

[Provided: May 14, 2020 9:38 am]

REPUBLIC OF AUSTRIA
Higher Regional Court Vienna as a cartel court

27 Kt 5 / 18i-43

The Vienna Higher Regional Court, as a cartel court, has appointed Dr. Senate President of the Higher Regional Court Völkl-Torggler as chairwoman and the judge of the Higher Regional Court Mag. Schaller and the expert lay judge KR Mag. Ginner and the expert lay judge KR Dr. Taurer as additional judge in the antitrust case of the applicant **Büchl GmbH**, Hannesgrub Nord 20/1, 4911 Tumeltsham, represented by Dr. Peter Thyri, a lawyer in Vienna, against the defendant **Peugeot Austria Gesellschaft mbH**, United Enzersdorfer- 59, 1220 Vienna, represented by Hausmaninger climbing Rechtsanwälte GmbH in Vienna, due to shutdown (§ 26 Cartel Act) to public and non-public hearing to

B e s c h l u s s

summarized:

I . 1 . The respondent is applied to turn off the abuse its dominant position, and while

A / in new car sales through

b) and e) the unilateral restriction of the applicant's freedom to set prices due to the economic constraint to participate in the actions specified by the respondent ;

c) the coupling of premium payments with the existing and actually practiced system of

Customer satisfaction surveys ;

d) margin reductions due to deliberately excessive sales targets;

Automatically generated translation via Google Translate

f) the practice of improperly low selling prices on the retail market by the respondent's majority owned property, in particular if their losses are covered by the respondent, while at the same time the respondent charges prices to the applicant and grants discount terms that it Make it impossible for the applicant to discontinue these low retail prices .

B / in the repairing operation by

g) the obligation to carry out guarantee and warranty work with conditions set by the respondent, in particular a control system that is also complex for the applicant and which make this work economically unprofitable for the applicant ,

h) the processing of guarantee and warranty orders with hourly rates that do not cover the costs, as well as refunds for spare parts that do not cover the costs ;

C / in new car sales and in the workshop area by

j) Passing on the costs of mystery shopping, mystery leads and standard criteria audits to the applicant, in particular by including these costs in the training fee .

I . 2 . The additional request for the content that the respondent would be ordered to stop the abuse of its dominant position, namely

a) in new vehicle sales by demanding inappropriate corporate identity investments at the expense of the applicant;

i) in the workshop operation by the practice of disproportionately high prices for test and diagnostic devices , which are necessary for the execution of guarantee and warranty orders, and the prescription of an annual fee for access to technical documentation ;

g) the disadvantage of the applicant through the exercise of economic pressures, as few warranty cases to edit;

f) general: the demand for purchase or sale prices or for other terms and conditions that differ from those that would arise with high probability if effective competition; such as

j) in the sale of new vehicles and in the workshop area, the collection of a disproportionately high training fee is **rejected** .

II. The first contingent request of the content, which is described in I.2. the above-mentioned repugnant part of the decision may be identified as an already ended infringement; such as

the second contingent request of the content, which is described in I.2. The above-mentioned repugnant part of the decision should be prohibited under Section 6 Local Supply Act, will be **rejected** .

B e g r u n d u n g :

1. Parties to the procedure:

The applicant is a GmbH registered with FN 116007z (LG Ried im Innkreis), which specializes in the sale of new and used vehicles of the Peugeot, Citroen and Opel brands and the provision of workshop services. It operates locations in Scharding, Ried and Mattighofen.

The respondent is a GmbH registered with FN 110977b (HG Vienna) and the Austrian general importer for new vehicles and original spare parts of the Peugeot brand. Within the Peugeot sales organization, she is solely responsible for signing new car and workshop contracts in Austria .

2. Contractual relationships:

Both a new car contract and a workshop contract (unlimited partner contract - workshop) were concluded between the applicant and the respondent, according to which the applicant was granted the non-exclusive right to have brand-new Peugeot passenger vehicles and light commercial vehicles up to 3 in accordance with these contracts. 5t as well as the associated equipment and accessories as well as service and repair services for these Peugeot products. As part of the unlimited partner contract - workshop, the applicant undertook to ensure customer service for Peugeot vehicles .

3. Remuneration system:

The remuneration system for new cars is specified by the AG via the so-called "commercial policy" (new for each year). In addition to a fixed margin, which ranges from 8.5% to 11.0% per model according to the sales price lists, the remuneration system also provides for an additional variable margin of up to 6.5% with 100% target achievement, which in turn amounts to 4.5% to a performance bonus and 2.0% to a quality bonus of 2% .

Variable margin:

The entry criterion for both components of the variable margin is the achievement of a recommendation level, the so-called "NET EQC", of at least 80%. If this threshold is not reached, the variable margin is not paid regardless of whether the criteria for the performance bonus or the quality bonus have been met. The level of recommendation is again determined by the AG by surveying customers in the respective month. A point scale from 1 to 10 is requested, with 10 being the highest grade. However , only the award of at least 9 points is rated as a recommendation, while the award of 1 to 8 points is not rated as a recommendation .

If the entry criteria are met positively, the performance and quality bonus are calculated .

A. Performance bonus:

Automatically generated translation via Google Translate

In any case, at least 70% of the monthly sales target must be achieved as an entry criterion for entitlement to a performance bonus. This entry criterion enables a quarterly roll-up of the sales results, ie an overall view of the sales results on a quarterly basis, provided that the monthly sales targets were achieved in total in the quarter .

The amount of the performance bonus depends on the target achievement of the monthly sales targets of the respective dealer in the car and truck sector (= monthly targets). If the sales targets for cars are not at least reached to the extent of 80%, no performance bonus is granted. If the sales targets are exceeded by more than 120%, the performance bonus is capped at 5% .

The performance bonus is graded as follows :

Target achievement	in %	Car performance bonus	Truck performance bonus
> = 80%		2.50%	0.00%
> = 90%		3.50%	0.00%
> = 100%		4.50%	3.00%
> = 110%		4.75%	3.00%
> = 120%		5.00%	3.50%

The sales targets are calculated as follows :

a) Annual target:

The first step in calculating these monthly targets is to set an annual target, which is based on the one hand on the historical criterion ("Quote QR") and on the other hand on the potential criterion ("Quote QM"). The historical criterion is based on the dealer's sales reports in the past 12 months. To calculate the potential criterion, the market in the area that is within a 30-minute travel radius of the retailer's location (whereby the retailer is also informed of the specific postcode numbers concerned) is considered within one year. In particular, short registrations of up to 90 days, regulatory approvals, rental car and diploma transactions are deducted, and an adjusted market in the areas of the respective assigned postcodes is used for the calculation. The quota for the annual target is then calculated using the formula $(2 * QR + QM) / 3$, with which the historical criterion is weighted twice as strongly. This follows from point 3.2. the commercial Policy (Supplement ./D).

Automatically generated translation via Google Translate

If a partner does not agree with the annual target, he has the option of being checked by an independent expert according to the new car dealer contract (Article III of the dealer contract [Appendix ./A]).

b) Monthly goal:

The monthly target is then calculated in a second step on the basis of the annual target just described - for cars and trucks - and the respective monthly market estimate and communicated to dealers by the 3rd working day of the month. Should the market fall in the monthly market estimate by more than 2%, the monthly target will subsequently be adjusted downwards. If the market is growing, there will be no adjustment (point 3.2.1 of the commercial policy).

c) Rollup - Overall view of the monthly sales target and the annual sales target
Quarterly roll-up:

As already mentioned above, there is the possibility of quarterly roll-ups in the car and truck sector. If the retailer reaches 100% of its monthly targets in the quarter, the performance bonus is rolled up to 100% and paid back (point 4.2.3 of the Commercial Policy).

Annual rollup:

If the dealer achieves his annual target in the year, he also receives the full performance bonus, as shown in the target letter. For the annual roll-up, only the achievement of the annual target is necessary and there are no entry criteria (such as the achievement of a certain level of recommendation).

B. Quality bonus:

Quality premium amount :

The amount of the variable quality bonus is a maximum of 2% and is made up of a recommendation for recommendation (Net EQC) (0.6%) and a bonus for the mystery shopping result (1.4%) .

Quality bonus thresholds :

The bonus of the recommendation implies the achievement of a recommendation level (NET EQC) of at least 89% based on the results of the customer surveys within the last 6 months (see point 4.4.3 of the commercial policy) and that of the mystery shopping the achievement of at least 820 out of 1,000 points for quarterly mystery shopping, which is carried out by a third-party company (point 4.4.3 of Commercial Policy).

If the target value for the bonus in the area of mystery shopping is not reached, every new car dealer has the opportunity to re-order a mystery shopping at their own expense in order to achieve the required target value.

Automatically generated translation via Google Translate

Summary of the remuneration system: This system is represented graphically as follows :

This is not a matter of dispute.

The applicant requested that the abuse of the defendant's dominant position be stopped
A / in new car sales through

a) the demand for inappropriate corporate identity investments at the expense of
the applicant;

b) the disproportionate transfer of the economic burdens of actions ;

c) withdrawal of premium payments based on non-representative, arbitrary and unilaterally
rated customer satisfaction surveys ;

d) arbitrary, hidden margin reductions due to deliberately excessive sales targets ;

e) the unilateral restriction of the applicant's freedom to set prices;

f) the practice of improperly low selling prices in the retail market by the respondent's
property, while at the same time providing the applicant with wholesale services at prices that made
it impossible for the applicant to compete with the respondent's retailers on the retail
market; generally the demand for purchase or sales prices or for other terms and conditions that
differ from those that would be highly likely to arise if competition were effective ;

B / in the repairing operation by

Automatically generated translation via Google Translate

) g of the burden of the operations of applicant with inappropriate guarantee tests and the disadvantage of the applicant by the Ausübung of economic pressure as possible few guarantee falls to edit;

h) the processing of guarantee and warranty orders with hourly rates that do not cover costs, as well as refunds for spare parts ;

i) the practice of disproportionately high prices for test and diagnostic equipment , which are necessary for the execution of guarantee and warranty orders, and the prescription of an annual fee for access to technical documentation; such as

C / in new car sales and in the workshop area by

j) the collection of a disproportionately high training fee.

In the event of the main request being rejected, the applicant applied in her first contingent request to determine that the infringement had already ended .

In the second contingent petition, she applied for the behavior in accordance with the request for a) to j)
To prohibit § 6 NVG .

The applicant argued that the incriminated behaviors were not limited to the applicant, but rather affected the entire Peugeot dealer network in Austria. The defendant's measures and requirements as an overpowering contractual partner are increasingly increasing one-sided, exploitative and restricting the economic freedom of traders. This increases the economic pressure on dealers from year to year and questions the continued existence of numerous medium-sized dealerships. The costs of the current and future massive economic changes on the automotive markets would to a large extent be passed on to the dealer network, which is entirely dependent on the manufacturer.

The defendant has a dominant position vis-à-vis the applicant both within the meaning of § 4 para

1 KartG as well as § 4 Abs. 3 KartG, as has been said several times by the Supreme Court for sole importers of motor vehicles of a certain brand. The defendant has an outstanding market position in relation to its customers, since the applicant is dependent on maintaining the business relationship with the defendant in order to avoid serious business disadvantages. The applicant had fully set up its business operations to sell the Peugeot, Citroen and Opel brands, which had belonged to the same group as the respondent since 2017. In the new car sector, around 69% of the sales generated by the applicant were attributable to the Peugeot brand, around 23% to the Citroen brand and 8% to the Opel brand .

Automatically generated translation via Google Translate

The behavior of the defendant described in the application constituted abusive or enforced conditions within the meaning of Section 5 (1) KartG, which the applicant partially did not agree to and at times only under the pressure of the importer's economic superiority. There is no objective justification for the one-sided burden on traders .

In new car sales , the applicant contests the following behavior of the respondent:

a) Demanding inappropriate corporate identity investments at the expense of the applicant:

In order to achieve a uniform brand appearance of the Peugeot brand in the dealer network, the defendant would unilaterally require the dealers to invest in corporate identity, which would represent a major economic burden. If the retailers did not implement the investments for a uniform brand appearance, they would face economic disadvantages in the form of loss of premiums, so that there would be an unfair distribution of the costs and benefits of corporate identity investments in favor of the respondent. The respondent was asked to move the "MOKA" tiled floor as part of the redesign of the sales rooms for Peugeot vehicles, although the applicant had only recently redesigned the sales room. In this way, the respondent had given no consideration to the economic depreciation period of these previous investments. Furthermore, the respondent took an economic advantage from this measure, since the prescribed tile material was required to be obtained from a manufacturer who had contractual relationships with the respondent.

