Case T – 155/06 Tomra v Commission

What exactly are the rules?

Alan Ryan
Brussels, 21 January 2011

FRESHFIELDS BRUCKHAUS DERINGER

Background

- Commission Decision March 2006
- Tomra is a manufacturer of “reverse vending machines”
- Only 57th largest company in Norway
- Decision found infringement in 5 Countries (Austria, Germany, Netherlands, Norway and Sweden) from 49 agreements categorised as either
  - formally exclusive
  - rebate agreements
  - “quantity commitments” de facto exclusive
- Decision is ambiguous but arguably main thrust of decision is that it is not based on a per se, legalistic approach but did try to do some economics
- Economic analyses were:
  - comparison of “tied” market share to Tomra’s market share
  - for the rebate agreements, graph illustrating the alleged suction effects
  - review of alleged effects, including impact on Tomra’s market share and statement Tomra’s prices went up

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General Court Judgment

Amongst the grounds of appeal were:

- Ambiguity in Commission Decision: per se or not?
- “insufficient coverage” argument: size of contestable market
- Mathematical errors in graph: no suction effect- prices generally never negative even for one unit
- Effects analysis wrong: no relationship between tied market share and Tomra market share and Tomra’s prices did not go up

General Court Judgment

The legal test: per se or not?

- Para215: "*It may be concluded from that line of cases, as the applicants indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article 82 EC, it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so*"
- Para 216: "*In the first place, consideration must be given, in this instance, to whether the Commission, in the contested decision, did not pay due account to the context in which the agreements concerned operated and, in the second place, to whether it provided an adequate statement of reasons for its conclusion concerning whether the agreements were capable of excluding competition*"
- ie implies that per se is not enough and need to examine "circumstances" and "context." But the judgement does not specify what an analysis of "circumstances" and "context" must include
- No further guidance apart from endorsing the Commission's approach in the Tomra Decision

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General Court Judgment

Size of contestable market

- Contestable share of each relevant market was on average 61%
- Decision does not analyse whether this is enough to sustain one or more competitors (as Commission did in *Intel*)
- No calculation of minimum viable scale
- No test or criteria set out for analysing capability to foreclose empirically
- Para 239: "*In the present case, the Commission, in the contested decision, found that, in the countries and during the years in respect of which the finding of infringement was made, the part of demand foreclosed was 'substantial' or 'not insubstantial' and that, particularly during the 'key years' of growth on each of the relevant markets, it represented a very significant proportion' (see recital 392 to the contested decision). The contested decision did not, however, establish a precise threshold beyond which the applicants' practices would be capable of excluding competitors*"
- Para 240: "*The Commission, rightly, held that by foreclosing a significant part of the market, as in the present case, the dominant undertaking restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole*"

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General Court Judgment

- Para 241: “*In fact, the foreclosure by a dominant undertaking of 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. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand*“
- Para 242: “*In that connection, only an analysis of the circumstances of the case, such as the analysis carried out by the Commission in the contested decision, may make it possible to establish whether the practices of an undertaking in a dominant position are capable of excluding competition. It would, however, be artificial to establish without prior analysis the portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors*”
- Judgement converts Decision from one on market foreclosure to customer foreclosure

Art 102 Enforcement Priorities

- What relevance para 36: *"If competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition, unless the switching of suppliers is rendered difficult due to the duration of the exclusive purchasing obligation."*
- No assessment in Decision of contestability of customer
- Para 241 of GC judgment states customer foreclosure is an abuse.
- So notwithstanding Commission communication and GC endorsement that it is not a per se legal standard, will all cases of exclusive contracts still lead to a finding of abuse because of para 241?
- What scope, let alone requirement, for quantitative analysis?

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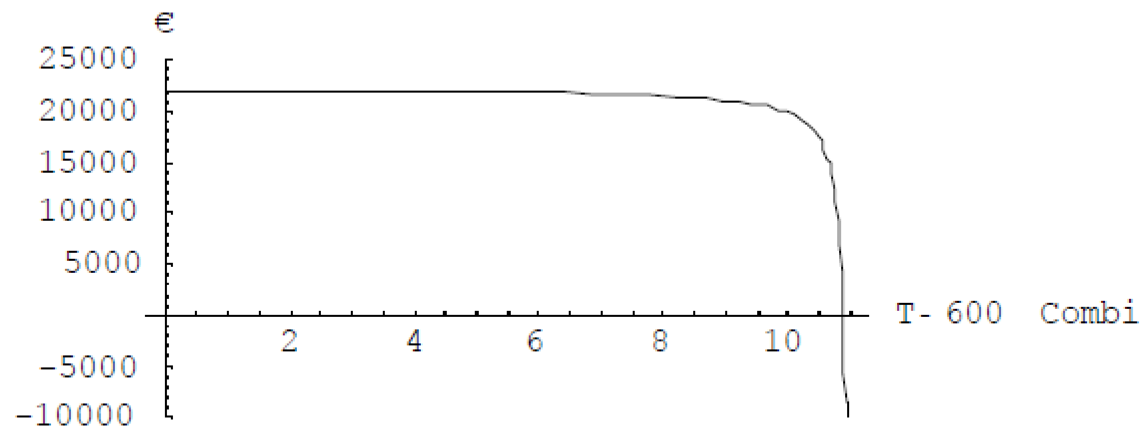
General Court Judgment

