# Competition on the merits in liberalised electricity markets: a regulatory reading of AG Rantos' Opinion in *Servizio Elettrico Nazionale*

Ignacio Herrera Anchustegui* and Leigh Hancher**

## 1 Introduction

The Opinion of Advocate General ('AG') Rantos in *Servizio Elettrico Nazionale* goes to the core of Article 102 TFEU. What is an abuse? What type of conduct is abusive? When does abusive conduct take place? What are the goals pursued by the prohibition of abuse of dominance, and who should be held liable within a corporate group?[1] The Opinion sheds light on *non-price-related* competition issues that can arise in partially liberalised markets where some market segments are open to competition, and other segments of the market are still heavily regulated. The electricity and gas markets are a case in point. The Opinion highlights the importance of the use of data in the market liberalisation process. Data is a competitive tool, and access to formerly 'captive customers' in liberated markets is critical to enable competition. Similar concerns regarding data sharing and data flows between different companies and within vertically integrated undertakings also arise in other sectors, such as telecommunications.[2] AG Rantos' Opinion confirms the importance of data in a liberalisation process (para. 76) and associated competition risks related to it.[3] As a takeaway, this Opinion provides crucial guidance for network sectors on when data use can amount to anti-competitive leveraging, an area in which some previous national cases exist.[4]

In this analysis, we focus on the relevance of the Opinion to highly regulated and liberalised markets. *Servizio Elettrico* provides an opportunity to reflect on the competitive risks associated with network industries. First, we summarise the main parts of the Opinion. We then discuss the implications of the Opinion for regulated industries, with a particular focus on the importance of data as a competitive tool.

## 2 Background to the dispute

The Opinion in *Servizio Elettrico* sheds light on non-price-related competition issues arising from the gradual or partial opening of the market in heavily regulated industries.[5] The liberalisation of the electricity sector is central to the case.

* Associate Professor, University of Bergen, Faculty of Law. Member of the Bergen Center for Competition Law and Economics (BECCLE) and the Bergen Offshore Wind Centre (BOW).

** Professor, Florence School of Regulation, RSCAS/EUI/S; University of Bergen and Tilburg University; Baker Botts LLP. We would like to thank Peter Alexiadis for his comments on a previous draft and Tollef Heggen for his research assistance. All errors and omissions are those of the authors only.

1 Opinion of Advocate General of 9 December 2021, *Servizio Elettrico Nazionale and Others*, EU:C:2021:998.

2 In the case of current or formerly vertically integrated undertakings, regulatory solutions prevent the data flow between different operational units as they impose requirements of independence. Information and data of one operational unit cannot be shared with another operational unit. Further, targeted 'win back' mechanisms, where one unit gains an advantage from sensitive competitive information gleaned from another corporate unit, are prohibited, often under national rules.

3 The importance of data being used as a tool to gain customers, increase market shares or even to outcompete rivals is growing rapidly in the literature. For discussions on data and competition law see: Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International BV, 2016); Christopher Townley, Eric Morrison and Karen Yeung, 'Big data and personalized price discrimination in EU competition law' [2017] *Yearbook of European Law* 36; Maximilian N. Volmar and Katharina O. Helmdach, 'Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation' [2018] *European Competition Journal* 14, no. 2-3; Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (Oxford University Press, 2016).

4 See, for example, Spanish National Competition Authority, 2 November 2009, Case S/0051/08, *UNESA, Iberdrola, Endesa, E.On España, Gas Natural, Hidroeléctrica del Cantábrico*; Spanish National Competition Authority, 13 May 2011, Case S/0159/09, *Iberdrola, Endesa, E.On España, Gas Natural, Hidroeléctrica del Cantábrico, UNESA*; and, recently, French Competition Authority, Décision n° 22-D-06 du 22 février 2022 relative à des pratiques mises en œuvre par la société EDF dans le secteur de l'électricité.

5 The energy, telecommunications and railroad sectors come to mind.

Without competition between electricity suppliers the dispute would have never arisen, as the case centres on the use of customer data from a non-liberalised part of the retail electricity market in the now liberalised market.

Pursuant to the electricity market liberalisation in Europe, the former Italian state monopoly – Enel – was separated into three companies: Enel Energia (EE), an electricity supplier for the deregulated market; Servizio Elettrico Nazionale (SEN), a supplier of the enhanced protection service; and e-distribuzione, a concessionaire for electricity distribution activities.

