Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 24 May 2011 [1]

Case C-209/10

Post Danmark A/S
v
Konkurrenceråd

(Reference for a preliminary ruling from the Højesteret (Denmark))

(Article 102 TFEU — Danish market for unaddressed mail — Abuse of a dominant position — Selective reduction of prices for the distribution of unaddressed mail — Prices less than average total costs — Prices more than average incremental costs — Exclusion of a competitor from the market — Intention — Effect — Practice of discriminatory pricing — Predatory prices)

I – Introduction

1. This reference for a preliminary ruling from the Højesteret (Denmark) concerns the interpretation of Article 82 EC (which corresponds to the present Article 102 TFEU).

2. The referring court wishes primarily to know whether a postal undertaking, in the present case Post Danmark A/S ('Post Danmark'), abused its dominant position in the Danish market for the distribution of unaddressed mail [2] on the ground of selective application of low prices in concluding agreements with three major customers of its principal competitor, Forbruger-Kontack ('FK'), even if it were shown that those prices had not been determined with the intention of driving FK out of the market.

3. Should that ground alone be insufficient, the referring court asks the Court, in essence, to indicate additional relevant factors which the national court should take into account in order to find abuse in predatory pricing practices.

4. Before considering those questions, which are not easy to answer, it is necessary to set out the basic facts of the case in the main proceedings giving rise to the present reference for a preliminary ruling.

5. Post Danmark and FK are the two leading undertakings on the Danish market for the distribution of unaddressed mail. The market is fully liberalised and is not covered by the Danish legislation on postal services, which aims to implement Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service. [3]

1 — Original language: French.

2 — According to the order for reference, unaddressed mail consists of brochures, telephone directories, other directories, local and regional newspapers, etc.

3 — Directive of the European Parliament and of the Council of 15 December 1997 (OJ 1998, L 15, p. 14). It should be noted that, after the facts of the main proceedings, substantial amendments were made to that directive by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67 (OJ L 52, p. 3). So far as the Kingdom of Denmark is concerned, the deadline for implementing the amendments in national law was 31 December 2010, in accordance with Article 2 of Directive 2008/6.

6. According to the order for reference, at the material time, that is to say, from 2003 to 2004, Post Danmark nevertheless enjoyed a monopoly of the distribution of addressed letters and parcels not exceeding a certain weight, together with a universal service obligation to distribute addressed mail under a certain weight.[4] Post Danmark thus had a distribution system covering the whole of Denmark that was also used for the liberalised distribution of unaddressed mail.

7. FK, a subsidiary of a Danish press group, has as its principal business the distribution of unaddressed mail. In the material period, that undertaking had created a distribution network covering almost the whole of Danish territory, mainly through acquiring small operators on the Danish unaddressed mail market.

8. Until 2004 FK's biggest customers were the three supermarket chains, SuperBest, Spar and Coop.

9. At the end of 2003 Post Danmark concluded agreements with those three groups to take over the distribution of their unaddressed mail from the beginning of 2004.

10. According to the order for reference, the agreement with Coop, concluded after negotiations with both Post Danmark and FK, represented more than three times, in annual volume, the distribution volume of unaddressed mail of Post Danmark's main customer. The Coop group distributed five items per household, whereas none of Post Danmark's previous customers distributed more than one item per household and the agreement in question was the first to provide for the distribution of unaddressed mail on Fridays and Saturdays. In terms of price, Post Danmark's offer to the Coop group was lower than the tariffs offered to its other customers. The Coop group was also given a bigger discount in relation to the official prices than Post Danmark's other customers

11. In addition, the referring court points out that Post Danmark's distribution costs per unaddressed item dropped by DKK 0.13 between 2003 and 2004 and that the price offered to the Coop group does not enable Post Danmark to cover its average total costs, but only its average incremental costs.

12. Following a complaint by FK that Post Danmark had engaged in predatory pricing, applied discriminatory prices and loyalty rebates and used cross-subsidisation, the Konkurrenceråd (Competition Council) found, by decision of 29 September 2004, that Post Danmark had infringed Article 82 EC by engaging in 'primary-line discrimination' in 2003 and 2004 in the form of different pricing for its competitor's customers and its own customers.

13. The Konkurrenceråd also took the view that Post Danmark had abused its dominant position by 'primary-line discrimination' in the form of target rebates for FK customers. Likewise, the Konkurrenceråd considered that Post Danmark had engaged in 'secondary-line price discrimination' by treating differently commercial partners in the same situation.

14. On the other hand, with regard to the complaint of predatory pricing, the Konkurrenceråd found that the question was complicated and called for more detailed examination, so that it must be considered in a later decision. Finally, with regard to the allegation of cross-subsidisation, the Konkurrenceråd observed that the documents in the file did not justify a finding that funds had been transferred from other business sectors of Post Danmark.

15. By decision of 24 November 2004, the Konkurrenceråd found that it could not be established that Post Danmark had intentionally sought to eliminate competition. Consequently, it had not abused its dominant position in the Danish market for the distribution of unaddressed mail by predatory pricing.

4 — It should be observed that Article 7 of Directive 2008/6 provides that the Member States are no longer to grant exclusive or special rights for the establishment and provision of postal services. Therefore the universal services must be financed by other means listed in Article 7 or by any other means compatible with the EC Treaty.

16. By decision of 1 July 2005, the Konkurrenceankenævnet (Competition Appeals Tribunal) upheld the Konkurrencerådet decisions of 29 September and 24 November 2004.

17. That decision became final with regard to the finding of secondary-line discrimination with regard to pricing, contrary to Article 82 EC, and the finding that there was no proof of predatory pricing on the part of Post Danmark.

18. Post Danmark appealed to the Østre Landsret (Eastern Regional Court) against the decision of 1 July 2005 in so far as it upheld the Konkurrencerådet decision of 29 September 2004 concerning the abuse of a dominant position by means of low prices applied selectively to the SuperBest, Spar and Coop groups (primary-line discrimination).

19. On 21 December 2007 the Østre Landsret upheld the decisions of the Danish competition authorities to the effect that Post Danmark had abused its dominant position on the Danish market for the distribution of unaddressed mail by applying, in 2003 and 2004, a different pricing policy to its own existing customers and FK's former customers, without being able to justify those differences on cost-related grounds. The Landsret found, in particular, that that practice took place on a market where Post Danmark held a very special position by virtue of its market share and remarkable structural advantages, in a situation in which its only true competitor, FK, was particularly vulnerable if it lost major customers.

20. Post Danmark appealed to the Højesteret against that judgment on the ground that there must be an intention to drive out competition in order for selectively low pricing, not covering average total costs, to constitute an infringement of Article 82 EC.

