



EUROPEAN COMMISSION

CASE AT.40026 - Velux

ANTITRUST PROCEDURE

**Council Regulation (EC) 1/2003 and
Commission Regulation (EC) 773/2004**

Article 7(2) Regulation (EC) 773/2004

Date: 14/06/2018

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EUROPEAN COMMISSION

Brussels, 14.06.2018
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FAKRO Sp. z o.o.
ul. Węgierska 144 A
33-300 Nowy Sącz
Poland

Subject: Case AT. 40026 - Velux
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Madam/Sir,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided to reject your complaint against VKR Holding A/S and its subsidiaries ("VKR"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. THE COMPLAINT

1.1 The Parties

- (2) The complainant, FAKRO Sp. z o.o. ("FAKRO"), is a Polish manufacturer of roof windows and accessories. FAKRO started producing roof windows in the early 1990s and its position has grown since then.²
- (3) The complaint is brought against VKR, a manufacturer of roof windows and accessories³. The mother company VKR Holding A/S is the parent of VELUX A/S and Altaterra Kft. VELUX A/S is the mother company of the VELUX Group ("VELUX"), which has been present on the market for several decades. In the EU28, VELUX's market

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

² Complaint, para 87 and the Commission's own calculation based on data from VELUX and FAKRO.

³ See FAKRO's Complaint para 89.

share (in volume terms) appears to have slightly decreased in the last 20 years⁴. Altaterra Kft. is the mother company of the Altaterra Group ("Altaterra"), created in the early 2000s, which sells products similar to VELUX products, *inter alia* under the RoofLITE, DAKEA and BALIO brands.

1.2 The Procedure

- (4) In July 2006, FAKRO lodged an informal complaint with the Polish Competition Authority (PCA) against VKR.
- (5) On 30 April 2007, on the basis of information received from the PCA and FAKRO, the Commission initiated an *ex officio* investigation in the market for roof windows in the EU (Case AT.39451 - Velux). The investigation was essentially based on the submissions and information provided by FAKRO, both to the PCA and directly to the Commission. Although FAKRO was not a formal complainant in the case, the Commission examined in detail a number of its claims,⁵ concerning alleged practices designed to marginalise or exclude it from the market.⁶
- (6) The Commission undertook a thorough market investigation, which included requests for information sent to some EU roof window distributors, to VELUX and to its main competitors (other than FAKRO) and inspections at VKR's premises in a number of EU locations and at the premises of some large distributors of roof windows.
- (7) In particular, the Commission assessed in detail the discounts, rebates and bonuses applied by VELUX in a number of Member States. The evidence indicated that the majority of the rebates were applied to all distributors equally, and not conditioned on exclusivity or on a certain threshold or any other condition which would create loyalty on their part. They were therefore considered not to pose anticompetitive issues.
- (8) The Commission also examined VELUX's turnover and sales bonus (a conditional rebate paid once a certain non-individualised threshold, in terms of volume or sales, was reached). As of 2008, these rebates were of limited duration and followed a step-by-step (incremental) system. In the context of its thorough market investigation, the Commission conducted an in-depth analysis of the criteria and rules governing the grant of the rebates and concluded that these rebates were very unlikely to bar competitors from access to the market.
- (9) The Commission also assessed in detail the allegation that RoofLITE was a fighting brand (i.e., a low-priced brand introduced with the sole purpose of eliminating competition), having analysed a significant amount of VKR's internal documents and

⁴ Source: the Commission's own calculation based on data from VELUX and FAKRO.

⁵ See in particular FAKRO's submissions of 10 July 2007, 22 January 2008, 15 and 20 May 2008.

⁶ FAKRO's submission of 10 July 2007, para 82. The alleged practices involved: (i) granting unlawful rebates (i.e., volume or value based rebates, rebates based on the ratio between certain more expensive products and all products and stock related rebates); (ii) granting advantages for not selling, advertising or installing FAKRO's windows; (iii) retaliatory measures against firms cooperating with FAKRO; (iv) unfair and misleading information about FAKRO's products; (v) agreements with some major distributors in the market with possible anticompetitive effects; (vi) unmeritorious patent applications; (vii) price discrimination and excessive prices (see FAKRO's submission of 10 July 2007, paras 18 *et seq.*); and (viii) the introduction of RoofLITE as a fighting brand (see FAKRO's submission of 15 May 2008, para 14).

correspondence as well as RoofLITE's financial results. The evidence in the present case did not indicate the existence of an anticompetitive strategy to exclude competitors from the market.

- (10) Neither the information from the replies to the questionnaires nor the inspections supported the other allegations made by FAKRO regarding anticompetitive behaviour by VKR. In January 2009, the Commission duly closed its investigation.⁷
- (11) On 11 July 2012, FAKRO lodged a complaint ("the Complaint") with the Commission alleging that VKR's behaviour in the market for roof windows and flashings amounted to an abuse of dominant position within the meaning of Article 102 TFEU. On 17 September 2012, FAKRO submitted a Supplement to the Complaint ("the Supplement").
- (12) On 24 August 2012, the Commission sent VKR a non-confidential version of the Complaint and on 26 September 2012, VKR submitted its response ("Response to the Complaint"). The Commission sent VKR a non-confidential version of the Supplement on 26 July 2013 in respect of which VKR submitted its response on 28 August 2013.
- (13) On 18 April 2014, FAKRO submitted a reply to VKR's two responses ("the Reply"), and on 18 June 2014, it submitted a second supplement to the Complaint ("the second Supplement"). In reply to questions by the Commission, additional information was supplied by FAKRO on 13 June 2013, 19 November 2013 and 24 January 2014.
- (14) The Commission met representatives of FAKRO on 12 November 2012, 28 June 2013, 6 March 2015 and 24 June 2015 to discuss the progress of the investigation. These meetings were preceded and followed by several written communications and phone calls with FAKRO.
- (15) The Commission also held meetings with representatives of VKR on 29 November 2012 and 28 June 2013. In reply to questions by the Commission, VKR submitted additional information on several occasions⁸. On 6 August 2014, the Commission sent VKR a non-confidential version of the second Supplement and VKR submitted its response on 29 August 2014 ("response to the second Supplement"), with additional information provided on 28 November 2014.
- (16) By letter of 21 December 2015 ('the Article 7(1) Letter'), the Commission informed FAKRO of its intention to reject the Complaint. In response, on 24 January 2016 FAKRO made additional observations ("the Observations") and submitted a third supplement to the Complaint ("the third Supplement"). FAKRO submitted additional information on 31 May 2016 ("the fourth Supplement"), on 17 October 2016 (in reply to questions by the Commission), on 28 April 2017 ("the fifth Supplement") and on 26 July 2017 ("the sixth Supplement").
- (17) On 8 September 2016, the Commission sent VKR a non-confidential version of FAKRO's Observations and on 24 November 2016, VKR submitted its comments ("the Comments"). On 28 November 2016, the Commission sent FAKRO a non-confidential

⁷ Commission letter of 16 January 2009 to Mr Ryszard Florek, CEO of FAKRO.

⁸ Additional information was submitted on 25 January 2013, on 12 July 2013, on 28 August 2013, on 20, 24, 26 and 30 September 2013, on 2 October 2013, on 25 November 2013 and on 22 January 2014.

version of VKR's Comments and FAKRO submitted its response ("the Reply to VKR's Comments") on 19 December 2016.

- (18) The Commission also met representatives of FAKRO on 18 July 2017 and 12 October 2017 to discuss the case. Subsequent to these meetings, FAKRO submitted additional explanations concerning select topics on 5 January 2018 ("the seventh Supplement"). On 6 February 2018, the Commission sent VKR a non-confidential version of the seventh Supplement and on 2 March 2018, VKR submitted its response ("VKR's response to the seventh Supplement"). On 16 March 2018 the Commission sent FAKRO a non-confidential version of VKR's response and FAKRO submitted its comments ("the eighth Supplement") on 6 April 2018.⁹

1.3 Main allegations in the Complaint and subsequent submissions

- (19) In the Complaint and subsequent written submissions, FAKRO alleges that VKR is infringing Article 102 TFEU in the "broader European market"¹⁰ for roof windows and flashings¹¹ through a number of actions, all aimed at foreclosing FAKRO from the market. FAKRO does not clearly specify during which period the infringements took place, although it claims these actions have taken place for more than ten years.¹² For the purpose of the current assessment, and based on the information presented by FAKRO in support of its claims, the Commission has considered the period since 2001 until today.
- (20) FAKRO alleges five categories of abuses:
- (a) **Selective pricing policy** by VELUX. FAKRO argues that VKR's model of selective anticompetitive pricing policy is a multi-level model where individual actions overlap and only the analysis of the policy as a whole system may fully reveal the anticompetitive actions and their cumulative effect¹³. This policy includes:
- (i) **rebates**, such as VELUX designing rebate schemes and bonuses to strongly disincentivise distributors from purchasing FAKRO products¹⁴ and making long-lasting, year-round sales promotions, amounting to *de facto* additional hidden rebates¹⁵. In particular, FAKRO claims that the turnover bonus has a loyalty-inducing character and

⁹ The Commission notes that throughout the entire procedure, it did not receive any complaint (formal or informal) from any other competitor of VKR.

¹⁰ FAKRO claims that the relevant geographic market includes all the territory of the EU28, together with Switzerland, Norway, Russia and Ukraine (see para (35) below).

¹¹ **Roof windows** are windows that are specially designed to be fitted into a roof slope. **Flashings** are sheets of impervious material installed to prevent water ingress between a roof window and the roof surface tiles or slates.

¹² Complaint, para 46.

¹³ See section 4.2.1 of the Observations.

¹⁴ Complaint, section 6.2.3.1.3.2. and sixth Supplement, section VI.

¹⁵ *Ibid.*, section 6.2.3.3

that some rebates are discretionary¹⁶. As regards the promotions, FAKRO claims that the Commission should have assessed their predatory-pricing effect¹⁷;

(ii) **predatory pricing** by VELUX, particularly in selected markets where FAKRO's position is relatively strong¹⁸. In this regard, FAKRO claims that the Commission should have conducted its own analysis based on the data which the Commission itself found reliable. In addition, FAKRO questions the analysis submitted by VKR¹⁹. It claims that VELUX's own calculations show irregularities which indicate that further irregularities could exist²⁰;

(iii) **price discrimination**, such as (i) applying prices and rebate schemes which differ between countries in order to have lower prices in countries where FAKRO's market share is significant²¹, (ii) VELUX A/S engaging in cross-subsidisation between the VELUX distribution companies, to hide losses resulting from anticompetitive price actions²² and (iii) VELUX selectively offering additional advantages to distributors (in particular investment rebates, but also other categories of rebates) which are not included in the official terms and conditions²³. In relation to investment rebates FAKRO claims that they are discretionary because they are not included in the official trade terms and conditions and they lead to discrimination on several levels. In FAKRO's view, distributors treat these rebates as discretionary, even if they are not used on non-discriminatory terms. It also argues that it is likely that predatory prices were used within investment rebates²⁴. Moreover, in FAKRO's view, the Commission's preliminary conclusion on the investment rebates wrongly accepts the explanation of VELUX according to which these are tender rebates and not discriminatory²⁵.

(b) **The introduction of RoofLITE, DAKEA and BALIO as fighting brands**, with the sole purpose of eliminating competition²⁶. According to FAKRO, Altaterra prices below cost, at least in the markets where FAKRO's position is stronger²⁷ and buys windows manufactured at a lower cost (than the cost that it would otherwise be able to secure), since it benefits from the economies of scale enjoyed by VELUX²⁸. The anticompetitive character of the RoofLITE brand is shown by the fact that Altaterra was not able to

¹⁶ See section 4.2.2 of the Observations.

¹⁷ See section 4.2.4 of the Observations.

¹⁸ Complaint, section 6.2.3.2

¹⁹ See section 4.2.3 of the Observations.

²⁰ See section 2.4 of the Reply to VKR's Comments.

²¹ Complaint, para 185-214 and Supplement, section 2.3.

