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## Post Danmark II – EU Commission Guidance on Economic Assessment of Rebates Under Article 102 Survives... Just.

Bill Batchelor (Baker & McKenzie) · Thursday, October 15th, 2015

The first Post Danmark case in 2012<sup>[1]</sup> brought about a modest antitrust revolution on Article 102 applicable to discrimination. Rarefied economic concepts were confirmed. Price discrimination as a standalone abuse was all but confined to a historical footnote in antitrust textbooks, to be replaced by a predation type test. Article 102 was ripe for overhaul and Post Danmark provided the vehicle.

### The Economic Test at Stake...

Commentators expecting the same much-needed revamp of Article 102 rebates case law from the sequel, Post Danmark II, will be disappointed. At stake was the Commission's much vaunted Article 102 Enforcement Priorities Guidance approach to rebates. This advocated a hard-nosed economic approach. If smaller rivals could match a dominant company's rebate scheme by staying above that company's cost – after adjusting it to take account of the small rival's much lower volume of sales (known as the “contestable share”) – then antitrust should not intervene. That was aggressive price competition, and should be encouraged by all companies, big and small. This “as efficient competitor” or AEC test was the corner stone of the Priorities Guidance approach to rebates.

Field trials of the Commission's guidelines ended in disappointment and acrimony as the Commission was accused of misapplying or disregarding its new economic theories in Tomra<sup>[2]</sup> and Intel<sup>[3]</sup> even though national authorities and courts seemed keen to apply the new theories<sup>[4]</sup>

### ...and the Court's Response

So the scene was set in Post Danmark II for the Court to consider the Priorities Guidance, and finally to offer clarity. The result is a damp squib:

? The Court confirms that three types of rebate scheme exist: (i) exclusivity, or near exclusivity, rebates which are generally illegal; (ii) quantity related rebates reflective of cost savings (a near impossible category); and (iii) “third category” rebate schemes which have to be analysed in the round. This categorisation is proposed by the lower Court in Intel, and now has the higher court's blessing.

? The Post Danmark II scheme fell into the third category and failed the “in the round test”. As

Post Danmark was a statutory monopolist as to 70% of the market, with an overall market share of 95% and a single rival (with 5% share), the application of a (modestly) aggressive retroactive rebate scheme, covering most major customers, meant that there were sufficient indicators of exclusion.

? That being the case, there was no need to apply the Priorities Guidance. Indeed to do so would be counterproductive. Given the statutory monopoly, it was highly unlikely that a rival would ever be able to make the same infrastructure investments to enter at the scale, and corresponding cost economies, of Danish Post. The cost structures of a small entrant and incumbent legal monopolist would never be comparable.

? The Priorities Guidance remains a tool – but only one of many – with which to consider exclusion. But an in-the-round assessment did not require its use, particularly on facts such as these.

? The Court states there is no de minimis threshold for abuse. But, nonetheless, competition authorities must demonstrate that a rebate scheme is at least likely to produce exclusionary effects. This offers, perhaps, a chink for a backdoor de minimis test, since the Court states that “the number of customers concerned” by the rebate scheme will be a necessary part of assessing its likely effects.

### **Counselling Implications**

So the Priorities Guidance survives. But it remains just that – guidance, not law. While authorities will wish to use it to add economic rigour to their assessments, there is no obligation on them to do so. The Commission may be bound to use the Guidance as a first filter for its case load, while the Guidance remains in place, but will be able to depart from it where circumstances, such as these, make it inapposite.

Counselling on rebate schemes using the Guidance gives some regulatory comfort to companies that Guidance-compliant schemes are at least not EU enforcement priorities. But there remains a risk that national courts or agencies may differ in approach. Practitioners cannot just focus on the mathematical niceties of margins and contestable share under the Guidance. They also need to ask the bigger picture questions: barriers to entry, relative size of competitors, dynamics of competition in the sector. In highly regulated sectors, particularly those with state monopolist incumbents, a rebate scheme should expect much greater scrutiny.

The Post Danmark II case is available here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169191&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=91181>

### ***How Would AEC Have Solved the Problem?***

Despite the Court’s reticence, a simple back of the envelope calculation shows AEC would have led to the same result. Indeed, rather more quickly than an in-the-round assessment.

**Facts:** Post Danmark’s 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 increasing by 1% increments until the final two tiers, which increased by 2% increments. The final tier rebate was 16%. Post Danmark has a 95% share and its only rival a 5% share.

**AEC analysis:** The rule for tiered rebates is to take the highest increment (2%), divide it by the

contestable share (using the rival's 5% share as a proxy) and add the second-to-last rebate in the scheme (14% – which is 2% less than the final tier rebate of 16%). Here that means a competitor faces an effective discount of  $(2/5 \times 100) + 14 = 54\%$ . It is difficult to believe that a state monopolist postal system could achieve margins in excess of 50%. As a result, this scheme was always likely to be illegal under a price-cost test.

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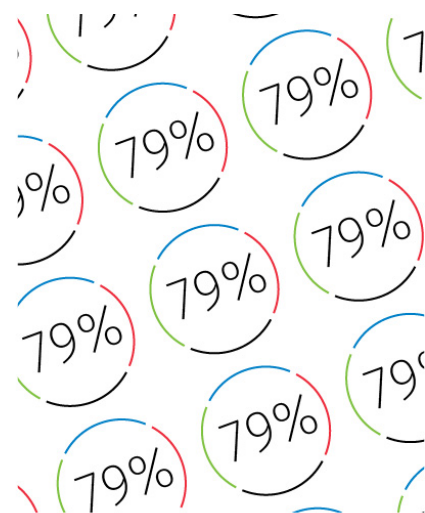
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