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Post Danmark II: An ‘Evolution’ Rather Than a ‘Revolution’ in the Assessment of Rebates

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The EU Court of Justice has handed down its much-awaited preliminary ruling in *Post Danmark II*.¹ This ruling marks an ‘evolution’ rather than a ‘revolution’ in the assessment of rebates under Article 102 TFEU. While regrettably unclear in certain passages, some aspects of the Court of Justice’s assessment are welcome in an area where the EU case law has been very formalistic and divorced from commercial reality.

Background

At the relevant time, Post Danmark, a state-controlled company, was the universal service provider of postal services in Denmark and enjoyed a statutory monopoly on the distribution of letters weighing up to 50 grams, including certain direct advertising mail.²

Post Danmark implemented a rebate scheme in respect of direct advertising mail. The rebate scale was standardized: all customers were entitled to receive the same rebate on the basis of their aggregate purchases over an annual reference period. The rebates were conditional: Post Danmark and its customers concluded agreements at the beginning of the year, in which estimated quantities of mailings for that year were set out. At the end of the year, Post Danmark adjusted the discounts where the quantities presented were not the same as those that had been estimated initially. The rebates were retroactive: where the threshold of mailings initially set was exceeded, the rebate rate applied to all mailings presented during the year and not only to mailings exceeding the estimated threshold initially set.

¹ Case C-23/14 *Post Danmark A/S v Konkurrencerådet* EU:C:2015:651. The case is commonly known as *Post Danmark II* as in 2012 the Court of Justice ruled in another dispute involving the same parties.

² Direct advertising mail consists in the distribution, in the context of marketing campaigns, of advertising mail of uniform content bearing the address of the addressee.

In 2007, Bring Citymail Danmark AS ('Bring Citymail') entered the market. Three years later, having suffered heavy losses, it withdrew. Following a complaint lodged by Bring Citymail, the Danish competition authority found that Post Danmark had abused its dominant position by granting rebates in respect of direct advertising mail. Post Danmark appealed the decision. It is in this context that a Danish court requested a preliminary ruling from the Court of Justice.³

Rebate Scheme Capable of Having an Exclusionary Effect Contrary to Article 102 TFEU

The first question submitted to the Court of Justice concerned the criteria to be applied in order to determine whether a rebate scheme, such as that at issue in the main proceedings, is liable to have an exclusionary effect contrary to Article 102 TFEU.

Nature of the Rebate

Before addressing the question, the Court of Justice considered the nature of the rebate. Perhaps inadvertently, it introduced a potentially significant change in EU competition law by identifying three categories of rebates:

- Quantity discounts linked solely to the volume of purchases which are not in principle liable to infringe Article 102 TFEU;
- "Loyalty rebates," which by offering customers financial advantages tend "*to prevent them from obtaining all or most of their requirements from competing manufacturers.*"⁴ The Court of Justice stated summarily that those rebates amount to an abuse of dominance; and
- Other rebates such as those at issue which (i) cannot be regarded as a simple quantity rebates linked solely to the volume of purchases and (ii) are not coupled with an obligation (or promise) to obtain all or a given proportion of supplies from the dominant company.

Traditionally, the case law has sought to determine whether a rebate scheme could be considered to be "fidelity-building" or "loyalty-enhancing," with a safe-harbor for standardized purely volume-based incremental rebates. In *Intel*⁵, the General Court took a particularly formalistic and strict approach to so-called "exclusivity rebates." Although the language used in *Post Danmark II* to describe the third category of rebates is based on the traditional case law⁶, the Court of Justice arguably promotes a more effects-based assessment. This is a welcome development at a time when the effects-based approach promoted by the Commission's Guidance Paper⁷ is at the heart of a lively debate over the legal standard that should apply to rebates.

³ In a preliminary ruling, the Court of Justice provides its interpretation of the applicable principles of EU law. It is then for the referring court to apply those to the case at hand.

⁴ *Post Danmark II*, para. 27. It should be noted that, elsewhere in the ruling, the Court of Justice refers to loyalty rebates as rebates that lead to customers buying all or a certain share from the dominant company.

