

5<sup>th</sup> April 2012*Practice Group:**Antitrust,  
Competition, Trade &  
Regulation*

## Below-cost pricing by a dominant company may not constitute a breach of EU competition law

By Neil A. Baylis and Jennifer P. M. Marsh

A recent European Court case has confirmed that a dominant firm will not breach EU competition law simply by selling its services below their total cost, as long as the services are charged above their 'incremental' cost. Furthermore, an abuse of dominance will only occur where it can be shown that the company intended to remove a competitor from the market as a result of its pricing strategies.

### Introduction

The Court of Justice of the European Union ('ECJ') has ruled<sup>1</sup> that a dominant postal company (Post Danmark) which has a universal service obligation may make selective price reductions, and bring its prices below the level of its average overall costs but **not** below its average incremental costs<sup>2</sup>, without infringing Article 102 of the Treaty on the Functioning of the European Union ('TFEU') prohibiting an abuse of a dominant position. The court concluded that each case should be judged on its particular facts but the important question is whether the pricing strategy has the result or potential, without objective justification, to remove a competitor from the market.

### Background

Post Danmark A/S ('PD') and Forbruger-Kontack ('FK') are two leading postal companies in Denmark. Between 2003 and 2004, PD effectively held a monopoly on the Danish postal market in the distribution of certain letters and packages. FK is a distributor of marketing material whose distribution network covers the whole of Denmark. In 2003, PD entered into contracts with three of FK's former clients (Coop, SuperBest and Spar supermarkets) to distribute their mail with no named addressee. PD had put forward an attractive quote, with cheaper prices than those offered to other clients. The quote to Coop also included five deliveries to each home whereas other clients only received one delivery to each home.

FK lodged a complaint with the Danish Competition Council on the grounds that PD was guilty of practising a targeted policy of reductions designed to ensure its customers' loyalty by not putting its customers on an equal footing in terms of rates and rebates and further by charging FK's former customers rates different from those it charged its own pre-existing customers. The Competition Council determined that PD had infringed Article 102 TFEU by discriminating between customers, although it declined to find that PD had deliberately sought to eliminate its competitor and that its conduct amounted to predatory pricing i.e., below cost pricing. PD made an unsuccessful appeal to the regional Court which upheld the Competition Council's decision. PD then appealed to the Højesteret (the Supreme Court of Denmark) which sought a reference for a preliminary ruling from the ECJ.

### ECJ's decision

<sup>1</sup> Case C-209/10-*Post Danmark A/S v Konkurrenceradet*, judgment of 27 March 2012.

<sup>2</sup> See also the decision in the case of *C-62/86 AKZO v Commission* [1991] ECR I-3359. In C-209/10, the Danish authorities defined incremental costs as "the costs that would be expected to disappear in the short to medium term (three to five years), if Post Danmark ceased to pursue the activity of distribution of unaddressed mail." Average total costs were defined as those "average incremental costs to which have been added a part of common costs of Post Danmark linked to activities abroad and the universal service obligation."

The preliminary reference addressed two issues:

- i) would selective reductions, by a dominant postal service operator with a universal service obligation, to a level below the concern's average overall costs but above its incremental costs constitute an abuse pursuant to Article 102 of the TFEU, where that behaviour is not intended to eliminate a competitor?
- ii) if such reductions could constitute an abuse, to what criteria should the national court have reference?

The ECJ confirmed that a dominant entity was not automatically guilty of abusing its dominant position by engaging in a low-price policy. The ECJ considered the facts of the case and concluded that a pricing policy whereby a dominant entity charged the purchaser below the level of its average overall costs but above its average incremental costs could not be considered abusive on this basis alone. Where the dominant entity has fixed its prices at a level which covers the costs of commercialisation of the product or the provision of a service, the ECJ considered that a competitor which is 'as efficient' should be able to compete without suffering any unsustainable losses.

On the facts, FK was able to sustain its business in spite of losing its contracts with the three supermarkets and succeeded in 2007 in winning back the Coop group's custom and subsequently that of the Spar group. The ECJ concluded that an abuse would only be established where an actual or probable eviction of a competitor from the market could be proved.

### *Comment*

The judgment offers some clarity to the pricing strategies that dominant undertakings may use to compete and attract business. Nonetheless dominant companies should take legal advice prior to adopting an aggressive strategy that risks being seen as intended to remove a competitor from the market.

---

### **Authors:**

#### **Neil A. Baylis**

neil.baylis@klgates.com  
+44.(0).20.7360.8140

#### **Jennifer P. M. Marsh**

jennifer.marsh@klgates.com  
+44.(0)20.7360.8223

## K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg  
Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh  
Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit [www.klgates.com](http://www.klgates.com).

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.