

CASE COMMENT

The Ruling of the CJEU in *Post Danmark*: Putting an End to Selective Price Cuts as an Abuse Under TFEU Article 102 and Turning Towards a More Economic Approach

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I. Introduction

For almost ten years European competition policy has been subject to reform towards a more economic approach to European antitrust law. In December 2008 the Commission published its Communication Guidance on the Commission's enforcement priorities in applying art.82 of the EC Treaty [now TFEU art.102] to abusive exclusionary conduct by dominant undertakings

(Guidance paper).¹ Scholars and practitioners whether in favour of a more economic approach or not, wait for a first statement of the Court of Justice (CJEU). In previous judgments the CJEU remained either vague in *TeliaSonera*² or rather traditional in *Tomra*³. Surprisingly, in the Grand Chamber judgement in *Post Danmark A/S v Konkurrencerådet* (C-209/10) of March 27, 2012 the CJEU delivered a first cautious position in favour of a more economic approach in a preliminary ruling and not on the occasion of a decision of the Commission decision which understands itself as a motor of the application of economic theory to European antitrust law. In *Post Danmark* the CJEU addresses the issues of predatory pricing, selective price cuts, cost allocation in multi-product undertakings, and specifies the conditions for a justification of anticompetitive behaviour under TFEU art.102.

II. The case of *Post Danmark A/S v Konkurrencerådet*

Post Danmark A/S (Post Danmark) and *Forbruger-Kontakt a-s* (FK) are the largest suppliers of unaddressed mail⁴ in Denmark. At the relevant period of time, Post Danmark had a monopoly in the delivery of certain addressed letters and parcels combined with a universal service obligation to deliver the respective addressed mail. Therefore, Post Danmark maintained a distribution network covering the entire Danish territory. This network was also used for the distribution of unaddressed mail. In contrast, the distribution of unaddressed mail is FK's principal activity. FK had created a distribution network which also covered almost the whole of Denmark.

At the end of 2003 Post Danmark enticed FK's major customers, supermarket chains SuperBest, Spar and Coop, away. Thereby, Post Danmark offered marginally lower prices than FK. Those prices were lower than the prices charged to Post Danmark's regular customers. The prices offered to SuperBest and Spar covered the average total costs (ATC) of delivering the unaddressed mail, whereas the even lower price offered to Coop covered only the average incremental costs (AIC).⁵ However, the Danish Competition Council "Konkurrencerådet" found no intention of Post Danmark to drive FK from the market.

In his preliminary ruling the CJEU had to assess whether (1) EC art.82 [now TFEU art.102] is 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

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¹ Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings issued in February [2009] OJ C45, p.7 onwards.

² *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09); see also Niamh Dunne, Margin squeeze: theory, practice, policy: Part 1 [2012] E.C.L.R. 29.

³ *Tomra Systems ASA and Others v Commission* (C-549/10 P).

⁴ E.g. brochures, telephone directories, guides, local and regional newspapers.

⁵ AIC are costs that would disappear in the short or medium term (three to five years), if Post Danmark ceased the distribution of unaddressed mail, *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.31; for a further assessment see also below.

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 and, (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?⁶

III. Price-based Exclusionary Conduct

A. Predatory Pricing

In determining whether the pricing behaviour of Post Danmark had an exclusionary effect on its competitors, the CJEU starts its assessment by recalling in paragraph 27 the findings of the famous judgement in *AKZO v Commission*,⁷ where it established a price/cost-test to identify predatory pricing. According to the so called AKZO-formula, prices below average variable costs (AVC, costs that depend on the quantity of output) are principally regarded as abusive. That is because there is no economic sense in applying such prices other than driving a competitor out of the market. Each sale generates a loss in the total amount of the fixed costs (costs that remain constant regardless of the quantities produced) and part of the variable costs relating to the unit produced.⁸ Prices below ATC but above AVC are deemed as predatory if they are part of a plan for eliminating a competitor.⁹ In applying these criteria to the case of *Post Danmark*, the CJEU finds—not surprisingly—that there is no case of predatory pricing, because intent to drive FK out of the market could not be established.¹⁰

However, we argue that three insights might be deduced from the *Post Danmark* preliminary judgment as regards predatory pricing:

- AVC still serve as a bottom benchmark, under which prices are per se predatory;
- ATC are a definite “safe harbour”, above which prices are not predatory in any case;
- in multi-product cases true common costs need not to be taken into account in assessing an incremental cost standard.

