Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 May 2015 [1]

Case C-23/14

Post Danmark A/S
v
Konkurrenceråd

(Request for a preliminary ruling from the Danish Sø- og Handelsret)

(Competition — Abuse of a dominant position (Article 82 EC) — Postal services — Danish market for the distribution of bulk mail — Direct advertising mail — Monopoly held by the former State-owned postal undertaking on a significant part of the market — Rebate scheme — Exclusionary effect — No appreciability or de minimis threshold — 'As-efficient-competitor' test)

I – **Introduction**

1. The present preliminary ruling proceedings provide the Court with a further opportunity to clarify with reference to Article 82 EC, now Article 102 TFEU, its case-law on the abusive nature of rebate schemes operated by undertakings occupying a dominant position on the market ('dominant undertakings'), the origins of which can be traced back more than 40 years. [2]

2. This case concerns the question whether the Danish undertaking Post Danmark A/S abused its dominant position on the market for the distribution of bulk mail to recipients in Denmark in 2007 and 2008. The crux of the issue here is whether Post Denmark engaged in an exclusionary practice by granting rebates of up to 16% on the distribution of direct advertising mail provided that its customers reached certain standardised volume or turnover thresholds over a reference period of one year. The rebate in question was retroactive, which is to say that it was applied to all direct advertising mail distributed for the customers concerned throughout the reference period.

3. In particular, the Court will have to clarify in this case whether, for the purposes of assessing the anti-competitiveness of rebate schemes from the point of view of Article 82 EC, it is legally necessary to carry out a price/cost analysis in which the commercial conduct of the dominant undertaking is compared with that of an equally efficient competitor (the 'as-efficient-competitor' (AEC) test). The question also arises whether the exclusionary effect of the rebate scheme operated by a dominant undertaking must exceed some form of appreciability (*de minimis*) threshold in order for it to be classified as anti-competitive.

1 — Original language: German.

2 — See, in particular, judgments in *Suiker Unie and Others* v *Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174), *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36); *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313); *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166); *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221); and *Michelin* v *Commission* (T-203/01, EU:T:2003:250).

4. These questions are particularly important at a time when there are mounting calls for European competition law to adopt a more economic approach. It is my view that, in its replies, the signal effect of which is likely to extend well beyond the present case,[3] the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.

II – **Legal framework**

5. The EU law framework applicable to this case is defined by Article 82 EC (now Article 102 TFEU). Danish law contains a national provision, in the form of Paragraph 11 of the Konkurrencelov,[4] which, for the purposes of the present case, corresponds to Article 82 EC and, according to the documents preparatory to that provision, must be interpreted in accordance with Article 82 EC.

III – **The facts and the main proceedings**

6. The main proceedings have their origin in a dispute between Post Danmark and the Danish competition authority, the Konkurrenceråd.[5] By decision of 24 June 2009, the Konkurrenceråd found that, in 2007 and 2008, Post Danmark had abused its dominant position on the Danish bulk mail market by operating a rebate scheme for direct advertising mail, thus infringing Article 82 EC and Paragraph 11 of the Konkurrencelov. For that reason, the Konkurrenceråd prohibited the undertaking from continuing to operate the rebate scheme.

7. During the period at issue, both the Danish State and private investors held shares in Post Danmark. The undertaking was subject to a statutorily regulated universal service obligation vis-à-vis certain types of mail, including direct advertising mail, and was required to apply uniform tariffs throughout Danish national territory. In return, Post Danmark held a statutory monopoly on all mail under 50g. As a result, some 70% of the bulk mail market was covered by the exclusive right exercised by Post Danmark.

8. The referring court considers the bulk mail market in Denmark to be the geographically relevant product market. Post Danmark's share of that market was approximately 95% at the relevant time. Of the bulk mail market, direct advertising mail, that is to say addressed advertising mail sent simultaneously to a large number of recipients, formed a segment representing some 12% of the overall market in 2007 and 7% in 2008. The proportion of direct advertising mail not covered by Post Danmark's monopoly was, in 2007, about 15% and, in 2008, about 9% of the bulk mail market.

9. From 2007 onwards, Bring Citymail Danmark A/S, a subsidiary of the Norwegian State undertaking Posten Norge AS, had offered a service, in competition with Post Danmark, involving the delivery of business mail, including direct advertising mail, in Copenhagen and the surrounding area, and, in the relevant period, was Post Danmark's only serious competitor on the Danish bulk mail market. In early 2010, heavy losses prompted Bring Citymail to withdraw from the Danish bulk mail market. The parties are in dispute as to whether that withdrawal was attributable to the rebate scheme which Post Danmark operated at that time in connection with direct advertising mail.

3 — The question of the legal necessity of an AEC test in connection with rebate schemes also plays a significant role in the proceedings pending in *Intel* v *Commission* (C-413/14 P).

4 — Law on competition.

5 — Competition Council.

10. Post Danmark's rebate scheme began in 2003. The rebates, which amounted to between 6 and 16% of normal postage,[6] were standardised and offered to all customers on the same publicly available terms. They each applied to periods of one year. All mailings commissioned from Post Danmark in volumes of at least 3 000 letters each over a reference period of one year qualified for the rebate. The rebate scheme made no distinction in this regard according to whether the mailings were covered by Post Danmark's monopoly or whether there was a competitor operating in the area in question.

11. The condition for attaining the first rebate threshold, which attracted a 6% rebate, was that the customer must have commissioned the distribution of at least 30 000 letters, or that the gross postage value of its mailings must have amounted to at least DKK 300 000, during a reference year. The scale applied by Post Danmark provided for eight further rebate levels.[7] In the case of the first seven rebate levels, the discount increased by one percentage point per level, and, in the case of the last two rebate levels, by two percentage points per level, reaching a maximum rate of rebate of 16%. The variation in the rebates granted was most pronounced among medium-sized customers, whereas large customers usually qualified for the highest level of rebate anyway on account of the volume of orders placed by them.

