Summary of Commission Decision of 29 March 2006
relating to a proceeding under Article 82 of the Treaty establishing the European Community and Article 54 of the EEA Agreement against Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikkystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH
(Case COMP/E-1/38.113 — Prokent/Tomra)
(Only the English version is authentic)
(Text with EEA relevance)
(2008/C 219/12)

1. On 29 March 2006, the Commission adopted a decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement. In accordance with the provisions of Article 30 of Regulation (EC) No 1/2003, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission’s working languages at DG COMP website at:
http://europa.eu.int/comm/competition/index_en.html

1. SUMMARY OF THE INFRINGEMENT

1.1. Introduction

2. The Decision was addressed to Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikkystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH (hereafter ‘Tomra group’). Tomra group is active in the area of collecting used beverage containers. Its main activity within the EEA consists of the supply of so-called reverse vending machines (RVMs) that are used for the collection of empty drink containers. Tomra’s worldwide turnover was approximately EUR 273 million in 1999, EUR 342 million in 2000, EUR 368 million in 2001 and EUR 336 million in 2002.

3. Until its bankruptcy, Prokent AG (‘Prokent’), the complainant, was based in Ilmenau, Germany. Like Tomra, it was a supplier of reverse vending machines and related products and services. It achieved a turnover of approximately EUR 2.3 million in 2000 and of approximately EUR 4.2 million in 2001. Prokent sold its products predominantly in Germany, but tried to enter other national markets as well. Following the bankruptcy of Prokent and subsequent acquisition of its assets by Wincor Nixdorf Technologies GmbH, based in Paderborn, Germany, in September 2003, the latter has carried on the former business of Prokent.

1.2. The proceedings

4. On 26 March 2001, the Commission received a complaint from Prokent, asking the Commission to investigate whether Tomra had abused its dominant position by preventing Prokent’s access to the market. The inspections were carried out by the Commission on 26 and 27 September 2001. Following a number of requests for information, on 1 September 2004, the Commission adopted a Statement of Objections against Tomra Systems ASA, Tomra Europe AS and Tomra group’s subsidiaries in six EEA-Contracting Parties. Tomra group responded to the Statement of Objections on 22 November 2004. The Oral Hearing took place on 7 December 2004.

1.3. Article 82 of the Treaty and Article 54 of the EEA Agreement

1.3.1. Dominance

5. Tomra and its competitors supply so-called reverse vending machines (RVMs) and related products, in particular backroom equipment (1). They also provide services in relation to the products they sell such as maintenance and repair services. RVMs identify the incoming container according to particular parameters such as shape and/or bar code and calculate the deposit that is to be reimbursed to the customer.

6. Tomra began supplying RVMs in 1972 and has maintained the market leader ever since. Whereas all other RVM suppliers, at the time when the investigation took place, were very small companies with a small number of employees and were active only in one country or a small number of EEA Contracting Parties. RVMs are usually installed in the retail outlets like supermarkets, therefore the RVM customers are usually retail groups, the number of which has shrunk recently due to the consolidation process on the market.

1.3.1.1. Relevant product market

7. Although automated and manual handling of containers may be functionally substitutable, they are not interchangeable from the perspective of an actual or potential purchaser of Tomra’s products, whose needs are not satisfied by manual handling. Customers prefer automated RVM solutions to manual handling for reasons of labour

(1) A backroom space in which the drink containers are further handled or processed, which may include conveyor systems for crates and individual containers, stacking, sorting, compacting, accumulation units etc.
costs and customer service mainly. Therefore, contrary to what is argued by Tomra, manual handling is not part of the same product market.

8. Considering that the RVMs that are designed for use in canteens or kiosks are distinct from RVMs designed for retail outlets, and since the relevant market players, that is the suppliers and customers of the respective products, are different, RVMs that are designed for use in canteens or kiosks cannot be part of the same product market as RVMs designed for retail outlets.

9. When looking at the product characteristics, the intended use of the machines and their price, it appears to be appropriate not to consider low-end RVMs as substitutable with other RVMs demanded by food retailers. There are reasons to consider that a separate market for high-end RVMs and systems exists, and the Commission considers that this would be the preferable market definition. However, the question can be left open whether high-end RVMs constitute a separate market or a part of an overall market for RVMs including low-end machines. The competitive assessment is the same whether there is one overall market for RVMs or a separate market for high-end machines.

10. The competitive assessment in the Decision is, therefore, based on the market for high-end reverse vending machines or systems, including, in particular, all RVMs that can be installed through a wall and can be connected to backroom equipment, and also on an overall market including high-end and low-end machines. The wider market definition is taken as a working basis as it yields more favourable figures, to Tomra’s advantage.

