I. Coca-Cola Enters Into a Draft Settlement with the European Commission

In 1999, the European Commission began an investigation into Coke and its bottlers in Austria, Belgium, Denmark, Germany, and Britain. The Commission was concerned that Coke’s sales tactics amounted to an abuse of its dominant position. On October 19, 2004, the European Commission and Coca-Cola Company entered into a draft settlement regarding Coke’s business practices in the European Union. The Commission found Coke’s commitments to be sufficient for a settlement decision, which would put an end to the five year investigation by the European Commission.

Coca-Cola Chairman, Neville Isdell, presented the commitments, on behalf of the company as well as the three main Coca-Cola bottlers, in Brussels, with the understanding that should the commitments be confirmed, they would become binding on the Company. Further, if Coca-Cola were to breach the commitment decision, a fine could be imposed. Subsequently, the Commission discussed the agreement with retailers and competitors. The Undertaking will be submitted to a more formal public consultation before becoming final, likely to occur next spring.

II. The European Carbonated Soft Drink Market and Applicability of the Agreement

1 In addition to the commitments discussed in this paper, Coca-Cola Company and the European Commission agreed to additional conditions in the following contexts, which will not be discussed in detail: when Coke is the sponsor of events or arenas; when Coke offers its products in fountain dispensers; when Coke offers its products in vending machines; and when Coke enters into a financing agreement with a customer.
Coca-Cola dominates Europe’s twenty-one billion dollar carbonated soft drink market. The agreement, once implemented, will potentially apply in twenty-five countries within the European Union. However, the agreement shall apply only in those member-states where Coke’s market share is over forty percent, as well as in those member states where Coke sales are more than twice that of its nearest competitor. Coca-Cola foresees taking more than twelve months to fully implement the Undertaking, and for the market to react to any resulting changes.

In a press release, the European Commission noted that this agreement will bring more competition to the European market for carbonated soft drinks, and further, will increase consumer choice in shops and at cafes. Competition Commissioner Mario Monti stated, “[t]hanks to the Commission’s action[,] consumers will generally have more choice at cafes, pubs and shops and will, therefore, be in a position to choose on the basis of price and personal preferences rather than pick up a Coca-Cola product because it’s the only one on offer.”

As opposed to the market in the United States, Coke has enormous leads in the carbonated soft drink market in Europe. For example, in Belgium, Coke has sixty-eight percent of the market to Pepsi’s five percent; and in France, Coke has sixty percent to Pepsi’s six percent. Such market concentration is in stark contrast to the United States, in which Coke as forty-four percent of the market, and Pepsi thirty-eight.

III. The Agreement

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The draft settlement agreement focuses on the following items. First, Coke agreed to put an end to exclusivity arrangements. Specifically, Coke customers will remain free to buy and sell carbonated soft drinks from the supplier of their choice. Second, Coke will no longer offer any rebates that reward its customers for purchasing the same amount or more of Coke’s products than in the past. Third, Coke agreed to no longer require a customer to buy a less popular brand with one of Coke’s best-selling brands. Similarly, Coke will no longer offer a rebate if the customer agrees to reserve shelf space for the entire group of products. Finally, where Coke provides a free cooler and there is no other similar storage to which the consumer has direct access, the outlet operator is free to use at least twenty percent of the cooler provided by Coke for any product it chooses.

Article 82 of the Treaty of Rome prohibits any abuse by one or more undertakings of a dominant position within the common market or in substantial part of it, insofar as it may affect trade between Member States. Similar to U.S. law, monopolies or oligopolies by themselves are not prohibited under E.U. law. However, unlike the courts in the United States, the E.U. founders were not as skeptical of government regulation, and therefore, the E.U. seeks to stringently regulate the conduct of the dominant firm.

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5 Id. See also Press release, supra note 2 (noting that no target growth rates “should make it easier for Coca-Cola’s customers to purchase from other CSD suppliers if they so wish.”).

6 Id.

7 Id. Further each brand under the Coke umbrella will be required to individually negotiate shelf space with each customer.
An abuse of a dominant position refers to behavior which influences the structure of the market. Specifically, the presence of a company with substantial market share weakens the degree of competition. Further, through means that differ from normal competition, such a presence has the effect of hindering the maintenance or growth of competition still existing in the market. Therefore, although a dominant position in and of itself does not implicitly require investigation, a dominant firm has a duty to not allow its conduct to impair genuine undistorted competition in the common market. 

Because the E.U. is not afraid of taking an active role in regulating dominant firms, Coca-Cola was smart in reaching an agreement with the Commission before a full blown trial erupted. The following sections discuss the likely approach that the European Commission would have taken on each part of the agreement

i. Exclusivity Agreements

Historically, practices designed to block the access of competitors to customers by tying the customer to the dominant supplier have been identified as abusive. By requiring a customer to purchase all of its specific product needs from one supplier, the dominant supplier has removed or restricted the opportunity of other producers or suppliers to compete effectively with the dominant supplier. Such action also consolidates the dominant position in a manner which has been held to be incompatible with the concept of competition inherent in Article 82. Additionally, an exclusivity

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11 See EU: Decision 2003/6/EC, paragraph 179 (Comp/33.133-C: Soda ash- Solvay) (using such reasoning in finding that Solvay abused its dominant position in the relevant market).
agreement of this nature has the effect of ensuring that the dominant position is almost entirely protected from competition.\textsuperscript{12}

Coca-Cola clearly has a dominant position in the European market. By requiring some of its suppliers to exclusively purchase its carbonated soft drinks, Coke ensured that other competitors would likely not be able to compete with regards to those customers. Absent such an agreement, other beverage providers such as Pepsi would be better positioned to compete with Coke. Unlike in the United States, where a court may first look to any procompetitive justifications, or sound business judgment, in determining whether the exclusivity agreements were anticompetitive, an E.U. court would likely find, based on Coke’s position in the market and the mere existence of the exclusivity agreements, an abuse of a dominant position. Therefore, an E.U. court would likely enjoin the action and impose fines. As such, Coke correctly avoided these results by entering into the settlement agreement with the Commission.

