II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 December 1977

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.146 — BMW Belgium NV and Belgian BMW dealers)

(Only the French and Dutch texts are authentic)

(78/155/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Articles 3 and 15 thereof,

Having regard to the applications made pursuant to Article 3 (2) (b) of Regulation No 17 by Automobilimporte C. Heuer, Dillingen, on 24 November 1975 and by MGH Motorgesellschaft mbH, Herford, on 9 December 1975,

Having regard to the Commission Decision of 3 November 1976 to initiate proceedings against BMW Belgium NV, Kontich, and 47 Belgian BMW dealers,

Having heard BMW Belgium NV and the 47 BMW dealers in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC [2],

Having regard to the opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions on 19 October 1977 pursuant to Article 10 of Regulation No 17,

Whereas :

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

I. The facts

1. From the applications made on 20 October 1975 by MGH and on 19 November 1975 by Heuer, the Commission learned that Belgian dealers belonging to the BMW network were no longer prepared to supply them with certain models of new BMW vehicles for export to the Federal Republic of Germany. BMW Belgium NV, which, through BMW Holding AG, Zurich, Switzerland, is wholly dependent on Bayerische Motoren Werke AG, Munich, and is its general importer for Belgium, had taken a series of measures to hinder imports. In particular it had required its 90 appointed dealers in Belgium to enter into an agreement, set out in a circular addressed to all dealers on 29 September 1975, to prevent exports from taking place ; 47 of the Belgian BMW dealers acted as required and signed the circular.

On 13 January 1975, BMW Belgium had notified the standard form distribution agreement entered into by its dealers and applied for exemption under Article 85 (3) of the EEC Treaty. However the standard form agreement contains no export prohibition. It simply prohibits appointed BMW dealers from selling new BMW vehicles to dealers that are not approved by BMW. It largely corresponds to the standard agreement which is used as a basis for the selective distribution system operated in the Federal Republic of

Germany and West Berlin by Bayerische Motoren Werke AG, Munich. The latter was exempted by the Commission Decision of 13 December 1974 ([1]), one of the main reasons being that there were no prohibitions on exports by approved BMW dealers. There has so far been no individual decision exempting the standard form distribution agreement for Belgium notified by BMW Belgium.

The details of the case are as follows :

2. In 1975 retail prices for new cars, including BMWs, were lower in Belgium than in other common market countries. Price controls imposed by the Belgian Government, designed to contain inflation, were responsible for a temporary freeze of retail prices for cars. The difference in price resulted in new BMW vehicles being re-exported from Belgian to other countries in the Community and elsewhere. In some cases consumers in Community countries other than Belgium bought vehicles directly from Belgian dealers in the BMW network. In other cases consumers used the services of intermediaries which without being appointed by the manufacturers for the purpose, nevertheless handled such imports. Exports were also facilitated by the fact that dealers that were not members of the BMW network bought BMW cars from authorized Belgian dealers for resale to the consumer. On occasion Belgian BMW dealers even sold BMW vehicles to approved BMW dealers in Germany.

3. The sale of BMW vehicles from Belgium to consumers in other Community countries disturbed local BMW dealers in whose territory the consumer lived, particularly because their dealership agreement obliged them to provide guarantee service even on BMW vehicles that they had not sold themselves. BMW Munich found that it was in a situation where BMW vehicles were being sold to the consumer through channels that had not been envisaged. Having received information from the beginning of 1975 about BMW vehicles re-imported into Germany by German BMW dealers and having checked German BMW registrations and the chassis numbers of BMW vehicles sold through BMW Belgium, BMW Munich wrote to BMW Belgium on 17 January, 21 and 22 May, 10, 20 and 23 June, 22 July and 14 and 17 October 1975, and there were discussions on 25 April and 3 October 1975.

([1]) OJ No L 29, 3. 2. 1975, p. 1.

In its letters to BMW Belgium, BMW Munich referred only to actual cases where unauthorized dealers had bought or where there was reason to believe they had bought BMW vehicles in Belgium. In its letters of 17 January, 23 June, 22 July and 17 October 1975, BMW Munich made it clear that the distribution system operated in Belgium prohibited sales only to unauthorized dealers but not to the consumer in other Community countries. The letter of 22 July 1975, for instance, states :

> 'May we remind you that, according to the terms of the dealership agreement, re-exports in themselves do not constitute a breach and no objection should be taken to individual cases. Please confine your attention to cases where you suspect there has been a sale to an unauthorized dealer in breach of the agreement.'

By letter dated 23 June 1975, BMW Munich indicated that re-imports of new BMW cars into Germany had achieved an excessive degree of publicity and were harming its relations with BMW dealers in certain areas and alleged that this was compromising its attempts to improve deliveries to export markets and the further development of distribution networks. BMW Belgium was asked to send a circular to its dealers drawing their attention to BMW's distribution policy ; the circular was to make the following points :

> '1. The legal situation following approval of the BMW distribution agreement by the European Communities is that no BMW dealer may sell to unauthorized dealers. This requires dealers to exercise extreme caution and to have considerable knowledge of the trade when assessing prospective customers.
>
> 2. Any breach of the contractual provisions may immediately invalidate the distribution agreement.
>
> 3. The need by the importer to have BMW dealers' interests at heart justifies the emphasis on seeing sales of new vehicles in relation to the potential profit to the network that they can generate (second-hand sales, after-sales services, sales of spare parts, credit arrangements and insurance).
>
> 4. The importer's obligation to develop the market also means that in case of shortage vehicles have to be allotted to individual areas in accordance with actual need.'

