

Effects analysis under article 102 after Tomra

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**Views expressed are personal and do not necessarily reflect those of OFT*

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Summary

- **What do we mean by effects analysis?**
 - Likely effects or actual effects
- **Issues with the Tomra judgment?**
 - Is the General Court setting the wrong threshold?
 - Is the General Court avoiding economic analysis?
- **How does this fit with Intel?**
 - Is Intel the right benchmark for effects analysis of rebates?



3 key arguments from Tomra

1. Inadequate evidence of actual effects

2. Inadequate analysis of the rebates

- no examination of Tomra's costs to determine whether rebates capable of foreclosing competition

3. Insufficient coverage of total demand

- 61% of the market open to competitors so alternative routes to market available

Actual or likely effects

- Hoffmann La Roche considers whether the conduct ‘has *the effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’
- “The ‘effect’ referred to in [Hoffmann la Roche] does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.” Michelin II para 239 cited by General Court in Tomra at para 289.
- EC article 82 Prioritisation guidance talks throughout about ‘likely’ or ‘potential’ effects

'likely' effects is the correct standard

- **Can never observe the counterfactual ⇒ pure 'actual' effects analysis impossible**
 - Tomra's argument that exit of competitors is not evidence of effects of conduct but is due to alternative reasons indicates the difficulty of actual effects analysis
- **Philosophically 'likely effects' captures the objectives of article 82**
 - Ability to prevent harm before actual effects occur
 - Deterrence requires that unsuccessful attempts to harm competition should be caught
- **Judgment confirms (para 219) that examination of actual effects is not necessary**
- **Paras 287-9 imply that demonstration of likely effects is not necessary but instead only that conduct is 'capable of' having that effect**

Key question is the level of evidence required to meet the 'likely' or 'capable of' threshold

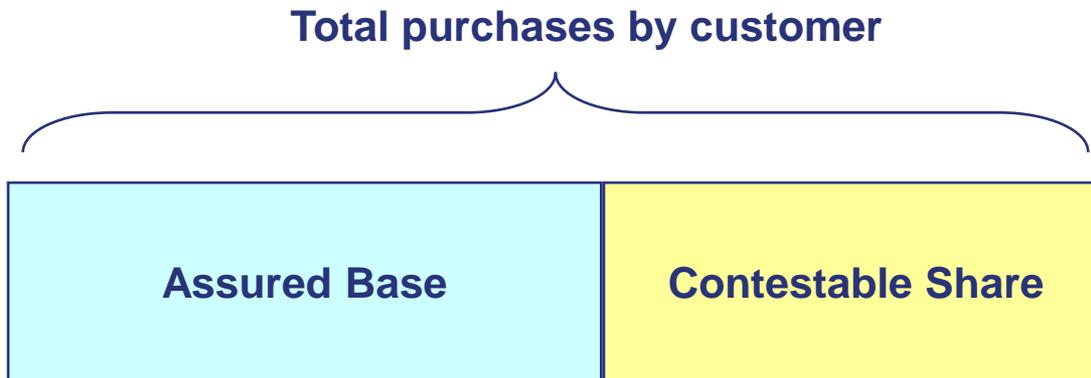
Rebates: A per se abuse?

General Court cites Hoffmann La Roche (at paras 208-9) and Michelin II (at paras 210-11) that de facto exclusivity is an abuse of dominant position

Para 216 poses question did the commission provide 'adequate statement of reasons'?

Paras 217-219 no real discussion of the adequacy of the analysis conducted

De facto exclusivity with rebates



If effective price over contestable share is lower than cost, an as-efficient competitor will not be able to make profitable sales to the customer.

Example: Cost is £8,000 per unit, Price is £10,000 per unit

Expected customer purchases is 100 units

A 5% discount if a customer buys 100 units

Effective price over last five units is zero (i.e. same price to buy 100 or 95 units)

Effective price over last 25 units is £8,000 (once customer has bought 75, next 25 units cost £200,000)

If assured base exceeds 75 units an as-efficient competitor cannot expect to make profitable sales

Effect of changes in costs

Costs per unit	Assured base sufficient for exclusivity
£8,000	75
£6,000	88
£5,000	90
£4,000	92
£2,000	94

Without looking at costs and assured base it is impossible to tell whether a 5% discount is sufficient to lead to de facto customer exclusivity or not

Is assured base test necessary?