First, in recalling AVC as minimum standard to determine, whether a dominant undertaking practised predatory pricing, the CJEU possibly contradicts the view taken by the Commission in the Guidance paper. In paras 26 and 64 of the Guidance paper the Commission advocates an average avoidable cost standard (AAC). AAC are the average of the costs that could have been avoided if the undertaking had not produced a certain increment of output. If the AAC is not covered it would have been cheaper to not produce the respective increment of output at all. Unlike AVC, AAC includes the sunk costs¹¹ of the extra output.¹² Thus, an AAC standard is more severe than an AVC standard. In recurring to the AVC standard, it seems likely that the CJEU would stick to it also in future decisions and not adopt an AAC standard as promoted by the Commission. Furthermore, the Commission in the course of a more economic approach advocates a mere presumption that the failure to cover AAC leads to predation,¹³ so that below AAC prices can be justified. Slightly opposed to that the CJEU regards prices under AVC as “in principle” abusive¹⁴ and thus, maintains a rule of per se illegality.

Second, the CJEU definitely establishes a “safe harbour” as prices above ATC will not be regarded as predatory in any case. In para.36 the CJEU finds that:

“... the prices offered to Spar and SuperBest groups were assessed as being at a higher level than those average total costs ... In those circumstances, it cannot be considered that such prices have anti-competitive effects.”

Although the court here refers to selective prices covering ATC, it is compulsory (*a fortiori*) that a uniform price that covers ATC cannot be deemed predatory either. Advocate General (AG) Mengozzi in his opinion rightly argued that an as efficient competitor is able to compete with this price.¹⁵ Insofar, the judgment in *Post Danmark* brings a level of legal certainty as the EU courts found prices predatory regardless of an underlying cost benchmark in earlier judgments of the CJ in *Compagnie maritime belge transports v Commission*¹⁶ and the GC in *Irish Sugar v Commission*.¹⁷ In *Post Danmark*, the CJEU does not even mention these cases. AG Mengozzi carried out that the conditions of the *Compagnie maritime belge transports v Commission* and *Irish Sugar v Commission* cases were relatively exceptional¹⁸ and that the findings of these cases are only “marginally relevant to the reply

⁶ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.18.

⁷ *AKZO v Commission* (C-62/86) [1991] E.C.R. I-3359.

⁸ *AKZO v Commission* (C-62/86) [1991] E.C.R. I-3359, para.71.

⁹ *AKZO v Commission* (C-62/86) [1991] E.C.R. I-3359, para.72.

¹⁰ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para. 29.

¹¹ Sunk costs are such fix costs that an undertaking has already incurred and that cannot be recovered, e. g. costs of an advertising campaign.

¹² Guidance paper, para.64 fn.3.

¹³ Guidance paper, para.26.

¹⁴ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para. 27.

¹⁵ Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.95 onwards.

¹⁶ (Joined C-395/96 P and C-396/96 P) *Compagnie maritime belge transport and Others v Commission* [2000] E.C.R. I-1365.

¹⁷ *Irish Sugar v Commission* (T-228/97) [1999] E.C.R. II-2969.

¹⁸ In both cases the dominant undertaking's intention to drive out a competitor was established and the dominant undertakings concerned held market shares of almost 90 per cent.

to be given”¹⁹. We strongly agree with the AG’s opinion in that regard and assume that the CJEU in not referring to these decisions also tacitly does. Again, there is a contradiction to the position taken by the Commission in its Guidance paper. In some cases the Commission will apply a “reasonably efficient competitor standard”, not only an “equally efficient competitor standard”.²⁰ Accordingly prices above the dominant undertaking’s costs could yet be qualified predatory. Moreover, the Commission only “normally” will deem prices above long-run average incremental costs (LRAIC)²¹ as not exclusionary²² and thus, lets open the backdoor for above cost predatory pricing.

