Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 April 2012 *

((Appeal — Competition — Dominant position — Abuse — Market for machines for the collection of used beverage containers — Decision finding an infringement of Article 82 EC and Article 54 of the EEA Agreement — Exclusivity agreements, quantity commitments and loyalty rebates))

In Case C-549/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 18 November 2010,

Tomra Systems ASA, established in Asker (Norway),

Tomra Europe AS, established in Asker,

Tomra Systems GmbH, established in Hilden (Germany),

Tomra Systems BV, established in Apeldoorn (Netherlands),

Tomra Leergutsysteme GmbH, established in Vienna (Austria),

Tomra Systems AB, established in Sollentuna (Sweden),

Tomra Butikksystemer AS, established in Asker,

represented by O.W. Brouwer, advocaat, J. Midthjell, advokat, and A.J. Ryan, solicitor,

applicants at first instance,

the other party to the proceedings being:

European Commission, represented by E. Gippini Fournier and N. Khan, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber)

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazák,

* Language of the case: English.

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 November 2011,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2012,

gives the following

Judgment

1 By their appeal the appellants ('Tomra') seek the setting aside of the judgment of the General Court of the European Union of 9 September 2010 in Case T-155/06 *Tomra Systems and Others* v *Commission* [2010] ECR II-4361 ('the judgment under appeal'), whereby the General Court dismissed their action for the annulment of Commission Decision C (2006) 734 final of 29 March 2006 relating to proceedings under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/E.-1/38 — 113/Prokent-Tomra) ('the contested decision').

Background to the dispute

2 In the judgment under appeal the General Court summarised the factual background to the dispute before it as follows:

'1. Tomra Systems ASA is the parent company of the Tomra group. Tomra Europe AS coordinates the business of the European distribution subsidiaries within the group. The distribution subsidiaries concerned by the present case are Tomra Systems GmbH in Germany, Tomra Systems BV in the Netherlands, Tomra Leergutsysteme GmbH in Austria, Tomra Systems AB in Sweden and Tomra Butikksystemer AS in Norway …. The Tomra group produces automatic recovery machines for empty beverage containers (reverse vending machines ("RVMs")) — which are machines for the collection of used beverage containers which identify the container by reference to certain parameters, such as shape and/or bar codes, and calculate the amount of the deposit to be reimbursed to the customer. ...

2. On 26 March 2001 the Commission … received a complaint from Prokent AG ("Prokent") a Germany company also active in the empty beverage-container collection sector and the supply of related products and services. Prokent requested the Commission to investigate whether [Tomra] had abused a dominant position by preventing it from entering the market.

3. On 26 and 27 September 2001 the Commission inspected the premises of Tomra Systems GmbH, in Germany, and of Tomra Systems BV, in the Netherlands. At the Commission's request, the European Free Trade Association ("EFTA") Surveillance Authority inspected the premises of Tomra Systems ASA and its subsidiaries in Norway. ...

4. On 23 December 2002, in a letter to the Commission, [Tomra] stated that they would put an end to the exclusivity agreements and would no longer apply the loyalty rebates.

5. On 30 March 2004 [Tomra] presented a competition compliance programme for the Tomra group, which was to apply from 1 April 2004.

6. On 1 September 2004 the Commission sent a statement of objections to Tomra Systems ASA, Tomra Europe AS and subsidiaries of the Tomra group in six States forming part of the European Economic Area (EEA), to which [Tomra] responded on 22 November 2004. ...

...

7. On 29 March 2006 the Commission adopted [the contested decision]. In that decision it found that [Tomra] had infringed Article 82 EC and Article 54 of the EEA Agreement [the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3)] in the period from 1998 to 2002 by implementing an exclusionary strategy in the national RVM markets in Germany, the Netherlands, Austria, Sweden and Norway, involving exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, thus foreclosing competition on the markets.

I — *Relevant market*

8. With regard to the relevant product market, the contested decision states that for the purposes of its assessment the Commission started from the premiss that there was a specific market for "high-end" machines or other systems, including in particular all RVMs that can be installed through a wall and connected to backroom equipment, and an overall market encompassing both high-end and low-end equipment. The Commission decided, however, to use the wider market definition as a working basis, since it yielded more favourable figures to [Tomra's] advantage.

9. With regard to the relevant geographic market, the Commission found in the contested decision that the conditions of competition had not been harmonious across the EEA in the period under consideration and that the relevant geographic markets were national in scope.

II — *Dominant position*

10. In the contested decision, the Commission, after finding, inter alia, that [Tomra's] market shares in Europe had continuously exceeded 70% in the years before 1997, that after 1997 they exceeded 95% and that, on all the relevant markets, [Tomra's] market shares were many times larger than those of their competitors, concluded that the Tomra group was a dominant undertaking for the purposes of Article 82 EC and Article 54 of the EEA Agreement.