21. In those circumstances the Højesteret decided to stay judgment and to refer the two following questions to the Court for a preliminary ruling:

'1. Is Article 82 EC to be interpreted as meaning that selective price reductions on the part of a dominant postal undertaking that has a universal service obligation to a level lower than the postal undertaking's average total costs, but higher than the provider's average incremental costs, constitutes an exclusionary abuse, if it is established that the price was not set at that level for the purpose of driving out the competitor?

2. If the answer to question 1 is that a selective price reduction in the circumstances outlined in question 1 may, in certain circumstances, constitute an exclusionary abuse, what are the circumstances that the national court should take into account?'

22. In accordance with Article 23 of the Statute of the Court of Justice of the European Union, written observations have been submitted by Post Danmark, the Danish, Italian and Czech Governments and the European Commission. Those parties and the EFTA Surveillance Authority also stated their views at the hearing of 1 March 2011.

II – Assessment

A – *Preliminary considerations*

23. In view of Post Danmark's attempts at the hearing to call into question some of the findings of the referring court, I think it is necessary to point out that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. [5]

5 — Case C-450/06 *Varec* [2008] ECR I-581, paragraph 23, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 30.

24. In the main proceedings, first of all, it is common ground that the relevant market is the Danish market for the distribution of unaddressed mail. Contrary to Post Danmark's observations before the Court, it does not appear from the documents in the main proceedings that, first, the Danish competition authorities or, secondly, the national courts, including the referring court, found that that market is subdivided into two segments, one being that for items distributed on weekdays and the other being 'Sunday' or, more generally, week-end distribution.

25. Therefore it seems to me unnecessary to spend time on Post Danmark's assertions that the (sole or main) aim of the disputed pricing practices was to extend the unaddressed mail service to the week-end distribution segment which had up to then been dominated by FK.

26. Secondly, it is also common ground that Post Danmark has a dominant position, within the meaning of Article 82 EC, on the market as delimited by the national authorities and courts. Furthermore, the reference for a preliminary ruling is expressly based on that premiss.

27. According to the order for reference, Post Danmark's dominance is shown by an overall analysis of the position it enjoys on the market. Nevertheless, that assessment is based mainly on its market share by turnover, which is of the order of 50%,[6] and its special position due to its nation-wide distribution network which can be maintained, because of the universal service obligation in respect of the distribution of mail, without the distribution of unaddressed mail.

28. Although the documents in the main proceedings do not indicate that the size of Post Danmark's market share was considered in relation to that of FK[7] or to the purchasing power, if any, of certain customers, the fact remains that, in the distribution of functions between the national courts and the Court, it is not for the latter, in spite of Post Danmark's request in its observations, to repeat the examination of one or more aspects of the analysis prompting the Danish authorities and courts to find that Post Danmark held a dominant position in the national market for the distribution of unaddressed mail

29. Lastly, it is necessary to delimit the subject-matter of the questions that have been referred to the Court.

30. In that connection, it must be noted that the questions referred to the Court do not concern an abuse of a dominant position, within the meaning of Article 82 EC, taking the form of predatory pricing.

31. As appears from the documents in the main proceedings, the Danish competition authorities were not able to establish the existence of a plan for eliminating a competitor, within the meaning of paragraph 72 of *Akzo* v *Commission*.[8] That conclusion was not disputed by FK before the national courts.

32. In order to find that there is predatory pricing within the meaning of paragraphs 70 to 72 of *Akzo* v *Commission*, it would have been necessary to prove that such a strategy had been put in place by Post Danmark because, as the referring court points out, at least with regard to the prices offered by Post Danmark to Coop, one of FK's customers, those prices were higher than the average incremental costs of the dominant undertaking, but less than its average total costs.[9]

6 — To be exact, the table used by the Danish competition authorities, which is reproduced in the order for reference, shows that Post Danmark's market share by turnover dropped from 47% in 2001 and 2002 to 44% in 2003 and rose to 55% in 2004.

7 — According to the order for reference, FK's market share was 15-25% in 2001, 23-35% in 2002, 35-45% in 2003 and 25-35% in 2004.

8 — Case C-62/86 [1991] ECR I-3359. Paragraph 72 states that prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs (which vary according to the quantities produced), must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. That approach was followed in Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 41, and Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 109.

9 — If the Court's reasoning at paragraphs 70 to 72 of *Akzo* v *Commission* is followed, if the prices were lower than the average incremental costs, it would not have been necessary to prove the existence of an elimination strategy as those prices would in themselves have been regarded as predatory.

33. The fact that the order for reference mentions Post Danmark's incremental costs as constituting the relevant costs to be taken into account in the main proceedings, and not the variable costs, as in *Akzo* v *Commission*, appears to be explained, according to the documents in the file, by the coexistence, within one undertaking, of, on the one hand, reserved and non-reserved operations the carrying on of which, in either case, is subject to universal service obligations and, on the other hand, purely commercial operations which take place on the liberalised market for unaddressed mail.

34. A comparison of prices with the variable costs of a dominant undertaking entrusted with a task of general economic interest (public service or universal service) proves to be inappropriate. On the one hand, it could entail an overestimate of losses because the undertaking's task of general economic interest entails higher costs than those of its competitors for the part of its business operations accounted for in the market open to competition. Conversely, to take the variable costs of the dominant undertaking as the only criterion could also lead to an overestimate of its costs if it operates with high fixed costs (for example, the costs of utilisation of its network) and small variable costs. [10]

35. In those circumstances, it appears appropriate to take into account a different cost criterion, namely incremental costs, which take account of the fixed costs and variable costs of the specific operations in the market which is open to competition.

36. In that connection, as the referring court points out, the use of incremental costs as the criterion in the main proceedings is based on the Commission's decision of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty concerning the pricing practices of Deutsche Post relating to mail-order parcel services in Germany [11] in a relatively similar situation. [12]

37. In the abovementioned decision the Commission found that Deutsche Post had abused its dominant position by offering the services in question at prices below its incremental costs, so that it had offered predatory prices. The Commission defined those costs as the costs arising solely from the provision of a specific service, which depend on the quantity supplied and which would disappear if the service were discontinued, which implies that the common fixed costs, which do not depend on the provision of a single service, are not included in the incremental costs. [13] It also appears from that decision, which on that point clearly guided the Danish competition authorities in the main proceedings, that the costs attributable to a specific service must not be burdened with the common fixed cost of providing network capacity, incurred as a result of the universal service obligation. Therefore the average incremental costs comprise only the average fixed and variable costs of providing the service exposed to competition. [14]

38. In the main proceedings, as in the *Deutsche Post* case cited above, the average incremental costs, like the average variable costs referred to in paragraphs 71 and 72 of the *AKZO* v *Commission* judgment, represent, therefore, the lowest limit or minimum below which the price of the undertaking in the dominant position would be predatory.

10 — See Mouy, N., 'Coûts incrémentaux: Retour sur les avantages concurrentiels du secteur public. Les spécificités des approches communautaire et française: un point de vue d'un régulateur', *Concurrences*, 2-2005, no. 1476, p. 13.

