



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.03.2006  
C(2006)734

## **DECISION**

**relating to proceedings under Article 82 of the Treaty  
and Article 54 of the EEA Agreement**

**(Case COMP/E-1/38.113 – Prokent-Tomra)**

**(ONLY THE ENGLISH TEXT IS AUTHENTIC)**

(text with EEA relevance)

# Commission Decision

of

relating to the proceeding under Article 82 of the Treaty and Article 54 of the EEA Agreement

(Case COMP/E-1/38.113 – Prokent-Tomra)

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to 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 of the Treaty, and in particular Article 7 (1) and Article 23 (2) thereof,<sup>1</sup>

Having regard to the complaint lodged by Prokent AG on 26 March 2001, alleging infringements of Article 82 of the Treaty and Article 54 of the EEA Agreement and requesting the Commission to put an end to those infringements,

Having regard to the Commission Decision of 22 July 2004 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19 (1) of Regulation No 17<sup>2</sup>, Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, Article 27 (1) of Regulation (EC) No 1/2003 and Articles 10 and 12 of Commission Regulation (EC) No 773/2004 of 7

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<sup>1</sup> OJ L1, 04.01.2003, p. 1-25 Regulation as amended by Regulation (EC) No 411/2004 (L68, 6.3.2004, p.1)

<sup>2</sup> OJ L3, 21.2.1962, p. 204/62; the Regulation was repealed by Regulation (EC) No 1/2003. Article 34(2) of Regulation No 1/2003 states that procedural steps taken under Regulation No 17 are to continue to have effect for the purposes of applying Regulation 1/2003.

April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty<sup>3</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case<sup>4</sup>

Whereas:

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<sup>3</sup> OJ L 123, 27.4.2004, p.18.

<sup>4</sup> OJ [..]

## I. FACTS

### A. THE PARTIES

- (1) The Tomra group (Tomra), the ultimate parent of which is Tomra Systems ASA (Asker, Norway), 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), and related products and services. In addition, Tomra provides, at least in some countries, data administration services to the material handling companies<sup>5</sup>, and to the local operators of deposit systems for non-refillable beverage containers, i.e. accounting for deposit charges and handling fees on behalf of the retailers with regard to collection of non-refillable drink containers. In certain territories outside the EEA Tomra is also involved in other activities related to the collection and the recycling of used drink containers such as logistics management and materials processing.<sup>6</sup> 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.<sup>7</sup>
- (2) Tomra operates on a worldwide level and has subsidiaries in all major markets worldwide. It had 1 886 employees in 2000, 1 994 in 2001 and 2 048 in 2002. Within the EEA at the time of the investigation Tomra had two production subsidiaries, one of them based in Norway and the other one based in Finland.<sup>8</sup> It has distribution subsidiaries, *inter alia*, in Austria, Denmark, Finland, France, Germany, the Netherlands, Norway, Sweden, and since 2001 – in Belgium.<sup>9</sup> The operations of these subsidiaries are coordinated by Tomra Europe AS, which is based in Asker, Norway. The Tomra group achieves about one third of its turnover within the EEA.
- (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

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<sup>5</sup> Companies that handle the material derived from processing of the non-refillable drink containers, e.g. cans, after the containers have been sorted, cleaned, shredded, flaked, crushed and bailed, in order to be recycled in a later stage.

<sup>6</sup> **Page 5015**, HSCH 2, p. 23, **pages 7249-7252**, Tomra's reply of 14 February 2002, p. 15-18.

<sup>7</sup> **Page 7309-3**, Tomra's reply of 14 February 2002, and **page 10173-3**, Tomra's reply of 25 June 2003. Tomra's turnover in NOK were as follows: 1998 – 1 456 million, 1999 – 2 169 million, 2000 – 2 718 million, 2001 – 2 924 million, and in 2002 – 2 674 million. The currency conversions are made following the official exchange rate of the European Central Bank (ECB) on 6 January 2006. In its Annual Report for 2002 Tomra puts the reduction in 2002 down to currency exchange reasons, **pages 10068-1 to 10068-72**, in particular **pages 10068-5, 10068-6 and 10068-51**.

<sup>8</sup> The latter one appears to have been phased out later. See Tomra's presentation made to the Commission's services on 30 March 2004, **page 11116**.

<sup>9</sup> The names of the subsidiaries are Tomra Butikkssystemer AS (Norway), Tomra Systems AB (Sweden), Tomra System A/S (Denmark), Tomra Systems B.V. (Netherlands), Tomra Systems GmbH (Germany), Tomra Leergutssysteme GmbH (Austria), Tomra NV (Belgium), OY Tomra AB (Finland) and Tomra Systèmes SA (France).

2.3 million<sup>10</sup> in 2000 and of approximately EUR 4.2 million<sup>11</sup> 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.

#### B. THE COMPLAINT

- (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. Prokent referred, in particular, to the agreements concluded by Tomra with the Dutch retail group Royal Ahold, Swedish ICA group (concluded in 2000), and the German Edeka Süd. The existence of these agreements was confirmed by press releases made by Tomra and by its 2000 Annual Report.

#### C. THE PROCEEDINGS

- (5) Since there were indications that Tomra may have pursued anti-competitive practices aiming, in particular, at preventing market access and eliminating its competitors, the Commission conducted inspections pursuant to Article 14 (3) of Regulation No 17. The inspections were conducted at the premises of Tomra Systems GmbH, Germany, and Tomra Systems BV, the Netherlands. In addition, the Commission requested the EFTA Surveillance Authority to conduct inspections at the premises of Tomra Systems ASA and its subsidiaries in Norway. The inspections were carried out on 26 and 27 September 2001 on the basis of Commission decisions adopted on 20 September 2001 and decisions by the EFTA-Surveillance Authority of 19 September 2001. Following the inspections, the Commission sent requests for information to Tomra ASA, to several competitors and customers pursuant to Article 11 of Regulation No 17.
- (6) At the same time as the inspections took place, Tomra attempted to take over the complainant. The transaction did not materialise. In September 2003 Prokent filed for bankruptcy, and Tomra once again unsuccessfully tried to acquire it. In the end, Prokent's assets were acquired by Wincor Nixdorf International GmbH. Since September 2003, Prokent's RVM business has been carried on by Wincor Nixdorf Technologies GmbH, a subsidiary of Wincor Nixdorf AG, Paderborn (Germany).<sup>12</sup>
- (7) By letter to the Commission of 23 December 2002 Tomra declared that it would no longer resort to exclusivity or preferred supplier agreements, and would no longer apply rebates with a foreclosure effect.<sup>13</sup> However, in some instances, Tomra continued to some extent its practice of maintaining exclusivity agreements and other exclusionary agreements. As will be demonstrated in this

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<sup>10</sup> DEM 4.5 million. The official exchange rate of the European Central Bank (ECB), <http://www.euro.ecb.int/en/section/conversion.html>.

<sup>11</sup> DEM 8.3 million, the official exchange rate of the ECB on 6 January 2006.

<sup>12</sup> **Page 11017-11020**, letter by Wincor Nixdorf Technology GmbH of 26 September 2003.

<sup>13</sup> **Pages 10000-10002**, letter of 23 December 2002.

Decision, in particular in Section III, certain agreements, considered to be anticompetitive by the Commission, were applicable beyond this date such as the Global Agreement with [confidential: customer A in Sweden] which continued to be applicable in 2003 as well.<sup>14</sup>

- (8) On 30 March 2004 Tomra's legal counsel submitted a competition compliance programme for the Tomra group which was to apply as of 1 April 2004.
- (9) On 1 September 2004 the Commission adopted a Statement of objections against Tomra Systems ASA, Tomra Europe AS and Tomra's subsidiaries in six EEA-Contracting Parties, which was subsequently notified to the respective companies. Tomra responded to the Statement of objections on 22 November 2004. A Hearing took place on 7 December 2004. In its response to the Statement of objections, Tomra corrected figures it had given to the Commission previously, provided new evidence and made other statements that were inconsistent with the information provided previously. Therefore additional requests for information were sent on 19 April 2005, to which Tomra replied on 25 April and 3 May 2005.
- (10) According to Article 56 of the EEA Agreement, the Commission has competence to deal with this case and to adopt this decision. The Commission has come to the conclusion that Tomra is dominant both within the Community and within the EEA. Tomra's turnover in the territory of the EFTA-States does not equal 33 per cent or more of its EEA turnover. Several of Tomra's competitors are based and active in other Member States, and Tomra had a production subsidiary in a Member State. Tomra engaged in exclusionary conduct in several Member States and the abuses were aimed at and were capable of influencing the competitive structure within the Community. Therefore, this decision concerns a case where trade between EC Member States is affected.<sup>15</sup>
- (11) By letter of 14 March 2002 Tomra formally chose English as the language of the proceedings in this case.<sup>16</sup>

## II. ARTICLE 82 OF THE TREATY AND ARTICLE 54 OF THE EEA AGREEMENT

### A. DOMINANCE

#### 1. THE PRODUCTS, CUSTOMERS AND COMPETITORS

##### *The products*

- (12) Tomra and its competitors supply so-called reverse vending machines (RVMs) and related products, in particular backroom equipment. They also provide services in relation to the products they sell such as maintenance and repair services. RVM suppliers may also be involved in other services related to the

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<sup>14</sup> Page 10528 (confidential), [confidential: customer A in Sweden] reply of 1 July 2003.

<sup>15</sup> With regard to the question of affectation of trade see also Section IV.C below.

<sup>16</sup> Page 7414, a letter signed by the President and CEO of Tomra Systems ASA, and page 7446.

operation of deposit systems, consisting, in particular, of the administration of data. In this area Tomra is active in several territories, e.g. Norway, Sweden, Finland as well as countries outside the EEA.

- (13) Initially, RVMs were used exclusively for the collection of empty returnable or refillable drink containers. Later RVMs for the collection of disposable or non-refillable containers were developed. Depending on their specifications, 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.
- (14) Amongst the RVMs, the machines differ according to what kind of beverage containers they accept: only refillable drink containers or only non-refillable, or both.<sup>17</sup> The most fundamental distinction between the different types of drink containers is that (i) refillable containers, when returned, are cleaned and then refilled, and (ii) non-refillable containers are returned in order to be recycled and in many countries are referred to as “one-way containers”. Non-refillable drink containers are collected by RVMs only in the territories where there is a deposit system for these types of drink containers. There is thus a clear link between the installation of RVM solutions and the prevalence of either a significant proportion of refillable containers and/or the existence of deposit schemes for non-refillable containers in a given territory. 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. Moreover, RVMs can accept individual containers or their crates.<sup>18</sup>
- (15) The type of RVM which is used depends, in particular, on the kind and volume of drink containers handled at a given installation site. Although there may be a potential demand and business opportunities with regard to other types of customers, RVMs of the kind supplied by Tomra and its competitors are installed predominantly in the food retail outlets, i.e. supermarkets of various sizes, the most significant customers being large retail groups. Particular types of RVMs are also found in canteens that are attached to schools, hospitals, private companies or public authorities, particularly in Germany.

### *The competitors*

- (16) Tomra began supplying RVMs in 1972 and has remained the market leader ever since. It has expanded steadily due to an increasing demand and through the acquisition of its competitors.
- (17) When new deposit systems are introduced in a particular country new suppliers try to enter the market. This occurred, for instance, in Sweden in 1984<sup>19</sup>, and in

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<sup>17</sup> Tomra offered upgrades to make the RVMs accepting only one type of containers (e.g. refillable drink containers) to accept other types (e.g. non-refillable containers). This is relevant, especially, in the context of the introduction of a new deposit system for cans and other non-refillable containers.

<sup>18</sup> RVMs accepting individual containers and their crates are called “combi-machines”. **Page 7249**, Tomra’s reply of 14 February 2002, p. 15, reply to question 4.

<sup>19</sup> Introduction of mandatory deposit on cans, **page 7237-7238**

Norway in 1999.<sup>20</sup> With regard to the situation in 1984 and 1999, Tomra explained that most of the new entrants, however, were unable to meet the technical requirements and most of the remaining companies had to leave the market after a short period of time. Only Halton, which entered the market in 1984-1985, achieved significant sales and market shares for a longer period in different EEA Contracting Parties<sup>21</sup>, being Tomra's largest competitor. In June 1997 Tomra acquired Halton.<sup>22</sup>

(18) In Sweden, Canmatic and Microlux entered the market in 1997-1998 offering RVMs for small stores. Eleiko entered the market in 1997, and later took over Canmatic and Nimo/Igenta, which previously sold a number of machines in Sweden and Norway. Eleiko was active in Sweden and to a smaller extent in Norway and Finland, and was able to offer a wide range of RVMs. In addition, it acted as Prokent's distributor in Sweden. In May 2001 Eleiko was taken over by Tomra.

(19) EM-Gerätebau entered the market in 1994 and left it in 2002, having been active predominantly in Germany and Austria. During this period, it only achieved moderate market shares.<sup>23</sup> In addition to machines for canteens, the German company Trautwein sold a significant number of free-standing RVMs for returnable bottles<sup>24</sup> to retail outlets predominantly in Germany. In 1998 Prokent, the complainant, entered the market, being active predominantly in Germany. Later on, Beveysys of Finland and Repant of Norway entered the market. These companies, like EM-Gerätebau, tried to compete with Tomra exclusively or predominantly in the segment of "through-the-wall-RVMs" or "high-end RVMs" and backroom equipment in certain national markets. According to the Commission's information and Tomra's submission, the US-based company Envipco, which is much smaller than Tomra, did not manage to make any sales within the EEA or, at best, only marginal sales until 2002.<sup>25</sup>

(20) All RVM suppliers, apart from Tomra, 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. The table below (Figure 1) illustrates the size and the geographical scope of activity of different suppliers. Tomra and other companies' turnover figures are expressed in Euro.<sup>26</sup>

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<sup>20</sup> Introduction of mandatory deposit on non-refillable containers, **page 7238**, and **page 11770**, Tomra's response of 22 November 2004, par. 119.

<sup>21</sup> This paragraph is based, in particular, on information provided by Tomra, **pages 7237-7238**.

<sup>22</sup> **Page 6090**, GS 65, Article in Lebensmittelzeitung of 6 June 1997.

<sup>23</sup> **Page 5205**, HSch 13. According to this internal document from Tomra, EM-Gerätebau achieved approximately 8% market share between 1994 and 1997 in Germany. It then lost market share and must have had rather low market shares in subsequent years. **Page 1508**, ATU/KKL/21: "...*Struggling losing customers and business...*".

<sup>24</sup> The relevant model is called « Bottlecomp ».

<sup>25</sup> It was, however, linked to EM-Gerätebau, **page 11764**, Tomra's response of 22 November 2004, p. 25.

<sup>26</sup> All currency conversions are made on the basis of the official European Central bank (ECB) currency exchange rate of 6 January 2006, see <http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html>.



**Figure 1:** Tomra and its competitors' total turnover (in million EUR) and the scope of their activity<sup>27</sup>

Turnover	1998	1999	2000	2001	2002	Geographical scope
<b>Company</b>						
<b>Tomra</b> <sup>28</sup>	183 million	273 million	342 million	368 million	336 million	Worldwide
<b>Tomra Europe</b> <sup>29</sup>	77 million	120 million	113 million	115 million	118 million <sup>30</sup>	Europe <sup>31</sup>
<b>Prokent</b> <sup>32</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Bevesys</b> <sup>33</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Repant</b>	n/a	n/a	n/a	starting up	n/a	Norway, Sweden
<b>Eleiko</b>	n/a	n/a	n/a	n/a	n/a	Sweden, Norway, Finland
<b>Trautwein</b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]

### Customers

(21) Due to the consolidation process in recent years, the number of independent retail groups has shrunk in many countries of EEA and in many of them there is now a small number of large retail groups. The organisation of the different retail groups varies considerably. Some have exclusively or predominantly outlets owned and managed by the organisation itself. Other organisations, such as cooperatives, have a significant proportion of independent retailers as their members. The degree of centralisation varies within different organisations. While decisions to acquire an automated system are often taken locally, most organisations have general agreements with Tomra and other RVM suppliers

<sup>27</sup> The figures were updated taking into account new information submitted by Tomra and currency exchange rates fluctuations. The changes in figures, however, are negligent and do not change the assessment.

<sup>28</sup> Figures submitted by Tomra on 14 February 2002, **page 7309-3**, and on 25 June 2003, **page 10173-3**.

<sup>29</sup> Figures submitted by Tomra on 14 February 2002, **pages 7308-9 and 7309-5**, and on 25 June 2003, **page 10173**.

<sup>30</sup> NOK 937 million. Through the conversion of local currencies into NOK there was only an increase of 3 % compared with 2001, whereas the increase would have been 10% if measured in local currency. See **page 10068 - 19**, Tomra's Management Report for 2002, p. 17.

<sup>31</sup> For most of the time, the only market outside the EEA with significant sales volumes was Switzerland.

<sup>32</sup> **Page 10919 (confidential)**, reply from Prokent of 12 April 2002.

<sup>33</sup> **Pages 10845-10847 (confidential)**, reply from Bevesys of 28 March 2002.

setting out the general framework containing different degrees of specification and commitment.

## 2. THE RELEVANT PRODUCT MARKET

- (22) At the beginning of the investigation, when replying to the Commission's first request for information on 14 March 2002, Tomra argued that all types of RVMs should be considered as part of the wider market for the collection of used beverage containers with deposit.<sup>34</sup>
- (23) Such a wide definition of the relevant market would include both high-end machines with backroom equipment and low-end, stand-alone machines, machines for canteens, as well as manual handling of empty drinks containers.

### *Manual handling is not part of the relevant market*

- (24) In its reply to the first request for information submitted to the Commission on 14 March 2002, Tomra was of the opinion that manual handling has to be considered as a competitive alternative to the purchase of an automated RVM system. In several EEA Contracting Parties which have deposit systems, drink containers were still handled manually at the time of the investigation. The consequence of this product market definition, according to Tomra, would be that at least all retail outlets, which sell and take back used beverage containers for a deposit, i.e. all actual or conceivable customers of RVM suppliers, would be part of the relevant market.
- (25) The Commission does not accept Tomra's argument that manual handling is part of the relevant product market. According to the Commission's Notice on the definition of relevant market for the purposes of Community competition law<sup>35</sup>, a relevant market comprises all those products and/or services that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their price or their intended use. Although automated and manual handling 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. This is particularly the case for purchasers of high-end machines. Moreover, in principle only products or services that are commercially offered on the market by other suppliers can be taken into account when determining their substitutability for the purposes of market definition. There seem to be no suppliers of manual handling that compete with Tomra or other RVMs manufacturers on the same market. Finally, customers prefer automated RVM solutions to manual handling for reasons of labour costs and customer service mainly. The space needed for each option differs significantly as well. In general, the choice available to a potential customer of RVMs to abstain from purchasing a machine and resort to manual handling instead cannot be considered to constitute a competitive constraint on a par with the products of an alternative supplier of RVMs.

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Pages 7414-7421, in particular page 7420, reply from Tomra of 14 March 2002, p. 1-8.  
OJ 97/C 372/03 of 9 December 1997.

- (26) In any case, in its response to the Statement of objections Tomra accepted that manual handling cannot be regarded as part of the relevant product market.<sup>36</sup> Therefore, the Commission does not consider manual handling to be part of the relevant product market.

#### *RVMs for canteens vs. RVMs for retail outlets*

- (27) In Germany, a significant number of RVMs are specifically designed for use in canteens or at kiosks. With exception of Trautwein, the suppliers of RVMs for canteens did not supply machines to retail outlets in the period under investigation. Trautwein, which is the leading manufacturer of RVMs designed for canteens in Germany, has also sold one specific RVM model to retail outlets (i.e. Bottlecomp) since 1994. It has distinct product lines depending on whether the machine is to be installed in a canteen or in a retail outlet<sup>37</sup> and has indicated that it [confidential].<sup>38</sup>
- (28) Canteens and kiosks usually have a considerably smaller space available than the retail outlets do. Therefore, the RVMs used by canteens must be similar in size and function to the machines intended for smaller shops. This implies that the machines purchased by the canteens and kiosks are free-standing and of lower storage capability. In addition, they do not need to accept crates of containers, and they could be of slower processing speed. Therefore, 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, i.e. 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. Therefore, machines designed for canteens and similar installation sites are not part of the relevant product market.

#### *High-end vs. low-end RVM*

- (29) There is a fundamental distinction between machines that are installed “through-the-wall” and “stand-alone” machines. “Through-the-wall” machines are usually connected to a backroom in which the drink containers are further handled or processed. Depending on local needs and the combination of drink containers returned, the backroom may include conveyor systems for crates and individual containers, stacking, sorting, compacting, accumulation units etc. The size and composition of backroom equipment can vary greatly according to the needs of the individual outlet.<sup>39</sup>
- (30) Backroom equipment is a complement to the through-the-wall RVMs. RVM suppliers generally market RVMs together with the backroom equipment as reverse vending systems or solutions. In most countries, the suppliers of RVMs also supply the necessary backroom equipment, although it is often made by sub-contractors in the country of delivery or, in some cases, by independent suppliers.

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<sup>36</sup> Page 11754, Tomra’s response of 22 November 2004, par. 44.

<sup>37</sup> Page 11104.

<sup>38</sup> Page 11088, Trautwein’s reply of 14 May 2004, p. 3.

<sup>39</sup> Page 10038, according to Tomra’s reply of 25 June 2003, p.7, the cost for backroom equipment can vary from EUR 1 000 to more than [confidential].

- (31) Stand-alone machines require less space and do not accept crates. They are not linked to backroom equipment, implying that the drink containers are accumulated internally. For instance, Tomra's free-standing T-42 RVM model intended for bigger stores to collect cans, can accumulate from 1 600 to 2 500 compacted cans. T-32, another Tomra machine for collecting glass containers, can only store up to 200-300 containers.<sup>40</sup> Therefore, in particular in the case of machines for refillable containers, the storage bins have to be emptied regularly by store personnel. In comparison, through-the-wall machines can store a much bigger volume of containers, as they are connected to the backroom equipment, the capacity of which is considerably bigger. Moreover, whereas through-the-wall RVMs are suitable for all types of retail outlets that have sufficient space, including large supermarkets with a high turnover of handled containers, this is not necessarily the case for stand-alone machines. Furthermore, a through-the-wall machine plus the respective installation fee and a minimum of backroom equipment requires much more investment compared to that needed for a purchase of a stand-alone bottle machine, and obviously a lot more space. For example, the price of Tomra's free-standing machine of T-42 model was EUR [confidential: 4 300 - 4 800], compared to the price of EUR [confidential: 6 300 -6 800] for the high-end T-600 BC model, which would in the end be even higher after adding on the backroom equipment costs.<sup>41</sup> Amongst the machines for non-refillable containers with compacting, shredding or crushing units there are, however, also machines that are suitable for larger supermarkets and that could be installed both as free-standing machines and in combination with backroom equipment.
- (32) Tomra also uses the terms "high-end" and "low-end" RVMs. As these terms are understood by Tomra, high-end RVMs are machines that are typically required by larger retail outlets.<sup>42</sup> All "through-the-wall" RVMs are, by definition, "high-end RVMs".<sup>43</sup> This suggests that the term "high-end" machines would basically encompass all types of RVMs designed for retail outlets apart from stand-alone machines designed specifically for small stores, and which cannot be combined with backroom equipment.
- (33) Considering their limited functions, features, degree of technical sophistication and/or their inability to handle larger volumes of containers etc., stand-alone machines would not be suitable for larger retail outlets. Given their lower price, they are an option for smaller shops.
- (34) In the past when indicating market shares relating to RVMs Tomra often implicitly referred to "high-end RVMs", for instance in its annual reports.<sup>44</sup> Prokent used the term "*RVMs of the kind supplied by Tomra and Prokent*"<sup>45</sup>, which points in a similar direction. Both terms coincide in that they include machines supplied by Tomra, Halton, EM-Gerätebau, Prokent, Bevesys and

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<sup>40</sup> Pages 7346 and 7353, Tomra's reply of 14 February 2002.

<sup>41</sup> Page 7276, Tomra's reply of 14 February 2002. The prices cited are the prices charged by Tomra to its affiliated companies in 1999 for hardware only. They did not include the price of the software.

<sup>42</sup> Page 10033 Tomra's reply of 25 June 2003, reply to question 3 (b).

<sup>43</sup> Page 10033, Tomra's reply of 25 June 2003, reply to question 3 (c).

<sup>44</sup> Page 7239, Tomra's reply of 14 February 2002, p. 5.

<sup>45</sup> Page 11012, reply from Prokent of 14 August 2003, reply to question 3.

Repant and others that are usually through-the wall models, but exclude cheaper RVMs that can only operate as stand-alone machines. The latter type of machines is generally simpler from a technical point of view.

### *Demand-side considerations*

- (35) With regard to the substitutability of different RVMs for customers within the food retail sector, the choice of a particular RVM depends largely on different factors such as the types and volumes of drink containers a given outlet has to handle and store, to what extent it receives crates, how much space is available and the price of a machine.<sup>46</sup> A free-standing RVM has less storage capacity, does not handle crates and will require frequent emptying of the storage bins by the store personnel if it is used in places receiving high volumes of containers. With regard to the investment needed, a customer will consider the price of backroom equipment if it considers purchasing a “through-the-wall” model. Within these objective factors, a supermarket will be able to choose between different RVM models with different features, options, handling speed etc. and may, in addition, order different sizes of backroom equipment. Low-end free-standing RVMs, however, respond to a different kind of demand compared to high-end RVMs.
- (36) Large retail outlets would consider a low-end machine only as a complement to high-end machines, in particular departments of a larger outlet, but not in isolation and certainly not as an option for handling the bulk of the returned drink containers.<sup>47</sup> On the other hand, it would be disproportionate, excessively costly and perhaps even physically impossible for many small retail outlets with limited space to install a through-the-wall model with backroom equipment.
- (37) If one considers the types of RVMs that were supplied and bought in the individual EEA Contracting Parties in the period covered by the investigation in this case, there was either no significant supply and demand for specific small-store RVMs or, in so far as such offer and demand existed, a clear gap prevailed between RVMs that were suitable for larger supermarkets and those designed for the specific needs of smaller outlets. Significant numbers of small store RVMs were sold only in Germany and in Sweden.
- (38) For customers in Germany, there was a clear gap between, on the one hand, a stand-alone bottle machine of the kind offered by Trautwein and, on the other, the through-the-wall RVMs provided by Tomra, Halton, Prokent etc. The machines supplied by the latter suppliers were, generally, combi-machines<sup>48</sup>, i.e. machines that accept both single bottles and crates. Being stand-alone machines

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<sup>46</sup> According to Tomra, it is a consideration of different parameters such as accumulation capacity and container mix, including in particular the quantity of crates to be handled, as well as space and price, which determine the choice between a free-standing and a through-the-wall model. See **pages 10034-10035**, reply from Tomra of 25 June 2003, reply to question 6.

<sup>47</sup> This has been confirmed by Rewe (**pages 10710 and 10712**, letter of 15 March 2004, reply to question 2), a large German retail organisation which encompasses retail outlets of very different sizes and which, among the retail organizations, is Trautwein’s largest customer. It has bought a significant number of through-the-wall models from suppliers such as Tomra and Prokent, but also many free-standing bottle machines.

<sup>48</sup> **Page 7249**, Tomra’s reply of 14 February 2002, p. 15, reply to question 4.

for single refillable bottles, Trautwein's RVMs were unable to accept crates, of which there is traditionally a very high number in Germany<sup>49</sup>, and could not be combined with backroom equipment. Their limited storage place, the need to frequently change the storage tray and the fact that it is impossible to insert crates, made them unsuitable for larger outlets and certainly for handling the bulk of the returned containers. In addition, they were less sophisticated from a technological point of view.<sup>50</sup>

- (39) In Sweden, when retail chains decided to also install RVMs in small outlets in 1997-1998, this demand was satisfied largely by specifically developed small store models with smaller handling capacity and a considerably lower price.<sup>51</sup>
- (40) To sum up, 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 stand alone machines as substitutable with other RVMs demanded by food retailers.

### *Supply-side considerations*

- (41) With regard to the supply side, there were different manufacturers for different categories of RVMs. [confidential]<sup>52</sup>
- (42) Tomra, Prokent, Bevesys, Repant and EM-Gerätebau focused on demand for the high-end machines.
- (43) The latter four suppliers offered exclusively through-the-wall RVMs. Eleiko of Sweden offered low-end RVMs that could be connected to backroom equipment, but it was acquired by Tomra in 2001. Even though Tomra at some point also marketed models to address the demand of smaller outlets, it mainly targeted the high-end demand. By 2002 Tomra offered the following models of through-the-wall machines: TEMPO, T-500, T-600, and T-610, all of which could be adapted for accepting different types of containers.<sup>53</sup> With regard to low-end machines, Tomra offered MiniCan, Quattro, T-22, T-32, T-42, T-62, Trio B, Bravo, and T-83, all of which would accept one or several types of drink containers, but no crates.<sup>54</sup> In fact, [confidential: 75-85%] of Tomra's machines were high-end machines delivered with backroom equipment. In addition, Tomra had different models in its portfolio where backroom equipment was optional.
- (44) The suppliers that exclusively offered low-end RVMs did not appear to have been able to easily and quickly extend their activity to develop and market high-end machines. Trautwein has been marketing its stand-alone bottle machine in Germany since 1994, without developing high-end machines for larger outlets in the period under investigation. While Tomra observed the activities of this

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<sup>49</sup> Page 7249, Tomra's reply of 14 February 2002, p. 15, reply to question 4.

<sup>50</sup> Page 2336, internal Tomra document.

<sup>51</sup> The situation in Sweden in 1997-1998 is described by Tomra in its reply of 14 February 2002, p. 4, page 7238.

<sup>52</sup> Page 11084 and 11088 (confidential), letter from Trautwein of 10 June 2003, answer to question 13.

<sup>53</sup> Pages 7240-7241, Tomra's reply of 14 February 2002.

<sup>54</sup> Pages 7242-7243, Tomra's reply of 14 February 2002.

supplier, it did not include it when establishing the market shares<sup>55</sup> and obviously did not see it as a threat to its high-end business. The companies Canmatic and Microlux only entered the market when there was a specific demand for small store RVMs in Sweden and were later acquired by other companies.<sup>56</sup> It, therefore, does not appear that competitors in the low-end segment of the market could significantly restrain Tomra's market power in the high-end segment during the period in question.

- (45) Tomra, as the supplier with the widest range of RVMs, started marketing a low-end machine that targets small retail outlets, in particular in Germany, only in the second half of 2000. It has also developed machines in response to the demand for small-store machines in Sweden. It seems, therefore, that there is supply side substitutability in that suppliers of high-end RVMs can successfully enter the market for low-end RVMs. However, this substitutability seems to be one-way, mainly due to the fact that high-end machines demand more complicated technology, i.e. connection to the backroom equipment, and a separate line of production.

### ***Conclusion***

- (46) 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. The competitive assessment 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.

### 3. THE RELEVANT GEOGRAPHICAL MARKET

- (47) The nationality of the manufacturer, the location of the production site(s) and transport costs appear to be of minor importance as Tomra, a Norwegian company with production facilities in Norway and Finland, achieved very high market shares in all EEA Contracting Parties and, also, worldwide. On the demand side of the market, there have been several mergers, acquisitions and instances of cooperation in the retail sector in recent years that affect more than one EEA Contracting Party. These are factors that could indicate that the relevant geographic market is larger than the individual EEA Contracting Parties. There

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<sup>55</sup> E.g. **page 5205**, HSCH 13: in a competitive up-date for Germany covering the period 1992-1997, Tomra included itself, Halton and EM-Gerätebau, but not Trautwein. In another internal document, **page 476**, Trautwein's model "Bottlecomp" is depicted in a table as being part of a separate market.

<sup>56</sup> Canmatic was acquired by Eleiko in 1998, which in turn was acquired by Tomra in 2001. Microlux merged with Repant in 2002-2003.

are, however, several considerations that make it more likely that the relevant geographic markets are national.

- (48) Despite the existence of Community legislation in relation to packaging and packaging waste, in particular Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste<sup>57</sup>, the markets for reverse vending solutions depend significantly on national legislation relating to waste management in general and deposit systems for used drink containers in particular. The prevalence and volumes of particular drink containers in the individual countries, as they result from regulatory requirements, choices of the beverage industry, the retail sector or consumer preferences, play a decisive role. The introduction of mandatory deposit systems on particular types of drink containers obviously increases demand for RVM solutions. Conversely, the lack of such legislation combined with an increasing use of non-refillable containers decreases the demand. The types and the volumes of drink containers on which there is a deposit 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.
- (49) Within the EEA significant market volumes for RVM solutions in food retail outlets by the time of the investigation existed only in the countries of North Europe (Sweden, Norway), Germany, Austria, the Netherlands and, to some extent, Belgium. Sales figures in the United Kingdom and Ireland, France and in the countries of South Europe (Italy, Portugal and Spain) have been insignificant. There used to be a market for RVMs in France, but it almost disappeared as a consequence of a decline in returnable drink containers and the increased use of disposable containers. In Germany the introduction of a mandatory deposit on non-refillable containers which had been expected for a number of years and was finally implemented in 2005, was expected to multiply the demand for RVM solutions and to influence the kind of machines that are put on the market. A strong increase in demand was generated previously through the introduction of state mandatory deposit systems for the collection of drink containers in different Nordic countries, e.g. in Norway in 1999, when the total number of RVMs sold increased from 230 in 1998 to 1 610 in 1999, and, to a lesser extent in 2000, when 430 RVMs were sold.<sup>58</sup>
- (50) Furthermore, amongst the countries with a significant number of RVMs installed the degree of market penetration varied. While countries such as Finland, Norway, Sweden, Denmark, the Netherlands and Austria are characterised by a high degree of automation and are referred to by Tomra as saturated or replacement markets, countries such as Germany and Belgium were considered to be growth markets.<sup>59</sup>
- (51) Due, *inter alia*, to the prevalence and number of different types of beverage containers, the preferences for different models varied in the different countries.

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<sup>57</sup> European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365 of 31 December 1994.

<sup>58</sup> Figures are based on data submitted by Tomra in its response of 22 November 2004, Attachment 6.

<sup>59</sup> E.g. page 498.



While machines particularly designed for the collection of non-refillable containers obviously sold best in countries with deposit systems for non-refillable containers, e.g. Sweden, through-the-wall combi-machines were very popular in countries with a high turnover in refillable bottles and crates such as Germany, Austria and the Netherlands. In Germany there was significant demand for particular types of RVMs for canteens.<sup>60</sup> There was demand for stand-alone machines solely for returnable bottles almost exclusively in German retail outlets.<sup>61</sup>

(52) According to Tomra, particular countries require particular software specifications.<sup>62</sup> In the period in question customer price levels varied considerably between the individual countries<sup>63</sup>, including neighbouring countries, although there may have been a tendency towards diminishing price differences towards the end of the period. With regard to machines to be supplied to particular countries, even Tomra's internal transfer prices varied.

(53) Despite examples of cross border consolidation and cooperation in the food retail sector, customers and their procurement process were predominantly organised at national level. Negotiations and purchases took place almost exclusively at national level through the relevant subsidiary or distributor of the suppliers. In some countries there were also customers that were organised regionally or whose activity did not extend beyond a particular region. Reverse vending solutions were delivered and installed by the national distribution subsidiary or the relevant distributor to retail outlets in the relevant territory.

(54) Between 1997 and 2002 RVM suppliers other than Tomra were active only in one or in a small number of EEA Contracting Parties.<sup>64</sup> Backroom equipment was usually made locally in the respective countries through sub-contractors.<sup>65</sup>

(55) 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, which was not challenged by Tomra in its response to the Statement of objections. During the Hearing in December 2004, Tomra actually emphasized the national differences between the

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<sup>60</sup> These machines are considered to be part of a separate product market.

<sup>61</sup> Until mid-2000 there was only Trautwein's model "Bottlecomp". This machine is considered to address the low-end segment. Subsequently, Tomra offered a machine which addresses the same segment, but which had additional features.

<sup>62</sup> This is explained by Tomra with regard to Germany and Austria with reference to the complex crate assortments which prevail in these countries. See **page 7275**, reply from Tomra of 14 February 2002, p. 41.

<sup>63</sup> See, for instance, **pages 87** and **82-83** with regard to price levels in the Netherlands, Sweden and Norway. The price level in Austria was considerably higher compared to Germany. See, for instance, **page 7688**, Tomra's reply of 14 February 2002, Appendix 6, Binder 1, and **page 7690**, Appendix 6, Binder 2.

<sup>64</sup> E.g. Prokent predominantly in Germany, Bevesys predominantly in Finland, the Netherlands and Austria, Repant predominantly in Norway and Sweden, Eleiko predominantly in Sweden, Finland and Norway. **[confidential]**

<sup>65</sup> In addition there were, at least in certain periods, one or more national manufacturers of backroom equipment which supplied these products to customers in Austria.

markets as a result of differences in the national legislation in the relevant countries.

#### 4. TEMPORAL DIMENSION

(56) In the RVM market the presence of state legislation on the mandatory deposit system is of vital importance. Typically RVM suppliers are present only in the national markets where there is such legislation, as for example Germany, Sweden, Denmark, Austria, the Netherlands and Norway. It is not excluded, however, that RVMs are supplied to the market players in countries where such state regulation is non-existent or where the deposit is not mandatory. As it will be demonstrated further, the introduction or the anticipated introduction of a new deposit system did however have a significant impact on the demand side of the RVM solutions. In each national market under investigation, a “key year” could be identified, when demand for RVMs increased considerably. For instance, in Germany, due to retailers’ anticipation of, and the uncertainty surrounding the introduction date of the new deposit system on cans, the demand for RVM solutions increased throughout 2000-2002. Relevant legislation was finally adopted only in 2003. In Norway, the key year was 1999, when the new deposit system for cans was introduced. In the Netherlands, according to Tomra, the demand for RVMs significantly increased in 2001 following the change of national currency to the Euro, when many retailers took the opportunity to renew their stock.<sup>66</sup> Tomra did not explain why this factor did not have a similar effect on other RVM markets where the currency was introduced as well.

#### 5. DOMINANT POSITION

(57) According to the case law of the Court of Justice of the European Communities, dominance is “*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, its customers and ultimately of its consumers*”.<sup>67</sup> Such a position is consistent with some degree of competition, but it enables the undertaking in question at least to have an appreciable influence on the conditions under which that competition will develop.<sup>68</sup>

(58) Despite the fact that the relevant markets are national and that low-end stand-alone RVMs could be separated from high-end RVMs, the competitive situation is analysed also with reference to the wider product market for RVMs for retail outlets, in which Tomra’s market shares are consistently lower. In so far as there were no sales or only negligible sales of low-end RVMs, no separate figures are provided in the decision. This means that the market shares indicated in those cases are assumed for reasons of simplicity to be valid for the market for high-end RVMs and the wider market for RVMs for retail outlets.

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<sup>66</sup> Page 12052, Tomra’s response of 22 November 2004, Attachment 6, p. 36.

<sup>67</sup> Case 27/76, *United Brands v Commission*, [1978] ECR 207, Case 85/76, *Hoffman-LaRoche v Commission*, [1979] ECR 461, Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission*, [1983] ECR 3461.

<sup>68</sup> *Hoffman-La Roche*, par. 39.

(59) Unless specified otherwise, the market shares relate to numbers of units sold in the respective markets in individual years. The Commission has chosen this approach, which, it must be noted, underestimates the market shares to Tomra's benefit. If market shares were to be established in terms of sales value, Tomra's market shares could be expected to be significantly higher due to the fact that Tomra's high-end RVMs were generally more expensive than those of its competitors. In so far as low-end RVMs for retail outlets are included, this effect would be even more significant since the price for a high-end RVM together with the backroom equipment is considerably higher than that for a small store stand-alone RVM. In addition to market shares based on annual unit sales, information is given on market shares relating to the installed base, i.e. the number of machines installed in a given market at a particular point in time.<sup>69</sup>

### *Tomra's market shares and market position in the EEA*

(60) Since it entered the market Tomra has been the market leader enjoying very high market shares. According to its annual reports and internal documents<sup>70</sup>, of which at least the Annual Reports are said to relate to high-end RVMs<sup>71</sup>, Tomra's market shares continuously exceeded 70% in Europe in the years before 1997. At world-wide level the market shares were even higher in those years.<sup>72</sup> Tomra's most significant competitor in Europe at the time was Halton, which, according to Tomra built up a market share of up to 30% in 1997, before it was acquired by Tomra.<sup>73</sup> According to internal documents and its annual reports<sup>74</sup>, Tomra's market shares have exceeded 95% in Europe since 1997, the year it took over Halton's RVM business with regard to new installations.<sup>75</sup> Tomra's worldwide

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<sup>69</sup> Tomra also refers to them as the "cumulative market share".

<sup>70</sup> See for instance, **page 7301**, Tomra's Annual Report for 1996, p. 5: "Tomra's market share of new installations in Europe during 1996 remains stable, in excess of 70%. Our accumulated market share remains about 80%." The Annual Report for 1995, **page 7299**, contains the following passage on page 34: "... our position as market leader has been strengthened, with increased market shares of more than 70% in total for the year". Annual Report for 1994, **page 7297**, page 6: "Tomra's market share in Europe was approximately 70% in 1994, i.e. the same level as the previous year; The cumulative market share in Europe in more than 80%." **Pages 3780-3794**, EF 13. According to this internal document, in 1995-1996 Tomra's market share in Europe was 80% with regard to the number of machines installed in the market and above 70% for new installations.

<sup>71</sup> **Page 7239**, see Tomra's reply of 14 February 2002, p. 5.

<sup>72</sup> In 1996, for instance, the worldwide market share was said to be approximately 80%.

<sup>73</sup> See, for instance, paragraph 30 (page 11) or paragraph 39 (page 13) of Tomra's response to the Statement of objections of 22 November 2004 (**page 11750**). This statement may overestimate Halton's market share slightly, given that Tomra indicated in its annual reports that its own market shares exceeded 70% and since there were also other suppliers such as EM-Gerätebau, even though their market shares were very low on European level. Although it was asked to provide information in this respect, Tomra did not provide market shares for Halton in individual years.

<sup>74</sup> See Tomra's Annual Reports for 1997 (**Pages 7303 - 7304-67**), **page 7304-5**, 1998 (**Pages 7305 - 7306-74**), **page 7306-6**, 1999 (**Pages 7307 - 7308-67**), **page 7308-39**, and 2000 (**Pages 7309-01 - 7309-72**), **page 7309-65** (Page 14 of the Management Report for 2000). According to a slide called "Tomra Group 2001 Background", **page 4981** (HSch 1, page 2), Tomra's Europe-wide market share in relation to the total number of machines installed was [confidential: 85-95%] in 2001 and in excess of [confidential: 85-95%] with regard to new installations. According to internal documents, **pages 1732 and 4669** (ATU/KKL/28, page 2, PDB 23, page 1) (Slide: Europe Highlights 1998), Tomra's market share within Europe was 95% in 1998.

<sup>75</sup> **Page 4981**, HSch 1, p. 2

market share was estimated to be only slightly lower in this period.<sup>76</sup> For 2001 and 2002 Tomra did not publish any estimates in its annual reports. From the information that is available to the Commission, Tomra's EEA-wide market shares must have decreased to an estimated level of approximately **[confidential: 80-90%]** in 2001 and 2002 due to the emergence of new competitors, in particular Prokent and Beveysys. If the low-end segment were to be included, the figures would have to be adjusted downwards, but would still exceed **[confidential: 75-85%]** of the RVMs sold to the food retail sector every year between 1997 and 2002 within the EEA, with the exception of 1998.<sup>77</sup>

(61) Tomra's estimated market shares at EEA-level with regard to high-end RVMs can be presented as follows (Figure 2) on the basis of numbers of machines sold each year:

**Figure 2:** Tomra's market shares on EEA level 1998-2002, high-end machines only<sup>78</sup>

% of number of units sold/year (estimated)				
1998	1999	2000	2001 <sup>79</sup>	2002
>95%	>95%	95%	<b>[confidential: 80-90%]</b>	<b>[confidential:80-90%]</b>

(62) If the low-end segment is included, Tomra's market shares would be approximately as follows (Figure 3) at EEA-level:

<sup>76</sup> For 2000/2001 Tomra estimated its market share to be **[confidential: 85-95%]** in the USA, **page 4981**.

<sup>77</sup> The percentages indicated result from sales figures received from Tomra and its competitors.

<sup>78</sup> The only market outside of EEA with significant Tomra sales was Switzerland. Tomra's Annual Report 1998, **page 7306-6**; Annual Report 1999, **page 7308-39**; **page 4981**, HSch 1, p. 2. Figures provided by Tomra's annual reports relate only to the high-end machines sales, **page 7239**, Tomra's reply of 14 February 2002.

<sup>79</sup> For 2001 and 2002, Tomra did not publish the estimates of its market share in its Annual Reports. From the information available to the Commission, Tomra's EEA-wide market shares must have decreased to a level of approximately **[confidential 80-90%]** in 2001 and 2002 due to the emergence of new competitors.

**Figure 3:** Tomra's market shares at EEA level 1998-2002, high-end and low-end machines included

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% of number of units sold/year (estimated)

1998	1999	2000	2001	2002
61%	86%	84%	[confidential: 79-89%]	[confidential:77-87%]

(63) The relatively low market share of Tomra on a wider RVM market in 1998 can be explained by unusually significant sales in the low-end segment. In particular, a high number of small store RVMs were sold in Sweden due to a specific demand in this particular year that was to a large extent satisfied by two small Swedish suppliers. These sales came close to a one-off exercise. Moreover, it must be kept in mind that the Commission deliberately chose conservative estimates of market shares, which is to Tomra's advantage.

(64) Tomra's share of the installed base in the EEA is even higher due to its long presence in the market and the take-over of competitors. On the basis of information provided by Tomra reflecting the situation at the end of 2002<sup>81</sup>, Tomra's market share would be more than 85%. This is substantial in particular with respect to service income and the potential for upgrades. Considering Tomra's market shares and the sales volumes achieved in Norway compared with those achieved in Member States, Tomra's market shares in the Community would vary only insignificantly compared with the market shares given for the EEA.

***Tomra's market shares in the individual countries***

*The Netherlands*

(65) Over many years the Netherlands were one of the largest markets for RVM solutions within the EEA. Following the acquisition of Halton, Tomra had extremely high market shares. Although there had been attempts to enter the market since 1998, competitors only managed to make more sales after 2001, which meant that Tomra's market share dropped to [confidential: 90-100%] in 2001 and [confidential: 85-95%] in 2002.

(66) Sales figures and Tomra's market shares in the Netherlands between 1998 and 2002 are presented in the table below (Figure 4). EM-Gerätebau also sold a very

<sup>80</sup> The percentages are based on estimates provided by Tomra: **page 10035**, Tomra's reply of 25 June 2003, p. 4 (machines sold to canteens and kiosks excluded), compared to the sales figures based on the information provided by Tomra (see **page 7253**, Tomra's reply of 14 February 2002, p. 19.), Prokent, Bevesys, Repant and Trautwein for the years in which they were active, as well as on market information relating to other competitors available in the file. Between 1994 and 2002 Trautwein sold [confidential] bottle machines for retail outlets in Germany and a smaller number in other EEA-countries.

<sup>81</sup> See **page 7452**, figures provided by Tomra in Appendix 4 to its reply of 14 March 2002 and **page 10070**, Appendix 2 to Tomra's reply of 25 June 2003.

small number of RVMs in the Netherlands, which cannot, however be attributed with certainty to particular years.<sup>82</sup> With regard to the machines sold by Tomra, only a small number of these were low-end machines. Their exclusion would affect Tomra’s market shares only negligibly, and that is why, for practical reasons, the percentages indicated in Figure 4 could be used for the competitive assessment for both high-end RVMs and the wider market for RVMs for retail outlets.

**Figure 4:** Tomra’s and other suppliers’ unit sales in the Netherlands, and Tomra’s market share 1998-2002, high-end and low-end RVMs included

	Number of units sold/year (estimated)				
	1998	1999	2000	2001	2002
<b>Appr. total<sup>83</sup></b>	347	529 <sup>84</sup>	569	835	255
<b>Tomra<sup>85</sup></b>	345	529	567 <sup>86</sup>	[confidential: 750-800] <sup>87</sup>	[confidential: 190-240] <sup>88</sup>
<b>Bevesys<sup>89</sup></b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Prokent<sup>90</sup></b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Tomra’s MS</b>	c. 99%	c.99%	c.99%	[confidential: 90-100%]	[confidential: 85-95%]

(67) When looking at the installed base, Tomra’s market share was approximately [confidential: 90-100%] at the end of 2002.<sup>91</sup>

<sup>82</sup> Page 11767, Tomra’s response of 22 November 2004, p. 28, where Tomra states there were 5 EM-Gerätebau machines installed in the Netherlands.

<sup>83</sup> Page 12052, Tomra’s response of 22 November 2004, Attachment 6, p. 36.

<sup>84</sup> Tomra submitted that in 1999 it was the only one to sell all RVMs on the Dutch market. Bevesys, however, submitted that it sold [confidential] machines the same year. It is likely that Tomra did not account for Bevesys’ negligent sales that year. For this reason, when the figures are contradictory or incomplete, they are referred to as “approximate”.

<sup>85</sup> Ibid., see footnote 84.

<sup>86</sup> Amongst which there were [confidential: few] machines of the type “Trio”, which are low-end machines intended for smaller stores (see page 12468, Tomra’s reply of 3 May 2005).

<sup>87</sup> Amongst which there was [confidential: few] machine of the type “Trio”, see page 12468.

<sup>88</sup> Amongst which there were [confidential: few] machines of the type “Trio”, see page 12468.

<sup>89</sup> As regards Bevesys sales figures, see page 10845 (confidential), Bevesys reply of 28 March 2002, p. 1, and page 10883 (confidential), reply of 2 June 2003.

<sup>90</sup> Page 10919 (confidential), Prokent’s reply of 12 April 2002.

<sup>91</sup> Page 10070, Tomra’s reply of 25 June 2003, Appendix 2.

*Sweden*

- (68) Tomra has submitted that in 1997-1998 the Swedish retail sector decided to install a number of RVMs in small stores and that two small suppliers of specific small-store RVMs, Canmatic, later acquired by Eleiko, and Microlux, managed to obtain large sales in 1998.<sup>92</sup> According to the available information, installations by Microlux were confined to the year 1998 and consisted of one particular type of machine.<sup>93</sup> Eleiko, which acquired Canmatic in 1998 and Nimo/Igenta in 2000, also acted as Prokent's distributor. According to Tomra's internal documents, Eleiko had a full range of RVMs and backroom equipment and was expected to become active in other national markets.<sup>94</sup> Including the companies it acquired, Eleiko sold up to 1000 RVMs<sup>95</sup> until its RVM business was taken over by Tomra in May 2001. In 2001 the Norwegian company Repant entered the market and it made more significant sales in 2002.
- (69) As regards sales between 1998 and 2002, the following figures (Figure 5) are available in relation to the number of RVMs sold to retail outlets, including low-end RVMs:

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<sup>92</sup> **Page 7238**, Tomra's reply of 14 February 2002, p. 4.

<sup>93</sup> See **pages 1499-1629**, ATU/KKL/21: Presentations from MD Meeting, Prague, May 2001, in particular **Pages 1550 and 1508** or **page 506**, RM 34, documents for board strategy meeting on 5-6 September 2000, slide "Europe- Current competitive landscape".

<sup>94</sup> **Page 1508**, ATU/KKL/21 dating from May 2001, section on Competition, slide: "Europe – Current Competitive Landscape", or **page 506**.

<sup>95</sup> See **page 7260**, Tomra's reply of 14 February 2002, p. 26. See also **page 1551**, ATU/KKL/21, Section on Sweden, slide: "Eleiko". According to Tomra's presentation, a large share of these machines must have been sold in 1998. A number of **[confidential]** has been confirmed by Eleiko (Eleiko's response of 7 April 2005). Reliable figures on annual installations are not available for the period before 1998.

**Figure 5:** Tomra’s and other suppliers’ unit sales in Sweden, and Tomra’s market share 1998-2002, high-end and low-end RVMs included

	Number of units sold/year (estimated)				
	1998	1999	2000	2001	2002
<b>Appr. total<sup>96</sup></b>	1 692 <sup>97</sup>	880 <sup>98</sup>	743	713	500
<b>Tomra<sup>99</sup></b>	648	678 <sup>100</sup>	533 <sup>101</sup>	[confidential: 500-550]	[confidential: 450-500]
<b>Prokent<sup>102</sup></b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Eleiko<sup>103</sup></b>	[confidential]	[confidential]	[confidential]	[confidential]	-
<b>Microlux</b>	[confidential]	[confidential]	-	-	-
<b>Repant</b>	-	-	-	[confidential]	
<b>Tomra’s MS<sup>104</sup></b>	c. 38%	c. 77%	c. 72%	[confidential: 65-75%]	[confidential: 90-100%]

(70) With regard to the installed base in relation to all types of RVMs, Tomra’s market share was approximately 80% in 2000, whereas Eleiko’s share was

<sup>96</sup> Figures submitted by Tomra in its response of 22 November 2004, Attachment 6, p. 27, **page 12043**.  
<sup>97</sup> In its response of 22 November 2004, Attachment 6, **page 12043**, Tomra has submitted that the total market demand in 1998 was 1 549. However, after adding up the sales figures of Tomra and those submitted by competitors, the total sales figure is bigger, i.e. 1 692.  
<sup>98</sup> **Page 12043**.  
<sup>99</sup> **Page 12043**.  
<sup>100</sup> Amongst which there were [confidential] machines of the type “Minican”, [confidential] of the type “Solo” and [confidential] of the type ”Duo”, all of which are low-end machines. See **page 12467**, Tomra’s reply of 3 May 2005.  
<sup>101</sup> Amongst which there were [confidential] machines of the type “Solo” and [confidential] of the type “Duo”, see **page 12467**.  
<sup>102</sup> [confidential]. **Page 10919 (confidential)**, Prokent’s reply of 12 April 2002.  
<sup>103</sup> All types of machines, including those installed by Canmatic, which was acquired in 1998, and Nimo/Igenta, acquired in 2000. The figures for the individual years are based on information provided by Eleiko in its reply of 7 April 2005, **page 12429 (confidential)**.  
<sup>104</sup> As no precise figures for each individual year are available for all suppliers, the indicated market shares are estimates.



approximately 12% and Microlux' – 8%.<sup>105</sup> According to Tomra, in 2002 it had [confidential: 85-95%] of the installed base in Sweden.<sup>106</sup> However, it is likely that it was above [confidential: 85-95%], as in 2001 Tomra acquired Eleiko.

