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Tomra – Judgment of the General Court of the EU September 9, 2010

On September 9, 2010, the General Court of the EU (the Court) issued its judgment in *Tomra vs. Commission* (Case T-155/06), dismissing an appeal brought by Tomra against a European Commission decision imposing a €24 million fine for abuse of its dominant position in Germany, Austria, Sweden, the Netherlands and Norway on the market for reverse-vending machines (RVM) used to collect used beverage containers. The judgment, which continues the Court's deferential approach in Article 102 cases, confirms established case law and rejects the need to consider actual effects in the context of exclusive agreements and loyalty-based rebates.

The Commission's Decision

In its decision of March 29, 2006 (case COMP/E-1/38.113 - Prokent-Tomra), the Commission found that Tomra had infringed Article 82 EC (now Article 102 of the Treaty on the Functioning of the European Union) by implementing an exclusionary strategy to prevent market entry or expansion by smaller rivals in five national RVM markets. This strategy involved (i) exclusive supply agreements, (ii) individualized quantity commitments, and/or (iii) individualized, retroactive rebate schemes in which the discount earned by reaching a specified target was applied retroactively to all purchases and not just to the purchases above the target.

The Commission determined that Tomra's market shares in Europe during the period of infringement (between 1998 and 2002) exceeded 95 percent and the agreements in question foreclosed, on average, around 39 percent of total demand in the countries under consideration.

The Commission based its finding of abuse on the "capability" of Tomra's practices to foreclose competitors. In addition, the Commission analyzed actual effects claiming that Tomra's practices did in fact eliminate competition in the market.

The Court's Judgment

Displaying a high degree of deference to the contested positions taken by the Commission on key issues, the Court confirmed existing case law and rejected the need to analyse any actual foreclosure effects, provided the conduct in question is capable of foreclosing competition. The Court stated that:

- a rebate system which has the potential to foreclose rivals will be regarded as contrary to Article 102 if it is applied by an undertaking in a dominant position [para. 211];
- in order to determine whether exclusivity agreements, individualized quantity commitments and individualized retroactive rebate schemes are compatible with Article 102, it is necessary to ascertain whether, "following an assessment of all the circumstances," those practices are

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"intended" to restrict or foreclose competition on the relevant market or are "capable" of doing so [para. 215] or, as the Court phrased it in para 287, whether the conduct in question "tended to restrict competition or … was capable of having that effect."

In rejecting Tomra's arguments that the coverage of its agreements was insufficient to be capable of foreclosing an as-efficient competitor, the Court concluded that:

- the agreements foreclosed, on average, about 39 percent of total demand in the market; and
- the foreclosure of such a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors because "competitors should be able to compete on the merits for the entire market and not just for a part of it." [para. 241].

The Court did not address Tomra's argument, made at the Oral Hearing, that a proper foreclosure analysis would require an elaborate economic assessment, such as the As-Efficient-Competitor test, which the Commission appears to advocate in its 2009 Guidance Paper on the enforcement of Article 102. Nevertheless, the Court concluded in general terms that "only an analysis of the circumstances of the case" makes it possible to establish whether a practice is capable of foreclosing competition. Without such analysis it would be artificial to establish the portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors [para. 242].

The Court further stated that the Commission did not attempt to base its finding of an infringement on the actual effects of Tomra's agreements and practices on each of the national markets examined, but that it had merely "complemented" its finding of infringement with a brief examination of the effects of those practices [para. 288]. In this context the Court held that:

- for the purposes of establishing an abuse, it is not necessary to show that the conduct in question had an actual impact on the relevant markets;
- it is sufficient to show that the abusive conduct tends to restrict competition, *i.e.*, is capable of having that effect [see para 289]; and
- since the Commission's analysis of actual effects merely complemented its finding of abuse, any errors in that analysis cannot affect the legality of the decision [see para. 290].

In so ruling, the Court dismissed Tomra's arguments concerning the lack of actual foreclosure and reaffirmed the established case law relating to exclusivity and loyalty discounts, pursuant to which it is only necessary to establish that the conduct of a dominant firm has the potential to foreclose competition. The Court also rejected Tomra's argument that the fine, which represented 8 percent of its turnover, was disproportionately high for a "serious" infringement as compared to Microsoft, which was fined 1.5 percent of its turnover for a "very serious" infringement. According to the Court, the Commission enjoys considerable discretion in calculating the level of the fine and "cannot be compelled to set fines which display perfect coherence with those imposed in other cases." (para 314).

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