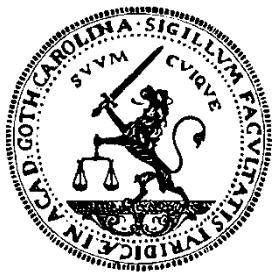

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Post Danmark

An in depth case analysis

JURM02 Graduate Thesis

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30 higher education credits

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Contents

Summary

Højesteret asked the Court of Justice of the European Unions for a preliminary ruling of the situation of Post Danmark abusive dominant position under article 102 TFEU. Post Danmark had applied price strategies acquired from synergies maintained from its range of products. Post Danmark was able to force prices down on the relevant market for unaddressed mail in the market of Denmark. The pricing held below cost for the Coop group and above cost for Spar and SuperBest assessed in this essay. The CJEU discussed abuse of dominant position, the competition on the merits test, pricing above and below cost, the 'as-efficient competitor' test, price discrimination, objective justification and special responsibility in the judgment and every aspect has been discussed and analysed in this essay. The purpose of this essay was to see how the Post Danmark judgment was dealt with by the European court and how the judgment would lead to a new approach concerning how to solve cases of abusive behaviour in the area of Union Competition law.

The test Competition on the merits is a threshold that all the companies that are allegedly abusing their position have to walk through. This test took form in Hoffman La Roche but was changed in the judgment of Post Danmark to include the working of detriment of consumers instead of competition. The AKZO-test was moderated to the Average incremental cost test in the judgment and was assessed in this essay with the conclusion that we have not seen every abusive situation been evaluated yet and that case law is constantly changing. This test was applicable because Post Danmark used its costs on different markets to find synergies in infrastructure and in the common costs. It was therefore essential in looking at these costs and seeing to the effect of what lower prices might lead to.

The selective low pricing concept and case law was discussed in the Opinion of Advocate General Mengozzi but was not stated in the courts judgment and did therefore not provide us with any new information. Price discrimination was seen in the judgment not to be by itself an abuse but together with negative effects or unlawful conduct made by the dominant undertaking. All the abovementioned theories and legal aspect have the potential to be abuse but may be justified when finding efficiencies of benefits for consumers.

The conclusion that was drawn from the discussions and the attempted analysis is that holding prices in between average total cost and average incremental cost might be seen as abusive if there are large common costs attained from a multi-product range or from economies of scope. The 'as-efficient compeitotr test will take this information into account when assessing the conduct.

Sammanfattning

Højesteret frågade domstolen i Europeiska Unions om förhandsavgörande i fallet om Post Danmarks hade missbrukat sin dominerande ställning med tolkning under artikel 102 i funktionsfördraget. Post Danmark hade tillämpat prisstrategier som förvärvats synergier som upprätthålls av sitt utbud av flera produkter. Post Danmark har kunnat tvinga ned priserna på den relevanta marknaden för oadresserade brev på den geografiska marknaden i Danmark. Prisnivån var satt under kostnaderna för Coop koncernen och över kostnaderna för Spar och SuperBest bedömdes i denna uppsats. I förhandsavgörandet diskuterade EU-domstolen missbruk av dominerade ställning, Pris och prestationskonkurrens testet , prissättning ovan och under kostnader, lika effektiv konkurrensprincipen, prisdiskriminering, objektivt godtagbara skäl, särskilt ansvar och varje aspekt har diskuterats och analyserats. Syftet med uppsatsen var att se hur domen i Post Danmark behandlades av de europiska domstolen och om denna skulle föranleda en ny strategi för hur man bör lösa missbruk av dominerande ställning inom EUs konkurrensrätt.

Testet angående Pris och prestationskonkurrens är en tröskel för alla företag som påstås missbruka sin ställning bör kliva över. Detta testet var skapat i Hoffman La Roche, men ändrades i domen av Post Danmark att omfatta bearbetning av skada för konsumenterna istället för konkurrensen. De omgjorda AKZO-testen till det inkrementala kostnader-testet i förhandsavgörandet utvärderades i denna uppsats med slutsatsen att vi inte har sett alla framtida situationer än och att rättspraxis är i ständig förändring. Detta test var tillämpligt på den grunden att Post Danmark använda alla sina kostnader på marknaden för att hitta synergier i infrastrukturen och i samkostnaderna. Det var därför väsentligt att titta på dessa kostnaderna och se vart dessa lägre kostnaderna kommer att leda till.

Det selektivt låga priskonceptet och den tillhörande rättspraxis diskuterades i Generaladvokatens Mengozzi förslag till förhandsavgörande men förekom inte i domstolens domslut och därför föranleder inte någon ny information. Prisdiskriminering sågs i domen att inte vara ett missbruk i sig, utan tillsammans med andra negativa effekter eller olagligt beteende från företaget i dominerande ställning. Alla ovannämnda teorier och juridiska aspekten har potentialen att vara grund för missbruk av dominerade ställning men kan rättfärdigas om fördelar i effektivitetshänseende som gynnar konsumenter.

Slutsats man kan dra av diskussionen och försöken till analys är att priserna på satta mellan den totala kostnaden och de inkrementala kostnaderna kan ses som missbruk om det finns stora samkostnader som kan uppnås av ett flerproduktutbud stordriftsfördelar. Pris och prestationskonkurrens testet tar dessa uppgifter i beaktande vid bedömning av uppträdandet.

Preface

This essay has provided me with all kinds of feelings; confusion, sadness because of confusion, disappointment but also hope and joy. Thank you Björn for showing me the way to hope and joy and for pulling me out of the darkness that confusion provides a law student with when writing the thesis. You have been essential to my understanding of the topic and for actually pulling me together. Axel, you are a dear friend helping me to see the light in the darkest of moment by reading through my essay and giving me advice. Douglas & Nina and Panos, thank you for always being interested in my essay by continuously asking me what is it about, how it is going and how I was feeling.

Thank you Sara for providing me with the right tools that allowed me to become what I am today and thank you for seeing my potential when I could not.

Last but not least I want to thank my family for the support you have given me and for always being there for me writing this essay. Tack Mamma för att du alltid har funnit där för mig och trott på mig och fått mig att gå denna långa och jobbiga utbildningen i Lund. Nu står jag snart i Lund inte bara med en juristexamen utan även med en Master i Europeisk affärsrätt.

Abbreviations

AAC	Average Avoidable Cost
AIC	Average Incremental Cost
ATC	Average Total Cost
AVC	Average Variable Cost
ECJ	European Unions Court of Justice
CJEU	Court of Justice of the European Union
GC	General Court
LRAIC	Long-run Average Incremental Cost
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Purpose

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibited: 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it.' The further content of this prohibition and the Commission's enforcement priorities are delineated in the Commission's Guidance Paper on abusive exclusionary conduct from 2009.[1] Prior to 2009, the Commission took an effect-based approach when evaluating situations involving an abuse of a dominant position. However, its Guidance Paper from 2009 the Commission switched to an economical approach, which is said to provide more legal certainty. Part of this economical approach is the 'As efficient competitor'- test that is applied when a dominant undertaking is said to engage in selectively low pricing or predatory pricing.

The purpose of this essay is to examine how selectively low pricing and predatory pricing is dealt with under the 'As-efficient competitor'-test by the European courts. More specifically, this essay will review the court's decisions in *AKZO*[2] and *Post Danmark A/S*[3] in order to determine the type of legal framework. To be able to assess this question it is key to understand that dominant position has already been established, with the relevant market criteria for the company involved. The matter of this essay will also discuss the abuse arise from pricing strategies. The economic approach when assessing abuse was firstly used in the *AKZO* judgment but later case law adopted the effect-based approach. The economical approach is an alternative method, still with flaws but allows the Union law to be more detailed.[4]

However, is the Commissions Guidance paper from 2009 helping the Commission in their approach towards abuse and showing the narrow corridor for the CJEU to walk through?

[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, 2009/C 45/02.
[2] Case C-62/86 *AKZO* v *Commission* EU:C:2004:566.
[3] Case C-209/10 *Post Danmark*, CLI:EU:C:2012:172.
[4] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, Journal of European Competition Law & Practice, 2012, p. 1.

In the *Post Danmark's* judgment the question arose whether future judgments should choose the approach in the *Tomra's* judgment[5] or the *AKZO* judgment's approach shall be adopted when solving future situations where element of abuse occur.

The *Areeda-Turner*-test transformed into the AKZO-test in the *AKZO* judgment. This test was again adopted to fit the resulting situation of Post Danmark's behaviour. Scholar suggested that Post Danmark's judgment would be the way of the future with the more economical approach to abuse of pricing strategies.

1.2 Research Question

In order to achieve the stated purpose, the following question will guide the subsequent exposition:

- How was the abusive pricing, made by Post Danmark, been dealt with in the Court of Justice of the European Union?
- Does the CJEU's ruling in Post Danmark signal a new approach or test to abusive pricing?

1.3 Method and Material

This essay attempts to review and discuss Union case law. Consequently the questions stated above will be answered through the application of the jurisprudential method i.e. classical method. This involved the use of several primary and secondary sources[6] such as case law from the European courts and the treaties formed by the Commission.

My main focus will be on the case law established by the CJEU but I will also examine cases from the General Court. To get a better understanding of the case law the Opinion of Advocate Generals will also be discussed.

Ever since the creation of the Sherman Act in 1890, the U.S. has been a pioneer country in the area of competition law. As a result, several of the doctrines used by the European courts have their origin in U.S. case law. Furthermore, questions concerning the economic efficiency of competition rules are widely discussed among American scholar. Consequently, I think it is only proper to look to the U.S. sources when evaluating the correct approach to a problem involving competition law. I have looked at guidelines and discussion papers to further illuminate the meaning of the case law from the European courts.

[5] Case C- 549/10 P *Tomra and Others v Commission,* EU:C:2012:221.
[6] Jareborg, Nils, Rättsdogmatik som vetenskap, Svensk Juristtidning, 2004, p. 8.

Finally, this essay will have sections containing legal assessment of occurring legal aspect and sections containing analysis. The analysis is not exclusively seen in these sections but will be on going throughout this essay.

1.4 Limitations

The basic concepts of European Competition law will not be defined, as the reader should have a basic understanding of this topic. Furthermore, this essay will only discuss different price strategies resulting in an abuse of a dominant position. Thus, the essay assumes that a dominant position has already been established in the given case. This means that any inquiry into the relevant geographical and product market will be superfluous. As natural monopolies frequently exist in these kinds of case law service of general interest will not be further discussed. The debate concerning article 102 (c) TFEU, price discrimination and false positives in price discrimination will not be discussed in depth, as these topics are extensive.

1.5 Outline

Chapter one discusses the purpose with the research question along with the method used in this essay. Chapter two will introduce the Post Danmark judgment and state the legal issues. The threshold of the concept of competition on the merits will be discussed in the same chapter. The legal issues in the judgment will be developed according to the concept of abuse and contrasted to the *Tomra* judgment in the same chapter. Chapter three will look at pricing below cost and discuss predatory pricing and the applicable tests, such as the AKZO-tests and what criteria that should be used and if there are other criteria that could be applied to the same test. The 'as-efficient competitor'-test will be introduced, discussed and applied to the relevant judgment in chapter four. Chapter five will introduce selective low pricing, discuss and assess the most relevant case law and principles needed in order to make an analysis. Price discrimination is a concept that is evaluated in the judgment hence a discussion will take place in chapter six to see if there is any new development steamed from the *Post Danmark*'s judgment. If the court in any judgment establishes abuse the possibilities for the dominant undertaking to justify the behaviour exist. Therefore, the concepts of objective justifications and special responsibility are assessed in chapter seven. The same chapter will discuss the *Intel* judgment in short to see how and if the CJEU changed its position and what the future might look like. Concluding remarks and the answers to the research questions will be made in chapter eight. Each chapter will have one or more sections for the analysis but the analysis is not focused only to these sections.

2 The *Post Danmark* Judgment

In order to better comprehend *the essay*, this chapter will introduce and describe the background of the Post Danmark judgment. The legal discussion made by the Court, will thereafter be summarized, seen in section 2.1.1, followed by a discussion of the concept of abuse acquired from the summary. This discussion is seen in section 2.2.1. How the abovementioned concept corresponds with competition on the merits will then be discussed in section 2.3. As competition on the merits is a concept that focuses on what is lawful, the writer will argue if in fact this concept sets a threshold for abusive behaviour.

2.1 Background of the Post Danmark's Judgment

It is the Court's understanding that Post Danmark A/S should be seen as a dominant undertaking in the sector selling the service for the distribution of unaddressed mail (brochures, telephone directories, guides, local and regional newspapers etc.).[7] The Court has therefore not evaluated the step for of proving the relevant market. The relevant product market was concluded to be distribution of unaddressed mail and Denmark as the relevant geographical market. Post Danmark had previously been a natural monopoly supplying mail nationally.[8] When the market for mail services was liberalised Forbruger-Kontakt became the main competitor as it acquired numerous minor companies on the same market. In the end of 2003 Post Danmark met with SuperBest, Spar and the Coop group negotiating a lower price than Forbruger-Kontakt could supply for their services of unaddressed mail in Denmark. Negotiations were held with both services providers, but Post Danmark manages to give a marginally lower price to the companies. Forbruger-Kontakt claimed that the price level set by Post Danmark had different rates than pre-existing customer and that these prices could not be justified. The Danish court (Konkurrenceankenævnet) came to the conclusion that Post Danmark did not cover its average total cost but its incremental costs. Post Danmark's defence was based on the concept of economies of scale hence stating in the Order of Reference that the cost of distribution for unaddressed mail decreased by DKK 0.13 between the periods of 2003-2004. Konkurrencerådet could not find the economies of scale argument sufficient and the cost reduced to the same household was not linked to the sender of the items. Konkurrencerådet came to a decision on the 29th of September 2004. Konkurrenceankenævnet later upheld this decision on the 1st of July 2005. Konkurrencerådet also upheld

[7] Case C-209/10 *Post Danmark*, para. 3.
[8] Ibid, para. 3.

