



Post Danmark – Portait of a serial infringer or a very unlucky company?

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Post Danmark – Portait of a serial infringer or a very unlucky company?

A national perspective on Post Danmark and its troublesome relationship with competition law

SANDEFJORD 16 SEP 2016

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A company with a long track record

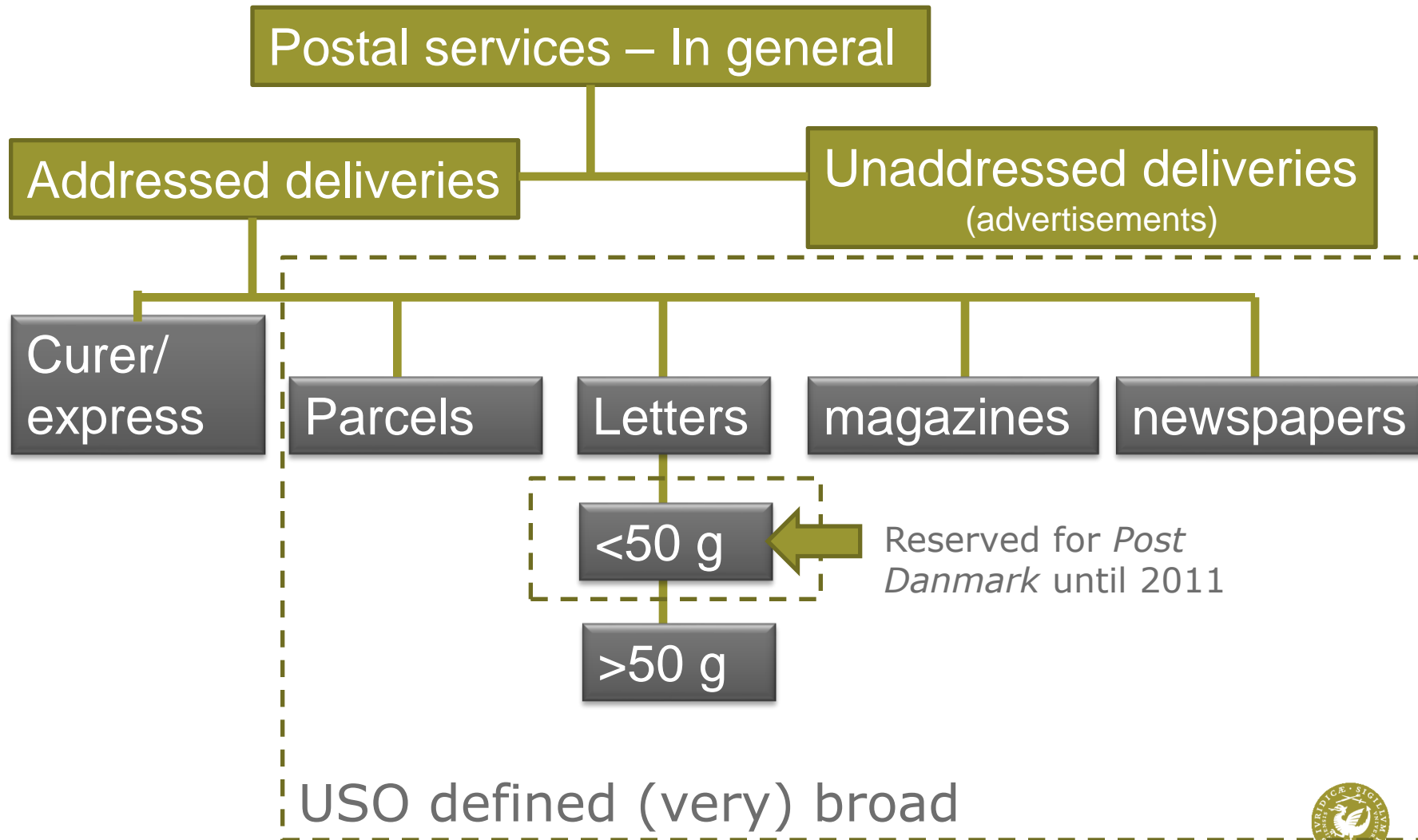
- It would be tempting to label *Post Danmark* as a serial infringer:



