

COMPETITION COMMISSION



Prokent/Tomra – A case of abuse of Dominant Position. Any clue for the future of Article 82?

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The Products

- Reverse-Vending Machines (RVM)
 - Identify containers (shape, bar code etc...) and calculate the deposit to pay to the customer
 - Used for different types of containers and different shapes



The Main Parties

- Tomra is a Norwegian firm selling RVMs and related products since 1972
 - Tomra acquired its main rival, Halton (entered 1984-85) in 1997 to reach market share over 90% EEA wide
- Prokent, the complainant, entered the market in 1998 mostly in Germany
- Other competitors are small firms that recently entered the markets (late 90s)



Product Market Definition

- Consider RVMs intended use
 - Exclude manual handling from the relevant market
 - Distinction between low-end and high-end RVMs
 - Leave product market definition open



Geographic Market Definition

- National Legislation regulate Deposit Systems for used drink containers
 - Different regulatory requirements
- Northern Europe => significant market volumes for RVM solutions in food retail outlets
- Southern Europe => insignificant sales



Dominant Position

- Tomra appears to have very large market shares
 - EEA-wide or country-wide
 - Broad or narrow product market definition
- But what about barriers to entry?
- Could we infer dominance from the abuse?



Useful Background Information

- RVMs are durable goods
- RVMs are sold to retail food outlets
 - One RVM per retail food outlet
- Small number of large retail groups
 - General agreement between suppliers of RVM and retail groups



“Key Year”

- Demand for RVMs peaks in anticipation of introduction of legislation for mandatory deposit scheme
 - Norway => 1999
 - Germany => 2000-2002
 - The Netherlands => 2001 (Euro change)



Contractual Arrangement

- Tomra entered in different contractual arrangements with its customers
 - Exclusivity Agreements
 - Quantity Commitment
 - Retroactive Rebates



Toward Exclusivity

- Quantity Commitment
 - Tomra offered individualised quantity target
 - Quantity forcing?
- Retroactive Rebate
 - Customers would receive a lump sum after reaching individualised quantity target at the end of reference period
- Objective => Reaching Exclusivity



Case-law

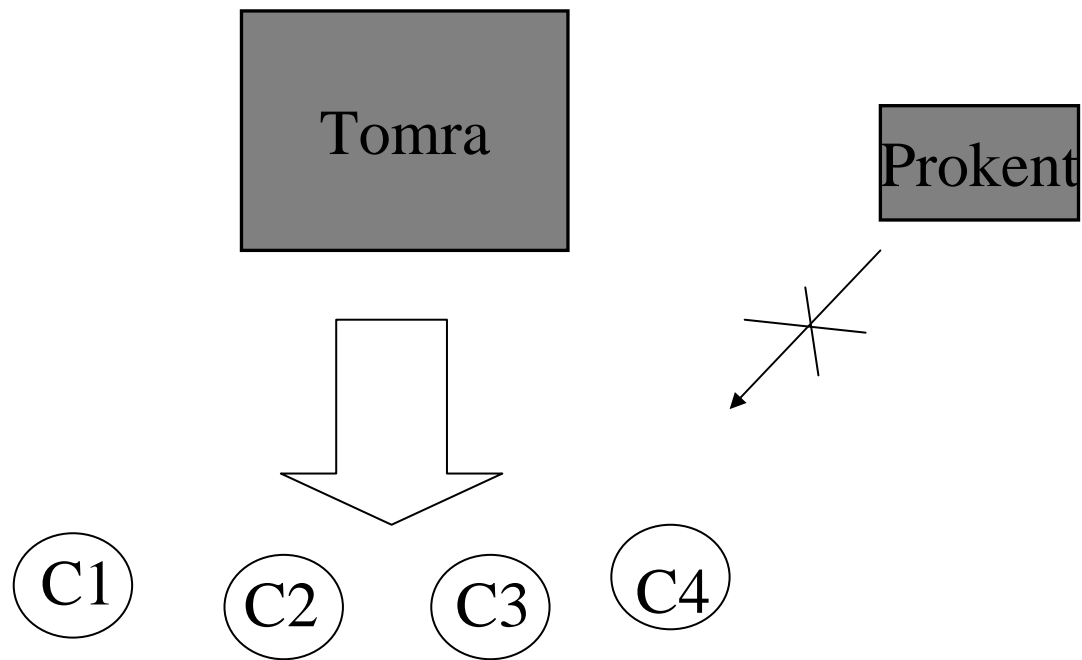
- Michelin II (2003)

“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.”

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Exclusivity Agreement





Theory of harm

- The Commission appears to base its decision on
 - Tomra is a dominant firm
 - It engages in exclusivity agreement, or offer agreement whose purpose is to obtain exclusivity
 - Tomra's practice covers a substantial part of the market
 - Tomra's thwart entry in "key years"

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Likely effect of Tomra's practice

- The Commission considers:
 - Tomra's practice did not generate any cost efficiencies nor demand efficiencies
 - And therefore the
 - Stable market share of Tomra
 - And the Weak and Unstable Position of the rivals
 - Are evidence of the likely foreclosing effect of Tomra's practice