEU is aimed at maximising consumer well-being,[63] and by the Court, according to which that provision is designed to preserve the structure of competition, independently of any disadvantage caused to consumers.[64]

86. Second, as regards the relevance of the question, it should be borne in mind that it is for the national court alone to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions submitted.[65] In the present case, the referring court justifies the necessity of the second question by explaining, in essence, that the

62 Judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 34).

63 The referring court cites, in that regard, the Guidelines, paragraph 19.

64 The referring court cites, in that regard, the judgments in *British Airways* (paragraphs 66 and 106); in *France Télécom* (paragraphs 104 to 107); and of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, 'the judgment in *GSK*', paragraph 63).

65 See, to that effect, judgment of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraphs 44 and 45 and the case-law cited).

answer to that question will determine the scope of the evidence that is required.[66] Therefore, in my view, that question has a direct relationship with the subject matter of the dispute in the main proceedings and it is not hypothetical.

2. Substance

87. The second question submitted for a preliminary ruling consists of two parts:

– the first part seeks to establish what interest is protected by Article 102 TFEU. Two possibilities are contemplated here which the referring court presents as alternatives, namely 'the maximisation of consumer protection' or 'the preservation of the structure of competition in the market';

– the second part seeks to determine the consequences in terms of evidence of the relationship between those two objectives of Article 102 TFEU.

(a) The first part

88. Before dealing with the substance of the first part, some preliminary remarks are called for.

89. First of all, it must be observed that, in the present case, this question arises in the context of exclusionary practices, which are aimed in particular at excluding competitors from the relevant market, and not in the context of exploitative practices, such as the imposition of purchase or selling prices or other trading conditions that are unfair under point (a) of the second paragraph of Article 102 TFEU.[67] Although the latter practices are directly detrimental to consumers (for example, because of excessive pricing), they do not, as a rule, alter the actual structure of the market.[68]

90. Next, it must be recalled that Article 102 TFEU is an application of the general objective of EU action laid down by Article 3(1)(b) TFEU, namely the establishing of the competition rules necessary for the functioning of the internal market.[69] That objective is alluded to in the protocol (No 27) on the internal market and competition annexed to the EU Treaty and the FEU Treaty, which, in accordance with Article 51 TEU, forms an integral part of those treaties.

91. It is in within that framework that the two objectives cited by the referring court, namely the protection of consumers and the protection of the structure of competition in the market, must be considered.

92. As regards the first objective, the Court has indicated that Article 102 TFEU is one of the competition rules the function of which is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring

66 See, more specifically, point 102 of this Opinion.

67 See the Guidelines, paragraph 7, and footnote 17 to this Opinion.

68 See, to that effect, judgment of 21 February 1973, *Europemballage and Continental Can* v *Commission* (6/72, EU:C:1973:22, 'the judgment in *Continental Can*', paragraph 26). However, there may be an overlap between exclusionary practices and abusive practices, since all exclusionary strategies are capable of leading to abuse eventually (see, in that regard, Petit, N., *Droit européen de la concurrence*, 3rd ed., LGDJ, 2020, paragraphs 1000 to 1002).

69 See, to that effect, judgments in *Continental Can* (paragraph 26); in *Hoffmann-La Roche* (paragraph 38); in *France Télécom* (paragraph 103); and in *Deutsche Telekom I* (paragraph 170).

the well-being of the European Union.[70] The well-being of consumers, therefore, is unquestionably one of the objectives of that provision. Indeed, the Court has expressly acknowledged the Treaty objective of protecting consumers by means of undistorted competition.[71] Moreover, the interests of consumers are expressly referred to in point (b) of the second paragraph of Article 102 TFEU, in connection with practices associated with abusive exclusionary conduct, namely 'limiting production, markets or technical development *to the prejudice of consumers*' (my italics).

93. As regards the second objective, it must be recalled that the Court's earliest judgments in cases involving the abuse of a dominant position clearly state that the effects on 'the structure of the market' are at the heart of Article 102 TFEU. For example, in the judgment in *Hoffmann-La Roche*, the Court stated that abuse refers to 'the behaviour of an undertaking in a dominant position *which is such as to influence the structure of a market* where … the degree of competition is weakened'.[72] The reference to the 'structure of the market', no doubt influenced by the ordoliberal thinking of the time, was initially conceived as seeking to guarantee 'economic liberalism'. In this sense, the objective of the protection of the structure of the market could encompass the 'protection of competitors' which form part of that market. However, it is clear from subsequent case-law, now settled, that Article 102 TFEU is not aimed at, or rather is no longer aimed at protecting competitors unconditionally in the face of an undertaking in a dominant position. Indeed, following the Commission's revision in 2005 of competition policy with regarded to abuses,[73] the Court has acknowledged that Article 102 TFEU does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market and that it does not, therefore, seek to ensure that competitors less efficient than the undertaking with the dominant position remain on the market.[74] That approach was confirmed in the judgment in *Intel*, in which the Court stated that '*competition on the merits may … lead to the departure from the market or the marginalisation of competitors that are less efficient*'.[75] The perception that Article 102 TFEU is not aimed primarily at protecting (less efficient) competitors, which the Commission also shares,[76] seems now to be an accepted tenet of EU competition law.

94. It is in the light of those observations that it is necessary to assess the relationship between those two objectives and, in particular, whether the preservation of a competitive structure can constitute an independent objective and, consequently, an alternative to the protection of consumer well-being, as the referring court suggests.

95. To my mind, that question should be answered in the negative.

70 See, to that effect, judgment in *TeliaSonera* (paragraph 22 and the case-law cited).

71 Judgments of 16 September 2008, *Sot. Lélos kai Sia and Others* (C-468/06 to C-478/06, EU:C:2008:504, paragraph 68), and in *Deutsche Telekom I* (paragraph 180).

72 Judgment in *Hoffmann-La Roche* (paragraph 91; my italics), reiterated several times in the case-law cited (see, inter alia, footnote 10).

73 See the 'DG Competition discussion paper on the application of Article 82 [EC] to exclusionary abuses' of December 2005.

74 See, to that effect, judgments in *Deutsche Telekom I* (paragraph 177); in *TeliaSonera* (paragraphs 31 to 33, 39, 40, 43, 63, 64, 70 and 73); and in *Post Danmark I* (paragraph 21).