Konkurrencerådets decision from the 24th of November 2004 on the basis that Post Danmark did not show any intent to eliminate competition by predatory pricing.

It was argued in both authorities' decision that Post Danmark had not abused its dominant position through predatory pricing but with the use of secondary-line price discrimination. Post Danmark appeal this decisions to Østre Landsret (eastern regional court), which also upheld this decision as abuse of pricing policies was based on the fact that the customers came from Forbruger-Kontakt. These policies were compared with Post Danmark's already existing customers.

Post Danmark used the *AKZO* judgment as evidence to show that the intent is necessary to establish an abuse. Konkurrencerådet, on the other hand, had the interpretation that intent is not necessary to prove in order to establish an abuse when the price level is set between average total cost and average incremental costs.

The proceedings went to the Danish Supreme Court, Højesteret, which referred questions to the court of Justice for preliminary rulings.

> (1) Is Article 82 EC to be interpreted as meaning that selective price reductions on the part of a dominant postal undertaking that has a universal service obligation to a level lower than the postal undertaking's average total costs, but higher than the provider's average incremental costs, constitutes an exclusionary abuse, if it is established that the price was not set at that level for the purpose of driving out a competitor?
>
> (2) If the answer to question 1 is that a selective price reduction in the circumstances outlined in that question may, in certain circumstances, constitute an exclusionary abuse, what are the circumstances that the national court must take into account?'[9]

What criteria must be used to establish an exclusionary abuse under Article 82 EC (now article 102 TFEU) when the price level is held between average total costs and average incremental cost?

2.1.1 CJEU's Judgment

In what situations can a selective low pricing to a single customer be considered abusive? Abuse cannot be solely based on the dominant position under article 102 TFEU. A dominant undertaking's behaviour is lawful as the concept of competition on the merits is respected. One can therefore reach the conclusion that competition on the merits provides justification for larger market shares and dominance. Furthermore when a company is

[9] Ibid, para. 18.

holding a dominant position it has a special responsibility not to distort competition on the internal market. A competitive environment is essential to the internal market as focus lies on creating efficiencies. Companies that are not as efficient don't have the capacity to compete on the market and is therefore not in demand by consumers according to 'price, choice, quality or innovation'[10]. When these elements are abused consumers are harmed.[11]

The fact that Post Danmark held a legal monopolistic position before the market was liberalised must be reflection upon in the assessment. The fact that the market was liberalised should be a sign that competition should thrive and that special responsibility for Post Danmark is held by not operating in a way that will impair genuine competition on the internal market.[12] Under article 102 TFEU certain prices strategies will be prohibited. There are a few price strategies that are unlawful and will foreclose effective competition on the market. These strategies are therefore not caught by the concept competition on the merits.[13] When the Court has delivered its assessment, the court has taken into account if there has been any 'dissimilar condition applied to a equivalent transactions with other trading parties'[14] that could lead to distortion of competition.[15]

Predatory pricing is a classic example of a price strategy that is prohibited. The test concerning predatory pricing was developed in the *AKZO* judgment and is consequently named the AKZO-test. This test is introduced in paragraph 26 of the judgment of Post Danmark. The AKZO-test covers abuse when the price level is held below average total cost. Intent is evaluated when the price level is kept below average total cost but above average variable cost.[16] This test was only semi-applicable in Post Danmark judgment as Post Danmark was operating on several markets. The benchmark used by the Danish Government was instead average incremental costs. The definition of average incremental costs used by the Danish Government were 'those costs destined to disappear in the short or medium term (three to five years), if Post Danmark were to give up its business activity of distributing unaddressed mail'[17]. Post Danmark were able to use the same infrastructure for unaddressed mail as for the universal service obligations.[18] A test to identify the main shares of the great bulk was preformed.[19]

The price strategy used by Post Danmark, towards Forbruger-Kontakt, could have the effect of foreclosure if intent was to proven. The threshold for

[10] Ibid, para. 22.
[11] Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, para. 24.
[12] Case C-209/10 *Post Danmark,* para. 23.
[13] Ibid, para. 25.
[14] Ibid, para. 26.
[15] Ibid, para. 26.
[16] Ibid, para. 27.
[17] Ibid, para. 31.
[18] Ibid, para. 32.
[19] Ibid, para. 34.

proving intent is rather high and the Court concluded that the evidence put forward was insufficient to satisfy this criterion. Post Danmark was clearly using price discrimination towards Forbruger-Kontakt but this concept does not automatically show that there is an exclusionary abuse.[20] The Court held that

> 'charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse'.[21]

When the Court assessed the price levels given to the Coop group, SuperBest and Spar is was implied that the price level offered to the Coop group did not manage Post Danmark to cover its average total cost. However, did in the cases of SuperBest and Spar.[22] The Court found that no exclusionary behaviour existed as only one of three price levels offered, to F-K customer, was held below average total cost nonetheless above average incremental cost.[23] Forbruger-Kontakt was able to maintain its position on the market for unaddressed mail; even after the lower price level was provided to the Coop group. There was no sufficient evidence proving the exclusionary abuse existed on the market. One can therefore conclude that an 'equally efficient' competitors is able to compete with Post Danmark's price level in the long-run without being foreclosed on the relevant market for unaddressed mails.[24] Forbruger-Kontakt did even manage to retrieve Coop's custom in 2007 and a short while later Spar's custom.[25]

The Court concluded in the judgment that if the national court found Post Danmark to be guilty of abuse, objective justifications could be reasoned by the undertaking.[26] The concept contains efficiency gains and consumer benefits and Post Danmark has the burden of proof if found guilty.

Efficiencies can distortion competition if the exclusionary effect is counterbalanced. These efficiency gains must be counterbalanced on the relevant market and it may not remove all or most existing sources of actual or potential competition.[27]

[20] Ibid, para. 29-30.
[21] Ibid, para. 30.
[22] Ibid, para. 35-36.
[23] Ibid, para. 37.
[24] Ibid, para. 38.
[25] Ibid, para. 39.
[26] Ibid, para. 40.
[27] Ibid, para. 41-42.

2.2 CJEU's judgment in Post Danmark- Article 102 TFEU applied

The legal assessment of the judgment of Post Danmark will be discussed and assessed in detail in the below chapters. This discussion will be based on the summary of the judgment made in section 2.1.1. To develop an in depth knowledge of the judgment each legal aspect of the judgment will be assess in the below section starting with section 2.2.1.

2.2.1 The Aims of Article 102 TFEU – Protection 'Consumers, Competitors or Both?'[28]

Article 102 TFEU contains the prohibition against the abuse of a dominant position in the EU competition law. The aim of the provision is to protect both the needs of the consumer and the competitive environment of the internal market.[29] The closer interpretation of the rule is constantly evolving along with its subject matter. The idea of a flexible rule against abuse of a dominant position is also apparent from its non-exhaustive list of potential abuses.[30] Thus, allowing for further development in the future.

A necessary element of Article 102 TFEU is the existence of a dominant position. Dominance is established either through the existence of a large market share or a 'position of economical strength'[31] it is important to obey competition on the merits. The dominant position held by Post Danmark was proven regarding unaddressed mail in Denmark. Post Danmark held a market share in between 44-47%[32] whereas the Commission suggest that the benchmark for dominance was after 40% on the relevant market.[33] The Commission's Enforcement Priorities Paper basis this benchmark on case law. Two examples are the *British Airway's* judgment, which concluded a dominant position of 40-46%[34] and 40% in the judgment of *United*

[28] Craig, Paul, De Búrca, Gráinne, EU Law, Text, Cases, and Materials, Oxford University Press, 2011, Fifth Edition, p. 1025.
[29] Case C-95/04 P *British Airways* v *Commission*, EU:C:2007:166, para. 57, Case C-85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, para. 91, Case C-322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission*, EU:C:1983:168, para. 70, Case C-62/86 *AKZO* v *Commission*, para. 69.
[30] Whish, Richard, Bailey, David, Competition Law, Seventh Edition, Oxford University Press, New York, 2012, p. 193 & Case C-6/72 *Europemballage Corp, v Commission* (Continental Can), EU:C:1975:50, para. 26.
[31] Jones, Alison, Sufrin, Brenda, EU Competition Law, Text, Cases, And Materials, p. 393.
[32] Petit, Nicolas, http://chillingcompetition.com/2013/02/28/post-danmark-more-than-just-one-case/ accessed 14 May 2014.
[33] Guidance Paper, para. 14.
[34] Ezrachi, Ariel, Article 82 EC, Reflections on its Recent Evolution, Hart Publishing, 2009, Anderman, Steven, Chapter 5: The Epithet That Dares Not Speak its Name: The Essential Facilities Concept in Article 82 EC and IPR after the Microsoft Case, p. 88-89 & Case T-219/99 *British Airways v Commission* (2003) EU:T:2003:343.

Brands.[35] The conclusion of Post Danmark's market share was stated in the Opinion of Advocate General Mengozzi and was not examined in the CJEU judgment.[36] Hence, limiting the discussion of relevant market.

The interpretation of article 102 TFEU has been developed over time and is constantly evolving, as it exists to protect the needs of consumers and the internal market.[37] The treaty developing the prohibitions found that the article should not be exhaustive[38] thereby opening up for future development of the article 102 TFEU[39] as the internal market and the consumers may change. The element of cross-boarder is essential when finding behaviour that is prohibited by the treaty, hence defined generously.[40] It is implied that the purpose of the article shall strive to maintain or strengthen the competitive environment on the internal market.[41] The case-by-case development is preferred in the examination if a dominant undertaking abuses its practices. Principles in line with the purpose of the article are the freedom to choice, freedom of entry, and principle of discrimination furthermore be upheld so that competition is not distorted.[42]

In order to show that a dominant undertaking is abusing its position on the market the Commission must provide information of negative effects, principally who or what is hurt by the conduct. Exploitative and exclusionary are the two existing abuses whereas the latter is a consequence of abuse towards competitors while the former is applied when consumers have been injured. An abusive dominant firm can injure competitors either through a potential effect or an actually effect. The protection of the competitors was not the purpose of the treaty, only consumers would be protected was argued. However, the General Court has aimed to protect competitors in the *Microsoft* judgment[43]. Conversely, the American perspective confirms the treaty's purpose hence competitors should not be protected.[44] Competitors are protected in order to maintain the competitive environment, which might lead to lower prices for consumers.

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[35] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* EU:C:1978:22, para. 108.
[36] Opinion of Advocate General Mengozzi in Case C-209/10, *Post Danmark*, delivered on 24 May 2011, EU:C:2011:342.
[37] Case C-95/04 P *British Airways* v *Commission*, para. 57.
[38] Whish, Richard, Bailey, David, Competition Law, p. 193 & Case C-6/72 *Europemballage Corp, v Commission* (Continental Can), para. 26.
[39] Case C-280/08 P *Deutsche Telekom* v *Commission* EU:C:2010:603, para. 173.
[40] Whish, Richard, Bailey, David, Competition Law, p. 146.
[41] Case C-85/76 *Hoffmann-La Roche v Commission*, para. 91, Case C-322/81 *Michelin* v *Commission*, para. 70, Case C-62/86 *AKZO* v *Commissio*, para. 69,
Case C-95/04 P *British Airways v Commission*, para. 66, & Case C-202/07 P *France Télécom* v *Commission*, EU:C:2009:214, para. 104.
[42] Case C-322/81 *Michelin* v *Commission*, para. 73, and *British Airways* v *Commission*, para. 67 & Case C-280/08 P *Deutsche Telekom* v *Commission*, para. 175.
[43] Case T-201/04 *Microsoft v Commission*, EU:T:2007:289.
[44] Swaine, Edward T, "Competition, Not Competitors," Nor Canards: Ways of Criticizing the Commission, 2002, p.599
https://www.law.upenn.edu/journals/jil/articles/volume23/issue3/Swaine23U.Pa.J.Int'lEcon.

Article 102 TFEU discusses the potential affect on consumer harm from less competition on the market. This was tested in the *TeliaSonera Sverige* judgment.[45] Undertakings try to acquire a large market share by competing on the merits and competing in a way that are within the boundaries of what is lawful under article 102 TFEU. This article exists as to ensure that less efficient competitor can be foreclosed out of the market without any consequences. To establish an abuse the benchmarks test competition on the merits has been applied to see if the behaviour is suitable on the market. This concept will be discussed in detail in the below section 2.3.

2.3 Competition on the Merits

Competition on the merits is a legal test that set the premier threshold for finding abuse. Competition on the merits should work as a safe haven for dominant undertaking that is genuinely trying to compete on the market without abuse. The term was first established by the CJEU in the *Hoffman La Roche* judgment phrased as taken into account 'normal competition'[46]. The phrase was superseded to 'competing within the basis of quality'[47]. The Commission should not intervene if the competition on the market is within these thresholds. These thresholds do mainly concern price, choice, quality or innovation. This conduct may enable dominant undertaking to increase market share and be able to lower prices on the market[48] without being examined as abusive. The Commission will neither intervene to ensure that a less efficient competitor is protected on the market.[49] The Commission will safeguard the competitive process on the market[50] and 'it is in no way the purpose of Article 82 EC to prevent an undertaking from acquiring, on its own merits, the dominant position on a market.'[51] In Post Danmark the court used emphasis on protection of the consumers, by 'has the effect, to the detriment of consumers'[52] and not competition. However, this concept is somewhat flawed, as a clear definition has not been formulated.

> Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[53]

L.597(2002).pdf , accessed 18 May 2014.
[45] Case C-52/09 *TeliaSonera Sverige*, para. 24.
[46] Case 85/76 *Hoffman La Roche*, para. 120.
[47] Case 62/86 *Akzo v Commission,* para. 70.
[48] Case C-209/10 *Post Danmark*, para. 21.
[49] Ibid, para. 22 & DG Discussion Paper, para. 54.
[50] Guidance Paper, para. 6.
[51] Case C-209/10 *Post Danmark,* para. 21.
[52] Ibid, para. 24.
[53] Ibid, para. 22 see also Prof. Montis Speech 2004, http://europa.eu/rapid/press-release_SPEECH-04-212_en.htm?locale=en.

The concept was even formulated as being the ability not to distort genuine competition on the market.[54] The focus should lie on maintaining a healthy competitive environment on the market and not focus on the competitors.[55] When the undertaking disobeys this concept, objective justification can be applied if the undertaking is found guilty of abuse.

Scholars have criticised the concept of being undefined.[56] The above stated conditions what competition should strive towards are not optimally defined and the inability to define the concept leaves the door open for abuse. Price, for example may foreclose competitive if held at a level too low. When competing with prices, the cuts must still ensure competition. Generally, when applying a price level above cost this will only have the capacity to foreclose a less efficient competitor.[57] Applying a price level below cost is interpreted as predatory pricing caught by the 'as efficient competitor'-test hence sacrificing profit and thereby incurring losses.[58] The conclusion that can be drawn is that when competition is decreased and companies have a hard time staying on the market, the conditions on the market do not provide a environment in line with competition on the merits. Advocate General Kirschner has explained that the performance in contrast to this principle for profit maximizing companies is disproportionate to the means achieved on the internal market.[59]

Competition on the merits is applied through the contradiction that if not caught by the concept then an abusive behaviour has occurred.[60] This indefinable concept has led to the fact that article 102 TFEU has been seen as too 'formalistic and inconsistent'[61].

The test must be applied to the conduct to see if there is abuse that will foreclose the market. The Court in the *Tomra* judgment did not evaluate this concept, whereas "the existence of an intention to compete on the merits, even if it were established, could not prove the absence of abuse."[62] The Court discussed the concept in the *Post Danmark* judgment and showed that no exclusionary effect was found when the undertaking preformed accordingly.[63] The ability to increase market share and profit was accepted

[54] Temple Land, J, O'Donoghue, R, The Concept of an Exclusionary Abuse under Article 82 EC, GCLC Research Papers on Article 82 EC, College of Europe, Bruges, 2005, p. 41.
[55] DG Discussion Paper, para. 54.
[56] Geradin, Damien, Layne-Farrar, Anne, Petit, Nicolas, EU Competition Law and Economics, Oxford University Press, Great Britain, 2012, para. 4.135-4.136.
[57] DG Discussion Paper, para. 127.
[58] DG Discussion Paper, para. 93.
[59] Case T-51/89 *Tetra Pak Rausing SA v Commission* EU:T:1990:41, para. 68.
[60] Ekaterina Rousseva, The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?, THE COMPETITION LAW REVIEW, Volume 2 Issue 2 March 2006, p. 70.
[61] Ekaterina Rousseva, The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?, p. 31.
[62] Case C- 549/10 P *Tomra and Others v Commission*, para. 22.
[63] Case C-209/10 *Post Danmark*, para. 22.

when competing with this standard.[64] The concept is weak at best. The Court instead turned to the effect approach of this unlawful behavior.

2.3.1 May Affect

The concept of effect developed when trade occurred between Member States but the necessity to include trade between member states lie outside of the definition. The boundaries for this concept are therefore generous.[65] The concept of 'may affect' has been describes in earlier case law as being the 'agreement or practise may have an influence, direct or indirect, actual or potential on the pattern of trade between Member States'[66]. This criterion is also to be interpreted widely.[67] The Commission examines if this abuse will eventually restrict competition i.e. 'the conduct is capable of having, or likely to have, such an effect'[68]. This important assessment is to show that the effect is likely and that speculation is not sufficient.[69] This was seen in the Post Danmark judgment where threshold for likely or actual effect was used.[70] It is important to have consumers in mind and see that these are not affected negatively.[71] The effect-based test will be discussed and analysed in the section below.

2.3.2 Legal Assessment of Abuse

In the judgment of *Post Danmark* the court stepping away from the traditional view of potential effect into the criteria of likely or actual effect.[72] Earlier case law has operated with the criterion of potentially affecting the market. In the *Tomra* judgment[73] the CJEU established that actual foreclosuring effect is not required when examining abuse only the potential effect.[74]

The Commission must show that, the behaviour of the dominant undertaking has the tendency to affect foreclosure on the market.[75] The loyalty rebates found in *Tomra* and *Hoffman La Roche* had a potential

[64] Ibid, para. 25.
[65] Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Official Journal C 101, 27/04/2004, p. 81-96, para. 22.
[66] Whish, Richard, Bailey, David, Competition Law, p. 146.
[67] Ibid, p. 146.
[68] Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission* EU:T:2003:250, para. 239 & Case T-219/99, *British Airways v. Commission*, para. 293.
[69] Guidelines of intra-state trade, para. 43.
[70] Case C-209/10 *Post Danmark*, para. 44.
[71] Guidelines of intra-state trade, para. 43.
[72] Case C-209/10 *Post Danmark*, para. 44.
[73] Case C-549/10 P *Tomra and Others v Commission*.
[74] Swaak, Christof, Wesseling, Rein, Braeken, Bas, ten Have, Floris, ECJ and EFTA court judgments on the abuse of dominance: confirmation and refinement of existing case law, European Union, 2012, http://www.lexology.com/library/detail.aspx?g=a21f69cd-11ac-4592-a130-36461ac1dc1f accessed 10 May 2014.
[75] Case C-549/10 P *Tomra and Others/ Commission*, para. 68.

exclusionary effect on the market. The Hoffman La Roche test, competition on the merits, was not applicable to Tomra. The court ignored the test. The application of the test should be based on the fact that the competitor's product lost in demand.[76] The agreements made by Tomra and the customers were not formally seen to be exclusionary however, implied in the rebates given.[77] The rebates must be shown no 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.[78] Tomra's rebate strategy was confirmed in the Hoffman La Roche doctrine to have the same effects as an exclusionary agreement[79] but also exploitative as it will be towards existing customers.[80] Effects are not necessarily to be established but at least shown.[81] Tomra's capacity to affect competition is sufficient when looking at behaviour that may lead to the restrictions on the market.[82]

Contrasts between the Tomra judgment and the Post Danmark judgment were the market shares and the use of the concept of competition on the merits. Tomra had a market share above 70% and sometimes even higher.[83] This must be taken into account when assessing the effects on the market. The threshold for competition on the merits was applied in the Post Danmark judgment, which lead to the use of the 'as-efficient competitor'-test. Another fact in contrast to the Post Danmark judgment is that Tomra was abusing loyalty rebates and the 'as-efficient competitor'-test could not be applied to economical data available.[84]

For the Commission to establish an alleged abusive effect the following criteria must be examined; percentage of market affected, duration and the how regularly the abuse occurred.[85] Competitor may show that the market share has changed on the relevant market or that competitor has been foreclosed on the relevant market.[86] According to Post Danmark, actual

[76] Case C-85/76 *Hoffmann-La Roche v Commission,* para. 90.
[77] Case C-549/10 P *Tomra and Others v Commission*, para. 70.
[78] Ibid, para. 71.
[79] Lundqvist, Björn, Skovgaard Ølykke, Grith, Post Danmark, now concluded by the Danish Supreme Court: Clarification of the Selective Low Pricing Abuse and Perhaps the Embryo of a New Test under article 102 TFEU? European Competition Law Review, Thomas Reuter UK Limited, 2013, p. 488.
[80] Ibid, p. 488.
[81] Ibid, p. 488.
[82] Case C-549/10 P Tomra and Others v Commission, para. 68.
[83] Ibid, para. 10.
[84] Samà, Danilo, The Antitrust Treatment of Loyalty Discounts and Rebates in the EU Competition Law: in Searcg of an Economic Approach and a Theory of Consumer Harm, LUISS "Guido Carli" University of Rome, Rome, Italy, 2012, p. 38.
[85] Guidance Paper, para. 20.
[86] Ibid, para. 20.

foreclosing effect must be show.[87] The Danish Supreme Court came to the same conclusion.[88]

2.3.3 Analysis

One can argue that the judgment of Post Danmark, was developed in deliberate way to suggest a more economical approach of solving the question of abuse. As the threshold for showing effect increased to *likely or actual* abuse this can lead to a greater legal certainty. The element of assessing potential effect has for a long time held strong ground in Union competition law. The fact that the threshold has changed with the Post Danmark judgment shows that the burden of proof for the Commission should be at a higher level when assessing future abuse. The Commission must prove, like before, not that the abuse has lead to any actual consequence on the market but that the likelihood of future consequence may occur. As the Commission has a higher threshold for showing future effects on the market the companies will feel more comfortable operating on the market. This will in the extension lead to more legal certainty and understanding for the operator on the market. This will attract entries to the market and lead to a greater competitive environment. On the other hand, the judgment of Tomra closed the door for actors that want to join the market, as the effect was assessed with a lower threshold than in the Post Danmark judgment. This will affect the environment on the market negatively, as insecurities will rise. One might argue that the definition of future effects, hence likely or actual abuse provides a better environment for larger companies that try to establish themselves. The question arises if the Post Danmark judgment has lead to any change on the market as the Tomra judgment was published only a few weeks later.

[87] Gerard, Damien, Looking back at a 2012 highlight: Post Danmark, Université catholique de Louvain, Belgium, 2013, http://kluwercompetitionlawblog.com/2013/01/07/looking-back-at-a-2012-highlight-post-danmark/ accessed 10 May 2014.
[88] Lundqvist, Björn, Skovgaard Ølykke, Grith, Post Danmark, now concluded by the Danish Supreme Court: Clarification of the Selective Low Pricing Abuse and Perhaps the Embryo of a New Test under article 102 TFEU?, p. 485.

3 Pricing Below Average Total Cost

3.1 Background and Assessment of the Concept of Predatory Pricing

The writer will try to describe and assess the pricing below cost situation and compare it with the AKZO-standard.[89] The AKZO-standard is formed the average incremental costs test and is essential to the understanding on the judgment. This chapter will evaluate both tests, the recoupment criterion found in American antitrust law and the concept of intent to see how the court has assessed these in the judgment. The writer will in the end of every section try to analyse these concept.

The Commission uses the concept of 'investment' in the *DG Competition Disussion Paper on the application of Article 82 of the Treaty to exclusionary abuses* whilst the concept of 'sacrifice' is being used in the Guidance Paper on the *applying of Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, when describing the lower price level and recoupment of losses.[90]

According to Richard Posner at the University of Chicago, predatory pricing is the same as 'pricing at a level calculated to exclude from the market an equally or more efficient competitor'[91]. This result is typically achieved through prices below cost, which are sufficiently low to force out any competitors. It is important to note that the dominant undertaking will only have to sustain the lower prices in the short-run. Once the competitor has exited the market, the dominant undertaking will be able to recoup its losses through higher prices.[92] Negative effects of predatory pricing have been argued to be short-run allocative inefficiencies, deadweight loss found in case of monopolies and social losses.[93]

Predatory pricing can be seen as pro-competitive in the short-run since consumers will enjoy lower prices and thus, higher welfare, while the dominant firm tries to force market exits. However, once the dominant undertaking has achieved its goal, the market will return to its depressed

[89] Case C-209/10, *Post Danmark*, para. 27.
[90] DG Discussion Paper, para. 97 & Guidance Paper, para. 63-64.
[91] Posner, Richard, Antitrust Law, An economic perspective, The University of Chicago, 1976, p. 188.
[92] DG Discussion Paper, para. 96.
[93] Joskow, Paul L., Klevorick, Alvin K., A Framework for Analyzing Predatory Pricing Policy, The Yale Law Journal, Volume 89, Number 2 December 1979, p. 224.

state and consumers will lose choice and quality as the prices are forced to a higher price level.[94]

In order for the undertaking to be able to enjoy the long-run effects steamed from this behaviour it must be dominant.[95] This will allow the undertaking to reap the profit from the conduct, by setting its own higher prices. On the other hand if the undertaking were not dominant then there would not be any possibility to use the concept of predatory pricing as the dominant undertaking have margin of error in its size on the market. Other obstacles of using predatory pricing, are if the dominant undertaking is wrongly interpreting the prey ability to stay on the market and if other competitors manage to capitalize on the profit that the dominant undertaking was to recoup.[96]

Prices must be set below cost in order to foreclose an 'as efficient competitor'.[97] The Areeda-Turner test is for assessing abusive behaviour below cost. This test concerns a cost/price analysis.[98] One can criticise the test for applying the short-run marginal cost, as it is too difficult to assess the marginal costs.[99] This is because of the fact that 'interest, rent, depreciation, and other overhead items, because they do not vary in the short run with the amount of output produced'[100]. The moderation of the classical test was applicable to the below costs behaviour conducted by AKZO. The test adopted in the judgment should not be assessed by hypothetical information but by practical and rational alternatives.[101] The former tests relevant criteria are applied differently depending on, in which legal systems the undertaking is operating. The American legal system was using *recoupment* and the Union is using *intent.* The AKZO judgment will first be investigated in which led to the AKZO-tests.

