Briefing

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Post Danmark II: Does this signal the end of the 'as efficient competitor' test?



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The ECJ has recently confirmed in its Post Danmark II preliminary ruling that the application of the as 'efficient competitor' test (**AEC**) to determine whether or not particular behaviours would drive an as-efficient-competitor out of the market is **not a necessary pre-condition** to finding that a rebate is anti-competitive and therefore illegal.[1] Whilst the ECJ's judgement is restricted to rebates, the opinion of the Advocate General on this case provides fertile ground for lawyers looking to exclude the application of the AEC test in a far wider range of exclusionary price abuses.

Post Danmark and the Retroactive Rebate Scheme

The ECJ handed down its decision in response to a preliminary ruling request from the Danish court in respect of rebates offered by Post Danmark, the Danish postal incumbent. Post Danmark had been operating a retroactive rebate scheme to all customers covering all types of mail including those that were contestable and non-contestable. The Danish Competition Council had found that Post Danmark had abused its dominant position on this market by virtue of these rebates which had the effect of tying customers and foreclosing the market, with no evidence of an objective economic justification. The case was referred to the ECJ for a preliminary ruling to clarify the criteria that are to be applied in order to determine whether a rebate scheme is liable to have an exclusionary effect on the market and thus be unlawful, in particular whether it was a legal requirement to apply the AEC test and whether the exclusionary effect of a rebate scheme must exceed some form of appreciability (de minimis) threshold in order for it to be classified as anti-competitive.

The Preliminary Ruling of the ECJ

The ECJ looked at the type of rebate scheme operated by Post Danmark and said that it had what it called a *"suction effect"*. By this, they meant that the scheme had a strong incentive effect on customers to obtain all or a substantial proportion of their supplies from Post Danmark thus reducing significantly customers' freedom of choice as to their supplier.

In assessing the legality of such a rebate, the ECJ said that authorities needed to examine "all the circumstances" of the case, particularly the criteria and rules governing the grant of the rebate, the extent of the dominant position of the undertaking concerned and the particular conditions of competition that existed on the market. It said that a rebate scheme that covered a majority of the customers on the market was not in itself conclusive evidence of abusive conduct but that it may constitute a useful indication as to the extent of the practice and the impact on the market and the likelihood of an anti-competitive exclusionary effect. The ECJ also said that the mere fact that a rebate scheme is not discriminatory does not preclude it from being regarded as capable of producing an exclusionary effect on the market. A scheme that applies to all customers can equally be as abusive as one that applies to specific categories of customers. Finally, the ECJ also said that it was not necessary to set an appreciability (de Minimis) threshold of harm. The ECJ concluded that the only necessary element is that the anti-competitive effect of a rebate scheme operated by

a dominant undertaking must be probable; there is no need to show that it is of a serious or appreciable nature.

On the application of the AEC test, the ECJ noted that there is no legal obligation on the authorities to apply the AEC test in order to find that a rebate is abusive. The test is merely one tool amongst many that competition authorities could apply for the purposes of assessing whether there was an abuse of a dominant position.

The ECJ also said that in this particular case, where Post Danmark held a very large market share and had structural advantages conferred by its statutory monopoly which provided it with exclusive rights over around 70% of mail on the relevant market, the AEC test was probably irrelevant in practice. This was because the market structure in Denmark was unlikely to accommodate the existence of an "as-efficient-competitor".

The ECJ in its judgement accepted the overall principle from the Advocate General's (AG) opinion that the AEC test is not a legal precondition for rebates. What is more interesting to consider, however, is what the ECJ has chosen to ignore from the opinion.

The Advocate General's Opinion

The Advocate General in the introduction to her opinion begins by suggesting that the decision in this case as to whether it is legally necessary in assessing the anti-competitiveness of rebate schemes to consider an AEC test and whether the exclusionary effect of the scheme must exceed some form of appreciability threshold, was particulary timely.

She referenced a growing clamour for European competition law to rely more on an economic approach and states that the Court's decision **is likely to have a signal effect that will extend well beyond the current case** and accordingly the court must not be unduly influenced by the zeitgeist of current thinking or ephemeral trends.

The AG addressed the issue of the AEC in respect of price based exclusionary abuses and refers to the Commission's communication on enforcement priorities and the fact that the Commission says it will:

> "Normally intervene against price based exclusionary conduct only where the conduct concerned has already been or is capable of hampering competition from competitors considered to be as efficient as the dominant undertaking."[2]

She refers to the fact that such an administrative practice is not binding on the national competition authorities or the courts and says:

"Although the national authorities themselves are not precluded from following the Commission's example and using the AEC test, they are none the less from a legal point of view, bound only by the requirements arising from Article 82 EC."[3]

She then says that Article 82 EC does not support the inference that there is the legal obligation to base a finding that a rebate scheme operated by a dominant undertaking is abusive on a price/cost analysis, such as the AEC test.

She refers to the fact that the Court previously has called for an AEC test to be carried out in connection with other pricing practices but says referring to previous case law:

> "That case-law does not support the inference of an absolute requirement always to carry out an AEC test for the purposes of assessing price-based exclusionary conduct from the point of view of competition law."[4]

The AG goes on to say that:

> "The form of words chosen by the Court, 'among other things' ... makes it clear that it cannot always be assumed that an abuse of a dominant position exists only where the exclusionary effect is felt by undertakings which are as efficient as the dominant undertaking."[5]

She then goes on to say:

> "It would of course not be inconceivable, in theory to make a finding of price based exclusionary conduct routinely conditional on the carrying out of an AEC test and therefore to prescribe such a test in the case of rebate schemes operated by dominant undertakings. However such a reorientation of the case law concerning Article 82 EC warrants some scepticism."[6]

She argues that:

> "The added value of expensive economic analyses is not always apparent and can lead to the disproportionate use of the resources of the competition authorities and the courts"[7] and that "it is wrong to suppose that the issue of price based exclusionary conduct can be managed simply and in such a way as to ensure legal certainty by applying some form of mathematical formula based on nothing more than the price and cost components of the businesses of the undertakings concerned."[8]

She finally concludes her assessment by saying:

> "If the abusive nature of the rebate scheme operated by a dominant undertaking is immediately shown by an overall assessment of the other circumstances of the individual case ... there is no need, from a legal point of view to carry out a price/cost analysis such as an AEC test.[9]

> "It follows a *fortiori* that Article 82 EC is not capable of giving rise to a legal obligation to carry out an AEC test, where because of the way in which the market is structured it is impossible for another undertaking to be as efficient as the dominant undertaking."[10]

The End of an Economist Driven Competition Regime?

It is clear that despite the ECJ not picking up on these wider comments of the AG, competition lawyers as opposed to competition economists will do so and will argue that Article 82 EC does not require the use of an AEC test in other cases of exclusionary price abuse. Could the case of Post Danmark II therefore signal the high water mark of economist driven competition rules?

References

1. C-23/14 Post Danmark A/S v Konkurrenceradet, (Judgement of the Court)
2. Opinion of Advocate General Kokott 2 Post Danmark A/S Case C2-23/14, para 59
3. Id, para 60
4. Id,para 63
5. Ibid
6. Id,para 65
7. Id, para 66
8. Id, para 67
9. Id, para 70
10. Id, para 71