(71) If the machines supplied by Tomra that can be included in the low-end segment or small store/convenience market, are subtracted from its RVMs sales, the following can be established<sup>107</sup>:

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<sup>105</sup> **Page 1550**, ATU/KKL/21. According to this internal Tomra document dated May 2001, Eleiko had a market share of 12% and Microlux of about 8%, the remaining 80% being attributed to Tomra.

<sup>106</sup> **Page 10070**, Tomra's reply of 25 June 2003, Appendix 2.

<sup>107</sup> In some of the markets under investigation the sales of low-end machines were more significant than in others. Where the number of low-end machines sold by Tomra was insignificant, and where the figures from other low-end machine suppliers were not made available to the Commission, the market shares of Tomra and the total sales figures are provided for the high-end and low-end RVMs product market.

**Figure 6:** Tomra’s and other suppliers’ unit sales in Sweden, and Tomra’s market share 1998-2002, high-end machines market only

	Number of units sold/year (estimated)				
	1998	1999	2000	2001	2002
<b>Appr. total</b>	700 <sup>108</sup>	540	700	700	500
<b>Tomra</b>	648 <sup>109</sup>	500 <sup>110</sup>	490 <sup>111</sup>	[confidential: 480-530]	[confidential: 450-500]
<b>Prokent</b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Eleiko</b>	[confidential]	[confidential]	[confidential]	[confidential]	acquired by Tomra
<b>Repant<sup>112</sup></b>	-	-	-	[confidential]	
<b>Tomra’s MS</b>	c. 94%	c. 95% <sup>113</sup>	c. 70%	[confidential: 68-78%]	[confidential: 90-100%]

*Norway*

(72) According to an internal document<sup>114</sup> dating from May 1996, Tomra estimated its own market share to be 80% in Norway, with Halton achieving some 15%.

<sup>108</sup> Due to incomplete information, these figures are estimates only, provided here to complete the assessment of Tomra’s market position. The high-end machines only sales figures in this instance are derived from the total unit sales figures, provided by Tomra in its response of 22 November 2004, Attachment 6, **page 12043**, after deducting the number of machines, which were clearly intended for smaller stores, sold by Microlux and Canmatic (**page 1550, page 10070, and page 12429**).

<sup>109</sup> According to Tomra, in 1998 it has not sold any small store machines of the types “Minican”, “Solo” or “Duo”. Therefore, for establishing estimate high-end machines sales figures, it is assumed that all machines sold by Tomra in 1998 in Sweden were intended for larger stores. See **page 12467**.

<sup>110</sup> In 1999 Tomra sold [confidential] smaller store machines of types “Minican”, “Solo”, and “Duo” in Sweden. **Page 12467**. Figures are adapted on the basis of 95% market share in high-end machines sector only, which was stated by Tomra itself in its Annual report 1999, **page. 7308-40**.

<sup>111</sup> Tomra sold [confidential] “Minican”, “Solo”, “Duo” machines in Sweden in 2000. **Page 12467**.  
<sup>112</sup> [confidential].

<sup>113</sup> **Page 7308-40**, Tomra’s Annual Report 1999, Tomra’s response of 14 February 2002.

<sup>114</sup> Meeting protocol of 15 May 1996 between Tomra Butikkssystemer and representatives from Tomra Systems ASA, **pages 3589-3590**, PHA/PAB/33.

After 1997, when it acquired Halton's RVM business, Tomra's market share must have been above 95 %. This figure is also stated in Tomra's 1999 Annual Report. In 1999 the Swedish companies Nimo/Igenta<sup>115</sup> and Eleiko installed a number of machines in the context of the introduction of a mandatory deposit for cans and non-refillable plastic bottles. Nimo/Igenta took its machines back in 2000. Eleiko sold a small number of machines in 2000. Another supplier, Hugin Argus, is a very small Norwegian company with a very small installed base.<sup>116</sup> In 2001 the Norwegian company Repant entered the market.

(73) With regard to Norway the following sales figures are available (Figure 7):

**Figure 7:** Tomra's and other suppliers' unit sales in Norway, and Tomra's market share 1998-2002, high-end and low-end machines included

	Number of units sold/year (estimated)				
	1998	1999	2000	2001	2002
<b>Total</b> <sup>117</sup>	230	1 610 <sup>118</sup>	430	338	300
<b>Tomra</b> <sup>119</sup>	228	1510	424	[confidential: 275-325]	[confidential: 250-300] <sup>120</sup>
<b>Repant</b> <sup>121</sup>	n/a	n/a		[confidential]	
<b>Treiton</b>	n/a	n/a	n/a	[confidential]	n/a
<b>Igenta</b>	n/a	[confidential]	n/a	[confidential]	

<sup>115</sup> Later taken over by Eleiko.

<sup>116</sup> **Page 11767**, Tomra's response of 22 November 2004, p. 28. Tomra refers to an installed base of approximately 50 RVMs. The Commission does not have sales figures for individual years.

<sup>117</sup> **Page 12047**, Tomra's response of 22 November 2004, Attachment 6, p. 31.

<sup>118</sup> And 170 upgrades. **Page 7253**, Tomra's reply of 14 February 2002, p. 19, and **pages 12047-12050**, Attachment 6 to Tomra's response of 22 November 2004, p. 31-34.

<sup>119</sup> **Page 12047**, Tomra's response of 22 November 2004, Attachment 6.

<sup>120</sup> Initially, Tomra submitted that in 2001 it sold [confidential: 180-230] RVMs (**page 7253**, Tomra's reply of 14 February 2002), and in 2002 – [confidential] RVMs (**page 10037**, Tomra's reply of 25 June 2003). However, in its response of 22 November 2004, it stated that it sold [confidential: 275-325] in 2001 and [confidential: 250-300] machines in 2002 (**page 12047**). Commission bases its assessment on the most recent figures.

<sup>121</sup> According to information provided by Repant, it had sold [confidential] machines in Norway, which were installed during 2000, 2001 and 2002. It sold [confidential] older model machines, that handled refillable PET bottles, and that were installed in 1994 and 1995. **Page 11036 (confidential)**, Repant's reply of 25 March 2002. According to Tomra, Repant sold 25 RVMs in 2001 and 2002, **page 7452**, Tomra's reply of 14 March, 2004.

Others	[confidential]	n/a	[confidential]	n/a	n/a
Tomra's MS <sup>122</sup>	c. 99%	c. 94%	c. 99%	[confidential: 91-100%]	[confidential: 86-96%]

(74) With regard to Tomra's market position in terms of the RVMs installed in Norway, it had **[confidential: 90-100%]** market share by the end of 2002.<sup>123</sup>

#### *Austria*

(75) In Austria, due, in particular, to the presence of Halton and its distributor, Tomra's market shares were likely to be lower compared to other national markets.<sup>124</sup> Between 1998 and 2000 Tomra's market share figures must have been close to its European average. In that period EM-Gerätebau sold small quantities on the Austrian market. In 2001 and 2002 Tomra's market share probably dipped slightly below the European average as a consequence of significant sales made by Bevesys. Trautwein sold only a small number of free-standing bottle machines, which could only have had a negligible impact on establishing the market shares.

(76) The information on sales and market shares can be summarised in the following tables<sup>125</sup>:

<sup>122</sup> The percentages indicated are approximate.

<sup>123</sup> **Page 10070**, Tomra's reply of 25 June 2003, Appendix 2. According to a document of Resirk Norge AS of December 2000, Tomra had installed 2 065 out of 2 080 machines in the market and there was only one active competitor, **pages 143-145**, RM 2: letter of 16 November 2000, signed by the Managing Director/CEO of Norsk Resirk AS, an organisation representing the breweries/soft-drink producers and the retail trade in Norway.

<sup>124</sup> See, for instance, **page 10846**.

<sup>125</sup> The information is based on sales figures provided by the different suppliers. For Bevesys see **pages 10846-10847 (confidential)**, Bevesys reply of 28 March 2002 and **page 10882**, point 4, letter of 2 June 2003.

**Figure 8:** Tomra’s and other suppliers’ unit sales in Austria, and Tomra’s market share 1998-2002, high-end and low-end machines included

	Number of units sold/year (estimated)				
	1998	1999	2000	2001	2002
<b>Total</b> <sup>126</sup>	254	295	296	220	219
<b>Tomra</b> <sup>127</sup>	239	280	280	[confidential: 130-180]	[confidential: 150-200]
<b>Bevesys/Toperczer</b> <sup>128</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Prokent</b> <sup>129</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Trautwein</b> <sup>130</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>EM</b> <sup>131</sup>		[confidential]		left the market	left the market
<b>Tomra’s MS</b>	c. 94%	c. 95%	c. 95%	[confidential: 72-82%]	[confidential: 76-86%]

(77) Of all RVMs installed in retail outlets in Austria, i.e. in relation to the installed base, Tomra’s market share was about 98% at the end of 2002.<sup>132</sup>

<sup>126</sup>

**Page 12059**, Tomra’s response of 22 November 2004, Attachment 6, p. 43.

<sup>127</sup>

Since 2000 Tomra’s figures include free-standing machines of the type “Trio”. The figures for the individual years are as follows: 2000 – [confidential], 2001 – [confidential], and 2002 – [confidential]. See Tomra’s reply of 3 May 2005, **page 12468**. Figures of total Tomra sales were submitted by Tomra in its response of 22 November 2004, Attachment 6, p. 43 (**page 12059**).

<sup>128</sup>

[confidential]. **Pages 10845-10847 (confidential)**, Bevesys’ reply of 28 March 2002.

<sup>129</sup>

**Page 10919 (confidential)**, Prokent’s reply of 12 April 2002.

<sup>130</sup>

**Page 11089 (confidential)**, Trautwein’s reply of 10 June 2003, Appendix 1.

<sup>131</sup>

On **page 4142**, EF 16, MD Meeting 23-28 May 2000, presentation on Austria, slide “Competition”, reference is made to an annual sales volume of 10-20 machines in relation to EM. Sales in 2001 and 2002, when EM-Gerätebau left the market, can be estimated to have been negligible. According to a document with the title “Europe – Current competitive landscape” of May 2001, **page 1508**, EM is said to be “struggling and losing customers and business”. In the presentation concerning Austria in 2001, slide “Austria – Market Developments – Competition”, **page 1560**, EM-Gerätebau is not even referred to any more as a competitor. Both documents are part of presentations from an MD Meeting of 30-31 May 2001, **pages 1499-1629**, ATU/KKL/21.

<sup>132</sup>

This is based on figures provided by Tomra, **page 10070**, and its competitors.

**Figure 9:** Tomra’s and other suppliers’ unit sales in Austria, and Tomra’s market share 2000-2002, high-end machines only<sup>133</sup>

	Number of units/year (estimated)		
	2000	2001	2002
<b>Appr. total</b>	281	200	208
<b>Tomra</b>	278 <sup>134</sup>	[confidential: 130-180]	[confidential: 140-180]
<b>Bevesys/Toperczer</b>	[confidential]	[confidential]	[confidential]
<b>Prokent</b>	[confidential]	[confidential]	[confidential]
<b>EM</b>	[confidential]	left the market	left the market
<b>Tomra’s MS</b>	c. 98%	[confidential: 75-85%]	[confidential: 75-85%]

#### Germany

(78) In Germany, where, due to the presence of more competitors, Tomra’s market share has been comparatively low in recent years, it nevertheless continued to reach levels of approximately 75-80% with regard to “high-end RVMs” or through-the wall RVMs. According to documents obtained during the inspections<sup>135</sup>, Tomra’s market share in Germany was estimated to be 95% in 1992, 84% in 1993, 75-78% in 1994<sup>136</sup>, 74% in 1995, and 73-75% in 1996.<sup>137</sup> Halton entered the German market at the end of 1991 or beginning of 1992 and was acquired by Tomra in spring 1997, achieving market shares of 16-19% since 1993. EM-Gerätebau was active on the German market between 1994 and 2001-2002 achieving market shares of around 8% between 1994 and 1997, which later decreased.<sup>138</sup>

(79) In 1998, following the acquisition of Halton’s RVM business, Tomra’s market share in Germany was estimated to have increased to approximately 95%.<sup>139</sup> Between 1999 and 2002, due to the emergence of Prokent, Tomra’s market share started to drop again and, according to the information available to the Commission, was over 90% in 1999, approximately 90% in 2000, and

<sup>133</sup> The relevant data relating to the sales of low-end machines is available only for 2000, 2001 and 2002.  
<sup>134</sup> Tomra sold [confidential] machines of type “Trio” in 2000, [confidential] in 2001 and [confidential] in 2002 in Austria. **Page 12468.**  
<sup>135</sup> See in particular **page 5205**, HSch 13, for figures between 1992 and 1996. Other documents are indicated in relation to the relevant years.  
<sup>136</sup> Relating to the latter figure see **page 6144**, GS 93.  
<sup>137</sup> Relating to the latter figure **page 6417**, AK 64.  
<sup>138</sup> **Pages 1499-1629**, ATU/KKL/21, in particular page **1508** : “Current competitive landscape in Europe “.  
<sup>139</sup> **Page 6852**, MS 104, information contained in Tomra’s letter sent to its customer.

approximately [confidential: 70-80%] in 2001 and 2002.<sup>140</sup> Prokent's market share developed from less than [confidential] % in 1999, to under [confidential] % in 2000 and under [confidential] % in 2001, reaching [confidential] % in 2002.<sup>141</sup>

(80) As regards low-end RVMs, Trautwein sb-technik started selling its model "Bottlecomp" in Germany in 1994. By the end of 2002 it had installed [confidential] of these machines in Germany.<sup>142</sup> If sales of low-end machines sold to food retail outlets are included, Tomra's market share would be reduced, in particular when looking at the number of machines sold.<sup>143</sup>

(81) In terms of RVMs sold to the retail sector in individual years the following figures<sup>144</sup> are available:

**Figure 10:** Tomra's and other suppliers' unit sales in Germany, and Tomra's market share 1998-2002, high-end and low-end machines included

	Number of units sold/year (estimated)				
	1998	1999	2000	2001	2002
<b>Appr. total<sup>145</sup></b>	952	1 150	1 478	1 211	1 160
<b>Tomra<sup>146</sup></b>	647	825	1 088	[confidential : 780-830]	[confidential : 650-700]
<b>Prokent<sup>147</sup></b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]

<sup>140</sup> These percentages are based on sales figures given by Tomra, see **page 7253**, Tomra's reply of 14 February 2002, p. 19, as well as **page 10037**, Tomra's reply of 25 June 2003, p. 6, **page 10921 (confidential)**, Prokent's reply to question 12, and **page 11013**, Prokent's reply to question 7 as well as on estimates made by these undertakings.

<sup>141</sup> See footnote 140.

<sup>142</sup> **Page 11089.**

<sup>143</sup> The general ratio between high-end and low-end RVMs being approximately 3:1 in the relevant years, e.g. **page 10070**, Tomra's reply of 25 June 2003, Appendix 2. The effect of the inclusion of low-end RVMs would obviously be much smaller when looking at the value of sales.

<sup>144</sup> Information generally provided by the different suppliers in response to requests for information.

<sup>145</sup> The figures take account of the estimates for EM-Gerätebau. The figures were submitted by Tomra in its response of 22 November 2004, Attachment 6, **page 12039**. Tomra did not explain whether these figures included the sales of low-end RVM producers. This is the reason why the figures in the table are approximate.

<sup>146</sup> **Page 12039**, Tomra's response of 22 November 2004, Attachment 6, p. 23. **Page 10036**, Tomra's reply of 25 June 2003, p. 5. Since 2000 the figures include free standing RVMs of the type "Trio". For the individual years the figures are as follow: 2000 – [confidential], 2001 – [confidential], 2002 – [confidential]. See **page 12468**, Tomra's reply of 3 May 2005. Tomra's figures submitted in its reply to the first request for information differed from the ones submitted in its response of 22 November 2004. According to Tomra's reply of 14 February 2002, Tomra has sold 872 RVMs in 1998, 883 in 1999, 1 235 in 2000, [confidential: 650-700] in 2001, and [confidential: 640-690] in 2002.

<sup>147</sup> **Page 10919 (confidential)**, Prokent's reply of 12 April 2002.

EM-G <sup>148</sup>	[confidential]	[confidential]	[confidential]	[confidential]	left the market
Bevesys <sup>149</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Trautwein <sup>150</sup>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Tomra's MS	c. 68%	c. 72%	c. 74%	[confidential: 60-70%]	[confidential: 65-75%]

(82) If low-end RVMs supplied to German retail outlets are excluded, the following market shares can be established for Tomra on the basis of the number of machines sold:

**Figure 11:** Tomra's and other suppliers' sales in Germany, and Tomra's market share 2000-2002, high-end machines only<sup>151</sup>

	Number of units sold/year (estimated)		
	2000	2001	2002
<b>Appr. total</b>	1 223	952	964
<b>Tomra</b>	c. 1013 <sup>152</sup>	[confidential: 720-770] <sup>153</sup>	[confidential: 600-650] <sup>154</sup>
<b>Prokent</b>	[confidential]	[confidential]	[confidential]
<b>EM-G</b>	[confidential]	[confidential]	[confidential]
<b>Bevesys</b>	[confidential]	[confidential]	[confidential]
<b>Tomra's MS</b>	<b>c. 83%</b>	<b>[confidential: 75-85%]</b>	<b>[confidential: 61-71%]</b>

<sup>148</sup> There are no individual yearly sales figures available since 1998. According to Tomra there were some 300 EM machines installed by 2002 before this company left the market. According to internal Tomra documents dating from 2001 relating to the competitive landscape, EM-G was struggling and losing customers and business, e.g. **page 1508**, ATU/KKL/21, p. 10. These factors make it unlikely that EM-G sold more than 30 machines on average per year since 1998.

<sup>149</sup> **Pages 10845-10847 (confidential)**, Bevesys' reply of 28 March 2002.

<sup>150</sup> **Page 11105 (confidential)**, Trautwein's reply of 10 June 2003.

<sup>151</sup> The figures of Tomra's low-end machines sales are available only for 2000-2002.

<sup>152</sup> Tomra sold [confidential] machines of type "Trio" in Germany in 2000, **page 12468**.

<sup>153</sup> Tomra sold [confidential] "Trio" machines in 2001, **page 12468**.

<sup>154</sup> Tomra sold [confidential] "Trio" machines in 2002, **page 12468**.



(83) As regards the total number of high-end machines installed in German retail outlets, i.e. the installed base, Tomra's share<sup>155</sup> was approximately [**confidential: 90-100%**] by the end of 2001<sup>156</sup> and [**confidential: 85-95%**] by the end of 2002.<sup>157</sup> If free-standing or low-end RVMs were included, Tomra's share would have been between [**confidential: 60-80%**]<sup>158</sup> at the end of 2002.

### *Other considerations relating to Tomra's market position*

#### *Market shares of competitors*

(84) The Court of Justice has consistently held that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.<sup>159</sup> The ratio between the market shares held by the undertaking concerned and that of its nearest rivals is a highly significant indicator of dominance.<sup>160</sup> After 1997 Tomra's market share in any relevant market considered was practically never below 75% in any individual year. Taking as a reference a wider market of RVMs for retail outlets, Tomra's market shares were in excess of 60% in every national market considered. In most territories and years the figures were clearly higher, often in the neighbourhood of 90%, and in some cases corresponding to a quasi-monopoly. The only exception appears to be Sweden, during the short period when two small manufacturers managed to sell a substantial number of machines, mainly for small retail outlets; this constituted a very specific, short-lived situation that was not representative of the competitive situation in that Member State in general. In any relevant markets Tomra's market share was a multiple of the market shares of its competitors. This situation is sufficient for finding dominance; however, the Commission will also explore additional elements that support this finding.

(85) Although there have been a number of market entries and attempted market entries in the period under consideration, the majority failed to stay in the market for any length of time and to reach a critical size that would make them become a serious competitor. 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. Many of them were start-ups, were in a weak financial position and left the market within a rather short period of time.<sup>161</sup>

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<sup>155</sup> Including Halton machines.

<sup>156</sup> **Page 7452**, Tomra's reply of 14 March 2002, Appendix 4, taking into account sales figures provided by Prokret and Bevesys.

<sup>157</sup> **Page 10070**, Tomra's reply of 25 June 2003, Appendix 2, taking account of sales figures provided by Prokret and Bevesys.

<sup>158</sup> This is based on the documents provided by Tomra and its competitors, including Trautwein. By the end of 2002, there were [**confidential**] Bottlecomp machines installed in Germany (**page 11089**) compared to [**confidential: 6 300 – 6 800**] Tomra machines (**page 10036**), Tomra's reply of 25 June 2003. Tomra's percentage estimate (**page 10036**) is too low.

<sup>159</sup> Case 87/76, *Hoffmann-La Roche v Commission*, [1979] ECR 461, par. 41, T-30/89, *Hilti v Commission*, [1992] ECR II-1439, par. 92, Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission*, [1983] ECR 3461.

<sup>160</sup> See Case T-219/99, *British Airways v. European Commission*, judgment of 17 December 2003, par. 210.

<sup>161</sup> **Page 5004**, HSch 1, p. 30, document of 19 September 2001: "Europe – Current Competitive Landscape". See also **pages 1011-1020**, JAA/MJA10, or the slide "Europe-Current Competitive

### *Tomra's response to new market entries*

(86) Market entrants that tried to enter all national markets were faced with an experienced, well established and powerful incumbent. Tomra was determined to keep the competition small in order to maintain its leadership, and acquired a reputation for aggressive responses to entry that targeted, in particular, those suppliers that Tomra expected to become serious competitors. 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. In this context reference may be made in particular to the take-over of Halton in 1997 and Eleiko in 2001, as well as the fact that Tomra almost succeeded in acquiring Prokent in September 2001.<sup>162</sup> It is important to note, that the Commission does not consider acquisition as being anti-competitive. These developments are presented to merely demonstrate Tomra's strategy in acquiring and maintaining its dominant position on the market.

(87) Patents and other intellectual property rights are very important in this sector<sup>163</sup>, at least where it comes to more sophisticated features and functions such as shape recognition technology and high-end equipment in general. Tomra has been able to patent its technology<sup>164</sup> and in a few instances used alleged patent infringement proceedings to meet the increasing competition from comparatively successful competitors.<sup>165</sup>

### *Buyer power*

(88) Tomra stresses the size and bargaining power of its customers, the food retail chains, and argues that low margins in the food retail business make the retail chains very difficult negotiating partners.<sup>166</sup> However, a comparison of the demand and the supply structure in the individual countries does not suggest that customers are able to outweigh Tomra's strong position on the supply side. Besides the generally three or four large retail groups in many countries there are a number of smaller retail groups with low market shares, including groups which are active only in particular regions. Even in the markets with a high degree of concentration as, for instance, in the Nordic countries, the largest retail

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landscape" contained in a presentation on MD Meeting in Prague, 30 and 31 May 2001, **page 1508** (ATU/KKL/21).

<sup>162</sup> See further sections for more detailed description.

<sup>163</sup> This follows, for instance, from information given by Tomra and its competitors in the context of replies to requests for information, **pages 10039-10040, 11015, 10882, 10883 and 11037**.

<sup>164</sup> **Page 730-53**, Management Report 2000, p. 2; here Tomra's CEO states: "*Why have we succeeded, when others have not? Because we have had good technology, which we have partly been able to patent: a technology comprising an enormous amount of industry knowledge...*". **Page 6199**, AK 1, p. 1: "*more than 30 patents*".

<sup>165</sup> This was the case, for example, in relation to Bevesys. After acknowledging its growing potential and threat to Tomra's sales, Tomra identified "*legal pursuit of patent infringement*" as part of its "Response Plan" in 2001, which was presented in the presentation under the heading "Europe – Current Competitive Landscape" on 19 September 2001 (**pages 5004-5005**).

<sup>166</sup> See, for instance, **page 7237**, Tomra's reply of 14 February 2002, or **page 7420**, Tomra's reply of 14 March 2002.

groups have much smaller market shares than Tomra, i.e. the concentration on the demand side is much lower than on the supply side.

- (89) The existence of buyer power on the demand side requires that there are either credible alternative suppliers to which the customers could turn, or that customers are able to sponsor new entrants. However, in the absence of established competitors which achieve significant and stable market shares, there cannot be a credible threat of even the largest customers moving all or a very large proportion of their requirements away from Tomra, by way of a bidding process or otherwise. Procurement of reverse vending equipment is not part of the core activities of retail groups. The circumstances of the case do not suggest that they were likely to act in a strategic manner in order to subsidise and actively build up competing suppliers to which large parts of the demand could be diverted. There is no evidence for any such behaviour of sponsoring new entry in the period under investigation. Moreover, such behaviour would have been prone to free riding, as building up a competitor would have resulted in a public good. Therefore, there was no substantial countervailing buyer power which would have been able to challenge Tomra's dominance in any of the markets concerned.

#### *Bidding market*

- (90) Tomra claims that the market in question is a bidding market and that the contracts in question represented the outcome of a bidding process where competitors had the chance to compete.<sup>167</sup> Apart from the fact that this assertion is incompatible with Tomra's allegation that, first of all, there was no viable competition, Tomra has not substantiated its claim and there is no evidence that there was any real bidding process in any of the cases referred to in the objections raised by the Commission. The evidence in the file implies that the substance of the contracts and conditions applied by Tomra was rather the result of negotiations that were to a significant extent influenced by Tomra. In so far as customers also had contacts with other suppliers or were considering options other than the agreements finally concluded with Tomra, this does not give the respective markets the character of bidding markets. Even in cases where the demand for RVM solutions increased significantly due to the introduction of new legislation, as was the case, for example, in Norway in 1999, RVM purchases were not made through a bidding process.<sup>168</sup>

#### *Tomra acknowledges its dominant position*

- (91) Finally, it follows from several documents found during the inspection that Tomra itself believes that it is in a dominant position. For instance, in slides prepared for a meeting of managing directors in May 2001, it is stated as a short term priority to "*protect and strengthen market position and dominance across Europe*".<sup>169</sup> Equally, a document prepared for an "MD Forum" on 17 April 2001 states that it is Tomra's overall goal to "*maintain market dominance and market*

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<sup>167</sup> See e.g. **page 11761-11763**, Tomra's response of 22 November 2004, par. 78-88.

<sup>168</sup> Details with regard to the negotiation process can be found in the respective sections below.

<sup>169</sup> **Page 1521**, presentations from the MD Meeting, Prague, 30-31 May 2001, starting at **page 1499** (ATU/KKL/21), "1. Targets and Initiatives 01-03, Slide "Short term Priorities".

share”.<sup>170</sup> In a reference document Tomra states that it “*has developed extensive systems for supporting Tomra’s role as the dominant RVM supplier in the market*”.<sup>171</sup> In its response to the Statement of objections Tomra did not contest that it enjoys a dominant position in the territories and periods at issue.

### **Conclusion**

(92) According to the case law of the Court of Justice, very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share over 50%.<sup>172</sup> Market shares in the region of 75-87 per cent were found by the Court to be “*so large that they are in themselves evidence of a dominant position*”.<sup>173</sup> Similarly, market shares of 84-90 per cent were considered by the Court to be “*so large that they prove the existence of a dominant position*”, and market shares of 93-100 per cent result in a factual monopoly.<sup>174</sup> Therefore, market shares of the magnitude that Tomra has been enjoying at EEA-level and in the individual EEA Contracting Parties at least since 1997 must generally be considered as evidence of a dominant position.<sup>175</sup> Tomra’s high market shares within the EEA and world-wide strengthen the finding of dominance in the individual EEA Contracting Parties.

(93) The large gap between Tomra and its competitors and other factors, discussed in paragraphs 84-91, further emphasise Tomra’s market power.<sup>176</sup> In addition, there is no relevant exercise of countervailing buying power that could neutralise Tomra’s strong position on the supply side. Although it is likely that the degree of Tomra’s dominance varies between different territories and years, it must be concluded that Tomra has been in a dominant position in the five EEA Contracting Parties considered, and in the EEA as well as the Community at least since 1997. Tomra would be in a dominant position in the years and territories identified even if the wider market for RVMs for the food retail sector (including low-end RVMs) were to be considered, with the possible exception of Sweden in 1998. Taking account of the factors mentioned in paragraphs 84-91, a dominant position already existed prior to 1997 at least in Norway.<sup>177</sup>

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<sup>170</sup> Page 2263, BLI 25, p. 3.

<sup>171</sup> Page 1641, ATU/KKL/22, Reference Document: Existing Business Models, p. 40.

<sup>172</sup> Case C-62/86, *Akzo*, [1991] ECR I-3359, par. 60.

<sup>173</sup> Case 85/76, *Hoffmann-La Roche v Commission (Hoffmann-La Roche)*, [1979] ECR 461; par. 53-56.

<sup>174</sup> *Ibid.*, par. 59-60 and 67.

<sup>175</sup> Case 85/76, *Hoffmann-La Roche v Commission*, [1979] ECR 461, T-30/89, *Hilti v Commission*, [1992] ECR II-1439, par. 92, Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission*, [1983] ECR 3461, Case C-62/86, *AKZO Chemie BV v Commission*, [1991] ECR I-3359, par. 60.

<sup>176</sup> Case 27/76, *United Brands Co and United Brands Continental BV v. Commission* [1978] ECR 207, and Case 322/81, *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461.

<sup>177</sup> This follows from information available on the competitive landscape in Europe and information available on particular countries. Tomra did not provide any information on Halton’s market shares in relation to individual years and countries. See page 10039, Tomra’s reply of 25 June 2003, answer to question 15. Tomra did not contest the Commission’s finding that it was dominant in the two countries in question also before 1997, page 11760, Tomra’s response of 22 November 2004, par. 76.

- (94) Tomra did not contest the Commission's conclusion with regard to its dominance at least since 1997 (and prior to 1997 in Norway).<sup>178</sup>
- (95) When looking at the sales figures as they result from the Figures 4-11 and comparing them to the situation at EEA-level, the country in which the smallest turnover was achieved in any individual year represented 5% or more of Tomra's EEA-wide turnover. With regard to the Community the relative significance of the individual national markets would logically be higher. Given the significance of each of the national markets in relation to the Community and EEA market for the products in question, each of the EEA Contracting Parties in which dominance has been established constitutes a substantial part of the common market and a substantial part of the territory of the EEA.
- (96) 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.

### III. TOMRA'S PRACTICES

#### A. TOMRA'S STRATEGY AND PRACTICES

- (97) Tomra's strategy was based on a policy that sought to preserve its dominance and market share<sup>179</sup> through means such as (i) preventing market entry<sup>180</sup>, (ii) keeping competitors small<sup>181</sup> by limiting their growth possibilities<sup>182</sup> 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 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

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<sup>178</sup> **Page 11760**, Tomra's response of 22 November 2004, par. 76.

<sup>179</sup> This goal is stated in several documents, for instance, in a presentation prepared for a meeting on 17 April 2001, **page 2263**, BLI 25, p. 3.

<sup>180</sup> E.g. **page 2263** and **3436**, PAB/PHA/15, p. 3, **pages 3431-3432**, PAB/PHA/5, **pages 3433-3452**, PAB/PAH/6. See also **page 1718**, ATY/KKL/25, p. 4, and **page 2427**: "*to avoid entering of other suppliers in our niche market*".

<sup>181</sup> Tomra's strategy of preventing market entries and preventing expansion of competitors is referred to in number of documents, e.g. **pages 3023-3026**, FEK/PC/36, **pages 3431-3432**, PAB/PHA/5, **page 3433**, PAB/PHA/6, **pages 3535**, PAB/PHA/15, **pages 3228**, LEP/GOR/1, **pages 1525, 2263, page 4085** and **page 5005, page 2263**. Often reference is made to expression such as "blocking competition", "building" or "raising competitive barriers" "creating" or "developing barriers to entry". The upper limit which Tomra "set" for any single competitor in any single market was a market share of 10%, excess of which triggered an aggressive response. See, for instance, **page 7013**, e-mail by Tomra Europe's sales director to Tomra Germany and Tomra Austria on 9 April 2001, which was copied to Tomra's top management.

<sup>182</sup> See footnote 181. Often also the term "blocking competitors" can be found. For example, with regard to Bevesys, Tomra identified "Response Plan" which comprised among other tools, a possibility to "block" it by means of "long term preferred supplier contracts", see **page 5005**.

practices, in particular, in anticipation of expected market entry, whether due to the planned introduction of new legislation 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.

(98) 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.<sup>183</sup> For example, with reference to a Norwegian company, called "Repant", that had started operations, [confidential: President of Tomra Europe AS] wrote to Tomra Butikkssystemer AS, Tomra's Norwegian distribution subsidiary: "We must use all means to keep them out/down." ... "I expect that you do everything possible to block any attempt from Repant of entering the market".<sup>184</sup> In an e-mail of 4 October 1999, that obviously concerns the Finnish competitor Bevesys, [confidential: then President of Tomra Europe AS], wrote to [confidential: Tomra's Chief Executive Officer ("CEO")], that "the Finns must be neutralised as soon as possible".<sup>185</sup> On 3 November 1999 [confidential: president of Tomra Europe AS] wrote to [confidential: chief executive officer of Tomra] that "priority number one is to take those guys away from the arena before they even get started".<sup>186</sup> In September 2001 the President of Tomra Europe stated in an e-mail, sent to Tomra Europe's Sales Director as well Tomra ASA's CEO: "It is important that we take Bevesys by the neck also in an early phase ...".<sup>187</sup> With regard to a Swedish company which was expected to enter the market, it was stated in an internal document that it was Tomra's aim to "work on them" in order to prevent them from developing a machine.<sup>188</sup>

(99) Tomra's policy is illustrated in an e-mail message of 6 September 2001 from the sales director of Tomra Europe AS to Tomra Finland that was copied to the President of Tomra Europe and the CEO of Tomra Systems ASA. This e-mail contains the following passage: "As we have discussed and agreed at several meetings before (please refer to the attached summary of our MD Forum discussion in April), we are absolutely intent on denying our competitors any growth in number of installations and market share. This has to be monitored on a local basis and reported very early to me as well. Our response must be

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<sup>183</sup> Pages 3052, FEK/PC 53, e-mail of 3 November 1999, pages 3116-3117, LEP/PC 31, e-mail of 4 October 1999, page 2771, ATS 16, pages 1499-1629, ATU/KKL/21), page 1508, or page 5004, HSch 1, p. 30, "Europe – Current Competitive landscape", page 1524, ATU/KKL/21, presentations for the MD Meeting, Prague, May 30-31 2001, p. 2 of the presentation on Germany, pages 4310-4312, WK 25, e-mail from [confidential: representative of Tomra Netherlands], to [confidential: representative of Tomra Europe AS] of 5 July 2001, page 4311, WK 25, page 2, e-mail from [confidential: representative of Tomra Europe AS] to the European subsidiaries of 5 July 2001, page 1738, document from beginning of 1999: ATU/KKL/28, p. 8, or page 4675.

<sup>184</sup> Page 3251, GOR/LEP/1: "Vi må derfor sørge at alle medler benyttes til å holde dem ute/nede. (...) Jag regner med at dere gjør alt som er mulig for å blokkere et hvert fremstøt i markedet fra Repant."

<sup>185</sup> Page 672. The original wording in Norwegian is: "Jeg blir mer og mer overbevist om at det vil være ritigst å få finnene 'nøytralisert' asap."

<sup>186</sup> Page 663. The original wording in Norwegian is: "Min prioritet nr 1 er fremdeles å få disse gutta løftet vekk fra arenaen før de kommer till start ..."

<sup>187</sup> Page 2771. The original wording reads: "Viktig at vi tar strupetak på bevesys også I en tidlig fase ...".

<sup>188</sup> Page 2395, ESP/TST/8: "Vår målsättning, att försöka knyta upp Recyc, så att de inte förleds att även starta upp en vidareutveckling av en automat."

*ruthless, but hopefully through measures which minimize the long term damage for us: trade-in campaigns, 'free machines' (e.g. buy 4, get 1 free), bundling, added value functionality/services, high volume block orders, long term financial arrangements, new machines, basic machine price cuts are always last resort!" (emphasis added)<sup>189</sup> In an e-mail of the same day [**confidential**: then President of Tomra Europe AS], stated that he was in full agreement with this approach.<sup>190</sup> Similar statements can be found in other documents.<sup>191</sup>*

- (100) Although Tomra's internal documents also mention normal means of competition, such as product innovation, an expansion of its product portfolio and customer satisfaction as barriers for competitors<sup>192</sup>, long-term preferred supplier contracts or high volume block orders with all major customers are often referred to as key elements in Tomra's policy of preventing market entries or denying market access to competitors. [**confidential**]<sup>193</sup>
- (101) At a Board Strategy meeting on 5 and 6 September 2000 in Düsseldorf, under Point 4, "Europe Review", Tomra's growth strategy and its response to competition were discussed. According to a presentation that was prepared for the board meeting and was found, *inter alia*, in the office of Tomra Systems ASA's CEO, focussing on "*long term partnership/preferred supplier agreements with major customer groups*"<sup>194</sup> is a key element to achieve Tomra's growth targets. "Long term preferred supplier contracts" and selective price cuts are also referred to in the context of Tomra's "response plan" with regard to specific competitors.<sup>195</sup> In a document describing the strategy for the period 2001-2003 "*long term partnership/ preferred supplier agreements with major customer groups*" are again mentioned as a practice to "focus on".<sup>196</sup> Tomra's focus on long-term partnership/preferred supplier agreements with major customers also appeared in other strategy documents of the group<sup>197</sup> and in documents setting out Tomra's negotiation objectives.<sup>198</sup>
- (102) The fact that the different terms such as "preferred supplier agreements", "long-term partnership or supply agreements" and similar terms or "high-volume block orders" are often mentioned in the context of tying-in customers, preventing market entries or responding to market entries or sales efforts by competitors shows that they pursue an exclusionary objective. The use of the term "preferred supplier" manifestly implied exclusivity or at least a tendency

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<sup>189</sup> Page 2771.

<sup>190</sup> Page 2271.

<sup>191</sup> E.g. page 2263.

<sup>192</sup> This is stressed by Tomra in its response to the Statement of objections, pages 11777-11781.

<sup>193</sup> Page 1718, ATU/KKL/25, p. 4.

<sup>194</sup> Pages 509 and 518, featuring amongst the presentations for the Board Strategy Meeting on 5-6 September 2000, pages 461-527, RM 34 and RM 35. Slides relating to Point 4 "Europe review" can be found on pages 493-527.

<sup>195</sup> Page 507, p. 15 of a presentation concerning Europe.

<sup>196</sup> Page 4995, HSch 1. See also page 5005.

<sup>197</sup> E.g. page 4995, HSch 1, p. 22: "Base Business Targets & Initiatives 2001 – 2003 Strat. Plan". Or pages 518, 1512 and 5005.

<sup>198</sup> E.g. page 2279, in relation to negotiations with ICA Ahold: "We know what we want: - long term agreement (preferably 3 years+) – exclusivity ....."

towards exclusivity.<sup>199</sup> “High volume block orders” implied the inclusion of quantities that corresponded to the customer’s requirements in a given reference period or a large proportion thereof.<sup>200</sup>

(103) Tomra’s policy is further confirmed by a letter<sup>201</sup> that the Managing Director of Tomra Systems B.V. sent to a customer in July 2001. In the letter he explains that Tomra’s prices depend, *inter alia*, on the number of machines to be ordered and the period in which they are installed, the duration of the agreement and on whether or not Tomra is granted exclusivity. In general this means that the most advantageous price a customer can hope to obtain from Tomra depends on its willingness to accept the most exclusionary contract terms.

(104) Finally, the numerous proposals that Tomra made for exclusivity or preferred supplier agreements or for individualised block orders or retroactive rebate schemes containing very ambitious sales targets<sup>202</sup> also confirm Tomra was pursuing an exclusionary strategy.

(105) At the time when the inspections took place Tomra was in the process of intensifying and extending these practices. In a document describing the strategy for the period 2001-2003 and its implementation, it is stated with regard to “long term partnership/ preferred supplier agreements”: “*Ongoing across most countries. Increased number of multi-year/high volume agreements*”.<sup>203</sup> Other documents confirm Tomra’s intent to resort increasingly to exclusive or preferred supplier agreements.<sup>204</sup> An agreement concluded with [confidential], which provided for Tomra being a primary supplier<sup>205</sup> for a period of 3 years, was seen as a model for future agreements.<sup>206</sup>

(106) In addition to the practices referred to paragraphs 97-105, Tomra also used patent infringements by competitors that had entered the market as a means to frustrate or slow down their business efforts, in particular with regard to competitors it intended to drive from the market.<sup>207</sup> In one of its internal documents, Tomra outlines its “response plan” in order to cope with the competitive landscape on the European market. With regard to Bevesys, which started to get a bigger market share and offered lower prices, Tomra identified “legal pursuit of patent infringement” as one of the responses.<sup>208</sup> While patent authorities and, at least in one case a court of a Member State,<sup>209</sup> dealt with patent issues, the Commission does not have sufficient elements in its possession to

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<sup>199</sup> See e.g. **page 2279** and the sections concerning the types of contract used by Tomra and the practices implemented in the individual EEA-States concerned.

<sup>200</sup> See the section III.B with regard to the practices implemented by Tomra.

<sup>201</sup> **Pages 3835-3836**, EF 23, letter sent to Superunie B.A. on 20 July 2001.

<sup>202</sup> The individual cases are described in the sections III (A)-(E) further.

<sup>203</sup> **Page 4995**, HSch 1. See also **page 518**.

<sup>204</sup> E.g. **pages 4995, 5077, 5094, 5115, 5178** and **5199**.

<sup>205</sup> It in fact constituted exclusivity status, which will be explained in Section III(A) concerning the agreements in the Netherlands.

<sup>206</sup> **Pages 6351-6352**, AK 38, **page 6230**, AK 7. [confidential]. **Page 11817**, Tomra’s response of 22 November 2004, par. 365.

<sup>207</sup> Alleged patent infringements were an issue at least in relation to Bevesys and Repant.

<sup>208</sup> **Page 5005**.

<sup>209</sup> Court order of 21st August 2001 of the President of the Rechtbankte ‘s-Gravenhage.



assess Tomra's practices in this respect under competition rules. These practices are outside the scope of this decision. In any event, Tomra's readiness and determination to use patent infringements in an offensive manner<sup>210</sup> represented at least a factor which was not without relevance to the competitive position of other suppliers.

(107) Finally, while Tomra aimed at preventing market entry and limiting growth potential for competitors, Tomra also offered cooperation to certain competitors and at least considered doing so in other cases.<sup>211</sup> Tomra also considered the acquisition of those competitors that it deemed to have at least some potential. In

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In one case it is documented that Tomra warned a retail organisation and individual retailers affiliated to it orally and in writing about the risk they would be running if they decided to invest in competing products, as the competitor, Bevesys allegedly infringed one of Tomra's patents. Tomra intended to use these warnings on a larger scale before it was stopped by a court order obtained by the competitor. As it results from an e-mail of 5 July 2001 (e-mail from the Sales Director of Tomra Europe AS to the Managing Directors and/or heads of the sales divisions of all European subsidiaries, **pages 4310-4312**, WK 25), which was sent to the Managing Directors and/or heads of sales department of the subsidiaries concerned, it was intended that the subsidiaries would send a letter to all customers where Tomra was in direct competition with the competitor. In the e-mail the following sentence can be found: *"I hope this is helpful in making the customers aware of the risks and uncertainties they take by investing in Bevesys and that this will help us to beat the hell out of Bevesys in the market place."* In his reply of the same day, the head of Tomra Systems B.V. sales remarks: "It is nice that the game "Killing the competitor" is still working." (**pages 4310-4312**, WK 25). The letters (**pages 10090-10095**, Tomra's reply of 25 June 2003, Appendix 5) were sent at least to Schuitema Vastgoed B.V. in the Netherlands and to two independent retailers who are members of Schuitema (**pages 10040-10042**, Tomra's reply of 25 June 2003, question 19). Furthermore, at least 14 franchisees were approached orally in this respect (**pages 10040-10042** and **10097-10115**, Tomra's reply of 25 June 2003, question 19 and Appendix 6). In the letter Tomra *inter alia* stated that it would take all necessary actions against Bevesys' alleged infringement and that Tomra felt confident that it would prevail. This would mean that Bevesys has to modify or recall its machines from its customers and is liable to pay Tomra damages. The letter concluded: *"We hope you will understand our need to pursue infringement on our patents and will appreciate this information."* In a Court order of 21st August 2001 (See **pages 10886-10903**, in particular **pages 10895** and **10896**), based on a preliminary assessment, the President of the Rechtbank te 's-Gravenhage ruled that Bevesys did not infringe Tomra's patent and ordered Tomra not to make any statements and suggestions and to write to all those concerned to inform them that, according to the court order, the statements and suggestions made by Tomra were incorrect. Tomra did not challenge this decision. **[confidential]** (See, for instance, **pages 11037-11038**).

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Shortly after Bevesys had started its operations Tomra took the initiative to have top level meetings with this competitor (**pages 3046-3052**, FEK/PC/49-53) in the context of *"building a good relationship with our competitors"*, as it was put by Tomra ASA's CEO (**page 3055**, FEK/PC/55). During the meeting(s), which eventually took place, Tomra offered this competitor to cooperate (**pages 665-668**, FEK/ET/37, in particular **page 668**, p. 4 and **pages 670-671**, FEK/ET/39, p. 2). These contacts coincided with Tomra's intention to drive it from the market. Tomra concedes that there was "possibly" an offer for cooperation, but insists it did not result in any unlawful cooperation (**page 11800**, Tomra's response to the Statement of objections of 22 November 2004, par. 273). When Halton entered the German market in 1991/1992, Tomra took the initiative to have regular contacts and exchanges of information on issues such as prices, discounts, customer relations, as well as numbers of planned installations and effectively installed machines (**pages 6194-6195** and **6171-6172**). Such contacts were pursued until the time Halton was taken over by Tomra (**pages 6180, 6124, 6123, 6145, 6152-6153, 6116, 6115, 6109-6110, 6098-6099** and **6101**). Collaboration was also referred to as one means of dealing with Prokent (**Pages 2427-2428**, ESP/TST/15, e-mail). In an e-mail sent to the Sales Director and President of Tomra Europe on 30 April 2001, the Managing Director of Tomra Leergutssysteme GesmbH, Tomra's Austrian subsidiary, proposed *"to establish a discussion with Prokent (on top level) to avoid/reduce a price fight"* and on the paper copy of this e-mail, found in the office of Tomra Europe's Sales director the following annotation is found: *"Try, but (do) not expect a lot"* (**page 2270**, BLI 26).

2000, for instance, the potential take-overs of Eleiko, Prokent and Bevesys were evaluated.<sup>212</sup> The acquisition of Eleiko's RVM business and the attempted take-over of Prokent in 2001 is referred further in this decision. Those practices are described here in order to illustrate Tomra's overall strategy and the means implemented to maintain its dominant position. This decision does not question the legality of these practices, which are outside its scope.

(108) Tomra argues that it did not pursue an exclusionary or abusive strategy<sup>213</sup> and claims that its competition approach is based on competing "on the merits" by "expanding output", "growing the market" and "ensuring customer satisfaction".<sup>214</sup> This, however, fails to give an explanation as to why the numerous documents relating to Tomra's strategy and policy as well as the documents relating directly to its practices, for example the offers, outline exclusionary agreements as means of ensuring attainment of these objectives. More importantly, Tomra failed to explain why: (i) it used bulk volume orders (which often corresponded to total or almost total requirements of the customers during one year or longer), (ii) applied exclusivity clauses covering the key periods in each market concerned, (iii) acquired competitors that had shown a certain growth potential, (iv) applied individualised quantity commitments and retroactive rebate systems (which, once again, aimed at fulfilling the total or almost total requirements of each customer). Moreover, Tomra was not able to explain its individualised rebate schemes and quantity commitments by corresponding cost savings. The facts are that 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.

## B. IMPLEMENTATION OF THE PRACTICES

(109) This section describes practices that specifically relate to Tomra's policy of blocking market access for competitors in particular by means of exclusivity agreements, *de facto* exclusivity agreements and loyalty building rebate schemes as they were implemented in five EEA Contracting Parties. These practices are subsequently<sup>215</sup> assessed under Article 82 of the Treaty and Article 54 of the EEA Agreement. For the purposes of presentation, the practices could generally be presented in two approximate categories. The first category would be "exclusivity", which relates to agreements with exclusivity clauses or, in some cases, exclusivity rebates on the one hand, and "*de facto* exclusivity", on the

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<sup>212</sup> **Page 524**, RM 35, p. 32. In an e-mail of 25 November 2000 the President of Tomra Europe AS launched the idea of entering into a partnership with Prokent or of taking over "this annoying competitor". In his response of the same day Tomra ASA's CEO stated: "I absolutely think that this is an idea that should be followed-up" ("Jeg synes absolutt dette er en ide som bør etterfølges"), **pages 2998-2999**, FEK/PC /23.

<sup>213</sup> E. g. **page 11919**, Tomra's response of 22 November 2004, par. 911.

<sup>214</sup> **Page 11777**, Tomra's response of 22 November 2004.

<sup>215</sup> Section IV below.

other hand. The second category could be subdivided into “quantity commitments”, “rebate schemes” and other practices which, given the purchasing volumes they referred to, implied full or partial exclusivity.

- (110) As all the practices identified in section III formed part of a common strategy and displayed common features, all exclusionary agreements are outlined altogether in sections III (A)-(E) concerning the individual national markets, that is to say, exclusivity and *de facto* exclusivity through either retroactive rebate schemes or high-volume block orders, with regard to each individual customer in a chronological manner.
- (111) As all the practices presented further share the same objective, are designed to achieve a similar effect and have to be seen in the context of Tomra’s policy, the presentation of a given practice under a particular heading is not decisive. In some cases, for example, a quantity commitment was combined with a sanction mechanism, according to which the customer was obliged to return a certain discount if it had failed to reach the target quantity. Such an arrangement could also be seen as a rebate scheme. There are also a few cases where it is unclear whether the customers actually committed to purchasing a specific quantity, but where Tomra had made it clear to them that the specific discounts it was willing to grant were linked to a specific or an approximate purchasing volume. Regardless of the differences in the individual cases, all the practices are an expression of the same policy on Tomra’s part consisting of linking the best prices and conditions to *de jure* or *de facto* exclusivity or purchasing volumes representing the estimated requirement of a customer or a large proportion thereof.
- (112) Tomra claims that agreements concluded between Tomra and the headquarters of organisations that include a considerable number of outlets run by independent retailers did not effectively bind all outlets or did not provide an incentive for all outlets<sup>216</sup> and therefore had a limited effect only. In so far as an exclusivity clause did, in a specific case, not apply to such outlets this is acknowledged. In so far as quantity commitments or targets were used in agreements or conditions, they were usually set at such a level that the whole organisation, including outlets run by independent retailers, had to purchase from Tomra if they wanted to be sure that the target would be reached, irrespective of whether outlets were directly owned and managed by the retail group or whether they were owned and run by independent retailers. There was, therefore, if not pressure, at least an incentive created by Tomra’s contract conditions for organisations as a whole to buy uniformly or almost uniformly from Tomra, even where the headquarters could not force all its outlets to stick to specific purchasing patterns from a strictly legal point of view. As will be demonstrated further, the strategy was successful as most independent retailers did indeed buy from Tomra under the agreed contracts.
- (113) In addition, it would be incomprehensible that Tomra sought to tie in such customers through the conclusion of agreements with their headquarters and that it was so focused on such agreements if the effect of agreements with such

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Pages 11782-11784, Tomra’s response of 22 November 2004, par. 183-199.

customers were as limited as is argued by Tomra in its response to the Statement of objections. Tomra's argument is further contradicted by its own emphasis on the significance of such agreements for its business and on the alleged bargaining power of the respective retail organisations as well as its reference to the effects brought about by such agreements.<sup>217</sup>

### **Exclusivity**

(114) The practices that appear under the heading "exclusivity" relate to all agreements, arrangements and conditions that explicitly grant Tomra the status of a sole, exclusive, preferred, main or primary supplier, or contain equivalent provisions. They also include cases where a certain discount or rebate is explicitly linked to exclusivity. Whereas the terms "exclusive supplier" or "sole supplier" are synonyms, the other terms in fact had a similar meaning in Tomra's contractual practice. The different terms were used indiscriminately, pursued the same objective and had the same meaning.

(115) This becomes clear, for instance, when looking at documents relating to negotiations with Royal Ahold as well as ICA and Hakon-Gruppen in relation to a Global Master Agreement and an attachment thereto.<sup>218</sup> With regard to the term "primary supplier", it follows from contract documents<sup>219</sup>, documents relating to negotiations<sup>220</sup>, documents commenting on such agreements<sup>221</sup> and statements made by Tomra in press releases<sup>222</sup> and its annual reports<sup>223</sup> that it had the same

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<sup>217</sup> **Pages 11777, 11761-11763**, Tomra's response of 22 November 2004.

<sup>218</sup> See, for instance **pages 3010-3013**, FEK/PC/29, e-mail from [**confidential: president of Tomra Systems ASA**] to [**confidential: representative of Royal Ahold**] of 8 April 2000. The e-mail contains the following passages: *"During all our discussions it was always agreed that Tomra should, in all practical terms be the sole supplier to Ahold <...>.It is therefore our preference that Tomra be appointed the "exclusive" global RVM service provider to Ahold. Words other than exclusive could be crafted, which would carry out the basic intent of the parties. However, putting aside choose of words, the deal as we all the time have discussed it is that TOMRA is to have the right to place machines (i) at any new store requiring RVMs and (ii) upon expiration of existing agreements at any store now serviced by another RVM provider."* The latter aspect does not concern the EEA. With regard to the ICA Ahold (ICA) agreement, it was Tomra's intention to extend its exclusivity status to ICA in Sweden and Hakon Gruppen in Norway. In a summary of a meeting with Ahold, ICA and Hakon Gruppen of 28 September 2000, it is mentioned that Tomra offered an extra discount subject to a specific volume target and a "preferred supplier position". The final agreement uses the terms "primary RVM provider" and "100% loyal".

<sup>219</sup> E.g. Attachment to the Global Master Agreement which applied in relation to ICA, and Hakon-Gruppen, **pages 57 or 3586**.

<sup>220</sup> **Pages 3010-3013**, FEK/PC/29. The word used in the contract as it was signed was "primary supplier".  
<sup>221</sup> In a fax of 21 April 2000, **page 89 or 4215**, WK 2, the Managing Director of Tomra Systems B.V. (NL) wrote in relation to this agreement, giving Tomra the status of a "primary provider of RVMs to stores owned or operated by Royal Ahold, its subsidiaries and affiliates": *"For replacement of every new store where Ahold wants to install an RVM, they are obliged to buy or lease a Tomra RVM during the term of the contract"*.