Furthermore, the respondent requested the applicant at the Ried site to close the central customer entrance and to set up two separate entrances for the existing showroom, which was designed on the left as a Peugeot and on the right as a Citroen showroom. As a result, the central reception area in the interior of the showroom would have to be divided into two separate reception areas. In view of the size of the showroom, the necessary additional staffing and the resulting customer channels, this is neither sensible nor necessary from a business perspective .

b) Disproportionate tie-up of the economic burdens of actions :

Actions would be unilaterally specified and announced by the respondent, without the applicant having the opportunity to influence these actions. Rather, the applicant was economically forced to participate in the action measures if she did not want to lose all support for actions by the respondent. The defendant's discount policy does not take into account whether there is a realistic prospect that the applicant can amortize the costs of the action. In competition with other brands and other Peugeot dealers, the applicant inevitably falls behind without taking part in the campaigns, so that regardless of her independence as an independent dealer, she is forced to economically support and co-finance the defendant's discount policy. Participation in the campaigns is absolutely necessary to achieve the monthly sales targets specified by the defendant,

Automatically generated translation via Google Translate

so compliance with the defendant's one-sided action requirements is also sanctioned by the threatened loss of premium by the applicant if the sales targets are not achieved .

g) Withdrawal of premium payments due to non- representative, arbitrary and unilaterally rated customer satisfaction surveys :

The respondent would only pay the quality premium of 2% and the performance premium of 4.5% if the retailer's recommendation rate in customer satisfaction surveys was at least 80%. The respondent prescribes the surveys unilaterally after contact with the customers. Satisfaction is asked on a scale of 1-10, with 10 being the highest grade. The respondent rated only the award of 9 or 10 points, while the award of 1-8 points was of no relevance for the measurement of the variable performance and quality bonuses. The returns of the queries are regularly bad and therefore not representative of the total number of customers looked after. These often find it difficult to separate satisfaction with the dealer's performance in new car sales or customer service from satisfaction with the Peugeot brand vehicle itself. Satisfied customers often did not speak at all, so that completely unimaginative results were regularly reported back to the respondent. The recommendation rate of 80% is difficult to achieve. If three of three customers give 10 points and one only 8 points, the recommendation rate is only 66%. The survey only serves to unilaterally and practically arbitrarily reduce the variable margin of the dealers by the respondent .

h) Arbitrary, hidden margin reduction through deliberately excessive sales targets :

The defendant pursues a policy of hidden margin reductions by specifying unrealistic monthly sales targets. According to commercial policy, the premium-relevant monthly sales targets would be adjusted to the market environment in 2017 based on the annual quota (historical criterion and taking into account the changing market conditions during the year (potential criterion). The potential criterion was in no way objectively verifiable by the applicant. The defendant provoked premium reductions by specifying deliberately overambitious sales targets, and the premium matrix was clearly designed in favor of the defendant, and exceeding the prescribed sales targets had a significantly less impact on the amount of the premium than that falling short of sales targets.

i) Unilateral restriction of the applicant's freedom to set prices :

The defendant's price and, in particular, discount policy leaves the applicant little room for independent pricing and discounting. This affects the competitive freedom of action of the applicant as the counterparty's contractual partner and falls under the imposition of inadequate terms and conditions within the meaning of Article 102 (2) (a) TFEU. The applicant, as well as the other independent Peugeot dealers, was unable due to the non-transparent and also retarding remuneration system of the respondent, apart from the defendant's discount policy, to set an independent price for the end customer, which the economic risk as independent Companies correspond. It is impossible for Peugeot dealers to effectively calculate the earnings on the sale of a vehicle in advance and to choose an independent offer for customers. This results in the economic constraint not to make prices lower than those offered by the defendant .

Automatically generated translation via Google Translate

Practicing improperly low selling prices in the customer market by the opposing companies owned by the respondent (cost-price scissors):

The competitive freedom of action of the applicant and the other Peugeot dealers is countered by an aggressive pricing policy of the dealerships belonging to the respondent's economic unit (PSA Retail). The defendant practices abusive low sales prices through the dealerships it owns, while at the same time selling vehicles to the applicant and other dealerships at prices that would make it impossible for the latter to compete with the respondent's dealerships on the retail market to pass. This competitive price undercutting by the defendant's dealerships should be classified as price-cost scissors or margin squeeze. In three specific examples of Peugeot vehicles, the offer price of the respondent's dealership was below the purchase price that a Peugeot workshop had to pay with a sales partner contract. The offer price resulted from a "daily admission campaign", while peugeot dealers had been banned from the respondent since October 2018 . In addition, PSA Retail businesses would have direct access to the respondent's information about the availability of certain types of vehicles and equipment and their suitability for sale at a given time.

According to the profit and loss transfer agreement concluded between the defendant and the Peugeot Autohaus GmbH in December 2015, 81% of Peugeot Autohaus GmbH's balance sheet loss was to be paid by the defendant and 19% by Citroen Österreich GmbH. The respondent's business is profitable, while Peugeot Autohaus GmbH's annual accounts show losses. This should be seen as targeted cross-subsidization by the defendant for their own dealerships, which had the goal of also displacing efficient independent dealerships on average from the end customer market. This is an improper undercutting .

The defendant is abusing its dominant position not only in new car sales, but also in the workshop area :

Burden on the applicant's business with inadequate guarantee checks and disadvantage of the applicant due to the exertion of economic pressure to process as few guarantee cases as possible :

The applicant's perception of how the respondent proceeded in connection with guarantee tests, like that of the entire workshop network, was particularly stressful. The processing of guarantee cases, which is extremely important for the dealer for reasons of customer loyalty, is penalized by the defendant, since this calculates a so-called CVR value. This tells you how many warranty cases dealers dealt with. Dealers who would deal with many and complex warranty cases achieved particularly poor CVR values, were placed on the list of "coached partners" and thus pilloried. This leads to a regular guarantee tourism in the workshop network, since many companies are afraid of the negative effects of the guarantee tests and if possible send customers

Automatically generated translation via Google Translate

with guarantee work to other workshops. In a multi-stage process, workshops would be subjected to different levels of intensive coaching, with the aim of booking as few warranty cases as possible. Warranty audits and coaching by the respondent served more to monitor and discipline the dealers than to provide the importer with efficient assistance to the contracting parties.

h) Processing of guarantee and warranty orders with hourly rates that do not cover costs and refunds for spare parts :

The proportion of warranty and guarantee cases for the applicant has amounted to approximately 7-10% of the total number of workshop orders in recent years. On average, the proportion of warranty and guarantee cases, depending on the company, is around 5 to 20%. Guarantee work could hardly be carried out to cover costs within the scope of the defendant's refund system. Rather, the workshop operation bears the main economic burden of defects in the new vehicle and subsidizes the manufacturer's spare parts sales over long distances. In the 2016/2017 business year, the applicant would have had unsupported own costs (excluding risk and profit premiums) of around EUR 44,641 .

i) Require non-conforming prices for test and diagnostic devices , which are necessary for the execution of guarantee and warranty orders , and prescription of an annual fee for access to technical documentation:

The applicant had to pay the respondent an amount of EUR 6,500 annually for access to the respondent's technical documentation, which was essential for the implementation of warranty and guarantee work. Furthermore, the respondent would prescribe a number of test and diagnostic devices that would only have to be obtained directly from her at inflated prices .

j) Training system billing system that does not meet needs and causes (training fee) :

Since 2017, the respondent has requested a training fee for the training measures prescribed by her on a wide variety of topics, which does not correspond to the true costs of the training courses described and is levied regardless of the size of the company. In 2017 this flat rate was EUR 2,700, in 2018 it was EUR 5,000. In 2016, the applicant only paid around EUR 500 to EUR 700 in the course of the individual charges for the training. The training fee also included the costs for mystery shopping and standard audits, which the dealers had not ordered, however. The training fee would cover the annual costs for the training portal, for four mystery shoppings in the area of new vehicles, for two mystery shoppings in the area of customer service, for six mystery leads and for a standard audit per year. In fact, in connection with the mandatory training, the applicant would have to spend between EUR 1,500 and EUR 2,000 a year, which, in strong disproportion, differs from the training flat rate actually raised by the respondent of EUR 5,000. stand. The training fee is charged per workshop contract and regardless of the size of the contract partner and

Automatically generated translation via Google Translate

the number and level of qualifications of the employees. The applicant would be required to pay two training flat rates for the Ried site, two training flat rates for the Schärding site and one training flat rate for the Mattighofen site for the Peugeot and Citroen brands, for a total of around EUR 25,000. This amount is extremely unreasonable given the actual training needs. Due to the kick-back regulation granted to provide two workshop replacement cars with special support each year, it could not be weighed out and represented an abuse of market power .

Since the incriminated behavior of the respondent affects the entire Peugeot dealer network in Austria and thus the entire territory of a member state in different forms, the interstate relationship is given and Art. 102 TFEU is applicable.

In the event that individual behavior of the defendant should have ended at the time of the decision, the applicant has the right to determine that violations of antitrust law have already ended in accordance with Section 28 (1a) a KartG. It has a legitimate interest in this finding, since the respondent's behavior had a direct effect on the legal and, in particular, the economic situation of the applicant. This applies in particular to the remuneration system for new car sales. With a possible determination decision, the basis for individual claims for damages of the applicant should be created. The finding of the ended antitrust violations was justified in view of the public interest in solving legal questions in similar cases and in view of a possible risk of repetition .

The applicant may base her right to be dismissed on the provisions of § 1 NVG, since the defendant's conduct fulfilled the factually unjustified requirement of special conditions and special equipment between suppliers and resellers. Within the meaning of Section 1 (2) NVG, additional services would not regularly be countered by any corresponding consideration. The NVG idF KaWeRÄG 2017 was intended to counter the increasingly worsening imbalances in the supply chain and to strengthen small and medium-sized companies such as the applicant, which depended on a strong contractual partner. The respondent's behaviors are exemplary use cases of the problem covered by the NVG .

The Respondent applied for the rejection of all applications, denied the Applicant's authority to apply under the Cartel Act and the Local Supply Act, and the conclusiveness of the arguments, since the relevant market was not delimited and the allegations of improper use of the Respondent's measures were lacking. Furthermore, she contested that, when selling Peugeot new vehicles, she used a quantitatively and qualitatively selective distribution system from dealers who had to meet the selection criteria and whose number was limited due to a numerus clausus. Workshops, on the other hand, are subject to a purely qualitatively selective distribution system and only have to meet the selection criteria set out in the workshop

Automatically generated translation via Google Translate

contract. Workshops would have the opportunity to conclude a distribution partner contract with a dealer and thus participate in the distribution of new Peugeot vehicles .

The rights and obligations affecting the distributors are contained in detail in the dealer contract. In this contract, the traders had undertaken to comply with the standards set by the respondent and now partly criticized by the applicant. The club of Austrian Peugeot dealers (“dealer association”) had a significant influence on the drafting of the contract. He was the counterparty's counterbalance for every planned measure .

The defendant's bonus system is set out in the “Commercial Policy” every year and provides for variable bonuses for the sale of new vehicles, which consist of a performance and a quality bonus. In view of the increasing importance of the quality of the service provision, the respondent is assigning more and more weight to the quality standards within the scope of the variable premium. With every effort, every retailer is able to earn the full premiums. The respondent had to react intensively to the rapidly changing market conditions, especially through the growing online market, which could only be achieved through special quality and customer satisfaction. These played an essential role in the respondent's existing sales and customer service structure .

According to Statistics Austria's current new car registration statistics, the respondent received only a 3.2% share of new registrations from January to October 2018 . There can therefore be no question of a dominant position of the respondent. It also has no relative market power over the applicant. In addition to the fact that the latter also sells Citroen and Opel in addition to Peugeot, which are brands that are completely independent in sales, even though they are affiliated with Peugeot, the business relationship between the applicant and the respondent is based on a unilateral autonomous decision by the applicant. A dependency of the applicant on the respondent was in no way recognizable and thus there was no relative market power of the respondent.

Even if, contrary to expectations, the dominant position of the respondent should be affirmed, there is in any case no abuse. The behavior criticized by the applicant was used exclusively for the purpose of quality assurance, increasing customer satisfaction and brand loyalty as well as creating the best possible infrastructure for dealers and workshops. In any event, the defendant's conduct was objectively justified. In the absence of a cross-border dimension, intergovernmental action cannot be impaired and the intergovernmental link is therefore lacking. Art 102 TFEU is therefore not applicable.