²² Complaint, para 240-247 and second Supplement, section 2.2.

²³ Complaint, section 6.2.3.4, Supplement, section 3, second Supplement, section 2.4 and third Supplement, section 3.2.

²⁴ See section 3.3 of the Reply to VKR's Comments.

²⁵ See section 4.2.5 and 4.2.6 of the Observations.

²⁶ Complaint, section 6.6, Supplement, section 6.4, second Supplement, section 4.2 and section 4.3 of the Observations.

²⁷ Complaint, para 689.

²⁸ Complaint, para 645-646.

generate profits from it, even though it was subsidised by VELUX.²⁹ This would be consistent with its publicly available financial results³⁰. Additional elements that show the anticompetitive character of the RoofLITE, DAKEA and BALIO brands include: **(i)** offering RoofLITE products at reduced prices to current and potential clients of competitors (FAKRO in particular)³¹; **(ii)** discretionary application of the DAKEA trade terms and conditions, based only on the distributor's relationship with FAKRO³²; **(iii)** offering consignment contracts for DAKEA products that would amount to exclusivity³³; and **(iv)** selectively offering BALIO products at reduced prices to customers or potential customers of Kronmat sp. Z o.o.³⁴, a subsidiary of FAKRO. FAKRO further claims that the distributors of Altaterra in the Czech Republic engage in price fixing³⁵.

- (c) ***Other discriminatory practices***, such as **(i)** discriminating on advertising expenses, number of sales representatives and delivery time depending on the position of FAKRO in each country³⁶, and **(ii)** VELUX otherwise discriminating between distributors and customers in the same market, based only on their relationship with FAKRO³⁷.
- (d) ***Unmeritorious patent and court applications***, such as filing patents with no innovative value or with the sole aim of blocking developments by FAKRO³⁸, introducing numerous legal actions against FAKRO, so as to harass it and exercising rights in an anticompetitive manner³⁹. In its Observations, FAKRO disputes the Commission's preliminary conclusion as regards the lack of evidence of the alleged intention to eliminate competition⁴⁰.
- (e) ***Exclusive agreements*** with suppliers and other business partners (e.g., roofing schools, advertising partners, etc.) aimed at preventing them from cooperating with FAKRO.⁴¹ In its Observations, FAKRO considers that this issue should have been examined based on the practical application of the agreements, instead of the wording only and claims that the agreements submitted by VKR were not the ones mentioned in the Complaint⁴².

²⁹ Complaint, section 6.6.2.4.2 and Supplement, para 30-45.

³⁰ See section 4.3 of the Reply to VKR's Comments.

³¹ Complaint, para 651 *et seq.* and Supplement, para 24-29.

³² Supplement, para 75-81 and second Supplement, section 4.3.

³³ Supplement, para 82-90.

³⁴ Second Supplement, section 4.2 and third Supplement, para 26-27.

³⁵ Second Supplement, para 107-113 and third Supplement, para 28-29.

³⁶ Complaint, section 6.3.

³⁷ Complaint, section 6.7 and Supplement, section 7. In the Observations, FAKRO claims the Commission did not assess its arguments regarding the discrimination of trading partners (see section 4.6 of the Observations).

³⁸ Complaint, section 6.5.3 and Supplement, para 17-18.

³⁹ Complaint, section 6.5.2 and fifth Supplement, para 4-20.

⁴⁰ See section 4.4 of the Observations.

⁴¹ Complaint, section 6.4.2., Supplement, para 15-16, second Supplement, para 65-81 and fourth Supplement, para 15.

⁴² See section 4.5 of the Observations and section 5 of the Reply to VKR's Comments.

- (21) In the Observations, FAKRO claims that the Commission did not thoroughly analyse the evidence supplied by FAKRO, it referred to the previous *ex officio* proceedings even though FAKRO raised different allegations, it accepted VELUX's arguments uncritically and failed to explain the substantive basis for its intention to reject the complaint⁴³;

1.4 Remarks of the undertaking subject to the investigation

- (22) In its Response to the Complaint and subsequent submissions, VKR states that:
- (a) VELUX's approach to the market and its price and rebate policy have not significantly changed since 2007-2008. All rebates and bonuses are justified on grounds of cost and are not loyalty-inducing.⁴⁴ Nor are they dependent on competitors' market position. As to the sales promotions, these do not amount to hidden rebates and are not long-lasting.⁴⁵ Investment rebates are not included in the official trade terms as they apply to project sales. The Rules for Project Sales establish conditions that must be satisfied for an opportunity to qualify as a project sale, in order to ensure that only project sales that are different from standard sales qualify. In offering these investment rebates, VELUX does not discriminate between customers and it ensures that prices are not predatory⁴⁶;
- (b) FAKRO's conclusions regarding supposed predatory pricing are founded on incorrect assumptions. VELUX has an elaborate central pricing system which ensures that all products in all countries are priced to cover product and marketing-related costs, and costs of transportation and handling.⁴⁷ Moreover, VELUX's price-cost analysis, updated to include market and communication costs, shows that prices are above costs⁴⁸.
- (c) The RoofLITE brand was not created as a fighting brand, but was rather intended to compete in the low-price market segment.⁴⁹ DAKEA and BALIO were created to address growing demand in the intermediate and the ultra-low price segments, respectively.⁵⁰ The pricing of Altaterra's brands is subject to strict control to ensure that prices are not anticompetitive.⁵¹ VELUX is invoiced for all costs that it bears in relation to Altaterra⁵² and none of Altaterra's brands apply discriminatory prices or conditions based on the distributor/customer's relationship with FAKRO⁵³. RoofLITE products have the same base price for all customers on a given market and adjustments to these prices do not depend on the customers' relationship with competitors, including FAKRO. As for

⁴³ See section 2.3 of the Observations.

⁴⁴ Response to the Complaint, section 4.

⁴⁵ *Ibid.*, section 6.1.2.

⁴⁶ VKR's Comments, Section 3.

⁴⁷ Response to the Complaint, section 5, Reply of 25 January 2013, section 2.1.

⁴⁸ VKR's Comments, Section 2.

⁴⁹ Response to the Complaint, section 10.1.

⁵⁰ Response to the Supplement, section 6.4 and response to the second Supplement, section 7.1.

⁵¹ "The background and conditions for the creation of Altaterra", section 7, and Reply of 25 January 2013, section 3.

⁵² Response to the Complaint, section 10.1.1.

⁵³ Response to the Complaint, section 10.1.1., and response to the second Supplement, section 7.2.

Altaterra, it has invested in its business and brands to serve customer demand and its business is on a positive trend⁵⁴;

- (d) VELUX distributors are free to export/import VELUX products, and local VELUX sales companies serve them irrespective of their origin.⁵⁵ Trade conditions and product offer do vary between countries but they are in compliance with competition law. Trade conditions contain objective criteria and are not discriminatory.⁵⁶ VELUX's marketing costs do vary between countries but this is a simple expression of normal business conduct and free competition.⁵⁷
- (e) The sole aim behind VELUX's legal actions against FAKRO is to cause FAKRO to stop its misleading and illegal activity, and it should not be relevant whether there are many such actions, as long as they are not unfounded.⁵⁸ Also, VKR has won the majority of proceedings initiated on patent rights and has a very high success rate in having its patent applications granted.⁵⁹
- (f) VELUX does not enter into exclusive agreements with any business partner.⁶⁰ The earlier versions of contracts already provided also do not contain exclusivity clauses⁶¹.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (23) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.⁶²
- (24) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. In addition, the Commission may consider the scope of the investigation required. If it emerges that an in-depth investigation would be a complex and time-consuming matter and the likelihood of establishing an infringement appears limited, this will weigh against further action by the Commission – all the more so if the Commission has already investigated some of the same conduct earlier and found no grounds for action, as is the case here.

⁵⁴ VKR's Comments, Section 4.

⁵⁵ Response to the Complaint, section 4.1.1.

⁵⁶ *Ibid.*, section 4.1.

⁵⁷ *Ibid.*, section 6.1.3.

⁵⁸ *Ibid.*, section 8.1.

⁵⁹ *Ibid.*, section 9.1.2.

⁶⁰ Response to the Complaint, section 7.1.

⁶¹ VKR's Comments, Section 5.

⁶² OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

- (25) Moreover, the case-law allows the Commission to reject complaints without taking any investigative measure⁶³ and places the burden of showing the likelihood of an infringement on the complainant.⁶⁴ Additionally, the case-law allows the Commission to take a strict view of the quality of the evidence that the complainant provided.
- In *EFIM*, the Court of Justice held that "*une plainte doit contenir des informations précises sur les faits dont on peut inférer qu'il y a infraction*" and that "*la charge de la preuve de l'infraction alléguée revient au plaignant*" (no English version available for the moment; an unofficial translation would be "a complaint must contain precise information about the facts, from which one may infer that there is an infringement" and "the burden of proof of the alleged infringement rests on the complainant").⁶⁵
 - In *Micro Leader*, the General Court held that the information provided by the complainant must (i) have probative value; (ii) be substantiated; and (iii) "point to" an infringement of the competition rules.⁶⁶
- (26) Also according to the case-law, it is entirely permissible for the Commission to assess the probative value of evidence independently.⁶⁷
- (27) In any event, the mere fact that the Commission has already dedicated some time and resources to an investigation does not preclude a rejection of the complaint for reasons of priority setting. The Commission may take a decision to reject a complaint even at an advanced stage in the investigation.⁶⁸

3. ASSESSMENT OF FAKRO'S COMPLAINT

- (28) After a preliminary assessment of the Complaint, the Commission does not intend to conduct an in-depth investigation into FAKRO's claims for the reasons set out below.

3.1. The likelihood of establishing the existence of an infringement

- (29) First, the likelihood of establishing the existence of an infringement of Article 102 TFEU in this case appears limited.

⁶³ T-432/05 *EMC Development*, ECLI:EU:T:2010:189, paras. 57-59; T-320/07 *Jones*, ECLI:EU:T:2011:686, paras. 112-116; T-319/99 *FENIN*, ECLI:EU:T:2003:50, para. 43; T-204/03 *Haladjian Frères*, ECLI:EU:T:2006:273, para. 28; and the Notice on Complaints, para. 47.

⁶⁴ C-56/12 P *EFIM*, ECLI:EU:C:2013:575, paras. 71-72; T-198/98 *Micro Leader*, ECLI:EU:T:1999:341, para. 57; T-712/14 *CEAHR*, ECLI:EU:T:2017:748, para. 39.

⁶⁵ C-56/12 P *EFIM*, ECLI:EU:C:2013:575, paras. 71-72. See also T-192/07 *Comité de défense de la viticulture charentaise*, ECLI:EU:T:2012:116, para. 74: "la plainte ne contenait aucun élément de preuve démontrant une infraction potentielle".

⁶⁶ T-198/98 *Micro Leader*, ECLI:EU:T:1999:341, para. 57.

⁶⁷ Case T-699/14, *Topps Europe Ltd v. Commission*, ECLI:EU:T:2017:2, para 52.

⁶⁸ Case T-110/95 *IECC v. Commission*, ECLI:EU:T:1998:214, paras 48 and 49.

3.1.1. Market definition

Product market

- (30) **Roof windows** are windows that are specially designed to be fitted into a roof slope. **Flashings** are sheets of impervious material installed to prevent water ingress between a roof window and the roof surface tiles or slates. **Chassis windows** are windows designed to provide ventilation and light for uninhabited and unheated spaces.
- (31) FAKRO considers that the relevant product market is the market for roof windows, including chassis windows, together with flashings. It points out that although windows and flashings are sold separately because different flashings can be used with different roof windows in a high number of potential combinations, roof windows and flashings make up a single system, and the two are always bought together.⁶⁹ It also argues that roof windows are not substitutable for vertical windows, due to their different use, different construction and properties and different sales price, and should constitute a separate product market.⁷⁰
- (32) VKR considers that the relevant product market should be the market for roof windows and installation products (including flashings). However, VKR argues that this market should not include chassis windows because these are developed for installation in uninhabited rooms, are often made of different materials and do not have the same technical and functional features as roof windows.⁷¹
- (33) In the Observations, FAKRO points out⁷² that it and VKR essentially agree on the definition of the product market as the market for roof windows and flashings, and that including or excluding chassis windows in the product market has no impact for present purposes.
- (34) For the purpose of assessing the Complaint, it appears that the relevant product market definition can be left open, since the assessment of the likelihood of establishing an abuse will remain the same under any of the mentioned potential market definitions.