⁵ Case T-286/09 *Intel v Commission* EU:T:2014:547. The judgment is currently under appeal before the Court of Justice.

⁶ *Post Danmark II*, paras 29 and 31.

⁷ Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings ('Guidance Paper') [OJ] C 45, 24 February 2009, p. 7-20. The Court of Justice notes in *Post Danmark II* that this guidance paper is not binding on national competition authorities and courts.

Assessment of the Effects of the Rebate

In order to determine whether a company has abused its dominant position by applying a rebate scheme such as that at issue in the main proceedings, and drawing heavily on the traditional case law⁸, the Court of Justice held it is necessary to:

- Consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market; and
- Investigate whether, in providing an advantage not based on an economic service justifying it, the rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market or to strengthen the dominant position by distorting competition.

In that context, the Court of Justice instructed the referring court to examine whether, considering all the circumstances, Post Danmark's rebate scheme was likely to produce an exclusionary effect.⁹ Regrettably, the Court of Justice failed to provide the referring court with any clear guidance, other than stating the retroactive nature of the rebate scheme and the year ("relatively long") reference period are to be taken into account in assessing the likely effects of the rebate scheme.

Criteria and Rules Governing the Grant of the Rebate

Looking at the criteria and rules governing the grant of the rebate, the Court of Justice noted in particular that:

- The contractual obligations of the customers of the dominant company and the pressure exerted upon them may be particularly strong where the rebate is retroactive.¹⁰
- Any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing the pressure on the buyer to reach the purchase figure needed to obtain the discount and to avoid suffering the expected loss for the entire period.¹¹

Post Danmark's Dominant Position and the Conditions of Competition

The Court of Justice then considered Post Danmark's dominant position and looked into the conditions of competition.

The Court of Justice first observed that Post Danmark held a share of 95% on the relevant market, access to which was protected by high barriers and which market was characterized by the existence of significant economies of scale.¹²

⁸ Case C-95/04 P *British Airways v Commission* EU:C:2007:166; Case C-549/10 P *Tomra Systems and Others v Commission* ('*Tomra Systems*') EU:C:2012:221.

⁹ That is to say whether these rebates are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners.

¹⁰ *Post Danmark II*, para. 33.

¹¹ *Post Danmark II*, para. 34.

¹² *Post Danmark II*, para. 39.

Other market features were of importance: Post Danmark enjoyed structural advantages (conferred, inter alia, by its statutory monopoly) and unique geographical coverage encompassing all of Denmark.¹³

The Court of Justice noted that “[b]y reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market.” The Court of Justice’s drafting on this point is unfortunate. The apparent link between the “significantly higher market share” and being an “unavoidable business partner” does not explicitly identify other factors of the case (i.e. those set out above and identified by the Court of Justice in the paragraph immediately preceding this statement) that one assumes the Court of Justice must have taken into account. Also, it must be borne in mind that Post Danmark’s market share of the “bulk mail” market was 95% (at its lowest point) and Post Danmark benefitted from a legal monopoly in respect of 70% of that market.

The Rebate Scheme Applies to the Majority of Customers on the Market

The referring court also inquired about the relevance to be attached, in the assessment of rebates, to the fact that the rebate scheme implemented by Post Danmark applied to the majority of customers on the market.¹⁴ The Court of Justice held that while this fact did not, in itself, constitute evidence of abusive conduct by that company,¹⁵ it could be a “useful indication” as to the extent of that conduct and its impact on the market, which may ultimately support the likelihood of an anti-competitive exclusionary effect.¹⁶ Thus, the Court of Justice appears to underline the importance of establishing an anti-competitive effect.

Objective Justification

Finally, the Court of Justice reminded the referring court that should it find actual or likely anti-competitive foreclosure effects attributable to the rebate scheme operated by Post Danmark, it remains entitled to provide objective justification for its behavior. It may in particular demonstrate that the exclusionary effect arising from its conduct may be counterbalanced by advantages in terms of efficiency which also benefit the consumer.