Of this trio of companies, EE and SEN were alleged to have engaged in abusive conduct because they used customer data from their protected market to retain these customers when they entered the liberalised market. Servizio Elettrico Nazionale SpA and Enel Energia SpA supplied electricity to two types of consumers. Servizio Elettrico Nazionale SpA provided electricity to regulated, 'captive' customers, whereas Enel Energia SpA had to fight for customers in the liberalised market. Clients who were captive customers of Servizio Elettrico Nazionale SpA in the regulated market were now the target of Enel Energy SpA, operating in the liberalised market segment.

As a result of national proceedings, on 20 December 2018, the Italian Competition Authority (ICA) fined the Enel Group for illegally using commercially sensitive information to transfer customers from SEN to EE in the period between May 2017 and January 2021. In particular, SEN obtained the consent of users to receive commercial offers in a discriminatory manner: first a request was sent for authorisation to process personal data by companies within the Enel Group and then a second request was sent to the benefit of third-party operators. The ICA held that customer data was used to avoid losing clients once the regulated market disappeared. The Enel Group first contacted customers to obtain their consent to send commercial offers and subsequently informed them of targeted offers (from the sister company Enel Energy). The conduct by SEN and EE was said to be coordinated by the Enel parent company. Customers usually consented to the initial request, but they generally refused the second, so that consent was only given to third-party operators having access to personal data in 30 per cent of cases. The ICA considered this a 'sui generis abuse' that made the entry of rivals into the liberalised market more difficult, and imposed fines on EE, SEN and the parent undertaking.

The undertakings from the Enel Group involved in the procedure appealed to the Italian courts, first before the Regional Administrative Court, Lazio, Italy, which had partially upheld the finding of an abuse of dominance but reduced the fine. Three subsequent appeals, one by each of the Enel Group undertakings, were made before the Council of State, seeking to annul the decisions imposing fines or to get the fines reduced.

The three appeals were joined by the Council of State, which is currently deciding the case at a national level. The Council of State has clarified that there is no doubt about the dominant position of the Enel Group in the electricity market, but the concept of abuse, and in particular of 'atypical' abuse cases, raises problems of interpretation (para. 25). Thus, a preliminary ruling was sought before the ECJ. The referring court wishes to know the extent to which the strategy of the Enel Group was commercially legitimate or unlawful. Furthermore, it wants clarification as to whether such conduct would be capable of excluding competitors from the relevant market, and whether it is necessary to adduce proof of active coordination between the various companies operating within the group, or if the mere fact of belonging to the group is sufficient (para. 26).

## 3 The Opinion in a nutshell

The Opinion is likely to become a mandatory read in EU competition law in general, and for the study of the interaction between EU competition law and sector-specific regulation law courses, as it is directed at determining what constitutes an abuse of dominance in non-price-based exclusion cases. It is thorough and rich in references to case law. For the most part, it does not invite controversy. The Opinion underlines the importance of economic analysis in abuse cases and the 'more economic approach' to competition law.[6] It shows a clear preference for an effect-based approach to competition issues rather than a form-based approach (para. 55).[7] That said, the Opinion is on an abstract level, leading commentators to reflect that it 'reads like a scholarly article'.[8] The level of abstraction can be attributed to the type of questions put to the court, but also to AG Rantos' aim to settle key conceptual issues on the concept of abuse of dominance. More concretely, the Opinion deals with five questions which we address below.[9]

---

6 For literature discussing the 'more economic approach' in EU competition law and, in particular, the effect-based analysis, see, inter alia: Pablo Ibáñez Colomo, 'Anticompetitive effects in EU competition law' [2021] *Journal of Competition Law & Economics*, vol. 17, No 2; Wouter P. Wils, 'The judgment of the EU General Court in Intel and the so-called more economic approach to abuse of dominance' [2014] *World Competition*, 37(4); Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law: State of Play and Perspectives* (Bruylant, 2013).

7 According to AG Rantos, the same approach has been taken in previous judgments. See, for example, Judgment of 6 December 2012, *AstraZeneca*, C–457/10 P, EU:C:2012:770 C–457/10 P, paragraph 106.

8 Assimakis Komninos, 'Competition Stories: November & December 2021' (6 January 2022), available at: https://leconcurrentialiste.com/competition-stories-nov-dec-2021/.