This letter from BMW Munich of 23 June 1975 further specified that these arguments had been approved by its legal department.

4. These letters from BMW Munich to BMW Belgium caused BMW Belgium to approach individual Belgian dealers on the subject of certain exports (letters dated 29 May, 9 and 19 June, 3, 9 and 24 July, 28 and 29 August, 10 and 19 September and 1 and 23 October 1975), and produced three circulars to all Belgian BMW dealers.

The circular of 4 July 1975 read as follows :

'Export sales

In the past few weeks we have unfortunately received information from BMW's Munich Head Office to the effect that a number of dealers have been selling BMW cars in the Netherlands and Germany. At a time when we are having to ration car supplies we can see no justification for such sales.

Furthermore, we would remind you that the BMW distribution agreement requires each dealer to refrain from selling any BMW product to dealers who have not been appointed for the sale of BMW goods.

Dealers who sell cars through such unauthorized dealers in Belgium or elsewhere are in serious breach of their BMW distribution agreement.

We must inform you that severe action will have to be taken ; if necessary, BMW dealer status will be withdrawn is such breaches continue.'

The abovementioned circular of 29 September 1975, signed by 47 BMW dealers, whereby BMW Belgium complied with the instruction given by BMW Munich on 23 June 1975 to send such a circular (see paragraph 3 above, read as follows :

'Sales of new BMW vehicles in foreign countries

Apart from sending individual letters to specific dealers, we wrote to all of you on 4 July 1975 referring you to the provisions of the BMW distribution agreement concerning sales to unauthorized dealers.

However, reports are still coming in from Germany and the Netherlands to the effect that Belgian dealers are selling cars there, and we must unfortunately conclude that these dealers cannot or will not understand the consequences of what they are doing.

At a special meeting of the Dealers' Advisory Committee we made the following points :

1. It is a fact that certain dealers are supplying cars to Germany and the Netherlands.

2. The reasons are, firstly, the difference in price and, secondly the fact that certain dealers have too many cars in stock or else a poor range.

3. It will be clear that BMW Munich can draw only two conclusions from this :

   (a) Belgian prices are too low ;

   (b) Belgian dealers have excessive stocks.

   The consequences are clear enough :

   (a) our prices must be brought up to those of neighbouring countries as quickly as possible ;

   (b) supplies of new vehicles to Belgium must be cut back from October 1975.

4. You yourselves are already being put at a serious disadvantage by the fact that a time when BMW vehicles are in a short supply you are supplying customers who :

   (a) will never come to your workshop ;

   (b) will never buy parts or accessories from you ;

   (c) will never give you the opportunity to make a further profit on a car sold to you in part exchange ;

   (d) will never, unlike most customers in your territory, give you any reason to expect an opportunity to sell them a second or third BMW.

5. Moreover, you will be creating serious difficulties both for yourselves and for the other members of the network by provoking BMW into what would after all be a logical reaction — drastically reducing the number of cars intended for Belgium.

Our view is therefore that in the present situation there is only one solution : henceforth no BMW dealer in Belgium will sell cars outside Belgium or to firms who propose to export them. Our solidarity and the protection of our network are at stake. This absolute solidarity of the BMW network and strict compliance with this sales policy should be convincing and will help to restore confidence in the Belgian BMW network. We therefore ask you to agree to the above proposals by signing the attached copy.

We enclose a statement by the members of Dealers' Advisory Committee, who fully support our arguments and will meet you personally to explain their views.

Agreed : . . . . . ,

The Belgian BMW Dealers' Advisory Committee, as requested by BMW Belgium, addressed the following circular to all Belgian BMW dealers on 29 September 1975. Its content, agreed by BMW Belgium, was as follows :

'Export sales

As members of the Dealers' Advisory Committee we unanimously support the statements made by BMW Belgium in its circular of 29 September 1975. We find it particularly regrettable that the entire distribution network should suffer on account of a small number of dealers who irresponsibly ignore the importer's recommendation of 4 July 1975 by delivering cars for export.

We have therefore asked for the names of these dealers to be made known to us so that we, your Advisory Committee, can inform you which of your fellow dealers are responsible for any reduction in the supply of two-door and 518 models to Belgium.

The Advisory Committee considers that its most important function is to give good advice to the BMW distribution network, and the only advice it has to offer in this case is : "No more sales outside Belgium".'

5. The Advisory Committee's duties are :

— to discuss with BMW Belgium's management all general questions relating to all or part of the distribution network,

— to make recommendations concerning the development of business by BMW dealers and relations with BMW customers,

— to give BMW Belgium the opportunity to deal with a small number of dealers representative of the whole network when establishing policy for the Belgian market,

— to improve mutual relations between BMW dealers.

The Advisory Committee's circular of 29 September 1975 was signed by the eight members of the Committee, who are proprietors of or hold senior positions in the following firms :

— Autohandel O. Cocquyt NV, Brugge,
— Etn. W. Jorssen, Wilrijk,
— Garage Hindrickx, Roeselare,
— Pvba J. Siau-Vermeesch, Dendermonde,
— Ets. Jo Vallé, Bree,
— Ets. J. Depotter, Chièvres,
— Etn. J. De Smeth, Overijse,
— Garage J. Wiliquet, Verviers.