Geographic market

- (35) FAKRO claims that the relevant geographic market includes all the territory of the EU28, together with Switzerland, Norway, Russia and Ukraine (hereafter defined as a “broader European Market”).⁷³ However, for present purposes the Commission will not analyse non-EEA countries. In support of this definition, FAKRO claims that the conditions of competition are homogenous in these territories and that the production of roof windows is organized at European level. In the Observations, FAKRO reiterates this point and adds that irrespective of how the relevant geographic market is defined, VKR still

⁶⁹ Complaint, para 70 *et seq.*

⁷⁰ *Ibid.*, para 63 *et seq.*

⁷¹ Response to the Complaint, section 3.1.

⁷² See para 47 of the Observations.

⁷³ Complaint, para 72 *et seq.*

dominates the whole market, due to its market share(s), the market structure and entry barriers⁷⁴.

- (36) In contrast, VKR considers that the geographic markets are divided along national lines (setting aside non-EEA countries). Although it appears to agree that manufacturers organize the production of roof windows at European level, it argues that distribution systems are organized on a national scale. The market shares, price levels and the trade conditions applied by VKR vary from country to country, as do consumer preferences, climate and energy policies as well as building standards.⁷⁵
- (37) The Commission notes at the outset that the conditions of competition may be different within the EEA and outside of the EEA, in view of customs barriers. In any event, given the lack of relevant precedents, the Commission has reserved its position as to the geographic market definition, and gone on to consider whether VELUX could be dominant following either of the proposed definitions (the "broader European market", excluding non-EEA countries, or national markets).

3.1.2. Dominance

- (38) The Union Courts have defined "dominance" as a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers.⁷⁶
- (39) FAKRO argues that VELUX is the leader in the relevant market (defined as roof windows and flashings) with a market share above 70% on the broader European Market (as defined by FAKRO, see paragraph (35) above)⁷⁷. FAKRO claims that together with the ROTO Group, it is among the two main competitors of VELUX, each holding a 6% market share (based on turnover)⁷⁸. According to FAKRO, the other competitors in the market have only marginal market shares, none of which exceeds 1% worldwide.⁷⁹
- (40) VKR contests FAKRO's description of the market shares. It argues that VELUX's market share varies considerably between different national markets (between [30-40]% and [80-90]%) and that, while competitors other than FAKRO do not generally play a significant role on a global scale, they do have strong positions regionally or locally (with market shares between [5-10]% and [20-30]%). FAKRO itself has significant market shares in some national markets, such as Poland.⁸⁰

⁷⁴ See para 50 of the Observations.

⁷⁵ Response to the Complaint, section 3.3.

⁷⁶ Case 27/76 *United Brands and United Brands Continentaal v Commission*, ECLI:EU:C:1978:22, para 65; Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 38.

⁷⁷ In the fourth Supplement, FAKRO argues that VELUX's share of the relevant market is above 80% and that it holds an exclusive monopoly, based on its profit. See para 7 of the fourth Supplement.

⁷⁸ Source: FAKRO's estimates.

⁷⁹ Complaint, para 89-91.

⁸⁰ Response to the Complaint, section 3.4.

- (41) FAKRO considers that undertakings that wish to enter or expand on the market will encounter significant barriers. These include the economies of scale that VELUX and Altaterra enjoy regarding costs.⁸¹ FAKRO further claims that no customer is strong enough to impose its conditions on VELUX.⁸² Moreover, the VELUX brand is very well established and has become a synonym for a roof window.⁸³ FAKRO also acknowledges that VELUX is more technologically advanced and has easier access to financial resources. In its Observations⁸⁴ and the fourth Supplement⁸⁵, FAKRO reiterates the above and adds that regardless of the precise market definition, the analysis of the indicators developed by the Court of Justice to evaluate the existence of a dominant position will always lead to the establishment of VELUX's dominance.
- (42) VKR agrees that VELUX benefits from economies of scale and argues that this is one of the reasons why it has been able to maintain its strong position on the market, since consumers benefit from these economies of scale. However, as regards its customers, it argues that many have strong purchasing power, since they operate on the broader market for building materials, of which roof windows make up only a minor part.⁸⁶
- (43) The Commission finds that VELUX's market share in some national markets is above 50%.⁸⁷ However, the Commission also considers that other factors, such as barriers to entry and countervailing buyer power would have to be taken into account in determining whether VELUX may be dominant on one or more (possible) relevant markets.⁸⁸
- (44) Based on the above, it cannot be excluded that VELUX may be dominant on one or more (possible) relevant markets and the Commission proceeds under the assumption of the existence of dominance.

3.1.3. *The alleged abuses*

(a) VELUX's pricing policy

Price discrimination and abuses through rebates

- (45) As regards the allegation that VELUX's prices and rebate schemes differ between Member States and lead to lower prices in countries where FAKRO's market share is significant (see para (20)(a)(iii) above), the Court has established that Article 102 TFEU does not preclude an "*undertaking in a dominant position from setting different prices in the various Member States, in particular where the price differences are justified by*

⁸¹ Complaint, para 101-125.

⁸² *Ibid.*, para 127.

⁸³ Complaint, para 129.

⁸⁴ See para 71 of the Observations.

⁸⁵ Fourth Supplement, para 2-13.

⁸⁶ Response to the Complaint, section 3.4.

⁸⁷ Source: the Commission's own calculation based on data from VELUX and FAKRO. See also Response to the Complaint, section 3.4.

⁸⁸ Case T-30/89 *Hilti v Commission*, ECLI:EU:T:1991:70, para 19; Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 48; Case 27/76 *United Brands v Commission*, ECLI:EU:C:1978:22, para 91; Case T-228/97 *Irish Sugar v Commission*, ECLI:EU:T:1999:246, paragraphs 97 to 104.

variations in the conditions of marketing and the intensity of competition".⁸⁹ A dominant undertaking is only precluded from applying artificial price differences in the various Member States such as "to distort competition in the context of an artificial partitioning of national markets".⁹⁰

- (46) Based on the elements presented by FAKRO (in the Complaint and subsequent submissions, as well as in the Observations⁹¹) it does not appear that VELUX is manipulating artificially prices, rebates and other sales conditions in different Member States in order to distort competition. Furthermore, given especially that distributors are allowed to engage in parallel trade, it seems unlikely that VELUX could be found to be trying to artificially partition national markets.⁹²
- (47) Given FAKRO's claims that VELUX sets lower prices in countries where FAKRO is stronger – such as the United Kingdom and Ireland, Poland, Romania and Slovak Republic⁹³ – in order to "*deprive FAKRO Group of its shares in these markets*"⁹⁴, the Commission analysed VELUX's and FAKRO's sales and market shares in these countries (based on data provided by the two companies⁹⁵). FAKRO also claimed that its negative financial results in Germany for the years 2003-2013 were due to VELUX's anticompetitive actions⁹⁶.
- (48) The Commission observes that, in these and other EU countries, the market for roof windows and flashings registered a contraction after 2008, which could be attributed, *inter alia*, to the financial crisis and to the stagnation in the building sector, as also admitted by FAKRO⁹⁷ and which could have an impact on sales of all parties. A loss of sales and market shares could therefore be explained by factors other than the alleged differentiation by VELUX of prices and rebates (or other alleged anticompetitive actions by VELUX).
- (49) On the basis of the above, the Commission considers that the adjustment of prices, rebates and other sales conditions to each national market show a low likelihood that a further investigation would result in a finding that these practices constitute an abuse of dominance under Article 102 TFEU.
- (50) FAKRO also maintains that some of VELUX's distribution companies are cross-subsidised by the parent company to hide their actual losses, which are the result of their aggressive price-fighting strategy, and thus show artificial (positive) profit levels⁹⁸. In

⁸⁹ Case T-83/91 *Tetra Pak International SA v Commission*, ECLI:EU:T:1994:246, para 160.

⁹⁰ *Ibid.*

⁹¹ See footnote 21 and para 80 and 84-89 of the Observations.

⁹² Response to the Complaint, section 4.1.1.

⁹³ Complaint, para 196 and 199.

⁹⁴ Complaint, para 196.

⁹⁵ See FAKRO's additional information, submitted on 24 January 2014 and VELUX's additional information, submitted on 22 January 2014.

⁹⁶ Sixth Supplement, section V.

⁹⁷ Second Supplement, para 7.

⁹⁸ Complaint, para 240-247, second Supplement, section 2.2 and para 84-89 of the Observations.

particular, this would derive from the fact that products are allegedly sold at different prices to each distribution company⁹⁹ and would be visible from the financial reports of some VELUX companies that show a decrease in the intra-group purchase price of products. According to FAKRO, this change has the sole purpose of hiding losses.¹⁰⁰

- (51) With regard to these allegations, VKR explains that VELUX A/S sells its products to VELUX sales companies at prices which comply with VELUX's transfer pricing methodology. It also claims that the change in cost of goods sold (i.e., the costs attributable to the production of the goods sold by the company) is explained by transfer pricing adjustments which aim to establish an arm's length profit margin in accordance with standard accounting principles, and is not meant to hide losses.¹⁰¹ In support of this position, VKR attached documents illustrating the internal policy and principles adopted by VELUX concerning transfer pricing, together with the reports issued by some national tax authorities which have conducted tax inspections of VELUX sales companies¹⁰². Moreover, VELUX submits that it follows internationally recognised principles for fiscal compliance, which entail the use of methodologies for internal price adjustments based on the "arm's length principle"¹⁰³. The purpose of these methodologies is to ensure that the taxable profits of multinational enterprises are not artificially shifted to different jurisdictions.
- (52) The Commission considers that based on the evidence it appears that the decrease in the intra-group purchase price of products may be justified and likely not used by VKR to create artificial profit levels. Thus, the evidence appears insufficient to indicate that some of VELUX's distribution companies are cross-subsidised by the parent company.
- (53) FAKRO further claims that VELUX employs rebate schemes and bonuses that strongly disincentivise distributors from purchasing FAKRO products (i.e., loyalty-building and discretionary rebates)¹⁰⁴.
- (54) In contrast to a quantity discount linked solely to the volume of purchases from the manufacturer concerned, which is not, in principle, liable to infringe Article 102 TFEU, a loyalty inducing rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse within the meaning of that provision.¹⁰⁵ In that regard, *"it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from*

⁹⁹ Complaint, para 240-247 and para 84-89 of the Observations. It should be noted that this claim is supported only by estimates based on list prices, average theoretical rebate levels and margins.

¹⁰⁰ Second Supplement, para 4-17.

¹⁰¹ Response to the second Supplement, section 6 and "Briefing paper on transfer pricing methodology".

¹⁰² Response to the second Supplement, section 6 and "Briefing paper on transfer pricing methodology" (and annexes).

¹⁰³ Such methodologies are based on the accounting principles highlighted by the OECD and their correct application is scrutinised by national fiscal authorities.

¹⁰⁴ Complaint, section 6.2.3.1.3.2. and sixth Supplement, section VI.

¹⁰⁵ Case C-23/14 *Post Danmark*, ECLI:EU:C:2015:651, para 27 and case law cited therein.

*access to the market, or to strengthen the dominant position by distorting competition*¹⁰⁶”.