9 See, for example, Pablo Ibañez-Colomo, 'AG Rantos's Opinion in Case C–377/20, Servizio Elettrico Nazionale: a clean framework capturing the essence of the case law (I) and (II)', available at: https://chillingcompetition.com/2021/12/10/ag-rantoss-opinion-in-case-c-377-20-servizio-elettrico-nazionale-a-clean-framework-capturing-the-essence-of-the-case-law-i/, and https://chillingcompetition.com/2021/12/29/ag-rantoss-opinion-in-case-c-377-20-servizio-elettrico-nazionale-a-clean-framework-capturing-the-essence-of-the-case-law-ii/; Assimakis Komninos, 'Competition Stories: November & December 2021' (6 January 2022), available at: https://leconcurrentialiste.com/competition-stories-nov-dec-2021/; Carmen Puscas, 'AG Rantos: What is the Legal Framework for Analysing Data Leveraging Abuses under Article 102 TFEU?' (3 January 2022), available at: http://competitionlawblog.kluwercompetitionlaw.com/2022/01/03/ag-rantos-what-is-the-legal-framework-for-analysing-data-leveraging-abuses-under-article-102-tfeu/; Miranda Cole, Laura van Kruijsdijk and Andrés Betancor Jiménez de Parga, 'Advocate General Rantos Provides Sound Guidance for Non-Pricing Abuse of Dominance Analysis (Case C–377/20) (30 January 2022)', available at: https://www.covcompetition.com/2022/01/advocate-general-rantos-provides-sound-guidance-for-non-pricing-abuse-of-dominance-analysis-case-c-377-20/.

### 3.1 On the notion of abuse

First, AG Rantos confirms that conduct that might be legal under a different field of the law, for example, sectoral energy regulation or civil law, might be classified as abusive (paras 32–81).[10] However, to be abusive, a pure exclusionary (actual or potential) effect in the market by and of itself is insufficient. The fact that a practice drives a competitor out of the market does not make it anticompetitive. Conduct may either entail a risk of foreclosure (as a response to competition on the merits) or an anticompetitive foreclosure.[11] Only conduct resulting in the latter is regarded as anticompetitive. Competitive foreclosure may be justified, as it benefits consumers in the form of price, choice, quality, or innovation (para. 44).[12] Thus, abnormal competition (that is, not economically justified) is necessary for abuse to take place.

For AG Rantos, this assessment does not need to be separated from whether the conduct has a restrictive effect (para. 48). In AG Rantos' words:

> … 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 [to determine whether a practice is abusive]. (para. 50)

Proving that a dominant undertaking has not acted consistently with 'competition on the merits' is not separated from the analysis of the effect of the conduct in question; the assessment is done jointly.[13] Normal competition has several synonyms: fair competition, competition on the merits, and competition based on quality. AG Rantos suggests using competition on the merits. We agree with this terminological proposal. In his view, this is an abstract concept that ought to be assessed on a case-by-case basis (para. 55). However, common elements and presumptions exist. Dominant players have a special responsibility, and, therefore, their conduct is subject to much tighter scrutiny than that of non-dominant undertakings. The form of the behaviour is not relevant to its classification as abusive (para. 61). It ought to restrict or be capable of restricting competition. Conduct that cannot be economically justified is not likely to be 'on the merits'.[14] Further, competition on the merits will lead to lower prices for consumers, better quality, and a greater variety and choice (para. 63).[15]

While, as this Opinion recalls, there is no such thing as a 'per se' infringement (para. 55), there are some practices that cannot be presumed to be 'on the merits'. If an abusive practice is 'by object' then its anticompetitive effects are presumed – and it need not be established by the Commission or an NCA in relation to all practices. Although AG Rantos mentions loyalty rebates at paragraph 54, pricing below average variable costs as in *Wanadoo* is a 'classic' example.[16] Pricing below average variable costs is abusive because it can be presumed to have an anticompetitive object. Such conduct makes no sense other than as a means for the dominant firm to eliminate competitors in order to enable it to subsequently raise its prices by taking advantage of its monopolistic position.

The Opinion also clarifies that even in non-pricing cases, the 'as-efficient competitor' approach might be a good tool to determine if the conduct results from competition on the merits (para. 44 and paras 66–74).[17] If equally efficient competitors can replicate the conduct, it would not lead to abusive foreclosure (para. 69). Thus, a practice that is replicable by competitors in an economically viable way would not be conduct that leads to anticompetitive foreclosure.

Connected to the former, whether conduct is typical or atypical is not decisive. AG Rantos departs from a 'form' oriented approach and instead distinguishes between foreclosure based on the merits and non-economically justified foreclosure. While this approach using economic rationale as the benchmark is an elegant theoretical distinction, it is hard to determine where one draws the line in investigations without the benefit of hindsight. Adopting economic justifications to draw the line between sanctionable and acceptable conduct is theoretically sound. Further, the evidence or lack thereof of post-infringement foreclosure resonates well as a dampener on antitrust

10 The same viewpoint is taken in Judgment of 6 December 2012, *AstraZeneca*, C–457/10 P, EU:C:2012:770 C–457/10 P, paragraph 132.

