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**Abusing Salty Snacks:
A Bad Habit With
Anticompetitive Effects**

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I. INTRODUCTION

By its judgment No. 869/2013, the Athens Administrative Court of Appeals (“AACA”) ruled on an appeal filed by TASTY FOODS S.A. (“TASTY”) against decision No. 520/VI/2011 of the Hellenic Competition Commission (“HCC”). The AACA judgment fully upheld the HCC decision on the merits, acknowledging however some attenuating circumstances which reduced the total penalty imposed.

The HCC decision No. 520/VI/2011 (“TASTY decision”) concerned the abuse of dominance in the Greek market of salty snacks and is considered one of the most important cases of the last years, not only due to the multiplicity, complementarity, and intensity of the abusive practices identified, but also due to the extent and depth of the analysis deployed by the HCC. In this aspect, the TASTY decision not only provides useful guidance for the self-assessment of dominant undertakings on a variety of commercial practices, such as rebate schemes and slotting allowances, but it also gives an insight on the HCC approach to the long standing debate about the necessity of proving actual anticompetitive effects to substantiate abuse of dominance—a view depicted in the EU Commission Guidance on its Enforcement Priorities² (“Commission Guidance”)—or, in the absence of such evidential burden, the mere tendency of causing such effects being sufficient to substantiate abuse, a view adopted by the EU courts in their traditional case law.³

This article is organized as follows: the second section briefly outlines the TASTY dispute; the third section analyzes TASTY’s position and individual business practices, as appraised by the HCC and AACA; the fourth section presents the main examples of the effects-based approach in the HCC analysis; and the last section concludes.

II. THE TASTY DECISION AND JUDGMENT NO. 869/2013 OF THE ATHENS ADMINISTRATIVE COURT OF APPEALS

The TASTY decision was issued in 2011, following a complaint by TSAKIRIS S.A., a subsidiary of the Coca-Cola 3E Group mainly active in the salty snacks market, against TASTY, a subsidiary of PepsiCo Twist B.V. and part of the PepsiCo Group, also active in the salty snacks market. TSAKIRIS’ complaint targeted a series of TASTY’s business practices, which it considered illegal, anticompetitive, and effectively an abuse of its dominant position in the market of salty snacks.

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²Communication from the Commission – Guidance on the Commission’s Enforcement Priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20.

³See indicatively Michelin II, T-203/01; British Airways v Commission Case T-219/99, etc.

The HCC conducted a thorough investigation of TASTY's business practices, which also included a dawn raid, and found that TASTY had indeed abused its dominant position in the market of salty snacks, in violation of Art. 102 TFEU and Art. 2 Law 703/77,⁴ and had also concluded anticompetitive agreements, in violation of Art. 101 TFEU and Art. 1 Law 703/77.⁵ Accordingly, the HCC imposed a fine amounting to EUR 16,177,514.00 in total, one of highest fines imposed by the HCC in the last years.

As expected, TASTY challenged the HCC decision before the AACCA. Its main position was that the relevant product market definition was too narrow, and instead of comprising only salty snacks it should also include flour snacks, salty cookies, crackers, and nuts. In TASTY's view, if this definition was followed, it would not be found dominant, and accordingly its business practices would not be considered abusive. Furthermore, TASTY challenged the anticompetitive character attributed by the HCC to its individual business practices, agreements, and the effects thereof, and accordingly concluded that the HCC should not have found any violation of Art. 102 TFEU, Art. 2 Law 703/77, Art. 101 TFEU and Art. 1 Law 703/77.

The AACCA essentially found no error of law or fact in the TASTY decision and entirely upheld the HCC analysis on the merits. However, contrary to the HCC, the AACCA did acknowledge some attenuating circumstances for TASTY, such as the amendment of the crucial anticompetitive agreements following the dawn raid; the cooperation with the HCC and the provision of information; the proposal for commitments, etc., and accordingly it reduced the fine from EUR 11,739,387.00 to EUR 8,276,000.00 for Art. 102 TFEU and Art. 2 L. 703/77 violations, and from EUR 4,438,127.00 to EUR 2,010,000.00 for Art. 101 TFEU and Art. 1 L. 703/77 violations.

III. THE MAIN FINDINGS OF HCC ON TASTY'S POSITION AND BUSINESS PRACTICES

A. *The Relevant Market and Tasty's Market Share*

The HCC first studied the relevant product characteristics and consumer preferences, and accordingly held that the relevant product market was the production and sale of salty snacks, which included potato chips, extruded snacks, and corn snacks, and could be further divided in i) a salty snacks market in Organized Trade ("OT"), such as supermarkets; and ii) a salty snacks market in Small-Drop outlets or Down-The-Street outlets ("DTS"), such as kiosks, bakeries, mini markets, grocery stores, etc.