Effective price below cost over contestable share is sufficient to establish de facto exclusivity

Is effective price below cost over contestable share necessary to establish strong inducement to exclusivity?

Equivalently if effective price is above cost over contestable share should this be a safe harbour?

Counter example:

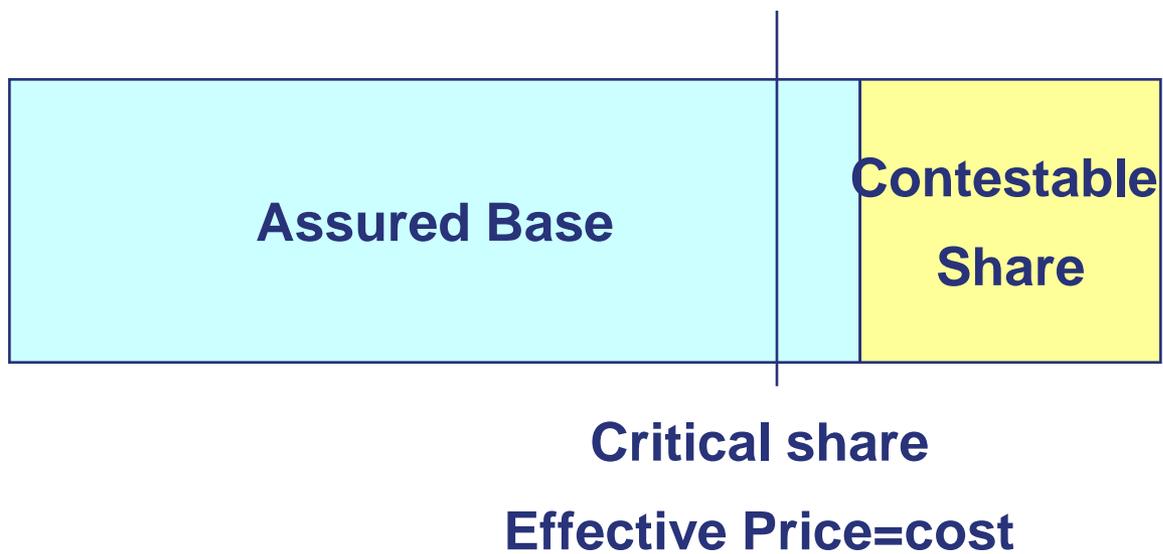
Suppose cost =£8,000 and assured base sold is 70 units so effective price is above cost and exclusivity not automatic

Purchase of next ten units from competitor could save £20,000 but to do so loses the buyer the option of the £50,000 rebate