6. Further to the circular from the Advisory Committee there were two regional meetings of BMW dealers held on 13 and 31 October 1975.

At the meeting of 13 October 1975, deliveries from Belgium to Germany and the Netherlands were discussed. Several dealers reported on their experience of German dealers and individuals and Belgian firms buying cars in Belgium and then registering them in other countries. The question of what provisions applied in respect of value added tax in such cases was also discussed. A number of dealers further expressed the view that sales outside their own territory were disadvantageous to them, since they made for no improvement in contribution to the profits or profitability at their own garages.

At the meeting of 31 October 1975, the dealers again considered the circular on exports of new vehicles. Protests were made that BMW's conclusions seemed to apply both to dealers who had been supplying non-approved dealers and dealers who had been complying with their agreement. The point was finally made that BMW Belgium itself also seemed to have been selling cars to Germany.

7. After BMW Belgium had informed BMW Munich of the content of its circular of 29 September 1975 by letter of 30 September 1975 and at a meeting in Paris on 3 October 1975, BMW Munich wrote the following letter on 17 October 1975 :

'Sales to dealers

We are pleased to see what you have been doing about dealers who, by supplying unauthorized dealers in breach of their agreement, have been jeopardizing the efficiency of the BMW distribution network. We also thank you for your discussing with the Belgian Dealers' Advisory Committee with a view to ensuring that our Belgian organization obtains full benefit of the potential earnings from business following on from our deliveries to you.

As already mentioned on 17 January, 23 June and 22 July 1975, we must again ask you, in respect of any measures taken, to bear in mind that :

— no action may be taken against your dealers simply because they have re-exported cars ; warnings may be given only where a dealer is suspected of selling cars to non-approved dealers in breach of his Agreement,

— no action may be threatened against your dealers unless made necessary by a proved breach of their agreement.

This instruction must also be complied with in any correspondence between BMW Belgium SA and the Belgian distribution network.

The above does not of course affect the obligation of BMW SA to keep supplies of vehicles to individual dealers and supplies of particular models under regular review and to adjust deliveries as part of the normal responsibilities of an importer.

The obligation of dealers to notify sales under the "VIS" system must be strictly complied with.

Similar considerations will naturally apply to decisions by BMW AG concerning deliveries to the Belgian market, which will seek solely to offset differing stock levels and delivery schedules in neighbouring markets.'

8. There is disagreement between MGH and Heuer, the applicants, and BMW Belgium and BMW Munich as to whether BMW Belgium can rely on the terms of the BMW distribution agreement in order to prevent sales to dealers not appointed by BMW when the Belgian BMW distribution system has not yet been exempted by the Commission, whether the applicants were justified in inducing Belgian BMW dealers to supply them with new BMW cars, and whether the applicants were to be regarded simply as agents for the ultimate consumer, and over the criteria for such status.

9. On 12 June 1975, BMW Munich informed MGH that BMW dealers in Europe were prohibited from supplying new BMW vehicles to persons or firms not within the BMW distribution system for resale, and that MGH was inducing BMW network dealers to act in breach of their agreements. BMW Munich demanded that MGH state in writing that in future it would obtain no more BMW vehicles from BMW dealers. On 23 June 1975, MGH replied that it did not buy BMW vehicles for resale but solely as agent for the consumer, this not being contrary to the BMW distribution arrangements. MGH pursued its endeavours to obtain new BMW cars from BMW dealers in Belgium, but realized that more and more BMW dealers were refusing to supply German consumers and referred to the circular they had received from BMW Belgium as the reason for such refusal.

On 9 October 1975, BMW Belgium informed MGH that its order for 12 BMW vehicles could not be met as there was a shortage in Belgium. MGH was asked to stop trying to obtain BMW vehicles from Belgian BMW dealers. On 24 October 1975, MGH replied that it was acting solely as an agent and that in this capacity represented consumers in the Federal Republic of Germany. It further alluded to the Commission Decision of 13 December 1974 relating to the BMW distribution system in Germany (1), according to which consumers were entirely free to buy BMW products anywhere in the common market and could call on the services of any firm for that purpose.

MGH demanded that BMW Belgium should declare in writing that it would not prevent it from operating in this capacity. On 7 November 1975, BMW Belgium wrote to the legal advisers of MGH, stating that they would make no such declaration since there was no evidence to prove that MGH was in fact only an agent. It had gained the impression that MGH was really a dealer and was endangering BMW's Belgian distribution system.

By letter dated 24 November 1975, MGH suggested to BMW Belgium that it should agree that MGH would in future import new vehicles into Germany on the basis of the written authority of the purchasers in German who were involved. On 2 December 1975, BMW Belgium replied that MGH had still provided no proof that it was indeed acting only as an agent. The fact that MGH described itself as an agent was immaterial to the actual nature of its business. If MGH did not cease its activities of reselling, BMW Belgium would have to take steps.

(1) OJ No L 29, 3. 2. 1975, p. 8 (paragraph 30).

