



**Legal analysis of the ruling by the Supreme Court of Justice of Austria of
17 February 2021 (16 Ok 4/20d)**

Introduction

The Supreme Court of Justice of Austria has instructed the importer of Peugeot vehicles for the country of Austria to stop - within 3 months - abusing their dominant position in the design of their margin system, the pricing in their own dealerships, the remuneration of warranty work and the passing on of costs for mystery shopping, mystery leads and standard criteria audits on the Peugeot partners. According to the requirements of the Supreme Court, the lower court must decide again whether the economic compulsion to participate in campaigns specified by the importer is associated with an abusive restriction on the freedom of the Peugeot partner to set prices.

On the abuse allegation itself, the Supreme Court ruled the following, in summary:

1. Ban of linking bonus payments to customer satisfaction surveys in a margin system for new car sales

In the present case, reaching a recommendation level of 80% is the entry criterion for the entire variable margin of the remuneration system, which is around 40% of the total achievable margin. If this level is not achieved, the entire variable margin will not be paid out. For this reason alone, the interest of a general importer in an “impeccable brand image” cannot outweigh the interests of the Peugeot partners, which is why linking bonus payments to customer satisfaction surveys is to be seen as abusive.

2. Ban of reducing margins for new car sales by setting excessive sales targets

The payment of the performance bonus is also dependent on achieving the target (cars: 80% monthly target; commercial vehicles: 70% monthly target). The amount is then determined according to the degree of target achievement.

A high annual and monthly target means that with the same absolute number of cars sold, the percentage target achievement decreases compared to lower targets. It is therefore crucial whether it is possible to achieve the target.

In the present case, the importer set the plaintiff's target value for 2019 in such a way that it increased the actual sales from 2018 by 25%. In view of the Supreme Court, the lower court rightly rated this as overambitious or deliberately inflated sales target setting in view of past experience with the setting of targets. It was taken into account that seven dealers in 2017 and 11 dealers each in 2018 and 2019 had made use of the contractually stipulated arbitration and expert proceedings. The plaintiff's annual target set by the importer for the year 2018 was reduced from 259 vehicles to 220 vehicles, of which 178 vehicles were actually sold. A further complicating factor was that the importer's own subsidiary was not able to achieve 100% of the sales target in 2018.

3. Ban of the practice of abusively low sales prices on the end customer market by a subsidiary (= dealership that is economically majority-owned by the importer)

In the end customer market, the importer indirectly competes with the dealer network through a subsidiary. In the present case, a profit and loss transfer agreement has also been concluded with the subsidiary, which guarantees that the importer will cover its losses. For this reason, the profitability of the subsidiary is not of vital importance, which is why it is able to lower its sales prices on the end customer market, which it actually does, and thereby draws customers away from the other Peugeot partners. In fact, the subsidiary is (also) writing losses because of the retail prices offered. Against this background, the importer behaves abusively with regard to its pricing policy as it is impossible for the plaintiff to stop the subsidiary's low retail prices, which even lead to losses at the subsidiary. The difference between the purchase price of the plaintiff and the subsidiary prices offered on the end customer market is not sufficient for the plaintiff to cover its own costs, with the result that it cannot work profitably if it wants to compete successfully on the end customer market. The fact that the subsidiary's losses are partly based on other circumstances (such as the central city location) does not change this assessment.

4. Ban of remunerating warranty work with non-cost-covering hourly rates and non-cost-covering reimbursement of spare parts costs as well as the establishment of conditions that make this work economically unprofitable for the Peugeot partner

It is true that a certain complexity of a uniform system for remunerating warranty work should not be viewed as abuse per se, but the interests of the authorized workshops in cost-covering remuneration must be implemented. Authorized workshops have a legitimate interest in not having to carry out warranty work that the manufacturer owes the buyer as a loss-making business at their own expense.

In the present case, the hourly rate for warranty work is determined based on the repair costs of the cheapest workshop, assuming that 70% of the labour costs fall into level 1 ("maintenance") and an additional 12% is deducted from these costs. The time that exceeds the actual repair time for the bureaucratic effort of processing warranty cases is not remunerated at all. The Supreme Court sees this as abusive.

The same applies to the reimbursement of spare parts costs. Spare parts costs are only remunerated at the dealer's purchase price plus a handling fee for cleaning and storage, with this replacement being capped at 65 euros (or 130 euros since 2019).

Viewed as a whole, the complicated system for remunerating warranty work - made up of many individual components - is at the expense of the Peugeot partners and leads to a cost shortfall in the range of 5 - 10%. The authorized workshops must therefore bear a considerable part of the costs of warranty work. They cannot avoid these costs because they are contractually obliged to carry out this work. Since the system does not meet the requirement of cost recovery, the Supreme Court considers it to be abusive.

