

# Dominance and rebates: beware

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The European Court of Justice recently confirmed that dominant companies need to be careful about granting rebates. If the rebate scheme makes it easier for the dominant company to tie its own customers to itself and attract the customers of its already weaker competitors, the rebate scheme may qualify as abuse.

The case concerned a retroactive rebate scheme implemented by Post Danmark in 2007 and 2008 regarding bulk advertising mail. At the time, Post Danmark was controlled by the Danish State and had a statutory monopoly on the distribution of letters, including – in the case of bulk mail – direct advertising mail weighing up to 50 grams. The rebate scheme operated by Post Danmark had three main features:

- it was a standardised rebate scale: all customers were entitled to receive the same rebate on the basis of their aggregate purchases over an annual reference period;
- the rebates were conditional: Post Danmark and its customers concluded agreements at the beginning of the year where estimated quantities of mailings for that year were set. At the end of the year, Post Danmark made an adjustment where the quantities presented were not the same as those that had been estimated initially;
- the rebates were retroactive: where the threshold of mailings initially set was exceeded, the rebate rate applied at the end of the year applied to all mailings presented during the period concerned and not only to mailings exceeding the threshold initially estimated.

The [ECJ](#) first reiterated its settled case law that, in contrast to a quantity discount linked solely to the volume of purchases from the manufacturer concerned, which is not, in principle, liable to constitute an abuse of a dominant position, a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse. However, Post Danmark's rebate scheme could neither be regarded as a simple quantity rebate, since the rebates were not granted for each individual order, nor as a traditional loyalty rebate, because it was not coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark. Consequently, to determine whether Post Danmark's rebate scheme constituted an abuse of its dominant position, it was necessary to consider all the circumstances, particularly:

- the criteria and rules governing the grant of the rebate, and to investigate the exclusionary effects, that is, whether the rebate tends to remove or restrict the buyer's freedom to choose his or her sources of supply and to bar competitors from access to the market, and
- the extent of Post Danmark's dominant position and of the particular conditions of competition prevailing on the relevant market.

The ECJ considered the three main features of Post Danmark's rebate scheme and noted that because Post Danmark held 95% of the relevant market, competition on that market was very limited. Based on these circumstances, the ECJ held that a rebate system operated by a dominant company which, without tying customers to it by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing companies, produces an anti-competitive exclusionary effect.

The ECJ furthermore held that the "as-efficient-competitor test" laid down in the *European Commission's guidance on its enforcement priorities regarding exclusionary conduct by dominant undertakings*, although a useful tool, was of no relevance in this case, since the structure of the market made the emergence of an as-efficient competitor practically impossible.