3.1.1 *AKZO v Commission*

ECS produced benzoyl peroxide, a chemical, which could be used in the bleaching process of flour milling, as well as a catalyst in plastic products. However, when ECS tried to enter the latter market, the incumbent company AKZO responded by offering ECS's largest customer in flour milling lower prices for their benzoyl peroxide needs, ECS complained to the Commission, which found AKZO's conduct in breach of Article 102 TFEU.

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[94] DG Discussion Paper, para. 96.
[95] Ibid, para. 97.
[96] Ibid, para. 97 & Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 417-418.
[97] Guidance Paper, para. 23-27.
[98] Whish, Richard, Bailey, David, Competition Law, p. 740-741.
[99] Joskow, Paul L., Klevorick, Alvin K., A Framework for Analyzing Predatory Pricing Policy, p. 250.
[100] Posner, Richard, Anittrust Law, An Economic Perspective, p. 191.
[101] Guidance Paper, para. 65.

AKZO enjoyed a dominant position of half the market, 50%, and the whole market for organic peroxides in the Community. AKZO used price below cost to foreclose ECS. AKZO was fined for this behaviour a sum of € 10 million and were to terminate the infringement immediately. Different customer should not be price discriminated on the same market. The Commission manage to prove that there was an intent to foreclose ECS. When competing in the Community, quality and scope of competition should determine success whilst price-strategies should not be seen as legitimate.[102] Built from the same interpretation from the concept of competition on the merits.

As mentioned before the Areeda-Turner test was not applicable as the court decided to adopted ATC and AVC. As prices were held above the AVC the ECJ (now CJEU) used a cost-based test and annulled the Commissions decision and lower the fines to € 7,5 million. The Court came to the conclusion that AKZO had abused its position with predatory prices. The fact that ECS were not foreclosed but that intent existed is enough to show abuse.[103] This kind of behaviour may lead to effective elimination of an equally efficient competitor, as the actual effect was not proven.[104]

3.1.2 The AKZO-Tests

The ECJ adopted a new cost/price-test from the judgment of AKZO. This test was formulated on a two-test rule for assessing predatory pricing under the article 86 EEC (now 102 TFEU). The assessment bases on the fact that dominant undertakings have no interest in applying a price level that is lower than different cost without looking to gain an advantage towards other competitors in the future. In the best case scenario the dominant undertaking is hoping to eliminate competition and later recoup profit through dominance on the market.[105] The benchmarks considered in the tests are ATC and AVC.

3.1.2.1 The First AKZO-Test

The unlawful price competition, predatory pricing was firstly introduced in the in Union with the AKZO judgment. When a dominant undertaking is applying prices below AVC it is obvious that there is an interest to force market exits.[106] The company with the largest economical resources have the possibility to last the longest making losses.[107] If the dominant undertaking is applying price levels below ATC the need to apply intent is

[102] Ibid, para. 70.
[103] Ibid, para. 115.
[104] Opinion of Advocate General Mengozzi in Case C-209/10 *Post Danmark*, para. 65.
[105] Case C-62/86 *AKZO v Commission*, para.71.
[106] DG Discussion Paper, para. 96.
[107] Case C-62/86 *AKZO v Commission,* para. 72.

low.[108] It is implied that market foreclosure is in demand. The prices are held at a level making competition impossible. This price level are said to be prima facie abusive.[109]

3.1.2.2 The Second AKZO-Test

The other price level that the ECJ discussed in the *AKZO* judgment is the price levels found in between ATC and AVC. When applying prices between ATC and AVC there must be *intent* to foreclose one or more competitors for abuse to be established.[110] As this price level is not giving up too much profit in comparison to the first AKZO-test the subjective criterion of intent is necessary to conclude abuse. The ECJ used the wording of a plan to eliminate a competitor.[111]

The ability to prove intent is not sufficient as the Commission must show that an actual plan exist that's mission is to eliminate a competitor. Professor Bork suggested that it is hard to apply the predatory pricing concept, as new entries will always occur when old leave.[112]

3.1.3 Analysis

The fact that a predatory pricing strategy only can be applied when the undertaking is enjoying a dominant position is obvious. The need for economical resources is essential to the conduct. The competitor that the undertaking is trying to force of the market must have less economical resources and this fact must be assessed thoroughly by the undertaking. The undertaking will not risk profit and not be able to foreclose the competitor. There must be a large difference in market share to be able to minimize the risk and the losses. One can argue that the market share in the Post Danmark judgment, would allow predatory pricing to apply as Forbruger-Kontakt held a smaller market share. Only Coop was given prices below ATC and not even below AVC. It is therefore important to assess the intent further and is made below. A test used in the *Deutsche Post* judgment was established in Post Danmark taking in the concept of average incremental cost which will be discussed below.

[108] Case C-333/94 P *Tetra Pak*, para. 42.
[109] Ibid, para. 41.
[110] Case C-62/86 *AKZO v Commission,* para. 72.
[111] Ibid, para. 72.
[112] Whish, Richard, Bailey, David, Competition Law, p. 740.

3.1.4 The Union's Criterion of Intent

Intent is the subjective part of the second AKZO-test and will be further discussed here. Intent must use a number of convergent criteria to be applicable. There must be a plan to eliminate a competitor.[113] The second AKZO-test showed that intent is essential and necessary to find undertakings abusive when applying a price level between AVC and ATC. No effect is necessary to be established if intent is proven.[114] The criteria for intent established in the *Tetra Pak* judgment were the 'duration, the continuity and scale of the sales at a loss'[115]. There were proof that the price level of the product were 20% lower in the primary market and up to 50% lower prices in other markets.[116] Other evidence found can point to intent are facts that for example the board of directors clearly stated that there should be financial losses in order to fight competition.[117] The court established *intent* in the AKZO judgment by looking at which customers that were offered prices between ATC and AVC. The customers offered these prices were exclusively ECS customers. This showed the strategy of predatory pricing as not all the customers on the market were offered low prices. There was methodical focusing on ECS customers.[118]

In order to acquire documentation proving *intent* is it necessary to preform dawn raids to attain 'internal documents, schemes, projections and prognosis work'[119]. The intent must be based on specific information that shows the intent to exclude a competitor on the market. These documents do not only show that the dominant undertaking has the interpretation to eliminate competitors but to force *a* competitor out of the market.[120] The ECJ developed this idea in the AKZO judgment.

3.1.5 Legal Assessment of Intent

Intent to eliminate a competitor can clearly be proven by the Court as predatory price levels are given to competitor's customers. There is usually not an extensive strategy to eliminate all competitors at the same time but

[113] Case C-62/86 *AKZO v Commission*, para. 72.
[114] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 407-408.
[115] Lowe, Philip, EU competition on predatory pricing, Introductory address to the Seminar "Pros and Cons of Low Prices", Stockholm, 5 December 2003, p. 3. & Case T-83/91, *Tetra Pak*.
[116] Lowe, Philip, EU competition on predatory pricing, Introductory address to the Seminar "Pros and Cons of Low Prices", p. 3. & Case T-83/91, *Tetra Pak*.
[117] Case C-83/91 *Tetra Pak*, para. 146.
[118] Case C-62/86 *AKZO v Commission,* para. 113-115.
[119] Lowe, Philip, EU competition on predatory pricing, Introductory address to the Seminar "Pros and Cons of Low Prices", p. 4.
[120] Case C-62/86 *AKZO v Commission*, para. 72.

focuses on lower the price for a few competitors' customers.[121] This gives the court a hint of information of which competitor the dominant undertaking has the intent to eliminate.

Professor Baumol's claim that even if the competitors is not eliminated when using predatory pricing this gives a disincentives for future market entry as a rough competitive market exist.[122] Professor Baumol has although stated that it is impossible to prove intent as no economist or lawyer has the ability to 'delving into anyone's mental state'[123]. This explanation follows the same path as in the line with Richard Posner idea that sometimes the clumsiness of words can be interpreted as intent.[124] Intent has been seen as being too vague due to its subjective approach.[125] Post Danmark had been aggressive toward Forbruger-Kontakt in media but intent was strictly interpreted.[126] The Danish Court instead focused on price, as intent is harder to fully establish.[127]

3.1.6 Analysis

To have a plan to eliminate a competitor must be seen as a subjective criterion as the Commission tries to establish the dominant undertakings willingness to exclude a competitor. Why is it necessary to have a subjective plan in a cost-based strategy? There are a number of reasons for this purpose. The Court will be able to argue the dominant undertakings plan easier but this also gives the undertaking a greater possibility to show reasons why the price level were set between ATC and AVC.

The fact of the matter stated by the dominant undertaking is that the reason for the lower applied price level is a campaign or rebates to gain market share in order to enjoy economies of scale by vending a larger output in the future. This would increase consumer welfare for consumers, as prices are force down.

When the court has established an abusive conduct by showing that there a plan to foreclose a rival of the market it is close to impossible for the undertaking to show that there are objective justifications.

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[121] Lowe, Philip, Speech of predatory pricing – Pros and Cons of Low Prices, p. 6.
[122] Ibid, p. 6.
[123] Ibid, p. 3.
[124] Posner, Richard, Antitrust Law, p. 190.
[125] Sharpes, Dustin, Reintroducing Intent into Predatory Pricing Law, 904 Emory Law Journal, [Vol. 61:903], p.925, http://www.law.emory.edu/fileadmin/journals/elj/61/61.4/Sharpes.pdf accessed 7 May 2014.
[126] Bertelsen, Erik, Kofmann, Morten, Munk Plum, Jens, Competition Law in Denmark, Kluwer Law International, the Netherlands, 2011, p. 136.
[127] Rosenblatt, Howard, Armengod, Héctor, Scordamaglia-Tousis, Andreas, Post Danmark: predatory pricing in the European Union, The European Antitrust Review, Global Competition Review, 2013, p. 23.

3.1.7 The American Criterion of Recoupment

As intent has not been widely accepted in American Antitrust law the focused was instead on *recoupment.* Hence the applied price level does not only have to be between ATC and above AVC but also contain recoupment of lost profit.[128] In the *Brooke* judgment[129] costs below some level of costs was necessary in order to establish abuse by the court. In the short-run the dominant undertaking, like the Unions interpretation of the predatory pricing strategy, would enjoy losses but able to recoup these in the long-run. The recoupment of the losses is essential in order to prove that the undertaking was using the concept of predatory pricing strategies.[130] This is in line with the American antitrust perspective that an abuse should lead to an economical advantage. The scheme must be seen as profitable for the undertaking.[131] Not only must profit be recouped but also market share. But on some markets the possibility for recoupment of losses is non-existent, as new entries will occur.[132] The loss recoupment is not applied in the EU competition law when proving predatory pricing.[133] On the other hand, the economical literature has come to the conclusion that recoupment is the next natural step after predatory pricing abuse but there are difficulties in applicable of the criterion.[134]

The reason why recoupment is not so extensively used is because of the fact that the undertakings have a hard to collecting the whole recoupment after the foreclosure of the competitor. The negative effects of predatory pricing and the need for recoupment is that this will lead to market exits and that consumer welfare is decreased and also choice.[135] In the Opinion of Advocate General Fennelly of Case *Compagnie Maritime Belge Transport* he argued that the possibility for the use of recoupment should exist.[136] The Commission explains that the recoupment is not required.[137] Therefore, the

[128] Lowe, Philip, Speech of predatory pricing – Pros and Cons of Low Prices, p.5.
[129] Brooke *Brooke Grp.*, 509 U.S. at 222–24. The Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (509 US 209, 113 S.Ct 2578).* & Bolton, Patrick, Brodley, Joseph F., Riordan, Michael H., Predatory Pricing: Strategic Theory and Legal Policy, B. The Brooke Decision, http://www.justice.gov/atr/public/hearings/single_firm/docs/218778.htm#4
[130] Brooke *Brooke Grp.*, 509 U.S. at 222–24. The Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (509 US 209, 113 S.Ct 2578).*
[131] Sharpes, Dustin, Reintroducing Intent into Predatory Pricing Law, p. 906, accessed 7 May 2014.
[132] Lowe, Philip, Speech of predatory pricing – Pros and Cons of Low Prices, p. 5.
[133] Ibid, p. 5 & Case C-202/07 P *France Télécom SA*, para. 111.
[134] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 412-413.
[135] Case C-202/07 P *France Télécom SA*, para 112.
[136] Opinion of Mr Advocate General Fennelly delivered on 29 October 1998 Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96), delivered on 29 October 1998 EU:C:1998:518, para. 136.
[137] Guidance paper, para. 71.

CJEU has taken a step away from the recoupment criterion[138] also suggested in the Opinion of Advocate General Mazák.[139] The interest in intent is greater.[140]

3.1.8 Analysis

One can argue that recoupment is easier to prove than intent as one compares the market before and after market exit. Should EU case law start to focus on the objectiveness of recoupment instead of intent? As intent is strictly interpreted in case law and almost impossible to prove should the focus instead lie on recoupment? Is the American way a more respectable solution? In theory more companies will be shown to be abusing their dominant position if the recoupment is used as this can be based on objective economical investigation, as this is easier to prove than intent.

A company that has forced market exit of a competitor cannot raise the price level, as this will show recoupment. The ability for the dominant undertaking to recoup the losses and hide this fact is impossible in theory. As laws in some countries protect companies' internal information as this is seen as know-how, this is hard to collect.[141]

One can also argue that in theory legal certainty is increased as it is easier to prove that recoupment exist by looking at the market shares after the competitors has exist the market. On the other hand the competitor may have been forced of the market when the Court has established that a predatory pricing strategy has been used as this will lead to fewer choices. The CJEU focuses on trying to help the competitor before it is too late and the American courts try to be objectively correct when proving abuse and predatory pricing. But the matter of the fact is that the *Brooke* judgment was the last judgment concerning predatory pricing in American Antitrust law as recoupment was impossible to prove. The EU's intent does win by default.