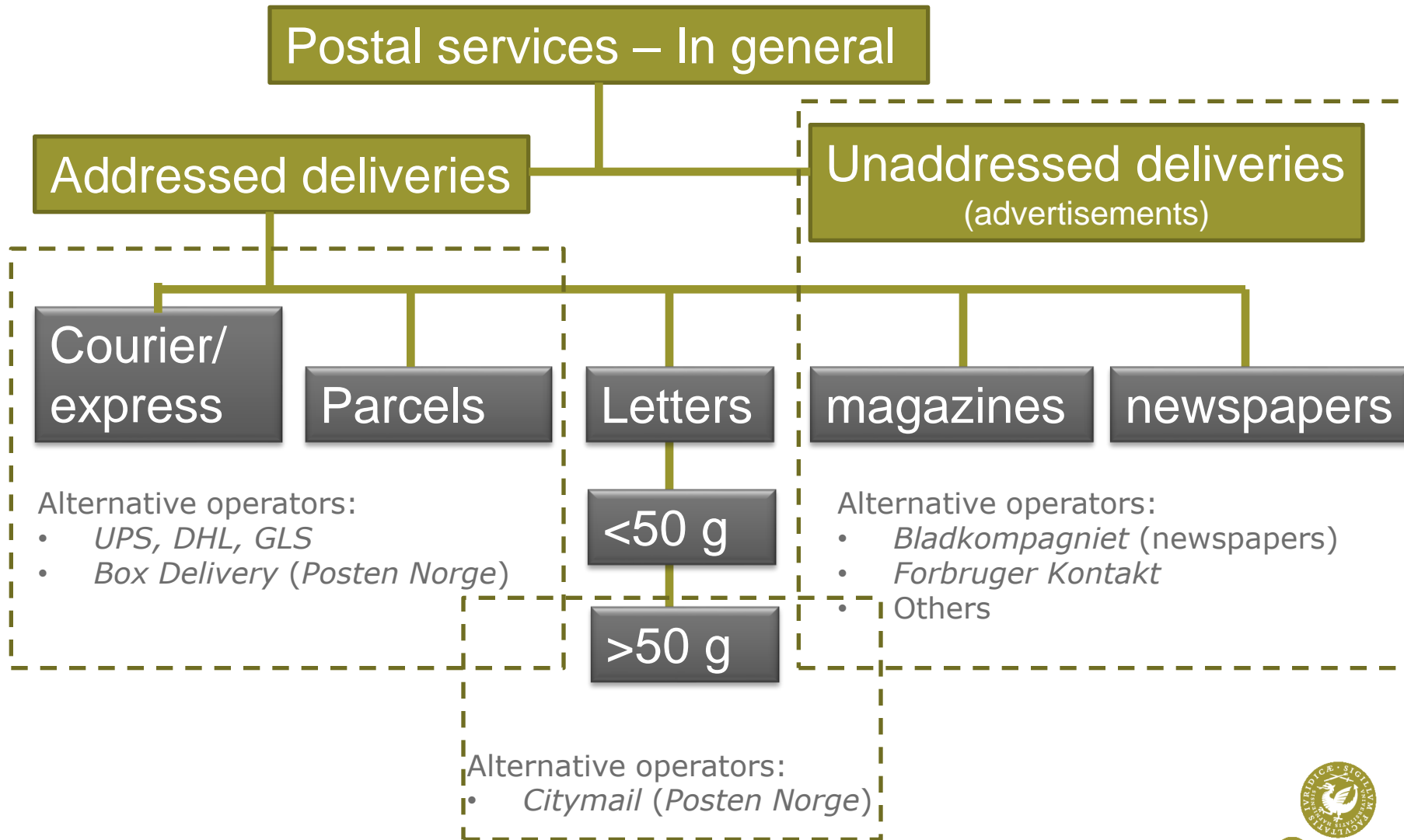
- 1999: *Klage over Post Danmark* (no abuse found)
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 - 2004: *Forbruger-Kontakts klage over Post Danmarks misbrug af dominerende stilling (predatory pricing)* (not pursued further by the NCA)
 - 2005: *Post Danmarks gebyrer for garanteret kl. 10-levering og for leje af postboks* (not pursued further by the NCA)
 - 2007: *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost (magasinpost I)*
 - 2009: *Klage over Post Danmarks direct mail-rabatsystem (direct mail I)* (aka *Post Danmark II* in EU)
 - 2010: *Post Danmarks individuelle og generelle rabatter for magasinpost (magasinpost II)* (overturned on appeal and sent back to NCA)
 - (Four additional cases according to circulating rumors)
- See the provided spreadsheet for further details or www.konkurrenceafgoerelser.dk



