Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 May 2022*

(Reference for a preliminary ruling – Competition – Dominant position – Abuse – Article 102 TFEU – Effect of a practice on the well-being of consumers and on the structure of the market – Abusive exclusionary practice – Whether the practice is capable of producing an exclusionary effect – Recourse to means other than those coming within the scope of competition on the merits – Hypothetical as-efficient competitor unable to replicate the practice – Existence of an anticompetitive intent – Opening-up of the market for the sale of electricity to competition – Transfer of commercially sensitive information within a group of undertakings in order to preserve a dominant market position inherited from a statutory monopoly – Whether a subsidiary's conduct can be imputed to the parent company)

In Case C-377/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 21 May 2020, received at the Court on 29 July 2020, in the proceedings

Servizio Elettrico Nazionale,

ENEL SpA,

Enel Energia SpA

v

Autorità Garante della Concorrenza e del Mercato and Others,

interested parties:

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,

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Fifth Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, C. Lycourgos, President of the Fourth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: A. Rantos,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2021,

after considering the observations submitted on behalf of:

– Servizio Elettrico Nazionale SpA, by M. D'Ostuni, A. Police and M. Russo, avvocati,

– ENEL SpA, by M. Clarich and V. Meli, avvocati,

– Enel Energia SpA, by F. Anglani, C. Tesauro, S. Fienga and M. Contu, avvocati,

– Autorità Garante della Concorrenza e del Mercato, by G. Aiello, avvocato dello Stato,

– Green Network SpA, by V. Cerulli Irelli, C. Mirabile and A. Fratini, avvocati,

– Associazione Italiana di Grossisti di Energia e Trader – AIGET, by G. d'Andria, avvocato,

– the German Government, by J. Möller and D. Klebs, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Galluzzo and S. Fiorentino, avvocati dello Stato,

– the Kingdom of Norway, by L. Furuholmen, K. Hallsjø Aarvik, K.S. Borge, E.W. Sandaa and P. Wennerås, acting as Agents,

– the European Commission, by G. Conte, P. Rossi and C. Sjödin, acting as Agents,

– the EFTA Surveillance Authority, by C. Simpson and M. Sánchez Rydelski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 102 TFEU.

2 The request has been made in proceedings between, on the one hand, Servizio Elettrico Nazionale SpA ('SEN'), its parent company, ENEL SpA, and a sister company, Enel Energia SpA ('EE'), and, on the other hand, the Autorità Garante della Concorrenza e del Mercato (Competition and

Markets Authority; 'the AGCM') and other parties, relating to that authority's decision to impose, pursuant to Article 102 TFEU, a fine on those companies for abuse of a dominant position ('the decision at issue').

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

3 The present case has arisen in the context of the gradual liberalisation of the market for the sale of electricity in Italy.

4 Since 1 July 2007, all users of the Italian electricity network, including households and small and medium-sized enterprises, have been able to choose their supplier. However, a distinction was drawn initially on the opening-up of the market between, on the one hand, customers that were eligible to choose a supplier on the free market other than their territorially competent distributor and, on the other, customers in the protected market, made up of 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, continued to be covered by a regulated regime referred to as the *servizio di maggior tutela* (enhanced protection service), establishing a protected market under the supervision of a national sectoral regulatory authority with respect to the definition of conditions of sale.

5 In a subsequent phase, the customers in the protected market were allowed access to the free market. The Italian legislature regulated the transition from the protected market to the free market by setting a date from which the special protections in respect of prices would no longer be applicable.

6 When the AGCM adopted the decision at issue on 20 December 2018, the date on which the special protections in respect of prices would be abolished was set at 1 July 2020. After a number of postponements, that date was ultimately set at 1 January 2021 for small and medium-sized enterprises and at 1 January 2022 for households.

7 For the purposes of liberalisation of the market, ENEL, an undertaking that, up to that point, had been vertically integrated and had held the monopoly in electricity generation in Italy and was also active in the distribution of electricity, underwent an unbundling of its distribution and sales activities and its trade marks. Following that procedure, the activities relating to the various stages of the distribution process were attributed to separate companies. Accordingly, E-Distribuzione was entrusted with distribution services, EE with the supply of electricity on the free market, and SEN with the management of the enhanced protection service.

8 The present disputes arose from a complaint lodged with the AGCM by the Associazione Italiana di Grossisti di Energia e Trader – AIGET (the Italian association of energy wholesalers and traders) and from information received from individual customers complaining of the unlawful use of commercially sensitive information by operators having access to those data 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 ascertain whether the conduct of those companies constituted an infringement of Article 102 TFEU.

9 That investigation concluded with the adoption of the decision at issue in which the AGCM found that, between January 2012 and 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. Consequently, the AGCM imposed a fine of EUR 93 084 790.50 jointly and severally on those companies.

10 The conduct complained of consisted in the implementation, from January 2012 to May 2017, of an exclusionary strategy for the purpose of transferring the client base of SEN, the incumbent manager of the protected market, which in 2017 still represented between 80% and 85% of households and between 70% and 85% of the other customers, to EE, which operates on the free market. The objective of the ENEL Group was thus to prevent the large-scale departure of SEN's customers to third-party suppliers, in anticipation of the complete abolition of the protected market, the date of which had, however, been set originally only in 2017.

11 To that end, according to the decision at issue, SEN had, from 2012, obtained the consent of its customers in the protected market to receive commercial offers in connection with the free market using discriminatory methods, consisting in requesting that consent 'separately' for the companies of the ENEL Group and for third parties. In this way, the customers approached tended to give their consent for the companies of the ENEL Group – having been led to believe that to do so was necessary for their supply in electricity to continue – and refused their consent for other operators. By so doing, SEN limited the number of consents given by the clients in the protected market to receive commercial offers made by competing operators. Of all the customers in the protected market which consented to receive commercial offers from the ENEL group, representing, between 2012 and 2015, 500 000 customers per year on average, that is, more than twice the size of the client base of the first three main competitors, 70% consented to receive offers from the ENEL group alone, in contrast to 30% which also consented to receive offers from competitors.