[138] Case C-202/07 P, *France Télécom v Commission*, para. 110.
[139] Opinion of Advocate General Mazák in Case C-202/07 P, France Télécom v Commission, delivered on 25 September 2008, EU:C:2008:520, para. 76.
[140] Case C-202/07 P *France Télécom SA*, para. 110.
[141] Mackenrodt, Mark-Oliver, Conde Gallego, Beatriz, Enchelmaier, Stefan, Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?, Springer-Verlag Berlin Heidelberg, Munich, 2008, p. 17-18.

3.1.9 Long-Run Average Incremental Costs[142]-Test

The Areeda-Turner test and the moderated AKZO-tests are not applicable to the economical situation in the *Post Danmark* judgment and therefore the average incremental cost test was used. This test is used when assessing industries where high fixed costs and low variable costs are present and where synergies have occurred by similar market.[143] The same infrastructure can occasionally be used for two markets supplying different but similar products on the same geographical market.[144]

The first example was in the judgment of *Deutsche Post* establishing that the undertaking was a multi-product firm[145] that could use the synergies of different markets to lower the prices in other markets.[146]

Deutsche Post was enjoying a monopoly in the letter-post market, which to some extent financed the commercial parcel market.[147] This allowed Deutsche Post to lower the price level to below ATC. This was concluded to be abusive. In Post Danmark the average incremental costs were defined as 'those costs destined to disappear in the short or medium term (three to five years), if Post Danmark were to give up its business activity of distributing unaddressed mail'[148]. Post Danmark used the infrastructure from the unaddressed mail market and created synergies with the universal obligation for certain addressed items of mail.[149] The possibility for Post Danmark to decrease its costs is made by the 'great bulk' concept taking into consideration the whole company's costs. The common variable costs have the same distribution channels as the distribution of unaddressed mail and the universal obligation for certain addressed items of mail.[150]

3.1.10 Legal Assessment of AIC

[142] 'The cost calculated by dividing all its long-run incremental costs by its output. LRAIC is the same as the average total cost of a firm producing a single product. It will be lower than the average total cost of a multi-product firm enjoying economies of scope as it excludes costs that are common to several products'- Whish, Richard, Bailey, David, Competition Law, p. 717-718.
[143] Whish, Richard, Bailey, David, Competition Law, p. 747.
[144] DG Discussion Paper, para. 101.
[145] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 399.
[146] Opinion of Advocate General Mengozzi in Case C-209/10 *Post Danmark*, para 39.
[147] Case C-399/08 P *Deutsche Post v Commission* EU:C:2010:481, para. 9-10.
[148] Case C-209/10 *Post Danmark*, para. 31.
[149] Ibid, para. 32.
[150] Ibid, para. 31-34.

CJEU is explaining the fact behind the conclusion of the case, discussing the moderated AKZO-tests and its application to this specific judgment. The classical Areeda-Turner test is not used, as marginal cost is not applicable in this present case. AVC is not used as Post Danmark is currently operating on several markets in the postal sector on the Danish market.[151] Post Danmark were a natural monopoly and has therefore the necessary infrastructure in order to be able to compete efficiently on the market.

In other words, to make a necessary analysis of the upcoming situation the CJEU must assess the concept of average incremental cost in accordance with Post Danmark's legal situation. The court stated that the AIC are the costs that are destined to disappear in the short or medium term, between three to five year, if Post Danmark were to give up its business activity distributing unaddressed mail.[152] The ATC were the costs made up by the AIC and the common cost anticipated from the activities other than those covered by the universal service obligation.[153] The Danish Government held that costs both in the universal service obligation and the services for unaddressed mail were intertwined.[154] Both the staff and the infrastructure were seen as the common cost as it were used for both product markets. The common costs were seen as being the AIC and could be interpreted as being the AVC. The 'common costs' were calculated to be 75% of the all costs and 25% were seen as being the non-attributable common costs.[155] The court did therefore provide the bulk cost test through the 'as-efficient competitor' test.

The price level given to the Coop group, one of the Forburger-Kontakt's customers, was held between the AIC and ATC. As the effect-based approach was used through the 'as efficient competitor'- test the anti-competitive behaviour was assessed through the concept of the actual or likely effect, which could lead to an exclusionary effect that will affect consumer welfare.[156] The fact that the court is looking at the effects shows that LRAIC is not enough to foreclose an 'as efficient competitor'.[157] The fact that both price levels for Spar and SuperBest were held higher than ATC shows the lack of of predatory pricing.[158] The price level for Coop was held in between ATC and LRAIC, which could not be seen as being exclusionary.[159] The 'as-efficient competitor' will be able to compete with these prices without suffering unsustainable in the long-run.[160] When

[151] Moisejevas, Raimundas, Novosad, Ana, Bité, Virginijus, Costs Benchmarks as Criterion for Evaluatio of Predatory Pricing, Mykolas Romeris University, Jurisprudeunce, 2012, 19(2), Vilnius, Lithuania, 2012, p. 593.
[152] Case C-209/10 *Post Danmark*, para. 31.
[153] Ibid, para. 31.
[154] Ibid, para. 32.
[155] Ibid, para. 33.
[156] Ibid, para. 44.
[157] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p. 7.
[158] Case C-209/10 *Post Danmark*, para. 36.
[159] Ibid, para. 37.
[160] Ibid, para. 38.

pricing between ATC and LRAIC the focus lies in proving intent. The evidence put forward was not sufficient to establish that Post Danmark had the intent to force competitor out of the market. As this was not established and Forbruger-Kontakt was able to stay on the market and at a later stage retrieve former customer showed that the behaviour was not actual abusive. If recoupment was used to prove abuse Post Danmark could not be seen as abusive as Forbruger-Kontakt was not foreclosed. Post Danmark behaviour can be seen as lawful and thus within the boarders of competition on the merit as the pricing strategy was not seen as being abusive or had the intent to eliminate a competitor.[161] Intent is not always needed when claiming that there is an abuse as long as there is proof of anti-competitive effects.[162] The above-mentioned fact did not lead to that F-K lost distribution network necessary to compete but lost market share in the short-run but managed to win back Coop group in 2007 and Spar.

3.1.11 Analysis

One can argue that Post Danmark's conduct to lower prices is dishonest as it was managed by the infrastructure created when Danish Government owned the undertaking from the time when Post Danmark was a natural monopoly on the postal service market. The infrastructure and the market share must show that Post Danmark have a vast advantage on the market for unaddressed mail in comparison to new entries and one can argue that the special responsibility doctrine can be applicable. One might even argue that the established market structures held by a former natural monopoly should not take advantages of this in unreasonable way according to competition. To allow all new entries to enjoy the benefit of the already established infrastructure would balance the competition on the market. The situation of a former natural monopoly could be assessed through the concept of super-dominance but lacks the market share necessary. On the other hand the principle of equal treatment should be applicable to all companies and in comparison between undertakings. But with the AIC then Post Danmark can take losses in one business area and make a profit in orders and still be able to foreclose competition.

[161] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p. 2.
[162] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p. 3.

4 The 'As-Efficient Competitors' -Test

4.1 Introduction and Description of the 'As-Efficient Competitor'- Test

This section will look more closely on the test used in the *Post Danmark* judgment, assess the legal aspect of the test and try to analyse what consequences may arise with the application of this test.

Markets are seldom identical and competition may in some markets be preformed with price competition. In some market competitors have to be efficient to survive and in some don't. The 'as-efficient competitor'-test is applicable on market where competitors are optimally cost-efficient.[163] The 'as-efficient competitor'-test is a test to indicate if anticompetitive behaviour exist by looking at a hypothetical competitor costs.[164] This test has been used in American antitrust case law[165] and created by Richard Posner. The European way of applying the test is by first looking if the dominant undertaking is competing on its merits. If answered no to this question, the test will be applicable.

Price competition is suggested to have positive effects on competition, as it will decrease prices for consumers hence increasing consumer welfare. Price competition is also one of the competitions on the merits conditions.[166] But price strategies can have negative effects on the market. The Commission will intervene when the 'conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking'[167]. Sometimes even a less efficient competitor with 'demand-related advantages, such as network and learning effects'[168] must be taken into consideration as this may lead to efficiency gains later on.[169] Another example is when a dominant undertaking might have been enjoying economies of scale or scope, learning curves or first mover advantages[170] as this may lead to the fact that smaller companies

[163] DG Discussion Paper, para. 63.
[164] Hildebrand, Doris, The Role of Economic Analysis in the EC Competition Rules, Kluwer Law International BV, Third edition, 2009, p. 368-369.
[165] Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, U.S. Department of Justice, 2008, Chapter 3, C. Equally Efficient Competitor Test, http://www.justice.gov/atr/public/reports/236681.htm, accessed 9 May 2014.
[166] Case C-52/09 *TeliaSonera Sverige*, para. 24.
[167] Guidance Paper, para. 23.
[168] Ibid, para. 24.
[169] Ibid, para. 24.
[170] For more information concerning the First-Mover Advantages see Leiberman, Marvin B., Montgomery, David B, First-Mover Advantages, October 1987, Stanford Business School, Research Paper No. 969.

have no possibility to stay on the market. The Commission will take into account the market context in every investigation.[171] The test should in principle exclude less efficient competitor, as its prices are held too high. Doctrine claims that these companies should not *per se* be considered in the test[172] and that competition law should not protect these companies.[173] But the test is flawed when there no ability to compare between companies that have different market share and different price levels on the market.[174]

The data that the Commission will first assess is the related cost and sales prices from the dominant undertaking. If this is not available then the 'as-efficient competitor'-test will be used taken the data from an apparently efficient competitor.[175] If this information is not attainable the Commission must first prove that abuse exist and then the burden of proof will be put on the dominant undertaking to show that the costs and pricing is held at an appropriate level.[176]

If relevant information can be retrieved from the dominant undertaking it will be utilized but if the data concerning cost is not available then it will be achieved from competitors or others.[177] The Commission has stated that the costs will be investigated through average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Average avoidable cost is to be interpreted as being the average variable cost. When the dominant undertaking and the as efficient competitor are not able to cover its costs the dominant undertaking is sacrificing profit. The 'as-efficient competitor' will not be able to cover its costs in the short-run.

If the 'as-efficient competitor' is able to compete without being foreclosed and there is no decrease in consumer benefit based on the relevant data collected by the Commission, the Commission will not suggest that the price conduct is unlawful and thus not intervene. The dominant undertaking has now received the label of 'safe harbour' showing that the conduct will not lead to any foreclosure when adopted to the price scheme.[178] This test is hard to apply in practise, as it is hard to retrieve information from the dominant undertaking as in some countries this information is protected by law.[179]

If the conduct forces the competitors out of the market the Commission will make a general assessment of anti-competitive foreclosure but also take into

[171] DG Discussion Paper, para. 67.
[172] Jones, Alison, Sufri, Brendan, EU Competition Law: Text, Cases and Materials, p. 329.
[173] Mackenrodt, Mark-Oliver, Conde Gallego, Beatriz, Enchelmaier, Stefan, Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?, Springer-Verlag Berlin Heidelberg, Munich, 2008, p.17.
[174] Ibid, p.18-19.
[175] DG Discussion Paper, para. 67.
[176] Ibid, para. 67.
[177] Guidance Paper, para. 25.
[178] DG Discussion Paper, para. 66.
[179] Mackenrodt, Mark-Oliver, Conde Gallego, Beatriz, Enchelmaier, Stefan, Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?, p. 17-18.

consideration other relevant quantitative and/or qualitative evidence[180] such as price schedule and rebate system.[181] Sometimes the Commission also look at the incremental costs as sometimes other markets are affected by the behaviour.[182]

4.1.1 Legal Assessment of the 'As-Efficient Competitor'-Test in Post Danmark

CJEU came to the conclusion that Post Danmark had not used predatory pricing to force the competitors out of the market as the 'as-efficient competitor'-test was used and evaluated the situation. Forbruger-Kontakt was not foreclosed and it was even able to retrieve the costumers that were lost to Post Danmark. The losses made by Forbruger-Kontakt showed that the conduct was not unsustainable in the short-run but the effects were likely to occur. But the test should be used when

> 'article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits.'[183]

Richard Posner claims that prices below cost are a conduct that will foreclose an 'as-efficient competitors' but that there lies difficulties in proving this fact.[184] Posner criticised the test of being flawed as only one example can provide evidence that the test works. This example is illustrated when a quasi-monopoly lowers its prices to ATC and the competitor is unable to compete.[185] The test has also a hard time taken into consideration economies of scale if the as efficient competitor is not also enjoying the same bulk costs.[186]

Another critic of the 'as-efficient competitor'-test is that is does not consider consumer harm.[187] This is one of two important criteria when assessing if

[180] Guidance Paper, para. 27.
[181] DG Discussion Paper, para. 66.
[182] Ibid, para. 67.
[183] Case C-209/10 *Post Danmark*, para. 25.
[184] Posner, Richard, Antitrust Law, An economic perspective, The University of Chicago, 1976, p. 188.
[185] Carrier, Michael A, Antitrust After the Interception: Of a Heroic Returner and Myriad Paths; A Review of Richard Posner, Antitrust Law, second edition, Rutgers University School of Law-Camden, 2001, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/carrier.authcheckdam.pdf, accessed 9 May 2014, p. 6.
[186] Marty, Frédéric, As-Efficient Competitor Test in Exclusionary Prices Strategies: Does Post-Danmark Really Pave the Way towards a More Economic Approach?, University of Nice Sophia-Antipolis, GREDEG Working Paper No. 2013-26, p.10.
[187] Nazzini, Renato, The Foundations of European Union Competition Law: The Objective and Principles of Article 102, Oxford Scholarship Online: January 2012, p. 224.

behaviour has objective justifications. The other criterion concerns the concept of efficiencies. This will be further discussed in Section 7.2 on Objective justifications. Professor Salop was also in line with the consumer critic claiming that the test is too focused on the competitor instead of the consumers.[188] Professor Hovenkamp, on the other hand found that the test is being precise to the matter of predatory pricing and is giving a safe path for dominant undertakings that is enjoying economies of scale.[189] When seeing to the judgment the test was used too broadly.[190] But the test is giving advantages in comparison to other tests and especially the form-based approach as it gives a 'stringency and predictability'.[191] The test had on the other hand a hard time to taken into considerations economies of scale as new entries cannot be able to compete with the dominant undertaking when there are high fixed costs on the market.[192] This is why the great bulk test was used in the judgment. Prices above average incremental cost will allow as efficient competitor to be able to compete and therefore the Commission will not intervene. But in this specific case Post Danmark vended a multiple of products enjoying economies of scale with significant common cost. These facts must be assessed to see if the as efficient competitor is foreclosed.[193] This conduct might also lead to consumer harm and is therefore looked upon as important.[194] If so, an effect-based test will be preformed and establishes if effect exist when prices are held below ATC but above LRAIC. The court has then confirmed the test stated in the guidance paper.[195]

4.1.2Analysis

It is obvious that doctrine is not in consensus if the 'as-efficient competitors'-test should be used concerning predatory pricing. It is clear from the doctrine although that this test is more appropriate as this will lead to the most accurate investigation of a dominant undertaking applying prices that can be seen as abusive. One can argue that this test should be used and was used when Post Danmark managed to strengthen its position on the market by behaviour unfamiliar of the competition on the merits.