75 Judgment in *Intel* (paragraph 134; my italics).

76 See the Guidelines, paragraphs 6 and 23.

96. In the first place, I would observe that, according to the Court's settled case-law, Article 102 TFEU, like Article 101 TFEU,[77] covers not only abuse which may directly harm consumers but also abuse which indirectly harms them by impairing the effective competitive structure.[78] In my view, the Court has thus created an inseparable link between the two objectives. Indeed, preserving an effective competition structure is intrinsically linked to an ultimate purpose, namely consumer protection.[79] Accordingly, the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers. Therefore, there is no logical reason to protect the competitive market, in the abstract, if there is no (actual or potential) risk of harm to consumers.

97. In the second place, I would point out that, according to the Court's more recent case-law, harm to consumers is an essential element for the application of Article 102 TFEU. Indeed, in the judgment of *Post Danmark I*, the Grand Chamber of the Court pointed out that Article 102 TFEU applied to the conduct of a dominant undertaking that, 'through recourse to methods different from those governing normal competition …, has the effect, *to the detriment of consumers*, of hindering the maintenance of the degree of competition existing in the market …'.[80] Similarly, in the judgment in *Intel*, again the Grand Chamber of the Court endorsed that approach, making it clear that consumer protection is an essential element for the application of the rules relating to abuse of a dominant position. Indeed, the Court pointed out that 'competition on the merits may … 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*'[81] I deduce from this that consumer well-being is the ultimate purpose that justifies the intervention of competition law in matters involving exclusionary practices.

98. In the third place, the essential role of consumer protection is apparent from the fact that, while Article 102 TFEU does not provide for an equivalent derogation to that laid down in Article 101(3) TFEU, the Court has established that gains in efficiency can also counteract the harmfulness of abusive conduct, where benefits are passed on to the consumer. Indeed, it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 102 TFEU by demonstrating, inter alia, that 'the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency *that also benefit consumers*'.[82]

77 See, to that effect, judgments in *Continental Can* (paragraph 25), and in *GSK* (paragraph 63).

78 See, to that effect judgments in *Continental Can* (paragraph 26); in *Hoffmann-La Roche* (paragraph 125); in *British Airways* (paragraphs 106 and 107); in *France Télécom* (paragraph 105); in *Deutsche Telekom I* (paragraph 176); in *TeliaSonera* (paragraph 24); and in *Post Danmark I* (paragraph 20).

79 See, to that effect, Opinion of Advocate General Kokott in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, point 71), and judgment of 7 June 2006, *Österreichische Postsparkasse und Bank für Arbeit und Wirtschaft* v *Commission* (T-213/01 and T-214/01, EU:T:2006:151, paragraph 115). See also, to that effect, judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission* (T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 99), in which it was pointed out that, in so far as Article 101 TFEU is concerned, that aim is apparent from the terms of Article 101(3) TFEU.

80 Judgment in *Post Danmark I* (paragraph 24; my italics).

81 Judgment in *Intel* (paragraph 134; my italics).

82 Judgments in *Post Danmark I* (paragraphs 41 and 42; my italics), and in *Intel* (paragraph 140).

99. In the fourth place, this pre-eminence of 'consumer well-being' appears to be consistent with the Commission's decision-making practice, under which consumer protection is the *leitmotiv* of any intervention of Article 102 TFEU [83] and of competition law more generally. [84]

100. On the basis of that analysis of the relationship between the two objectives, I consider that it is necessary to conclude that, in the context of abusive exclusionary practices, Article 102 TFEU is aimed at maximising consumer well-being, inter alia by protecting the competitive structure of the market. That protection may, therefore, indeed be an objective pursued by Article 102 TFEU, not independently but only when, in a specific case, it contributes to the ultimate objective of the (direct or indirect) protection of consumers. Thus, the two objectives, which the referring court seems to consider mutually exclusive, in fact are not.

(b) The second part

101. By the second part of the second question, the referring court asks the Court, in essence, how the relationship between the two objectives referred to above translates in evidentiary terms.

102. According to the reasoning of the referring court, if the interest protected by Article 102 TFEU is the maximisation of consumer well-being, the court (and, a fortiori, competition authorities) will be required in some way to measure the decrease (or the risk of a decrease) in consumer well-being resulting from the conduct at issue (for example, by comparing consumer well-being before and after that conduct was implemented). However, if the interest that is protected is the preservation of the competitive structure of the market, the court would need to refrain from investigating whether the conduct of the dominant undertaking has been detrimental to consumers and confine itself simply to considering whether the conduct is capable of having an effect on the competitive structure of the market, on diversity, on quality or on innovation.

103. I cannot endorse that reasoning of the referring court, since, as has been illustrated above, the two objectives are not mutually exclusive.

104. In that regard, it is clear from the case-law of the Court that, since Article 102 TFEU is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, a competition authority, or, where appropriate, a court, will not have to examine whether the conduct in question has actually caused harm to consumers for the purposes of subparagraph (b) of the second paragraph of Article 102 TFEU, but will have to examine whether the conduct at issue has had a restrictive effect on competition. [85] Indeed, it is normally the potentially harmful nature

[83] See the Guidelines, paragraphs 5 and 6.

[84] See Commission Notices on the Guidelines on the application of Article [101(3) TFEU] (OJ 2004 C 101, p. 97), paragraph 97 and on the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6), paragraph 16. Also see the speech entitled 'European Competition Policy – Delivering Better Markets and Better Choices', given by N. Kroes on 15 September 2005 at the 'European Consumer and Competition Day'.

[85] Judgment in *British Airways* (paragraphs 106 and 107). However, for some types of abuse, the evidence relating to the immediate harm to consumers forms part of the assessment of the abusive nature of the conduct. Thus, the Court has held that 'in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product *for which there is a potential consumer demand*, that it is unjustified and such as to exclude any competition on a secondary market' (see judgment of 6 April 1995, *RTE and ITP* v *Commission, known as 'the judgment in Magill'* (C-241/91 P and C-242/91 P, EU:C:1995:98), as summarised in paragraphs 32 to 38 of judgment of 29 April 2004, *IMS Health* (C-418/01, EU:C:2004:257; my italics))

of the conduct that is taken into account in order to establish an abuse of a dominant position, without it being necessary to show any concrete effect, in particular in relation to consumers. [86]

105. While it is for the competition authority, or in this case the national court, to assess the harmful effect of an exclusionary practice and, in particular, whether that practice is such as to undermine the structure of the market and, as a result, also harm consumers, I think it may be helpful if I make the following observations.