III — *Abuse*

11. The contested decision states that [Tomra] devised a strategy having an anti-competitive object or effect, both in their practices and in internal discussions within the group. The Commission asserts in the decision that [Tomra] sought to preserve their dominance and market share through means such as preventing new operators gaining market entry, keeping competitors small by limiting their growth possibilities and weakening and eliminating competitors by way of acquisition or other methods. That strategy was, according to the contested decision, implemented through the conclusion, between 1998 and 2002, of 49 agreements between [Tomra] and a certain number of supermarket chains, which took the form of exclusivity agreements, agreements containing individualised quantity commitments and agreements establishing individualised retroactive rebate schemes.

12. It is also apparent from the contested decision that, although the agreements, clauses and conditions contain a number of different features, such as explicit or de facto exclusivity clauses, undertakings or promises, on the part of the customers, to purchase quantities corresponding to a significant proportion of their requirements or retroactive rebate schemes related to the customers' requirements or a combination of those features, they must all, in the Commission's view, 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, ultimately, at driving them out of the market so as to create a situation of virtual monopoly.

13. First of all, according to the contested decision, exclusivity clauses, because they require customers to purchase all or a significant part of their requirements from a dominant supplier, are, by definition, liable to have a foreclosure effect. In the present case, as [Tomra] were dominant on the market and as the exclusivity clauses were applied to what the Commission considered could be regarded as a substantial part of the total demand, the Commission concluded that the exclusivity agreements entered into by [Tomra] were capable of having, and in fact had, a market-distorting foreclosure effect. It was stated in the contested decision that, in this instance, there were no circumstances that could exceptionally justify exclusivity or similar arrangements and that [Tomra] had also failed to justify their practices by cost savings.

14. The contested decision then adds that discounts granted for individualised quantities corresponding to the entire or almost entire demand have the same effect as explicit exclusivity clauses, in that they induce the customer to purchase all or virtually all its requirements from a dominant undertaking. The same is true of loyalty rebates, in other words, rebates that are conditional on customers purchasing all or most of their requirements from a dominant supplier. In the Commission's view, it is not decisive for the exclusionary nature of the agreements or conditions concerned whether the purchase-volume commitment is expressed in absolute terms or as a percentage. So far as [Tomra's] agreements were concerned, the contested decision states that the stipulated quantity targets constituted individualised commitments which were different for each customer, regardless of its size and purchasing volume, and which corresponded to the customer's entire requirements or to a large proportion of them, or even exceeded them. The contested decision adds that [Tomra's] policy of tying their customers, in particular their 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, their negotiations and the offers made by them to their customers. Given the nature of the RVM market and the characteristics of the product itself, in particular the transparency and relatively foreseeable demand of each customer for each year, the Commission found that [Tomra] had the market knowledge necessary to make a realistic estimate of each customer's approximate demand.

15. Furthermore, concerning the rebates, the Commission noted in the contested decision that the rebate schemes were individual to each customer and the thresholds were linked to the total requirements of each customer or a large part thereof. They were established on the basis of the customer's estimated requirements and/or purchasing volumes achieved in the past. The incentive for buying exclusively or almost exclusively from [Tomra] was, according to the contested decision, particularly strong where thresholds such as those applied by [Tomra] were combined with a system whereby the achievement of the bonus or a more advantageous bonus threshold benefited all purchases made by the customer during the reference period and not exclusively the purchasing volume exceeding the relevant threshold. Under a retroactive scheme, a customer which has started purchasing from [Tomra] — a very likely scenario given [Tomra's] strong market position — thus has a strong incentive to reach the required threshold in order to reduce the price of all its purchases from [Tomra]. That incentive increased, according to the contested decision, the closer the customer came to the threshold in question. For the Commission, the combination of a retroactive rebate scheme with a threshold or thresholds corresponding to the customer's entire requirements or a large proportion thereof represented a strong incentive to buy 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. The Commission therefore concluded that, in accordance with case-law, the rebate schemes at issue had to be qualified as a means of loyalty building and thus as loyalty rebates.

16. Finally, the contested decision points out that, although … for the purpose 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, the Commission completed its analysis by considering the likely effects of [Tomra's] practices on the RVM market. In that regard, the contested decision states

that during the entire period under consideration, namely 1998 to 2002, [Tomra's] share on each of the five national markets under consideration remained relatively stable. Over the same period, their competitors' position remained rather weak and unstable. One successful competitor, the complainant, left the market in 2003 after managing to acquire an 18% share of the German market in 2001. Other competitors that had demonstrated the potential and ability to acquire larger market shares, such as Halton and Eleiko, were eliminated because they were acquired by [Tomra]. In addition, in the Commission's view, [Tomra's] exclusionary strategy, as it was operated by them throughout the period from 1998 to 2002, had an effect that is demonstrated by changes in the tied market share and the sales of market players. Moreover, according to the contested decision, some customers started purchasing more of the competing products after the expiry of their exclusionary agreements with [Tomra]. In addition to there being no cost efficiencies such as to justify [Tomra's] practices, there was in the present case no benefit to consumers either. The contested decision states that the price of [Tomra's] RVMs did not fall after the sales volume had increased and that, on the contrary, prices stagnated or even rose during the period under investigation.