11 — OJ 2001 L 125, p. 27, 'the Deutsche Post decision'.

12 — See also the assessment of that decision by the General Court in Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 249. The appeal to the Court of Justice (Case C-202/07 P, cited above) did not concern that point.

13 — Deutsche Post decision, paragraphs 6, 9, and footnote 7. It must also be observed that, in Case T-60/05 *Ufex and Others* v *Commission* [2007] ECR II-3397, paragraph 161, the Commission also stated that, in order to establish abuse of a dominant position by Poste Française in the express mail market, it was necessary for the Commission to check whether the tariffs invoiced by that undertaking for the infrastructure services provided to its subsidiary in that market were at least equal to the incremental costs of the provision of those services, that is to say the costs which are exclusively imputed to the provision of a specific service and which cease to exist once the service ceases to be provided. Without using the word 'incremental', that is, in essence, what is aimed at by Article 14 of Directive 97/67 in requiring the Member States to compel the providers of universal postal service to adopt an analytical accounting system so as to allocate the costs directly assigned to a particular product or service, as well as common costs, in accordance with the provisions of that Article.

14 — *Deutsche Post* decision, paragraphs 9 and 10.

39. It follows from those paragraphs of the *AKZO* v *Commission* judgment, making allowance for the *Deutsche Post* decision, that a price higher than the average incremental costs, but less than the total average costs, would also be predatory if it had been fixed as part of a plan to drive a competitor from the market.

40. However, as I have said, the referring court has stated that the Danish competition authorities had not been able to demonstrate the existence of such a plan. The reference for a preliminary ruling does not, therefore, relate to predatory conduct on the part of Post Danmark.

41. Nevertheless, the foregoing observations make it easier to understand the questions put by the referring court. In short, it wishes to know whether an abuse by way of driving out or excluding a competitor can be found on the part of a dominant undertaking, such as Post Danmark, when there is a selective reduction in prices that is not predatory and, if so, in what circumstances.

42. This leads me to two further observations.

43. First, the referring court's questions do not relate to the abuse of a dominant position in the form of price discrimination between Post Danmark's customers affecting the market or markets of those customers ('secondary-line discrimination').

44. It is clear from the order for reference and the documents in the main proceedings that Post Danmark has not challenged before the national courts the finding by the Danish competition authorities that Post Danmark treated customers in a comparable situation differently with regard to prices, within the meaning of Article 82(1)(c) EC.

45. The referring court concentrates only on Post Danmark's selective reduction of prices which had, or could have had if the Danish competition authorities had not intervened, the effect of driving or excluding FK from the market for the distribution of unaddressed mail in Denmark ('primary-line discrimination').

46. The distinction made by the Danish authorities and courts between 'primary-line' and 'secondary-line' discrimination seems to me expedient and it is, furthermore, strongly supported by certain commentators.[15] Although the list of abusive practices in Article 82 EC is not an exhaustive enumeration of the kinds of abuses of a dominant position prohibited by that Article,[16] the distinction makes it possible, in my opinion, to clarify the relationship between discriminatory pricing practices under Article 82(c) EC, that is to say, those whose anti-competitive effects are produced in the market or markets of 'trading parties', thereby 'placing them at a competitive disadvantage', which corresponds to what is known as secondary discrimination because, by definition, those parties cannot be the competitors of the undertaking which is abusing its dominant position, and the effects that are produced on the market on which the dominant undertaking and its competitors operate and which fall within other situations, including that of limiting production, markets or technical development to the prejudice of consumers, referred to by Article 82(c) EC, and which have the effect of driving out or excluding those competitors.

47. My second observation is that, by mentioning in its first question selective price reductions the level of which lies between the dominant undertaking's average incremental costs and its average total costs, the referring court appears to confine that question to Post Danmark's pricing in relation to Coop, without taking into account its pricing for the two other customers of FK, namely Spar and SuperBest, also mentioned in the order for reference, to which it is established that Post Danmark offered prices *higher* than its average total costs.

15 — See, among others, Temple Lang, J., and O'Donoghue, R., 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC', *Fordham International Law Journal*, No 83, 2002, p. 86; Geradin, D., and Petit, N., 'Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?', *Journal of Competition Law and Economics*, No 3, 2006, p. 487 et seq.

16 — Case C-6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26; Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 112; Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 57; Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph. 173, and Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, paragraph 26.

48. It is uncertain how that omission is to be interpreted. On the one hand, it may mean that the referring court has already rejected the argument that Post Danmark's pricing for Spar and SuperBest could lead to driving FK from the market. On the other hand, it could simply mean that the referring court takes the view that, after it is enlightened as to the interpretation of Article 82 EC in relation to the prices offered by Post Danmark to Coop, it must and could itself draw the appropriate conclusions from the Court's reply with regard to the legality of Post Danmark's pricing for Spar and SuperBest.

49. In any case, it seems to me that, in order to give a helpful reply to the referring court, Post Danmark's pricing for Spar and SuperBest should not be disregarded in considering the question whether it can be found that the dominant undertaking abused its position by aiming to drive or exclude a competitor from the market when there is a selective reduction of prices of a non-predatory nature and, if that is the case, in what circumstances.

B - The selective reduction of prices and the effect of excluding competitors

50. On the question mentioned in the previous paragraph the parties which submitted observations to the Court are divided.

51. In essence, for Post Danmark and the Czech Government, the exclusion of competitors by pricing can be found only if the price is below the corresponding cost category. In the present case, a price higher than the average incremental cost could not entail the exclusion of a competitor unless it was part of a strategy aimed at driving out the competitor, a strategy that could, according to the Czech Government, be inferred from an economic analysis but that, according to Post Danmark, ought to appear solely or mainly from evidence showing a subjective intention to eliminate competition. Inasmuch as the documents in the main proceedings do not demonstrate that any such strategy was pursued by Post Danmark, there is, it is submitted, no abuse of a dominant position within the meaning of Article 82 EC.

52. In contrast, FK, the Danish and Italian Governments, the EFTA Surveillance Authority and, to a certain extent, the Commission, take the opposite view, particularly after the clarification of its position made by the latter at the hearing. In broad outline, those interested parties submit that, *irrespective of costs*, selective pricing by a dominant undertaking in relation to customers of its only genuine competitor leads, or may very likely lead, to the exclusion of the latter if such pricing is not justified on economic grounds, particularly economies of scale. That is said to be the situation in the main proceedings.

53. Much of the dispute between the interested parties turns on the interpreting of the implications of a series of judgments of the Court of Justice and the General Court in which selective pricing on the part of dominant undertakings has been examined. On both sides the judgments support the views expressed in the observations submitted to the Court.

