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BWB BUNDESWETTBEWERBSBEHÖRDE

Statement of the Bundeswettbewerbsbehörde (Austrian Federal Competition Authority) regarding the exemplary behaviour of the vehicle trade communicated by the Bundesgremium des Fahrzeughandels (Austrian Federal Board of the Automotive Trade)

Starting situation

In a meeting with representatives of the Bundesgremium des Fahrzeughandels on 6 April 2016 the Bundeswettbewerbsbehörde was informed about the economic and financially strained situation of numerous franchised vehicle dealers. This is not least due to diverse requirements, measures or contractual conditions of the respective suppliers/importers through which the costs, respectively the earning opportunities of the companies are influenced in such a way that positive economic management is made more difficult or sometimes impossible.

In particular in the sphere of stipulated quality standards within the framework of existing selective sales systems (which is a condition for maintaining the sales agreements) investments were required – which in view of the general and/or brand-specific market situation cannot be presented in an economic way and which are hence irresponsible from a business perspective.

A further field of issues affects the purchase conditions and the remuneration of services. Here it is argued that the use of bonuses for customer satisfaction or remuneration of services within the framework of warranty/guarantee is intransparent and arbitrary.

All this apparently takes place against the background that the franchised vehicle dealers are not able to freely choose to reject demands of the suppliers/importers because of the existing economic dependency as a result of market-specific investments that have been made.

In the correspondence dated 11.7.2016 the Bundeswettbewerbsbehörde (BWB) was presented with exemplary circumstances with the request for a statement and a classification under competition law.

Preliminary remarks

The following general legal explanations and the evaluation of these exemplary cases should be noted in advance:

- The evaluation is made on the basis of this presentation of the circumstances, whose correctness and completeness was not able to be checked by the BWB.
- In the same way the BWB is also not able to make a final evaluation of the costs and earnings structure of the sector or individual companies and hence the presented business classification must be used as a basis.
- The evaluation can therefore only act as a basic guide for a legally proper weighing up of interests and show in what situations circumstances relevant under competition law are conceivable. However, in individual cases a deviating assessment is possible, for instance due to different sizes/types of companies.

Legal framework

In the existing context this isn't about competition restrictions agreed between suppliers and purchasers within the framework of sales in the sense of Article 101 of the Treaty on the

Functioning of the European Union (TFEU) (respectively § 1 of the Austrian Cartel Act) whose admissibility in particular is to be evaluated in accordance with the regulations of Commission Regulation 330/2010 vertical Block Exemption Regulation (BER), respectively Commission Regulation 461/2010 (categories of vertical agreements and concerted practices in the motor vehicle sector), but rather about the **appropriateness of contractual regulations** in organising these systems.

Here it must be noted that the existing agreements grant the supplier side regular **unilateral organisation rights**, for instance with regard to standards or commercial conditions. The question of the admissibility of such organisation rights can already be placed on two levels **in terms of civil legislation**:

- abstractly at the contractual level where one contractual party is granted organisational rights
- specifically at the level of exercising such organisational rights

In the sense of the basic principle of **contractual freedom** under civil law it is assumed that unilateral organisational rights may be effectively granted in favour of one contractual party as a matter of principle. However, the admissible limit will be exceeded if the exercising of an amendment right is unrestrictedly made at will by one party. Therefore, prudently the determinants for subsequently exercising the organisational right are already regulated as comprehensively as possible in the respective contractual regulation. Similarly the specific exercising of such an organisational right must in any case be made in accordance with **reasonable discretion**, respectively taking into consideration the principles of good faith, i.e. taking appropriate consideration of the interests of the other side.

The majority of the presented circumstances is hence already subject to general contractual legislation aspects of a (rough) corrective, whereby an evaluation under civil law complete with any possible (invalidity) consequences of such agreements cannot be made by the BWB.