12 Information relating to the customers in the protected market which had consented to receive commercial offers from the ENEL group were subsequently included in lists ('the SEN lists') which were transferred to EE by way of rental contracts for consideration. Given that they contained information that could not be found elsewhere, that is, as to whether users were covered by the enhanced protection service, the AGCM found that those SEN lists had a strategic and non-replicable value, as they made it possible to engage in targeted commercial practices.

13 The SEN lists were used by EE, which launched commercial offers targeted exclusively at that type of consumer, such as the commercial offer '*Sempre Con Te*' ('Always with you'), made during the period from 20 March to 1 June 2017, thereby implementing the exclusionary strategy. According to the AGCM, the use of the SEN lists enabled EE to take from its competitors a significant proportion – that is, over 40% – of the 'contestable demand' of customers moving from the protected market to the free market.

14 According to the decision at issue, only one single competitor of EE contacted SEN in order to purchase the SEN lists containing the details of the customers which had consented to receive offers from other undertakings. That company, which stated that it was aware of the offer for sale of those lists only by consulting SEN's website, ultimately declined to purchase them. Other companies, operating for many years on the relevant market, stated that they had never been informed of that commercial opportunity.

15 ENEL, SEN and EE brought separate actions challenging the decision at issue before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the court of first instance.

16 By judgments of 17 October 2019, that court, while finding that there had been an abuse of a dominant position, upheld in part the actions brought by EE and SEN regarding 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.

17 Those three companies brought separate appeals against those judgments before the referring court, asking that court to annul that fine or, in the alternative, to reduce the amount thereof.

18 In support of their appeal, ENEL, SEN and EE argue, in the first place, that there is no evidence that their conduct was abusive or, more specifically, that that conduct was capable, even if only potentially, of having anti-competitive exclusionary effects.

19 They submit, first of all, that the mere inclusion of a customer's name on a telemarketing list for the purpose of promoting the services of subsidiaries 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.

20 Next, they claim that use of the SEN lists was unlikely to bring about a rapid and large-scale transfer of customers from SEN to EE. Indeed, between March and May 2017, the only two months between the launch of the '*Sempre Con Te*' offer and the closure of telephone sales (*teleselling outbound*), EE obtained, by using the SEN lists, a mere 478 customers, representing 0.002% of the users of the enhanced protection service and 0.001% of all electricity users.

21 In addition, ENEL, SEN and EE submit that the AGCM failed to examine the economic evidence provided by them, which showed that the conduct in question could not and did not produce restrictive effects on competition. In that regard, they submit that the positive results achieved by EE in gaining 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 and, second, the attractiveness of the ENEL brand.

22 Lastly, the appellants claim that 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 comprehensive and less costly.

23 In the second place, ENEL challenges the AGCM's application of a prima facie presumption of parent company liability. In that connection, it submits that, as from 2014, the ENEL Group was restructured and its decision-making procedures were decentralised. Within that new organisational structure, ENEL, the parent company of the group, merely held the role of promoting synergies and best practices among the various operating companies, having left behind its decision-making role.

24 According to the referring court, which has joined the three appeals in the main proceedings, there is no doubt that the ENEL Group holds a dominant position on the relevant market. However, the concept of 'abuse', in particular in so far as concerns 'atypical' abuse, such as that

aimed at preventing growth in, or diversification of, competitors' offers, raises issues of interpretation in that, on the one hand, Article 102 TFEU does not set out exhaustive application criteria and, on the other hand, the traditional distinction between exploitative abuse and exclusionary abuse is not relevant. More specifically, the referring court is uncertain whether it is appropriate to take into consideration the strategy of the undertaking in a dominant position when, as here, that undertaking sought to prevent the departure of customers to competitors and the fact that the conduct of that company is in itself lawful because, in the present case, the SEN lists were, according to the referring court, obtained lawfully.

25 The referring court is also uncertain whether it is sufficient that the conduct in question is capable of excluding competitors from the relevant market where that group produced, during the course of the investigation, economic studies to demonstrate that its conduct had not actually had any exclusionary effect.

26 Lastly, the abuse of a dominant position by a group of companies raises the question whether it is necessary to prove active coordination among the various companies operating within a group or whether the fact of belonging to that group is sufficient to establish that a contribution has been made to the abusive practice, even by a company in the group that has not engaged in the abusive conduct.

27 In those circumstances, the Consiglio di Stato (Council of State, Italy) decided to stay the proceedings and to refer the following 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 competition 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 companies belonging to the same corporate group, is membership of that group sufficient reason to assume that even those companies 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 companies 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 indirectly, of a specific situation of coordination and instrumentality among the various companies within the dominant group, in particular in order to demonstrate the involvement of the parent company?'

Consideration of the questions referred

Admissibility

28 Several parties, in the written observations available to the Court, have called into question the admissibility of certain questions.

29 AIGET submits that the second question should be declared inadmissible on the ground that it is worded in general terms and is irrelevant. It is not disputed that, should the abuse attributed to the ENEL Group be established, that abuse would be such as to exclude competitors from the market and cause harm to consumers.

30 Green Network SpA raises the question of the admissibility of the first four questions, as those do not appear to it to be necessary for the resolution of the disputes in the main proceedings and, in any event, as the Court has already answered those questions.

31 Last, the AGCM and AIGET submit that the fifth question is inadmissible because it is hypothetical, given that the investigation conducted by the AGCM found that there was a group strategy to transfer customers from SEN to EE and thereby prevent their departure to competing groups.

32 In connection with those submissions, it must be borne in mind that, according to settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 54 and the case-law cited).

33 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not

have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 55 and the case-law cited).

34 In the present case, it must be stated, regarding, first of all, the second question, that the fact that that question is worded in general terms does not preclude it from being relevant to the outcome of the disputes in the main proceedings.