12. In practice, the rebate scheme was operated in such a way that, at the beginning of each reference year, the price payable by a given customer was determined on a provisional basis by reference to the volume which that customer was expected to order during that year. At the end of the reference year, all prices were then — retroactively — adjusted according to the volume of mail actually sent for that customer during the year. As a result, the customer could be required to reimburse Post Danmark if the actual volume ordered fell short of the volume forecast and the rebate estimated and granted at the beginning of the year had therefore been too high.

13. The Konkurrenceråd took the view that the application of the rebate scheme described above constituted an abuse of a dominant position on the market. It stated that, because of the way in which rebates were granted, customers were tied to Post Danmark and the bulk mail market had thus been foreclosed, to the detriment of current and potential competitors, but there had been no countervailing efficiency gains, for the benefit of consumers, capable of offsetting those anti-competitive effects.

14. In the course of its assessment, the Konkurrenceråd chose not to carry out a price/cost analysis in the form of an AEC test. It stated that this was not an appropriate assessment criterion given that, because of the special features that characterise it, there cannot be an as-efficient-competitor on the Danish postal market. In support of its assumption of abusive conduct, the competition authority relied instead on the special position occupied by Post Danmark on the relevant market, which, it contends, makes the undertaking an unavoidable trading partner. The Konkurrenceråd also referred, inter alia, to the existence of barriers to market entry, as well as to the specific modus operandi of the rebate scheme, in particular the fact that it applies retroactively to a one-year reference period, the extent of the discount of up to 16% and an examination of the customers' actual positions on the scale of rebates.

15. By order of 10 May 2010, the Konkurrenceankenævn[8] confirmed the Konkurrenceråd's decision. On 1 July 2010, Post Danmark appealed against that order before the Danish Sø- og Handelsret,[9] the referring court. Bring Citymail Danmark joined the main proceedings as an intervener in support of the form of order sought by the Konkurrenceråd.

6 — According to information supplied by Post Danmark, the average rebate granted was 10.6%.

7 — The other rebate levels were 75 000, 150 000, 300 000, 500 000, 750 000, 1 000 000, 1 500 000 and 2 000 000 items or a gross value of at least DKK 750 000, 1 500 000, 3 000 000, 5 000 000, 7 500 000, 10 000 000, 15 000 000 and 20 000 000.

8 — Competition Appeals Tribunal.

9 — Maritime and Commercial Court.

IV – **Request for a preliminary ruling and proceedings before the Court**

16. By order of 8 January 2014, received on 16 January 2014, the Sø- og Handelsret referred the following questions to the Court for a preliminary ruling:

‘(1) What guidelines should be used to decide whether the application by a dominant undertaking of a rebate scheme with a standardised volume threshold having the characteristics referred to in the order for reference constitutes an abuse of a dominant position contrary to Article 82 EC?

In its answer the Court is requested to clarify what relevance it has to the assessment whether the rebate scheme's thresholds are set in such a way that the rebate scheme applies to the majority of customers on the market.

In its answer the Court is further requested to clarify what relevance, if any, the dominant undertaking's prices and costs have to the evaluation pursuant to Article 82 EC of such a rebate scheme (relevance of an 'as-efficient-competitor' test).

At the same time the Court is requested to clarify what relevance the characteristics of the market have in this connection, including whether the characteristics of the market can justify the foreclosure effect being demonstrated by examinations and analyses other than an 'as-efficient competitor' test (see, in that regard, paragraph 24 of the Commission's communication on the application of Article 82 EC).

(2) How probable and serious must the anti-competitive effect of a rebate scheme having the characteristics referred to in the order for reference be for Article 82 EC to apply?

(3) Having regard to the answers given to Questions 1 and 2, what specific circumstances must the national court take into account in assessing whether a rebate scheme, in circumstances such as those described in the order for reference (characteristics of the market and the rebate scheme), has or is capable of having such a foreclosure effect in the specific case that it constitutes an abuse covered by Article 82 EC?

In this connection, is it a requirement that the foreclosure effect is appreciable?’

17. In the preliminary ruling proceedings before the Court, written observations have been submitted not only by Post Danmark and Bring Citymail, but also by the Kingdom of Denmark, the Federal Republic of Germany, the European Commission and the EFTA Surveillance Authority. With the exception of Germany, the same parties attended the hearing of 26 March 2015.

V – **Assessment**

18. By its extensive list of questions, the Sø- og Handelsret wishes to ascertain, in essence, which criteria or 'guidelines' are to be applied for the purposes of assessing rebate schemes operated by dominant undertakings from the point of view of Article 82 EC. In particular, the referring court seeks to determine whether it is a legal requirement to carry out an AEC test in order to establish the existence of an abuse of a dominant position, and whether an appreciability (*de minimis*) threshold is applicable in the assessment of any exclusionary effect which a rebate scheme may have.

19. These questions have arisen against the background of a rebate scheme operated by Post Danmark which was characterised by the following features:

— The rebate scheme was based on standardised and generally applicable conditions, contained nine rebate levels comprising reductions of 6% to 16%, applied to a reference period of one year and was retroactive.

— The rebate scheme was operated on a market in which Post Danmark held a 95% market share and over 70% of the mail to be distributed was covered by the undertaking's statutory monopoly; there were high barriers to market entry, Post Danmark enjoyed structural advantages and was only for a while in competition with a substantially smaller supplier, in the form of Bring Citymail, on one geographical sub-section of the market.

20. The answer to this request for a preliminary ruling must be based on the prohibition of abuse of a dominant position on the market in the version of that prohibition applicable prior to the entry into force of the Treaty of Lisbon, since the main proceedings are concerned with the operation of a rebate scheme in 2007 and 2008 and the contested decision of the Danish competition authority was made in June 2009. The submissions concerning Article 82 EC which are set out below are of course readily transposable to the identically worded Article 102 TFEU.

