I. Overview of 2015

There has been a notable change in personnel at DG COMP since last year’s survey. In November 2014, Margrethe Vestager replaced Joaquin Almunia as Commissioner for Competition; in September 2015, Johannes Laitenberger replaced Alexander Italianer as Director-General of DG COMP. The new appointments have coincided with (or perhaps precipitated) a particularly active period in Article 102 enforcement.

Commissioner Vestager inherited several challenging Article 102 cases from her predecessor, including politically sensitive investigations into Google and Gazprom. At several previous junctures, the Commission appeared inclined to resolve these investigations using the Article 9 commitments mechanism. Some commentators therefore expected the new Commissioner to resolve one or both cases with commitments within her first months in office. Indeed, prior to her appointment, Commissioner Vestager indicated that she was in favour of using Article 9 to accelerate case closure and avoid cases being ‘dragged over years and years’.1 However, contrary to these expectations, the Commission issued a Statement of Objections (‘SO’) in both cases shortly after the Commissioner took office.2

The Commission’s enforcement of Article 102 in 2015 was not limited to the Gazprom and Google investigations. The Commission issued a further four SOs in cases with Article 102 elements,3 and accepted commitments in one case (BEH Energy, discussed further below).4 Two of the SOs were addressed to the US semiconductor manufacturer, Qualcomm, and explore theories of harm relating to exclusivity payments and predatory pricing.5 The SOs were issued barely 6 months after the announcement of formal investigative proceedings against the company.6 Investigations were also opened into Google’s mobile operating system, Android, and

Key Points
- DG COMP accelerated its Article 102 enforcement work in 2015, opening five new investigations and issuing provisional adverse findings (Statement of Objections) in six cases—companies implicated in these investigations include Amazon, Gazprom, Google, and Qualcomm.
- In *Post Danmark II* and *Huawei v. ZTE*, the Court of Justice provided clarity on its approach to controversial areas of the law but left several important questions unanswered.
- Following criticism that it has been too quick to resolve cases through the Article 9 commitments mechanism, the Commission has announced an ex-post evaluation of the effectiveness and efficiency of past Article 9 decisions.

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4 Case AT.39767—BEH Electricity, Commission press release IP/15/5234 (SO issued in August 2014).
5 Case AT.40153—E-Book MFNs and Related Matters, Commission press release IP/15/5166 (investigation focusses on Amazon’s most-favoured nation clauses for the distribution of e-books); Case AT.40220—Qualcomm: Exclusivity Payments and Case AT.39711—Qualcomm: Predatory Pricing, both Commission press release IP/15/5383; and Case AT.40208—International Skating Union’s Eligibility Rules, Commission press release IP/15/4771 (investigation focusses on whether eligibility rules unduly prevent athletes from exercising their professions by making it difficult for rivals to organise ice-skating events).
6 Case AT.40220—Qualcomm: Exclusivity Payments (Qualcomm has already paid significant amounts to smartphone and tablet manufacturers conditioned on the exclusive use of Qualcomm’s baseband chipsets) and Case AT.39711—Qualcomm: Predatory Pricing (Qualcomm has allegedly sold baseband chipsets at prices below costs with the intention of hindering competition), both Commission press release IP/15/6271.
Amazon’s e-book distribution arrangements. Finally, the Commission conducted unannounced inspections in the rail passenger transport sector in Austria and closed an investigation into oil benchmarks.

The Court of Justice (‘ECJ’) issued two important judgements in preliminary reference cases in 2015: Post Danmark II10 (relating to rebate mechanisms) and Huawei v. ZTE (relating to the circumstances in which an essential patent owner may seek an injunction in patent disputes). We analyse both cases below. In addition, the General Court (‘GC’) handed down a judgment concerning the interplay between Articles 102 and 106 in Slovenská Poštá11 and heard appeals of Commission rejection decisions in Si.Mobil12 and easyJet.13

II. Summary of selected commission decisions and court judgments in 2015

Similar to our last survey, this section provides a thematic overview of last year’s Commission decisions and European Court judgments in cases with Article 102 elements. Specifically, we focus on three themes and three cases: the analysis of so-called ‘destination clauses’ under Article 102 (BEH Energy), the application of Article 102 in the context of standards-essential patent litigation (Huawei v. ZTE), and the European Courts’ methodology for assessing rebate schemes implemented by dominant companies (Post Danmark II).14

