Distribution Law Center
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CASE CARD | 26 October 2021

Peugeot (Case 16 Ok 4/20d)

1. CASE SUMMARY

A. Summary of facts

This decision concerned various aspects the classic distribution relationship between manufacturer/importer and dealer/workshop and its market dominance implications. In particular, the Austrian Supreme Court affirmed that Peugeot Austria held a dominant position in the sectors of new car sales and after sales business vis-à-vis its dealers/workshops (so-called 'relative market power'). As a consequence, the Austrian prohibition of abuse of market power served as legal framework for the obligations imposed upon the dealers/workshops contained in the distribution contracts.

B. Legal analysis

Regarding market dominance, the paramount question was whether the applicant (a Peugeot-dealer) was economically dependent on its relationship with Peugeot Austria. In the case at hand, the applicant had to maintain its business relationship with Peugeot Austria in both areas in order to avoid serious economic disadvantages, since it generates around 68% of its turnover with the Peugeot brand in the area of new car sales and around 60% in the after sales business, such that losing the contract with the general importer would threaten its existence.

Moreover, the Austrian Supreme Court found the following conduct to be abusive. Some of the actions are not inherently abusive (such as bonuses for customer satisfaction and the stipulation of conditions for warranty work), but were performed in an abusive manner by Peugeot Austria. They might be permitted if they were structured differently.

New car sales

- Premium payments were directly linked to customer satisfaction surveys (abusive both as implemented on paper and in actual practice);
- The performance premium (and thus the trade margin) depended on sales targets that were deliberately inflated;
- Subsidiaries of Peugeot-Austria (PSA-Retail) set abusively low sales prices on the retail market.

After sales business

- The dealer had to perform warranty and guarantee work under conditions imposed by Peugeot Austria, including a control system that is also costly for the dealer, which made this work economically unviable for the dealer;
- Warranty and guarantee orders were settled with hourly rates that did not cover costs, and refunds for spare parts did not cover costs.

The Austrian Supreme Court did not decide whether the economic compulsion to participate in the Peugeot Austria promotions also constitutes abuse by unilaterally restricting the dealer's freedom to set prices. Indeed, according to the OGH, abuse depends on numerous factors. The Cartel Court has now to examine the following circumstances: (i) the scope of the model range covered by the promotions, (ii) the sales success of the dealer during the promotion periods, and (iii) the extent to which the promotion prices deviate from the regular prices.

2. QUOTES

"[…] Pursuant to Section 4 (3) of the Austrian Cartel Act, an entrepreneur is also deemed to be dominant if he has a superior market position in relation to his customers (or suppliers).

This definition of dominance is based on an exceptional distribution of weight in business relations in a vertical relationship. The question whether a dominant position exists is not answered by a comparison with competitors, but by analyzing the business relationship with certain entrepreneurs on the opposite side of the market. This provision defines relative market dominance, which is based on the maintenance of business relations. Such dominance exists, in particular, if the customers are dependent on the maintenance of the business relationship in order to avoid serious economic disadvantages. This can be justified, for example, by the fact that a commercial entrepreneur is dependent on the supply of a certain range of goods. The decisive factor is whether there are alternative sales or procurement possibilities at economically justifiable conditions. If this prerequisite is missing, relative market power within the meaning of Section 4 (3) of the Austrian Cartel Act exists - irrespective of any general market power of the entrepreneur […]"

"[…] Section 4 (3) of the Austrian Cartel Act stipulates - as explained above - relative market dominance, which is based on the requirement of maintaining business relations. The decisive factor is whether alternative possibilities exist, i.e. alternative sales or procurement possibilities exist at economically justifiable conditions. In the decision 16 Ok 12/13, the Senate emphasized the necessity of a "serious" economic disadvantage in the vertical relationship and negated this criterion there in view of a turnover of only 10% with the products in question.

According to the decisions 4 Ob 187/02g and 4 Ob 214/97t, serious economic disadvantages do not only exist if the existence of the entrepreneur is threatened, but such disadvantages can also exist if there is a massive loss

of sales or a loss of a significant part of the clientele. This may be due, for example, to the fact that a retail entrepreneur is dependent on the supply of a certain range of goods (branded articles). It depends on the possibilities of substitution, i.e. whether alternative sources of supply exist for the customers on the relevant market. […]"

*"[…] In the case at hand, the applicant has been trading in vehicles of the P***** brand for almost 30 years, repairs them and is identified by this name by its customers. Whether it could therefore actually outsource the workshop services in the specific case without further ado, or whether it must in fact also carry out the repairs itself in accordance with its reputation even without contractual or legal compulsion, can ultimately be left open. Even if one were to assume separate markets, according to the findings in both areas the applicant is dependent on maintaining the business relationship with the respondent in order to avoid serious economic disadvantages, since in the new car area its sales of vehicles of the brand in question account for around 68% of total sales (with around 2/3 of customers not willing to change vehicle brand), and in the repair shop area the share of sales concerned is around 60%, so that in both areas the loss of the contract with the respondent would threaten the existence of the company. […]"*