\textit{ii. Rebates}

The E.U. courts generally condemn loyalty rebates by dominant firms as unfair and as an impediment to normal price competition.\textsuperscript{13} Specifically, the Court of First Instance has found that a company abused its dominant position when the company pursued a pricing policy based on rebates, or other financial benefits, where one of its main objectives was to maintain its market share.\textsuperscript{14} The Court specifically noted that such a

\begin{itemize}
  \item \textit{Id.} at paragraph 180.
  \item Id. at paragraph 26.
\end{itemize}
loyalty rebate is contrary to Article 82 EC, as such a rebate is designed to prevent customers from obtaining their supplies from competing producers.\textsuperscript{15}

Coca-Cola was offering rebates to its customers to maintain, at the very least, that customer’s historical purchase balances. The European courts would likely have found such rebates to be loyalty in nature. Therefore, the Commission would have enjoined such conduct, and almost certainly, levied fines upon the Company.

\textit{iii. Tying Less Popular Brands with Coke’s Best-Sellers}

Article 82(d) specifically states that an abuse of a dominant position may consist of making the conclusion of a contract subject to acceptance by another party of supplementary obligations which, by their nature, have no connection with the subject of the contract. Conditioning the sale of one product on the customer purchasing another forecloses competing suppliers of the tied product. Tying may also allow the dominant firm to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time. For tying to be successful, the supplier must have significant market power in the tying product so as to restrict competition in the tied product. Generally speaking, when a tying arrangement seals off a market to other competitors, it impedes the exchange of products or services, and is therefore contrary to the Community interest.\textsuperscript{16}

First and foremost, Coca-Cola has the requisite significant market power in the tying product, which in this case, is the Company’s best-selling products, such as Coke, Diet Coke, and Sprite. Further, by forcing its customers to purchase Coke’s less popular brands along with the best sellers, the Company closed off the market to competitors in

\textsuperscript{15} \textit{Id.} at paragraph 56.

\textsuperscript{16} EU: Decision 2002/180/EC, paragraph 81. (Comp/37.859 De Post- La Poste).
the tied product, such as orange pop and ice tea. As this conduct is contrary to the
Commission’s views on competition, the Commission would likely have continued to
pursue the investigation of these agreements, and potentially have enjoined the conduct
as well as have imposed fines.

iv. Restriction of Cooler Access

The European Court of First Instance addressed a situation where leading ice cream
firms had a network of agreements with retailers whereby the firms would provide
freezers “free” and require that the retailer use the freezer only for the supplier’s ice
cream and not for the ice cream of competitors.17 The court found that such an
arrangement made entering the market more difficult; any new competitor entering the
market would have to either persuade the retailer to exchange the freezer cabinet installed
for the new entrant’s, or to persuade the retailer to install an additional freezer, which
could prove impossible because of limited space.18 The court found an absence of
evidence that the agreements improved the production or distribution of goods, or
promoted technical or economic progress.19 As such, the court agreed with the
Commission that these agreements were significant road blocks to market access.20

The agreements that Coke maintained with its retailers as regarding the retailers’
cooler supply were virtually identical those in the “Ice Cream Cooler” case. Coke
supplied many of its freezers free of charge, conditioned on the retailer stocking these

Cooler”].
18 Id. at paragraph 84.
19 Id. at paragraph 142.
20 Id. at 147.
freezers with only Coke products. In light of these facts, the Commission would have likely challenged the cooler agreements as being substantial road blocks to market access.

Additionally, although the European Commission has recognized the Essential Facilities doctrine, it is not necessarily applied generously. A refusal to supply a competitor (in this case with cooler space) is not automatically considered abusive just because an input is necessary to compete in the secondary market.\textsuperscript{21} Specifically, the Commission seeks to strike a balance between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with its competitors.\textsuperscript{22} Authorities may impose site sharing where competitors lack viable alternatives.

It is unlikely that the Commission in the case at hand would find Coca-Cola’s coolers to be an “essential facility.” First, Coca-Cola does not have the only access to production of such coolers. Second, Coke’s competitors could similarly offer coolers in which to stock their product. Further, under E.U. case law, a product cannot be considered “necessary” or “essential” unless there is no real or potential substitute.\textsuperscript{23}

However, the Agreement requires Coke to allow competitors to stock up to twenty percent of the cooler where Coke gave the cooler to the customer free of charge and there is no other viable means of cooling beverages. In this limited instance, where the specific customer lacks the capacity or means to switch coolers or offer more than one area of

\textsuperscript{21} Case C-109/03 KPN Telecom BV v. OPTA, paragraph 39 (2004) ECR 0.

\textsuperscript{22} Id.

storage, the Commission may have pursued this investigation of abuse of a dominant position under the essential facilities doctrine.

**IV. Conclusion**

By entering into the settlement agreement with the Commission, Coca-Cola Corporation has illustrated the Commission’s heightened awareness of dominant firms and whether there is potentially an abuse of a dominant position. In numerous countries within the E.U., Coke’s presence leads the next competitor, Pepsi, by over sixty percent; further, across the E.U. Coke leads Pepsi by forty percent. Such a dominant position clearly raises concerns, especially in light of the exclusivity agreements, loyalty rebates, tying agreements, and restriction of access to potentially essential facilities. This undertaking between Coca-Cola and the Commission is a foreshadow of what companies of such magnitude and dominance in a market may be forced to execute so as to avoid drawn-out and expensive litigation in the European Union.