35 Moreover, it is not for the Court, but for the national court, to ascertain the facts which have given rise to the dispute in the main proceedings and to establish the consequences which they have for the judgment which it is required to deliver (judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 119). Consequently, provided that the national court sets out in its request the factual and legal material necessary to enable the Court to give a useful answer to the questions submitted to it, those questions cannot be declared inadmissible merely because they are worded in general terms.

36 As for the claim that there has been no challenge regarding whether the alleged abuse is capable of excluding competitors of the ENEL Group from the market and of causing harm to consumers, even if this should prove to be the case, the fact remains that the interpretation of the objectives pursued by Article 102 TFEU could prove useful to the referring court in order to determine which conditions must be fulfilled in order to be able to make a finding of abuse of a dominant position.

37 Next, as regards the relevance of the first, third and fourth questions, it is sufficient to note that it is not obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the disputes in the main proceedings or to their purpose. On the contrary, having regard to the facts in those proceedings, each of the questions appears to be capable of providing guidance to the referring court in order to enable it to rule on the disputes. As to the assertion that the Court has previously given a ruling on those questions, it should be observed that that circumstance in no way prevents a national court from referring questions for a preliminary ruling to this Court, the answer to which, in the submission of certain parties to the main proceedings, leaves no scope for reasonable doubt (judgment of 14 October 2021, *Viesgo Infraestructuras Energéticas*, C-683/19, EU:C:2021:847, paragraph 26).

38 Last, so far as the fifth question is concerned, it cannot be ruled out that the referring court's decision may differ from the decision at issue. Therefore, the Court cannot find that, as asserted by the AGCM and AIGET, that question manifestly bears no relation to the actual facts of the disputes in the main proceedings or to their purpose, or that it is hypothetical.

39 Accordingly, the questions asked by the Consiglio di Stato (Council of State) must be regarded as admissible.

Substance

The second question

40 By its second question, which it is appropriate to examine in the first place, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that, in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a

competition authority to prove that that practice is capable of adversely affecting an effective competition structure on the relevant market or whether it must be proved further, or in the alternative, that that practice is capable of affecting the well-being of consumers.

41 In that connection, it must be borne in mind that Article 102 TFEU is part of a set of rules, the function of which is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, which ensure well-being in the European Union (see, to that effect, judgment of 17 February 2011, *TeliaSonera*, C-52/09, EU:C:2011:83, paragraphs 21 and 22).

42 In that regard, Article 102 TFEU is an application of the general objective of European Union action laid down by Article 3(1)(b) TFEU, namely the institution of the competition rules necessary for the functioning of the internal market (see, to that effect, judgments of 2 April 2009, *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214, paragraph 103, and of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 170).

43 The vital nature of the FEU Treaty provisions on competition is also apparent from the Protocol (No 27) on the internal market and competition, which forms an integral part of the Treaties in accordance with Article 51 TEU and states that the internal market includes a system ensuring that competition is not distorted (judgment of 17 November 2011, *Commission* v *Italy*, C-496/09, EU:C:2011:740, paragraph 60).

44 Among these rules, the purpose of Article 102 TFEU more specifically is, according to settled case-law, to prevent conduct of a undertaking in a dominant position that has the effect, to the detriment of consumers, of hindering, through recourse to means or resources different from those governing normal competition, maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 91; of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 24; and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 148 and the case-law cited). To that effect, as the Court has held, that provision seeks to sanction not only practices likely to cause direct harm to consumers but also those which cause them harm indirectly by undermining an effective structure of competition (see, to that effect, inter alia, judgments of 15 March 2007, *British Airways* v *Commission*, C-95/04 P, EU:C:2007:166, paragraphs 106 and 107, and of 17 February 2011, *TeliaSonera*, C-52/09, EU:C:2011:83, paragraph 24).

45 By contrast, as emphasised previously by the Court, that provision does not preclude, as a result of competition on the merits, departure from the market or marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 134 and the case-law cited).

46 It follows that, as observed in essence by the Advocate General in point 100 of his Opinion, the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position within the internal market or a substantial part of that market. Therefore, as the Court has previously held, an undertaking in such a position may show that an exclusionary practice escapes the prohibition laid down in Article 102 TFEU by, inter alia, demonstrating that the effects that could result from the practice at issue are counterbalanced or even outweighed by advantages in terms of efficiency which also benefit the consumer in terms of, specifically, price,

choice, quality or innovation (see, to that effect, judgments of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 134 and 140, and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 165 and the case-law cited).

47 Therefore, a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could impair, by using resources or means other than those governing normal competition, an effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers. The dominant undertaking concerned may nevertheless escape the prohibition laid down in Article 102 TFEU by showing that the exclusionary effect that could result from the practice at issue is counterbalanced or even outweighed by positive effects for consumers.

48 Having regard to the foregoing considerations, the answer to the second question is that Article 102 TFEU must be interpreted as meaning that, in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a competition authority to prove that that practice is capable of impairing an effective competition structure on the relevant market, unless the dominant undertaking concerned shows that the exclusionary effects that could result from the practice at issue are counterbalanced or even outweighed by positive effects for consumers in terms of, among other things, price, choice, quality and innovation.

The third question

49 By its third question, which it is appropriate to examine in the second place, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that, in order to determine whether the conduct of an undertaking in a dominant position is abusive, the evidence adduced by that undertaking – seeking to show that, despite its abstract ability to produce restrictive effects, that conduct did not produce such effects – should be considered relevant, and, if so, whether the competition authority is required to examine that evidence in depth.

50 As a preliminary matter, the Court observes that, regarding exclusionary practices, a category to which the conduct complained of in the disputes in the main proceedings belongs, it is apparent from the Court's case-law that, if such conduct is to be characterised as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, of producing the alleged exclusionary effects (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 154 and the case-law cited).

51 Consequently, where a dominant undertaking submits, during the administrative procedure and with supporting evidence, that its conduct was not capable of restricting competition, the competition authority concerned is required to examine whether, in the particular circumstances, the conduct in question was indeed capable of doing so (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 138 and 140).