[188] Moreira Mateus, Abel, Coelho Moreira, Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America, Edward Elgar Publishing, Northampton, USA, 2010, p. 210.
[189] Ibid, p. 209.
[190] Mandorff, Martin, Sahl, Johan, The Role of the 'Equally Efficient Competitor' in the Assessment of Abuse of Dominance, Working Paper 2013:1, Swedish Competition Authority, p. 13.
[191] Ibid, p. 18.
[192] Marty, Frédéric, As-Efficient Competitor Test in Exclusionary Prices Strategies: Does Post-Danmark Really Pave the Way towards a More Economic Approach?, p. 15.
[193] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p. 6.
[194] Ibid, p. 7.
[195] Ibid, p. 7.

The lack of competing tests gives the 'as-efficient competitor'-test an advantage. This approach made by the CJEU is clearly a step towards a more economical approach providing more legal certainty. But what will happened if the dominant undertaking will not give information about their costs and price level to the Commission and the Commission will not be able to provide sufficient evidence proving abusive behaviour? This test will only be applicable with help outside of the Commission and the test requires counter-performance. If the dominant undertaking is enjoying economies of scale and foreclosing the as-efficient competitor the test is not applicable as the 'know-how' will not be attained. The 'safe harbour' concept can be misinterpreted to include all types of abusive behaviour. The test will on the other hand be developed in future EU case law and be applicable in future judgments. The test is although a hypothetical test and should be applied in the same way.

5 Pricing Above Average Total Cost

5.1 Selective Pricing

5.1.1 Introduction

As Chapter 3 has described and analysed the abuse when pricing below average total cost, the abusive effect might be established even if prices are held above average total cost. This chapter will introduce the concept, present relevant case law, assess the concept and finish this of with an attempted analysis.

Selective pricing is essentially a strategy through, which a dominant undertaking tries to steal customer from their rival companies through differentiated pricing. By applying different prices to the same product the dominant will try to out-compete its rival for customers through lower prices while making up for the lost profits in other markets.[196] Since the price remains above the average total cost, the abusive conduct arises from the preferred treatment of on customer segment to detriment to other customers.[197] Recall that Article 102 (c) lists the application of dissimilar condition to equivalent transactions as a type of abuse inconsistent with Union law. If the conduct has the ability to foreclose the consumer or affect consumer harm negatively it must be seen as discriminatory.[198] But according to the concept of predatory pricing prices held above average total costs should not be seen as abusive. But exceptional circumstances might indicate that such a price lead to consumer harm.[199]

5.1.2 Case law Concerning Selectively Low Pricing

5.1.2.1 Hilti[200]

The *Hilti* judgment involved a company, Hilti, which produced nails and nail guns. Faced with increasing competition, Hilti tried to capute its competitor's customers through lower prices: sometimes even giving away its products free of charge.[201] The Commission came to the conclusion that this was unlawful behaviour since the conditions applied by Hilti were

[196] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 396.
[197] Geradin, Damien, Petit, Nicolas, Price Discrimination under EC Competition Law: The Need for a case-by-case Approach, GCLC Working Paper 07/05, Bruges, Belgium, p. 15.
[198] DG Discussion Paper, para. 127.
[199] Ibid, para. 129.
[200] Case C-53/92 P *Hilti v Commission* EU:C:1994:77.
[201] Whish, Richard, Bailey, David, Competition Law, p. 750.

selective and discriminatory. The customers that were already buying from Hilti was seen as being discriminated against and were bearing the cost of the new customers with reduced price.[202] Can Hilti be applicable to the average incremental cost test as Hilti were competiting on two markets selling the nails at a level that was below average total cost and even giving away the product for free? We will never know as the economical approach was not used but the effect-based approach was concentrating on tying.

5.1.2.2 Irish Sugar v Commission[203]

Irish Sugar plc supplied sugar to customers on the Irish market granting selective low pricing discounts to a few companies near Irelands and the boarders of Northern Ireland. This behaviour held prohibited elements according to article 86 (c) EC as the foreclosure effects would occur. The General Court came to the conclusion that Irish Sugars behaviour fell within the prohibited behaviour of selective low pricing. The intent to force competition out of the market was suspected to have existed as alleged effects could be proven to appear. The rebates given to a few customers were financed by higher prices in other regions of the country. Consumers had not received the benefit of low prices and no economical efficiencies were recognized. The necessity to show foreclosure is not mandatory but illustrate that the rebates used could have actual foreclosing effects.[204] The condition in the case concerning dominant market share is essential in the finding abuse of dominant position. The criterion of super-dominant applied to the situation and are not uncommon in case law concerning selective prices above costs.[205]

5.1.3 The Concept of Fighting Ship

The concept of fighting ship means to work above average total cost and without price competition. By choosing the same routes as the competitor, with lower prices that small undertaking don't have the ability to compete with will lead to foreclosure. This behaviour can both be seen as abusive and applicable to article 101 and article 102 TFEU. The assessment of article 101 TFEU is within the limitation and will not be discussed further. With the use of a liner conference the number of competing vessels increase with the co-operation. The fighting ship will take all the same routes and from the same ports as the non-member is taken in order to steal the rivals customers.[206] The prices for the linear conference competing with the non-member are an important factor. The prices are set at the same level or lower even as the competitor, even if the conference decreases its profit. The costs and losses of profit of each vessel competing with the non-linear

[202] 88/138/EEC: Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - Eurofix-Bauco v. Hilti), para 80.
[203] Case T-228/97 *Irish Sugar plc v. Commission* EU:T:1999:246.
[204] Ibid, para. 191.
[205] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 375.
[206] DG Discussion Paper, para. 128.

conference member is divided between all the members. As the non-member is enjoying bigger losses companies fighting in than the conference the possibility to compete are low or even non-existent. The concept of fighting ship is based on a collective dominant position using selecting low prices for the competitor's customers.[207] This was highlighted in the below judgment.

5.1.3.1 *Compagnie Maritime Belge Transports and Others v Commission*[208]

The *Compagnie Maritime Belge Transports and Others v Commission* judgment highlighting the concept of fighting ship for the first time. Compagnie Maritime Belge Transport was one of the members in the liner conference Associated Central West Africa Lines, also known as CEWAL, competing unlawfully according to the concept against G&C. The conferences members departed the same time as G&C but with lower fees in order to increase demand for its product. The concept can be explained as, when a member closest to the schedule act, change rates in order to have a competitive advantage against competition and the competitors customers, this would leads to a loss of profit which members split between them.[209]

The difference between predatory pricing and fighting ship is that the latter does not set prices below costs. As the Commission did not see a revenue loss it instead focus on the question of intent in its decision[210] as obviously existed with the plan to eliminate a competitor.[211]

The application of the intent was important, to say the least, as the AKZO test was not applicable due to the fact that there were only prices above average total cost. This tactic differed from the *AKZO* judgment in that there were costs below ATC and sometimes AVC in AKZO but as CEWAL had costs above ATC no sacrifice was made, only loss of revenue. CEWAL on the other hand, appeal to the fact that prices could not be seen as prohibited according to article 102 TFEU as the price level was held above average total cost.[212] However, the use of rates/fees clearly proved that intent existed to eliminate a competitor. The use of selective pricing and lower prices for some targeted customer showed a strategy of unfair competition.[213] The fact that the group were trying to eliminate a competitor will in the extension

[207] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 421.
[208] Case C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and others / Commission,* EU:C:2000:132.
[209] Pozdnakova, Alla, Liner Shipping and EU Competition Law, Kluwer Law International, The Netherlands, 2008, p. 358-359.
[210] Ibid, p. 358-359.
[211] Opinion of Mr Advocate General Fennelly in Case 395/96 and 396/96 *Compagnie Maritime Belge Transports SA*, para. 119.
[212] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 421-422.
[213] Opinion of Mr Advocate General Fennelly in Case 395/96 and 396/96 *Compagnie Maritime Belge Transports SA*, para. 119.

have the capacity of affect the trade between Member states.[214] The CJEU concluded that this behaviour could not be rendered legitimate competition.[215] CEWAL even disposed meetings with the conference members named Special Fighting Committee in which oversaw the practices of the alleged abuse.[216]

The Commission argued on the fact that selectively low fees had negative effects on competition.[217] The stolen customers were likely to be given lower rates then regular customers that were only offered normal or higher rates. This conduct provided prohibited price discriminated. The Commission claim in its decision that the fighting ship practice could not be a reasonable and proportionate response to a new competitor as the possible effects were evaluated. The conduct should only have the capacity to have such an effect on competition.[218] CEWAL was seen as using a behaviour prohibited according to the article 102 TFEU. CEWAL works on a special market and one can argue that these specific circumstances are not applicable to other markets or situations.

5.1.4 Legal Assessment of the Concept of Pricing Above Average Total Cost

The concept of super-dominance was established in both in the CEWAL and Irish Sugar judgments. In both judgments the companies held market share above the threshold of super-dominance even close to the fact of monopoly-power.[219] CEWAL enjoyed a market share of 90% on the relevant market[220] and Irish Sugar held an even greater market share of 95% on the relevant market.[221] Is the element of super-dominance lowering the threshold for abuse? One can argue that this should not affect what is prohibited conduct according to article 102 TFEU but thought the court.[222] As predatory pricing is only applicable to pricing held below cost, price discrimination was

[214] Case T-24/93 *Compagnie Maritime Belge Transports v. Commission*, para. 203.
[215] Case C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and others v Commission*, para. 96-97.
[216] Opinion of Mr Advocate General Fennelly in Case 395/96 and 396/96 *Compagnie Maritime Belge Transports SA*, para. 93.
[217] Pozdnakova, Alla, Linear Shipping and EU Competition Law, p. 358.
[218] Case T-24/93 *Compagnie Maritime Belge Transports v. Commission*, para. 201.
[219] Opinion of Mr Advocate General Fennelly in Case 395/96 and 396/96 *Compagnie Maritime Belge Transports SA*, para. 137.
[220] Case C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and others v Commission*, para. 119.
[221] Commission fines IRISH SUGAR for abuse of its dominant position on the Irish sugar market, Brussels, 14 May 1997, http://ec.europa.eu/competition/antitrust/closed/1997/en/ip97405.html, accessed 25 May 2014.
[222] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 420-421.

applied. The application of price discrimination, the high market share and taking into account all the circumstances negative effects on the market may be seen. So is the super-dominance criterion necessary when finding abuse in selective low pricing schemes?

As stated above Post Danmark held a market share of 44-47%, which could not be seen as being super-dominant and could therefore not fit under the concept.[223] But if all prices levels, offered to customers, would have been above average total could the selective low pricing concept be applicable? One can argue against the fact, as only less efficient competitors would be foreclosed.[224] However, the behaviour made by CEWAL was founded to be applicable to the concept of collective dominance and Irish Sugar was founded to have several abuses.[225] The fact that the court in Post Danmark did not even mentioned the Irish Sugar judgment and CEWAL judgment must be a hint that these cases were not applicable.[226]

But what happens in this scenario when the competition is showing the price level at average total cost but the dominant undertaking is having lower prices but still working on ATC? The only possibility to provide proof that the dominant undertaking is not working below cost is to show it's cost and revenue situation.[227] But the undertaking could argue economies of scale. Economies of scale hinder market entry, as not entry is able to compete with the price level applied by the undertaking. The above stated price level may be exempted conduct as no abusive behaviour has occurred.