IV — *Fine*

17. The contested decision states that the assessment of the gravity of [Tomra's] infringement must take account of the fact that they had deliberately employed the practices in question in the context of their exclusionary strategy and also of the geographic scope of the infringement, namely the fact that it encompassed five EEA States: Germany, the Netherlands, Austria, Sweden and Norway. Conversely, account must also be taken, in the Commission's view, of the fact that the infringement did not cover the whole of the reference period on all the national markets under consideration and that within each of those markets its intensity could well have varied over time.

18. In particular, the contested decision specifies, at recital 394, that the infringement concerns the following territories and periods:

— Germany: 1998 to 2002

— Netherlands: 1998 to 2002

— Austria: 1999 to 2001

— Sweden: 1999 to 2002

— Norway: 1998 to 2001

19. The Commission concluded that it was a serious infringement and set the basic amount of the fine at EUR 16 million, taking as its basis the five-year period running from 1998 to 2002. The starting amount of the fine was increased by 10% for each full year of the infringement. Finally, the contested decision states that there were no aggravating or mitigating circumstances.

20. The enacting terms of the contested decision read as follows:

"*Article 1*

[Tomra] have infringed Article 82 [EC] and Article 54 of the EEA Agreement in the period 1998-2002 by implementing an exclusionary strategy in the national [RVM] markets in [Germany, the Netherlands, Austria, Sweden and Norway], involving exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, thus foreclosing competition on the markets.

Article 2

For the infringement referred to in Article 1, a fine of EUR 24 million is imposed on [Tomra], jointly and severally."'

The procedure before the General Court and the judgment under appeal

3 In their action for annulment of the contested decision brought before the General Court, Tomra relied on six pleas in law.

4 In the judgment under appeal the General Court rejected all those pleas in law.

Forms of order sought

5 The appellants claim that the Court should:

— set aside the judgment under appeal,

— give final judgment and annul the contested decision or in any event reduce the fine imposed, or, in the alternative, if the Court of Justice does not itself decide the case, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice, and,

— order the Commission to pay the costs of the proceedings before the General Court and before the Court of Justice.

6 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

7 In support of their appeal, the appellants raise five grounds of appeal, claiming, first, an error of law in the review undertaken by the General Court of the Commission's finding of an anti-competitive intent to foreclose competition on the market; second, an error of law and failure to provide adequate reasoning with regard to the portion of total demand which the agreements had to cover in order to constitute abuse; third, a procedural irregularity and error of law in the assessment of retroactive rebates; fourth, an error of law and failure to provide adequate reasoning in the analysis of whether the agreements in which the appellants are named as 'preferred, main or primary supplier' could be characterised as 'exclusive'; fifth, an error of law in the assessment of the fine, in the light of the principle of equal treatment.

The first ground of appeal: error of law in the review undertaken by the General Court of the Commission's finding of an anti-competitive intent to foreclose competition on the market (paragraphs 33 to 41 of the judgment under appeal)

Arguments of the parties

8 Tomra consider that, when assessing whether the Commission had proved anti-competitive intent, the General Court erred in law by refusing to take account of evidence showing that Tomra were intent on competing on the merits. Such a failure is contrary to the General Court's obligation to undertake a comprehensive judicial review of the conditions for the application of Article 102 TFEU.

9 Tomra maintain that the Commission erroneously relied on Tomra's internal correspondence in order to establish anti-competitive intent on their part, while disregarding evidence capable of showing that Tomra were intent on competing on the merits.

10 Tomra state that it is apparent from recitals 97 to 105 of the contested decision that anti-competitive intent was a significant factor in the finding that there was an anti-competitive strategy and that that reasoning had a crucial role in the finding of the infringement.

11 The Commission contends that this ground of appeal is unfounded. The concept of 'abuse' within the meaning of Article 102 TFEU is an objective concept, and consequently there is no requirement that there be any anti-competitive intent.

12 In the Commission's opinion, such an intention is nonetheless not without relevance to the general assessment of the conduct of a dominant undertaking. Evidence of such an intention might possibly be relevant to the calculation of the fine, particularly as regards whether the infringement was committed intentionally or negligently.

13 Further, the Commission disputes the appellants' assertion that the assessment of subjective factors had a significant bearing on the finding of an infringement of Article 102 TFEU.

14 The Commission states, in that regard, that the appeal fails to identify any evidence that the Tomra group intended to compete on the merits which was not taken into account by the General Court, and that the appeal does not explain how such evidence could call into question the analysis of the exclusionary practices which were implemented.

15 The Commission adds that Tomra failed to demonstrate that their practices had any commercial justification. The General Court was therefore correct to make a finding that the Tomra group had a strategy which was anti-competitive.