54. Before considering those judgments, it must be observed that, according to the case-law, in prohibiting any abuse of a dominant position on the market in so far as it may affect trade between Member States, Article 82 EC covers practices which are likely to affect the structure of a market on which, as a direct result of the presence of the undertaking with the economic strength deriving from its dominant position, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market. [17]

17 — See, to that effect, Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 91; Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission* [1983] ECR 3461, paragraph 70; *AKZO* v Commission, paragraph 69; *British Airways* v *Commission*, paragraph 66; *France Télécom* v *Commission,* paragraph 104; *Deutsche Telekom* v *Commission*, paragraph 174, and *TeliaSonera Sverige*, paragraph 27.

55. Therefore, as Article 82 EC refers not only to practices that may cause damage to consumers directly, but also to those detrimental to them through their impact on competition, a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. [18]

56. From that point of view, while the prohibition of the abuse of a dominant position may, quite naturally, be intended to ensure the direct welfare of consumers, it is also justified by the need to protect and maintain competition, the pursuit of that objective being presumed in some way to benefit consumers.

57. So far as pricing is concerned, while the special responsibility of the dominant undertaking has led the Court to state that not all competition by means of price may be regarded as legitimate, [19] that statement means that such competition is generally authorised, or even recommended, subject to exceptions. Competition by price being generally beneficial, it is not, as a matter of principle, to be prohibited for undertakings with a dominant position on a given market.

58. Nevertheless, the question whether the pricing practices of an undertaking with a dominant position in a given market lead to abuse of that position within the meaning of Article 82 EC must be determined by considering all the circumstances and calls for examining whether those practices tend to bar competitors from access to the market or to strengthen the dominant position by distorting competition. [20]

59. As some of the interested parties have pointed out, the case-law refers to several cases in which the Union judicature has found that a selective reduction in prices by one or more undertakings with a dominant position conflicted with the prohibition laid down by Article 82 EC.

60. The first of those cases gave rise to *Akzo* v *Commission*.

61. Akzo's pricing practices of which the Commission complained in the Community market for organic peroxides [21] included not only, as already mentioned, abnormally low (predatory) prices offered to the customers of one of its competitors (ECS), examined at paragraphs 98 to 109 of the Court's judgment, but also selective offers to customers of the same competitor of prices considerably lower than those that Akzo charged its own customers, [22] a practice which is examined by the Court at paragraphs 110 to 121 of the judgment.

62. After upholding the Commission's finding that Akzo held a dominant position on the market in question by reference to its market share of about 50% and to other factors, [23] the Court went on to consider the selective nature of the prices offered to the 'large independents' who were customers of ECS. The Court observed that Akzo did not deny that it charged differing prices to buyers of comparable size, but that it had not advanced arguments to show that the differences related to the quality of the products or to special production costs. [24] The Court then noted that the prices charged by Akzo to its own customers were above its average total costs, whereas those offered to its

18 — Judgments in *France Télécom* v *Commission*, paragraph 105; *Deutsche Telekom* v *Commission*, paragraph 176, and, to that effect, *TeliaSonera Sverige*, paragraph 24.

19 — *Akzo* v *Commission*, cited paragraph 70.

20 — Judgments in *Nederlandsche Banden Industrie Michelin* v *Commission*, paragraph 73; *Deutsche Telekom* v *Commission*, paragraph 175, and *TeliaSonera Sverige*, paragraph 28.

21 — Commission decision 85/609/EEC of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698-ECS/AKZO Chemie), OJ 1985 L 374, p. 1.

22 — *Akzo* v *Commission*, paragraphs 9 and 111.

23 — *Ibid.*, paragraphs 59 to 61. It should be observed that, after a detailed examination of the justification for the Commission's decision, Advocate General Lenz concluded that, on the contrary, the Commission had not shown that Akzo held a dominant position on the market in question (see paragraphs 62 to 124 of his Opinion in *Akzo* v *Commission*).

24 — *Ibid.*, paragraph 113.

competitor's customers were below its average total costs.[25] At paragraph 115 of the judgment, the Court concluded that Akzo was thus able, at least partly, to set off losses resulting from the sales to customers of ECS against profits made on the sales to the 'large independents' which were among its own customers, which showed that Akzo's intention was not to pursue a general policy of favourable prices, but to adopt a strategy that could damage its competitor. The Court therefore upheld on that point the Commission's decision that Akzo had abused its dominant position

63. At this stage of the analysis, I shall confine my comments on those points of the *Akzo* judgment to the two following remarks.

64. In the first place, the Court confirmed that the selective nature of the prices offered by Akzo constituted an abuse by reference to the criterion of the costs of the dominant undertaking, namely, its average total costs.

65. That criterion proves to be relatively harsh so far as the dominant undertaking is concerned. By taking as its point of reference the undertaking's average total costs, that is to say, including fixed costs and variable costs, the Court condemns selectiveness even though the sale of an additional unit to the dominant undertaking's own customers covers the variable costs of the unit produced and at least part of the fixed costs attributable to that unit. In that context, although it is clear that the difference in pricing treatment between the customers of the dominant undertaking and those of the competitor to whom the advantageous offers are made may actually represent discrimination entailing a disadvantage in competition between those customers, within the meaning of Article 82(c) EC ('secondary-line discrimination'), it is less certain that such a practice, considered in isolation, may lead to the elimination of an equally efficient competitor because the latter could easily take away all or some of the dominant undertaking's regular customers who are victims of the discriminatory treatment, unless they are subject to particular constraints imposed by the dominant undertaking binding them too tightly to it.

66. Although the Court did not make those points in the relevant passages of *Akzo* v *Commission*, it must be observed, first, that Akzo's selective price offers were associated with a number of unlawful practices on its part, including predatory pricing, and, second, that the Court inferred from Akzo's selective pricing that it did not have the effect of driving out the competitor, but merely an intention to do so. Going back to the general context of *Akzo* v *Commission*, paragraphs 113 to 115 of that judgment suggest by implication that examination of Akzo's selective reduction of prices contributed to proving that it had a plan or strategy of eliminating competition.

67. In the second place, the Court's apparent harshness in *Akzo* v *Commission* with regard to a selective reduction of prices on the part of a dominant undertaking appears to be explained by the fact that such a practice, as opposed to generally low prices, is detrimental to that undertaking's own customers and has no economic justification. In other words, the Court appears to take the view that the object of selective pricing is not to ensure that customers and, at least indirectly, consumers benefit from low prices (which, in contrast, is generally the case with non-selective low prices, or even predatory prices, at least in the short term), but is only to win certain customers from the competitors of the dominant undertaking, with no benefit whatever for consumers or for the competitive structure of the market.

68. If, as I have just pointed out, the Court's approach in *Akzo* v *Commission* with regard to selective offers of low prices by the dominant undertaking is based on the criterion of its costs, the Union judicature has not concerned itself with that criterion in other, later cases.

25 — *Ibid.*, paragraph 114.

