

CASE CARD | 18 January 2023

Porsche-Tuning II (KZR 35/20)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

Porsche and its German distributor distributed their vehicles within a selective distribution system through authorized dealers and according to the provisions of a so-called 'Porsche dealer and service agreement' ('dealer agreement'). This agreement prohibited the authorized dealers to sell new Porsche vehicles, Porsche spare parts and Porsche accessories to so-called (unauthorized) "resellers". According to the definition in the dealer agreement, "resellers" expressly included tuning companies, i.e. companies that acquire motor vehicles in order to commercially convert or tune them and then resell the tuned vehicles. Similarly, the dealer agreement also prohibited the sale of new vehicles for presentation purposes in relation to tuning equipment. Moreover, Porsche provided the authorized dealers within the distribution system with a declaration of commitment to be signed by the end customers, which contained the obligation of the end customers to not use Porsche spare parts for tuning purposes or in relation to tuning products.

In this context, the Association considered this conduct of Porsche and its German distributor to be a restraint of competition. The Association took legal action against Porsche and its German distributor by applying for injunctive relief, initially before the Regional Court of Stuttgart. While the Regional Court ruled in favour of the Defendants, both the Stuttgart Higher Regional Court as the FCJ ruled in favour of the Association and essentially held that the conduct of Porsche and its German distributor infringed German and EU antitrust law.

B. Legal analysis

The FCJ held that:

- The prohibition to supply to tuning companies is a (twofold) restriction of competition according to Section 1 of the German Act against Restraints of Competition ('ARC').

The prohibition to supply to tuning companies constitutes in the view of the FCJ an object restriction of competition within the meaning of Section 1 ARC. This not only in respect of the competition between the tuning companies and Porsche, but also in respect of the competition between the authorized dealers among themselves.

Competition between the authorized dealers among themselves was restricted as the agreement generally prohibited them to sell new cars to tuning companies. The dealers were thus hindered from entering into competition with regard to such sales to tuning companies.

The clauses at issue, particularly those prohibiting the sale of new vehicles for presentation purposes in relation to tuning equipment, restricted competition between Porsche and independent tuning companies, as Porsche itself also offered tuning services. By prohibiting the sale of new cars to tuning companies, such companies were forced to resort to old models in order to present their tuning products. Therefore, they were unable to properly present to customers their range of tuning services of the newest model series.

- The agreement did not constitute an exception according to the principles applicable to qualitative selective distribution.

While sales to unauthorized 'resellers' can be prohibited within the framework of a (permitted) selective distribution system, the term 'reseller' needs to be determined objectively in the context of a particular distribution agreement. A selective distribution system cannot arbitrarily exclude sales by its members to groups of "undesirable" buyers by arbitrarily declaring them 'resellers' (instead of 'end users'). The term 'reseller' only applies to retailers reselling the vehicle in an as-new condition without substantial modifications, which, according to the FCJ, is not the case for tuning companies. Independent tuning companies therefore do not fall under the term 'resellers'.

- No exemption according to Section 2 ARC in conjunction with Regulation 330/2010 (VBER) and according to Regulation 461/2010 (MVBBER)

The FCJ reminded that the burden of proof regarding the fulfilment of the conditions of an exemption under the Vertical Block Exemption Regulation (Regulation 330/2010, 'VBER') and the Motor Vehicle Block Exemption Regulation (Regulation 461/2010, 'MVBBER') lies with the party that relies on it. Concretely, the defendants failed to demonstrate that the 30% market share threshold of Article 3 of the VBER was not exceeded, whereas a reference to statements on market delimitations in merger control decisions is not sufficient.

- The same considerations essentially apply to the clauses concerning the general ban on the sale of Porsche spare parts and accessories to tuning companies, as well as to the clauses providing for the ban on the sale of new vehicles to be used for presentation purposes in relation to tuning equipment.

- Also, the “declaration of commitment” provided by Porsche to the authorized dealers to be signed by end customers containing the obligation of the end customers to not use Porsche spare parts for tuning purposes or in relation to tuning products, also infringed antitrust law.

2. QUOTES

"A supply ban imposed on authorized dealers concerning and limited to the sale to companies, which commercially convert, modify by inter-changing the components and enhance the performance of motor vehicles (tuning) as a customer group of those dealers is an intended restriction of competition." (free translation of b))

"In a selective distribution system, the term reseller, which is decisive for the scope of a permitted agreement, is to be determined objectively. Tuning companies as such are not resellers." (free translation of c))

3. RELEVANT LEGISLATION

- Section 33 (4) No. 1 lit. a) ARC
- Section 1 ARC
- Article 101 TFEU
- Section 2 ARC
- Regulation 1/2003
- Regulation 330/2010
- Regulation 461/2010

4. PRACTICAL SIGNIFICANCE

The judgment of the FCJ clearly demonstrates that details are crucial when it comes to structuring distribution agreements in compliance with (EU) competition law. Particularly sales bans should always be assessed carefully.

Furthermore, this ruling is a rare example of a case requiring interpretation of the VBER at national level. The FCJ's approach entails a significant limitation of the contractual obligations that brand owners may use to ensure that their products are only sold by members of their selective distribution.

While it is a typical practice of suppliers operating a selective distribution system, the judgment suggests that



suppliers and manufacturers may not be able to prevent customers of their authorized resellers from making significant modifications to their goods and then reselling them (still under the supplier's trade mark) outside the authorized network.