



SWISS COMPETITION COMMISSION FINES BMW

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I. SUMMARY¹

1. The Swiss Competition Commission (Comco) fines BMW AG (Munich) a total of 156 million CHF because of restrictions on direct imports of BMW vehicle due to an export ban².

II. CASE

A. Parties

2. *Bayerische Motoren Werke AG, München* ("Defendant"). Target of the investigation is the BMW Group³ and all with the group of companies connected companies, especially the distributors in the EEA⁴ and the BMW Switzerland AG, with headquarters in Dielsdorf.

B. Market

3. BMW is active in the following national markets for passenger cars (BMW and MINI):

- Mini Cars
- Lower middle class cars
- Upper middle class cars
- Upper class cars
- Luxury cars

COMCO takes into account, that the boundaries between the individual product markets are transparent.

C. Behavior/agreement under scrutiny

- Illegal agreements to allocate markets geographically
- Obstruction of direct imports (export ban)

¹ AGON-Authors: Patrick L. Krauskopf & Fabio Babey

² Swiss Competition Commission, Decision, 7/5/2012 (available online www.comco.ch)

³ From now on referred to as BMW

⁴ European Economic Area

D. Actual infringement

4. Illegal restraints of competition amongst companies at different levels of the market to allocate markets geographically, particularly:

- Export ban: The BMW dealer contracts include a clause (export ban) that prohibits the dealers of the EEA to supply BMW vehicles to parties outside the EEA.

"1.5 Export

The dealer is not permitted to supply directly or through other parties new BMW vehicles and original BMW parts to customers in countries outside the EEA and to retrofit vehicles for such purposes."⁵

E. Chronicle

5. **Background.** On October 12th, 2010 COMCO received a complaint from a swiss customer who tried to buy a BMW car abroad. The dealer has told the customer that BMW prohibits him to sell BMW cars to Switzerland and swiss customers. On October 19th, 2010 COMCO received a letter from the editorial office of "Kassensturz" , in which BMW informed the editorial office of "Kassensturz"⁶, that BMW dealer contracts do not provide the sale from EEA dealers of BMW to non EEA residents. On the same day the program "Kassensturz" ran on swiss television announcing that BMW prevent swiss costumers from buying cheap BMW cars abroad. As a consequence several swiss customers informed COMCO about their unsuccessful attempts to buy BMW cars abroad.

- *October 25th, 2010:* COMCO launched an investigation against BMW Group and all with the group of companies connected companies. BMW was requested to give comment to the accusations and send copies of EEA dealer contracts.
- *October 26th, 2010:* The German Competition Commission (Bundeskartellamt) was informed that the investigation had been opened.
- *December 10th, 2010:* COMCO asked the swiss federal customs administration about import-statistics.
- *October 26th, 2010:* COMCO asked the Association of Free Car Trade Switzerland (VFAS) for information and experiences about the import of BMW and MINI Cars.
- *January 12th, 2011:* COMCO asked the Association of Swiss Car Importers for statistics about imports and other related topics.
- *January 28th, 2011:* COMCO asked a multi label wholesale dealer about the import of BMW cars.

⁵ The clause has been used in BMW dealer contracts since october 1st, 2003

⁶ Swiss television program about consumer protections

- *August 15th, 2011:* COMCO asked BMW to send copies of EEA dealer contracts for the years 2004-2008.
- *September 5th, 2011:* BMW send COMCO an EEA dealer contract of 2003. Due to BMW this contract was a typical dealer contract for the whole EEA.
- *March 26th, 2012:* According to Art. 30 par. 2 Cartel Act a hearing of BMW took place in the offices of the COMCO.
- *Mai 7th, 2012:* COMCO ruled on the present case.
- *Mai 2012:* BMW appealed and pleaded for COMCO to overturn its decision. The Federal Administrative Court's decision is pending.

III. JUDGMENT/DECISION

A. Procedural Findings

6. *BMW Swiss dealer contracts.* BMW argued that COMCO received in December 2004 samples of BMW dealer contracts to review. At that time COMCO qualified these contracts as admissible. COMCO agreed on this point of view, but clarified that BMW didn't presented COMCO the BMW dealer contracts for EEA, only the contracts for Swiss dealers. Therefore COMCO never received a dealer contract with the export ban clause. In this context COMCO pointed out (2004) that BMW dealers in Switzerland need to have the possibility to import BMW vehicles from other BMW dealers in the EEA.

B. Substantial Findings

7. *Agreement/Collusion.* COMCO concluded that the clause in the BMW dealer contracts (export ban) deemed to be agreements affecting competition in the sense of Art. 5 par. 4 Cartel Act.

8. *Elimination of effective competition.* The presumption of the elimination of effective competition as defined in Art. 5 par. 4 Cartel Act can be refuted by the existing intra-brand and inter-brand competition for all relevant product markets. In this case, COMCO concluded that due to the export ban the intra-brand competition is heavily limited. Furthermore, BMW has market power in the relevant markets, even though many competitors exist and put pressure on BMW. Still, inter-brand competition exists. COMCO précised that due to existing inter-brand competition the presumption of the elimination of effective competition can be disproved.

9. *Significant restriction of competition.* Based on an overall assessment of the qualitative and quantitative criteria COMCO concluded that the contractual agreements between BMW and the BMW dealers EEA since October 2010 led to a significant restriction of competition within the meaning of Art 5 par. 4 in connection with par. 1 Cartel Act.

10. *Fine.* An enterprise that participates in an illegal understanding shall pay an amount up to 10 percent of the turnover achieved in Switzerland during the last three years (Art. 49a Al. 1 Cartel Act). COMCO imposed a total fine of 156 million CHF on BMW.

IV. COMMENTS

A. Procedural Issues

11. *Investigating and fining in vertical restraints cases.* This corresponds with the practice of the European Commission to atone only the manufacturer or producer in cases of contractual export bans in the automotive sector⁷. Based on these considerations, COMCO didn't extend the investigation to the BMW dealers in EEA. For the BMW dealers the export ban was a disadvantage and turnover reducing.

B. Substantial Issues

12. *Selectively organized distribution.* Under a permitted selectively organized distribution, the automotive supplier prescribe the authorized dealers only to sale to other dealers of the corresponding mark (known as cross-supplies), towards end users and authorized intermediaries who act on behalf of a consumer. The export ban could be defined as part of such a selectively organized distribution, preventing the sale to not authorized dealers. However, this is not the case: the export ban prevents the sale to authorized dealers outside the EEA, to end customers and plenipotentiary intermediary outside the EEA.

C. Other Observations

13. *Direct imports.* COMCO stated that during the observation period in all product markets, direct imports were made to some extent. But without the export ban for swiss customers, at least since October 2010, the amount of direct imports would have been higher in any case.

14. *No investigation against dealers.* Even though COMCO qualified the behavior in the present case as agreement between BMW and their dealers (EEA), only against BMW was investigated. COMCO mentioned three main reasons for this attitude: (i) Interest asymmetry between BMW and dealers (the dealers hat no interest in the export ban because they e.g. didn't take a profit out of it), (ii) enforcement difficulties (regarding dealers without locations in Switzerland), and (iii) the practice of the European Commission in similar cases (see IV.1). Regarding this background, an imposition of measures nor an extension of the investigation against BMW dealers of EEA was justified.

⁷ KOMM ABI. L 173/20 vom 27.6.2006 - Peugeot; KOMM ABI. L59/1 vom 28.02.2001 - Opel