

European Court of Justice Rules on Retroactive Loyalty Rebates

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On October 6, 2015, the European Court of Justice (the ECJ) issued an important judgment clarifying the application of Article 102 to retroactive loyalty rebates (*Post Danmark AS*, Case C 23/14). The case, which had been referred to the ECJ by the Danish Commercial Court, concerned rebates for direct advertising mail granted by Post Danmark, which has a 95 percent share of the Danish market for bulk mail, of which 10 percent is accounted for by direct advertising mail. The rebates in question ranged from 6 to 16 percent and were dependent on customers reaching certain standardized volume thresholds over a one-year reference period. The rebate was retroactive, *i.e.*, if the highest turnover or volume threshold was reached a 16 percent rebate was applied to the customer's purchases throughout the prior reference year, meaning the prices initially paid by the customer were adjusted. All customers benefitted from the same terms.

Criteria for Assessing Rebate Schemes Operated by Dominant Firms

In response to the Danish court's questions concerning the criteria for assessing the legality of rebate systems operated by dominant firms, the ECJ reaffirmed that the key issue is whether the dominant undertaking grants rebates that are capable of producing an *exclusionary effect*, which is not economically justified when examined in light of all relevant circumstances of the case. The court's pronouncements here are consistent with prior jurisprudence that has distinguished quantity discounts (which are normally not considered abusive) from retroactive discounts. The Court went on to note that in assessing the latter, relevant factors include the extent of the firm's dominant position, the number of customers concerned and the conditions of competition prevailing on the relevant market.

The court noted that a rebate will be exclusionary where it is capable of (i) making market entry very difficult or impossible for competitors of the dominant firm; and (ii) making it more difficult or impossible for the customers of that undertaking to choose between various sources of supply or commercial partners. On the first point, the ECJ considered that the retroactive application of the rebate, the relatively long duration of the reference period (one year), and the application of the rebate to both the contestable part and larger, non-contestable part of the market, was capable of tying customers to the dominant undertaking and attracting the customers of its competitors. On the second point, the ECJ considered that Post Danmark held 95 percent of the market for bulk mail in a market where significant barriers to entry existed, and where 70 percent of the market was conferred to Post Danmark by a statutory monopoly.

With regard to the Danish court's question as to significance of the number of customers affected by the rebate scheme, the ECJ stated that the fact that a large proportion of customers on the market are affected by the rebate scheme is not evidence of abusive conduct. Rather, it is indicative of the possible impact on the market and may "bear out the likelihood of anti-competitive exclusionary effect."

The Use of the "As Efficient Competitor" Test (the AEC Test) to Assess Rebate Foreclosure Effects

The Danish court had asked whether, as a matter of law, it was necessary to carry out a price-cost analysis test to determine whether an "as efficient competitor" could match the dominant firm's rebate without selling below cost. In response, the ECJ held that the AEC test was not a prerequisite to finding an abuse. Rather, the ECJ stated that the AEC test was irrelevant to the facts in the present case as Post Danmark's statutory monopoly made it virtually impossible that a competitor could be equally efficient. By so ruling, the ECJ firmly rejected the application of the AEC test at least in Post Danmark's case,

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despite the commission's endorsement of this test in its Guidance Paper on Article 102. The ECJ's position also is consistent with the General Court's rejection of the AEC test in its *Intel* judgment, which involved exclusive rebates. It should, however, be noted, that the ECJ did not rule out use of the AEC test altogether in future cases involving rebates.

The Appreciability and Likelihood of the Anti-Competitive Effects

In response to the Danish court's questions concerning the threshold of appreciability for establishing the existence of an abuse, the ECJ stated that in order to constitute an abuse the exclusionary effect of a rebate scheme operated by a dominant undertaking need only be probable, that is, more likely to occur in practice than not. According to the ECJ, there is no need to establish that the exclu-

sionary effect is appreciable or serious, and further, that "fixing an appreciability (*de minimis*) threshold ... is not justified."

Conclusion

The ECJ's judgment affirms the existing, strict EU jurisprudence on retroactive rebates and the traditional approach to abuse, in which there is no need to establish the seriousness and appreciability of the exclusionary effects of a retroactive rebate scheme. It must only be shown that, in light of all relevant circumstances in a particular case, the exclusionary effect is not economically justified and is "probable." The ECJ's judgment contrasts sharply with its ruling in the first Post Danmark case. In that case, which involved targeted rebates, the ECJ accepted the possibility that targeted rebates could foreclose a less efficient competitor without constituting an abuse.

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