11 For some literature dealing with foreclosure, particularly related to abuse of dominance cases (and related to infrastructure) see, inter alia: Patrick Rey and Jean Tirole, 'A primer on foreclosure', *Handbook of Industrial Organization* 3 (2007), 2145–2220; Steven C. Salop, 'The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test' [2017] *Antitrust Law Journal* 81, no. 2; Damie Geradin, 'The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm?' [2010], *Journal of European Competition Law & Practice* 1, no. 2 (2010); Frank P. Maier-Rigaud, Federica Manca and Ulrich Von Koppenfels, 'Strategic underinvestment and gas network foreclosure – the ENI case' [2011] *EC Competition Policy Newsletter* 1; Christian Bergqvist and Ignacio Herrera Anchustegui, 'Uses and abuses of EU competition law in energy' in Tina Soliman Hunter, Ignacio Herrera Anchustegui, Penelope Crossley and Gloria Alvarez (eds) *Routledge Handbook of Energy Law* (Routledge, 2020).

12 See also Judgment of 6 September 2017, *Intel*, C-413/14 P, EU:C:2017:632, paragraphs 133 to 134 and Judgment of 6 October 2015, *Post Danmark I*, C–23/14, EU:C:2015:651, paragraphs 21 to 23 and the case law cited. For some literature on this case see also: Rupprecht Podszun, 'The Role of Economics in Competition Law: the "effects-based approach" after the Intel-judgment of the CJEU' [2018] *Journal of European Consumer and Market Law* 7, no. 2; Florian Kraffert, 'How the Intel case changed our understanding of the objectives of EU competition law' [2019] *European Competition Journal* 15, no. 1; Daniel Sokol, 'European competition law: enforcement or regulation after Intel?' [2017] *Competition Policy International Antitrust Chronicle*, 2 November.

13 Assimakis Komninos, 'Competition Stories: November & December 2021' (6 January 2022), available at: https://leconcurrentialiste.com/competition-stories-nov-dec-2021/.

14 See also Judgment of 17 February 2011, *TeliaSonera*, C–52/09, EU:C:2011:83 paragraph 88 and Judgment of 14 September 2010, *AKZO*, C–550/07 P, EU:C:2010:512 paragraph 71.

15 See also Judgment of 6 September 2017, *Intel*, C–413/14 P, EU:C:2017:632, paragraph 134 and Judgment of 6 October 2015, *Post Danmark I*, C–23/14, EU:C:2015:651, paragraph 22.

16 See Judgment of 2 April 2009, *France Télécom v Commission*, C–202/07 P, EU:C:2009:214 and Judgment of 30 January 2007, *France Télécom v Commission*, T–340/03, EU:T:2007:22.

actions. However, such an approach may hinder the development of a workable standard of review for NCAs, which only leaves scope for a case-by-case assessment. Predictability may be sacrificed in the process.

A further issue is how to reconcile the interaction between the special responsibility concept[18] and foreclosure. The Opinion discusses the concept of special responsibility, stressing 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' (para. 59). Further, it adds that:

> … 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. (para. 59)

However, competition on the merits that is economically justifiable would in principle not be actionable. How does one draw the line in these cases? If the conduct is economically justified, it would be on the merits and, therefore, a duty of special responsibility would be moot. This may be an important indicator for the application of competition law in network sectors traditionally dominated by incumbents.

### 3.2 Goals pursued by Article 102 TFEU

Second, the Opinion examines the values protected by Article 102 TFEU. AG Rantos analyses in depth whether the goal is to protect consumers, the competition process, or both. Here, the Opinion goes through a policy recount of EU competition law, including some broad remarks on Ordoliberalism,[19] and one consideration: EU competition law does not protect (less efficient) competitors (para. 93).

AG Rantos answers the question concerning the values protected by merging the two objectives into one. Protecting the competitive structure is not a separate goal from safeguarding the well-being of consumers. Protection of the market, however, is only relevant if this is to prevent harm to consumers (para. 96).[20] AG Rantos also stresses that harm to consumers is '*an essential element for the application of Article 102 TFEU*'. This is not a controversial statement but is more nuanced than it seems, as consumers are not always easy to identify. Also, this concept is broader than the end consumer.[21] In black-and-white terms, AG stresses that:

> Article 102 TFEU is aimed at maximizing 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. (para.100)

Additionally, the Opinion is illustrative of the necessity for evidence of harm needed to trigger the application of Article 102 TFEU. AG Rantos clarifies that the case law has consistently shown that Article 102 TFEU is triggered not only in case of direct consumer harm but also in the light of conduct 'detrimental to them through their impact on an effective competition structure' (para. 104).[22] Thus, the evidence needs to show whether the conduct has had a restrictive effect on competition and not (only) if there has been harm to consumers.