Can economies of scale and intent to foreclose competitors out of the market is applicable at the same time? It is impossible for the dominant undertaking to know if its price level is below the ATC of the competitors price level[228] as the safe harbour concept might be applicable. In *CEWAL*, G&C had actually increased its market share as the abusive effect was evident to the Commission, but this was not seen as a remissive ground.[229] G&C could potentially increased it's market share more significant if the abuse had not been preformed by CEWAL.[230]

The Advocate General, in the judgment of Post Danmark, concluded, that prices that are given to different customers, no matter customer, and that prices above average total cost could not force an equally efficient

[223] Petit, Nicolas, http://chillingcompetition.com/2013/02/28/post-danmark-more-than-just-one-case/ accessed 14 May 2014.
[224] DG Discussion paper, para. 127.
[225] Jones, Alison, Sufrin, Brenda, EC Competition Law, Text, Cases, And Materials, p. 424.
[226] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p. 8.
[227] DG Discussion Paper, para. 129.
[228] O'Donoghue, Robert, Padilla, Jorge, The Law and Economics of Article 102 TFEU, Second Edition, Hart Publishing, Portland, 2013, p.337-338.
[229] Case T-24/93, T-26/93 and T-28/93, *Compagnie Maritime Belge Transports v. Commission* EU:T:1993:42, para. 149.
[230] Case T-24/93 to T-26/93 and T-28/93, *Compagnie Maritime Belge Transports v. Commission,* para. 149.

competitor out of the market. If the competitor has higher costs than the dominant undertaking then the 'equally-efficient competitor' concept is not applicable but there will be a test according to competition on the merits.[231] Although the behaviour can change the structure of competition on the market[232], price discrimination will not always lead to negative effects. The pros and cons of Price Discrimination will be further discussed in the Chapter 6.

5.1.5 Analysis

The collection of dominant undertakings in the CEWAL judgment did not enjoy economies of scale, as the costs were not shared but only the losses of profit. This fact allowed G&C to compete with the price level applied on the market before the abusive behaviour started. The fact that CEWAL was having such a high market share should allow the threshold for abusive behaviour to be relatively low. The doctrine of special responsibility will be further discussed in chapter 7.3. It is shown in this case of collective dominance that all the undertakings were having equal costs, as G&C were able to compete effectively on the market. The fact that G&C were able to increase its market share although the market was influenced by abuse shows that the concept of fighting ship is flawed. One can argue that the concept only provides a safety net for competitor on the market.

Selective low pricing should not be seen as an abuse when the price level is held above average total cost as if the dominant undertaking(s) is competing through pricing strategies it should be seen as being competing fairly with price competition. The fact that CEWAL could lower its prices and still enjoy prices above average total cost shows that it is the consumers that are affected on this specific market. Consumer welfare will eventually be decreased. As the fixed cost on this market are high in few competitors will be able put in the sunk cost and compete on the market. The risk is too high in comparison to the fixed costs.

The super dominant undertaking Irish Sugar held a quasi-monopolistic market share on the Irish market for sugar. As the company provided rebates to a few by managing to finance this with higher prices for the rest would effect the market. As a market share reaches over 70% of a special responsibility to compete with quality is applied. Irish Sugar was seen as a too large undertaking to be granted the behaviour of selective low pricing.

When looking at the *Hilti* judgment, Hilti supplied product to a very low price and sometimes even for free. The fact that the nails were tied to the machine and the nails were given to a low price could not only be seen as unlawful. The prices set by Hilti were sometimes not only seen as selective

[231] Opinion of Advocate General in Case C-209/10 *Post Danmark*, para. 98.
[232] Case C-62/86 *AKZO v Commission*, para. 83.

low but also predatory which very often is seen as abusive. The Court did not even look at the consumer welfare or efficiencies that could arise.

As there were no desired effects seen in Irish Sugar and CMBT, intent was established through the companies' internal documentation. The price level applicable on both markets must show that the price competition should be interpreted strictly in Union's competition law. But selective pricing might lead to consumer welfare, as price discrimination will allow more consumers to be able to experience the product. The concept will lead to a change in market shares but the positive effects might outweigh the negative effects. One can argue this in the CEWAL judgment as more consumers will be able to afford the product and G&C actually increased its market share. G&C might even be able to state that it is more market friendly as it is currently being foreclosed on the relevant market, as consumers will be more inclined to buy services from them.

An output increase is a likely effect of price discrimination as different customers have different price elasticity of demand. More customers will enjoy the product and only shift market share in the short run. This was seen in the Post Danmark judgment were Forbruger-Kontakt lost Coop, SuperBest and Spar but managed to retrieve Coop and Spar a few years later.[233]

Thus, an effect of increasing output is the ability to find economies of scale. This will also allow lower uniform price and increase consumer welfare, which will benefit the whole market as more customers can enjoy the products. Economists have generally seen this as creation of efficiencies.

[233] Case C-209/10 *Post Danmark*, para. 39.

6 Price Discrimination

6.1 Introduction to the Concept of Price Discrimination

Price discrimination is a conduct that can both be seen as hinding and enhancing the competition. A discussed will be held in this chapter if Post Danmark's conduct concerning selectively low pricing is seen as discriminatory according to price. The concept will be introduced, linked to the judgment and analysed. The conduct of price discrimination concerned focuses on the market situation where Forbruger-Kontakt were discriminated as a rival and where customers, to both Forbruger-Kontakt and Post Danmark, were price discriminated between them.

The conduct of discriminatory pricing falls under article 102 TFEU. CJEU has developed its case law from 1960's to include price discrimination in the following wording found in subparagraph (c) 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;'[234]. According to Professor Richard Posner, price discrimination is

> price discrimination is a term that economists use to describe the practice of selling the same product to different customers at different prices even though the cost of sale is the same to each of them. More precisely, it is selling at a price or prices such that the ratio of price to marginal costs is different in different sales.[235]

But instead the CJEU created criteria to be fulfilled for better interpretation of the abuse of price discrimination. CJEU has established in case law that price discriminatory have effects of foreclosure if the undertaking applying the prices are dominant on the relevant market. Dominant position must be applied collectively.

This increases the burden of proof to the application of price discrimination.[236] The principles of equality and fair treatment will not suffice for applying price discrimination.[237] Customers, in practise, have imperfect information of the market and therefore the dominant undertaking has the ability to price discriminate. If the customers have more information arbitration will be applicable and price discrimination will not be.[238] The effect is not necessarily needed in determining the abuse. Deffernetiated

[234] Article 102 (c) TFEU.
[235] Richard Posner, Antitrust Law, First Edition, p. 62.
[236] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p.10.
[237] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p.10.
[238] Geradin, Damine, Petit, Nicolas, Price Discrimination under EC Competition Law: The Need for a case-by-case Approach, p. 4.

pricing in different Member States may also obstruct the development of the interal market.[239] The aim and understanding of the paragraph c in article 102 TFEU is that consumers[240] and the function of the market[241] should be protected. However, when looking at the effect the necessity to use economic theories so that both the consumers and the firm can benefit from price discrimination should exist.[242] Effect must not be established when determining price discrimination.[243]

As exclusion should be hindered under article 102 TFEU entry possibilities must be assessed properly. The main purpose of evaluating price discrimination is to see if there are less products sold or if there are any efficiency gains. Taking away price discrimination can lead to the fact that 'upstream companies'[244] refuses to have 'selectively price cuts'[245]. Another consequence of price discrimination is the fact that consumers with lower incomes have the possibility to buy goods that are usually on a higher price level. Price discrimination should be assessed according to the purpose of efficiencies, higher outputs and consumer welfares.

The threshold for showing effect built from price discrimination is high. The CJEU clarified that the price discrimination must show an actual distorting of the competition.[246] This distortion must be significant.[247] In order to prove price discrimination, discrimination must affect the costs or revenue significantly, cost or price changes affect price, output and innovation or that there are negative effects on production or dynamic efficiencies of some undertakings.[248]

6.1.1 Legal Assessment of Price Discrimination

Criteria needed in determining price discrimination are that trading partners are affected, that they compete with each other and that disadvantage occurs.[249]

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[239] Perrot, Anne, Towards an effects-based approach of price discrimination, The Pros and Cons of Price Discrimination, Konkurrensverket Swedish Competition Authority, Elanders Gotab AB 2005, p. 163.
[240] Guidance Paper, para. 5.
[241] Opinino of Advocate General Kokott British Airways C-95/04 P [2007] ECR I 2331 delivered on 23 February 2006, EU:C:2006:133, para. 86.
[242] Perrot, Anne, Towards an effects-based approach of price discrimination, p. 164.
[243] Ibid, P. 163.
[244] Ibid, p.181.
[245] Ibid, p.181.
[246] Gerard, Damien, Looking back at a 2012 highlight: Post Danmark.
[247] Nazzini, Renato, The Foundations of European Union Competition Law: The Objective and Principles of Article 102, p. 258.
[248] Nazzini, Renato, The Foundations of European Union Competition Law: The Objective and Principles of Article 102.

[249] Craig, Paul, De Búrca, Gráinne, EU Law, Text, Cases, and Materials, p. 1034.

Anne Perrot thinks that the European Competition Authority has not used these criteria properly as the one can conclude that case law is easily applicable.[250]

The Competition authorizes must analyse the allegedly harmful situation thoroughly in order to evaluate the potential anti-competitive effect. This entails an assessment of the market structure and outlining the competitors' need, not only output and consumer welfare. The need for a case-by-case evaluation and an assessment of all details is of outmost importance.[251] Post Danmark's

> pricing policy in issue in the main proceedings, (can) be described as "price discrimination" that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.[252]

Price discrimination was not assessed according to the effect as the court only concluded that the different prices were insufficient in proving effects. The exact boundaries of the anti-competitive test concerning price discrimination will certainly be at the center of considerable future litigation. The secondary-line discrimination was already established on a domestic level and hence not evaluated here. David Spector confirms this view when discussing that Competition authorities need not to see price discrimination as a separate offence in order to minimize the existence of false positives.[253]

If the Commission has concluded abusive effects these can be justified with, as stated above, efficiencies and welfares. If more customers have the possibility to purchase a greater output and choice is attained as this product would otherwise not be offered to these customers.[254]

In the short-run the companies are gaining profit when using price discrimination, something that differs from other types of abuse where companies giving up profit in rebates, discounts and tying & bundling situation. Seeing to the increase in welfare, as output increases, customers that are not willing to buy products under the uniform price now has the possibility to a lower price.

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[250] Perrot, Anne, Towards an effects-based approach of price discrimination, p. 165.
[251] Geradin, Damien, Petit, Nicolas, Price Discrimination under EC Competition Law: The Need for a case-by-case Approach, p. 2.
[252] Case C-209/10 *Post Danmark*, para. 30.
[253] Spector, David, The strategic uses of Price Discrimination, The Pros and Cons of Price Discrimination, Konkurrensverket Swedish Competition Authority, Elanders Gotab AB 2005, p. 189.
[254] Whish, Richard, Bailey, David, Competition Law, p. 763.

Discrimination will shift market share between competitors in the short-run.[255] Price at a higher level will allow fewer customers to enjoy the product and the undertaking will not increase output thereby selling more.[256] When having prices above price equilibrium on the market this should be a signal for market entry.

In this sense even a less efficient competitor can be able to exist and provide low competition market. In the extension, this will lead to less competition and not benefitting the consumers, as there will be no willingness to push prices.[257] Therefore is the selective low pricing that is something that will benefit the consumer, as more customers will be able to buy the product.

Price discrimination may lead to the effect of market foreclosure, as rivals are not able to compete on the price level. This is exclusionary conduct as output and consumer welfare decreases.[258] But as every customer has different demand for the product there should be different prices.

6.1.2 Analysis

The fact that the court showed that a test of anti-competitive price discrimination must be applied to show effect of the conduct opens up for the positive effects of price discrimination. Positive effect arising from price discriminate, are greater output and in the extension the ability to decrease prices via economies of scale if discriminating optimally. These additional investments can be made when selling more units.

Retailers receiving different prices vertically in the chain will force price down allowing consumers to benefit from lower price. Competition will increase with price discrimination, as every customer is important to work for. Instead of having higher overall costs prices can be lower for some customers increase the competitive environment. When selectively having lower costs for rivals customers and higher for new customers a more dynamic competition market has been created. The comfort level will be lower but the price is providing end-customer the more benefit. To conclude, the new approach to price discrimination will enhance competition.

[255] Geradin, Damien, Petit, Nicolas, Price Discrimination under EC Competition Law: The Need for a case-by-case Approach, p. 6.
[256] Perrot, Anne, Towards an effects-based approach of price discrimination, p. 170-172.
[257] Ibid, p. 174.
[258] Geradin, Damien, Petit, Nicolas, Price Discrimination under EC Competition Law: The Need for a case-by-case Approach, p. 6.

7 Justifications

7.1 Introduction of the chapter

Chapter 7 will introduce justification, when the Commission has established abusive effects. The concept of objective justification and the doctrine of Special responsibility will be introduced and analysed in accordance to the judgment of *Post Danmark*. Objective justifications are seen to outweigh the negative effects of abuse and the special responsibility of dominant undertakings applies special conduct undertakings enjoying a larger market share.

7.2 Objective Justification

Article 102 TFEU does not contain a specific provision concerning objectives to justify the dominant undertakings behaviour but has been provided by the Commission in the *Guidance enforcement priorities* and in *DG Competition Discussion* paper.[259] An abusive conduct, by a dominant undertaking, that is not caught by the concept of competition on the merits must provide evidence of efficiencies.[260] The behaviour is presumed to be abusive and then the burden of proof lies on the dominant undertaking to prove that there are objective justifications.[261] When abuse has been concluded the dominant undertaking has the ability to show that the alleged behaviour is justified by some objective criteria.[262] The two applicable defences are 'objective necessity defence' and 'meeting competition defence'.[263] As the dominant firm has to prove that the behaviour is 'objectively necessary', or that the behaviour is producing 'substantial efficiencies that outweighs any anti-competitive effects on consumers'[264].

