

**FIDELITY DISCOUNTS AND REBATES NOT JUSTIFIED BY THE COSTS : IN WHICH CASES SHOULD A
DOMINANT ENTERPRISE BE FORBIDDEN SUCH PRACTICES ?**

AUSTRIA

MMag. Dr. Astrid Ablasser-Neuhuber
bpv Hugel Rechtsanwälte OEG

Ares-Tower, Donau-City-Strae 11
AT-1220 Vienna /Austria
Office: +43 1 260 50 205
Fax: +43 1 260 50 208
E-mail: astrid.ablasser@bpv-huegel.com
<http://www.bpv-huegel.com>

1) Definition of fidelity discounts

The question refers to fidelity discounts. “Fidelity” identifies a sub category of discounts, intended to provide either implicit or explicit compensation for loyalty (you buy only from me). In theory, “fidelity” discounts should be distinguishable from “quantity” discounts, the other sub category of discounts, where a seller provides compensation for large purchases. In practice, the distinction between “fidelity” and “quantity” discounts is much less clear, largely indirect and based on the “objective” justification of the provided discounts. If discounts are objectively justified (strictly cost based) then discount enhances fidelity only indirectly, since the discount passes down to customers the cost reductions originating from the purchase. In such cases discounts are unlikely to be considered fidelity discounts (see also point 2)

1.1 Are you aware of any decision/judgement in your jurisdiction providing a definition of “fidelity” discounts as opposed to other types of discounts? Please describe

In 4 Ob 90/99k (“Jahresbonus”), the Austrian Supreme Court (as a Cartel Appellate Court) defined fidelity rebates – in quoting the ECJ in Hoffman La Roche, Michelin (I), AKZO and BPB - as *„rebates which are granted if the customer of a dominant undertaking procures all his demand or at least a substantial part of it exclusively from the dominant undertaking”*.

The Supreme Court further specified that a criterion is the application of *“dissimilar conditions to equivalent transactions”* resulting in two purchasers paying a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or from several competing sources of supply.

Such obligation on the buyer for exclusive or almost exclusive purchases is deemed to be an abuse of market dominance, regardless if combined or not with rebates.

2) Cost justification

The problem is that a cost justification is presumed whenever discounts are directly proportional to quantities purchased in a given period (usually a year). This is not always appropriate. A cost justification may exist if a single order is placed at the beginning of the production period, while deliveries are distributed in the course of the year (reduction of demand uncertainty). A cost justification may also exist if delivery of all quantities purchased occurs in a single instalment

(reduction of transportation costs). On the other hand, if the quantity that triggers a discount is achieved by unplanned purchases made in the course of a year, a cost justification is much more difficult to identify.

2.1 Are you aware of any decision/judgement in your jurisdiction discussing evidence of the cost justification underlying a discounting policy? Please describe

In 4 Ob 34/01f (“Supermärkte”) the Supreme Court states in a general way that rebates or price differences reflecting cost savings are always objectively justified. This is based on the reason that a special economical service/benefit is rendered by the purchaser to the supplier. This benefit is then subsequently refunded by granting the rebate.

As regards evidence, the Supreme Court clearly ruled that the burden of proof that the rebates system is not economically justified stays on the plaintiff’s side.

In the case cited the plaintiff applied for the court retaining an expert opinion on the question of whether the rebate granted corresponds to the cost savings achieved by the delivery of higher quantities, taking into consideration the general price regime (“cost plus”) usually applied by the supplier. The application was dismissed by the Cartel Appellate Court but then held admissible by the Supreme Court.

3) Price discrimination

“Fidelity” discounts are meant to compensate exclusive purchasing patterns. Therefore “fidelity” discounts are inherently discriminatory. A purchase of 100 units may trigger a discount if the supplier covers all the needs of the acquirer for that particular product, otherwise the acquirer may not receive any discount (and pay a higher price than its competitors). This implies that acquirers of the same quantities may face different prices.

3.1 In your jurisdiction may price discrimination by a dominant firm violate antitrust law? If so, how is this discrimination defined? In particular, is this discrimination prohibited per se or only inasmuch as it actually distorts competition in the market? Please describe

Yes, price discrimination may violate Austrian Antitrust law. Any discrimination is prohibited per se, under the condition that the respective measure is capable of distorting competition.

3.2 Are there rules in your jurisdiction that prohibit price discrimination irrespective of the market power of the firm involved? Can you briefly describe these rules and discuss how they are interpreted?

The Austrian Local Supply Act (Nahversorgungsgesetz - NVG) mainly provides that practices of companies can be prohibited in so far as they are capable of endangering competition based on merits. Furthermore, the NVG aims to prevent the imposition of different conditions on equal transactions without objective justification.

Therefore, if price discriminations would endanger competition, it could be also challenged by the NVG, irrespective of the fact whether the undertaking concerned is dominant or not. However, in analysing whether behaviour was in breach of the NVG, the Supreme Court (nevertheless) usually refers in its reasoning to principles developed under Art 82 EC principles (see, e.g., 4 Ob 34/01f, Supermärkte).

Furthermore, the Austrian Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, "UWG") prohibits unfair business practices between undertakings (and between undertakings and consumers). Irrespective of market dominance (however a certain market power is conditional), price discrimination can be assessed as an unfair business practice under Sec 1 UWG, if competition to the disadvantage of a competitor is substantially influenced.