69. That applies to the cases *Compagnie maritime belge transports and Others* v *Commission*[26] and *Irish Sugar* v *Commission*.[27] [28]

70. In the first of those cases, the Commission complained that the shipping conference Associated Central West Africa Lines ('Cewal'), of which Compagnie maritime belge transports was a member, and which held a share of more than 90% in the relevant market, had altered its freight rates by departing from the tariff in force in order to obtain rates the same as or less than those of its main independent competitor (G&C) for vessels sailing on the same or neighbouring dates (a practice known as 'fighting ships'), contrary to Article 86 of the EEC Treaty.[29]

71. The General Court upheld the Commission's assessment.

72. First of all, that Court observed that the applicant undertakings did not deny the three factors constituting the practice of fighting ships, (which differed from predatory pricing), namely, (a) designating as fighting ships those vessels of the conference members whose sailing dates were closest to the sailings of G&C ships, without altering scheduled timetables; (b) jointly fixing fighting rates different from the rates normally charged by Cewal members so that they were the same as or lower than G&C's advertised prices, and (c) the resulting decrease in earnings, which was borne by Cewal members.[30]

73. The General Court went on to examine the applicants' submissions concerning the abuse of a dominant position and found, having regard to the documents in the file, that the Commission had established to a sufficient legal standard that that practice was carried out with a view to removing Cewal's only competitor on the relevant market.[31] In those circumstances, the Commission considered that, as the practice aimed to remove the only competitor, the applicants could not effectively argue that they had merely entered into a price war started by the competitor or responded to expectations of their customers. Even assuming them to be proved, those circumstances could not, according to the Court, render the response of the members of Cewal reasonable and proportionate.[32]

74. Finally, the General Court dismissed the applicants' claim that the increase in G&C's market share meant that the practice complained of had no effect and hence that there was no abuse of a dominant position. The Court took the view that, where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterised as an abuse of a dominant

26 — Judgment of the General Court in Joined Cases T-24/93 to T-26/93 and T-28/93, and the Court of Justice in Joined Cases C-395/96 P and C-396/96 P, cited above.

27 — Judgment of the General Court in Case T-228/97 [1999] ECR II-2969, and of the Court of Justice in Case C-497/99 P [2001] ECR I-5333.

28 — I should like to point out that the Commission's approach in Decision 88/138/EEC of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - *Eurfix-Bauco* v *Hilti*) (OJ 1988, L 65, p. 19) was not based on costs. That case concerned a number of discriminatory and selective practices on the part of Hilti aiming to dissuade customers from buying from competitors nails for the nail guns which it itself made, Hilti's share of that market being estimated at between 70% and 80%. The practices which the Commission considered constituted an abuse included discounts granted to some of the main customers of Hilti's competitors, who produced nails compatible with its nail guns. Its own customers buying similar or equivalent quantities were not given the benefit of those special offers. In the decision, the Commission took the view that the special offers were not a defensive reaction to competitors, but reflected Hilti's pre-established policy of attempting to limit their entry into the market for Hilti-compatible nails (Decision, paragraph 80). The Commission added that 'the abuse in this case does not hinge on whether the prices were below costs (however defined … . Rather it depends on the fact that, because of is dominance, Hilti was able to offer special discriminatory prices to its competitors' customers with a view to damaging their business, whilst maintaining higher prices to its own equivalent customers' (Decision, paragraph 81). In the action for the annulment of the decision (Case C-30/89 *Hilti* v *Commission* [1991] ECR II-1439), Hilti put forward in certain respects very general submissions which did not specifically relate to the selective discounts, but which were dismissed by the General Court at paragraph 100 of the judgment and, in other respects, Hilti admitted other practices of which it was accused, of which the Court merely had to take note (Decision, paragraph 101). The appeal to the Court of Justice (Case C-53/92 *Hilti* v *Commission* [1994] ECR I-667) did not concern the assessment in those paragraphs of the General Court's judgment.

29 — Commission Decision 93/82 of 22 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ 1993 L 34, p. 20).

30 — Judgment cited above, paragraphs 139 and 141.

31 — *Ibid*., paragraph 147.

32 — *Ibid*., paragraph 148.

position within the meaning of Article 86 of the Treaty and added that, 'contrary to the applicants' assertions, the fact that G&C's market share increased does not mean that the practice was without any effect, given that, if the practice had not been implemented, G&C's share might have increased more significantly'. [33]

75. On appeals against the General Court's judgment, the Court of Justice set it aside in so far as it concerned the fines imposed on the applicants. [34]

76. On the other hand, with regard to the abuse of a dominant position, the Court upheld, albeit somewhat cautiously, the assessment by the General Court.

77. After observing, first, that the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case showing that competition has been weakened and, second, that the maritime transport market is a very specialised sector and liner conferences may be authorised by virtue of Union law to fix rates, [35] the Court stated that 'where a liner conference in a dominant position selectively cuts its prices in order deliberately to match those of a competitor, it derives a dual benefit. First, it eliminates the principal, and possibly the only, means of competition open to the competing undertaking. Second, it can continue to require its users to pay higher prices for the services which are not threatened by that competition'. [36]

78. At paragraphs 118 to 120 of the judgment the Court added as follows:'118. It is not necessary, in the present case, to rule generally on the circumstances in which a liner conference may legitimately, on a case by case basis, adopt lower prices than those of its advertised tariff in order to compete with a competitor who quotes lower prices …

119. It is sufficient to recall that the conduct at issue here is that of a conference having a share of over 90% of the market in question and only one competitor. The appellants have, moreover, never seriously disputed, and indeed admitted at the hearing, that the purpose of the conduct complained of was to eliminate G&C from the market.

120. The Court of First Instance did not, therefore, err in law, in holding that the Commission's objections to the effect that the practice known as 'fighting ships', as applied against G&C, constituted an abuse of a dominant position were justified. It should also be noted that there is no question at all in this case of there having been a new definition of an abusive practice'.

79. The second case, *Irish Sugar* v *Commission*, concerned acts of that undertaking, which the Commission found to constitute an abuse, on the retail sugar market in Ireland, where it had a market share of more than 88%. [37] In particular, the Commission complained that Irish Sugar had granted special discounts, with no objective economic justification, to certain retailers in the frontier region between Ireland and Northern Ireland in order to meet competition from sugar imports originating from Northern Ireland or from its own sugar reimported into Ireland. Referring to the *EC* v *Akzo Chemie* decision, the Commission found that the selective frontier discounts constituted an abuse of a dominant position. [38]

33 — *Ibid.*, paragraph 149.

34 — Joined Cases C-395/96 P and C-396/96 P, cited above, paragraphs 146 and 147 and point 1 of the operative part.

35 — *Ibid.*, paragraphs 114 to 116.

36 — *Ibid.*, paragraph 117.

37 — Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/34.621, 35.059/F-3 – Irish Sugar plc) (OJ 1997 L 258, p. 1).

38 — Decision, paragraphs 133 to 135.