10. On 27 January 1976, MGH applied for an interlocutory injunction against BMW Belgium in the Antwerp Commercial Court, under Article 54 of the Belgian Trade Practices Act and Article 85 (1) of the EEC Treaty, seeking revocation of the circular of 29 September 1975.

11. On 20 February 1976, BMW Belgium sent the following circular to all Belgian BMW dealers :

'Sales of new BMW vehicles to unauthorized dealers

On 29 September 1975, we wrote to you on the subject of the new situation arising on the Belgian market following the sale of new BMW vehicles to dealers in other countries in 1975. At that time we made a number of recommendations and stated what, at least in our view, was and still is in your best interests.

We are informed that this circular and the letter attached to it are regarded by outsiders as instructions from importers to dealers, although this was not our intention.

If this has been the case, we should now like to put an end to any misunderstanding.

It was not in the past, nor is it now, our intention or that of the Dealer's Advisory Committee to impose specific instructions on you or to prohibit you from exporting. You are to regard our circular of 29 September 1975 as null and void to the extent that it might be construed as an export prohibition.

The object of that circular was to remind you that under your distribution agreement you are prohibited from selling BMW vehicles to unauthorized dealers in Belgium or elsewhere.

In no case do we wish or did we wish to prevent a BMW dealer from trading with an agent acting for private customers, but we do oppose transactions between BMW dealers and resellers.

With the agreement of the Dealers' Advisory Committee we should like once again to remind you that it is not in your own financial interest to confine your business to the sale of new BMW vehicles. A customer who brings his BMW vehicle to your for maintenance, buys spare parts and accessories from you and uses your servicing facilities is also providing you with the means of making a profit. The same applies when you take a customer's present vehicle in part exchange. Finally a satisfied customer will come back to you when he buys his next BMW.

We hope that we have now cleared up any remaining doubts as to the rights and duties of appointed BMW dealers in Belgium.'

12. Having issued this circular on 20 February 1976, BMW Belgium stated before the Antwerp Commercial Court that it would no longer refuse to sell new vehicles to MGH or prevent their sale by the Belgian distribution network provided MGH ceased reselling vehicles sold to it by BMW Belgium and acted solely as an importing intermediary agent, producing if necessary, an authority in each case. MGH accepted this statement made before the court. The president of the Commercial Court confirmed this agreement between the parties in settlement of the case. BMW Belgium was ordered to pay the costs.

13. Since that time MGH has brought an action against BMW Belgium in the Bielefeld Landgericht (regional court) (Case 10 162/76), seeking damages on the ground that, in breach of Article 85 (1) of the EEC Treaty, BMW Belgium had unlawfully and wrongfully prevented MGH from seeking to make a profit by arranging sales of new BMW vehicles in Germany.

14. From the correspondence between the applicant Heuer (letters dated 20 October, 24 November and 15 December 1975) and BMW Belgium (letters dated 7 November and 8 December 1975 and 23 January 1976) it appears that BMW Belgium was refusing to supply cars to Belgian BMW dealers for supply to Heuer, referring to its suspicion that Heuer was acting as a reseller. On 23 January 1976, BMW Belgium informed Heuer that in future it would no longer object to its import business, as Heuer had proved that on recent occasions it had indeed been acting only as agent. Heuer nevertheless succeeded in obtaining BMW vehicles from Belgian BMW dealers only until 6 August 1975. Subsequent attempts until 20 February 1976 were unsuccessful.

15. From figures supplied by BMW Belgium NV, the total number of new BMW vehicles re-exported to the Federal Republic of Germany alone between May and November 1975 was 103, but only 14 between December 1975 and October 1976, during which period no more than three vehicles were exported in any one month. In November 1975, the appropriate Belgian authority authorized an increase in retail prices, aligning Belgian prices more closely with those in other Community countries and reducing the incentive to re-export. Between 1 November 1975 and the end of 1976, there were several changes in the recommended list prices to consumers in Belgium and other Community countries, narrowing the differences in the prices actually charged in individual countries.

Whereas these differences between Belgian and German list prices for three popular BMW models between 25 August and 1 November 1975 were 12·2, 10·1 and 12·9 %, the differences between 20 September and 31 December 1976 were down to 3·6, 1, and 4·6 % respectively.

16. Between 18 July 1973, when it commenced business, and 30 September 1974, BMW Belgium achieved total sales of Bfrs [.....], of which Bfrs [.....] were accounted for by new cars. In the business year 1 October 1974 to 30 September 1975, sales totalled Bfrs [.....], of which Bfrs [.....] were accounted for by new cars. Between 1 October 1975 and 20 February 1976, a total of [.....] new BMW cars were delivered to a total value of Bfrs [.....].

BMW's 1975 and 1976 market shares in percentages for cars in Belgium and in the other countries where re-exports can be shown to have taken place were as follows :

	1975	1976
Belgium	2·3	2·0
Federal Republic of Germany (including West Berlin)	6·1	5·6
Netherlands	2·0	2·0
France	0·8	0·7
Italy	1·5	1·4
United Kingdom	0·6	0·7

The undertakings, from which originate the members of the Advisory Committee of BMW dealers who signed the circular of 29 September 1975 (see paragraph 4 above), achieved the following turnovers in Belgian francs in 1975 :

	Total	New BMW vehicles
Cocquyt	(.....)	(.....)
Jorssen	(.....)	(.....)
Hindrickx	(.....)	(.....)
Siau-Vermeesch	(.....)	(.....)
De Smeth	(.....)	(.....)
Vallé	(.....)	(.....)
Depotter	(.....)	(.....)
Wiliquet	(.....)	(.....)