4) Exclusionary nature of "fidelity discounts"

Discounts can be exclusionary when they do not allow competitors to profitably compete with the discounting dominant firm. However there are a number of problems associated with this exclusion. The first one relates to the burden of proof. Is indirect evidence (e.g. the fact that competitors market shares were not affected) sufficient to rule out any exclusionary effect?

4.1 In your jurisdiction is indirect evidence that market shares of competitors (and especially market shares of complainants) were not affected by the discounting policy sufficient to rule out its allegedly exclusionary effect? Please describe

The authority or the party claiming that an undertaking is abusing its dominance must prove the allegations. Therefore it is up to the court/judge to assess the proofs submitted. He is not bound in his discretion and evaluation of direct and indirect evidence. In the end, an overall assessment of all the evidence submitted is made. This means, the fact that the market shares are not affected may rule out an exclusionary effect, but may also not be sufficient depending on the circumstances of the case.

In order to assess whether a fidelity discounts strategy is actually exclusionary, competition authorities may need to assess whether the practice is replicable by competitors. Replicability depends on whether matching the pricing strategy of the dominant firm would lead competitors to price below some measure of costs. Therefore, it is necessary to assess whether, as a result of discounts, prices fall below some measure of costs (average variable, average total, incremental or marginal). Furthermore, as for predatory prices, the assessment could be made over the cost of the dominant firm, or, alternatively, over the relevant costs of competitors.

4.2 In your jurisdiction is the exclusionary nature of discounts proved through a comparison of costs and revenues? If not, how else is such exclusion assessed?

In Austria, no comparison of cost has been made so far in court precedents as regards exclusionary discounts. In 4 Ob 90/99k (22 June 1999), the exclusionary nature was simply proven by the fact that the rebate system was a fidelity discount as defined above.

4.3 Should your jurisdiction perform a comparison of costs and revenues, what is the definition of costs that is used, average variable, average total, incremental or marginal? Please describe

No comparison of costs related to exclusionary discounts has been made so far in Austria. As regards predatory pricing in general, Austrian precedents (see, e.g., 16 Ok 11/02, "Red Bull") are following the general EC approach (i.e., prices below average variable costs are regarded as abusive, prices below average overall costs (fixed costs plus variable costs), but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor). Two Austrian special rules: predatory pricing is – contrary to Art 82 EC – explicitly listed as an abuse of dominance (see Sect 5 para 1 no 5 Cartel Act) and under Sect 5 para 2 Cartel

Act it is on the dominating undertaking to disprove the semblance of predatory pricing and to prove its objective justification.

4.4 *Furthermore in your jurisdiction are the relevant costs over which the comparison is undertaken the costs of the dominant firm or the cost of the excluded competitor? In any case are there instances where an above costs abuse was identified in your jurisdiction? Please describe*

The costs concerned are the costs of the dominant firm. However, please note that as a prima facie evidence it is accepted that the complainant demonstrates that - based on the prices of the dominant undertaking - he would be under costs. ***[Please define “above cost abuse”, so that we can answer the entire question]***

The outcome of the replicability assessment depends also on the definition of the sales of the dominant firm which are benchmarked against the relevant measure of costs (total yearly output or some other range). For example, if firms compete for the total demand of a given customer, rivalry occurs at the beginning of the reference period and discounts cannot be predatory in so far as they lead to total revenues above costs. However, if there are asymmetries among firms, in the sense that only the dominant firm can supply total demand by individual customers and its competitors either do not have the capacity to do so, do not have enough reputation so as to satisfy all potential customers, or supply only a limited part of the portfolio of products of the dominant firm, then the relevant measure of sales has to be identified.

4.5 *In your jurisdiction what is the relevant output over which the exclusionary effect of discounts is calculated and, in the case of bundled discounts, which is the relevant revenue over which the exclusionary effect of discounts is calculated? Please describe*

Concerning the period of time on which the exclusionary effect of discounts is calculated, the respective approach seems to be dependent on the discounts granted. One time it is the “reference period” ((see, e.g., 4 Ob 34/01f, “Supermärkte”), one time it is monthly periods (16 Ok 6/00, “Tiroler Tageszeitung”), one time it is a year (4 Ob 90/99k, “Dachziegel”).

As regards bundled discounts, the Supreme Court in 16 Ok 9/04, “Postmonopol”, calculated the exclusionary effect by examining each discount for its own. However, it has to be stressed that this was a case in the postal sector. The Austrian post offered bundled discounts, which were based on services on the one side, where the post still had a monopoly and services on the other side, where Austrian Post was in free competition. The Supreme Court ruled, that only separate discount systems in both, the monopoly and the free competition area, would have been no abuse of dominance.

5) *Justifications for exclusionary discounting policy*

Appropriate consideration might be given to the fact that in a pluralistic market structure (where the number of competitors is greater than two), expansion or new entry is limited by rivalry from all market participants, not just from the dominant firm. In this respect, the record of entry in the industry and the relative movements of market share from year to year should be given proper consideration, in the sense that if there is profitable and extensive entry in the industry in the course of the years practice was in place, the practice itself may not be as exclusionary as expected.

5.1 *Once a discounting policy is proved to be exclusionary, are there instances where the competition authority accepts justifications by the dominant firm as for the legality of the*

discounting strategy and if so which justifications have a greater probability of being accepted? Are these justifications relevant for the identification of the abuse, for assessing the level of a possible sanction or for both? Please describe.

If there is an exclusionary effect proven, we are not aware of case law accepting any kind of justification. As far as the question relates to some sort of efficiency defence, there are no precedents in Austria yet.