1.3.1.2. The relevant geographic market

11. The types and the volumes of drink containers on which there is a deposit (1) in a given EEA Contracting Party determine the potential for reverse vending solutions and the models of RVMs that are marketed in the country in question. Despite examples of cross border consolidation and cooperation in the food retail sector, customers and their procurement process were predominantly organised at national level. Moreover, between 1997 and 2002 RVM suppliers other than Tomra were active only in one or in a small number of EEA Contracting Parties. All these factors indicate that the conditions of competition were not harmonious across the EEA in the period under consideration and that the relevant geographical markets were national in scope.

1.3.1.3. Dominant position

12. Since it entered the market Tomra has been the market leader enjoying very high market shares. According to its annual reports and internal documents, of which at least the Annual Reports are said to relate to high-end RVMs, Tomra’s market share continuously exceeded 70 % in Europe in the years before 1997. Tomra’s market share have exceeded 95 % in Europe since 1997. In any relevant markets Tomra’s market share was a multiple of the market shares of its competitors. Tomra’s rivals, including those who had the potential to become strong competitors, were all small or very small companies, with a very low turnover and very few employees. Tomra’s ability and determination to acquire its most serious competitors and/or competitors with potential to become such in the future, further reduced the chances for the development of credible competition. Moreover, there was no substantial countervailing buyer power which would have been able to challenge Tomra’s dominance in any of the markets concerned. Tomra, therefore, is a dominant undertaking in the common market and in the territory of the EEA as well as in substantial parts of the common market and the territory of the EEA, which means that it is a dominant undertaking in the sense of Article 82 of the Treaty and Article 54 of the EEA Agreement.

1.3.2. Tomra’s practices

1.3.2.1. Tomra’s strategy

13. Tomra’s strategy was based on a policy that sought to preserve its dominance and market share through means such as: (i) preventing market entry; (ii) keeping competitors small by limiting their growth possibilities, and (iii) finally weakening and eliminating competitors, by way of acquisition or otherwise, especially those competitors that were deemed to have the potential to become more serious challengers. To achieve this objective Tomra employed various anti-competitive practices, including exclusivity and preferred supplier agreements, as well as agreements containing individualised quantity commitments or individualised retroactive rebate schemes. The latter types of agreements or conditions usually relate to quantities representing the entire requirements of the customer or a large proportion thereof within a given reference period. They are often referred to as ‘high-volume block orders’. Tomra resorted to such practices, in particular, in anticipation of expected market entry, whether due to the planned introduction of new legislation introducing a deposit system or otherwise, or as a reaction to the implementation of such legislation, being aware that competitors needed to achieve certain sales volumes in order to become profitable. Tomra’s overall strategy is not only confirmed by the different practices employed by the group, but was also discussed extensively within the group on various occasions, be it at meetings and conferences or in correspondence, for instance, e-mail.

(1) Low-end are the stand-alone machines that accumulate the containers inside, whereas the high-end RVMs are connected to a backroom which storage capacity is much higher compared to that of the low-end machine.

(2) A deposit system is established by a state legislation under which a mandatory deposit on a drink container is charged for the purchase of drinks. The deposit amount is returned to the buyer when the empty container is brought back to a specific collection point, RVMs amongst others.
14. Tomra was focused on preventing market entry, considering and offering cooperation with much smaller competitors, that often had just entered the market, and/or driving them from the market, and giving priority to long-term preferred supplier agreements and high volume block orders. The latter is not a strategy confined to the normal competitive process and the selection resulting from it. Rather, it is designed to interfere with this process and prevent it from eroding the dominant position of the undertaking.

1.3.2.2. Implementation

15. Tomra’s policy of blocking market access for competitors was pursued in particular by:

— concluding exclusivity agreements with a number of its customers for the supply of RVM solutions in five EEA countries (Austria, Germany, the Netherlands, Norway and Sweden) in the period of 1998-2002,

— concluding agreements with its customers in the period of 1998-2002 imposing upon them an individualised quantity target, that corresponded to the customer’s total or almost total demand for RVM solutions in a specific period of time. The customers were granted discounts subject to their commitment to purchase the agreed target quantity,

— concluding agreements with the retail companies in the period of 1998-2002 in five EEA countries establishing individualised retroactive rebate schemes, thresholds of which corresponded to customers’ total or almost total demand.

16. Tomra through its subsidiaries has implemented the above identified practices in five national markets (Austria, Germany, the Netherlands, Norway and Sweden).