106. In the first place, given that it is the protection of consumer well-being and not the protection of a certain market structure as such that is the ultimate aim, proof of a restrictive effect on the structure of the market will be sufficient for the purpose of classifying conduct as abuse only when the restriction in question is liable to affect consumers, either directly or indirectly. However, while the impact on the competitive structure of the market is a good indicator (proxy) of the consequences that an exclusionary practice may have for consumers, [87] that is not always the case. Indeed, the conduct of a dominant undertaking should not be considered abusive within the meaning of Article 102 TFEU when, independently of any harm caused to the structure of the market, it is not liable also to cause actual or potential harm to the consumers affected. It therefore seems to me incorrect to interpret the Court's existing case-law as merely indicating that, in order to establish an abusive exclusionary practice, it is sufficient to establish that the practice in question is capable of affecting the structure of the market. Indeed, an adverse effect on the competitive structure of the market does not necessarily or automatically translate into a potential decrease in consumer well-being. While such a presumption of harm does exist in the case of cartels, it does not in the case of abuses of a dominant position. [88] By way of example, as was indicated in point 44 of this Opinion, where the structure of the market is altered by the removal of a competitor, that does not necessarily mean that the conduct is anticompetitive, such as to be potentially harmful to consumers.

107. In the second place, it must be observed that it is objectively difficult to quantify changes affecting consumer well-being. In that regard, it should be borne in mind, first of all, that the definition of a 'consumer', in competition law, encompasses both intermediate consumers and final consumers. However, where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream. [89] Next, I note that the very concept of 'consumer well-being' contains an element of inherent subjectivity, in that that well-being may be considered not only in terms of price, but, depending on the product or service, also in terms choice, quality and innovation. [90] Lastly, Article 102 TFEU targets practices whose effects on the market do not necessarily become manifest. Indeed, an analysis of anticompetitive effects, as I shall explain in relation to the third question, may also be prospective. Therefore, to require, as the referring court suggests, a clear demonstration of a decrease in consumer well-being over time would run counter to the logic

86 See judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 124).

87 See Opinion of Advocate General Kokott in *British Airways* v *Commission* (C-95/04 P, EU:C:2006:133, point 68).

88 In this connection I note that Article 17(2) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) provides that only cartel infringements may be presumed to cause harm.

89 See the Guidelines, paragraph 19, and footnote 15.

90 See, inter alia, judgment in *Intel* (paragraph 134 and the case-law cited), and the Guidelines, paragraph 6.

and effectiveness of that provision. Indeed, the degree of evidence required of the impact on consumers will vary depending on the type of abuse and the timing of the conduct in question. [91]

108. Having regard to the foregoing considerations, I suggest that the Court's answer to the second question should be that Article 102 TFEU must be interpreted as being aimed at prohibiting not only exclusionary practices which may cause direct harm to consumers, that being the ultimate purpose of that provision, but also conduct which may harm them indirectly, as a result of its effect on the structure of the market. It is incumbent on the competition authorities to demonstrate that such an exclusionary practice impairs the effective competition structure, while at the same time verifying that it is also liable to cause actual or potential harm to consumers.

C. The third question

109. By its third question, the referring court asks, in essence, whether, for the purposes of establishing the existence of an infringement of Article 102 TFEU, evidence adduced by a dominant undertaking which establishes that the conduct at issue, despite its abstract ability to produce restrictive effects, did not cause any actual harm should be treated as relevant and, if so, whether the competition authority is required to examine the evidence produced by the undertaking in relation to the actual ability of that conduct to produce the effects in question.

110. In the first place, I recall that it is not necessary, in order to establish an infringement of Article 102 TFEU, to show that the conduct in question actually produced anticompetitive effects in the case at hand, it being sufficient to show that it was capable of producing such effects. [92] A competition authority is solely required to demonstrate the harmful potential of the conduct complained of, irrespectively of whether anticompetitive effects actually materialised. Indeed, it would be contrary to the *ratio* of that provision, 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.

111. Some examples of the Court's recent case-law may be illuminating in this regard.

112. In the judgment in *TeliaSonera*, the Court expressly stated that 'the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU'. [93] Similarly, in the judgment in *Tomra*, the Court held that, 'for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position *tends to restrict competition* or that the conduct *is capable of having that effect*'. [94] Following the same logic, in the judgment in *Post Danmark II*, the Court indicated that the assessment of whether a rebate scheme is capable of restricting competition seeks to 'determine whether the conduct of the dominant undertaking *produces an actual or*

[91] In the case of predatory pricing practices, for example, prices below cost will clearly benefit consumers (certainly in the short term), unless and until those low prices are recovered through higher pricing at a later stage. However, a predatory pricing practice may fall foul of Article 102 TFEU in the absence of proof of recuperation, because it can cause the removal or marginalisation of competitors and thus alter the structure of competition in such a way as could cause detriment to consumers (see judgment in *France Télécom* (paragraphs 110 to 112)).

[92] See, to that effect, judgments in *British Airways* (paragraphs 106 and 107), and in *Telefónica* (paragraph 124). See also points 41 and 104 of this Opinion.

[93] Judgment in *TeliaSonera* (paragraph 65). See also, to that effect, *Deutsche Telekom I* (paragraph 254), and judgment of 30 January 2020, *České dráhy* v *Commission* (C-538/18 P and C-539/18 P, not published, EU:C:2020:53, paragraph 70).

[94] Judgment in *Tomra* (paragraph 68; my italics).

likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests'.[95] In that regard, 'fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anticompetitive practice is, *by its very nature, liable to give rise to not insignificant restrictions of competition*' and, consequently, 'in order to fall within the scope of [Article 102 TFEU], the anticompetitive effect of a rebate scheme operated by a dominant undertaking *must be probable, there being no need to show that it is of a serious or appreciable nature*'.[96] Moreover, in the judgment in *Intel*, the Court made specific reference to the need to assess the '*capability* of [the rebate] to restrict competition', listing some of the factors relevant for that assessment.[97] Lastly, in the recent judgment in *Generics (UK)*, the Court pointed out that, 'if such conduct is to be characterised as abusive, that presupposes that that conduct was *capable of* restricting competition and, in particular, producing the alleged exclusionary effects'.[98]

113. Although it sometimes uses different terminology – the terms 'capability' and 'probability' having much the same meaning –[99] that case-law points to the conclusion that a competition authority is not required to demonstrate that anticompetitive effects have actually been produced in order to class conduct as abusive.

114. Accordingly, evidence put forward *ex post* by an undertaking to show the absence of anticompetitive effects, such as economic analyses or other types of analysis, cannot serve to exonerate the undertaking or to transfer the burden of proof to the competition authority such that it is obliged to demonstrate that harm did actually result from the conduct complained of,[100] even when a long period of time has elapsed since the abusive conduct took place.[101] Moreover, as a general rule, the anticompetitive nature of particular conduct must be assessed at the time that conduct took place,[102] which, furthermore, conforms to the general principle of legal certainty, since the dominant undertaking must be able to assess the lawfulness of its conduct on the basis of existing evidence.[103]

115. In the second place, that same case-law does, however, confirm the obligation to assess all the relevant circumstances of the case in order to determine whether particular conduct is actually capable of producing the alleged anticompetitive effects (whether or not those effects ultimately occur).