Findings of the Court

16 By their first ground of appeal, the appellants seek, in essence, to establish that the General Court was wrong to endorse an alleged finding by the Commission of anti-competitive intent on the part of the Tomra group, in particular by failing to take into account internal documents proving that the Tomra group was intent on competing on the merits.

17 In order to assess whether this ground of appeal is well founded, it must be recalled that the concept of abuse of a dominant position prohibited by Article 102 TFEU is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of

the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see Case C-52/09 *TeliaSonera* [2011] ECR I-527, paragraph 27 and case-law cited).

18 None the less, the Commission, as part of its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, is obliged to consider all of the relevant facts surrounding that conduct (see, to that effect, C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 67).

19 It must be observed in that regard that where the Commission undertakes an assessment of the conduct of an undertaking in a dominant position, that assessment being an essential prerequisite of a finding that there is an abuse of such a position, the Commission is necessarily required to assess the business strategy pursued by that undertaking. For that purpose, it is clearly legitimate for the Commission to refer to subjective factors, namely the motives underlying the business strategy in question.

20 Accordingly, the existence of any anti-competitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused.

21 However, the Commission is under no obligation to establish the existence of such intent on the part of the dominant undertaking in order to render Article 82 EC applicable.

22 In that regard, the General Court correctly stated, in paragraph 36 of the judgment under appeal, that it was perfectly legitimate for the contested decision to concentrate primarily on Tomra's anti-competitive conduct, since it was precisely that conduct which it was the Commission's task to establish. The existence of an intention to compete on the merits, even if it were established, could not prove the absence of abuse.

23 That being the case, in paragraph 38 of the judgment under appeal, the General Court also stated, and thereby did not err in law, as is clear from paragraph 20 of this judgment, that the concept of abuse is objective.

24 The General Court therefore concluded, in paragraph 39 of the judgment under appeal, that the Commission had, in recital 97 et seq. of the contested decision, established that the practices of Tomra, considered in their context and in conjunction with a number of other factors, including Tomra's internal documents, were liable to foreclose competition. The General Court also correctly stated, in the same paragraph of the judgment under appeal, that the Commission had by no means relied exclusively on the intention or policy of Tomra in order to substantiate its finding of an infringement of competition law. It is clear from recital 284 of the contested decision, in the part of that decision setting out the Commission's assessment of the practices at issue, and from the specific examination of those practices carried out from recital 286 onwards, that the Commission emphasised the objective character of the infringement of Article 102 TFEU which it found to exist.

25 As regards the argument that the General Court misinterpreted a number of items of correspondence between persons within the Tomra group in its reasoning in relation to Tomra's commercial strategy, it must further be observed that, in accordance with settled case-law, it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see Case C-535/06 P *Moser Baer India* v *Council* [2009] ECR I-7051, paragraph 31 and case-law cited).

26 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see *Moser Baer India* v *Council*, paragraph 32 and case-law cited).

27 Further, a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see *Moser Baer India* v *Council*, paragraph 33 and case-law cited).

28 However, no claim has been made by the appellants before this court of any such distortion of the facts.

29 The first ground of appeal must therefore be rejected.

The second ground of appeal: error of law and failure to provide adequate reasoning with regard to the portion of total demand which the agreements had to cover in order to constitute abuse (paragraphs 238 to 246 of the judgment under appeal)

Arguments of the parties

30 Tomra claim that the General Court committed an error of law in and did not adequately state reasons for its rejection of the plea in law to the extent that it held that the agreements at issue covered a sufficient part of total demand so as to be capable of restricting competition.

31 Tomra consider that the reasoning followed by the General Court in that regard was based on expressions such as a 'substantial' part, 'far from being small' or a 'very high' proportion. Consequently, due to the use of such undefined terms, the General Court did not provide an adequate statement of reasons in support of its judgment.

32 Tomra claim that the General Court does not provide any adequate benchmark for determining whether the practices at issue apply to a portion of the market which is sufficient actually to foreclose competition in that market. The only benchmark concerning the capability to foreclose all competition referred to in the judgment under appeal is implied in the General Court's observation that Tomra's competitors should be able to compete for the entire market. The General Court's reasoning that any exclusivity arrangement is automatically capable of foreclosing competition on the market concerned is an error of law.

33 Tomra add that the Commission should have applied the 'minimum viable scale' test or any other appropriate method for the determination of whether the agreements at issue were capable of foreclosing competition on the market in question.

34 The Commission states that there can be no doubt that Tomra's practices covered a very substantial part of the market at issue. Tomra themselves accept that on average, and taking the five years and five markets together, the practices in question tied about 39% of demand.

35 The Commission observes that the effects of the agreements at issue were most visible in the provision of significant incentives to customers of the Tomra group in their choice of supplier.

36 The Commission maintains, lastly, that the use of terms such as 'significant' was amply justified by the relevant facts. The statement of reasons to be provided by the General Court should be appropriate to the act at issue, which it was in this case.