Third, the CJEU gives guidance on the role of common costs in cases of alleged predation.²³ In paragraph 38 the court stipulates:

“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* [emphasis added], 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.”

With “great bulk of the costs ...” the CJEU refers to the AIC as defined in paras 31 to 33. Thereafter, AIC are costs that would disappear in the short or medium term (three to five years), if Post Danmark ceased the distribution of unaddressed mail.²⁴ Thus, AIC include such costs of infrastructure and staff, even if primarily used for the fulfillment of Post Danmark’s universal service obligation, that would be avoided in the relevant time period of three to five years.²⁵ For example Post Danmark employs five postmen for providing a certain area with services of both addressed and unaddressed mail. If Post Danmark ceased the distribution of unaddressed mail, two postmen would suffice to serve the respective area with addressed mail. So, common costs would decrease in the amount of the costs of employing three additional postmen. Although common costs, they can be allocated to the unaddressed mail service and therefore are to be taken into account in AIC. On the other hand, true common costs are not included in AIC. True common costs are in that case costs of the distribution network used for both the distribution of addressed and unaddressed mail that accrue independently

of a cessation of the activity in the distribution of unaddressed mail. That definition of AIC is very close (except the time period taken into account) to the definition of LRAIC and allocation of common costs in the Commission’s Guidance paper.²⁶ The Commission explains that in cases of multi-product undertakings due to economies of scope:

“...LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs.”²⁷

So far the Commission’s definition of LRAIC matches the approach taken by the CJEU in determining AIC. However, in the same footnote 2 the Commission stipulates further that:

“[i]n situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.”

This passage became kind of famous between antitrust practitioners as it leads to grave legal uncertainty. In that respect the preliminary ruling in *Post Danmark* fills this lack of legal certainty. The CJEU establishes a “general rule” in a case where cost allocation of a multi-product undertaking is decisive without taking common costs into account in setting the relevant cost benchmark. We argue that in doing so there is no room left for an application of sentence 7 of footnote 2, i.e. taking maybe into account true common costs, if they are significant. Besides enhancing legal certainty the CJEU’s ruling is also in line with economic literature. There is no economic basis to force dominant undertakings with significant economies of scope to behave as if any such efficiency advantage did not exist.²⁸

B. Price Discrimination

The Konkurrencerådet (Denmark) by decision of September 29, 2004 took the view that Post Danmark had infringed TFEU art.102 in form of “primary-line discrimination” by charging FK’s customers selectively lower prices.²⁹ Primary-line discrimination is a form of exclusionary conduct where competitors of the

¹⁹ Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.90 onwards.

²⁰ Guidance paper, para.24.

²¹ LRAIC is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. Mostly, LRAIC come close to ATC and equal ATC in one product companies. In multi-product firms LRAIC do not include common costs, which are included by ATC.

²² Guidance paper, para.67.

²³ Again, the CJEU in *Post Danmark* assesses a practice of selective pricing. However, these findings apply *a fortiori* to uniform pricing behaviour, too.

²⁴ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.31.

²⁵ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.32.

²⁶ Guidance paper, para.26 fn.2.

²⁷ Guidance paper, para.26 fn.2.

²⁸ Ridyard, “The European Commission’s Article 82 Guidelines: Some Reflections on the Economic Issues” [2009] E.C.L.R. 230, 233.