17. The Commission began its investigations in this case with a request for information dated 26 November 1975, received by BMW Belgium on 28 November 1975, intended to establish whether and to what extent BMW Munich, BMW Belgium and the Belgian BMW Dealers' Advisory Committee were preventing exports from Belgium to other common market countries. The request had the stated object of ascertaining to what extent BMW Belgium or BMW dealers had infringed Article 85 of the EEC Treaty, whether BMW Belgium's application for exemption from the prohibition of Article 85 (1) should be dismissed and whether proceedings should be initiated under Article 15 (1) (a) and (2) (a) of Regulation No 17.

II. Applicability of Article 85 (1) of the EEC Treaty

Article 85 (1) prohibits, as incompatible with the common market, all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

18. The 47 Belgian BMW dealers who declared in writing that they accepted BMW Belgium's circular of 29 September 1975 are undertakings for the purposes of Article 85, and by their written declaration entered into an agreement with the undertaking BMW Belgium and with each other on the terms set out in BMW Belgium's circular of 29 September 1975 (see paragraph 4 above). The content of the agreement should be seen in the context of the market circumstances prevailing at that time (paragraphs 2, 3 and 15 above) and, above all, the circular from the Dealers' Advisory Committee to BMW dealers of 29 September 1975, dispatched together with BMW Belgium's circular of the same date and agreed in advance with BMW Belgium.

19. The Advisory Committee's circular of 29 September 1975 is also based on an agreement between the members of the Advisory Committee and between them and BMW Belgium, which approved the content thereof. The object of this agreement was to dissuade all Belgian BMW dealers from exporting any new vehicles at all.

20. The main content of these two agreements is as follows :

Whereas, by letter of 22 July 1975, BMW Munich clearly informed BMW Belgium that re-exports did not of themselves constitute a breach of the distribution agreement (paragraph 3 above), BMW Belgium's circular of 29 September 1975, like that of 4 July 1975 (paragraph 4) referred explicitly to the distribution agreement, which only prohibited sales to unauthorized dealers, but did not refer to the otherwise general freedom to export. Indeed, although exports were certainly not entirely prohibited, the letter further stated, despite what had been said in the circular of 4 July 1975, that Belgian dealers were still selling in Germany and the Netherlands and could not or would not understand the consequences of what they had been doing. Since BMW Belgium stated that one of the consequences was that BMW Munich would probably have to reduce the numbers of cars available for distribution in Belgium and that Belgian BMW dealers were creating serious problems for German and Dutch dealers, any businessman placing a reasonable interpretation on the terms of the circular could only conclude that its authors sought the abandonment of all export business — and indeed the circular was concluded by the following statement : 'Our view is therefore that in the present situation there is only one appropriate solution : henceforth no BMW dealer in Belgium will sell cars outside Belgium ...'. This can only mean that cars were not even to be sold directly to consumers or to firms acting as their agent. The fact that the circular sought a general prohibition of exports can be seen from the remainder of the above sentence, which in addition to prohibiting sales to unauthorized dealers appears to prohibit all exports ('henceforth no BMW dealer in Belgium will sell cars ... to firms who propose to export them'). Finally, the appeal that is then made to the 'absolute solidarity of the BMW network' is clearly designed to persuade Belgian BMW dealers to refrain from any exports which might disturb the business of BMW dealers in other Community countries.

The intention to impose a general export prohibition is further evidenced by the text of the circular from the Advisory Committee of the same day, agreed with BMW Belgium and unanimously supporting BMW Belgium's circular. The damaging effects to the network as a whole were referred to, it was indicated that the names of dealers that nevertheless insist on exporting would be made public, and it was made clear that harm would result if exports of any kind continued. The final sentence of the circular revealed its intention by stating the view of the Committee that 'the only advice it has to offer in this case is : "no more sales outside Belgium".'

21. The two agreements of 29 September 1975 (paragraphs 18 and 19 above) have the object, as can be seen from their manifest content (paragraph 20), of appreciably preventing, hindering and distorting competition in the common market. Where a distribution network operated by a motor vehicle manufacturer, based on sales by selected dealers throughout the common market and on concentration of sales promotion by each dealer primarily in his allotted territory, is reinforced by a general prohibition on exports by dealers even if in one Member State only no particular proof is required of the extent to which appointed dealers have been dissuaded by the export prohibition from selling to consumers outside their own allotted territory or would have been able to effect such sales in the absence of the prohibition. As stated clearly in its Decision of 13 December 1974 [1] and on other occasions [2], the Commission will exempt selective distribution systems in the motor industry under Article 85 (3) of the EEC Treaty, regarding the restrictions of competition inherent therein as indispensable for that purpose, only if there is no other restriction on the freedom of consumers to buy new cars anywhere in the common market or to effect such purchases by agents. An exemption always requires an examination as to whether potential competition remains between all the selected dealers in the common market, so that they are compelled through competitive pressures to react to each other's price structures and to respond to low prices quoted by other dealers. The export prohibition concerned in these proceedings sought to eliminate such pressures and insulate the market operated by Belgian dealers for new BMW vehicles from the markets operated by other dealers for these vehicles in the common market.