The subdivision of the relevant product market was mainly based on the differences of consumer habits and aims pursued by the purchasers in each of these channels (e.g. purchase for spontaneous consumption in DTS, scheduled purchases of big quantities for subsequent consumption in OT); price differences (higher prices in DTS than in OT); differences in the competitors' market shares in each distribution channel; differences in the organization and structure of the supply chain in each distribution channel; differences in the supply practices; differences in the package size and the range of available products due to space restrictions and stock capacity in DTS; different ages of customer groups (younger in DTS, older in OT), etc.

⁴ The national equivalent of Art.102 TFEU at the time, now replaced by Art. 2 L.3959/11.

⁵ The national equivalent of Art.101 TFEU at the time, now replaced by Art. 1 L.3959/11.

The relevant geographic market was defined as Greece.

Pursuant to the above market definitions, the HCC held that TASTY had a market share of at least 70 percent in the salty snacks market as a whole, while the remaining 30 percent was held by undertakings with significantly lower market shares. The HCC also held that TASTY's market share in the DTS channel amounted to 80-85 percent, while its share in the OT channel reached 60-65 percent.

Based on the above, and taking into account the long duration of TASTY's high market shares, its strong position vis-à-vis its competitors, its high production volume, its wide distribution and sales network, its strong brand image, and the fact that its portfolio was the largest and most famous in the market, the HCC concluded that TASTY was an unavoidable trading partner for its customers, that the market had barriers to entry, and finally that TASTY was dominant in the salty snacks market as a whole and super-dominant in the DTS market segment.

B. Tasty's Business Practices as Analyzed by the HCC and AACA

1. Exclusive Distribution Agreements

In the prefecture of Attica,⁶ TASTY distributed its products by its own means and directly supplied its products to all relevant points of sale. Outside Attica, TASTY had concluded exclusive distribution agreements with its wholesalers.

According to the HCC investigation, during the period 2000-2008 TASTY was executing successive exclusive distribution agreements with its wholesalers of a 5-year duration, which provided that the wholesalers would exclusively distribute all products produced or distributed by TASTY and, in return, they would receive a rebate for their capacity of "exclusive distributors." Also, wholesalers were obliged to ensure that the DTS retailers executed a special "loan agreement" for product cabinets, which would be given free of charge or at reduced prices and would be used exclusively for the storage of TASTY products (see below under B.2).

Furthermore, TASTY had concluded exclusive agreements with retailers in special distribution channels, such as ferry lines, commercial ships, the army, airports, bus stations, hotels, school canteens, sports centers, hospitals, catering companies, cinemas, theatres, etc.), according to which TASTY products would be distributed on an exclusive basis.

The HCC held that: (i) these exclusive agreements foreclosed TASTY's competitors from access to distribution networks and, consequently, from the market; (ii) they tended to restrict competition; and (iii) their anticompetitive effects were further intensified by the exclusivity rebates granted to wholesalers. Similar effects were held to be caused by the exclusive distribution agreements and relevant rebates granted to the special channels, especially taken into account the importance of these channels for the promotion of salty snacks. In view thereof, the HCC found that the exclusive agreements in question infringed Articles 1 and 2 L. 703/77 as well as 101 and 102 TFEU, a conclusion also upheld by the AACA.

⁶An area of Greece including Athens.

2. Product Cabinets/Slotting Allowances

As mentioned above under IB.1., in order to capture as much space as possible in DTS stores TASTY lent product cabinets to DTS retailers, free of charge or at reduced prices, on the condition that they would be exclusively used to store TASTY products. Furthermore, TASTY offered rebates to DTS in return for placing a cabinet in their store and an additional monthly/annual rebate if they placed a second cabinet and/or a larger cabinet, or if they allocated a certain percentage of shelf-space exclusively to TASTY products.

These practices appeared to be quite effective: according to a relevant market survey, TASTY's cabinet was found in 90 percent of the DTS stores, while 64 percent of DTS retailers and 67 percent of kiosk owners said that they did not have space for a second cabinet. Furthermore, 44 percent of the DTS stores only had a TASTY cabinet, and 25 percent of these admitted that their customers requested the products of TASTY's competitors.