116. In that regard, first of all, it seems to me indisputable that, from a procedural viewpoint, evidence of an absence of anticompetitive effects put forward *ex post* must be taken into account by a competition authority, in particular when that evidence relates to conduct which ceased well before the decision finding abuse. Indeed, in the judgment in *Intel*, the Court explained that, in the case where an undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not *capable* of restricting competition, the Commission is required to examine a number of matters in order to assess whether the conduct in question was *capable* of excluding from the market competitors that were at least as

95 Judgment in *Post Danmark II* (paragraph 69; my italics).

96 Judgment in *Post Danmark II* (paragraphs 73 and 74; my italics).

97 Judgment in *Intel* (paragraphs 138 and 139; my italics).

98 Judgment in *Generics (UK)* (paragraph 154; my italics).

99 Opinion of Advocate General Wahl in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, point 115).

100 Also see Opinion of Advocate General Mazák in *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:293, point 64)

101 See, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission* (T-336/07, EU:T:2012:172, paragraph 272).

102 See, to that effect, judgment in *AstraZeneca* (paragraph 110).

103 See, to that effect, judgment in *TeliaSonera* (paragraph 44).

efficient.[104] Moreover, a capacity to foreclose is relevant also to the assessment of whether particular conduct may be objectively justified or whether its restrictive effects may be counterbalanced by advantages in terms of efficiency.[105] In that context, economic evidence demonstrating, after that conduct has come to an end, the absence of exclusionary effects must be considered admissible when the dominant undertaking is seeking to prove the absence of a capacity to restrict competition. Moreover, the anticompetitive effect of a particular practice must not be purely hypothetical[106] and supporting evidence contesting the capacity to restrict competition may corroborate such a hypothetical nature. Therefore, from a procedural viewpoint, since the burden of proving anticompetitive exclusionary effects rests on the competition authorities, I consider that those authorities are under an obligation to take careful account of the evidence produced by the dominant undertaking when they are analysing the possible existence of abuse.

117. Next, as regards the probative value of this type of evidence in relation to the existence of an abuse, it is important to note that the failure of particular conduct to produce restrictive effects may in fact be due to a variety of reasons. It cannot automatically be excluded that the absence of such effects is due to the fact that the conduct at issue was, by its very nature, incapable of restricting competition. Accordingly, a competition authority should, depending on the particular context, take this type of evidence into account as potentially corroborating the absence of any capacity to restrict competition.

118. I observe in this connection that the Court has not established in its case-law what degree of probability of an anticompetitive exclusionary effect is required, or, in other words, the nature of the foreclosure capability.[107] That will obviously depend on the legal, economic and factual context of each case, but I do consider that foreclosure capability must rest on hard facts, such as a sufficient duration and sufficient coverage of the relevant market.

119. Against that background, the importance to be attributed to evidence of an absence of restrictive effects *ex post* varies depending on whether the abstract capacity to have restrictive effects is based on a risk of foreclosure having actual or potential effects, the lack of actual effects on competition being less relevant in the latter situation. By contrast, the absence of actual effects on the market may be relevant, even if the foreclosure theory is based on a potential risk, in the case of conduct adopted in the past that has, as in the present case, been brought to an end well before any competition authority investigation. Indeed, according to the Guidelines, 'if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anticompetitive foreclosure'.[108] Conversely, in my view, the absence of actual effects could make it reasonable to assume that the practice was not even theoretically capable of harming competitors, with the

104 Judgment in *Intel* (paragraphs 138 and 139).

105 Judgment in *Intel* (paragraph 140).

106 Judgment in *Post Danmark II* (paragraph 65) and point 41 of this Opinion.

107 This issue was examined by Advocate General Wahl in his Opinion in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, points 117 and 118). In his view, the aim of the assessment of the capability of restricting competition is to ascertain whether, *in all likelihood*, the impugned conduct has an anticompetitive foreclosure effect. That means that likelihood must be *considerably more than a mere possibility* that certain behaviour may restrict competition. Conversely, the fact that an exclusionary effect appears more likely than not is simply not enough. See, however, in that regard, Opinion of Advocate General Kokott in *Post Danmark II* (C-23/14, EU:C:2015:343, point 82).

108 See the Guidelines, paragraph 20. I note, however, that that document merely sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts

result that the theory of harm proves to be purely hypothetical. Such would be the case in particular where it is shown that the absence of actual effects cannot be affected by other subsequent factors not connected to the conduct at issue.

120. Lastly, for the sake of completeness, I would point out that the absence of effects is also relevant to the assessment of the gravity of the infringement, and could substantially reduce the amount of any fines that are to be imposed on the undertaking that has abused its dominant position.

121. Having regard to all of the foregoing considerations, I suggest that the Court's answer to the third question should be that Article 102 TFEU must be interpreted as meaning that, in order to establish the existence of an abuse of a dominant position, a competition authority is required to demonstrate, in the light of all the relevant circumstances and taking into account, inter alia, the evidence adduced by the dominant undertaking, that the conduct of that undertaking was capable of restricting competition. Where appropriate, it must analyse, to that end, any evidence that the conduct in question did not produce anticompetitive effects in the relevant market.

D. The fourth question

122. By its fourth question, the referring court asks, in essence, whether an intention on the part of the dominant undertaking to restrict competition is relevant to the assessment of whether conduct is abusive.

1. Admissibility

123. Green Network expresses doubts as to the admissibility of this question. Without formally requesting a declaration of inadmissibility, it observes that, since the AGCM did in fact examine whether the abusive conduct was intentional, an answer to this question is not necessary. Moreover, the answer is indisputably clear from the Court's case-law.

124. Those objections must, to my mind, be dismissed, for the same reasons as those I set out in points 85 and 86 of this Opinion. The referring court in fact explains the need for this question by stating, in essence, that the case-law is unclear and ambiguous.[109] In addition, it is clear from the order for reference that the question relates directly to the subject matter of the dispute in the main proceedings and is not merely hypothetical, given that, in this case, the AGCM collected documentary evidence in the investigation of the Enel Group' strategic intention to counteract the departure of customers by encouraging them to switch to the free market with EE.