- (55) The Commission reviewed VELUX's trade conditions applicable in a number of Member States¹⁰⁷ and considers that these share the same basic structure, although specific types of discounts may not exist in all countries. The main categories of discounts applied by VELUX¹⁰⁸ include:
- (a) basic discount applied to all distributors fulfilling certain objective criteria (e.g., having a place of business, distributing VELUX brochures and price lists);
 - (b) stock discount, rewarding distributors that keep certain levels of stock of VELUX products in their warehouses;
 - (c) marketing discounts that reward a commercial effort towards the VELUX brand (e.g., training bonus, granted for employing staff that completed a specific training course; display bonus, rewarding distributors' efforts to present VELUX products in a specific manner);
 - (d) logistics discounts which reflect cost savings for VELUX (e.g., pallet discount, when a full pallet is ordered which leads to lower logistic costs than pallets of mixed products; full truck discount, which reflects reduced transport costs; discounts for deliveries on specific days of the week only);
 - (e) financial/process discounts applied if a distributor fulfils certain order and payment conditions, such as agreeing to direct debit, placing orders through electronic systems or paying within a specified period of time.
- (56) The evidence gathered by the Commission indicated that in the Member States where it is active, VELUX essentially offers discounts which apply equally to all distributors and that reflect a cost saving or a commercial effort from the distributors.¹⁰⁹ These discounts do not seem to be conditioned on exclusivity or on any condition which could induce loyalty on their part.¹¹⁰ On that basis, the Commission considers that a further investigation into these rebates is unlikely to lead to the conclusion that they are fidelity-inducing.
- (57) VELUX also offers a turnover/sales bonus (not applied retroactively and applying non-individualised thresholds) which is available to all customers on the same terms and is meant to reward customers that purchase significant quantities because purchased

¹⁰⁶ Case C-549/10 P *Tomra Systems and Others v Commission*, ECLI:EU:C:2012:221, para 71. See also Case C-23/14 *Post Danmark*, ECLI:EU:C:2015:651, para 29.

¹⁰⁷ All EU Member States where VELUX is active (i.e., all except Croatia, Cyprus, Greece, Luxembourg and Malta).

¹⁰⁸ Reply of 25 January 2013, Exhibit 1.A and Trade Conditions for the national VELUX sales companies.

¹⁰⁹ Discounts that reflect a commercial effort from the distributor are, e.g., discounts attributed to distributors who follow a training course on VELUX products, thus increasing their knowledge on these products and discounts attributed to distributors who also offer installation services or who display VELUX products in a certain way.

¹¹⁰ Response to the Complaint, Section 4.1.3 and Reply of 25 January 2013, Section 1.1.

volumes are associated with economies of scale and other production efficiencies.¹¹¹ According to VELUX, there are significant scale economies associated with high capacity utilization and the turnover/sales bonus aims at sharing these benefits with contributing customers.¹¹² The Commission examined the criteria and rules governing the grant of the turnover sales/bonus¹¹³ and concluded that they are unlikely to bar competitors from access to the market.

- (58) As to the alleged existence of retroactive rebates¹¹⁴, the Commission first notes that retroactivity is not, as such, indicative of an infringement. Additionally, the Commission notes that the evidence presented dates back to 2002, 2006 and 2008. The more recent information regarding the rebates offered by VELUX¹¹⁵ however, suggests that the turnover/sales bonus is no longer applied retroactively. The assessment of the more recent information also suggests that, in its current terms, the turnover/sale bonus is not likely to bar competitors from access to the market (see para (57) above). Given that the retroactivity appears to have ceased and in view of the assessment of the more recent information, it appears unlikely that further investigation would lead to the finding of an infringement.
- (59) As to the claim that some of the rebates are applied in a discretionary manner¹¹⁶, this is only supported by a reference to VELUX's official trade terms and conditions. The assessment of these trade terms and conditions however does not suggest that the criteria for granting the relevant discounts are unclear, non-objective or discretionary. Moreover, there is no evidence to support the allegation that these rebates would *de facto* be applied in a discretionary manner and that this had allowed VELUX to use them in order to induce loyalty.
- (60) On the basis of the information at its disposal, the Commission thus considers that a further investigation into these rebates is unlikely to lead to the finding of an infringement of Article 102 TFEU.

Predatory pricing by VELUX

- (61) FAKRO asked Ernst & Young ("EY") to carry out an analysis of selected pricing practices by VELUX as regards the sale of roof windows, with the aim of determining whether these demonstrated a predatory pricing strategy in violation of European competition law.¹¹⁷ EY concluded that from 2005 to 2011, the prices of VELUX

¹¹¹ Reply of 25 January 2013, Exhibit 1.A and Submission of 2 October 2015.

¹¹² Submission of 2 October 2015.

¹¹³ Reply of 25 January 2013, Exhibit 1.A and Trade Conditions for the national VELUX sales companies. Response to the Complaint, Section 4.1.4.

¹¹⁴ Sixth Supplement, section VI

¹¹⁵ Reply of 25 January 2013, Exhibit 1.A and Trade Conditions for the national VELUX sales companies.

¹¹⁶ Complaint, para 229-236 and para 95 of the Observations.

¹¹⁷ Complaint, para. 277-279 and Annex 17, 18 and 19 to the Complaint. The EY analysis followed the Commission's practice that, if a dominant undertaking fixes its prices below AAC (average avoidable cost), this would constitute sufficient ground to conclude that the undertaking's pricing policy is predatory. On the other hand, if a dominant undertaking fixes its prices above AAC but below ATC (average total cost), then additional evidence indicating that the pricing policy has the intention of foreclosing a competitor is needed. Finally, if prices are found to be above ATC, the pricing policy is not generally thought to be predatory. EY points out

products were systematically below AAC (average avoidable cost) in Latvia and Romania, and that, over the same time period, the prices of VELUX products were systematically below ATC (average total cost) but above AAC in Bulgaria, Estonia, Hungary, Lithuania, Poland, Slovakia, and the United Kingdom.¹¹⁸

- (62) EY's analysis was based on the estimated price of an Average Product (constructed on the basis of VELUX's main product groups), calculated with reference to VELUX's published price lists and rebates. EY then compared this price against an estimate of VELUX's AAC and ATC for each country in order to establish whether pricing was set at a predatory level.
- (63) In reply to the Complaint, VKR contested EY's results, on the basis of a replication of EY's analysis, using its own data and the best possible approximation to the Average Product definition employed by EY. VKR concluded that, at least from 2005 to 2013, the general price levels of VELUX products have not been below ATC in any of the countries covered by the EY report.¹¹⁹
- (64) As regards the EY report, first, the Commission considers that EY's approach is inconsistent with the broader European market definition proposed by FAKRO.¹²⁰ In fact, while FAKRO claims that the relevant geographic market includes all the territory of the EU28 (plus Switzerland, Norway, Russia and Ukraine); EY carried out its analysis and drew its conclusions on a country by country basis. In its Observations, FAKRO did not provide any explanation for this apparent inconsistency.
- (65) Secondly, as regards the definition of the Average Product, as well as cost information and sales data, EY's analysis seems to have been hampered by the lack of sufficient publicly-available data. EY itself indicates that publicly available financial and market data relating to the VELUX group "*is considerably limited*"¹²¹. As a consequence, although some data on prices and rebates are public, EY seems to have been obliged to base a significant part of its analysis on assumptions, with inevitable implications for the reliability of its conclusions.¹²²
- (66) Thirdly, with regard to the calculation of VELUX's AAC and ATC for particular countries, EY had to rely on FAKRO's own method of differentiating between fixed

that, in most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided (See Annex 17 to the Complaint, p. 7). In *Akzo*, the Court of Justice stated that prices below average variable costs must be regarded as abusive, while prices below average total costs but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. See Case 62/86 *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, para. 71-72.

¹¹⁸ For the purpose of this assessment, the Commission disregards non-EEA countries (see para (35)).

¹¹⁹ Response to the Complaint, section 5 and response to the second Supplement, section 5.3.b.

¹²⁰ Nevertheless, the Commission considers that for the provisional assessment of the Complaint the exact geographic market definition can be left open (see para (37)). Therefore, for the purpose of the predatory pricing assessment, the Commission assessed the claim that predatory pricing exists at the level of the national markets.

¹²¹ Annex 17 to the Complaint, p. 10.

¹²² For example, the Average Product does not take into account that VELUX sells a multiplicity of product lines in the various national markets. This simplification may ignore some significant differences between offers in different territories.

production costs and variable costs.¹²³ EY considered that this was a reasonable approach since FAKRO was a comparable undertaking to VELUX.¹²⁴ However, given the specialisation into different product groups, the different geographic coverage and the difference in size between VELUX and FAKRO, the Commission doubts that FAKRO's own cost structure is a good and precise proxy for that of VELUX¹²⁵. All these factors appear to weaken the reliability of EY's conclusions as regards VELUX's costs for particular countries.

- (67) Finally, when calculating VELUX's effective prices, EY points out that for countries where there was no precise and reliable data relating to VELUX's trading policy, FAKRO estimated the level of rebates on the basis of the average rebate level in all the countries.¹²⁶ Considering the fact that the trading policy of VELUX varies between countries, this approach can lead to an imprecise estimate of effective prices in some countries and the Commission accordingly treats these results with particular caution.
- (68) In order to assess the allegation of predatory pricing, the Commission examined the financial accounts of the VELUX companies in the countries where, according to EY, predatory pricing is allegedly taking place.¹²⁷ This examination, which was based on the costs and revenues generated by the windows and flashings business, did not provide any indication that the companies in question have not been able to cover their costs over the period since 2008¹²⁸. On the contrary, the evidence gathered demonstrates that for the windows and flashing business, all these companies covered their variable costs attributable to those products.¹²⁹ These results are not suggestive of predatory practices. Moreover, in relation to prices below ATC the elements¹³⁰ put forward by FAKRO are insufficient to conclude that VELUX followed an anticompetitive plan.
- (69) In its Observations, FAKRO argues that most of the data used in EY's report is publicly available and taken from VELUX's official price list, rebate policies and financial reports

¹²³ FAKRO also supplied supplementary expert estimates as to the level of effective rebates and the costs of distribution on chosen countries (Annex 17 to the Complaint, pp. 7-10).

¹²⁴ Annex 17 to the Complaint, pp. 9 and 23.

¹²⁵ FAKRO itself remarks the differences in cost structure between the two companies. According to its analysis, distribution costs, research and development costs and transport costs are considerably different between the two companies. Unlike FAKRO, VELUX is also reportedly benefiting from high economies of scale. See Complaint, para 106-126.

¹²⁶ Annex 17 to the Complaint, page 14.

¹²⁷ See para (61).

¹²⁸ Commission's own calculation based on VELUX's financial statements and other additional data from VELUX.

¹²⁹ Financial statements of VELUX companies, submitted on 12 July 2013 and Submission of 25 November 2013. According to EY, in most cases, AAC and the average variable cost (AVC) will be the same (See footnote 117 above).

¹³⁰ To support the allegation that VELUX followed an anticompetitive plan, FAKRO mentions the circumstance presented in EY's analysis that VELUX allegedly introduced predatory pricing only in select countries, when FAKRO entered or expanded on those countries (see paras 284-298 of the Complaint). FAKRO also mentions VELUX's actions with regards to the alleged fighting brands, as proof that VELUX followed an anticompetitive plan (see para 33 to the Reply to VKR's Comments).

and that only a small portion of the data were estimates. It further argues that the Commission should have supplemented EY's analysis with all the missing data¹³¹.