<sup>222</sup> **Page 6**, press release of 13 April 2000. The press release contains the following passage: *"TOMRA and the Dutch retail group Royal Ahold have entered into a global supply agreement that makes TOMRA the exclusive provider of Reverse Vending Machine technology and services during a period of 3 years"*.

<sup>223</sup> **Page 7309 – 65**, the Management Report 2000, p. 14, which, contains the following sentence: *"In April TOMRA signed a global supply agreement with the Dutch retail group Royal Ahold that made TOMRA the exclusive provider of RVMs and services for a period of three years."* It continues on the following

meaning as exclusive or sole supplier. At least in the case of the Global Master Agreement Tomra acknowledges that the term “primary provider” was supposed to grant Tomra exclusivity.<sup>224</sup>

(116) The same applies to the term “preferred supplier”. In internal documents the term “preferred supplier contracts” or “long term preferred supplier contracts” is often referred to as a means to “block competitors”, or to “tie-in (key) customers”<sup>225</sup>, thereby indicating that this concept is considered to have the same effect as “exclusivity”. In negotiations with Royal Ahold, ICA and Hakon Gruppen concerning a long-term agreement with ICA of Sweden and Hakon-Gruppen of Norway, for instance, where it was Tomra’s aim to exclude competitors, Tomra proposed the term “preferred supplier”, making it clear in internal documents and in relation to the customer that this meant exclusivity for Tomra.<sup>226</sup> At a later stage the term “primary supplier” was used.<sup>227</sup> In its title the final agreement refers to Tomra as a “primary and preferred RVM supplier”, while the text of the agreement specifies that the “customer undertakes to reflect the intentions of the Global Master Agreement”, that unquestionably is an exclusivity agreement. The agreement also contains the term “100% loyal”.<sup>228</sup> There are also internal documents that show that for Tomra “preferred supplier” was unequivocally a synonym for exclusivity.<sup>229</sup>

(117) Tomra’s contention that the term “preferred supplier” has no exclusionary implication/connotation and cannot be assumed to have the same meaning as exclusivity, but simply meant “*being the supplier providing the best product and thus preferred by the customers*”<sup>230</sup> is inconsistent with the documents referred to previously with regard to at least several agreements. It is in contradiction with a statement made by [confidential: Managing Director of Tomra Systems B.V.] on 27 September 2001 when being questioned in the context of the Commission’s inspections. Referring to the Global Master Agreement, in which Tomra is formally appointed as “primary provider”, but which Tomra concedes is an exclusivity agreement, [confidential: Managing Director of Tomra Systems B.V.], who was closely involved in the contract negotiations, stated that the Global Master Agreement contained a provision under which Tomra is the “preferred

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page: “*The Ahold agreement was further expanded in October 2000 to cover RVM and service supplies to ICA Ahold in Sweden and Norway ...*”

224 **Page 11927**, Tomra’s response of 22 November 2004, par. 947.

225 See, for instance, documents relating to the Board Strategy Meeting on 5-6 September 2000, **pages 461-527**, in particular **pages 507, 509, 518** (RM 34, RM 35). Summary of the meeting with Royal Ahold, ICA and Hakon Gruppen on 24 August 2000, **page 84**.

226 According to a document summarising negotiations with Royal Ahold, ICA and Hakon Gruppen] (**pages 69-72**) which took place on 27 September 2000, it was made clear that a preferred supplier position implied “*[tying] Ica and Hakon Gruppen into a long term agreement, and at the same time block Eleiko and other competitors in these accounts.*” (**page 70**). **Page 2279**.

227 **Page 67**, Tomra’s proposals of 27 September 2000, and its proposal of 11 October 2000, **page 3587**, PHA/PAB/32, p. 63.

228 Attachment signed on 13 October 2000. See, for instance, **page 57** or **page 3586** (PHA/PAB/32).

229 See, in particular, an internal document relating to an agreement concluded with ICA Ahold, e.g. **pages 227** and **2279** where the following statements can be found: “*Tomra named as primary and preferred supplier – Exclusivity*” and “*exclusivity (“primary and preferred supplier”)*”.

230 **Page 11781**, Tomra’s response of 22 November 2004, par. 178.

supplier”<sup>231</sup>, making it very plain that the term “preferred supplier” is equivalent to exclusivity in Tomra’s contractual practice.

(118) A cooperation agreement in which Tomra is referred to as the “main cooperation partner”<sup>232</sup> is commented on in a circular letter signed by the Managing Director of the respective subsidiary as implying that Tomra is the “sole supplier” of RVMs to all outlets of the relevant customer<sup>233</sup>, demonstrating that also terms such as “main supplier” or “main cooperation partner” have the same meaning as “exclusive” or “sole supplier” in specific circumstances. The fact that the circular letter was sent out before the agreement was formally signed, as stressed by Tomra<sup>234</sup>, is not decisive considering that Tomra does not argue that the text of the agreement was changed after the circular letter had been distributed or that the circular letter was repealed, replaced or corrected once the agreement had been signed. “Long term partnership contracts” are also mentioned as a tool for blocking market access for competitors in internal documents<sup>235</sup>. It is clear, therefore, that various terms and, in particular, the ones referred to specifically in this section, had the same meaning as exclusivity in Tomra’s contractual practice. Accordingly, the agreements containing such terms are all presented under the heading “exclusivity”. Apart from formal agreements, the sections III (A)-(E) also contain a few examples of less formal agreements or arrangements.

(119) While exclusivity, [confidential], meant that even the testing of competing products was prohibited<sup>236</sup>, the testing of competing products was allowed as an exception to exclusivity in specific cases.<sup>237</sup> Where exclusivity was combined with purchasing targets, a specific number of machines or a particular amount to be spent in a given period, or with rebate schemes, the relevant agreements appear under the title “exclusivity”.

(120) Tomra submits that it proposed exclusivity only in exceptional cases<sup>238</sup> and accepted it only because it could not afford to reject requests by customers to grant them additional rebates in exchange for exclusivity.<sup>239</sup> This presentation of the typical negotiation process is, however, not supported by evidence. Although customers may in some cases have influenced such contract terms or may even have proposed them in a few cases<sup>240</sup>, there is no doubt that the conclusion of

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231 **Page 3709.**

232 **Page 3235, GOR/LEP/2, [confidential].**

233 **Page 3585, PHA/PAB/31, letter of 30 September 1996 sent to Tomra’s sales representatives and signed by [confidential: Managing Director of Tomra Butikkssystemer AS], referring to the agreement with Spar Norge. The original wording is: [confidential].**

234 **Page 11843, [confidential].**

235 **Page 1718, ATU/KKL/25, p. 4, and page 5005.**

236 **Page 4700: [confidential]. Pages 3835 and 3836: [confidential].**

237 **Pages 10466-10469, [confidential], pages 6385-6388 and 6687-6690.**

238 See, for instance, **page 11816**, Tomra’s response of 22 November 2004, par. 360.

239 **Pages 11816-11817**, Tomra’s response of 22 November 2004, par. 363. This argument was as well put forward by **[confidential: representative of Tomra Europe AS]** presentation during the Oral Hearing on 7 December 2004, p. 4, **page 12144**.

240 According to the evidence available, such proactive proposal seems to have come from Norges Gruppen in the context of the agreement for 1999. However, this offer was made at a time when through the agreed quantity commitment/rebate scheme Tomra had already secured quasi-exclusivity anyway. It is

such agreements was part of Tomra's policy and that it was generally Tomra that actively pursued the aim of concluding exclusivity or "preferred supplier" agreements.<sup>241</sup> There are also examples where Tomra pushed for exclusivity, where it is obvious that the customer did not want to include such terms or where the customer rejected such proposals.<sup>242</sup> This confirms that Tomra's allegation that it simply responded to requests by customers is incorrect.

(121) The duration of the individual exclusivity agreements or arrangements generally varied between one year and three years with the exception of a few agreements and arrangements applying in Germany. In most countries, exclusivity agreements (and other exclusionary arrangements such as individualised retroactive rebate schemes and quantity commitments) were concluded, either anticipating the increase in demand due to the introduction of a new deposit system or for some other reason (for example, change to new currency), or capturing the increased demand the same year. This was the case in Germany (in 1999-2001), the Netherlands (1999-2001), Austria (2000), and Norway (1999).

(122) With regard to the duration of agreements, however, it is important to note the characteristics of the RVM market. As the demand for RVM solutions is usually affected by the introduction of deposit systems, it results in RVMs sales being "lumpy", that is to say, it results in occasional big volume orders. After the substantially increased demand is captured by a company, it is satisfied until the machines need replacing. Bearing in mind the long life-cycle of an RVM (7-10 years), this will not happen for a period much longer than the actual contract reference period. Therefore, due to the special characteristics of an RVM as a product, the real effect of the reference period in the RVM supply contracts is greater. Even if an agreement for the sale of RVMs is valid only for 6 months, the demand will not re-occur for at least several years, until the customer needs to replace the old machine with a new one.

#### *Quantity commitments leading to de facto total or partial exclusivity*

(123) Amongst the agreements aiming at achieving a similar result to exclusivity through implying either exclusivity or quasi-exclusivity, there is a group of agreements that contain individualised purchase targets. These quantities corresponded entirely or almost entirely to the actual purchase requirements of customers in a certain contract period. The agreements bore different titles, including the term "block order". They contained provisions indicating a

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also possible that Edeka-Süd either proposed quasi-exclusivity or influenced the inclusion of such terms in the agreements concluded with Tomra (page 12091, Tomra's response of 22 November 2004, Attachment 18). Royal Ahold must have, at some point, considered granting Tomra exclusivity, but the inclusion of the terms effectively granting Tomra exclusivity in the final agreement was clearly due to Tomra's insistence (pages 3010-3013, e-mail of Tomra's CEO of 8 April 2000).

<sup>241</sup> See the documents referred to in the context of Tomra's strategy and its implementation above. This policy is also confirmed by the offers that Tomra made to customers. It does not matter whether the term "exclusivity", "preferred supplier" agreement or any other term was used, as the meaning of the different terms was the same. See also page 7012, which is a document of 17 April 2001, showing that Tomra proactively introduced the concept of exclusivity in negotiations with customers.

<sup>242</sup> Several examples can be found in the section relating to the individual agreements (Section III (A)-(E), e.g. the offers made to Superuni and Schuitema in 2001 (Section III (A)).

commitment by the customer to reach the agreed quantity. While there is generally a reference to a specific number of machines or a specific purchasing volume defined in the form of a given turnover, or to a minimum number of machines or a minimum turnover, there are also examples where the respective number or the respective volume are qualified by terms such as “approximately” or “the estimated volume of ...”, indicating that a minor deviation would still be covered by the wording of the agreement.

(124) Although the stipulated volumes refer to absolute quantities they were manifestly based on the estimated requirements of the customer in the reference period, on purchases by the respective customer in the previous year or in previous years or on projections for the future. They generally corresponded to the actual requirements of the customer or a large proportion thereof.<sup>243</sup>

(125) Tomra claims that it only responded by giving a quote for quantities specified by the customer<sup>244</sup> or that such commitments were the result of unilateral business decisions by the customers or at the discretion of buyers.<sup>245</sup> Tomra did not, however, provide any evidence to support its claim and all the evidence available with regard to contract negotiations points in a different direction. Furthermore, it was part of Tomra’s policy to propose very ambitious quantity commitments or targets, internally referred to as “high-volume block orders”, to customers, for them to be able to benefit from a given discount. Often these quantities exceeded the actual requirements of customers or the requirements customers were willing to commit. In certain cases there is evidence that customers tried to reduce the volume commitment and/or the length of the reference period or to introduce less binding language.<sup>246</sup>

(126) The following instances give a few examples of this: an agreement with **[confidential: customer A in Sweden]** (October 2000 – end of 2002) contained a quantity commitment of 1 100 machines for a period of 2 ¼ years, whereas the customer originally estimated its yearly requirements to be approximately 250 machines and Tomra suggested a quantity of 1 500 machines and a contract period of three years. The original estimate given by the customer was very close to its actual requirements.<sup>247</sup> With regard to **[confidential: customer H in the Netherlands]** Tomra proposed a contract period of 2 ½ years and a minimum quantity of 325 machines, while the final agreement related to a contract period of 1 ½ years and a quantity of 130 machines, that, according to the customer, represented its estimated requirements.<sup>248</sup> For 1999 Tomra made proposals to Norwegian customers that were manifestly related to the expected requirements

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<sup>243</sup> This will be demonstrated in following sections dealing with individual national markets.

<sup>244</sup> E.g. **Page 11813**, Tomra’s response of 22 November 2004, par. 342, or **page 12143 1/16**, Tomra’s lawyer presentation during the Oral Hearing of 7 December 2004, and **page 12148**, **[confidential: representative of Tomra Europe AS]** presentation during the Oral Hearing of 7 December 2004, p. 5.

<sup>245</sup> E.g. **page 11813**, Tomra’s response of 22 November 2004, par. 342.

<sup>246</sup> It may be referred, for instance, to the agreement concluded with **[confidential: customer H in the Netherlands]** on 20 July 2001, **pages 3814-3817**, to the agreements concluded with **[confidential: customer C in the Netherlands]** or the agreement concluded with **[confidential: customer C in Norway]** in 1999, **pages 3563-3566**.

<sup>247</sup> See section III (B) below.

<sup>248</sup> See section III (A).



of the customer, and for the period comprising the second half of 2000 and the first half of 2001 Tomra's offer related to quantities that clearly exceeded the actual requirements of the customers.<sup>249</sup> In several cases the volumes referred to in the actual agreements still exceeded the demand of the customer.

(127) Quantities were, therefore, not determined unilaterally by customers, but were the object of negotiations in which Tomra pushed for ambitious volume commitments or at least targets, that can be described as quantity forcing. Even in so far as specific customers did in specific cases fix the quantities in a more autonomous fashion, for which there is no evidence, they could have done so in awareness of Tomra's policy, which made it clear to them that the best price a customer could hope for depended on quantity commitments that corresponded to their entire or almost entire requirements.

(128) In certain cases quantity commitments were supplemented by rebates or bonuses providing an incentive for buying from Tomra beyond the committed quantity or by other supplementary clauses emphasising Tomra's privileged position in relation to the customer in question.<sup>250</sup>

(129) In a few cases it is unclear whether customers actually committed to a given volume of purchases proposed by Tomra. In such cases, however, the customers did not formally reject the offers and purchased the quantities under the terms offered by Tomra. Such situations are equivalent at least to unilateral conditions communicated to the customers and are part of the same pattern of behaviour on Tomra's part. They are, therefore, treated in the same section as quantity commitments although there is no evidence of binding commitment on the part of the customers.

(130) In so far as agreements provide for exclusivity as well as a quantity commitment, they are presented under the heading "exclusivity".

### ***Rebate schemes***

(131) The third category, called "rebate schemes", encompasses an array of agreements or conditions under which customers were entitled to retroactive rebates or bonuses that depended on reaching a particular purchasing volume by the end of a given reference period. The bonuses or rebates were paid at the end of the reference period and took the form of a cash refund. There are, however, also examples where bonuses were paid in kind, namely in certain numbers of machines that were to be installed for free, or where a bonus was directly subtracted from the machine price with or without a provision that expressly entitled Tomra to claim back such bonus payments in case the respective threshold was not reached. The agreements were referred to as "cooperation agreement", "block order", "bonus agreements" and "framework agreements".

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<sup>249</sup> For examples and further details see section III (E), concerning agreements concluded in Norway.

<sup>250</sup> For example, agreement concluded with [confidential: customer A in Norway] in 1998, provided for quantity commitment of 450 machines in addition to 50 upgrades. If the customer had bought more than 750 machines, higher discount would be granted. See Section III (E).

(132) Apart from individualised rebate schemes and bonuses, that necessitated reaching or exceeding a single purchasing target close to customers' requirements, Tomra applied progressive bonus schemes, that is to say systems according to which customers were entitled to increasing bonuses or rebates depending on the actual purchasing volume they reached by the end of the reference period. Often there were only two or three bonus steps; however, there are also a few examples with up to seven or eight steps. The bonus rate reached at the end of the reference period applied to all purchases made in the reference period, which are often referred to as retroactive rebates, and not only to the slice in turnover that exceeded the relevant threshold.<sup>251</sup>

(133) As it is the case in relation to quantity commitments the rebate schemes applied by Tomra constitute individualised targets rather than a generalised grid. The quantity thresholds featuring in the rebate schemes were manifestly based on estimated requirements or on purchases made by the relevant customer in the past. The higher bonus thresholds - or in the case of agreements containing a single bonus threshold, the only bonus threshold - regularly corresponded to, almost corresponded to or even exceeded the estimated or actual requirements of the respective customers. Often, even the lower thresholds already represented a large proportion of the estimated or actual requirements of the customer.

#### (A) *Netherlands*

(134) The Netherlands market is one of the biggest RVM solutions market in the EEA, where Tomra continued to hold a rather high market share<sup>252</sup> throughout the period under investigation: starting with 99% in 1998 and 1999, which decreased to **[confidential: 85-95%]** in 2001 and 2002 as a result of new competitors emerging, namely Bevesys and Prokent. The demand for RVMs in the Netherlands increased significantly in 2001, when most of the customers used the introduction of the Euro for renewing their equipment.<sup>253</sup> This resulted in two new companies trying to enter the RVM market, of which Bevesys was the most successful one. It managed to sell **[confidential]** RVM in 2001 and **[confidential]** in 2002.<sup>254</sup> Prokent, at the same time, sold **[confidential]** RVM in 2001 and 2002.<sup>255</sup>

(135) Tomra's top five customers were Albert Heijn (part of Ahold), Schuitema, Lidl and Laurus, which represented more than two thirds of Tomra's sales between 1999 and 2001.<sup>256</sup> Almost all major customers together with other, smaller retailers, concluded agreements that the Commission considers as having anticompetitive exclusionary effects during the reference period.

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<sup>251</sup> According to Tomra's reply of 14 February 2002, **page 7269**, this rule applied in Norway, Germany, the Netherlands and Austria, but not in relation to Sweden. According to the information available to the Commission, the rebate system applied in Sweden worked in the same way as in the four countries mentioned above.

<sup>252</sup> On the market of low-end and high-end machines. See Figure 4 above.

<sup>253</sup> This information was submitted by Tomra, according to which many retailers used the occasion of the introduction of Euro in the Netherlands to renew their equipment. It is not clear why this factor did not have an importance on the total RVMs sales on other national markets. See **page 12052**.

<sup>254</sup> **Pages 10845-10847 (confidential)**, Bevesys' reply of 28 March 2002.

<sup>255</sup> **Page 11013 (confidential)**, Prokent's reply of 14 August 2003.

<sup>256</sup> **Page 12052**, Tomra's response of 22 November 2004, Attachment 6, p. 36.

(136) It must be noted from the outset, that all the agreements and arrangements described further in Sections III (A) – (E) are not arranged into separate categories of agreements, that is to say, exclusivity, quantity commitments and rebate schemes. This is done for clarity and consistency reasons only. In Section III.C and the following sections of this decision, the agreements and arrangements are assessed according to the initial categories once again.

### *Exclusivity and quantity commitments*

#### *[confidential: customer A in the Netherlands]*

(137) In October 1998, Tomra and **[confidential: customer A in the Netherlands]**, agreed on a “block order”<sup>257</sup>, according to which **[confidential: customer A in the Netherlands]** committed to buy 200 RVMs before the end of 2000 with a possible extension until 31 March 2001. By April 2000, when a new agreement was signed, **[confidential: customer A in the Netherlands]** had actually purchased 121 RVM from Tomra and still had to buy 79 additional RVMs<sup>258</sup> in order to meet the agreed target. The customer still had to make a serious effort to reach the volume to which it had committed itself. The 200 machines target constituted approximately 80% of the customer’s requirements in the contract period.<sup>259</sup> Tomra argues that it was clear for both parties that the quantity **[confidential: customer A in the Netherlands]** required would exceed the contracted volume<sup>260</sup>, but it does not indicate which quantity **[confidential: customer A in the Netherlands]**’s estimated requirements would have corresponded to.

(138) In April 2000 Tomra signed a “Reverse Vending Equipment Global Master Agreement” (Global Master Agreement)<sup>261</sup> with **[confidential: customer A in the Netherlands]**, according to which the customer committed to buying 200 RVMs up until the end of 2002. The agreement’s base term was three years, starting on 1 January 2000 and ending on 31 December 2002.<sup>262</sup> According to Article 1.2 of the agreement, **[confidential: parent of customer A in the Netherlands]** appointed Tomra Group as the “*primary provider of RVMs to stores owned or operated by [confidential: parent of customer A in the Netherlands], its subsidiaries and affiliates*”. The fact that “primary provider” in reality meant “exclusive provider” is inferred from Tomra’s press release, issued following the signing of the agreement, its Annual Report 2000, internal

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<sup>257</sup> **Pages 3925-3926**, EF 35, **pages 9197-9198**, Tomra’s reply of 14 March 2002, Appendix 6, Binder 6. The existence of this agreement is further confirmed in Article 4.2. of the Global Master Agreement. See also **page 4524**, CR 68.

<sup>258</sup> Article 4.2. of the Reverse Vending Equipment Global Master Agreement, **pages 4846-4878**, BN-6-1.

<sup>259</sup> **[confidential]** (**page 12052**, Tomra’s response of 22 November 2004, Attachment 6, p. 36), which constitute a correction of the figures given on **page 7271** (Tomra’s reply of 14 February 2002, p. 37). According to Tomra (**page 11819**, Tomra’s response of 22 November 2004, par. 375) **[confidential: customer A in the Netherlands]** bought 252 machines under the agreement including 60 units bought by **[confidential: customer A in the Netherlands]** franchisees.

<sup>260</sup> **Page 11819**, Tomra’s response of 22 November 2004, par. 375.

<sup>261</sup> **Pages 4846-4878**, BN-6-1 and **pages 90-122**.

<sup>262</sup> However, if less than **[confidential]** RVMs had been purchased or leased in North America by 31 December 2002, the base term was to be extended for the entire agreement until the purchasing volume was achieved.

documents commenting on the agreement, and from the documents relating to the negotiations with **[confidential: parent of customer A in the Netherlands]**, and from the acknowledgment by Tomra.<sup>263</sup>

(139) The first sentence of Tomra's press release reads: "Tomra and the Dutch retail group **[confidential: parent of customer A in the Netherlands]** have entered into a global agreement that makes TOMRA the exclusive provider of Reverse Vending Machine technology and services during a period of 3 years".<sup>264</sup> The same language is found in Tomra's Management Report 2000.<sup>265</sup> During the negotiations with **[confidential: parent of customer A in the Netherlands]**, Tomra pursued the aim of obtaining exclusivity from the start and throughout the negotiation process<sup>266</sup> and was willing to accept other words only if they carried the same idea.<sup>267</sup> Towards the end of the negotiations, when the customer had second thoughts about the idea of appointing Tomra as its exclusive supplier, Tomra vigorously insisted on this point. In an internal note informing dealers and distributors on the conclusion of the Global Master Agreement, the Managing Director of Tomra Systems B.V. (NL) wrote: "*For replacement or for every new store where **[confidential: parent of customer A in the Netherlands]** wants to install an RVM, they are obliged to buy or lease a Tomra RVM during the term of the contract.*"<sup>268</sup>

(140) Apart from quantity obligations affecting specifically the USA, **[confidential: parent of customer A in the Netherlands]** had also committed to purchasing at least 200 additional RVMs in the Netherlands in addition to the 200 machines that **[confidential: parent of customer A in the Netherlands]** was obliged to buy from Tomra in accordance with a previous agreement concluded in 1998. In return for the appointment of Tomra Group as a "primary worldwide provider" of RVMs and the quantity commitments applicable in North America and the Netherlands, **[confidential: parent of customer A in the Netherlands]** was to be paid a global bonus following the execution of the agreement. In addition, the agreement provided for incremental worldwide bonus opportunities through

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<sup>263</sup> Page 11927, Tomra's response of 22 November 2004, par. 947.

<sup>264</sup> Page 6, Prokent's complaint, Annex 3, Tomra press release of 13 April 2000.

<sup>265</sup> Page 4943, BN-6-2, Tomra's Management Report 2000, p. 14.

<sup>266</sup> Page 4004, EF 9, p. 4; pages 3010-3013, FEK/PC/29: e-mail of 8 April 2000 by **[confidential: president of Tomra Systems ASA]** to **[confidential: representative of the customer]**. In a draft of February 2000 (pages 4625-4643, PDB 10), in particular, pages 4625 and 4626, the terms "exclusivity" and "exclusive appointment" were used. Page 3084, LEP/PC/4: An e-mail of 30 September 1999 by Tomra ASA's President and CEO relating to the negotiation process at the time and containing a draft letter to be sent to **[confidential]**. It contains the following passage: "*All the bonus payments will be tied to the general conditions listed in our proposal; the business volume should be achieved within a 3 year term 2000-2002. Tomra should be the exclusive supplier to all chains operated or controlled by **[confidential]**.*" See also pages 75 and 77.

<sup>267</sup> Page 3010-3013, FEK/PC/29, e-mail from **[confidential: president of Tomra Systems ASA]** to **[confidential: representative of the customer]** of 8 April 2000. The e-mail contains the following passages: "*During all our discussions it was always agreed that Tomra should, in all practical terms be the sole supplier to **[confidential]**... It is therefore our preference that Tomra be appointed the "exclusive" global RVM service provider to **[confidential]**. Words other than exclusive could be crafted, which would carry out the basic intent of the parties... However, putting aside choose of words, the deal as we all the time have discussed it is that TOMRA is to have the right (i) to place machines at any new store requiring RVMs ..."*

<sup>268</sup> Page 4215, WK 2, or page 89, fax of 21 April 2000.

increased worldwide purchases as an incentive for higher purchasing volumes.<sup>269</sup> **[confidential: customer A in the Netherlands]** actually purchased 52 RVM in 2000, 250 in 2001, and 15 in 2002 under the Global Master Agreement.<sup>270</sup> It bought **[confidential]** from a competitor in 2001.

(141) In its response to the Statement of objections<sup>271</sup> Tomra stated that the conclusion of the **[confidential: parent of customer A in the Netherlands]** agreement had been the result of a rigorous evaluation process and that, after considering other options, in 1999 the customer decided that Tomra was able to offer the best overall solution for its purposes. It is evident, however, that the contract terms, including the exclusivity clause and the various bonus arrangements, were not determined unilaterally by the customer, but were the result of a lengthy negotiation process that was influenced to a considerable extent by Tomra.

***[confidential: customer B in the Netherlands]***

(142) According to Tomra's submission<sup>272</sup>, **[confidential: customer B in the Netherlands]** signed an agreement with Halton in mid-1997. In the meantime, Halton was acquired by Tomra, which, however, did honour the contract. Under that agreement, **[confidential: customer B in the Netherlands]** committed itself to buying 25 RVMs by the end of 1998. In another agreement, signed in April 1999, the prices for Tomra RVMs were based on **[confidential: customer B in the Netherlands]**'s intention to buy at least 40 machines within two years.<sup>273</sup> In addition, in September 2000 before the previous contract of 1999 expired, **[confidential: customer B in the Netherlands]** agreed to replace 44 old Halton and 33 old Tomra machines with 77 new Tomra RVMs by the end of that year.<sup>274</sup> **[confidential: customer B in the Netherlands]**'s actual purchases of Tomra machines were 12 in 1998, 21 in 1999, 82 in 2000 and 31 in 2001.<sup>275</sup> These figures show that the quantities referred to in the agreements concluded in 1999 and 2000 corresponded more or less to the entire requirements of that customer in the relevant reference periods. According to the Commission's information, **[confidential]**

***[confidential: customer C in the Netherlands]***

(143) In January 1999 Tomra offered **[confidential: customer C in the Netherlands]** a "block order"<sup>276</sup> containing a discount based on a minimum purchase quantity of 200 RVMs to be ordered within a period of two years. In June 1999 **[confidential: customer C in the Netherlands]** agreed to a "block order" of 100 RVMs to be bought before the end of 2000<sup>277</sup>, that is to say, a

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<sup>269</sup> Article VI of the agreement.

<sup>270</sup> **Page 12053**, Tomra's response of 22 November 2004, Attachment 6, p. 37.

<sup>271</sup> **Page 11817**, Tomra's response of 22 November 2004, par. 365.

<sup>272</sup> **Page 12053**, Tomra's response of 22 November 2004, Attachment 6, p. 37.

<sup>273</sup> **Pages 9215-9216**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.

<sup>274</sup> **Pages 9217-9218**, Tomra's reply of 14 February 2002, Appendix 6, Binder 6.

<sup>275</sup> **Page 7271**, Tomra's reply of 14 February 2002, p. 37. **Page 12052**, Tomra's response of 22 November, Attachment 6, p. 36.

<sup>276</sup> **Pages 4268-4270**, WK 15.

<sup>277</sup> **Pages 4414-4416**, CR 27, **pages 10804-10806**.

period of approximately 1½ years. In August 2000 Tomra and **[confidential: customer C in the Netherlands]** agreed on a further “block order”<sup>278</sup> with an obligation to order 100 RVMs before 1 January 2002. The price per machine, offered by the agreement, however was a “block order price” based on the purchase of 200 machines: it took account of the fact that 100 machines had already been ordered in the context of the previous block order. The agreement also stated that it should be considered in about 2 months whether **[confidential: customer C in the Netherlands]** could convert the block order into a block order of 200 machines under the same conditions. In May 2001 Tomra and **[confidential: customer C in the Netherlands]** agreed on a new block order<sup>279</sup> with a commitment to order 100 machines before the beginning of 2002. The agreement explained that the applicable price corresponded to the price that normally applied to a block order of 200 machines.<sup>280</sup> In fact, **[confidential: customer C in the Netherlands]** bought 105 RVMs in 1999, 160 RVMs in 2000, 125 RVMs in 2001, and **[confidential]** RVMs in 2002 from Tomra.<sup>281</sup> **[confidential: customer C in the Netherlands]** bought **[confidential]** machines from a competitor in 2001, when the demand for the RVMs was the highest due to the introduction of the Euro in the Netherlands.<sup>282</sup> The minimum quantity in Tomra’s offer for the two-year period 1999 and 2000 corresponded to approximately **[confidential]** % of **[confidential: customer C in the Netherlands]**’ actual requirements in that period. The minimum quantities referred to in the three block orders actually concluded in 1999, 2000 and 2001 corresponded to more than **[confidential]** % of **[confidential: customer C in the Netherlands]**’ total requirements in that period. The quantities agreed on were based on **[confidential: customer C in the Netherlands]**’ anticipated needs and **[confidential: customer C in the Netherlands]**’ actual purchases under the first two agreements were larger than anticipated by **[confidential: customer C in the Netherlands]**<sup>283</sup> due to purchases from franchisees.

- (144) Although they are separate agreements, the three agreements were obviously linked with each other in that the agreement concluded in 2000 took account of the quantity commitment made in 1999, and stated that the conclusion of a further block order relating to 100 machines would be considered, while Tomra’s original offer had referred to 200 units. Furthermore, the obligation for **[confidential: customer C in the Netherlands]** to arrange sales of Tomra

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<sup>278</sup> **Pages 9223-9225**, Tomra’s reply of 14 March 2001, Appendix 6, Binder 6. **Pages 10801-10803**. The block order was placed on 21 August, sent to **[confidential: customer C in the Netherlands]** in writing on 28 August. **[confidential: customer C in the Netherlands]** signed it on 12 October 2000.

<sup>279</sup> **Pages 3941-3943**, EF 38, **pages 10798-10800**.

<sup>280</sup> When comparing this with the price applicable to **[confidential: customer A in the Netherlands]**’s price for 200 RVMs there does, however not seem to be such a thing as a particular price for this particular quantity.

<sup>281</sup> **Page 12052**, Tomra’s response of 22 November 2004, Attachment 6, p. 36, and **page 10072**, Tomra’s reply of 25 June 2003, Appendix 3.

<sup>282</sup> **[confidential]**. This also results from information given by **[confidential: customer C in the Netherlands]**, **pages 10788- 10789**, replies to question 5 and 12. **Page 12052**, Tomra’s response of 22 November 2004, Attachment 6.

<sup>283</sup> **Page 11821**, Tomra’s response of 22 November 2004, par. 379.

machines to its own and its affiliated outlets gave Tomra a privileged position in relation to other suppliers even beyond the minimum numbers indicated.<sup>284</sup>

*[confidential: customer D in the Netherlands]*

(145) In April 1998 Tomra concluded an agreement under which the **[confidential: customer D in the Netherlands]** was obliged to purchase at least 25 Tomra RVMs over a period of two years or longer in addition to accepting Tomra as its sole supplier.<sup>285</sup> In exchange, **[confidential: customer D in the Netherlands]** was granted a discount of approximately 10%. The volume of 25 machines represented more than the entire demand of this customer in the contract period.<sup>286</sup> In April 2000 **[confidential: customer D in the Netherlands]** and Tomra signed a new agreement<sup>287</sup> which granted Tomra the status of an exclusive supplier for the period from 19 April 2000 till the end of 2001, which obliged the customer to order 35 machines, upon which it would receive two machines for free. After finalising this block order, **[confidential: customer D in the Netherlands]** was obliged to place a new block order with Tomra at increased prices.<sup>288</sup> Furthermore, **[confidential: customer D in the Netherlands]** was obliged to make independent purchasers within the Jumbo formula buy Tomra machines, wherever it was profitable to install such machines.<sup>289</sup> In fact, **[confidential: customer D in the Netherlands]** purchased 33 machines from Tomra in the period from 1998 to 2001 covered by both contracts.<sup>290</sup> In 2001 this customer bought **[confidential]** from Bevesys.<sup>291</sup>

*[confidential: customer E in the Netherlands]*

(146) According to the contract signed in February 1999 between Tomra and **[confidential: customer E in the Netherlands]** B.V., the customer agreed to obtain a block order<sup>292</sup> of at least 10 RVMs, which had to be ordered before the end of 1999. The agreed prices were based on this minimum quantity

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**[confidential: clause of the agreement]**

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**Pages 4828–4830**, in particular, **page 4830**, BN5-1. The relevant passage reads: **[confidential: the clause of the agreement]** It is obvious from the circumstances that the last part of the sentence meant that Tomra was accepted as this customer’s sole supplier of RVM technology for the contract period and not that Tomra committed to supplying RVMs exclusively to **[confidential: customer D in the Netherlands]** and not to any other customer.

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This follows from a sentence in the subsequent agreement **page 4226**, WK 14, according to which 4 RVMs which still had to be ordered under the 1998 agreement would be included in the agreement for the subsequent period: **[confidential: clause of the agreement]**

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**Pages 4265-4267**, in particular, **page 4265**, WK 14. The relevant passage reads: **[confidential: clause of the agreement]** *Tomra Systems BV will deliver exclusively RVMs to the [confidential: customer D in the Netherlands].*”) As to the interpretation of the last part of the sentence, see footnote 285 relating to the previous agreement.

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The relevant passage reads **[confidential]**. Tomra’s allegation (**page 11818**, Tomra’s response of 22 November 2004, par. 369) that this was to ensure that the customer could purchase at the same prices, is not supported by the wording of the agreement.

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The relevant passage reads: **[confidential]**. Tomra’s suggestion that “voorschrijven” should be translated as “to recommend” is not correct. In fact, the correct translation of “voorschrijven” is “to prescribe”.

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**Page 12054**, Tomra’s response of 22 November 2004, Attachment 6, p. 38.

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**Page 10846 (confidential)**, Bevesys reply of 28 March 2002.

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**Pages 3811-3813**, EF 19, p. 2-4, **pages 4960-4962**, BN 6-7.

(“blokkorderkorting”), in addition to the condition that Tomra was the exclusive supplier.<sup>293</sup> Already in 1998 the discounts Tomra granted to this customer were dependent on Tomra being the exclusive supplier.<sup>294</sup> In fact, the customer purchased 11 RVMs from Tomra under this agreement, which means that the target in the contract represented approximately [confidential] % of the actual demand of [confidential: customer E in the Netherlands].<sup>295</sup> [confidential: customer E in the Netherlands] bought [confidential] from a competitor in 1998.

*[confidential: customer F in the Netherlands]*

(147) At least between 1996 and 2000 Tomra granted rebates to [confidential: customer F in the Netherlands] which were linked to Tomra being appointed as the exclusive supplier of reverse vending equipment. This follows from different documents, that refer to an “exclusivity relationship discount”<sup>296</sup>, and state that the rebates were granted under the condition that “Tomra is again chosen as the exclusive supplier of RVM equipment”.<sup>297</sup> The fact that over the years Tomra used an almost identical format and identical wording in its conditions as well as the use of the word “again”, suggest that the conditions that applied in 1998 and 1999 must have been similar to the ones applicable in 1997 and 2000, which has at least implicitly been confirmed by Tomra<sup>298</sup>, implying that a continuous exclusivity relationship existed throughout those years.

(148) The agreements, in addition to exclusivity, contained fidelity rebate schemes. The bonus steps, as they applied at least since 1997, were as follows: for purchases worth at least NLG 500 000 (EUR 228 000<sup>299</sup>) – there would be entitlement to a discount of 2% of the total purchase value, up to NLG 750 000 (EUR 341 000), a 3% discount; for purchases worth more than NLG 750 000, there would be 4% discount on the value of customer’s entire purchase. In 2000 an additional bonus level starting at NLG 1 million (EUR 455 000) was added, above which a 5% bonus was to be paid.<sup>300</sup> For 2002<sup>301</sup> the bonus steps were converted into Euro and were fixed as follows: purchases of up to EUR [confidential: 210 000 – 260 000] – 2%, up to EUR [confidential: 310 000 – 360 000] – 3%, up to EUR [confidential: 420 000 – 470 000] – 4%, more than EUR [confidential: 430 000 – 480 000] – 5%. The fact that over the years Tomra used an almost identical format and identical wording in its conditions indicates that the

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<sup>293</sup> In case the customer had bought machines from other suppliers, the block order discount, that was approximately 10%, would have been scrapped. The relevant passage reads: [confidential].

<sup>294</sup> Page 4700, minutes of Tomra Systems B.V.’s sales department meeting on 19 June 1998.

<sup>295</sup> Page 12054, Tomra’s response of 22 November 2004, Attachment 6, p. 38.

<sup>296</sup> “Exclusiviteits relatie korting” (“Discount subject to exclusivity”), pages 4499 and 4954.

<sup>297</sup> The relevant phrase can be found at least in documents from 1997 (page 4499, CR 60, p. 3) and from 2000 (pages 4953-4955, BN 6-5, Annex to reply from [confidential: customer F in the Netherlands] of 14 February 2003). The relevant passage, for instance in the document for 2000, reads: [confidential].

<sup>298</sup> Page 11819, Tomra’s response of 22 November 2004, par. 373.

<sup>299</sup> The amounts are converted into Euro on the basis of the official exchange rate of ECB (1 EUR = 2.20371 NLG) on 6 January 2006.

<sup>300</sup> Pages 4953-4955, BN6-5.

<sup>301</sup> Pages 10759-10761.



conditions that applied in 2001 must have been similar to the ones applying in 2000 and 2002. This has not been contested by Tomra.<sup>302</sup>

(149) **[confidential: customer F in the Netherlands]** achieved the following purchase value of Tomra's equipment between 1998 and 2002: in 1998 – EUR 443 000, 1999 – EUR 463 000, 2000 – EUR 466 000, 2001 – EUR 833 000, and 2002 – EUR **[confidential: 370 000 – 420 000]**.<sup>303</sup> With the exception of 2001, the threshold for the lowest bonus rate represented **[confidential]** % or more of the customer's actual requirements, while the threshold for the highest possible bonus rate (5%) usually corresponded to or exceeded the actual total requirements of the customer.

(150) For the period from 2000 to 2002 a provision was added which stated that the prices for the relevant year were based on the customer's indication that the turnover would at least equal the turnover achieved in the previous year.<sup>304</sup> Even in so far as Tomra did not have an exclusivity status, the agreements aimed at preventing any or at least any significant sales from competitors. The customer in fact bought **[confidential]** from Tomra's competitor in 2000.

***[confidential: customer G in the Netherlands]***

(151) In 1999 Tomra and **[confidential: customer G in the Netherlands]** concluded an agreement<sup>305</sup> providing for the purchase of at least 51 RVMs between 1 February 1999 and 31 December 2001 by the customer through its affiliated members **[confidential]**. Once the target quantity was achieved, **[confidential: its affiliated member]** was to be granted one RVM for free.<sup>306</sup> In October 1999 **[confidential: its affiliated member]**, part of **[confidential: customer G in the Netherlands]**, committed<sup>307</sup> to and ended up buying 12 additional RVMs before the end of 2001. **[confidential: customer G in the Netherlands]**, including **[confidential: its affiliated member]**, in total acquired 63<sup>308</sup> and bought **[confidential]** from a competitor in the three-year period.

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<sup>302</sup> **Page 11824**, Tomra's response of 22 November 2004, par. 393-396.

<sup>303</sup> See **page 7271**, figures submitted by Tomra in its reply of 14 February 2002, on page 37, and **page 10072**, in its reply of 25 June 2003, Appendix 3. The 2002 figure was corrected by Tomra's response of 22 November 2004, Attachment 6, p. 38 (**page 12054**).

<sup>304</sup> **Pages 4954**, BN6-5, **pages 10760** and **10765**: **[confidential: clause of the agreement]**. The same sentence was used for 2002.

<sup>305</sup> **Pages 9238-3240**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.

<sup>306</sup> In addition a second machine was to be delivered as a compensation for an older installation at a given site. According to Tomra (**page 11820**, its response of 22 November 2004, par. 377) the two units, supplied for free, constituted the consideration for two "obsolete" machines, which Tomra took back. Apart from the fact that it is not clear how two new machines could have constituted the consideration for two "obsolete" machines, the wording is very clear in that one machine was to be supplied for free once all 12 RVMs had been installed.

<sup>307</sup> **Page 9227**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.

<sup>308</sup> **Page 11820**, Tomra's response of 22 November 2004, par. 376.

*[confidential: customer H in the Netherlands]*

(152) Tomra had unsuccessfully attempted to obtain a 2 ½-year exclusivity agreement with a minimum purchase quantity of 325 machines<sup>309</sup> with **[confidential: customer H in the Netherlands]**, the purchasing organisation of several Dutch retail chains. **[confidential: customer H in the Netherlands]** was not willing to accept this kind of commitment, therefore Tomra tried to maintain exclusivity, but offering, exceptionally, that competing products could be tested.<sup>310</sup> On 20 July 2001, however, the agreement with **[confidential: customer H in the Netherlands]** for a duration of 1 ½ years was finally concluded.<sup>311</sup> The contract did not provide for exclusivity, but established an obligation for the customer to purchase a minimum quantity of 130 machines. Amongst the conditions for the agreed price was a statement that the price was based on a larger quantity and that the parties expected the quantity to be greater than 130 machines.<sup>312</sup>

(153) Another condition provided that **[confidential: customer H in the Netherlands]** would arrange sales of Tomra RVMs to its members and to independent shopkeepers affiliated to its members<sup>313</sup>.

(154) According to the customer, **[confidential]**.<sup>314</sup> The minimum quantity to be purchased according to the agreement corresponded to approximately **[confidential]** % of the actual purchases of the customer.<sup>315</sup> **[confidential]**.<sup>316</sup> The agreed number of RVMs to be bought and the additional provisions of the agreement in fact meant quasi-exclusivity for Tomra. The fact that **[confidential: customer H in the Netherlands]** is a C.I.V. (Coöperatieve Inkoop Vereniging), a cooperative purchasing organisation as opposed to a single retail group<sup>317</sup>, cannot limit the effect of the agreement since there is no evidence suggesting that the individual members did not feel bound by the agreement negotiated and concluded on their behalf by **[confidential: customer H in the Netherlands]**.

*[confidential: customer I in the Netherlands]*

(155) In an agreement for 1999, **[confidential: customer I in the Netherlands]** B.V. committed itself to ordering a minimum of 36 RVMs in return for an 11%

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<sup>309</sup> Pages 4646-4650, PDB 13 and 14, and page 10827 (confidential), **[confidential: customer G in the Netherlands]** reply to question 6. See also a letter from Tomra to **[confidential: customer H in the Netherlands]** of 20 July 2001, which refers to the negotiation process, pages 3835-3836, EF 23, or page 4649, PDB 14.

<sup>310</sup> Pages 3835-3836, EF 23.

<sup>311</sup> Pages 3814-3817.

The relevant clause reads: **[confidential: clause of the agreement]**.

<sup>312</sup> Pages 3814-3817, EF 20, in particular, page 3815: **[confidential: clause of the agreement]**.

<sup>313</sup> Page 10827 (confidential), **[confidential: customer H in the Netherlands]**'s reply of 18 February 2003, answer to question 5.

<sup>314</sup> 171 units. Page 11777, Tomra's response of 22 November 2004, p.38.

<sup>315</sup> Page 10827 (confidential), reply by **[confidential: customer H in the Netherlands]** to request for information of 18 February 2003, answer to question 5.

<sup>316</sup> This fact is emphasised by Tomra, page 11821, Tomra's response of 22 November 2004, par. 381. Tomra did not, however, provide any evidence which would show that the agreement was without any effect.

discount.<sup>318</sup> The entire quantity was purchased by the customer.<sup>319</sup> In February 2001 **[confidential: customer I in the Netherlands]** committed itself to buying a minimum of 25 RVMs by 1 September 2001.<sup>320</sup> It acquired only 21 RVM.<sup>321</sup> According to Tomra, the customer started buying competing products only in 2002, by purchasing 1 or 2 machines from Bevesys.<sup>322</sup>

*[confidential: customer J in the Netherlands]*

(156) In 1997 and 1998 Tomra had the status of the exclusive supplier to **[confidential: customer J in the Netherlands]**<sup>323</sup> Under the contract of 1998, the customer purchased 19 RVMs.<sup>324</sup>

*[confidential: customer K in the Netherlands]*

(157) In December 1998 **[confidential: customer K in the Netherlands]** agreed to order 19 machines within the following 15 months, in return for two additional machines installed for free by Tomra.<sup>325</sup> The 19 RVMs were delivered in 1999 and 2000. **[confidential]**.

*Proposed contracts*

(158) Apart from the exclusivity agreements actually concluded, Tomra also proposed such agreements on several occasions. According to a hand-written note on a draft agreement<sup>326</sup> found in the office of Tomra B.V.'s Managing Director, Tomra offered an additional bonus to the Dutch retail chain **[confidential: customer C in the Netherlands]** subject to Tomra being granted exclusivity status. In the early months of 1999 Tomra offered **[confidential: customer B in the Netherlands]** Netherlands a two-year exclusive agreement.<sup>327</sup> Eventually neither of the customers accepted an exclusivity clause. Tomra, however, concluded other anti-competitive agreements with these customers, which were described in this section. In March 2001, Tomra offered to conclude

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<sup>318</sup> **[confidential]**.  
<sup>319</sup> **Page 11823**, Tomra's response of 22 November 2004, and **page 12054**, Tomra's response of 22 November 2004, Attachment 6, p. 38.  
<sup>320</sup> **Pages 9208-9209 and 9210-9211**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.  
<sup>321</sup> Tomra's submitted information in relation to the quantity purchased by **[confidential: customer I in the Netherlands]** under this agreement differs. According to Tomra's response of 22 November 2004 (**page 11823**, **[confidential: customer I in the Netherlands]** bought 21 RVMs. According to Tomra's response of 20 November 2004, Attachment 6, p. 38-39 (**page 12054**) **[confidential: customer I in the Netherlands]** bought only 11 machines.  
<sup>322</sup> **Page 11823**, Tomra's response of 22 November 2004, par. 390.  
<sup>323</sup> See letter from Tomra to **[confidential: customer J in the Netherlands]** of 20 January 1998, **page 10807: [confidential: clause of the agreement]**.  
<sup>324</sup> **Page 12054**, Tomra's response of 22 November 2004, Attachment 6, p. 38.  
<sup>325</sup> **Pages 9242-9243**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.  
<sup>326</sup> **Pages 3842-3844**, EF 25. In addition to a quantity related bonus, **[confidential: customer C in the Netherlands]** would have received one RVM for free.  
<sup>327</sup> **Pages 9215**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6. In the letter confirming the agreement eventually concluded, **[confidential: customer B in the Netherlands]** specified that it did not accept exclusivity, for which there was no need if Tomra had not proposed exclusivity. Furthermore, this kind of proposal would have been in line with Tomra's policy as it has been described above. In its response, Tomra does not state that it did not propose exclusivity to the customer, **pages 11822-11823** (Tomra's response of 22 November 2004, par. 387).

a block order agreement<sup>328</sup> with **[confidential: customer L]**, subject to Tomra's exclusivity for the period of one year or 21 months. The prices quoted in the offer depended on agreed and expected minimum numbers of machines to be purchased by the customer.<sup>329</sup> The best price was based on a block order of 100 machines and an expectation of an additional number of 50 machines with exclusivity for Tomra. Whereas 100 machines had to be bought within 12 months of signing the agreement, 150 machines had to be bought by the end of 2002. The target of 150 machines would have exceeded the actual purchases of **[confidential: customer L]** from Tomra in 2001 and 2002, and would have been close to **[confidential: customer L]**'s total requirements.<sup>330</sup> There is no evidence suggesting that **[confidential: customer L]** accepted Tomra's offer. In fact, in 2001 the customer bought **[confidential]** machines from Tomra's rival, Bevesys, **[confidential]**.<sup>331</sup>

### *Impact*

(159) Tomra's policy of excluding competitors from the market in order to maintain and strengthen its dominant position was implemented vigorously in the Netherlands. For many years, at least from 1998 until 2002, Tomra systematically pursued a policy of tying customers into exclusivity agreements, retroactive rebate schemes and individualised high volume "block orders", which, in fact, gave Tomra quasi-exclusivity status. Besides its numerous attempts, in many instances Tomra succeeded in actually concluding exclusionary agreements. Tomra's strategy of maintaining its leader position was implemented through capturing total or almost total demand of the customers. In the Netherlands, just as in other EEA markets that will be discussed in further, Tomra implemented its strategy either by concluding exclusivity agreements or, where this was not possible, by obtaining quasi-exclusivity through individualised quantity commitments targeting total demand of customers. In addition, in the case of Samenwerkende van den Broek, Tomra applied a rebate system covering several years that aimed at capturing the total demand of the customer as well. While in many cases the quantities committed to corresponded to the entire requirements of the customers, in all instances they corresponded to at least 75-80% of the customers' total demand in one year. Moreover, such minimum purchase volumes were complemented by additional clauses that would ensure purchases from Tomra, for example requiring the customer to facilitate the sale of Tomra's machines to independent retailers.

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<sup>328</sup> **Pages 3837-3841**, EF 24, **pages 4273-4277**, WK 17.

<sup>329</sup> **Page 4952**, BN 6-4, in August 2001 **[confidential: customer L in the Netherlands]** ordered 42 machines, 2 RVMs were given for free.

<sup>330</sup> **[confidential: customer L in the Netherlands]** bought 33 machines in 1998, 64 machines in 1999, 59 machines in 2000, **[confidential: 85-95 machines]** in 2001 and **[confidential: 5-10]** machines from Tomra in 2002 (**page 12052**, Tomra's response of 22 November 2004, Attachment 6, p. 36, by which the figures provided by it on 14 February 2004 were corrected). In addition, **[confidential: customer L in the Netherlands]** bought **[confidential]** machines from Bevesys in 2001, **page 10846**, and may have bought a smaller number of machines from other suppliers also in 2002. Tomra's allegations that the conclusions relating to sales figures and the customer's requirement are incorrect (**page 11823**, Tomra's response of 22 November 2004, par. 391) are contradicted by information in the file and, in particular, by information provided by Tomra in the Attachment 6 of its response of 22 November 2004 and confirmed by Tomra's reply of 2 March 2005.

<sup>331</sup> **Pages 10845-10847 (confidential)**, Bevesys' reply of 28 March 2002.

- (160) The agreements in question usually covered reference periods of between one and three years. They were in force at least until the end of 2002 and continuously affected both large and smaller retail groups that constituted a substantial part of the market. Apart from the agreements described in this section, this is illustrated by a statement in the minutes from the board meeting of Tomra Systems B.V. of 19 January 2000 that reads: “*The management explained that the biggest supermarket chains have a long-term-contract with Tomra (2000/2001).*”<sup>332</sup>
- (161) Between 1998 and 2002 several large retail groups as well as many smaller retailers were tied into the exclusivity and *de facto* exclusivity agreements. Through the Global Master Agreement with **[confidential: customer A in the Netherlands]** alone Tomra managed to block access to the largest customer for three years. **[confidential: customer A in the Netherlands]** represented approximately **[confidential: 20-30%]** of the demand for RVMs in the Netherlands in 2000, **[confidential: 25-35%]** in 2001 and almost **[confidential: 5-15%]** in 2002. At the same time, other large customers such as **[confidential: customer C in the Netherlands]** and **[confidential: customer H in the Netherlands]** were tied into “*high volume block orders*”, and many smaller retail chains had exclusivity agreements or quantity commitments guaranteeing Tomra quasi-exclusivity.
- (162) The agreements identified in this section covered more than 50%<sup>333</sup> of the demand in the whole period from 1998 till 2002. The proportion of the demand covered by the exclusionary agreements in each individual year varied, and in some years it was extremely high: in 1998 the proportion of the total demand covered by Tomra’s exclusionary contracts was 10%, in 1999 and 2000 – above 60%, 2001 – 58%, and in 2002 – 37%.<sup>334</sup>
- (163) It is clear that exclusionary agreements concluded by Tomra in the Netherlands covered a not unsubstantial proportion of the market. In addition, it had a significant anticompetitive effect on the market. This is demonstrated by the developments of the market shares of Tomra and its rivals together with the changes in the size of the market demand foreclosed to competitors – non-

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<sup>332</sup> Page 1392, ATU/KKL/5.

<sup>333</sup> All percentages which are indicated in this section, as well as in other sections, describing the impact of the practices, are meant to be rough indications of their significance. The Commission considers that approximately 1 280 out of 2 535 machines were directly tied by exclusivity agreements, individualised quantity commitments and retroactive rebate agreements. Tomra arrives at an average figure of below 50% only because it did not include several agreements contributing to the anticompetitive impact of Tomra’s overall strategy in the Netherlands, e.g. the agreement with **[confidential: customer G in the Netherlands]** or several agreements with **[confidential: customer F in the Netherlands]**. Tomra argues that in cases when the customers purchased below the threshold established by the agreements, which would entitle them to a discount, the quantities actually purchased by customers under these agreements were contestable for competitors. This argument cannot be accepted as valid, and is elaborated upon further in Section IV.B below.