2. Substance

125. The fourth question is composed of two parts:

– the first part seeks to establish whether Article 102 TFEU must be interpreted as meaning that conduct must be classed as abusive solely on the basis of its (potential) restrictive effects, or whether the intention to restrict competition constitutes a parameter that may be useful (even exclusively) in that assessment; and

[109] The referring court refers in this connection to the judgments of 30 September 2003, *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 241), and of 30 January 2007, *France Télécom* v *Commission* (T-340/03, EU:T:2007:22, paragraph 195).

– the second part seeks to understand whether proof of that intent must be regarded as sufficient in order to ascribe the alleged anticompetitive effects to the conduct in question, or whether it merely shifts the burden of proof to the dominant undertaking, which will have the burden, at that stage, of demonstrating that the exclusionary effect did not occur.

(a) The first part

126. By the first part, the referring court asks, in essence, whether proof of the dominant undertaking's intention to drive out competitors is necessary or sufficient evidence for the purposes of the analysis of the existence of an abuse.

127. I would reiterate in this connection that the Court has repeatedly stated that the abuse of a dominant position prohibited by Article 102 TFEU is an objective concept, [110] irrespective of any fault, [111] and that there is no requirement to establish the existence of an anticompetitive intent on the part of the dominant undertaking in order to render Article 102 TFEU applicable. [112] It follows that, save in exceptional cases, [113] the subjective motive of the dominant undertaking is not among the factors which constitute an abuse and, consequently, a competition authority is not required to prove the motive in order to establish the existence of an abuse.

128. Nevertheless, the Court has held that evidence of such an intent, while it cannot be sufficient in itself, constitutes a fact that may be taken into account in order to determine that a dominant position has been abused. Indeed, the Court has held that, as part of its examination of the conduct of a dominant undertaking, and for the purpose of identifying a possible abuse of a dominant position, the Commission is obliged to consider all the relevant facts surrounding that conduct, and that that exercise also includes an assessment of the business strategy pursued. For that purpose, it is clearly legitimate to refer to subjective factors, namely the motives underlying the business strategy in question. Accordingly, according to the Court, the existence of an anticompetitive intent is merely one of a number of facts which may be taken into account in order to determine that a dominant position has been abused. [114]

129. An anticompetitive intent, if clear and proven, can indeed be relevant for the purpose of establishing an abuse of a dominant position. Indeed, the Commission states that 'direct evidence of any exclusionary strategy' is one of the factors considered to be generally relevant not only to the assessment of whether the alleged abusive conduct is likely to lead to anticompetitive foreclosure, but also 'in interpreting the dominant undertaking's conduct'. Such evidence may consist in 'internal documents which contain direct evidence of a strategy to exclude

110 See point 34 of this Opinion.

111 See judgments in *Continental Can* (paragraph 29), and of 9 September 2009, *Clearstream* v *Commission* (T-301/04, EU:T:2009:317, paragraph 141).

112 Judgment in *Tomra* (paragraph 21).

113 An intention on the part of the dominant undertaking to exclude a competitor may constitute evidence necessary for a finding of infringement. That is the case (i) in certain instances of predatory pricing where sale prices are below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, in respect of which the Court has acknowledged that such prices must be regarded as abusive 'if they are determined as part of a plan for eliminating a competitor' (see judgments in *AKZO* (paragraph 72); in *Tetra Pak* v *Commission* (paragraph 41); and in *France Télécom* (paragraph 109)), and (ii) in cases of vexatious litigation, the Commission having lain down two cumulative criteria for determining whether proceedings are vexatious, the second of which is that the action is 'conceived in the framework of a plan whose goal is to eliminate competition' (see judgment of 17 July 1998, *ITT Promedia* v *Commission* (T-111/96, EU:T:1998:183, paragraph 55)). However, even in these exceptional cases, the subjective element is not in itself sufficient to establish the unlawfulness of the conduct.

114 Judgments in *Tomra* (paragraphs 18 and 19), and in *Generics (UK)* (paragraphs 162 and 164).

competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action'. [115]

130. In reality, abusive exclusionary practices are seldom established by demonstrating a specific subjective intention on the part of the dominant undertaking to restrict competition, but on the basis of the economic rationale underlying the conduct in question as it appears objectively from the characteristics of the conduct and its context. An anticompetitive rationale underlying particular conduct may be deduced, for example, from 'the absence of any other economic and objective justification'. [116] However, where no such rationale is evident, recourse to subjective evidence may be particularly helpful. Indeed, evidence of that type has been used in the case of both price-related practices [117] and practices unrelated to pricing. [118]

131. Since this is therefore one of the numerous facts which may be taken into account in order to determine that a dominant position has been abused, it is for the competition authority alone to assess the probative value of direct evidence of an exclusionary strategy. In that regard, the following matters appear relevant to me.

132. First, in order for such evidence to be relevant, even if only as an indication, with regard to the existence of an abusive exclusionary practice, the intention to exclude must also translate into capability to exclude. [119] The analysis of intention cannot, therefore, supplant the analysis of the effects. The Court has expressly stated in this connection that, where the dominant undertaking disputes that its conduct was capable of restricting competition, the Commission is also required, among other things, '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'. [120]

133. Second, such evidence may provide useful indications regarding the nature of the conduct in question and, consequently, its propensity to restrict competition. For example, those indications could consist of evidence that the dominant undertaking clearly expected, on the basis of its analysis or its knowledge of the market, that its conduct would have an anticompetitive effect, indications such as those being relevant given the dominant undertaking's expert knowledge of the structure of the market on which it operates. Accordingly, if such an undertaking adopts a strategy with a view to excluding its competitors from the market or marginalising them, where there is evidence in support of that fact, it may logically be deduced that such conduct is capable of producing such effects.

134. Third, the probative value of evidence of intent will depend on the factual context. Statements about excluding competitors made by senior members of management – whose job it is to exert a decisive influence on the undertaking's practices – or made in the context of formal

115 See the Guidelines, paragraph 20.

116 Judgment in *TeliaSonera* (paragraph 88). See, in that regard, point 62 of this Opinion.

117 Such as predatory pricing practices (judgment in *AKZO* (point 72)), loyalty contracts (see judgment of 16 March 2000, *Compagnie maritime belge transports and Others* v *Commission* (C-395/96 P and C-396/96 P, EU:C:2000:132)) and exclusivity agreements (see judgment in *Tomra* (paragraphs 19 and 21)).

118 Inter alia, where the dominant undertaking engages in vexatious litigation (see judgment of 17 July 1998, *ITT Promedia* v *Commission* (T-111/96, EU:T:1998:183, paragraph 55)), or deceives the public authorities so as to exclude manufacturers of generic medicines (see judgment of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraph 359)); see also the 'pay-for-delay' cases (see judgment in *Generics (UK)* (paragraph 161)).

