Rethinking Rebates Policy Under EU Competition Law

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On 6 October 2015, the European Court of Justice (ECJ) ruled in a case concerning rebates and when they fall foul of EU competition law.

Background

The case concerns Post Danmark and, unlike appeals against European Commission Decisions, came by way of a reference from the Danish High Court seeking formal guidance on the interpretation of EU law relating to rebates. This is the second of two such cases involving Post Danmark, the first having been decided in 2012.

The relevant market in this case was the bulk mail market, in which Post Danmark had a 95% share and its only rival a 5% share. Post Danmark offered a standardised volume rebate scheme applicable to all customers, with a series of tiers starting at 30,000 letters. The scheme offered increasing rebates starting at 6% (for 30,000 letters) and rising by 1% increments until the final two tiers, which increased by 2% increments. The final tier rebate was 16%. The final amount of the rebate was retroactive, since the highest amount was applicable to all volumes during a reference period of one year. There was no express requirement on customers to obtain all or most of their requirements from Post Danmark.

The ECJ referred to the classical distinction between volume rebates, which are not in principle liable to infringe EU competition law, and loyalty (or "fidelity") rebates. Loyalty rebates may infringe EU competition law when granted by a dominant company where they prevent customers from obtaining some part of their requirements from a competing supplier.

The ECJ also referred to its repeated rulings that all the circumstances of the case need to be considered and, in particular, whether the rebate in question is capable of having an exclusionary effect. On the facts, the ECJ found that competition on the relevant market was already very limited.

The ECJ found that, in the circumstances of this case, a rebate scheme could produce exclusionary effects (even though it is not formally exclusive when it requires lower pricing for customers to obtain supplies from competing suppliers). The fact that the conduct covered a large proportion of the relevant contracts was a useful indicator of abuse, but was not determinative of the issue.

The ECJ also found that it was not necessary to conduct an "as-efficient competitor" test in order to find that a dominant undertaking had committed an abuse, particularly where the share of the dominant undertaking was such that the emergence of an as-efficient competitor was practically impossible.

Finally, the ECJ found that merely excluding competitors' access is not enough for a practice to be considered abusive. It is sufficient that such an effect is probable and that it is not necessary to show that it is of a serious or appreciable nature.

Conclusions

Whilst it is not always easy to draw practical guidelines from individual abuse of dominance cases, the findings of the ECJ in the case in question are instructive. The most clear inference that can be drawn is that economic analysis of the impact of the behaviour of dominant undertakings in markets where competition is already severely limited is scarcely relevant. If an impact is probable, it need not be measured. Economic analysis may be useful, particularly where market shares and barriers to entry are lower, but it is not always necessary.

Although the "safe harbour" for volume rebates has been re-confirmed (contrary to the proposals of the Advocate-General), the ECJ's judgment is challenging not just for dominant companies but also for enforcement authorities. In the case of Commerzbank, the ECJ noted that the volume rebates complained of by the ECJ were based on standardised contracts, but that the Commission had not considered the market share or other factors that might be relevant in a particular case.

The Commission has also been at the forefront of efforts to create a more effects-based approach in dominance cases and will have to think hard about what today's Judgment leaves to it. The judgment is challenging for both the Commission itself and likely other economic analyses, such as market share, which have been used to support its position.

Now the ECJ has ruled, the case returns to the Danish High Court for determination on the facts.