The finding that there was intentional restriction and distortion of competition is not invalidated, as the firms concerned allege, by the fact that the export prohibition was formally operated only for the fairly brief period 29 September 1975 to 20 February 1976. The decision as to whether an agreement of initially unlimited duration is incompatible with the common market and prohibited by Article 85 (1) of the EEC Treaty cannot depend on the length of time during which competition was actually disrupted. If it did, the Commission could take no action until competition had been disrupted, which cannot be the meaning of a prohibition on restrictive practices which is designed to protect competition. The fact also remains that BMW Belgium was obliged to revoke its circular of 29 September 1975 only because of the measures taken by the applicants (paragraphs 8 to 14) and the prompt reaction of the Commission (paragraph 17).

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(1) OJ No L 29, 3. 2. 1975, p. 1.

(2) Fourth Commission report on competition policy (1974), pp. 24 and 25 and 57 to 65 ; fifth Commission report on competition policy (1975), pp. 23 and 24 and 49 to 52.

The further allegation by the undertakings concerned that, immediately after they issued their circular, market circumstances had changed and consumer prices in Belgium had been aligned with prices in other Community countries is also of no relevance. They themselves do not deny that before and at the time of the circular there were price differences which meant that reimports were both possible and, from the consumer's point of view, economically desirable. BMW Belgium and the firms that signed the agreements of 29 September 1975 could not foresee, furthermore, whether consumer prices in the various Community countries might again diverge. The fall in re-exports to the Federal Republic of Germany noted by BMW Belgium after 1 November 1975 (paragraph 15) in no way invalidates the finding that the object of the agreements was to restrict competition appreciably.

Finally the BMW dealers concerned allege that they could not have infringed Article 85 (1) because the distribution agreement with BMW Belgium made them so dependent on BMW Belgium for business purposes that there was no question for them of failing to comply with BMW's request that they sign the circular. The distribution agreement does indeed create a degree of dependence, notably through its inherent prohibition of competition, the duration of the agreement, the opportunities for the examination of business records and for varying the treatment of individual dealers. However, the fact that of the 90 addressees of the circular, only 48 BMW dealers (one of whom has since died) signed, shows that there were 42 dealers who were not willing to enter into a written agreement to infringe the rules of competition of the EEC Treaty. The 47 dealers could have refused and ought to have done so.

22. Since it has been shown that the agreement had the object of appreciably restricting and distorting competition, there is no need, for a finding of an infringement, to proceed to consider the extent to which it also had the effect of restricting and distorting competition. It is accordingly unnecessary to determine what consumers were unable to obtain new BMW vehicles after 29 September 1975 as a result of the agreements and whether the applicants, in attempting to obtain more BMW vehicles, were acting solely as agents for consumers outside Belgium.

23. The fact that the general export prohibition in the agreement, which has the object of restricting and distorting competition in the common market, is such as appreciably to affect trade between Member States also follows from the very nature of such a prohibition. It related directly to inter-State trade in a specific branded product. Belgian BMW dealers retain the freedom to meet orders from consumers in the territory allotted to another Belgian BMW dealer, but are deprived of that freedom in inter-State trade. Yet, as the Commission has always held [1], trade in new BMW vehicles through distribution channels other than those set up by BMW Munich is precisely that which Article 85 (1) of the EEC Treaty aims to protect.

24. Accordingly the agreements of 29 September 1975 are incompatible with the common market and prohibited by Article 85 (1) of the EEC Treaty. The undertakings party to the agreements acted contrary to that prohibition until 20 February 1976. The requirements for a decision under Article 3 (1) of Regulation No 17 finding that there has been an infringement are accordingly satisfied.

III. Inapplicability of Articles 4 (2) (1) and 15 (5) of Council Regulation No 17

25. BMW Belgium has notified the Commission of its selective distribution system, which excludes unauthorized dealers from selling new BMW vehicles and consequently from exporting them from Belgium to other Community countries. However, no agreement prohibiting any export by Belgium BMW dealers from Belgium or sales to consumers in other Member States, which in both cases would go beyond the content of the distribution agreement as notified, has been notified to the Commission under Article 4 (1) of Regulation No 17.

There can be no doubt that persons agreeing to a general prohibition on exports cannot rely on Article 4 (2) (1) of Regulation No 17. The Commission does not therefore have to consider whether Article 85 (3) of the EEC Treaty applies to an agreement between BMW Belgium and 47 of its 90 Belgian appointed dealers by which a general export prohibition was introduced. An export prohibition which goes beyond a simple prohibition on sales to unauthorized dealers directly affects exports to other Member States for the purpose of this provision.

As no notification has been made, the Commission is not prevented by Article 15 (5) of Regulation No 17 from imposing a fine under Article 15 (2) (a) thereof in respect of the infringement.

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[1] Commission Decision of 28 September 1964 in Grundig-Consten (OJ No 161, 20. 10. 1964, p. 2545/64).
Judgment of the Court of Justice of 13 July 1966 in Joined Cases 56 and 58/64, Grundig-Consten [1966] ECR 299.
Commission Decision of 13 December 1974 in BMW (OJ No L 29, 3. 2. 1975, p. 1).
Fourth Commission report on competition policy (1974), pp. 24 and 25 and 57 to 65.
Fifth Commission report on competition policy (1975), pp. 23 and 24 and 49 to 52.