Findings of the Court

37 The second ground of appeal concerns, in essence, the question whether the General Court was well founded in its assessment of the relevant part of the market at issue which had to be covered by the agreements at issue before it could be established that those agreements were capable of foreclosing competition on the market.

38 As regards the level of domination of a specific market by the undertaking concerned necessary to establish the existence of abuse by that undertaking, it is clear from paragraph 79 of *TeliaSonera* that the dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors and its customers.

39 Moreover, it is clear from paragraphs 80 and 81 of *TeliaSonera* that Article 102 TFEU does not envisage any variation in form or degree in the concept of a dominant position. Where an undertaking has an economic strength such as that required by Article 102 TFEU to establish that it holds a dominant position in a particular market, its conduct must be assessed in the light of that provision. None the less, the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.

40 It is true that, as is stated in paragraph 239 of the judgment under appeal, the Commission did not establish a precise threshold beyond which the practices of the Tomra group would be capable of excluding its competitors from the market in question.

41 However, in paragraph 240 of the judgment under appeal, the General Court properly approved the Commission's reasoning that, by foreclosing a significant part of the market, the Tomra group had restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole.

42 In fact, and as stated by the General Court in paragraph 241 of the judgment under appeal, 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.

43 Further, the General Court stated, in paragraph 242 of the judgment under appeal, that 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.

44 The General Court accordingly determined, following that analysis of the circumstances of this case, in paragraph 243 of the judgment under appeal, that a considerable proportion (two fifths) of total demand during the period and in the countries under consideration was foreclosed to competition.

45 That conclusion of the General Court cannot be regarded as containing any error of law.

46 As regards the appellants' argument that the Commission should have applied the 'minimum viable scale' test, suffice it to observe that, first, the General Court was correct to hold that the determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 102 TFEU and, secondly, in the light of the findings made in paragraph 243 of the judgment under appeal, it was, in any event, in the present case, proved to the requisite legal standard that the market had been closed to competition by the practices at issue.

47 Lastly, as regards the appellants' argument that the statement of reasons by the General Court in relation to the total demand which the agreements at issue had to cover before they could be regarded as abusive was inadequate, it must be borne in mind that the duty to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and that the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraph 114 and case-law cited).

48 It follows, however, from all the foregoing, and particularly from the fact, mentioned in paragraph 46 of this judgment, that the determination of a precise threshold of foreclosure of the market was not essential, that the General Court did not fail to comply with its obligation to state reasons in rejecting Tomra's abovementioned arguments.

49 In those circumstances, the second ground of appeal must therefore be rejected in its entirety.

The third ground of appeal: procedural irregularity and error of law in the assessment of retroactive rebates (paragraphs 258 to 272 of the judgment under appeal)

Arguments of the parties

50 Tomra claim that because the General Court distorted the arguments relied on in relation to retroactive rebates the judgment under appeal is vitiated by procedural irregularity. Further, that judgment is vitiated by an error of law, since the Commission had failed to establish that the retroactive rebates led to prices which were lower than costs.

51 Tomra state that the Commission did not examine the relevant costs in order to establish the level below which the prices charged by Tomra entailed exclusionary effects. A comparison of prices and costs was essential in order to assess the capacity of retroactive rebates to restrict competition.

52 The appellants also refer to the Commission communication titled 'Guidance on the Commission's enforcement priorities in applying Article 82 [EC] to abusive exclusionary conduct by dominant undertakings' (OJ 2009 C 45, p. 7, 'the Guidance'), observing that the Guidance specifically provides for such a comparison, when an alleged abuse is the result of prices charged by a dominant undertaking.

53 Tomra add that the General Court, for its part, also failed to investigate whether the prices charged by Tomra were or were not lower than cost prices. In particular, the General Court failed to take account of the argument that in order to establish that the rebates would be capable of having an exclusionary effect the Commission had to demonstrate that the prices were so low that they were lower than cost prices.

54 The Commission considers that the third ground of appeal is inadmissible, given that the argument was not properly raised before the General Court.

55 As regards the substance, the Commission contends that this ground of appeal is ineffective and, in any event, unfounded.

56 The Commission states that, even if the appellants were justified in asserting that the question of 'negative prices' was not a central part of their argument as put forward at first instance — which it is not — the appellants do not dispute, on appeal, the General Court's conclusion that the question of whether competitors were compelled to offer 'negative prices' was not crucial to the conclusion that the retroactive rebates scheme set up by the Tomra group was abusive.

57 The Commission states that the rebates at issue were applied generally to quantities representing the entirety or a large part of the requirements of each customer in a given reference period.

58 The Commission contends that the appellants' belief that the demonstration of the existence of 'negative prices' was a prerequisite to a finding that the loyalty schemes were abusive is based on a misreading of the contested decision.

Findings of the Court

59 It must be stated, at the outset, that the third ground of appeal relates specifically to the alleged absence, in the judgment under appeal, of an examination of arguments advanced by the applicants at first instance, on the need to compare the prices charged by them with their costs.