The defendant objected to the individual complaints regarding the behavior of new cars as follows:

a) Corporate identity investments:

Automatically generated translation via Google Translate

The respondent has a legitimate interest in a uniform appearance and the positioning, maintenance and development of the Peugeot brand . Already in the dealer contract, the dealers are required to comply with specific corporate identity requirements that guarantee a uniform brand presence. In order not to burden the dealers excessively with the costs, the redefinition of the corporate identity requirements is based on an investment cycle of 7 years, which corresponds to the depreciation period of the investments made. In addition, the respondent grants support to the dealers for the implementation of the new corporate identity requirements, as was the case with the applicant. The respondent did not earn anything from the corporate identity requirements and the establishment of corporate identity conformity, while the retailers benefited directly from the investments in the appearance of the showroom in relation to the shopping experience offered to customers. Compliance with the requirements is sanctioned by the non-awarding of the quality bonuses, which is a necessary, expedient and appropriate measure. The requirement of approved suppliers for the execution of the work for the production of the corporate identity ensures the uniform implementation and is associated with a substantial volume discount for the dealers. Both the laying of the MOKA tiled floor and the separation of the entrance areas for Peugeot customers, on the one hand, and Citroen customers, on the other hand, are the result of the defendant's corporate identity policy and do not lead to inappropriate disadvantages. There was no abusive behavior .

b) Actions:

At the of the defendant proposed actions if it were completely normal market procedures that were used to promote sales activities of the participating dealers and the sales of new vehicles of the brand Peugeot boost should. The respondent made available to the dealers in advance monthly campaigns in a transparent manner. Participation in the individual offers and promotions is at the discretion of the retailers, who would give their written consent. There is no obligation to participate in the actions. The defendant bears the costs of national advertising for campaigns entirely and supports the dealers in the regional advertising measures they carry out. The cost sharing of the dealers in the action measures is therefore in any case proportional.

c) Customer satisfaction surveys:

Since the quality of the service provided by the applicant plays a central role in fulfilling the contracts concluded with the respondent and the applicant is obliged to achieve high customer satisfaction, the measurement of customer satisfaction in surveys is of crucial importance. It was therefore necessary to link the retailers' premium system provided for in commercial policy with the results of the customer satisfaction surveys. The quality premium was only intended for dealers

Automatically generated translation via Google Translate

who achieved excellent values in terms of customer satisfaction . With a customer satisfaction scale of 1 to 10, this is only the case from a rating of 9 points. Only customers who gave excellent ratings would actually recommend the dealer. The defendant's aim is to win new customers through recommendations and thereby increase their market share. The method she used to record customer satisfaction using a scale from 1 to 10 in connection with the question “ *Would you recommend this brand / company to a friend?* “Are based on recognized scientific methods and should be regarded as lawful. In order to protect the interests of the dealers, the respondent both had a minimum threshold in the form of the entry criterion for the new car quality bonus of 32 interviews per month and, if this value was not reached, a portion of the usable - Introduced 60% email addresses. After this entry criterion has been reached, the respondent only asks for the appropriate quota of at least 80% recommendation regarding customer satisfaction. In any case, this is feasible and is currently only being achieved by two dealers. The applicant achieved a recommendation rate of 100% in the period from January to November 2018. With a separate coaching program for customer service employees to achieve the recommendation rate and the hot alert process to identify unsatisfied customers and their subsequent satisfaction, the respondent has also developed tools to enable retailers to achieve a higher recommendation rate. Overall, the measures taken by the respondent would have led to a significant increase in the recommendation rate. They are therefore reasonable and proportionate and can in no way be considered as abuse .

d) Spread reduction:

The sales targets set by the respondent to the dealers were in no way unrealistic and did not lead to hidden margin reductions, as claimed by the applicant. With the monthly targets that have been set since 2017, it is possible to focus more on the actual sales potential of the individual retailer. The applicant had achieved its annual target of 101% in 2017. Even when looking at the individual months, the target achievement was never less than 80% in any month and was even 129% or 128% in individual months. Since the parameters used to calculate the monthly targets, namely the historical criterion and the potential criterion, are already reflected in the Commercial Policy 2018, there can be no question of a lack of transparency of the potential criterion. The specification of sales targets and the corresponding award for their compliance are common practice in connection with distribution agreements and pursue the legitimate interest in motivating dealers to perform special sales services .

By subsequently adjusting the monthly targets , the defendant can incorporate the current economic situation into the target calculation . This would protect traders from a declining market and set fair targets based on actual circumstances. Furthermore, the monthly consideration is cushioned by the “quarterly bonus” according to Commercial Policy 2018 and the retailer, who cumulatively achieved at least 100% of his monthly targets in the quarter, in the months of the quarter in which the target achievement was less than 100%, the performance bonus rolled up to 100% and repaid. The monthly sales targets should therefore in no way be classified as abusive .

Automatically generated translation via Google Translate

e) Unilateral restriction of the applicant's freedom to set prices :

For the respondent, the purchase prices at which the dealers bought the new Peugeot cars were the same for all dealers. The dealers are completely free in their pricing towards the end customers. Selling at the list price is unusual because different discounts are granted by the retailer during the sales talk. For the final sales price, the negotiating skills of the dealer are crucial. He is free to decide which of the respondent's rewards the dealer would like to pass on to the customer. Customer loyalty plays an important role, particularly in rural areas, since customers may place greater importance on the special personal support provided by the retailer they trust than on achieving the cheapest price. The defendant's auction prices are recommended retail prices for a certain period of time, which would normally also be undercut by the dealers. The decisive factor for the price paid by the end customer is competition among dealers, the market level of other brands with comparable vehicles, the negotiating skills of the dealer or his inventory. The defendant would therefore in no way restrict the traders' freedom to set prices .

f) Abusive low selling prices in the customer market by the respondent's dealerships (cost-price scissors):

Brand director of the Peugeot brand and managing director of the respondent, MMag. Rieger, was indeed entered from intercompany political reasons the company register as a managing director of PSA retail, but not part of their business operations. The applicant's allegation that the respondent practices abusive low sales prices through PSA Retail, while at the same time providing new cars in advance which make it impossible for the applicant to compete with PSA Retail on the retail market no authorization to. The respondent would treat all dealers equally and apply commercial policy to all dealers alike. The defendant was not active on the end customer market - with the exception of individual direct sales to certain customers listed in the dealer contract. Apart from the fact that the characteristics of a competitive price undercutting were not present, the applicant inadmissibly compared sales partners with new car dealers. However, a sales partner only acts as an intermediary for a new car dealer who, based on the respondent's uniform sales policy, has the same premium options as PSA Retail. PSA Retail is a dealer and not a sales partner and therefore does not sell cheaper than sales partners who buy new cars, since sales partners did not buy any new cars at all. The examples of price setting by PSA Retail cited by the applicant do not represent a competitive price undercutting, since other dealers would have offered the vehicles mentioned at the same or lower prices as PSA Retail. The latter also offered the criticized prices only for a limited time. Abusive combat prices were therefore not available.

Automatically generated translation via Google Translate

The fact that PSA Retail is writing losses is due to the expensive city locations in Vienna and Linz. For brand policy reasons, a presence of the brand in these locations is important, so that losses are seen as national marketing costs. Both the higher proportion of fleet customers in the cities, which lead to lower margins for PSA Retail, and the generally higher demand for Peugeot vehicles on land represent a location disadvantage for PSA Retail. In addition, the PSA Retail companies are flagship companies that are characterized by the digitization of the retail network and the intensification of customer relationships. There can therefore be no question of an intention to suppress it. There was also no abusive cross-subsidization. The profit and loss transfer agreement between the defendant and PSA Retail not only included losses, but - as in 2016 - also profits and was only based on the permissible tax optimization within the group for the purpose of group taxation .

PSA Retail has no access to the respondent's information about the availability and sale of certain vehicles that other dealers would not have. Rather, the other traders would be treated the same way with regard to this information .

With regard to the applicant's allegations in the workshop area , the respondent objected as follows:

g) Inappropriate guarantee tests and the exercise of economic pressure on the applicant's possible lichst few warranty cases to edit:

The review of the correct billing of warranty work carried out by workshops and paid for by the respondent is absolutely necessary in order to find negligent or willful false statements to the detriment of the respondent. The respondent had a legitimate interest in such guarantee audits, on the one hand to prevent possible misuse and on the other hand to offer the workshops assistance in the proper acceptance and implementation of guarantee work and thus to ensure the uniformity of customer care. The actual execution and frequency of the guarantee work would be included in the so-called CVR value, which represents a valuable indication of the frequency of the guarantee work carried out in the network of authorized workshops. The CVR value thus only shows the activities of the workshops in the guarantee area. These would be divided into delegated and coached contractors based on the CVR value. Coached workshops with a high guarantee volume are only likely not to be able to make goodwill decisions without consulting the respondent. The CVR value therefore represents an advantage for contract workshops with a particularly high guarantee volume, since their risk is reduced in the event of a guarantee audit.

h) Hourly rates for guarantee and warranty orders as well as refunds for spare parts :

Authorized workshops are obliged to carry out warranty work and are reimbursed for the costs they incur on the basis of appropriate guide values and guide times. Each tool get site for the

Automatically generated translation via Google Translate

work in connection with the warranty work of her billed the customer customer denstundensatz minus 12% from the defendant replaced. This deduction corresponds to a customary discount due to the large order volume of the respondent for the workshops in connection with warranty and guarantee work. For necessary spare parts, the purchase price plus a handling fee of 5% for administrative expenses will be replaced. There can be no question of abuse .

A guarantee tourism, according to which authorized workshops refused to carry out warranty work and further referred customers to other workshops, was not tolerated by the respondent .

i) Prices for test and diagnostic devices , annual fee for access to technical documentation :

The prices for access to the defendant's technical documentation and for the test and diagnostic devices required to carry out the warranty and guarantee work are, of course, reasonable and in line with the market.

For the point concerning the new car sales and the workshop area the

j) Training fee

The respondent argued that, given the enormous technological developments in the automotive market, she had a legitimate interest in efficient training measures for workshop employees. The training flat rate offers an incentive to take part in all training courses offered as part of the flat rate. This applies not only to the technicians, but also to the employees in the customer service area. Of course, the training courses would have to be carried out for the employees working at each workshop location, since every customer of a workshop is entitled to professional work. The fact that different car brands lead to different training courses is in the nature of things and cannot be held against the respondent. The services included in the flat rate can be seen clearly from the information provided by the respondent. There can be no question of a lack of transparency. The costs for mystery shopping and criteria audit included in the training fee are also reasonable and proportionate. Mystery shopping is not only in the interest of the respondent, but also in that of the applicant, since compliance with standards and selection criteria can be objectively checked. Compliance with this would have a positive impact on the respondent's premium benefits. The training fee of EUR 5,000 covers the amount of the offered training courses and the training portal with an amount of EUR 3,000, while mystery shoppings, mystery leads and standard criteria audits account for an amount of EUR 2,000. In terms of their number and quality, the price is appropriate and appropriate.

Automatically generated translation via Google Translate

The extent to which the defendant in the form of kick-back regulations granted by the defendant in connection with the training flat rate could constitute abuse of market power is not open to the defendant in any way.

There was no violation of the local supply law by the defendant. Apart from the applicant's lack of authorization to apply in accordance with Section 7 (2) NVG, the rules of the Local Supply Act aimed at completely different matters than the present one. Protective purpose of the standard is the maintenance of a performance-based competition between companies of different sizes. In particular, it serves to protect suppliers from high-demand resellers. In the present case, there is no power gap, since the respondent only has an insignificant position on the relevant market and the dealers in the dealer association are strongly organized. In addition, there would be objective justification for every behavior of the respondent.

Evidence:

Evidence was taken by interrogation of the witnesses Bernhard Kalcher (ON 18), Markus Figl (ON 23), Walter Mayer (ON 23) and Georg Messeritsch (ON 31) as well as the managing director of the applicant Josef Büchl (ON 17) and the managing director the respondent MMag. Silvia Rieger (ON 24, 31 and 40) as parties and by inspecting the documents attached .A to .T and .1 to .37 and .I.

Findings:

The applicant runs an old-established dealer and workshop operation, since she has been a Peugeot dealer in Schärding since 1992 and operates a Peugeot workshop. She has had a location in Ried since 2001 and in Mattighofen since 2006. The applicant has been trading Citroen vehicles in Schärding and Ried since 2011, and Opel vehicles in Schärding since 2016. The Mattighofen location only sells Peugeot vehicles. There is only one service contract for Opel vehicles in Schärding.

When it comes to new car sales, all three locations together account for around 60% Peugeot vehicles, 30% Citroen vehicles and 10% Opel vehicles. In workshop operations, about 50% are Peugeot vehicles, over 20% Opel vehicles and the rest Citroen vehicles. The applicant has between 45 and 50 employees on average. In the business year 2016/2017 (November 1, 2016 to October 31, 2017), the applicant's annual sales were over EUR 11.8 million, of which around EUR 5.6 million related to the sale of new cars and around the same to the sale of used cars EUR 2.7 million, workshop revenues around EUR 3.1 million and other proceeds such as the sale of tires, oils and lubricants, the rental of vehicles and the like, around EUR 0.5 million. The share of sales with the Peugeot brand amounts to approx. 68% in the area of new cars and approx. 60% in the area of workshop services. The workshop proceeds include proceeds in connection with the handling of warranty and guarantee cases

Automatically generated translation via Google Translate

in the amount of approx. EUR 0.2 million. As the applicant has been selling Peugeot vehicles for almost 30 years, she is identified by her customers with the name Peugeot. If the applicant were to lose the sale of Peugeot vehicles and had to switch to another car brand, she would lose 2/3 of her customers, as they are not ready to switch to another car brand. Since the applicant has also made significant investments in the Peugeot brand, for example in 2011/2012 EUR 2 million in the expansion of the workshop in the Ried plant, a loss of Peugeot as a contractual partner of the applicant in new vehicle sales and in the workshop area would be existential for the applicant - hend (PV Josef Büchl S 4 ff).