- (70) Second, FAKRO states that the Commission's analysis of predatory pricing (see para (68) above) was limited to the analysis of VELUX's financial data and argues that, since VELUX applies the "arm's length principle" (i.e., transfer pricing methodology), any attempt to identify possible predatory pricing on the basis of a simple analysis of financial statements of sales companies would not be successful¹³². In particular, FAKRO claims that if VELUX is applying a predatory pricing strategy, it "conceals" it by manipulating internal cost measures¹³³.
- (71) Third, FAKRO considers that VELUX's counter-analysis of the predatory pricing allegations is incomplete and flawed as it omits some cost categories¹³⁴. In particular, FAKRO claims that VKR's analysis for 2005-2012 omitted a category of cost (marketing and communication costs, "MCC") that, if included, would lead to different results.
- (72) The Commission notes that, as regards its assessment of EY's report, FAKRO, in its Observations and in the Reply to VKR's Comments¹³⁵, simply reiterates some of the arguments contained in its previous submissions (e.g., that most of the data used by EY in its report comes from public sources and that FAKRO and VKR's cost structure should be considered similar¹³⁶) without clarifying or adding any significant new element in support of its allegations.
- (73) In particular, FAKRO did not address the Commission's questions about the limitations of certain assumptions regarding, for example, the distribution of costs, the assumed analogy in cost structure between VKR and FAKRO, and the determination of the relevant rebates in EY's analysis. Moreover, even though the Commission pointed out that only in specific circumstances can prices above AAC and below ATC be considered abusive, FAKRO did not bring forward any additional evidence supporting the idea that such specific circumstances are present in this case, neither in the Observations nor in the Reply to VKR's Comments. As such, the Commission maintains its doubts regarding the reliability of EY's conclusions.
- (74) With reference to the scope and nature of the Commission's own analysis of predatory pricing, the Commission observes that its assessment is based on the evidence submitted by FAKRO (namely the EY report) and on evidence submitted by VKR. Additional data has been used to complement such analysis (which, in any case, showed already limited evidence of a predatory strategy carried out by VKR) and this additional data also did not suggest the existence of predatory practices. With regard to FAKRO's claim that the Commission should have supplemented EY's analysis with the missing data, as mentioned above, the case-law does not preclude the Commission from rejecting

¹³¹ See para 116 of the Observations.

¹³² See para 118-123 of the Observations.

¹³³ See para 124 of the Observations.

¹³⁴ See para 127-139 of the Observations.

¹³⁵ See section 2 of the Reply to VKR's Comments.

¹³⁶ See para 116 of the Observations.

complaints without taking any investigative measure if there is a low likelihood of finding an infringement.¹³⁷

- (75) As regards the claim that VKR manipulates its internal cost measures, the Commission observes that this is not substantiated (see also paras (51)-(52) above).
- (76) Finally, as regards VKR's counter-analysis, the Commission notes that it leads to opposite results comparing to FAKRO's. In this respect, although FAKRO criticised the previous non-inclusion of MCC in the analysis¹³⁸ and VKR's argument that part of MCC should be categorised as "non-avoidable" costs¹³⁹, it does not add sufficiently convincing elements to explain why, once these costs are included, VKR's methodology would still be flawed¹⁴⁰. In its Comments, VKR shows that its original analysis developed in response to the Complaint¹⁴¹, although not containing MCC, involved already the use of a stricter cost benchmark than the AAC test¹⁴². In any event, in response to the Observations, VKR updated its analysis by including also MCC. Such inclusion did not alter the outcome of the analysis, which still shows positive margins for all of VELUX's products¹⁴³.
- (77) On the basis of the information at its disposal, the Commission thus considers that a further investigation into the selected pricing practices by VELUX as regards the sale of roof windows is unlikely to lead to the finding of an infringement of Article 102 TFEU.

Long-term sales promotions

- (78) In the Complaint, FAKRO alleged that VELUX makes long-lasting, year-round sales promotions which constitute *de facto* additional rebates¹⁴⁴. In its Observations it adds that this claim was not brought up as an allegation of a fidelity inducing rebate but as evidence in support of predatory pricing, while also stating that some promotions may have loyalty inducing effects¹⁴⁵.

¹³⁷ T-432/05 *EMC Development*, ECLI:EU:T:2010:189, paras. 57-59; T-320/07 *Jones*, ECLI:EU:T:2011:686, paras. 112-116; T-319/99 *FENIN*, ECLI:EU:T:2003:50, para. 43; T-204/03 *Haladjian Frères*, ECLI:EU:T:2006:273, para. 28; and the Notice on Complaints, para. 47.

¹³⁸ See para 137 of the Observations and para 31, 34 of the Reply to VKR's Comments.

¹³⁹ FAKRO states that MCC costs "*are a key category when calculating predatory pricing and, if they are omitted, such calculations miss their point*". See para 31 of the Reply to VKR's Comments.

¹⁴⁰ FAKRO generically states that the calculation method is established by VELUX and not subject to external verification. Furthermore, FAKRO argues that if VELUX's objective is to cover its predatory strategies, the methodology could be established accordingly, but provides no evidence to support this allegation. See paras 28, 31 of the Reply to VKR's Comments.

¹⁴¹ Response to the Complaint, section 5 and Annex 5.3.

¹⁴² See pages 1, 3 of VKR's Comments. VKR explains that its cost benchmark includes some non-avoidable fixed costs, such as the cost of premises and depreciation cost.

¹⁴³ See pages 2-7 of VKR's Comments and Annex 1.

¹⁴⁴ Complaint, para 396.

¹⁴⁵ See para 145-146 of the Observations.

- (79) The evidence presented by FAKRO covers promotions addressed both to individual end customers as well as distributors of VELUX products.¹⁴⁶ Almost all the promotions addressed to individual end customers concerned a refund or bonus of a specific amount for customers having bought particular models of roof windows. The refund or bonus was not of very high value and was often limited to a small total number of roof windows. These promotions appear to bring no advantage to VELUX distributors. Similarly, promotions addressed to distributors almost always concerned a prize (e.g., watches or electronic devices), but not a financial contribution, to be awarded for the sale of a certain number of specific roof windows. These promotions often concerned different sets of products¹⁴⁷. According to VELUX, some of these promotions concerned newly launched, premium products while others, such as the pallet promotions, were time limited offers involving savings for VELUX.¹⁴⁸
- (80) Given the above described characteristics of the promotions and in particular the type of reward attributed (especially as it concerns distributors) and the fact that refunds and bonuses to end customers were limited to a small total number of roof windows, it appears unlikely that the promotions could have similar effects as rebates or that they could lead to pricing below cost. The duration of the promotions is not likely to change this conclusion. Moreover, this conclusion is supported by the predation analysis presented by VKR¹⁴⁹, which took promotions into account. As regards any potential fidelity inducing effects, an analysis of the criteria and rules of the promotions that FAKRO listed as evidence does not reveal any conditions that could have a fidelity inducing effect and also shows that participation in the different promotions did not require participation in previous or future promotions.¹⁵⁰ In addition, it appears that the promotions are available to all distributors in a given territory. Given the rules of the promotions, it appears unlikely that these could have a fidelity-building effect.
- (81) On the basis of the information at its disposal, the Commission thus considers that a further investigation into VELUX's promotions is unlikely to lead to the finding of an infringement of Article 102 TFEU.

Additional privileges/rebates not included in the official trade terms and conditions

- (82) FAKRO further claims that VELUX discriminates between distributors, in particular by offering investment rebates (i.e., rebates offered for investment/project sales) and other rebates not included in the official terms and conditions, as a means of reward or punishment of the particular distributors¹⁵¹.

¹⁴⁶ For the purpose of this assessment, the Commission only took into account promotions related to the relevant product market.

¹⁴⁷ Response to the second Supplement, section 5.1.

¹⁴⁸ Response to the Complaint, pages 60-61.

¹⁴⁹ Response to the second Supplement, section 5.3 (b).

¹⁵⁰ Complaint, para 358-371 (in particular the annexes containing the promotion's regulations) and Response to the Complaint, pages 59-60.

¹⁵¹ Complaint, section 6.2.3.4, Supplement, section 3, second Supplement, section 2.4, third Supplement, section 3, para 149 of the Observations and seventh Supplement, section 2.

- (83) As regards the fact that investment rebates are not included in the official trade terms and conditions, the Commission does not consider this fact to be *a priori* evidence of an abuse of dominant position. The prohibition of discrimination provided for in Article 102 TFEU requires the application of dissimilar conditions to equivalent transactions. However, it appears that investment rebates are only offered by VELUX in the case of project sales, which do not appear to be equivalent transactions to regular sales to distributors. Project sales are defined by VELUX as "*a bidding market in which suppliers are asked to submit bids for particular products and the winner takes it all*"¹⁵². These sales involve the supply of products for use in large construction or renovation projects (e.g., for apartment blocks or office buildings) and are characterised by particularly high volumes of products. The nature of project sales, where bidding for a project happens in various stages and where, at each stage, contractors/investors attempt to obtain better conditions from the different suppliers before awarding the project to a single supplier or particular suppliers, differentiates these from other sales and therefore would seem to justify a departure from the standard sales terms and conditions. The evidence presented by FAKRO also indicates that project sales are characterised by multi-stage bidding, as FAKRO itself seems to make different bids at different stages of the bidding process in order to win the project.¹⁵³ Additionally, the evidence suggests that these sales generally involve a high volume of products.¹⁵⁴
- (84) As regards the practical application of the investment rebates, FAKRO argues that these are discretionary and offered selectively, leading to discrimination between distributors. In particular, FAKRO argues that VELUX only offers investment rebates or support when the investor uses the distributor indicated by VELUX and that it uses these rebates to reward or punish distributors for their loyalty.¹⁵⁵ FAKRO also argues that the investment rebates lead to predatory prices, or at the least, that they involve the selective¹⁵⁶ sacrifice of short-term profits with the goal of foreclosing FAKRO.¹⁵⁷
- (85) Based on the evidence on file, however, it does not appear that investment rebates are offered selectively with a view to building the distributors' loyalty. The majority of the evidence presented by FAKRO suggests that the rebates offered for each specific project are offered to the contractor/investor (either directly by the manufacturer or indirectly through the distributors) and borne by VELUX (not the individual distributors).¹⁵⁸ It also appears that it is the contractor/investor who chooses which supplier to award the project to, and which distributor is chosen (both where the rebate is offered to the

¹⁵² Response to the second Supplement, section 4.

¹⁵³ See e.g., Complaint, para 415 and Annexes A-35, A-36 and A-37 and second Supplement, para 47, Annex D-8 and Annex D-9.

¹⁵⁴ In many cases, more than 100 windows and in some cases reaching up to 1000 windows, although, by definition, there is a spectrum between situations with a high volume of windows and situations with a lower, or low, volume of windows.

¹⁵⁵ Seventh Supplement, Section 2.2 and 2.3 and eighth Supplement, Section 2.1.

¹⁵⁶ I.e., only towards certain clients, on particular markets or in a particular time (Eighth Supplement, paras 57-59).

¹⁵⁷ See para 64-68 of the Reply to VKR's Comments and section 2.2.2.4 of the eighth Supplement.

¹⁵⁸ See e.g., second Supplement, para 33 and Annex D-4, Annex D-9, para 49-52, para 54 and Annex D-21 and third Supplement, para 18 and Annex E-16.

contractor/investor or to the distributors).¹⁵⁹ Moreover, in some cases, the same distributor presents offers from several suppliers.¹⁶⁰ The evidence also does not suggest that where the investment rebate/support is offered directly to the contractor/investor, the distributors are offered any additional advantages by VELUX apart from their normal margins. Neither does the evidence suggest that VELUX would use these in a discretionary manner with a view to building the distributor's loyalty. There are also no sufficient indications in the Commission's possession that any form of exclusivity would actually exist.¹⁶¹

- (86) VKR acknowledges that VELUX offers investment rebates or support directly to contractors/investors. It also explains that investment rebates can also be offered to distributors. When this is the case, VKR claims that all the distributors that wish to bid are offered the same rebate at each stage of the bidding process and are free to decide on the price they offer to contractors/investors¹⁶². There are no sufficient indications in the Commission's possession to suggest this is not the case. VKR also claims that VELUX does not select the distributors that will bid for a project¹⁶³ and that the application of these investment rebates does not lead to predatory prices.¹⁶⁴ In support of these claims, VKR submitted VELUX's Internal Rules for Project Sales which determine the conditions for applying investment rebates (e.g., rules on minimum prices and equal treatment of dealers), and provided specific examples of their application in practice, suggesting that these rebates are not predatory and applied in a non-selective and non-discretionary manner.¹⁶⁵ Moreover, where it appeared from the evidence presented by FAKRO that different terms might have been offered for the same investment/project and the same products¹⁶⁶, VKR has provided evidence¹⁶⁷ showing that the different terms were due to the fact that they were offered at different stages of the bidding process and that at the same stage, all bidders were offered the same terms. There are also no sufficient indications in the Commission's possession that the rebates offered, or the level of the rebates, are in any way related to each distributor's relationship with FAKRO. It

¹⁵⁹ While VELUX says that it sometimes recommends distributors, on the request on the contractor/investor, it claims that this is done based on objective factors (VKR's response to the seventh Supplement, Section 2.3). Moreover, the evidence does not suggest that this leads to VELUX *de facto* choosing the distributor (as other distributors are still allowed to bid and the final choice remains with the contractor/investor) or that the recommendations result in the reward/punishment of certain distributors in view of their relationship with FAKRO (see para 26 of the eighth Supplement).

