Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

27 March 2012*

((Article 82 EC — Postal undertaking with a dominant position and subject to a universal service obligation with regard to certain addressed mail — Low prices charged to certain former customers of a competitor — No evidence relating to intention — Price discrimination — Selectively low prices — Actual or likely exclusion of a competitor — Effect on competition and, thereby, on consumers — Objective justification))

In Case C-209/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Højesteret (Denmark), made by decision of 27 April 2010, received at the Court on 3 May 2010, in the proceedings

Post Danmark A/S

v

Konkurrencerådet,

intervener:

Forbruger-Kontakt a-s,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, Presidents of Chambers, A. Rosas, A. Ó Caoimh (Rapporteur), L. Bay Larsen, T. von Danwitz, A. Arabadjiev and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2011,

after considering the observations submitted on behalf of:

— Post Danmark A/S, by S. Zinck, advokat, T. Lübbig, Rechtsanwalt, and N. Westergaard, advokat,

— Forbruger-Kontakt a-s, by P. Stig Jakobsen, advokat,

— the Danish Government, by C. Vang, acting as Agent, assisted by O. Koktvedgaard, advokat,

* Language of the case: Danish.

— the Czech Government, by M. Smolek, T. Müller and V. Štencel, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Arena, avvocato dello Stato,

— the European Commission, by B. Gencarelli, U. Nielsen and K. Mojzesowicz, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis and M. Schneider, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2011,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 82 EC.

2 This reference has been made in proceedings between Post Danmark A/S ('Post Danmark') and the Konkurrencerådet (competition council) concerning the prices Post Danmark charged to three former customers of its competitor, Forbruger-Kontakt a-s ('Forbruger-Kontakt').

The dispute in the main proceedings and the questions referred for a preliminary ruling

3 In Denmark, Post Danmark and Forbruger-Kontakt are the two largest undertakings in the unaddressed mail sector (brochures, telephone directories, guides, local and regional newspapers etc.). According to the order for reference, this sector is entirely liberalised and is not covered by the Danish legislation on postal services. It is common ground in the main proceedings that the relevant market can be considered to be that of the distribution of unaddressed mail in Denmark.

4 At the material time, Post Danmark enjoyed a monopoly in the delivery of addressed letters and parcels not exceeding a certain weight, which, on account of the sole right of distribution, was allied with a universal service obligation to deliver addressed mail under that weight. For that purpose, Post Danmark had a network that covered the national territory in its entirety and that was also used for the distribution of unaddressed mail.

5 The principal activity of Forbruger-Kontakt, part of the press group Søndagsavisen a-s, is the distribution of unaddressed mail. At the material time, it had created a distribution network covering almost the entire national territory, chiefly through the acquisition of smaller distribution undertakings.

6 Until 2004, the SuperBest, Spar and Coop groups, undertakings in the supermarket sector, were major customers of Forbruger-Kontakt. Towards the end of 2003, Post Danmark concluded contracts with those three groups for the distribution of their unaddressed mail from 1 January 2004.

7 Before concluding a contract with Post Danmark, the Coop group had conducted negotiations both with that undertaking and with Forbruger-Kontakt. The offers made by those two operators were comparable in terms of price, Post Danmark's being only marginally lower.

8 Following a complaint made by Forbruger-Kontakt, by decision of 29 September 2004 the Konkurrencerådet held that Post Danmark had abused its dominant position on the Danish market for the distribution of unaddressed mail, practising a targeted policy of reductions designed to ensure its customers' loyalty, by, first, not putting its customers on an equal footing in terms of rates and rebates (which the Konkurrencerådet called 'secondary-line price discrimination') and, secondly,

charging Forbruger-Kontakt's former 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 (a practice described by the Konkurrencerådet as 'primary-line price discrimination').

9 The court making the reference states that, while the price offered to the Coop group did not allow Post Danmark to cover its 'average total costs', it did allow it to cover its 'average incremental costs'.

10 According to Post Danmark, the contract concluded with that group made it possible to achieve considerable economies of scale, due in particular to the fact that that contract concerned five of the group's brands and thus up to five items per household. In this connection, it is stated in the order for reference that the costs of the distribution by Post Danmark of unaddressed mail fell by DKK 0.13 per item from 2003 to 2004.

11 The Konkurrencerådet considered nonetheless that, as regards cost analysis, that fact had no effect on the overall appraisal of the pricing policy Post Danmark applied to the Coop group. First, a criterion based on economies of scale was absent from Post Danmark's general terms regarding prices and reductions, rebates and discounts and, secondly, the marginal reduction in the cost of distributing several items of mail to one and the same household was not linked to the fact that the items were sent by one and the same sender.

12 By decision of 1 July 2005, the Konkurrenceankenævnet (competition appeals tribunal) upheld the Konkurrencerådet's decision of 29 September 2004.