A / New car sales:

a) Corporate identity investments:

According to Art. 10 of the dealership contract for new vehicles (enclosure ./A), the dealers are obliged to adhere strictly to the standards defined by the respondent for the location and the interior and exterior of the business premises. The respondent is very interested in a uniform corporate identity for the sales network and in the positioning, maintenance and development of the Peugeot brand. This also includes the use of the brand-specific shade of blue in the sales area. In 2010 this was changed to a darker blue that deviated from the previous color, with the changeover accelerating until 2015 and from that point on for the retailers who were not yet participating. In 2016, the MOKA floor tile was defined as mandatory. In 2012, the applicant invested EUR 2 million in the Ried location in the equipment specified by the respondent. In 2017, the applicant's specifications included a separate entrance for the Peugeot premises and the laying of the MOKA tiled floor. Therefore, the applicant installed the MOKA tiled floor in autumn 2018 and created a separate entrance area for the Peugeot premises. The resulting total costs of around EUR 30,000 were ultimately borne by the defendant, since she sold the applicant a grant of around EUR 40,000 for conversions, floors, furniture, etc. in the form of a subsequent premium Cars agreed. Without the corresponding renovation work, the applicant would not have received this premium. Other Peugeot dealers also received these premiums, so that the respondent paid each dealer an average of EUR 50,000 as a premium for investments (PV MMag. Rieger ON 24 S 14; Josef Büchl ON 17 S 7 f).

b) and e) Unilateral restriction of the applicant's freedom to set prices due to economic constraint to participate in the actions specified by the respondent :

Since the claimant's management was taken over by MMag. Silvia Rieger in February 2018 launched the respondent 6 campaigns per year, each of which is valid for 2 months. Before 2018, the campaigns lasted only 1 month. Since hardly any vehicle is sold at the list price in the automotive industry, promotions are sales-promoting measures that are intended to draw the customer's attention to a specific model of the Peugeot vehicles. The respondent plans the actions

Automatically generated translation via Google Translate

for Austria. However, they are coordinated across Europe, particularly when it comes to product launches. At the beginning of the year, a marketing plan for the coming year will be presented to dealers at a dealer conference. It contains which vehicles will be part of campaigns and which target groups should be addressed. However, the marketing plan does not indicate which promotional support and how much is paid to dealers. The respondent discussed the planning of the actions with the marketing committee that has existed since 2018, which includes 6 Peugeot dealers and an agency partner. The Peugeot dealer association is no longer called upon by the defendant to determine actions, unlike before (PV Mag. Rieger ON 24 S 16 ff).

As part of the campaigns, there is an autumn, spring and trade fair bonus. 33% of this bonus must be borne by the dealer and 66% by the defendant. This means that a trader who does not take part in the campaigns lacks the 66% bonus contributed by the respondent.

Since July 2016, retailers have had to give their written consent to participate in campaigns (supplement ./11). Theoretically, a trader is therefore also free not to participate in certain or all of the defendant's actions. However, this is not economically viable for a dealer. Participation in the promotions is essential to achieve the monthly sales targets set by the respondent. Promotions increase sales of new vehicles, which leads to higher sales in the new car business and thus to higher premiums for dealers. If the dealer does not take part in the campaigns, it is very likely that he will not be able to achieve the monthly and annual targets. This is at the expense of his performance bonus. If the level falls below 80%, there is even a risk of losing the entire performance bonus. The premium loss is not economically viable for the dealer. Without participating in the campaigns, the applicant will most likely not be able to achieve a positive result when selling new cars (supplement ./HS 6). For this reason, the applicant is not able to set their own prices in the course of the campaigns. Nonetheless, the defendant calls the promotional prices "communicated target prices" without being so.

In 2018 and 2019, all Peugeot dealers in Austria took part in the campaigns initiated by the respondent (PV MMag. Rieger ON 24 S 17).

The promotions also pose a problem for the retailers in that they make an offer to a customer in one month based on an existing promotion. If the customer does not want to buy the vehicle until next month, the campaign may already have ended. Actions make it difficult for dealers to plan offers to customers. From the retailer's point of view, a runtime of 3 months would be better (PV Josef Büchl ON 17 S 9 ff).

The applicant is largely satisfied with the regional and national advertising measures of the respondent for Peugeot vehicles (PV Josef Büchl ON 17 S 11).

c) Customer satisfaction surveys:

Automatically generated translation via Google Translate

In Art IV of the dealer contract (enclosure ./A), the Peugeot dealer undertakes to provide high-quality services within the scope of fulfilling the dealer contract and to ensure the highest possible level of customer satisfaction. The respondent regularly assesses the quality of the services offered by the dealers and customer satisfaction on the basis of quality surveys. The respondent regards the quality premium in return for achieving excellent values in customer satisfaction .

To assess customer satisfaction, after purchasing a new car, customers are sent an email from an agency commissioned by the respondent with a link to a form containing three questions about overall satisfaction, recommendation, and courtesy of the team A scale of 1-10 is to be answered, whereby 10 represents the best level of recommendation. However, this link is only available for two weeks (PV Mag. Rieger ON 24 p. 8). The entry criteria for the new car quality bonus is the minimum number of 32 interviews per month when the total number of interviews within the last year is considered. If this minimum number is not reached, the entry criterion is also considered to have been reached if the proportion of usable email addresses in this period is 60% .

The defendant demands a quota of at least 80% recommendation for customer satisfaction itself. The quality premium therefore requires a rating of 9 or 10 points. Values below 1-8 are not taken into account. The only exception to this is the initiation of a “hot alert” process, in which the dealer has the opportunity to subsequently satisfy an unsatisfied customer (ratings 1 - 6) and with an additional 1.5% on the result “recommendation” “To be rewarded (enclosure ./DS 8). In order to achieve the quality premium, the applicant is therefore dependent on summoning its customers to give the best possible rating and urgently recommending this on the grounds that they would otherwise lose the quality premium. Most of the applicant's customers are insightful in this regard and actually give a correspondingly high rating because they do not want the applicant to lose the quality premium. In this way, the applicant managed to achieve a recommendation rate of 100% from January to November 2018. However, this is not easy for the applicant to accomplish, but involves a considerable amount of communication and a degree of shame on the customer that is perceived as shameful. The applicant takes on all of this, since the quality premium is very important to her in business (PV Josef Büchl ON 17 S 15). However, it also happens that customers want to persuade the dealer to perform additional services if they threaten a poor rating.

This situation is largely the same for all Peugeot dealers, since the recommendation rate increased significantly in 2018 compared to 2017 (Appendix ./5). In 2019 there was only one Peugeot dealer that had a referral rate of less than 80%. He retired as a Peugeot dealer on June 31, 2019. The method chosen by the respondent to couple the customer satisfaction surveys with the award of the quality bonus has nothing to do with a real survey of customer satisfaction, since it has to be seen as a pressure on the customer and not as a real question .

Automatically generated translation via Google Translate

In the case of workshop customers, the respondent requests at least 20 assessments per month. However, workshop customers are far less interested in an evaluation than new car customers. However, the approval rate among workshop customers has no influence on the quality bonus.

d) margin reduction due to excessive sales targets: at the outset of this decision already wiedergege-

The applicant's level calculation of the sales targets, to which the merchant is bound to receive the performance bonus, is shown here using an example for better understanding :

For November 2018, the respondent estimated the entire car market with 26,500 registered cars and the truck market with 3,600 registered trucks. This resulted in a market share for Peugeot of 3.66% for cars and 7.22% for trucks. The dealer target for November 2018 for all of Austria was 970 cars and 260 trucks. This number was multiplied by the individual dealer quota, so that the applicant had a sales target for November 2018 of 17 cars and 5 trucks, for a total of 22 vehicles. In order to receive a performance bonus in the following month, the applicant had to achieve 70% of the overall goal, ie sell 15 vehicles. The respondent informed the applicant of this in a letter of November 2018 (enclosure ./19). At the same time, the applicant revised the estimate for October 2018 to the extent that the estimate included a car market of 27,000 vehicles and a truck market of 3,500 vehicles, but actually 22,603 cars and 3,589 trucks were actually registered in October 2018. The market share that the respondent wanted to achieve in October 2018 was 4.1% for cars and 6.9% for trucks. The applicant's sales target of 20 cars for October 2018 was subsequently reduced to 16 cars, while the target for trucks remained the same (supplement ./19, PV MMag. Rieger ON 24 S 23 f).

If a dealer achieves the monthly target in some months and not in others, but ultimately reaches the annual target of 100%, the performance bonus will not be reduced.

The applicant's annual target for 2018 was 259 vehicles. The applicant made use of the right granted in Supplement ./A in the dealer contract to appeal to an arbitration tribunal and have the annual target set anew by an expert. She wasn't the only one. In 2017, 7 dealers called the arbitral tribunal, 11 each in 2018 and 2019. As a result of the arbitration, the applicant's 2018 annual target was reduced from 259 to 220 vehicles. In 2018, the applicant sold 178 vehicles, which is more than 40 cars less than the already reduced annual target of 220 vehicles. The applicant therefore achieved the reduced annual target only with 86%, whereby in most cases it was 80% per month and 100% in individual months reached. The benefit bonus was not reduced for the latter months (PV Josef Büchl ON 17 S 15 ff and MMag. Rieger ON 24 S 23 ff). If the goal is not reached in one month and already in the following month, this is taken into account in the quarterly roll-up. However, in one month the trader has to exceed the monthly target to catch up the other month .

The date of the vehicle's sale is not decisive for the performance bonus, but the date of delivery to the buyer. If a vehicle has a long delivery time after the conclusion of the purchase

Automatically generated translation via Google Translate

contract, this can have an impact on the achievement of the monthly target for the dealer. Around 65% of Peugeot vehicles purchased have a delivery time of less than one month. For individual vehicle types with high demand, delivery times of 2 to 4 months also occur. In such a case, a trader cannot calculate what premium he will get because he does not know how high the premium will be in 2 or 3 months. Individual Peugeot companies, including the applicant, have a relatively large vehicle warehouse and make sales from this warehouse without delivery times. However, such Peugeot dealers order warehouse vehicles at their own discretion and at their own risk.

It is extremely important for a retailer to reach the performance bonus threshold in one month, otherwise he will not receive any premium in the next month. He sells a vehicle in the hope of receiving the premium and uses it to calculate. For example, it can make sense for him to sell a vehicle at the end of the month at relatively favorable terms in order to achieve the monthly target. However, since the defendant can subsequently reduce the monthly target, the question of whether it makes sense to sell such a vehicle cheaply before the end of the month is very difficult for dealers to assess. This makes the calculation extremely difficult for them (PV Josef Büchl ON 17 S 17).

For the applicant, the annual target for 2019 was set in such a way that the actual sale for 2018 was increased by 25%. This also poses a problem for the applicant in that certain geographic areas, which are included in the annual target calculation, cannot be reached. These are regional peculiarities. For example, the city of Braunau cannot be reached by the applicant from either the Ried or Mattighofen location, since customers from Mattighofen do not shop in Braunau and vice versa. In addition, there are 5 Peugeot workshops in Braunau, which broker Peugeot sales contracts for the Linz-based PSA Retail Austria GmbH, which is linked to the respondent (see point f below). Nevertheless, the Braunau area is included in the catchment area of the applicant and is included in the calculation of the annual target for the applicant. There is also a similar problem in the outskirts of Vöcklabruck. The managing director of the applicant Josef Büchl informed the respondent of these problems, but was not heard (PV Josef Büchl ON 17 S 6).

The defendant generally tends to overambitiously and overestimated the car market, which results in too high annual and monthly targets for dealers. Even if the monthly targets are subsequently reduced in part as part of the quarterly roll-up, there is a massive pressure situation for the dealers - already in view of the associated difficult planning of reaching the monthly targets.

In a circular from June 2019, the Peugeot dealers were given the mandatory CO₂ targets regarding the structure of the planned commercial policy 2020 and the priorities set,

Automatically generated translation via Google Translate

in particular in connection with the CAFE regulation of the EU (VO 2019/631) have been informed (enclosure ./T). The content of commercial policy in 2020 cannot be determined due to the lack of a corresponding template .

f) Sales prices of PSA Retail dealerships:

PSA Retail Austria GmbH (until October 2018: Peugeot Autohaus GmbH) (FN 91431 h), based in Vienna and with its business address at Triesterstraße 50a, 1100 Vienna, is part of the PSA Group's own retail organization. The latter is a listed company in France and manufacturer of the brands Peugeot, Citroen, DS Automobiles and Opel. PSA Retail Europe is the second largest automotive retail group with 374 branches in 10 countries. PSA Retail Austria GmbH has branches in Linz Leonding (Peugeot Autohaus GmbH) and Vienna Perfektastrasse (Peugeot Autohaus GmbH Vienna South) and operates locations in Vienna Triesterstrasse, Vienna Wagramerstrasse, Vienna Simmering, Linz Industriezeile and Steyr (open commercial register ; www.psa-retail.com). Managing Directors of PSA Retail Austria GmbH are Mag. Sebastian Haböck, MMag. Silvia Rieger and Anne Abboud. The respondents are 81% shareholders and Citroen Österreich GmbH 19% (open commercial register).

A profit and loss transfer agreement was concluded between Peugeot Autohaus GmbH on the one hand and the respondent and Citroen Österreich GmbH on the other hand, according to which the defendant's annual loss of 81% and Citroen Österreich GmbH of 19% by the respondent is to be covered. Such a profit and loss transfer agreement had existed between the respondent and her own dealership since December 17, 1992. It was replaced by the profit and loss transfer agreement dated December 16, 2015. In 2013 the annual loss of Peugeot Autohaus GmbH was around EUR 777,000, 2015 just under EUR 2.2 million, 2017 just under EUR 630,000 and 2018 EUR 2.6 million. The annual profit of Peugeot Autohaus GmbH in 2016 was around EUR 1.1 million was due to the comparison purchase of property in Vienna Perfektastraße zurückzuführen (side dishes ./P and ./Q; PV MMag Rieger oN 40 S 8f).