The Danish market - Traditional



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The Danish market - Traditional

Postal services – In general

Addressed deliveries

Unaddressed deliveries (advertisements)

Courier/
express

Parcels

Letters

magazines

newspapers

Alternative operators:

- UPS, DHL, GLS
- Box Delivery (Post Danmark)

<50 g

Alternative operators:

- Magniet (newspapers)
- Kontakt

Others

>50 g

Alternative operators:

- Citymail (Posten Norge)

Post Danmark fears converging markets and new entrants on the letter market



The Danish market - Traditional

Postal services – In general

Addressed deliveries

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Alternative operators:

- UPS, DHL, GLS
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Alternative operators:

- Espagniet (newspapers)
- Berlingske Kontakt

<50 g

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Alternative operators:

- Citymail (Posten Norge)

But argues that letters are loss-making and expansions are required to meet USO

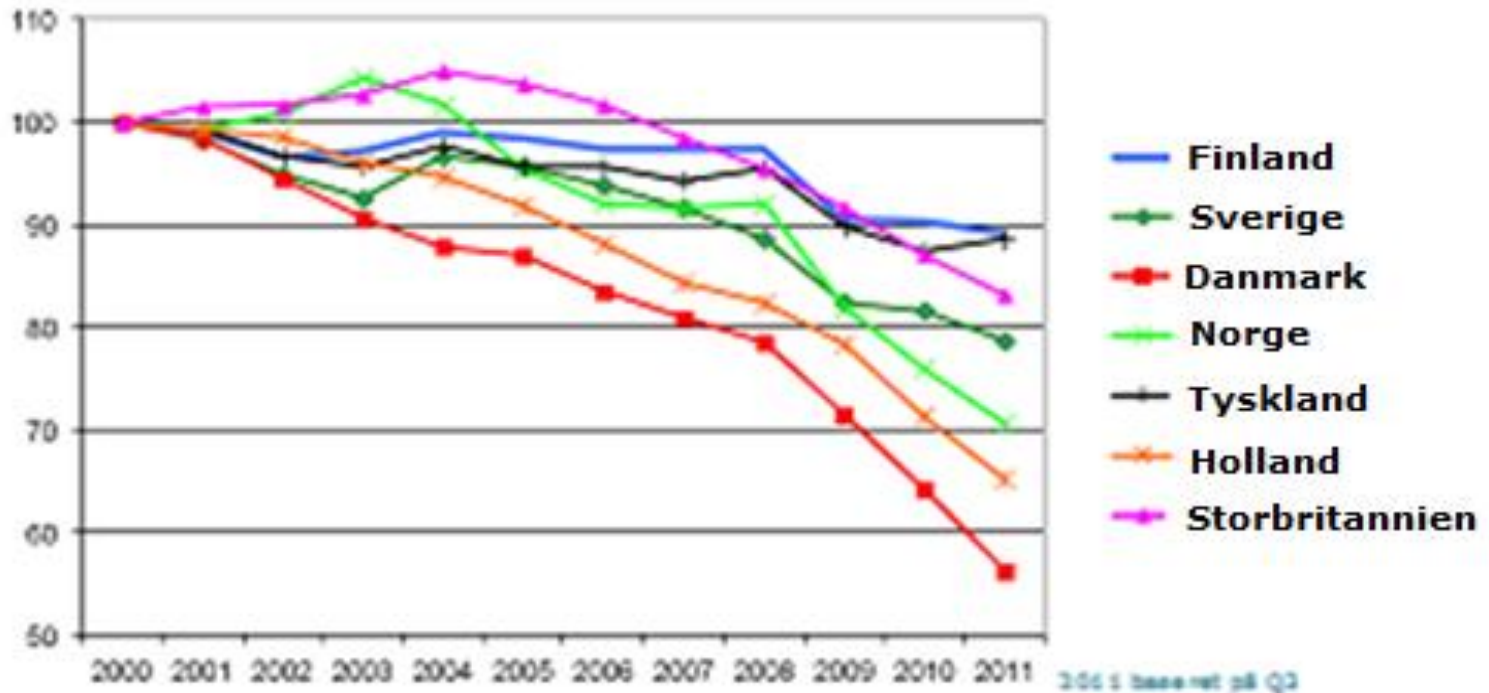
And that magazines, newspapers and advertisements only add marginal extra costs to the distribution of letters