A. Destination clauses as an Article 102 abuse

‘Destination clauses’ are contractual terms whereby an undertaking restricts the purchaser’s ability to resell the goods into a certain geographical territory or territories. The Commission has traditionally reviewed these and other forms of territorial restrictions within the framework of Article 101.15 BEH Energy and the parallel Gazprom proceedings16 are the first investigations in which the Commission has used Article 102 to investigate these territorial restrictions.17

On 12 August 2014, the Commission issued an SO concerning contractual provisions in electricity supply agreements between the Bulgarian energy supplier, Bulgarian Energy Holding (‘BEH’), and its customers.18 The SO provisionally concluded that BEH was dominant in the market for the wholesale supply of electricity at freely negotiated prices in Bulgaria and had abused this position by imposing territorial restrictions on the resale of electricity by its customers. According to the SO’s theory of harm, the territorial restriction clauses limited the freedom of independent customers purchasing electricity from BEH’s production subsidiaries to resell the electricity to customers outside Bulgaria. The clauses therefore had the potential to raise barriers to trade between Bulgaria and other Member States, distorting the allocation of electricity within the common market and adversely affecting the liquidity and efficiency of its electricity markets. In December 2015, following a market test, the Commission announced that it had accepted Article 9 commitments from BEH to ‘end [the] restrictions in Bulgaria and make the Bulgarian wholesale electricity market more open and transparent.’19

As noted, the Commission has traditionally investigated destination clauses under Article 101. The Commission’s press release in BEH Energy does not specify establishing a breach of Article 106 in conjunction with Article 102. The judgment is under appeal.

15 See, eg, Cases AT.38662—GDF/ENEL and GDF/ENI, Commission decisions of 26 October 2004 (the GDF-ENI contract concerned the transportation of natural gas purchased by ENI and included a clause restricting ENI to market the gas exclusively after leaving France; the GDF-ENEL contract concerned the swap of liquefied natural gas purchased by ENEL in Nigeria. It contained a clause that required ENEL to use the gas only in Italy. The Commission concluded that both clauses were infringed Article 101. See Commission press release IP/04/1310 and Case AT.39201—E.ON/GDF, Commission Decision of 16 October 2009 (the parties had signed a contract agreeing not to sell gas transported over the MGAL pipeline in each other’s home markets. The Commission concluded the agreement infringed Article 101 and imposed a €553.5M fine on each party).

16 Case AT.39816—Upstream gas supplies in Central and Eastern Europe, Commission MEMO/15/4829.

17 Although Gazprom and BEH Energy are the first investigations in which the Commission has used Article 102 in connection with resale destination clauses, they are not the first investigations in which the Commission has used Article 102 to address obstacles to the creation of a single European energy market. See, for example, OPCOM/Transelétrica; CEZ: Czech electricity sector; Electrabel: long-term electricity supply contracts; E.ON—German electricity market; and E.ON—German gas market.

18 Case AT.39767—BEH Electricity, Commission press release IP/14/922 (formal proceedings were opened in November 2012).

which limb of Article 102 the Commission proposed to use in this case. The press release and the Article 27(4) market test notice allude to ‘raising barriers to trade’ between Bulgaria and other EEA Member States, but this is not one of the explicit categories of abuse under Article 102. Conceivably, the theory of harm could have been framed as abusive under Article 102(a), which prohibits undertakings from abusing their dominant position by imposing exploitative trading conditions on contracting parties, 102(b), which prohibits undertakings from abusing their dominant position by limiting markets to the prejudice of consumers, or under Article 102(c), which the Commission has employed in abusive price discrimination cases.

The Article 9 decision, when published, may provide greater clarity on whether the Commission provisionally considered BEH’s conduct to fit squarely within one of the existing categories of abuse under Article 102, or as a new form of abuse (as was the case in Astrazeneca and Rambus). The proper categorisation of destination clauses deemed unlawful under Article 102 is an interesting academic point but does not affect the implications or legitimacy of the Commission’s investigation in BEH Energy. The Commission is not obliged to fit the case within one of the established categories of abuse under Article 102, although these categories are arguably sufficiently broad to accommodate most conceivable forms of abuse. The Court confirmed in Deutsche Telekom that the categories of abuse listed in Article 102 are not exhaustive.

The principal commercial interest of the Commission’s decision rather lies in the novelty of the commitments made by BEH. Typically, Article 9 commitment decisions involve companies undertaking to conduct themselves on the market in a certain way (eg to amend contractual arrangements), or to supply access to or divest existing assets or facilities. Commitment decisions have not, until now, envisaged the creation of new market infrastructure. However, the Commission’s press release in BEH Energy states that BEH has undertaken to establish an independent power exchange in Bulgaria and to contribute a minimum volume of electricity to the exchange for the duration of the commitments (5 years). That is, the commitments envisage the creation of new market infrastructure, rather than the provision of access to existing assets.

