International Development

Non-binding 'recommended price' as concerted practices—The Federal Supreme Court of Switzerland rules on recommended prices that are communicated electronically to retailers

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I. Introduction

In a recent case (Judgment 2C_149/2018 of 4 February 2021), the Federal Supreme Court of Switzerland [hereafter: *FSC*] assessed the conditions under which a so-called 'recommended price' qualifies as an unlawful vertical agreement restraining competition within the meaning of the Swiss Federal Act on Cartels and other Restraints of Competition [hereafter: *CartA*].[1] While 'standard' recommended prices are typically set out in catalogues or lists, the recommended price in the case at hand was communicated to the points of sale via an electronic database system. The price automatically appeared to a retailer when he or she scanned the barcode of the product.

To the best of our knowledge, this situation differs from recommended price cases that have been assessed under EU law to date. In particular, cases in which a manufacturer or distributor communicates its recommended price to retailers directly via the operator of an electronic database system are not considered by the Commission either in the actual[2] nor in the draft[3] version of its Guidelines on vertical restraints. The FSC thinking for this type of recommended price is therefore potentially of great interest to European competition authorities and to the practice.

The reasoning of the FSC consisted in two main parts. Firstly, the FSC assessed whether the recommended price was to be defined as a concerted practice that qualified as an *agreement affecting competition* within the meaning of Art. 4 (1) CartA. The Court took into review the specificities of concerted practices, the existence of a successful coordination between the parties in particular. Secondly, having concluded that the recommended price was in reality a concerted practice that qualified an as agreement affecting competition, the FSC stated that this agreement was an *unlawful agreement affecting competition* under Art. 5 (1) and (4) CartA, which may be sanctioned by a fine (Art. 49*a* CartA). Lacking the factual elements necessary to sanction the conduct, the FSC referred the case back to the lower court, i.e. the Federal Administrative Court [hereafter: *FAC*].

Key Points

- Pfizer issued non-binding 'recommended prices' for Viagra that were automatically transmitted to retailers via an electronic database system; the prices appeared when the barcode of the product was scanned.
- Such a case has not yet been encountered by European competition authorities; the assessment of the Federal Supreme Court of Switzerland plays a pioneering role.
- Recommended prices may qualify as a concerted practice that constitutes an unlawful agreement affecting competition.
- According to the ruling, a concerted practice exists when at least 50 per cent of the retailers comply with a recommended price; a retailer complies with a recommended price when at least 50 per cent of the products are sold with no discount.

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1 Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act, CartA), SR 101.

2 Guidelines on vertical restraints [2010] OJ C130/1, paras 46, 223–229.

3 Commission, 'Approval of the content of a draft for a Communication from the Commission—Commission Notice: Guidelines on vertical restraints' (Communication) [2021] OJ C359/12, paras 173–174, 183–186.

II. Pfizer's 'recommended price' and the proceeding at hand

Pfizer AG [hereafter: *Pfizer*] distributes Viagra in Switzerland for its mother company. This medicine, used to treat erectile dysfunction, is available only by prescription. Viagra is a so-called *Hors-List Medicine* ('*Hors-Liste-Medikament*'), which are not reimbursed by the Swiss compulsory health insurance scheme.

The case at hand dates back to the year 2006, when the Swiss Competition Commission [hereafter: *ComCo*] opened an investigation against Pfizer. The company had issued what it called 'non-binding recommended prices' for Viagra to retailers that reached them in a processed form through an electronic database system run by an independent operator. This database system contained the barcode corresponding to the product and when a retailer—a pharmacy or self-dispensing physician—scanned a package of Viagra, the price automatically appeared, provided the retailer had not previously entered a different retail price. In other words, Pfizer communicated its price for Viagra, which was entered into an electronic database system, and this price was automatically transmitted to retailers who used the database system; the 'recommended price' thus appeared to retailers when they scanned the product. The nature of the system was known to the points of sale.