21. As there are in some places substantial overlaps between the individual questions referred, it is advisable to answer them in a different order and to examine in turn each of the various points of law raised in the order for reference.

A – *The criteria for assessing rebate schemes operated by dominant undertakings*

1. General (first part of the first question)

22. The referring court directs the first part of the first question at the general rules of law which, in accordance with Article 82 EC, are applicable to the assessment of rebate schemes operated by dominant undertakings.

23. At first sight, it might seem surprising that rebates applied by dominant undertakings, which do at least represent a price advantage for the customers of such undertakings, can be classified as abusive under Article 82 EC.

24. It must be borne in mind, however, that competition on the relevant market is weakened by the very presence of a dominant undertaking.[10] That undertaking therefore has a particular responsibility, whatever the causes of its dominant position, to ensure that its conduct does not undermine effective and undistorted competition in the common market.[11]

10 — Judgments in *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 91); *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 70); and *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 17).

11 — Judgment in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 57); see to the same effect judgments in *France Télécom* v *Commission* (C-202/07 P, EU:C:2009:214, paragraph 105); *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 176); and *TeliaSonera Sverige* (C-52/09, EU:C:2011:83, paragraph 24).

25. Accordingly, within the scope of application of Article 82 EC, a dominant undertaking is subject to certain restrictions that do not apply to other undertakings in the same form. A practice which would be unobjectionable in normal circumstances may constitute abuse if engaged in by a dominant undertaking.[12] In particular, not every form of price competition to which a dominant undertaking has recourse may be regarded as permissible.[13]

26. As the Commission has rightly commented, rebates granted by dominant undertakings sometimes conceal anti-competitive practices which are only superficially the expression of a favourable offer, closer inspection showing them to have little to do with genuinely low prices, and can be very damaging to competition.

27. While it is true that rebate schemes operated by dominant undertakings do not attract a general assumption of abuse which those undertakings must disprove, the distinction to be drawn in the case of such rebates between legitimate competition on the merits, on the one hand, and anti-competitive commercial conduct, on the other, is none the less usually a delicate matter requiring careful examination.

28. It is recognised in case-law[14] that quantity rebates linked solely to the volume of purchases made do not normally have anti-competitive effects and, therefore, are not abusive even when granted by dominant undertakings. If increasing the quantity supplied has the effect of reducing the costs borne by the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable price. Loyalty rebates or target discounts, by which dominant undertakings attempt to tie to themselves their own customers and attract the customers of their competitors, do, on the other hand, constitute abuse within the meaning of Article 82 EC.

29. For the purposes of assessing the rebate scheme operated by a dominant undertaking from the point of view of Article 82 EC, however, it is ultimately immaterial whether the scheme can be assigned to a traditional category of rebate (in particular, quantity rebates or loyalty rebates). The decisive criterion is, rather, whether, in providing an advantage not based on any economic supply justifying it, the rebates seek to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition.[15] In short, what matters is whether the dominant undertaking grants rebates which are capable of producing on the relevant market an *exclusionary effect* which is not economically justified (that is to say, by the passing-on of a cost saving to customers).[16] Moreover, subparagraph (c) of the second paragraph of Article 82 EC in particular also prohibits dominant undertakings from granting discriminatory rebates applying dissimilar conditions to equivalent transactions with other trading parties.[17]

12 — Judgment in *Compagnie maritime belge transports and Others* v *Commission* (C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 131).

13 — The judgments in *AKZO* v *Commission* (C-62/86, EU:C:1991:286, paragraph 70); *France Télécom* v *Commission* (C-202/07 P, EU:C:2009:214, paragraph 106); *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 177); and *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 25).

14 — Judgments in *Suiker Unie and Others* v *Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 518); *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraphs 89 and 90); *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 71); *Portugal* v *Commission* (C-163/99, EU:C:2001:189, paragraph 50); *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 70); and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraphs 56 to 59).

15 — Judgments in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 73); *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 67); *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 71); and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 60).

16 — Judgment in *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraphs 68 and 69).

17 — Judgments in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 73); *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 67); *Portugal* v *Commission* (C-163/99, EU:C:2001:189, paragraph 50); and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 60).

30. In the light of its standardised and generally applicable conditions, there is nothing in the present case to indicate that the rebate scheme operated by Post Danmark is discriminatory. The national authorities dealing with the dispute in the main proceedings were therefore right to focus their attention on the question whether Post Danmark's rebate scheme is capable of producing an economically unjustified exclusionary effect.

31. Whether the rebates granted by a dominant undertaking are capable of producing such an exclusionary effect must be examined in the light of all the relevant circumstances of the individual case [18] (see in this regard my observations in sections 2 and 3 below).

32. It goes without saying here that neither the dominant undertaking's wish to increase its turnover nor its desire to plan its business better can be regarded as constituting an economic justification for granting rebates where these are capable of producing an exclusionary effect. [19]

2. The circumstances to be taken into account in the assessment of rebate schemes (first part of the third question and last part of the first question)

33. The issue as to which circumstances in particular must be taken into account in the assessment from the point of view of Article 82 EC of any exclusionary effect resulting from rebate schemes operated by dominant undertakings forms the subject-matter of the first part of the third question and of the last part of the first question referred.

34. It is of course impossible to provide a universally applicable, exhaustive list of all the circumstances to be taken into account for the purposes of Article 82 EC, since each market and each rebate scheme may have features which are peculiar to it. It is none the less possible, in the light of the facts of the main proceedings as described in the order for reference, to provide the referring court with some useful guidance that should make it easier for it to reach its decision.