The managing director of the respondent MMag. Rieger is also the managing director of PSA Retail Austria GmbH, but is not responsible for the operational management of PSA Retail Austria GmbH. This is with Mag. Haböck.

The defendant is only occasionally active in the end customer market, since it makes individual direct sales to certain customers such as Swiss Post, Hertz and AVIS. The respondent handles 95% of its business through dealers. It concluded the same new car and workshop contracts with PSA Retail Austria GmbH as with the independent Peugeot dealers. Peugeot dealers and PSA Retail Austria GmbH are supplied by the respondent on the same terms, the commercial policy

Automatically generated translation via Google Translate

applies to everyone in the same way (PV MMag. Rieger ON 40 S 3 f). The defendant sells about 23% of the Peugeot vehicles through PSA Retail Austria GmbH with all locations and the affiliated sales partners. PSA Retail Austria GmbH companies do not have access to the respondent's information that other retailers do not have. Every year PSA Retail Austria GmbH sells around 2,600 new Peugeot vehicles with all locations and all sales partners. At certain locations, PSA Retail Austria GmbH is also a dealer for Citroen, DS, Hyundai and Suzuki. PSA Retail Austria GmbH's sales figures have increased in some cases in recent years, in which it posted losses, and in some cases not. The sales figures for Peugeot vehicles are increasing slightly (PV MMag. Silvia Rieger ON 40 S 4). In 2018, PSA Retail Austria GmbH did not reach 100% of the sales targets. How this was for the years 2015 to 2017 cannot be determined (PV MMag. Rieger ON 40 S 13 f).

The losses of PSA Retail Austria GmbH are partly due to the fact that the rental costs for the locations as well as the wage costs in cities such as Vienna or Linz are higher than in the country. In addition, the market share for Peugeot vehicles on land is better than in the city. The market share of PSA Retail Austria GmbH in Vienna was 1.5% in the first half of the year and 2.3% in the first quarter. The applicant's average market share is 3.8%. Individual rural dealers have a market share of up to 8% (PV MMag. Rieger ON 40 S 7 f).

On the other hand, PSA Retail Austria GmbH's losses are due to the fact that the profit and loss transfer agreement enables it to charge low retail prices on the retail market. For them, profitability is not essential because their losses are covered by the defendant as the majority owner. Although the defendant treats PSA Retail Austria GmbH formally in the same way as independent dealers, it can sell without margin and even accept a loss due to the guaranteed loss coverage. At the same time, the defendant charges prices to the independent dealers and grants them discount conditions which, apart from individual cases, make it impossible for the applicant to maintain or undercut the retail prices offered by PSA-Retail Austria GmbH. Customers are increasingly used to online price comparisons and are less and less dependent on local retailers in their area.

Since the beginning of 2019, the respondent has no longer permitted daily registrations; in the last quarter of 2018, there was still a transition period in this regard. This means that there are no longer any bonuses for daily registrations, but only for demonstration vehicles. For the latter, the minimum period for admission is 2 months. The respondent does not check whether and how many kilometers this demonstration vehicle covers during the two months (PV MMag. Rieger ON 40 S 6).

Automatically generated translation via Google Translate

It cannot be determined whether PSA Retail Austria adheres to this ban on daytime registrations .

PSA Retail Austria GmbH did not participate in the warehouse sale for Peugeot vehicles 2008 from October 2019 (supplement ./R; PV MMag. Rieger ON 40 S 11).

B / workshop:

g) Warranty Checks:

When purchasing a new car, the defendant grants the customer a 2-year new car guarantee. In addition to the statutory warranty, the respondent assumes the costs for the repair or replacement of defective parts. The respondent does not differentiate between warranty and guarantee work. It assumes that the customer must sign a corresponding order for both warranty and guarantee work (ZV Georg Messeritsch ON 31 S 15; ZV Markus Figl ON 23 S 7). In Art III of the workshop contract (Appendix ./B), the contracted workshops undertake to provide all warranty services, work within the framework of product recalls and all other maintenance and repair work on vehicles of the Peugeot brand. This means that customers can have this work carried out in any of the manufacturer's authorized workshops. Approx. The applicant is responsible for 7-10% of the total number of workshop orders for warranty and guarantee work. On average, the proportion of warranty and guarantee cases, depending on the company, is around 5-20%. It is in the defendant's interest to check the correct billing of warranty work. After all, it happens occasionally that workshops illegally charge work as guarantee work .

The defendant developed a reimbursement system for the reimbursement of the costs of the guarantee work, which is based on standard values and standard times (see point h below). To do this, it uses the CVR (= cost vehicle repair) value: the standard repair costs for this warranty case are calculated from the material and labor costs for a particular warranty case for a certain Peugeot model with a certain engine. A comparison is thus made of the costs incurred by the individual workshops for this specific guarantee case. The workshop that has the lowest costs for the warranty claim is used as the "best performer", so that these costs represent the standard costs. There are reference repair standard costs of this kind for any guarantee work (ZV Georg Messeritsch ON 31 S 10). The average hourly rate used for Austria is calculated in such a way that the respondent has the various hourly rates of the different workshops leveled by an agency. This determination of the average hourly rate is not understandable for the traders. Theoretically, an incorrect best performer value is also possible if the best performer makes a mistake and omits a necessary spare part (PV MMag. Rieger ON 24 S 26).

Automatically generated translation via Google Translate

The Delta CVR value is the comparison of the costs for warranty work based on the CVR values of the individual workshops. Different costs for warranty work can result from the fact that the correct repair instructions were not chosen from the outset in a workshop or that unnecessary spare parts were used.

On the basis of the CVR value, the contract workshops are divided into "delegated" and "coached" contract partners. Delegated contractors do not have a high guarantee volume. You are empowered to carry out guarantee work yourself up to EUR 1,500 without prior clarification with the respondent. 75-85% of the Peugeot workshops are delegated contracting parties. Coached contracting parties, on the other hand, have to obtain a preliminary promise from the respondent for each guarantee application from EUR 350.00. With the advance confirmation, the workshops can be made aware if the warranty claim is incorrect. The workshops remain coached partners for 4 months. The decision as to who is the coached contract partner is based on the delta CVR value, the guarantee refusal rate, ie the number of guarantee applications not released due to an error, and the submission period for guarantee applications. The guarantee rejection rate should not exceed 5%, so no more than 5% of the guarantee applications submitted should be rejected. Furthermore, the guarantee applications should be submitted to the respondent within 5 days (ZV Georg Messeritsch ON 31 S 10 ff).

In Austria, an average of 15-25% of the 162 Peugeot workshops are coached every year. There are 3 levels for this coaching :

In Coaching 1, the coach drives to the workshop and randomly selects 50 warranty cases from the past 12 months. He analyzes the problems and the process in the workshop and discusses the discovered defects or anomalies with the managing director and the guarantee technician. He then draws up an action plan for improvements. This form of coaching has no financial disadvantages for the workshop. She then has 3 months to implement the improvements .

The respondent then follows a 9-month observation of the CVR value. If the CVR value is increased again, it is checked at coaching 2 whether the action plan from coaching 1 has been implemented. 50 guarantee applications are being viewed again and suggestions for improvement are being made. If there is a faulty application among the 50 checked guarantee applications, this will be debited back. The workshop must therefore refund the defendant's money received for the guarantee work. Such errors are, for example, the lack of the customer's signature on the order form, the lack of the technician's electronic signature, that he has read the repair instructions, or if a screw does not appear in the warranty claim. In this context, it is irrelevant for the respondent whether it was actually used or not, since it cannot check the use of the screw without a written record .

Automatically generated translation via Google Translate

If coaching 2 is not successful, the third stage is a so-called guarantee audit. 3 months are selected from a period of the last 12 months and all warranty claims for these 3 months are checked for errors.

The errors are divided into 3 levels :

The slightest mistakes in level 1 have no financial consequences. These include, for example, the lack of a measured value or the insufficient storage of the required documents.

Errors in level 2 lead to a return charge to the workshop, which means that the costs paid for this guarantee work by the defendant to the workshop must be paid back. Such an error is, for example, the lack of a customer signature on the order. If more than 3% of these errors have the same reason for complaint, the errors are extrapolated to the year (eg EUR 100.00 x 52:12). The defendant assumes that the workshop made this mistake all year round. If, for example, the customer's signature is missing for 10% of the orders in the observation period, the respondent assumes that the signature is missing for 10% of the guarantee orders for the whole year. The total charge back is capped at EUR 3,000. In 2018 there were 5 such guarantee audits (PV MMag.Rieger ON 24 S 27 ff; ZV Georg Messeritsch ON 31 S 12 ff).

Level 3 mistakes are the most serious mistakes. This includes, for example, backdating a repair date so that the repair still falls within the warranty period, or if both a customer and the respondent have paid for warranty work. There is no threshold of 3% for these errors, so each level 3 error is extrapolated. However, the extrapolation is only up to EUR 3,000 per case. If there is a Level 3 error in a repair that cost EUR 5,000, the charge back must not be higher than EUR 5,000 + the limit of extrapolation of EUR 3,000, thus a total of EUR 8,000. -.

This increases the risk for workshops if errors occur during a very expensive repair, since every single sum of incorrect warranty claims is extrapolated over the whole year (ZV Georg Messeritsch ON 31 S 14).

The risk of warranty audits forces workshops to work very precisely. Submitting a guarantee application requires a relatively high level of bureaucratic effort in order to fill in and print out the corresponding examination forms. Under certain circumstances, this effort considerably exceeds the duration of the actual repair of the defect on the vehicle. In addition, the defendant's guarantee guidelines are changed again and again and the workshops are not always informed of this in circulars (PV Josef Büchl ON 17 S 21 f; ZV Markus Figl ON 23 S 6). Another difficulty is that it sometimes takes a relatively long time for the respondent to report back to the workshop as to whether and which work can be carried out under guarantee. So it happens that a vehicle is in the workshop for several days and blocks the process until it is clear which work can

Automatically generated translation via Google Translate

actually be carried out (ZV Walter Mayer ON 23 S 22). During the guarantee tests, the inspectors know where there are weak spots in the workshops. You do not look for the 50 warranty cases to be checked at random, but select them specifically. Therefore, it practically never happens that no errors are found during a guarantee check. In this way, the dealers ultimately bear a considerable part of the costs of the guarantee tests by way of a chargeback, although these are in the overriding interest of the respondent. Workshops fear such guarantee tests that make employees nervous and a burden for them (PV Josef Büchl ON 17 S 22).

Carrying out guarantee work and documenting it in the course of submission in the manner prescribed by the defendant often represents a greater effort for workshops than carrying out a repair commissioned by a customer. Basically, therefore, workshops are not overly enthusiastic when many guarantee cases are brought up to them. It cannot be determined whether a “guarantee tourism” occurs at Peugeot workshops, that is, a customer with a guarantee case is sent to another workshop under excuses .

The respondent once submitted the list of coached partners to all contract workshops. After fierce criticism of this, the defendant, however, stopped the procedure. Now only the individual contract workshops are informed that they are coached partners .

In a letter dated February 26, 2019, the respondent "reminded" the contracted workshops of their contractual obligations and stated that Peugeot original spare parts may only be purchased from the authorized sales partner Groupe PSA. In fact, according to the workshop contract, such a purchase obligation only applies to spare parts, accessories and equipment that are incurred during warranty work, product recalls, and services provided for in the service contracts of the importer (Art VII, supplement ./B). When it became clear to the respondent that the workshops understood this letter in such a way that this reminder related not only to warranty work but to all repairs, and that this sense was not compatible with the workshop contract supplement ./B, she wrote Letter in which she clarified that the obligation to use original spare parts only related to warranty work (supplement ./N).

h) Hourly rates and refunds for spare parts in the course of processing guarantee and warranty orders:

The respondent reimburses the costs for carrying out the guarantee work to the workshops according to a reimbursement system set up by them. This is based on guide values and guide times.

More than 65% of the workshops do not distinguish which of their employees does the work at the hourly rate. Rather, they have a uniform hourly rate. The other workshops distinguish 3 levels for the hourly rates, namely "Maintenance",

Automatically generated translation via Google Translate

"Repair" and "technician". In order to determine the guideline value for the guarantee work, the respondent requests the workshops in a circular each December to announce their hourly rates for these three levels. The hourly rates vary from workshop to workshop. The defendant will weight the hourly rates announced to it in such a way that 70% of the costs incurred for warranty work are at level 1, 20% at level 2 and 10% at level 3, ie the most highly qualified technician. This regulation is the same across Europe. The respondent then deducts 12% from the hourly rate determined for the workshop. The remainder of the hourly rate will be refunded to each workshop for carrying out the guarantee work (PV MMag. Rieger ON 24 S 30 f; ZV Georg Messeritsch ON 31 S 16 f).

The respondent specifies standard times for repair work. These are determined in such a way that a mechanic carries out various work on a new vehicle model and the time required for this is determined using the stopwatch. These guidelines apply throughout Europe. In principle, it is possible for workshops to inform the respondent via the Internet portal that certain target times are too short and repairs cannot be carried out during this time. These communications are not sent to the respondent, but directly to Germany. It cannot be determined whether there have already been such complaints about target times for workshops in Austria .

The target times for carrying out the repair work are very tight, at least for some of the work, which puts the workshops under pressure.