²⁹ The decision was upheld in this point by consecutive decisions of the Konkurrenceankenævnet and the Østre Landsrat; see also *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.8 onwards.; Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.12 onwards.

discriminating undertaking might be driven out of the market, e.g. rebates or selective price cuts.³⁰ Whether (above cost) selective price cuts are anticompetitive is a highly controversial issue in the application of TFEU art.102.³¹ In *Eurofix-Bauco/Hilti* the Commission held a selectively discriminatory pricing policy by a dominant firm abusive regardless whether the prices were below cost.³² On appeal the GC upheld the decision and stated that a:

“selective and discriminatory policy such as that operated by Hilti impairs competition inasmuch as it is liable to deter other undertakings from establishing themselves in the market.”³³

Likewise, selective price cuts (independent of costs) were found anticompetitive in *Irish Sugar v Commission*³⁴ and *Compagnie maritime belge transports v Commission*.³⁵ These decisions were widely criticised, especially for increasing uncertainty³⁶ and it was argued to limit the scope of these precedents to the respective factual circumstances of the cases.³⁷

In *Post Danmark* the CJEU ruled that:

“Article 82 EC [now Article 102 TFEU] 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 this ruling and in paras 36 and 37 the CJEU restores legal certainty in stipulating that prices above ATC—even if selectively discriminatory charged—cannot be considered as anticompetitive. Prices covering AIC are not abusive due to the mere fact that they are applied selectively:

“... a pricing policy ... cannot be considered to amount to an exclusionary abuse *simply* [emphasise added] because the price charged to a single

customer is lower than average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter ...”³⁸

The underlying reasoning is that an as efficient competitor may compete with such prices.³⁹ Again, the CJEU does not refer to earlier cases, in which selective price cuts were considered anticompetitive. Insofar the same as in the above section on predatory pricing applies. However, as the wording “simply” in para.37 and “merely” in the court ruling indicates selective prices between ATC and AIC might be exclusionary due to other accompanying facts. Correspondingly, in the second part of its ruling the CJEU states that:

“[i]n 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.”⁴⁰

By saying in the first part of its ruling that selective prices under ATC, but above AIC are not *per se* abusive and in looking to the actual or possible effects of the respective pricing behaviour in the second part the CJEU tends to adopt a more economic approach. This is welcome in general, because false positives and false negatives might be avoided. On the other hand—unless the CJEU provides sufficient guidance—there is a lack of legal certainty once again. In *Post Danmark* the CJEU only mentions that the Højesteret shall take into account the fact that FK managed to maintain its distribution network and to win back Coop and Spar as customers despite *Post Danmark*’s pricing policy.⁴¹ One might deduce that, according to the CJEU, a foreclosing effect is unlikely if things go better for competitors despite the behaviour of the dominant firm. The Commission in its Guidance paper as well takes the view that the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure after a sufficient period of time.⁴² In that respect the CJEU clarifies that the market performance may serve as an indicator of abusive behaviour respectively that there has been no foreclosing

³⁰ Opposed to that “secondary-line discrimination” effects undertakings on fore and after markets.

³¹ Geradin/Layne-Farrar/Petit, *EU Competition Law and Economics* (Oxford University Press, 2012), para.4.284; Whish, *Competition Law*, 6th edn (Oxford University Press, 2009), p.738.

³² *Eurofix-Bauco v Hilti* IV/30.787 and 31.488, decision of December 22, 1987, [1988] OJ L65/19, para.81.

³³ *Hilti AG v Commission* (T-30/89) [1990] E.C.R. II-163, [1992] 4 C.M.L.R. 16, para.100.

³⁴ *Irish Sugar v Commission* (T-228/97) [1999] E.C.R. II-2969, para.215 onwards., *Irish Sugar plc* IV/34.621 and 35.059/F-3, decision of May 14, 1997, [1997] OJ L258/1, para.134.

³⁵ (Joined C-395/96 P and C-396/96 P) *Compagnie maritime belge transport and Others v Commission* [2000] E.C.R. I-1365, para.117 onwards; (Joined T-24/93, T-25/93, T-26/93 and T-28/93) *Compagnie maritime belge transport v Commission* [1996] E.C.R. II-1201, para.147.

³⁶ See for instance, Fernandez, Increasing powers and increasing uncertainty: collective dominance and pricing abuses, [2000] E.C.L.R. 645; Preece, “Compagnie Maritime Belge: missing the boat?” [2000] E.C.L.R. 388.