Beyond the general regulations under civil law, more stringent admissibility restrictions can arise from the **competition law regulations**. In particular in connection with the existence of **market power**, agreements or actions which are otherwise unobjectionable can prove to be inadmissible.

Austrian Cartel Act

The described circumstances and ways of behaving are first of all to be checked on the basis of the regulations of the **Austrian Cartel Act** with regard to **abuse supervision** regarding market-dominating companies. Thus, the basic prerequisite is the existence of a **market-dominating position** of the supplier.

In accordance with § 4, sub-section 1 of the Austrian Cartel Act, a company dominates the market when – as a supplier or purchaser – it is not subjected to competition or is only subjected to insignificant competition or if it has an outstanding market position in relation to other competitors. In accordance with sub-section 3 leg cit, a company which has an outstanding market position in relation to its customers or suppliers also applies as market dominant; such a position in particular exists if this **relies on maintaining the business relationship** to avoid serious business disadvantages.

However, this **relative market power** is not an additional independent **market-dominating situation**, but rather only a concretisation of the basic principle of a lack of effective competition regulated in § 4, sub-section 1 Z 1. Here, too, the decisive factor is the existence of **avoidance possibilities**[1]. Because of the dependency of the opposite side in the market, which – amongst other things – can arise from a market dependency or an investment-

intensive organisation towards one contractual partner, a relatively market-powerful company is also not subjected to any such competition which effectively limits the behavioural room for manoeuvre resulting from the dependency[2].

The starting point for the evaluation is therefore always the demarcation of the **relevant market**. In 1993 in connection with the sales contracts in the vehicle sector the Austrian Supreme Cartel Court (KOG) already ruled in the legislation preceding the Cartel Act (KartG) of 1988 that the decisive aspect was the perspective of the other side of the market, i.e. the franchised dealers (of a specific brand) which can only cover their demand through one importer (of the respective brand), because changing a brand would involve serious business disadvantages. Consequently the relevant market was restricted to the **vehicles of the respective brands**. This meant the party exclusively entitled to sales was not subjected to any competition; the market was dominated by this party[3].

As far as this is evident, the aspects cited then also continue to apply to the sales agreements in the vehicle sector. In the meantime the degree of dependence even appears to have tendentiously increased since 1993.

In itself the existence of a market-dominating position does not receive any condemnation. However, the market-dominating company has a **particular responsibility** for ensuring that the effective genuine competition is not impaired by its behaviour. Therefore the abuse of a market-dominating position is forbidden in accordance with § 5, sub-section 1 of the Cartel Act.

Designated as **abuse** are all types of behaviour of a company in a dominant position which can **influence the structure of a market** where the competition is especially already weakened because of the presence of the company in question and the maintenance of competition which still remains on the market or its development is hindered by the use of means which deviate from the means of normal product competition or service competition on the basis of the services of the market citizens[4].

Such abuse exists in particular in the demand for **purchase or selling prices** or for other **business conditions**, which deviate from those which would very probably arise in the case of effective competition (§ 5, sub-section 1, line 1 of the Cartel Act).

An abuse of the market power is, for instance, to be assumed if the conditions[5] cited by the market-dominating company as being necessary for concluding the contract are not justified in terms of their content, because in terms of the national economy they are to be qualified as abuse of the market position merely for the market-dominating company's own use or if the market-dominator imposes **obligations** on the contractual partner which are **unnecessary** for achieving what in itself is a legitimate objective and which **unfairly restricts** the freedom of the contractual partner (4 OB 187/o2g mwN).

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[1] Vartian/Schumacher in Petsche/Urlesberger/Vartian, (publisher), Austrian Cartel Act 2005[2] (2016) § Rz 4, 44

[2] Austrian Supreme Court of Justice (OGH) as Supreme Cartel Court (KOG) from 14.06.1993, Oct. 3/93

[3] Wolf in Munich commentary on antitrust law, 2015[2], Act on Restraints against Competition (GWB) § 18 market dominance marginal note 20-25

[4] RIS-Justiz RS0063530, see also essentially European Court of Justice; Rs 85/76 (Hoffman-La Roche)

5 This concept will be all the more transferable to the conditions for the maintenance of a contractual relationship.

In checking whether an abusive exploitation of a market-dominating position exists, the conflicting **interests** must always be carefully weighed up (16 Ok 1/12, 16 Ok 14/04, 16 Ok 11/03, 16 Ok 12/02, 16 Ok 1/99).