Relevance to be Attached to the As-Efficient-Competitor Test in Assessing a Rebate Scheme

The referring court wished to clarify the relevance to be attached to the as-efficient-competitor test in assessing a rebate scheme under Article 102 TFEU.

In 2009, the Commission issued the Guidance Paper setting out the approach that the Commission will adopt in its prioritization and assessment of Article 102 cases.¹⁷ The Guidance Paper refers to the as-efficient-competitor test as a central aspect for assessing conduct that may lead to anti-competitive foreclosure. This test consists in examining whether the pricing practices of a dominant undertaking would be likely to drive an equally efficient competitor from the market. It has been applied by the EU Courts to selective price cuts, predatory pricing and margin squeeze.¹⁸

¹³ *Post Danmark II*, para. 39.

¹⁴ *Post Danmark II*, para. 43.

¹⁵ *Post Danmark II*, para. 44.

¹⁶ *Post Danmark II*, para. 46.

¹⁷ For example, the press release that accompanied the adoption of the Guidance Paper stated that “[t]he guidance paper outlines the analytical framework that the Commission employs when assessing the most commonly encountered forms of exclusionary conduct, such as exclusive dealing, rebates, tying and bundling, predatory practices, refusal to supply and margin squeeze) [...] The Commission will fully apply the approach set out above to future cases” (IP/08/1877).

¹⁸ *Post Danmark II*, para. 55.

In *Post Danmark II*, the Court of Justice held that it was not possible to infer from Article 102 TFEU that “*there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test.*”¹⁹ Nevertheless, according to the Court of Justice, the as-efficient-competitor test is to be considered as “*one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.*”²⁰ This is, to the best of our knowledge, the first time that the Court of Justice has recognized the relevance of the “as efficient competitor” test in an Article 102 rebates case. Looking at the dispute at hand, the Court of Justice observed that applying the as-efficient-competitor test would be of no relevance given that, in its view, the structure of the market makes the emergence of an as-efficient competitor practically impossible.²¹

The Court of Justice’s statement that the as-efficient-competitor test is to be considered as “*one tool amongst others*” seems to be a (much welcome) invitation by the Court of Justice to the Commission to apply its Guidance Paper to the assessment of rebates.²²

Likelihood and Materiality of Anti-Competitive Effect

Furthermore, the referring court asked whether Article 102 TFEU must be interpreted as meaning that the anti-competitive foreclosure effect of a rebate scheme must be (i) probable and (ii) serious or appreciable.

As regards the likelihood of an anti-competitive effect, consistent with the Guidance Paper, the Court of Justice held that only dominant companies whose conduct produces an actual or likely anti-competitive effect on the market fall within the scope of Article 102 TFEU.²³ This is a welcome development and represents an alignment of the case law with the Guidance Paper.

As regards the serious or appreciable nature of an anti-competitive effect (sometimes referred to as a *de minimis* threshold), the Court of Justice stated that having established a “probable” anti-competitive foreclosure effect, there is no independent requirement to prove that the effect is of a serious or appreciable nature. Indeed, while the Court of Justice refuses to commit itself *ex ante* to a number, e.g., percentage of market foreclosed (a point already made in its 2012 *Tomra* ruling),²⁵ a “not insignificant” anti-competitive foreclosure effect is nevertheless inherent in the notion of abuse.²⁶

¹⁹ *Post Danmark II*, para. 57.

²⁰ *Post Danmark II*, para. 61.

²¹ *Post Danmark II*, para. 59.

²² The Guidance Paper also states that in certain circumstances, it may be desirable to protect less efficient competitors (para. 24). However, it is extremely debatable whether it would be appropriate—other than in exceptional circumstances (that, it could be argued, may be present in the facts underlying the *Post Danmark II* ruling)—to attach legal liability to conduct that forecloses only less efficient rivals.

²³ *Post Danmark II*, paras 67 and 69.

²⁴ Guidance Paper, para. 20.

²⁵ *Tomra Systems*, para. 46.

²⁶ *Post Danmark II*, para. 73.