The HCC held that the practice of offering cabinets to DTS stores for exclusive storage of TASTY products, and the additional rebates granted for a second/larger cabinet, foreclosed competitors from the market and reduced competition in this distribution channel. Likewise, the AACA held that these practices, in combination with TASTY's dominant position in salty snacks and the weak position of its competitors, the space restrictions in DTS stores which reduced the possibility of access through cabinets, and the fact that the "cabinet" is considered the most important promotional instrument of salty snacks, resulted in impediment to competition in a significant part of the DTS market and constituted an infringement of Articles 1 and 2 L. 703/77 and 101 and 102 TFEU. Finally, both the HCC and the AACA held that the economic motives (rebates) granted to DTS retailers for a second and/or a larger cabinet, or for allocating more shelf-space to TASTY products, imposed an additional impediment to competition and thus also violated Articles 1 and 2 L. 703/77 and 101 and 102 TFEU.

3. Rebates

In addition to the rebates mentioned above under B.1 and 2, TASTY granted additional rebates to its wholesalers and retailers. In particular, TASTY granted a special target rebate to its exclusive wholesalers as a reward for achieving a certain sales growth compared to the previous year ("development bonus"); a similar target rebate was also granted to those wholesalers with whom no exclusive distribution agreement could be concluded (e.g. wholesalers active in the Greek islands). Finally, TASTY granted special retroactive rebates to its retailers, payable at the end of the year, of a percentage equal to that of sales growth compared to the previous year.

The HCC held that TASTY's rebate system to its wholesalers and retailers in return for sales increases was capable of impeding competition, due to their retroactive character and the longevity of the reference period. Those target rebates, the HCC held, were granted to a wide network of wholesalers and retailers during the period 2002-2008 and provided a strong motive for them to increase purchases, especially towards the end of the year, since a condition for the rebate was the sales increase compared to the previous year. Thus, the HCC concluded that TASTY's rebate system reduced the sales of competitive products and hence the access of competitors to the market, and as such, it constituted a violation of Article 2 L. 703/77 and 102 TFEU.

4. Anti-Tsakiris Action Plan

Finally, according to the HCC investigation, TASTY had designed and applied a targeted plan against its main competitor, TSAKIRIS S.A., which involved economic motives and gifts to DTS retailers in order to replace the competitors' product cabinets with TASTY cabinets and/or to completely remove the competitors' products. The so-called "Anti-Tsakiris action plan" also involved night ventures by TASTY employees, who physically removed the competitors' cabinets from DTS stores, and/or screwed the TASTY cabinets on the floor of the store, and/or covered the trademarks and other distinctive features of competitive products with TASTY stickers, and/or placed TASTY products in the cabinets of competitors, etc. Also, the HCC investigation found that TASTY's policy provided for "commandos" who would develop sales and block space in DTS stores, monetary motives for "anti-competition attitude" by TASTY sellers and a budget for additional rebates and promotional activities (e.g. second cabinet) to be granted to DTS stores.⁷

Finally, the HCC invoked various internal documents of TASTY, which made reference to this Anti-Tsakiris action plan,⁸ such as:

- "We should finish off Tsakiris before September. (...) I wish one day our friends from Tsakiris and Chipita understand us and forgive us!!! They need to understand who the market leaders are and unfortunately for them we will not stop at this;"
- "How do we block Tsakiris potential expansion outside Athens?;"
- "Primary objective is to block space and safeguard top customers with a solid selling story," etc.

This Anti-Tsakiris plan was considered particularly important by TASTY and its effective application constituted a criterion for the appraisal of its employees

The HCC concluded that these policies and actions by TASTY foreclosed its competitors, impeded competition and constituted a violation of Art. 2 L. 703/77 and 102 TFEU.

5. HCC & AACA Conclusion

Based on the above, the HCC and AACA concluded that TASTY's business practices violated Articles 1, 2 L. 703/77 and 101, 102 TFEU.

In addition, they held that TASTY's business practices should be seen as a whole, from the viewpoint of a general foreclosure strategy aiming at exclusivity, aggressive maintenance and expansion of space in retail stores, and foreclosure of competitors. Thus, the HCC and AACA concluded that TASTY's intention was to maintain and strengthen its dominant position at both the wholesale and retail levels and to impede or reduce the possibilities for development to its competitors. This conclusion was based, among others, on TASTY's internal documents which

⁷See indicatively ¶¶161-171 of the *TASTY* decision.