35. It is settled case-law that, when it comes to assessing a rebate scheme from the point of view of Article 82 EC, the criteria and rules governing the grant of the rebate are particularly relevant [20] (see in that regard section (a) below). However, as the Court's use of the word 'particularly' indicates, other factors may also play a role, namely the conditions of competition prevailing on the relevant market and the (closely associated) position of the dominant undertaking on that market (see section (b) below).

a) The criteria and rules governing the grant of the rebate

36. With regard, first, to the criteria and rules governing the grant of the rebate, an indication that the rebate scheme is abusive is present where (as in the case of the contested rebate scheme operated by Post Danmark) the effect of that scheme is not purely incremental, in the sense that the achievement of each new rebate threshold not only triggers a reduction in the price of all further orders placed but is also retroactive, thus also cutting *ex post facto* the cost of all orders already placed during a given reference period. [21]

18 — Judgments in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 73); *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 67); *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraphs 18 and 71); and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 60).

19 — Judgment in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 85).

20 — Judgments in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 73); *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 67); *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 71); and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 60).

21 — See to that effect judgments in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 81); *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 73); and *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 75).

37. For, in this way, even relatively modest variations — whether upwards or downwards — in the turnover figures relating to the products of the dominant undertaking have disproportionate effects on co-contractors.[22] So it is that such a rebate scheme usually has a loyalty-building effect, which may also be described as a suction effect. It makes it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and thus, ultimately, to secure the suction to itself of the contestable part of demand on the relevant market.[23]

38. Naturally, that suction effect becomes proportionately stronger the higher the rebates granted are and the longer the time span over which the reference period forming the basis of the rebates due for achieving each new threshold is measured. The fact, as here, that comparatively high rebates of between 6% and 16% are granted retroactively over a relatively long reference period of one year[24] is indicative of a strong suction effect. In the present case, that suction effect is further enhanced by the fact that the rebates applied without distinction both to the contestable part of demand and to the non-contestable part of demand, that is to say, in particular letters up to 50g, which are covered by Post Danmark's statutory monopoly.

39. If it can also be demonstrated that the dominant undertaking pursued an exclusionary intent, this will be a strong additional indication that the rebate scheme applied by it is abusive.[25] Such an exclusionary intent or strategy is not, however, a mandatory precondition for a finding of infringement of Article 82 EC, since abuse of a dominant position is an objective concept.[26] The mere fact that, in the present case, Post Danmark states that it did not act with exclusionary intent does not therefore in any way protect the undertaking from a finding of abuse within the meaning of Article 82 EC.

40. It is true that the abusive nature of the rebates applied by the dominant undertaking is particularly manifest where there is discrimination between trading parties within the meaning of subparagraph (c) of the second paragraph of Article 82 EC. However, a rebate scheme may also constitute abuse within the meaning of Article 82 EC where, without being in any way discriminatory, it gives rise to anti-competitive exclusionary effects on the market.[27] In this regard, the EFTA Surveillance Authority was right to point out that the existence of abuse hangs less on a distinction between individualised and standardised rebates and more on an examination of whether the rebate scheme in question is actually capable of producing exclusionary effects on the market.

41. Finally, the invoicing of 'negative prices', in other words prices below cost prices, to customers is *not* a prerequisite of a finding that a retroactive rebates scheme operated by a dominant undertaking is abusive.[28] Because of its appreciably higher turnover, the dominant undertaking can usually continue to cover its costs even though it is offering substantial rebates. It can therefore, through its rebates, trigger an exclusionary effect without necessarily having to go into the red itself.

22 — Judgment in *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 73).

23 — Judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 79).

24 — On the length of the reference period, see, for example, judgment in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 81).

25 — See to that effect judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraphs 20 and 21).

26 — Judgments in *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 91); *AKZO* v *Commission* (C-62/86, EU:C:1991:286, paragraph 69); *TeliaSonera* (C-52/09, EU:C:2011:83, paragraph 27); and *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraphs 17 und 23).

27 — Judgment in *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 65).

28 — Judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 73).

b) The conditions of competition prevailing on the relevant market and the position of the dominant undertaking on that market

42. As regards the prevailing conditions of competition and the dominant undertaking's position on the relevant market, any anti-competitive exclusionary effect exerted by the rebate scheme will be all the more likely and significant, the stronger the dominant undertaking is on the relevant market and the weaker the position is of its current or potential competitors. In this regard, account must be taken not only of the market shares held by the dominant undertaking and its competitors, but also the origin of the dominant undertaking's position and any existing statutory monopoly which it has over all or some of the market. [29]

43. In the present case, according to the findings contained in the order for reference, Post Danmark, as the historical State-owned postal undertaking, held an overwhelming 95% share of the Danish bulk mail market, whereas Bring Citymail accounted for only some 5% of that market.

44. Such a wide divergence between the dominant undertaking's market share and that of the competition may promote the emergence of exclusionary effects, since it is particularly difficult in those circumstances for competitors of the dominant undertaking to undercut the rebates offered by the latter, which are based on its overall volume of sales. [30]

45. Moreover, 70% of the market came under Post Danmark's statutory monopoly (that is to say, the monopoly on letters up to 50g) and was therefore closed to competition from the outset. What is more, Bring Citymail, Post Danmark's only serious competitor, was active on only one geographical sub-section of the market, the greater Copenhagen area, whereas Post Danmark has an efficient, nationwide distribution network.

46. All of this indicates that, in the light of its dominant position on the market, Post Danmark was an unavoidable trading partner and the rebates which it applied carried considerable exclusionary potential. [31] An examination of some of the structural factors peculiar to the relevant market reinforces that impression.

47. As I have already mentioned, a market such as the Danish bulk mail market is characterised by the provision of network-based services. In order to operate efficiently and provide the services that customers expect, a supplier on such a market needs to have as efficient a distribution network as possible. The other side of the coin, as the order for reference also points out, is that, from an economic point of view, such a market is characterised by high economies of scale and high barriers to entry which make it difficult for the dominant undertaking's competitors to establish themselves on the market and compete with that undertaking for the contestable part of demand.