119 See, to that effect, Opinion of Advocate General Wahl in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, point 128).

120 Judgment in *Intel* (paragraph 139 and the case-law cited; my italics).

presentations will be more relevant than spontaneous statements. [121] In that regard, I note the fact that the very purpose of competition is to encourage undertakings to surpass one another. Accordingly, statements targeting or denigrating competitors are commonplace in an environment of competition on the merits, and should be considered relevant only when they are part of a foreclosure strategy. Lastly, it seems clear to me that there should be a temporal relationship between such evidence and the conduct in question.

135. Fourth, the existence of evidence that the dominant undertaking did not intend to drive out its competitors can also be relevant to the calculation of the fine, and constitute extenuating circumstances, particularly in so far as concerns the question as to whether the infringement was committed intentionally or negligently. [122]

(b) The second part

136. As regards the second part, the referring court asks, in essence, whether proof of an intention to foreclose reverses the burden of proving the anticompetitive exclusionary effect of the conduct, transferring it to the dominant undertaking.

137. In that connection, it would seem logical to me if no such consequence were to flow from a finding of a subjective intention to restrict competition, since proof of that matter, which is only one factor, is not in itself sufficient to establish that the conduct is contrary to Article 102 TFEU. [123] Thus, such a finding does not give rise to a rebuttable presumption of anticompetitive conduct, because that approach does not seem compatible with the objective nature of the concept of abuse, within the meaning of Article 102 TFEU. Indeed, a legal presumption of such a kind could lead to findings of abuse merely on the basis of the dominant undertaking's intention, which would be contrary to the settled case-law of the Court cited above.

138. Nevertheless, it seems logical to me to suppose that, since the competition authorities can use this type of evidence to corroborate the existence of an abuse, the undertakings concerned should in turn be able to use internal documents to prove the absence of any exclusionary intention. [124] However, such proof, being negative in nature, is obviously difficult to furnish and, even if accepted, cannot in itself prove the absence of abuse. [125]

139. Having regard to the foregoing considerations, I suggest that the answer to the fourth question should be that, in order to class an exclusionary practice of a dominant undertaking as abusive, it is not necessary to establish the undertaking's subjective intention to exclude its competitors. Such an intention may, however, be taken into account, as one factor, in particular in establishing that the conduct is capable of restricting competition. Establishing an exclusionary intention by presumption does not entail any reversal of the burden of proof regarding the question of whether the conduct is abusive.

121 See, to that effect, judgment of 30 January 2007, *France Télécom* v *Commission* (T-340/03, EU:T:2007:22, paragraph 202).

122 Judgment in *Tomra* (paragraph 12). See also the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, points 27 and 29).

123 See, to that effect, Opinion of Advocate General Wahl in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, point 128).

124 See, to that effect, Opinion of Advocate General Mazák in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:55, point 10).

125 See, to that effect, judgment in *Tomra* (paragraph 22).

E. The fifth question

140. By its fifth question, the referring court asks, in essence, whether the fact of belonging to a corporate group that has directly participated in the abusive conduct is sufficient for liability to be imputed to a parent company which holds all of the capital of the companies in the group, without it being necessary to prove the parent company's involvement in the abusive practice or, at least, active coordination between the various companies operating within the group. [126]

1. Admissibility

141. The AGCM and AIGET express doubts regarding the admissibility of this question, which concerns the conditions under which a parent company may be presumed liable, [127] considering that it is not relevant to the resolution of the dispute, since the AGCM did not base Enel's liability on any presumption arising from the fact that it fully controls SEN and EE, but on its direct involvement in the practices regarded as abusive. Indeed, the AGCM's investigation revealed the existence of a true group strategy – one that may therefore also be imputed to Enel – to bring across as many customers as possible from the company operating on the protected market (SEN) to the company with responsibility for the free market (EE).

142. Enel, however, states that, in the contested decision, the AGCM held it to be jointly liable for the infringement both on the ground that it was actively involved in the abusive strategy and on the basis of the presumption of decisive influence. On that point, it alleges that, as a result of a reorganisation of the Enel Group, it has sufficiently demonstrated that it no longer has control in decision-making over its subsidiaries and that it has thus rebutted the presumption of decisive influence.

143. Since the conditions under which that presumption may be applied are, according to the referring court, disputed before it and since, in any event, it is for the national courts alone to assess, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give judgment and the relevance of the questions which they put to the Court, I am of the view that the Court should give a ruling on this question. [128]

144. Moreover, it does appear to me that the conditions for the application of the presumption of decisive influence could be relevant to the resolution of the dispute in the main proceedings. Indeed, Enel argues before the referring court that the AGCM found that it was actively involved in the conduct complained of without having taken into account the documents which it had produced to show that it had relinquished its decision-making powers after the restructuring of the group. If the referring court finds that evidence to be persuasive it will still have to rule on the

[126] The question as framed concerns any company belonging to a corporate group irrespectively of any relationship, in terms of control, with the companies that participated in the abusive conduct. In the dispute in the main proceedings, this question has arisen solely in connection with the liability of the parent company of the group and I therefore propose to reformulate it so that it addresses the rules governing the imputing of liability to a parent company which, as in the present case, holds the entirety of the share capital of the subsidiaries which committed the infringement.

[127] According to this presumption, a parent company which holds 100% of the capital of subsidiaries that have infringed the competition rules exerts a decisive influence on the conduct of those subsidiaries and may be held liable for that infringement in the same way as its subsidiaries ('the presumption of decisive influence', see point 149 of this Opinion).

[128] See judgment of 4 March 2020, *Schenker* (C-655/18, EU:C:2020:157, paragraph 22).

application of this presumption. It is accordingly appropriate to establish whether the presumption can still apply on the sole basis of being part of the group. The question is therefore not hypothetical. [129]

2. Substance

145. In addressing the substance of the fifth question it is necessary to refer to certain well-established concepts of competition law, such as the concept of an 'undertaking' and the concept of the 'presumption of a decisive influence', which underpin the logic of the imputability of liability for an infringement of the competition rules. [130]

146. First of all, I note that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of competition law. [131] This autonomous concept of EU law designates any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed. Thus, the concept of 'undertaking' must be construed as designating an economic unit, for the purpose of the subject matter of the anticompetitive practice in question, even if in law that economic unit consists of several natural or legal persons. [132]

147. It follows from that choice, first, that, where such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement and, second, that a legal person may, under certain conditions, be held personally jointly and severally liable for the anticompetitive conduct of another legal person belonging to the same economic entity. [133]

148. It follows that liability for the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary does not determine independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. [134] In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking, a decision imposing fines may be addressed to the parent company, without it being necessary to establish the personal involvement of the latter in the infringement. [135]

149. According to the Court's settled case-law, in the particular situation where, as in the present case, a parent company (directly or indirectly) has a 100% shareholding in a subsidiary which has infringed the Union's rules on competition, that parent company is able to exercise decisive

129 See, in this regard, paragraphs 260 and 261 of the contested decision the public version of which is available (in Italian) on the AGCM's website.