13 In addition, the Konkurrenceankenævnet upheld a decision of the Konkurrencerådet of 24 November 2004 finding that it could not be established that Post Danmark had intentionally sought to eliminate competition and that, accordingly, it had not abused its dominant position on the market for the distribution of unaddressed mail by the practice of predatory pricing.

14 Those decisions of the Konkurrencerådet and the Konkurrenceankenævnet became final in so far as they found, on the one hand, that there was no abuse of a dominant position as a result of predatory pricing and, on the other, that there was such abuse by reason of the policy of 'secondary-line price discrimination' with respect to Post Danmark's customers other than the SuperBest, Spar and Coop groups.

15 Inasmuch as those decisions concerned an abuse of a dominant position by means of selectively low prices applied to those groups, they were challenged by Post Danmark before the Østre Landsret (eastern regional court).

16 By decision of 21 December 2007, that court upheld those decisions of the Konkurrencerådet and Konkurrenceankenævnet in so far as they found that Post Danmark had abused its dominant position on the Danish market for the distribution of unaddressed mail by pursuing, in 2003 and 2004, a pricing policy for former customers of Forbruger-Kontakt different from its policy for its pre-existing customers, without being able to justify that difference on cost-related grounds.

17 Post Danmark brought an appeal against that decision of the Østre Landsret before the court making the reference. In particular, it claimed that, according to the criteria stemming from the judgment in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, as 'adapted' by Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/35.141 — Deutsche Post AG) (OJ 2001 L 125, p. 27), the prices offered to the Coop group may be considered to amount to abuse only if an intention to drive a competitor from the market can be established. For its part, the Konkurrencerådet maintained that an intention to drive a

competitor from the market is not absolutely necessary in order for a practice of selective prices, lower than average total costs but higher than average incremental costs, to amount to an abuse of a dominant position.

18 In those circumstances, the Højesteret decided to stay proceedings and to refer the following questions to the Court of Justice 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 a competitor?

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

Concerning the questions referred

19 By its questions, which may appropriately be examined together, the court making the reference asks, in essence, what the circumstances are in which a policy, pursued by a dominant undertaking, of charging low prices to certain former customers of a competitor must be considered to amount to an exclusionary abuse, contrary to Article 82 EC, and, in particular, whether the finding of such an abuse may be based on the mere fact that the price charged to a single customer by the dominant undertaking is lower than the average total costs attributed to the business activity concerned, but higher than the total incremental costs pertaining to the latter.

20 It is apparent from case-law that Article 82 EC covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition (see Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, paragraph 24 and case-law cited). It is in the latter sense that the expression 'exclusionary abuse' appearing in the questions referred is to be understood.

21 It is settled case-law that a finding that an undertaking has such a dominant position is not in itself a ground of criticism of the undertaking concerned (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 37). It is in no way the purpose of Article 82 EC to prevent an undertaking from acquiring, on its own merits, the dominant position on a market (see, inter alia, *TeliaSonera Sverige*, paragraph 24). Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.

22 Thus, not every exclusionary effect is necessarily detrimental to competition (see, by analogy, *TeliaSonera Sverige*, paragraph 43). Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.

23 According to equally settled case-law, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (Case C-202/07 P *France Telecom* v *Commission* [2009] ECR I-2369, paragraph 105 and case-law cited). When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.

24 In that regard, it is also to be borne in mind that Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, *AKZO* v *Commission*, paragraph 69; *France Télécom* v *Commission*, paragraphs 104 and 105; and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraphs 174, 176 and 180 and case-law cited).

25 Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate (see, to that effect, *AKZO* v *Commission*, paragraphs 70 and 72; *France Télécom* v *Commission*, paragraph 106; and *Deutsche Telekom* v *Commission*, paragraph 177).

26 In order to determine whether a dominant undertaking has abused its dominant position by its pricing practices, it is necessary to consider all the circumstances and to examine whether those practices tend to remove or restrict the buyer's freedom as regards choice of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 175 and case-law cited).

27 In *AKZO* v *Commission*, in which the issue was to determine whether an undertaking had practised predatory pricing, the Court held, in the first place, at paragraph 71, that prices below the average of 'variable' costs (those that vary depending on the quantities produced) must, in principle, be regarded as abusive, inasmuch as, in charging those prices, a dominant undertaking is deemed to pursue no economic purpose other than that of driving out its competitors. In the second place, it held, at paragraph 72, that prices below average total costs, but above average variable costs, must be regarded as abusive if they are part of a plan for eliminating a competitor.

28 Thus, in order to assess the lawfulness of a low-price policy practised by a dominant undertaking, the Court has made use of criteria based on comparisons of the prices concerned and certain costs incurred by the dominant undertaking, as well as on the latter's strategy (*AKZO* v *Commission*, paragraph 74, and *France Télécom* v *Commission*, paragraph 108).

