COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 11/CR/Feb06

In the matter between:

The Competition Commission — Applicant

and

BMW Dealers — Respondents

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents.

Y Carrim

17 February 2006
Date

Concurring: U Bhoola, M Mokuena

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Held at Pretoria

CT Case No.:
CC Case No.: 2004Apr951

In the matter between:

The Competition Commission **Applicant**

And

BMW Dealers **Respondents**

AGREEMENT
BETWEEN THE COMPETITION COMMISSION AND THE RESPONDENTS ON THE TERMS OF AN APPROPRIATE CONSENT ORDER
In terms of section 49D of the Competition Act, 1998
(Act No. 89 of 1998), as amended

The Competition Commission ("the Commission") and BMW Dealers, represented by Berry Willis, in his capacity as Chairperson of the BMW Dealer Association of South Africa, being Respondents in Competition Commission Case Number 2004Apr951, hereby agree that application be made by the Commission to the Competition Tribunal for a consent order in terms of section 49D of the Competition Act No. 89 of 1998, as amended, on the terms set out below.

1. DEFINITIONS

For the purposes of this agreement and any consent order pursuant hereto, the following definitions shall apply unless otherwise stated or the context otherwise requires:

1.1 *"the Act"* means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

1.2 "*Commission*" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.3 "*Tribunal*" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.4 "*Complaint*" means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2004Apr951;

1.5 "*Consent Order Agreement*" means this agreement duly signed and concluded between the Commission and the Respondents;

1.6 "*Respondents*" means individual entities which have concluded dealership agreements with BMW South Africa (Pty) Ltd ("BMW SA") and constitute the dealership network through which BMW SA sells and distributes its motor vehicles in the Republic of South Africa.

2. BACKGROUND

2.1 During April 2004, following an investigation by the Commission in respect of alleged resale price maintenance, Toyota South African Motors (Pty) Ltd ("Toyota") and the Commission concluded a consent order agreement whereby Toyota, *inter alia*, agreed to pay an administrative penalty of R12 million.

2.2 Thereafter and during April 2004, the Commission commenced an industry-wide investigation in the motor industry to ascertain whether certain prohibited practices were taking place. The Commission summonsed BMW SA and certain of its dealers to provide it with certain documentation and to appear in person.

2.3 The Commission's investigation encompassed the following:

2.3.1 The fixing of prices and/or trading conditions by manufacturers / importers and/or dealers, a contravention of section 4(1)(b) of the Act;

2.3.2 Agreements between manufacturers / importers and their dealers containing restrictions that have the effect of substantially lessening or preventing competition in the market, a contravention of section 5(1) of the Act;

2.3.3 Minimum retail price maintenance imposed by manufacturers / importers on dealers, alternatively minimum retail price maintenance by agreement between the manufacturers / importers and their dealers, a contravention of section 5(2) of the Act; and

2.3.4 Excessive pricing by manufacturers / importers which are dominant in their respective markets, a contravention of section 8(a) of the Act.

3. COMMISSION'S INVESTIGATION

The following facts became apparent to the Commission during its investigation:

3.1 The Respondents are in a horizontal relationship;

3.2 The relationship between the Respondents and BMW SA is governed by the terms and conditions of a BMW dealer agreement concluded between BMW SA and each of the Respondents in terms of which each of the Respondents is appointed as a BMW dealer on a non-exclusive basis within a geographical territory;

3.3 The Respondents are members of the BMW Dealer Association of South Africa ("the Dealer Association");

3.4 The Dealer Association meets to discuss operational and strategic matters of mutual interest to the Respondents;

3.5 In the conduct of their business the Respondents make use nationally of the Focus Pro Program. This program *inter alia* includes a facility which is used to generate an Offer to Purchase or a Proposal in regard to the sale of a new motor vehicle. This facility contains a pop-up which requires the sales executive to obtain authorisation for a sale at a discount level higher than that set in the pop-up. Without obtaining such authorisation the sales executive is not able to generate an Offer to Purchase or a Proposal at the higher level;

3.6 The Dealer Association set the discount level above which authorisation was required at a level which was applicable to all of the Respondents; and

3 7 The Respondents stopped the above conduct in about December 2004, as soon as they became aware that the Commission was of the view that their conduct contravened the Act.