52 In those circumstances, in accordance with the right to be heard, which, according to a consistent body of case-law, is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual, competition authorities have, inter alia, the obligation to hear the undertaking concerned, which means that they must pay due attention to the observations thus submitted by that undertaking, examining carefully and

impartially all the relevant aspects of the individual case, and, in particular, the evidence submitted by that undertaking (see, by analogy, judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraphs 39 to 42).

53 That being said, it must be borne in mind that the characterisation of a practice of a dominant undertaking as abusive does not mean that it is necessary to show that the result of a practice of such an undertaking, intended to drive its competitors from the market concerned, has been achieved and, accordingly, to prove an actual exclusionary effect on the market. The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, irrespective of whether such practice has proved successful (see, to that effect, 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 and the case-law cited).

54 As stressed in point 20 of the Communication from the European Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings' (OJ 2009 C 45, p. 7), although, where the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide evidence of the exclusionary effect of the practice in question, the opposite situation that a certain course of conduct has not produced actual anti-competitive effects cannot rule out the possibility that that conduct was in fact capable of doing so when it was implemented, even if a long period of time has passed since that conduct took place. Such absence of effect could stem from other causes and be due to, inter alia, changes that occurred on the relevant market since that conduct began or to the fact that the undertaking in a dominant position was unable to complete the strategy underpinning that conduct.

55 Therefore, the evidence produced by an undertaking in a dominant position attesting to the lack of actual exclusionary effects cannot be regarded as sufficient of itself to preclude the application of Article 102 TFEU.

56 By contrast, that fact may constitute evidence that the conduct in question was not capable of producing the alleged exclusionary effects. That evidence must, however, be supplemented, by the undertaking concerned, by items of evidence intended to show that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects.

57 It follows that, in the present case, the fact (on which the companies concerned rely in order to dispute the existence of abuse of a dominant position) that EE obtained, by means of the use of the SEN lists, just 478 clients, that is to say, 0.002% of the customers in the protected market, cannot be regarded as sufficient of itself to show that the practice in question was not capable of producing an exclusionary effect.

58 Having regard to all of the foregoing considerations, the answer to the third question is that Article 102 TFEU must be interpreted as meaning that, in order to rule out that the conduct of an undertaking in a dominant position is abusive, the fact that evidence adduced by the undertaking in question shows that that conduct has not produced actual restrictive effects is not of itself sufficient. That evidence may indicate that the conduct in question is unable to produce anti-competitive effects, although it must be supplemented by further items of evidence intended to demonstrate that inability.

The fourth question

59 By its fourth question, which it is appropriate to examine in the third place, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that the existence of an abusive exclusionary practice carried out by an undertaking in a dominant position must be assessed only on the basis of whether that practice is capable of producing anti-competitive effects, or whether it is necessary to take into account the anti-competitive intent of the undertaking concerned.

60 In that connection, it must be borne in mind that abuse of a dominant position prohibited by Article 102 TFEU is an objective concept (see, inter alia, judgments of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 148, and of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 41).

61 As recalled in paragraph 50 of the present judgment, the characterisation of an exclusionary practice as abusive depends on the exclusionary effects that that practice is or was capable of producing. Thus, in order to establish that an exclusionary practice is abusive, a competition authority must show that, first, that practice was capable, when implemented, of producing such an exclusionary effect, in that it was capable of making it more difficult for competitors to enter or remain on the market in question and, by so doing, that that practice was capable of having an impact on the market structure; and, second, that practice relied on the use of means other than those which come within the scope of competition on the merits. Neither of those conditions requires, in principle, evidence of intent.

62 Consequently, in order to make a finding of abuse of a dominant position for the purposes of applying Article 102 TFEU, competition authorities are in no way required to show anti-competitive intent on the part of the undertaking in a dominant position (judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 21).

63 That said, although, for the purposes of applying Article 102 TFEU, there is no requirement to establish that the dominant undertaking has an anticompetitive intent, evidence of such an intent, while it cannot be sufficient in itself, constitutes a factor that may be taken into account in order to determine that a dominant position has been abused (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 162 and the case-law cited).

64 Having regard to the foregoing considerations, the answer to the fourth question is that Article 102 TFEU must be interpreted as meaning that the existence of an abusive exclusionary practice carried out by an undertaking in a dominant position must be assessed on the basis of whether that practice is capable of producing anti-competitive effects. A competition authority is are not required to show intent on the part of the undertaking in question to exclude its competitors by means or having recourse to resources other than those governing competition on the merits. Evidence of such intent does, however, constitute a factor which may be taken into account in order to determine that a dominant position has been abused.

The first question

65 By its first question, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that a practice which is otherwise lawful outside the context of competition law may, when implemented by an undertaking in a dominant position, be

characterised as 'abusive' for the purposes of that provision solely on the basis of its potentially anti-competitive effects, or whether such characterisation also requires that that practice be implemented by means or resources other than those governing normal competition. In that second scenario, that court is uncertain as to the criteria for distinguishing the means or resources which come within the scope of normal competition from those which come within the scope of distorted competition.

66 In that connection, in must be borne in mind that Article 102 TFEU declares that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

67 It is settled case-law that the definition of 'abuse' for the purposes of Article 102 TFEU is based on an objective assessment of the conduct in question. The illegality of abusive conduct under that provision is unrelated to the characterisation of that conduct in other areas of law (see, to that effect, judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraphs 74 and 132).

68 In practice, as is apparent from paragraph 44 of the present judgment, that concept covers any practice capable of adversely affecting, by way of resources other than those which govern normal competition, an effective competition structure. It is therefore intended to penalise 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 means different from those governing normal competition in goods 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 (judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 91, and of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 41).

69 With regard to the practices that are the subject matter of the disputes in the main proceedings, as observed in paragraph 50 of the present judgment, if such conduct is to be characterised as abusive, that presupposes that that conduct was capable of producing the alleged exclusionary effects which form the basis of the decision at issue.