When the claim has been put forward by the dominant firm the Commission looks at the claim through the criterion of *indispensablity* and the safety standard concerning necessity and proportionate[265] when looking at the meeting competition defence.[266]

The dominant undertaking has the ability to provide proof of efficiencies to show that consumer's welfare is not damaged. The four criteria are collectively needed in proving benefits for the consumers steaming from ideas of technical improvements, the conduct is need to meet this goal, the

[259] Craig, Paul, De Búrca, Gráinne, EU Law, Text, Cases, and Materials, p. 1041.
[260] DG Discussion Paper, para. 60.
[261] Whish, Richard, Bailey, David, Competition Law, p. 210-211.
[262] Guidance Paper, para. 28.
[263] DG Discussion Paper, para. 80-81.
[264] Guidance Paper, para. 28.
[265] Ibid, para. 28.
[266] DG Discussion Paper, para. 81-81.

upside is greater than the downside of the behaviour and the behaviour does not exclude effective competition such as innovation. When fulfilling the criteria mentioned above it is essential, according to the Commission, that the dominant firm does not maintains, creates or strengthens its dominant position.[267] The Commission will in the light of consumer harm ultimately evaluates the criteria put forward by the dominant undertaking.[268] This essentially means that the dominant undertaking has a better and cheaper product than the competitors.[269]

These criteria must also be proven to be indispensible for goal of efficiencies. To prove indispensability, criteria like realistic and attainable alternatives must be met. The undertaking must also prove that this is the only way to attain these goals.[270]

What are the obligatory criteria? In the necessary criteria there must be a connection between the product and public health or safety.[271] In the judgment of *Tetra Pak*[272] the integrated system of cartons was made for public healthy issues. The General court claimed that it is not up to Tetra Pak to decide what is to be included in these criteria by excluding competitors that has unsafe products regulations. Tetra Pak must consulting public authorities hence provide permission.[273] The court does not appreciate the initiative.[274] The possibility to justify its abusive behaviour is thin.

In the judgment of *Microsoft*[275], Microsoft's could also not justify its conduct. Microsoft was force to share its R&D as the effects of its behaviour was seen as being foreclosing. This objection was not justified as the Commission looked at the whole market for this service and came to the conclusion that the innovation did not have the positive effect to justify Microsoft behaviour.[276]

7.2.1 Objective Justification According to Post Danmark

The Court makes no investigation of Post Danmark is in fact guilty of the charges made in the judgment but states the objective justification can be applied if effects are found. There is a premise built into the concept, that

[267] Guidance Paper, para. 30.
[268] Ibid, para. 31.
[269] DG Discussion Paper, para. 84.
[270] Ibid, para. 86.
[271] Guidance Paper, para. 29.
[272] Case T-83/91 *Tetra Pak International v Commission* (Tetra Pak II) EU:T:1994:246.
[273] Ibid, para. 83.
[274] DG Discussion Paper, para. 80.
[275] Case T-201/04 R, *Microsoft v Commission*.
[276] Maher, Imelda, Editorial (editorial introduction), The Competition Law Review, Volume 1 Issue 2 December 2004, p. 3, http://www.clasf.org/CompLRev/Issues/CompLRevVol1Issue2.pdf, accessed 19 May 2014.

dominant undertakings in an abusive position might utilize justification if necessary.[277] The effect for consumers cannot be detrimental if not justification can not be found.[278]

When the objective justification is applied the need to prove innocence does not exist only the possibility to show that justification to the behaviour under article 102 TFEU. The behaviour must be proven to be objectively necessary, counterbalance or outweighing the abuse in terms of efficiencies[279] by the dominant undertaking.[280] The dominant undertaking must prove that there are efficiencies gains and that effective competition is not eliminated.[281] In the extension consumer interest should be directly protected and the CJEU explains that it will follow the Commissions path explaining that consumers benefit should be ensured.[282]

7.2.2 Analysis

The burden is first put on the Commission to show that there are negative effects arising from the conduct by the undertaking then the burden is transformed on to the defendant that must prove that the conduct has efficiency gains for the market. The conduct shown must in the extension also benefit consumers. The CJEU claim that the conduct must counteract abusive effects with efficiencies. This is a fact that is bit different from the guidance paper, which states that the efficiencies must outweigh the abusive behaviour. The Court set the threshold of counterbalance and not necessarily to outweigh the negative aspects. An important fact to take into consideration is the position of the consumers that should remain in tact.

7.3 Special Responsibility

To have a special responsibly is quite common for companies in a dominant position and especially for former legal monopolies.[283] The definition[284] is vague at best but make companies more watchful of its conduct.[285] The responsibility for the dominant undertaking is to make sure that its behaviour is neither impairing genuine nor distortion of competition on the

[277] Case C-209/10 *Post Danmark*, para. 40.
[278] Ibid, para. 24.
[279] Ibid, para. 41.
[280] Guidance Paper, para .31.
[281] Case C-209/10 *Post Danmark*, para. 42.
[282] Rousseva, Ekaterina, Marquis, Mel, Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU, p. 11.
[283] Opinion of Advocate General Fennely in Case C-395/96 *Compagnie Maritime Belge Transports and Others v Commission*, para. 137.
[284] 'not to allow its behaviour to impair genuine, undistorted competition on the internal market'. Case C-202/07 P *France Telecom v Commission*, para. 105.
[285] Case C-202/07 P *France Telecom* v *Commission*, para. 105.

internal market.[286]

Dominant undertaking with a large market share has an extra responsibility applied to its conduct. The concept of special responsibility came from the concept that undertakings should apply a higher performance standard, arising from German Competition law and the GWB provisions of abuse.[287] Professor Ulmer at the University of Heidelberg claimed that there should be tests discussing if the undertaking used non-performance competition and that the performance is restricting the competitive environment on the market. The non-performance competition has though not been defined.[288] The concept was alternated but the content was used again. In the judgment of *Michelin* the doctrine was declaring of how Michelin should act, as there is complete competition on the market.[289] This concept does not concern the dominance *per se* but how the dominant undertaking should act.[290] The active performance by a dominant undertaking should not make entry harder for companies except if the undertaking is enjoying objective justification through legitimate efficiencies.[291] This doctrine should work as a way to protect the consumer and to maintain direct welfare.[292] The undertaking should ask as to distinguish between abusive and legitimate market behaviour.[293] The dominant undertaking must therefore balance its profit with the consumer's interest.[294] The specific definition takes into account the case by case approach as every infringement situation 'show a weakened competitive situation'[295].

When present on a weak market and holding a dominant position the concept of special responsibility must be taken into account. All facts must be considered in the light of specific circumstances of each case i.e. the larger the market share the greater responsibility is held by the dominant undertaking.[296]

[286] Case C-209/10 *Post Danmark*, para. 23.
[287] Lovdahl Gormsen, Lisa, Article 82 EC: Where are we coming from and where are we going to?, Volume 2 Issue 2, The Competition Law Review, March 2006, p. 12.
[288] Ibid, p. 12-13.
[289] Case C-322/81 *Michelin v Commission*, para. 10 & 57.
[290] Ibid, para. 57.
[291] Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, para. 149.
[292] Opinion of Advocate General in Case C-209/10 *Post Danmark*, para. 55.
[293] Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA and others v Commission*, para. 37.
[294] Rousseva, Ekaterina, The Concept of 'Objective Justification' on an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?, p. 3.
[295] C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission*, para. 114 & Case C-333/94 P Tetra Pak v Commission EU:C:1996:436, para. 24.
[296] Case C-333/94 *Tetra Pak v Commission*, para 24 & Guidance Paper, para. 20.

7.3.1 Legal Assessment of Special Responsiblity

Irish Sugar and CEWAL enjoyed a quasi-monopolistic market share.[297] The doctrine is proportionate in the sense that larger market share will force a higher responsibility on the conduct made by the dominant undertaking. In both these specific case the undertakings were seen as being abusive according to the concept of selective low pricing which is hard to apply as this threshold is put relatively high. In contrast with these judgments Post Danmark was barely able to fit into the threshold of a dominant position with the market share of 44-47%. A special responsibility is also applicable towards natural legal monopolies. However, the concept of special responsibility is not taken into consideration if and when the dominant undertakings behaviour of abuse is assessed according to the effects.[298]

7.4 What will the future look like?

As the *Tomra* judgment and the Post Danmark judgment applied different tests for assessing abusive effect the future is uncertain. Will the economical great bulk-test concerning the hypothetical 'as-efficient competitor'-test be applied or the effect-based seen from the *Tomra* judgment as Intel also conduct a loyalty rebate scheme.

7.4.1 Legal Assessment of The Intel Decision[299]

In 2009, The Commission fined Intel € 1.06 billion because of a number of practices that were having the effect of foreclosing the market.[300] The competitor in mind, AMD, was detrimental for consumer on the market as it gave additional choice.[301] Intel gave loyalty rebates to Dell and HP in exchange for that these OEMs should purchase 80-100% of the product x86 central processing units from Intel.[302] The judgment was based on the capacity of causing or the likeliness to have foreclosing effects.[303] The Commission claimed that the 'as-efficient competitor'-test is applicable according to case law and not the guidance paper as this was in effect after

[297] Rousseva, Ekaterina, The Concept of 'Objective Justification' on an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?, p. 29.
[298] Whish, Richard, Bailey, David, Competition Law, p. 189.
[299] Case T-286/09 Pending Case, Intel / Commission & Commission Decision, COMP/C-3 37.990 Intel, Brussels,13.5.2009
D(2009) 3726 final.
[300] Whish, Richard, Bailey, David, Competition Law, p. 174.
[301] Commission Decision, COMP/C-3 37. 990 Intel, Brussels, 13.5.2009
D(2009) 3726 final, para. 1612.
[302] Jones, Alison, Sufrin, Brenda, EU Competition Law, Text, Cases, And Materials, p. 483.
[303] COMP/C-3 37.990 *Intel*, para. 925.

the investigation of Intel's potential abusive behaviour had started.[304] Instead the Commission used the criteria stated in the *British Airways* judgment that there is a tendency that the dominant undertaking is restricting competition[305] contrary to the argumentation of Intel.[306] The 'as-efficient competitor'-test was used which included an examination of the contestable share of the customer's demand and relevant time horizon of viable costs.[307] Professor Damien Geradin has criticized the decision on the basis that the assessment of foreclosure and consumer harm was only considered in theory.[308]

CJEU's interpretation of Post Danmark's conduct was assessed through the criteria of likeliness and actuality concerning anti-competitive effects. The CJEU changed the wording after the *Tomra* judgment to only include potential effect in the anti-competitive test. In the pending judgment of *Intel* the CJEU has the possibility to take a firm decision on how to assess future cases. The 'effect-based' approach has been based upon a large number of judgments and established in case law. The effect on the market will be clear if Intel were not to be seen as abusing the market. On the other hand the fact that the CJEU used the test must be an indication that the test will be further used.[309]

[304] COMP/C-3 37.990 *Intel*, para. 925.
[305] Case T-219/99 *British Airways*, para. 293.
[306] COMP/C-3 37.990 *Intel*, para. 922.
[307] Ibid, para. 1009, 1013 & 1036,
[308] Geradin, Damien, 'The Decision of the Commission of 13 May 2009 in the *Intel* case: Where is the Foreclosure and Consumer Harm?, 2010, http://jeclap.oxfordjournals.org/content/early/2010/03/01/jeclap.lpp016.full, accessed 20 May 2014.
[309] Marty, Frédéric, As-Efficient Competitor Test in Exclusionary Prices Strategies: Does Post-Danmark Really Pave the Way towards a More Economic Approach?, p. 31.

8 Conclusion

The Højesteret sent a question of preliminary ruling to CJEU in order to acquire clarification in the specific situation of Post Danmark's legal conduct in the Danish postal service for unaddressed mail. Should Post Danmark conduct be seen as having anti-competitive effect on the market? The Danish Supreme court came to the conclusion that the conduct was seen as unlawful and had created anti-competitive effects through the application of the legal test of competition on the merits. The conclusion established the fact that pricing between average total cost and average incremental cost created anti-competitive effects as Post Danmark was able to increase its market share in proportion to Forbruger-Kontakt's decrease. The *Deutsche Post* judgment did touch upon the question of average incremental costs but was primarily a case concerning service of general interest. It was interesting to see how the European court would deal with the concept of average incremental cost. Usually when undertakings applying prices on in between average incremental cost and average total cost no competition would be foreclosed but as Post Danmark enjoyed synergies by infrastructure and the common cost the 'as-efficient competitor'-test was applied. The economical approach used by the court can be seen as a good attempt to acquire more legal certainty. The effect-based approach was applied together with the hypothetical 'as-efficient competitor'-test. The court used the great-bulk test to find out if an 'equally efficient competitor' could not be foreclosed on the relevant market if it covered the great bulk of the costs attributable to the supply of the goods or services in question.

The pricing abuse was dealt with the European court by applying a new economical test seeing to the costs and prices applied on the market. One can argue that this test will change the course of assessing anti-competitive conduct in the Unions competition law. However, the fact that the *Tomra* judgment was delivered only a few weeks later and contradicted the economical application of anti-competitive behavior cannot be seen as pacing the way for a future more concerned with the economical approach. On the other hand the decision from the Commission concerning *Intel* applies the 'as-efficient competitor'-test. So the future will be certain when the judgment has been delivered. My conclusion must say that Post Danmark showed, a new way in assessing anti-competitive effects and that this was a new approach to future case law. Post Danmark's judgment will not change the course of future case law according to effects of abusive conduct under article 102 TFEU.

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