

Kluwer Competition Law Blog

New Swiss Supreme Court decision reshapes assessment of lawful price recommendations and vertical price fixing

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The Swiss Federal Supreme Court (the “**Court**”) found in its decision of February 4, 2021, 2C_149/2018 (the “**Decision**”) that Pfizer Ltd. (“**Pfizer**”) had entered into an unlawful vertical price agreement (concerted practice) with pharmacies and physicians limiting competition by issuing vertical price recommendations for Viagra. The decision raises questions as to whether and under what conditions price recommendations are lawful under Swiss competition law.

Facts

Pfizer, like other drug manufacturers, provided a price recommendation for Viagra to its distributors (pharmacies and physicians) by means of a specialised database. As the database was connected to the cash registers, they showed the recommended price by default when the distributors scanned the bar code of Viagra. However, the distributors could still change the price manually. Pfizer had neither exercised pressure nor offered any incentives to the distributors for adhering to the recommended price. Contrary, some distributors even asked Pfizer to provide them with a recommended resale price. Almost 90 % of all distributors fully or partially adhered to the recommended price.

Considerations of the Federal Supreme Court

Agreement (concerted practice) Limiting Competition

The Court concluded that the price recommendation for Viagra and the conduct of the distributors qualify as a concerted anti-competitive practice within the meaning of Article 4(1) of the Swiss Cartel Act (“**CartA**”).

According to the Court, for a concerted anti-competitive practice four elements need to be fulfilled: (a) a concerting, (b) effective market conduct following the concerted action, (iii) a causal link between the concertation and the effective market conduct, and (iv) a restriction of competition. The Court held that at the case at hand all four elements are met:

Regarding the concerting, the Court argued that the recommended price had been constantly

communicated to the distributors through the specialised third-party database. As the cash register showed the recommended price by default when the distributors scanned the bar code of Viagra, the distributors would have been fully aware thereof. The Court went on to state that Pfizer could assume that the distributors would not adjust the recommended price as this would have required additional efforts (own calculations and software adjustment). That would have been why the distributors followed the price recommendation or at least took them into account and set their prices accordingly. In doing so, the distributors would have accepted the price recommendation of Pfizer. According to the Court, the distributors were aware that all other points of sale had the same price information of Pfizer. Therefore, the Court concluded that Pfizer and the distributors were concerting the resale price. In this respect, the Court also referred to the fact that certain distributors have actively asked Pfizer to provide a price recommendation for Viagra, as this amounted to additional communication between Pfizer and its distributors.

With regards to the effective market conduct, the Court assessed the number of distributors applying the recommended price (first level of adherence) as well as the number of units sold by the distributors at the recommended price (second level of adherence). The Court held that the facts show that Pfizer's price recommendation has been followed by the distributors on both levels. Almost 90 % of the pharmacies and physicians would have applied the recommended prices fully or partially, the critical threshold being 50 %. The Court, therefore, concluded that the success of the concerting – a corresponding market conduct – can be affirmed.

With respect to the causal link, the Court stated that if – like in the case at hand – concerting is proven, there is a rebuttable presumption that the undertakings involved have taken the exchanged information (the recommended price in the case at issue) into account in determining their market conduct. This would apply in particular if concerting takes place regularly over a long period of time. In the opposite case, i.e. if competitors behave in a similar manner, this may indicate a concerted practice. With these two relaxations of the standard of proof regarding the causal link, the Court follows the case-law of the European Court of Justice. Concerning the standard of proof, the Court further stated that the standard of proof required to establish a concerted practice should in general not be set too high.

Eventually, the Court went on to state that Pfizer's price recommendation had the object and effect of restricting competition. It argues that the uniform pricing amongst the distributors at least impeded competition and that its objective was to eliminate competition. Furthermore, the facts that most of the points of sale adhered the recommended price and that the price for the drug would have been lower without the price recommendation would indicate its effect of restricting competition.