2. ASSESSMENT OF THE PRACTICES UNDER ARTICLE 82 OF THE EC TREATY AND ARTICLE 54 OF THE EEA AGREEMENT

17. Article 82 of the Treaty and Article 54 of the EEA Agreement prohibit abuses of the dominant position that an undertaking holds on a relevant market. The Court of Justice has held that an undertaking that is in a dominant position and ties purchasers, even if it does so at their request, by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking, abuses its dominant position within the meaning of Article 82 of the Treaty, whether the obligation in question is stipulated without further qualification or is undertaken in consideration of the grant of a rebate. This applies to cases where the dominant company is granted full exclusivity, but also where the customer undertakes to purchase a given percentage of its requirements from the dominant company (4). The same is true in cases where purchasing targets for a given period are expressed in absolute figures, where these quantities represent all or a large portion of the customer’s requirements or its capacity for absorption in the contract period in question (5).

18. According to the case law the same applies if the said undertaking, without tying purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts or rebates conditional on the customer’s obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position (6).

19. Although the agreements, arrangements and conditions found in this case contain different features such as explicit or de facto exclusivity clauses, undertakings or promises to purchase quantities corresponding to a significant proportion of the customers’ requirements or retroactive rebate schemes related to the customers’ requirements, or a combination of them, they all have to be seen in the context of Tomra’s general policy directed at preventing market entry, market access and growth opportunities for existing and potential competitors and eventually driving them out of the market so as to create a situation of virtual monopoly.

20. According to the case law of the Court of Justice, abuse in terms of Article 82 of the Treaty is an ‘objective concept’, which refers to the conduct of a dominant company which through recourse to methods different from the ones governing normal competition ‘has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’ (7). The Commission has investigated the likely restrictive effects of the practices.


21. Exclusivity obligations, because they require the customers to purchase all or significant parts of their demand from a dominant supplier, have by their nature a foreclosing capability. Given Tomra’s dominant position on the market and the fact that exclusivity obligations were applied to a not insubstantial part of the total market demand, it was capable of having and in fact had a market distorting foreclosure effect. In this case there are no circumstances that could exceptionally justify exclusivity or similar arrangements. Moreover, Tomra has failed to justify its practices by its cost savings.

22. Discounts granted for individualised quantities that correspond to the entire or almost entire demand, have the same effect as explicit exclusivity clauses, that is to say, they induce the customer to purchase all or almost all its requirements from a dominant supplier. The same applies to fidelity (loyalty) rebates, that is to say, rebates that are conditional on customers purchasing all or most of their requirements from a dominant supplier. It is not decisive for the exclusionary character of agreements or conditions whether the purchase volume commitment is expressed in absolute terms or with reference to a certain percentage thereof. With regard to Tomra’s agreements identified in this decision, the stipulated quantity targets constituted individualised commitments that were different for each customer regardless of its size and purchase volume. Furthermore, they corresponded either to the customer’s entire requirements or to a large proportion of them, or even exceeded them. Moreover, Tomra’s policy to tie customers, in particular key customers, into agreements that aimed at excluding competitors from the market and denying them any chance of growth, is evident from the documents relating to Tomra’s strategy, its negotiations and the offers made by it to its clients. Considering the nature of the RVM solutions market and the special characteristics of the product itself, in particular the transparency and rather foreseeable demand of each customer for machines each individual year, Tomra had the necessary market knowledge for a realistic estimate of each individual customer’s approximate demand.

23. The rebate schemes were individualised for each customer and the thresholds related to the total requirements of the customer or a large proportion thereof. They were established on the basis of estimated customer requirements and/or purchasing volumes achieved in the past, as is evident from the circumstances. The incentive for buying exclusively or almost exclusively from Tomra is particularly strong where thresholds of the kind described in this section are combined with a system whereby the achievement of the bonus or a more advantageous bonus threshold benefits all purchases made by the customer in the reference period and not exclusively the purchasing volume exceeding the respective threshold. Under a retroactive system, a customer who has started buying from Tomra, which is a very likely scenario given Tomra’s strong market position, has a strong incentive to reach the threshold in order to reduce the price of all its purchases from Tomra. This incentive increased the closer the customer came to the threshold in question. The combination of a retroactive rebate system with a threshold or thresholds corresponding to the entire requirements or a large proportion thereof represented a significant incentive for buying all or almost all the equipment needed from Tomra and artificially raised the cost of switching to a different supplier, even for a small number of units. In accordance with the case law of the Court of Justice and the Court of First Instance of the European Communities, the rebate schemes identified have to be qualified as loyalty building and, therefore, as fidelity rebates.

2.1. Effect on trade

24. The products supplied by Tomra and its competitors are made and sold in different EEA Contracting Parties. Tomra, as a dominant company, engaged in exclusionary practices in several Member States and in Norway. Furthermore, the abuses aimed at excluding and/or eliminating competitors who were active in different Member States and EFTA States. The practices in question may, therefore, have had an effect on trade between Member States, as required by Article 82 of the Treaty, and within the EEA territory, as required by Article 54 of the EEA Agreement.