In addition to the work remunerated by the defendant by way of the guideline times, it also requires the contracted workshops to perform a number of tasks when performing the guarantee work, but without remunerating it. The respondent insisted that replaced spare parts be cleaned, packaged and stored for 90 days. During this time, the respondent then arranges for the replacement parts to be removed. In addition, the workshop must report the warranty claim to the respondent in a relatively complex procedure. The respondent will not replace the associated administrative effort.

In the case of spare parts , the respondent pays the purchase price plus 5% handling costs or a maximum of EUR 65 per warranty application . Therefore, if spare parts are needed for a guarantee application for which the handling fee of 5% exceeds a total of EUR 65, no more than the cap amount of EUR 65 will be paid (ZV Georg Messeritsch ON 31 S 17). The handling fee of 5% applies to all Member States across Europe. Since 2019 it has been reduced to 4%, but is paid up to a maximum amount of EUR 130 (PV Mag. Rieger ON 24 S 32). A workshop has an average margin of around 32 to 33% for spare parts. However, as already stated, the respondent only receives the handling fee of 5% or now 4%. With the latter intended from the standpoint of the respondent administrative work with the spare parts, such as warehousing, 90 days retention period etc., gotten off are.

In an overall view of the 12% deduction from the hourly rate, the handling fee of only 5% or 4%, the short guide times and the administrative work involved in reporting warranty cases and packaging and storage of the replaced spare parts it can be assumed that the remuneration paid by

Automatically generated translation via Google Translate

the respondent for warranty work for the applicant as well as for other Peugeot workshops does not cover 100% of the costs. The extent to which costs are not paid cannot be precisely determined. The order of magnitude is between 5 and 10%.

i) Prices for test and diagnostic devices that are necessary for the execution of guarantee and warranty orders; Annual fee for access to technical documentation:

The respondent stipulates the use of one Peugeot diagnostic device per 4 productive employees for their authorized workshops. From 2020 this was changed to one diagnostic device per 3 productive employees. The diagnostic device is a robust laptop suitable for workshop operation and must be obtained from the respondent. It is supplied with diagnostic software, maintenance is included in the price. The cost of the device is to be paid in monthly installments for 3 years. The first monthly installment amounts to EUR 995, the following to EUR 175 each. The device therefore costs EUR 7,120 for 3 years and must be replaced after this period. Again, the same costs are incurred. However, it is possible to buy the old device for EUR 1 and continue to use it. However, it does not replace the equipment prescribed by the respondent for the productive employees .

The respondent supplies the workshops with technical documentation that contains the complete parts catalog, repair instructions, customer service management and technical documentation with vehicle specifications, which means everything that is necessary to process a repair order. From 2 productive employees, the annual fee is EUR 2,832. Up to 17 productive employees and more, it rises to an amount that cannot be determined exactly between EUR 7,500 and EUR 7,940. Austrian workshops have an average of 5.6 productive employees. There is only one workshop that has 16 productive employees.

If a workshop also repairs Citroen vehicles , there is the option of using the diagnostic device for both brands for an additional charge and obtaining both technical documentation for an additional fee .

Independent workshops have the option of using the defendant's technical documentation for a corresponding subscription price for a certain number of hours or days, or for a monthly fee. However, you will only receive the technical documentation and not the diagnostic programs .

It cannot be determined whether the hardware supplied by the respondent, ie the laptops, is available on the open market in this version and what it costs .

C / In new car sales and in the workshop area:

j) Training fee:

Both the workshop and the dealer contract state that the employees must take part in paid and / or free training courses (supplement ./B Art V.4; supplement ./A Art X.6). Until 2018, the

Automatically generated translation via Google Translate

respondent offered retailers and workshops individual training courses, each of which was charged individually. Part of this was mandatory training.

Before 2018, the applicant took part in compulsory training and, in addition, individual training for her employees if she considered it to be necessary. The respondent changed this system from 2018. She now demands a training fee of EUR 5,000 per year. Trained technicians must complete 4 days each year as mandatory training, customer advisors 2 days a year. In addition there are 2 to 3 product training courses in the area of new cars and warranty training in the workshop area. It is also possible to complete the technical training as part of the training fee, which extends over 2 years and lasts 19 or 27 days depending on the level of training (PV MMag. Rieger ON 24 S 35 f).

Since the training fee is charged for each company, the applicant receives annual training fees of EUR 15,000 for the three companies for the Peugeot brand. The training fee for the Citroen brand is the same as for Peugeot. The applicant therefore pays EUR 30,000 a year in training fees for Peugeot and Citroen for their three companies. In any case, there is a fundamental need for training for both sales and workshop personnel. The respondent introduced the training flat rate on the grounds that more training courses are used in this way, since they are covered by the training flat rate anyway than with individually paid training courses. This consideration applies in particular to companies with a higher staff turnover. For companies with a lot of regular staff, such as the applicant, this advantage is not so significant. The companies are given an annual training program from which they can see which training courses are on offer (supplement ./8). The training fee generally increased the frequency of training, since there was an increase of 40% in the mandatory training. The number of non-contractual training courses has quadrupled.

However, in the training fee of EUR 5.000, - not only - as the name suggests can include training courses. Rather, a partial amount of EUR 2,000 covers four mystery shoppings in the area of new cars, two mystery shoppings in the area of customer service, 6 mystery leads as well as a new car or customer service standard criteria audit per year.

With the mystery shopping, financed by the dealers, the respondent checks with a third party that the quality requirements contained in the dealer and workshop contract have been met. A mystery shopping in the new car area costs EUR 210, and in the customer service area EUR 300. The defendant originally bore the costs of the mystery shopping itself. A first attempt to pass these costs onto the dealers and workshops resulted in a massive protest by the Peugeot dealer association. Therefore, the respondent included the costs in the training fee .

Mystery leads are inquiries to dealers for test drives etc., whereby not a customer, but a third party company commissioned by the respondent inquires by email and pretends to be a

Automatically generated translation via Google Translate

customer. It checks whether there is a response from the dealer within the specified time. The respondent's agency creates approximately 2-4 such mystery leads per dealer per year. What costs are incurred for this cannot be determined. For traders, mystery leads are an additional burden because they have to answer the inquiries made by email within one hour. There is also the difficulty that there are sometimes language-related difficulties in communicating with callbacks, or that the callback is not accepted at all (PV Josef Büchl ON 17 S 28).

Under a standard criteria audit is the verification of compliance with the operational requirements dare sales in new and understood customer service. The process is carried out in such a way that the auditors in the companies control five standards they have selected. There are 9 operational standards in the new car area and 13 in the customer service area. There are also two cross-divisional standards. The duration of such a standard audit is about 2 hours, it costs about EUR 250 to EUR 300 (PV MMag. Rieger ON 24 S 36 f).

In connection with the training fee, the defendant grants a kick-back regulation, according to which 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 demonstration car conditions otherwise granted (Supplement ./6 and ./9). The retention period for workshop replacement vehicles and demonstration vehicles is 3 months, ie these vehicles may not be sold before this period expires .

Mystery Shopping, Mystery Leads and Standard Audit thus serve to control the respondent's compliance with whether the contractual requirements are met by the dealers and workshops. However, the costs for this are borne essentially by the dealers and workshops alone.

Evidence of evidence:

The ascertained facts are largely based on the consistent statements of the respective managing directors and the interrogated witnesses, as well as on the documents presented, unless the parties' arguments agree. If the statements of the parties and witnesses differ, the findings are based on the following considerations:

The duration of the actions was given by Josef Büchl as one month, while MMag. Rieger explained that the duration of the actions has been extended to two months since she took over the management. Since Josef Büchl also conceded that since MMag. Rieger has improved the situation between the dealers and the defendant in numerous points, the court considers it quite plausible that Josef Büchl, in his consent, described the situation before 2018. From the letter of the defendant in June 2016, the PEU geot dealer (Supplement ./4) shows that the actions before February 2018 each ran a month because there of

Automatically generated translation via Google Translate

"Monthly offers and promotions" is mentioned. MMag. Rieger, on the other hand, only provided information during the entire process at the time when she had already taken over the management, i.e. from February 2018. She stated that campaign prices were "communicated" by the respondent and that each dealer was free to choose whether to contact the Actions takes part (PV MMag. Rieger ON 40 S 2f). However, this statement could not be accepted in view of the remaining evidence in brackets .

The problems of dealers with customer satisfaction surveys were vividly described by both the managing director of the applicant Josef Büchl and the witness Bernhard Kalcher (ON 18 S 10 f). Bernhard Kalcher stated that the only thing they talked about in his company with customers was how they rated the company, and that customers found this procedure shameful. This representation is understandable and plausible, so that the corresponding statements had to be made .

In her interview with the party, the managing director admitted that carrying out and documenting warranty work in connection with submitting it to the respondent is not an easy task for the Peugeot workshops (ON 24 S 28). The managing director of the applicant clearly explained that the target times were very tight even for well-trained technicians. This was also confirmed by the witnesses Bernhard Kalcher (ON 18 S 18). Only the witness Markus Figl stated that he had no major problems with the target times in his company (ON 23 S 11). Both the witness Georg Messeritsch and the managing director of the respondent Mag. Rieger stated that they were not aware of any complaints from workshops about inappropriate guideline times for repairs. However, since the witness Messeritsch stated that such complaints would be sent directly to Germany, the fact that Georg Messeritsch and Mag. Rieger are not aware of such complaints about target times is not evidence that they actually do not exist. It is also clear that the respondent is interested in keeping the target times as short as possible. Therefore, the corresponding statement had to be made, even if the witness Messeritsch stated that, in his opinion, the target times were absolutely not short or too short .

The phenomenon of "guarantee tourism" can basically be explained by the difficulties associated with handling guarantee cases and does not appear implausible. The managing director of the applicant described cases of guaranteed tourism along the Autobahn in Lower Austria, but did not in any way stipulate that these were Peugeot workshops. The information given by the witness Bernhard Kalcher (ON 18 S 16 f) is not sufficiently specific to make positive statements as to whether and to what extent Peugeot workshops send guarantee customers to other workshops. The witness stated that his workshop received warranty cases, but leaves it open whether this is the case from Peugeot authorized workshops. This also applies to the information

Automatically generated translation via Google Translate

given by the witness Markus Figl (ON 23 S 9 f), who reported guarantee tourism from hearing, as well as to the witness Walter Mayer (ON 23 S 23).

However, the statements of these three witnesses and the managing director of the applicant gave a clear picture of the fact that the system of checking the guarantee work by the defendant is associated with a high level of bureaucratic effort for the workshops and puts them under far greater pressure than performing normal repairs.

The finding that the respondent tends to overestimate the car market, and thus the number of newly registered cars, and that this results in an overambitious annual target for dealers, which puts them in a massive pressure situation, is based on the understandable information from the managing director of the applicant Josef Büchl. It is also given very specifically by the managing director of the respondent MMag. Silvia Rieger confirmed. With reference to the letter from the respondent, Supplement ./19 stated that the respondent estimated the car market for October 2018 with the new registration of 27,000 cars. In fact, however, only 22,603 cars were registered. From the viewpoint of the respondent, it is understandable that the respondent is striving massively to increase Peugeot's market share in Austria and that there is a tendency, particularly towards the top management, to communicate the market share as high as possible. The determination made is also based on this consideration. In addition, the applicant's annual target for 2018 was reduced from 250 cars to 20 cars after calling on the arbitral tribunal. Ultimately, however, the applicant only managed to achieve 86% of the annual target. Despite this problem, the respondent raised the annual target for 2019 by 25% compared to the 2018 target. Since the applicant, as a long-established company and in particular also the managing director of the applicant, can in no way be denied an honest and diligent effort to achieve the monthly and annual targets, the sum of these considerations led to the determination made.

The information provided by the witness Messeritsch and the managing director of the respondent MMag. Rieger differed in the number of coached partners. MMag. Rieger stated that an average of 40 out of 162 workshops are coached in Austria every year, i.e. around 25%. In contrast, the witness Georg Messeritsch stated that 15% of the workshops were coached and this percentage always remained the same. It was therefore clear that the percentage of coached workshops was around 15-25% .

The finding that the price level of the vehicles offered by PSA Retail Austria can not be held by the applicant or undercut, is based on the documented in Appendix ./O calculations of the applicant, after their A purchase prices gross over the PSA Retail Austria GmbH offered Ver - are purchase prices. It may be that the calculations made by the applicant in this context do not apply in all cases. Supplements ./23, ./24 and ./25 show that in some cases the vehicles offered by PSA

Automatically generated translation via Google Translate

Retail Austria GmbH are offered by other dealers at the same or a slightly cheaper price. However, this does not change the determination made. Just because PSA Retail Austria GmbH does not have to cover the costs to the same extent as a self-employed Peugeot dealer on the basis of the profit transfer agreement, it is obvious that PSA Retail Austria GmbH offers are generally from independent dealers are not adjustable. The market presence of PSA Retail Austria GmbH, in conjunction with the prices and discount conditions granted by the defendant to the independent dealers, creates massive additional pressure on the Peugeot dealers. Even if the profit and loss transfer agreement has tax-related reasons within the group, it does mean that PSA Retail Austria GmbH has far more freedom in pricing policy than the independent Peugeot dealers, for whom profitability is essential for survival .

