



EUROPEAN COMMISSION
Competition

CASE AT.40072- Magyar Suzuki Corporation

ANTITRUST PROCEDURE

**Council Regulation (EC) 1/2003 and
Commission Regulation (EC) 773/2004**

Article 7(2) Regulation (EC) 773/2004

Date: 14/10/2014

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EUROPEAN COMMISSION

Brussels, 14.10.2014
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Auto Team 4x4 s.r.o.
Kocelova 9
82108 Bratislava

Slovakia

Subject: Case COMP/AT.40072 – Magyar Suzuki
(Please quote this reference in all correspondence)
Commission Decision rejecting the complaint

Dear Mr [REDACTED],

- (1) I refer to the complaint that you lodged on 11 January 2013 against Magyar Suzuki Corporation (hereinafter "Suzuki") on behalf of your company Auto Team 4x4 s.r.o. (hereinafter "Auto Team").
- (2) I am writing to inform you that the European Commission (hereinafter the "Commission") has decided to reject your complaint pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004¹.

1. THE COMPLAINT

- (3) In your complaint, you requested the Commission to investigate Suzuki's behaviour in the field of motor vehicle distribution, which you consider to have breached Article 102 of the Treaty on the Functioning of the European Union (hereinafter "TFEU"), and to be out of line with the provisions of Article 4(1) of Commission Regulation 1400/2002².

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

² Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector. OJEU L 203/30 1.8.2002.

- (4) You alleged that Suzuki abused a dominant position within the meaning of Article 102 TFEU by:
- (i) Limiting Auto Team's ability to order cars by switching off the Suzuki electronic ordering system;
 - (ii) Manipulating the bonus system;
 - (iii) Withholding Auto Team's monthly deposit of ████████ EUR;
 - (iv) Not reimbursing Auto Team for pre-delivery inspections of cars, ████████
CONFIDENTIAL TERMS OF THE DEALERSHIP AGREEMENT;
 - (v) Failing to communicate regarding Auto Team's 2011 sales plan;
 - (vi) Failing to communicate as regards commercial activities for Suzuki customers (from December 2010 until the end of January 2011);
 - (vii) Terminating Auto Team's dealer agreement on 27 January 2011; and
 - (viii) Removing mention of Auto Team from the Suzuki website www.suzuki.hu.
- (5) You alleged that the underlying motivation behind this behaviour was to prevent Auto Team from selling vehicles to consumers from other Member States. You attached a number of documents in support of these allegations, including emails from two Suzuki executives, Mr **X.Y.** and Mr **Y.Z.**, on the subject of export sales of Suzuki vehicles.
- (6) You also considered that this behaviour did not comply with Article 4(1) of Commission Regulation 1400/2002, which was the block exemption regulation applicable to dealer agreements in the motor vehicle sector at the relevant time.

2. SUZUKI'S COMMENTS ON YOUR COMPLAINT

- (7) With your agreement, on 18 June 2013, the Commission sent Suzuki a copy of your complaint and asked it to provide comments thereon.
- (8) In its reply of 10 July 2013, Suzuki asserted that Auto Team's eviction from the authorised network and the earlier measures taken against your company were not due to you having sold vehicles to buyers from other Member States, but rather to the fact that Auto Team's showroom did not comply with Suzuki's minimum quality requirements. Suzuki provided evidence that you had been informed of its objections to Auto Team's showroom on several occasions prior to the contract termination.
- (9) As regards your specific allegations, Suzuki claimed that:
- (i) Auto Team was disconnected from the ordering system because of a failure to send in sales reports;
 - (ii) Bonuses were withheld because of Auto Team's failure to comply with the showroom related requirement;