Incidentally not different applies in the field of Union law: the checking of the appropriateness of business conditions always requires the weighing up of interests, taking into consideration the legitimate purpose of the contractual regulation. In accordance with the proportionality principle, the dominant company is obligated to not bind the contractual partner more strictly than is essential for the contractual purpose.[6]

On the basis of these abstract considerations the examples presented by the vehicle industry can be classified as follows:

Case group investments in architecture, equipment and fittings of salesrooms, workshops, etc.

On the one hand the respective manufacturer (importer) is to be granted a legitimate interest in a standard appearance as well as the positioning, cultivation and development of its band, which is why no objection is to be raised regarding the issuing of certain requirements as a matter of principle. The same applies to requirements which are aimed at securing a comprehensive and professional provision of service and maintenance services.

However, here not only the above-mentioned but also the (economic) interests of the contractual partners must be taken into consideration.

In an individual case requirements may prove to be abusive. This is for instance evident

- if the required investment cycle noticeably deviates from a usual depreciation duration for the respective assets[7],
- if the required amount of investment is noticeably disproportionate in relation to the sales and earning opportunities of the business enterprise,
- if economically unreasonable or unjustifiable investments are demanded,
- specific goods and services are bound to a specific supply source, in particular if these do not compare favourably with a third-party source.

In such situations there is an unfair unjust allocation of costs and benefits of the measures to the benefit of the market-dominating contractual partner.

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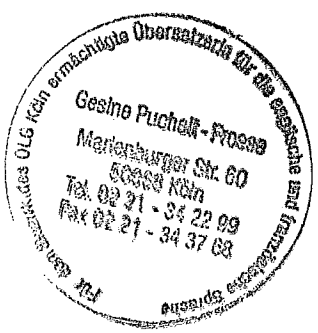
6 Mestmäcker/Schweitzer, European Competition Law 2014[3], § 18 Rz 7.
7 This applies all the more so if the demanded investment is also previously devalued by investments previously arranged by the market-dominant contractual partner.



Case group remuneration of services, bonuses

An important area within this case group involves the remuneration of services which the franchised garages provide within the framework of **warranty** and **manufacturer guarantee**[8]. The problems which already existed in this area in the past motivated the legislator to anchor an explicit special regulation in § 5 of the Austrian Motor Vehicle Sector Protection Law (KraSchG) (in supplementation to § 993b of the Austrian General Civil Code (ABGB). According to this the necessary and useful expense must be compensated, whereby the law does not define this term more precisely. Admittedly the unjust enrichment legislation regulations of the ABGB can provide certain points of reference, whereby it cannot be underestimated that in this connection action is in particular taken on the basis of contractual obligation.

In examining the interest situations of the contractual parties it must be noted that admittedly from the point of view of the supplier it is legitimate to standardise the remuneration of such services through stipulating time schedules, fixed rates, etc., which – together with the introduction of formal execution processes – is aimed at reducing the administrative expense and protecting against unjustified claims.

On the other hand, the franchise garages are interested in processing warranty and guarantee work in business processes which at least do not make losses or are indirectly financing the guarantee promises of the supplier.

Even if the exact determination of an appropriate remuneration in an individual case appears to be difficult and allows a certain room for manoeuvre, in this connection in particular against the background of the existence of an explicit statutory remuneration regulation it is to be regarded as abuse if

- time schedules or similar are systematically stipulated which are shorter than the times actually required for remedying faults,
- times for the necessary preparation and follow-up (troubleshooting, test drive, etc.) are systematically not remunerated,
- overhead costs which are necessary for operating an automotive workshop, respectively a spare parts store are systematically not remunerated
- form regulations are used as an excuse for refusing to remunerate services which have actually been provided.