70 Admittedly, such effects must not be purely hypothetical (judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 65). As a result, first, a practice cannot be characterised as abusive if it remained at the project stage without having been implemented. Second, competition authorities cannot rely on the effects that that practice might produce or might have produced if certain specific circumstances – which were not prevailing on the market at the time when that practice was implemented and which did not, at the time, appear likely to arise – had arisen or did arise.

71 By contrast, in order for such a characterisation to be established, it is sufficient that that practice was, during the period in which it was implemented, capable of producing an exclusionary effect in respect of competitors that were at least as efficient as the undertaking in a dominant position (see, to that effect, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 66 and the case-law cited).

72 Given that the abusive nature of a practice does not depend on the form it takes or took, but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts (see, to that effect, judgments of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 154, and of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239, paragraph 42).

73 That said, as recalled in paragraph 45 of the present judgment, it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits – on account of its skills and abilities in particular – a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. Indeed, not every exclusionary effect is necessarily detrimental to competition since competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 133 and 134).

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

75 Consequently, although undertakings in a dominant position can defend themselves against their competitors, they must do so by using means which come within the scope of 'normal' competition, that is to say, competition on the merits.

76 By contrast, those undertakings cannot make it more difficult for competitors which are as efficient to enter or remain on the market in question by using means other than those which come within the scope of competition on the merits. In particular, they must refrain from using their dominant position in order to extend that position over another market by means other than those which come within the scope of competition on the merits (see, to that effect, judgments of 3 October 1985, *CBEM*, 311/84, EU:C:1985:394, paragraph 25; of 14 November 1996, *Tetra Pak* v *Commission*, C-333/94 P, EU:C:1996:436, paragraph 25, and of 17 February 2011, *TeliaSonera*, C-52/09, EU:C:2011:83, paragraph 87).

77 Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits (see, to that effect, judgment of 3 July 1991, *AKZO* v *Commission*, C-62/86, EU:C:1991:286, paragraph 71).

78 The same applies, as observed by the Advocate General in points 69 to 71 of his Opinion, to a practice that a hypothetical competitor – which, although it is as efficient, does not occupy a dominant position on the market in question – is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position.

79 The relevance of the material or rational impossibility for a hypothetical competitor, which is as efficient but not in a dominant position, to imitate the practice in question, in order to determine whether that practice is based on means that come within the scope of competition on the merits, is clear from the case-law on practices both related and unrelated to prices.

80 Regarding the first of these two categories of practices, which includes loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered *in abstracto*, is capable of reproducing the conduct of the undertaking in a dominant position (see, inter alia, judgment of 17 February 2011, *TeliaSonera*, C-52/09, EU:C:2011:83, paragraphs 41 to 43).

81 Admittedly, that test is merely one of the ways to show that an undertaking in a dominant position has used means other than those that come within the scope of 'normal' competition, with the result that competition authorities do not have an obligation to rely always on that test in order to make a finding that a price-related practice is abusive (see, to that effect, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 57).

82 Nonetheless, the fact remains that the significance generally given to that test, when it can be carried out, shows that the inability of a hypothetical as-efficient competitor to replicate the conduct of the undertaking in a dominant position constitutes, in respect of exclusionary practices, one of the criteria which make it possible to determine whether that conduct must be regarded as being based on the use of means which come within the scope of normal competition.

83 Regarding the second category of practices referred to in paragraph 79 of the present judgment, namely practices not related to pricing, such as refusal to supply goods or services, the Court has emphasised that the choice of an undertaking in a dominant position to reserve to itself its own distribution network does not constitute refusal to supply contrary to Article 102 TFEU where, specifically, it is possible for a competitor to create a similar network for the distribution of its own goods (see, to that effect, judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraphs 44 and 45).

84 Where a competition authority shows that a practice of an undertaking in a dominant position is capable of impairing effective and undistorted competition in the internal market, it remains possible for that undertaking, in order to prevent that practice from being regarded as abuse of a dominant position, to show that that practice is or was justified objectively, either by certain circumstances of the case, which must, inter alia, be external to the undertaking concerned (see, to that effect, judgment of 17 February 2011, *TeliaSonera*, C-52/09, EU:C:2011:83, paragraphs 31 and 75), or, having regard to the objective ultimately pursued by Article 102 TFEU, by the interests of consumers (see, inter alia, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 165).

85 Regarding that second scenario, it must be stressed that the concept of competition on the merits covers, in principle, a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Thus, as noted by the Advocate General in point 62 of his Opinion, conduct which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of the goods already on offer must, inter alia, be considered to come within the scope of competition on the merits.

86 In such a case, the dominant undertaking can provide justification for conduct that is liable to be caught by the prohibition laid down in Article 102 TFEU by showing that the exclusionary effect capable of being produced by its conduct was counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers (see, to that effect, judgments of 15 March 2007, *British Airways* v *Commission*, C-95/04 P, EU:C:2007:166, paragraph 86; of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 140, and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 165).

87 So far as the disputes in the main proceedings are concerned, it is for the referring court to assess whether the AGCM has shown to the requisite legal standard that the strategy implemented by the undertaking ENEL between 2012 and 2017 was liable to impair effective, undistorted competition within the internal market. However, in order to guide that court in its assessment, the Court may provide it with full guidance on the interpretation of EU law which might be useful to it (see, inter alia, judgments of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 62, and of 6 October 2021, *A (Border crossing by pleasure boat)*, C-35/20, EU:C:2021:813, paragraph 85).

88 In the present case, it is apparent from the case file before the Court that, first of all, following the separation of the various activities of the undertaking ENEL – which, until that point, was vertically integrated and held a monopoly on the markets for the production, transport and distribution of energy in Italy – SEN was entrusted with management of the customers in the single protected market in that Member State. However, it was clear that the protected market was not intended to be permanent and that the customers concerned would have to choose a new supplier once it was abolished. In addition, in order to prevent the transfer of a competitive advantage, sector-specific regulation authorised the transfer of commercially sensitive information between companies selling electricity on the protected market and companies active on the free market only if the provision of such information was non-discriminatory.

