A Too Efficient Competitor
An Alternative Interpretation of Post Danmark II

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Michael Funk
Motivation

• The «as efficient competitor test» (AEC test) is one of the main ingredient of the «more economic» approach to exclusionary conduct

• However, until recently, the case law has been rather confusing:
  – Post Danmark I: application of AEC test, confirmed by CJEU
  – Intel (GC): AEC test is not necessary, largely form based approach
  – Post Danmark II (CJEU): AEC test not always necessary
  – Intel (CJEU): authorities need to establish the potential for foreclosure with the AEC test

→ How can we explain this «zigzag course»?
Content

• The rationale for the AEC test
• A closer look at the relevant case law
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The rationale for the AEC test

- Objective is to protect efficient competition, not individual firms
- Key economic rationale: a less efficient firm would leave the market as a result of the normal competitive process
- AEC test is well established for assessment of margin squeeze or predatory pricing
- For rebates, the economic theory is less clear cut since the AEC test is not capable of reliably proving anticompetitive conduct
- However, a price-cost test is necessary to assess the potential of foreclosure in order to support the theory of harm

→ Without price-cost test, there is no point of reference
A closer look at the relevant case law

• The specific method to implement the AEC test was largely established with cases involving postal operators with an universal service obligation

• In Deutsche Post and Post Danmark I the authorities established the average incremental cost (AIC) as the relevant cost benchmark

• In Post Danmark I the following definition of AIC has been recognized:
  – Cost which disappear in the short or medium term (three to five years), if Post Denmark were to give up distributing unaddressed mail
  – The AIC include both variable and fixed costs specific to unaddressed mail and a share of the common (overhead) costs across all products
  – «Capacity cost» of fulfilling the universal service obligation was treated as common fixed cost and therefore was not included in the AIC
The wrong counterfactual

- The costs of the «as efficient competitor» are usually taken from the dominant undertaking
- However, dominant postal operators are usually highly regulated, especially when they have a universal service obligation
  - A USP is by definition not efficient – otherwise there would be no universal service obligation
  - An efficient entrant to a postal market does not need to uphold reserve capacities and provide loss-making services

→ To model an efficient market player based on an USP establishes the wrong counterfactual
The wrong cost

• AIC of a USP reflect a competitor which cannot efficiently reduce its capacity
• AIC of a USP may also include economies of scale and scope, which no other firm on the relevant market can achieve
• But in general, the AIC for the contestable part of the market of a USP are very low

→ AIC of a USP carries no information about the cost of an efficient firm in a competitive postal market
The wrong incentives

• By modelling an efficient competitor on the AIC of a USP, the authorities assumed a too efficient competitor
  – The test assumes a competitor in the contestable part of the market, which does not have to bear the necessary capacity cost
  – No competitor will be able to offer services at this level
  – The more extensive the universal service obligation, the lower are AIC

→ To use AIC of a USP does not protect effective competition but rather the USP from competition in the contestable portion of the markets
A closer look at Post Danmark II

• Post Danmark II: strong evidence of a successful exclusionary strategy
  – Retroactive rebate scheme with strong loyalty effect
  – Bring Citymail suffered heavy losses and was finally prompted to withdraw from the market

• The CJEU denied the necessity to conduct a AEC test because of the special market structure
  – Dominant undertaking with very large market share
  – Strong structural advantages

→ The emergence of an as efficient competitor is unlikely
→ Also a less efficient competitor can exert competitive pressure
A too efficient competitor

- In Post Danmark II the authorities rightly concluded that according to the applied cost benchmark, the emergence of an as efficient competitors is impossible
  - Not because of economies of scale or scope or structural advantage
  - But because the cost for providing the universal service obligation were deducted from the AIC

→ A competitor producing at AIC of a USP is too efficient
The right cost?

• Need to adjust the AIC for an efficient service provider without universal service obligation
• Calculate cost benchmark based on net cost of the universal service provision
• Bottom-up model of an efficient service provider
• ATC can serve as an upper boundary
Conclusion

• Post Danmark II was as very special case: the CJEU dismissed the need for a AEC test because it realized no market entrant could produce at the presented cost

• Given the particular circumstances of postal markets, an AEC test «by the book» is not meaningful

• The use of AIC of a USP does not protect competition but the dominant firm from competition

• In abuse of dominance cases authorities need to adjust the relevant cost benchmark for postal operators

• Post Danmark II highlights the trade-off between the provision of universal services and the functioning of an efficient market
Kontaktautor
michael.funk@swiss-economics.ch

Swiss Economics, Weinbergstrasse 102, CH-8006 Zürich
www.swiss-economics.ch