

Restriction of Passive Sales and Resale Price Maintenance under Swiss Antitrust Law - Conflicting Approaches of the Swiss Federal Administrative Court in *BMW* and *Altimum*

On 13 November 2015 and 17 December 2015, the Swiss Federal Administrative Court (**FAC**) issued two judgments on restrictions of passive sales and resale price maintenance. In the one case (*BMW*) the FAC held that a contractual prohibition of passive sales into Switzerland infringed the Swiss Act on Cartels (**CA**) regardless of the effects of that contractual provision. In the other case (*Altimum*), the FAC held that a resale price maintenance did not infringe the CA since only 12% of the dealers adhered to it.

BMW: Per se approach

In the one case, the FAC upheld a CHF 157 million fine of the Swiss Competition Commission (**ComCo**) against Bayrische Motoren Werke AG, Munich (**BMW**).

BMW's agreements with its authorized EEA-dealers included 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 FAC found that this export prohibition fell under Article 5(4) CA. Article 5(4) CA presumes that the restriction of passive sales into Switzerland eliminates effective competition. Switzerland is not

an EEA member state; consequently, a prohibition to sell into countries outside the EEA restricts passive sales into Switzerland.

While the presumption of elimination of effective competition could be rebutted, the FAC held that the export prohibition would constitute an unlawful **significant restriction of competition**. In general, a restriction of competition has to be qualitatively **and** quantitatively significant to be unlawful. The FAC, however, argued that since a restriction of passive sales would presumptively eliminate effective competition, it would be deemed to restrict competition significantly (*a maiore ad minus*-argument) and there would be no need to show that the export prohibition would be quantitatively significant (for example due to the adherence rate, the market shares of the parties, the lack of interbrand competition etc.). Consequently, the export prohibition imposed by BMW would be unlawful.

Altimum: Effects-based approach

In the other case, the [Altimum](#) case, the FAC adopted an effects-based approach and lifted the fine (CHF 470,000) imposed by ComCo.

Altimum, a wholesaler of alpine sports equipment (headlamps, harnesses, helmets, ice axes, etc.) of the Petzl brand, had issued resale price recommendations. There was evidence that Altimum had imposed pressure on its dealers not to undercut the recommended resale prices by more than 10%.

The FAC found that the evidence presented by ComCo would support an agreement on a resale price maintenance only in relation to 12% of Altimum's dealers (i.e. 39 out of 333). Also, these 39 dealers would be among the smaller ones.

The FAC then went on stating that this resale price maintenance would fall under Article 5(4) CA which presumes that a resale price maintenance eliminates effective competition. This presumption of elimination of effective competition could be rebutted, however.

As regards the significance of the restriction of competition, the FAC disagreed with its own *maiore ad minus*-argument in [BMW](#). The FAC held that the presumption of elimination of effective competition in Article 5(4) CA would not imply that the quantitative significance of the restriction would be irrelevant. The FAC held that the resale price maintenance (while being qualitatively significant) would be **quantitatively insignificant** because only 12% of the dealers had participated in it. Consequently, the resale price maintenance would not constitute a significant restriction of competition and, therefore, would not be unlawful.

Conclusion

While in [BMW](#) the FAC adopted a formal per se approach holding that a vertical hardcore restriction is unlawful regardless of its effects, in [Altimum](#), the FAC adopted a more balanced approach assessing the effects of the alleged hardcore restriction.

The FAC does not offer any guidance on how to resolve the contradiction of these two judgments. It adds to the confusion that the judge conducting the proceeding in the [Altimum](#)-case was also one of the judges deciding the [BMW](#)-case.

Both judgments have been appealed to the Federal Supreme Court. It remains to be seen whether the Federal Supreme Court will endorse the per se approach of the [BMW](#)-judgment or the effects-based approach of [Altimum](#).

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