Crisis Management in the Automotive Industry

Best Practice Guide to Implementing the Framework for the Restart of Automotive Production

I. Framework for the Restart

By means of a comfort letter dated 09.06.2020, the Federal Cartel Office (BKartA) announced that it is, in the light of the current Corona crisis, not considering an in-depth review of the measures envisaged by the VDA to ensure the restart of automotive production as they are likely to comply with applicable antitrust laws.

These measures consist of two specific activities:

a) The collection and publication of information by the VDA which is important for all market participants in the restart process. This concerns, in particular, the date and timing of the restart of OEMs and Tier 1 suppliers, which will be published on the VDA website. It is at the sole discretion of each OEM and supplier to make its information available to the VDA for publication. Furthermore, it remains the free and autonomous decision of each of the participating companies to decide whether and when to resume its activities. There will be no coordination nor obligation to resume production at a specified time and/ or to a certain extent. Furthermore, only restart or shut-down times of the respective production sites will be published, additional information such as capacity usage or specific production figures will neither be collected nor published.

b) The publication by the VDA of a Best Practice Guide with concrete proposals to avoid a misallocation of resources during the restart (cf. section II below).

II. "Best Practice Guide"

Due to the process- and coordination-related difficulties of the restart after the shutdown (and even thereafter), as well as due to the burden of COVID19 in the supply chain, e.g. through the failure of individual suppliers, the production of a supplier may not be sufficient to meet the actual contractually fixed demand of all its customers. If and to the extent the supplier does not give cause for this inability and cannot do anything himself to eliminate or at least improve the shortage, he and his customers can find themselves in an almost insolvable dilemma between contractually owed performance on the one side and actually available capacity on the other side. In this situation, the supplier will have to decide which customer calls he will meet and which not. This will lead to a situation where all customers try to enforce their calls. This cannot only put the supplier in an insolvable situation, but also puts less assertive customers into a severe disadvantage.

All contractual supply obligations, including the legal and contractual consequences of non-fulfillment of supply obligations remain unaffected and fully in place as far as no exemption from the performance obligation is given on the basis of legal or contractual provisions - in particular due to impossibility or *force majeur*.

In order to resolve the predicament referred to above, this Best Practice Guide describes a system which, irrespective of the circumstances, leads to as fair as possible results and achieves a balance between the supplier and his customers on the one hand and among the customers on the other.

To this end, a percentage-based allocation scheme should be chosen which allocates the actual capacity based on volumes among the customers affected by the capacity shortage.

- Reference should be the technical capacities contractually agreed upon at the time of the production shortage. This includes new SOPs taking into account their starting curve. Increased demands requested only during the time of the supply shortage shall be disregarded for the calculation of the quota.
  <u>Example:</u> Supplier L faces delivery obligations in the amount of 400 units per relevant supply period. 200 units (50%) thereof are owed to customer A, 120 units (30%) to customer B and 80 units (20%) to customer C. In the current supply period, L's customers call for a total volume of 200 units. However, L is only able to produce and supply 100 units in total. This volume is allocated according to the percentage-based ratio (50/30/20).

The following common principles apply to the implementation of the allocation ratio:

- The allocation shall be based on volumes/units, not turnover.
- The allocation ratio shall not be applied to the total volume across all product groups of the respective supplier, but to the individual product groups concerned by the respective supply shortage.
  <u>Example:</u> Supplier L has two production areas - aluminum and iron castings. Due the Corona crisis, L is only partially able to source raw material for its aluminum castings – despite all efforts. The allocation ratio shall therefore be formed based on the agreed technical capacity for aluminum castings and applied only to the reduced aluminum castings production.

III. Application

This Best Practice Guide is not binding on OEMs and suppliers. Any supplier is free to negotiate divergent solutions bilaterally with its customers.

This Best Practice Guide is valid until 31.12.2021 and may be extended.

The VDA remains in regular contact with the BKartA in relation to the specific impact of the comfort letter and this Best Practice Guide. Any potential implications of such exchange - e.g. in the form of amendments – on this Best Practice Guide will be taken into account and published immediately.

Any company relying on and implementing this Best Practice Guide, remains committed to ensuring compliance with applicable antitrust rules (self-assessment). The VDA cannot provide legal advice. Nor will the VDA engage in any consultation nor dispute resolution concerning the bilateral supply relationships of the relevant suppliers and their customers nor regarding the implementation or interpretation of this Best Practice Guide.

Berlin, 06 July 2020