89 Next, it is apparent from the information provided by the referring court that the conduct referred to in the decision at issue turns, in essence, not on SEN's refusal to allow competitors of EE to access an essential facility – the contact information of customers in the protected market – but on SEN's decision to transfer, for consideration, certain commercial information which it held concerning its customers, including their contact information in particular, to EE, in an unfavourable and therefore discriminatory way in respect of EE's competitors on the free market, even though SEN was in a dominant position on the protected market.

90 Last, the referring court appears to operate on the premiss that, at the very least, SEN and EE were a single undertaking for the purposes of Article 102 TFEU.

91 Having regard to those factors, which it is for the referring court to verify, it appears appropriate to bear in mind that, where an undertaking which holds exclusive rights such as a statutory monopoly uses resources (inaccessible, in principle, to a hypothetical competitor that is as efficient but does not enjoy a dominant position) for the purpose of extending the dominant market position which it holds as a result of those exclusive rights on another market, then that use must be considered to constitute use of means other than those which come within the scope of competition on the merits (see, to that effect, judgment of 17 July 2014, *Commission* v *DEI*, C-553/12 P, EU:C:2014:2083, paragraphs 45 to 47 and 66 to 68).

92 It follows, a fortiori, that, when an undertaking loses its previous statutory monopoly on a market, that undertaking must refrain, throughout the entire liberalisation of that market, from using means available to it on account of its former monopoly and which, for that reason, are not available to its competitors, in order to preserve, other than on its own merits, a dominant position on the recently liberalised market in question.

93 In the disputes in the main proceedings, those considerations mean that the undertaking consisting of, at the very least, SEN and EE had a particular responsibility to refrain from any conduct on the protected market that might impair an effective competition structure on the free market and, more specifically, to refrain from extending the dominant position which it had on the protected market to that free market other than by means which come within the scope of competition on the merits (see, by analogy, judgment of 3 October 1985, *CBEM*, 311/84, EU:C:1985:394, paragraph 27).

94 It is not disputed that the possibility of contacting the client base of the protected market was of certain economic interest to any undertaking that wished to expand on the free market. Therefore, since the undertaking considered to be made up of SEN and EE intended to transfer to EE, for consideration, certain commercial information held by SEN relating to its client base, that undertaking should also have offered to EE's competitors the opportunity to access that information, under the same conditions for equivalent services, in order not to impair an effective competition structure.

95 Admittedly, having regard to the right to the protection of personal data, which is a fundamental right guaranteed by Article 8(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), a company in SEN's position cannot be criticised for having obtained in advance the consent of its customers to having some of their personal information transferred in this way. Similarly, such a company also cannot be held responsible for the decision by a portion of its customers to authorise the transfer of their personal information only to certain companies.

96 However, in order to fulfil the special responsibility which lies with it on account of its dominant position on the protected market, SEN was required, for the purposes of pre-empting the intentions of third-party companies that might wish to expand on the free market to also access that information, to propose to its clients, in a non-discriminatory way, to receive offers from companies that did not belong to the ENEL Group, by ensuring, inter alia, that it did not create bias when collecting consents in such a way as to result in the lists intended to be transferred to EE not being significantly more fleshed out than those intended for sale to that company's competitors.

97 In the present case, the information provided to the Court does not make it possible to understand the precise nature of the discriminatory treatment identified by the AGCM. Although it is apparent from the order for reference that SEN sought the consent of its customers in the protected market to receive commercial offers 'separately' from the companies in the ENEL Group and from third parties, that qualifier does not make it possible to determine with sufficient clarity whether that term refers to the fact that the requests were made at different times or to the fact that they were in different parts of the same document or, moreover, in the event that all the third-party companies were referred to without distinction in a single request for consent, whether it was possible to consent to receiving offers from third-party companies without also having to consent to receive those from the ENEL Group or whether SEN

customers could choose on a case-by-case basis which third-party companies were authorised to send them commercial offers, similarly to what appears to have been foreseen for the ENEL Group.

98 That said, it must be borne in mind that the burden of proving that SEN's conduct was capable of producing actual or potential exclusionary effects lies with the AGCM. Given that that ability must not be purely hypothetical, the AGCM was therefore required, in order to discharge that burden, to show, in the decision at issue, supported by evidence such as behavioural studies, that the procedure used by SEN in order to collect its customers' consent to the transfer of their information was indeed such as to favour the lists intended to be transferred to EE.

99 Were the referring court to find that the AGCM has shown to the requisite legal standard, in the decision at issue, that the manner in which SEN requested its customers' consent to receive offers was biased in such a way as to favour the companies in the ENEL Group to the detriment of its competitors, the existence of such bias would preclude the finding that the difference in the quantity of information contained in the lists intended for EE and in the lists intended for competitors is due to the fact that the companies in the ENEL Group performed better on the free market or due to the attractiveness of the ENEL brand. The very existence of that bias would, by definition, make it impossible to determine whether there were objective causes for the difference in the consents given. Consequently, given that, in that scenario, that bias would stem from SEN's conduct, that company should be responsible for the difference in the number of customers in the lists intended for EE and those intended for EE's competitors.

100 As a result, SEN would have transferred to EE a resource likely to confer a comparative advantage on an undertaking which, according to the premiss set out in paragraph 90 of the present judgment, is made up of those two companies together, on the free market, despite the fact that it is apparent from the documents in the case file that the purpose of the process of dissociating ENEL's activities was specifically to prevent such a transfer. Therefore, the subsequent use of that resource should be regarding as giving specific expression to the implementation of a practice which was, at least initially, capable of producing exclusionary effects on the free market.

