

**Briefing November 2017**

## Swiss Federal Supreme Court Confirms CHF 157 Million Fine Against BMW for Restricting Parallel Imports into Switzerland

The Swiss Federal Supreme Court (FSC) has confirmed a CHF 157 million fine of the Swiss Competition Commission (ComCo) against Bayerische Motoren Werke AG, Munich (BMW) for restricting parallel imports into Switzerland. The judgment confirms the FSC's rather formal assessment of restrictions captured by Article 5(4) and (3) of the Act of Cartels (CA), such as restrictions of passive sales. The judgment also indicates a lack of willingness for a vigorous review of the level of fines imposed by ComCo.

### Facts and decision of ComCo

BMW had included in its EEA distribution agreements the following prohibition of exports into countries outside the EEA:

#### *"1.5 Export*

*The Dealer shall neither sell new BMW vehicles and original BMW parts directly or indirectly through third parties to buyers in countries outside the EEA nor rebuild vehicles for such purposes."*

The case came to the attention of ComCo when a consumer protection show of the Swiss national broadcaster revealed that German BMW dealers would not sell BMWs to Swiss customers and when BMW then went on to confirm to the show makers in writing that the export ban in fact existed and served to strengthen the position of its authorised dealers in and outside the EEA.<sup>1</sup>

While ComCo could only establish in 16 cases (i.e. the number of complaints) that Swiss customers had faced difficulties in buying a new BMW/Mini in the EEA, during the same period, 1774 new BMW/Mini cars were demonstrably parallel-imported into Switzerland.

ComCo concluded that BMW's agreements with its authorised EEA-dealers restricted competition significantly and could not be justified for reasons of economic efficiency and imposed a fine of CHF 157 million on BMW. The Federal Administrative Court (FAC) rejected the appeal of BMW against ComCo's decision.

### Judgment of Federal Supreme Court

The FSC also rejected BMW's appeal against the judgment of the FAC. The FSC's judgment is noteworthy in a number of aspects:

<sup>1</sup> The letter is published on <https://www.srf.ch/content/download/4695388/65683200/version/3/file/20101019-autoimport-sn-bmw.pdf>

### **Jurisdiction**

The FSC confirmed that ComCo had jurisdiction because the export ban would have effects in Switzerland. The FSC further held (in line with the Colgate-Palmolive judgment<sup>2</sup>) that in order for ComCo to have jurisdiction, it would be sufficient for the alleged conduct to have at least potential effects in Switzerland; thus, appreciable effects in Switzerland would not be required for ComCo to have jurisdiction. The FSC, however, clarified that a restriction of a US company to sell into Canada would not be caught by Swiss Act on Cartels.

The FSC's clarification was not necessary in the case at hand and does not remove much of the legal uncertainty created by the Colgate-Palmolive judgment. However, it indicates that the FSC recognises that its Colgate-Palmolive judgment would create an overly broad jurisdiction of ComCo if taken literally.

### **Quantitative criteria irrelevant for significance of restriction**

BMW argued that the export ban would not constitute a significant restriction of competition as it had not been complied with, as there would be inter-brand competition with other car brands and as BMW would not have market power.

The FSC rejected these arguments. It reiterated that agreements according to Article 5(4) and (3) CA (i.e. vertical agreements to restrict passive sales, vertical agreements on resale price maintenance as well as agreements among competitors to fix prices, restrict production-, purchasing- or supply-quantities or to allocate territories or customers) would, in general, restrict competition significantly. Thus, there would be no need to examine the effects of the export ban. Equally, the existence of any inter-brand competition and the lack of market power of BMW would be irrelevant. It would simply be sufficient that the agreements had potentially restricted competition.

Taken literally, the FSC's statements may suggest that in case of agreements according to Article 5(4) and (3)

CA, ComCo would not have to examine the actual effects of such agreements anymore. However, such a literal reading would be unjustified, among other things, because the scope of Article 5(4) and (3) CA (as interpreted by ComCo) is wider than the scope of restrictions by object under EU competition law. Given that the BMW case involved a restriction by object that was at least partially implemented (i.e. there were established effects) and given that BMW admitted the existence of the export ban in a statement vis-à-vis the Swiss national broadcaster, the FSC's statements should not be overstated.

### **Fine**

BMW had argued, amongst other points, that the fine of CHF 157 million would be excessive in light of the fact that ComCo had established restrictions of parallel imports in only 16 cases.

The FSC rejected BMW's arguments. It held that the chosen gravity multiplier for the fine of 5% of the Swiss turnover generated during the last three years would be appropriate (the maximum statutory gravity multiplier is 10% of the Swiss turnover generated during the last three years in the affected markets). The FSC asserted that the number of 16 cases of documented restrictions of parallel imports as well as the number of 1774 parallel-imported new BMWs would only reflect the fact that the export ban had not been strictly adhered to everywhere. The FSC held that these numbers would not indicate how many Swiss consumers may have failed to buy a new BMW in the EEA. The fact that the export ban had only partially been implemented, had already been taken into account in setting the gravity multiplier at 5% (out of 0-10%).

The FSC's statements reveal a worrying lack of willingness for a vigorous review of the level of fines imposed by ComCo. The fine imposed on BMW was close to the cap applicable to such a fine. The BMW-judgment shows little willingness by the FSC properly to take into account the established effects of the infringement when setting the fine.

<sup>2</sup> See Briefing April 2017 on [https://www.baerkarrer.ch/publications/BK\\_Briefing\\_Prohibitions\\_of\\_parallel\\_imports\\_into\\_Switzerland\\_generally\\_unlawful.pdf](https://www.baerkarrer.ch/publications/BK_Briefing_Prohibitions_of_parallel_imports_into_Switzerland_generally_unlawful.pdf)

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## Outlook

The BMW-judgment marks a further step of the FSC towards a form-based approach that tends to take limited notice of the actual facts of the case. It remains to be seen whether the FSC will expand this formal approach to cases of a more ambiguous nature.

However, the significance of the BMW-judgment should not be overstated. Sweeping statements of the FSC such as that the actual effects would not have to

be examined and that a potential restriction of competition would be sufficient, have to be read against the background that the export ban was not only clearly evidenced in the dealer agreements and demonstrably at least partially implemented but also that BMW had confirmed in writing that the export ban in fact existed and that its purpose was to strengthen the position of its Swiss dealers.

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