- (iii) Although Auto Team's deposit was withheld for a time, it was ultimately repaid;
 - (iv) **CONFIDENTIAL INFORMATION REGARDING PRE-DELIVERY INSPECTIONS**;
 - (v) Suzuki did communicate with you as regards Auto Team's sales plan for year 2011;
 - (vi) Any exclusion of Auto Team from email circulars was accidental;
 - (vii) The termination of Auto Team's sales contract was lawful and related entirely to Auto Team's failure to comply with showroom standards; and
 - (viii) Auto Team's removal from the Suzuki website was a normal consequence of the fact that Auto Team had ceased to be an authorised Suzuki dealer.
- (10) On 27 November 2013, the Commission sought further clarification from Suzuki via a request for information pursuant to Article 18(1) of Commission Regulation 1/2003³. This request related essentially to the emails from Mr **X.Y.** and Mr **Y.Z.** that you annexed to your complaint.
- (11) Suzuki's reply was received on 23 December 2013. *Inter alia*, Suzuki provided the Commission with a copy of a circular dated 18 May 2011 that it had sent to all Slovak Suzuki dealers, explaining the legal position as regards sales to buyers from other Member States. This document informed dealers about their rights under the dealership agreements, as well as the EU competition law rules applicable to active and passive sales. Suzuki stated that "*the exclusive dealers in the distribution system are free of active sales (...) for their dedicated territory as well as the territory in which it operates a selective distribution system*". As regards active sales, Suzuki explained that "*any active sales by the dealer in the territory which is part of an exclusive distribution system and is reserved to another dealer will be prohibited*". It also further stated that "*in the case of passive sales of new vehicles to end users to resellers, the dealer is not restricted in any way (...)*"⁴.

3. YOUR WRITTEN OBSERVATIONS RECEIVED ON 24 JUNE 2014

- (12) By letter of 23 May 2014, pursuant to Article 7(1) of Commission Regulation (EC) 773/2004 ("the letter of 23 May 2014"), Director-General Italianer informed you of the Commission's intention to reject your complaint.
- (13) In your subsequent written observations received on 24 June 2014, you expressed disappointment that the Commission did not personally interview you via an

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJEU L 1/1 4.1.2003.

⁴ Translation (for convenience purposes) of the Circular of Suzuki Slovensko to Slovak dealers dated 18 May 2011 provided by Suzuki to the Commission on 20 December 2013.

interpreter and did not contact another Suzuki dealer, whose details you had provided. You also reiterated the points made in your complaint, making reference to a number of supporting documents.

- (14) The legal arguments in your written observations received on 24 June 2014 all turn around the alleged breach of Article 102 TFEU, and you made no further reference to Commission Regulation 1400/2002. As regards Suzuki's alleged dominance, you argued that the Commission took an incorrect approach in the letter of 23 May 2014; you submitted that instead of assessing Suzuki's share of the relevant market, the Commission ought to have examined Suzuki's dominance within its relationship with Auto Team. You pointed out in this respect that the majority of the cars purchased by Auto Team were sourced from Suzuki.
- (15) You also added further explanation as to the mechanism for the alleged abuse, notably as regards:
- (i) *The termination of the agreement* - you alleged that Suzuki dealers were forced to sign up to unrealistic sales plans, and that when these were not complied with, Suzuki had the contractual right to terminate the dealer agreements in question, and indeed did so. You also claimed that Suzuki incorrectly assessed that Auto Team's showroom did not meet its dealership standards,
CONFIDENTIAL INFORMATION REGARDING DEALERSHIP STANDARDS
 - (ii) *Switching off the electronic ordering system* – you disputed Suzuki's claims regarding the number of times that it disconnected Auto Team from the system, and you also gave additional explanation as to the effect that this had on your business.
 - (iii) *The bonus system* – you gave additional detail as to how you view the system to have been manipulated.
 - (iv) *The pre-delivery inspection* – you disputed Suzuki's explanation of its remuneration system.
 - (v) *The deposit* – you reiterated that it was wrongfully withheld for 33 days, and explained that Suzuki never paid you any interest for this period.
 - (vi) *The removal of your firm from the Suzuki webpage* – here again, you disputed Suzuki's explanation.

4. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (16) The Commission is unable to pursue every complaint that is brought to its attention alleging that EU competition law has been infringed⁵. It has limited resources and

⁵ The Commission notes the remark made in your written observations received on 24 June 2014 that it did not personally interview you via an interpreter and did not contact another Suzuki dealer whose details you had provided. However, the Commission observes that the case-law is well-established in this regard: it may

must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the Handling of Complaints.