### 3.3 Evidence and intent

Third, the AG deals with the notion of evidence to determine the existence of abuse. The Opinion clarifies that there is no obligation to show its effects for a conduct

17 For more on the 'as-efficient competitor' test, see *Post Danmark I*, C–23/14, EU:C:2015:651, paragraphs 53–62. For some literature on the test, see: Raphaël de Coninck, 'The as-efficient competitor test: some practical considerations following the ECJ Intel judgment' [2018] *Competition Law & Policy Debate* 4, no. 2; Elisabeth de Ghellinck, 'The as-efficient-competitor test: necessary or sufficient to establish an abuse of dominant position?' [2016] *Journal of European Competition Law & Practice* 7, no. 8; Kai-Uwe Kühn and Marinova Miroslav, 'The role of the "as efficient competitor" test after the CJEU judgement in Intel' [2018] *Competition Law & Policy Debate* 4, no. 2.

18 This is a well-discussed concept in the case law. See, for example: Judgment of 9 November 1983 in *Michelin v Commission*, C–322/81, EU:C:1983:313, para. 57; Judgment of 16 March 2000 in *Compagnie Maritime Belge Transports and Others v Commission*, C–395/96 P, EU:C:2000:132, para. 37; Judgment of 9 September 2010, *Tomra Systems and Others v Commission*, T–155/06, ECR, EU:T:2010:370, para. 207, Judgment of 17 December 2003, *British Airways v Commission* of 17 December 2003, T–219/99, ECR, EU:T:2003:343, para. 242; Judgment of 7 October 1999, *Irish Sugar v Commission*, T–228/97, ECR, EU:T:1999:246, para. 112; and, in general cases, more recently in Judgment of 6 December 2012 in *AstraZeneca v Commission*, C–457/10 P, EU:C:2012:770, para. 105. See also Communication from the Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C 45/7, para. 1; Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart 2010), p. 31.

19 AG Rantos remarks on the ordoliberal influence when it comes to the importance of a market structure. As a side note, Ordoliberalism does not promote the protection of inefficient firms (some authors related to the Freiburg School might) – and here Rantos does not seem to argue to the contrary. Herrera Anchustegui has written on Ordoliberalism and Competition Law, for those interested in the topic see: Ignacio Herrera Anchustegui, **'**Competition Law through an Ordoliberal Lens' [2015] *Oslo Law Review*, Vol. 2, No.2. For other works on Ordoliberalism and competition law, see, inter alia: David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001); Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact upon EU Competition Law' [2014] 1/14 Europa-Kolleg Hamburg Discussion Paper, 1; Matthew Cole, 'Ordoliberalism and its Influence on EU Tying Law' [2015] 36 *European Competition Law Review*; Lisa L Gormsen, 'Article 82 EC: Where are we Coming from and Where are we Going to?' [206] *The Competition Law Review* 2.

20 See Judgment of 7 June 2006, *Österreichische Postsparkasse und Bank für Arbeit und Wirtschaft*, T–213/01 and T–214/01, EU:T:2006:151, paragraph 115.

21 This could be the case in buyer power scenarios, for example, as discussed in Ignacio Herrera Anchustegui, *Buyer Power in EU Competition Law* (Institut de Droit de la Concurrence – Concurrences 2017).

to be abusive – potential harm is sufficient but, as the case law confirms, it cannot be purely hypothetical.

The key factor is to demonstrate that the conduct is capable of restricting competition by excluding as efficient competitors. An absence of effects in the market may not necessarily mean that the conduct was not abusive (para. 117 onward). Conduct that has not resulted in any detectable effects can still be regarded as capable of restricting competition. However, the absence of effects over a sufficient period may make it reasonable to conclude that the 'practice was not even theoretically capable of harming competitors' (para. 119). Absence of effects may, however, be used to assess the gravity of the conduct and reduce the size of the fines to be imposed (para. 120). So – a yes but no, and be careful, regardless.

Fourth, the Opinion addresses whether intent plays a role in abuse cases. AG Rantos clarifies that abuse is an objective concept that may be triggered absent any fault (para. 127), so evidence of intent is not necessary.[23] However, evidence of intent may be a factor to help determine if abuse has taken place.[24] For AG Rantos, it is economic evidence that matters most as

> … 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. (para. 130)

Determining that there has been intent does not reverse the burden of proof. It is for competition authorities to prove the abusive nature of the conduct (para. 139).