48. The willingness to change of the customers on the relevant market and the extent to which they are able to have their needs met at all by the dominant undertaking's competitors without losing some of the rebates they enjoy may also be relevant to the assessment of any exclusionary effects of rebate schemes operated by dominant undertakings.

29 — See to that effect judgment in *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 23, *in fine*).

30 — Judgments in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 82) and *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 75), as well as my Opinion in the latter case (EU:C:2006:133, point 52).

31 — With specific regard to the requirement to take into account the position of the dominant undertaking as an unavoidable trading partner, see judgments in *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 41) and *Compagnie maritime belge transports and Others* v *Commission* (C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 132).

49. In this regard, it was established in the main proceedings that, in the case of two thirds of the mailings open to competition, a switch from Post Danmark to another postal service provider would have been possible only at the expense of rebate losses for the customers concerned. This is indicative of a high exclusionary potential on the part of the rebate scheme operated by Post Danmark.

50. All in all, therefore, the conditions of competition on the relevant market and the position of the dominant undertaking on that market give every indication that a rebate scheme such as that operated by Post Danmark was capable of producing considerable exclusionary effects.

3. The widespread impact of the rebate scheme (second part of the first question)

51. The second part of the first question referred concerns the widespread impact of a rebate scheme such as that operated by Post Danmark. The referring court wishes to ascertain how significant it is from the point of view of the legal assessment under Article 82 EC that, because its individual rebate levels (described in the order for reference as 'volume thresholds') are standardised, the rebate scheme is not geared towards individual customers but applies to the majority of customers on the market.

52. As the Court held at a very early stage, the number of contracts to which the rebates granted by a dominant undertaking apply (and thus, ultimately, the number of customers concerned) is irrelevant to the legal assessment of those rebates under Article 82 EC.[32]

53. Accordingly, the mere fact that many or even most customers on the market are affected by a rebate scheme and that that scheme therefore has a very widespread impact says nothing in itself about whether that scheme is abusive for the purposes of Article 82 EC.

54. If, however, such a rebate scheme is capable of producing a suction effect for the benefit of the dominant undertaking, the fact that it covers a substantial number of customers and a large part of the contestable demand on the market may mean that its actual or potential exclusionary effects are more serious than in the case of rebate schemes with less widespread impact. A number of parties to the proceedings have rightly pointed this out.

4. Interim conclusion

55. In summary, it must therefore be concluded that:

A rebate scheme operated by a dominant undertaking constitutes abuse within the meaning of Article 82 EC where an overall assessment of all the circumstances of the individual case shows that the rebates are capable of producing an economically unjustified exclusionary effect, it being important to take into account in that regard, in particular, the criteria and rules governing the grant of the rebate, the conditions of competition prevailing on the relevant market and the position of the dominant undertaking on that market.

32 — Judgment in *Suiker Unie and Others* v *Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 511).

B – *The importance of the 'as-efficient-competitor' (AEC) test (third part of the first question)*

56. The third and last part of the first question is concerned in particular with the AEC test. The purpose of such a test is to ascertain, from a price/cost comparison,[33] whether a competitor as efficient as the dominant undertaking can compete with the latter or whether, on the contrary, the dominant undertaking's rebate policy produces anti-competitive exclusionary effects on the relevant market.

57. The referring court asks whether a finding as to the existence of an abuse of a dominant position by a rebate scheme requires as a matter of law that an AEC test be carried out and, if that is not the case, what other circumstances may, where appropriate, support the conclusion that that rebate scheme constitutes abuse.

58. Those sub-questions must be viewed against the background of the Commission communication of 2009,[34] in which, in its capacity as competition authority, it set out its enforcement priorities in applying Article 82 EC. The referring court makes express reference to the Enforcement Priorities Communication in this regard.

59. In its Enforcement Priorities Communication, the Commission announced that it would normally intervene against price-based exclusionary conduct only where the conduct concerned has already been or is capable of hampering competition from competitors considered to be as efficient as the dominant undertaking.[35] In order to establish this, the Commission undertook to carry out, as a rule, an AEC test in connection with price-based exclusionary conduct.

60. Such an administrative practice by the Commission is not, of course, binding on the national competition authorities and courts, however. This follows, on the one hand, from the wording of the Enforcement Priorities Communication itself, which does not constitute 'a statement of the law',[36] and, on the other hand, from the settled case-law concerning such Commission statements.[37] Although the national authorities themselves are not precluded from following the Commission's example and using the AEC test, they are none the less, from a legal point of view, bound only by the requirements arising from Article 82 EC. It is for the Court to define what those requirements are.

61. In my view, Article 82 EC *does not* support the inference of any legal obligation requiring that a finding to the effect that a rebate scheme operated by a dominant undertaking constitutes abuse must always be based on a price/cost analysis such as the AEC test.

33 — This looks at the dominant undertaking's average avoidable costs, its long-term average marginal costs and the price which one of its competitors would have to offer to the dominant undertaking's customers in order to compensate them for the loss of the rebate granted by that undertaking.

34 — Commission communication entitled 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', presented on 24 February 2009 (OJ 2009 C 45, p. 7), ('the Enforcement Priorities Communication'.)

35 — Paragraph 23 of the Enforcement Priorities Communication. I shall take the liberty of pointing out in this regard that the German wording of that passage from the Enforcement Priorities Communication ('daran hindert bzw. bereits gehindert hat, am Wettbewerb teilzunehmen') reflects only approximately the legal provisions to the effect that actual anti-competitive effects do not need to be demonstrated (see judgments in *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 68) and *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraphs 68 and 79). The English ('has already been or is capable of hampering competition') and French ('ont déjà entravé ou sont de nature à entraver la concurrence') language versions of the Enforcement Priorities Communication seem to be more readily compatible with the legal framework defined by Article 82 EC (Article 102 TFEU).

36 — Paragraph 3 of the Enforcement Priorities Communication.

37 — Judgments in *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 21) and *Expedia* (C-226/11, EU:C:2012:795, paragraphs 29 and 31).