4. RELEVANT PROVISIONS OF THE ACT

Section 4(1)(b) prohibits the restrictive horizontal practice. Section 4(1)(b) of the Act states:

> *"4. Restrictive Horizontal Practices Prohibited:*
>
> *1) An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-*
>
> *a)....*
>
> *b) it involves any of the following restrictive horizontal practices:*
>
> *i) directly or indirectly fixing a purchase or selling prices or any other trading condition;*
>
> *ii)....*

5. COMMISSION'S FINDINGS

5.1 The Commission is of the view that the conduct referred to in paragraph 3 above amounts to a prohibited practice in terms of section 4(1)(b) of the Act in that:

5.1.1. there was an agreement (in the form of an arrangement or understanding) between, or concerted practice by, the Respondents to directly or indirectly fix selling prices.

5.2 In regard to the other possible contraventions of the Act which were the subject of this investigation under case number 2004Apr951, the Commission has decided not to proceed with any referral to the Tribunal.

6. AGREEMENT CONCERNING CONDUCT

It is recorded that the Respondents and the Dealer Association do not admit having contravened the Act. Nevertheless the Dealer Association has taken steps to bring to an end the conduct regarded by the Commission as a contravention of the Act.

The Commission and the Respondents as represented by the Chairperson of the Dealer Association agree that the Dealer Association and its members shall:

6.1 not impose a maximum discount structure on any motor vehicle or BMW products;

6.2 take all reasonable steps to ensure that the Respondents terminate their part in implementing the alleged anti-competitive conduct;

6.3 not itself or through any officer or employee of the Dealer Association or any person authorised to act on behalf of the Dealer Association notify to dealers, or otherwise publish in relation to any goods, a price stated or calculated to be understood as the maximum discount which may be charged on the sale of any BMW products;

6.4 refrain in the future from engaging in any of the alleged conduct in conducting their business which may contravene the Act;

6.5 circulate to all Respondents within one month from the date of this agreement being confirmed as a consent order by the Tribunal, a statement conveying the substance of the consent order and advising them:

6.5.1 that they are free to sell and display for sale of goods supplied by BMW SA at whatever price they may choose;

6.5.2 that the Dealer Association does not in any way condone and positively discourages agreement between dealers as to the prices to be charged or quoted for goods supplied by BMW SA;

6.6 institute, within twelve months from the date of this order, a compliance programme designed to ensure that the Respondents are informed about their obligations under Competition Law and the existence and substance of this consent order;

6.6 submit its compliance programme to the Commission within twelve months from the date of confirmation of this consent order.

7. ADMINISTRATIVE PENALTY

7.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act in settlement of any contravention of section 4(1)(b)(i) of the Act in relation to the period from September 1999 to date of signature hereof, the Respondents have agreed to pay an administrative penalty in the amount of R8 000 000-00 (eight million rand). It is recorded that the amount does not exceed 10% of the Respondents' combined turnovers during the preceding financial year.

7.2 The administrative penalty will be paid not later than thirty (30) business days after the confirmation of this agreement as a Consent Order by the Tribunal.

7.3 The penalty amount is to be paid to the Commission whose banking details are as follows:

Bank: ABSA
Name of Account : The Competition Commission Fees
Branch Name: Pretoria
Branch Code: 323345
Account Number: 4050778576

7.4 The Commission will pay over the penalty amount to the National Revenue Fund, referred to in section 59(4) of the Act.

8. FULL AND FINAL SETTLEMENT

This Agreement, upon confirmation by the Competition Tribunal, concludes proceedings between the Commission and the Respondents

under Commission Case Number 2004Apr951.

9. EFFECT

The Respondents record that nothing in this consent order agreement amounts to an admission of liability on their part and no statements shall have any effect in any private lawsuit that may be brought against the Respondents.

10. VARIATION

No contract varying, adding to, deleting from or cancelling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.

Dated and signed at Pretoria on the 31 day of January 2006.

Berry Willis
Chairperson
BMW Dealer Association of South Africa

Dated and signed at Pretoria on the 01 day of February 2006.

Shan Ramburuth
Acting Commissioner
Competition Commission

"A"

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