Therefore, unlike to the lower instance, the Court concluded that the vertical price recommendation constituted a concerted practise within the meaning of Article 4 para. 1 CartA, which must be assessed under Article 5 CartA in a next step.

Unlawful Price Agreement according to Article 5 CartA

The Court concluded on the basis of the high level of adherence to Pfizer's price recommendation that Pfizer and its distributors had entered into an unlawful price agreement pursuant to Article 5(4) CartA. Therefore, it would be assumed that effective price competition is eliminated.

Although this presumption could be rebutted such agreements still impede competition significantly. To be lawful, it would be required that such agreement may be justified by efficiency reasons. According to the Court, these were not given in the case at hand. Neither the prevention of double marginalisation nor the reduction of transaction costs may justify Pfizer's behaviour.

The Court agreed with the Competition Commission in stating that the existing competition among wholesalers prevented imposing them excessive margins. The Court also rejected Pfizer's argument that without the recommendation, the prices for Viagra would likely have increased, as those distributors that deviated from the price recommendation had set their prices lower. Furthermore, vertical price agreements that increase efficiencies may only occur for a limited period of time.

The Court further rejected the argument that price recommendations would have reduced transaction costs because distributors that did not adhere to Pfizer's price recommendation would have set the prices below and not above the recommended price. By the same token, there would be no reason to assume that prices would have been significantly higher on average without the price recommendation. Distributors would have been able to determine their own costs and resale prices, based on modern IT tools, even without price recommendations.

Therefore, the Court found that Pfizer and its distributors had entered into an unlawful price agreement pursuant to Article 5(4) CartA which eliminated effective price competition and that Pfizer requires to be sanctioned.

Responsibility of Pfizer

The Court stated, that by knowingly and willingly communicating its price recommendation to pharmacies and physicians by means of the electronic data transmission system Pfizer had to assume that such distributors would make use of such price recommendation. Hence, Pfizer had taken the decisive step to a concerting practice and accordingly should have been aware that this behaviour was problematic under Swiss competition law.

Calculation of Fine

According to the Court, Pfizer has violated Swiss competition law in a way that triggers fines. Concerning the amount of the sanction, the Court stated that the lower court did not establish the facts sufficiently for calculating it. In addition, the amount of the sanction would be in the discretion of the lower court and, hence, not subject to the review of the Court. Therefore, it remitted the case to the lower court in order to determine the fine.

Comments

The decision of the Court is deplorable for several reasons. It is particularly striking that the Court affirms a concerted practice, although Pfizer neither exerted pressure on the distributors nor offered any incentives for adhering the recommended prices. Consequently, a company that provides its

distributors with non-binding price recommendations has no influence on whether it is entering into an unlawful price agreement. This is particularly disturbing in the case at hand since the competition authorities only sanctioned the manufacturer but not the distributors whose behaviour only led to the unlawfulness of the recommended prices. The decision also gives rise to criticism from a procedural point of view. In order to assess whether Pfizer behaved unlawfully and in particular, whether the conduct could be justified by efficiency reasons (Article 5(2) CartA), the Court relies on facts that were only established by the Competition Commission but not reviewed by the Federal Administrative Court. With regard to the fact-finding, Pfizer was thus deprived of an instance.

Implications for Antitrust Practice

This decision raises questions as to whether and under what conditions price recommendations are lawful under Swiss competition law. As the Court relied strongly upon the argument of constant communication between Pfizer and the distributors, communication on price recommendations between the manufacturer and the distributors and in particular providing the recommended prices through an electronic third-party database seem to be problematic from an antitrust point of view. This decision is likely to have implications beyond the assessment of vertical price recommendations. Since the Court seems to be willing to accept a lower standard of proof concerning concerted practice it can be expected that the competition authorities will take a tougher stance on information exchange in general.

Marcel Meinhardt and his team from Lenz & Staehelin represent Pfizer in this proceeding in front of the competition authorities.

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