The development of the Danish market

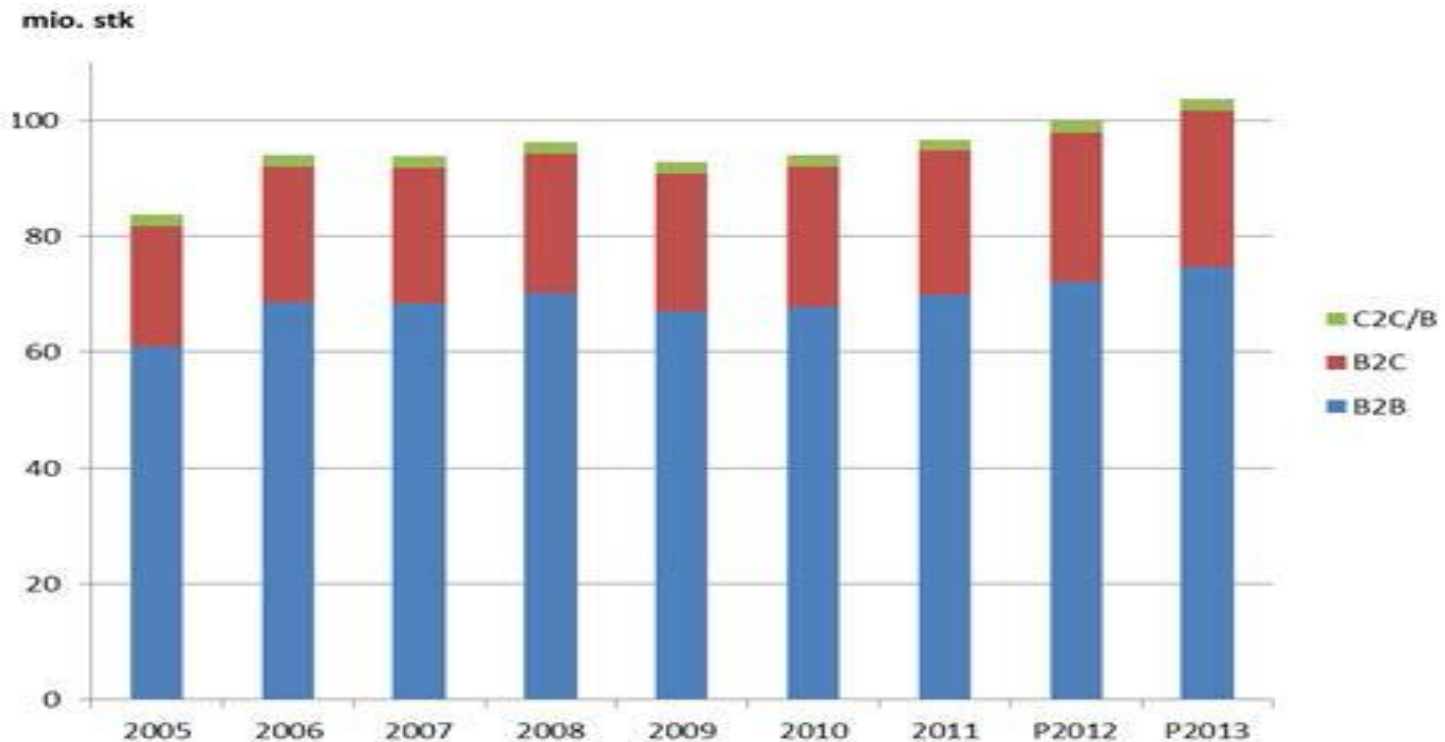
- I'm not qualified to pass judgement on the merits of *Post Danmark's* statements regarding letters as loss-making and the expansions required to honor the USO. However, it's obvious that it becomes increasingly difficult to make a profit on traditional letters, thus diluting the value of *Post Danmark's* 90 % market share (2013)