IV. Applicability of Article 15 (2) (a) of Council Regulation No 17

This provision empowers the Commission by decision to impose on undertakings fines of from 1 000 to 1 000 000 units of account where they intentionally or negligently infringe Article 85 (1) of the EEC Treaty.

26. BMW Belgium and the eight undertakings of which the proprietors or managers are members of the Belgian Dealers' Advisory Committee (paragraph 5) intentionally agreed to persuade all Belgian BMW dealers to participate in any agreement to refrain from all re-exports (paragraphs 19, 20, 21, 23 and 24). They consistently took part in the subsequent agreement between BMW Belgium and the 47 Belgian BMW dealers, this infringement being also intentional (paragraphs 18, 20, 21, 23 and 24). In the light of the Commission Decision of 13 December 1974 in the BMW case, the judgments of the European Court and the Commission Decisions concerning export prohibitions in distribution agreements [1], BMW Belgium and the eight members of the Belgian Dealers' Advisory Committee were aware that in agreeing a general export prohibition they were infringing Article 85 (1) of the EEC Treaty. This follows, in particular, from the fact that in their circular letter they subscribed to formulations of the general export prohibition which are not necessary for and go beyond a selective distribution system.

In fixing the amount of the fine under Article 15 (2) of Regulation No 17 regard shall be taken of both the gravity and the duration of the infringements (last sentence of Article 15 (2)).

The gravity of the infringement in this case lies in the fact that a selective distribution system which itself restricts competition has been compounded by a general export prohibition based on a prohibited agreement.

As to the question of the amount of the fine to be imposed on BMW Belgium, there is the aggravating circumstance that BMW Belgium invited others to commit the infringement and was in a position to exert and did exert economic pressure on the members of the Advisory Committee. By acting in such a manner BMW Belgian bears a major responsibility for the infringement, and hence liability to a fine. The indications given by BMW Munich made BMW Belgium perfectly aware that it was acting in breach of the prohibition in Article 85 (1) of the EEC Treaty (paragraph 3, in particular the letter from BMW Munich dated 22 July 1975). It cannot be pleaded in BMW's favour that German and Dutch BMW dealers had demanded action against re-exports. By not confining its action to enforcing the obligations of a selective system and by not advising of the need to adjust prices, BMW Belgium reacted improperly by resorting to territorial protection for BMW dealers outside Belgium by means of a prohibited restrictive practice.

On the other hand, as regards the amount of the fine to be imposed on the eight undertakings represented by members of the Belgian BMW Dealers' Advisory Committee, there are mitigating circumstances. As has already been said, they are dependent for business purposes on BMW Belgium (end of paragraph 21). However, they too cannot escape the charge that as spokesman for the Belgian BMW dealers they should not have taken part in a prohibited restrictive practice and they should not have sought its occurrence.

The fines to be imposed on BMW Belgium and these eight undertakings should reflect the fact that the agreement existed for only a relatively brief period and that its effects cannot be quantified precisely.

The turnovers of the undertakings in question and particularly their turnovers in new BMW vehicles (see paragraph 16) also determine the amount of the fine. The turnovers achieved give indications of the relevant market positions of the undertakings involved and thereby indicate the gravity of their involvement in the infringement. The turnovers are also important for the purpose of determining the degree to which the undertakings are affected by the fines imposed.

The fines to be imposed on the eight undertakings, the owners or managers of which form the Advisory Committee, are to be relatively small in view of the circumstances of the case. The fact that some of these undertakings had a relatively small turnover is also a factor to be taken into account in fixing the fine.

27. The other BMW dealers involved in the infringement (paragraphs 18, 20, 21, 23 and 24) were at least negligent by being unaware, when signing the agreement, that they were engaging in a prohibited restrictive practice. On reasonable reflection, they should have realized without difficulty that in signing the circular letter they agreed to a general export prohibition which went beyond the needs of a selective distribution system and thereby infringed the competition rules of the EEC Treaty. In the light however of their degree of involvement, the imposition of the lowest possible fine is appropriate. It therefore follows that no account can be taken of their differences in turnover,

[1] See note [1] of this Official Journal.

HAS ADOPTED THIS DECISION :

Article 1

It is hereby established that the undertakings named in Article 4 infringed Article 85 (1) of the Treaty establishing the European Economic Community by agreeing on the general export prohibition called for in the circular from BMW Belgium of 29 September 1975 and the circular from the Belgian BMW Dealers' Advisory Committee, and maintaining that prohibition from 29 September 1975 to 20 February 1976.

Article 2

The following fines are hereby imposed in respect of the infringement found in Article 1 :

1. BMW Belgium : 150 000 (one hundred and fifty thousand) units of account or 7 500 000 Belgian francs.
2. For each of the undertakings numbered 2 to 6 in Article 4 : 2 000 (two thousand) units of account or 100 000 Belgian francs.
3. For each of the undertakings numbered 7 to 9 in Article 4 : 1 500 (one thousand five hundred) units of account or 75 000 Belgian francs.
4. For each of the undertakings numbered 10 to 48 in Article 4 : 1 000 (one thousand) units of account or 50 000 Belgian francs.