5. Warranty checks and chargebacks

A warranty system that does not fully reimburse the workshops for the costs of actually carried out warranty work (both in individual cases and systematically), although only details are missing, is abusive in the opinion of the Supreme Court.

In the present case, certain errors made by the authorized workshop when submitting a warranty application can lead to the entire cost of the warranty claim reimbursed by the importer being charged back. This not only applies to objectively significant errors, but also in the case of neglecting relatively minor details (such as missing signature or electronic signature of the technician). The entire repair costs are forfeited even though the repair was a warranty case and was also carried out by the workshop.

That the workshops would have to reimburse services that they would not have legally obtained, as the importer argues, cannot be seen in this generality in the opinion of the Supreme Court. In fact, costs that are wrongly charged as warranty work only occur sporadically.

In addition, if the error frequency is 3% or more, all warranty services for a year affected by the reason for the complaint must be repaid, because in this case the importer assumes that the error will always be made. The attempt by the importer to justify this by referring to sufficient information and training by the workshops fails, in the opinion of the Supreme Court, because the warranty guidelines are constantly being changed and the workshops are not always informed about this.

It is true that the importer must be able to protect himself from not paying for work that is not covered by warranty, but that does not mean that within these cases the importer can also define other errors with the consequence that the Peugeot partners bear the costs of checking the correctness of the invoices - to a large extent - too. Such an allocation of costs of the warranty work check is to be seen as an abuse of conditions in view of the importer's overriding interests in the owed warranty work.

6. Ban of passing on the costs for mystery shopping, mystery leads and standard criteria audits to the Peugeot partners, in particular by including these costs in the training flat rate

In the present case, the Supreme Court assumed that the importer would transfer not only actual training costs, but also costs for mystery shopping, mystery leads and standard audits (amounting to 2,000 EUR out of a total of 5,000 EUR training flat-rate) to the Peugeot partner. The Supreme Court also assessed this as an abuse of conditions. The importer's interest in checking training results in no way means that the costs of such control measures can be passed on to the Peugeot partners. The Supreme Court did not allow the importer's attempt to justify the passing on of costs by claiming that the contractual partners would receive special support for the purchase of 2 workshop replacement vehicles (one per half-year) totalling 1,000 euros as compensation. This is not because the special support associated with a purchase incentive does not financially compensate for the passing on of costs and it only benefits the dealer if he actually purchases two workshop replacement vehicles. Instead, the Supreme Court emphasized that mystery shopping, mystery leads and standard criteria audits are in the sole interest of the importer and it was only possible because of the importer's dominant position in the market to pass these costs on to the Peugeot partners.

7. Economic compulsion to participate in campaigns specified by the importer, which lead to a restriction of the Peugeot partner's freedom to set prices

When assessing the unfairness of being forced to participate in the importer's campaigns, many aspects have to be taken into account, in particular the number of campaigns. In the present case, there are six campaigns per year, each lasting at least two months. These result in margin losses for one or the other model practically throughout the year. The price-setting autonomy of the dealer is de facto restricted by the promotional prices advertised - although non-binding.

What matters here is that the remuneration system is designed in such a way that the dealer can hardly achieve his monthly or annual target without participating in the campaigns and the resulting loss of premiums is not economically viable.

The fact that campaigns are "a perfectly normal practice in economic life" may generally be the case, but without knowledge of the particular circumstances, it does not say anything about their admissibility under antitrust law.

A final assessment of the abuse of the obligation to participate in the importer's campaigns still depends on the determination of the extent to which the price-setting autonomy of the Peugeot partners is restricted by this obligation. This requires further determinations by the lower court. It must also be taken into account to what extent (antitrust compliant) campaigns may be necessary in order to survive in interbrand competition.

Conclusion:

1. In its order, the Austrian Supreme Court ruled on a whole series of issues in favour of motor trades and repair companies which have also been of long-term concern to German car dealers and authorised workshops for many years.
2. The cease and desist order expressed in the decision is not limited to the plaintiff, but also unfolds its positive effects in the present case on the other Austrian Peugeot partners, because the Supreme Court – already due to the use of uniform dealer and service contracts - assumed that they have a similar relationship of dependency to the Austrian general importer as the plaintiff.
3. The ruling does not have any direct effect on other brands in Austria. Nevertheless, the chances that the other Austrian vehicle importers will also take the decision of the Supreme Court into account when drafting their contracts in the future have increased enormously.
4. The Austrian decision also has no direct effect on the contracts of German dealer and service organizations. To do this, it would be necessary for a German antitrust authority, a German court or the European Court of Justice to make an appropriate decision. Whether this will happen in a comparable way depends crucially on how the respective authority or court defines the "relevant market" in the new car trade and repair sector and what market power a manufacturer/importer will gain from it. This in turn is crucially dependent on the facts presented. In Germany - as in Austria - a dealer would have to be willing to go the sometimes stony path through the courts.