80. In determining whether frontier discounts of that kind constituted an abuse, the General Court began by finding that the Irish Sugar prices were not predatory prices within the meaning of the Court's case-law.[39] The General Court then noted that it was clear from the documents in the file that Irish Sugar deliberately chose to offer a special rebate selectively to certain retailers, but also that the undertaking suspected that such a practice was illegal.[40]

81. That led the General Court to find that such a practice constitutes abuse of a dominant position within the meaning of Article 86(c) EC[41] and it dismissed all Irish Sugar's submissions seeking to show that its conduct was lawful.[42] In particular, the General Court dismissed Irish Sugar's argument that it sought to defend itself against the competition from low-price imports (but not below the cost price) from the British and Northern Ireland markets, noting that, as Irish Sugar had admitted, the latter's economic capacity to offer discounts in the region along the border with Northern Ireland depended on the stability of its prices in other regions, which amounted to recognition that it financed those rebates by means of its sales in the rest of Irish territory.

82. The Court concluded that, by conducting itself in that way, Irish Sugar had prevented the development of free competition on that market and distorted its structures, in relation to both purchasers and consumers, as the latter had not been able to benefit, outside the region along the border with Northern Ireland, from the price reductions caused by the imports of sugar from Northern Ireland.[43] According to the General Court, the protection of the commercial position of an undertaking in a dominant position with the characteristics of Irish Sugar at the time in question must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers, which was not apparent in that case.[44]

83. It must also be noted that the General Court dismissed Irish Sugar's claim that the Commission had relied on the mere withdrawal of a competitor from the market as proof that the border rebates constituted an abuse. After pointing out that that was not the Commission's position, the Court added that 'in so far as the border rebates were aimed at securing the loyalty of purchasers exposed to offers from competitors, without enabling all the applicant's customers to benefit from the impact of competition on the sale prices of its products, the removal of a competitor following such a practice illustrates all the better the fact that it was an abuse within the meaning of Article 86 EC'.[45]

84. Irish Sugar's appeal against that judgment was limited to challenging the General Court's assessment regarding the existence of a dominant position. The Court of Justice did not, therefore, have to give a ruling on the findings of the court of first instance concerning Irish Sugar's conduct which constituted an abuse.

85. What are the implications of those two cases?

86. First, as I have already mentioned, they are instances of a judicial approach according to which a selective reduction in prices by a dominant undertaking is held to be contrary to Article 82 EC, without the prices having been considered in relation to the costs of the undertaking and when it is apparent that the prices had not been fixed below the average total costs.

39 — Case T-228/97, paragraph 182.
40 — *Ibid.*, paragraph 183.
41 — *Loc. cit.*
42 — *Ibid.*, paragraphs 184 to 192.
43 — *Ibid.*, paragraph 188.
44 — *Ibid*, paragraph 189.
45 — *Ibid.*, paragraph 191.

87. Second, whereas in *Akzo* v *Commission* the Court deduced, from the selective discounts offered to customers of Akzo's main competitor, that Akzo intended to drive out competitors, in the abovementioned cases of *Compagnie maritime belge transports and Others* v *Commission* and *Irish Sugar* v *Commission* the Union judicature adopted a different approach. The Court took the view that the pricing practices in question gave effect to the intention of driving out the competitor, that intention being evidenced, not by the selective pricing, but by internal documents of the dominant undertakings concerned or other documents in the case file.

88. In that connection, it must be observed that, in the two latter cases, the fact that the practices in question did not have the desired effect, that is to say, that they did not lead to the withdrawal of the competitor, was not considered decisive with regard to the finding that there was no abuse of a dominant position. That assessment is particularly significant in the General Court's judgment in *Compagnie Maritime belge transports and Others*, because it appears from that judgment that the market shares of the main or only competitor of the dominant undertaking had increased during the period when the disputed pricing practices were adopted. [46]

89. That conclusion appears to mean that the pricing practices in question are anti-competitive in object but not in effect. However, when read outside its context, it could also come up against the consideration that dominant undertakings are not, in principle, deprived of the right to compete by price. [47]

90. The explanation for the Union judicature's approach in *Compagnie maritime belge transports and Others* and *Irish Sugar* could, in my opinion, be due to three aspects, of a rather factual nature, common to the situations giving rise to the judgments of the Court of Justice and the General Court.

91. First, as I have already observed, in both cases the dominant undertaking's intention to drive out a competitor was inferred, not from selective pricing, but from other circumstances. Therefore, selective pricing was not considered to be the concrete form of that intention.

92. Second, it must be observed that the economic strength of the dominant undertakings concerned was close to that of a monopoly because their respective market shares were almost 90%. Consequently there were barriers to entering the market because of a 'super-dominance', of which Advocate General Fennelly was aware in his Opinion in *Compagnie maritime belge transports and Others*. [48]

93. Finally, the selective pricing practices formed part of a series of other practices which constituted abuses, whether in relation to prices or not, all of which had a cumulative effect which may have been significant.

94. These considerations lead me to think that *Compagnie maritime belge transports* and *Irish Sugar* are only marginally relevant with regard to the reply to be given to the referring court, even if only because, in the case in the main proceedings, it is established that no intention to drive out a competitor was proved by either the Danish competition authorities or the Danish courts, and because there is no indication at all in the documents in the file that Post Danmark was in a position of 'super-dominance'. Furthermore, with regard to *Irish Sugar* in particular, on which the Commission based some of its observations at the hearing, it must be observed that, first, in that case the dominant undertaking was trying to keep its customers by offering selective discounts to its distributors who were exposed to competition from other sugar producers and not, as in the main proceedings here,

46 — At paragraph 126 of the judgment the General Court refers to the applicants' statement that G&C'S market share had risen from 2% to 25% during the period in question. That statement was not rebutted in the other grounds of the judgment (see Case T-24/93, paragraph 149)

47 — See paragraph 57 of the present Opinion.

48 — Opinion in Joined Cases C-395/96 P and C-396/96 P, paragraphs 135 to 137. More recently, the Court has stressed the characteristic of the market strength of Cewal in *Compagnie maritime belge transports* (see *TeliaSonera Sverige*, paragraph 81).

trying to attract customers from its main or only competitor. Secondly, the discounts in question were aimed at limiting the influence of the pricing policy of operators active principally on an adjacent national market on that of operators active on another national market, a practice which has in fact been held to constitute an obstacle to the achievement of the common market. [49]

95. It seems to me that the Court's case-law must be interpreted as meaning that, where the (relatively exceptional) conditions of the *Compagnie maritime belge transports* and *Irish Sugar* cases are not fulfilled, and in particular where no intention on the part of the dominant undertaking to drive out a competitor or competitors can be inferred from the circumstances other than offers of selective prices, a selective price reduction must be examined by reference to the costs of the dominant undertaking, following the example of the criterion used in paragraphs 114 and 115 of *Akzo* v *Commission*.