All these points are all the more serious the more the share of guarantee and warranty services is in the overall workshop revenue.

[8] The manufacturers' call-back campaigns are also to be similarly categorised.

Variable tensioning components are also cited as another problem area, as they in particular occur in the area of remunerating customer satisfaction.

What cannot be disputed is the justified interest of the supplier (also) to try to achieve a high level of customer orientation within its sales organisation via financial incentive systems.

On the other hand, there is the interest of the contractual partner that such evaluations take place within the framework of an objective, fair, transparent and comprehensible system.

As in the case of the other remunerations there will be a certain organisational room for manoeuvre in this area. However, the existence of certain elements which – at most in accumulation – reveal an **arbitrary granting** of bonuses, can indicate abuse. For instance, these can include the following:

- possibility of arbitrary stipulation of target figures, respectively use of dynamic target figures which are not oriented to the objective achievement of target figures (for instance the best x% receive remuneration)
- survey of satisfaction using unusual evaluation schema
- lack of transparency and response with regard to how results are achieved

Additional case examples

The **obligation to purchase** specific equipment, installations or fittings from the supplier itself or from a company cited by the supplier, which was already mentioned above, can still be relevant under another aspect.

In accordance with § 5, sub-section 1, line 4 abuse can also be assumed with regard to the condition related to concluding the contract that additional services must be accepted which are neither objectively related to the object of the contract nor are customary commercial practice (**linkage**).

In doing so the market dominator uses its position in the area of the main service to force the client to accept other services which the client doesn't want or could procure at better conditions from third parties.[9]

Such an abuse in accordance with line 4 or at least an equivalent situation covered by the general clause of § 5, sub-section 1 does indeed exist if the supplier stipulates that other goods or services must be procured from it, which have absolutely no objective connection with the main services of the contract, such as tiles, carpets, furniture, signs, planning services, etc. The same shall indeed also apply to the case when a third-party company is cited as a source of supply. Generally this will be in a contractual (commission) relationship with the supplier. If the goods and services are also offered at a price which is considerably more than the price demanded on the free market, this is a further indication of the abusive nature of the behaviour.

[9] Vartian/Schumacher in Petsche/Urlesberger/Vartian, (publisher), Cartel Act 2005[2] (2015) § 5, Rz 56. The second possible anti-competitive dimension of linkages, namely the predatory competition through market closure, appears not be relevant here.

It is also contended that to some extent an **own business of the importer** with final consumers (without restriction to reserved customer groups, for instance to public authorities) exists. Here the supplier enters into a direct competitive relationship with its dealerships, but sometimes offers prices under their cost price.

The information related to this is too vague for a more detailed analysis; however, reference is made to the case group of the cost-price discrepancy (margin squeeze)[10] allocated to the hindrance abuse developed in the judicature to Article 102 of the Treaty on the Functioning of the European Union (TFEU).

The starting point is the situation in which a (at one level market-dominating) vertically integrated company as sub-supplier is facing competitors who are not vertically integrated. Abuse now exists if a competitor who is equally efficient as the market-dominator could offer at the wholesale price charged to competitors not without loss at the final customer level. Hence the relevant factor is the difference between final customer price of the market-dominator and the wholesale price charged to the competitors. If this is negative (as here alleged), it can indeed be assumed that there is abuse. However, taking into such consideration the distribution costs an abuse can also exist in the case of a positive difference.[11]

It is unclear whether these considerations can be directly transferred to the existing situation, because in each case only one submarket based on the specific contractual situation (for supplying vehicles of a specific brand) is affected, but competition also comes from the distribution networks of other brands. However, this is also no denying that considerations developed for the market squeeze within the framework of the blanket clause are to be taken into consideration for the argumentation of a non-typified abuse, whereby in the given context another aspect is that through stipulating standards the supplier can directly influence the costs of its competitors.

