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THE «CLEAR OBSCURITY» STRIKES BACK: THE APPLICATION OF ARTICLES 102 AND 106(1) TFEU ACCORDING TO THE OPINION OF ADVOCATE GENERAL WAHL IN THE GULLOTTA CASE

Introduction

The opinion issued by Advocate General Wahl (hereinafter, the "AG") in the Gullotta case (C-497/12, not yet available in English) deserves attention for several reasons. Many of them refer to the sort of «disappointed guidance» that the AG provides to national courts (and particularly to the Tribunale Amministrativo Regionale per la Sicilia – hereinafter, the "TAR") with regard to the correct formulation of references for preliminary rulings *ex* art. 267 TFEU.

This entry aims at analysing a specific aspect touched upon in the opinion, *i.e.* the issue of the correct interpretation of Article 106(1) TFEU when applied in combination with Article 102 TFEU. The occasion is provided by the third question referred by the TAR to the European Court of Justice (hereinafter, the "ECJ"), according to which the latter must establish whether such provisions could preclude a national legal regime reserving, inter alia, the right to sell Class-C medicines to pharmacies (thus banning para-pharmacies from this market).

The twofold nature of Article 106(1) TFEU: between national sovereignty and competition

Notwithstanding its position among the competition rules applicable to undertakings, Article 106(1) TFEU is addressed primarily to Member States. Indeed, such provision prohibits – both the adoption and the maintenance in force of – any national measure contrary to any rule contained in the Treaties, when it comes to undertakings that are either controlled by a public authority, or bear special and exclusive rights (hereinafter, the "privileged undertakings"). In other words, Article 106(1) TFEU acknowledges that the Treaties do not preclude Member States from setting up companies and from conferring them privileges, but then clarifies that these instances shall not conflict with the Treaties themselves.

Accordingly, Article 106(1) TFEU can be defined as a so-called reference provision: it is not self-contained, and cannot be applied alone. In order to breach Article 106(1) TFEU, the national measure at stake should infringe another provision of the Treaties. One may then argue that Article 106(1) TFEU simply echoes the duty of loyal cooperation enshrined in Article 4(3) TEU, and merely reminds Member States that they shall comply with the Treaties. However, one should further consider that not every Treaties' provision is actually addressed to Member States. For example, competition rules refer

only to anticompetitive behaviours performed by one or more undertakings, and usually not to Member States' acts. When applied in combination with Articles 101 or 102 TFEU, Article 106(1) TFEU therefore extends to Member States the binding force of antitrust provisions. In other words, it prohibits – the adoption and the maintenance in force of – national measures contrary to rules that are *per se* addressed only to economic operators and would not otherwise cover national legislative or regulatory acts.

Such dichotomy between public and private has further consequences within the context of Article 106(1) TFEU. Indeed, such provision is strictly connected with the (very broad) issue of the definition of the appropriate place for State intervention in the economy. A question that in the EU legal order is tackled also by Article 345 TFEU, a rule that offers to Member States another viable legal basis to create public enterprises. More precisely, Article 106(1) TFEU tries to strike a balance between two opposite goals: on the one hand, the EU's interest to obtain national markets integration and liberalisation; on the other hand, the Member States' interest to retain a certain degree of national sovereignty in the economic field.

The ECJ's approach to Articles 106(1) and 102 TFEU: from Sacchi…

Quite unsurprisingly, the twofold nature of Article 106(1) TFEU influences (and complicates) its interpretation and practical application, especially when it comes to its relation with Article 102 TFEU. The jurisprudence has tackled this issue in several occasions, underlining the contradictory nature (the «clear obscurity», according to AG Tesauro; see immediately *infra*) of such provision. The main reason is «the objective difficulty of reconciling the actual idea of a monopoly or undertaking holding exclusive rights with a system of free competition and a common market» (AG Tesauro, Terminal equipment for telecommunications, C-202/88 § 11). To be sure, a market based on competition is at odds with not only monopolies and privileges, but also with a high level of state involvement in the industry. Indeed, the role played by the state in the economy poses an even greater threat to competition than the one played by economic operators, mainly because the former usually pursues general objectives and policies that may be incompatible with the free market rationale.

The ECJ's approach has dramatically changed over time, passing from one side to the other (*i.e.*, from ensuring Member States' economic sovereignty to fostering competition and liberalisation). The starting point is represented by the Sacchi judgment, where privileges and public monopolies have not been considered *per se* incompatible with Articles 102 and 106(1) TFEU (155/73 § 14). Although the «Sacchi formula» has ever since been repeated (the AG Wahl's opinion makes no exception: § 84), such statement has become a sort of *clause de style*. Indeed, the more recent jurisprudence has completely reversed the presumption of the legitimacy of public monopolies and privileged undertakings. In the light of the above, it is not surprising that the shift begun to occur in the aftermath of the Single European Act, when the EU Commission was beginning to elaborate its wide programme of Member States' economies liberalisation.

As a first step, the ECJ has begun to consider incompatible with Article 102 and 106(1) TFEU those national measures that *compel* privileged undertakings to abuse their dominant position (*i.e.*, to

behave in a way that would be illegitimate under Article 102 TFEU if done voluntarily by an «ordinary» undertaking). For example, this happens if a national measure forces the privileged undertaking to impose unfair prices or other trading conditions (Corsica ferries, C-18/93). At a later stage, Articles 102 and 106(1) TFEU begun to be applied also to national measures that – do not compel but – *merely induce* public or privileged undertakings to abuse their dominant position, simply by exercising their special rights. For example, this happens when (*i*) privileged undertakings are not able to satisfy the existing demand in their «protected market» (Höfner, C-41/90), or when (*ii*) Member States couple the granting of a privilege with the conferral of regulatory powers, creating a conflict of interest for the privileged undertaking (GB-Inno, C-18/88).