## 4 Why this case took place in this sector and the importance of data

AG Rantos points out that using data to contact customers is nothing but defensive conduct by the ENEL Group in light of the market liberalisation. The Opinion puts forth that in principle this is an entirely normal practice – it is competition on the merits and one that its competitors would also engage in (para. 67). By and large we agree with this. Companies strive to keep clients to obtain revenue and profits, even former monopolists. Implementing business strategies, including the use of client data to retain a client base, would not in itself constitute abuse (para. 66).

However, the Opinion also stresses that not all measures may be a legitimate means of keeping customers. Competitive advantages (such as could be the case of a previous statutory monopoly, although not mentioned in the Opinion) must not be used if they are likely to have the effect of foreclosing rivals as efficient as the dominant undertaking (para. 69). The fact that a practice removes a competitor from the market is not sufficient for it to be abusive, however, even in newly liberalised markets.

As noted by Puscas, these passages concerning whether data use falls within the concept of competition on the merits or not are interesting.[25] While not necessarily novel (examples of the replicability test exist in merger control cases), the originality lies in the approach given to it by AG Rantos. The Opinion points in the direction that replicability tests follow the logic of the as-efficient competitor test outside price-related cases. The question is whether such a test deals with abstract replicability or the actual concrete ability to do such a test, and whether the test should include considering whether the dominant firm could have foreseen the ability of its rivals to do so.

The court in Luxembourg and the referring court in Italy have a challenge ahead: deciding whether access to captive/previous customers is an advantage derived from the previous statutory monopoly, and whether such advantage makes it impossible or very difficult to commercially replicate the data. AG Rantos argues that new providers can contact customers, and that electricity providers can find alternative ways to collect client data. Furthermore, being captive does not mean that customers are tied to the previous and monopolist service provider (para. 76). Thus, it seems from the Opinion that data sources for competitors were readily available. However, as clarified by AG Rantos, the fact that lists of data are available does not mean that is a decisive factor in exonerating a party from potential abuse of dominance (para. 80).

However, economically viable data replicability comes, in principle, within the scope of competition on the merits (para. 81). Here one wonders whether the fact that consumers are often not motivated enough to switch suppliers should also have been discussed in the Opinion as a risk inherent in these types of industries. Overall, this case highlights the importance of competition law as an additional tool to ensure competition in network-intensive sectors. Competition must not only be made possible (this being the main objective of regulatory law); it must be conducted on the merits (and that assessment may well lie outside the scope of regulatory law). However, this is the model adopted in Europe for the co-existence and co-application of sectoral regulation and

22 See Judgment of 15 March 2007, *British Airways*, C–95/04 P, EU:C:2007:166 paragraphs 106 and 107 and Judgment of 10 July 2014, *Telefónica and Telefónica de España*, C–295/12 P, EU:C:2014:2062, paragraph 124.

23 See Judgment of 19 April 2012, *Tomra Systems*, C–549/10 P, EU:C:2012:221, paragraph 21. On the concept of abuse in general see: Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*. (Bloomsbury Publishing, 2012); Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *Abuse of Dominance in EU Competition Law: Emerging Trends* (Edward Elgar 2017); Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart 2010).

24 See Judgment of 19 April 2012, *Tomra Systems*, C–549/10 P, EU:C:2012:221, paragraphs 18 and 19 and Judgment of 30 January 2020, *Generics (UK) and Others*, C–307/18, EU:C:2020:52, paragraphs 162 and 164.

25 Carmen Puscas, 'AG Rantos: What is the Legal Framework for Analysing Data Leveraging Abuses under Article 102 TFEU?' (3 January 2022), available at: http://competitionlawblog.kluwercompetitionlaw.com/2022/01/03/ag-rantos-what-is-the-legal-framework-for-analysing-data-leveraging-abuses-under-article-102-tfeu/.

competition law.[26] This 'division of tasks' is all the more important when the conduct that takes place is novel – in this case, the use of personal data to 'secure' clients – and/or when it does not relate to pricing.

## 5 More than a special responsibility and the notion of equal footing?

In paragraph 60, AG Rantos stresses that 'inheriting' a dominant position does not preclude the need to assume a special responsibility in the market. This is uncontroversial. The Opinion emphasises that the same applies to operators with a *public service obligation* (electricity providers, transmission operators, and energy distributors).[27] Should we question whether an inherited monopoly 'graced' with a pre-competition advantage (here the previously captive customers) is expected to discharge an even higher level of special responsibility? AG Rantos' Opinion points to the contrary. The Opinion stresses that even incumbents:

> … 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. (para. 66)

What a legacy monopolist should avoid, according to the Opinion, is compartmentalising the market and it should not adopt conduct that may foreclose as efficient competitors. In the words of AG Rantos,

> 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. (para. 67)

However, for AG Rantos, even if the incumbency advantages might make it impossible for competitors to replicate a similar strategy (because they did not have the monopoly), this does not preclude competitors from using customer lists available in the market, similar to those lists put together by the Enel Group.

