

CASE CARD | 17 January 2023

XXXLutz (B1-7/19-7)

Anniversary rebates

1. CASE SUMMARY

A. Summary of facts

In August 2019, XXXLutz, a retailer of furniture, had, on the occasion of the company's 75th anniversary in 2020, requested from its suppliers a 7.5% anniversary discount over two three-month periods in 2020. In a letter to the suppliers in this respect, XXXLutz justified its demand by stating that the 75th anniversary would be "advertised with extensive, additional marketing measures" and that "additional brochures, TV commercials and mailings will be used to make a clear statement".

At the FCO's insistence, XXXLutz confirmed in writing the respective consideration granted to each supplier in return for the rebate.

B. Legal analysis

According to Section 19(2) No. 5 of the Act against Restraints of Competition ('ARC') an abuse of a dominant position exists in particular if a dominant undertaking requests other undertakings to grant it advantages without objective justification. In this regard, particular account is taken of whether the other undertakings were given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request. According to Section 20(2) ARC, the dominant position of undertakings may be established with respect to the undertakings which are dependent on them.

2. QUOTES

"With regard to demands for special rebates, it is in any case necessary that both the demand for a rebate and the consideration to be provided in return are objectively and reasonably justified. Any flat-rate contribution to the retailer's general (advertising) costs made by its suppliers which is calculated based on all of the suppliers' sales to the retailer and which is therefore not supplier, goods or items related, breaches the typical separation of functions between suppliers and retailers. It does not strike a balance between the opposing interests of the manufacturer and the retailer but one-sidedly promotes the interest of the retailer with market power as defined in section 20 (2) GWB in passing on such costs."

"According to German case law, demands are deemed to be fair and performance-related if they are based either on the volume of goods procured or on specific services or other economically calculable considerations provided by the retailer making the request. The mere announcement of advertising measures and the associated expectation that sales will increase are not sufficient in this regard. In addition, the anniversary rebate demanded was so high that even the criterion of a striking disproportion between the demand and the consideration set by the Federal Court of Justice with regard to unfair demands could have been shown to exist."

3. RELEVANT LEGISLATION

- Sections 19 and 20 ARC

4. PRACTICAL SIGNIFICANCE

According to case law of the Federal Court of Justice, demands for rebates issued by dominant undertakings are deemed to be fair and performance-related if they are based either on the volume of goods procured or on specific services or other economically quantifiable considerations provided by the undertaking making the request. The mere announcement of advertising measures and the associated expectation that sales will increase are not sufficient in this regard.

This case is particularly relevant since, as also observed by the FCO itself, rebate demands such as those made in the present case occur frequently in the furniture sector. Such rebates may include, for instance anniversary rebates or wedding rebates (mergers, acquisitions).