Index "2000"=100



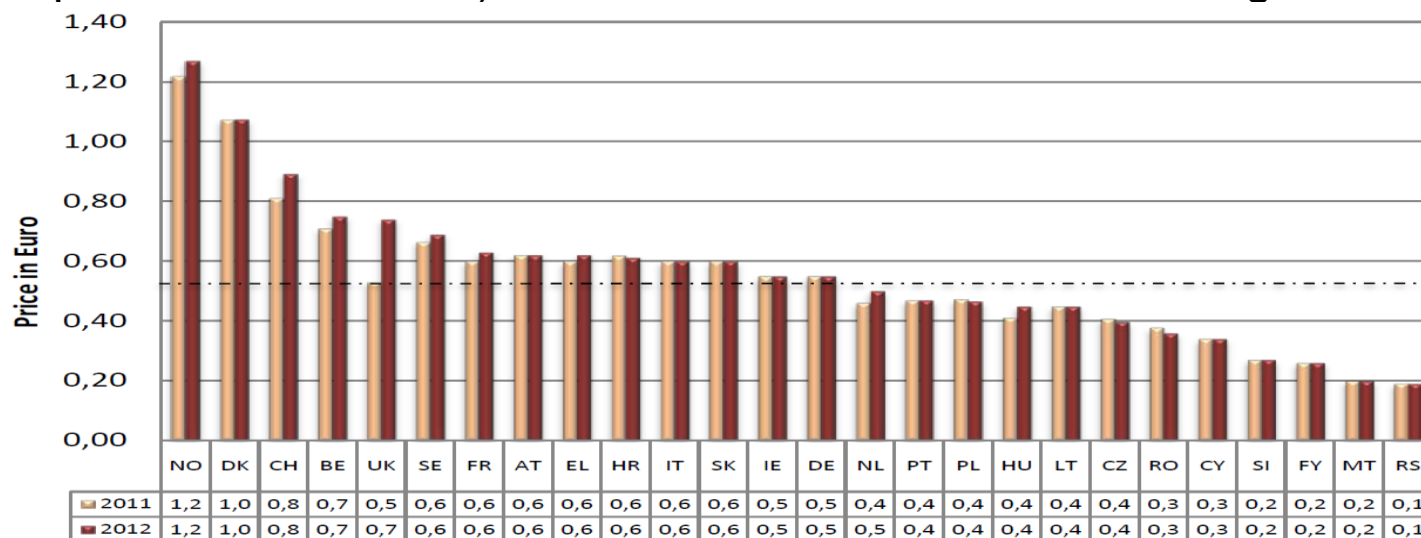
The development of the Danish market

- Parcels are increasing, partly compensating for the loss of letters. However, *Post Danmark* only has a 50-55 % market share (2013). Moreover, the logistics of magazines, letters, newspapers and advertisements are the same, creating possible converging markets and new entrants henceforth, particularly in urban areas



The issue of distributing costs

- There are substantial economics of scale and scope in the postal sector, providing cover for prices below the Stand-Alone Costs for non-letter activities as welfare enhancing and competition neutral
- Directive 1997/67 requires distribution of costs to where they are generated. Traditionally, all common and shared costs have been allotted to the USO area and other activities are only required to cover their Incremental Costs (perhaps explaining why letters are so expensive in Denmark). Embedded risk of cross subsidizing!



A company with a losing business case

Post Danmark is confronted with a number of challenges:

- Delivery of traditional letters has been liberalized and is shrinking. In Denmark, particularly fast due to the mandatory use of secure e-mails when communicating with public authorities.
- Use of Parcels are growing but *Post Danmark* does not have an equally strong position here (50-55 % in 2013)
- Strong competitors willing to invest resources into logging complaints with the NCA and a NCA willing to pursue these
- A need to secure a “correct” distribution of costs taking the substantial economic of scale and scope into consideration



A company with a long track record

- It would be tempting to label *Post Danmark* as a serial infringer:

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The number of actual infringements are lower than indicated by cases. Currently limited to two

(including rumors)

provided spreadsheet for further details or



Along came *Post Danmark I* (2004)