96. That interpretation allows a consistent reading of the case-law. It may also provide greater legal certainty for undertakings with a dominant position when they offer selective price reductions. Moreover, in so far as a dominant undertaking knows its own costs and prices, and not those of its competitors, for the competition authorities and the courts to take into account the structure of the competitor's costs may run counter to the principle of legal certainty, for it would not allow the dominant undertaking to assess the legality of its own conduct, save for special circumstances. [50]

97. In that respect, regardless of the sector in which it operates, I think that a dominant undertaking which offers different prices, but all, nevertheless, higher than its average total costs, depending on whether they are offered to its regular customers or to its competitor's customers, cannot, in principle, even if its pricing is selective and discriminatory, cause the removal of the equally efficient competitor.

98. That competitor will, in principle, always be able to respond to such competition by prices because selling at such prices covers the average variable costs and fixed costs. Those sales will therefore be profitable and it would, in theory, be inconceivable for the competitor to be driven from the market. The result could be different if, in spite of everything, the competitor's prices were higher than the average total costs of the dominant undertaking. However, in that situation, the competitor will probably be less efficient than the dominant undertaking. The competitor's removal will therefore be only the normal result of competition on merits, in which dominant undertakings must also be able to participate in spite of their special responsibility.

99. It is true that the behaviour of the dominant undertaking may still be found contrary to Article 82(c) EC in so far as it may entail a competitive disadvantage for certain customers of the dominant undertaking ('secondary-line discrimination'). However, its behaviour must not, in principle, cause its competitor to be driven out.

100. When applied to the facts of the main proceedings, the assessment in paragraphs 96 to 98 above should, in my opinion, lead the referring court to find that the prices offered by Post Danmark to Spar and Superbest, two of FK's three customers whose situations were mentioned in the order for reference and in the observations of the interested parties, could not in principle result in FK's being driven from the market because it is established, as I have already said, that those prices were higher than Post Danmark's average total costs. In addition, the referring court has not informed the Court of FK's cost structure.

101. It remains to be considered whether a dominant undertaking such as Post Danmark may wrongfully drive out its competitor if it, Post Danmark, offers a selective reduction in prices to a large customer of its competitor when those prices are higher than the average incremental costs of the dominant undertaking, but less than its average total costs.

49 — Case T-228/97 *Irish Sugar* v *Commission*, paragraph 185.

50 — *TeliaSonera Sverige*, paragraphs 44 and 45.

102. First of all, I do not think that the mere fact that the price offers in question were made to a single customer of the main or only competitor can lead to rejecting a finding of abuse of a dominant position. Such a customer may indeed account for a significant volume of purchases and a significant market share, as appears to have been the case of Coop in the main proceedings.

103. Secondly, it would be tempting to extend by analogy the Court's reasoning at paragraphs 113 to 115 of *Akzo* v *Commission*, as the Commission suggested at the hearing.

104. Taking that approach, it would follow that the fact that the dominant undertaking offered its competitor's customer prices lower than its average total costs, while charging its regular customers prices higher than that average, would enable it, at least partly, to offset 'the losses' arising on sales to the competitor's customer with the profits on sales to its regular customers. If there were no economic justification, such a practice would amount to driving the competitor from the market.

105. In the main proceedings, that approach would in all likelihood lead the referring court to find that Post Danmark had abused its dominant position in the national market for the distribution of unaddressed mail, in so far as the Danish competition authorities found that Post Danmark had not shown that the selective offer to Coop, one of FK's main customers, was justified by economies of scale, and that finding was not overruled by the Danish court in its order for reference.

106. While that does not necessarily affect the finding of abuse of a dominant position by Post Danmark, I nevertheless hesitate to suggest a line of reasoning strictly based on that in paragraphs 113 to 115 of *Akzo* v *Commission*, as the Commission proposed at the hearing.

107. That line of reasoning seems to me to over-simplify, at the very least, the problem of selective price offers by a dominant undertaking operating at one and the same time on a partly reserved market, where it has a universal service obligation, and on a market totally open to competition, where no operator is burdened by universal service constraints.

108. First, the fact that the prices offered to the competitor's main customer are higher than the average incremental costs of the dominant undertaking must not, in my view, be regarded as a situation in which sales give rise to 'losses', but rather as characterised by sales which do not maximise the earnings of that undertaking. In principle, such sales remain profitable because the earnings from them cover the costs engendered in carrying on the specific business on the competitive market, namely, in the present case, the distribution of unaddressed mail.

109. Therefore, whether the dominant undertaking can charge prices at that level does not depend, in my opinion, on a set-off of the price of sales to regular customers on the market open to competition, with regard to which it maximises its earnings, against the price of sales to the competitor's main customer on the same market, with regard to which the dominant undertaking does not maximise earnings. In order to maintain the price level offered to the competitor's customer, the dominant undertaking does not, in principle, need to set off in that way.

110. However, in a market where there is no other constraint on the regular customers of the dominant undertaking who are victims of the difference in pricing, the latter are perfectly able in principle to find a competitor capable of offering them equivalent services at a price less than that charged by the dominant undertaking. [51]

51 — In the present case, Post Danmark repeated at the hearing that the premature termination of an agreement for the distribution of unaddressed mail by one of its customers entailed no penalty whatever and was only subject to one month's notice. That situation differed very clearly from that in *Compagnie maritime belge transports* (paragraph 117), where the Court stressed particularly that the dominant undertaking offered low prices to its competitor's customers while it could continue to charge users higher prices for services which were not threatened by such competition.

111. Secondly, on the other hand, in so far as incremental costs take little or no account of the fixed costs common to business carried out on both markets on which the dominant undertaking is present, in particular, the fixed costs of maintaining the capacity of its distribution network used, as in the main proceedings, both for its (partly reserved) operations in fulfilling universal service obligations, and also for its unaddressed mail business, the dominant undertaking could, even while charging a price higher than its average incremental cost, in the final analysis, cause the customers of the partly reserved operations in the market in which it has a universal service obligation to bear the cost of the distribution network capacity mobilised by the dominant undertaking for its unaddressed mail business.

112. In other words, it is perfectly possible, taking the average incremental cost as the yardstick, for the dominant undertaking to be able to charge a price slightly higher than that average (thus preventing the price from being automatically regarded as predatory) by causing all or part of the common fixed costs to be borne by the partly reserved operations in the market in which it has a universal service obligation, and those operations therefore subsidise the price offered on the market which is open to competition. Whether selective or not, such a practice could eventually lead to driving competitors from the liberalised market, that is to say, in the main proceedings here, those operating in the Danish market for the distribution of unaddressed mail which, of course, do not benefit from the same cross-subsidy arrangement. [52]

113. I consider, therefore, that the fact that a dominant undertaking, such as Post Danmark, charges a selective price higher than the average incremental cost does not make it impossible, contrary to what was in essence suggested by Post Danmark and the Czech Government in their observations before the Court, that such a price level may entail a risk of driving out that undertaking's competitor, since the price is likely to be subsidised by the earnings from the partly reserved business of the dominant undertaking on the market on which it operates while carrying out universal service obligations.