- (17) The Commission takes various factors into account when deciding which cases to pursue⁶. There is no fixed set of criteria. Since the assessment of EU interest presented by a particular complaint depends on the circumstances, the Commission is not restricted to the exclusive use of certain criteria, and the number of criteria to which the Commission may refer is not limited.
- (18) One element the Commission may consider is whether, on the basis of the information available, it seems likely that further investigation will ultimately allow it to find an infringement. It may also take into account whether the complaint concerns ongoing conduct or conduct that lies completely in the past. Finally, the Commission may take into account whether national courts may adequately deal with the matter.

5. ASSESSMENT OF YOUR COMPLAINT

5.1. Market definition

- (19) Any finding of a breach of Article 101 or 102 TFEU must be founded on a robust definition of the relevant market. In your complaint, you appear to claim, without putting forward any analysis, that there is a separate market for the sale of Suzuki cars in Slovakia.
- (20) In the Commission's view, your proposed brand-specific product market definition is not realistic. In this respect, according to the Notice on Market Definition, a relevant product market "*comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*"⁷. Applying this test, Suzuki's vehicles appear to be substitutable to a greater or lesser extent with vehicles from other manufacturers. The Commission has therefore had regard to its previous practice and to publicly available classifications, in order to assess the degree of substitution and the scope of the product markets in question.
- (21) In its decision-making practice in merger cases, the Commission recognises that, although the car market has traditionally been segmented on the basis of a number of

reject complaints without taking investigative measures (Case T-432/05, Judgment of the Court of First Instance of 12 May 2010, *EMC Development*, paras. 57-59; Case T-320/07, Judgment of the Court of First Instance of 23 November 2011, *Jones*, paras. 112-116; Case T-319/99, Judgment of the Court of First Instance of March 2003, *FENIN*, para. 43; Case T-204/03, Judgment of the Court of First Instance of 27 September 2006, *Haladjian Frères*, para. 28; and the Notice on Complaints, para. 47). Moreover, as explained below, the Commission's preliminary examination of the factual and legal aspects brought to its attention shows that there is no need to take such measures.

⁶ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

⁷ Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5-13, paragraph 7.

objective criteria such as engine size or vehicle dimensions, the boundaries between segments are blurred by other factors. These factors include price, image and the amount of extra accessories⁸. To date, all merger decisions have therefore left open the question of the segmentation of the car market. However, the narrowest market definition used by the Commission in merger decisions does not divide the overall market for new cars along brand lines as you appear to propose, but rather into the following segments⁹:

- A: mini cars
- B: small cars
- C: medium cars
- D: large cars
- E: executive cars
- F: luxury cars
- S: sport coupés
- M: multi-purpose cars
- J: sport utility cars (including off-road vehicles)

- (22) In decisions relating to the grant of state aid¹⁰, the Commission has considered several other ways of segmenting markets such as those developed by Global Insight and POLK. In both of these methods, the segmentation is mainly based on size and pricing rather than along brand lines.
- (23) Global Insight proposes a relatively narrow segmentation of passenger cars into 27 segments. It allocates cars to different segments based on a hybrid combination of all factors: interior/exterior, dimensions, price, competitor models, brands, etcetera.
- (24) POLK differentiates the car market into segments A000, A00, A, B, C, D and E, depending upon average price, size and engine performance. Segment A000 comprises urban small cars and segment E is the ultra-luxury category.
- (25) The industry association ACEA also segments the passenger car markets when presenting statistics, namely into small, upper-medium, and executive cars¹¹.

⁸ Commission Decision of 8 October 2009, C(2009)8131, *Hungary – Aid to Audi Hungaria Motor Kft* (ex N 113/2009) para.76.

⁹ Case No COMP/M.1406 - *Hyundai / Kia* of 17 March 1999.

¹⁰ Commission Decision of 28 October 2009, *Audi Hungaria Motor Kft*. Commission Decision of 30 April 2008 C(2008)1613, *Romania - Ford Craiova* (N767/2007), Commission Decision of 29 April 2009 C(2009)3051, *Italy - Fiat Sicily* (N635/2008), Commission Decision of 17 June 2009 C(2009)4530, *Spain - Ford España* (N473/2008).