- In 2003 *Post Danmark* won three advertisement contracts from *Forbruger-Kontakt* making the later lodge a complaint with the NCA:
 - In September 2004 the offered prices were held to be (a) discriminatory and loyalty-inducing, pursuing a foreclosure of *Forbruger-Kontakt* and (b) discriminatory by thwarting competition downstream, where some customers got better terms
 - In November 2004 predatory pricing was rebutted as prices had covered AIC and there was no intent found. Unwilling to accept *Post Danmarks* allotting of common and shared costs the NCA included an additional portion of these, utilizing a AIC+ standard
- While only the September 2004 decision was carried leading to EU-case C-209/10 - *Post Danmark I*- it's important to see the link to the predatory pricing case providing the AIC+ calculation later used here. Moreover, *Forbruger-Kontakt* originally argued misdistribution of costs leading to cross subsidizing from letters (and stateaid)



Along came *Post Danmark I* (2004)

- Moreover, the NCA had in reality taken issue with three elements:
 - As only new customers had been offered better terms these were *discriminatory*. Moreover, the better terms involved a target discount and were hence *loyalty inducing*. However, both elements pursued a foreclosure of a direct competitor (*Forbruger-Kontakt*) making it the foreclosure that merited condemnation referred to as *primary-line-discrimination*
 - As the offered discounts also thwarted competition downstream, where some customers got better terms, they were also (genuinely) *discriminatory*, referred to as *second-line-discrimination*. This utilized a large number of Danish cases mandating identical treatment. However, today it is obvious these represented a manifest misreading of EU case law
- Essentially *Post Danmark I* came about as a consequence of a misreading of EU practice that surfaced partly as a consequence of the *Discussion Paper*. Consequently, in 2012 the Danish Supreme Court sent the case back to the NCA- which decided to bury it