"[…] A tie is deemed to be excessive and therefore unreasonable if it was agreed solely or predominantly in the unilateral interest of the dominant company. This circumstance must not only be taken into account in the weighing of interests, but is also an independent element of abuse which justifies the application of Art 102 TFEU even if exploitation cannot be established (prohibition of excessiveness). Contractual provisions that impair the contractual partner's freedom of competitive action are covered not only by the prohibition of cartels but also by the prohibition of abuse if they are unilaterally in the interest of the dominant company, have no objective justification and prevent the contractual partner from economically exploiting the acquired goods or services […]"

"[…] The appellant claims that the system of customer satisfaction surveys established by it is scientifically sound. The customer survey is a "real" evaluation and a representative method with sufficient significance; the subjective perception as shameful instead of a matter of course of a service-oriented business is not accessible to an objective consideration. It was inadmissible to speak of "manipulated results" or the resulting blackmailability of the dealers. Any "pressuring" of customers was to be attributed to the sphere of the applicant.

The dealers could also easily fulfill the conditions for the quality bonus, which was already evident from the fact that only one dealer had not reached the relevant threshold of 80% referrals in 2018. If the dealers do not suffer any economic disadvantages from this practice, there is no abusive conduct. Moreover, the premium that can be acquired in this context only accounts for 0.6%, which is why it is questionable, in the context of the required balancing of interests with the advantages from the customer survey that clearly predominate anyway, whether this is of any economic significance at all for the applicant.

Gugerbauer and the Federal Competition Authority (in its statement on the motor vehicle sector of fall 2016, argue

that a dominant company can also abuse its market power by making financial services (partly) dependent on customer satisfaction. In order to rule out an abuse of the dominant market position, the assessment of customer satisfaction must be objective, transparent and comprehensible. For example, the arbitrary setting of target values, unusual evaluation schemes, the lack of transparency and feedback on the achievement of results are inadmissible. In particular, if financial benefits are linked to the target values as part of the trader margin, there could be market abuse.

However, as far as the appellant refers to the scientific foundation of its method, it has to be referred to the article submitted by itself (Exhibit ./14), which describes this method of the "Net Performence Score" (NPS), but considers it unsuitable to measure customer loyalty or relationship strength. Moreover, the appellant departs from the findings when it presents customer satisfaction as relevant only for the quality bonus in the amount of 0.6%, since the court of first instance expressly stated that the achievement of a recommendation level of 80% (NET EQC) is the entry criterion for the entire variable margin of the bonus of the remuneration system (i.e., around 40% of the achievable total bonus) and that the entire variable margin is not paid out if this level is not reached. [...]"

"The decision 4 Ob 62/00x, Fiat II, states in connection with area dealer contracts of a certain car brand that the "trade margins" (difference between the purchase price of the area dealer and the resale price recommended to him without obligation) offered by the defendant group company of the vehicle manufacturer to its future area dealers were lower than those agreed with the former contractual partner of the area dealers. However, the fact that these amounts were lowered did not necessarily mean that the contractual terms were unreasonable. It could not be said in this generality that margins in motor vehicle sales of 7-14.5% depending on the model (previously 7-18%), taking into account an additional possible bonus of a maximum of 2.5% if certain sales targets were achieved, put the area dealer at an undue disadvantage because - compared to the previous conditions - they in any case led to a disproportionately high profit for the importer.

It can be deduced from this decision that the worsening of the conditions there for the dealers per se was not considered sufficient for the assumption of an abuse of market power. Furthermore, it is clear from this that the conditions of a fixed remuneration of 8.5-11% of the sales price of a motor vehicle model referred to as "fixed margin" (there: "margin") to be assessed in the case of the occasion, with an additional remuneration referred to as "variable margin" (there: "bonus") of up to 6.5% in the event of 100% target achievement, contain a significantly higher proportion of a variable remuneration linked to the achievement of the specified sales target.

It follows that a high annual and monthly target means that, for the same absolute number of vehicles sold, the percentage of target achievement (and thus the percentage of the "variable margin" to which the company is entitled, which according to the findings accounts for a share of around 40% of total remuneration) falls compared with lower targets. Whether this remuneration is called a "margin" or a "bonus" is irrelevant from a legal point of

view - contrary to the attempts of the appellant to define it [...]"