⁸See ¶¶170 et seq of the *TASTY* decision.

were thought suitable to disclose TASTY's true intentions about capturing more space and effectively dominating the DTS.⁹

Consequently, the HCC and AACA held that TASTY's business practices were part of a general anticompetitive strategy, which affected multiple levels of the market, was applied to different categories of customers, and effectively violated Articles 1,2 L. 703/77 and 101, 102 TFEU.

IV. THE HCC POSITION ON THE EFFECTS BASED-APPROACH TO DOMINANCE ABUSE

A. Introduction

As mentioned in the beginning, the *TASTY* decision is particularly useful due to the guidance it offers on a large number of business practices by dominant undertakings and the approach that the HCC is likely to adopt when examining their eventual anticompetitive character. Indeed, the HCC analysis and findings briefly presented above concern the most important aspects of an undertaking's business policy, such as rebates, distribution agreements, and promotional activities, and, in that, the *TASTY* decision proves particularly useful for the self-assessment process of dominant undertakings.

In addition, the *TASTY* decision is particularly useful because it offers guidance on the more general position of HCC about the necessity to prove "anticompetitive effects" in order to substantiate dominance abuse (a view supported by the EU Commission Guidance), or, in the lack of such evidential burden, the mere likelihood of anticompetitive effect being sufficient (a view supported by the traditional EU case-law).

In principle, the HCC appears to follow the traditional view of EU case law and invokes dicta of well-known dominance cases to support its basic position that it is unnecessary to prove that TASTY's conduct caused actual anticompetitive effects. The HCC repeats this basic position in many points of the decision and insists, "It is not necessary to prove specific actual or direct effects of the rebate schemes. It is sufficient to prove that that conduct of the dominant undertaking tends to restrict competition or that the conduct is capable of having or may have that effect."¹⁰

Nevertheless, and despite this basic position of the HCC which follows the traditional formalistic approach to anticompetitive effects, a closer examination of the decision reveals that the HCC frequently adopts the EU Commission's effects-based approach—to a significant degree in some points, as manifested by its extensive analysis of concrete anticompetitive effects presumed to have been caused as well as in the analysis of actual effects caused by TASTY's practices.¹¹ In essence, the HCC follows to an important degree the economic approach adopted

⁹ The HCC invokes documents containing phrases such as "objective of dominating the points of sale and the market;" "we designed a well thought out plan to capture, control and dominate every POS in Greece;" "more space, more sales;" "size blocking;" "brand blocking;" aim of "blocking;" "eliminating competition;" etc.

¹⁰ See ¶314 of *TASTY* decision, with references to *Michelin II*, T-203/01, ¶239, *British Airways v Commission*, Case T-219/99, ¶293, *Tomra T-155/06*, ¶289.

¹¹ See indicatively ¶¶199 et seq. of *TASTY* decision.

by the EU Commission in the *Tomra*¹² and *Intel*¹³ cases—which sought to establish concrete anticompetitive effects and substantiate the economic impact of the conduct in question—as well as the basic principles of the Commission Guidance. This approach is evident in many points of the decision.

B. Examples of HCC Effects-Based Approach

1. Internal Documents/Evidence of Intention and Foreclosure Strategy

As stipulated by the Commission Guidance,¹⁴ and applied by the EU Commission in *Tomra*,¹⁵ in assessing anticompetitive foreclosure the HCC put particular emphasis on “direct evidence” of exclusionary strategy, primarily found in TASTY’s internal documents.¹⁶ For HCC, these internal documents provided direct evidence of TASTY’s strategy to exclude competitors and its plan to eliminate its main competitor through the “Anti-Tsakiris Action Plan.” Based on such evidence, the HCC sought to interpret TASTY’s conduct, to put its practices in context, and to understand TASTY’s own assessment of these practices, in order to conclude whether the foreclosure of competitors was intended, or if there was a different explanation for these practices.

In addition to relying on such evidence of intent, the HCC also sought to substantiate the possibility of anticompetitive effects based on objective data, such as TASTY’s position in the market; the position of competitors; evidence of actual foreclosure; the character, intensity, extent, sequence, and complementarity of abusive practices; evidence of actual application of such practices, etc.

Consequently, the HCC appears to have based its findings of abusive effects on both TASTY’s intention and actual evidence of a foreclosure strategy, as these elements derived from its internal documents, and supported these findings by objective data and evidence. In doing so, the HCC did not approach the business conduct under examination in abstracto, as an objective fact, but sought to establish its findings by evidence on the subjective effects and purposes pursued by the dominant undertaking.