BEH’s commitment to establish the independent power exchange is reinforced through additional undertakings. In particular, BEH will contribute the required electricity volumes via an auction-based, day-ahead trading platform, and the price of this electricity volume will be capped. Since the seller of power on an exchange cannot trace the ultimate destination of the electricity it sells, the exchange mechanism will prevent BEH from enforcing territorial restrictions on resale. To ensure the independence of the exchange, BEH has committed to enter into an agreement with an independent third party experienced in power exchange management and operation.

Moreover, the commitments provide that after 6 months, BEH will transfer its equity interest in the exchange to the Bulgarian Ministry of Finance. The commitments therefore provide for the State ownership of new market assets but with the ultimate goal of further liberalisation of European energy markets.

BEH Energy therefore demonstrates, once more, that Article 9 commitments can be a powerful and flexible tool for enforcing Article 102. The Commission can use the Article 9 mechanism to accelerate case closure while achieving solutions that are both tailored to the business(es) concerned and potentially transformative for the industry. Concerns remain that the Commission may rely too heavily on Article 9 in some areas of its enforcement work, including Article 102. Although Article 9 enables the Commission to achieve faster resolution of Article 102 proceedings, it may reduce the overall body of precedent in a complex area of EU competition law or enable the Commission to extract concessions from companies in investigations predicated upon novel and uncertain theories of harm. In this context, it is encouraging that the Commission recently announced that it will conduct an ex post evaluation of the effectiveness and efficiency of past Article 9 decisions.

B. Refusal to deal

Interoperability standards, a common feature in markets that involve complex systems, are generally efficiency

24 Samsung; eBooks, Rio Tinto Alcan; Areva and Siemens; Standard and Poor’s; Svenska Kraftnat; EDF—long-term electricity supply contracts; Rambus; Ship classification (IACS); DaimlerChrysler, Toyota, Fiat, and General Motors; De Beers/Alrosa: Cannes Extension Agreement; Repsol; English Premier League TV rights; Coca-Cola; German Bundesliga.
25 For example, Air France/KLM, Alitalia, and Delta; Deutsche Bahn; Star Alliance (Air Canada, Lufthansa, and United); CEZ; Thomson Reuters; Sky Team; IBM; ENI Group; oneworld alliance (BA, AA, and IB); EON—German gas market; EDF—long-term electricity supply contracts; GDF Suez; Rambus; RWE Group; EON—German electricity market; and Distrigas.
enhancing. Interoperability standardisation facilitates economies of scale, improves product quality, and encourages investment in product development. Standardisation may occur de facto through organic market development, with a single technical format demonstrating itself to be the most efficient. Alternatively, standardisation may occur through a formal standard-setting process, as part of a private (e.g., JEDEC, which develops open standards for the microelectronics industry) or a public (e.g., the GSM standard) initiative. Interoperability standards may comprise either proprietary technology or ‘open’ technology, or both. If a developer cannot implement a standard without using this technology, the technology is referred to as ‘essential’. A patent granted to protect standards-essential technology is referred to by the shorthand ‘standards-essential patent’ or ‘SEP’.

In recent years, antitrust authorities in a number of jurisdictions have considered how best to protect market participants and consumers against ex post exploitative or exclusionary conduct by SEP owners. In particular, the authorities have considered how to mitigate the potential adverse effects of technological ‘lock-in’. Lock-in describes the circumstance in which market participants, having agreed to implement a standard based on certain SEPs, make follow-on investments and/or abandon parallel research tracks that might otherwise have led to the development of competing technologies. It may then become impossible or prohibitively costly for these market participants to switch to alternative technologies, leaving them vulnerable to exploitation and/or exclusionary strategies by the SEP holders. SEP holders can extract supra-competitive license fees or impose other exploitative terms, and/or restrict access to the SEPs in order to disadvantage potential or actual competitors. Consumers may also suffer as supra-competitive prices are passed down the supply chain and/or new product development is impaired by prohibitive licensing terms.

In order to mitigate the risk that SEP holders may exploit technological ‘lock-in’, many standard-setting organisations require SEP holders to license their technology to third parties on fair, reasonable, and non-discriminatory (‘FRAND’) terms. The FRAND commitment is a quid pro quo for including the SEP holder’s technology in the standard. However, although the principle of FRAND is widely accepted, neither the meaning of FRAND nor the specific circumstances in which it applies are uniformly understood. This is problematic because FRAND is intended to facilitate commercial agreement between parties with competing commercial objectives; ambiguities in FRAND therefore risk chilling commercial negotiations.