114. In order to ascertain whether that is so, I think it would be necessary to establish the 'stand-alone' cost [53] of the services provided by the dominant undertaking in the market in which it carries out universal service obligations and to determine whether the earnings generated by those services exceed such cost. If so, it would probably have to be found that there was a cross-subsidy of sales on the market open to competition, for which the price charged is less than the average total cost. In view of the particular responsibility of an undertaking in a dominant position for maintaining the competition structure of the market, the use of such cross-subsidies would eventually involve a real risk of driving out the competitor and would, in my view, justify preventive action by the competition authorities.

115. Depending on how long that practice was employed, such a risk may be inferred from the competitor's loss of market share.

116. In the main proceedings it seems, however, as I observed in paragraph 14 of this Opinion, that the Danish competition authorities were unable to find that there were unlawful cross-subsidies in favour of Post Danmark's distribution business for unaddressed mail. However, the referring court will have to satisfy itself on that point.

117. At this stage, it is still uncertain whether the price offer made by Post Danmark to one of the main customers of its only or main competitor in the unaddressed mail market is proportionate. The question can be considered from two angles.

52 — See, generally, Thouvenin, V., 'Coûts incrémentaux: retour sur les avantages concurrentiels du secteur public. Éléments de définition des coûts incrémentaux dans le contexte d'une stratégie de prédation: point de vue d'un économiste', *Concurrences*, cited above, p. 11.

53 — See the papers by Faulhaber, G.R., 'Cross-Subsidization: Pricing in Public Enterprises', *American Economic Review*, 1975, No 5, p. 966, and 'Cross-Subsidy Analysis with more than two services', *Journal of Competition Law and Economics*, 2005, No 3, p. 441, which gives the following definition: 'the stand-alone cost of any service or group of services of an enterprise is the cost of providing that service (at the existing or "test" demand level) or group of services by themselves, without any other service that is provided by the enterprise'. See also Thouvenin, V., *op. cit.*, p. 11.

118. First, it may be asked whether, in view of the particular responsibility of the dominant undertaking in the market, it did not fall to the latter to refrain from offering, in a selective manner, a price higher than its incremental costs, so as to pursue a non-discriminatory pricing policy in relation to its regular customers. Secondly, there is a question as to the reasons why a dominant undertaking such as Post Danmark should make different price offers to its competitor's customers.

119. On the first point, I think that to compel a dominant undertaking to offer the same prices to its regular customers and to those of its competitor, that is to say, in the main proceedings, to offer a uniform price higher than average incremental costs, could no doubt prevent 'secondary-line discrimination' between the trading partners of that undertaking, but would not have a positive influence on the potential effect of driving out the competitor. While it is possible that uniform pricing cannot be maintained for as long as in the context of selective pricing, on the other hand the level of the prices offered by the dominant undertaking to its competitor's customer remains unchanged, irrespective of whether the price is offered selectively or in the context of a uniform rate.

120. With regard to the second point, in so far as the competitor's customers to whom different prices were offered are considered to be in a comparable situation, I find it difficult to understand the reasons why a dominant undertaking such as Post Danmark should vary its offers in such a way that two of them (those to Spar and SuperBest) cover Post Danmark's total average costs, while the other (Coop) does not, although in the first case the offers, which, as I have said, entail no risk of removal of the competitor, are always below the competitor's prices. Consequently even a price offer at the level of that made to Spar and SuperBest could have been sufficiently attractive for a customer like Coop because, it seems, it was less than the prices offered by FK without, however, having the possible effect of driving out the competitor. Nevertheless, whether that effect actually materialises will depend above all on whether the dominant undertaking can subsidise the prices offered to Coop from its own (partly reserved) business operations in the sector in which it has a universal service obligation.

121. To conclude, the approach which I have just proposed, which is to give priority to considering an at least potential effect of driving out a competitor, rather than an intention to do so, as in *Akzo* v *Commission*, also seems to me more appropriate in view of the circumstances of the main proceedings. Unlike the situation in *Akzo* v *Commission*, the referring court is not confronted by a number of unlawful practices on the part of one and the same undertaking, some of which clearly have the object of removing its competitor, which in my eyes may explain why the Court, when considering Akzo's selective pricing, merely inferred that undertaking's intention to damage its competitor.

122. The result of adopting an approach based on the intention of excluding a competitor rather than on the effects of so doing would be to regard any selective pricing as an abuse intended to drive out competitors, because the prices of the dominant undertaking are less than its average total costs, unless that is justified economically. However, as I have explained in the foregoing arguments, that presumption seems to me neither well founded from the economic and legal aspects, nor appropriate. It cannot be automatically inferred from a difference in the price treatment of regular customers of the dominant undertaking and the customer or customers of its competitor.

123. For all those reasons, I consider that Article 82 EC is to be interpreted as meaning that the conduct of a dominant undertaking constitutes abuse of a dominant position when that undertaking thereby offers a selective reduction in prices, at a level higher than the average incremental costs but lower than the average total costs of that undertaking, to the main customer of its main or only competitor on the national market for the distribution of unaddressed mail, which is fully open to competition, if the selective price offer is likely to be subsidised by the earnings from the dominant undertaking's operations, which are partly reserved, on the market for postal services on which it operates by carrying out universal service obligations, so having the effect of driving that competitor from the market. In that connection, in order to establish the existence of unlawful

cross-subsidisation of the dominant undertaking's unaddressed mail business, it is necessary to determine whether the earnings generated by its services in the postal services market on which it carries out universal service obligations exceed the 'stand-alone' cost of those services. It is for the national court to determine whether such is the case in the dispute in the main proceedings.

III – Conclusion

124. In view of the foregoing considerations, I propose that the Court reply as follows to the questions submitted to it by the Højesteret:

Article 82 EC is to be interpreted as meaning that the conduct of a dominant undertaking constitutes abuse of a dominant position when that undertaking thereby offers a selective reduction in prices, at a level higher than the average incremental costs but lower than the average total costs of that undertaking, to the main customer of its main or only competitor on the national market for the distribution of unaddressed mail, which is fully open to competition, if the selective price offer is likely to be subsidised by the earnings from the dominant undertaking's operations, which are partly reserved, on the market for postal services on which it operates by carrying out universal service obligations, therefore having the effect of driving that competitor from the market. In that connection, in order to establish the existence of unlawful cross-subsidisation of the dominant undertaking's unaddressed mail business, it is necessary to determine whether the earnings generated by its services in the postal services market in which it carries out universal service obligations exceed the stand-alone cost of those services. It is for the national court to determine whether such is the case in the dispute in the main proceedings.