In this aspect, the HCC appears to have departed from the traditional formalistic approach of EU courts, which insist that the notion of abuse is objective and consequently that the Commission can—but is not obliged to—establish any element of “intent” by the dominant undertaking.¹⁷ Instead, it followed the EU Commission approach which requires “cogent and convincing evidence” to substantiate anticompetitive foreclosure.¹⁸

2. As-Efficient-Competitor-Test

One of the most economic-oriented methods for substantiating pricing abuses by dominant undertakings is the “As-Efficient-Competitor-Test” (the “AECT”), a method described

¹²COMP/E-1/38.113 ProkentTomra, confirmed by T-155/06 and C-549/10 P.

¹³COMP/C-3 /37.990 Intel.

¹⁴Commission Guidance, ¶20.

¹⁵Case T-155/06 ¶35

¹⁶See indicatively ¶¶176-177 of TASTY decision.

¹⁷In this aspect See Case C-549/10P¶¶20-21.

¹⁸Commission Guidance, ¶20.

in detail in the Commission Guidance¹⁹ but generally not followed by traditional EU case law.²⁰ In this case, TASTY argued that the HCC should have applied the AECT to substantiate its findings of pricing abuses, especially with regard to its rebate system, and in failing to do so its findings of pricing abuses were not appropriately established.

The HCC correctly rejected this argument²¹ and held that there was no obligation to perform AECT in order to substantiate a pricing abuse,²² this being merely one of the options available. However, and despite this declaration, the HCC subsequently attempted to determine the effective price²³ at which an equally efficient competitor would have to sell its products in order to compete with the price offered by TASTY following the rebate, and concluded that such price would either be extremely low or even negative—a fact which proved that TASTY’s rebate system exacerbated the foreclosure of its competitors. After this price determination, and taking into account the particular circumstances of the case, such the must-stock brand character of TASTY products, the low market shares of its competitors, their much smaller portfolio, and their low participation in the wholesalers’ total turnover, the HCC concluded that TASTY’s competitors could not offer similar advantages to the wholesalers.

In view of the above method applied by the HCC, and despite its aforementioned “disclaimer” about the lack of obligation to determine the effective price that a hypothetical competitor should offer, the HCC attempted in practice to determine this price, in order to establish by economic criteria that TASTY’s pricing practices were effectively anticompetitive.

3. Analysis of Rebates/Exclusivity Effects

A clear manifestation of the HCC position about the need to prove effect can be found in its analysis of TASTY’s rebate system, which essentially follows the EU Commission approach in *Tomra* and focuses on exclusivity effects, amounting to an abuse. The HCC analysis studies the specific characteristics of each rebate scheme and then assesses the effects of their application, taking into account the characteristics of each customer group to which the rebate is applied, the concrete market conditions of each distribution channel, and the existing degree of competition in the particular market segment, and then also considers TASTY’s other practices. In doing so, and irrespective of the fact that almost all rebate schemes were found to have exclusivity effects, the HCC analysis is individualized and seeks to establish the likely and/or actual effects of the different rebate schemes in each distribution channel.

In addition to thoroughly analyzing the foreclosure effects of TASTY’s exclusive supply and distribution agreements with its exclusive wholesalers, the HCC also analyzed the effects of the “special rebates” TASTY granted to its non-exclusive wholesalers, namely the wholesalers with whom it was impossible to conclude exclusive agreements due to specific circumstances.²⁴ Said “special rebate” was essentially an additional target rebate for achieving sales increases

¹⁹Commission Guidance, ¶¶23 et seq.

²⁰See indicatively *Tomra*, C-549/10P ¶¶78-79.

²¹See ¶319 of *TASTY* decision.

²²In this aspect See *Intel*, COMP/C-3/37.990 ¶¶395; 1155; 1799.

²³See ¶321 of *TASTY* decision.

²⁴For instance, wholesalers in the Greek islands were obliged to supply a wide range of products due to the transport constraints of the territory and thus no exclusivity agreements were possible.

compared to the previous reference period, based on annual, monthly, and bimonthly targets. These targets and the overall sales increase were individually and separately determined for each wholesaler at the beginning of each reference period. According to the HCC, such programs were capable of having extremely intense effects of restricting competition and foreclosing the market, mainly due to:

- their retroactivity and the fact that the rebate referred to the wholesalers' entire turnover, namely there was no connection between the rebate and the profit accrued by TASTY as a result of the sales increase;
- the long reference period, which increased pressure on wholesalers to increase sales towards the end of the year in order to receive the rebate—even if they had failed to achieve the monthly/bimonthly targets;
- their individualized character;
- the calculation of rebate on the total turnover of the wholesaler, which also included the products where TASTY was dominant;
- the sharp differences per threshold of the rebate scale;
- the high percentages of the rebate, in combination with the fact that the basis for their calculation was the entire TASTY portfolio, which made it impossible for competitors to offer similar economic advantages; and
- the fact that TASTY was an unavoidable trading partner for its customers.