¹¹ See, for instance: <http://www.acea.be/statistics/tag/category/segments-body-country>

- (26) As to the geographic market, a study carried out by the University of Leuven in 2002 found that the relevant markets in the EU for the sale of new cars are national in scope¹². However, there have been considerable changes in the markets since that research was carried out, including the introduction of the Euro, a considerable reduction in price differentials between Member States¹³, and the adoption by certain manufacturers of EU-wide pricing. It is therefore possible that the relevant market is now EU-wide.
- (27) On the basis of the above, the Commission concludes that the market definition advanced in your complaint seems too narrow, since the relevant markets could be national or EU-wide, and could potentially comprise vehicles of various brands. The Commission also considers that it might be possible to define separate markets according to the size and function of vehicles.

5.2. Article 102 TFEU - Dominance

- (28) The Commission has gone on to assess the likelihood of establishing a breach of Article 102 TFEU. Any such finding must be predicated upon a finding of dominance.
- (29) In this regard, the Commission notes the assertion, made in your written observations received on 24 June 2014, that in order to establish dominance within the meaning of Article 102 TFEU the Commission ought to examine Suzuki's dominance within its relationship with Auto Team, rather than assessing Suzuki's position on the relevant market. However, the legal position, as laid down by the case-law of the European courts, is quite clear: dominance is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers¹⁴.
- (30) Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power, and that dominance is not likely if the undertaking's market share is below 40%¹⁵.

¹² Quantitative Study to Define the Relevant Market in the Passenger Car Sector by Frank Verboven, K.U. Leuven, September 2002. http://ec.europa.eu/competition/sectors/motor_vehicles/documents/study01.pdf. See page 33.

¹³ See Car Price Reports at http://ec.europa.eu/competition/sectors/motor_vehicles/prices/report.html

¹⁴ See Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 38.

¹⁵ Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), paras 13-14.

- (31) It should be noted in this respect that you have adduced no evidence on market shares. The Commission has therefore had regard to publicly available sources in order to ascertain Suzuki's market position.
- (32) The Commission has firstly considered Suzuki's market position as regards all cars sold at the relevant time. Data from the Slovak Auto Association ("ZAP")¹⁶ shows that in 2011, Suzuki was only the seventh car manufacturer in terms of total sales on the Slovak market, with a share of 3.16 %, down from 4.06% the previous year¹⁷. EU-wide, its market share was only 1.3%¹⁸.
- (33) The Commission has gone on to assess what Suzuki's share would be on the basis of the market definition used by the Commission in its decision-making practice in merger cases outlined above. For the purpose of this exercise, the Commission assumed that the relevant geographic market was national. In Slovakia, Suzuki appears to have been most successful in the "B" segment, in which its most popular model, the SX4, competed against cars such as the VW Polo and the Skoda Fabia. However, even in this segment, Suzuki's market share was far from the level at which dominance might be implied; the Polo was around as popular as the SX4, while the Fabia outsold it by a factor of about three. The Commission observes that this position would be unlikely to change substantially, even if the product market were segmented along narrower lines¹⁹. In particular, the Commission observes that even if it would retain the narrowest market definition as presented above (i.e., the market definition suggested by POLK which depends upon average price, size and engine performance), given Suzuki's market position it is unlikely that this would lead to the conclusion that Suzuki would be in a dominant position.

Conclusion on Article 102 TFEU

- (34) The Commission therefore takes the view that it is not necessary to come to a precise definition of the relevant market in order to make an assessment under Article 102 TFEU, since no credible market definition would be likely to result in a finding that Suzuki was in a dominant position.
- (35) The Commission is therefore of the opinion that further investigation into your allegations regarding Article 102 TFEU seems disproportionate, given the low likelihood of finding that Suzuki was in a dominant position.

5.3. Article 101 TFEU

- (36) In your complaint, you claim that Suzuki's behaviour towards Auto Team at the relevant time did not comply with Article 4(1)(b) of Regulation 1400/2002. That

¹⁶ Zväz Automobilového Priemyslu.

¹⁷ Reproduced at <http://zavolantom.autovia.sk/2012/01/16/predaje-2011-poradie-znaciek-aut-na-slovensku/>

¹⁸ European Automobile Manufacturer's Association ("ACEA") figures.

¹⁹ ZAP, as above.

provision reads: "*The exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object (...) the restriction of the territory into which, or of the customers to whom, the distributor or repairer may sell the contract goods or services (...)*".