³⁷ Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.95; Whish, *Competition Law*, 6th edn (Oxford University Press, 2009), p.741.

³⁸ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.37.

³⁹ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.38 regarding prices above AIC; Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.97 as regards prices above ATC.

⁴⁰ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.44.

⁴¹ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.39.

⁴² Guidance paper, para. 20 indent 6.

effect. In *Compagnie maritime belge transports v Commission* the GC, however had expressly rejected the argument that the competitors marketshare had risen despite the use of “fighting ships” by the shipping conferences.⁴³

C. Cross-Subsidisation

In his opinion AG Mengozzi stated that Post Danmark by charging prices covering only AIC might have subsidised its unaddressed mail business with the services where it had a monopoly at the time.⁴⁴ He argued that in that case all common costs were borne by the customers of the partly reserved services. AG Mengozzi therefore proposed a “stand-alone cost test” to identify cross-subsidies with a possible foreclosing effect. The stand-alone costs of the reserved services should be compared with the earnings generated by those services. According to AG Mengozzi a cross-subsidy of sales on the market open to competition would be probable if earnings in the reserved area exceeded stand-alone costs, when, at the same time, prices in the market open to competition do not cover ATC.⁴⁵ This test is similar to a test applied by the Commission in *Deutsche Post AG* with the difference that the Commission compared the stand-alone costs with the incremental costs⁴⁶ of, and prices charged for, the service deemed to be subsidised.⁴⁷

The CJEU does not refer to the issue of cross-subsidisation. That might be due to the fact that cross-subsidisation is independent of the selectivity of a pricing policy,⁴⁸ but that is what the Højesteret referred to in its questions. Nevertheless, the CJEU in para.21 states:

“It is in no way the purpose of Article 82 EC [now Article 102 TFEU] to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.”

On the other hand para.23 reads as follows:

“When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.”

A stand-alone cost test as proposed by the AG in his opinion or taken by the Commission in *Deutsche Post AG* might be a way to take into account a (former) legal monopoly of the dominant undertaking. Insofar, it is regrettable that the CJEU did not use the chance to establish a rule in this respect.

Post Danmark did not exactly transfer its market power from the reserved market to the liberalised market for unaddressed mail. Nevertheless, Post Danmark used resources, especially its distribution network, of a reserved service. This situation is at least comparable to a situation where a dominant position has its origins in a legal monopoly.

IV. Justification of anticompetitive conduct

Giving answer to the second question of the Højesteret, i.e. the circumstances that have to be taken into account in assessing the possible anticompetitive behaviour in the case, the CJEU recalls that it is open to a dominant undertaking to justify its behaviour that otherwise infringes TFEU art.102.⁴⁹ In particular, efficiency gains that also benefit consumers may provide a justification.⁵⁰ For the first time, the CJEU specifies the conditions which have to be met.

First, the burden of proof lies on the dominant undertaking:

“... it is for the dominant undertaking to show ...”⁵¹

Second, the CJEU establishes a sort of TFEU art.102 (3) in para.42. The efficiency gains have to be:

- (a) likely to result from the conduct under consideration;
- (b) counteract any likely negative effects on competition and consumer welfare in the affected markets;
- (c) the conduct in question is necessary for the achievement of the gains in efficiency; and
- (d) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

⁴³ (Joined T-24/93, T-25/93, T-26/93 and T-28/93) *Compagnie maritime belge transport and Others v Commission* [1996] E.C.R. II-1201, para.149.

⁴⁴ Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.111 onwards.

⁴⁵ Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.114.

⁴⁶ See the definition above.

⁴⁷ *Deutsche Post AG* COMP/35.141, decision of March 20, 2001, [2001] OJ L125/27, para.6.

⁴⁸ Opinion of Advocate General Mengozzi of May 24, 2011 in *Post Danmark A/S v Konkurrencerådet* (C-209/10), para. 112.