Graphs showing suction effect

Figure 23: The effect of Tomra's rebate scheme on the price a competitor would have to offer to make the customer switch from Tomra (Austria)



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General Court Judgment

- Graphs are mathematically wrong;
- Para 258: “*It must be stated, first of all, that this complaint is based on an incorrect premise. Contrary to the applicants’ contention, the fact that the retroactive rebate schemes oblige competitors to ask negative prices from the applicants’ customers benefiting from rebates cannot be regarded as one of the fundamental bases of the contested decision in showing that retroactive rebate schemes are capable of having anti-competitive effects*“
- Para 260: “*In the first place, the contested decision finds that the incentive to obtain supplies exclusively or almost exclusively from the applicants was particularly strong when thresholds, such as those applied by the applicants, were combined with a system whereby the achievement of the bonus threshold or, as the case may be, a more advantageous threshold benefited all the purchases made by the customer during the reference period and not exclusively the purchasing volume exceeding the threshold concerned (see recitals 132, 297 and 316 to the contested decision)*”

General Court Judgment

- Para 261: "*In the second place, the Commission points out in the contested decision that the rebate schemes were individual to each customer and that the thresholds were established on the basis of the customer's estimated requirements and/or past purchasing volumes*"
- Para 267 : "*Retroactive rebate scheme ensure that , from the point of view of the customer, the effective price for the last units is very low because of the 'suction effect'*" [But no elaboration on what it takes to be "very low"]
- Para 268: "*In view of the foregoing, the fact that some diagrams contain errors cannot, on its own, undermine the conclusions relating to the anti-competitive nature of the rebate schemes operated by the applicants"* [BUT: most of the graphs shown had fundamental mathematical errors]

Article 102 Enforcement Priorities

- Contrast para 40 of Commission communication: *"… what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit but the foreclosing effect of the rebate system…"*
- Para 41: *"… the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand (the relevant range) away from the dominant undertaking."*
- Para 42: *"… it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the "contestable share" or "contestable portion")…"*

General Court Judgment

Effect of Tomra’s practices

- Decision Para 239: “*When the proportion of the total demand on the Austrian market covered by Tomra’s exclusionary agreements decreased, the competitors also managed to acquire higher market share. In 2000 Bevesys **[confidential]**, whereas in 2001 (when the tied market share went down to 11%), Bevesys captured **[confidential]** % of the market demand, increasing it to **[confidential]** % the following year (when the tied market share fell to 0%). The same development was experienced by Prokent: from selling **[confidential]** RVM in 2000, it managed to sell **[confidential]** each year in 2001 and 2002.534 Figure 26 demonstrates how the market share of Tomra’s competitors developed following the change in the size of the non-contestable share of the total unit sales each year*“

General Court Judgment

Effect of Tomra's practices

- Decision Para 285*:"The Court in Michelin II established that "[t]he 'effect' referred to in the caselaw cited in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect".629 It has abundantly been shown in this decision that Tomra's practices tended to restrict competition, that is to say, were clearly capable of having that effect. In addition, however, the Commission has investigated the likely restrictive effects of the practices, which is discussed in section IV.2."*
- Applicants argued that the factual claims were inaccurate. No statistical relationship between tied share and Tomra's share and prices did not go up

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General Court Judgment

Effect of Tomra's practices

- GC Judgment: Para 288: "*It is thus clear that the Commission did not attempt to base its finding of an infringement of Article 82 EC on that consideration of the actual effects of the applicants' practices on each of the national markets examined but that it merely complemented its finding of infringement with a brief examination of the likely effects of those practices*"
- Para 289 : "*It must also be stated that, for the purposes of establishing an infringement of Article 82 EC, it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (Michelin II, paragraph 239, and British Airways v Commission, paragraph 293)*"

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