Consequently, the HCC held that the effects likely to have been caused by such “special rebates” to wholesalers were the same as those of exclusivity, namely binding the wholesalers to TASTY and foreclosing its competitors from the market. In addition, the HCC held that this conclusion was confirmed by TASTY's own admission about applying such “special rebates” only to those wholesalers with whom no exclusivity agreement was in place; an admission which the HCC held proved the complementarity between TASTY's rebates in return for exclusivity and the “special rebates.”

Furthermore, the HCC conducted a similar analysis with regard to TASTY's rebates to retailers and likewise concluded that such rebates also had exclusivity effects, namely the foreclosure of competitors from the market. This finding was mainly based on the facts that:(i)the rebates were individually designed for each retailer at the beginning of the reference period, (ii) they were granted retroactively at the end of the year on the condition of achieving certain sales growth compared to the previous year, (iii) the reference period was long, and(iv)the rebate was calculated on the entire turnover of TASTY products, including those where TASTY had a dominant position.

According to the HCC, this rebate system was designed to supply the entire product needs of the retailers, or a major part thereof, from TASTY and thus no explicit exclusivity clause was necessary. In view thereof, the HCC held that TASTY's rebate system to retailers was also abusive since it had exclusivity effects, it foreclosed the market, and it sought to strengthen TASTY's dominant position.

The HCC also held that rebates granted in return for exclusivity and/or target rebates and/or rebates for shelf space (slotting allowances) to special channels operated as “promoters” for the brand and had the same effects as the other TASTY practices, namely binding wholesalers and retailers to TASTY, foreclosing competitors from the final points of sale, and essentially ensuring exclusivity. Such effects were considered significant, especially taking into account the number of such outlets, the high sales achieved, the extent of the relevant market covered by such channels, and the “prestigious” character of these distribution channels, which made them extremely valuable for the promotion of salty snacks.²⁵ In view thereof, the HCC held that the rebates TASTY granted to special channels had the same effects as all other exclusivity arrangements due to the strong motives such rebates provided for exclusive cooperation and sales increases.

Furthermore, the HCC analyzed the rebates that TASTY granted to DTS retailers on the condition of placing a second and/or larger cabinet to exclusively store TASTY products. The HCC held that such rebates constituted an economic motive which intensified the foreclosure effects already caused by all other TASTY practices, they had the effect of TASTY products occupying the entire (or almost the entire) space available in DTS stores, and essentially they had the same effects as exclusivity. Thus, the HCC held that these economic motives fortified the barriers to entry and expansion for TASTY’s existing and potential competitors, they further reduced the intensity of competition between the super-dominant TASTY and its competitors, and they operated complementarily to TASTY’s other abusive practices.

Finally, the HCC analyzed TASTY’s policy on slotting allowances, namely the economic motives it granted to DTS stores to ensure shelf space, which—according to TASTY’s own admissions—amounted to 80 percent of the shelf. The HCC found that TASTY’s slotting allowances for exclusive shelf space impeded competition. Since they sought to consolidate an important part of demand, they tended to have the same effects as exclusivity in the point of sale, plus they aimed at foreclosing entry of competitors to an effective distribution channel and they limited consumer choice. Those conclusions were mainly based on the super-dominant position of TASTY in DTS, the low buyer-power of DTS stores, the high percentage of the rebate which prevented competitors from granting a similar economic advantage, and the fact that this practice was combined with many other practices, including rebates for a second/larger cabinet and/or target rebates.

The HCC confirmed these effects by inferring the findings of a relevant market study that found that TASTY was present in 73.9 percent of the DTS stores, as opposed to 14.4 percent and 22.9 percent of the DTS stores for its two major competitors, and that TASTY products were exclusively sold in 41.2 percent of said DTS stores. In an attempt to confirm the “actual effect” of this exclusionary practice, the HCC noted that these indexes were in complete disharmony with the respective indexes in OT, where TASTY could not apply such complementary abusive practices, especially given the OT buyer-power and the absence of space restrictions.