¹⁶⁰ See e.g., third Supplement, para 18 and second Supplement, para 54, para 38 and Annex D-9.

¹⁶¹ FAKRO claims that if investment rebates are assessed only in relation to each specific project, they would qualify as exclusive rebates, in that the rebate would only be granted if the distributor were to purchase all products from VELUX (Eighth Supplement, para 48). However, based on the information available to the Commission, it appears that distributors purchase all the products for one particular project from the same supplier because this is requested by the contractor/investor and not because it would be a condition to obtain the investment rebate.

¹⁶² VKR's response to the seventh Supplement, Sections 2.2 and 2.3.

¹⁶³ *Ibid.*

¹⁶⁴ Response to the second Supplement, section 4 and VKR's Comments, section 3.

¹⁶⁵ Response to the second Supplement, section 4 and annexes 16-25 and VKR's response to the seventh Supplement, sections 2.2 and 2.3.

¹⁶⁶ Third Supplement, para 11-14 and para 153-156 of the Observations.

¹⁶⁷ VKR's Comments, section 3 and Annexes 2-5.

therefore appears that the application of investment rebates is not likely to place certain distributors at a competitive disadvantage vis-à-vis others.

- (87) FAKRO further claims that investment rebates also lead to discrimination between VELUX's clients (i.e., contractors/investors) as the rebate would vary depending only on FAKRO's involvement in each project.¹⁶⁸ However, the available evidence does not seem to suggest that either the granting of an investment rebate or its level is dependent on FAKRO's involvement in a specific project, rather than on other factors.¹⁶⁹
- (88) On balance therefore, the evidence gathered in the present case does not seem sufficient to support FAKRO's assertion that these rebates are applied in a selective and discriminatory manner in order to exclude FAKRO from the market, that these rebates involve a selective sacrifice of profit with the goal of excluding competition or that they could lead to predatory pricing¹⁷⁰, nor its claim that distributors believe the rebate to be purely discretionary and treat it as such¹⁷¹.
- (89) As to the claim that VELUX offers other additional rebates and privileges, not included in the official trade terms and conditions, which are not investment rebates linked to project sales¹⁷², the Commission notes that much of the evidence presented is anecdotal and consists of internal FAKRO materials which do not sufficiently point to the rebates being outside of the trade terms and conditions, not being objectively justified, or unrelated to the services for which they were allegedly offered¹⁷³. In this regard, where it was possible to identify the specific circumstances, VKR has provided explanations for the granting of the rebates¹⁷⁴. More importantly, however, there is no sufficient evidence to suggest that the rebates were selectively offered to distributors because of their relationship with FAKRO¹⁷⁵. On balance, therefore, the evidence does not appear sufficiently conclusive to suggest that VELUX has a policy of selectively offering rebates and privileges, not included in the official trade terms and conditions that would aim at excluding FAKRO.
- (90) On the basis of the information at its disposal, the Commission thus considers that a further investigation into VELUX's additional privileges/rebates not included in the official trade terms and conditions is unlikely to lead to the finding of an infringement of Article 102 TFEU.

¹⁶⁸ Eighth Supplement, paras 63-65.

¹⁶⁹ See, e.g., second Supplement, Annex D-3.

¹⁷⁰ As explained above (See para. (61)-(77)), it seems unlikely that VKR engaged in a predatory pricing strategy.

¹⁷¹ See para 158 of the Observations and para 60 of the Reply to VKR's Comments.

¹⁷² Complaint, para 429-452, Supplement, para 5-14, second Supplement, para 63-64 and para 149 of the Observations.

¹⁷³ Additionally, some of the evidence refers to rebates/privileges offered by distributors to their customers, and not rebates/privileges offered by VELUX (see, e.g., annex A-69 to the Complaint and annex B-16 to the Supplement).

¹⁷⁴ Response to the Complaint, p.65-67

¹⁷⁵ Complaint, para 402.

VELUX's multi-level selective anticompetitive pricing policy

- (91) FAKRO claims that only the analysis of VELUX's multi-level pricing policy as a whole system may fully reveal the anticompetitive actions and their cumulative effect¹⁷⁶. It asserts that the multi-level structure of the policy multiplies its anticompetitive effects, which are to foreclose FAKRO from the market¹⁷⁷. However, this claim is supported only by a reference to VELUX's financial results, which would suggest that VELUX's profitability is below the average profitability of other undertakings in the world¹⁷⁸.
- (92) In view of the lack of substantiation, and taking into account the Commission's assessment of the individual allegedly abusive practices detailed above, the Commission considers that a further investigation is unlikely to lead to the finding of an infringement of Article 102 TFEU.

(b) The introduction of RoofLITE, DAKEA and BALIO as fighting brands

- (93) The Altaterra Group was created in the early 2000s and was initially called the RoofLITE company. The company was renamed in 2011, as new product lines were offered, in order to avoid confusion between the name of the company and the brand. RoofLITE is a brand of roof windows that was created to meet competition in the low price market segment. DAKEA and BALIO are also brands of roof windows, created to address growing demand in the intermediate and the ultra-low price segment, respectively.¹⁷⁹
- (94) FAKRO argues in this regard that these are "fighting brands", used by VKR to introduce a strategy of anticompetitive, selective actions aimed at eliminating FAKRO from the relevant market.¹⁸⁰
- (95) At the outset, the Commission notes that the creation of low-priced brands does not necessarily imply selective and targeted price cuts for the purpose of eliminating competitors from the market. Instead, it usually involves the creation of new product lines, with different characteristics (in terms of production, sales structure, marketing, after-sale support, etc.) and different prices, to address a different segment of the market.
- (96) In this perspective, the Commission does not consider that the fact that VKR launched low-price brands to compete in the segment where FAKRO mainly operates could be viewed as indication of an infringement. On the contrary, the Commission considers that, in general, intense price competition is beneficial for consumers. It should be noted in this regard that FAKRO itself created a cheaper brand of roof windows in 2012, Optilight, active in the low-level segment of the market and sold through one of its subsidiaries¹⁸¹, suggesting that a segmentation strategy may be common practice in this market or at least that these brands presumably tend to respond to customers' needs. The

¹⁷⁶ Complaint, para 153-176 and 453-460. See also para 75-83 of the Observations.

¹⁷⁷ See para 164 of the Observations.

¹⁷⁸ This assertion seems to be in contradiction with the claim (see para 10-11 of the fourth Supplement) that VKR's profitability is high and has increased considerably in recent years.

¹⁷⁹ "The background and conditions for the creation of Altaterra", section 4.

¹⁸⁰ Complaint, para 697-705.

¹⁸¹ Second Supplement, para. 84.

fact that VKR saw this possible customer need first does not indicate that this introduction of low-price brands is anticompetitive. While FAKRO argues that it launched the Optilight brand only because it had no choice in order to be able to compete with VKR, and that the timing of the introduction of VKR's new brands hurt FAKRO,¹⁸² this does not mean that the introduction by VKR of one or more low-priced brands to compete in different market segments than the one addressed by the VELUX brand is anticompetitive.

- (97) Similarly, the Commission does not consider that the alleged benefit that Altaterra would have from the economies of scale effect enjoyed by VELUX is an indication of an anticompetitive behaviour. A subsidiary of a large corporate group may procure its inputs through the group's centralised purchasing. Where the group is able to purchase inputs at a lower price than a standalone smaller firm, it may legitimately pass on these cost savings – i.e., economies of scale – to its subsidiaries. If VELUX (and subsequently Altaterra) were found to be able to price lower than FAKRO by exploiting a cost advantage generated by economies of scale, this would not necessarily be considered anticompetitive.
- (98) To substantiate its claims as regards fighting brands, FAKRO cites¹⁸³ the Commission's decision and the Union Courts' case law in the *Compagnie Maritime Belge* ("CMB") case.¹⁸⁴ In that case, the Courts confirmed the Commission's decision which found that the pricing practice of "fighting ships"¹⁸⁵ constituted an abuse of dominant position even though prices were not below cost. The essence of the abusive conduct in this case resided in a strategy of selective and targeted application of lower rates in response to the competitive threat posed by Grimaldi and Cobelfret (a competitor of CMB), pursued for the avowed purpose of eliminating that competitor.¹⁸⁶
- (99) The Court also pointed out that the maritime transport market was, at that time, subject to specific rules under Regulation 4056/86, a "block exemption" for so-called "liner conferences" (i.e., price-fixing and capacity-fixing horizontal agreements among container shipping operators). This meant that since competition was already reduced in this sector because of the block exemption, it was all the more important to ensure that competition was not further reduced by the parties' behaviour.¹⁸⁷ The market at issue in the current case is very different from the maritime transport market and the market

¹⁸² See para 169 of the Observations.

¹⁸³ Complaint, section 6.6.1.2.

¹⁸⁴ Commission Decision 93/82/EEC of 23 December 1992, Cewal, Cowac and Ukwal (OJ 1993 L 34, p. 20), Joined Cases T-24/93 to T-26/93 and T-28/93, *Compagnie Maritime Belge Transports and Others v Commission*, ECLI:EU:T:1996:139 and Joined cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge v. Commission*, ECLI:EU:C:2000:132.

¹⁸⁵ CMB and other undertakings forming a liner shipping conference implemented a practice aimed to drive a competitor out of the market by using selective price cuts. Such a practice, known as "fighting ships" involved: designating as fighting ships specific vessels whose sailing dates were closest to the sailings of the competitors' ships; fixing fighting rates different from the rates normally charged so that they were the same or lower than the competitors' prices; and the resulting decrease in earnings.

¹⁸⁶ Opinion of Advocate General Fennelly delivered on 29 October 1998, Joined cases C-395/96 P and C-396/96 P, ECLI:EU:C:1998:518, para 119 and 137.

¹⁸⁷ Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge v. Commission*, ECLI:EU:C:2000:132, para 115-117.

position held by VKR cannot be compared to the collective dominant position held by the members of the liner conference. As such, it appears that the test as set out in *CMB* may not be suitable to apply in this case.

- (100) As regards selective pricing by dominant undertakings, in *Irish Sugar* the Court has stated that a distortion of competition may arise if a “*financial advantage granted by the undertaking in a dominant position is not based on any economic consideration justifying it, but tends to prevent the customers of that dominant undertaking from obtaining their supplies from competitors*”¹⁸⁸. One important element was whether “*the practice in question takes place in the context of a plan by the dominant undertaking aimed at eliminating a competitor*”¹⁸⁹.
- (101) In the present case, it appears that the different characteristics (in terms of production, sales structure, marketing, after-sale support, etc.) of the low-priced brands introduced by VKR differentiate these from other brands and therefore would appear to justify the difference in prices. As such, it seems that such a pricing policy is likely to be objectively justified and does not appear to prevent customers from obtaining their supplies from competitors. The Commission thus comes to the conclusion that there is a low likelihood that a further investigation would result in a finding that these practices constitute selective pricing in breach of Article 102 TFEU.
- (102) FAKRO also argues that Altaterra does not cover its costs¹⁹⁰. Predatory pricing involves pricing below an appropriate measure of cost,¹⁹¹ on the understanding that cost is to be calculated on the basis of fair intra-group accounting to avoid anticompetitive cross-subsidisation.
- (103) In this respect, the Commission has in particular examined Altaterra's (previously RoofLITE) financial statements for the period 2005-2012¹⁹², as well as the updated financial statements covering also the period 2013-2015¹⁹³. These reveal that for each year in the period considered, Altaterra was able to cover its variable costs.¹⁹⁴ The evidence gathered by the Commission indicates that Altaterra's Earnings Before Interest and Taxes (EBIT) was not always positive¹⁹⁵. This could suggest that Altaterra was not always covering what might be considered to be a reasonable approximation to its ATC. The Commission notes, in this regard, that the launches of Contrio and Itzala, both new brands of blinds for roof windows, in 2005-2007, as well as the launch of the DAKEA

¹⁸⁸ Case T-228/97 *Irish Sugar*, ECLI:EU:T:1999:246, para 114 and case-law cited therein.