130 The rules on imputing liability were recalled, inter alia, in the judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536), and of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314).

131 Judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 46 and the case-law cited).

132 Judgment in *Deutsche Telekom II* (paragraph 72 and the case-law cited).

133 Judgment in *Deutsche Telekom II* (paragraph 73 and the case-law cited).

134 Judgment in *Deutsche Telekom II* (paragraph 74 and the case-law cited).

135 Judgment of 15 April 2021, *Italmobiliare and Others* v *Commission* (C-694/19 P, not published, EU:C:2021:286, 'the judgment in *Italmobiliare*', paragraph 54 and the case-law cited). See also, judgments of 14 July 1972, *Imperial Chemical Industries* v *Commission* (48/69, EU:C:1972:70, paragraph 140), and in *Deutsche Telekom II* (paragraph 94).

influence over the conduct of its subsidiary, and there is a rebuttable presumption (or 'simple presumption') that the parent company does in fact exercise such influence, unless the parent company proves otherwise. [136]

150. Such a presumption implies, unless it is rebutted, that the actual exercise of decisive influence by the parent company over its subsidiary is considered to be established, such that the former may be held liable for the conduct of the latter, without it being necessary for any further evidence to be produced. [137] The parent company to which the unlawful conduct of its subsidiary is attributed is held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary and by which it was able to determine the subsidiary's conduct on the market. [138]

151. It follows that, in such circumstances, it is sufficient for the competition authority to prove that the entire capital of a subsidiary is held by its parent company in order for it to be presumed that the parent exercises decisive influence over the commercial policy of that subsidiary. The competition authority will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market. [139] Thus, the implementation of the presumption of decisive influence is not conditional upon the production of additional indicia relating to the actual exercise of influence by the parent company. [140]

152. Having regard to the foregoing, the fact of belonging to a corporate group that has directly participated in the abusive conduct is sufficient in order for liability to be imputed to a parent company which holds all of the capital of the companies in the group, without any further evidence being necessary, unless the parent company adduces sufficient evidence to show that those companies acted independently on the market.

153. In the present case, it is common ground that Enel holds 100% of the capital of its subsidiaries SEN and EE. Accordingly, Enel does not dispute the applicability of the presumption of decisive influence, only some aspect of it.

154. In the first place, Enel argues that the mere presence of a relationship of control is not in itself sufficient reason to penalise a parent company for the conduct of a subsidiary, even where the control is total. It alleges that, even in such a case, it is necessary to ensure that the parent company has the power actually to exert a decisive influence over the subsidiary.

155. That argument cannot, in my view, be accepted. Indeed, it is clear from the case-law cited above that the presumption of decisive influence precisely implies that actual exercise of a decisive influence is deemed established, without any proof being required. Any contrary interpretation would run counter to the effectiveness of that presumption, which is based on the premiss that the holding of total control over a subsidiary necessarily implies the (economic)

136 See judgment in *Italmobiliare* (paragraphs 47 and 55 and the case-law cited).

137 See judgment in *Italmobiliare* (paragraph 55). See also, to that effect, judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraph 30).

138 Judgment in *Italmobiliare* (paragraph 56 and the case-law cited).

139 Judgment in *Italmobiliare* (paragraph 48 and the case-law cited).

140 Judgment of 27 January 2021, *The Goldman Sachs Group* v *Commission* (C-595/18 P, EU:C:2021:73, 'the judgment in *Goldman Sachs*', paragraph 33 and the case-law cited).

ability to exert such an influence.[141] Indeed, the Court has held that it is not the mere holding of the capital of the subsidiary in itself that gives rise to that presumption, but the degree of control that this holding implies.[142]

156. In the second place, Enel argues that, as this is a rebuttable presumption, if the parent company adduces evidence to show that the subsidiary acted independently on the market, it then falls to the competition authority to provide sufficient reasons for its different view. In the present case, Enel denies that it exerted a decisive influence because, following the group restructuring of 2014, it ceased to perform a decision-making or organisational role and confined itself to promoting synergies and best practices among the various operating subsidiaries. It produced documents in this connection which it says were not taken into consideration or were unreasonably rejected by the AGCM.

157. These arguments call for three series of remarks.

158. First, regarding the burden of proof, given that the presumption of decisive influence is rebuttable, it is common ground that it is for the parent company to adduce evidence to demonstrate its absence.[143] Nevertheless, the mere fact of adducing such evidence is not enough to reverse the burden of proof *ipso facto*. Indeed, the competition authority alone is able to establish whether a parent company has succeeded in rebutting the presumption of decisive influence by demonstrating the autonomy of its subsidiary. If that is the case, parent company liability cannot be imputed to it simply because it holds all the share capital of the subsidiary,[144] and that authority, if it decides to pursue the parent company, will have to base liability on other hard evidence of decisive influence. Indeed, as in this case, the competition authorities often choose to support the presumption with other factual evidence.[145]

159. Second, as regards the competition authority's duty to state reasons, it is clear from the Court's case-law that a decision to apply competition law must be sufficiently reasoned with respect to each of its addressees, particularly with respect to those among them that must bear for the consequences of that infringement. Thus, with regard to a parent company held liable for the offending behaviour of its subsidiary, such a decision must contain a detailed statement of reasons for imputing the infringement to that company.[146] If such a decision relies exclusively on the presumption of decisive influence, a competition authority will be required – if it is not to render that presumption de facto irrebuttable – to explain adequately the reasons why the points of fact and of law put forward did not suffice to rebut that presumption.[147]

160. This duty on a competition authority to state the reasons for its decisions on this point arises, in particular, from the rebuttable nature of the presumption of decisive influence. Indeed, I would point out that the Court has held that this presumption seeks to find a balance between the importance, on the one hand, of the objective of penalising conduct contrary to competition rules and of preventing its repetition and, on the other, the requirements of certain general

141 See, to that effect, judgment of 13 September 2013, *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423, paragraphs 501 and 502)

142 Judgment in *Goldman Sachs* (paragraph 35).

143 See judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraphs 32 to 34).

144 Judgment of 28 October 2020, *Pirelli & C.* v *Commission* (C-611/18 P, not published, EU:C:2020:868, paragraph 74).

145 See, to that effect, judgment in *Goldman Sachs* (paragraph 40 and the case-law cited).

146 See, by analogy, judgment of 2 October 2003, *Aristrain* v *Commission* (C-196/99 P, EU:C:2003:529, paragraphs 93 to 101).