62. It is true that the Court has on occasion called for an AEC test to be carried out in connection with pricing practices other than rebates, in so far as it has held that 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*.[38]

63. However, that case-law does not support the inference of an absolute requirement always to carry out an AEC test for the purposes of assessing price-based exclusionary conduct from the point of view of competition law. On the one hand, that case-law is specifically concerned with pricing practices by dominant undertakings, such as a low-pricing policy (loss leader pricing, for example) or margin squeezing through the reduction of the cost-price ratio, which are by their very nature closely related to the cost structure of the undertakings in question. On the other hand, the form of words chosen by the Court, 'among other things' (French: 'notamment'),[39] makes it clear that it cannot always be assumed that an abuse of a dominant position exists only where the exclusionary effect is felt by undertakings which are as efficient as the dominant undertaking.

64. With specific regard to rebate schemes operated by dominant undertakings, the Court has never yet made their classification as an abuse within the meaning of Article 82 EC conditional on a price/cost analysis. On the contrary, so far as such rebate schemes are concerned, it has held until very recently that the absence of a comparison of prices with costs does not constitute an error of law.[40] The Court should maintain that position in the present case too.

65. It would of course not be inconceivable, in theory, to make a finding of price-based exclusionary conduct routinely conditional on the carrying out of an AEC test, and therefore to prescribe such a test also in the case of rebate schemes operated by dominant undertakings. However, such a reorientation of the case-law concerning Article 82 EC warrants some scepticism, on a number of grounds.

66. On the one hand, the added value of expensive economic analyses is not always apparent and can lead to the disproportionate use of the resources of the competition authorities and the courts, which are then unavailable for the purposes of effectively enforcing the competition rules in other areas. The methodology applied can (as the submissions made before the Court by Post Danmark, Bring Citymail and the Danish Government amply demonstrate) prompt considerable differences of opinion.[41] What is more, the data available for use as a basis for such analyses are not always reliable[42] and presuppose that the dominant undertaking is genuinely ready to cooperate with the competition authorities and the courts, which, as the German Government has pointed out, is not always necessarily the case.

67. On the other hand, it is wrong to suppose that the issue of price-based exclusionary conduct can be managed simply and in such a way as to ensure legal certainty by applying some form of mathematical formula based on nothing more than the price and cost components of the businesses of the undertakings concerned. As I have already said, corporate data is not uncommonly open to different interpretations.

38 — Judgment in *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 25); see also judgments in *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, in particular paragraphs 177, 183, 196, 203 and 254) and *TeliaSonera* (C-52/09, EU:C:2011:83, in particular paragraphs 67, 73 and 94); the judgment in *AKZO* v *Commission* (C-62/86, EU:C:1991:286, in particular paragraphs 71 and 72) also relies, inter alia, on a price/cost analysis.

39 — Judgments in *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 25) and *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 177, the German-language version of which renders the French 'notamment' as 'u.a.' (inter alia).

40 — Judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 80; in addition, see also paragraph 73).

41 — The fact that the result of an AEC test is not always clear is an assumption on which the Commission, too, proceeds in paragraph 25 of its Enforcement Priorities Communication.

42 — The fact that an AEC test requires the availability of reliable data is emphasised by the Commission, too, in paragraph 25 of its Enforcement Priorities Communication.

68. In particular, however, a finding of abuse in the context of Article 82 EC, as in other contexts, always requires an evaluation which takes into account all the relevant circumstances of the individual case in question and must not be confined to an examination of price and cost components alone. On the contrary, there are many other factors, such as the specific *modus operandi* of a rebate scheme and certain characteristics of the market on which the dominant undertaking operates, that may also be relevant to a finding of abuse. In fact, they may be much more informative than a price/cost analysis.

69. The fact of taking into account all the relevant circumstances of the individual case and considering whether there is any objective justification for the dominant undertaking's commercial conduct adequately ensures that the legal requirements applicable to a finding of abuse within the meaning of Article 82 EC do not disregard economic realities. [43]

70. If the abusive nature of the rebate scheme operated by a dominant undertaking is immediately shown by an overall assessment of the other circumstances of the individual case, as I have described above, [44] there is no need, from a legal point of view, to carry out a price/cost analysis such as an AEC test.

71. It follows *a fortiori* that Article 82 EC is not capable of giving rise to a legal obligation to carry out an AEC test where, because of the way in which the market is structured, it is impossible for another undertaking to be as efficient as the dominant undertaking. This may be because of the particular conditions of competition prevailing on the relevant market (such as the fact that the market — as here — is characterised by high barriers to entry, high economies of scale and/or network-based services) or because the level of the dominant undertaking's costs is specifically attributable to the competitive advantage which its dominant position confers on it. [45]

72. In such cases, it would from the outset make no sense to carry out some form of price/cost analysis in order to examine whether the rebate scheme operated by the dominant undertaking has an exclusionary effect on a purely hypothetical as-efficient competitor. If no competitor can be as efficient as the dominant undertaking, then, by extension, an AEC test will not provide any reliable conclusions as to whether or not there are likely to be any exclusionary effects on the market.

73. On the contrary, on a market in which competition is so weakened by the presence of a dominant undertaking that as-efficient competitors cannot even establish themselves there, [46] the competitive pressure exerted even by less efficient undertakings must not be underestimated. Maintaining that pressure is one of the fundamental objectives pursued by Article 82 EC. It is after all essential to ensure that the market structure and the choices available to customers do not deteriorate further because of the commercial conduct of the dominant undertaking. [47]

74. It follows that Article 82 EC prohibits an AEC test from being carried out on a market where, on account of the structure of the market, it is impossible for another undertaking to be as efficient as the dominant undertaking.

43 — See, in that regard, my Opinion in *Solvay* v *Commission* (C-109/10 P, EU:C:2011:256, point 80).

44 — See, in that regard, points 33 to 54 of this Opinion, above.