101 In that scenario, such conduct would necessarily be incapable of being adopted by a hypothetical as-efficient competitor, since, on account of SEN's position on the protected market following the abolition of the statutory monopoly formerly held by the undertaking ENEL, no competing undertaking had available to it a structure capable of providing such a large amount of contact information on customers in the protected market.

102 It follows that, in so far as abuse of a dominant position must be assessed in the light of whether the conduct at issue is capable of producing exclusionary effects, and not in the light of its actual effects, if it were shown that SEN sought customers' consent to receive offers from the companies in the ENEL Group and from its competitors, respectively, in a discriminatory way, that fact alone would be sufficient to show that the conduct of the undertaking made up of SEN and EE at the very least was capable of impairing effective, undistorted competition. That finding could not be called into question in the light of the reasons why none of those competitors decided to purchase the information offered to them, in the light of EE's ability to transform that comparative advantage into commercial success or in the light of the actions that competitor undertakings potentially took or could have taken, such as purchasing files from third parties containing information on customers in the protected market, in order to limit the harmful consequences of that practice.

103 Having regard to the foregoing, the answer to the first question is that Article 102 TFEU must be interpreted as meaning that a practice which is lawful outside the context of competition law may, when implemented by an undertaking in a dominant position, be characterised as 'abusive' for the purposes of that provision if it is capable of producing an exclusionary effect and if it is based on the use of means other than those which come within the scope of competition on the merits. Where those two conditions are fulfilled, the undertaking in a dominant position concerned can nevertheless escape the prohibition laid down in Article 102 TFEU if it shows that the practice at issue was either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers.

The fifth question

104 By its fifth question, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that, when a dominant position is abused by one or more subsidiaries of an economic unit, the existence of that unit is sufficient for a finding that the parent company is also responsible for that abuse, even where that company did not participate in the abusive practices, or whether it is necessary to prove, even indirectly, that the various companies were coordinated and, more specifically, that the parent company was involved.

105 At the outset, it must be borne in mind that the authors of the FEU Treaty chose the term 'undertaking' for the perpetrator of an infringement of competition law, which must be understood, in that context, as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 48).

106 It follows from that choice that, where such an economic unit infringes EU competition rules, it is for that unit, consistently with the principle of personal liability, to answer for that infringement (judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 73).

107 Given, however, that responsibility for such infringement rests on a legal person on which fines can be imposed, the application of the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entails the application of joint and several liability as between the entities of which the economic unit is made up at the time when the infringement was committed (see, to that effect, judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 44).

108 Where persons with separate legal personalities are organised as a group, it is settled case-law that those persons form a single undertaking when they do not decide independently upon their own conduct on the market in question but, having regard, more specifically, to the economic, organisational and legal links between those persons and a parent company, those companies are subject to the effects, to that end, of the actual exercise of that decisive influence, by being run as one (see, to that effect, judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraphs 74 and 75).

109 It follows from equally settled case-law that, in the specific scenario where the parent company holds, directly or indirectly, all or almost all of the capital of the subsidiary which has infringed EU competition rules, it can be presumed that the parent company has actually exercised a decisive influence (see, to that effect, judgment of 15 April 2021, *Italmobiliare and Others* v *Commission*, C-694/19 P, not published, EU:C:2021:286, paragraph 55).

110 That presumption is, however, rebuttable (see, to that effect, judgment of 8 May 2013, *Eni* v *Commission*, C-508/11 P, EU:C:2013:289, paragraph 47). As highlighted by the Court, it is not the holding of such a percentage of the capital of the subsidiary that gives rise to that presumption, but the degree of control of the parent company over its subsidiary that this holding implies (judgment of 27 January 2021, *The Goldman Sachs Group* v *Commission*, C-595/18 P, EU:C:2021:73, paragraph 35). However, although the fact that one company holds almost all the capital of another is highly indicative that such control is held, this does not make it possible to rule out with certainty the possibility that another person or other persons may hold, alone or together, decision-making power, since, inter alia, ownership of the capital may have been dissociated from voting rights.

111 Moreover, it is clear from the case-law recalled above that, in order to form a single undertaking with its subsidiary, a parent company must exercise control over the conduct of its subsidiary. This may be demonstrated by showing either that the parent company has the ability to exercise a decisive influence over its subsidiary's conduct and, moreover, that it has actually exercised such influence, or that that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities (see, inter alia, judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraphs 94 and 95).

112 Consequently, a parent company must also be able to rebut the presumption set out in paragraph 109 of the present judgment by demonstrating that, although it held all or almost all of the capital of another company when the practice occurred, it was not giving instructions to that company or participating, directly or indirectly, via, inter alia, appointed administrators, in the adoption of the decisions of that company relating to the economic activity concerned.

113 In the present case, ENEL maintains that the issues that arose in the disputes in the main proceedings are not related to the application of that presumption, but rather to (i) the apportioning of the burden of proof in respect of whether the various companies concerned in the ENEL Group were a single undertaking and (ii) the competition authority's obligation to state reasons where that authority intends to reject the evidence submitted by the parent company in order to rebut that presumption.

114 In that connection, regarding the burden of proof, as observed by the Advocate General in point 155 of his Opinion, it is clear from the Court's case-law that the presumption which arises from the fact that a parent company holds all or almost all of the capital of its subsidiary means that the actual exercise of decisive influence by the parent company over its subsidiary and, as a result, the existence of a single undertaking made up of those companies are considered to be established without the competition authority having to produce any further evidence (see, inter alia, judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission*, C-155/14 P, EU:C:2016:446, paragraphs 29 and 30).

115 As for the obligation to state reasons, it must be borne in mind that that obligation is a general principle of EU law, reflected in Article 41 of the Charter, which is applicable to Member States when they are implementing that law (see, to that effect, judgment of 24 November 2020, *Minister van Buitenlandse Zaken*, C-225/19 and C-226/19, EU:C:2020:951, paragraph 34 and the case-law cited).