147 See, to that effect, judgments of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 153); of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics* v *Commission* (C-588/15 P and C-622/15 P, EU:C:2017:679, paragraph 87); and of 28 October 2020, *Pirelli & C.* v *Commission* (C-611/18 P, not published, EU:C:2020:868, paragraph 45).

principles of EU law, such as, in particular, the principles of the presumption of innocence, that penalties should be applied only to the offender, of legal certainty and of the rights of the defence, including the principle of equality of arms. It is particularly for that reason that it is rebuttable.[148] Moreover, the Court has held that the fact that it is difficult to adduce the evidence necessary to rebut the presumption of decisive influence does not in itself mean that that presumption is in fact irrebuttable and therefore contrary to the principle of the presumption of innocence.[149]

161. That said, it should be borne in mind that the Court has held that the Commission is not required in such a context to adopt a position on factors which are manifestly irrelevant, unimportant or clearly ancillary.[150] In addition, this duty to state reasons does not necessarily entail an obligation to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the grounds on which the decision is based and provides the court with sufficient material for it to exercise its powers of review in the context of a legal action.[151] Those principles may apply by analogy to national competition authorities.

162. Third, without wishing to encroach upon the assessment which will ultimately be made in the main proceedings by the referring court, I would observe that the Court has already had occasion to clarify, first of all, that the fact that (wholly) controlled companies enjoyed a certain autonomy as regards their industrial activities, that the parent company was merely a technical and financial coordinator or that it provided those undertakings with financial and investment assistance is not in itself sufficient to rebut the presumption of decisive influence.[152] Next, the Court has also held that the fact that an entity is a 'financial holding company' and without the status of an 'undertaking' cannot alter the application to it of that presumption.[153] Lastly, the Court has rejected the argument that the application of the presumption to a 'holding company' would infringe Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Articles 17 and 21 of the Charter of Fundamental Rights of the European Union, as well as Article 345 TFEU, in that it would give rise to an arbitrary and unjustified difference in treatment between different property regimes.[154]

163. Having regard to the foregoing considerations, I suggest that the answer to the fifth question should be that the fact that a parent company belongs to a corporate group consisting in particular of wholly owned subsidiaries which have engaged in abusive conduct, within the meaning of Article 102 TFEU, is sufficient basis to presume that that parent company has exerted a decisive influence on the subsidiaries' policies, such that a competition authority may impute to it liability for that conduct, without having to produce evidence of the latter's involvement in the abusive practice. The presumption may be rebutted by the parent company, by adducing sufficient evidence to show that the subsidiaries acted independently on the market. In such a case, the

148 See judgments of 8 May 2013, *Eni* v *Commission* (C-508/11 P, EU:C:2013:289, paragraphs 57 to 59), and in *Italmobiliare* (paragraph 57).

149 Judgment in *Italmobiliare* (paragraph 58 and the case-law cited).

150 See judgments of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 154 and the case-law cited), and of 28 October 2020, *Pirelli & C.* v *Commission* (C-611/18 P, not published, EU:C:2020:868, paragraph 46).

151 See, by analogy, judgment of 26 November 2013, *Groupe Gascogne* v *Commission* (C-58/12 P, EU:C:2013:770, paragraphs 37 to 39).

152 Judgment of 8 May 2013, *Eni* v *Commission* (C-508/11 P, EU:C:2013:289, paragraph 64).

153 Judgment in *Italmobiliare* (paragraph 41).

154 Judgment in *Italmobiliare* (paragraphs 62 and 63).

authority will be under a duty to explain adequately any reasons why the evidence put forward did not suffice to rebut that presumption, unless it considers it manifestly irrelevant, unimportant or clearly ancillary.

IV. Conclusion

164. In light of the foregoing, I suggest that the Court's answer to the questions referred by the Consiglio di Stato (Council of State, Italy) for a preliminary ruling should be as follows:

(1) Article 102 TFEU is to be interpreted as meaning that a practice adopted by an undertaking in a dominant position, irrespective of its lawfulness under branches of law other than competition law, may not be characterised as abusive within the meaning of that provision solely on the basis of its exclusionary effect in the relevant market, since such conduct should not be equated with a restrictive effect on competition unless it is shown that the undertaking has employed methods or means different from those which come within the scope of competition on the merits. In principle, an exclusionary practice which can be replicated by competitors in an economically viable way does not represent conduct that may lead to anticompetitive foreclosure and thus comes within the scope of competition on the merits.

(2) Article 102 TFEU must be interpreted as being aimed at prohibiting not only exclusionary practices which may cause direct harm to consumers, that being the ultimate purpose of that provision, but also conduct which may harm them indirectly, as a result of its effect on the structure of the market and, therefore on the maintenance of effective competition. It is incumbent on the competition authorities to demonstrate that such an exclusionary practice impairs the effective competition structure, while at the same time verifying that it is also liable to cause actual or potential harm to consumers.

(3) Article 102 TFEU must be interpreted as meaning that, in order to establish the existence of an abuse of a dominant position, a competition authority is required to demonstrate, in the light of all the relevant circumstances and taking into account, inter alia, the evidence adduced by the dominant undertaking, that the conduct of that undertaking was capable of restricting competition. Where appropriate, it must analyse, to that end, any evidence that the conduct in question did not produce anticompetitive effects in the relevant market.

(4) Article 102 TFEU must be interpreted as meaning that, in order to class an exclusionary practice of a dominant undertaking as abusive, it is not necessary to establish the undertaking's subjective intention to exclude its competitors. Such an intention may, however, be taken into account, as one factor, in particular in establishing that the conduct is capable of restricting competition. Establishing an exclusionary intention by presumption does not entail any reversal of the burden of proof regarding the question of whether the conduct is abusive.

(5) The fact that a parent company belongs to a corporate group consisting in particular of wholly owned subsidiaries which have engaged in abusive conduct, within the meaning of Article 102 TFEU, is sufficient basis to presume that that parent company has exerted a decisive influence on the subsidiaries' policies, such that a competition authority may impute to it liability for that conduct, without having to produce evidence of the latter's involvement in the abusive practice. The presumption may be rebutted by the parent company, by adducing sufficient evidence to show that the subsidiaries acted independently on the market. In such a case, the

authority will be under a duty to explain adequately any reasons why the evidence put forward did not suffice to rebut that presumption, unless it considers the evidence manifestly irrelevant, unimportant or clearly ancillary.