45 — See, to that effect, judgment in *TeliaSonera* (C-52/09, EU:C:2011:83, paragraph 45, *in fine*).

46 — See also, to that effect, paragraph 24 of the Enforcement Priorities Communication; see also judgment in *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 123, *in fine*).

47 — Judgments in *France Télécom* v *Commission* (C-202/07 P, EU:C:2009:214, paragraph 105); *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraphs 83 and 176); *TeliaSonera* (C-52/09, EU:C:2011:83, paragraph 24); and *Post Danmark* (C-209/10, EU:C:2012:172, paragraphs 20 and 23), see, to similar effect, judgment in *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 66).

75. In summary, it must therefore be concluded that:

Article 82 EC does not require the abusive nature of the rebate scheme operated by a dominant undertaking to be demonstrated by means of a price/cost analysis such as the as-efficient-competitor test, where its abusive nature is immediately shown by an overall assessment of the other circumstances of the individual case.

However, the authorities and courts dealing with competition cases are at liberty to avail themselves of a price/cost analysis in their overall assessment of all the circumstances of the individual case, unless, on account of the structure of the market, it would be impossible for another undertaking to be as efficient as the dominant undertaking.

C – *The question of the appreciability of any anti-competitive effects of the rebate scheme (second question and second part of the third question)*

76. Last but not least, the referring court wishes to ascertain, by its second question, how 'probable and serious' the anti-competitive effect of a rebate scheme operated by a dominant undertaking such as Post Danmark must be for Article 82 EC to 'apply'. The same clarification is also sought by the second part of the third question, in which the referring court asks whether the 'foreclosure effect' of such a rebate scheme must be 'appreciable'.

77. To my mind, it would be insufficient to respond to this issue by simply drawing the referring court's attention to the procedural autonomy enjoyed by the Member States in matters of evidence. [48] This case is after all concerned with the *substantive* requirements to be attached to a finding of abuse within the meaning of Article 82 EC. Those requirements have the character of EU law and must be administered uniformly throughout the European Union so as to ensure that all undertakings active on the internal market operate within framework conditions for the rules of competition which are as uniform as possible ('level playing field'). [49]

78. It is appropriate to look separately at the two points raised by the referring court, that is to say, the likelihood of an anti-competitive effect, on the one hand, and the seriousness of that effect, on the other.

1. Likelihood of the presence of an anti-competitive effect

79. First, the referring court asks how likely the anti-competitive effect of a rebate scheme operated by a dominant undertaking has to be in order to constitute abuse within the meaning of Article 82 EC.

80. It should be noted in that regard that the exclusionary effect of such a rebate scheme must not be of a purely hypothetical nature. [50] In other words, the schemes in question must be capable not only *in the abstract* but also *in practice* of making it difficult or impossible for the dominant undertaking's competitors to gain access to the market and for its co-contractors to choose between various sources of supply or trading partners. [51]

48 — See, in that regard, the fifth recital in the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

49 — On the concept of the '*level playing field*', see, for example, my Opinions in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:229, point 169); *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 118); and *KONE and Others* (C-557/12, EU:C:2014:45, point 29).

50 — See, to that effect, judgments in *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 254) and *TeliaSonera* (C-52/09, EU:C:2011:83, paragraphs 66 and 67).

51 — See, in that regard, my Opinion in *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, point 73).

81. It is not necessary for this purpose, however, to carry out a costly analysis of the actual effects of the rebates on competition, which is to say that it does not need to be determined whether an exclusionary effect was *actually* present.[52] The reason for this is that the prohibition contained in Article 82 EC also covers conduct by dominant undertakings which has a *potentially* anti-competitive effect.[53] Thus, even if Post Danmark were correct in asserting that the rebate scheme at issue was not ultimately the cause of Bring Citymail's withdrawal from the Danish market, this does not preclude a finding of abusive conduct for the purposes of Article 82 EC.

82. According to settled case-law, it is necessary but also sufficient that the rebates in question *can* produce an exclusionary effect.[54] This is the case where, on the basis of an overall assessment of all the relevant circumstances of the individual case, the presence of the exclusionary effect appears more likely than its absence.[55]

83. It would in my view be inappropriate to set a higher bar for assuming the existence of an abuse that is incompatible with Article 82 EC and, for example, to require that the presence of an exclusionary effect must be 'very likely' or 'particularly likely' or must be assumed to be 'beyond reasonable doubt'.

84. After all, a dominant undertaking — whatever the causes of its dominant position — has a particular responsibility to ensure that its conduct does not undermine effective and undistorted competition in the internal market.[56] That responsibility entails some obligation to exercise restraint on the market. The dominant undertaking must therefore refrain from *all* commercial practices which are likely to produce an exclusionary effect, not just those in the case of which such an effect seems 'very likely' or 'particularly likely' or must be assumed to be 'beyond reasonable doubt'.

85. The degree of likelihood as to the presence of exclusionary effects may at most have a bearing on the extent of any penalties, such as, for example, the fines to be imposed by a competition authority. The level of those penalties must always fulfil the requirements of proportionality (Article 49(3) of the Charter of Fundamental Rights of the European Union and Article 23(3) of Regulation No 1/2003), which is to say that the severity of the penalty must increase in proportion as the likelihood of the exclusionary effect grows and the extent of that effect becomes greater. However, the issue of penalties does not form part of the subject-matter of the present preliminary ruling proceedings.

2. Seriousness of the likely anti-competitive effect

86. The referring court then seeks to ascertain how 'serious' or 'appreciable' the anti-competitive effect of a rebate scheme has to be to be caught by the prohibition of abuse laid down in Article 82 EC.

87. This touches ultimately on the issue of the appreciability of any anti-competitive effects arising from rebate schemes operated by dominant undertakings. It must be clarified whether a finding of abuse under Article 82 EC requires that the restriction of competition brought about by a rebate scheme exceeds some form of *de minimis* threshold.