At least one of the sales documented in Appendix .O is obviously a vehicle with day registration. According to the managing director MMag. Rieger are no longer permitted to do daily approvals for independent Peugeot dealers in that they do not receive any bonuses. With regard to supplement .O, it cannot be determined with certainty whether PSA Retail Austria also adheres to this prohibition, so that only a negative determination could be made in this connection .

With supplement .H, the applicant submitted an analysis result from Siscon Unternehmensberatung GmbH & Co KG, according to which only 86% of the services actually performed by the applicant are paid in connection with warranty and guarantee work. The witness Georg Messeritsch and the managing director of the respondent clearly explained that a considerable part of the additional services listed in pages 3 and 4 of supplement .H also apply to normal repair work. However, they agreed that the cleaning and packaging of the replaced spare parts and the corresponding warehousing for 90 days are in any case additional services that are only incurred for warranty work. On the other hand, the managing director of the applicant stated that the 86% mentioned in supplement .H were still too high and he believed that ultimately the respondent would pay even less. Overall, it was to be assumed that the respondent's remuneration for guarantee work did not cover 100% of the work performed, but only 90-95%.

The information given by the managing director of the respondent and that of the witness Georg Messeritsch regarding the costs of the technical documentation varied with regard to the maximum amount from EUR 7,514 to EUR 7,940. It was therefore only possible to determine that the maximum costs for the technical documentation for 17 and more productive employees are of this magnitude .

The witness Messeritsch explained that the respondent's test and diagnostic devices are workshop laptops that are considerably more robust than standard laptops. Sufficient evidence of whether these devices are available on the open market and what they cost is not available.

Automatically generated translation via Google Translate

Legally, this results in the following:

1. Prohibition of abuse in national and European competition law:

According to Section 5 KartG, abuse of a dominant position is prohibited. All those behaviors that can influence the structure of a market, *including* abuse of abuse and exploitation (*Vartian / Schuhmacher in Petsche / Urlesberger / Vartian KartG* ² § 5 Rz 23) are considered to be abusive . A prerequisite for the scope of application of the national prohibition of abuse is that an issue has an impact on the domestic market. This can cover the entire market or only parts of the market. According to the principle of impact of Section 24 (2) KartG, it is irrelevant whether the issue has been realized in Germany or abroad, provided that it affects the domestic market .

Under Article 102 TFEU, the abuse of a dominant position on the internal market or on a substantial part of it by one or more companies is prohibited, insofar as this can affect trade between Member States .

2. On the “interstate”:

According to Art 5 VO (EG) No. 1/2003 of the Council of 16.12.2002 for the implementation of the competition rules laid down in Art 81 and 82 of the contract, OJ 2003 L 1/1 (VO No. 1/2003) the member states are for the application of Art 101 and 102 TFEU is responsible in individual cases. You can order ex officio or on the basis of a complaint to stop infringements and interim measures, accept commitments and impose fines, periodic penalties or other sanctions.

The intergovernmental criterion is a conflict of law rule that is not intended to assess competition law, but rather to answer the question of whether it is appropriate to assess the matter under Community law (16 Ok 10/09 mwN). The principle of the comprehensive primacy of European antitrust law over national antitrust law applies only to a limited extent to the abuse of a dominant position insofar as, due to the exception in Art. 3 para. 2 sentence 2 of Regulation No. 1/2003, The state is not prevented from stipulating stricter national regulations to prevent or punish unilateral actions by companies - such as abusive behavior within the meaning of Art. 102 TFEU. In the event of abuse of a dominant position, stricter national regulations such as Section 4 (3) KartG can also be applied (*Vartian / Schumacher in Petsche / Urlesberger / Vartian KartG* ² Section 5 margin no.11).

Trade between Member States is already impaired when a measure restricting competition, taking into account the totality of objective legal or factual circumstances, can be expected with sufficient probability that it will be direct or indirect, actual or the possibility of trade between goods affects Member States in a way that could be detrimental to the objectives of a single intergovernmental market . It is therefore irrelevant whether international trade has actually been

Automatically generated translation via Google Translate

affected. Measures whose restrictive effects extend to the entire territory of a member state are generally suitable for impairing trade between member states because, by their very nature, they solidify the foreclosure of national markets and prevent the desired market integration. Therefore, measures by companies that only affect competition within a single member state can influence intra-Community trade (16 Ok 4/13 mwN). Art 102 TFEU can also be applicable in cases where only part of the Member State is affected (Commission guidelines on the concept of impairment of international trade in Art 81 and 82 of the Treaty, OJ C 2004/101, 83 Margin 21 mwN).

The defendant's condition structure, as she herself admits in her comment ON 8 S 26, affects the entire Peugeot dealer network in Austria, since the conditions apply equally to all dealers. It is true that the subject of the present proceedings is the impact of the defendant's terms on the applicant's company. It remained open to what extent the defendant's behavior has the same or a similar influence on the Peugeot new car dealers and workshops throughout Germany, as these were not the subject of the specific evidence procedure. However, since there are uniform dealer and workshop contracts, it is obvious that the respondent's behavior affects the entire territory of Austria. Therefore, according to the conditions outlined above, there may be an impairment of international trade.

This means that both European and national antitrust law, including the stricter provisions of Section 4 (3) KartG as stipulated in the KartG, can apply to the present situation in the area of abuse control .

3. Market definition

The abusive practices of § 5 KartG and de s Art 102 TFEU assume a dominant position and abuse. If a company does not have a dominant position, the abuse per se is ruled out. Since the determination of the dominant position presupposes the delimitation of the relevant market according to factual and geographical criteria, the question of delimitation of the market is fundamental for the supervision of abuse.

The market is the central concept of competition law. From an economic point of view it is the economic place of exchange, defined by the market participants who are opposed to one another as providers and buyers of goods or services with opposing and economic interests (16 Ok 15/08 mwN;

16 ok 8 / 14h). The task of defining the market when assessing antitrust matters is to identify competitive relationships. The delimitation of a market, both in terms of its factual and its spatial dimensions, is intended to determine which competing companies are actually able to limit the behavior of the companies involved and to prevent them from evading effective competitive pressure (RIS Justice RS0129158).

Automatically generated translation via Google Translate

The relevant product market is to be determined according to the needs market concept. Only those goods or services can form the same relevant market that, from the point of view of the average consumer, are interchangeable as users. The functional interchangeability of the goods or services in question is therefore important (RIS Justice RS0124671; Commission notice on the definition of the relevant market within the meaning of Community competition law, OJ C 1997/372, 5 margin no. 7).

The respondent defined the relevant market for the sale of new passenger cars at the wholesale level, in which the importer sells vehicles to dealers, in such a way that each has its own relevant product market for the sale of passenger cars and the sale of light commercial vehicles - testify (the respondent's submissions in ON 8 S 15). The respondent based this argument on the decisions of the European Commission COMP / M.5061, COMP / M.2832, COMP / M.6403 and COMP / M.5250.

However, these occurred in merger proceedings and delimited the market across brands. For the abuse procedure within a distribution system, the focus cannot be on the cross-brand market, since it is about the market position of a Peugeot dealer vis-à-vis its importer .

With regard to the factually relevant market with regard to workshop services for Peugeot vehicles, the defendant claimed that there was a qualitatively selective distribution system for workshops that did not limit the number of Peugeot workshops in Austria. These only have to meet the selection criteria set out in the appendix to the workshop contract. In contrast, Peugeot new car dealers must meet the selection criteria set out in the dealer's contract within the quantitative and qualitative selective distribution system of the respondent and the number of dealers is limited due to a numerus clausus. However, since a Peugeot dealer must also have an appropriate workshop to carry out repairs and guarantee and warranty work, the defendant cannot rely on a separate, objectively relevant market for workshop services and new car sales .

However, an exact demarcation of the relevant product market can be left out here, since in the present case it is the relationship between the applicant and the respondent that is important and this relationship in Section 4 (3) KartG, which according to the principles of Regulation No. 1 / 2003 is also applicable, is subject to a separate regulation for vertical market dominance (see point 5 below).

The geographically relevant market comprises the area in which the entrepreneurs involved offer the relevant products or services, in which the conditions of competition are sufficiently homogeneous and which differs from neighboring areas by noticeably different conditions of competition (RIS justice RS0123677 = 16 ok 4/08).

Automatically generated translation via Google Translate

Relevant factors for determining the geographically relevant market include the properties of the products or services concerned, the existence of barriers to entry or consumer preferences, significantly different market shares of companies between neighboring areas or significant price differences (Commission announcement on the definition of the relevant market within the meaning of Community competition law, OJ C 1997/372, 5 margin no. 8).

A certain product market in the area of market dominance can be limited to individual regional or local sub-markets in the area of Austria, to the entire federal territory or to another geographically relevant market that is not limited to the domestic market (16 Ok 14/02; *Vartian / Shoemaker* in *Petsche / Urlesberger / Vartian* KartG² § 4 Rz 30f).

The demarcation of the geographically relevant market can also be avoided for the reasons already outlined in the factually relevant market demarcation and reference is made to item 5 below .

4 . Market dominance:

A company is dominant when it is exposed to no or only insignificant competition as a supplier or customer (Section 4 (1) 1 KartG) or has a dominant market position in relation to the other competitors, in particular its financial strength , the relationship with other companies, the access to the procurement and sales markets and the circumstances that restrict market access for other entrepreneurs must be taken into account (Section 4 (1) (2) KartG; RIS-Justiz RS0119451). A dominant company is therefore in a position to prevent effective competition from remaining in the relevant market because it has the possibility of behaving to a significant extent independently of its competitors, its customers and ultimately consumers. The acquisition and assertion of a dominant position per se, however, does not in itself constitute behavior prohibited by the KartG. Only the abuse of such a dominant position within the meaning of Section 5 KartG (*Vartian / Schumacher* in *Petsche / Urlesberger / Vartian* KartG² Section 4 Paragraph 9) is *frowned upon*).

The applicant does not claim that the respondent has a dominance on the market within the meaning of Section 4 (1) KartG. Rather, it bases its request on the fact that the respondent has relative market power in relation to the applicant's company :

5 . Relative market power within the meaning of Section 4 (3) KartG:

The applicant relies on the fact that the respondent is dominant within the meaning of Section 4 (3) KartG. According to this, an entrepreneur is considered to be dominant if he has an outstanding market position in relation to his customers or suppliers. The relative market power is therefore independent of the general market power of an entrepreneur, that is regardless of his

Automatically generated translation via Google Translate

market share. The structural contrast to market dominance according to Section 4 Paragraph 1 KartG is that the entrepreneur in question does not enjoy the outstanding market position in relation to the competitors, i.e. horizontally, but in relation to his customers or suppliers, i.e. vertically (*Hoffer / Barbist*, The New Antitrust Law³ 33). Relative market power according to Section 4 (3) KartG exists in particular if vertically integrated companies are dependent on maintaining the business relationship in order to avoid serious business disadvantages or depend on their economic existence (16 Ok 12/13). This provision is intended to make the exercise of market power controllable within the framework of applicable supply and service contracts. When assessing the question of whether a vertically integrated company is dependent on maintaining the business relationship, the decisive factor is whether there are alternative options, ie the customer has alternative sales or procurement options on the geographically relevant product market. Where this is not the case on economically reasonable terms, the demand competition does not work.

Whether a company has a (vertical) relationship with its customers in an outstanding market position in accordance with Section 4 (3) KartG cannot - as in the case of market dominance in Section 4 (1) KartG - not be abstract, but only in view of one assess a specific market because substitution options are important (4 Ob 66 / 14f mwN).

According to the older case law of the Supreme Court, sole importers of motor vehicles of a certain brand were to be regarded as dominant companies within the meaning of (now) Section 4 KartG 2005 (4 Ob 62 / 98s; 8 Ob 295 / 99m; 4 Ob 62 / 00x). However, this general statement was not upheld in decision 4 Ob 187 / 02g. Rather, the extent to which the authorized dealer also sells vehicles from other manufacturers and whether he is dependent on maintaining the business relationship with the general importer in order to avoid serious business disadvantages must be checked in individual cases using the demand market concept (4 Ob 119 / 09t mwN).

According to the findings, the applicant's three locations account for around 60% of new car sales with Peugeot vehicles, 30% for Citroen vehicles and 10% for Opel vehicles. A workshop includes around 50% Peugeot vehicles, over 20% Opel vehicles and the rest of Citroen vehicles. The proportion of sales with the Peugeot brand for the applicant in the area of new cars is approximately 68%. A loss of Peugeot as the contractor of the applicant in the sales of new vehicles and in the workshop area would threaten the existence in view of the associated loss of customers and the investments already made in the Peugeot brand. It can therefore be assumed that the applicant is dependent on maintaining the business relationship with the respondent in order to avoid serious business disadvantages and that it depends on this business relationship. According to the findings, the applicant has no alternative sales or purchase options.

Automatically generated translation via Google Translate

The respondent's relative market power within the meaning of Section 4 (3) KartG vis-à-vis the applicant must therefore be affirmed.