60 The claim made is that the General Court focussed, in the judgment under appeal, on the examination made by the Commission of the prices charged by the Tomra group, in the context of the rebates applied, and in particular on whether those rebates forced the competitors of the Tomra group to charge 'negative prices' to customers of the Tomra group.

61 Accordingly, the criticism made by the appellants of the General Court is, first, that the judgment under appeal is vitiated by a procedural irregularity, because the General Court failed to examine the arguments based on the relationship between the prices and the costs of the Tomra group, and secondly, that the General Court committed a substantive error of law by not requiring the Commission to take account of the significance of whether the prices charged were or were not lower than their long run average incremental costs in relation to the question of whether the rebates applied by Tomra were abusive.

62 As regards the admissibility of the third ground of appeal, it must first be observed that it is directed to the assessment made by the General Court of the third part of the second and fourth pleas in law raised at first instance, those pleas having been rearranged by the General Court into a single plea in law (see paragraph 198 of the judgment under appeal). That third part concerned the claim that the Commission's assessment of the capability of the retroactive rebates to foreclose competition was based on incorrect and misleading evidence and assumptions.

63 In that regard, the General Court, in paragraphs 247 and 248 of the judgment under appeal, narrated the arguments advanced by Tomra before it as stated in paragraphs 102 to 131 of the application at first instance.

64 It follows from the summary of those arguments that Tomra had claimed, inter alia, that the Commission's case on retroactive rebates was based on the argument that the retroactive rebates allowed the Tomra group to charge 'negative prices' or prices which were 'very low'. However, it is clear from paragraph 105 of the application at first instance that the criticism made by Tomra of the Commission was that it had failed to examine their costs. Indeed, Tomra stated there that the Commission had referred, in recital 165 of the contested decision, to the rebates leading to 'very low prices, possibly even negative prices', but did not examine the costs of the Tomra group, in order to establish the level below which those prices would be exclusionary or predatory.

65 In the light of the foregoing, it is clear that the argument which is the subject-matter of the third ground of appeal was properly presented before the General Court.

66 It follows that that ground of appeal must be declared to be admissible.

67 As regards the substance, it must be observed that, according to the Commission, the failure in the judgment under appeal to examine the arguments on whether the prices charged by the Tomra group were lower than their long-run average incremental costs had no effect on the conclusion reached by the General Court that the Commission's analysis of the abusive nature of the rebates applied by Tomra was well founded.

68 The General Court was correct to observe, in paragraph 289 of the judgment under appeal, that, for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect.

69 As regards rebates granted by a dominant undertaking to its customers, the Court has stated that those may infringe Article 102 TFEU, even where they do not correspond to any of the examples mentioned in the second paragraph of that Article 102 (see, to that effect, *British Airways* v *Commission*, paragraph 58 and case-law cited).

70 In the event that an undertaking in a dominant position makes use of a system of rebates, the Court has ruled that that undertaking abuses that position where, without tying the purchasers by a formal obligation, it applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position (see Case 85/76 *Hoffman-La Roche* [1979] ECR 461, paragraph 89, and Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 71).

71 In that regard, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (see *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 73).

72 As regards the present case, it is clear from paragraph 213 of the judgment under appeal that a rebate system must be regarded as infringing Article 102 TFEU if it tends to prevent customers of the dominant undertaking from obtaining their supplies from competing producers.

73 Contrary to what is claimed by the appellants, the invoicing of 'negative prices', in other words prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebates scheme operated by a dominant undertaking is abusive.

74 As the General Court was fully entitled to observe, in paragraph 258 of the judgment under appeal, the third part of the second and fourth pleas in law submitted at first instance was based on an incorrect premiss. The fact that the retroactive rebate schemes oblige competitors to ask negative prices from Tomra's customers benefiting from rebates cannot be regarded as one of the fundamental bases of the contested decision in showing that the retroactive rebate schemes are capable of having anti-competitive effects. Further, the General Court correctly stated, in paragraph 259 of the judgment under appeal, that a whole series of other considerations relating to the retroactive rebates operated by Tomra underpinned the contested decision as regards its conclusion that those types of practices were capable of excluding competitors in breach of Article 102 TFEU.

75 In that regard, the General Court observed, more particularly, that, according to the contested decision, in the first place, the incentive to obtain supplies exclusively or almost exclusively from Tomra was particularly strong when thresholds, such as those applied by Tomra, 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 (paragraph 260 of the judgment under appeal). Secondly, the rebate schemes were individual to each customer and the thresholds were established on the basis of the customer's estimated requirements and/or past purchasing volumes and represented a strong incentive for buying all or almost all the equipment needed from Tomra and artificially raised the costs of switching to a different supplier, even for a small number of units (paragraphs 261 and 262 of the judgment under appeal). Third, the retroactive rebates often applied to some of the largest customers of the Tomra group with the aim of ensuring their loyalty (paragraph 263 the judgment under appeal). Lastly, Tomra failed to show that their conduct was objectively justified or that it generated significant efficiency gains which outweighed the anti-competitive effects on consumers (paragraph 264 of the judgment under appeal).