Article 3

This Decision shall be enforceable in the manner provided in Article 192 of the Treaty establishing the European Economic Community.

The fines imposed under Article 2 shall be payable within three months from the date of adoption of this Decision to the following account :

Commission of the European Communities,
Banque Bruxelles Lambert,
310.0231000.32.

Article 4

This Decision is addressed to the following undertakings :

1. BMW Belgium NV, Pierstraat 231, 2550 Kontich ;
2. Autohandel O. Cocquyt NV, Maria van Bourgondiëlaan 63, 8000 Brugge ;
3. Etn W. Jorssen, Boomsesteenweg 427, 2610 Wilrijk ;
4. Garage Hindrickx, Meensesteenweg 86, 8800 Roeselare ;
5. Pvba J. Siau-Vermeesch, Lindanustraat 21, 9330 Dendermonde ;
6. Ets. J. De Smeth, Steenweg op Brussel 558, 1900 Overijse ;
7. Ets. Jo Vallé, Peerderbaan 114, 3690 Bree ;
8. Ets. J. Depotter, Ch. St. Ghislain 117b, 7950 Chièvres ;
9. Garage J. Wiliquet Sprl, rue David 61, 4800 Verviers ;
10. Ets. Rajans SA, chaussée de Nivelles 20, 1420 Braine-l'Alloud ;
11. Garage Verhaeren, avenue Odon Warland 226, 1090 Bruxelles ;
12. S. C. Dewilde Motor, chaussée de Vleurgat 73, 1050 Bruxelles ;
13. Ets. Autogamas Sprl, chaussée de Mons 711/713, 1070 Bruxelles ;
14. Ets. Houyoux, rue de Neufchatel 7/11, 1050 Bruxelles ;
15. Garage Léon Louyet Sprl, route de Mons 77—79, 6000 Charleroi ;
16. Station Albert 1er SA, avenue Albert 1er 277, 1320 Genval ;
17. Sprl Auto-Service, rue Anatole France 31, 7100 La Louvière ;
18. Ets. A. Petit & Co. SA, boulevard Frankignoul 8, 4020 Liège ;
19. Ets. Jean Blaise Sprl, rue d'Anderluss 64, 6558 Lobbes ;
20. Ets. Cuisinier, avenue de Jemappes 137, 7000 Mons ;
21. Ets. Briot Sprl, rue Dewez 18/20/22, 5000 Namur ;
22. Garage Georges Antoine, rue des Six Bonniers 10/12, 4100 Seraing ;
23. Garage Hubert Scaillet, chaussée de Dinant 43, 5311 Spontin ;
24. Ets. Ferracin, rue Ste. Barbe 106, 5600 Tamines ;
25. Ets. Le Stop, chaussée de Namur 250, 1300 Wavre ;
26. Autobedrijf De Ruysscher, O. L. Vrouwplaats 17/20, 9300 Aalst ;
27. Garage W. Termont-Vermeire, Veldekensstraat 41, 9991 Adegem ;
28. NV Centrauto, Plantin & Moretuslei 159/161, 2200 Borgerhout ;
29. Garage R. Geurts & Zn Pvba, Grotestraat 63/67, 3600 Genk ;
30. Etn. Dekkers, Rooigemlaan 619, 9000 Gent ;
31. Etn. J. Vandeperre Pvba, Steenweg op Brussel 510, 1500 Halle (Brabant) ;
32. J. Sebrechts, Turnhoutsebaan 42, 2241 Halle (Kempen) ;
33. Garage Van Avondt & Zn Pvba, Brusselsesteenweg 242, 3020 Herent-Leuven ;
34. Garage A. Ottevaere, Leuvensesteenweg 135, 2970 Hever ;
35. Ceres-Leterme Pvba, Augustijnenstraat 62, 8900 Ieper ;
36. Garage St Christophe Pvba, Burg. Vercruysselaan 26, 8500 Kortrijk.

37. Garage Vangoidsenhoven, Aarschotsesteenweg 42, 3306 Vissenaken-Kumtich ;
38. Garage Moderne-Ghyselinck J., Grote Kaai 17, 9100 Lokeren ;
39. Garage R. Kellens-Behiels, Jos. Smeetslaan 175, 3630 Maasmechelen ;
40. Garage S. De Mey, Aalterbaan 197, 9990 Maldegem ;
41. Etn. J. & M. Sels Pvba, Gen. de Wittelaan 8, Industriepark, 2800 Mechelen ;
42. Garage Tanghe Pvba, Steenweg op Haacht 51, 1910 Melsbroek ;
43. Pvba Gebr. Van den Bulck, Van Heybeeckstraat 13, 2060 Merksem ;
44. Pvba De Kempische Molen, Borgerhoutsedijk 165, 2400 Mol ;
45. Garage Aalbrecht W., Steenweg op Vilvoorde 210, 1890 Opwijk ;
46. Etn. Erco NV — W. Roefs, Bredabaan 1165/1167, 2120 Schoten ;
47. Garage A. Liesens, Neremweg 151, 3700 Tongeren ;
48. Garage Centrum-Mottoul, Walderdonk 99, 9070 Wachtebeke.

Done at Brussels, 23 December 1977.

For the Commission

Raymond VOUEL

Member of the Commission