… to DEI (and from the so-called «behaviour theory» to the «effects theory»)

The ECJ's case law has gone even further within the shaping of a market-based approach to Article 102 and 106(1) TFEU. The bottom line is that such dispositions may apply even in the absence of any abuse of the privileged undertakings. Accordingly, it has been held that national measures are prohibited even if they simply *give rise to a risk* of a potential abuse of a dominant position (MOTOE, C-49/07 § 50). The preference for *laissez-faire* and free market over Member States' intervention in the economic is even clearer in the recent Greek lignite case (DEI, C-553/12), where the ECJ has further lowered the threshold of competitive distortion required to apply Articles 102 and 106(1) TFEU.

In such case, the ECJ confirms that, to assess whether an infringement of such disposition has occurred, it is irrelevant to consider if the privileged undertaking has actually committed, or may be induced to commit, any conduct prohibited under Article 102 TFEU (DEI § 41). However, the ECJ further clarifies that it is irrelevant as well to identify the (purely) hypothetical abuse that the national measure may have induced the undertaking to commit. Rather, it suffices that a potential *anticompetitive consequence* is liable to result from the national measure at stake (DEI § 46). A condition that is affirmed (for the first time not as a mere *obiter dictum*, but as the only *ratio decidendi* of the case) to be fulfilled when a national measure is liable to affect the structure of the market, merely by creating an *inequality of opportunities* between economic operators in a given market (DEI § 46). In other words, an *abusive behaviour* (neither actual or potential – DEI § 47) of the privileged undertaking is no longer required to trigger the application of Articles 102 and 106(1) TFEU; all that is necessary is that the national measure has an anticompetitive *effect* on the market.

Arguably, such endorsement of the ECJ for the so-called «effects theory» over the opposite «behaviour theory» (AG Wathelet opinion in DEI § 42) seems to reduce in an inappropriate manner the place for Member States' intervention in the economy. Indeed, given that the conferral of special or exclusive rights (not to mention the creation of public monopolies) seems to inherently alter the opportunities between operators in favour of the privileged undertakings, one may even argue that the DEI judgment may have the effect of implicitly repeal Article 106(1) TFEU. If the above assumptions were correct, this would mean that Member States are nowadays free to «get away» from competition rules only within the limited exceptions provided by Article 106(2) TFEU with regard to the services of general economic interest. In turn, if national laws and regulations cannot restrict competition (*rectius*, cannot affect the structure of the market, by creating an inequality of opportunities between

undertakings), Member States would have basically lost their sovereign powers within the economic sphere, for the benefit of the EU Commission.

The AG Wahl opinion in the Gullotta case

As mentioned above, the Gullotta case deals with the Italian legal regime reserving, inter alia, the right to sell Class-C medicines to pharmacies, and therefore banning para-pharmacies from this economic activity. In order to evaluate the compatibility of such regime with Articles 102 and 106(1) TFEU, the AG affirms that, according to the case law, an infringement of such provisions occurs in two circumstances. On the one hand, this happens when national measures create a situation where privileged undertakings, merely by exercising their special rights, are led to abuse their dominant position; on the other hand, when those special rights are liable to create a situation where that undertakings are led to commit such abuses (§ 81). In the AG's mind, the question referred is therefore either inadmissible (§ 82) and without merit (§ 86) precisely because the TAR has not indicated how the legal regime under scrutiny could led the pharmacies to abuse their dominant position pursuant to the exercise of their special rights.

Interestingly enough, the AG suggests that such approach has been followed by the ECJ also in the DEI judgment (§ 81). Quite to the opposite, as we have explained above, the interpretation proposed by the AG represents the traditional approach to Articles 102 and 106 TFEU. An approach that, after having represented the standard of application of such provisions for many years, it has been abandoned by the ECJ precisely in the DEI case.

Conclusive remarks: a step back in the course of the process of sovereignty's transfer from Member States to the EU Commission?

If one applies the «DEI formula» to the facts of the Gullotta case, a breach of Articles 102 and 106(1) TFEU is quite straightforward. Indeed, it is hard to hold that the legal regime at stake does not alter the equality of opportunities between pharmacies and para-pharmacies. The second category of economic operators is simply banned from the market. Moreover, according to DEI, there is no need to prove any further conduct of the privileged undertakings, or any actual or potential abuse of their dominant position pursuant to their special rights.

One can therefore wonder why the AG has expressly mentioned the DEI judgment while following the traditional and more restrictive approach to Article 102 and 106(1) TFEU. This question seems to be explainable in two opposite ways. On the one hand, one may believe that such «incongruity» is unintentional: becoming one of the victims of the «clear obscurity» of Article 106 TFEU, the AG may have misunderstood the meaning of the DEI judgment. However, it seems quite unlikely that the AG has actually committed such an error.

On the other hand, one can then assume that the AG was well aware of the far-reaching implications of the DEI judgement, but has nevertheless decided to follow this pattern. If this is the case, the «inaccuracy» can be seen in a whole new light: indeed, quoting a «revolutionary» case as if it has confirmed the traditional approach is arguably one of the best ways to try to step back from the initial

revirement.This is even truer if one does so in the very first occasion in which the innovative judgement can be interpreted, as it happened in Gullotta.

If the above supposition were correct (and thus the opinion actually represents a prompt attempt to reduce the scope of the DEI judgment), one should further infer that the AG considers the «DEI formula» too broad, and has therefore tried to restore an appropriate place for the intervention of national governments and authorities in the economy. We prefer to – at least – believe that this is the case here.

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