2.2. Repercussions of Tomra practices for competition

25. Although, as stated by the Court in Michelin II and British Airways, to establish an abuse under Article 82 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 (1), the Commission has completed its analysis in this case by considering the likely effects of Tomra’s practices on the RVMs market.

26. A dominant supplier may use rebate schemes and quantity discounts for different reasons, and these practices may lead to different — both positive and negative — effects on the market, depending on their characteristics. The main possible negative effect of the rebates applied by the dominant supplier is the foreclosure of the market for the competitors and potential competitors. The same can be applied with regard to the quantity commitments, aimed at meeting the entire or almost entire demand of a customer. Exclusivity has, by its nature, the capability to foreclose, because it requires the customer to purchase all or almost all its requirements from the dominant supplier. With regard to the assessment of the negative effects created by the rebate schemes and the quantity commitments employed by a dominant supplier, it would be necessary to establish whether they have the capability to hinder the degree of competition still existing on the market or the growth of that competition.

(1) Michelin II, paragraph 239, British Airways, paragraph 250.
27. The main possible positive effect is demand expansion or efficiencies. Given that demand for RVMs is inelastic and that other possible efficiencies do not apply, it is difficult to conceive of any efficiency enhancing arguments that could be advanced in favour of Tomra.

28. Throughout the reference period of the Decision, from 1998 till 2002, Tomra’s market share in each of the five national markets considered remained comparatively stable. At the same time, the position of its rivals, remained rather weak and unstable. One successful competitor, the complainant, exited the market in 2003 after managing to acquire an 18 % market share on the German market in 2001. Other rival companies that demonstrated the potential and ability to acquire bigger market shares were eliminated by Tomra by acquisition, such as Halton and Eleiko. In addition to this, Tomra’s exclusionary strategy, as it was implemented throughout 1998-2002, had an effect that is demonstrated by the changes in the tied market (%) share and the sales of market players. Moreover, some customers started purchasing more of the competing products after the expiry of their exclusionary agreements with Tomra. In addition to the absence of cost efficiencies justifying Tomra’s practices, there was no benefit to consumers either. The price of RVMs offered by Tomra did not fall after the sales volume had increased. On the contrary, prices for Tomra’s machines stagnated or increased during the period under investigation.

3. FINES

3.1. Gravity

29. Tomra’s practices consisted of a system of exclusivity, quantity commitments and loyalty-inducing discounts. This system aimed at eliminating or at the very least preventing the entry and/or the expansion of its competitors. Tomra purposefully employed the practices in question as part of its exclusionary policy. In addition, the assessment of the gravity of Tomra’s abuse must take account of its geographic scope, encompassing five EEA Contracting Parties: Austria, Germany, the Netherlands, Norway and Sweden. It is clear that Tomra’s practices were in fact implemented and were capable to deter new entry and to prevent expansion of the few, if any, existing competitors.

30. In the overall assessment of gravity of the practices addressed in this decision, account is taken of the fact that the infringement did not always cover the entire period in each of the national markets considered, and that within each national market the intensity of the infringement may have varied over time.

31. With regard to the gravity of the infringement, the Commission comes to the conclusion that it was a serious infringement.

3.2. Duration

32. The Commission bases itself on the five-year period running from 1998 to 2002 for the purposes of establishing the appropriate level of fine. As a result, the starting amount of the fine should be increased by 10 % for each full year of the infringement.

3.3. Aggravating and mitigating factors

33. There are no aggravating or mitigating circumstances.

3.4. Amount of the fine

34. For the above reasons, the amount of the fine to be imposed on Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikksystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH, jointly and severally, should be fixed at EUR 24 million.

4. DECISION

35. Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikksystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH have infringed Article 82 of the Treaty and Article 54 of the EEA Agreement in the period 1998-2002 by implementing an exclusionary strategy in the national reverse vending machines markets in Austria, Germany, the Netherlands, Norway and Sweden, involving exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, thus foreclosing competition on the markets.

36. For the infringement referred to above, a fine of EUR 24 million is imposed on Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikksystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH, jointly and severally.

37. Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikksystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH shall immediately bring to an end the infringements referred to in Article 1 insofar they have not already done so.

38. They shall refrain from repeating any act or conduct referred to in Article 1 and from any act or conduct having the same or equivalent object or effect.

(1) In this context, what is meant by the term ‘tied market’ is the quantity of units purchased by the customers from Tomra under the anticompetitive agreements discussed in the Decision. The contestable part of the volume was not covered by the exclusionary agreements, and therefore was contestable to Tomra’s competitors.