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*Post Danmark II*: the emergence of a distinct ‘effects-based’ approach to Article 102 TFEU

Pablo Ibáñez Colomo\*

Case C-23/14 *Post Danmark A/S v Konkurrencerådet* 6 October 2015

*A system of standardised, ‘all-unit’ rebates implemented by a dominant firm is contrary to Article 102 TFEU if an analysis of the nature and operation of the scheme and of the features of the relevant market reveals that it is likely to have an exclusionary effect.*

## Facts

In January 2014, the SØ- og Handelsret (Denmark) lodged a request for a preliminary ruling. The three sets of questions submitted by the national court revolved around the criteria to determine the lawfulness of a rebate scheme under Article 102 TFEU.

The contentious scheme was implemented by Post Danmark, the incumbent postal operator in the country. It had the following features: it was (i) standardised (it was based on the volume supplied); (ii) ‘all-unit’ (the rebates applied to all purchases over a period of one year); and (iii) retroactive (in the sense that the amount of the rebate was recalculated at the end of the relevant period).

The first set of questions submitted by the SØ- og Handelsret related, inter alia, to whether the ‘as efficient competitor’ test is a necessary and/or sufficient condition to establish an abuse of a dominant position. It also asked whether the coverage of the practice is a relevant consideration in this regard.

The second question concerned the requisite degree of probability and seriousness of the anticompetitive effect. Finally, the third question raised the issue of whether the anticompetitive effect must be appreciable for Article 102 TFEU to come into play.

## Analysis

### *Generalities*

Before *Post Danmark II*, the substantive test applicable to standardised, ‘all-unit’, rebate schemes was unclear. In *Hoffmann-La Roche*,<sup>1</sup> the Court of Justice held that quantity rebates are presumptively lawful under Article 102 TFEU. In *Michelin II*,<sup>2</sup> the General Court considered that the abovementioned schemes are abusive if an analysis of ‘all the circumstances’ reveals that they have a ‘loyalty-inducing’ effect.

The Court of Justice did not depart from the case law according to which loyalty rebates (that is, those that are conditional upon exclusivity or quasi-exclusivity) are abusive (para 27). On the other hand, it confirmed that volume-based rebate schemes are in principle compatible with Article 102 TFEU (ibid.).

According to the Court, the scheme at stake in the national proceedings was not comparable to a loyalty-based scheme but was not purely based on volume either. As a result, it was not found to be prima facie lawful. According to the Court, only volume-based rebates that are transaction-specific are presumptively compatible with Article 102 TFEU (para 28).

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<sup>1</sup> Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* EU:C:1979:36.

<sup>2</sup> Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* EU:T:2003:250.

Against this background, the Court of Justice ruled that the lawfulness of a standardised, 'all-unit', rebate scheme should be assessed in light of 'all the circumstances' (para 29). The Court laid down a 'two-step' test. First, it is necessary to consider the nature and operation of the rebate scheme (*ibid.*). Secondly, it is necessary to consider the extent of the dominant position enjoyed by the supplier as well as the features of the relevant market (para 30).

#### *A two-step test for standardised, 'all-unit' rebate schemes*

As far as the first step of the test is concerned, the Court confirmed its past stance concerning 'all-unit' schemes granted over a relatively long period. According to the case law, such schemes are capable of having an exclusionary effect. In the context of the case, exclusionary effects were 'further enhanced' by the fact that the rebate scheme applied both to the contestable (that is, open to competition) and non-contestable (that is, protected by exclusive rights) parts of customer demand (para 35).

The fact that the rebate scheme was standardised, and as such potentially applicable to all customers, was not deemed decisive. The Court noted that the application of the scheme across the board supports the conclusion that it is not discriminatory within the meaning of Article 102(c) TFEU (para 37). However, the absence of discrimination does not rule out the possibility that the scheme in question amounts to an abuse of a dominant position (para 38).