¹⁸⁹ *Ibid.*

¹⁹⁰ See para 187 of the Observations.

¹⁹¹ "Prices below average variable costs [...] must be regarded as abusive". See Case 62/86 *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, para. 71.

¹⁹² Reply of 25 January 2013, Annex 4-S: "*Altaterra Financial Results 2005-2011*", Submission of 24 September 2013: Annexes 3.1- 3.4 and Submission of 26/30 September 2013: "*Consolidated P&L, Management Account*".

¹⁹³ VKR's Comments, Annex 9.

¹⁹⁴ See footnote 117.

¹⁹⁵ Reply of 25 January 2013, section 4 and VKR's Comments, Section 4. It should be noted that although the Altaterra company was named RoofLITE until 2011, RoofLITE was only one product line in the company. This means that the analysis of Altaterra's profitability may include other product lines and the results should therefore be treated with caution.

and BALIO brands in 2012, are likely to have had an impact on Altaterra's financial results.¹⁹⁶

- (104) In 2008, Altaterra's financial statements began to differentiate between product lines¹⁹⁷ and it is therefore possible to analyse their profitability separately (for the period until 2012). Such an analysis shows that the RoofLITE product line has been fully profitable since 2008 and confirms that any losses were attributable to other product lines, some of which were not roof windows (such as Contrio and Itzala).
- (105) As for BALIO and DAKEA, the Commission analysed the financial statements of these product lines and found no indication that the introduction of these product lines would amount to an abuse. In particular, with reference to DAKEA, the Commission took into account the circumstance that its launch in 2012 was preceded by a marketing campaign. Moreover, VKR has explained that as this brand has a higher quality positioning, Altaterra needed to invest significantly in sales organisation, branding, etc., which explains the negative results in the immediately following years.¹⁹⁸ As for BALIO, the Commission took into account the fact that the brand was only created in 2012.¹⁹⁹ In general, it seems reasonable to assume that a new business may not be immediately profitable after its launch, and that its start-up investments and costs can be sometimes recovered only after a certain period of time.
- (106) The Commission further notes that the evidence presented by FAKRO does not seem to support the conclusion that Altaterra's costs are underestimated or manipulated due to VELUX subsidising Altaterra.²⁰⁰ VKR has stated that VELUX does not sell windows to Altaterra below cost (this is supported by a breakdown of Altaterra's accounts and an explanation of its pricing system);²⁰¹ that it only covers costs of Altaterra when this is necessary in order to ensure compliance with local legislation, and that all such costs are invoiced to Altaterra.²⁰² On balance it appears unlikely that VELUX is subsidising Altaterra.
- (107) In sum, the evidence in the present case did not provide indication that the RoofLITE roof windows business was unprofitable from 2008 onwards: a finding which weighs against the claim that the RoofLITE brand was a tool for predatory behaviour.²⁰³ As regards Altaterra as a whole, the Commission's assessment based on its EBIT is that, although it has not always been profitable, it has always covered its variable costs and any losses can be attributed to the launch of new products and/or the 2008 economic crisis. Therefore, Altaterra's financial statements also do not support the claim that VKR

¹⁹⁶ Reply of 25 January 2013, section 4.2.2. and VKR's Comments, page 11.

¹⁹⁷ RoofLITE, Contrio and Itzala (and DAKEA and BALIO since 2012). See submission of 24 September 2013: Reply to question 3 and Annexes 3.1-3.4.

¹⁹⁸ VKR's Comments, page 11.

¹⁹⁹ Response to the Supplement, section 6.4.2. and "The background and conditions for the creation of Altaterra", section 4.

²⁰⁰ Complaint, para 693-694 and Supplement para 35.

²⁰¹ See submission of 24 September 2013: Reply to question 3 and Annexes 3.1-3.4

²⁰² Response to the Complaint, section 10.1.1, response to the Supplement, section 6.3.2 and Reply of 25 January 2013, section 1.3.2.2 and section 3.

²⁰³ Submission of 24 September 2013 - Annexes 3.1- 3.4.

was engaged in a strategy by which "fighting brands" incurred systematic losses and were sold below variable costs in order to exclude competitors in the low-end segment of the market.

- (108) In the Observations, FAKRO contests the Commission's assessment of Altaterra's publicly available financial statements: in particular, it observes that: *i*) over the last ten years Altaterra's financial statements have shown losses every year except for 2011; *ii*) Altaterra has not increased its turnover, which remains at a similar level from year to year; and *iii*) Altaterra does not cover its fixed costs.²⁰⁴
- (109) In its Article 7(1) Letter, the Commission pointed out that the creation of low-priced brands is not necessarily anticompetitive and that it could be abusive only if it had a clear exclusionary intent (e.g., if it were demonstrated that Altaterra consistently sold its products below cost). The Commission observes that, nevertheless, FAKRO did not bring in its Observations or the Reply to VKR's Comments, any new element in support of such a possibility, besides additional figures regarding Altaterra Hungary Ltd.'s revenues and profit.
- (110) The Commission also notes that FAKRO does not contest the profitability of the RoofLITE business since 2008. Finally, the Commission points out that in the light of the evidence gathered the claim that Altaterra's turnover did not increase in the last nine years does not seem to be substantiated. On the contrary, it appears that Altaterra's turnover shows a positive trend and an increase well above 50% of its revenues in the last nine years²⁰⁵.
- (111) This assessment is further supported by the internal documents presented by VKR²⁰⁶, in particular the minutes of Altaterra board meetings covering the period 2005-2012. An analysis of these documents does not support the claim that RoofLITE, DAKEA and BALIO were created with the purpose of foreclosing FAKRO, but shows instead that they were created to address existing demand and with a focus on the profitability of each line and Altaterra in general. [...] ²⁰⁷. These documents, taken in context, show that RoofLITE was introduced to address a different segment of the market than the one addressed by VELUX, in a competitive manner, but do not suggest that VKR intended to sacrifice the profitability or growth of the brand in order to foreclose FAKRO, or to sell products below costs, nor that it intended to adopt any selective or targeted actions not based on any economic consideration, in order to use the brand to foreclose competitors. Therefore, these documents do not suggest that VKR's low-price brands are anticompetitive.
- (112) Regarding the additional elements that allegedly show the anticompetitive nature of Altaterra's brands (see para (20)(b) (i) to (iv) above), the Commission considers that these also do not appear to support the notion of a "fighting brand" strategy. In particular, the evidence does not seem to support the claim that when it was first launched, RoofLITE selectively targeted FAKRO's existing distributors and offered them lower

²⁰⁴ See section 4.3.4 of the Observations.

²⁰⁵ See page 11 of VKR's Comments.

²⁰⁶ Reply of 25 January 2013, section 4 and Exhibits 4.A to 4.R.

²⁰⁷ [...]

prices. VKR has presented a list of Altaterra's customers since 2002 from which it derives that many of its customers were not distributors of FAKRO. It has also presented invoices showing that different companies were offered similar prices.²⁰⁸ As for the claim that RoofLITE approached only potential customers of FAKRO²⁰⁹, this is unlikely to be seen as anticompetitive. Altaterra and FAKRO's products are competing and substitutable, and therefore, any Altaterra potential customer is also a potential customer of FAKRO. There is also insufficient evidence to suggest that RoofLITE selectively offered lower prices to these potential customers.

- (113) Moreover, the Commission notes that FAKRO's claim²¹⁰ that RoofLITE does not have official published trade terms and price lists does not necessarily mean that trade terms and prices are set individually for each recipient. Instead, VKR has explained that the Altaterra pricing system provides a set of base prices for each RoofLITE product, which are market specific. These base prices are adjusted in function of objective customer characteristics, none of which relate to the customer's relationship with competitors, including FAKRO²¹¹. The evidence provided by FAKRO is not sufficient to demonstrate that any difference in the price offered between customers is due to their relationship with FAKRO and not to the other characteristics mentioned by VKR. On balance, therefore, the evidence suggests a low likelihood of infringement.
- (114) It also does not appear that DAKEA and BALIO's pricing is related to the customer's relationship with FAKRO. Indeed, it appears that DAKEA is offered under trade terms and conditions based on objective criteria²¹², such as purchase volumes, whether the customer is a wholesaler or a retailer, credit risk, etc., and the practical application of these conditions does not seem to be discriminatory or loyalty inducing. The evidence provided does not imply that any difference in the rebates offered is due to the customer's relationship with FAKRO instead of objective economic reasons. As for BALIO, it appears that each order is considered a tender market and quoted individually²¹³ and it appears from the evidence presented that FAKRO also treats this as a tender market, as it sometimes adjusts its offer to win a particular bid. In its Observations²¹⁴, FAKRO does not bring forward any new arguments to show that this is not the case. It also appears that BALIO loses more bids than it wins against FAKRO (FAKRO itself admits that BALIO's offer is sometimes not accepted over its own), which would contradict the claim that it prices more aggressively against FAKRO or that it systematically undercuts FAKRO's prices.²¹⁵ The fact that FAKRO often has to sell its products at little profit in order to win bids over BALIO²¹⁶ is not sufficient to show that the pricing of BALIO

²⁰⁸ Response to the Complaint, section 10.1.1.

²⁰⁹ Complaint, para 652 b).

²¹⁰ See para 147 of the Observations.

²¹¹ See section 4 of VKR's Comments.

²¹² Response to the Supplement, section 6.4.3 and Response to the second Supplement, section 7.2.

²¹³ Response to the second Supplement, section 7.1.

²¹⁴ See para 175-177 of the Observations.

²¹⁵ Second Supplement, para 86-95, third Supplement, para 26-27 and Response to the second Supplement, section 7.1 and 7.2.

²¹⁶ See para 177 of the Observations.

targets FAKRO in order to foreclose it, especially as there is no evidence to suggest that BALIO prices below cost²¹⁷.

- (115) On the basis of the information at its disposal, the Commission thus considers that a further investigation into the creation of the DAKEA and BALIO brands is unlikely to lead to the finding of an infringement of Article 102 TFEU.
- (116) As for the claim that the distributors of Altaterra in the Czech Republic all offer the same maximum rebate for internet sales of DAKEA products (see para (20)(b) above), the evidence does not appear sufficient to suggest that this stems from an agreement between the distributors themselves, or that this practice is imposed by VELUX.
- (117) On the basis of the information at its disposal, the Commission thus considers that a further investigation into this conduct is unlikely to lead to the finding of an infringement of Article 102 TFEU.

