Kluwer Competition Law Blog

Rethinking Rebates Policy Under EU Competition Law

David Wood, Peter Alexiadis (Gibson Dunn) · Tuesday, October 13th, 2015

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 applied 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 rebates in question are 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, where it makes it more difficult 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 whilst the anti-competitive effects of a particular practice must not be purely hypothetical, 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 this case are extremely important. 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 EU, not least the European Commission. The Commission has been at the forefront of efforts to include a more effects-based analysis in dominance cases and will have to think hard about where today's Judgment leaves it. Even if the law on loyalty rebates has been clarified, the treatment in the future of other forms of abuse, such as margin squeezes, which have become heavily dependent on the Commission's economic analysis, is now unclear. Moreover, it also draws into question some of the more expansive readings of the first Post Danmark case, which should be re-read in the light of this one. Finally, it remains to be seen whether the ECJ's focus on the need for "all the circumstances of the case" to be taken into account gives the Commission more discretion, or less.

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

This entry was posted on Tuesday, October 13th, 2015 at 8:43 pm and is filed under Source: OECD“>Competition, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.