Suzuki's behaviour towards Auto Team

- (37) As regards Suzuki's behaviour towards Auto Team, the Commission firstly observes that there is no concrete evidence to demonstrate any link between Auto Team's export sales and the alleged behaviour. Instead, the evidence provided by Suzuki seems to demonstrate that there was a dispute between Suzuki and Auto Team as regards contractual standards that lasted from 2009 to 2011. Suzuki appears to view its behaviour within this dispute as stemming from Auto Team's failure to meet contractual obligations, whereas you are of the opinion that Suzuki's acts were a response to Auto Team's export sales.
- (38) As to Auto Team's eviction from the Suzuki distribution network, Suzuki takes the view that this was the result of a failure to meet showroom standards, whereas you claim that Suzuki terminated Auto Team's contract on the basis of an illicit manipulation of those same standards.
- (39) The Commission notes in this respect that Suzuki has its headquarters in Hungary and that the dealership agreement concluded between Suzuki and Auto Team²⁰ is governed by Hungarian laws. This agreement foresees in particular that any dispute between the Parties **"CONFIDENTIAL INFORMATION REGARDING DISPUTE RESOLUTION** and that **[REDACTED]**²¹. In this light, the Commission considers that national courts may deal adequately with your dispute with Suzuki, including any competition aspects thereof.

*The emails from Mr **X.Y.** and Mr **Y.Z.***

- (40) When assessing your complaint, the Commission has had regard not only to your claims as regards Suzuki's treatment of Auto Team, but also to the entirety of the evidence that you have submitted, and in particular the emails sent by the Suzuki employees Mr **X.Y.** and Mr **Y.Z.**, in which the two make certain remarks to Slovak Suzuki dealers as to their sales to purchasers resident in other Member States.
- (41) The Commission's assessment of these emails is that a full investigation might reveal that they had the potential to interfere with dealers' ability to engage in passive sales to consumers and resellers from other Member States. This in turn might mean that Suzuki's network of dealership agreements in Slovakia was caught by Article 101(1)

²⁰ See the standard dealership agreement in Force on 27 February 2009 with Suzuki dealers in Slovakia concluded on 4 July 2005 between Suzuki and Auto Team.

²¹ Ibid. point 28.

TFEU, did not comply with Article 4(b) of Regulation 1400/2002, and could not benefit from exemption on an individual basis under Article 101(3) TFEU.

- (42) The Commission recalls, however, that in deciding in whether to carry out a full investigation, it tends to prioritise cases in which alleged harm resulting from the anti-competitive behaviour is ongoing²². In the present case, Suzuki appears to have "rectified" the emails of Mr **X.Y.** and Mr **Y.Z.** by sending a circular to its dealers on 18 May 2011 clarifying their contractual rights as regards active and passive sales to buyers from other Member States. You have provided no evidence, either in your complaint, or in your written observations received on 24 June 2014, that the behaviour that you describe continued after this circular was sent. It would therefore appear that this behaviour lies completely in the past, and there are no clear indications that it currently affects competition. In these circumstances, the Commission considers that further investigation into the circumstances surrounding the emails, and their effect on dealers' behaviour, would be disproportionate.

Conclusion on Article 101 TFEU

- (43) Given that the national courts may adequately deal with the issues you have raised in your complaint against Suzuki, including any competition aspects thereof, and that the behaviour embodied in the emails from Mr **X.Y.** and Mr **Y.Z.** appears to have ceased, the Commission does not intend to further investigate your allegations regarding Article 101 TFEU.

6. CONCLUSION

- (44) In view of the above considerations, in its discretion to set priorities, the Commission has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects your complaint pursuant to Article 7(2) of Regulation No. 773/2004.

7. PROCEDURE

7.1. Possibility to challenge this Decision

- (45) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

7.2. Confidentiality

- (46) The Commission reserves the right to send a copy of this Decision to Suzuki. Moreover, the Commission may decide to make this Decision, or a summary thereof,

²² See point 44 of the above mentioned Notice on the Handling of Complaints.

public on its website²³. If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform [REDACTED]

[REDACTED]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Suzuki.

- (47) If you so request, your identity may be concealed in the published version of the Decision, but only if this is necessary to protect your legitimate interests.

For the Commission

*Joaquín ALMUNIA
Vice-President*

²³ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.