

**Case summary**

27 February 2020

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**Bundeskartellamt points out boundaries set by competition law with regard to XXXLutz's demands for special rebates**

Sector: Furniture sector

File number: B1-7/19-7

Date of decision: 25 February 2020

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In autumn 2019, the Bundeskartellamt started to review the demands made by XXXLutz KG, based in Wels, Austria (in the following: "XXXLutz"), for an "anniversary rebate" from its suppliers and expressed concerns that XXXLutz's conduct could be violating the prohibition of abusive practices under competition law. XXXLutz subsequently entered into negotiations with the suppliers regarding the rebate. At the Bundeskartellamt's insistence, the company offered a consideration to all suppliers which were originally denied a service in return for the rebate and also recorded the respective consideration to be granted to each supplier in writing. In light of this, the Bundeskartellamt refrained from further enquiries in this case.

**1. Demands made by XXXLutz on suppliers**

In celebration of its 75th anniversary in 2020, XXXLutz "requested" its suppliers in late August 2019 to grant the company a 7.5% anniversary rebate over two three-month periods in 2020. In the relevant letter to the suppliers, XXXLutz justified this demand by stating that the 75th anniversary would be "advertised using a range of additional marketing measures" and that "a significant increase in sales" was to be expected "due to additional leaflets, television adverts and advertising mail".

**2. Preliminary legal assessment of the Bundeskartellamt**

In early September 2019, the Bundeskartellamt informed XXXLutz that, based on its first preliminary assessment, the demand was likely to constitute a violation of Section 20 (2) of the German Competition Act (GWB) as read with Section 19 (1) and (2) no 5 GWB. According to this provision, a company's conduct in relation to the undertakings which depend on it is deemed abusive if the company requests such other undertakings to grant it advantages without any

objective justification. In this regard, particular account is to be taken of whether the other undertakings have been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.

In the preliminary view of the Bundeskartellamt, a substantial number of the many suppliers addressed by XXXLutz were small and medium-sized furniture manufacturers that are likely to depend on the business relationship with XXXLutz. This presumed dependence would have to be analysed in more detail in the first step of an in-depth review of the matter.

The Bundeskartellamt also informed XXXLutz that, in the authority's opinion, demands relating to the granting of an advantage were in general objectively justified within the meaning of section 19 (2) no 5 GWB only if, based on the overall assessment of the terms, a consideration was provided in return for such requests. With regard to the anniversary rebate demanded by XXXLutz it seemed questionable – subject to the outcome of detailed examinations – whether this rebate had been embedded in the general annual negotiations during which it could have been possible to include the rebate in a negotiation process with the suppliers and in the overall bundle of terms. Instead, XXXLutz had sent all suppliers a separate draft agreement regarding the anniversary rebate. In this respect, the suppliers had been requested to respond by email within 14 days, confirming the anniversary rebate.

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.<sup>1</sup> 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. In the opinion of the Federal Court of Justice, it is thus to be assumed that no objective justification exists in such cases. According to the case law handed down by the Federal Court of Justice, the relevant companies can rebut this assumption only if a guaranteed and fair consideration relating to the performance rendered, such as a guaranteed listing or a guaranteed purchase of products over a specific period of time, is evident to the supplier already at the time the supplier is requested to grant a rebate.<sup>2</sup>

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<sup>1</sup> Cf. Federal Court of Justice, decision of 23 January 2018, KZR 3/17 "Hochzeitsrabatte" (Wedding rebates), para. 23

<sup>2</sup> Cf. Federal Court of Justice, decision of 23 January 2018, KZR 3/17 "Hochzeitsrabatte" (Wedding rebates), para. 97

This was questionable in the case of the anniversary rebate originally demanded by XXXLutz. According to the preliminary assessment, the general 7.5% anniversary rebate demanded was simply based on the number “75” of the upcoming anniversary and for this reason alone lacked any guaranteed and fair consideration relating to the performance rendered. The rebate was furthermore “to be deducted directly from the amount on the invoice” for every delivery made within the period in question; consequently, it was not a special volume-based discount granted due to increased sales. In addition, XXXLutz expressed only the expectation that sales would “increase significantly”. The question as to whether and to what extent this increase would materialise was left open, especially since it was unclear how the marketing measures associated with this interacted with other promotional discounts offered by XXXLutz. Advertising the 75th anniversary provided only the possibility of increased sales for suppliers but was not associated either with fixed sales volumes or sales targets linked to the rebate. In the preliminary view of the Bundeskartellamt, the anniversary rebate was thus not a fair demand, meaning it was not a demand associated with a guaranteed, fair, performance-related consideration provided by XXXLutz.

According to the court ruling, 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.<sup>3</sup> 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.

Against this background, the Bundeskartellamt asked XXXLutz to comment on the matter and suggested that the general anniversary rebate in the demanded form be reconsidered and a guaranteed and fair consideration be offered to the suppliers in a transparent manner.

### **3. Change in XXXLutz’s behaviour**

Following this communication from the Bundeskartellamt, XXXLutz once again wrote to its suppliers in late September 2019 and informed them that it was “no longer necessary to confirm the anniversary rebate as requested”. The company would soon get back to them to arrange a

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<sup>3</sup> Cf. Federal Court of Justice, decision of 23 January 2018, KZR 3/17 “Hochzeitsrabatte” (Wedding rebates), para. 18, with reference to the statement of legislative intent of the government bill of the Fourth Act amending the German Competition Act, Bundestag printed paper 8/2136, p. 25.

date for the upcoming annual talks and intended to negotiate the purchasing conditions for XXXLutz's 75th anniversary in the course of these talks.

It then became known that XXXLutz had entered into negotiations with the suppliers regarding the anniversary rebate and that the amount of the rebate and the duration of the arrangement had been agreed individually for each supplier. In most cases, the rebate was significantly lower than the 7.5% rebate over a six-month period that had been requested originally. However, doubts nevertheless continued to exist as to the extent to which this matter had been included in the annual talks and as to whether fair considerations had been agreed.

The Bundeskartellamt thus asked XXXLutz to document and prove the negotiation results with regard to all suppliers with which an anniversary rebate had been agreed. The considerations for the anniversary rebate specified in this context particularly included the listing of additional product ranges, additional placements in certain locations, specific advertising measures (such as in certain leaflets) and price increases. XXXLutz agreed to conclude corresponding written agreements for all arrangements made with regard to the anniversary rebate, including the relevant consideration, and to provide the Bundeskartellamt with proof of this.

On the basis of this documentation, the Bundeskartellamt informed XXXLutz on 25 February 2020 that it would not take any further steps regarding the anniversary rebate. Accordingly, the authority will also not render a decision on the lawfulness of the demands made. It decided not to examine the adequacy of the respective considerations in view of the considerably reduced rebates limited in time.

Since rebate demands such as those made in the present case occur frequently in the furniture sector ("anniversary rebates", "wedding rebates", etc.), the Bundeskartellamt will keep an eye on this matter and again take action in the event of indications suggesting abusive practices. Especially the adequacy of considerations is then likely to be examined in more detail.