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Confusion remains: ECJ in Tomra repeats conflicting dicta on de minimis

Gavin Bushell (Baker McKenzie, Belgium) · Friday, April 20th, 2012

That the ECJ rejected Tomra's appeal was unsurprising. The strictures of the EU case law on illegal rebates for dominant companies is well known. The case law of the Court takes a near per se approach to condemning any rebate scheme linked to exclusivity, substantial volume purchases or stretch targets, taking the view that by their nature such programmes tend to exclude competitors. Absent cost savings or benefits that can be shown – and hitherto none have survived review in the Court's case law – then the rebate scheme would be illegal.

Degree of Foreclosure

But practitioners were watching closely whether the ECJ would resolve apparently irreconcilable dicta of the General Court, dicta with potentially far reaching consequences for advising on rebate schemes. In Tomra, the General Court appeared to say that no degree of foreclosure was permitted, no matter how small, as a result of a rebate scheme. A few paragraphs later it states, nonetheless, that by any measure Tomra's 40% (2/5ths) foreclosure of the market was substantial and sufficient to show that the rebate scheme tended to restrict competition.

Not unreasonably Tomra questioned this approach. The EU's 2009 Article 102 Enforcement Guidelines and its decisional practice abounds with examples of conduct by dominant companies that has minimal market impact because it affects only one customer or a minimal percentage of demand. The rest of the market is open to competitors so no harm arises. The theory that a dominant company acts illegally unless all customers are free to switch to rivals seems far out of touch with economic principles.

The ECJ's dicta in the Tomra judgment handed down on 19 April 2012 do nothing to resolve the conundrum. It first states that Tomra was rightly found to have acted abusively "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" (para. 41). This would be consistent with the 2009 Guidelines and EU decisional practice. Foreclosing a tiny proportion of demand will not harm competition. Foreclosure of a substantial part may well do.

But then the ECJ restates with apparent approval the General Court's more extreme proposition "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." (para. 42). That would

flatly contradict a de minimis thesis. No customer, or portion of a customer's demand, no matter how small, may be foreclosed.

The better reading is that the ECJ seeks only to address Tomra's plea that the Commission had not articulated any threshold of foreclosure beyond which Tomra's conduct was abusive. The ECJ's response is that the Commission properly did not do so because in theory any degree of foreclosure might be harmful, so a case by case assessment is required, rather than a fixed percentage applicable in all cases. This is consistent with the concluding paragraphs in dealing with this plea (paras. 43-44) where the ECJ approves the Commission's analysis on the facts and its conclusion that a 40% degree of foreclosure was sufficient to show harm.

Nonetheless we can expect para. 41 to be much cited in complainant's briefs, with defendants countering that the paragraph must be read in a broader context.

Cost/Price Analysis

Tomra also complained that the Commission did not apply a costs analysis to its rebate scheme. In the 2009 Guidelines, the EU presents an economics based test for determining whether a rebate scheme has foreclosing effects, essentially asking whether a smaller competitor would be able to remain above cost when selling to a customer if it had to match the size of the dominant company's rebate. A dominant company, so the theory goes, can fund a far larger rebate from its "uncontestable demand" (a portion of a customer's requirements which it will have to buy from the dominant company because it is a "must stock" brand or because smaller suppliers are capacity constrained), so the smaller rival may be forced to offer negative margin prices to compete over a smaller base of sales. If the costs analysis shows a smaller rival can counter the rebate scheme and stay above cost, then no adverse effects on competition arise. If it's forced below cost, the scheme is likely to be illegal.

The ECJ reiterated the orthodoxy that in EU case law no such cost based test is required to find that a rebate scheme is unlawful (paras. 78-79). The Commission and General Court were entitled to find illegality without such a test if the facts show that the schemes tended to have an exclusionary effect by raising switching barriers, targeting customers' entire needs and looking to lock in the largest customers (para. 75). The only comfort to be had is that the ECJ cites with approval the Commission and General Court's consideration of the "suction effects" caused by a dominant company offering rebates based on its "uncontestable demand", both economics inspired concepts that show – perhaps – that the ECJ's mind is not closed to such arguments in future.

Also, this was a case that pre-dated the Article 102 Enforcement Guidelines which advocate a more economics-based approach to assessing foreclosure. With a nod to being prepared to adopt a different approach in post-Guidelines cases, the ECJ expressly notes that here there was no need to apply the costs based foreclosure tests set out in the Guidelines, since the Guidelines post-date the Commission decision in Tomra (para. 81).

Implications for Rebates Counselling

So counselling on rebate schemes will remain complex, with practitioners needing to guide clients through the tension between the 2009 Enforcement Guidelines and the EU Court case law. Most commentators consider it likely – and the Commission's post-Tomra cases show – that the EU Commission will apply the economic approach of the 2009 Guidelines. But it remains only guidance as to the exercise of prosecutorial discretion, not something which courts or national

regulators must adhere to. The trend to date – outside of the EU Courts – has been encouraging with national regulators and courts being prepared to use the economic tools suggested by the EU Guidelines. But the Tomra case serves as a reminder that counselling on rebate schemes will remain one of the most complex areas of EU competition law for some time to come.

Gavin Bushell/Bill Batchelor

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