6. Prohibition of abuse:

The defendant is thus subject to the prohibition of abuse of Section 5 (1) 1 KartG. Exploitation of exploitation within the meaning of this provision exists when purchasing conditions are enforced that can only be explained by the exploitation of scope for behavior due to the exploitation and lead to a disparity between performance and consideration. Other abuse of conditions may lie in the direct or indirect enforcement of terms and conditions outside of the price component. This includes all competition-related content of the agreement, such as business, delivery, sales, purchasing and payment conditions, regardless of whether they are negotiated individually or are generally pre-formulated. Here, too, it depends on whether the principle of proportionality between performance and consideration has been observed or whether the obligations imposed by the dominant entrepreneur unduly restrict the freedom of the contractual partner. A balance of interests must be taken into account, which includes the interests of the parties and the aim of maintaining competition. In general, terms and conditions are inadequate in the event of apparent unfairness. The weighing of interests may not be limited to the assessment of a single business condition. Rather, such a clause can be compensated for by other favorable contractual elements (*Vartian / Schuhmacher in Petsche / Urlesberger / Varian* , KartG² § 5 Rz 36 and 38; 1 Ob 1 / 07i). In the sense of a flexible system, it is therefore necessary to examine in a general view whether the defendant's terms and conditions in the new car sales and workshop contracts and the commercial policy unilaterally distribute benefits and risks in favor of the defendant and are therefore obviously unfair or not.

This test leads to the following result:

1. The points b) and e) of the request (disproportionate via binding of the economic burdens of actions; one-sided restriction of the price-setting freedom) both relate to the upstream of the defendant given actions problems associated. They cannot be separated in terms of content and therefore summarized. Promotions arouse customers' interest and are a typical sales tool. They serve to promote sales and are in the interests of both sides, that is, the dealer and the importer. Therefore, an appropriate share of the promotion costs is generally in line with the competition. Restrictive conditions for the execution of the campaign, eg short periods of the duration of the campaign, can lead to speculative calculation risks on the part of the retailers. According to the findings, participation in actions is essential for the applicant in business management. It cannot therefore withdraw from participation without losses, but is forced to participate. The applicant has thus been deprived of the opportunity to independently calculate the

Automatically generated translation via Google Translate

sales prices within the scope of these actions specified by the respondent. The fact that the applicant must give their written consent to every action does not change this. This consent is not based on your free choice. The short duration of the campaigns of one month or two months from 2018 is also problematic because it makes it difficult for the applicant to plan the sales prices if a customer cannot immediately decide to buy a vehicle. This means that since she wants to satisfy the customer, she is in a printing situation. A duration of the campaigns of three months would bring considerable relief for the applicant in that it would be much easier to deal with the duration of the purchase decision for a customer .

2. Customer satisfaction surveys are an essential parameter for the retailer's earnings situation, as they need an excellent result in order to receive the quality bonus. This coupling of customer satisfaction surveys, in which only ratings of 9 or 10 points are counted, with the receipt of the quality premium leads to the results that the retailer is forced to urge the customer for a correspondingly high rating. If the dealer fails to persuade the customer to have a correspondingly high rating, he bears the full risk of losing the part of the quality premium attributable to the customer satisfaction survey, which in turn contributes to the retailer's economic dependence on the importer. This type of customer satisfaction survey affects the profitability of the dealer, so that it is neither in the interest of the dealer nor of the importer. Manipulated results up to the blackmailability of the retailer have nothing to do with a real assessment of the quality of the retailer's services and are therefore not in line with the competition.

The granting of a quality premium for customer satisfaction as such is fundamentally unobjectionable and serves both sides. Merely the parameters specifically set by the respondent compel traders to behave towards their customers in a way that they would never do voluntarily .

3. Range reduction through excessive sales targets : The coupling of the achievement of the monthly and annual targets with the receipt of the performance bonus and the complex calculation system for the performance bonus lead to a lack of calculability of marketable offers, with the risk of profitability only for the retailer wearing. The monthly and annual targets set very high by the respondent were not attainable for the applicant even when the annual target was lowered by an expert. The notoriously exaggerated sales expectations of the respondent in a difficult market environment overcomes the main risks of the difficult to predict calculation. According to the findings, even the group's own PSA Retail Austria GmbH was unable to achieve the annual targets. This also suggests that the sales targets are too high. In addition, the date of delivery and not that of the sale is relevant for the achievement of the sales targets and delays in delivery are at his expense. The very complex and complex calculation system makes the calculation difficult for the dealer .

Automatically generated translation via Google Translate

4. The defendant is active in the market of independent Peugeot dealers through the majority ownership of PSA Retail Austria GmbH. PSA Retail Austria GmbH can calculate the selling prices on the retail market based on the guaranteed loss coverage associated with the profit and loss transfer agreement and can draw customers from the dealers due to this overpowering financial strength. It also makes use of this option by launching offers on the market which, apart from individual exceptional cases, cannot be set for the retailer due to the prices and discount conditions charged by the respondent. This also applies to the applicant, who must at least compete with the locations in Linz Industriezeile and Linz Leonding. This increases the pressure on the applicant and her dependence on the respondent. The more dependent a trader is, the more he has to comply with the business segments of the respondent and loses the economic freedom to act. This restricts competition, so that dealerships become more and more dependent sales assistants of the respondent and the intra-brand competition decreases.

5. Warranty checks represent a legitimate interest of the respondent as to whether the warranty processing system is correct. In this context, control is basically justified and necessary. However, the guarantee work for the workshops is associated with a high level of bureaucratic effort and brings with it considerable difficulties in handling. In addition, as part of the guarantee audits, the auditors specifically look for the verified guarantee cases. Although the control system is in the overwhelming interests of the respondent, its costs are borne to a large extent by the workshops through the chargeback .

The distinction between legitimate control and abuse is difficult to find on this point. However, a balance ultimately leads to the fact that - even in connection with the cost of the workshops mentioned under point 6 - the level of legitimate control is exceeded even if the basic justification of the guarantee tests is taken into account.

6. The hourly rates of the warranty work and the refund for spare parts are in view of the 12% deduction made by the respondent for the hourly rates and the fact that 70% of the costs are classified with level 1 hourly rates, although warranty work is usually complicated , problematic. Guide times are sometimes very short and the range of spare parts with the 4% handling fee is small. On the other hand, there is a relatively high level of administrative work involved in reporting warranty cases. According to the findings, the warranty and guarantee work covers only 90-95% of the costs. This means that there is no complete reimbursement of the expenses, even though the warranty and guarantee work are attributable to the defendant's sphere. If costs are not covered, this represents _____ misuse _____ in _____ a monopoly situation.

7. The part of the training fee that does not relate to the courses actually offered, but to the amount of EUR 2,000 on mystery shopping, mystery leads and standard audit, serves to control the respondent as to whether the dealers and workshops comply with the defendant's However, the

Automatically generated translation via Google Translate

costs for this inspection are passed on to dealers and workshops as part of the training fee, so that they are essentially borne by the dealers and workshops alone. This behavior is typical in a monopoly situation and constitutes misuse. The kick-back regulation, according to which a partner company annually provides two workshop replacement cars with an extraordinary special support in the amount of EUR 1,000 plus the otherwise granted demonstration car conditions can not abolish the fact of abuse, since it is linked to an incentive to buy from the dealer and thus has a considerable steering effect.

In an overall view of the respondent's behavior, the exploitation of power-related scope for behavior can be affirmed. There is no basis for compensation through other, favorable contractual terms, so that the abuse of the dominant position within the meaning of Section 5 (1) 1 KartG must be affirmed in the scope of the application. The findings do not provide an appropriate basis for the fact that the illegal behavior had already ended at the time of the decision. Therefore, a corresponding shutdown order within the meaning of Section 26 KartG had to be issued (*Vartian / Schuhmacher* in *Petsche / Urlesberger / Vartian* KartG² Section 26 Rz 20).

Proportionality:

According to section 26 sentence 2 of the KartG, assignment orders must not be disproportionate to the offense committed. Behavior-oriented measures take precedence over structural measures and injunctive relief orders over positive actions (*Variant / Schuhmacher* in *Petsche / Urlesberger / Vartian* KartG²

§ 26 margin 17). The cessation of the incriminated behavior mentioned in the saying constituted an order for an injunction and is therefore within the scope of the sentence 26 in sentence 26

1 KartG standardized proportionality. Version of the assignment order:

According to settled case law, a narrow version of the injunctive relief, which is based on specific abusive behavior, is appropriate in the antitrust abuse proceedings, since antitrust dismissal orders intervene sensitively in the entrepreneurial freedom of action and violations of a dismissal order can be punished with high fines. In view of the almost limitless variety of behaviors open to a company, it is impossible to include every conceivable variant - no matter how minor - of an identified abusive behavior in the slogan of a shutdown order and thereby "circumvent it" to understand. The obligated party can therefore only be prohibited from behavior that they have already demonstrated on the affected market (16 Ok 13/08 mwN). The removal order must therefore contain the specific behavior to be blamed on the respondent, insofar as these are to be regarded as abuse.

However, not all points contained in the application constitute abuse:

Automatically generated translation via Google Translate

Corporate identity investments do not lead to an unreasonable distribution of risk if the respondent, as the “client”, participates to a considerable extent in the investment costs and an average, efficient company can earn the share of costs that it incurs in an economically sensible manner. According to the findings, the defendant covered the applicant's total costs for the tiled floor and her own entrance area with her subsidy for conversions, floors, furniture, etc. in the form of a subsequent premium on vehicles sold. This means there is no abusive behavior.

The findings do not show that the applicant was disadvantaged by the exertion of economic pressure to process as few warranty cases as possible. According to the workshop contract, the authorized workshops are obliged to process all the warranty cases that are brought up to them, so that no pressure is exerted by the respondent to process as few warranty cases as possible. Only a negative statement could be made regarding the “guarantee tourism” claimed by the applicant. Abuse must therefore be denied.

The same applies to the prices for test and diagnostic devices and the annual fee for access to technical documentation. In principle, the respondent can request a market-compliant fee for a product, with which she passes on the knowledge necessary for the execution of guarantee and warranty orders. The applicant was unable to demonstrate that the prices for laptops suitable for workshop operation, including diagnostic software and maintenance, are abusive. It could not demonstrate that the respondent was asked to pay prices for the diagnostic devices and the annual fee that were not in line with the market. This means there is no reported abuse of relative market power.

The application for cancellation contained in the second sentence of point k) must also be rejected by asking for purchase or selling prices or for other terms and conditions that deviate from those that would arise with a high degree of probability in effective competition (ON 29). This part of the application is obviously merely a general description of the abuse alleged under point j) of the application in ON 29 due to the low selling prices on the retail market by the companies owned by the respondent. It is so general and has no factual substrate, so it was also rejected.

The introduction of the training flat rate, insofar as it actually covered training with EUR 3,000, meant that both mandatory and non-contractual training courses were used to a much greater extent by the workshops than in the period before the introduction of the training flat rate was the case. This is in the interest of both the defendant and that of the workshops, since - as the applicant itself conceded - basic and advanced training is essential in a rapidly changing market such as the vehicle market. This part of the training flat rate even enables very complex training for technicians. Therefore, there is no indication that the training fee of EUR 3,000 per year and per company is excessive. To this extent, the request for dismissal was also rejected.

Automatically generated translation via Google Translate

II. Contingent requests upon determination:

A contingent request is raised in the event that the main request is not granted. This was expressly stated by the applicant at the hearing on November 19, 2019 (protocol ON 40 S 1). The contingent request for determination will only become the subject of negotiation and decision if the main request is rejected or rejected (*Rechberger / Klicka* in *Rechberger ZPO*⁵ § 226 Rz 6).

To point I.1. the request for dismissal was granted, so that there was no need to discuss the contingent request to this extent .

Point I.2., With which part of the application for dismissal was rejected, does not entitle the contingent application to ascertain :

Pursuant to Section 28 Paragraph 1 KartG, the Cartel Court must determine that an antitrust violation has already ended if there is a legitimate interest in doing so. The application of Section 28 (1) KartG therefore presupposes an already ended violation of a ban on the first main part of the KartG .

The applicant did not substantiate the claim that the defendant had already ended anti-trust behavior. At the hearing on November 19, 2019, the applicant merely submitted that the violations were only partially still present according to point I. of the application. For this reason alone, the request for assessment is not justified .

In addition, the dismissive part of the decision on the request for dismissal is based on the fact that there is no abuse to this extent. Therefore, the prerequisites for a determination according to Section 28 Paragraph 1 KartG are not met in any case .

III. Alternative proposal to the local supply law: From the applicant was as a second contingent desire requests to prohibit the behaviors listed in the application for dismissal pursuant to Section 6 NVG. In this context, it is based on § 1 NVG. If this argument is to be understood in such a way that it is not a genuine request for contingency, but the provisions of the NVG are to be applied alongside those of the KartG, then it should be pointed out that the respondent's behavior is already one with regard to the granting part of the request for a dismissal abuse frowned upon according to the KartG represents a dominant position. It is therefore unnecessary to consider whether the subsidiary provisions of the NVG apply to this matter or not.

If the application has been made as a genuine contingent request in the event that the main request is rejected, this will fail due to the applicant's lack of argument regarding the extent to which the respondent's behavior in connection with corporate identity investments, prices for test and diagnostic devices, Annual fee and training fee (i.e. the rejected parts of the application)

Automatically generated translation via Google Translate

represent a violation of the NVG. Since the rejection of these parts of the application is based on the fact that there is no abuse, a violation of the provisions of the NVG is not an option.

Higher Regional Court Vienna as a cartel court
1011 Vienna, Schmerlingplatz 11
Dept. 27, on May 12, 2020

Dr. Sabine Völkl-Torggler electronic copy
according to § 79 GOG