Austrian Local Supply Act

The federal law for improving local supply and competitive conditions (Austrian Local Supply Act – NVG) is a special law for competition legislation whose regulations on "**good commercial conduct**" (§§ 1 to 3) are not restricted to economic sectors that are important for local supply[12], and in particular also apply in situations outside the existence of a market-dominating position although a certain economic power imbalance is a prerequisite[13]. Although the legislator focused on protecting suppliers from market-dominant purchasers when the legislation was drafted, the text of the law is neutral and also includes contrary circumstances (see also explicitly in § 2 of the NVG).

The blanket clause of § 1, sub-section 1 of the Austrian Local Supply Act (NVG) forbids all behaviour which is suitable for jeopardising **performance-related competition**. As an example sub-section 2 leg cit cites services and conditions which are not objectively justified, in particular when there is no service in return.

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[10] European Court of Justice, Rs C-280-08 (Deutsche Telekom) European Court of Justice Rs C-52/09 (Telia-Sonera Sverige)

[11] See all of the Mestmäcker/Schweitzer, European Competition Law 2014[3], § 19 Rz 24ff and priority notification of the Commission when applying Article 82 of the EU Treaty in cases of hindrance abuse ABl 2009 No. C 45/02

[12] 16 Ok 3/08

[13] Ditz in Pelsche/Urlesberger/Vartian, (publisher), Cartel Act 20052 (2016) Austrian Local Supply Act (NVG) § 1 Rz 11f

Good commercial conduct is generally understood as every type of behaviour which is typical amongst conscientious businessmen or at least should be typical. Under the protection of the performance-related competition the judicature of the Austrian Supreme Court of Justice understands compliance with a specific existing form of competition which is characterised by many small and medium enterprises.

With regard to the question of **objective justification** because of a lack of judicature on § 1 of the Austrian Local Supply Act (NVG) it may be reverted mutatis mutandis to the jurisdiction on § 2. According to this, services and conditions are objectively justified if there is an appropriate service in return or cost advantages are reflected. Outside this area **interests have to be weighed up** between the supplier and purchaser, whereby within the framework of a proportionality check the reasonableness and **appropriateness** of a measure is required. Consequently in each case the mildest means is to be chosen to achieve the objective.

In terms of content the Austrian Local Supply Act (NVG) hence contains bans on abuse which are very similar to the Austrian Cartel Act. In both cases it ultimately involves weighing up conflicting interests and checking for appropriateness. Therefore reference can be made to the above-mentioned.

Hence § 1 of the Austrian Local Supply Act (NVG) appears as a matter of principle to be applicable to circumstances where the assessment of service and service in return is not the result of objective considerations – i.e. in particular taking into consideration the cost and revenue situation and the value of a service that has been provided – but instead where the result is based on arbitrary and/or intransparent stipulations. In any case this applies to services and conditions in a direct exchange relationship between supplier and purchaser, i.e. for the conditions, respectively remunerations for procuring contractual goods or the provision of contractual services. From the cited case examples this could in particular apply to the scope of the granted remuneration of guaranty and warranty work as well as variable elements of assessing trade margins/bonuses. In economic terms this type of behaviour amounts to claiming discounts, respectively special conditions.

On the other hand, the use application of circumstances could be questionable where no service is provided to the other contractual party, but instead – for instance – investments in the own business of the purchaser. However, a special case within these groups is those circumstances where procurement (for instance of CI elements) is to be made from the supplier itself (or from a company related to it), in particular at conditions which are not customary in the market and hence again a direct service is provided.

I, the undersigned, duly authorised translator of Cologne Higher Regional Court, hereby certify that the preceding text (eight (8) pages is a complete and correct translation of the German original.

Cologne, October 28, 2016

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