Article 101 is the most appropriate enforcement tool for regulating the interaction between companies within the standardisation process. However, the ex post unilateral exploitation of market power derived from inclusion of patented technology in a standard, and the interpretation by the SEP holder of the FRAND commitments encumbering its technology, fall under Article 102.

In its Samsung and Motorola investigations, the Commission provided guidance on the circumstances in which a SEP holder may prevent an infringer/prospective licensee from using its technology on unacceptable terms. Specifically, the Commission found that the holder of FRAND-encumbered technology cannot threaten an injunction, or enforce an injunction, against an infringer who is ‘willing’ to enter into a license agreement on FRAND terms, thereby forcing the infringer/prospective licensee to accept non-FRAND terms. The decisions envisaged a ‘safe harbour’ for infringers/prospective licensees, who could avoid an injunction by agreeing to third-party determination of FRAND terms (by a court or arbitration tribunal). By providing for this safe harbour, the Samsung and Motorola decisions arguably shifted the balance of power in licensing negotiations towards patent users and away from patent holders. The ECJ’s preliminary ruling in Huawei v. ZTE appears to have redressed this balance.

Huawei, a Chinese telecommunications company, holds a European patent declared as essential to the Long Term Evolution (‘LTE’) standard developed by the European Telecommunications Standards Institute (‘ETSI’). During the standard-setting process, Huawei committed to ETSI that it would grant licenses to third parties to this essential technology on FRAND terms. ZTE, also a Chinese telecommunications company, markets LTE base stations that use Huawei’s patented technology. Licensing negotiations between ZTE and Huawei broke down. Huawei therefore brought an action for patent infringement against ZTE before the Düsseldorf court. Huawei sought various remedial measures, including an injunction prohibiting ZTE from further unauthorised use of the technology. In defence, ZTE claimed that it was a willing licensee and that Huawei’s action for an injunction was an abuse of Article 102.

29 Case C-170/13, Huawei Technologies Co. Ltd v. ZTE Corp and ZTE Deutschland GmbH, judgment of 16 July 2015, ECLI:EU:C:2015:477. (‘Huawei v. ZTE.’)
The Düsseldorf court was faced with inconsistent guidance at the national and EC levels:

- In Orange-Book-Standard, the German Federal Court established a high threshold for abuse of dominance by a patent holder seeking an injunction in respect of its de facto essential patents. The Federal Court held that the patent holder would only commit an abuse by seeking an injunction where the infringer/prospective licensee had (i) unconditionally offered to take a license on terms that the patent holder could not reasonably refuse (or at a rate to be determined by the plaintiff, subject to court adjustment ex post) and (ii) behaved as if it were an actual licensee, in particular by paying royalties into an escrow account and rendering accounts to the patent holder. Orange-Book-Standard was not directly on point, however, because it concerned a de facto essential patent rather than a patent set by a standard-setting organisation, and because the Federal Court did not rely on a promise to license on FRAND terms.

- In a press release of Samsung, the Commission signalled (consistent with its subsequent decision) that it was abusive to seek an injunction where (i) the patent holder had committed to a standardisation body to grant licenses on FRAND terms and (ii) the infringer was willing to negotiate such a license (although the press release did not explain the circumstances in which an infringer may be regarded as being willing to negotiate).

The Düsseldorf court found that if it applied Orange-Book-Standard, it would uphold the action for infringement, but if it applied the principles set out by the Commission, it might ultimately dismiss Huawei’s action for injunction as abusive under Article 102. The Düsseldorf court therefore stayed the proceedings and asked the ECJ to clarify whether—and, if so, in what circumstances—an action for injunction brought by the holder of a FRAND-encumbered SEP constitutes an Article 102 abuse.

The ECJ distinguished the present case from established precedent on refusal to license intellectual property (under which the exercise of an exclusive right may be deemed abusive only under ‘exceptional circumstances’). The ECJ observed that, unlike previous cases, Huawei v. ZTE concerned technology that was essential for competing products to appear or remain in the market and which had only acquired this essential character by virtue of the SEP holder’s irrevocable commitment to license on FRAND terms. The ECJ held that this commitment created legitimate expectations for third parties that they could license the technology on FRAND terms. Frustration of this legitimate expectation by the SEP holder could, in principle, amount to an abuse within the meaning of Article 102. A licensee could therefore raise Article 102 as a defence to injunctive action by the SEP holder.