76 Accordingly, it is apparent from all the reasoning set out in paragraphs 260 to 264 of the judgment under appeal, referred to above, that the General Court came to the conclusion that the third part of the second and fourth pleas in law submitted at first instance was based on an incorrect premiss as regards the evidential value, in respect of whether the rebates scheme at issue was anti-competitive, of the specific characteristics of that scheme, irrespective of the precise level of prices charged.

77 The General Court took its reasoning further by stating, in paragraph 266 of the judgment under appeal, that the Commission, in the contested decision, first, did not state that the rebate schemes automatically resulted in negative prices and, second, did not maintain that showing that is a prerequisite to finding those rebate schemes to be abusive.

78 The General Court added, in that regard, in paragraph 267 of the judgment under appeal, that the exclusionary mechanism represented by retroactive rebates does not require the dominant undertaking to sacrifice profits, since the cost of the rebate is spread across a large number of units. If retroactive rebates are given, the average price obtained by the dominant undertaking may well be far above costs and ensure a high average profit margin. However, retroactive rebate schemes 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'. The General Court therefore rejected as ineffective the claims made by Tomra that there were errors of fact in the analysis within the contested decision of the level of prices charged by them.

79 The General Court was therefore justified in ruling, in essence, in paragraphs 269 to 271 of the judgment under appeal, that the loyalty mechanism was inherent in the supplier's ability to drive out its competitors by means of the suction to itself of the contestable part of demand. When such a

trading instrument exists, it is therefore unnecessary to undertake an analyse of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition, as recalled in paragraph 68 of this judgment.

80 That being the case, the alleged absence, in the judgment under appeal, of an examination of the arguments raised by the applicants at first instance, on the need to compare the prices charged by them with their costs, which underlies both the complaint of a procedural irregularity and that of an error of law, cannot mean that the judgment under appeal is vitiated by an error of law. The Commission established the existence of an abuse of a dominant position by relying on the other considerations set out in paragraphs 260 to 264 of the judgment under appeal, and the General Court correctly found that that analysis was adequate and sufficient to establish the existence of that abuse. Accordingly, neither the Commission nor the General Court was obliged to examine the question of whether the prices charged by the Tomra group were or were not lower than their long-run average incremental costs, and accordingly this ground of appeal must fail in the context of the present appeal.

81 The appellants' arguments that the Commission's Guidance (see paragraph 52 of this judgment) provides for a comparative analysis of prices and costs cannot invalidate that conclusion. As the Advocate General observes in point 37 of his Opinion, the Guidance, published in 2009, has no relevance to the legal assessment of a decision, such as the contested decision, which was adopted in 2006.

82 It follows from all the foregoing that the third ground of appeal must be rejected.

The fourth ground of appeal: error of law and failure to provide adequate reasoning in the analysis of whether the agreements in which Tomra are named as 'preferred, main or primary supplier' could be characterised as 'exclusive' (paragraphs 55 to 67 of the judgment under appeal)

Arguments of the parties

83 Tomra consider, first, that the General Court did not examine, and failed to provide an adequate statement of reasons, whether all the agreements in which Tomra were described as 'preferred, main or primary supplier' by the parties, held by the Commission to be exclusivity agreements, did in fact deal with the exclusive obtaining of supplies from Tomra.

84 Tomra state, secondly, that the General Court neglected to examine the question of whether there existed, in the agreements which did not contain a formal exclusivity obligation, other incentives for Tomra's customers to obtain supplies exclusively from them.

85 The Commission contends that the fourth ground of appeal is inadmissible since it disputes the General Court's assessment of the facts. This ground of appeal does no more than dispute a finding of the General Court that the contracts designating Tomra as 'preferred, main or primary supplier' implied an exclusivity commitment. The question of whether those agreements were understood by the parties concerned as such a commitment was a question of fact, to be resolved on the base of the available evidence, and not on the basis of provisions of national law governing those contracts.

86 The Commission states that the General Court also examined whether the agreements at issue contained other mechanisms operating as incentives to obtain supplies exclusively from the Tomra group. Further, the Commission states that this constitutes a new ground of complaint which is inadmissible on appeal.

87 The Commission contends, lastly, that the fourth ground of appeal does not satisfy the requirements of Article 38(1)(c) of the Rules of Procedure of the Court of Justice. The only passage in the appeal where the appellants make reference to agreements designating Tomra as 'preferred, main or primary supplier' is a footnote which does no more than list a limited number of agreements without any explanation. Such a submission cannot constitute an adequately substantiated ground of appeal for the purposes of that provision of the Rules of Procedure.

