



Press Release – Communiqué de presse – Medienmitteilung – Comunicato stampa

St. Gallen, 4 December 2015

Judgment B-3332/2012 of November 13, 2015

Fine of CHF 156 million against BMW confirmed

In a decision of May 7 2012, the Swiss Competition Commission (ComCo) imposed a fine in the amount of approximately CHF 156 million on Bayerische Motoren Werke AG (BMW). The Swiss Federal Administrative Court dismisses BMW's appeal in its judgment of 13 November 2015. It finds that the contractual clause which bans exports by BMW dealers located in the European Economic Area (EEA) to countries outside the EEA and therefore also into Switzerland constitutes an unlawful vertical territorial restriction within the meaning of the Swiss Cartel Act (CartA).

In October 2010 a complaint was lodged with ComCo by a prospective buyer who had unsuccessfully tried to purchase a new car from an authorized BMW and MINI dealer outside of Switzerland. A week later the Swiss TV program "Kassensturz" in a report on the subject of motor vehicle imports stated that BMW prevented imports of vehicles of their brands into Switzerland, thereby keeping prices in Switzerland on a high level. Subsequently, ComCo received several complaints from prospective buyers residing in Switzerland. More than half of the complainants had been informed of a directive from BMW regarding the sale of motor vehicles in Switzerland.

ComCo then opened an investigation and in a decision of 7 May 7 2012 found that the contractual export prohibition agreed on between BMW and its dealers - with the exception of the Principality of Liechtenstein - constituted an unlawful agreement affecting competition under the CartA. It imposed a fine of approximately CHF 156 million on BMW. BMW challenged this decision before the Federal Administrative Court.

The Federal Administrative Court holds that based on the effects doctrine the CartA applies in cases such as the one at hand. In order to guarantee the effectiveness of Swiss law, ComCo must be able to become active if the facts have occurred abroad, but produce effects inside the country. The Federal Administrative Court upholds the finding of ComCo that territorial restrictions within the meaning of Article 5(4) CartA, which hinder active and passive sales into a territory, are among the most detrimental agreements. Such absolute territorial agreements are to be considered by nature as agreements qualitatively restricting competition in a significant

way. Justification based on grounds of economic efficiency remains an option, but is not possible in the case at hand. The Court also upholds ComCo's view that such agreements are caught by the sanction norm of Article 49a CartA. According to this provision, an undertaking shall be charged up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years. Consequently, BMW's appeal is dismissed.

The judgment may be appealed to Federal Supreme Court.

The Swiss Federal Administrative Court

The Federal Administrative Court renders judgment in cases of appeal against decrees issued by Swiss federal authorities. In certain matters the court is also authorized to examine decisions rendered by cantonal authorities and issue judgments on complaints filed against cantonal decisions. Where the Federal Administrative Court is lower instance court, its judgments can be appealed before the Federal Supreme Court. Based in St. Gallen, the Federal Administrative Court accommodates five divisions and a General Secretariat. Approximately 75 judges and 320 members of staff constitute the largest Swiss federal court.

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