Magasinpost I (2007) – An intermezzo

- *Magasinpost I* originated from complaints from *Forbruger-Kontakt* and *Citymail*, arguing that in 2004-2005 *Post Danmark* had offered discriminatory discounts on the distribution of magazines
- The discounts were calculated using a one year reference period and had steps with a 24 % span from the lowest to the highest. However, no formal loyalty was requested
- Utilizing the principles tabled by the *Discussion Paper* including the calculation of effective price and minimum required market share the NCA found the discounts capable of foreclosing an As Efficient Competitor. Moreover, the calculations supplemented a traditional approach condemning loyalty discounts per se
- As a separate infringement, the offered discounts also thwarted competition downstream, where some customers got better terms. Calculations were supplied by the NCA in support of the claim (but not made publically available) making it unclear if this element recycles the same flawed reading of EU practice as *Post Danmark I*



And then came *Post Danmark II* (2009)

- In 2006 *Citymail* logged a complaint arguing that in 2004-2005, *Post Danmark's* terms for direct mail had been loyalty inducing. Direct mail are essentially letters sent in large quantities with identical content e.g. advertisements
- The discounts followed a standardized scale but had steps (0 to 24 %) and were calculated against all purchases, including earlier and across products, including letters <50 gram, which at that time were reserved for *Post Danmark*
- Using the *Enforcement Paper* the NCA demonstrated, as a supplement, how an As Efficient Competitor could be foreclosed. Moreover, in light of substantial economic of scale and scope and incumbent advantages, testing against an Reasonably Efficient Competitor was reserved
- *Post Danmark* challenged the NCA decision before the Judiciary, arguing mandatory use of the AEC test, resulting in the three questions to the Court of Justice, aka *Post Danmark II*. This having already failed, the strategy behind it is unclear. But Perhaps *Post Danmark* was stalling for time or nervous about the future prospect of being reviewed under a REC standard
- In June 2016 it was announced that *Post Danmark* had lifted its legal challenge to the NCA decision making this final



Magasinpost II (2010)

- As a follow up to *Magasinpost I* and a 2008 dawn raid, the *Post Danmark* terms for the delivery of magazines were in 2007-2009 condemned by the NCA on two grounds:
- Firstly, *Post Danmark* had offered substantial individualized target discounts to its four largest magazine customers in 2007-2009 in exchange for defacto exclusivity. Moreover, the discounts failed the AEC test and were therefore anti-competitive regardless of the methods and principles used
- Secondly, while in principle offering a standard discount system without retro elements, these could nevertheless be found as a certain minimum quantity per title and circulation had to be met. Therefore, this system had a strong sucking-in effect
- On appeal before the Competition Complaint Board, *Post Danmark* provided objective justifications for the use of minimum quantity requirements leading to an overturn of the entire decision. Its unclear if the NCA has subsequently decided to bury the case



Pending cases (based upon rumors)

- *Forbruger-Kontakt* lodged a complaint (2013) arguing below cost pricing (predatory pricing) on the distribution of advertisements. Not admitted by the NCA
- *Post Danmark* have lodged two complains (2013 and 2015) against *Forbruger-Kontakt*, arguing that the latter has infringed Article 101 and 102. Presumably for the purpose of challenging the current market definitions and *Post Danmark's* position as dominant. NCA has not admitted any of them but is currently undertaking a market study
- In 2016, newspapers indicated that an updated complaint from *Forbruger-Kontakt* had been tabled once again, arguing below-cost pricing (predatory pricing)



Serial infringer or a very unlucky company?

- Noting the (high) number of competition cases involving *Post Danmark*, it's tempting to deem it a bad company, pursuing a foreclosure strategy & protecting it's cash cow; distribution of letters
- However, the number of infringements are lower making it more a company with an inferior product (higher costs) in a dying market (letters) confronted with strong competitors and a NCA willing to pursue cases even when needing substantial resources