The ECJ stipulated that in order to pre-empt an Article 102 defence, the SEP holder must (i) alert the SEP user of their infringement and explain why their use of the technology amounts to an infringement, and (ii) if the SEP user has indicated, they are willing to take a license on FRAND terms, present a detailed, written FRAND licence offer, indicating the proposed royalty (and the methodology for calculating it).

The judgment also placed obligations on the SEP user. The ECJ stated that the SEP user must (i) respond promptly and in good faith to the specific, detailed FRAND offer, without engaging in delaying tactics; (ii) if it does not accept the initial offer, propose a detailed, written counter-offer on FRAND terms; and (iii) if no agreement is reached, provide appropriate security and be able to render accounts (if already using the technology concerned). The ECJ clarified that none of the foregoing barred the SEP user from challenging the validity and/or essentiality of the technology, and/or the existence of an infringement, in parallel to licensing negotiations (and also after conclusion of the license agreement). The judgment therefore implies that SEP holders cannot make a license conditional on the acknowledgment of the SEP’s validity.

The ECJ held that where no agreement is reached, the amount of the royalty may, by common agreement, be determined by an independent third party.

Huawei v. ZTE provides detailed and welcome guidance on the conduct of SEP licence negotiations and develops the framework established by the Commission in Motorola and Samsung in a sensible fashion. However, the judgment leaves unanswered several important questions that fell outside the scope of the preliminary reference. For example, is an SEP holder dominant by virtue of having a (single) patent that is essential to a standard? What terms are ‘FRAND’? What is ‘appropriate’ security? The judgment effectively leaves these issues to the courts and competition authorities to tackle on a case-by-case basis.

Moreover, the judgment does not fully play out the various scenarios that may arise in the SEP licensing negotiations. For example, the judgment states that the
SEP holder must present the alleged infringer a specific, written offer for a licence on FRAND terms. The judgment states, subsequently, that the alleged infringer must respond diligently to ‘that offer’—meaning, the FRAND offer—and, if it does not agree with those terms, submit a specific, FRAND counter-offer. But the judgment does not clarify what happens if neither party makes a FRAND proposal. In that scenario, the SEP holder has failed to insulate itself against a claim of abuse, but the SEP user has, for its part, failed to satisfy the preconditions for relying on Article 102 as a defence to an injunction claim. It is unclear whether an injunction in such circumstances would be abusive. The scenario is not merely hypothetical. The SEP holder might plausibly wish to avoid formulating a FRAND offer, either because they do not wish to make an offer at all or because they do not wish to weaken their bargaining position by making the first move towards commercial settlement. Similarly, the SEP user might wish to avoid conceding ground by making the first serious licence offer, or, as the judgment implicitly acknowledges, they may not be well placed to formulate a FRAND offer at all. Conceivably, therefore, the imposition of symmetrical obligations on the SEP holder and SEP user may, in certain circumstances, encourage a commercial stand-off.

Some commentary on the judgment interpreted the ECJ’s position as shifting the balance of power in licensing negotiations to SEP users, away from SEP holders. This analysis relied, in particular, on the finding that SEP holders should make an initial FRAND license offer. This conclusion seems premature, however. The judgment arguably places SEP holders in a stronger position that they were following Motorola and Samsung. Specifically, the judgment removes SEP users’ safe harbour, which allowed users to avoid an injunction by agreeing to have the license terms determined by a court of arbitration tribunal. Third-party determination will now only be available by common agreement. Moreover, if parties fail to reach an agreement on the license terms, the SEP user must provide appropriate security and be able to render accounts, putting a clear and important burden on the SEP user.

C. Loyalty rebates

Rebates and discounts are a common feature of commercial relations and may be pro-competitive and economically efficient. Intermediate customers may benefit from lower prices, and part of this price reduction can be expected to flow through to consumers through the reduction of double marginalisation. The supplier can use rebates to expand production, potentially generating economies of scale, or to price discriminate between customers and thereby recoup their fixed costs more quickly. Reflecting these incentives, rebates are used by dominant and non-dominant firms alike. However, as with other pricing practices, EU competition law imposes a special responsibility on dominant undertakings to ensure that their rebate schemes remain within the confines of ‘competition on the merits’ and do not impair ‘genuine undistorted competition in the common market’.