Thus, former national monopolies are entitled to fight for their previous consumers and keep them, based on competition on the merits. They are not expected to play less hardball when competing in newly liberalised markets, even if they have a public service obligation or prior advantage.

## 6 Parent liability: food for thought for Vertically Integrated Utilities (VIUs)?

The Opinion also sheds light on the concept of parent liability in competition law.[28] Enel has traditionally been organised as a vertically integrated undertaking (VIU) with a monopoly in the generation and distribution markets (para. 11).

AG Rantos clarifies that an undertaking designates an economic unit (para. 146).[29] An economic unit may be aligned (but is not necessarily so) with a sole natural or legal person; several persons may jointly be an economic unit. Based on this, a person within an economic unit may be held personally, jointly and severally liable for the anticompetitive conduct of another person in the entity (para. 147).[30] A parent company, ENEL SpA, may be imputed with the subsidiary's conduct if the latter is not able to determine its business activity independently. If owned in whole by the parent company, there is a rebuttable presumption of decisive influence from the parent to the subsidiary without requiring further evidence (para. 155).[31] Rebuttal of this presumption would require that the parent company provides evidence of independent behaviour by the subsidiary.[32]

In the energy sector, one could readily assume that a case entails a vertically integrated group or a vertically integrated undertaking (encompassing production, transmission, and distribution of energy), the target of

26 The discussion between the concomitant application of competition and regulatory law from a comparative perspective is an interesting issue. One of us has written about it regarding the electricity sector here: Ignacio Herrera Anchustegui, 'Transmission Networks in Electricity Competition: Third-Party Access and Unbundling – a Transatlantic Perspective (Acceso a las Redes de Transmisión de Electricidad y Separación Efectiva: Una Perspectiva Transatlántica)', in Juan Ignacio Ruiz Peris and Carmen Cerdá Martínez-Pujalte (eds), *Competencia en mercados con recursos esenciales compartidos: telecomunicaciones y energía* (Thomson-Aranzadi, 2019). In the US see: *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

27 Article 9 of the Electricity Directive allows Member States to 'impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including the security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection': Directive (EU) 2019/944 on common rules for the internal market for electricity (OJ [2019] L 158/125).

28 For some literature on this see, inter alia: Andriani Kalintiri, 'Revisiting parental liability in EU competition law' [2018] *European Law Review* 43, no. 2; Paul Hughes, 'Competition Law Enforcement and Corporate Group Liability – Adjusting the Veil' [2014] *European Competition Law Review* 35, no. 2; Alison Jones, 'The boundaries of an undertaking in EU competition law' [2012] *European Competition Journal* 8, no. 2.

29 See Judgment of 25 March 2021, *Deutsche Telekom II*, C–152/19 P, EU:C:2021:238, paragraph 73 and the case law cited. Discussing the concept of a single economic entity see: Okeoghene Odudu and David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' [2014] 51 *Common Market Law Review*; Carsten Koenig, 'An economic analysis of the single economic entity doctrine in EU competition law' [2017] *Journal of Competition Law & Economics* 13, no. 2.

30 See Judgment of 15 April 2021, *Italmobiliare and Others*, C–694/19 P, not published, EU:C:2021:286, paragraph 54 and the case law cited; Judgment of 14 July 1972, *Imperial Chemical Industries*, 48/69, EU:C:1972:70, paragraph 140; and Judgment of 25 March 2021, *Deutsche Telekom II*, C–152/19 P, EU:C:2021:238, paragraph 140.

31 See Judgment of 13 September 2013, *Total Raffinage Marketing*, T–566/08, EU:T:2013:423, paragraph 496.

32 Ibid., paragraph 511.

unbundling rules in EU energy law. Unbundling seeks to prevent possible competition distortions typically arising from the control over the network (transmission and/or distribution) for generators. Denying access or only allowing it under less favourable conditions (such as in a margin-squeeze scenario) confers a competitive advantage on an undertaking producing energy.

However, the current Enel Group and the parties involved have a different structure. Servizio Elettrico Nazionale SpA and Enel Energia SpA supplied electricity to two types of consumers. Servizio Elettrico Nazionale SpA provided electricity to regulated, 'captive' customers, whereas Enel Energia SpA had to fight for customers in the liberalised market.