Buyer needs to commit to buy all 30 units from the competitor to achieve savings

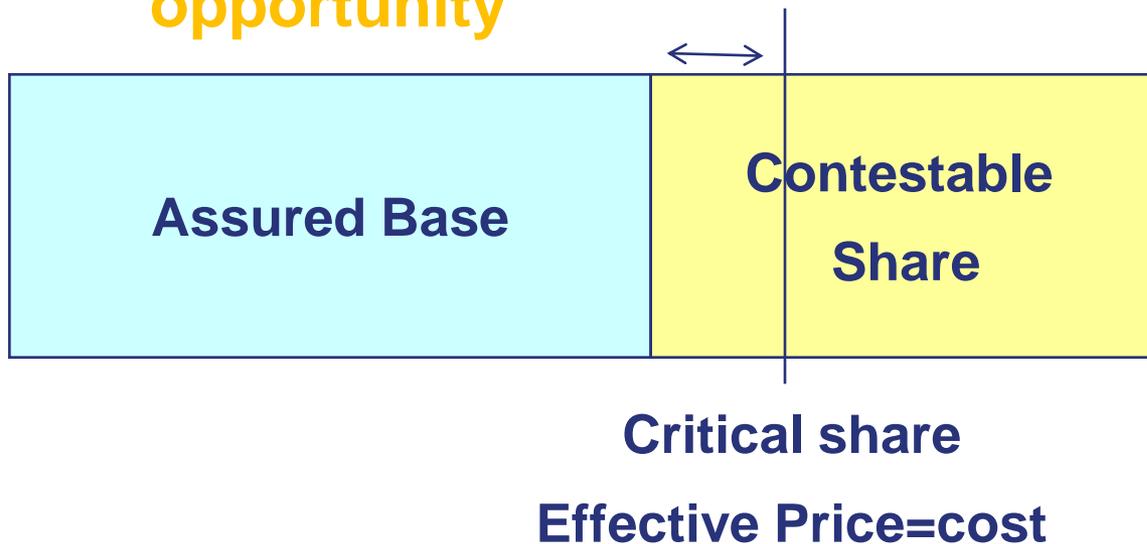
Window of opportunity

No window of opportunity

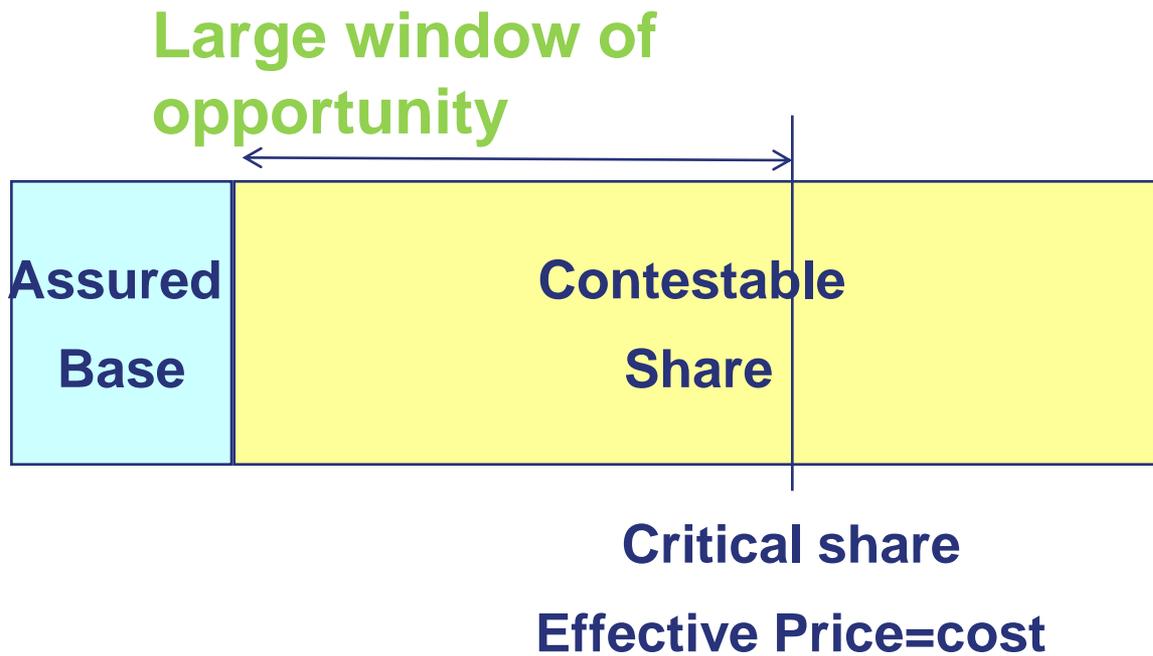


Window of opportunity

Small window of opportunity



Window of opportunity



Intel and Tomra

	Tomra	Intel
Timing	Pre article 82 guidance	Post article 82 guidance
Commission Decision	No discussion of assured base or costs	150+ pages of assured base, cost analysis
General Court	No engagement with details of effects analysis	?

Effects on overall market

According to Tomra across whole market, including customers not on 'exclusive' deals, contestable share was 2000 units and minimum efficient scale is 500-1000 units

Therefore scope for efficient competitor to win business

General Court argues that it is not for dominant firm to determine number of competitors

A finding of abuse only if contestable share was less than minimum efficient scale, would mean that only de facto monopolisation is an abuse