From an economic standpoint, the theory of harm in rebate cases involving dominant companies focusses on ‘leveraging’. The theory posits that the dominant company has an assured or ‘non-contestable’ sales base, for which it faces no effective competition from rivals. The dominant company seeks to exploit this assured base in order to expand sales to the ‘contestable’ sales base, where it does face competition. The dominant company may do this by offering customers a refund on some or all of their purchases, which is triggered where the customer’s purchasing volumes exceed a stipulated minimum threshold. The minimum threshold is set in excess of the non-contestable portion of demand. With every additional unit that the customer purchases, the customer gets closer to qualifying for the rebate, and the effective price of purchasing additional units decreases. This creates a ‘suction effect’, drawing contestable sales towards the dominant company. In order to win sales from the dominant company, the competitor must therefore compensate the customer for the lost rebate.

Historically, EU competition law has applied an essentially form-based approach to rebates. The case law has distinguished between three categories of rebates:

- **Quantity rebates:** Rebates linked solely to the quantity of product purchased by the customer. These rebates have generally been considered lawful because the refund reflects the pass-through of savings in production costs.

- **Exclusivity rebates:** Rebates granted on the condition that the customer sources all—or most—of its requirements from the supplier. These rebates have
generally been considered (per se) anticompetitive, absent compelling evidence that the scheme is objectively necessary, or that potential foreclosure effects are counterbalanced by pro-competitive efficiencies.

- Other loyalty-inducing rebates, in which the discount system depended on the customer attaining particular sales targets, but which were neither quantity discounts (ie linked exclusively to the purchase volume) nor exclusivity rebates because they did not require the customer to obtain all or most of its supplies from the dominant undertaking.

The form-based approach has been criticised as unsophisticated. A focus on form over economic substance risks ‘Type 1’ (over-enforcement) errors, potentially capturing legitimate discounting practices that are not exclusionary but are ‘loyalty-inducing’ in the sense that they encourage customers to purchase more units of product from the supplier.  

In February 2009, the Commission published guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings (the ‘Guidance Paper’). The Guidance Paper advocated a shift away from the form-based approach to rebates towards a more economics-based assessment centred around the ‘as-efficient competitor’ test. A rebate scheme would only be likely to result in anticompetitive foreclosure if an equally efficient competitor could not match the effective price set by a dominant company following adjustment for the rebate.

The status of the effects-based approach was unclear following the GC’s 2014 Intel judgment. In Intel, the GC held that there was no need to employ the as-efficient competitor test when examining exclusivity rebates, which were per se unlawful. The GC’s reserve to apply the as-efficient competitor test was disappointing for advocates of the Guidance Paper’s approach. However, some commentators argued that Intel may have not been a true test of the GC’s willingness to employ an effects-based review in rebate cases because the Commission decision under appeal—which pre-dated the Guidance Paper—also employed a form-based assessment (alongside an effects-based approach). The ECJ’s 6 October 2015 preliminary ruling in Post Danmark II therefore provided an opportunity for the GC to clarify its position.

Post Danmark II was a preliminary reference from the Danish commercial court, reviewing an appeal by Post Danmark A/S (‘Post Danmark’) against an infringement decision of the Danish national competition authority (‘NCA’). At the time of the original decision, Post Danmark had a universal service obligation for the delivery of certain types of bulk mail in Denmark, including direct advertising mail. As part of this universal service obligation, Post Danmark was required to apply uniform delivery tariffs throughout the Danish national territory, irrespective of cost. In order to offset Post Danmark’s universal service obligation, the Danish State granted Post Danmark a monopoly over the distribution of all mail weighing less than 50 g. This monopoly covered approximately 70 per cent of the bulk mail sector. In January 2007, a competitor, Bring Citymail, began to deliver business mail, including direct advertising mail, to customers in the Copenhagen area. Bring Citymail withdrew from the market in 2010 after suffering heavy losses.

Following a complaint by Bring Citymail, the NCA (in June 2009) found that Post Danmark had abused its dominant position on the Danish bulk mail market by operating (between 2008 and 2009) an anticompetitive rebate scheme that had the effect of foreclosing competition in the direct advertising mail segment. The NCA found that Post Danmark was dominant and an unavoidable trading partner in the supply of bulk mail in Denmark, noting the company’s statutory monopoly and the existence of high entry barriers. The NCA found that Post Danmark could only compete for c. 30 per cent of the bulk mail segment even within its own narrow geographic area of operations. The NCA did not apply the as-efficient competitor test. In the NCA’s view, below average avoidable cost, the rebate would likely be anticompetitive because it would exclude as-efficient competitors. If the effective price was above average avoidable cost but below the safe harbour of long-run average incremental costs, the Commission would ‘investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected’. This assessment would take into account, for example, ‘whether and to what extent competitors have realistic and effective counterstrategies at their disposal, for instance their capacity to also use a “non contestable” portion of their buyers’ demand as leverage to decrease the price for the relevant range’. Guidance Paper, paragraphs 37–45.