"Here, the respondent acts indirectly (through its majority-owned subsidiary) on the retail market as a competitor of the independent dealers and thus also of the applicant. This subsidiary can calculate the sales prices on the end customer market lower (which it actually does) due to the guaranteed loss coverage associated with the profit and loss transfer agreement, which does not make its profitability critical for survival, and thereby draw customers away from the authorized dealers. That this would only be the case in comparison to the (in this respect possibly inefficient) applicant can in no way be inferred from the statements of the first court. Moreover, the question of the result of an efficient competitor does not arise here, if only because the pricing of the subsidiary itself also leads to losses (covered by the appellant). Insofar as the appellant describes the evidence leading to the findings of the court of first instance as incorrect, it is to be referred to the settlement of the evidentiary objection and therefore does not proceed from the findings in this respect. The fact that the subsidiary is (also) writing losses because of the retail prices offered is also consistent with the findings.

On this basis, the trial court correctly concluded that the Appellant is abusive in this grievance because it is impossible for the Appellant to discontinue the low retail prices of the subsidiary (which even lead to losses at the subsidiary, which are ultimately borne by the Appellant). The fact that the subsidiary's losses are also partly due to other causes cited by the appellant does not change this assessment. There are no indications of the existence of the aforementioned reasons for justification."

"[...] It is thus a case of abuse of a dominant position ("other abuse of conditions" within the meaning of § 5 (1) item 1 KartG) if the respondent, under the guise of the training lump sum, not only passes on actual training costs, but also costs for mystery shopping, mystery leads and standard audits in the amount of EUR 2,000 (out of a total of EUR 5,000) to the applicant without compensation. This finding is confirmed by the fact that the appellant originally bore these costs itself and the attempt to pass them on to the authorized dealers resulted in massive protests from the dealers, which is why the appellant ultimately "included" these costs in the training flat rate. Also, the alleged legitimate interest of the appellant in warranty inspections ("control of training results") in no way entails the permissibility of passing on the costs of such inspection measures to the inspected parties.

The court of first instance found that each partner company is entitled to two workshop replacement cars (one per half-year) with an extraordinary special support of EUR 1,000 in addition to the other conditions. The fact that this regulation would have to be understood as "EUR 1,000 each", as the appellant now claims, and as a result of which a possible financial compensation would occur in the first place, also does not result from the Exhibit ./6 submitted in this regard. However, even if the appellant were to actually "live" in this way, this would not change the correctness of the assessment of the court of first instance, because the special support can in any case only benefit the dealer if he acquires such vehicles in the first place, whereas the training lump sum must be paid annually and per business. Compensation therefore requires that the applicant finances the purchase of a new

workshop vehicle from the appellant six times per year in order to be able to benefit from the special support. Even if workshop replacement vehicles have to be kept on hand, this does not mean that every workshop would have to purchase two new vehicles per year for this purpose. The court of first instance was therefore right to focus on the incentive to purchase associated with this special support for the repair shop operators and the accompanying steering effect (which is not altered by the finding that the retention period for repair shop replacement vehicles is three months), because the special support can only be obtained if the corresponding number of vehicle purchases is financed beforehand. Thus, contrary to the allegations of the appeal, the court of first instance did not base its assessment of abusiveness solely on the fact that a dealer's incentive to resell the vehicle existed. It therefore also did not deviate from its own findings. This special support is therefore not capable of outweighing the abusiveness of the identified cost pass-through.

The argument of the appellant that an overall consideration leads to the admissibility of the cost transfer is also not convincing: Mystery shopping, mystery leads and standard criteria audits are all in the obvious sole interest of the appellant. Only due to its dominant position in the market is it possible for it to pass on these costs to the applicant. In this respect, it is precisely the overall weighing of interests that leads to the affirmation of an abuse of the dominant position by the appellant […]"

3. RELEVANT LEGISLATION

Section 4 and 5 Austrian Cartel Act

4. RELEVANT LITERATURE

See: Update - Vertragliche Vorgaben eines KFZ-Importeurs auf dem Prüfstand (2020)

5. OTHER COMMENTS

The so-called 'Peugeot-judgement of the Austrian Supreme Court (Antitrust) is a true landmark decision, as it outlines in detail the concept of relative market power and provides numerous examples and assessments of specific distribution provisions.

Further, the Cartel Court ordered Peugeot Austria to stop the abusive conduct in the entire new car sales and after sales business. In its appeal, Peugeot Austria argued that the order should have been limited to the specific dealer. This was rejected by the Austrian Supreme Court: It could be assumed that the cooperation between Peugeot Austria and the other dealers was based on comparable contracts and that a similar relationship of

dependence also existed among these dealers. It was therefore not necessary to restrict the order only to the applicant (Büchl). The Austrian Supreme Court thus clears the way for other Peugeot Austria dealers to directly invoke this decision against Peugeot Austria, provided they are also affected by the abusive conduct. Peugeot Austria must therefore not only make changes regarding Büchl, but must comprehensively adapt its systems for the new car sales and after sales business

6. PRACTICAL SIGNIFICANCE

This decision concludes a series of important landmark decisions outlining the concept of relative market power. Its many examples of unlawful abuse of market power provide helpful guidelines for designing distribution systems. This significance is evidenced by the new Section 4a Austrian Cartel Act, which is solely dedicated to relative market power.