116 In accordance with the right to an effective remedy enshrined in Article 47 of the Charter, the reasons given must be such as, first, to make it possible for the persons concerned to ascertain whether the decision adopted is vitiated by a defect which may permit its legality to be contested and, second, to enable the court with jurisdiction to review the legality of that act (see, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 84).

117 Thus, when a decision contains a finding that a company formed, at the material time, a single undertaking with one or more of its subsidiaries for the purposes of carrying on an economic activity, sufficient reasons can be considered to have been given for that decision only if it contains a statement of reasons justifying that finding (see, to that effect, judgments of 2 October 2003, *Aristrain* v *Commission*, C-196/99 P, EU:C:2003:529, paragraph 100, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 152).

118 It follows that, as observed by the Advocate General in point 160 of his Opinion, where, in order to impose a fine on a parent company for the conduct of the undertaking which it formed, at the material time, with another company which was, at that time, its subsidiary, a competition authority has relied on the presumption of decisive influence flowing from the fact that that parent company held, at the material time, all or almost all of the capital of that other company (even though the parent company had submitted evidence for the specific purpose of rebutting that presumption during the course of the administrative procedure), that competition authority is required, in order to fulfil its obligation to state reasons, to explain adequately the reasons why that evidence do not make it possible to rebut that presumption (judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 153).

119 Such an obligation to state reasons does not, however, mean that the competition authority is required to state its position on each item of evidence submitted by the parent company to rebut that presumption (judgment of 5 December 2013, *Commission* v *Edison*, C-446/11 P, not published, EU:C:2013:798, paragraph 23).

120 First, the question whether the statement of reasons in a measure meets the requisite legal standard must be assessed by reference to its context and the applicable rules (see, by analogy, judgment of 19 November 2013, *Commission* v *Council*, C-63/12, EU:C:2013:752, paragraph 99). Second, because a statement of reasons is a formal requirement, it is sufficient, for that requirement to be met, that the contested decision sets out a line of reasoning demonstrating that, despite the various items of evidence submitted, there were no grounds for rebutting the presumption. It is then for the addressees of that decision to argue that that ground is not well founded.

121 It follows that, in the disputes in the main proceedings, given that it is common ground that ENEL held all or almost all of SEN's capital, the AGCM was entitled to presume that that parent company formed a single undertaking with its subsidiary for the purposes of electricity distribution on the market in question. ENEL could, however, attempt to rebut that presumption by submitting evidence to show either that that shareholding nevertheless did not make it possible for it to control SEN or that it did not make use, directly or indirectly, of its ability, on account of its holding all or almost all of SEN's capital, to exercise a decisive influence over SEN. In that case, the AGCM was required to state its position on the evidence submitted, setting out, at the very least, a line of reasoning to show that, despite those items of evidence, there were no grounds for rebutting the presumption.

122 That said, in the disputes in the main proceedings, it can be observed that the claim that the decentralised decision-making processes within the group resulted in ENEL merely having the role of promoting synergies and best practices among the various companies in the group does not, in any event, appear to be sufficient to rebut that presumption in so far as, inter alia, it does not preclude ENEL representatives from being members of SEN decision-making bodies or even guarantee that members of those bodies were functionally independent of the parent company.

123 Having regard to the foregoing, the answer to the fifth question is that Article 102 TFEU must be interpreted as meaning that, when a dominant position is abused by one or more subsidiaries belonging to an economic unit, the existence of that unit is sufficient for a finding that the parent company is also liable for that abuse. The existence of such a unit must be presumed if, at the material time, at least almost all of the capital of those subsidiaries was held, directly or indirectly, by the parent company. The competition authority is not required to adduce any additional evidence unless the parent company shows that it did not have the power to define the conduct of its subsidiaries and that those subsidiaries were acting independently.

Costs

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

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

1. **Article 102 TFEU must be interpreted as meaning that, in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a competition authority to prove that that practice is capable of impairing an effective competition structure on the relevant market, unless the dominant undertaking concerned shows that the exclusionary effects that could result from the practice at issue are counterbalanced or even outweighed by positive effects for consumers in terms of, among other things, price, choice, quality and innovation.**

2. **Article 102 TFEU must be interpreted as meaning that, in order to rule out that the conduct of an undertaking in a dominant position is abusive, the fact that evidence adduced by the undertaking in question shows that that conduct has not produced actual restrictive effects is not of itself sufficient. That evidence may indicate that the conduct in question is unable to produce anti-competitive effects, although it must be supplemented by further items of evidence intended to demonstrate that inability.**

3. **Article 102 TFEU must be interpreted as meaning that the existence of an abusive exclusionary practice carried out by an undertaking in a dominant position must be assessed on the basis of whether that practice is capable of producing anti-competitive effects. A competition authority is not required to show intent on the part of the undertaking in question to exclude its competitors by means or having recourse to resources other than those governing competition on the merits. Evidence of such intent does, however, constitute a factor which may be taken into account in order to determine that a dominant position has been abused.**

4. **Article 102 TFEU must be interpreted as meaning that a practice which is lawful outside the context of competition law may, when implemented by an undertaking in a dominant position, be characterised as 'abusive' for the purposes of that provision if it is capable of producing an exclusionary effect and if it is based on the use of means other than those which come within the scope of competition on the merits. Where those two conditions are fulfilled, the undertaking in a dominant position concerned can nevertheless escape the prohibition laid down in Article 102 TFEU if it shows that the practice at issue was either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers.**

5. **Article 102 TFEU must be interpreted as meaning that, when a dominant position is abused by one or more subsidiaries belonging to an economic unit, the existence of that unit is sufficient for a finding that the parent company is also liable for that abuse. The existence of such a unit must be presumed if, at the material time, at least almost all of the capital of those subsidiaries was held, directly or indirectly, by the parent company. The competition authority is not required to adduce any additional evidence unless the parent company shows that it did not have the power to define the conduct of its subsidiaries and that those subsidiaries were acting independently.**

[Signatures]