<sup>334</sup> Tomra does not specify explicitly to what product market (high-end only or high-end and low-end) definition the figures submitted by it in this context relate. The Commission assumes they were submitted with regard to the wide market definition, as Tomra submitted the figures in its response to the Statement of objections, which outlined the assessment in view of broad market definition.

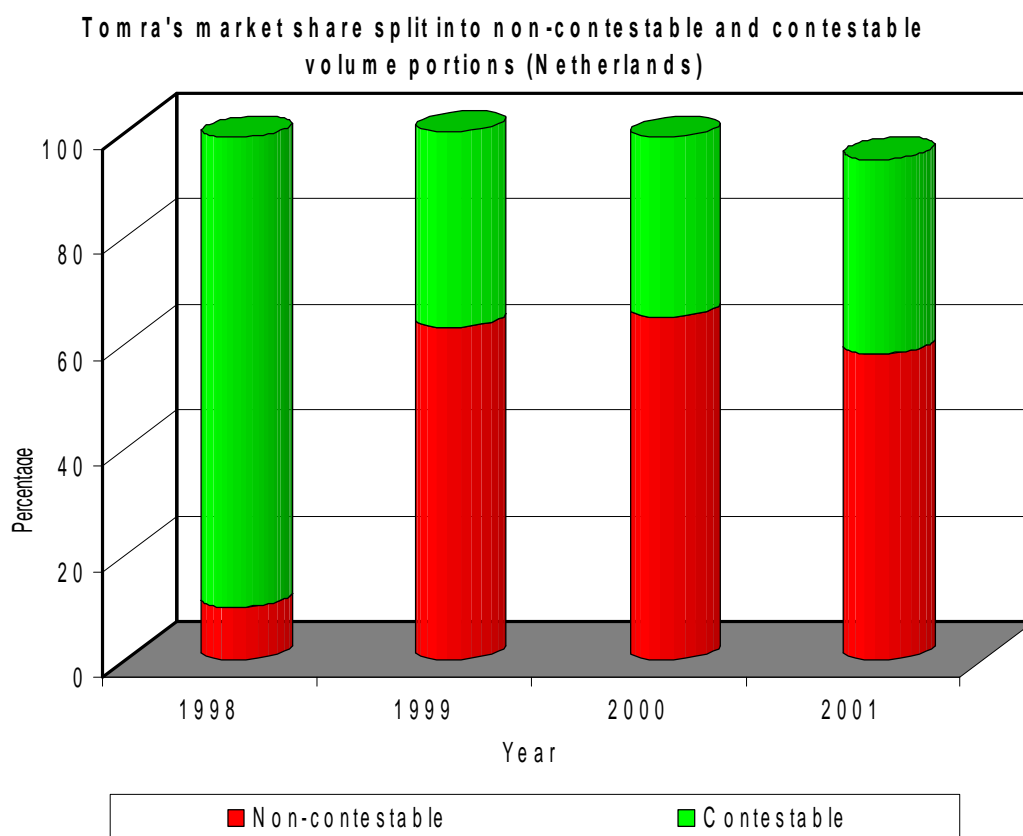
contestable part of demand, or tied market share.<sup>335</sup> Tomra's market share during the time frame under investigation was the highest throughout 1998-2000, at 99%. During these years, especially during 1999-2000, the size of the foreclosed demand covered by Tomra's exclusionary agreements was the highest as well – above 60%. The following year, the proportion of the demand covered by the exclusionary agreements began declining: in 2001 it went down to 58%, and in 2002, to 37%. Tomra's market share followed the same pattern by decreasing to **[confidential: 87-97%]** in 2001 and **[confidential: 85-95%]** in 2002. This trend is depicted in Figure 12, which shows the proportion of Tomra's total unit sales in one year that was sold under the anticompetitive schemes agreements discussed in this section. The tied market demand covered by the exclusionary Tomra contracts was highest before 2001, the so-called "key year" on the Dutch RVM market, when demand for the machines was the highest due to the introduction of the Euro. That year the total market demand went up to 835 RVMs, compared to 569 in 2000 or 529 in 1999.<sup>336</sup> Anticipating this increase, Tomra's practice of exclusive or *de facto* exclusive supply agreements was noticeably intensified.

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<sup>335</sup> **Pages 12052-12056.** In this context, what is meant by the term "non-contestable part of the volume" 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. According to Tomra, only 41% of the total quantities sold on the Dutch RVM market 1998-2002 were non-contestable to its competitors. It reaches this figure by summing up quantities purchased by the customers under the exclusionary Tomra agreements, which were identified by the Commission. However, Tomra claims that certain quantities were contestable because (i) the customer has purchased significantly below the threshold, which, according to Tomra, demonstrates that the commitment did not provide any incentive for the customer, or (ii) the customer has purchased significantly above the threshold, which equally demonstrates that the threshold did not provide any incentive. To establish the proportion of the non-contestable volume in all the national markets under investigation, Tomra's approach was followed by the Commission. However, it is not correct to say that the threshold did not create an incentive to purchase when the actual purchase volume was much above or below the threshold. Such an assumption would be over simplistic, as in reality it is difficult to establish the exact moment in time at which the customer has lost the incentive, i.e. to know at exactly what quantity purchased he realised the threshold will not be met or will be exceeded. For this reason, in cases where the customer purchased below the threshold, the Commission included only the actual number purchased by the customer. Where the threshold was exceeded, the Commission included only the threshold quantity. These figures do not take account of quantity commitments relating to a reference period of only few months, even in so far as they were added to existing long-term agreements with Tomra. This concerns for instance **[confidential: customer B in the Netherlands]** order of September 2000 or **[confidential: customer L in the Netherlands]**'s order in August 2001. The figure of 50% therefore underestimates the impact of Tomra's practices.

<sup>336</sup> **Page 12052,** Tomra's response of 22 November 2004, Attachment 6, p. 36.

**Figure 12:** Tomra's market share split into non-contestable and contestable volume portions 1998-2002 in the Netherlands, high-end and low-end machines included (estimated)<sup>337</sup>



(164) At the same time, the smaller the portion of total demand that was covered by the exclusivity, quantity commitments or exclusionary rebate schemes, the greater the share of the market Tomra's rivals were acquiring: from selling, on average, [confidential] RVMs per year throughout 1998-2000, Bevesys had gained [confidential] % market share in 2002. Prokent also managed to sell [confidential] RVMs to customers in the Netherlands that year, compared to [confidential] machines sold during 1998-2000 (see Figure 13 and Figure 14).

<sup>337</sup> Figures were submitted by Tomra in its response of 22 November 2004, Attachment 6, p. 36-40 (pages 12052-12056). [confidential: column for 2002].

**Figure 13:** Market shares of Tomra, Bevesys, Prokent and the tied market demand, high-end and low-end machines included (estimated)<sup>338</sup>

	1998	1999	2000	2001	2002
<b>Tomra</b>	99%	99%	99%	[confidential l: 87-97%]	[confidential l: 85-95%]
<b>Bevesys</b>	[confidential l]	[confidential l]	[confidential l]	[confidential l]	[confidential l]
<b>Prokent</b>	[confidential l]	[confidential l]	[confidential l]	[confidential l]	[confidential l]
<b>Tied marked demand</b>	10%	63%	65%	58%	37%

**Figure 14:** Evolution of Tomra’s and its competitors’ market shares as the size of the non-contestable share of the market declines in the Netherlands 1998-2000 (estimated)

[confidential -- figure]

(165) In addition to the exclusionary effect of the exclusivity clauses, quantity commitments and retroactive rebate schemes aiming at meeting the total or almost total customer demand on the Dutch market, the rebate schemes which applied to most of the customers in the Netherlands created a competitive situation where Tomra’s rivals were forced to offer very low or even negative prices in order to compete with the dominant supplier. In the market of RVMs, it is unlikely that a customer will immediately buy large quantities from a company that has just entered the market. It is normal practice for customers to first test the new machines and, subject to a satisfactory result, decide whether to purchase more RVMs. These market characteristics in conjunction with Tomra’s rebate schemes had a significant impact on competitors, which could only provide a small number of machines to a customer. As a result, such a new competitor would need to offer very low prices, possibly even negative prices, in order to sell in the presence of the rebate schemes employed by Tomra. The following figure (Figure 15) visualizes the unit price a competitor would need to offer to induce a customer to buy the remaining units from it, taking into account the quantities Tomra has already sold.<sup>339</sup> The horizontal axis indicates the units that

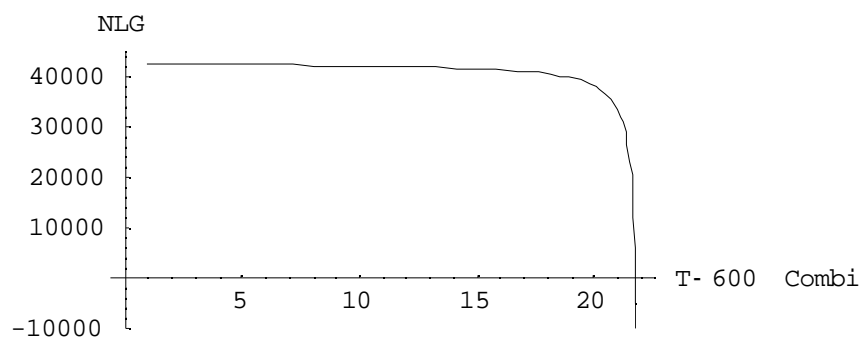
<sup>338</sup> See Figure 4.

<sup>339</sup> The figure is based on the rebate scheme applied to [confidential: customer F in the Netherlands] in 2002. The figure is based on a unit price of NLG [confidential], taking account of a 4% rebate available for a purchase value equal EUR [confidential] and an additional rebate of 1% once the



a competitor may still be able to sell up to the total demand of the customer. The vertical axis shows the unit price the competitor would have to offer to make Tomra's customer's switching rational. The effect of the rebate depicted in Figure 15 is that the effective price of the last unit bought to reach the threshold (in this case 25 units) is negative. From that perspective, it is clear that if a certain buyer had already reached this level, a competitor would not only have to offer his RVMs for free, but would actually have to make a significant transfer. Obviously, this effect is not limited to the last unit only. When a customer has purchased a small volume of units, in terms of Figure 15 for example 5-10 units, the uncertainty of whether or not he will be able to reach the threshold is probably the highest as the number of remaining units to purchase is still significant. The retroactive nature of the discount received (that is to say, the discount is paid with regard to the entire purchase value) and the fear of sanctions may result in customers refraining from purchasing from Tomra's competitors even if they are able to offer a slightly better price.

**Figure 15:** The unit price a competitor would need to offer to induce a customer to buy the remaining units from him taking into account the quantities Tomra has already sold (Netherlands)<sup>340</sup>



(166) Therefore, it can be concluded that the exclusive and *de facto* exclusive agreements concluded between Tomra and its main customers covered a not insignificant part of the total demand for RVMs on the Dutch market from 1998 until 2002. The tied market share was the highest, anticipating the increase in demand, in 2001. This in turn, had an effect on the market in that the market share of Tomra decreased more when less total demand was covered by its exclusionary agreements. In addition, the fewer machines were sold under the anti-competitive agreements, the greater the share of the market the rivals managed to acquire. This corroborates the fact that Tomra's exclusive agreements, individualized rebates schemes and quantity commitments were not competition on the merits as is alleged by Tomra.

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threshold of EUR [confidential] is passed. It does not take account of the fact that the volumes also include expenses for backroom equipment. This way the effect of the rebate scheme is underestimated. The vertical axis of the Figure gives the price per unit and the horizontal axis depicts the number of machines bought from Tomra. The curve in the Figure gives the price per unit a competitor would need to offer for the remaining units up to the threshold in order to match Tomra's rebate price.

**(B) Sweden**

(167) The demand for RVM systems on the Swedish market was rather unstable during the reference period, just as Tomra's position on the market was: its market share ranged between 38% in 1998<sup>341</sup> and **[confidential: 88-98%]** in 2001.<sup>342</sup> Tomra's top five customers in Sweden were ICA, COOP, Axfood, Bergendahls and Systembolaget. From 1998 Tomra was the RVM market leader, facing minor competition on the high-end RVM market from Prokent, Eleiko (acquired by Tomra in 2001) and Repant.

***Exclusivity and rebate schemes***

***[confidential: customer A in Sweden]***

(168) **[confidential: customer A in Sweden]** is a joint venture between **[confidential: parent of customer A in Sweden]** and **[confidential: parent of customer A in the Netherlands]** and is the leader of the Swedish retail market.<sup>343</sup> Through its subsidiaries<sup>344</sup>, **[confidential: customer A in Sweden]** represents the largest food retail group in Sweden and the second largest one in Norway. On 13 October 2000 an Attachment to the Global Master Agreement was signed by representatives of Tomra and **[confidential: customer A in Sweden]**.<sup>345</sup> The agreement refers to Tomra as a "primary and preferred RVM supplier" to **[confidential: customer A in Sweden]** in its title.<sup>346</sup> According to the Attachment to the Global Master Agreement, Tomra has extended its exclusive status to **[confidential: subsidiary of customer A in Sweden]** and **[confidential: customer B in Norway]**, both subsidiaries of **[confidential: customer A in Sweden]**.<sup>347</sup> In its Annual Report 2000 Tomra states that the Global Master Agreement has made it the exclusive RVM supplier not only to **[confidential: parent of customer A in the Netherlands]**, but also to **[confidential: customer A in Sweden]** in Sweden and Norway.<sup>348</sup>

(169) Although the initiative for negotiations was apparently taken by **[confidential: parent of customer A in the Netherlands and parent of customer A in Sweden]** with the aim of obtaining lower prices in Sweden and Norway where prices charged by Tomra were higher than in the Netherlands, Tomra saw the negotiations as a "*valuable opportunity for Tomra to tie [confidential: customer A in Sweden] and [confidential: customer B in Norway] into a long-term preferred supplier agreement and block Eleiko and other competitors in these*

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<sup>341</sup> Before acquiring its competitor, Eleiko.

<sup>342</sup> After acquiring Eleiko. The figures relate to the broad product market definition, i.e. low-end and high-end machines included.

<sup>343</sup> **[confidential]**.

<sup>344</sup> **[confidential: customer A in Sweden]** (Sweden) and **[confidential: customer B in Norway]** (Norway).

<sup>345</sup> **Page 3586 or page 57.**

<sup>346</sup> The full title reads: **[confidential]**.

<sup>347</sup> **[confidential: clause of the agreement]** Annex to **[confidential: representative of Tomra Systems ASA]** statement, Tomra's Annual Report 2000, **pages 7309-65-66**, which refers to the fact that the Global Master Agreement, characterised as an exclusivity agreement, was expanded to **[confidential: customer A in Sweden]** and **[confidential: customer B in Norway]**.

<sup>348</sup> **Pages 7309-65 and 7309-67**, Tomra's Management Report 2000, p. 14 and 16.

accounts”.<sup>349</sup> Tomra also made it clear that any extra discount from current prices in Sweden and Norway would be subject to an ambitious volume target and to a preferred supplier position for Tomra in relation to both retail groups.<sup>350</sup>

(170) In its response to the Statement of objections<sup>351</sup>, Tomra emphasised that in the Global Master Agreement reference was only made to “a” primary and preferred supplier. It is, however, not warranted to read anything into the use of the indefinite article used before “primary and preferred supplier”, especially having regard to the way in which the title is drafted. When looking, moreover, at the agreement as a whole, considering, in particular, that it is referred to as an attachment to the agreement with **[confidential: parent of customer A in the Netherlands]** or as an expansion of that agreement<sup>352</sup>, and that according to the text of the agreement the customer “*undertakes to reflect the intentions of the Global Agreement between [confidential: parent of customer A in the Netherlands] and Tomra Systems*”, which even Tomra acknowledges is an exclusivity agreement, it is evident that the agreement can only be interpreted as an exclusivity agreement. This is corroborated by an internal document describing the agreement, which makes clear that “primary and preferred supplier” indeed meant exclusivity<sup>353</sup> and the quantity targets referred to in the agreement as “guaranteed volumes”, exceeded the actual requirements of the customer.

(171) The Global Master Agreement covered the supply of RVMs and related services during the period from 1 October 2000 until the end of 2002. Initially, however, Tomra tried to obtain exclusivity covering 3 years and not two.<sup>354</sup> Moreover, it covers all types of RVMs without distinction.<sup>355</sup> Due to an undertaking by the customer “*to reflect the intentions of the Global Agreement between [confidential: parent of customer A in the Netherlands] and Tomra Systems*”, **[confidential: customer A in Sweden]** was obliged to purchase a minimum of 1 100 machines in Sweden and Norway, in exchange for a 10% discount. If the customer failed to achieve this target, the 10% discount would have to be returned to Tomra at the end of the reference period. According to the agreement, however, it was still **[confidential: customer A in Sweden]** intention “*to drive volumes up to 1 500 machines or more in the period*”. Even though Tomra initially made the 10% discount dependent on a higher volume

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<sup>349</sup> **Page 84 and pages 2585-2586**, summary of a meeting with **[confidential: parent of customer A in the Netherlands]**, **[confidential: customer A in Sweden]** and **[confidential: customer B in Norway]** on 24 August 2000. A similar statement can be found in the summary of a meeting which took place on 27 September 2000, **page 70**.

<sup>350</sup> **Page 69**, summary of a meeting with **[confidential: customer A in Sweden]** and **[confidential: customer B in Norway]** on 27 September 2000. On the same page the term “exclusivity” is used.

<sup>351</sup> **Pages 11827-11832**, Tomra’s response of 22 November 2004, par. 413-428.

<sup>352</sup> **Pages 7309-1 – 7309-49**, Tomra’s Annual Report 2000, Tomra’s reply of 14 February 2003. Appendix 10.

<sup>353</sup> **Pages 2277 and 2279**, which contain the following statements: “*Tomra named as primary and preferred supplier – Exclusivity* “ and “*exclusivity (“primary and preferred supplier”)*”.

<sup>354</sup> **Page 87**.

<sup>355</sup> **[confidential]**.

commitment<sup>356</sup>, the number of 1 100 RVMs constituted a very ambitious target and involved increased RVM purchases compared to previous years.<sup>357</sup> This target was above the quantities indicated as realistic by the customer during the negotiations,<sup>358</sup> and in fact **[confidential: customer A in Sweden]** was unable to reach this target<sup>359</sup> and the agreement was extended until July 2003<sup>360</sup>, which further precluded competition from Tomra's rivals for the demand of this customer. In fact, **[confidential: customer A in Sweden]** bought 60 RVMs in 2000 (after the signing of the Global Master Agreement), and **[confidential: 450-500]** RVMs in total in the years 2001 and 2002.<sup>361</sup>

(172) In its reply to the Statement of objections<sup>362</sup>, Tomra also argues that the agreement did not bind individual **[confidential: customer A in Sweden]** outlets. As regards the degree of commitment for the individual **[confidential: customer A in Sweden]** stores, it is possible that **[confidential: customer A in Sweden]**, given the structure of the organisation, could not fully guarantee that each and every store would buy Tomra's machines. The agreement, however, clearly aimed at applying exclusivity to the organisation as a whole, which is confirmed by **[confidential: customer A in Sweden]**'s undertaking to reflect the intentions of the Global Master Agreement and to do its utmost to support Tomra across its network of stores and to remain loyal to this agreement. Furthermore, the guaranteed volumes, by definition, required the organisation as a whole to buy exclusively from Tomra in order to reach this quantity. From Tomra's point of view, it would not be reasonable to bind the customer, whether the structure of its organization was decentralised or not, to purchase a certain number of machines and not to expect this commitment to be attained. Moreover, Tomra has not explained why it attached so much importance to this agreement and saw it as a valuable opportunity to tie-in the customer and block the competitors, if its effect had been as limited as Tomra submits it was.<sup>363</sup>

***[confidential: customer B in Sweden]***

(173) **[confidential: customer B in Sweden]** is a wholly-owned subsidiary of **[confidential: customer A in Sweden]** that used to run its own stores in Sweden, which later on were converted into **[confidential: customer A in Sweden]** stores. For the period from 1 July 1999 until 30 June 2000, **[confidential:**

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<sup>356</sup> See summary of a meeting with **[confidential: parent of customer A in the Netherlands]**, **[confidential: customer A in Sweden]** and **[confidential: customer B in Norway]** of 27 September 2000, **pages 69-70**.

<sup>357</sup> **Pages 53-54**, letter from Tomra to **[confidential: customer A in Sweden]** of 16 February 2001; **pages 47-49** letters from **[confidential: customer A in Sweden]** to Tomra of 26 April 2001 and 8 May 2001.

<sup>358</sup> **Pages 2585-2586**, summary of a meeting with **[confidential: parent of customer A in the Netherlands]**, **[confidential: customer A in Sweden]** and **[confidential: customer B in Norway]** of 24 August 2000.

<sup>359</sup> **Page 10072**, figures provided by Tomra on 25 June 2003, Appendix 3. In fact, 690 machines were bought by **[confidential: customer A in Sweden]** in 2000, 2001 and 2002.

<sup>360</sup> **Page 10528 (confidential)**, **[confidential: customer A in Sweden]** reply of 1 July 2003, answer to question 11.

<sup>361</sup> **Page 12045**, Tomra's response of 22 November 2004, Attachment 6, p. 29.

<sup>362</sup> **Pages 11827-11832**, Tomra's response of 22 November 2004, par. 413-428.

<sup>363</sup> Tomra, in support of its argument, claims that some **[confidential: customer A in Sweden]** stores bought competing machines, but it did not present evidence in support of this argument.

**customer B in Sweden]** was entitled to the following retroactive volume related rebates for purchases made from Tomra: for purchase equal to SEK 4-5 million (EUR 421 000 – 526 000)<sup>364</sup> it would receive 4% discount, for SEK 5-6 million (EUR 526 000 - 632 000) – 6%, and for SEK 6-7 million (EUR 632 000 - 737 000) – 8%. If the customer had purchased more than SEK 7 255 050 (EUR 763 689) worth, it would have been granted a 10% bonus.<sup>365</sup> Tomra has admitted that one could assume **[confidential: customer B in Sweden]** had informed Tomra about its expected total requirements were SEK 7 255 050.<sup>366</sup> In fact, **[confidential: customer B in Sweden]** was paid a bonus of approximately SEK 1.23 million (EUR 129 473)<sup>367</sup>, corresponding to a 10% rebate, that is to say, the highest rebate threshold. It had reached the total purchasing volume of approximately SEK 12.3 million (EUR 1.3 million), which corresponded to the purchase of approximately 110 RVMs.<sup>368</sup> **[confidential]**.<sup>369</sup> In April 2000, **[confidential: customer B in Sweden]** agreed to another contract (“block order 2000”<sup>370</sup>) in the context of which it was entitled to a 10% rebate subject to **[confidential: customer B in Sweden]**’s purchasing value reaching the target of SEK 7.5 million in the period starting from 1 July 2000 to 30 June 2001. In October 2000, however, this block order agreement was replaced by the Attachment to the Global Master Agreement.<sup>371</sup> Therefore, the block order threshold was not applicable for **[confidential: customer B in Sweden]** as of October 2000. In fact, under the block order agreement, that is to say, from July 2000 to October 2000, **[confidential: customer B in Sweden]** purchased approximately 23 RVMs<sup>372</sup>, which constituted approximately SEK 2.6 million (EUR 273 684) worth of purchases.

(174) With regard to the agreements with **[confidential: customer B in Sweden]**, Tomra itself has submitted the relevant documents to the Commission. Later, however, Tomra questioned whether the Commission had based its analysis on

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<sup>364</sup> The amounts are converted into Euros on the basis of the official ECB exchange rate of the ECB (1 EUR = 9,5722 SEK) on 6 January 2006.

<sup>365</sup> **Pages 9087 and 9104-9106**, Tomra’s reply of 14 March 2002, Appendix 6, Binder 6.

<sup>366</sup> **Page 11840**, Tomra’s response of 22 November 2004, par. 464.

<sup>367</sup> **Page 9104**, letter from Tomra to **[confidential: customer B in Sweden]** explaining that for purchases in 1999 an extra volume rebate of **[confidential]** was paid in April 2000 and that a further **[confidential]**. See also **page 10528 (confidential version)** or **page 10533 (non-confidential version)**, **[confidential: customer A in Sweden]**’s reply of 1 July 2003, answer to question 8 (c). Tomra’s response of 22 November 2004, Attachment 6 states that **[confidential: customer B in Sweden]** has purchased for SEK 12.3 million (EUR 1.3 million).

<sup>368</sup> **Page 10528 (confidential)**, **[confidential: customer A in Sweden]** reply of 1 July 2003, answer to question 8 (b).

<sup>369</sup> **Page 10528 (confidential)** or **page 10533 (non-confidential)**, **[confidential: customer A in Sweden]** reply of 1 July 2003, answer to question 9.

<sup>370</sup> **Pages 9107-9108**, Tomra’s reply of 14 March 2002, Appendix 6, Binder 6. The reference period was 1 July 2000 – 30 June 2001. As **[confidential: customer B in Sweden]** is part of **[confidential: customer A in Sweden]**, the agreement concluded between Tomra and **[confidential: customer A in Sweden]** on 13 October 2000 applied also to **[confidential: customer B in Sweden]**. As a consequence, the agreements between **[confidential: customer B in Sweden]** and Tomra Systems AB no longer applied, **page 9108**.

<sup>371</sup> See **pages 9104-9108**, letter from Tomra to **[confidential: customer B in Sweden]** of 2 November 2000. The letter implicitly confirms that there was an agreement (“avtal”) based on Tomra’s offer of 3 April 2000.

<sup>372</sup> **Page 12045**, Tomra’s response of 22 November 2004, Attachment 6, p. 29.

the documents actually representing the content of the agreements.<sup>373</sup> However, the documents submitted by Tomra itself do not suggest that any other agreements or conditions applied instead. Furthermore, the documents are consistent in themselves and all evidence available confirms that the agreements as they are described here actually applied.

*[confidential: customer C in Sweden]*

(175) **[confidential: customer C in Sweden]** is one of the largest food retailers in Scandinavia, namely in Sweden and Finland. It conducts its business on the Swedish market through the wholly-owned store chains **[confidential]**. In addition, some of the related retail chains, such as **[confidential]**, are operated by the independent shop-owners themselves. The **[confidential: customer C in Sweden]** group represents more retailers for the purposes of purchases of different supplies, including shop equipment.

(176) In 1998 **[confidential: chain No. 1]**, belonging to the **[confidential: customer C in Sweden]** group, had the possibility of getting an “extra volume rebate” on the entire purchase turnover if its purchases in that year reached SEK 4 million (EUR 421 000). The customer had failed to reach the relevant threshold<sup>374</sup>, and had purchased for only SEK 3.37 million (EUR 354 736).<sup>375</sup> In the following year, in the context of a “block order” for 1999<sup>376</sup>, **[confidential: chain No. 1]** was entitled to the following bonuses: if it purchased SEK 4-5 million worth (EUR 421 000 – 526 000) – it would get a 3% discount, for SEK 5-6 million (EUR 526 000 – 632 000) – 5%, for SEK 6-7 million (EUR 632 000 – 737 000) – 7%. **[confidential: chain No. 1]** estimated demand was within the **[confidential]** band<sup>377</sup>, which corresponds to the **[confidential]** threshold. In fact, **[confidential: chain no. 1]** spent SEK 4 million that year, and therefore only reached the threshold entitling it to receive the lowest 3% bonus.<sup>378</sup> It exceeded the threshold by a small margin. **[confidential]**.<sup>379</sup>

(177) Another member of **[confidential: customer C in Sweden]** group, **[confidential: chain No. 2]**, was entitled to the following retroactive volume related bonuses in 2000: for the purchases worth SEK 2-3 million (EUR 211 000 – 316 000) – 3% bonus, SEK 3-4 million (EUR 316 000 – 421 000) – 4%, more than 5 million (EUR 526 000) – 5%.<sup>380</sup> Its actual purchasing volume was well

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<sup>373</sup> **Pages 11839-11841**, Tomra’s response of 22 November 2004, par. 463-469.

<sup>374</sup> See letter from Tomra to **[confidential: customer C in Sweden chain No. 1]** of 17 January 1999, **page 9136**. In addition, see the purchasing figures submitted by **[confidential: customer C in Sweden]** in its reply of 17 February 2003, in its answer to question 7, **page 10464**.

<sup>375</sup> **Page 12045**, Tomra’s response of 22 November 2004, Attachment 6, p. 29.

<sup>376</sup> **Pages 9130-9132, 9123**, Tomra’s reply of 14 March 2002, Appendix 6, Binder 6.

<sup>377</sup> **Page 9131** and **pages 11835-11836**, Tomra’s response of 22 November 2004, par. 445.

<sup>378</sup> **Pages 9120-9125**, Tomra’s letters of 29 December 1999 and 17 February 2000, Appendix 6, Binder 6; **page 10465 (confidential)**, **[confidential: customer C in Sweden]**’s reply of 4 August 2003.

<sup>379</sup> **Page 10465 (confidential)**, **[confidential: customer C in Sweden]**’s reply of 4 August 2003.

<sup>380</sup> **Page 9087**, Tomra’s reply of 14 March 2002, Appendix 6, Binder 6, table at the beginning of the Swedish section; and **pages 9138-9143**. In its response to the Statement of objections and in its reply of 17 February 2005, in answer to question 4, Tomra questioned whether an agreement was actually concluded. Since it failed to provide any information or documents indicating which conditions applied

below the threshold for the first bonus step.<sup>381</sup> [confidential].<sup>382</sup> For 2000 [confidential: chain No. 3] was entitled to the following volume related bonuses with regard to entire purchase value: purchases of SEK 2-3 million (EUR 211 000 – 316 000) – 3% discount, SEK 3-4 million (EUR 316 000 – 421 000) – 4%, and more than SEK 4 million – 5% rebate.<sup>383</sup> As the customer purchased for just over SEK 4 million, corresponding to 26 RVMs plus backroom equipment, it was paid a 4% bonus.<sup>384</sup> In the case of [confidential: chain No. 4], part of [confidential: customer C in Sweden], the bonus steps were as follows: SEK 2-3 million – 4%, SEK 3-4 million – 5%, more than SEK 4 million – 6%. In fact, this customer received a 4% bonus for 2000, achieving a purchasing volume of SEK 2.77 million (EUR 292 000).<sup>385</sup> The different thresholds and bonus rates for the different chains indicate that the thresholds in the agreement were adapted to each customer's total requirements.<sup>386</sup>

(178) In the context of a “cooperation agreement” covering supplies in 2001, the [confidential: customer C in Sweden] group was entitled to the following “loyalty and volume bonus[es]”: for a purchase volume of SEK 0-15 million (EUR 0-1.58 million) – 0% discount, SEK 15– 17.5 million (EUR 1.58 million - 1.84 million) – 1%, SEK 17.5 – 20 million (EUR 1.38 million – 2.11 million) – 2%, at least SEK 20 million (EUR 2.11 million) – 3%.<sup>387</sup> In 2000, [confidential: customer C in Sweden]'s combined purchases were [confidential]<sup>388</sup>, which corresponds to the middle threshold of the rebate system established by Tomra for the customer in 2001.<sup>389</sup> In 2001 however, the customer did not meet the first threshold for the lowest discount rate. The following year, the agreement no longer contained this type of bonus as the customer wished to remove the

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instead of those referred to on 14 March 2002, it has to be concluded that [confidential: customer C in Sweden chain No. 2] was entitled to the rebates indicated initially.

381 SEK 577 517 (EUR 60 158). Page 12310, Tomra's reply of 2 March 2005, answer to question 5.

382 Page 10464 (confidential), [confidential: customer C in Sweden] reply of 17 February 2003, answer to question 8.

383 Page 9087, Tomra's reply of 14 March 2002, Appendix 6, Binder 6, table at the beginning of the Swedish section. And pages 12310, 12325, 12326, 12329 and 12330, Tomra's reply of 2 March 2005, answer to question 6.

384 Pages 12310-12311, 12329, 12330, Tomra's reply of 2 March 2005, answer to question 6.1.

385 Pages 9145-9147, Tomra's reply of 14 March 2002, Appendix 6, Binder 6. Page 12045, Tomra's response of 22 November 2004, Attachment 6, p. 29, where Tomra specifies that this corresponded to [confidential: 25-35] RVMs.

386 In the case of [confidential: customer C in Sweden chains No. 2 and 3], this follows from information on [confidential: customer C in Sweden]'s total purchasing volume in 2000, which was [confidential]. See page 10464 (confidential) [confidential: customer C in Sweden]'s reply of 17 February 2003, p. 3.

387 Pages 9115-9118, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.

388 See page 10464 (confidential), purchasing data provided by [confidential: customer C in Sweden], [confidential: customer C in Sweden]'s reply of 17 February 2003, answer to question 7. See also page 10072, sales information provided by Tomra, Tomra's reply of 25 June 2003, Appendix 3.

389 It is not clear how Tomra can argue that the agreement was not binding as it was unquestionably signed by both parties. In fact, [confidential: customer C in Sweden] does not claim that the agreement was not valid or did not apply. Its statement, according to which, the agreement was “not binding” (page 10465) can only mean that it did not include an obligation for [confidential: customer C in Sweden] to buy the respective quantities. The Commission does not allege that such an obligation existed, but it is evident that [confidential: customer C in Sweden] was entitled to the bonuses depending on the purchasing volume achieved.

“loyalty and volume bonus”.<sup>390</sup> In 2002 [confidential: customer C in Sweden]’s purchases were around SEK [confidential] million.<sup>391</sup>

(179) The following year, Tomra and the [confidential: customer C in Sweden] group concluded an exclusivity agreement for supplies in 2003, entitled “Framework agreement regarding supplies”. According to the agreement, the [confidential: customer C in Sweden] group committed itself to using Tomra “loyally” as its “main supplier” for its own stores.<sup>392</sup> The customer, however, reserved the right to occasionally test and evaluate competing products.<sup>393</sup> Despite this, it is evident that Tomra had been appointed as [confidential: customer C in Sweden] sole supplier with regard to stores owned and managed directly by [confidential: customer C in Sweden] (with the limited exception of occasional purchases for testing purposes), as is confirmed by the provisions of the contract, Tomra’s contractual practice, and the understanding of the customer.<sup>394</sup> Tomra’s submission that this agreement allowed the customer also “to start buying” from competitors if the tests were positive<sup>395</sup>, is incompatible with the wording of the agreement and not supported by any of the evidence provided by Tomra.<sup>396</sup> Although it is possible that such tests could lead to more significant orders in the future, there is no suggestion that the customer would have been entitled to start ordering more significant quantities of competing machines within the contract period.<sup>397</sup> [confidential].<sup>398</sup> As neither of the parties terminated the agreement, it continued to apply in 2004.<sup>399</sup>

### *Impact*

(180) Tomra’s policy of excluding competitors from the market through tying-in the customers’ demand in order to maintain and strengthen its dominant position was implemented in Sweden as well. For several years, at least from 1998 until 2002 Tomra systematically pursued a policy of tying major customers in exclusivity agreements, high volume “block orders” or retroactive rebate schemes, which, in fact, gave Tomra a quasi-exclusivity status. Tomra’s strategy of maintaining its dominant position was implemented through capturing total or almost total demand of the customers.

(181) Tomra has concluded exclusivity agreements with two of the biggest retail market players, namely [confidential: customer A in Sweden], valid for 2 ½

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<sup>390</sup> Page 12298 (confidential), [confidential: customer C in Sweden]’s reply of 25 February 2005, answer to question 2.

<sup>391</sup> Page 10464 (confidential), see purchasing data provided by [confidential: customer C in Sweden], [confidential: customer C in Sweden]’s reply of 17 February 2003, answer to question 7; and page 10072, sales data provided by Tomra, Tomra’s reply of 25 June 2003, Appendix 3.

<sup>392</sup> Page 10467. Swedish text: [confidential].

<sup>393</sup> Page 10467. Swedish text: [confidential].

<sup>394</sup> Page 10465.

<sup>395</sup> Pages 11833-11834, Tomra’s response of 22 November 2004, par. 435-437.

<sup>396</sup> In particular Attachment 15 to Tomra’s response of 22 November 2004, pages 12085-12086.

<sup>397</sup> The fact that [confidential: customer C in Sweden] bought some Repant machines in 2002 (page 11834, Tomra’s response of 22 November 2004, par. 437) cannot be of any relevance for an agreement which applied in 2003.

<sup>398</sup> Section 6 of the agreement

<sup>399</sup> Pages 10466.



years and **[confidential: customer C in Sweden]**, valid for 2 years. If customers did not agree with the exclusivity condition, Tomra would offer them individualised rebate systems that were adapted to either the forecasted demand of the customer or its past purchases, as was the case with **[confidential: customer B in Sweden]** and **[confidential: chain No. 1 of customer C in Sweden]**.

(182) In order to maintain its strong position on the Swedish market, Tomra tried to deprive its rivals of any significant share of the market. It did so by capturing the entire or almost entire demand of the customers. The yearly bonuses related to the volume purchased, at least since 1998, were clearly adapted to expected total purchase forecast of a customer or to its actual purchases in the previous year. In the case of **[confidential: customer B in Sweden]**, Tomra admitted that it might have known the expected purchase volume of this customer in the second half of 1999 and first half of 2000. This was reflected in the allocation of the rebate steps – the highest rebate step was equal to the customer’s expected demand. In fact, the customer had purchased worth the amount entitling it to the highest bonus. In the case of **[confidential: chain No. 1 of customer C in Sweden]** in 1998 and 1999, **[confidential: chain No. 4 of customer C in Sweden]** in 2000 and **[confidential: customer C in Sweden]** in 2001, the lowest threshold already corresponded to the customer’s total requirements whereas the higher bonus levels exceeded these requirements. The fact that the rebate thresholds were intended to cover a significant part of, if not the entire requirement of customers, is evident from the fact that none of the customers have purchased significant amounts of competing machines. **[confidential: customer B in Sweden]** did not buy competing machines in the period covered by the first contract with Tomra (in 1999 and in the first half of 2000), nor did **[confidential: chain No. 1 of customer C in Sweden]** in 1998 and 1999, or **[confidential: chain No. 2 of customer C in Sweden]** in 2000. Only some of the independent retailers belonging to **[confidential: customer A in Sweden]**, had, according to Tomra, purchased a few competing machines. Tomra, however, has not submitted evidence supporting this argument.

(183) The agreements in question usually covered reference periods of between one and three years. Between 1998 and 2002 several large retail groups as well as many smaller retail groups were tied in by the exclusivity and *de facto* exclusivity agreements. Tomra implemented its strategy through tying into the exclusionary agreements the main retail market players, like **[confidential: customer A in Sweden]** (whose market share in 1995-2002 was in the range of **[confidential]** %<sup>400</sup>) and **[confidential: customer C in Sweden]** (market share of approximately **[confidential]** % on the retail market of consumer goods<sup>401</sup>). The agreements identified in this section covered around one fifth of the Swedish

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<sup>400</sup> The market share depends on which product market is being analysed. **[confidential: customer A in Sweden]** stated that it had the highest market share in the retail market for consumer goods. It had the lower share on the wholesale market as well as on the procurement market for consumer goods. See page 10524 (confidential), **[confidential: customer A in Sweden]** reply of 1 July 2003, answer to question 3.

<sup>401</sup> Page 10462 (confidential), **[confidential: customer C in Sweden]**'s reply of 17 February 2003, answer to question 3.

RVM market demand during the period 1998-2002.<sup>402</sup> In some years, however, the market demand foreclosed to competitors was extremely high, in particular in 2001 and 2002 – 40% and 54% respectively. The exclusivity agreement with **[confidential: customer A in Sweden]** alone covered almost **[confidential: more than one third]** of the demand for RVMs in Sweden in 2001 and 2002<sup>403</sup>, and a significant percentage in 2003. Combined with the bonus agreement concerning **[confidential: customer C in Sweden]**<sup>404</sup> and the bonus agreements with other customers, it certainly affected more than 50% of the demand in RVM solutions in 2001 and 2002. It is obvious that the agreements in question covered a not unsubstantial part of the market at least for two years and probably longer.<sup>405</sup>

(184) In addition to establishing the fact that Tomra had indeed implemented its strategy, it can be shown that this had the effect of pushing competitors out of the market or eliminating possibilities for their growth. After entering the Swedish market in 1984-1985, Halton was the most successful Tomra rival on that market. By 1995-1996 Halton had managed to acquire a 30% market share when it was bought by Tomra.<sup>406</sup> Following this, Eleiko, another rival on the Swedish market with **[confidential]** % market share in 2000, was eliminated by Tomra's acquisition in 2001.<sup>407</sup> Prokent never managed to reach a market share higher than **[confidential]** %, and finally left the market in 2002. Repant entered the market in 2001, with an initial market share of **[confidential]** %, increasing to **[confidential]** % the following year.<sup>408</sup> Figure 16 demonstrates how the market shares of Tomra's rivals evolved following the increase in the tied market share of Tomra's agreements.

**Figure 16:** Evolution of Tomra's and its competitors' market shares as the size of the non-contestable share of the market in Sweden changed 1998-2002, high-end and low end machines included (estimated)<sup>409</sup>

**[confidential -- figure]**

(185) The impact of Tomra's practices could also be demonstrated by the development of its market shares and its rivals, and the changes in the size of the

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<sup>402</sup> All percentages which are indicated in this section as well as in other sections describing the impact of the practices are meant to be rough indications of their significance. The Commission considers that 886 out of 4 385 machines were directly tied by exclusivity agreements, quantity commitments and rebate agreements. Tomra arrives at an average figure of below 20% only because it did not include several agreements, e.g. the agreement with **[confidential: customer C in Sweden]** in 2001 or agreement with **[confidential: customer B in Sweden]** 1998-1999, arguing that the number of machines actually purchased by the customers was either below the threshold contained in the agreement or much above the threshold. This, according to Tomra, should indicate that the quantities actually purchased in these cases were contestable to competitors.

<sup>403</sup> **[confidential]** of just over 1 200 machines in 2001 and 2002. See, *inter alia*, **pages 12043-12046**, Tomra's response of 22 November 2004, Attachment 6, p. 27-30.

<sup>404</sup> For 2000 this has to be read as the groups which later made up **[confidential: customer C in Sweden]**.  
<sup>405</sup> This is based, in particular, on figures provided by Tomra in its response of 22 November 2004, Attachment 6, p. 27-30 (**pages 12043-12046**), taking into account that Eleiko sold in fact **[confidential: 115-145]** machines.

<sup>406</sup> **Page 7238**, Tomra's reply of 14 February 2002, p. 48.

<sup>407</sup> **Page 7238**.

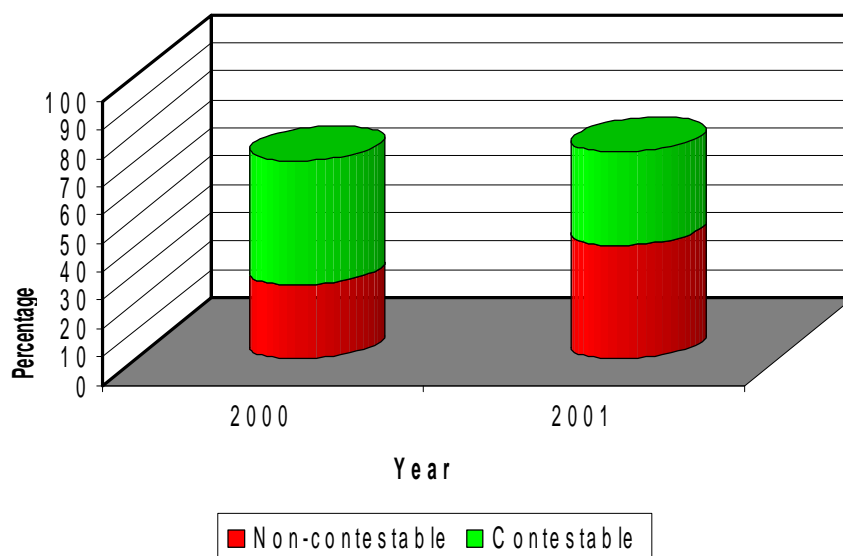
<sup>408</sup> **Page 11036 (confidential)**, Repant's reply of 25 March 2002.

<sup>409</sup> See Figure 5 Figure 6, and **pages 12043-12046**, Tomra's response of 22 November, Attachment 6.

foreclosed market demand. Tomra's market share during the reference period (1998-2002) on the Swedish high-end and low-end RVM market was at its highest in 2002, [confidential: 90-100%], compared to approximately 70% in 2000. This was followed by the increase of the proportion of the total market demand covered by Tomra's exclusionary agreements: in 2002 it covered more than half of the total RVM demand, compared to one fifth in 2000 (see Figure 17). In addition, as the size of the foreclosed market share increased, the market shares of competitors decreased: for instance, Eleiko had [confidential] % market share in 2000, which went down to [confidential] % the following year. Prokent had [confidential] % in 2000 compared to [confidential] % in 2001, and [confidential] % in 2002.

**Figure 17:** Tomra's market share (units/year) split into non-contestable and contestable volume portions in Sweden 2000-2002 (estimated)<sup>410</sup>

Tomra's market share split into non-contestable and contestable volume portions (Sweden)



(186) In addition to the exclusionary effect that the exclusivity clauses, quantity commitments and rebate schemes had on the Swedish market, the rebate schemes applied to most customers in Sweden created a competitive situation where Tomra's rivals were forced to offer very low or even negative prices in order to compete with the dominant supplier. The following figure (Figure 18) depicts the unit price a competitor would at least need to offer on a per unit basis in order to match Tomra's price under the rebate scheme. The horizontal axis depicts the number of machines increasing from left to right and the vertical axis the corresponding price. Figure 18 demonstrates that competitors may need to offer very low, possibly even negative prices for the last units before the rebate threshold is reached in order to make Tomra's customers switch. The figure is

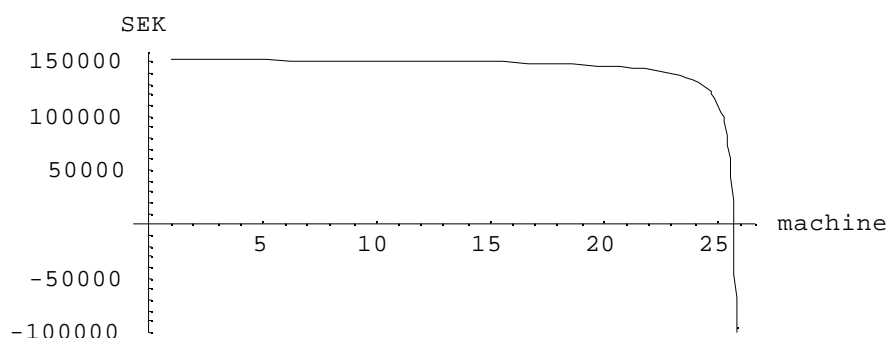
<sup>410</sup> Figures submitted by Tomra in its response of 22 November 2004, Attachment 6, p. 27-31 (pages 12043-12047). [confidential: column for 2002].

based on the rebate applying to [confidential: customer C in Sweden chain No. 3] in 2000.<sup>411</sup>

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<sup>411</sup> The figure is based on the fact that the customer bought for just over [confidential], which corresponded to 26 machines in addition to, as the case may be, the backroom equipment and at an average price of [confidential] per machine plus, as the case may be, backroom equipment. It also takes account of the fact that by exceeding the threshold of SEK 4 Mio, the customer was entitled to an additional bonus of 1%.

**Figure 18:** The effect of Tomra’s rebate scheme on the price a competitor would have to offer to make the customer switch from Tomra (Sweden)



(187) Therefore, it can be concluded that the exclusive and *de facto* exclusive agreements concluded between Tomra and its main customers in Sweden covered a substantial part of the total market demand in 2001-2002. This in turn has an effect on the market in that the market share of Tomra has been increasing along with the growth of tied market demand. After acquiring its most promising competitors (Halton and Eleiko), Tomra faced competition only from two rivals on the high-end machine market that had not managed to acquire significant market share.

**(C) Germany**

(188) Germany is one of the largest RVM markets in the EEA. However, until 2003, there was no mandatory deposit system for the collection of non-refillable drink containers in Germany. With a degree of uncertainty, there was a significant amount of speculation with regard to the possible date of introduction of the deposit system, which also affected the demand for RVMs on the market. The demand in the reference period increased significantly in 2000, but was already rather high in 1999 and 2001, that is to say, above 1000 machines per year. There is evidence that Tomra was already considering resorting increasingly to exclusivity or preferred supplier agreements in 2001, and saw the introduction of the new mandatory deposit system in Germany as a “new business opportunity”.<sup>412</sup> In autumn 2002, the German government finally took the decision concerning the introduction of the deposit system, which was planned to be implemented in October 2003. However, the system will only be finalised in 2006.

(189) Furthermore, it must be noted from the outset that the German RVM market is different from other markets discussed in this Decision. In Germany, a significant number of RVMs are installed in canteens, kiosks and small retail outlets. For this reason, low-end RVM suppliers have achieved comparatively higher sales

<sup>412</sup> Pages 2119 and 2115.

volumes than in other countries discussed. The most successful suppliers of stand alone RVMs were Trautwein and EM-G.

*Exclusivity, quantity commitments, discounts and rebates*

(190) Tomra's main German customers in 1998-2002 were EDEKA, Metro, Rewe, Spar and Netto. In Germany Tomra made offers to conclude exclusivity agreements or arrangements and made offers for such agreements in the period 1997-2002.

*[confidential: customer A in Germany]*

(191) **[confidential: customer A in Germany]** group is the leader of the German retail market with 20% market share. It consists of several divisions, the regional companies that are coordinated by the **[confidential: central unit of customer A in Germany]**.<sup>413</sup> Following its strategy of tying the major retail companies elsewhere in Europe, Tomra implemented such practices in Germany as well.

(192) For the period from March 1998 until June 1999, Tomra concluded a supply agreement with **[confidential: subsidiary No. 1 of customer A in Germany]**, which represented **[confidential: customer A in Germany]** in Bavaria, Thuringia and Saxony. The agreement gave Tomra the position of an exclusive supplier with regard to the supermarkets, owned and managed by **[confidential: customer A in Germany]** (so-called "Regiebetriebe"), and, "in so far as possible" also in relation to the independent members of the **[confidential: customer A in Germany]** group. Only if competing products had offered **[confidential: customer A in Germany]** "significant advantages"<sup>414</sup>, could the customer order machines from suppliers other than Tomra. Therefore, **[confidential: customer A in Germany]** was given the right to install competing products for testing purposes to a limited extent.<sup>415</sup>

(193) In relation to this clause, it must be noted that it is characteristic in RVM markets to order machines from a new supplier only after its products have been tested successfully. Retailers do not purchase significant numbers of RVMs without first having tested the product. This could explain the clause included in the contract with **[confidential: customer A in Germany]** which, however, did

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<sup>413</sup> **[confidential]**.

<sup>414</sup> This is stressed by Tomra, **pages 11886-11887**, Tomra's response of 22 November 2004, par. 695.  
<sup>415</sup> Agreement of 27 August 1998, **pages 6385-6388**, AK 47, **pages 6687-6690**, MS 70, **page 6686**, MS 69. The agreement states that the customer will purchase RVMs from Tomra "in a concentrated manner" **[confidential]**. Other contractual arrangements show that this in reality meant exclusivity with limited exceptions. Furthermore, an internal e-mail within Tomra Germany (MS 69), referring to an oral contact with the customer, makes it clear that the agreement that was going to be signed was understood to be an exclusivity agreement. The e-mail contains the following sentence: **[confidential]**. Although the precise wording of the agreement may not have been known at the time, which is stressed by Tomra (**page 11886**, Tomra's response of 22 November 2004, par. 689), it describes what had been agreed orally and what the thrust of the agreement was going to be. Clause 4 relating to test installations reads: **[confidential]**. There are five cooperation partners within **[confidential: subsidiary No. 1 of customer A in Germany]**, according to Tomra. According to Tomra the clause is unclear and could also be interpreted as allowing for test installations in all outlets of the association (**page 11888**, Tomra's response of 22 November 2004, par. 704-706). This interpretation, however, would be clearly incompatible with the manifest purpose of this clause and of the agreement as a whole.

not change the effect of Tomra's exclusivity for one year. Moreover, the clause in question, allowing the purchase of competing machines, does not envisage purchases from other suppliers where their products are comparable, or where advantages offered by the competing product are less than significant and where the customer may wish to buy from other sources for different reasons. The limited exceptions contained in the agreement and the internal communications between Tomra and the customer confirm that the basic understanding of both was that Tomra was indeed the exclusive supplier. The examples given by Tomra, according to which a competitor had obtained a test installation and a franchisee had bought competing equipment that was considerably cheaper<sup>416</sup>, simply confirm that exclusivity was the rule and that there were only limited exceptions. If competing machines were much cheaper, as argued by Tomra, and the agreement was not exclusive, it is unclear why other franchisees would not even test other machines or contemplate switching. The agreement therefore resulted in quasi exclusivity.<sup>417</sup>

(194) In relation to the agreements concluded with **[confidential: subsidiary No. 1 of customer A in Germany]**, Tomra argues that the agreement concluded in 1998 was drafted by the customer, and that this customer used the concept of exclusive or preferred supplier in contracting and price negotiations to obtain better conditions.<sup>418</sup> With regard to this, it must be stressed that the fact on whose headed paper the contract is drafted is irrelevant for the assessment of the exclusivity clause effect. It is clear that the terms of agreements are negotiated by both parties, no matter which of them drafts the final version. The contracts are the results of mutual agreement. What is important is that the agreement constrained the customer not to purchase competing machines, which is the effect of exclusivity.

(195) For the second half of 2000, when the customer had planned major investments following the take-over of 44 **[confidential]** supermarkets, Tomra obtained an agreement with **[confidential: subsidiary No. 2 of customer A in Germany]** according to which the customer committed to equip all the new stores exclusively with Tomra machines.<sup>419</sup> In 2000 Tomra sold 52 machines to **[confidential: subsidiary No. 2 of customer A in Germany]**, which was significantly more than the purchasing volume of this customer in 1999 and 2001.<sup>420</sup>

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<sup>416</sup> Page 11887, Tomra's response of 22 November 2004, par. 697.

<sup>417</sup> The fact that, according to Tomra, in 1998 only 90% and in 1999 only 93% of the installed machines by **[confidential: subsidiary No. 1 of customer A in Germany]**, which includes franchisees and also periods in which the agreement did not apply, does not call this analysis into question.

<sup>418</sup> Page 11885, Tomra's response of 22 November 2004, par. 686-687, and Attachments 18, 24, 25.