The second step of the test supported the conclusion that the rebate scheme was abusive. The Court noted that Post Danmark held a 95% market share at the time of the facts and enjoyed unparalleled structural advantages (in particular, its activities were deemed to have unique geographic coverage). Moreover, 70% of the relevant market, which is characterised by significant economies of scale, was protected by statutory barriers to entry (para 39).

The fact that a scheme applies to a large proportion of customers is not in itself sufficient to justify a finding of abuse. At the same time, the Court found it to be a useful indicator about the likelihood of an anticompetitive effect. It may be a reliable proxy for the extent of the contentious practice and its impact on the relevant market (para 46).

Finally, the Court pointed out that, once a *prima facie* finding of abuse is established, it is possible for the dominant firm to advance an objective justification for the practice. The efficiency gains that result from it may be sufficient to counteract any negative effects deriving from it (para 49).

#### *The relevance of the 'as efficient competitor' test*

The Court of Justice was clear in stating that the 'as efficient competitor' test is not a necessary criterion to assess the lawfulness of a standardised, 'all-unit', rebate scheme. In other words, the compatibility of a scheme under Article 102 TFEU does not depend on whether it is capable of driving an equally efficient competitor out of the market. The Commission Guidance on exclusionary abuses,<sup>3</sup> which endorses the test, is not binding on national courts and authorities (para 52).

On the other hand, there is nothing precluding national courts and authorities from applying the 'as efficient competitor' test in the context of a particular case (para 58). However, the facts of *Post Danmark II* pleaded against reliance on the test. This is so, according to the Court, because the regulatory barriers to entry precluded the emergence of an equally efficient competitor (para 59). In

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<sup>3</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ (2009) C 45/7.

such circumstances, the presence of a less efficient competitor could contribute to placing some pressure on the behaviour of the dominant firm (para 60).

#### *The probability and the threshold of anticompetitive effects*

The national court inquired about the relevant threshold of effects when establishing an abuse. The anticompetitive effect must not be merely hypothetical (para 65), but there is no requirement that the effect be certain or concrete (para 66). According to the Court, it is sufficient to show that the exclusionary effects are likely (or probable).

Concerning the appreciability of effects, the Court did not find it justified to set a de minimis threshold below which the anticompetitive impact of the practice would be unlikely (para 73). In line with previous case law, the Court pointed out that Article 102 TFEU applies in instances where competition is already weakened by the presence of a dominant firm (para 72). Thus, any practice has the potential to yield exclusionary effects.

#### **Practical significance**

*Post Danmark II* confirms that there are two lines of Article 102 TFEU case law. Some practices are deemed abusive by their very nature (or ‘by object’) and other practices are abusive only insofar as they have an anticompetitive effect. Standardised, ‘all-unit’, rebates and target rebates fall under the second category. Loyalty rebates fall under the first.

The judgment provides clarity about the sort of ‘effects-based’ assessment that is required in rebate cases. It is necessary to consider not only the nature and operation of the scheme, but also its impact on the relevant market. In this regard, *Post Danmark II* departs from the approach sketched in previous case law on rebates, in particular *Michelin II*. The analysis is much closer in nature to that found in ‘margin squeeze’ cases like *TeliaSonera*.<sup>4</sup>

Anticompetitive effects cannot simply be assumed. It is necessary to show that such effects are likely, in light, of the extent of the dominant position, the coverage of the practice and the features of the relevant market. The Commission also endorsed a standard of likelihood in the Guidance. In this sense, the case law and the administrative practice are more in line with one another than commonly assumed.

The ‘as efficient competitor’ test will be of relevance in rebate cases after *Post Danmark II*. While the Court rightly held that this test is not required under the case law, it does not oppose to its use in proceedings at the national level. In many instances, it will prove helpful to identify practices that are likely to harm the competitive process.

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<sup>4</sup> Case C-52/09 Konkurrentverket v TeliaSonera Sverige AB EU:C:2011:83.