Post Danmark has given us legal clarity

- The legal community is much in debt to *Post Danmark* as it has settled many issues including that:
 - The AEC test first articulated in the *Discussion Paper* and matured in the *Enforcement Paper* has been applied. Initially as a supplement but gradually as an integrated part of the analysis
 - While it is not mandatory for NCA to use the principles of the *Enforcement Paper* and the AEC test I find it unlikely that we will see many cases where this is directly refused
 - A large chunk of (very bad) Danish case law mandating identical treatment has been rendered obsolete (if not plainly wrong), significantly adjusting the concept of discrimination
 - Attention has been drawn to the need to distribute costs correctly when dealing with multi-product companies and the issue of incumbent advantages in newly liberalized sectors



And they are looking for new lawyers



Konkurrenceretsspecialist

Vi søger nu en konkurrenceretsspecialist til Group Legal Affairs i Danmark. Konkurrenceret er et prioriteret område i PostNord, og PostNord deltager blandt andet i Dansk Industris arbejde for konkurrenceret.

Dine kvalifikationer
Du har stor indsigt i konkurrenceretlige spørgsmål og har formentlig i 6-8 år arbejdet på højt niveau med konkurrenceret og særligt spørgsmål om dominerende stilling i et advokatfirma, en virksomhed, organisation eller myndighed. Udover konkurrenceretlig rådgivning skal du yde generel bistand til PostNord og et godt kendskab til kontraktkoncipering, obligationsret og eventuelt sektorspecifik lovgivning er derfor et plus. Du arbejder omkostnings-effektivt, forretningsorienteret og serviceminded, hvilket giver dig gennemslagskraft. Du kommer til at arbejde både selvstændigt og i team. Arbejdet kræver proaktivitet, fleksibilitet og evne til at tage initiativ. Vi ser derfor, at du er en fleksibel person som kan varetage både store og små sager med samme entusiasme, og at du har en høj stresstærskel og integritet.

Dine opgaver
Du er ansvarlig for konkurrenceretten i den danske virksomhed. Dine opgaver vil derfor særligt være:

- Sikre konkurrenceretlig compliance
- Varetage PostNords interesser i konkrete tvister i samarbejde med eksterne rådgivere
- Deltage i udvikling af nye forretningsmodeller og samarbejder
- Legal training i organisationen

Vi tilbyder
En spændende stilling med krævende konkurrenceretlige opgaver med stort ansvar i en nordisk koncern med mulighed for faglig og personlig udvikling samt gode kolleger i et arbejdsmiljø, som er kendetegnet ved højt fagligt niveau, selvstændighed og en uformel tone.

Ansøgning
Send din ansøgning senest 21. oktober til: General counsel Kristina Lija, kristina.lija@postnord.com samt advokat Anders Vibe Andreassen, anders.vibe.andreassen@postnord.com

Vi indkalder løbende til samtaler. Hvis du har spørgsmål til stillingen er du velkommen til at kontakte advokat Anders Vibe Andreassen på tlf. 33 61 40 21. Alle henvendelser behandles fortroligt.

PostNord er Nordens førende aktør indenfor kommunikations- og logistik tjenester til, fra og indenfor Norden. PostNord omsætter for mere end 30 milliarder DKK og har 39 000 ansatte. PostNord arbejder efter en miljøorienteret leverancestrategi, hvor performance, viden til at vinde og ansvarlighed er afgørende.

Group Legal Affairs leverer juridisk bistand til alle PostNord enheder. Group Legal Affairs består af 17 jurister i Norden, heraf 6 i Danmark. Vi har et tæt samarbejde med vores kolleger i hele organisationen og har en bred berøringstale.

Baseres på postnord.com

postnord

"...Konkurrenceret er et prioriteret område i PostNord...."

"...Du har stor indsigt i konkurrenceretlige spørgsmål og har formentlig i 6-8 år arbejdet på højt niveau med konkurrenceret og særligt spørgsmål om dominerende stilling i et advokatfirma, en virksomhed, organisation eller myndighed."

Unusual for a Danish company to have dedicated Article 102 lawyers employed



Questions

Feel free to contact me on cbe@jur.ku.dk