<sup>419</sup> Pages 6694, MS 74, 6693, MS 73, 6691, MS 71, 6623, MS 56, 6625, MS 57. In a letter from Tomra of 4 July 2000 (page 6694, MS 74), confirming the results of a meeting on 30 June 2000, it was stated that all supermarkets will be equipped exclusively with Tomra machines ("*Sämtliche Märkte werden exklusiv mit Tomra Automaten ausgerüstet.*") In exchange, **[confidential: subsidiary No. 2 of customer A in Germany]** was *inter alia* granted a special bonus ("*Sonderbonus*"), which was to be paid at the end of the installations, plus one machine for free. At the same time, Tomra thanked **[confidential: subsidiary No. 2 of customer A in Germany]** for its loyalty. An internal note of 11 September 2000, page 6625, refers to an existing exclusivity agreement ("*... bestehenden Exklusivvertrag*"). See also page 6623.

<sup>420</sup> Page 10046, Tomra's reply of 25 June 2003, answer to question 29.

(196) For the period 1 July 2000 until 31 March 2001, Tomra managed once again to obtain an exclusivity agreement with **[confidential: subsidiary No. 1 of customer A in Germany]**<sup>421</sup>, with regard to the chains directly run by the organisation.<sup>422</sup> In exchange for exclusivity, Tomra committed to upgrade free of charge all existing machines of this customer to online-capability.<sup>423</sup> As in the previous agreement competing machines could be ordered only if they offered “*significant advantages*”. In fact, the agreement applied only in the period 1 July 2000 until 31 December 2000.<sup>424</sup> In addition to the exclusivity agreements, Tomra also concluded agreements with **[confidential: customer A in Germany]**, in which it committed itself to purchasing an agreed quantity over a certain period of time in return for the discounts. For example, **[confidential: subsidiary No. 3 of customer A in Germany]** was granted a quantity rebate of 10% for committing to order 70 machines in 1997.<sup>425</sup> In fact **[confidential: subsidiary No. 3 of customer A in Germany]** bought 93 RVMs<sup>426</sup>, which means that the committed quantity corresponded to 75% of the customer’s actual requirements. The majority of these purchases were made by independent retailers. The annual agreement with **[confidential: central unit of customer A in Germany]** contained a 1% bonus on the entire turnover if at least 200 machines were ordered in the course of 1999.<sup>427</sup> According to information provided by Tomra, 229 machines were bought by **[confidential: central unit of customer A in Germany]** in 1999<sup>428</sup>, which means that the target corresponded to more than 85% of the customer’s requirements in the reference period.<sup>429</sup>

(197) Tomra has also offered **[confidential: customer A in Germany]** discounts depending on the value of its purchases. For example, in 1999 Tomra granted **[confidential: subsidiary No. 4 of customer A in Germany]** the following retroactive progressive bonuses: purchase value at least DEM 2 million (EUR 1.02 million) – 0.5% discount, from DEM 2.5 million (EUR 1.28 million) – 1%,

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<sup>421</sup> Page 6667, MS 64, pages 6668-6669, MS 65, page 6670, MS 66. The offer and the acceptance by the customer explicitly use the terms “Exklusiv-Liefervertrag” (“Supply Agreement”) and “Exklusiv-Vereinbarung” (“Exclusive Agreement”).

<sup>422</sup> “Regiebetriebe”.

<sup>423</sup> In so far as this was technically possible. Tomra’s contention that the only reward hinging on the customer’s accepting exclusivity was that the first six months of on-line connection were free-of-charge is incorrect in that Tomra’s offer of 18 May 2000 for an exclusivity contract contains a list of advantages granted in return for an exclusivity agreement, including the upgrading of all existing machines to allow them to go on-line. Point 12 of Tomra’s offer makes it clear that only 2 points in Tomra’s offer, were independent of exclusivity. They do not include the free-of-charge upgrades.

<sup>424</sup> Page 11890, Tomra’s response of 22 November 2004, par. 715, and Attachment 26. According to Tomra’s letter of 30 November 2000 the agreement was terminated with effect as of 31 December 2000.

<sup>425</sup> Pages 7753-7755, Tomra’s reply of 14 March 2002, Appendix 6, Binder 2, No 12. The agreement is referred to as a “Gesamtauftrag”. The individual machines were to be delivered c. 4-6 weeks after they had been ordered. The address to which they had to be delivered was to be indicated in the individual cases.

<sup>426</sup> Page 11903, Tomra’s response of 22 November 2004, par. 800-802.

<sup>427</sup> Pages 6645-6649, MS 60.

<sup>428</sup> Page 11906, Tomra’s response of 22 November 2004, par. 821 and Attachment 6, p. 25 of Tomra’s response (page 12041). This figure constituted a correction of the information given on page 7272 (Tomra’s reply of 14 February 2002, p. 38).

<sup>429</sup> In addition to machines bought from Tomra, **[confidential]** were bought from Prokent, page 10921. As has been seen above, there was also an exclusivity agreement with **[confidential: subsidiary No. 1 of customer A in Germany]**.



from DEM 3 million (EUR 1.53 million) – 2% in addition to the conditions negotiated centrally.<sup>430</sup> The first threshold clearly exceeded the customer’s actual requirements, as it purchased only DEM 0.5 million (EUR 0.26 million) worth that year from Tomra.<sup>431</sup> In an offer for an agreement on prices and conditions for 2001<sup>432</sup>, [confidential: customer A in Germany] was offered the following turnover related progressive bonuses (“Umsatzrückvergütung”): purchase value up to DEM [confidential: 10-15 million] in six months – 2.25%, as from DEM [confidential: 10-15 million] – 2.75%, as from DEM [confidential: 12-17 million] – 3.75%. An additional “stability bonus” of 0.5% was offered if the turnover of the previous year, which had been relatively high, was reached in the 3 regions. This proposal was, however, not accepted and the annual agreement for 2001 does not contain any turnover related bonuses.<sup>433</sup> [confidential: customer A in Germany]’s actual purchasing volume in 2001 was below DEM [confidential: 8-13 million]<sup>434</sup>, which means that it would have reached only 83% of the volume necessary for the first bonus step. Any sales from competitors would have made it impossible to reach the bonus.<sup>435</sup>

(198) The annual agreement with [confidential: central unit of customer A in Germany] for 2002<sup>436</sup> contained the following turnover related bonuses (the thresholds are converted into Euros): purchasing volume equal to or more than EUR [confidential: 3-8 million] – 1.5% of the total purchasing value, equal to or more than EUR [confidential: 5-10 million] – 2.5%, as of EUR [confidential: 8-13 million] – 3.5%. The lowest threshold, EUR [confidential: 3-8 million], corresponded to the volume purchased by the customer the previous year, but was not achieved by this customer in 2002. It only purchased EUR [confidential] million worth.<sup>437</sup> [confidential].<sup>438</sup>

*[confidential: customer B in Germany]*

(199) In 2000 Tomra obtained a framework exclusivity agreement with [confidential: customer B in Germany], which imposed a purchase target of 25 RVMs to be reached in 2000 as well.<sup>439</sup> In exchange Tomra had agreed to upgrade 13 older machines with online-capability function for free. Subsequent to the exclusivity agreement, [confidential: customer B in Germany] was

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<sup>430</sup> Page 6442, AK 75.

<sup>431</sup> Page 11908, Tomra’s response of 22 November 2004, par. 829-831. [confidential: customer A in Germany] missed the first threshold, buying for less than DEM 0.5 million.

<sup>432</sup> Pages 9473-9474, Tomra’s reply of 14 March 2002, Appendix 7, No 25, pages 7042-7057, SH 30, 31 and 32. The drafts which were found in Mr. Golz’s and Ms. Lehr’s offices were created at the end of November 2000 and were sent to [confidential: customer A in Germany].

<sup>433</sup> Pages 7740-7741, Tomra’s reply of 14 March 2002, Appendix 6, Binder 2, No 6. See also page 8047, circular letter from [confidential: central unit of customer A in Germany] of 12 February 2001, Appendix 6, Binder 3, No 23.

<sup>434</sup> In fact, it was under EUR [confidential: 4-6] million, page 7272, Tomra’s reply of 14 February 2003, p. 38.

<sup>435</sup> [confidential], page 10920.

<sup>436</sup> Pages 10131-10135, Tomra’s reply of 25 June 2003, Appendix 11.

<sup>437</sup> Edeka bought [confidential: 140-190] machines from Tomra and achieved a turnover of approximately EUR [confidential: 3-6] million (page 10072, Tomra’s reply of 25 June 2003, Appendix 3).

<sup>438</sup> This takes account of the equipment bought from Prokent, page 11013.

<sup>439</sup> Written confirmation of 10 March 2000, pages 6263-6265, AK 17 and pages 6389-6391, AK 48. This letter constitutes Tomra written confirmation of what had been agreed orally.

granted a “loyalty bonus”<sup>440</sup> for agreeing to purchase at least 20 new Tomra systems in 2001.<sup>441</sup> In fact, the customer bought 19 RVMs in 2000<sup>442</sup> during the application term of the exclusivity agreement, and [confidential: 18-22] RVMs in 2001 under the quantity commitment.<sup>443</sup> Tomra argues that this agreement was the result of a unilateral [confidential: customer B in Germany] business decision.<sup>444</sup> Even if this was true, however, it does not change the assessment of the contract containing exclusivity as will be demonstrated further. In any case, the document referred to shows that the agreement was indeed the result of negotiations between both parties.<sup>445</sup>

*[confidential: customer C in Germany]*

(200) For the period from the beginning of 1997 until the beginning of 1998 Tomra concluded a cooperation agreement with [confidential: customer C in Germany].<sup>446</sup> The prices and conditions of the agreement were subject to the supply of [confidential: 30-60] RVMs within the respective reference period. The correspondence exchanged between Tomra and the customer proves that<sup>447</sup>, as a consequence of the agreements in question, Tomra was at least *de facto* sole supplier to [confidential: customer C in Germany].<sup>448</sup> In 1999 [confidential: customer C in Germany] committed to buy approximately [confidential: 20-50] machines, which in fact it did buy.<sup>449</sup>

(201) The following year, Tomra and [confidential: customer C in Germany] concluded another agreement for 2000<sup>450</sup>, under which the customer agreed to

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<sup>440</sup> Tomra claims that the “loyalty bonus” was a “normal discount”, but offers no explanation as to why the term “loyalty” would have been used erroneously by itself.

<sup>441</sup> Page 6261, AK 15, Page 6291, AK 21.

<sup>442</sup> Page 11905. Tomra’s response of 22 November 2004, par. 814. Tomra also states that it did not react to this “supposed breach of contract”, which would show that there was no binding commitment.

<sup>443</sup> Page 12042, Tomra’s response of 22 November 2004, Attachment 6, p. 26.

<sup>444</sup> Page 11905, Tomra’s response of 22 November 2004, par. 813.

<sup>445</sup> The document in question (page 6261) is a fax drafted by Tomra, in which it explicitly refers to “friendly and constructive talks” which had taken place on the customer’s premises and summarises the outcome of the negotiations.

<sup>446</sup> Pages 6770-6777, MS 91, pages 7859-7863, Appendix 6, Binder 2, No 32, 33.

<sup>447</sup> Pages 6073-6075, GS 61, letter of 22 April 97 from Tomra to [confidential: customer C in Germany]: [confidential]. Page 7863, Appendix 6, Binder 2, No 33, p. 2, letter from Tomra to [confidential: customer C in Germany] of 25 February 1997, confirming the agreement for 1997: [confidential].

<sup>448</sup> Pages 8464-8466, Appendix 6, Binder 4, No 157, this is also illustrated by the fact that at the beginning of 1997 [confidential: customer C in Germany] still had to buy a considerable number of machines under the previous agreement. Tomra actually offered to include the remaining machines in a new agreement over 73 machines. Under this agreement [confidential: customer C in Germany] purchased 42 machines from Tomra and 18 machines from Halton (pages 11901-11902, Tomra’s response of 22 November 2004, par. 788-791, and Attachment 27). As, however, Halton was taken over by Tomra in 1997, the fact that also Halton machines were also supplied does not have any particular relevance.

<sup>449</sup> Pages 8467-8468 and pages 8469-8470, Tomra’s reply of 14 March 2002, Appendix 6, Binder 4, No 158 and 159, pages 8957-8962, Appendix 6, Binder 5, Section 6, 2000-1999. Page 7272, Tomra’s reply of 14 February 2002, p. 38. There is no evidence of any purchases from competitors.

<sup>450</sup> Pages 7864-7867, Appendix 6, Binder 2, No 34. The installations were to be terminated by 30 June 2001. In its response to the Statement of objections, Tomra tried to portray this agreement as a unilateral decision by the customer (see page 11902, Tomra’s response of 22 November 2004, par. 794-795). The evidence referred to (pages 8469 and 7864) does not, however, prove this, but rather shows that the agreement was the result of negotiations between the parties. Tomra’s letter of 22 October 1999

buy at least 150 machines. In exchange, **[confidential: customer C in Germany]** would receive 10 machines for free, in addition to the ones already purchased.<sup>451</sup> In fact, **[confidential: customer C in Germany]** bought 180 Tomra machines in 2000<sup>452</sup> and received two additional RVMs free of charge in line with the agreement for 2001.<sup>453</sup> The quantity target agreed with Tomra constituted 83% of the customer's demand.

(202) According to an agreement for 2001, **[confidential: customer C in Germany]** was entitled to the following progressive bonuses from Tomra: if it bought 150 machines – it would get **[confidential: 8-13]** RVMs free, 180 RVMs – **[confidential: 10-15]** RVMs free, 200 RVMs – **[confidential: 13-18]** RVMs free, and if 250 RVMs – **[confidential: 19-24]** RVMs free.<sup>454</sup> The second bonus threshold corresponded to the number of machines purchased by **[confidential: customer C in Germany]** in the previous year. In fact, **[confidential: customer C in Germany]** bought **[confidential: 80-130]** Tomra machines in 2001 and **[confidential: 100-150]** machines in 2002.<sup>455</sup> The lowest threshold, including the bonus in kind, represented 67% of the customer's requirements in 2001 and 2002, while the highest threshold exceeded the actual requirements of the customer in this two-year period. The agreement was extended and continued to apply in the first half of 2002.<sup>456</sup> As was the case with other customers, the contracts could be extended, presumably to allow the customer to reach the target. This, in turn, precluded the customers from purchasing competing products.

(203) Tomra argues that it was the customer who suggested the number of 150 RVMs and not Tomra. Moreover, Tomra argues that there was no mutual understanding between the parties that this number corresponded to the entire or almost entire requirements of **[confidential: customer C in Germany]**.<sup>457</sup> Given the correlation of the bonus thresholds with the volume previously purchased by the customer, it is highly unlikely that Tomra could not have envisaged **[confidential: customer C in Germany]**'s entire demand. In addition, the fact that even the first threshold was not reached in 2001<sup>458</sup> simply indicates that it was a very ambitious target and did not in itself leave any scope for purchases from competitors. Tomra's further contention that the bonus scheme constituted an incremental rebate scheme without exclusionary potential<sup>459</sup> is incorrect. Apart from the fact that the lowest bonus threshold already exceeded the customer's requirements in one year, it constituted an atypical rebate scheme that provided a particularly strong incentive for reaching the higher bonus thresholds, given that once a threshold had been reached, further purchases did not yield any rebate at

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(page 7864) refers to "constructive talks" ("das konstruktive Gespräch"), and summarises the content of what was agreed.

<sup>451</sup> The agreement was considered to be an extension of the agreement for 1999.

<sup>452</sup> Page 7272, Tomra's reply of 14 February 2002, p. 38.

<sup>453</sup> Page 5649, GS 38.

<sup>454</sup> Pages 6333-6335, AK 33, pages 8476-8478, Tomra's reply of 14 March 2002, Appendix 6, No 163, where the agreement is referred to as "Bonus Agreement".

<sup>455</sup> Page 7272, Tomra's reply of 14 February 2002, p. 38, and page 10072, Tomra's reply of 25 June 2003, Appendix 3.

<sup>456</sup> Page 12323, Tomra's reply of 2 March 2005, answer to question 17.

<sup>457</sup> Page 11906, Tomra's response of 22 November 2004, par. 817-818.

<sup>458</sup> Page 11906, Tomra's response of 22 November 2004, par. 818.

<sup>459</sup> Page 11905, Tomra's response of 22 November 2004, par. 816.

all, and gave entitlement to a rebate only in so far as the next threshold was reached.

*[confidential: customer D in Germany]*

(204) The agreement with **[confidential: customer D in Germany]**, another big customer of Tomra in Germany, for 1999<sup>460</sup> included the following progressive bonuses depending on the volume purchased and applicable on the entire purchase value of the customer: at least DEM 1 million (EUR 0.51 million) – this would get a rebate of 0.5%, DEM 1.5 million (EUR 0.77 million) – 1%, DEM 2 million (EUR 1.02 million) – 1.5%, DEM 2.5 million (EUR 1.28 million) – 1.75%, DEM 3 million (EUR 1.53 million) – 2%, DEM 3.5 million (EUR 1.79 million) – 2.5%. In fact **[confidential: customer D in Germany]**'s purchases were twice as high, leading to an adaptation of the bonus scheme for the subsequent year. The framework agreement for 2000 provided for the following progressive bonus thresholds<sup>461</sup>: value purchased of at least DEM 4 million (EUR 2.04 million) – 0.5%, from DEM 6 million (EUR 3.06 million) – 1%, from DEM 8 million (EUR 4.08 million) – 1.5%, from DEM 10 million (EUR 5.1 million) – 2.5%.<sup>462</sup> The turnover of DEM 10 million, necessary to benefit from the highest bonus, corresponded approximately to that achieved by **[confidential: customer D in Germany]** the previous year.<sup>463</sup> In fact, this customer bought fewer machines than the previous year and exceeded the threshold for 1.5% bonus only.<sup>464</sup>

(205) The framework agreement for 2001<sup>465</sup> contained the same progressive bonus steps as the agreement for 2000, and continued to apply in 2002 as well.<sup>466</sup> In fact, in 2001 **[confidential: customer D in Germany]** purchased an amount entitling it to 1.5% bonus.<sup>467</sup> In 2002 the purchasing volume was even lower – it only exceeded the threshold for 0.5% rebate.<sup>468</sup> Therefore, in 2000, 2001 and 2002 **[confidential: customer D in Germany]**'s actual purchases were clearly below the thresholds fixed for the highest possible bonus rate. At the same time, the **[confidential: customer D in Germany]** group bought very few RVMs from other suppliers: throughout the period 1996-2002 it bought only **[confidential]** RVMs from competitors, most of them low-end machines.<sup>469</sup> The fact that in 2001 one or two sub-organisations had taken steps to put certain volumes out for tenders to which other suppliers were also invited, but then later abandoned this

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<sup>460</sup> **Pages 7798-7803**, Tomra's reply of 14 March 2002, Appendix 6, Binder 2, No 24, **page 4524**, CR 68.

<sup>461</sup> In addition to a 4.5% sales volume based bonus that was to be paid up front.

<sup>462</sup> **Pages 6304-6308**, AK 28, **Pages 4300-4302**, WK 21.

<sup>463</sup> **Page 7272**, Tomra's reply of 14 February 2002, p. 38.

<sup>464</sup> **Page 5738**, GS 53, p. 57, **page 7272**, Tomra reply of 14 February 2002, p. 38.

<sup>465</sup> **Pages 6322-6332**, AK 32.

<sup>466</sup> **Page 10646 (confidential)**, **[confidential: customer D in Germany]**'s reply of 5 August 2003, answer to question 7.

<sup>467</sup> **Page 7272**, Tomra's reply of 14 February 2002, p. 38.

<sup>468</sup> **Page 10072**, Tomra's reply of 25 June 2003, Appendix 3.

<sup>469</sup> According to **[confidential: customer D in Germany]**'s reply of 5 August 2003, answer to question 11, (**page 10646 (confidential)**), the following numbers of high-end machines were bought between 1996 and 2002: **[confidential]** RVMs from Halton (prior to 1998) and **[confidential]** from Prokent. In addition, **[confidential]** RVMs from EM-Gerätebau and **[confidential]** RVMs from Trautwein that were low-end machines.

idea, does not indicate that the rebate system applying to **[confidential: customer D in Germany]** could not have had any effect. In the end, since Tomra was considering acquiring Prokent for the first time in 2001, the fact that the orders were put up for tender would not have introduced much more competition – in the high-end machine market there were only Tomra, Prokent and Bevesys (which was only starting up in 2001, with the sale of **[confidential]** RVMs).

(206) With regard to the agreements concluded with **[confidential: customer D in Germany]**, Tomra emphasises that they were drafted by the customer.<sup>470</sup> Even if an agreement is drafted on the official paper of one of the parties to it, it is obvious that the terms would have been set by mutual agreement after negotiations. In the end, the effect of an exclusionary rebate scheme is the same – to exclude competitors from the market.

(207) Tomra also argues that there was a lack of transparency within the organisation of **[confidential: customer D in Germany]** with regard to the rebate scheme, as a result of which the individual outlets allegedly were not informed about the rebate scales and thus did not know where their organisation stood in relation to them at any given time during the year.<sup>471</sup> As the nature of the rebate scheme was to reward the organisation as a whole for purchases from Tomra, it is inconceivable that no information or no instructions reached the individual outlets. What is more important is the fact that none of the members of **[confidential: customer D in Germany]** had indeed purchased significant volumes of competing machines. The fact that individual outlets did not know where the organisation stood with regard to the different thresholds, that is to say, the fact that the system was non transparent does not necessarily minimise the effect of the rebate scheme.

***[confidential: customer E in Germany]***

(208) According to an internal Tomra communication<sup>472</sup>, Tomra had the status of sole supplier of two regional **[confidential: customer E in Germany]** organisations at least in 1996 and in 1997. At the beginning of 1999 Tomra had obtained an exclusivity agreement for 1999 and 2000 with **[confidential: Austrian subsidiary of customer E in Germany]**. It attempted to obtain an exclusivity commitment from **[confidential: customer E in Germany]** in Germany for 1999 and 2000. Tomra argued in its correspondence with **[confidential: customer E in Germany]** that exclusivity had been promised to it orally in relation to Germany as well for 1999 and 2000.<sup>473</sup> When asked about the

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<sup>470</sup> Pages 11908-11913, Tomra's response of 22 November 2004, par. 834, 860, 864 and 869.

<sup>471</sup> Pages 11910-11911, Tomra's response of 22 November 2004.

<sup>472</sup> Page 6613, MS 49, pages 9591-9592, Tomra's reply 14 March 2002, Appendix 7, Binder 1, No 103. Internal communication of 25 March 1997, according to which Tomra remained the sole supplier to **[confidential: customer E in Germany]** in 1997 ("Tomra weiterhin Alleinlieferant").

<sup>473</sup> A letter from Tomra to **[confidential: customer E in Germany]** of 1 March 1999, page 6600, MS46 and page 8855, Tomra's reply of 14 March 2002, Appendix 6, Binder 5, contains the following sentence: **[confidential]**. Pages 6856-6857, MS 107, a letter from Tomra to **[confidential: customer E in Germany]** of 6 May 1999, contains the following sentence: **[confidential]**.

contractual relationship with Tomra for 1999 and 2000, **[confidential: customer E in Germany]** replied that there was no exclusivity agreement in 2000.<sup>474</sup>

(209) Tomra announced a price increase in relation to **[confidential: customer E in Germany]**'s purchases in 1999. After **[confidential: customer E in Germany]** indicated that its purchasing volume would be 145 machines, Tomra withdrew its previously announced increase.<sup>475</sup> While there is no evidence as to whether a formal commitment to purchase 145 machines was concluded, there was a clear link between the withdrawal of the price increase and this quantity. In fact, the entire organisation of **[confidential: customer E in Germany]** bought 150 machines from Tomra<sup>476</sup> and **[confidential]** machines from Prokent in 1999, which means that the volume of 145 machines corresponded to more than **[confidential]**% of **[confidential: customer E in Germany]**'s actual requirements.

(210) In 2000 Tomra attempted to obtain volume commitments from regional organisations within the **[confidential: customer E in Germany]**<sup>477</sup> and managed to secure such an agreement at least in one case, when **[confidential: customer E in Germany]** committed to purchasing 20 RVMs in 2000.<sup>478</sup> In this case the quantity the customer committed to buy was however clearly below the customer's requirements.<sup>479</sup>

***[confidential: customer F in Germany]***

(211) Over many years progressive bonuses were part of the yearly agreements that Tomra concluded also with **[confidential: customer F in Germany]**, a purchasing cooperation of several retail organisations, including **[confidential: customer G in Germany]** and **[confidential: customer B in Germany]**. Such bonuses were applied at least throughout the period from 1998 until 2002. In the individual years the bonus structure was as follows. In 1998, if the customer purchased for at least DEM 500 000 (EUR 255 102) – it would receive 2% bonus, for at least DEM 1 million (EUR 510 204) – 3%. The customer in fact bought RVMs for DEM 2 million. In 1999 the thresholds were amended: purchase volume as of DEM 1 million (EUR 510 204) – 1.5%, as of DEM 1.75 million (EUR 892 857) – 2.5%, as of DEM 2.5 million (EUR 1.28 million) – 3.5%, as of DEM 3.25 million (EUR 1.66 million) – 4.5%, as of DEM 4 million (EUR 2.04 million) – 5.5%. The threshold for 3.5% corresponded to the previous year's purchased volume. In fact the customer bought machines worth approximately DEM 1 million. Under the agreement concluded for 2000, the

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<sup>474</sup> **Page 10688 (confidential)**, **[confidential: customer E in Germany]**'s reply of July 2003, reply to question 8.

<sup>475</sup> **Page 6600**, MS 46, p. 2, letter from Tomra to **[confidential: customer E in Germany]** of 1 March 1999. The relevant passage reads: **[confidential]**.

<sup>476</sup> **Page 7272**, Tomra's reply of 14 February 2002, p. 38.

<sup>477</sup> E.g. **[confidential: customer E in Germany]**, 27 April 2000, **page 6598**, MS 45.

<sup>478</sup> **[confidential: customer E in Germany]**: 20 T-600 Combi RVMs at a price of **[confidential]** between 1 May and 31 December 2000, for which a 3% discount was granted, **page 8835**, Tomra's reply of 14 March 2002, Appendix 6, Binder 5, and **page 12040**, Tomra's response of 22 November 2004, Attachment 6, p. 24.

<sup>479</sup> **[confidential: customer E in Germany]** committed to ordering 20 RVMs, but bought at least 45 RVMs from Tomra, **pages 11903-11904**, Tomra's response of 22 November 2004, par. 803-806.

customer was entitled to the following rebates: as of DEM 2 million (EUR 1.02 million) – 2%, as of DEM 2.5 million (EUR 1.28 million) – 2.5%, as of DEM 3.25 million (EUR 1.66 million) – 3.5%, as of DEM 4 million (EUR 2.04 million) – 4.5%. In 2001: as of DEM [confidential: 1-3 million] – 1%, as of DEM [confidential 1.5-3] million – 2.5%, as of DEM [confidential 2.5-3.5] million – 4.5%, as of DEM [confidential: 3-4] million – 5.5%. In 2002 the relevant bonus steps were: as of EUR [confidential: 0-1.5 million] – 1%, as of EUR [confidential: 1-2 million] – 2.5 %, as of EUR [2-3 million] – 4.5%.<sup>480</sup>

(212) The increases in purchasing volume were not necessarily proportionate to the increases in the bonus rate. After 2000 the bonus rate increased more significantly than the respective volume thresholds. The volumes required to reach the respective bonus rates obviously took account of the expected or past requirements of the customer. Apart from 1998, the threshold for obtaining the highest bonus rate was fixed at a level that corresponded to or even exceeded the actual requirements of [confidential: customer F in Germany] in the respective years.<sup>481</sup>

(213) In August 1999 Tomra and [confidential: customer G in Germany] orally agreed that Tomra would be [confidential: customer G in Germany] exclusive supplier until the next yearly “talks”<sup>482</sup> which took place in March 2000.<sup>483</sup> On 22 March 2000, Tomra offered [confidential: customer G in Germany] a 2-year-exclusivity contract.<sup>484</sup> In exchange for exclusivity, Tomra offered, amongst other things, to upgrade one existing machine to online-capability for every two new machines that were installed. Shortly afterwards, in April 2000, Tomra improved its offer, amongst other things by extending the free-of-charge upgrade to all machines. These conditions depended upon Bunting signing at least a 3 year exclusivity agreement. [confidential: customer G in Germany], however, did not accept the offer, and decided to purchase under the terms negotiated by [confidential: customer F in Germany].<sup>485</sup>

(214) Tomra argues, as in the case of the agreement with [confidential: customer D in Germany], that the structure and organisation of [confidential: customer F in

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<sup>480</sup> Page 7877, page 9755, page 11913, Tomra’s response of 22 November 2004, par. 873. Pages 6817-6819, MS 95, page 11914, Tomra’s response of 22 November 2004, par. 879, page 11915, Tomra’s response of 22 November 2004, par. 883. (page 6259, AK 13), page 11915, Tomra’s response of 22 November 2004, par. 887.

<sup>481</sup> For 1999 this is illustrated by document MS 95, pages 6817-6819. In 2000, [confidential: customer F in Germany] only reached the volume entitling it to a 2.5% bonus, despite the fact that [confidential: customer B in Germany] had concluded an agreement relating to 25 machines. This is further illustrated by [confidential: customer G in Germany] purchasing volume between 1997 and 2002 (page 10051, Tomra’s reply of 25 June 2003, answer to question 36). The relevant figures show that [confidential: customer G in Germany] bought the highest number of machines in 1998, while the volumes necessary to reach the higher bonus levels were increased in subsequent years.

<sup>482</sup> Pages 6403-6404, AK 54, letter of 30 August 1999 ; page 6821, MS 96, p. 2. The letter contains the following sentence: [confidential]. [confidential: customer F in Germany] is a purchasing cooperation of several retail organisations, including [confidential: customer G in Germany] and [confidential: customer B in Germany].

<sup>483</sup> Page 6280, AK 20.

<sup>484</sup> Pages 6280-6281, AK 20, letter of 22 March 2000 and pages 8573-8574, Appendix 6, Binder 4, No 201.

<sup>485</sup> Pages 6276-6279, AK 19, letter of 11 April 2000; page 10051, Tomra’s reply of 25 June 2003, p. 20.

**Germany]** is such that information regarding the rebate scale, its thresholds and actual purchases made by other members of the **[confidential: customer F in Germany]** group is not transparent for the decision maker.<sup>486</sup> It adds that the agreements did not provide a significant incentive because the rebates would have to be distributed between the members.<sup>487</sup> These arguments are contradicted by the fact that Tomra itself admits that its rebates aimed at stimulating sales.<sup>488</sup> Tomra, furthermore, encouraged the **[confidential: customer F in Germany]** members to agree to a joint rebate structure, which makes it evident that all members would benefit from higher rebates.<sup>489</sup>

***[confidential: customer H in Germany]***

(215) For the period from 1 May 2000 until 31 March 2001, Tomra obtained a commitment from **[confidential: customer H in Germany]** to order **[confidential: 15-25]** machines, for which it was granted a bonus.<sup>490</sup> The quantity corresponded to the customer's expected demand in the contract period. The customer's total purchases in 2000 and 2001 were **[confidential: 20-30]** RVMs.<sup>491</sup>

*Proposed agreements*

(216) At the time when the inspections were carried out, Tomra was considering achieving exclusivity or preferred supplier agreements with most key customers before 2001<sup>492</sup> in Germany and obtaining volume commitments from the remaining major customers<sup>493</sup> in the run up to the expected introduction of a mandatory deposit system in 2003.

(217) In June 2000 Tomra tried to obtain a promise from **[confidential: customer K in Germany]** that it would exclusively buy Tomra RVMs.<sup>494</sup> As a result the customer bought 13 RVMs from Tomra in 2000.<sup>495</sup> In 2001 Tomra started negotiations with **[confidential: customer K in Germany]** on a Europe-wide

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<sup>486</sup> **Pages 11913, 11914, 11915**, Tomra's response of 22 November 2004, par. 874, 880, 884 and 888.

<sup>487</sup> **Pages 11914, 11915, 11916**, Tomra's response of 22 November 2004, par. 875, 881, 885 and 889.

<sup>488</sup> Tomra argues that its strategy was aimed at, among others, **[confidential]**, see **page 11777**, Tomra's response of 22 November 2004.

<sup>489</sup> In a letter of 22 October 1999 sent to one of the members of **[confidential: customer F in Germany]**, Tomra emphasised that if this customer bought a given number of RVMs the next bonus threshold would be reached and all **[confidential: customer F in Germany]** members, including itself, would be granted a higher bonus rate, which would lead, for the member in question, to a significant effective discount in relation to the additional machines ordered. See **pages 6817-6818**. According to the letter, Bunting would receive an effective discount of at least 5% on 10 additional machines ordered by the end of the year due to the fact that **[confidential: customer F in Germany]** would exceed the next bonus threshold.

<sup>490</sup> **Pages 7923-7924**, Appendix 6, No 49: the "bonus" was to be subtracted directly.

<sup>491</sup> **Page 11904**, Tomra's response of 22 November 2004, par. 808.

<sup>492</sup> **Pages 5062-5079**, HSch 6, in particular **page 5073**, p. 11, **pages 5080-5099**, HSch 7, in particular **page 5094**, p. 14, **pages 5100-5120**, HSch 8, in particular **page 5115**, p. 15, **pages 5184-5204**, HSch 12, in particular **page 5199**, p. 15.

<sup>493</sup> **Pages 5121-5140**, HSch 9, in particular **page 5135**, p. 14, **pages 5141-5162**, HSch 10, in particular **page 5157**, p. 16, **pages 5163-5183**, HSch 11, in particular **page 5178**, p. 15.

<sup>494</sup> **Pages 6351-6352**, AK 38, draft letter confirming the content of a meeting of 7 July 2000.

<sup>495</sup> **Page 12042**, Tomra's response of 22 November 2004, Attachment 6, p. 26.



agreement.<sup>496</sup> Tomra's objectives were exclusivity, a guaranteed volume and/or a progressive bonus system.<sup>497</sup> The agreement with **[confidential: parent of customer A in the Netherlands]** was seen as a model to be followed.<sup>498</sup> No agreement, however, was concluded in 2001<sup>499</sup>, probably because the expected law on the deposit system for cans was not adopted by then. Yearly bonuses relating to particular quantities were also applied to other smaller customers, including cases where the agreed target was similar for a number of years<sup>500</sup>.

### *Impact*

(218) In the period from 1997 to 2002 Tomra systematically pursued a policy of obtaining exclusionary agreements with the customers in the form of exclusivity agreements or arrangements, individualised quantity commitments and retroactive rebate schemes, construed to meet the total or almost total requirements of the customers. Although the impact of exclusivity agreements and arrangements discovered by the investigation was relatively limited, other types of exclusionary agreements, in addition, continuously affected a not insubstantial part of the demand in the German market. Based on the evidence available to the Commission, exclusionary agreements and arrangements could be estimated to have had an impact on roughly 30% of the demand in high-end RVMs throughout the five years from 1998 until 2002.

(219) The size of the tied market demand, however, was much higher when looked at each year individually. In 1998, the agreements covered roughly 22% of the total market demand that year, which increased significantly in 1999 – when the proportion of the non-contestable for Tomra's competitors market was above 30%. In 2000, when the demand for RVMs peaked due to the anticipation of the introduction of the deposit system on cans, the relevant agreements covered a bit below 30% of total demand. In 2001 the tied market share remained approximately 26%, most of which was covered by progressive rebate schemes.

(220) The size of the tied market demand fluctuated from year to year. With regard to the years when it was low, it is important to bear in mind the specificity of the RVM market, namely a long life-cycle of the RVMs and occasional peaks in demand. As the life-cycle of an RVM is on average 7-10 years, the number of machines sold in individual years does not realistically reflect the real impact on market demand. Once a company captures a significant part of a customer's demand, it is secure in fulfilling the customer's demand for a considerably long time frame, and the guaranteed upgrades and servicing of its products for the upcoming years. Moreover, the demand is significantly influenced by government regulation. In Germany the demand for RVMs peaked in 2001

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<sup>496</sup> Page 6222, AK 2, page 6230, AK 7 and page 6231, AK 8.

<sup>497</sup> Page 6222, AK 2, page 6230, AK 7 and page 6231, AK 8, page 7012, SH 11, pages 6543-6554, MS 27, of 18 September 2001, where reference is made to a guaranteed volume of at least **[confidential]**.

<sup>498</sup> Page 7012, SH 11.

<sup>499</sup> Page 10052, see Tomra's reply of 25 June 2003, answer to question 37.

<sup>500</sup> **[confidential: customer K in Germany]**, for instance, was granted the following yearly bonuses, at least in the period 1999-2001: purchase of **[confidential: 5-10]** machines – 2%, **[confidential: 10-15]** machines – 3%, pages 9846-9851, Appendix 7, Binder 1, No 231-235.

mainly due to the anticipated introduction of new state legislation introducing a new deposit system for one-way containers.

(221) Tomra's competitors on the German high-end market were relatively small companies – Prokent and Bevesys. From 1992 until 1997, Tomra was faced with a rather successful rival, Halton, that had managed to acquire a market share of 19%. In 1997, however, it was eliminated after acquisition by Tomra. From 1997 onwards Prokent continuously increased its market share, starting with [confidential] % in 1998, up to approximately [confidential] % in 2002. With Prokent's success, Tomra's market share on the high-end machines market began to fall in 2000 and continued to decline in 2001 and 2002. At the time when the inspections were carried out, in 2001 Tomra intended to intensify its exclusionary policy with regard to all major customers due to the expected introduction of a mandatory deposit on non-refillable containers. This was exactly when the effect of Tomra's strategy materialised, resulting in one third of the total market demand being covered by its exclusionary agreements. As a consequence, Prokent's market share ceased growing, and later on began to drop, finally leading to bankruptcy. Before this happened, however, Tomra endeavoured to eliminate the growing rival by trying to buy Prokent in 2001. Figure 19 demonstrates how the market shares of Tomra's competitors evolved following the changes in the size of the non-contestable volume throughout 1998-2002.

**Figure 19:** Evolution of Tomra's and its competitors' market shares in Germany as the size of the non-contestable share of the market changed 1998-2002, low-end and high-end machines included (estimated)

[confidential – figure]

(222) Since 1999 the progressive bonus steps found in the yearly agreements with, for example [confidential: customer D in Germany], were non-linear, that is to say, the increases in the bonus rates were not proportionate to the respective increase in the purchasing volume required, but were, in fact, higher. From 2000 the threshold for the top bonus rate was considerably higher than the actual requirements of the customer. The most advantageous bonus rate usually corresponded to the actual requirements of the customer or exceeded them. The fact that the bonus steps increased disproportionately compared to the respective volumes exacerbated this effect. Moreover, the rebate thresholds were set on an individual basis, allowing Tomra to capture the most elastic demand of the customers and to adapt to their foreseen demand. In view of these facts, it must be concluded that the bonus schemes referred to in this section were intended to have and actually had, the effect of discouraging customers from purchasing from Tomra's competitors.

(223) In fact, the two biggest Tomra customers, [confidential: customer A in Germany] and [confidential: customer E in Germany], continued to buy fewer machines from Tomra under the exclusionary agreements discussed in this decision throughout the period 1998-2002. For example, [confidential: customer A in Germany] purchased on average 200 RVMs each year in 1998 and 1999. This changed significantly in 2000 and 2001, when it purchased only 46 and 20 machines under the exclusionary agreements with Tomra. This might be explained by the fact that the agreements applicable then were not exclusive. In fact, the purchases the customer made from Prokent in the same period of time, increased gradually from [confidential] machines in 1999 to [confidential] in 2002. This indicates that the customer was able to purchase more equipment from Tomra's competitors when its choice was not restricted by exclusionary agreements. In addition, it also proves that Tomra's strategy of meeting the total or almost total customer demand was implemented and, to an extent, did have the desired effect on the market. This trend is illustrated in the graph below (see Figure 20).

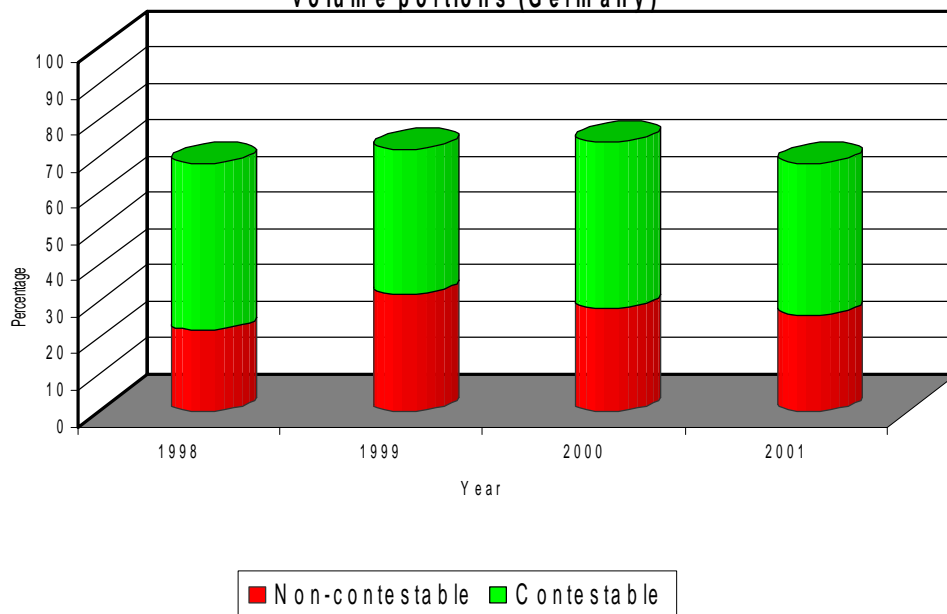
**Figure 20:** Tomra's market share in Germany split into non-contestable and contestable volume portions 1998-2002, high-end and low-end machines included (estimated)<sup>501</sup>

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<sup>501</sup>

Figures were submitted by Tomra in its response of 22 November 2004, Attachment 6, p. 23-27, pages 12039-12043. [confidential: column for 2002].

Tomra's market share split into contestable and non-contestable volume portions (Germany)

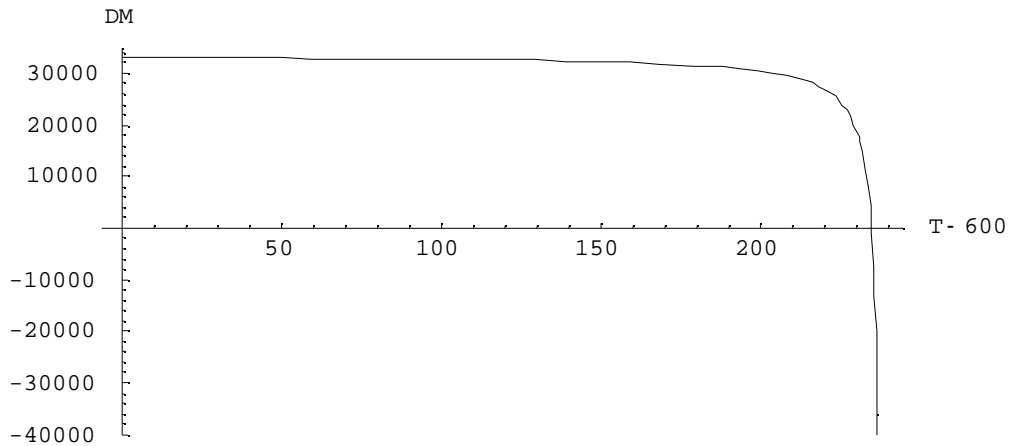


(224) The exclusionary intention and its likely effect are corroborated by the prices the rivals would have had to offer the customers on the German market in order to compete with Tomra. The following figure (Figure 21) depicts the unit price a competitor would at least need to offer on a per unit basis in order to match Tomra's price under the rebate scheme. The horizontal axis depicts the number of machines increasing from left to right and the vertical axis the corresponding price. Figure 21 demonstrates that competitors may need to offer very low, possibly even negative prices for the last units before the rebate threshold is reached in order to make Tomra's customers switch. Figure 21 is based on the rebate contained in the agreement with [confidential: customer D in Germany] for 2000.<sup>502</sup>

<sup>502</sup>

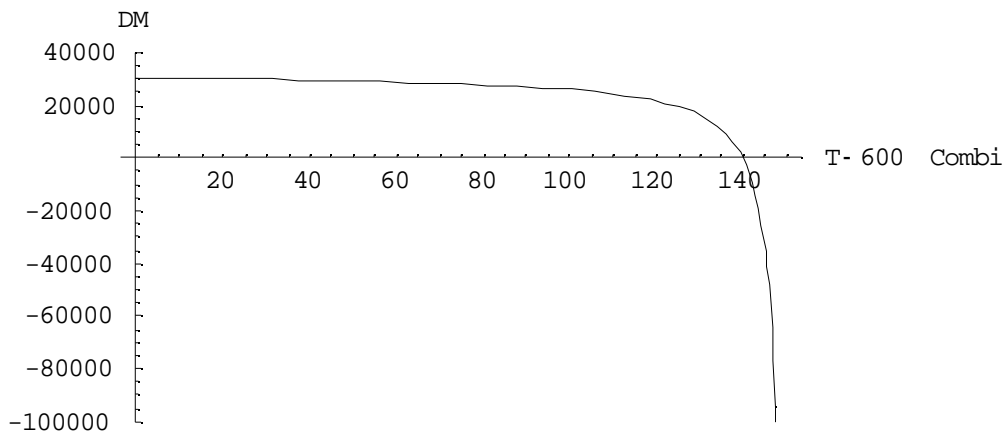
The figure is based on a price of DEM [confidential], an incremental bonus rate of 1.5%, a number of 238 machines and ignores that also a backroom equipment and service expenses were also taken into account.

**Figure 21:** The effect of Tomra's rebate scheme on the price a competitor would have to offer to make the customer switch from Tomra (Germany)



(225) The effect of the rebate scheme on the prices a competitor would have to offer to compete with Tomra for the last units before reaching the threshold of 150 machines, or on competing for a small number of machines in general, is depicted in Figure 22, based on the price and the rebate converted into a percentage as they are shown in the table. Exactly the same situation would arise in the case of [confidential: customer F in Germany].

**Figure 22:** The effect of Tomra's rebate scheme on the price a competitor would have to offer to make the customer switch from Tomra (Germany)



(226) Tomra implemented its strategy of maintaining its dominant position on the market in Germany in a similar way, as it has done so in the markets discussed previously (the Netherlands and Sweden). The main tools for the implementation were once again the exclusivity agreements, individualised quantity

commitments and retroactive rebate schemes targeted mainly at the major retailers on the German market, designed to meet the entire or almost entire demand of a customer.<sup>503</sup> With regard to customers that refused to accept Tomra's exclusivity, they accepted either the quantity targets or rebate schemes, which usually aimed at satisfying the total requirements of each customer. In this way, customers were not able to purchase any or only negligible amounts of machines from competitors. Facing this challenge in addition to the big discount that they had to offer the retailers in order to persuade them to switch from Tomra, competitors were foreclosed from the market.

**(D) AUSTRIA**

(227) The Austrian RVM market is the smallest of the markets covered by this Decision. The average market size was approximately 260 RVMs per year between 1998 and 2002.<sup>504</sup> The biggest retail companies in Austria in 2003-2004, and at the same time the biggest customers of Tomra, were REWE Austria and SPAR Österreichische Warenhandels-AG, which shared 65-70% of the Austrian grocery retail market. The discount retailers, such as Lidl and Hofer pose fierce competition as well.<sup>505</sup> One peculiarity of the Austrian retail market is that it has a higher supermarket density than in Germany.

***Exclusivity and quantity commitments, rebate schemes***

***[confidential: customer A in Austria]***

(228) **[confidential: customer E in Germany]**'s Austrian subsidiary, **[confidential: customer A in Austria]**, one of the biggest customers of Tomra on the market, concluded an exclusivity agreement in February 1999<sup>506</sup>, according to which Tomra was granted an exclusive supplier status for a period of two years. In addition to this, the parties agreed on a framework agreement setting out minimum numbers of machines to be purchased in 1999 from Tomra by the customer. In 1999 and 2000 this customer bought far more machines than in subsequent years: it purchased 197 RVMs from Tomra in 1999. It did not purchase any competing machines in 1999 and 2000. Only in 2002 did it buy **[confidential]** machines from Toperczer.<sup>507</sup> Tomra's submission that the two-year exclusivity agreement came about as a consequence of **[confidential: customer A in Austria]**'s, desire to reduce the price for a specific machine to the price

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<sup>503</sup> In 2003 Edeka was the leader on the German retail market, followed by Rewe which has 17.8 % market share, Tengelmann – 6.7%, Spar – 7.4% and Metro – 8.1%, and others. Source: <http://www.edeka.de>.

<sup>504</sup> **Page 12059**, Tomra's response of 22 November 2004, Attachment 6, p. 43.

<sup>505</sup> According to the "Annual Report on Competition Policy Developments in Austria – 2003-2004", available at <http://www.oecd.org/dataoecd/36/33/34720199/pdf>.

<sup>506</sup> **Pages 7595-7597**, Tomra reply of 14 March 2002, Appendix 6, Binder 1, framework agreement of 1999 valid from 25 January to 9 February 1999, was supplemented by a two-year exclusivity agreement on 23 February 1999. See hand-written addition to the framework agreement for 1999, initialled **[confidential: Managing Director of Tomra Austria]**, on 23 February 1999. The text reads: **[confidential]**. The existence of an exclusivity agreement is further confirmed by a fax, setting out prices for 2000 and signed by Tomra on 28 April 2000 and **[confidential: customer A in Austria]** on 22 May 2000. The relevant passage reads: **[confidential]**.

<sup>507</sup> **Page 10571 (confidential)**, **[confidential: customer A in Austria]** reply of 1 September 2003, answer to question 8.

level applied to **[confidential: customer E in Germany]**<sup>508</sup>, does not affect the interpretation of this agreement.

**[confidential: customer B in Austria]**

(229) In March 1998 and March 1999 (extended orally, and confirmed by a note<sup>509</sup>) Tomra concluded agreements with the Austrian retail chain **[confidential: customer B in Austria]**<sup>510</sup> by which a bonus of 4% for the purchase of 10 RVMs was granted subject to the customer's undertaking to grant Tomra exclusivity. The customer bought 8 machines in 1998 and 2 in 1999.<sup>511</sup> The following year the same kind of agreement was concluded for 2001<sup>512</sup>, according to which **[confidential: customer B in Austria]** was obliged to buy 10 machines once again. In 2001, the customer purchased **[confidential: 3-8]** RVMs from Tomra. The respective agreements applied for approximately one year. The document relating to the agreement for 2001 was supplied to the Commission as an example of a "less formally concluded agreement." The relevant document, a letter which Tomra sent to **[confidential: customer B in Austria]** on 23 October 2000, states clearly that in 2001 Tomra would grant the customer a bonus based *inter alia* on **[confidential: customer B in Austria]** promise to use Tomra as its sole supplier, constituting a written confirmation of what had been agreed orally. **[confidential: customer B in Austria]** purchased **[confidential]** in both 1998 and 2001.<sup>513</sup>

**[confidential: customer C in Austria]**

(230) For 1999 **[confidential: customer C in Austria]** accepted an offer from Tomra containing the following bonuses: 2 % rebate for the purchase of 2-5 RVMs, 3% for 5-10 machines, and 4 % for 11 machines or more.<sup>514</sup> If **[confidential: customer C in Austria]** had committed itself to ordering 20 machines before 30 June 2000, Tomra would have guaranteed the prices applicable at the end of 1998 and the beginning of 1999 for the whole reference period.<sup>515</sup> In an agreement covering the year 2001, Tomra granted **[confidential: customer C in Austria]** a bonus of 4% on the basis of the customer purchasing

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<sup>508</sup> **Pages 11878-11879**, Tomra's response of 22 November 2004, par. 646-650.

<sup>509</sup> A copy of the note was provided by Tomra on 14 March 2002 in response to a request for information, **page 7609**.

<sup>510</sup> For the agreements with **[confidential: customer B in Austria]**, see **pages 7606, 7607 and 7609**, Tomra's reply of 14 March 2002, Appendix 6, Binder 1. According to which, the "bonus agreement" of 30 March 1998, applying as of 10 March 1998, contains the following sentences: **[confidential]**. According to a written note, specifying the content of the agreement, the agreement was extended orally on 4 March 1999 with the same conditions and with reference to a letter of 30 March 1998. The same wording was used in the bonus agreement which was to be applied from 2 January 2001.

<sup>511</sup> **Page 12060**, Tomra's response of 22 November 2004, Attachment 6, p. 44.

<sup>512</sup> **Page 7661**, letter of 23 October 2000, submitted by Tomra's reply of 14 March 2002, Appendix 6, Binder 1. Apart from the year referred to, the wording is the same as the one quoted in the previous footnote 505

<sup>513</sup> **Page 10584 (confidential)**, **[confidential: customer B in Austria]** reply of 23 May 2003, answer to question 8.

<sup>514</sup> **Pages 7614-7618**, Tomra's reply of 14 March 2002, Appendix 6, Binder 1.

<sup>515</sup> **Page 7618**.

[confidential: 8-13] RVMs, in addition to promising exclusivity to Tomra.<sup>516</sup> Tomra claims that this agreement was a quantity commitment and not an exclusive agreement, as the term “exclusivity” was added at the request of [confidential: customer C in Austria].<sup>517</sup> Tomra’s argument that the agreement did not have any effect because the customer bought one competing machine and requested the exclusivity itself cannot, however, call the exclusionary nature of this agreement into question.

(231) [confidential: customer C in Austria] indicated a purchasing volume of approximately 10 RVMs as being realistic. On average this customer bought 11 RVMs per year between 1999 and 2001.<sup>518</sup> In fact, [confidential: customer C in Austria] bought 10 Tomra RVMs in 1999<sup>519</sup>, which corresponded to the second rebate threshold. By the end of 2002 only one franchisee, belonging to the organization of [confidential: customer C in Austria], [confidential] from another supplier.<sup>520</sup> Tomra’s submission that the bonus agreement was the result of [confidential: customer C in Austria]’s request for price reductions<sup>521</sup> does not affect the character of the agreement.

*[confidential: customer D in Austria]*

(232) In October 1999 Tomra and [confidential: customer D in Austria] concluded a framework agreement<sup>522</sup> for 15 months. Under the contract, [confidential: customer D in Austria] committed to purchase Tomra machines for at least ATS 5 million (EUR 363 372)<sup>523</sup>, in return for which it would receive 3% bonus. By the time that [confidential: customer D in Austria] had sold its supermarkets, and the contract was formally terminated by the letter of 5 September 2000, at most 52% of this purchasing target had been reached<sup>524</sup>, corresponding to approximately 11 RVMs.<sup>525</sup>

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<sup>516</sup> **Page 7613.** For the agreements with [confidential: customer C in Austria] see Tomra’s reply of 14 March 2002, Appendix 6, Binder 1.