In the case of a VIU, could an allegation such as this one related to the transfer of data to prevent the loss of formerly captive consumers take place? In principle, strict unbundling rules would rule out parental liability, as they create an obligation of independence between the members of a single entity (if vertically integrated). If full or ownership divestiture had taken place, then the kind of conduct that took place in this case would not have arisen or only if there had been an agreement between undertakings. This is the theory, however. Servizio Elettrico Nazionale serves as a reminder of the risks accompanying vertical integration, and Independent Transmission Operator (ITO) and Independent Transmission Operator + (ITO+) unbundled entities ought to read the case carefully.[33] Partial unbundling might not suffice to address competition concerns beyond the scope of regulatory law. This is particularly the case regarding the unbundling of energy distribution networks in which data sharing might be more of an issue than is the case under the stricter unbundling rules for transmission networks. Full 'ownership' unbundling is of course unusual outside the field of energy network regulation.

## 7 Some final thoughts

The Opinion of AG Rantos in Servizio Elettrico Nazionale clarifies several points concerning the concept of abuse in EU competition law, and more particularly regarding the use of data in exclusionary cases. At the same time, the AG uses broad, conceptual language that might be hard to apply in practice. Will the ECJ render a more 'practical' answer to the referring court?

By and large, the Opinion adopts a 'more economic approach' to the concept of abuse and it seeks to bridge the gap between pricing and non-pricing abuses. AG Rantos' Opinion offers an important benchmark for Article 102 cases: in the case of it being possible for an as efficient competitor to replicate or imitate a particular practice, no anticompetitive conduct may be ascertained on the part of an incumbent in a liberalised market. In this case it is for the ECJ to determine whether data replicability is a critical factor of the matter and whether it is necessary to determine how as efficient competitors may use data from other sources to compete on an equal footing with the dominant firm.[34]

The Opinion does not address whether data sharing practice could have been actionable under the prohibition of anticompetitive agreements under Article 101 TFEU in addition to the discussion regarding a possible abuse of dominance. The question is relevant as economic operators, even if they form part of a vertically integrated undertaking, are to be treated as independent actors. Would such data exchanges, therefore, constitute vertical and/or horizontal anticompetitive agreements?

The Opinion gives further conceptual clarity to regulated industries. AG Rantos raises the importance of ensuring that all entities operate *on an equal footing* in a liberalised market (para. 64). Even in cases of a former incumbent or legacy monopoly there is no reason why AG Rantos' reasoning cannot apply to data leveraging by any firm found to be dominant in one market in order to gain a position in an adjacent market.

While the case revisits the well-worn topic of striking the right balance between liberalisation and competition, adding access to data as a new twist, it also leaves the door open for further discussion of important issues for EU competition policy in general. It is still to be decided by the national courts (at the Italian level) if the practices (condemned by the Italian NCA) by the Enel Group effectively limited the data available to competitors in the free market, foreclosing them as efficient competitors to the ultimate detriment of competition and the welfare of consumers.

Furthermore, and more generally, how do we establish parameters for courts to determine what constitutes competition on the merits? Is this left to economic analysis on a case-by-case basis or are there clearer and more predictable indicators? What sort of behaviour and context are relevant in this assessment of the conduct? What role should incumbency and the advantages derived from 'inheriting' a protected monopoly play in the assessment of competition and determining who is an as efficient competitor? On what basis do we evaluate the transfer of customer lists and data from the regulated market to the free market? What would happen if the customer lists prepared by the former incumbent (SEN) were made available in a non-discriminatory manner to competitors? How would courts evaluate whether there was no incumbent advantage even if it was possible to duplicate these SEN lists with telemarketing databases, for example? Perhaps some of these difficult-to-answer issues will be addressed by the ECJ in the months to come. We will stay tuned.

33 The rules concerning unbundling of electricity transmission systems and transmission system operators that applied at the time are spelled out in Article 9 of the Directive 2009/72 concerning common rules for the internal market in electricity, OJ (2009) L 211/55. This Directive has been repealed by Directive 2019/944 on common rules for the internal market for electricity in which the unbundling rules remain mostly unaltered, OJ (2019) L 158/125.

34 Carmen Puscas, 'AG Rantos: What is the Legal Framework for Analysing Data Leveraging Abuses under Article 102 TFEU?' (3 January 2022), available at: http://competitionlawblog.kluwercompetitionlaw.com/2022/01/03/ag-rantos-what-is-the-legal-framework-for-analysing-data-leveraging-abuses-under-article-102-tfeu/.