52 — Judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraphs 68 and 79); see, to the same effect, judgments in *Tetra Pak* v *Commission* (C-333/94 P, EU:C:1996:436, paragraph 44) and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 239).

53 — Judgment in *TeliaSonera* (C-52/09, EU:C:2011:83, paragraph 64); see, to the same effect, the judgment in *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 44), which refers to an 'actual or likely exclusionary effect'.

54 — Judgments in *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 68) and *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 239).

55 — See, to that effect, judgment in *Post Danmark* (C-209/10, EU:C:2012:172), which refers to 'likely negative effects on competition' (paragraph 42) and an 'actual or likely exclusionary effect' (paragraph 44).

56 — Judgment in *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 57); see, to the same effect, judgments in *France Télécom* v *Commission* (C-202/07 P, EU:C:2009:214, paragraph 105); *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 176); and *TeliaSonera* (C-52/09, EU:C:2011:83, paragraph 24).

88. As a number of parties to the proceedings have pointed out, the referring court's doubts in this regard may well stem from a terminological issue arising from the 2012 judgment in *Post Danmark*. In the binding Danish-language version of that judgment, the expression 'exclusionary effect' is, surprisingly, rendered as 'mærkbare virkninger',[57] which has the same meaning as 'appreciable effects'. Similarly, other parts of the same judgment refer to 'eliminerende virkning',[58] that is to say 'eliminatory effect', which also sounds comparatively strong.

89. A look at the French-language version, in which that judgment was drafted and deliberated, shows however that the choice of words in the Danish must be a translation error, as the French simply refers to 'effet[s] d'éviction', that is to say 'exclusionary effect', which is consistent with the other case-law concerning Article 82 EC.[59]

90. In those circumstances, the terms 'mærkbare virkninger' and 'eliminerende virkning' in the 2012 judgment in *Post Danmark* are not to be interpreted as meaning that some form of appreciability criterion or *de minimis* threshold applies to rebate schemes operated by dominant undertakings. On the contrary, abuse within the meaning of Article 82 EC is to be regarded as being constituted by all rebate schemes operated by dominant undertakings which are capable of producing an exclusionary effect,[60] not just those whose effects on competition are or may be 'serious' or 'appreciable'.

91. After all, since the structure of competition of the relevant market has already been weakened by the presence of the dominant undertaking, within the field of application of Article 82 EC, any further weakening of the structure of competition may constitute an abuse of a dominant position.[61]

92. To the very same effect, the Court held (at about the same time as the 2012 judgment in *Post Danmark*) that the determination of a precise threshold beyond which the rebates granted by a dominant undertaking have to be regarded as abusive is not required for the purposes of applying Article 82 EC,[62] since customers should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Moreover, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.[63]

93. The use of a *de minimis* threshold for the purposes of assessing the exclusionary effects of a dominant undertaking's commercial conduct seems to be unnecessary for two further reasons: first, as I have already said,[64] the exclusionary effects referred to above are to be determined on the basis of a specific examination of all the relevant circumstances of the individual case and their presence must be more likely than their absence. Secondly, the prohibition of abuse contained in Article 82 EC is in any event directed only at conduct capable of affecting trade between Member States.

94. Each of those two considerations is in itself entirely sufficient to rule out the proposition that the prohibition of abuse laid down in Article 82 EC may apply to conduct the anti-competitive effects of which are only hypothetical or of wholly negligible significance.

57 — Judgment in *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 25).

58 — Judgment in *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 41; see, to the same effect, paragraphs 17, 22, 27, 29 and 44).

59 — See, in that regard, point 29 of this Opinion, above.

60 — See again, in that regard, point 82 of this Opinion, above.

61 — Judgment in *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 123, *in fine*).

62 — Judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraphs 46 and 48); see, to similar effect, the earlier judgment in *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 89, *in fine*), which states that fidelity rebates constitute an abuse 'whether the quantity' of the purchases in question 'be large or small'.

63 — Judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 42).

64 — See again points 31, 68 and 82 to 85 of this Opinion, above.

3. Interim conclusion

95. In summary, it must therefore be concluded that:

Aside from the requirement that a rebate scheme operated by a dominant undertaking must have an actual or potential adverse effect on trade between Member States, the exclusionary effect that may be produced by such a scheme does not have to exceed any form of appreciability (*de minimis*) threshold in order to be classified as abuse within the meaning of Article 82 EC. It is sufficient for the presence of such an exclusionary effect to be more likely than its absence.

VI – **Conclusion**

96. In the light of the foregoing considerations, I propose that the Court should answer all of the questions referred by the Danish Sø- og Handelsret as follows:

(1) A rebate scheme operated by a dominant undertaking constitutes abuse within the meaning of Article 82 EC where an overall assessment of all the circumstances of the individual case shows that the rebates are capable of producing an economically unjustified exclusionary effect, it being important to take into account in that regard, in particular, the criteria and rules governing the grant of the rebate, the conditions of competition prevailing on the relevant market and the position of the dominant undertaking on that market.

(2) Article 82 EC does not require the abusive nature of the rebate scheme operated by a dominant undertaking to be demonstrated by means of a price/cost analysis such as the as-efficient-competitor test, where its abusive nature is immediately shown by an overall assessment of the other circumstances of the individual case.

However, the authorities and courts dealing with competition cases are at liberty to avail themselves of a price/cost analysis in their overall assessment of all the circumstances of the individual case, unless, on account of the structure of the market, it would be impossible for another undertaking to be as efficient as the dominant undertaking.

(3) Aside from the requirement that a rebate scheme operated by a dominant undertaking must have an actual or potential adverse effect on trade between Member States, the exclusionary effect that may be produced by such a scheme does not have to exceed any form of appreciability (*de minimis*) threshold in order to be classified as abuse within the meaning of Article 82 EC. It is sufficient for the presence of such an exclusionary effect to be more likely than its absence.