29 As to whether Post Danmark pursued an anti-competitive strategy, it can be seen from the documents before the Court that the complaint at the source of the main proceedings was based on the suggestion that Post Danmark, by a policy of low prices directed at certain of its competitor's major customers, might drive that competitor from the market in question. However, as is apparent from the order for reference, it could not be established that Post Danmark had deliberately sought to drive out that competitor.

30 Moreover, contrary to the line of argument put forward by the Danish Government, which has submitted observations in these proceedings in support of the Konkurrencerådet's position in the main proceedings, the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be 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.

31 In the present case, it emerges from the case-file that, for the purpose of carrying out a price-cost comparison, the Danish competition authorities had recourse, not to the concept of 'variable costs' mentioned in the case-law stemming from *AKZO* v *Commission*, but to another concept, which those

authorities termed 'incremental costs'. In this respect, it can be seen from, in particular, the written observations of the Danish Government and its written replies to the questions asked by the Court, that those authorities defined 'incremental costs' as being 'those costs destined to disappear in the short or medium term (three to five years), if Post Danmark were to give up its business activity of distributing unaddressed mail'. In addition, that government stated that 'average total costs' were defined as being 'average incremental costs to which were added a portion, determined by estimation, of Post Danmark's common costs connected to activities other than those covered by the universal service obligation'.

32 However, as the Danish Government stated in its written replies to those questions, a notable feature of the case in the main proceedings is that there are considerable costs related both to the activities within the ambit of Post Danmark's universal service obligation and to its activity of distributing unaddressed mail. These 'common' costs are due, in particular, to the fact that, at the material time, Post Danmark was using the same infrastructure and the same staff for both the activity of distributing unaddressed mail and the activity reserved to it in connection with its universal obligation for certain addressed items of mail. That government states that, according to the Konkurrencerådet, because Post Danmark's unaddressed mail activity used the undertaking's 'common distribution network resources', the costs of its universal service obligation activities could be reduced over a period of three to five years if Post Danmark were to give up distributing unaddressed mail.

33 In those circumstances, it emerges from the case-file, and in particular from paragraphs 148 to 151 and 200 of the Konkurrencerådet's decision of 24 November 2004, mentioned in paragraph 13 above, that for the purpose of estimating what it described as 'average incremental costs', the Konkurrencerådet included, among other things, not only those fixed and variable costs attributable solely to the activity of distributing unaddressed mail, but also elements described as 'common variable costs', '75% of the attributable common costs of logistical capacity' and '25% of non-attributable common costs'.

34 In the specific circumstances of the case in the main proceedings, it must be considered that such a method of attribution would seem to seek to identify the great bulk of the costs attributable to the activity of distributing unaddressed mail.

35 When that estimation was completed, it was found, among other things, that the price offered to the Coop group did not enable Post Danmark to cover the average total costs attributed to the activity of unaddressed mail distribution taken as a whole, but did enable it to cover the average incremental costs pertaining to that activity, as estimated by the Danish competition authorities.

36 Moreover, it is common ground that, in the present case, the prices offered to the Spar and SuperBest groups were assessed as being at a higher level than those average total costs, as estimated by those authorities. In those circumstances, it cannot be considered that such prices have anti-competitive effects.

37 As regards the prices charged the Coop group, a pricing policy such as that in issue in the main proceedings cannot be considered to amount to an exclusionary abuse simply because the price charged to a single customer by a dominant undertaking is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter, as respectively estimated in the case in the main proceedings.

38 Indeed, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.

39 It is for the court making the reference to assess the relevant circumstances of the case in the main proceedings in the light of the finding made in the previous paragraph. In any event, it is worth noting that it appears from the documents before the Court that Forbruger-Kontakt 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 the Coop group's custom and, since then, that of the Spar group.

40 If the court making the reference, after carrying out that assessment, should nevertheless make a finding of anti-competitive effects due to Post Danmark's actions, it should be recalled that it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 82 EC (see, to this effect, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 184; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraphs 54 and 55; and *TeliaSonera Sverige*, paragraphs 31 and 75).

41 In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary (see, to that effect, Case 311/84 *CBEM* [1985] ECR 3261, paragraph 27), or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 86, and *TeliaSonera Sverige*, paragraph 76).

42 In that last regard, 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.

43 In the present case, it is enough to state, with regard to the considerations set out at paragraph 11 above, that 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 cannot justify a refusal to take into account, where necessary, such gains in efficiency, provided that that their actual existence and their extent have been established in accordance with the requirements set out in paragraph 42 above.

44 Having regard to all the foregoing considerations, the answer to be given to the questions referred is that Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order 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.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order 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.

[Signatures]