<sup>517</sup> **Page 11877,** Tomra’s response of 22 November 2004, par. 641-645. Tomra moreover argues that the agreement did not have a legally binding effect as the one franchisee purchased one competing machine. In addition, [confidential: customer C in Austria] itself stated that it did not have any exclusivity or rebate schemes.

<sup>518</sup> **Page 7272,** Tomra’s reply of 14 February 2002, p. 38.

<sup>519</sup> For purchase figures (12 RVMs) see Tomra’s reply of 14 February 2002, p. 38, **page 7272.** According to more recent reply of Tomra, i.e. of 22 November 2004, Attachment 6 (**page 12060**), it bought 10 RVMs.

<sup>520</sup> **Page 10600,** Tomra’s reply of 26 May 2003, answer to question 7.

<sup>521</sup> **Page 11880,** Tomra’s response of 22 November 2004, par. 657.

<sup>522</sup> **Pages 7620-7625,** Tomra’s reply of 14 March 2002, Appendix 6, Binder 1. The relevant passages, **pages 7621 and 7622,** read: [confidential].

<sup>523</sup> The currency conversion is made on the basis of ECB currency exchange rate on 6 January 2006 (1 EUR=13.76 ATS), available at <http://www.euro.ecb.int/de/section/conversion.html>.

<sup>524</sup> **Page 12060,** Tomra’s response of 22 November 2004, Attachment 6, p. 44. **Page 7659,** letter from Tomra to [confidential] of 5 September 2000, Appendix 6, Binder 1.

<sup>525</sup> Based on the price offered by Tomra to [confidential: customer E in Austria] in 1999 for T-600, **page 10550.**



*[confidential: customer E in Austria]*

(233) Under the framework agreement<sup>526</sup> covering 2000 and 2001, **[confidential: customer E in Austria]** committed itself to ordering **[confidential: 28-33]** RVMs before the end of 2001. In 2000 **[confidential: customer E in Austria]** bought 28 machines from Tomra<sup>527</sup> and none from competitors. In 2001 **[confidential: customer E in Austria]** bought **[confidential: 8-13]** machines from Tomra, but also ordered **[confidential]** machines from a competitor.<sup>528</sup> While on average, this customer bought roughly **[confidential: 18-23]** machines per year<sup>529</sup>, it bought **[confidential: 53-58]** machines in 2000 and 2001, of which 30 machines or **[confidential]** % of its requirement in two years and more than its total requirements in one year were tied by the agreement with Tomra.

### *Impact*

(234) In Austria, at least between 1998 and 2002, Tomra pursued and implemented a policy of concluding exclusivity agreements and imposing quantity targets corresponding to the annual requirements with several of its customers, including the second largest customer on the Austrian market. It concluded exclusivity agreements with **[confidential: customer A in Austria]** and **[confidential: customer B in Austria]**, with the validity of the agreements varying between 14 months and 2 years. In addition, it imposed quantity commitments on the customers that clearly targeted the entire demand of each retailer. This is corroborated by the actual purchases of each customer in addition to the fact that none of them made significant purchases from competing suppliers during the contract term. Tomra implemented its strategy of keeping its competitors from the market by capturing completely or almost completely the demand of its customers. Once again, while the objective of maintaining dominance on the market cannot be seen in any way as anticompetitive, the means of achieving it, in particular the ones employed by Tomra on the Austrian RVMs market, could be and were exclusionary in that the competitors were foreclosed from the market.

(235) In addition to this, the impact of foreclosure was intensified by the fact that the competitors had to offer significant price discounts in order to compete with Tomra's offer. The following figure (Figure 23) depicts the unit price a competitor would at least need to offer on a per unit basis in order to match Tomra's price under the rebate scheme. The horizontal axis depicts the number of machines increasing from left to right and the vertical axis the corresponding price. Figure 23 demonstrates that competitors may need to offer very low, possibly even negative prices for the last units before the rebate threshold is

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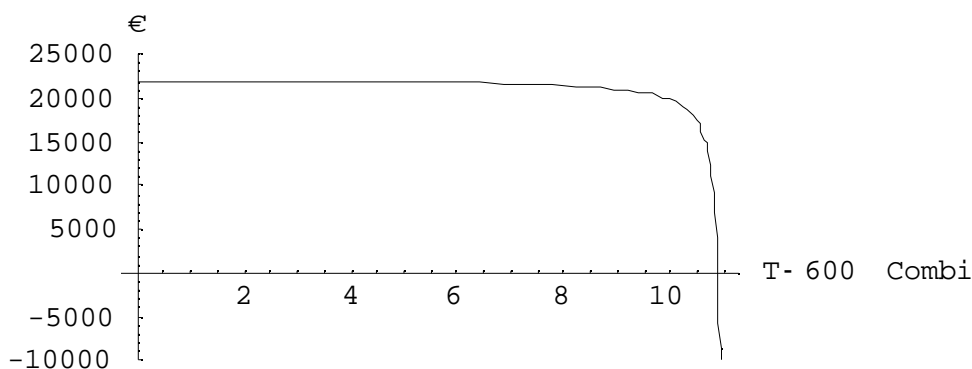
<sup>526</sup> **Page 7601**, Tomra's reply of 14 March 2002, Appendix 6, Binder 1. The relevant passages read: **[confidential]**.

<sup>527</sup> **Page 11880**, Tomra's response of 22 November 2004, par. 655.  
<sup>528</sup> **[confidential]**.

<sup>529</sup> This is based on sales figures provided by Tomra, **pages 7272** (1998-2001) and **10072** (2002), taking into account a certain number of machines bought from competitors. **[confidential]**, **page 10550 (confidential)**, and with a statement made in an internal communication within the Tomra group, **page 2124**, where it stated that **[confidential: customer E in Austria]** buys less than **[confidential: 18-23]** machines a year.

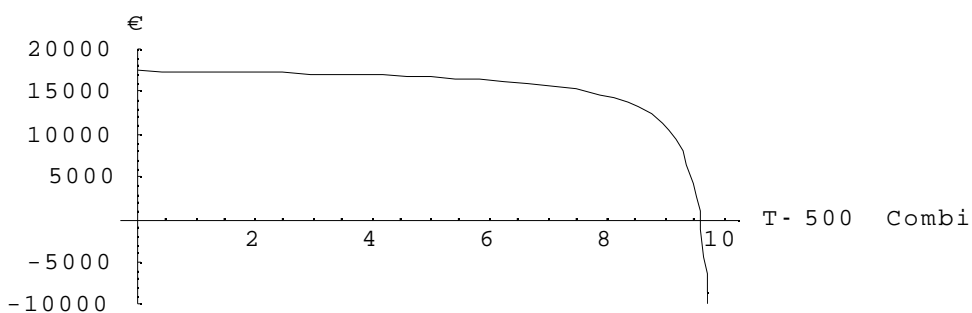
reached in order to make Tomra's customers switch. Figure 23 is based on the rebate applying to [confidential: customer C in Austria] in 1999.

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



(236) Furthermore, the price effects of the agreement applying in 2001 are visualised in Figure 24, regardless of the fact that the rebate was in addition dependent on exclusivity.<sup>530</sup>

**Figure 24:** The effect of Tomra's rebate scheme on the price a competitor would have to offer to make the customer switch from Tomra (Austria)



(237) The exclusivity agreement with [confidential: customer A in Austria] alone affected approximately 35% of the demand in 1999 and 2000. In conjunction

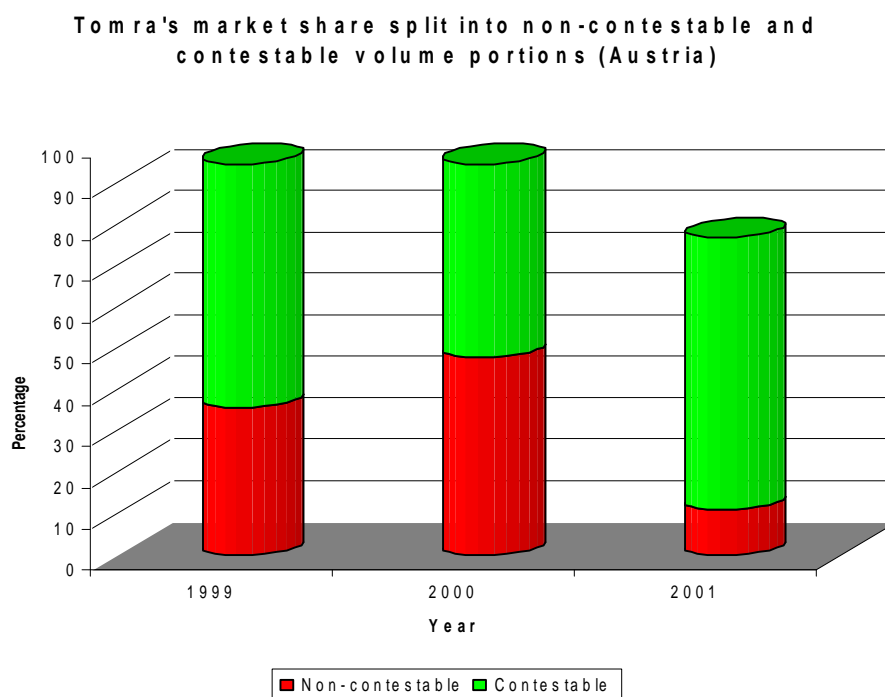
<sup>530</sup>

The figure for 1999 is based on a fact that by buying at least 11 units rather than 5-10, the customer could increase the rebate by 1% and that the price for a T-600 Combi was EUR [confidential: 20 000 – 20 500] for up to 10 units. The second figure is based on a fact that the price for a T-500 Combi was EUR [confidential: 18 000 – 18 500] before reaching the threshold of 10 machines, which entitled to a 4% rebate.

with the other agreements referred to, including further exclusivity agreements, the relevant percentage was at least 45%<sup>531</sup> in those two years. In 2001, agreements described in this section affected slightly more than 10% of the total demand of the market. In 2001 and 2002, demand for RVM solutions was considerably lower than in the previous years.

(238) In 1999 and 2000 the size of the non-contestable market was the highest. In 1999 the volume procured under the contracts discussed in this section comprised approximately 36%. In 2000 it was even higher – approximately 50%.<sup>532</sup> Here again, as in the markets discussed in sections III (A)-(C), the relation between the increase in the size of the foreclosed market and the change in the market share of Tomra shows that Tomra’s strategy, implemented through the identified agreements, had an exclusionary effect on the market. The market share of Tomra increased from 94% in 1998 to 95% in 2000. When the proportion of the non-contestable market decreased in the following year to 11%, the market share of Tomra went down as well – from 95% in 2000 to **[confidential: 73-83%]** in 2001. This trend is illustrated in the Figure 25, which shows the non-contestable proportion of Tomra’s total unit sales for each year.

**Figure 25:** Tomra’s market share (units sold/year) split into non-contestable and contestable volume portions in Austria 1999-2001, high-end and low-end machines included (estimated)<sup>533</sup>



<sup>531</sup> These percentages are based on figures provided by Tomra, taking into account the corrections and additional information provided by it in its response of 22 November 2004, Attachment 6, and its competitors.

<sup>532</sup> Based on the information submitted by Tomra on pages 12059-12062.

<sup>533</sup> Pages 12059-12062, Tomra’s response of 22 November 2004, Attachment 6, p. 43-46. **[confidential: column for 2002].**

(239) When the proportion of the total demand on the Austrian market covered by Tomra's exclusionary agreements decreased, the competitors also managed to acquire higher market share. In 2000 Bevesys [confidential], whereas in 2001 (when the tied market share went down to 11%), Bevesys captured [confidential] % of the market demand, increasing it to [confidential] % the following year (when the tied market share fell to 0%). The same development was experienced by Prokent: from selling [confidential] RVM in 2000, it managed to sell [confidential] each year in 2001 and 2002.<sup>534</sup> Figure 26 demonstrates how the market share of Tomra's competitors developed following the change in the size of the non-contestable share of the total unit sales each year.

**Figure 26:** Evolution of Tomra's and its competitors' market shares as the size of the non-contestable share of the market changed in Austria 2000-2002, low-end and high-end machines included (estimated)<sup>535</sup>

[confidential -- figure]

(240) All this indicates that Tomra pursued its exclusionary strategy on the Austrian market as well, by tying major retailers on the market with exclusivity agreements and quantity commitments or retroactive rebate systems that targeted the entire customer requirements. Such agreements had an exclusionary effect that is demonstrated by the correlation between the changes in Tomra's market shares and the size of the foreclosed market. The less the demand was captured by the identified Tomra agreements, the more its rivals were able to sell their products to customers. For example, [confidential: customer A in Austria], one of the biggest Tomra customers, was purchasing all its machines from Tomra under the exclusionary agreements in 1999 and 2000. After the expiry of those arrangements, however, it purchased almost [confidential: few] times fewer RVMs from Tomra, and instead began buying more competing machines from Bevesys in 2001 and 2002.

#### **(E) Norway**

(241) Norway is the "home market" for Tomra, where its presence is the strongest. The Norwegian retail market, just as most of the European markets in this sector, is highly concentrated, and is mainly dominated by four big players: COOP (a cooperative of consumers), NorgesGruppen (with subsidiaries like Spar and Kiwi), Hakon Gruppen (which has merged with ICA AB, and changed its name to ICA Norge in 2003; its biggest chains are ICA and Rimi), and Rema 1000. These four retailers share 97% of the Norwegian market.

(242) The key year in terms of the increase in the demand for RVM solutions was 1999, when the new deposit system for non-refillable containers was introduced in Norway. The demand for RVMs has multiplied almost 8 times reaching 1610 machines in 1999, compared to 230 RVMs sold on the market the year before.

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<sup>534</sup>

Page 11013 (confidential), Prokent's reply of 26 September 2003, answer to question 6.

<sup>535</sup>

Page 12059, 12468, 10845-10847 (confidential), 10919 (confidential) and 11089 (confidential).

### *Exclusivity, quantity commitments and rebate schemes*

(243) Tomra carries out its operations in Norway through its local subsidiary – Tomra Butikkssystemer. Just as in other European markets, Tomra implemented its strategy through capturing the biggest retailers by exclusivity agreements, quantity commitments or rebate schemes.

#### *[confidential: customer A in Norway]*

(244) **[confidential: customer A in Norway]** is the largest retailer on the Norwegian market. **[confidential: chain No. 1 and chain No. 2]** are two of the biggest chains belonging to this group. In October 1996 Tomra concluded a cooperation agreement with **[confidential: chain No. 1 of customer A in Norway]**<sup>536</sup> according to which it established its status of a “main supplier” which was valid for 36 months as long as **[confidential: chain No. 1 of customer A in Norway]** did not request the termination of the agreement. In an internal letter<sup>537</sup> it has explained that the agreement with **[confidential: chain No. 1 of customer A in Norway]** meant that Tomra was “the sole supplier of RVMs to all **[confidential: chain No. 1 of customer A in Norway]** shops”. According to a cooperation agreement with **[confidential: chain No. 1 of customer A in Norway]** reached in August 1997, Tomra again had the status of the sole supplier of RVMs.<sup>538</sup> Tomra was the “main supplier” to **[confidential: chain No. 2 of customer A in Norway]** as well<sup>539</sup> for 1996, according to the cooperation agreement concluded with the customer.

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<sup>536</sup> Pages 3225-3229, GOR/LEP/2.

<sup>537</sup> Letter of 30 September 1996, signed by **[confidential: Managing Director of Tomra Butikkssystemer AS]**, and sent to Tomra’s sales representatives, page 3585, PHA/PAB/31, referring to the agreement with **[confidential: chain No. 1 of customer A in Norway]**. The original wording is: **[confidential]**. Tomra emphasises that the letter was issued before the signature of the agreement, page 11843, Tomra’s response of 22 November 2004, par. 479. Since Tomra did not argue that the text of the agreement was amended subsequent the issuing of the letter or that the circular letter was corrected after the signature of the agreement, there are no reasons to believe that the circular letter did not represent an accurate description of the content of the agreement.

<sup>538</sup> Pages 3548-3549, PAB/PHA/19, letter from **[confidential: Managing Director of Tomra Butikkssystemer AS]**, of 1 August 1997. Tomra has confirmed that the document represents an agreement Tomra entered into, page 9346. In its response of 22 November 2004, par. 485 (page 11844), Tomra emphasises the fact that the document in the file does not contain the signature of the customer. Tomra did not, however, give a satisfactory explanation as to why its initial reference to the document as an agreement would have been erroneous or as to which other terms would have applied between the parties at the time. As a consequence, there is no reason to conclude that the document referred to might not represent the terms of an agreement which applied at the time.

<sup>539</sup> Pages 3240-3242, GOR/LEP/3, letter of 15 January 1996 signed by **[confidential: Managing Director of Tomra Butikkssystemer AS]**. This document does not contain the signature of the customer. In its reply of 14 March 2002, Tomra, however, confirmed that the document represented an agreement Tomra entered into, page 9346. In its later response to the Commission’s Statement of objections (response of 22 November 2004, page 11843), Tomra emphasises the fact that the document in the file does not contain the signature of the customer. Tomra did not, however, give a satisfactory explanation of why its initial reference to the document as an agreement would have been erroneous and did not explain at all which other terms would have applied between the parties at the time.

(245) In December 1998 **[confidential: customer A in Norway]** concluded an agreement<sup>540</sup> with Tomra based on a minimum quantity of 500 machines: 450 new RVMs and 50 upgrades. The prices invoiced to **[confidential: customer A in Norway]** were based on the expected quantity of 500 installations. **[confidential: customer A in Norway]** committed to purchasing this number by the end of 1999. While the agreement stated that **[confidential: customer A in Norway]** was not legally bound to actually achieve the threshold of 500 installations within the deadline, **[confidential: customer A in Norway]** would have had to reimburse the discount for each machine ordered at the end of the year if it did not. Had it bought more than 750 machines, **[confidential: customer A in Norway]** would have received a higher discount.<sup>541</sup> Therefore, the central target for **[confidential: customer A in Norway]** was 500 installations, whereas 750 installations was an additional opportunity. In fact, **[confidential: customer A in Norway]** bought 537 new Tomra machines plus 8 upgrades in 1999.<sup>542</sup> The agreement was actually extended to the first half of 2000 as a consequence of delays in the installations.<sup>543</sup> **[confidential: customer A in Norway]** ordered a further quantity of 90 machines and no upgrades in the first half of 2000. The target quantity stipulated in the agreement therefore corresponded to more than 90 % of the machines and upgrades actually purchased in 1999. When purchases in the first half of 2000 are included the respective percentage would still be almost 80 %.

(246) Tomra contends that **[confidential: customer A in Norway]** had indicated at the beginning of the negotiations that its demand for new installations could be between 1 and 1300.<sup>544</sup> This indication was relatively vague, with the probability margin being very big. In addition, **[confidential: customer A in Norway]** mentioned the demand volume that would include all the purchases made by many smaller outlets, without even referring to the year 1999. This does not indicate that the target of 1300 was ever considered as a realistic target for 1999. As the negotiations progressed, the number of **[confidential: 400-550]** evidently emerged as a realistic volume, which is also confirmed by the drafting of the agreement and the number of machines eventually installed.

(247) In an offer<sup>545</sup> concerning the second half of 2000 and the first half of 2001 **[confidential: customer A in Norway]** was offered a 10% discount if it ordered approximately **[confidential: 145-155]** RVMs. An additional rebate of 3%,

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<sup>540</sup> See **pages 3546-3547**, PAB/PHA/18 and **pages 3544-3545**, PAB/PHA/17, faxes of 18 December 1999, the former one referring to an offer made on 7 December 1998 and **page 3543**, PAB/PHA/Doc 16, fax of 21 December 1999.

<sup>541</sup> **Pages 3544-3545**, PAB/PHA/17. The sentence applying to both situations reads: **[confidential]**. The prices for at least 750 machines would have been **[confidential]** for T-600 and **[confidential]** for T-62 instead of **[confidential]** and **[confidential]** for T-62.

<sup>542</sup> **Page 12047**, Tomra's response of 22 November 2004, Attachment 6, p. 31, supplemented by Tomra's reply of 2 March 2005, answer to question 8 (**page 12313**), these figures constituting a correction of figures given on page **7273**, by Tomra's reply of 14 February 2002, p. 39.

<sup>543</sup> **Page 10348**, **[confidential: customer A in Norway]** reply of 20 June 2003.

<sup>544</sup> **Page 12104**, Tomra's response of 22 November 2004, Attachment 23, and par. 519 (**page 11852**).

<sup>545</sup> **Pages 9366-9367**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6. This document does not bear customer's signature and is drafted as an offer. It was, however, provided by Tomra in its response of 14 March 2002, in answer to question 26, which requested copies of agreements including "*copies of documents relating to agreements which were concluded in a less formal manner ...*".

applicable to all purchases and to be paid at the end of the year, was granted conditional on the customer buying at least **[confidential: 155-165]** machines.<sup>546</sup> During one year when the contract was applicable, however, the customer purchased **[confidential: 50-55]** RVMs.<sup>547</sup> **[confidential: customer A in Norway]** **[confidential]**.<sup>548</sup> The customer had not reached the target by mid-2001 either.

***[confidential: customer B in Norway]***

(248) In August 1998, anticipating the fact that Norway would be introducing a deposit on cans with effect from 1999, as a result of which the demand for RVMs would multiply, Tomra had offered volume rebates to **[confidential: customer B in Norway]**, as well as **[confidential: customer A in Norway]** and **[confidential: customer C in Norway]**. Tomra's offers were dependent on the quantities that the customers were expected to require as a consequence of the new deposit system. The following quantity related progressive discounts were offered<sup>549</sup>: 0-99 RVMs purchased – 0% rebate, 100-250 RVMs – 5%, 250-500 RVMs – 8%, and 500-750 RVMs – 14%. The respective numbers would have had to be ordered by the end of 1999. Eventually, **[confidential: customer B in Norway]** accepted an agreement<sup>550</sup> based on a minimum of 500 machines to be purchased<sup>551</sup>, encompassing 400 new machines and 100 upgrades.<sup>552</sup> It was also stated in the agreement that in the unlikely event that there were fewer installations in 1999, **[confidential: customer B in Norway]** would be invoiced the difference between the price applicable for at least 500 machines and the price applicable to the effective quantity.<sup>553</sup> Given its wording and the reimbursement mechanism, the agreement was, contrary to what is argued by Tomra, more than a pure discount scheme.<sup>554</sup>

(249) Even without an exclusivity clause, the contractual arrangements created pressure for both **[confidential: customer B in Norway]** and **[confidential:**

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<sup>546</sup> **[confidential]**. See Tomra's response of 22 November 2004, Attachment 6, p. 31-34 (**pages 12048-12050**): **[confidential: 215-225]** machines in 2000 and 2001, minus approximately **[confidential: 85-95]** machines bought in the first half of 2000. **Pages 7273**, Tomra's reply of 14 February 2002.

<sup>547</sup> 52 RVMs according to **page 12049**, Tomra's response of 22 November 2004, Attachment 6, p. 33.

<sup>548</sup> **Page 10321 (confidential)**, reply from **[confidential: customer A in Norway]** of 18 February 2003.

<sup>549</sup> **Pages 3577-3581**, PHA/PAB/29, **[confidential]**. **Pages 3558-3562**, PHA/PAB/25, **[confidential]**, e.g. **pages 35544-3547**, PAB/PHA/18 and PAB/PHA/17, **[confidential]**.

<sup>550</sup> Agreement of 26 November 1998. See **pages 9349-9352**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.

<sup>551</sup> The agreement contains the words: **[confidential]**.

<sup>552</sup> **[confidential]**.

<sup>553</sup> Norwegian wording: **[confidential]**.

<sup>554</sup> Tomra's statement (**pages 11846-11847**, Tomra's response of 22 November 2004, par. 492-495) that the agreement simply indicated the price which was based on an indicated quantity which had been fixed by the customer, does not take account of the fact that the wording of the agreement clearly formulates an obligation for the customer to purchase the specified quantity and that the customer responded to Tomra's offer which contained a specified rebate structure, clearly geared at making the customer's to order 500 units. The reimbursement of a considerable discount, which apart from the amount to be reimbursed may raise serious question within an organisation composed of many outlets and depending on everybody making their contribution, constitutes more than a simple loss of opportunity as this is argued by Tomra (**page 11847**, Tomra's response of 22 November 2004, par. 498).

**customer A in Norway]** to make their respective groups, including all chains and retailers, buy exclusively or almost exclusively from Tomra in order to be sure of reaching the threshold of 500 machines. In addition to the numbers, which speak for themselves, it results from a statement made by **[confidential: customer A in Norway]**<sup>555</sup> that the conclusion of the agreement with Tomra did not leave any space for significant purchases from other suppliers in 1999 and implied that chains and retailers within **[confidential: customer A in Norway]** had to buy exclusively or almost exclusively Tomra machines to be certain to meet the target. In fact, **[confidential: customer B in Norway]** bought 650 machines in 1999<sup>556</sup>, including 520 new machines and 130 upgrades.<sup>557</sup> In 1999 the target quantity set out in the agreement corresponded to 77% of **[confidential: customer B in Norway]**'s actual purchases in new machines and upgrades. The agreement for 1999 was extended until June 2000.<sup>558</sup> In the first half of 2000, 35 new machines and two upgrades were bought.

(250) Since both customers had exceeded the target of 500 machines at the end of 1999, the direct pressure generated by the risk of missing the threshold of 500 machines had disappeared at the beginning of 2000 for these customers. The extension of the agreements and the discounts related to it, however, was able to discourage purchases from competitors in the first half of 2000, at least in so far as competitors would have had to offer very substantial discounts for relatively small quantities in order to be able to compete for the remaining quantities, while Tomra's discount was based on the target of 500 machines in 1999 and was considerably higher than the discounts granted by it normally. In the light of this context this situation can not, therefore, be qualified as "normal price competition".<sup>559</sup>

(251) The fact that **[confidential: customer B in Norway]** and **[confidential: customer A in Norway]** declared in February 1999 that they were interested in using an alternative supplier "in the next round" does not shed a different light on the effect of the agreements<sup>560</sup>, but rather confirms that during the duration of the agreements with Tomra, both customers felt bound to purchase from Tomra only and did not see any scope for purchasing competing products, although they were manifestly interested in having more than one supplier.

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<sup>555</sup> **Page 10321**, Tomra's reply of 17 February 2003, p. 2: "As **[confidential: customer A in Norway]** entered into agreement with Tomra (underlined by the Commission), only 4-5 machines were purchased from a competitor ...".

<sup>556</sup> **Page 7273**, Tomra's reply of 14 February 2002, p. 39.

<sup>557</sup> This results from figures submitted by Tomra in its response of 22 November 2004, Attachment 6, p. 31 and 33 (**page 12047** and **12049**).

<sup>558</sup> **Page 11846**, Tomra's response of 22 November 2004, par. 492. **Page 10528 (confidential)**, **[confidential: parent of customer A in Sweden]** reply of 1 July 2003, p. 3, and **page 10307 (non-confidential)**.

<sup>559</sup> With regard to agreement with **[confidential: customer A in Norway]**, see **pages 11852-11853**, and with regard to agreement with **[confidential: customer B in Norway]**, see **page 11847** of Tomra's response of 22 November 2004.

<sup>560</sup> **Pages 12099-12103**. Tomra's response of 22 November 2004, Attachment 22. The relevant formulation in Norwegian reads as follows: **[confidential]**. Tomra submitted this document to support its claim that the quantities were not intended to represent the customers' total requirements, **pages 11847** and **11850**, Tomra's response of 22 November 2004, par. 495 and 513.



(252) For the period starting from the second half of 2000 until the first half of 2001, Tomra offered a similar agreement to **[confidential: customer B in Norway]** with a 10% discount for at least **[confidential: 125-175]** machines and a 13% discount for at least **[confidential: 140-190]** machines.<sup>561</sup> As the Attachment to the Global Master Agreement between Tomra and **[confidential: parent of customer A in Sweden]** was concluded in October 2000, Tomra became the sole supplier to **[confidential: customer B in Norway]** until December 2002.<sup>562</sup> In conjunction with **[confidential: customer A in Sweden]**, **[confidential: customer B in Norway]**, in addition, committed itself to purchasing a guaranteed volume.<sup>563</sup> This agreement was extended until July 2003.

(253) Tomra submits that the Attachment to the Global Master Agreement did not constitute an exclusivity agreement and that it did not affect the outlets run by independent retailers within **[confidential: customer B in Norway]**<sup>564</sup>, the second largest retailer in Norway. As has been established in the section concerning Sweden, the agreement constituted an exclusivity agreement and affected **[confidential: customer A in Sweden]** and thereby **[confidential: customer B in Norway]** as a whole.<sup>565</sup>

***[confidential: customer C in Norway]***

(254) **[confidential: customer C in Norway]** accepted a "framework agreement"<sup>566</sup> that was based on an estimated minimum of 400 machines plus 100 upgrades and which obliged the customer "to do everything possible and necessary" at central level for this number of machines to be installed by the end of the first quarter of 2000. If there was a significant deviation from this purchasing volume there was an obligation for the parties to meet to discuss extraordinary measures to increase the volume to the level indicated in the framework agreement. If this happened, Tomra also had the possibility to increase prices for future deliveries/supplies. In this case the formulation of the customer's commitment and of the sanctions faced by it in the event of not reaching the target was more flexible compared to that of **[confidential: customer B in Norway]** and **[confidential: customer A in Norway]**<sup>567</sup> and with the offers Tomra had made to **[confidential: customer C in Norway]** originally.<sup>568</sup>

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<sup>561</sup> **Pages 3553-3554**, PHA/PAB 22, letter of 21 June 2000.

<sup>562</sup> **Page 3586**. Tomra's submissions with regard to this agreement have been analysed above in the section concerning Sweden. As has been stated there (par. 174-178), the Attachment to the Global Master Agreement meant that Tomra was granted the status of an exclusive supplier. The fact that **[confidential: customer B in Norway]** is composed both of stores that are directly managed by the group and stores that are owned and run by independent retailers, cannot affect this conclusion since the wording of the agreement and the volumes referred to clearly included the independent retailers.

<sup>563</sup> More details can be found in the section relating to Sweden (Section III (B))

<sup>564</sup> **Pages 11828-11831**, Tomra's response of 22 November 2004, par. 419-428.

<sup>565</sup> See par. 174 above.

<sup>566</sup> **Pages 3563-3566**, PHA/PAD/26. The relevant passage reads: **[confidential]**.

<sup>567</sup> Tomra had tried to introduce the same mechanism as in the other cases. See proposal of 25 January 1999, **pages 3572-3576**, in particular, **page 3574**.

<sup>568</sup> See offer of 7 October 1998, **pages 3577-3581**, according to which the rebate for less than 500 machines was 8% rather than 14%, and offer of 25 January 1999, **pages 3572-3576**, which refers to a minimum of 500 machines without the more flexible arrangements in the final agreement.

(255) While the mechanisms provided for in the final agreement did not constitute a strict commitment by **[confidential: customer C in Norway]**<sup>569</sup> to actually reach the target of 400 machines plus 100 up-grades within the contract period and provided no possibility for Tomra to enforce this precise result<sup>570</sup>, the contractual arrangements still obliged the customer at least implicitly to try and reach this target, which corresponded to almost the entire requirements of the customer, and to justify any significant deviation from it. This way the agreement still allowed Tomra to put pressure on this customer to come close to the indicated quantity. During the contract period **[confidential: customer C in Norway]** bought 407 new machines and 32 upgrades in 1999 and the first half of 2000<sup>571</sup>, which means that the target was reached at least with regard to new machines. **[confidential: customer C in Norway]** bought approximately **[confidential]** RVMs from competitors.<sup>572</sup> The number of machines and upgrades referred to in the framework agreement, therefore corresponded more or less to the actual total requirements of the customer, while the more flexible formulation of the commitment that the customer managed to obtain in the negotiations left a limited scope for purchases from competitors.

(256) For the period from the second half of 2000 until the first half of 2001, Tomra offered a 10% discount to **[confidential: customer C in Norway]**<sup>573</sup> on the basis of the customer's stated intention to order approximately **[confidential: 145-175]** Tomra machines. This was a rather flexible formulation compared with the one used in relation to the other Norwegian customers, but in line with the wording **[confidential: customer C in Norway]** was able to negotiate for the previous period. While the purchasing targets were comparable to those of **[confidential: customer A in Norway]** and **[confidential: customer B in Norway]** and higher than those of **[confidential: customer D in Norway]**, **[confidential: customer C in Norway]** was offered a price that was considerably higher than the prices offered to the other customers, which basically meant that this customer was penalised for its unwillingness to accept more exclusionary contract terms. The customer was offered a further 3% rebate if it bought at least **[confidential: 150-200]** RVMs within that period.<sup>574</sup> Therefore in order to gain this additional rebate it had to buy far more machines than other customers. In actual fact, **[confidential: customer C in Norway]** bought **[confidential: 50-60]** Tomra machines and **[confidential]** from competitors in the second half of 2000 and the first half of 2001<sup>575</sup>, and **[confidential: 100-110]** Tomra machines and

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<sup>569</sup> This is stressed by Tomra in its response of 22 November, par. 536-547, **pages 11855-11857**.

<sup>570</sup> Tomra argues that the possibilities for Tomra to put pressure on the customer were limited, Tomra's response of 22 November 2004, par. 536-547, **pages 11855-11857**.

<sup>571</sup> **Pages 12047 and 12050**, Tomra's response of 22 November 2004, Attachment 6, p. 31 and 34, and **pages 12313-12314**, Tomra's reply of 2 March 2005, answer to question 10.

<sup>572</sup> **Page 10282 (confidential)**, **[confidential: customer C in Norway]** reply of 26 February 2003, answer to question 9.

<sup>573</sup> **Pages 9360 -9362**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6. This document does not bear the customer's signature and is drafted as an offer. It was, however, provided by Tomra in its reply of 14 March 2002 where it was requested to submit copies of agreements, including "*copies of documents relating to agreements which were concluded in a less formal manner ...*".

<sup>574</sup> **[confidential]**.

<sup>575</sup> **Page 10281 (confidential)**, **[confidential: customer C in Norway]** reply of 26 February 2003.

[confidential] competing machines in the period from the second half of 2001 until the end of 2002.<sup>576</sup>

*[confidential: customer D in Norway]*

(257) In relation to [confidential: customer D in Norway], Tomra had the status of the sole supplier of RVMs in 1996.<sup>577</sup> This included a rebate on a service contract and 50% reduction for upgrades. In the respective offers Tomra had made it clear that the prices and discounts granted to the customers were dependent on Tomra being the sole supplier.

(258) According to a letter of 18 February 1999, [confidential: customer D in Norway] was offered discounts on the basis of a framework order of approximately 200 machines<sup>578</sup>, to be installed by the end of June 2000. Whereas other customers were offered a 5% discount for this quantity, [confidential: customer D in Norway] could benefit from a 14% discount. The Commission does not possess a document of [confidential: customer D in Norway]'s 1000 formal acceptance of this offer.<sup>579</sup> According to information provided by Tomra and the customer, [confidential: customer D in Norway] ordered 200 machines in 1999 and 2000 at the price indicated in Tomra's offer<sup>580</sup>, including the quantity based discount.<sup>581</sup> In addition, Tomra also argues that [confidential: customer D in Norway] had indicated that it would purchase 200 machines, and refers to the discount as a price reduction for a "large order".<sup>582</sup> The letter of 18 February 1999, therefore, merely constituted a unilateral expression of the conditions that Tomra was willing to grant to the customer. Tomra, however, could have invoked these terms to remind the customer that the discount granted was based on specific expectations with regard to [confidential: customer D in Norway]'s purchasing volume, and could in principle have charged [confidential: customer

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<sup>576</sup> See pages 12047-12050, Tomra's response of 22 November 2004, Attachment 6, p. 31-34, and pages 12313-12314, Tomra's reply of 2 March 2005, answer to question 10.1. According to this information, 28 machines were bought under the new conditions in 2000 and [confidential: 73-78] machines in 2001. See also page 10281 (confidential), reply from [confidential: customer C in Norway] of 26 February 2003, p. 5.

<sup>577</sup> Pages 3245-3248, GOR/LEP/5, letter of 14 December 1995 signed by [confidential: Managing Director of Tomra Butikksystemer AS]. This document does not contain the signature of the customer. Tomra has, however, confirmed that the document represented an agreement that Tomra entered into with the customer, page 9346. In its more recent response (of 22 November 2004, page 11845), Tomra, however, emphasised the fact that the document does not contain the signature of the customer. Tomra did not, however, give a satisfactory explanation of why its initial reference to the document as an agreement would have been erroneous or as to which other terms would have applied between the parties at the time.

<sup>578</sup> Revised offer of 18 February 1999, page 9369-9371, Tomra's reply of 14 March 2002, Appendix 6, Binder 6.

<sup>579</sup> Tomra argues that [confidential: customer D in Norway] did not tacitly accept the offer even though it bought under the terms of the agreement. Tomra, however, does not claim that it received any communication from [confidential: customer D in Norway] rejecting the conditions offered by Tomra, see page 11859, Tomra's response of 22 November 2004, par. 558.

<sup>580</sup> Pages 7273, Tomra's reply of 14 March 2002, and pages 9346, 9401, 10421, 10423.

<sup>581</sup> Page 11859, Tomra's response of 22 November 2004, par. 558. [confidential: customer D in Norway], while not making a specific statement with regard to this period, stated that it did not *commit* (stress added by the Commission) to buying a minimum quantity within any given period of time, see page 10404, [confidential: customer D in Norway] reply of 12 March 2003.

<sup>582</sup> Page 11860, Tomra's response of 22 November 2004, par. 565.

**D in Norway]** the price difference “between the quantity bought and the quantity ordered”.<sup>583</sup>

(259) The prices [**confidential: customer D in Norway**] paid corresponded to the prices Tomra charged [**confidential: customer A in Norway**] and [**confidential: customer B in Norway**] and were lower than the prices charged to [**confidential: customer C in Norway**]. By offering a 14% discount for 500 RVMs in the case of [**confidential: customer A in Norway**], [**confidential: customer B in Norway**] and [**confidential: customer C in Norway**], and for 200 RVMs in the case of [**confidential: customer D in Norway**], Tomra manifestly aimed at establishing targets that made it impossible for all the main customers on the Norwegian market to buy significant quantities from other suppliers.

(260) Shortly before receiving this offer [**confidential: customer D in Norway**] had indicated that it intended to buy more machines from a competitor.<sup>584</sup> This fact, together with the more advantageous discount offered to [**confidential: customer D in Norway**] compared to other customers, suggests that Tomra, after securing quasi-exclusivity with the three largest customers on the Norwegian market, designed this offer in such a way as to prevent also the fourth largest customer from buying significant quantities from other suppliers. In the end, the target of 200 machines was reached.<sup>585</sup> In 1999 [**confidential: customer D in Norway**] bought 22 machines from a competitor, of which two were installed in the first quarter of the year, while no machines were bought from competitors in 2000.<sup>586</sup> The quantity referred to in Tomra’s offer, therefore corresponded to approximately [**confidential**] % of the actual requirements of the customer in the envisaged reference period and more than [**confidential**] % of the entire requirements of the customer in 1999 and 2000.<sup>587</sup>

(261) For the period starting from the second half of 2000 until the first half of 2001, [**confidential: customer D in Norway**] was offered a 10% discount for agreeing to buy approximately [**confidential: 65-75**] machines. The customer had the possibility of receiving a further rebate of 3% if, by the end of the period, it bought at least [**confidential: 83-93**] machines.<sup>588</sup> In fact, [**confidential:**

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<sup>583</sup> **Page 11860**, Tomra’s response of 22 November 2004, par. 565.

<sup>584</sup> **Page 12100**, Tomra’s response of 22 November 2004, Attachment 22, p. 2. And **page 11860**, Tomra’s response of 22 November 2004, par. 564.

<sup>585</sup> It is not certain whether this occurred by the end of June, which a statement in Tomra’s response of 22 November 2004, Attachment 6, p. 33 (**page 12049**), suggests, or in October 2000 as is stated in Tomra’s response of 22 November 2004, par. 567 (**page 11859**) and in [**confidential: customer D in Norway**] reply of 13 June 2003, **page 10423**.

<sup>586</sup> **Pages 10404, 10418-10419**, [**confidential: customer D in Norway**] reply of 12 March 2003.

<sup>587</sup> In 1999 and 2000 [**confidential: customer D in Norway**] bought 261 RVMs, 239 from Tomra, see page 12047, Tomra’s response of 22 November 2004, Attachment 6, p. 31, and [**confidential**] from competitors, **page 10404 (confidential)**, [**confidential: customer D in Norway**] reply of 12 March 2003, answer to question 6.

<sup>588</sup> **Pages 3582-3584**, PHA/PAB/30 and **pages 9372-9374**, Tomra’s reply of 14 March 2002, Appendix 6, Binder 6. The relevant passage reads: [**confidential**]. This document does not bear the customer’s signature and is drafted as an offer. It was, however, provided by Tomra in its reply of 14 March 2002, in an answer to question 26 of the Commission’s request for information that requested copies of agreements including “copies of documents relating to agreements which were concluded in a less formal manner ...”.

**customer D in Norway**] bought [confidential: 71-81] machines in the relevant period.<sup>589</sup> [confidential].<sup>590</sup>

### *Other agreements*

(262) According to the documents submitted by Tomra to the Commission, it had the status of the “sole supplier” of RVMs for 1995 and 1996 with [confidential: **customer E in Norway**].<sup>591</sup> The agreements were concluded for an unlimited period of time and remained in force until they were terminated by the partners. According to the framework agreement<sup>592</sup> Tomra was [confidential: **customer F in Norway**] sole supplier for 1996.

(263) Tomra’s Annual/Management Report for 1999 states that in Norway “the majority of the retail trade selected Tomra as their preferred supplier of RVM solutions”.<sup>593</sup>

### *Impact*

(264) In 1999, when Norway introduced a deposit on cans, demand for RVMs multiplied. While the effect could still be felt to some extent in 2000, sales diminished in subsequent years. According to Tomra<sup>594</sup>, eight suppliers tried to enter the market then, but only three suppliers met the technical specifications and engaged in negotiations with the retail industry. Tomra implemented its strategy of tying in the major retail market players, such as [confidential: **customer A in Norway**], [confidential: **customer B in Norway**] and [confidential: **customer C in Norway**], by either concluding exclusivity agreements with them, or offering individualised block orders, with the targets corresponding to customers’ approximate total demand. Tomra’s block order offers were dependent on the quantities customers were estimated to require as a consequence of the new deposit system. Despite the fact that when negotiating with Tomra, the customers could have only a rough idea of their actual requirements<sup>595</sup>, it is clear that, in fact, the targets offered by Tomra corresponded to approximately 70-90% of total customers’ requirements. The fact that no customer bought a significant number of competing machines confirms Tomra’s strategy and its actual effect. This is supported by the statements made by a

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<sup>589</sup> Page 12049, Tomra’s response of 22 November 2004, Attachment 6, p. 33.

<sup>590</sup> Page 10404 (confidential), see [confidential: **customer D in Norway**] reply of 12 March 2003, p. 2, answer to question 6 and 7, and pages 10423-10424.

<sup>591</sup> Page 3185, LKP/OMH/9 and pages 3186-3187, LKP/OMH/10.

<sup>592</sup> Pages 3243-3244, GOR/LEP/4, letter of 29 January 1996 signed by [confidential: **Managing Director of Tomra Butikkssystemer AS**]. This document does not contain the signature of the customer. Tomra has, however, confirmed that the document represents an agreement Tomra entered into, page 9346. In its more recent response (of 22 November 2004, par. 483 (page 11844)), Tomra emphasises the fact that the document in the file does not contain the signature of the customer. Tomra did not, however, give a satisfactory explanation as to why its initial reference to the document as an agreement would have been erroneous and did not explain at all which other terms would have applied between the parties at the time.

<sup>593</sup> Pages 7308-40, Tomra’s reply of 14 February 2002, Appendix 9. The expression “selected as their preferred supplier” is not the same as “bought the large majority of their RVMs from Tomra.”

<sup>594</sup> Page 7238, Tomra’s reply of 14 February 2002, p. 4.

<sup>595</sup> See, for instance, page 10349 (confidential), [confidential: **customer A in Norway**] reply of 20 June 2003, p. 2.

competitor, which reported that several of the customers concerned indicated that they were unable to purchase or even to evaluate its products due to contracts with Tomra.<sup>596</sup>

(265) The prices offered by Tomra changed significantly depending on the quantity a customer was willing to commit to<sup>597</sup>, and once a given threshold was reached the customers would benefit from the higher discount rate for all their purchases, that is, benefiting from a retroactive rebate scheme. This system and the bonus rates related to it created a strong incentive for the customers concerned, in particular those who intended to buy a larger quantity from Tomra anyway, i.e. to commit to quantities of at least 500 machines, which corresponded more or less to the actual or estimated requirements of those customers. Eventually, **[confidential: customer B in Norway]**, **[confidential: customer A in Norway]** and **[confidential: customer C in Norway]** each agreed or stated their intention to buy at least 500 machines. This number included a certain number of upgrades in each case. With reference to the outcome of the negotiation process Tomra stated in its 1999 Annual Report<sup>598</sup> that the majority of the retail trade chose Tomra as their preferred supplier.<sup>599</sup>

(266) While it is correct that customers had the opportunity to evaluate the machines offered by the different suppliers, and perhaps Tomra was able to offer the most comprehensive solution for them<sup>600</sup>, Tomra sought to influence the purchasing patterns of the retail organisations in an exclusionary manner through the way in which it designed its offers. Tomra's offers were manifestly designed to encourage all customers to accept a mechanism which almost forced the organisations to buy exclusively or almost exclusively from Tomra in 1998 and beyond. The offers made it extremely unattractive for customers and their outlets to buy significant quantities from competitors in addition to the quantities contracted from Tomra.

(267) It is clear from the comparison of the quantities and prices offered by Tomra, that discounts on prices granted, for example, to **[confidential: customer C in Norway]** were more advantageous than those offered to **[confidential: customer**

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<sup>596</sup> Apart from affiliates of **[confidential: customer A in Sweden]**, i.e. **[confidential: customer B in Norway]**, this also applied to **[confidential: customer A in Norway]** and **[confidential: customer D in Norway]**. **[confidential]**, page 11040. With regard to **[confidential: customer A in Norway]**, this statement is not contradicted by a statement made by **[confidential: customer A in Norway]** on page 10351, since **[confidential: customer A in Norway]** explicitly limited its response to current staff. Its statements with regard to the question of whether there was an agreement are contradictory. While on one occasion it confirmed the existence of an agreement for 1999/2000 and for 2000/2001 (pages 10321-10322, answer to questions 6, 7 and 8), another statement (see page 10349) suggested that it did not consider that there was an agreement for the period of second half 2000 and first half 2001. At the same time it is evident that the prices referred to in Tomra's offer actually applied.

<sup>597</sup> This is correct also with regard to **[confidential: customer C in Norway]**, even though the agreement eventually concluded provided for a softer mechanism.

<sup>598</sup> **Page 7308-40**. The report also refers to a number of 1 800 machines sold, which is higher than the number of 1 510 indicated to the Commission. The difference can probably be explained by the fact that the number 1 510 machines does not include upgrades.

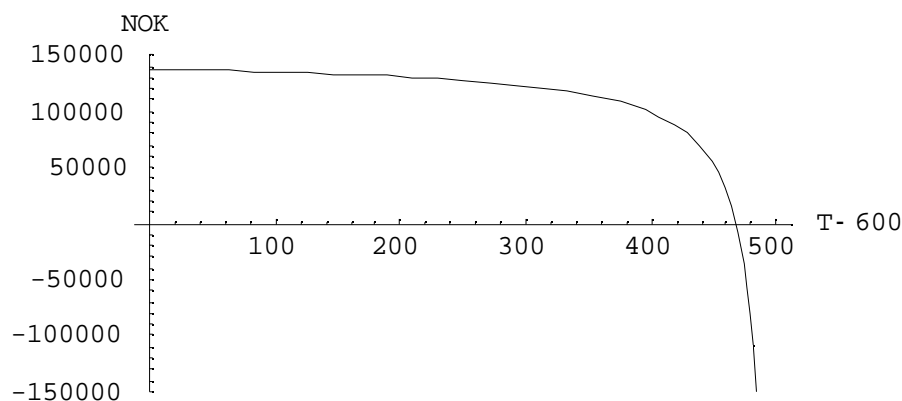
<sup>599</sup> According to **page 7253**, Tomra's reply of 14 February 2002, p. 19, Tomra sold 1 510 machines.

<sup>600</sup> Tomra argues that the agreements were the result of a competitive process and that customers also evaluated the machines of Tomra's competitors, see e.g. **page 11805**, Tomra's response of 22 November 2004, par. 294-295.

**A in Norway]** and **[confidential: customer B in Norway]**. For half the volume, **[confidential: customer C in Norway]** was offered the same price as the **[confidential: customer A in Norway]** and **[confidential: customer B in Norway]**. This confirms the argument that Tomra followed the strategy of capturing major customers' demand through adapting its prices and quantities to the actual requirements of the customers and so removing any opportunity for competitors to capture a portion of demand.

(268) In addition to the exclusionary effect that the exclusivity clauses, quantity commitments and retroactive rebate schemes, aiming at meeting the total or almost total customer demand, had on the Norwegian RVMs market, the rebate schemes created a competitive situation where Tomra's rivals were forced to offer very low or even negative prices in order to compete with the dominant supplier. The following figure (Figure 27) depicts the unit price a competitor would at least need to offer on a per unit basis in order to match Tomra's price under the rebate scheme. The horizontal axis depicts the number of machines increasing from left to right and the vertical axis the corresponding price. Figure 27 demonstrates that competitors may need to offer very low, possibly even negative, prices for the last units before the rebate threshold is reached in order to make Tomra's customers switch. Figure 27 is based on the rebate contained in the agreement concluded with **[confidential: customer A in Norway]**.<sup>601</sup>

**Figure 27:** The effect of Tomra's rebate scheme on the price a competitor would have to offer to make the customer switch from Tomra (Norway)



(269) Between 1998 and 2002, almost 70% of the total market demand was covered by the identified contracts concluded with Tomra.<sup>602</sup> Tomra argues that it was

<sup>601</sup> The figure is based on the fact that there is an incremental rebate of 6.5% linked to the threshold of 500 machines and that the price for quantities between 250 and 500 machines was NOK **[confidential]** whereas it was NOK **[confidential]** for at least 500 machines. The figure does not take account of the fact that the threshold of 500 also included 50 upgrades.

<sup>602</sup> Tomra asserts that only 40% of the market demand throughout 1998-2002 was affected by the exclusionary contracts. This figure is the result of the exclusion of certain quantities as being fully contestable. For example, the number of machines sold under the agreement with **[confidential: customer A in Norway]** in 1999 – Tomra asserts that it was contestable to competitors, as the actual purchase was above the rebate threshold. See **page 12049**, Tomra's response of 22 November 2004, Attachment 6, p. 33.

only 41%.<sup>603</sup> More than 80 % of the demand in the market was effectively tied in the period 1999-2001 as a consequence of the agreements and conditions.<sup>604</sup> In addition, Tomra had exclusivity status with **[confidential: customer B in Norway]** between October 2000 and July 2003. In this period **[confidential: customer B in Norway]** represented roughly 20% of RVM sales on the Norwegian market. Although, in retrospect, the practical effect of Tomra's offers and agreements for competition in 1999 was more limited than the coverage of its practices suggests, in the light of the fact that the main competitor at the time had to take back its machines in 2000, the way in which Tomra acted in a phase with extraordinary demand confirmed its policy of limiting market access opportunities for competitors.

(270) Moreover, the link between the size of the tied market and the market share of Tomra is evident in this situation as well, just as in the markets described in sections III (A)-(D). In 1999, the tied market size increased significantly compared to 1998, and exceeded 90%. In 1998 it was only 5%. This was influenced by the increased demand on the market, following the introduction of the mandatory deposit system for cans. In 2000, the size of the tied market share remained considerably high, reaching 85%. The market share of Tomra in 1999 was around 94%, which increased to **[confidential: 94-99%]** in 2000 and 2001. Tomra's market share was lowest in the reference period in 2002, when it went down to **[confidential: 88-93%]**. This could be explained by the fact that there were no longer any exclusionary agreements in force in 2002. At the same time this allowed Repant, the most successful rival of Tomra in Norway, to get more orders from customers and to increase its market share to approximately **[confidential]** in 2002. In 2003 Repant managed to sign a framework purchase agreement with Tomra's biggest customer **[confidential: customer A in Sweden]**, which controls **[confidential: customer B in Norway]** in Norway. The agreement was signed for 2 ½ years and covered three Scandinavian markets where ICA is present through its subsidiaries.<sup>605</sup> This again, as in the markets discussed in sections III (A)-(D), indicates that the lower the proportion of demand covered by exclusionary agreements, the more customers were willing to buy from rivals and therefore the lower the volumes Tomra was able to sell.

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<sup>603</sup> Page 12051, Tomra's response of 22 November 2004, Attachment 6, p. 35.

<sup>604</sup> This is a very cautious statement and takes, *inter alia*, account of the fact that in the first half of 2000 there was no longer any pressure on **[confidential: customer B in Norway]** and **[confidential: customer A in Norway]** to reach the target volume, pursuant to the agreements for 1999, and of the fact that the wording of the agreements and conditions applying to **[confidential: customer C in Norway]** left a certain degree of flexibility. Tomra argues that the exclusionary impact would be significantly smaller (pages 12048-12051, Tomra's response of 22 November 2004, Attachment 6, p. 32-35). This is explained by the fact that Tomra erroneously does not take the agreements and conditions applied in relation to **[confidential: customer A in Norway]** into account. Apart from the fact that there is no valid reason for doing so, in the light of what has been said in relation to those agreements, Tomra's conclusion can also be explained by miscalculations in relation to purchases under the agreement for 1999. The Commission's calculations are based on a number of approximately 2 005 machines, including upgrades installed in 1999-2001.

<sup>605</sup> Information from Repant website, <http://www.repant.no>.



### C. GENERAL IMPACT OF TOMRA'S PRACTICES

(271) Tomra's policy and its practices were designed to, were clearly capable of, and were likely to restrict market access for competitors, thereby, to foreclose the RVM market and to affect the competition structure on it. In addition to the effect the different practices had on competition in the national markets concerned, they also had an impact on competition in the EEA as a whole. Taking account of the fact that they were part of a policy applied in different EEA Contracting Parties, competitors were also facing similar practices in other territories. Tomra's degree of dominance and its readiness to resort to measures, such as agreements and arrangements addressed section III, were liable to have an impact on the possibility for competitors of obtaining meaningful market access opportunities. The fact that some of the exclusionary practices discussed here affected only a relatively limited percentage of demand or a limited number of key customers, does not reduce their anticompetitive effect, in particular because of the strong position of Tomra. The high degree of dominance allows Tomra to profit most when tying only a limited percentage of demand while still maintaining large margins on the remaining sales.

