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Prevent vs Audi and VW: a win – loss situation

The Düsseldorf Higher Regional Court's decision in the long-running dispute between the Volkswagen Group and automotive supplier Prevent provides noteworthy general instructions for the assessment of purchasing and supply obligations as well as termination rights of strong buyers

The Düsseldorf Higher Regional Court (the 'Court') on 05 February 2020[1] issued a recently published ruling regarding the termination of supply contracts between the Volkswagen Group ('VW') and its subsidiary Audi respectively on the purchasing side and Prevent on the supplying side. The Court decided that the extraordinary termination of the supply contract by VW was lawful, as Prevent had previously blackmailed VW by threatening with a supply stop to enforce a 25 % price increase. This termination was also in line with antitrust law: an obligation to contract does not exist, not even for a dominant buyer, in case of a legitimate termination based on wrongful behaviour of the contractual partner. However, the Court found Prevent entitled for damages against Audi whose mere ordinary termination of its contract with Prevent was not permissible pursuant to the contract and thus invalid.

Background: Long-running dispute between VW and Prevent

In 2008, VW (and later its subsidiary Audi) entered into a supply relationship with Prevent, a manufacturer of, *inter alia*, backrests. In return for signing several so called 'Nomination Letters', a jointly developed concept for backrests for the respective vehicles was transferred exclusively to VW. The contract was to remain in force until the end of production of the vehicle models concerned and the end of the supply of spare parts.

In 2016, a dispute escalated as in order to achieve higher prices, two of Prevent's subsidiaries stopped to supply VW. After VW yielded, the dispute cooled down a bit until at the end of 2017, Prevent insisted on another price increase of 25 % and left open, even when expressly asked by VW, what would happen if the price increase was not accepted. VW and Audi then terminated the supply contract in March 2018 with a twelve-month expiration period as of 31 March 2019. VW also terminated the contract extraordinarily in May 2018, also with effect from 31 March 2019. Both reduced their purchases from Prevent down to 80 % of their demand first and then stopped purchasing completely as of April 2019.

Prevent sought for (i) damages incurred in consequence of the reduced purchases in the period before April 2019 as it was of the opinion that the contract contains a right to supply the parties exclusively, i.e. 100 % of their demand, and (ii) damages incurred from the complete stop as of April 2019. The court of first instance dismissed the action.

The decision of the Düsseldorf Higher Regional Court

The Court dismissed the claim *against VW* entirely but found Prevent to be entitled to damages *against Audi* whose mere ordinary termination of March 2018 was deemed invalid. According to the decision, the complete stop of purchasing as of April 2019 constituted a contract breach that led to damage claims. The exact amount of damages was left open.

80 % purchasing obligation

With regard to Prevent's claim for damages incurred by the reduction of purchases down to 80 % of requirements in the period before April 2019, the Court stated that in the Nomination Letters the parties only agreed to an 80 % supply portion in order to ensure the validity of the contract from an antitrust perspective. The parties had been aware that because of its duration (lifetime of the vehicle, i.e. more than five years) under Art. 5(1)(a) of the Vertical Block Exemption Regulation ('VBER'), an

[1] Düsseldorf Higher Regional Court, decision of 5/2/2020, U (Kart) 4/19.

agreement of exclusivity would not be exempted under Art. 101(3) TFEU, Art. 2 VBER. According to the Court, the fact that VW and Audi, in the sense of a 'single-source strategy', actually obtained almost 100 % of their European demand scope from Prevent from the beginning of their relationship did not have any impact on their contractual obligation.

Lawfulness of the extraordinary termination

The Court found that only the extraordinary termination of VW was lawful. The supply agreement did not contain a right of ordinary termination as it was not concluded for an indefinite period of time but rather was limited in time, specifically until the end of production of the respective vehicle models. The parties moreover had contractually excluded the right of ordinary termination. The invalid ordinary termination could not be reinterpreted into a valid extraordinary termination. However, VW's extraordinary termination was possible because Prevent had impliedly threatened to stop to supply by 'eloquent silence' in case the price increase request was not accepted.

No antitrust violation

The extraordinary termination also complies with antitrust law. Whilst leaving open the precise market definition as well as the assessment of a dominant position of VW on a demand market at the time of the termination, the Court stated that a legitimate extraordinary termination based on wrongful behaviour of the contractual partner shall not be deemed as an unfair impediment or discrimination pursuant to Sec. 19, 20 German Act against Restraints of Competition or Art. 102 TFEU. For buyers, an obligation to enter into a contract only exists in exceptional cases and clearly not if the supplier has given good cause for an extraordinary termination – like Prevent's attempt to blackmail VW. In the case at hand, this applied *a fortiori*, since Prevent was sufficiently protected through the one-year expiration period.

The know-how transfer agreement of 2009 did not infringe the so called 'Anzapfverbot' (i.e. a prohibition for undertakings with relative market power not to abuse their position in relation to business partners that are dependent on them) as the plaintiff did not sufficiently outline that VW had a dominant position at the time of the transfer agreement. An infringement would furthermore not lead to the invalidity of the extraordinary termination.

Comment

The decision contains useful guidance for drafting or evaluating contracts with purchasing and supply obligations between OEMs and their suppliers but also beyond that. From an antitrust perspective, exclusive purchase obligations that cover 100 % of the purchaser's business are inadmissible in case such obligation may last longer than five years. It is, however, important to note that for the first five years of such a supply relationship, it would be possible to agree on exclusivity and only for the time thereafter an 80 % or lower threshold definitely needs to be observed. Anyway, the buyer at any time is allowed but not obliged to purchase 100 % of the supply and the supplier may be contractually obliged to supply 100 %.

With regard to termination rights, the judgement on the one hand strengthens the position of OEMs stating that an extraordinary termination is possible even for a dominant buyer if the supplier has given good cause for the termination. In the future, suppliers have to watch out how to claim price increases or other demands. On the other hand, it reinforces the basic principle of *pacta sunt servanda* i.e. that in the absence of extraordinary circumstances there is no way out for either party from contractual obligations agreed upon.

This certainly will not be the last clash for VW and Prevent. Several other proceedings in both the US and Germany are pending and in the case at hand it is likely that at least one of the parties will file a non-admission complaint to the Federal Court of Justice.

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