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The Federal Administrative Court reverses the sanctions of the Competition Commission against Pfizer, Eli Lilly and Bayer (ED Medications)

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On 19 December 2017 the Federal Administrative Court issued three judgments reversing the sanctions against the producers Pfizer, Eli Lilly and Bayer imposed by the Competition Commission which totaled in CHF 5.7 million. The court concludes that the non-binding price recommendations published by the three pharmaceutical companies did not restrict competition but rather prevented excessive prices.

A. Background

The pharmaceutical companies Pfizer AG ("Pfizer"), Bayer (Schweiz) AG ("Bayer") and Eli Lilly (Suisse) SA ("Eli Lilly") sell their medications for erectile dysfunction, Viagra (Pfizer), Levitra (Bayer) and Cialis (Eli Lilly) in Switzerland through pharmacies and self-dispensing physicians who are authorized to sell medications themselves. These medications are prescription drugs, but not refunded by health insurers ("ED Medications"). All three pharmaceutical companies have published retail price recommendations ("RPR") for these medications which were explicitly designated as "non-binding".

In November 2009, the Competition Commission ("ComCo") ruled that publishing and following the RPR would result in an unlawful and sanctionable vertical price fixing within the meaning of Art. 5 (1) in conjunction with Art. 5 (4) CartA. Pfizer, Bayer and Eli Lilly were prohibited from continuing to publish the RPR. In addition, the pharmaceutical companies were fined a total of CHF 5.7 million.

In its ruling of 28 January 2015, the Federal Supreme Court ruled that the application of the Federal Cartel Act was not excluded by health-care regulations, namely the absolute prohibition of public advertising, and rejected the case to the Federal Administrative Court ("FAC"). However, such regulations, as competitive factors, influence the assessment under antitrust law. Therefore, the prohibition of public advertising also had a significant influence on the assessment of the RPR.

B. Judgements of the FAC of 19 December 2017

With its judgments of 19 December 2017, the FAC reverses the prohibitions and sanctions imposed by the ComCo.

a) FAC recognises economic ambivalence and efficiency-enhancing effects

The FAC had to examine whether the RPRs for the disputed ED Medications led to a concerted practice in accordance with Art. 4 (1) (in conjunction with Art. 5 (1) and (4) CartA). The RPRs would then in principle have been able to be sanctioned as a vertical price fixing.

The considerations of the FAC are groundbreaking in view of the classification of vertical price fixing and recommendations under Swiss anti-trust law: Due to the economic ambivalence, price recommendations have to be examined on a case-by-case basis under the concrete, market-related circumstances. According to the FAC they can serve as mechanisms to overcome market failures if, for example, recommended prices eliminate price uncertainty for end consumers.

Unilaterally announced, recommended prices are only to be classified as critical under anti-trust law if they lose their recommendatory character and are monitored and enforced by exerting pressure or granting incentives. However, even vertical price fixing, which is fundamentally problematic, can have efficiency-enhancing effects (e.g. the prevention of double marginalisation), which must be taken into account in the context of a possible justification in accordance with Art. 5 (2) CartA.

b) Due to the regulatory framework for medicinal products and medical devices, the RPRs acted as price caps

The FAC's approach is based on the prevailing economic doctrine which declares fixed maximum prices as permissible, unless they result in minimum or fixed prices or facilitate collusion. This applies all the more to *self-imposed* maximum price recommendations as well as to recommended prices which, *without being explicitly declared as such*, resulted in maximum prices.

In this case, the effect of a price cap resulted because the comprehensive prohibition on public advertising, which is stated in Art. 32 (2) (a) of the Federal law on medicinal products and medical devices, severely restricts market transparency for prescription-only medications. According to the FAC, as long as the prohibition on public advertising does not allow effective price publicity among pharmacies and self-dispensing physicians, the patient cannot avoid excessive prices by means of price comparisons.

c) The FAC criticises file management and investigation methods of the ComCo

In large parts of the judgment, the FAC criticises the file management and investigation methods of the ComCo.

For example, the FAC stated that the ComCo was unable to dispel doubts about the reliability of the evaluated responses to its questionnaires.

In particular, the FAC criticises that the ComCo only worked with aggregated figures for all three medications concerned and did not examine each of the three medications separately as to the price recommendations in question had an effect resulting in sanctionable fixed prices. In the opinion of the FAC, it also weighs heavily that the ComCo ignored the importance of the price in the selection of the medication required for treatment by the prescribing physician, and that the investigations on the degree of compliance (see below) were hindered by complicated questions that were incomprehensible to the addressees of the questionnaires.

d) The degree of compliance as such is not decisive

The FAC considers that the number of resellers complying with price recommendations is not sufficient without further evidence in order to demonstrate a coordinated behavior and thus an agreement within the meaning of Art. 4 (1) CartA. This degree alone is *„barely meaningful from a competition point of view“*.

With its criticism of file management and investigation methods, the FAC doubts the degree of compliance ascertained by the lower court. Around two thirds of the market volume for ED Medications sold via the pharmacy channel was accounted for by pharmacies that did not strictly adhere to the retail price recommendations or granted discounts on them. A similar picture also emerged among the self-dispensing physicians. Therefore, the degree of compliance had to be significantly lower than portrayed by ComCo.

In the end, however, the degree of compliance did not matter. Due to the special peculiarities of the regulatory framework for medicinal products and medical devices remedies, the RPR resulted in a price cap, so that further evidence was not required and even a rejection to determine the degree of compliance was unnecessary.

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