(c) Discriminatory practices

- (118) In its Complaint and subsequent submissions, FAKRO claims that VELUX discriminates on advertising expenses, number of sales representatives and delivery time depending on the position of FAKRO in each country (see para (20)(c) above). This claim is largely unsubstantiated. Nevertheless, the Commission notes that it is not necessarily anticompetitive to allocate different resources for marketing or a different number of sales representatives to different countries, as this will most often depend on the market characteristics in each country and other objective reasons (as also claimed by VKR²¹⁸). As regards delivery times, it also appears reasonable that these should vary between countries, regardless of the competitive situation in each country. Overall, it does not appear that any differences as regards advertising expenses, number of sales representatives and delivery time are related to FAKRO's position in each country, or that they could constitute indications of a likely abuse within the meaning of Article 102 TFEU.
- (119) FAKRO further alleges that VELUX generally discriminates between distributors and other trading partners, based only on their relationship with FAKRO, either by rewarding those who do not cooperate with FAKRO (*in plus* discrimination) or by punishing those who do (*in minus* discrimination)²¹⁹. As already mentioned above, the prohibition of discrimination provided for in Article 102 TFEU requires the application of dissimilar conditions to equivalent transactions. With regards to the alleged instances of *in plus* discrimination, it appears that these cover attempts by VELUX to win new customers which do not go beyond normal business actions, and the evidence does not seem to conclusively support the claim that these actions are targeted only at customers that cooperate with FAKRO.
- (120) With regards to the alleged instances of *in minus* discrimination, FAKRO refers to anecdotal, second-hand reports on conversations where distributors or trading partners express an unwillingness to cooperate with FAKRO, in some cases seemingly without

²¹⁷ Response to the second Supplement, section 7.3.

²¹⁸ Response to the Complaint, p.67-68.

²¹⁹ Complaint, section 6.7, Supplement, para 104-111.

any reference to a possible reaction from VELUX and in other cases, because this could lead to loss of discounts or to the "dissatisfaction" of VELUX. The Commission first notes that these claims are vague and largely unsubstantiated. Second, a loss of discounts does not necessarily have to result from a targeted "punishment" of the distributor and could be the result of, for example, the loss of a logistics discount, if quantities ordered change. Similarly, the evidence does not indicate that VELUX acted on the alleged "dissatisfaction" in a way that would lead to discrimination of distributors cooperating with FAKRO. The additional evidence presented (which does not come from FAKRO's internal documents) mostly includes only vague and largely unsubstantiated claims, does not show how VELUX's actions were discriminatory, and does not sufficiently suggest that VELUX has treated the particular distributor or trading partner in a different manner due to its relationship with FAKRO or without any objective legitimate reason.

- (121) On the basis of the information at its disposal, the Commission thus considers that a further investigation into these allegations is unlikely to lead to the finding of an infringement of Article 102 TFEU.

(d) Unmeritorious patent and court applications

- (122) According to the General Court, access to a court is a fundamental right and a general principle ensuring the rule of law; it is therefore only in very exceptional circumstances that bringing legal proceedings can amount to an abuse of a dominant position.²²⁰ Such proceedings can only be abusive when they cannot reasonably be considered as an attempt to establish an undertaking's rights and can only serve to harass, and when they are conceived within the framework of a plan whose goal is to eliminate competition.²²¹ These two conditions are cumulative and must be interpreted and applied restrictively.²²²
- (123) In its Observations FAKRO asserts that it is not the number of actions but their characteristics²²³, already described in the Complaint, that show VELUX's intention to eliminate competition. However, the elements provided by FAKRO in support of its claim that VELUX abuses its subjective rights do not appear sufficient to show that VELUX's actions are part of a plan to eliminate competition rather than aimed at defending its rights. The fact that the actions described, ranging from letters of demand to law suits, often aim at what FAKRO believes are minor issues, that FAKRO incurs high costs in replying to these actions, and that the actions are numerous and directed at the different distribution companies of FAKRO, does not of itself demonstrate that VELUX's

²²⁰ Case T-119/09 *Protégé International Ltd v Commission*, ECLI:EU:T:2012:421, para 48 and Case T-111/96 *ITT Promedia NV v Commission*, ECLI:EU:T:1998:183, para 60.

²²¹ Case T-119/09 *Protégé International Ltd v Commission*, ECLI:EU:T:2012:421, para 49 and Case T-111/96 *ITT Promedia NV v Commission*, ECLI:EU:T:1998:183, para 61.

²²² Case T-119/09 *Protégé International Ltd v Commission*, ECLI:EU:T:2012:421, para 49 and T-480/15 *Agria Polska and Others v Commission*, ECLI:EU:T:2017:339, para 67.

²²³ These allegedly include filing actions against small FAKRO entities outside of Poland, making FAKRO bear the maximum of costs, showing no interest in the effectiveness of the actions, making exorbitant demands in particular for provision of information and multiple summons to different units concerning the same topics (see para 190-192 of the Observations).

behaviour is abusive.²²⁴ Moreover, it does not appear from the evidence provided that VELUX believes its own actions are baseless and only meant to harass.

- (124) As regards VELUX's patenting strategy, a similarly strict interpretation should be followed, given that the protection of intellectual property is an important right for an undertaking.²²⁵ FAKRO alleges that several of VELUX's patent applications were met with an objection based on lack of novelty at the stage of patent search report and that VELUX patents many solutions that it does not use itself, using blocking patents and patent families in an abusive manner. However, the evidence presented is not sufficient to demonstrate that VELUX's behaviour was not reasonable market conduct, and that it had instead an exclusionary intent.
- (125) As for the potential applicability of the case-law arising from the AstraZeneca judgment²²⁶ to some of FAKRO's allegations²²⁷, the Commission notes that this judgment involved conduct different from that attributed to VELUX by FAKRO. The alleged conduct of VELUX²²⁸ concerned the defence of an existing intellectual property right through legal proceedings (which included a request for protective measures). According to the information available to the Commission, the aforementioned conduct neither involved the provision of misleading information to relevant authorities nor the misuse of regulatory procedures. Moreover, there were no indications that the court to which VELUX applied for protective measures lacked discretion in the exercise of its powers.²²⁹
- (126) On the basis of the information at its disposal, the Commission thus considers that a further investigation into VELUX's litigation and patenting strategy is unlikely to lead to the finding of an infringement of Article 102 TFEU.

(e) Exclusive agreements

- (127) In the Complaint and subsequent supplements, FAKRO claimed that VELUX had entered into exclusive agreements with several suppliers of raw materials, as well as other business partners, such as roofing schools or advertising partners (see para (20)(e) above). In its Observations and in the Reply to VKR's Comments, FAKRO further asserts that the absence of explicit exclusivity clauses in the agreements does not prevent the parties from treating the agreements as exclusive, and that this is the case in practice²³⁰. In addition, FAKRO points out that some of the agreements presented to the Commission by VELUX were concluded after the alleged exclusivity-based actions took place²³¹.

²²⁴ Case T-119/09 *Protégé International Ltd v Commission*, ECLI:EU:T:2012:421, para 65-66.

²²⁵ Opinion of Advocate General Wathelet, Case C-170/13 *Huawei*, ECLI:EU:C:2014:2391, para 61.

²²⁶ Case T-321/05 *AstraZeneca v Commission*, ECLI:EU:T:2010:266.

²²⁷ Fifth Supplement, para 20.

²²⁸ Fifth Supplement, para 6-11.

²²⁹ Case T-321/05 *AstraZeneca v Commission*, ECLI:EU:T:2010:266, para 357.

²³⁰ See paras 195-196 of the Observations and para 92 of the Reply to VKR's Comments.

²³¹ See para 197 of the Observations.

- (128) The Commission finds that the evidence presented by FAKRO does not appear to support a finding of an abuse. VKR asserts that it is not VELUX's policy and practice to enter into exclusive agreements.²³² Additionally, where it was possible to identify the agreements referred to by FAKRO, VKR presented the agreements it has with the business partners in question and explained its relationship with them.²³³ In its Comments on FAKRO's Observations, VKR provided also earlier versions of the agreements with two suppliers, covering the period of the alleged abuse (this included the agreement with Cardinal CG, to which FAKRO referred already in the Complaint, as well as again in the Sixth Supplement)²³⁴. An analysis of those agreements shows that they do not contain exclusivity clauses.
- (129) As for the allegation that these agreements would be treated as *de facto* exclusive agreements, the evidence presented by FAKRO consists mainly of internal FAKRO documents and some e-mail exchanges with third-parties which, for the most part, do not seem to support the assertion that the refusal to cooperate with FAKRO is due to a *de facto* exclusivity imposed by VELUX. Moreover, it appears that FAKRO offers roof windows containing some of the products allegedly subject to the exclusivity²³⁵ and that several of the other products/services allegedly subject to the exclusivity (or refusal to cooperate) are (and were already at the time of the alleged exclusivity) available from a number of alternative suppliers, such that even if *de facto* exclusivity may have existed for a couple of products/services, for a limited time, FAKRO does not seem to have been prevented from effectively competing on the market²³⁶. On balance therefore, it appears that the evidence is not sufficient to demonstrate a high likelihood of infringement as regards these practices.
- (130) On the basis of the information at its disposal, the Commission thus considers that a further investigation into VELUX's alleged exclusive agreements is unlikely to lead to the finding of an infringement of Article 102 TFEU.

²³² Response to the Complaint, section 7.1.1.

²³³ Response to the Complaint, sections 7.1.2 *et seq.* and response to the second Supplement, section 3.

²³⁴ VKR's Comments, Section 5 and Annexes 6-8 and 10-12. As regards the agreements with Akzo Nobel, VELUX explained that no company-wide agreement existed in 2004 (at the time of the alleged exclusivity) and that prior to the 2005 cooperation agreement (provided in Annex 6), only price agreements were concluded with Akzo (see Annexes 10-12). These are simple price agreements, containing only prices and delivery and payment terms. As for Cardinal, the agreement provided by VELUX in Annex 7 was effective as of 27 June 2007, thus covering almost all of the period of the email correspondence presented as evidence by FAKRO. VKR further explained that prior to this agreement VELUX and Cardinal cooperated on the basis of annual price agreements and Cardinal's standard terms and conditions and provided the price agreement concluded on 2 June 2006, which covered the period until 31 December 2007 (VKR's response to the seventh Supplement, Section 3 and Annexes).

²³⁵ Response to the Second Supplement, Section 3.3.

²³⁶ Response to the Second Supplement, Section 3.1, 3.3 and 3.4. For example, FAKRO itself acknowledges that it was able to buy one product allegedly subject to exclusivity – Cardinal glass – as of 2010 and that before that period, it purchased the same product from another supplier – see Complaint, para 492-493. While FAKRO claims that the product it purchased from another supplier was more expensive and had less good properties than Cardinal's glass, the Commission notes that this allegation is unsubstantiated and not supported by the information on file.

3.2. The scope of the investigation required

- (131) An in-depth investigation would require considerable resources and would probably be disproportionate in view of the limited likelihood of establishing the existence of an infringement.
- (132) Such an investigation would, first of all, require the Commission to conduct a comprehensive analysis of the relevant geographic market in order to conclude if it is national or EEA-wide. In addition, the Commission would need to establish whether VELUX had a dominant position. This would require it to assess *inter alia* the market shares of the parties and their competitors, necessitating the acquisition of extensive sales data, as well as an assessment of any barriers to entry or countervailing buyer power, which would require requesting information from customers in the market.
- (133) To assess the allegations of predatory pricing, the Commission would need to conduct a full economic analysis of VELUX's prices and costs. This would require gathering and analysing an extensive set of data. In particular, some measures of cost (e.g., long run incremental costs, avoidable costs, common costs, etc.) that are needed to perform an analysis of predation, not being normally part of companies' financial statements, have to be specially computed. This could be particularly long and labour-intensive and require the expenditure of substantial Commission resources.
- (134) As regards the other allegations of anticompetitive conduct, an in-depth investigation would require the Commission to examine in detail VELUX's practices towards its distributors in all Member States where it competes with FAKRO as well as other third parties. This would likely necessitate extensive requests for information to be directed to both VKR, its major distributors in the different Member States (including all those referenced by FAKRO in its submissions) and the numerous third parties referenced in the Complaint.
- (135) Inspections at the premises of VELUX and Altaterra might also be required.
- (136) The Commission is therefore of the view that further investigation would be disproportionate in view of the limited likelihood of establishing the existence of an infringement.

4. CONCLUSION

- (137) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (138) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (139) The Commission reserves the right to send a copy of this Decision to VKR. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.²³⁷ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform [...]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to VKR.
- (140) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Margrethe VESTAGER
Member of the Commission

²³⁷ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.