²⁵See ¶¶285-293 of the *TASTY* decision.

4. Quantification of Anticompetitive Effects

The HCC also attempted to quantify the anticompetitive effects of TASTY's business practices, thus appearing to adopt the EU Commission's position in *Tomra*, where the Commission essentially rejected the view that any foreclosure equals abuse, but, on the contrary, "significant" foreclosure should be established and accordingly held that "by foreclosing a significant part of the market, (...), the dominant undertaking restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole."²⁶

Likewise, the HCC held that:

by foreclosing competition in a significant part of the market through exclusivity agreements with wholesalers, who were important for the access of competitors to final points of sale and especially to DTS, where the majority of retail sales correspond, Tasty foreclosed competitors from the market and restricted competition in the whole market.²⁷

By this reference, the HCC appears to also adopt the view that not every departure from the market is anticompetitive and/or attributable to dominance abuse, but market foreclosure needs to have significant effects to be considered abusive.

Nevertheless, immediately after this declaration, the HCC invoked the General Court's position in *Tomra* (a position now upheld by the ECJ) that:

the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.²⁸

This appears to suggest that, in principle, no competitor, no matter how small, may be foreclosed.

This HCC position, which appears to follow the formalistic approach of the EU courts and is rather contradictory to the prerequisite of "significant foreclosure" mentioned just before, does not appear to have been followed in practice by the HCC. Most of its analysis was focused on a detailed examination of concrete, likely, and/or actual, effects of TASTY's business conduct as well as the quantification and appraisal of such effects and the generating factors, and it was not limited to a formalistic or vague projection of some "likely" effects.

A good example of the HCC quantification of effects is its analysis of the foreclosure caused by TASTY's practices with regard to product cabinets, namely their loan to DTS for the exclusive storage of TASTY products. The HCC held that the DTS stores were the most profitable points of sale due to the higher product prices, the sales of the most profitable package sizes, and the lack of buyer power, and consequently any foreclosure effects caused in this distribution channel would be particularly important. Indeed, the HCC concluded that TASTY's

²⁶*Tomra v Commission*, T-155/06 ¶240.

²⁷See ¶¶199-200 of *Tasty* decision.

²⁸See *TASTY* decision ¶¶200; Case T-155/06 ¶¶241; and C-549/10P ¶42.

cabinet policy resulted in *de facto* exclusivity and had foreclosure effects of particular gravity due to market-specific factors such as the space restrictions in DTS, the reluctance of retailers to switch suppliers and/or place cabinets of other suppliers, TASTY's super-dominance in the DTS channel, the low market shares of TASTY's competitors, the importance of the cabinet for the promotion of snacks' sales, the aim pursued by the exclusive use of the cabinet as described in TASTY's internal documents, the characteristics of snacks as products of spontaneous consumption, the extent and duration of these practices, etc.²⁹

Finally, the HCC attempts to quantify the overall foreclosure effect caused by TASTY's practices, also by studying the cumulative effects caused by the combination of its practices³⁰ such as the exclusive agreements with its wholesalers and DTS retailers and the target rebates. To do so, the HCC compared the market shares of TASTY and its competitors in the DTS segment, where such practices were applied, with their respective market shares in OT, where these practices were not applied. By this test, the HCC concluded that the market share of TASTY's competitors (e.g. Tsakiris) was up to three times lower in the DTS segment compared with their respective market shares in OT, where no exclusivity arrangements existed. This meant that TASTY enjoyed a market share of approximately 80 percent in the DTS segment as opposed to 60-65 percent in OT. These findings led HCC to the conclusion that TASTY's combined practices did not only have a cumulative "actual" effect of foreclosure, but also that such effect was particularly important since the market share differences were sharp.

Consequently, even though the HCC suggests that any foreclosure should be considered anticompetitive irrespective of its degree or the importance of its effects, in practice the HCC attempts to quantify the foreclosure caused based on specific characteristics of the market and practices in question and essentially condemns those practices which have or expected to have a significant anticompetitive effect in the market.

5. Cumulative Anticompetitive Effect

Finally, another manifestation of the HCC analysis which moves towards the EU Commission's effects-based approach is its detailed analysis of the co-relation between TASTY's individual business practices and their complementarity, which effectively caused a "cumulative anticompetitive effect" in the market.