Findings of the Court

88 By the fourth ground of appeal, the appellants challenge, first, the findings made by the General Court as to the fact that the agreements at issue describing Tomra as 'preferred, main or primary supplier' actually concerned exclusivity of supply and, secondly, the failure of the General Court to examine whether the agreements not containing any formal exclusivity obligation contained mechanisms of other forms, such as quantity commitments or rebates, which served as incentives to Tomra group customers to obtain supplies from the Tomra group.

89 It must be observed, in that regard, that this ground of appeal relates to the findings made by the General Court as to the particular features of the contractual relationships of Tomra and their customers. The Commission, in the contested decision, assessed those features, taking account of a wide range of factual circumstances surrounding those relationships.

90 The General Court, in paragraph 57 of the judgment under appeal, established that the Commission on the basis of the evidence available to it had, in the contested decision, characterised the various contracts devised by Tomra as 'exclusive' or 'preferential', and that those contracts were understood to be such, irrespective of whether they were enforceable under national law.

91 In that context, the General Court undertook, in paragraphs 58 to 66 of the judgment under appeal and in paragraphs 88 to 197 of that judgment, an extensive assessment of many examples of commercial relationships between the Tomra group and its customers. In doing so, the General Court comprehensively examined the arguments advanced by Tomra in relation to the particular terms of those relationships, and came to the view that those terms had no relevance to the Commission's classification of those relationships.

92 The object of that appraisal was, as stated by the Advocate General in point 60 of his Opinion, the effect of the Tomra group's practices, and the evidence submitted to the General Court on that subject, in particular as regards the mechanisms intended to act as incentives to the various customers to obtain supplies exclusively from Tomra.

93 It follows that the appellants' arguments on this subject are intended to call into question the appraisal of facts made by the General Court.

94 However, the General Court has exclusive jurisdiction to make findings of fact, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. The appraisal of the facts thus does not, save where the clear sense of the evidence before it has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 48 and 49).

95 It should be added the appellants have not claimed that there was any distortion of the facts in connection with that appraisal by the General Court.

96 It follows also from the foregoing that, contrary to what is claimed by the appellants, the General Court examined in detail whether the agreements at issue contained incentives to obtain supplies exclusively from the Tomra group, and consequently the judgment under appeal is not vitiated by a failure to state reasons in that regard.

97 Lastly, as regards the argument that the General Court ought to have taken into account other incentives for Tomra's customers, it must be observed, as the Advocate General states in points 71 and 72 of his Opinion, that the General Court was not called on to examine that argument in the pleadings submitted to it.

98 It follows that that argument must be regarded as a new plea in law.

99 According to the Court's case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would be to authorise it to bring before the Court of Justice, the appellate jurisdiction of which is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to a review of the findings of law on the pleas argued before the General Court (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59).

100 Consequently, the fourth ground of appeal must be rejected as being inadmissible.

The fifth ground of appeal: error of law in the assessment of the fine in the light of the principle of equal treatment (paragraphs 310 to 321 of the judgment under appeal)

Arguments of the parties

101 Tomra claim that the General Court committed an error of law by imposing on the applicants at first instance a fine which was considerably higher than that imposed on other undertakings placed in a comparable situation.

102 The Commission consider that the argument advanced by the appellants has no foundation in law. The Commission's practice in previous decisions cannot itself serve as a legal framework for the fines imposed in competition matters.

103 The Commission contends that the alleged infringement was clear and had been committed deliberately. There was therefore no special factor to justify a reduction of the fine. Further, the basic amount of the fine, set in this case at EUR 16 million, was well within the bracket provided for in respect of serious infringements.

Findings of the Court

104 It must be recalled that the Court has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (see Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 205, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 233).

105 Accordingly the fact that the Commission has, in the past, imposed fines set at a specific level for certain categories of infringements cannot prevent it from setting fines at a higher level, if raising of penalties is deemed necessary in order to ensure the implementation of European Union competition policy, that policy continuing to be defined solely by Council Regulation (EC) No 1/2003 of

16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 EC (OJ 2003 L 1, p. 1) (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 227).

106 The Court has, indeed, stated that the implementation of that policy requires that the Commission may adjust the level of fines to the needs of that policy (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109).

107 It should be added that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and no binding or exhaustive list of the criteria which must be applied has been drawn up (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

108 Accordingly the General Court was correct, in paragraph 314 of the judgment under appeal, to reject Tomra's argument based on the comparison of the fine imposed on the Tomra group and the penalties imposed by the Commission in other decisions relating to competition.

109 In those circumstances, the General Court did not infringe the principle of equal treatment in its assessment of the amount of the fine imposed.

110 The fifth ground of appeal relied on by the appellants in support of their appeal must therefore fail.

111 It follows from all the foregoing that the appeal must be dismissed in its entirety.

Costs

112 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds, the Court (Third Chamber) hereby

1. **Dismisses the appeal;**

2. **Orders Tomra Systems ASA, Tomra Europe AS, Tomra Systems GmbH, Tomra Systems BV, Tomra Leergutsysteme GmbH, Tomra Systems AB and Tomra Butikksystemer AS to pay the costs.**

[Signatures]