39 S Bishop and M Walker, The Economics of EC Competition Law: Concepts, Application and Measurement (3rd edn Sweet & Maxwell, London 2010) 257. For example, a supplier might offer a customer a discount if the customer’s purchases in Q2 exceed its purchases in Q1. But if the overall market is growing at a faster rate than the growth target, the supplier’s market share will not increase even if the customer hits the growth target.

40 The Guidance Paper explained that in the context of rebates, this would usually mean allocating the entirety of the discount available under the rebate scheme to the contestable portion of customer demand (for retroactive rebates) or the incremental purchases considered (for an incremental rebate]. The Guidance Paper indicated that as long as the effective (ie after deduction of the refund) price charged by the dominant company over the contestable/incremental portion of demand remained above the dominant undertaking’s long-run average incremental costs, there would be no anticompetitive foreclosure. If the effective price was above average avoidable cost, the rebate would likely be anticompetitive because it would exclude as-efficient competitors. If the effective price was above average avoidable cost but below the safe harbour of long-run average incremental costs, the Commission would ‘investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected’. This assessment would take into account, for example, ‘whether and to what extent competitors have realistic and effective counterstrategies at their disposal, for instance their capacity to also use a “non contestable” portion of their buyers’ demand as leverage to decrease the price for the relevant range’. Guidance Paper, paragraphs 37–45.

41 Intel, paragraph 99.

42 Case C-23/14, Post Danmark A/S v. Konkurrencestyrelsen, judgment of 6 October 2015, ECLI:EU:EU:C:2015:651 (‘Post Danmark II’).
the as-efficient test imposed too high a threshold in the circumstances; given the specific features of the sector, no new competitor could be as efficient as Post Danmark. The NCA instead focussed on the structure of the rebate scheme and the intensity of the rebates offered. The NCA noted, in particular, that the rebates were standardised (ie all customers were entitled to receive the same rebate on their aggregate purchases over a 1-year period); conditional (ie activated once the customer achieved prospectively set thresholds); retroactive (ie applying across all purchases, not the incremental purchases exceeding the threshold); and covered both the contestable and non-contestable portions of demand. The NCA found that customers would suffer an adverse drop in rebates if they switched more than one-third of their non-reserved direct advertising mail requirements to Bring Citymail.

Post Danmark appealed the NCA’s decision to the Danish Maritime and Commercial Court. The national court referred the following questions to the ECJ:

- The court asked the ECJ to clarify the relevant criteria for assessing the lawfulness of a standardised volume rebate scheme. In particular, the court asked the ECJ: (i) whether it was relevant that the rebate scheme applied to the majority of customers on the market, and (ii) whether it should apply the as-efficient competitor test, given the specific features of the Danish postal market.
- The court asked the ECJ ‘how probable and serious’ the anticompetitive effects of the rebate scheme needed to be in order for Article 102 to apply, and in particular whether the foreclosure effect needed to be ‘appreciable’ for an infringement of Article 102.

The ECJ recalled the established distinction between quantity rebates, exclusivity rebates, and other loyalty-inducing rebates and placed Post Danmark’s scheme in the third category. The ECJ therefore held that it was ‘necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether […] the rebate tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition’.44 The ECJ highlighted several features of the rebate scheme.

- First, the rebate scheme was retroactive, rather than incremental. The ECJ held that retroactive rebates were more harmful than incremental rebate schemes, since ‘relatively modest variations in sales […] could have disproportionate effects’ on customers.45
- Second, the rebate scheme applied over a relatively long reference period, in this case 1 year. The ECJ held that any system that linked the rebate to a ‘relatively long reference period has the inherent effect, at the end of that period, of increasing the pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period’.46
- Third, the rebate scheme applied to both the contestable and non-contestable portions of demand, which the ECJ said ‘enhanced’ the suction effect.47
- Fourth, the rebate threshold was set at around two-thirds of each customer’s contestable portion of demand, which the ECJ considered created a ‘particularly strong’ incentive for customer to obtain ‘all or a substantial proportion of […] supplies’ from Post Danmark.48