Indeed, the HCC analyzed the effect caused by the combination of TASTY's various business policies and practices, in both the wholesale and retail levels, and held that despite taking different forms (e.g. non-compete clauses, target rebates, exclusivity on the use of cabinets, rebates against shelf-space, replacement and elimination of competitors' products, etc.) and despite having different intensity, TASTY's practices constituted a whole and were part of a general foreclosure strategy designed and applied by TASTY. In particular, the HCC held that:

This strategy, as evidenced by the content of TASTY's internal documents, aimed at exclusivity, aggressive maintenance and expansion of the space taken by TASTY in various points of sale, as well as the prevention of entry and presence of actual and potential competitors. The time coincidence of said practices, their range and their sequence, their common characteristics, their complementarity as

²⁹See ¶252 of the TASTY decision.

³⁰See below under B.3.5

to the common aim pursued of foreclosing competitors from the market, lead to the conclusion that TASTY had adopted and materialized a comprehensive, long and targeted strategy of foreclosing its competitors from the most important distribution channel of DTS.³¹

As a relevant example of the complementarity of TASTY's practices, the HCC invoked the additional rebate TASTY offered for a second and/or a larger cabinet in DTS stores, in combination with the exclusivity clause already agreed for the use of such cabinets. The HCC held that by such combined practices TASTY intensified the foreclosure effects already caused in the market, since it succeeded in binding also those (few) DTS outlets which had the space capacity and motive to have an additional cabinet, which would be otherwise available to its competitors.³²

Thus, as the European Commission had done in previous cases,³³ the HCC concluded that—despite their different forms—TASTY's exclusionary practices pursued the same objectives, they were complimentary to each other, and they caused a cumulative foreclosure effect. Consequently, they should be addressed not only in isolation, but also as a general strategy that similarly constituted an abuse of dominance. This HCC approach, which essentially intends to reveal the actual objectives of a dominant undertaking in case of multiple practices in order to appropriately evaluate the actual and/or likely effects of that undertaking's business strategy, was also adopted by the EU Commission in recent decisions which follow the effects-based approach, including *Tomra*³⁴ and *Intel*.³⁵

V. CONCLUSIONS

As mentioned in the beginning of this article, the HCC decision on the *TASTY* case, now upheld by the AACA, is one of the most important cases on abuse of dominance of the last years, not only due to the guidance it provides for the assessment of various business practices by dominant undertakings, but also for its guidance on the HCC approach to the long-standing debate about the necessity of proving anticompetitive effects to substantiate dominance abuse.

The HCC appears to follow the EU Commission effects-based approach to a large extent of its analysis, however it does so implicitly, while simultaneously invoking dicta of the traditional EU caselaw, which adopts a more formalistic approach on the evidence of effects. In this aspect, the HCC does not overtly endorse the EU Commission's approach on effects, and when it actually follows such approach, it often invokes certain EU caselaw to suggest that it is not obliged to do so.

These seeming contradictions are to be expected, however, since the HCC is legally bound by the EU case law, which predominantly rejects the effects-based approach and follows the basic position that the notion of dominance abuse is "objective" and the mere likelihood of anticompetitive effects is sufficient to establish abuse. Taking this into account, the mere fact that the HCC not only invokes the traditional EU case law, but also EU Commission decisions and

³¹See ¶¶183-184 of the *TASTY* decision.

³²See ¶268 of the *TASTY* decision.

³³See indicatively COMP/C-3/37.792 Microsoft ¶1064.

³⁴See *Prokent-Tomra*, Case COMP/E-1/38.113, ¶392.

³⁵See *Intel*, COMP/C-3/37.990 ¶s. 1741, 1743, 1745, 1747.

case law adopting the effects-based approach³⁶ as well as the EU Commission Guidance *per se*, is certainly a very hopeful sign about the HCC approach on the analysis of effects, as also is its actual analysis of effects of each of TASTY's business practices.

In view of this precedent, which manifests the willingness of HCC to move towards an effects-based approach on dominance abuse—especially at a time when the EU case law hardly offers assistance to that avail—it will be interesting to see how the HCC will approach cases of dominance onwards, in particular after the ECJ judgment on *Post Danmark*³⁷ (a judgment issued one year after the *TASTY* decision), which appears to straight-forwardly adopt the effects-based approach of the EU Commission.³⁸

³⁶ Indicatively *Intel*, *Tomra*, *Microsoft* cases.

³⁷ Case C209/10, Reference for a preliminary ruling under Article 267 TFEU from the Højesteret (Denmark), *Post Danmark A/S v Konkurrencerådet*,

³⁸ See indicatively ¶¶ 21, 22, 30, 38 and 44 of *Post Danmark*.