(272) Some competitors managed to survive despite Tomra's practices, although with comparatively limited growth and reduced chances to acquire bigger market shares. At the same time, it is possible that some of the market exits were not primarily caused by Tomra's practices. To a certain extent they may indeed have been related to objective difficulties in this specific market, as stressed by Tomra. It is also true, however, that Tomra was aware that, under the specific RVM market circumstances, blocking competitors' growth opportunities was able to hurt them and therefore could contribute to their exit. Tomra's assertion that the difficulties its competitors were experiencing were unrelated to its practices and could be attributed exclusively to their inability to cope with market conditions, including quality requirements<sup>606</sup>, is not convincing. First of all, it is not likely that Tomra would resort to exclusionary practices, and consider cooperation with and take-overs of some of its rivals, if it was convinced that they were in any case all unable to compete and stay in the market because of their inferior products. Several internal documents, including those that show that Tomra was considering cooperation and take-overs, demonstrate that Tomra deemed some of them to have potential, including in terms of technology and product quality.<sup>607</sup>

(273) One of the best examples of how Tomra's exclusionary practices affected the growth and in some cases even led to exit, is the case of Eleiko in Sweden. Shortly after Tomra had reached an agreement with **[confidential: customer A in Sweden]**, by which it barred access to the largest customer in Sweden, take-over negotiations concerning Eleiko's RVM business started and were completed a few months later.<sup>608</sup> At the time Eleiko was the most significant competitor in Sweden. Eleiko had been in the market since 1997, had a full range of RVM and

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<sup>606</sup> Pages 11769-11775, Tomra's response of 22 November 2004.

<sup>607</sup> Pages 5004, 5623 or 5628: "Direct comparison between Acris C and T-500 is not necessarily advantageous for us." Acris C is a model that was sold by Prokent at the time. An internal Tomra e-mail of 28 February 2001, page 5674, refers to the fact that customers who had bought a Prokent machine were satisfied.

<sup>608</sup> Page 7260, Tomra's reply of 14 February 2002, p. 26.

backroom equipment, and was expected to be active in new markets that would follow the introduction of mandatory deposit systems on non-refillable containers. It had also just had relative success with a new machine in 2000.<sup>609</sup> While several factors will have influenced its decision to leave the market, the size of the installed base was cited as one of them.<sup>610</sup> It is evident that Tomra's agreement with ICA reduced Eleiko's prospects of selling larger volumes in Sweden considerably. The fact that Eleiko left the market in 2001 is referred to in an internal Tomra document by the phrase: "taken out of business".<sup>611</sup>

(274) It is evident that Tomra's practices in Germany and elsewhere in the EEA made it very difficult for Prokent, the complainant, to expand its business. [confidential].<sup>612</sup> Tomra's allegation that the reasons for this development or Prokent's "failure" were related to its inability to cope with objective requirements in the market and included strategic mistakes and "uncompetitive products"<sup>613</sup>, is not supported by evidence and is contradicted by Tomra's own assessment of this competitor's performance and potential at the time. Moreover, the growth in Prokent's market share in Germany indicates the opposite: starting with approximately [confidential] % market share in 1998, Prokent reached [confidential] % in 2000, and [confidential] % in 2001. In October 2000 the management of Tomra Europe AS referred to the idea of entering into a partnership with Prokent or taking it over. In 2001 there were references to Prokent's ambitions, its sales successes and the quality of its technology in internal Tomra documents<sup>614</sup> and Tomra was willing to pay a significant price for the company<sup>615</sup>, all of which suggests that it did not consider Prokent to be a failed company.

(275) At the time when the EFTA-Surveillance Authority and the Commission carried out their inspections, the parties had already agreed on the purchasing price and were exchanging draft agreements.<sup>616</sup> By fax on 31 August 2001 Prokent sent Tomra a document with the title "*Essentials of a Purchase Contract*

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<sup>609</sup> **Page 1508**, ATU/KKL/21, presentations from MD Meeting, Prague, 30-31 May 2001, table "Europe-Current Competitive Landscape". Eleiko sold [confidential] units of its new Eleiko 2000 machine in 2000 and [confidential], **page 12435 (confidential)**, Eleiko's reply of 7 April 2005, answer to question 3, and **page 12598 (confidential)**, Eleiko's reply of 3 June 2004.

<sup>610</sup> See **page 12080**, Tomra's response of 22 November 2004, Attachment 11, which contains a declaration of a former Eleiko manager. While the value of this declaration has to be considered with caution, given that it was procured by Tomra, subsequent to the receipt of the Statement of objections, and given that the comments on Tomra's practices received from suppliers which were still competing with Tomra describe the competitive situation rather differently, it still cites the size of the installed base as one of the reasons for Eleiko's market exit.

<sup>611</sup> **Page 1508**.

<sup>612</sup> **Page 10923 (confidential)**, Prokent's reply of 12 April 2002, p. 5, answer to question 23.

<sup>613</sup> **Pages 11766-11775**, Tomra's response of 22 November 2004.

<sup>614</sup> **Page 5623 or 5628, 5674**. In another document reference is made to a "*rather sophisticated prototype*" that had been developed by Prokent. It is also not clear why Tomra was willing to pay a significant amount, EUR [confidential: 8 - 10 million] (**page 533**), for Prokent if the company had no potential and why it had been considering taking over Prokent for some time.

<sup>615</sup> **Page 533**, EUR 8.5 - 9 million.

<sup>616</sup> **Pages 2780-2781**, ATS/Kons.rom./22, letter from [confidential; Tomra representative] to [confidential: Prokent representative] of 10 September 2001. **Page 7261**, Tomra's reply of 14 February 2002, p. 27.

*between the shareholders of Prokent AG and TOMRA SYSTEMS ASA*".<sup>617</sup> This document refers, amongst other things, to the purchase price envisaged by the parties. Under the heading "Representations" the following passage can be found: "*Whereas TOMRA – for their part – are interested to widen their RVM activities and, therefore, approached Prokent AG and made the suggestion to purchase this business line...*" In its reply of 10 September 2001 Tomra insisted that "*in order to defend this case to the market, the authorities etc.*" it should be stated instead that "*Prokent has approached Tomra in order to strengthen its position in Germany and internationally*", which, apart from the fact that it does not suggest that Prokent was a failed company, is an unusual way of describing a market exit.<sup>618</sup> The acquisition would have affected the structure of competition in Germany and the EEA very significantly. As a consequence of the Commission's investigation the acquisition was, however, put on hold and did not materialise.

(276) Tomra argues that many of the agreements in question were concluded at a time when there was no viable competition in the market, that the customers made informed choices and that Tomra would have been chosen in any case because of its advanced technology<sup>619</sup>, superior quality and service, despite its higher prices, with the consequence that exclusivity agreements and the other types of agreements would, in fact, not have affected actual purchasing patterns. Once again, it is not clear why Tomra needed to resort to exclusivity or other exclusionary agreements if the customers would have chosen its products in any case. The same could be said with regard to Tomra's argument that there was no competition in some of the markets. While it is certainly true that in the phase immediately following the take-over of Halton, that is to say in the years 1997-1999, there was only very limited competition in most markets and new competitors were just entering the market or were making preparations to do so, the practices in question also aimed, from Tomra's point of view, at preventing or delaying market entry. In fact, Tomra was monitoring any preparations for market entry closely and was also aware of them in the period 1997-1999.<sup>620</sup> Furthermore, many of the agreements in question also applied and affected competition in periods when competitors had effectively entered the respective markets.

(277) As the established supplier Tomra could certainly rely on factors such as a larger product portfolio, a denser service network or an established reputation. Although this was objectively not necessarily the case in relation to all individual

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<sup>617</sup> Pages 209-218, RM 13.

<sup>618</sup> Pages 2714-2715, ATS/kons.room/9. It is hard to understand how Prokent could have strengthened its position on the market by being taken over by its much larger rival and, thereby, disappearing from the market. If the relevant passage in Prokent's draft was incorrect, Tomra's CEO could have said so and would not have needed to refer to the perception of third parties (pages 11798-11801, Tomra's response of 22 November 2004).

<sup>619</sup> An example quoted is the horizontal infeed of containers, which it was first to offer on the market. In the period when Tomra was the only supplier able to sell machines with a horizontal infeed system, it was still selling in parallel machines with vertical infeed like its competitors, offering, in addition, a PET-stabilizer for plastic bottles.

<sup>620</sup> There are numerous references to the expected market entry in internal documents. In one internal Tomra document of June 1998, page 4700, reference is made to a new competitor trying to obtain test installations in the Netherlands.

competitors and machine models at all times<sup>621</sup>, Tomra could generally also invoke the superior and, in any event, established quality of its products. While these factors explain why many customers would have bought considerable quantities from Tomra anyway and that there was no real risk of customers switching to a new competitor entirely, they do not show that Tomra's practices were deprived of any effect.

#### IV. ASSESSMENT OF THE PRACTICES DESCRIBED IN SECTION III UNDER ARTICLE 82 OF THE TREATY AND ARTICLE 54 EEA-AGREEMENT

(278) Article 82 of the Treaty prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it, insofar as it may affect trade between Member States. Article 54 of the EEA Agreement contains a similar prohibition. However, the reference in Article 82 to trade "between Member States" is replaced by a reference to trade "between Contracting Parties" and the reference to abuse "*within the common market or in a substantial part of it*" is replaced by a reference to abuse "within the territory covered by this [EEA] Agreement or in a substantial part of it". Such abuse may, in particular, consist of limiting production, markets or technical development to the prejudice of consumers.

(279) 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. In this case, the relevant market, as was discussed in Section II, is the market for reverse vending machines or systems, including, in particular, all high-end RVMs that can be installed through a wall and connected to backroom equipment, as well as the overall market including the low-end machines. The geographical scope of the relevant market is national. As was stated in Section II, Tomra holds a dominant position on the relevant market having regard, in particular, to its market share on the national markets, the market shares of its competitors and buying power. Tomra has not challenged the existence of its dominance on the relevant markets.

(280) Article 82 of the Treaty and Article 54 of the EEA Agreement do not only aim at preventing practices that may cause damage to customers directly, but also at preventing those that are detrimental to them through their impact on the competitive structure and which, in the short term, may even appear to offer certain advantages to customers. Exclusionary practices that are designed to block access to customers and thereby hinder existing competition or the development of new competition have been qualified as abuses of dominant position by the Court of Justice on many occasions.<sup>622</sup>

(281) 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

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<sup>621</sup>

[confidential].

<sup>622</sup>

See, for instance, case 85/76, *Hoffmann-LaRoche*, [1979] ECR-461, in particular, par. 91; Case C-62/86, *AKZO*, [1991] ECR I-3359, in particular, par. 69; Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, in particular, par. 111; Case 322/81, *Nederlandsche Banden Industrie Michelin (Michelin I)*, [1983] ECR-3461; Case T-65/89, *BPB Industries Plc and British Gypsum LTD*, [1993] ECR II-389.

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.<sup>623</sup> The same is true in cases where purchasing targets for a given period are expressed in absolute figures,<sup>624</sup> 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.

(282) 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.<sup>625</sup> These kinds of agreements and conditions can be permissible only in exceptional circumstances. *“Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because - unless there are exceptional circumstances which may make an agreement between undertakings in the context of article 85 and in particular of paragraph ( 3 ) of that article, permissible - they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market. The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply. Finally these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted.”*<sup>626</sup>

(283) 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

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<sup>623</sup> Case 85/76, *Hoffmann-LaRoche*, [1979] ECR-461.

<sup>624</sup> See, for instance, case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR-3461.

<sup>625</sup> Case 85/76, *Hoffman La Roche*, par. 89; Case C-62/86, *AKZO v Commission*, [1991] ECR I-3359, par. 149; Case T-65/89, *BPB Industries Plc and British Gypsum LTD*, [1993] ECR II-389, par. 120.

<sup>626</sup> *Hoffmann-La Roche*, par. 90.

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. Tomra's strategy to maintain its leader position was described in Section III.

(284) 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*".<sup>627</sup> To establish this, the Court stated that "*it is necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.*"<sup>628</sup>

(285) The Court in *Michelin II* established that "[t]he 'effect' referred to in the case-law cited in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect".<sup>629</sup> It has abundantly been shown in this decision that Tomra's practices tended to restrict competition, that is to say, were clearly capable of having that effect. In addition, however, the Commission has investigated the likely restrictive effects of the practices, which is discussed in section IV.2.

#### A. EXCLUSIVE OR PREFERRED SUPPLIER AGREEMENTS OR ARRANGEMENTS

(286) Under some of the agreements or arrangements identified in Section III, Tomra was granted the status of an exclusive or sole supplier. As has been established, terms such as preferred supplier, primary supplier, main supplier etc. had the same meaning in Tomra's contractual practice, that is to say, they aimed at the complete exclusion of other suppliers in relation to the customers in question. Cases where Tomra has obtained an explicit or implicit promise that the customer would not buy competing products have to be considered in the same manner. The same applies to discounts, rebates or bonuses that are linked to exclusivity.<sup>630</sup> In general, exclusivity meant that even the testing of competing

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<sup>627</sup> *Hoffmann-La Roche* par. 91, *Michelin I*, par. 70, *AKZO*, par. 69, *Irish Sugar*, par. 111.

<sup>628</sup> *Michelin I*, par. 73, and Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission (Michelin II)*, judgment of 30 September 2003, par. 240.

<sup>629</sup> *Michelin II*, par. 239, and *British Airways*, par. 250.

<sup>630</sup> *Hoffmann La Roche* etc.

products was prohibited.<sup>631</sup> In a few cases, however, the testing of competing products was explicitly permitted. Limited exceptions cannot change the fundamental character of the respective agreements and do not justify a different assessment. It is not decisive in which form the relevant agreements or arrangements were concluded.

(287) Given the circumstances of the case, such as the fact that demand was non-recurring and coinciding with the introduction of a mandatory deposit system, and, in particular, Tomra's market power compared with that of its competitors, exclusivity agreements concluded for a rather short period of time and affecting only a small proportion of the demand, were also harmful. At the very least they contributed to blocking market access for other suppliers, especially since they were part of Tomra's exclusionary policy. Even though agreements concluded for a shorter period of time are, generally speaking, less restrictive than agreements with a longer duration, they may in fact relate to significant quantities and may have a sizeable foreclosure effect beyond the actual reference period. In fact, it is important to note that the special characteristics of the RVM market are the long life-cycle of the product<sup>632</sup> and irregular increases in demand from the customers' side. This in turn leads to big volume orders from time to time, because of which the foreclosure effect of exclusionary agreements with a short reference period extends beyond the actual contract period, preventing competitors from making sales and providing services in the future. All this has a significant foreclosure impact on the market. The agreements may also, as was the case in several instances, affect a period with higher demand than in previous or subsequent periods. This was especially the case with regard to the so-called "key years" mentioned previously in section II.4, during which the demand for RVMs was increasing noticeably, due to for instance the anticipation of new deposit systems. For example, the key year in Norway was 1999, when the new deposit for cans was introduced. In the Netherlands, it was 2001, when the industry used the opportunity to upgrade its equipment in view of the introduction of the Euro. Moreover, especially in the absence of effective *ex ante* competition for individual customers, where there is no real possibility for a competitor to compete successfully for the full requirements of the customer, a sequence of exclusivity or other exclusionary agreements of shorter duration can have a similarly restrictive effect as a single agreement covering the same total period. Furthermore, even smaller customers can be strategically important from the point of view of market entrants and smaller competitors.

(288) It should also be taken into account that, in general, exclusivity agreements gave customers the most advantageous prices they could hope to obtain from Tomra and, therefore, provided an incentive for concentrating purchases in the contract period. Where exclusivity is combined with ambitious purchasing targets<sup>633</sup>, the exclusionary effect can be exacerbated as such arrangements are also likely to affect future demand.

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<sup>631</sup> Pages 4700, BN-9, pages 3835-3836, EF 23.

<sup>632</sup> Page 7437, Tomra's reply of 14 February 2002.

<sup>633</sup> See, for instance, the agreement with ICA Ahold for 2000-2002.

- (289) In the case of agreements or conditions which relate to longer reference periods and which apply to customers representing a large share of the demand in a given market, the effect is evidently more severe.
- (290) 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. It is the very purpose of these kinds of agreements or arrangements to exclude competitors from the respective parts of the market. 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. Tomra was not allowed to engage in this kind of practice, and the exclusivity agreements and arrangements constituted an abuse of a dominant position.
- (291) 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.
- (292) The fact that customers often accepted exclusivity or a similar status since this allowed them to benefit from the best conditions that Tomra was willing to offer, and, as Tomra claims, may in some cases have proposed exclusivity themselves, is not an objective justification. The Court of Justice has ruled that even the fact that a customer specifically asks a dominant undertaking to conclude an exclusive agreement does not disqualify the agreements in question from constituting an abuse.<sup>634</sup> Apart from the fact that Tomra has been unable to provide evidence to support its allegation that the initiative to conclude exclusive agreements usually came from customers<sup>635</sup>, it is evident that a clear Tomra policy to offer and conclude such agreements or arrangements existed, and that without the negative reaction of some customers to such offers, there would have been even more exclusivity contracts.
- (293) Tomra also asserts that several of the identified exclusivity agreements could not be qualified as abuses since in certain markets and years Tomra held a virtual monopoly or since customers would have chosen Tomra in any case because of its superior products or services.<sup>636</sup> As has been established, Tomra's practices and their effect were not limited to the phases where there was virtually no competition, and were liable to discourage market entry. Moreover, the fact that competition was very weak in certain markets during certain periods does not make it acceptable for Tomra to employ practices that aim at perpetuating this situation. Finally, as Tomra claims, the customers would have chosen its products

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<sup>634</sup> Case 85/76, *Hoffmann-La Roche*, [1979] ECR-461, par. 89.

<sup>635</sup> According to the evidence available, such a proactive proposal seems to have come from **[confidential: customer A in Norway]** in the context of the agreement for 1999. However, this offer came at a time when, through the agreed quantity commitment/rebate scheme, Tomra had already secured quasi-exclusivity anyway. Otherwise, it appears as if **[confidential: subsidiary No. 1 of customer A in Germany]** either proposed quasi-exclusivity or influenced the inclusion of such terms in the agreements concluded with Tomra (**pages 12091-12092**, Tomra's response of 22 November 2004, Attachment 18). **[confidential: parent of customer A in the Netherlands]** must, at some point, have considered granting Tomra exclusivity, but the inclusion of the terms effectively granting Tomra exclusivity in the final agreement was clearly due to Tomra's insistence.

<sup>636</sup> E.g. **page 11927**, Tomra's response of 22 November 2004, par. 949.



anyway or there were no alternative sources of supply other than Tomra, there is no rational explanation as to why Tomra would have deemed it useful to employ exclusivity agreements in the first place to increase sales.

(294) As has already been established<sup>637</sup>, the fact that the actual orders for individual installations were often placed by the individual outlets, including, in some cases, a significant number of independent retailers, only affected the scope of the exclusivity clauses in the few cases where such outlets were explicitly excluded from the respective exclusivity provision or rebate.

(295) Moreover, the fact that in a few cases customers bought very small quantities of competing machines in spite of an exclusivity clause<sup>638</sup>, as is stressed by Tomra, cannot in any way affect the assessment of the agreements. Such instances were minor incidents in the overall scheme. Tomra has not argued that it was always aware of these incidents at the time. There is evidence, however, that Tomra was not indifferent when it became aware of the fact that a customer intended to buy or test competing machines. It was willing to withhold a “block order discount” in a case where it had become aware of a customer’s intention to test machines of a competing supplier.<sup>639</sup> There was no policy of non-enforcement on Tomra’s behalf on which customers could rely. The agreements were designed in such a way as to make customers buy exclusively or almost exclusively from Tomra. Finally, the fact that an agreement has not been honoured in its entirety does not mean that it cannot have had any effect.

(296) Having regard to these considerations, at least the following agreements or arrangements in their entirety constitute an exclusionary practice in the sense of Article 82 of the Treaty and Article 54 of the EEA Agreement, all being part of an anti-competitive exclusionary strategy:

- agreements with **[confidential: customer E in Norway]** for 1995 and 1996,
- agreement with **[confidential: chain No. 1 of customer A in Norway]** of October 1996 (valid for 36 months),
- agreement with **[confidential: chain No. 2 of customer A in Norway]** for 1996,
- agreement with **[confidential: customer F in Norway]** for 1996,
- agreement with **[confidential: customer D in Norway]** for 1996,
- cooperation agreement with **[confidential: chain No. 1 of customer A in Norway]** of August 1997,

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<sup>637</sup> See, for example, the agreement with **[confidential: customer H in the Netherlands]** concluded for 2001-2002 (Section III (A)).

<sup>638</sup> This is stressed by Tomra, e.g. **page 11816**, Tomra’s response of 22 November 2004, par. 361. This was usually the case with the individual outlets, run by independent retailers or franchisees.

<sup>639</sup> **Page 4700**, minutes of the Tomra Systems. B.V. sales department meeting of 19 June 1998. The relevant passage reads: **[confidential]**.

- agreements with **[confidential: customer E in Germany]** and **[confidential: customer E in Germany]** for 1997,
- exclusivity agreements with **[confidential: customer J in the Netherlands]** for 1997 and 1998,
- yearly agreements with **[confidential: customer F in the Netherlands]** for 1997-2000,
- agreements concluded with **[confidential: customer B in Austria]** of March 1998, March 1999 and October 2000,
- agreement with **[confidential: subsidiary No. 1 of customer A in Germany]** for 1998-1999,
- agreement with **[confidential: subsidiary No. 1 of customer A in Germany]** for 2000-2001,
- exclusivity agreements with **[confidential: customer D in the Netherlands]** concluded in April 1998 and in April 2000,
- agreement with **[confidential: customer A in Austria]** for 1999 and 2000,
- exclusivity agreement with **[confidential: customer B in Germany]** for 2000,
- oral agreement between Tomra and **[confidential: customer G in Germany]** for 1999-2000,
- agreement with **[confidential: subsidiary No. 2 of customer A in Germany]** for the second half of 2000,
- agreement with **[confidential: customer C in Austria]** for 2001,
- Reverse Vending Equipment Global Master Agreement concluded with **[confidential: parent of customer A in the Netherlands]** for 2000-2002,
- Attachment to the Global Master Agreement with **[confidential: parent of customer A in Sweden]**, which applied to **[confidential: customer A in Sweden]** and **[confidential: customer B in Norway]** concluded for 2000-2003,
- agreement with **[confidential: customer C in Sweden]** for 2003 and 2004.

B. DE FACTO TOTAL OR PARTIAL EXCLUSIVITY THROUGH QUANTITY COMMITMENTS AND  
REBATE SCHEMES

(297) According to the case law, it is not only agreements providing for a dominant company's exclusivity that are considered to be an abuse, but also agreements containing quantity commitments, representing the entire requirements or most of the total requirements of a customer in a given reference period.<sup>640</sup> Discounts

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<sup>640</sup> See case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461, [1979] 3 CMLR 211, par. 89-90, 95-101; Case C-163/99, *Portugal v. Commission: Landing Fees at Portugese Airports* [2001] ECR I-

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, all of which were described in Section III. In addition to the exclusivity or preferred supplier agreements, Tomra implemented its policy and achieved its objective through the quantity commitments and rebate or bonus schemes.

(298) 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. It is rather easy to estimate the demand for RVM solutions, especially because each retail outlet will need one (if a mandatory deposit system exists), and the number of retail outlets of each retailer can easily be obtained by the market players, as can the number of future retail outlets. Moreover, many customers had indicated their estimated demand during the negotiation process with Tomra.<sup>641</sup> By pushing for ambitious quantity commitments or targets, and making attractive discounts or rebates dependent on such commitments or targets, it at least contributed to the establishment of the stipulated quantities. The cases where the demand was significantly underestimated by the parties or by Tomra, for example, because of higher purchases of a given customer in a particular period, constitute anecdotal exceptions.

(299) The fact that contract conditions were negotiated centrally, that the orders were often placed locally and that many retail groups included a significant number of independent retailers, cannot call the exclusionary character of the respective agreements and conditions into question as the respective quantities were aimed at the organisation as a whole, irrespective of who placed the orders.

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2613, [2002] 4 CMLR 1319, par. 50; Cases 40/73, etc. *Suiker Unie v. EC Commission* [1975] ECR 1663, [1976] 1 CMLR 295, par. 513; Case 322/81, *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461, [1985] 1 CMLR 282, par. 73; and Commission Decision in *Deutsche Post* [2001] OJ L125/27 5 CMLR 99, par. 33.

<sup>641</sup>

In several instances Tomra's comments in its response imply that it was very well aware of the customers' total requirements. See for example **pages 11805-11806**, Tomra's response of 22 November 2004.

The rebates certainly depended on the organisations attaining the agreed target volumes, otherwise the conclusion of such agreements would have not made economic sense from Tomra's point of view. Therefore they provided pressure or, at least, an incentive for the organisations as a whole to reach the respective quantity or quantities regardless of their composition. Finally, the main interest for the independent retailers in organising themselves into big cooperatives or belonging to a retail group is to obtain more favourable contract conditions with various suppliers, including RVM solution suppliers such as Tomra.

(300) Tomra has asserted that customers would have chosen Tomra products in any case for reasons other than its prices, which is demonstrated by their willingness to pay higher prices for Tomra equipment than for that of its competitors.<sup>642</sup> The fact that Tomra's prices were, in general, higher than those of its competitors, does not mean that Tomra's price levels were irrelevant for customers buying machines from Tomra. Once again, it is not clear why Tomra had to apply its strategy of tying in the major customers through exclusivity, quantity or rebate scheme arrangements if the customer, as argued by Tomra, would have chosen its products anyway regardless of its higher prices.

(301) Tomra has, furthermore, stated that its agreements were supposed to have a stimulating effect<sup>643</sup> and it is inconceivable that Tomra would have sought such agreements, including discounts and rebates, and, in particular, the conditions attached to them, if it had not expected any effect on its own sales rather than on the overall market demand. With regard to this, it is important to keep in mind the special characteristic of the RVM market. The number of RVMs purchased by customers is influenced by the size and the number of their retail outlets rather than by the price offered by RVM supplier. The customers, even if offered a very good price for a machine, are unlikely to buy more than they need as they will not store them in the same way as they could do with other products.

#### *Quantity commitments and unilateral conditions relating to specific quantities*

(302) As has been established previously there were a number of agreements containing individualised quantity commitments. In several instances it was uncertain whether the customers had formally accepted the terms offered by Tomra with regard to purchase targets. In such cases, however, a given discount was linked to a specific purchasing volume, at least according to Tomra's statement. The agreements and conditions considered in this section are:

- block order agreements with **[confidential: customer E in the Netherlands]** for 1998 and 1999 (exclusivity),
- agreement with **[confidential: customer C in Germany]** for 1997-1998 and 2000,
- agreement with **[confidential: customer B in the Netherlands]** for - 1999-2000,

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<sup>642</sup> Pages 11806-11807, Tomra's response of 22 November 2004, par. 302-303.

<sup>643</sup> See, for example, page 11777, Tomra's response of 22 November 2004, par. 157-160.

- agreement with **[confidential: customer A in the Netherlands]** for 1998-2000,
- agreement with **[confidential: customer I in the Netherlands]** for 1999 and 2001,
- agreement with **[confidential: customer K in the Netherlands]** for 1998-2000,
- agreements with **[confidential: customer A in Norway]**, **[confidential: customer B in Norway]**, **[confidential: customer C in Norway]** and **[confidential: customer D in Norway]** for 1999-2000,
- agreement with **[confidential: customer D in Austria]** for 1999-2000,
- agreement with **[confidential: customer G in the Netherlands]** for 1999-2001,
- block order agreements with **[confidential: customer C in the Netherlands]** of June 1999, August 2000 and May 2001,
- agreements with **[confidential: customer A in Norway]**, **[confidential: customer C in Norway]** and **[confidential: customer D in Norway]** for 2000-2001,
- agreement with **[confidential: customer H in the Netherlands]** of July 2001(valid for 18 months),
- agreement with **[confidential: customer F in the Netherlands]** for 2001 and 2002,
- agreement with **[confidential: customer E in Austria]** for 2000-2001,
- agreement with **[confidential: customer E in Germany]** for 2000,
- agreement with **[confidential: customer H in Germany]** for 2000-2001,
- and agreement with **[confidential: customer B in Germany]** for 2001,
- agreement with **[confidential: customer B in Sweden]** 2000, applicable until October 2000 only.

(303) While in many cases there was a clear commitment to purchase a specific quantity or a minimum quantity<sup>644</sup>, there were also instances where the quantity indicated was qualified by terms such as “approximately”<sup>645</sup> or “the estimated volume of”. Such terms allowed for a limited deviation from the agreed quantity, but did not fundamentally change the nature of the commitment. Other agreements, for example, the agreement concluded with **[confidential: customer B in the Netherlands]** for 1999 and 2000 and the agreement with **[confidential: customer C in Norway]** for 2000-2001, contained softer language with regard to the actual nature of the commitment, stating the customer’s “intention” to

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<sup>644</sup> See, for instance, the agreements applying to customers in the Netherlands, Section III (A).

<sup>645</sup> For example, agreement with **[confidential: customer D in Norway]** for supplies from the second half 2000 till first half 2001.

purchase a specific quantity from Tomra. Although it did not constitute a firm commitment, the agreed price was based on the indicated purchase quantity. The respective sentences implied that, under normal circumstances, Tomra relied on the customer doing its best to achieve the relevant purchase target. As a consequence of this, the customer did not feel free to consider buying from other suppliers if that would have implied missing the indicated quantity by a significant amount. Article 82 of the Treaty and Article 54 of the EEA Agreement focus on the practices of dominant undertakings, whether they constitute agreements or unilateral practices. Considering this, it is appropriate to consider instances where the formal acceptance by a customer of an offer is questionable in a similar way to those where acceptance is clear-cut. This could have been done by Tomra making it clear to a customer that a given price was linked to a specific purchasing target and where the respective prices and discounts were actually applied. Such practices form part of the same pattern of behaviour and pursue the same objective.

(304) As was already stated, it is evident that the quantities referred to in the agreements aimed at fulfilling the total requirements of the respective customers or at least at their potential of absorption. This is manifest from (i) Tomra's policy, (ii) its practices implemented in different national markets, (iii) the circumstances relating to agreements concluded with specific customers, in particular their actual purchasing volumes and preceding agreements, and (iv) the statements made by customers and Tomra itself. Even where the purchase targets were set below the estimated or actual requirements of a customer, they were likely to lead to foreclosure for Tomra's rivals, in particular where the indicated volume represented a high proportion of the customer's demand.

(305) Tomra has submitted that customers often had only a rather approximate understanding of the precise requirements of the outlets within the respective reference periods, which was even more the case with regard to complex organisations.<sup>646</sup> In order to reach the committed quantity, complex retail organisations would not consider purchasing from other suppliers until they were certain that they had reached or would reach the agreed target. In cases where the purchased number of machines exceeded the committed target by a certain margin, it was often the case that the purchasing volume in retrospect turned out to be higher than predicted by the customer at the beginning of the reference period, due, for instance, to higher than expected purchases by the independent retailers.<sup>647</sup> Furthermore, due to the fact that orders for specific installations were often placed by the individual outlets, there would be certain delays before all outlets become aware of the fact that a particular purchasing volume had, in fact, been achieved by the organisation.<sup>648</sup>

(306) These factors could have easily led to the overshooting of the forecasted demand of the customers, which did not necessarily make the margin of the

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<sup>646</sup> **Pages 11782-11784**, Tomra's response of 22 November 2004.

<sup>647</sup> For example, 1999, 2000 and 2001 purchases made by [**confidential: customer C in the Netherlands**] were above the target due to the fact that its franchisees purchased more than expected.

<sup>648</sup> Both aspects are emphasised by Tomra, e.g. see **pages 11906-11907**, Tomra's response of 22 November 2004, par. 823 and 827.

purchased machines above the agreed minimum quantity or target contestable for Tomra's competitors. This has been acknowledged by Tomra, when referring to the non transparency of the situation for customers, and resulted in a willingness to add a 10% margin of error in its economic analysis of agreements and conditions.<sup>649</sup>

(307) Given this situation, a target representing approximately 90% of the actual purchasing volume will, in practical terms, often be equivalent or close to full exclusivity. Where a purchase target corresponds to approximately 70-90% of a customer's actual requirements, there is, at least theoretically, a certain scope for purchases from the competitors. It is, however, questionable to what extent this constitutes effective sales opportunities for rivals during the course of the reference period of the agreement and even at the end of it, especially if they are not aware of such opportunities. Such agreements will have a likely foreclosure effect that will go beyond the formally tied proportion of the customer's requirements and will often be equivalent to quasi-exclusivity.

(308) In many instances quantity commitments were complemented by additional clauses, awarding Tomra a privileged status. For instance, some customers in the Netherlands were obliged to promote the sales of Tomra's products. According to other agreements, the actual purchases from Tomra were expected to be higher or the customer was expected to buy more machines from Tomra<sup>650</sup> beyond the volume to which it was firmly committed. Although it is difficult to convert such contractual arrangements into percentages, they unquestionably reinforced the foreclosure.

(309) With longer reference periods, a purchase target corresponding to a smaller proportion of the actual requirements can achieve a similar foreclosure effect to a target which is equal to a larger proportion of the total demand to be achieved during a shorter reference period, at least in the earlier phases of the reference period. With a longer reference period the number of machines purchased will increase, leading to a bigger percentage of the market being affected by the agreements. The higher the commitment compared to the actual or the estimated requirements with a short reference period, the more foreclosure concerns could be raised. Ambitious quantity commitments can, in general, increase the foreclosure effect even beyond the initial contract period, for instance, by causing customers to bring forward certain investments and, thereby, reducing demand in subsequent periods, or by leading to an extension of the contract period. Reference periods have to be evaluated in the context of the circumstances of the case, for example, the degree of Tomra's dominance, the long life-cycle of RVM and the non-recurring nature of demand. It follows that even short periods of less than a year, not to mention 1-3 years, can have and have had a substantial

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<sup>649</sup> Intransparency is stressed in numerous places in Tomra's response of 22 November 2004, see, for instance, **page 11838, 11840 and 11847**, par. 459, 467 and 499. In Attachment 6 to Tomra's response, containing an economic analysis of Tomra's agreements and conditions, Tomra adds a margin of error of 10% to the respective quantities.

<sup>650</sup> For example, agreement with Superunie for 2001-2002 **pages 3814-3187**, in particular, **page 3815**. See also "Attachment to the Global Master Agreement", **page 3586**. In its response, including Attachment 6 thereto, Tomra does not take this factor into account.

foreclosing effect when the conduct in question related to periods of demand corresponding to the introduction of mandatory systems.

(310) As was demonstrated in Section III by the agreements described there, the purchasing targets referred to in the agreements or conditions applied by Tomra usually represented a proportion of at least 70% of the actual requirements for a reference period of approximately one year. Often the percentage was higher and sometimes the relevant quantity even exceeded the actual requirements.

(311) Amongst the agreements with a reference period of longer than one year, the purchase volume commitment contained in the agreement with **[confidential: customer E in Austria]** for supplies in 2000-2001 constituted the lowest percentage (55%) of customer's demand compared to all agreements identified in this Decision. The committed quantity, however, corresponded to approximately 75% of the "normal" requirements of this customer in a two-year period and exceeded the actual demand in the first year, preceding the introduction of the mandatory deposit system.

(312) Tomra argues that in so far as the stipulated quantities were considerably higher than the customers' actual requirements, the respective quantities were fully contestable for competitors as this would prove that the agreement was manifestly not enforced.<sup>651</sup> The Commission cannot accept this reasoning, given that this situation confirms Tomra's policy of pushing for ambitious and sometimes unrealistically large quantity commitments. The agreements and purchase conditions put pressure on the customer to try to do its best to come close to the target, excluding purchases from competitors at least for some part of, if not the entire, reference period. Moreover, it is wrong to state that the ambitious target did not foreclose the competitors from the competition for customers' orders during the entire reference period, as it is difficult to establish at exactly what moment the customer accepted the fact that he was not going to reach the target. In the end, it was not necessarily decisive whether a specific purchasing target was met entirely within the agreed time frame as long as none or only insignificant purchases were made from competitors. Therefore, "non-enforcement" of such commitments or targets could not weaken the exclusionary nature of the agreements or conditions, contrary to what is argued by Tomra. The fact that agreements or arrangements were sometimes prolonged, allowing the customer to reach the target rather than Tomra insisting on the customer's reaching the target within the agreed deadline, was directed precisely at achieving the exclusionary effect.

(313) For the reasons given, the agreements and conditions referred to in this section have to be considered as providing, in fact, for total or partial exclusivity.

### ***Rebate schemes***

(314) The following rebate schemes have been identified throughout this decision:

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<sup>651</sup> See for example, section on Germany, **pages 12040-12043**, Tomra's response of 22 November 2004, Attachment 6, p. 24-27.



- agreements with **[confidential: chain No. 1 of customer C in Sweden]** for 1998-1999,
- agreements with **[confidential: chain No. 2 of customer C in Sweden]**, **[confidential: chain No. 3 of customer C in Sweden]** and **[confidential: chain No. 4 of customer C in Sweden]** for 2000,
- cooperation agreement with **[confidential: customer C in Sweden]** for 2001,
- agreement with **[confidential: customer C in Germany]** for 2001 and 2002,
- agreements with **[confidential: central unit of customer A in Germany]** for 1999 and 2002,
- agreements with **[confidential: subsidiary No. 4 of customer A in Germany]** for 1999,
- agreement with **[confidential: customer C in Austria]** for 1999,
- agreements concluded with **[confidential: customer D in Germany]** for 1999-2002,
- agreements with **[confidential: customer F in Germany]** for 1998-2002,
- agreement with **[confidential: customer B in Sweden]** for 1999-2000.

(315) Apart from these rebate schemes, several of the agreements discussed under quantity commitments also featured elements of a total rather than incremental turnover rebate scheme, in particular the agreements applying to big customers in Norway in 1999-2000 and the conditions applying in 2000-2001 and the agreements with **[confidential: customer F in the Netherlands]** for 2001 and 2002.

(316) According to the individualised rebate schemes identified customers were entitled to bonuses or rebates depending on them reaching or exceeding a given purchasing target at the end of a given reference period. The reference period was usually one year. While in some cases the relevant rebates or bonuses depended on reaching a single purchasing target, other agreements contained progressive bonuses relating to two, three or more thresholds. All the rebate schemes that applied in Norway, Sweden, the Netherlands, Germany and Austria were retroactive in the sense that the achievement of a given threshold at the end of the reference period entitled the customer to a rebate on all the purchases made during the reference period, that is to say, the rebates were retroactive.

(317) While most of the individualised rebate schemes provided for a cash discount, in some cases Tomra granted bonuses in kind, namely machine installations or upgrades for free. Most of the rebate schemes provided for the rebate to be paid at the end of the reference period depending on whether the threshold was reached. In other instances, the rebate was subtracted from an invoiced price for the machines, usually combined with a provision obliging the customer to

transfer back the discount if the agreed target was missed.<sup>652</sup> Irrespective of the discount payment mechanism used, the purpose was to put pressure on the customer to actually reach the respective threshold.

(318) In most cases the individualised retroactive rebate schemes were part of a more or less formal agreement. It is not, however, necessary for the other party to explicitly accept the respective rebate scheme. A unilateral granting of rebates has to be taken into account at least in so far as the customer can have a reasonable expectation that it will be granted the discount or rebate if it reaches the respective purchasing volume.<sup>653</sup>

(319) As was established with regard to the quantity commitments discussed in Section III, 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.

(320) With regard to the most progressive rebate schemes, that is to say, the schemes containing at least two thresholds<sup>654</sup>, the first threshold already corresponded to a substantial proportion of the customer's estimated or actual requirements and usually represented more than half of the customers' total demand<sup>655</sup>, while the additional bonus steps constituted further incentives for buying quantities from Tomra. The higher bonus thresholds corresponded regularly to the total requirements of the customer for the contract reference period or even exceeded them. This was the case in relation to **[confidential: chain No. 1 of customer C in Sweden]** in 1999, **[confidential: chain No. 2 of customer C in Sweden]**, and **[confidential: chain No. 4 of customer C in Sweden]** in 2000, in relation to **[confidential: customer C in Sweden]** for 2001 and 2002, in relation to **[confidential: customer A in Norway]**, **[confidential: customer C in Norway]** and **[confidential: customer D in Norway]** in 2000-2001, in relation to **[confidential: customer C in Germany]** for 2001 and in relation to **[confidential: central unit of customer A in Germany]** for 2002. As an exception to the rule, the highest threshold of the rebate scheme applicable to **[confidential: customer B in Sweden]** in 1999 was exceeded rather clearly by the customer, as a result of which the top bonus threshold corresponded to 59% of the actual requirements of the customer, which was an atypical situation.<sup>656</sup> In other cases, however, for example, **[confidential: customer C in Sweden]** and

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<sup>652</sup> For example, agreement concluded with **[confidential: customer A in Norway]** for 1999, see Section III (E).

<sup>653</sup> Case 85/76, *Hoffman La Roche*, ECR 1979, p. 461, in particular, par. 89; Case C-62/86, *AKZO v Commission*, [1991] ECR I-3359, par. 149; Case T-65/89, *BPB Industries Plc and British Gypsum LTD*, [1993] ECR II-389, par. 120.

<sup>654</sup> Exceptions are the agreements with **[confidential: customer customer F in Germany]**, **[confidential: customer D in Germany]** and **[confidential: customer C in Austria]** in 1999, which start at a lower level.

<sup>655</sup> In the agreements relating to **[confidential: customer F in the Netherlands]**, which have already been discussed above and which contain other restrictive elements, the lowest threshold was in the area of 50% compared to the average annual requirements.

<sup>656</sup> In 2000, **[confidential: customer B in Sweden]** top bonus threshold was set slightly above the threshold applying in 1999.

[confidential: customer C in Germany] in 2001, the first threshold already exceeded the actual requirements of the customers.

- (321) 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.<sup>657</sup> 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. Marginal sales, that is to say, sales that allowed the customer to reach the threshold, were very attractive in terms of the financial benefit.
- (322) 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. This was true irrespective of whether the customer was actually aware of being close to the threshold or whether it was only generally aware about the benefits provided by the system. The incentive was particularly high where the first threshold already represented a large proportion of the customer's requirements, since the possibility of missing it implied the risk of not receiving any rebate at all.
- (323) Tomra has not provided any evidence in support of its allegation that those who placed the order, often the individual outlets, were not aware of the rebates or had only a limited interest in helping to increase the bonus rate for other outlets. Moreover, since it is evident that the schemes were designed to provide an incentive for the retail organisations as a whole and depended on the performance of the entire group, it is inconceivable that no information on essential features of the agreement and no instructions were given to the lower level of the organisation.<sup>658</sup> It is furthermore inconceivable that Tomra, which has stated that the purpose of the rebate schemes was to stimulate its own sales<sup>659</sup>, would have granted any such rebates if it was convinced that such rebates could not have had any effect on the volume purchased by the customers. Tomra's argument that it was necessary to operate a retroactive rebate scheme in order to make sure that the benefit of the higher bonus rate was spread evenly amongst the individual outlets<sup>660</sup> also shows that the outlets cannot have been unaware of the existence of the respective rebate schemes.

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<sup>657</sup> Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission (Michelin II)*, judgment of 30 September 2003, par. 88.

<sup>658</sup> Tomra argues that the individual outlets were not aware of the rebates and discounts, see footnote 649 above, but does not offer any evidence for this allegation.

<sup>659</sup> **Page 11777**, Tomra's response of 22 November 2004.

<sup>660</sup> The fact that this argument does not constitute an acceptable justification for such rebate schemes, is another matter. This is explained below.

- (324) The fact that Tomra’s customers and, in particular the individual purchasers, were often unaware of where they stood with regard to the rebate scheme thresholds and with regard to how many machines the organisation as a whole would still buy in the remaining course of the reference period<sup>661</sup>, did not reduce the incentive. This element of non transparency may even exacerbate the effect of the rebate scheme, as the customers would still have a perception of a possible incentive even where the organisation was unlikely to reach the necessary volume or had already reached it. While not being a precondition for the existence of a fidelity rebate, non transparency has been recognised as an element of it, liable to strengthen the loyalty building character of a rebate scheme.<sup>662</sup>
- (325) In accordance with the case law of the Court of Justice and the Court of First Instance of the European Communities<sup>663</sup>, the rebate schemes identified have to be qualified as loyalty building and, therefore, as fidelity rebates. In the framework agreement with **[confidential: customer C in Sweden]** concluded for 2001, the relevant bonus, which in its characteristics is similar to the other bonus schemes referred to, is even explicitly referred to as a “loyalty and volume bonus”.
- (326) Unlike other cases, the rebate schemes applied in relation to the **[confidential: customer D in Germany]** group and **[confidential: customer F in Germany]** in Germany<sup>664</sup>, as well as to **[confidential: customer C in Austria]** in Austria for the purchases in 1999<sup>665</sup>, did not start at a level representing a high proportion of the customer’s requirements. The higher bonus thresholds, however, corresponded to or even exceeded the customers’ requirements in a reference period of one year.<sup>666</sup> Moreover, the most advantageous bonus rate the customer achieved applied to all purchases made during the reference period. All this in the end provided a clear incentive for continuing to buy from Tomra, up to the customers’ total requirements and so to obtain a higher bonus for all its purchases rather than switching to a competitor. This incentive grew with increased orders in the course of the year<sup>667</sup>. This way the rebate schemes in question also had a loyalty building character. Having regard to the fact that the actual purchasing volumes turned out to exceed the highest threshold by a very large margin in relation to **[confidential: customer F in Germany]** in 1998 and **[confidential: customer D in Germany]** in 1999, these two agreements are not considered to be loyalty building.

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<sup>661</sup> This is stressed by Tomra in its response.

<sup>662</sup> *Michelin II*, par. 141, and T-219/99, *British Airways plc v. Commission*, 2003 ECR.

<sup>663</sup> See *Hoffmann-La Roche*, par. 89, *Michelin I* (par. 71-86) and *Michelin II* (par. 56).

<sup>664</sup> See Section III (C).

<sup>665</sup> See Section III (D).

<sup>666</sup> Except the situation relating to **[confidential: customer D in Germany]** in 1999 and **[confidential: customer F in Germany]** in 1998.

<sup>667</sup> The effect of the bonus scheme is illustrated by a letter that Tomra sent to a member of **[confidential: customer F in Germany]** in October 1999, where it stressed that additional purchases would lead to a higher bonus rate, benefiting all purchases made in the course of the year, **pages 6817-6819**, MS 95. In October 1999 with regard to Tomra’s offer to **[confidential: customer G in Germany]** Tomra stressed that placing the order would make the customer reach the next bonus step, which in turn would benefit all its purchases made in 1999. While the yearly bonus for all purchases would be increased by 1% to 3.5%, the actual advantage for the additional purchases would in fact be much higher.

(327) In so far as the bonus rates progressed less strongly than the corresponding volume threshold, that is to say, degressively, this cannot call the loyalty building character of the respective schemes into question.<sup>668</sup> Often the bonus rates increased in a more or less linear fashion compared to the thresholds. Sometimes the bonuses even increased disproportionately compared to the respective quantities, thereby emphasising the loyalty building character of the scheme. In the case of **[confidential: customer D in Germany]** and **[confidential: customer F in Germany]**, the quantities necessary to reach the higher bonus levels were, furthermore, increased over the years.

(328) In the light of what has been said above, the rebate schemes applying to **[confidential: customer D in Germany]**, **[confidential: customer F in Germany]** and **[confidential: customer C in Austria]** also have to be qualified as fidelity rebates with the exception of the schemes applying to **[confidential: customer F in Germany]** in 1998 and **[confidential: customer D in Germany]** in 1999.

(329) Tomra's argument that the possibility of not reaching a certain threshold, and thereby losing the opportunity to obtain a higher rebate, does not constitute a "penalty"<sup>669</sup> for a customer, cannot affect the character of the rebate schemes in question. As has been stated by the Court<sup>670</sup>, the risk of foregoing a financial advantage or, in other words, the risk of a loss of opportunity is the essence of any rebate scheme. In so far as a discount has been subtracted directly but had to be reimbursed in the event of failing to reach the target, this may in fact be perceived as some sort of penalty. It does not follow from the case law of the Community courts that it is necessary to demonstrate that the rebate scheme has the drastic effect that the other party could not afford to take the risk of buying from a competitor as it would otherwise incur losses.<sup>671</sup> In any case the "penalty" has to be seen as a switching cost for the customer who would be likely to consider alternative suppliers. The fact that Tomra's prices were generally higher than those of its competitors does not reduce the incentive provided by rebates, but means simply that arithmetically much more significant rebates had to be offered by competitors to offset the switching costs incurred by the customers.

### C. EFFECT ON TRADE

(330) The products supplied by Tomra and its competitors are made in different EEA Contracting Parties, in particular Norway, Finland, Sweden and Germany, and are sold in different EEA Contracting Parties, including Member States and EFTA States. 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. Under these circumstances, the practices in question were capable of influencing appreciably the patterns of trade amongst Member States as well as between the EFTA States, in particular Norway, and Member

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<sup>668</sup> *Michelin II*, par. 91.

<sup>669</sup> See, for instance, **page 11919**, Tomra's response of 22 November 2004, par. 909.

<sup>670</sup> *Michelin II*, par. 56.

<sup>671</sup> See **pages 11921-11922**, Tomra's response of 22 November 2004, par. 917-918. Also e.g. *Michelin I*, par. 71, 85.

States and were capable of influencing the competitive structure within the Community and the EEA.<sup>672</sup> 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. Since the practices of Tomra may have had an effect on trade between Member States and Contracting Parties to the EEA Agreement, the Commission is competent in this case to apply both Article 82 of the Treaty and Article 54 of the EEA Agreement on the basis of Article 56 of the EEA Agreement.

#### D. REPERCUSSIONS OF TOMRA'S PRACTICES FOR COMPETITION

- (331) Article 82 of the Treaty and Article 54 of the EEA Agreement are not designed to punish a successful company for acquiring a strong position on the market. Only the practices which abuse the dominant position are prohibited. A dominant company may grant justified discounts and rebates in order to attract more customers or induce its present customers to buy more significant portions of its requirements from the dominant supplier.<sup>673</sup> A dominant company is, however, not permitted to adopt practices that “*through recourse to methods different from those which condition 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.*”<sup>674</sup>
- (332) 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”<sup>675</sup>, the Commission has completed its analysis in this case by considering the likely effects of Tomra's practices on the RVMs market.
- (333) 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.<sup>676</sup> In *Michelin I*, the Court of Justice stated that it is necessary “*to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the*

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<sup>672</sup> See also the Commission's notice “*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*”, OJ C 101 of 27 April 2004, in particular, par. 17, 61, 75, 76, 93 and 94 thereof, as well as the following decisions of the Court of Justice: Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] ECR p. 223; Case 85/76, *Hoffmann-La Roche*, [1979] ECR-461, par. 125; Joined Cases C-241/91 P and C-242/91 P, *RTE (Magill)*, [1995] ECR I-743, par. 70; Case 6/72, *Continental Can*, [1973] ECR 215, par. 16 and case 27/76, *United Brands*, [1978] ECR 207, par. 197-203.

<sup>673</sup> Case T-203/01, *Michelin II*, par. 58.

<sup>674</sup> Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, par. 91.

<sup>675</sup> *Michelin II*, par. 239, *British Airways*, par. 250.

<sup>676</sup> *Michelin I*, par. 57.

market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition”.<sup>677</sup> The same can be applied with regard to the quantity commitments, aimed at meeting the entire or almost entire demand of a customer.<sup>678</sup> 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. 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.

(334) Tomra has generally argued that the rebate schemes and quantity commitment offered to its customers were justified by its cost efficiencies “*related to investment incentives and the recovery of fixed costs of production*”.<sup>679</sup> It has, however, failed to submit any estimates or calculations to demonstrate the cost reductions attained. In addition, the discounts granted under different contracts, irrespective of whether they were granted under a rebate or under a quantity commitment, were all individualised.

### ***Stable market share of Tomra***

(335) That Tomra’s exclusionary strategy did have the intended effect could first be demonstrated by the stable market share kept by the dominant company in each national market, and on the EEA market in general.

(336) On individual national markets the position of Tomra has differed from country to country, however its market share has always been on average around 80% on the market for high-end and low-end machines throughout the period of investigation,<sup>680</sup> and has never been lower than 38%, which in fact was an exceptional development once in Sweden in 1998 when a lot of low-end machines were sold by other suppliers.<sup>681</sup> On the high-end machine market, however, Tomra’s market share was never lower than 66% throughout the reference period in any of the five national markets under investigation (see Figure 28).<sup>682</sup> It has always stayed comparatively stable, compared to the weak market position of its rivals. Throughout 1998-2002 Tomra’s market share has never decreased by more than 25%, which actually happened only once in

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<sup>677</sup> *Michelin I*, par. 73.

<sup>678</sup> In *Irish Sugar* the Court said that quantity commitments are “normally unobjectionable”, but only when they are not related to customer’s purchases over a period of time and are granted in return for costs savings achieved by the dominant supplier.

<sup>679</sup> **Page 12022**, Tomra’s response of 22 November 2004, Attachment 6, p. 6.

<sup>680</sup> See Figure 3, Figure 4, Figure 5, Figure 6, Figure 7, Figure 8, and Figure 10.

<sup>681</sup> See Figure 5.

<sup>682</sup> See Figure 11.

Sweden when Tomra's market share dropped from 95% to 70% in 2000.<sup>683</sup> In the Netherlands, Tomra maintained a very stable market share for five years, starting with 99% in 1998 and keeping it rather high until 2002, when it held [confidential: 85-95%] market share. In Norway, Tomra's market share has not changed by more than 5 percentage points in any individual year throughout the reference period. Overall, Tomra's market position remained very stable in each individual market and in the EEA in general, especially considering the characteristic of RVM systems market where the demand is non-recurring and generally does not remain stable over the course of several years.