On the basis of these factors, the ECJ (recalling Tomra49) concluded that the rebate scheme tended to make it more difficult for customers to obtain supplies from competing undertakings and therefore had an anticompetitive exclusionary effect. The Court attributed less weight to the standardised (rather than individualised) nature of the rebate scheme. Although a standardised rebate scheme was unlikely to be unlawfully discriminatory within the meaning of Article 102(c), it could nevertheless be loyalty-inducing and therefore exclusionary.50 The Court also indicated that the proportion of customers covered by the rebate scheme was not determinative of whether a rebate scheme was abusive—Suiker Unie51 established that it was unnecessary to determine what proportion of customers were covered by a rebate scheme—but could be useful evidence of the magnitude of its anticompetitive effect.52

The ECJ observed that the Guidance Paper was not binding on the national courts or competition authorities. The ECJ noted that it had nevertheless...
applied the as-efficient competitor test in cases involving selective/predatory pricing (see Post Danmark I, AKZO, and France Telecom) and margin squeeze (TeliaSonera Sverige).\textsuperscript{53} The ECJ held, however, that a price/cost comparison was not a necessary or legal requirement in rebate cases. In a market with high entry barriers, even the loss of a less efficient competitor could adversely impact competition. Moreover, the as-efficient competitor test was not well suited to markets (such as the Danish bulk mail market) where the market structure ‘made the emergence of an as-efficient competitor practically impossible’.\textsuperscript{54} In short, the ECJ concluded that the as-efficient competitor test was merely one tool, among others, that the Commission or the Courts could use to assess the lawfulness of a dominant company’s rebate scheme.

In response to the final question, the ECJ stated that while the anticompetitive effect of the rebate scheme must be more than purely hypothetical, it need not be ‘concrete’. Although the ECJ proceeded to formulate this less-than-concrete standard in various terms, including ‘effect which may potentially exclude’, ‘likely to have anticompetitive effect’, and ‘likely exclusionary effect’, it finally settled on the more prosaic ‘probable’. In clearer terms, the ECJ stipulated that there was no ‘de minimis’ threshold for anticompetitive effect under Article 102. Recalling the ‘special responsibility’ of dominant companies not to allow their behaviour to impair competition, the ECJ concluded that markets featuring dominant companies were already distorted and that any further weakening of the market structure—no matter how slight—could amount to an abuse.

As noted above, following Intel, there was some confusion regarding the European Courts’ approach to analysing dominant companies’ rebate schemes. In Post Danmark II, the ECJ took an unambiguous position on several key themes: competition authorities need not apply the as-efficient competitor test when assessing the lawfulness of a dominant company’s rebate scheme; there is no de minimis threshold for anticompetitive effect, provided such an effect is ‘probable’; and exclusivity rebates are per se unlawful, but other loyalty-inducing rebates require a contextual, case-by-case analysis. Although this clarity may assist practitioners and their clients to self-assess rebate schemes, the Court’s position on rebates in the context of Article 102 remains unsatisfactory from a microeconomic perspective. There is no coherent basis for the Courts to apply the as-efficient competitor test to some forms of abuse (eg predatory pricing) but not others, such as rebates. The economic rationale for rebate practices—such as reduction of double marginalisation or efficient recovery of fixed costs through (Ramsey) price discrimination—is not weaker than the economic rationale for these other practices. Post Danmark II is a significant case, but it is unlikely to settle the debate between the form-based and effects-based schools.

III. Expectations for 2016

The year 2016 will likely be one in which the Commission closes its Gazprom or Google investigations (or both). If the Commission decides to issue an infringement decision rather than an Article 9 decision, any fine imposed is likely to be substantial. Public reports have suggested that the Commission is currently following a double-track approach in Gazprom, exploring commitments while advancing infringement proceedings in parallel.\textsuperscript{55} The precise status of the Google investigation is less clear. The Commission now has four Article 102 investigations at the SO stage: BEH Gas, Baltic Rail Transport, and the two Qualcomm investigations. We expect further developments in these investigations during the coming year. By comparison, the European Courts may be less active in the area of Article 102, since the cases currently pending are relatively recent.\textsuperscript{56}

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\textsuperscript{54} Post Danmark II, paragraph 59.

\textsuperscript{55} Mlex, ‘Gazprom, EU to continue settlement talks in antitrust case’, 10 December 2015.

\textsuperscript{56} The two Article 102-related cases that are currently pending before the ECJ are appeals of prior GC judgments: Case C-293/15 P, Slovenska Posta a.s. v. Commission (appeal brought on 15 June 2015) and Case C-413/14 P, Intel Corporation v. Commission (appeal brought on 28 August 2014). The GC has one Article 102-related case that is pending: Case T-827/14, Deutsche Telekom v. Commission and Case T-851/14, Slovak Telekom v. Commission (Actions brought on 24 and 26 December 2014 relating to Commission decision in Case AT/39523—Slovak Telekom).