Kluwer Competition Law Blog

Looking back at a 2012 highlight: Post Danmark

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Looking back at 2012 antitrust developments and browsing through this blog, I was surprised not to see any posting on what was in my view a major highlight of the past year, namely the EU Court of Justice (ECJ) judgment in *Post Danmark* (C-209/10). In a sweet and short judgment (8 pages) issued on March 27, 2012, the ECJ embraced indeed a modern vision of Art. 102 TFEU enforcement that had been badly missing until then. The judgment was rendered in response to a request for preliminary ruling, so it is unclear whether and how the ECJ will translate that approach in annulment cases (the Tomra judgment dated a couple of weeks later was not exactly encouraging in that respect), but it still sets a very useful precedent for it contains a wealth of recitals clearly conveying an effects-based approach to unilateral pricing practices.

The case has of course already been commented (*e.g.*, by Ekaterina Rousseva and Mel Marquis in an extensive note published in the October issue of the JECL&P and in French by Anne-Lise Sibony in Concurrences). After outlining the background of the case, I will therefore limit myself to three points that will hopefully give you a sense of the importance of the case for the future of the EU law on dominance.

In 2004, the Danish incumbent postal service operator (Post Danmark) poached three major customers from its main competitor in the distribution of unaddressed mail, *i.e.*, folders, brochures, telephone directories, local newspapers, etc. The competitor accused Post Danmark of having abused its dominant position on the Danish market for the distribution of unaddressed mail by having resorted to targeted price reductions and engaged in price discrimination practices, *i.e.*, by having charged new customers "*rates different from those it charged its own pre-existing customers without being able to justify those significant differences in its rate and rebate conditions by considerations relating to its costs*" (para. 8). The complainant prevailed before the Danish Competition Council on the count of (first line) price discrimination but not on that of predatory pricing. The Danish Competition Appeals Tribunal upheld the infringement decision and the case eventually ended up before the Danish Supreme Court, which sought guidance from the ECJ. In essence, the request for preliminary ruling dealt with the circumstances that might support the abusive character of Post Danmark's pricing practices inasmuch as they resulted in quoting prices below average total costs but above average incremental costs (at least to one of the three customers in question).

Interestingly, the Court of Justice immediately framed the case in exclusionary (and not purely discriminatory) terms and insisted that "*not every exclusionary effect is necessarily detrimental to competition*" since "*competition on the merits may, by definition, lead to the departure from the*

market or the marginalization of competitors that are less efficient" (para. 22). It then clearly put "*the detriment of consumers*" to the heart of the Art. 102 TFUE analysis (para. 24) by restating the Hoffmann-Laroche formula. Subsequently, it established the "as efficient competitor" test developed in previous price-squeeze cases as the relevant benchmark for the assessment of pricing practices across the board (para. 25). As such, these remarks would have deserved a long post and should secure to *Post Danmark* a place of choice in the next edition of every EU competition law treatises. But there is more to it:

Effects. After dismissing the possibility for pricing below average total costs but above average incremental costs to amount a *per se* infringement of Art. 102 TFEU, the ECJ ruled that "*to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests*" (paras. 37 and 44). Whereas it belongs to the referring court to assess the existence of such effects, the ECJ expressly underlined that the complainant in this case had "*managed to maintain its distribution network despite losing the volume of mail related to the three customers involved and managed, in 2007, to win back*" two of them (para. 39). Thus, the ECJ not only validated the reliance on average incremental costs as the relevant benchmark in cases involving a commonality of costs with a regulated service/public policy obligation, which testifies of an economically sensitive analysis, but it effectively held that above that benchmark (*i.e.*, in most pricing cases) anticompetitive effects have to be established and that evidence of lack of effects certainly has to be taken into account.

Efficiencies. Moreover, the ECJ expressly admitted that, next to objective justifications, "*exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers*" (para. 41). In effect, it built into Art. 102 TFEU criteria similar to those found in Art. 101(3) TFEU, as follows: "*it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition*" (para. 42). As importantly, the ECJ insisted that efficiency gains be effectively assessed and not only dismissed because of "*the mere fact that a criterion explicitly based on gains in efficiency was not one of the factors appearing in the schedules of prices charged by Post Danmark*" (para. 43).

Price discrimination. Last but not least, the ECJ stated that the fact that "*the pricing policy in issue in the main proceedings* [is] *described as 'price discrimination', that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse*" (para. 30). This is a welcome clarification to the effect that price discrimination is abusive only to the extent that it actually distorts competition, which was far from obvious in relatively recent Commission and court cases (see, *e.g.*, the 2004 Clearstream decision and here for a general discussion). Likewise, the ECJ's finding appears to definitely preempt any attempt at circumventing the standards of exclusion by relying on some loose discrimination claims.

In sum, *Post Danmark* marks a clear departure from purely structural/institutional approaches to antitrust enforcement in the field of dominance, as well as from the reliance on hypothetical cost

justifications. Rather, it embodies a convergence with the core principles underlying the Commission's 102 Communication (and goes even beyond it to some extent). As noted, it remains to be seen, though, how the principles formulated in *Post Danmark* will permeate the ECJ's future review of Commission decisions…

And on that note, I wish you all a successful and fulfilling year 2013!

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