**Figure 28:** Tomra's market share on the national markets of high-end and low-end machines

	1998	1999	2000	2001	2002
<b>The Netherlands</b>	99%	99%	99%	[confidential: 90-100%]	[confidential: 85-95%]
<b>Sweden<sup>684</sup></b>	38%	77%	72%	[confidential: 65-75%]	[confidential: 90-100%]
<b>Norway<sup>685</sup></b>	99%	94%	99%	[confidential: 88-98%]	[confidential: 86-96%]
<b>Austria<sup>686</sup></b>	94%	95%	95%	[confidential: 75-85%]	[confidential: 76-86%]
<b>Germany<sup>687</sup></b>	68%	72%	74%	[confidential: 60-70%]	[confidential: 65-75%]

<sup>683</sup> The tied market share in 1999 was very low – 8% only, compared to 23% in 2000, 40% in 2001, and 54% in 2002.

<sup>684</sup> If low-end machines are excluded, the market shares would be the following: 1998 – 94%, 1999 – 95%, 2000 – 70%, 2001 – 73%, 2002 – 95%.

<sup>685</sup> Low-end machine sales in Norway were negligent, therefore, the market shares held by Tomra on high-end machine market would not differ significantly.

<sup>686</sup> The sales of low-end machines were very small, therefore the market shares of Tomra on the high-end machines market would be similar to the ones on the low-end, if not higher. According the available figures for 2000-2002, Tomra's market share on the high-end machines product market was 98% in 2000, [confidential: 75-85%] in 2001 and [confidential: 75-85%] in 2002.

<sup>687</sup> If low-end machines are excluded, Tomra's market shares would be the following: 2000 – 83%, 2001 – [confidential: 72-82%], 2002 – [confidential: 61-71%] (low-end machine sales figures are available only for 2000-2002).



### *Weak position of the rivals*

- (337) When Tomra's market position remained more or less unchanged, the market position of its rivals continued to be weak, notwithstanding periodic positive demand shocks on most of the market, that occurred due to the introduction of mandatory deposit systems and that may have attracted entry.
- (338) In the Netherlands, for instance, Bevesys and Prokent were major Tomra rivals on at least the high-end RVM market. The highest market share reached by either of them during 1998-2002 was [confidential] % and [confidential] % respectively. In Sweden, Tomra's only competitor on the through-the-wall machines market was Repant with a [confidential] % market share in 2002<sup>688</sup>, after two other rivals, Prokent and Eleiko, had exited the market.<sup>689</sup> In Norway, Tomra's "home" market, the only competitor was Repant, who managed to acquire a [confidential] % market share in 2002. The only period during which competitors managed to achieve market shares bigger than 10% was when Tomra's exclusionary practises were less intense.<sup>690</sup>
- (339) This indicates that despite the growth shocks that would normally attract new entry or would lead to increased market shares of rivals, it was not possible for Tomra's competitors to achieve a stronger position on the market. Furthermore, there was no successful entry into any of the national markets. On the contrary, some of the rivals left the market either due to insolvency or due to acquisition. The complainant, Prokent, was predominantly present on the German market, where it managed to acquire an [confidential] % market share in 2001 and 2002, a big increase compared to [confidential] % in 1998. In 2003, however, it left the market. In Norway, Halton was eliminated through Tomra's acquisition in 1997, just as Eleiko was in the Swedish market in 2001.

### *Relation between the tied market demand and the changes in position of the market players*

- (340) Changes in Tomra's market share were connected to the variations in the size of the tied market demand. Usually, Tomra would sell a higher number of machines during the years when more of the total market demand was covered by its exclusionary agreements. For instance, in the Netherlands the demand for RVM solutions peaked in 2001 due to the introduction of the Euro when most of the retailers used the opportunity to upgrade their equipment. Anticipating this increase, Tomra committed its customers to purchasing the highest volume of RVMs under the identified exclusivity, rebate and quantity commitment agreements during the years under investigation, namely 1998-2002. In 1999 the tied market share was roughly 61% and Tomra's market share was 99%. When a

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<sup>688</sup> Page 10070, Tomra's reply of 25 June 2003, Appendix 2.

<sup>689</sup> Prokent left the market after it went bankrupt, Eleiko was acquired by Tomra.

<sup>690</sup> In Germany, for example, Prokent acquired [confidential] % market share in 2000 when the tied market share of Tomra's exclusionary practices went down to 19% compared to 45% the previous year. In the Netherlands, Bevesys acquired [confidential] % in 2002, when Tomra's exclusionary agreements covered only 37% of the total market demand compared to 65% in 2000 and 58% in 2001.

smaller number of machines was sold under the exclusionary agreements in 2002, resulting in only one third of the total market demand being covered, Tomra's market share in the Netherlands reached its lowest level throughout the reference period 1998-2002, namely [confidential: 85-95%].

(341) The situation in the Netherlands is one of the best illustrations of the effect that the intensified exclusionary strategy had on the market, sales and competitors. In other markets where the relation between Tomra's market position and the intensity of its exclusionary practices was not so evident, other observations demonstrate a similar effect of the exclusionary strategy. For example, when the customers were not restrained by the exclusionary agreements concluded with Tomra, they began to purchase larger numbers of competing machines.<sup>691</sup> In general, the rival RVM suppliers sold more products, the smaller the portion of total market demand covered by exclusionary arrangements.<sup>692</sup>

#### *Other observations*

(342) In addition to Tomra's stable market shares on the markets compared to the weak position of its rivals and the link between the size of the tied market demand and Tomra's market share, there are additional factors that indicate the exclusionary effect of Tomra's practices.

(343) The market for RVM solutions is in general created by the adoption of national legislation introducing mandatory deposit systems. This, in turn, results in the demand for the machines being periodical, meaning that it increases significantly during certain periods of time. Once the sales have increased, the number of machines purchased afterwards will be significantly lower in the following years because most of the customers will endeavour to complete their purchase of RVMs so as to be ready for the introduction of deposit systems. When the demand on the market is non recurrent, as is the case in the RVM market, and a dominant supplier succeeds in capturing the majority of the demand in the "key year", the market will no longer offer the opportunity for entry or for recent entrants to establish a stronger position. This effect, in the RVM market, will continue to exist throughout the life-cycle of RVMs or until a new change in the national legislation with regard to the deposit system occurs.

(344) Notwithstanding occasional surges in demand for RVMs and the fact that, as was demonstrated by the fact of several new players entering the market<sup>693</sup>, entry into the RVM market is not impossible or exceedingly costly, the RVM markets throughout the reference period continued to be almost monopolistic. However, there seem to be no objective reasons behind the existence of such a strong position on a market like the RVM solutions market. This in turn led to a situation where the prices did not go down and the choice of the products did not

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<sup>691</sup> This was the case e.g. in Germany, where [confidential: customer A in Germany] and [confidential: customer E in Germany] began buying bigger numbers of Prokent machines each year after the expiry of the exclusionary agreements with Tomra.

<sup>692</sup> As it was the case in Norway in 2001, when the tied market share was 21% compared to 93% in 1999. In 2001, Repant was able to sell some machines then. There was a similar situation in Sweden, Austria, Germany and the Netherlands.

<sup>693</sup> For example, Prokent and Repant.

change significantly. For example, the list price for one of Tomra's T-600 BC machines remained the same throughout 1999, 2000 and 2001.<sup>694</sup> For RVMs such as the T-500 BC and the "TRIO", the price increased.

### **Conclusion**

(345) Throughout the reference period of this 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.

(346) In addition to the absence of cost efficiencies justifying Tomra's practices described in section III, 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.

### **E. POSSIBLE JUSTIFICATION/TOMRA'S DEFENCE**

(347) Tomra argues that, in its view, the respective agreements are unobjectionable, *inter alia* since as a supplier it simply reacted to requests by customers who specified the respective quantities and asked for discounts and rebates in order to obtain the best possible price from it.<sup>695</sup> Tomra also claims that its discounts and rebates were justified by the cost-savings brought about by the agreements.<sup>696</sup> It argues that its discounts and rebates simply constituted quantity discounts that are perfectly legal under Articles 82 of the Treaty and 54 of the EEA Agreement.<sup>697</sup> Tomra also claims that "a great number of discounts" were granted on the invoice.<sup>698</sup> Finally, Tomra contends that the rebate schemes as applied by it were innocuous, and only less than a third of such agreements listed by the Commission could be considered as potentially exclusionary.<sup>699</sup>

(348) While it is correct that pure quantity discounts have to be distinguished from loyalty rebates<sup>700</sup>, Tomra ignores the fact that its discounts and rebates did not relate to a single transaction or the bundling of transactions over a short period of

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<sup>694</sup> **Page 7275**, Tomra's reply of 14 February 2002.

<sup>695</sup> **Page 7246**, this is at least implied e.g. in Tomra's reply of 14 March 2002, p. 12.

<sup>696</sup> **Page 7269**, Tomra's reply of 14 February 2002, p. 35.

<sup>697</sup> E.g. **page 11928** or **11929**, Tomra's response of 22 November 2004, par. 958 or 961, or **page 11814 - 11816**, Tomra's response of 22 November 2004, par. 346-357.

<sup>698</sup> **Page 11923**, Tomra's response of 22 November 2004, par. 925-926.

<sup>699</sup> **Pages 12065-12066**, Tomra's response of 22 November 2004, Attachment 6, p. 49-50.

<sup>700</sup> *Michelin II*, par. 58.

time, but instead depended on the accumulated purchases in a given reference period, usually one year. Even in so far as they were subtracted directly from the invoiced price they were still linked to a given purchasing volume within the reference period.

## 1. COST SAVINGS

(349) A general reference to economies of scale or the fact that, the more machines a customer buys or commits to buying, the more cost efficient it would be to sell to this customer<sup>701</sup> or to the significance of fixed costs<sup>702</sup>, is not sufficient.<sup>703</sup> These considerations reveal nothing about Tomra's cost versatility in response to output changes, but only reveal non-linear pricing by Tomra. In particular, Tomra has not submitted any evidence that economies of scale exceeded the size of the total market thereby explaining the high concentration of the market, developing towards monopoly. It remains unexplained, for instance, how deliveries to many different locations spread over a longer period could have reduced shipping and avoided storage costs.<sup>704</sup> Tomra has failed to explain how the various discounts could have adequately reflected any cost-savings based on economies of scale<sup>705</sup>.

(350) Apart from the fact that Tomra has not provided any evidence to that effect, various factors make it very unlikely that the practices are and could be justified by cost savings.

(351) Although even an entirely consistent system of discount and rebates does not necessarily imply cost savings, there are inconsistencies in relation to the different discounts and bonuses applied by Tomra. This, in turn, makes it difficult to accept that the discounts, rebates and bonuses could have represented an objective consideration for cost-savings. When considering the different cost factors referred to by Tomra and its flexible "Just-in-time" production and "Ship-to-line" delivery principles, one would, for instance, expect concentrated larger orders with precise specifications as to equipment and installation sites and installations concentrated in a short period of time to be more cost efficient than long term and less specific agreements. This, however, is not reflected in Tomra's discount and bonus policy as it results from the file. In general, Tomra applied the most advantageous discounts to long-term and less specific agreements. Furthermore, there was little connection between the quantity purchased and the discounts offered.

(352) The price [**confidential: customer L in the Netherlands**] paid for a quantity of 43 RVMs to be installed within 3 months in 2001, for instance, was clearly

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<sup>701</sup> **Page 7269**, Tomra's reply of 14 February 2002, p. 35, answer to question 28.

<sup>702</sup> **Pages 11971-11972**, Tomra's response of 22 November 2004, par. 1310-1313, and **pages 12022-12023**, Tomra's response of 22 November 2004, Attachment 6, p. 6-7.

<sup>703</sup> See *Michelin II*, par. 107-110.

<sup>704</sup> These aspects were also mentioned in Tomra's reply of 14 February 2002, **page 7269**. Tomra did not elaborate on them in its response of 22 November 2004.

<sup>705</sup> In its response of 22 November 2004 and in the Oral Hearing of 7 December 2004, Tomra did not provide any explanations of this, aside from drawing attention to its high level of fixed costs and to its aim of increasing purchasing volumes without explaining to what extent the fact that it tied rebates to exclusionary conditions was liable to significantly increase sales compared with discounts granted independently of purchasing volumes and targets.

higher than the price it would have had to pay for committing 150 RVMs to be installed within 21 months.<sup>706</sup> **[confidential: customer G in the Netherlands]**, which committed to purchasing a quantity of 51 RVMs over 3 years, that is to say, 17 per year, was offered a higher discount than customers which committed to higher quantities per year but only had an annual agreement.<sup>707</sup> For a concentrated and specific order of 19 RVMs in June 2001, **[confidential: customer I in Germany]** was charged a much higher price than other customers had to pay and was granted only a minor discount.<sup>708</sup> By contrast, one German customer was offered very advantageous conditions compared to other customers in exchange for a two- or three-year exclusivity agreement<sup>709</sup>, although this customer used to order only relatively small numbers of RVMs. According to internal notes, long-term-contracts led to lower margins.<sup>710</sup>

(353) Most significantly, there was no consistent relationship between objective quantities and quantity related discounts or bonuses, either within individual countries, or within the EEA as a whole. The same quantity did not necessarily correspond to the same discount or bonus, whereas the same or a similar discount or bonus applied to different quantities in other cases. There are also examples where larger objective quantities led to smaller discounts or bonuses compared to smaller quantities.<sup>711</sup>

(354) In relation to progressive bonus schemes which started at a low level, the bonus steps were linear in some cases and non-linear in other cases. In certain cases the increase in bonus percentages was even higher than the respective increase in purchasing volume. In other schemes there were large margins, especially those between zero and the first bonus threshold, within which the

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**[confidential].**

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**[confidential].**

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**Pages 6280-6281**, AK 20, letter of 22 March 2000, **pages 8573-8574**, Annex 6, Binder 4, No 201, letter of 11 April 2000, **pages 6276-6279**, AK 19.

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**Pages 3951**, EF 3, (Notes from an MD meeting): "...long term deal means also loss in margins .." **page 3955**, EF 4, Tomra Systems B.V., The Netherlands, Budget 2001, hand-written addition: "Long term deals will affect your profit margins."

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Amongst the number of examples, it may, for instance, be referred to the following: between 2000 and 2002 **[confidential: parent of customer A in the Netherlands]** paid NLG **[confidential]** for a T-610, in exchange for a commitment to purchase c. 270 RVMs within 3 years (200 and the remaining quantity from the previous agreement), while **[confidential: customer H in the Netherlands]** was offered NLG **[confidential]** for a commitment to purchase 325 RVMs of the same type in 2 ½ years and was finally charged this price for a minimum of 130 RVMs in 1 ½ years, which represents approximately the same quantity per year as in the case of **[confidential: parent of customer A in the Netherlands]**. In Austria between 1999 and 2001 **[confidential: customer D in Austria]** had to pay prices that were considerably higher than **[confidential: customer A in Austria]**'s, although the latter bought fewer machines, while in 1999 and 2000 **[confidential: customer E in Austria]** had to pay higher prices than customers which bought much smaller quantities (**page 7272**, Tomra's reply of 14 February 2002, p. 38, and **page 7688**, Tomra's reply of 14 March 2002, Appendix 6, Binder 1). In Germany, in 2000, **[confidential: customer G in Germany]** was offered lower prices than several larger customers, in case it would sign a long-term exclusivity agreement. In Norway, in 1999/2000, **[confidential: customer D in Norway]** was granted a 14% discount for only 200 RVMs, while other customers had to commit quantities of approximately 500 RVMs to be granted the same price. **[confidential: customer D in Norway]** paid a lower price than **[confidential: customer C in Norway]**, which purchased a much higher quantity (**page 9401**, Tomra's reply of 14 March 2002, Appendix 6, Binder 6, and **page 7273**, Tomra's reply of 14 February 2002, p. 39).

quantity that was committed or purchased did not have any influence on the bonus or rebate<sup>712</sup>, whereas relatively small additional quantities could lead to a considerably higher bonus.<sup>713</sup> It is not clear either why the passing of a certain threshold all of a sudden made supplies to a particular customer considerably cheaper, including the equipment already supplied before the threshold was reached.

(355) Finally, the fact that, in line with Tomra's policy, the quantities relating to discounts or rebates represented tailor-made or individualised targets through which Tomra, by way of commitment and/or financial incentive, secured quantities that made it the exclusive or almost exclusive supplier, also shows that the primary aim of the discounts in question cannot have been to adequately reflect cost savings. This is borne out by the fact that the most advantageous discounts offered usually related to exclusivity.<sup>714</sup> Moreover, some of the discounts or rebates which are similar in character to many of the rebates applied in relation to other customers, were explicitly referred to as loyalty rebates.<sup>715</sup>

(356) There are, therefore, plenty of indications that Tomra's agreements and conditions and the discounts, rebates and bonuses contained in them constituted primarily a means to secure *de facto* exclusivity or a reward for loyalty.

(357) As regards Tomra's assertion that it was necessary to operate retroactive rebate systems in order to make sure that the benefit was spread evenly across the outlets of an organisation<sup>716</sup>, it is sufficient to point out that there are other possibilities to ensure that price arrangements do not discriminate between individual outlets, without giving them a loyalty-inducing character.

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<sup>712</sup> E.g. cooperation agreement with [confidential: customer C in Sweden] for 2000 and 2001 and agreement with [confidential: customer C in Germany] for 2001.

<sup>713</sup> Discounts/bonuses applicable in [confidential: EEA country] in 2000-2001.

<sup>714</sup> In 2000, in Germany, for instance, [confidential: subsidiary No. 1 of customer A in Germany], which accepted Tomra as its sole supplier, was granted the most favourable conditions at the time. Apart from being offered a price of DEM [confidential] for a T-500 Combi, it did not have to pay the installation charge, which was usually DEM [confidential], and was also granted free-of-charge upgrades for older machines (see pages 6668-6670, and page 10618, reply given by [confidential: subsidiary No. 1 of customer A in Germany], answer to question 8). [confidential: customer G in Germany] was offered a price of DEM [confidential] for the T-500 plus free-of-charge upgrades in exchange for a three-year exclusivity agreement, while at the same time other customers, including those which bought higher quantities, had to pay higher prices (See a price table annexed to Tomra's reply of 14 March 2002, page 7690). Between 2000 and 2002 [confidential: parent of customer A in the Netherlands] was granted the lowest prices in the Netherlands. It follows from a letter sent by Tomra Systems B.V. to [confidential: customer H in the Netherlands] on 20 July 2001, (page 3835, EF 23) that the question of whether a customer was willing to grant Tomra exclusivity was an important factor for the prices Tomra charged.

<sup>715</sup> E.g. framework agreement with [confidential: customer C in Sweden] for 2001 and 2002 and of agreement with [confidential: customer B in Germany] for 2000 and 2001.

<sup>716</sup> See, for example, page 11860, Tomra's response of 22 November 2004, par. 565.

## 2. TOMRA ARGUES THAT CUSTOMERS REQUESTED REBATES AND QUANTITY DISCOUNTS THEMSELVES

(358) As regards Tomra's argument that customers often asked for discounts and rebates<sup>717</sup>, it is reasonable for customers to try to obtain lower prices from Tomra. At the same time, the essence of the objections raised against Tomra is that it abused its dominant position by pursuing a policy under which it made the best possible prices customers could expect dependant on the commitment or achievement of volumes that corresponded to the total requirements of the individual customers for a certain period or a large proportion thereof, or on exclusivity.

(359) Tomra emphasises that, in so far as a given agreement referred to a specific purchasing volume or to specific purchasing volumes in absolute figures, whether this is done in the form of a quantity commitment or a rebate scheme, there is no evidence that the parties agreed on the fact that the quantities in question represented the total needs or the near total needs of the customer in the reference period.<sup>718</sup> It also claims that it only provided quotes for the quantities specified by its customers and was dependant on quantity indications given by the customers<sup>719</sup>, which is why it could not be accused of having committed an abuse.

(360) As has been established, the conclusion of contracts was not dominated by a bidding process conducted by customers and by Tomra simply responding to quantities and terms specified by the customers<sup>720</sup>, but was instead characterised by a negotiation process during which Tomra, in accordance with its policy, pushed for high quantity commitments or purchasing targets and often fully or partly succeeded in implementing these.<sup>721</sup> Tomra, moreover, must have known that the stipulated quantities were close to the entire requirements of the customer in the reference period or a large proportion thereof and that, in so far as they existed, additional clauses were able to emphasise the effect of the stipulated quantities. Under these circumstances the exclusionary character of this group of agreements cannot depend on evidence of an explicit understanding between the parties that the respective quantities corresponded to or were close to the customer's requirements.

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<sup>717</sup> See, for example, **page 11816**, Tomra's response of 22 November 2004, par. 360.

<sup>718</sup> E.g. **page 11809** or **11813**, Tomra's response of 22 November 2004, par. 319 or 343. This argument is repeated with reference to several individual agreements. See, for instance, **page 11929**, Tomra's response of 22 November 2004, par. 961, where Tomra states that, to find an abuse on Tomra's part, it would be necessary to prove that both parties deliberately negotiated the agreement with a view to substituting an exclusivity clause in words by an exclusivity clause expressed in numbers.

<sup>719</sup> **Page 11929.**

<sup>720</sup> This is asserted by Tomra. See e.g. **page 11928** or **11929**, Tomra's response of 22 November 2004, par. 957 or 961.

<sup>721</sup> Tomra has not provided any clear evidence for its contention and, in so far as there is evidence on the negotiation process, it is evident that quantities are a matter of discussion, and that it is often Tomra who proposes quantities and who, as a matter of policy, makes the best price dependent on the most exclusionary terms, including high volume quantity commitments, which in the end comes close to quantity forcing.

(361) Tomra has argued that the agreements were often drafted by customers.<sup>722</sup> Some evidence suggests that several agreements concluded in Germany were indeed drafted on a customer's headed note paper.<sup>723</sup> In the other countries concerned there are only a very few examples of agreements drafted on paper featuring the customer's letter head. Often these agreements were manifestly drafted by Tomra and/or were based on offers made by Tomra. Even in so far as agreements were drafted by customers it is evident that Tomra proposed and often managed to include exclusionary elements. In any event, as with formal exclusivity, it is clear that, even if customers had proposed certain exclusionary conditions in certain cases, this would not disqualify the respective agreements or conditions from being abusive.<sup>724</sup>

### 3. TOMRA ARGUES THERE WAS NO ENFORCEMENT OF AGREEMENTS

(362) Tomra has stated that it did not enforce the agreements and did not pursue breaches of contract, for example, where a customer did not reach the agreed target within the agreed period of time.<sup>725</sup> Given the fact that at least one of the aims of the respective agreements was to prevent purchases from competitors, it was not necessarily decisive for Tomra whether a customer eventually reached the agreed volume target and certainly not in a very precise fashion, but was important rather to tie the customer to attempting to reach the target. In the end, what is of most importance is the fact that Tomra's practices generated a strong incentive for customers not to purchase competing RVMs, irrespective of whether this incentive was followed up by enforcement through legal action

(363) In many cases customers actually met the objectives. In other cases Tomra could show flexibility, for instance, where it became clear that the targets were unrealistically ambitious and simply not achievable. In certain cases where the effective number of installations was smaller than predicted or where there were delays in installation<sup>726</sup>, the agreements were extended, which obviously did not limit their effect: on the contrary, it extended the effect of tying in the customers. Many rebates were to be paid retroactively depending on the achievement of the threshold reached, which made it unnecessary to start any enforcement actions. With regard to quantity related bonuses that had been subtracted directly from the invoiced price before it was clear whether the target would be reached, there is evidence that, at least in certain cases, Tomra insisted on the precise achievement of the respective targets and on customers paying back the bonus if the target was not achieved even by a small margin.<sup>727</sup> In sum, there was no policy of non-enforcement on Tomra's part and it can be excluded that any leniency that Tomra

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<sup>722</sup> Page 11785, Tomra's response of 22 February 2004, par. 200.

<sup>723</sup> For example, agreements with [confidential: customer D in Germany and subsidiary No. 1 of customer A in Germany] for 1998-1999.

<sup>724</sup> Customers face a prisoner's dilemma type of situation. Even though they could collectively do better by not asking for rebates, the best price they can get individually from Tomra is a rebate price. Case 85/76, *Hoffmann-La Roche* [1979] ECR 461 par. 89.

<sup>725</sup> See, for example, page 11813, Tomra's response of 22 November 2004, par. 344.

<sup>726</sup> For example, agreements with [confidential: customer A in Norway] 1999-2000, [confidential: customer C in Germany] 2001-2002.

<sup>727</sup> Pages 7607 and 7614-7615, letters sent to customers in Austria on 16 February 1999 and on 18 August 1999.



exercised in retrospect negatively affected the exclusionary character of its agreements and practices significantly.

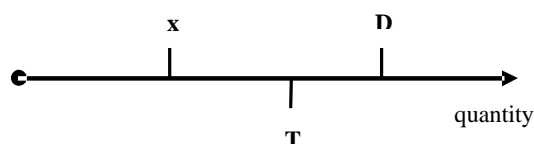
#### 4. ECONOMIC ARGUMENTS INVOKED BY TOMRA TO JUSTIFY ITS REBATE SCHEMES

(364) In this section the economic claims concerning rebate schemes made by Tomra and laid out in the Economic Assessment of Tomra's Contracts ("the economic study")<sup>728</sup> are addressed. It is necessary to address these technical aspects in order to demonstrate that the rebate schemes employed are not innocuous as argued by Tomra. In particular, the Commission rejects the line of reasoning presented in the theoretical report mainly for reasons of unjustified and implicit off-equilibrium assumptions, that is, the assumption that the incumbent as well as the competitor behave irrationally. As a result, the Commission cannot agree with the conclusions drawn in the economic study based on such reasoning. This section does therefore not discuss the rebate schemes employed in general but specifically aims at rebutting the specific theoretical arguments presented by Tomra.

##### *Off equilibrium assumptions*

(365) The economic study relies predominantly on the constellation depicted in Figure 29, where  $x$  stands for the amount already bought from the incumbent,  $T$  for the threshold level of the rebate offered by the incumbent and  $D$  for actual demand of RVMs.

**Figure 29:** Relationship of units bought, threshold and demand



(366) The key assumption of such a constellation is that the threshold is systematically set below actual demand.

(367) With respect to the assumption made by the Commission that  $T=D$ , that is to say, the incumbent will try to set the threshold  $T$  in order to equate expected demand  $D$ , Tomra notes that the Commission has taken "*a simplistic and unduly conservative approach to the possible foreclosing effects*".<sup>729</sup> The report further states that the assumptions are restrictive and misleading.<sup>730</sup> Tomra then claims that "[w]hen one applies more realistic assumptions, the simulations show that competition under these contracts was not significantly impeded."<sup>731</sup>

<sup>728</sup> The Lexecon economic study is part of Tomra's response to the Statement of objections, submitted to the Commission on 22 November 2004.

<sup>729</sup> **Page 12014**, Tomra's response of 22 November 2004, Attachment 6, p. i.

<sup>730</sup> **Page 12015**, Tomra's response of 22 November 2004, Attachment 6, p. ii.

<sup>731</sup> **Page 12015**, Tomra's response of 22 November 2004, Attachment 6, p. ii.

(368) Rejecting the assumption made by the Commission, Tomra writes:

*“It is of course very unlikely that a competitor will need to offer a discount exactly equal to the maximum discount [that is T] <...> in order to compete for sales under the retroactive rebate scheme.”<sup>732</sup> “It is likely instead that the competitor will be able to induce the buyer to purchase from it more than just a quantity equal to [T] <...>, given that this would allow the competitor to increase its unit price, without making the buyer worse off. <...> As the quantity sold by the competitor firm increases, the discount that needs to be offered in order to match the volume rebate scheme decreases rapidly, making it easier for the rival firm to compete with the incumbent in spite of the existence of a retroactive rebate scheme.”<sup>733</sup>*

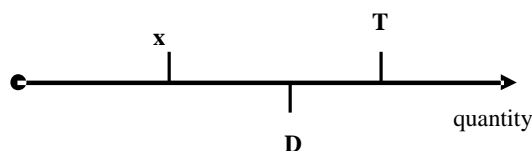
(369) The Commission does not and has never contested the simple fact that the switching costs for a quantity  $D > T$  are lower than for a quantity  $D = T$ , however, motivating  $D > T$  is difficult because it is not clear why the incumbent would want to set the threshold  $T$  systematically below expected demand. In technical terms such an assumption violates the incumbent’s individual rationality constraint (profit maximising principle) and no justification has been given for why it may be plausible that the incumbent does not maximise profits when deciding about rebate thresholds. In any case, even if the assumption made by Tomra were correct, effects are still likely to arise for a quantity  $T$  and possibly also  $D$ .

#### ***Violation of individual rationality on the incumbent side***

(370) The reason why the assumption that  $D = T$  is the only sensible assumption and the alternative presented by Tomra’s economic study does not hold up to basic economic modelling practices is due to the fact that the economic study does not ask the question what threshold the incumbent is most likely to pick. Three possible constellations exist. Either  $D > T$ ,  $D < T$  or  $D = T$ .

(371) Clearly an incumbent would not set the threshold above expected demand because the rebate scheme would not work. This is illustrated in Figure 30.

**Figure 30:** Relationship of units bought, threshold and demand



(372) If  $T$  can clearly not be reached by the buyer, there is no effect and if there is no effect, there also is no reason to use a rebate scheme – something that the economic study appears to fail to see when it claims that the schemes used by the incumbent do not create switching costs while at the same time arguing that they create efficiencies.

<sup>732</sup>  
<sup>733</sup>

Page 12030, Tomra’s response of 22 November 2004, Attachment 6, p. 14.  
Ibid.

(373) The main assumption made by the economic study is, however, that demand is above T, that is to say, the situation depicted in Figure 29. This is, however, just as unrealistic as the other possibility because the incumbent would also benefit from moving the threshold up to expected demand. As a result, the economic study assumption requires irrationality on the incumbents side – irrespective of switching costs or efficiencies, it is clear that the incumbent is better off setting the threshold at expected demand.

### *The need to distinguish between ex ante and ex post analysis*

(374) The economic study claims that the assumptions made by the Commission are “extreme” and lead to “seriously exaggerated”<sup>734</sup> criticism of the rebate schemes since “as soon as one RVM is purchased from a competitor the customer loses the discount it was being granted by Tomra” (typing error and emphasis already contained in the original). The study claims that “[t]he Commission’s assumption that demand exactly corresponds to one of the discount thresholds is not realistic.”<sup>735</sup> In an effort to back up the assumption that demand is above the threshold, Tomra’s economic study presents *ex post* empirical evidence, that is, the study demonstrates for “most of the retroactive rebate schemes” that in hindsight, actual demand has been above the threshold.<sup>736</sup>

(375) The *ex post* empirical “evidence” produced in favour of this assumption cannot be considered meaningful, because it relates to actual as opposed to expected demand. The fact that demand *ex post* deviates from expected demand is *irrelevant* for the behavioural norm of setting the threshold equal to expected demand *ex ante*.<sup>737</sup>

(376) Absent any alternative justification, the assumption made by the Commission is the only meaningful way of approaching the problem. The threshold is set at expected demand and that threshold will have an impact irrespective of whether demand deviates from its expected value *ex post* or not. In more technical language, expectations will be correct in equilibrium, and considering demand realisations *ex post* is not meaningful. It is in that sense that the analysis provided in the economic study – even though mechanically correct – is theoretically ill-founded because the off-equilibrium assumptions made cannot be sustained.

(377) By analogy this also applies to the “proof” of demand expansion with *ex post* data. In fact demand expansion is particularly implausible in this case where demand is rather inelastic.

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<sup>734</sup> Page 12033, Tomra’s response of 22 November 2004, Attachment 6, p. 17.

<sup>735</sup> Page 12034, Tomra’s response of 22 November 2004, Attachment 6, p. 18.

<sup>736</sup> “As our empirical analysis illustrates in detail (see Section 3) for most of the retroactive rebate schemes offered by Tomra, actual demand was not equal to the level of the threshold.” See page 12034, Tomra’s response of 22 November 2004, p. 18.

<sup>737</sup> Consider the following analogy: if one wants to know whether somebody took his umbrella with him or not in the morning, it is sufficient to know that the person always takes his umbrella if meteorologists announce rain, i.e. when the person expects it to rain. The question whether in fact it does or does not rain that day is irrelevant. And an *ex post* analysis that concludes that meteorologists only had an impact on that person (in the sense of inducing her to take the umbrella with her) if it rains, would simply be wrong. . Indeed evidence that it rained that day does not allow drawing conclusions as to whether the person took his umbrella or not.

### ***Violation of Individual Rationality on the competitor side***

(378) The economic study presented by Tomra claims that:

*“[i]f demand is above the threshold <...> then the price schedule that Tomra’s competitor needs to match is very different than the one computed in the SO: for small quantities the price that needs to be matched is simply the average discounted price offered by Tomra; for higher quantities the price is lower (since the competitor needs to compensate the customer for the loss of the block discount), but it is never negative and it is only significantly lower than Tomra’s discounted price for relatively small quantity ranges.”<sup>738</sup>*

(379) Following this line of thought and assuming, for a second, that the incumbent chooses a threshold that is clearly below expected demand (see above), equation 1 and equation 2 of the technical appendix as well as the main text of the economic report (including Figure 4 in the report) stipulate that the price a competitor would need to offer increases with an increase in demand *ceteris paribus*. That is, switching costs decline “rapidly”.

(380) Although the model laid out in the report is unnecessarily complex<sup>739</sup>, the Commission has analysed the arguments presented in detail. The theoretical appendix provides a special case of the equations that are presented here with the only difference being that the economic study assumes, for unidentified reasons, that quantities are continuous.<sup>740</sup> In order to keep the analysis as simple as possible, the discussion in this decision will not follow the approach of Tomra’s economic study but rather discuss why the Commission rejects the arguments presented in the Appendix using discrete quantities. The equations used in the following text are more general than those proposed by Tomra’s economic consultants in their study. Nevertheless, the general equation based on the report derived here can be reduced to the special case discussed by Tomra’s study where only one unit needs to be bought from the incumbent before the threshold is reached.

(381) The general, interpretable equation that according to the report gives the price  $p_c$  a competitor would need to offer to make the buyer indifferent between buying the remaining amount  $D-x$  from him or the incumbent is:

$$p_c = [(D-x)p - prT - (D-T)p(1-r)] / (D-x)$$

(382) That is,  $(D-x)p$  denotes the total amount that can still be sold at normal price minus  $prT$ , that is the rebate granted for reaching the threshold, minus  $(D-T)p(1-r)$ , that is the savings on all units above the threshold due to the rebate price  $p(1-r)$ . This term is then divided by  $(D-x)$ , the total amount of possible sales under discussion to get a unit price

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<sup>738</sup> **Page 12034**, Tomra’s response of 22 November 2004, Attachment 6, p. 18.

<sup>739</sup> Besides misspecifications in the variables such as  $Q_t = T - D$  (p.51), the Lexecon model employs ratios and a host of unnecessary variables that all cancel out in the end.

<sup>740</sup> Again, there is nothing wrong as such with this assumption except that it cannot be justified in this case. The assumption cannot be justified because neither the incumbent nor competitors will sell non-integer amounts of RVMs, in other words, it is not possible to sell, 20.111974 machines.

(383) Simplifying we get

$$p_c = [Dp_r + Tp(1-2r) - px] / (D-x)$$

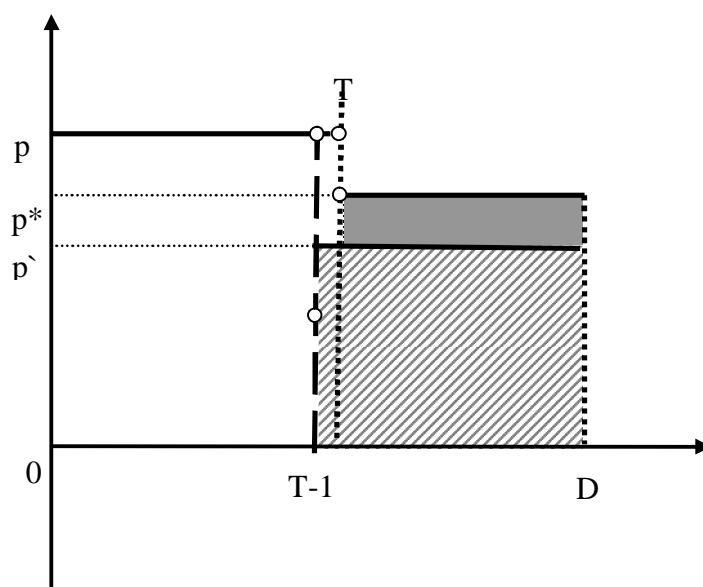
where  $Dp_r$  denotes the *ex post* average price if all units were to be bought from the incumbent multiplied by the quantity.

(384) Now consider the case discussed in the appendix of the economic study presented in this case. Inserting  $T-1$  for  $x$  and  $(p-p^*)/p$  for  $r$  we get the discrete case of equation 1 and 2 of the study, namely

$$p_c = [D(p^*-p) - pT + 2p^*T - p(T-1)] / (D - (T-1))$$

(385) As is easily verified, this term indeed increases in  $D$  implying a decrease in switching costs as claimed by Tomra. As before, however, Tomra's study fails to check whether such a mechanic calculation makes economic sense. Indeed, as before, this is not the case as Figure 31 clearly demonstrates.

**Figure 31:** Price schedule and revenues



(386) The economic study argues that the rebate scheme in its most problematic form (namely when only one unit needs to be sold by the incumbent before the rebate enters into force) is not as problematic as it looks because if demand is sufficiently above the threshold, the discount that the competitor needs to offer is reduced through two mechanisms:

*“it increases the volume base over which the competitor can compensate the customer the loss of the retroactive rebate <...> and it lowers the loss to the customer from purchasing from another firm since it decreases the level of sales still bought from the incumbent at the higher price”.*<sup>741</sup>

(387) Aside from the fact that this sentence reveals an inconsistency in the sense that the customer cannot at the same time be compensated and his losses be reduced, it assumes non profit maximising behaviour on the part of the competitor. Again, the assumptions made in Tomra’s economic study – in this case that a competitor would actually try to sell  $D-(T-1)$  units at a price  $p'$  – cannot be justified.

(388) In fact, there are two reasons why this is not just unrealistic but incorrect. First, the one extra unit (namely the one that the customer would have needed to reach the incumbent’s threshold) has a negative price. This implies that incurring losses in selling that unit only makes sense if a price higher than the one obtained in the absence of this unprofitable sale can be obtained for the remaining units up to  $D$ . The situation described in Tomra’s economic study, however, is the reverse. The competitor is assumed to be willing to offer a negative price for this last unit and

<sup>741</sup> Page 12068, Tomra’s response of 22 November 2004, Attachment 6, p. 52.

offer  $p^*$  for the remaining units (D-T), so that in effect he offered an average price of  $p'$  for D-(T-1) units (the profits for that case are given in Figure 31 as the smaller area shaded from the left bottom corner towards the right upper corner). Clearly profits will always be greater if the competitor forgoes the sale of the T-1<sup>th</sup> unit and sells only D-T units at  $p^*$  (the profits for that case are given in Figure 31 as the bigger grey area). Selling all D-(T-1) units implies making profits of  $(D-T)p^*$  minus the negative price of the marginal unit before the threshold. This clearly violates individual rationality – this time on the competitor side.

(389) The second reason relates to relative profit maximisation. The first argument clearly showed that it is not profit maximising for the firm to behave in this way in absolute terms, however, even in relative terms (relative to the profits of the incumbent) it makes no sense to behave like this because by taking the unnecessary loss of selling the marginal unit, the incumbent avoids paying out the rebate. In fact, stepping in with a negative price saves the incumbent from paying out the rebate (the rebate amount, that is the negative price for the marginal unit is:  $p-(p-p^*)(T-1)$ ).

### **Conclusion**

(390) The Commission rejects the line of reasoning presented in the theoretical report presented by Tomra. In particular the Commission cannot agree with the conclusion that only less than a third of the rebate schemes listed by the Commission can be considered potentially exclusionary. The principal reasons for this are the unreasonable assumptions on which the conclusions drawn in the report are based.

#### 5. CONCLUSION ON POSSIBLE JUSTIFICATIONS/TOMRA'S DEFENCE

(391) In short, given the characteristics of the discounts and rebates in questions, they cannot be qualified as simple innocuous quantity discounts and did not simply constitute a means of normal price competition. Finding that Tomra's discounts and bonuses as they were applied in the period under investigation were part of an abuse does not, therefore, prevent Tomra from competing on price as is argued by Tomra.<sup>742</sup> Finally, Tomra failed to submit any evidence to support its arguments concerning cost efficiencies.

#### F. SUMMARY

(392) Despite their different forms, the exclusionary practices, identified in Sections IV.A and IV.B, were part of Tomra's general policy which shared a common objective and had similar effects and, thereby, constitute a pattern of practices. They therefore have to be seen, in their entirety, as an abuse in the sense of Article 82 of the Treaty and Article 54 of the EEA Agreement. This is all the more the case given that the practices had a not insubstantial effect in each of the EEA Contracting Parties concerned and in the EEA as a whole, irrespective of whether the markets for high-end RVMs or high-end and low-end RVMs for retail outlets are considered. In the light of the fact that the practices identified in

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<sup>742</sup> This concern is expressed in Tomra's response of 22 November 2004, e.g. in par. 913, **page 11920**.

Section III were part of a wider policy aimed at limiting market access opportunities for competitors, and given Tomra's degree of dominance, the practices have to be considered abusive even in so far as they affected only a smaller proportion of the demand in certain individual years and countries. As was described in Section III, the proportion of demand affected by Tomra's practices was never unsubstantial in any of the individual markets under consideration, and in some years in each of these markets, it was a very vast proportion.

(393) This does not exclude that the individual practices can also be considered as abuses in themselves. The Commission, however, has not made individual findings relating to each agreement in this decision.

(394) The abuse of Tomra's dominant position concerned the following territories and periods:

- Netherlands: 1998-2002
- Sweden: 1999-2002<sup>743</sup>
- Norway: 1998- 2001<sup>744</sup>
- Austria: 1999-2001<sup>745</sup>
- Germany: 1998-2002

#### *G. LIABILITY FOR THE INFRINGEMENT AND THE ADDRESSEES OF THIS DECISION*

(395) It is settled case law that the anticompetitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking having regard in particular to the economic links between them.<sup>746</sup>

(396) In the case of wholly owned undertakings, the Commission is entitled to assume that the infringement committed by the wholly owned subsidiary is attributable to the parent company, as the parent company is presumed to have exercised decisive influence over the wholly owned undertaking.<sup>747</sup> In the case of

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<sup>743</sup> Tomra held 38% market share on the wide RVM market (high-end and low-end machines included) in 1998 in Sweden. On the high-end RVMs market, however, it held 94% (see Figure 5 and Figure 6). Furthermore, the non-contestable portion of the volume sold in Sweden in 1998 was negligent. For all these reasons the Commission does not include 1998 into the duration of the infringement period in Sweden.

<sup>744</sup> There were no anti-competitive arrangements in force in Norway in 2002.

<sup>745</sup> There were no anti-competitive arrangements in force in Austria in 2002.

<sup>746</sup> Case C-294/98 P, *Metsä-Serla Oyj* [2000] ECR I-10065, par. 27, Case 107/82, *AEG v. Commission* [1983] ECR 3151, par. 49, Case 48/69, *Imperial Chemical Industries* [1972] ECR 619, par. 132-133.

<sup>747</sup> Case T-305/94, *PVC*, par. 961 and 984, Case 107/82, *AEG v. Commission*, [1983] ECR 3151, par. 50. Recent case law extends this presumption to a shareholding below 100%, but above 99%. See Case T-203/01, *Michelin v. Commission (Michelin II)*, [2003] ECR II-4071, par. 290.



wholly owned undertakings, the Commission is entitled to assume that the infringement committed by the wholly owned subsidiary is attributable to the parent company, as the parent company is presumed to have exercised decisive influence over the wholly owned undertaking.<sup>748</sup> In such a case, it is for the parent company to adopt, in regard to its subsidiary, any measure necessary to prevent the continuation of the infringement of which it was not unaware.<sup>749</sup>

(397) As the Tomra group forms an economic unit and, therefore, an undertaking in the sense of Article 82 of the Treaty and Article 54 of the EEA Agreement<sup>750</sup>, it is the Tomra group that has abused its dominant position. As parts of the economic unit constituted by the Tomra group, all the legal entities to which this decision is addressed bear joint responsibility for the infringement.

(398) Tomra Systems ASA had 100% ownership of Tomra Europe AS which, in turn, entirely owned all the different subsidiaries in the periods in question<sup>751</sup>, which creates a presumption that they exercised decisive influence on them. Moreover, representatives from Tomra Systems ASA and/or Tomra Europe, in most cases the CEO of Tomra Systems ASA and/or the President of Tomra Europe AS, were continuously represented on the boards of directors of the subsidiaries in the Netherlands, Norway, Sweden, and Austria, in most countries and years forming the majority of the board.<sup>752</sup> In the case of Germany, the supervisory board<sup>753</sup> of Tomra Systems GmbH was continuously composed of representatives from Tomra Systems ASA and Tomra Europe, including the CEO of Tomra Systems ASA and the President of Tomra Europe. All addressees were concerned with RVMs and related products and services. The subsidiaries were in the first place responsible for marketing and sales of Tomra products, being supported in this function by a centralised sales support within Tomra Europe AS.

(399) In addition, Tomra ASA and Tomra Europe AS were directly involved at least in the negotiations of some of the most significant agreements and in other practices. This is documented, for instance, with regard to the Global Master Agreement, or its extension to Sweden and Norway, that was also signed by a representative of Tomra Systems ASA, in the former case, and of Tomra Europe AS, in the latter. The parent companies were at the very least informed about

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<sup>748</sup> Case C-286/98 P, *Stora Kopparbergs Bergslags AB*, par. 29.

<sup>749</sup> Case T-308/94, *Cascades v. Commission* [1998] ECR II-925, par. 158, Case T-347/94, *Mayr-Melnhof v. Commission* [1998] ECR II-1751, par. 397-398, Case T-354/94, *Stora v. Commission* [1998] ECR II-2122, par. 83.

<sup>750</sup> The principle that in competition law the term “undertaking” designates an economic unit, even if in law it consists of several legal persons, was laid down by the Court of Justice in Case 170/83 *Hydrotherm* [1984] ECR 2999, par. 11, and has been confirmed ever since. See more recently Case T-203/01, *Michelin v Commission*, judgment of 30 September 2003, par. 290.

<sup>751</sup> As regards the Austrian subsidiary, 100% ownership exists since 1997. For the other subsidiaries concerned, 100% ownership existed also prior to this date. This is documented, for instance, in Tomra’s Annual Reports. See **pages 7304-19** and **7306-19**. Tomra did not contest its ownership of the subsidiaries in its response to the Commission’s Statement of objections.

<sup>752</sup> **Page 10042**, Tomra’s reply of 25 June 2003, p. 11, and **page 10117**, Appendix 7 as regards the periods since 1997. There is no reason to believe that the situation was different before 1997.

<sup>753</sup> ” *Beirat*”.

more significant negotiations and their approval was required in all important matters.<sup>754</sup>

(400) Furthermore, parent companies devised the general group strategy<sup>755</sup> and monitored the tools that were to be implemented by the subsidiaries. The developments, the strategy and the tools to be employed in the different countries as well as in relation to particular competitors were regularly discussed bilaterally or at group meetings or video conferences. Even if within this framework the subsidiaries may have had some degree of autonomy where it came to individual agreements or practices, the respective measures were in line with the strategy and the tools for which the parent companies bear responsibility.

(401) As they form an economic unit and, therefore, an undertaking infringing Article 82 of the Treaty and Article 54 of the EEA Agreement, each and every one of the addressees, can be held jointly and severally liable for the identified infringement.

(402) In summary, the Commission finds that all addressees of this decision should be held jointly and severally liable for having infringed Article 82 of the Treaty and Article 54 of the EEA Agreement in the periods and territories indicated.

#### H. ARTICLE 3 OF REGULATION NO 17 AND ARTICLE 7 (1) OF REGULATION (EC) NO 1/2003

(403) Article 3 of Regulation No 17 and Article 7 (1) of Regulation (EC) No 1/2003 states that, where the Commission, upon a complaint or upon its own initiative, finds that there is infringement of Article 81 or Article 82 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

(404) To avoid the risk of reoccurrence of the practices it is necessary to oblige Tomra to bring the infringement described in Section II to an end and not to engage in such practices for as long as it is in a dominant position in any relevant market within the EEA.

(405) It should be noted that in the course of 2005, in exchanges of correspondence and meetings with the Commission departments, Tomra discussed commitments it was willing to enter in order to bring the infringement to an end. In its correspondence of 23 December 2002<sup>756</sup> Tomra declared that it would no longer apply the exclusivity or preferred supplier agreements and the rebate schemes with foreclosing effects in order to take account of the Commission's observations.

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<sup>754</sup> E.g. page 6566, MS 33, pages 1774-1775, ATU/KKL/39, 1999 [confidential: customer D in Germany] annual contract.

<sup>755</sup> See e.g. pages 2263-2265.

<sup>756</sup> Page 10000-10002.

## I. REMEDIES

### 1. ARTICLE 15 (2) OF REGULATION NO 17 AND ARTICLE 23 (2) OF REGULATION (EC) NO 1/2003

(406) Under Article 23 (2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings, where, either intentionally or negligently, they infringe Article 82 of the Treaty and/or Article 54 of the EEA Agreement. Regulation (EC) No 1/2003 was incorporated into the EEA Agreement by EEA Joint Committee Decision No 130/04.

(407) Under Article 15 (2) of Regulation No 17, which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement cannot exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23 (2) of Regulation (EC) No 1/2003.

(408) Pursuant to both Article 15 (2) of Regulation No 17 and Article 23 (3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in those Regulations. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence.

### 2. THE BASIC AMOUNT OF THE FINE

(409) It is warranted to impose a fine in accordance with Article 23 of Regulation (EC) No 1/2003. The infringement was committed intentionally. Tomra was in no doubt about its dominant position. It was, furthermore, aware of the likely effect of its practices and of the fact that they were liable to cause harm to its competitors and to competition in general, which was, at least, one of the reasons for employing them.

(410) The basic amount of the fine is determined according to the gravity and duration of the infringement.

(411) In assessing the gravity of the infringement, consideration must be given to its nature, its actual impact on the market (where it can be measured) and the size of the relevant geographic market.

(412) 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.

(413) 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.

(414) 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. The Commission takes account of the fact that, within each national market, the intensity of the impact of the infringement may well have varied over time: in

some countries and years the impact was, in all likelihood, considerably larger than in other periods and markets.

- (415) The Commission is entitled to impose a single fine for a multiplicity of infringements,<sup>757</sup> without being required to state specifically how it took into account each of the abusive components objected to for the purposes of setting the fine.<sup>758</sup> 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.
- (416) With regard to the gravity of the infringement, the Commission comes to the conclusion that it was a serious infringement. On the basis of the above, the basic amount of the fine to be imposed jointly and severally on the addressees of this decision is set at EUR 16 million.
- (417) With regard to the duration of the infringement the Commission does not take the period between 1994 and 1997 into account, considering that evidence in the file of the Commission is limited. Since there is very little evidence on the file for the period after 2002, this was not investigated systematically, and despite the fact that there is evidence that the criticised practices were not discontinued entirely, 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. The basic amount of the fine jointly and severally imposed on the addressees of this decision is therefore set at EUR 24 million.
- (418) The Commission does not claim that all the abusive components identified in this decision existed throughout the entire period in question in each of the national markets investigated. This decision indicates on each occasion the countries and periods covered by the different components of the infringement. The single fine imposed on Tomra deals globally with all of the infringements established, which together cover the entire period in question, and in the same manner the increase for duration also takes into account the entirety of this period. The fact that the infringement does 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, has already been taken into account in establishing the basic amount of the fine.

### 3. AGGRAVATING AND MITIGATING CIRCUMSTANCES

- (419) There are no aggravating or mitigating circumstances.

### 4. AMOUNT OF THE FINE

- (420) For the above reasons, the amount of the fine to be imposed on Tomra Systems ASA, Tomra Europe AS, Tomra Systems B.V., Tomra Systems GmbH,

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<sup>757</sup> Case T-83/91, *Tetra Pak v Commission*, [1994] ECR II-755, par. 236; Case T-144/89, *Cockerill Sambre v Commission*, [1995] ECR II-947, par. 92.

<sup>758</sup> *Tetra Pak v Commission*, (cited above) par. 236.

Tomra Butikksystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH, jointly and severally, should be fixed at EUR 24 million.

HAS ADOPTED THIS DECISION:

*Article 1*

Tomra Systems ASA, Tomra Europe AS, Tomra Systems B.V., Tomra Systems GmbH, Tomra Butikkssystemer AS, Tomra Systems AB and Tomra Leergutssysteme 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.

*Article 2*

For the infringement referred to in Article 1, a fine of EUR 24 million is imposed on Tomra Systems ASA, Tomra Europe AS, Tomra Systems B.V., Tomra Systems GmbH, Tomra Butikkssystemer AS, Tomra Systems AB and Tomra Leergutssysteme GmbH, jointly and severally.

The fine shall be paid in euro, within three months of the date of notification of this Decision, to the following account:

**Account Nr 001-3953713-69 of the European Commission with FORTIS BANK S.A., Rue Montagne du Parc, 3 at B-1000 BRUSSELS (IBAN Code: BE71 0013 9537 1369; SWIFT Code: GEBABEBB).**

After the expiry of that period, interest shall automatically be payable at the rate applied by the European Central Bank to its main refinancing operations **on the first day** of the month in which this Decision was adopted, plus 3.5 percentage points.

*Article 3*

Tomra Systems ASA, Tomra Europe AS, Tomra Systems B.V., Tomra Systems GmbH, Tomra Butikkssystemer AS, Tomra Systems AB and Tomra Leergutssysteme GmbH shall immediately bring to an end the infringements referred to in Article 1 insofar they have not already done so.

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.

*Article 4*

This decision is addressed to:

**Tomra Systems ASA:**

Drengsrudhagen 2, N-1372, Asker, Norway.

**Tomra Europe AS:**

Drengsrudhagen 2, P.O. Box 278, N-1372 Asker, Norway.

**Tomra Systems B.V.:**

Paramariboweg 77, Postbus 90, NL-7333 PA, Apeldoorn, Netherlands.

**Tomra Systems GmbH:**

Walder Str. 53, D-40724, Hilden, Germany.

**Tomra Butikksystemer AS:**

Solbraveien 49, P.O. Box 362, N-1372 Asker, Norway.

**Tomra Systems AB:**

Djupdalsvägen 32, Box 66, S-191 21 Sollentuna, Sweden.

**Tomra Leergutssysteme GmbH:**

Meischlgasse 13, A-1230, Vienna, Austria.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels,

*For the Commission*

*Neelie KROES*

*Member of the Commission*

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