⁴⁹ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.40; see, to this effect also, *United Brands and United Brands Continentaal v Commission* (27/76) [1978] E.C.R. 207, para.184; *British Airways v Commission* (C-95/04 P) [2007] E.C.R. I-2373, paras 69 and 84 onwards.; (Joined C-241/91 P and C-242/91 P) *RTE and ITP v Commission* [1995] E.C.R. I-743, para.54 onwards; *TeliaSonera Sverige* (C-52/09) [2011] E.C.R. I-0000, paras 31 and 75.

⁵⁰ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.41; see also, *British Airways v Commission* (C-95/04 P) [2007] E.C.R. I-2331, para.86; *TeliaSonera Sverige* (C-52/09) [2011] E.C.R. I-0000, para.76.

⁵¹ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.42.

The conditions resemble those of TFEU art.101(3). Thereby, the CJEU contradicts systematic concerns expressed in literature. Some scholars argue that the establishment of an TFEU art.102(3) is contrary to the intention of the Member States as they did not create an TFEU art.102(3) as opposed to TFEU art.101(3).⁵² Finally, the conditions for justification of anticompetitive conduct under TFEU art.102 comply with those set up by the Commission in para.30 of the Guidance paper.

In the case of *Post Danmark* no special indication of such efficiency gains is given. However, *Post Danmark*, in the main proceedings, asserted a reduction of the costs of the distribution of unaddressed mail in the amount of DKK 0.13 per item from 2003 to 2004 as a result of the contract concluded with Coop.⁵³ The Konkurrencerådet rejected that argument on grounds, in particular, that a criterion based on economies of scale was absent from *Post Danmark*'s general terms.⁵⁴ The CJEU clarifies:

“... 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 ... such gains in efficiency...”⁵⁵

and thus, rejects the reported consideration of the Konkurrencerådet. The view taken by the CJEU will please practitioners. Indeed, it would be nearly impossible to include every supposable efficiency gain in terms and conditions or schedules of prices as required by the Konkurrencerådet.

V. Conclusion

The preliminary ruling in *Post Danmark* brings new insights on pricing abuses under TFEU art.102 and enhances legal certainty in some respects.

In assessing predatory pricing the CJEU seems to stick to the *AKZO* cost-benchmarks also in future cases. Most important, in multi-product cases true common costs need not to be included when applying an incremental cost standard.

Regarding selective price cuts the CJEU closes the lack of legal certainty that arose from *Compagnie maritime belge transport v Commission* by clearly stipulating that prices above ATC cannot be considered anticompetitive even if applied selectively. Likewise, selective prices under ATC, but above AIC are not per se abusive, there is also no assumption that such prices have foreclosing effects. While closing that one lack of legal uncertainty the CJEU opens up a new one. Prices between ATC and AIC might be anticompetitive if they produce foreclosing effects. Unfortunately, the CJEU does not provide sufficient guidance when that is the case albeit it clarifies that a competitor's actual performance following the alleged abusive behaviour has to be taken into account.

Finally, the CJEU, for the first time, specifies the conditions for a justification of anticompetitive unilateral conduct and establishes a kind of TFEU art.102 (3).

⁵² Particularly, this argument is brought in German literature; see e.g., Fuchs/Möschel, in: Immenga/Mestmäcker eds., *Europäisches Wettbewerbsrecht*, 5th edn, (2012) art.102 AEUV, para.162; Weiß, in: Calliess/Ruffert eds., *EUV/AEUV, Kommentar*, 4th edn (2011) art. 102 AEUV, para.37; Hirsbrunner/Schädle, "Sicherer Hafen oder Bermudadreieck? Wohin geht die Reise bei der Neuorientierung der Praxis der Europäischen Kommission gegenüber Missbräuchen marktbeherrschender Unternehmen i. S. des Art. 82 EG?" [2006] *Zeitschrift für europäisches Wettbewerbsrecht (EuZW)* 583, 585.

⁵³ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.10.

⁵⁴ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.11.

⁵⁵ *Post Danmark A/S v Konkurrencerådet* (C-209/10), para.43.