In considering the Viagra case, the ComCo concluded on 2 November 2009 that the publication and automatic transmission of the recommended price to points of sale through the electronic database system, together with the retailer's compliance with these prices, constituted an unlawful agreement eliminating competition within the meaning of Art. 5 (1) *cum* 5 (4) CartA. Unlawful agreements within the meaning of this article cover both agreements properly so-called and concerted practices withing the meaning of Art. 4 (1) CartA (hereafter under *III.A.*)

According to the FSC, the communicated price at least partially oriented the points of sale: they took this price into account when they fixed the retail price of Viagra.[4] Pfizer was fined in the amount of CHF 2'860'174.-. [5]

Pfizer launched an appeal against the decision of the ComCo that was upheld by the FAC on 3 December 2013. For the FAC, which did not examine the appeal on the merits, the CartA did not apply to the case at hand. This judgment was annulled by the FSC on 28 January 2015, which referred the case back to the FAC. The FAC again upheld Pfizer's appeal on 19 December 2017, concluding that the company's conduct did not qualify as an unlawful agreement affecting competition under Art. 4 *cum* 5 CartA. This second judgment of the FAC was successfully appealed by the Swiss Federal Department of Economic Affairs, Education and Research in the case at hand. The case will be reviewed once again by the FAC, which will have to assess the sanction imposed on Pfizer by the ComCo.

III. Legal assessment

A. Introduction: Pfizer's 'recommended price' for Viagra as a concerted practice that eliminates effective competition

The analysis of the FSC focused on whether the 'recommended price' for Viagra and the behaviour of the points of sale—pharmacies and self-dispensing physicians—qualified as an unlawful agreement within the meaning of the CartA. What Pfizer qualified as a non-binding recommended price might indeed have amounted to disguised price fixing [*Preisvorgabe*].[6]

The issue of whether an agreement affecting competition (Art. 4 [1] CartA) is unlawful according to Art. 5 CartA must be examined separately. The legal assessment conducted by the FSC regarding Pfizer's recommended price was thus separated into two parts.

- Firstly, the FSC assessed whether Pfizer's 'recommended price' constituted an 'agreement affecting competition' (hereafter under *B.*); these agreements are '*binding or non-binding agreements* and *concerted practices* between undertakings [. . .] which have a restraint of competition as their object or effect' (Art. 4 [1] CartA, emphasis added).
- Secondly, after having concluded that Pfizer's 'recommended price' was a concerted practice that qualified as an agreement affecting competition (Art. 4[1] CartA), the Court examined whether this concerted practice was an 'unlawful agreement affecting competition' within the meaning of Art. 5 CartA (hereafter under *C.*). According to Art. 5 (1) CartA, unlawful agreements affecting competition include those agreements that significantly

4 Federal Supreme Court of Switzerland, Judgment 2C_149/2018 of 4 February 2021, para 5.2.1.

5 Eli Lilly (Suisse) SA—the distributor for Switzerland of the medicine for erectile dysfunction *Cialis*—and Bayer (Schweiz) AG—the distributor for Switzerland of the medicine for erectile dysfunction *Levitra*, were also involved and sanctioned following the investigation relating to the recommended prices passed to retailers through an electronic database. Unlike Pfizer, however, Eli Lilly (Suisse) SA and Bayer (Schweiz) AG did not appeal against the decision of the ComCo, which is why they did not appear as parties in the present proceeding.

6 Judgment 2C_149/2018 (n 4), para 5.1.3.

restrict competition in a specific market as well as agreements that eliminate effective competition. In case of vertical agreements, Art. 5 (4) CartA specifies that the elimination of effective competition is presumed in case of agreements regarding fixed or minimum prices (often referred to as 'resale price maintenance').

B. Pfizer's 'recommended price' as a concerted practice affecting competition (Art. 4 [1] CartA)

The term 'recommendation', while not defined by the law, is understood as a unilateral, legally non-binding statement that is addressed to a recipient and aimed at influencing its behaviour.[7] From the point of view of competition law, the designation of conduct as a recommendation is not determinative: what counts is whether the conduct constitutes an agreement affecting competition according to Art. 4 (1) CartA. Such agreements cover both agreements properly so-called and concerted practices. This definition being consistent with the notion defined by Art. 101 TFEU, the FSC also relied on the case law of the Court of Justice of the European Union [hereafter: *CJEU*] in its assessment.

After having found that Pfizer's recommended price did not qualify as an agreement properly so-called,[8] the Court analysed whether a concerted practice existed.

A concerted practice qualifies as an agreement affecting competition when it has as its object or effect a restriction of competition. In line with EU law, the FSC explained that the concept of concerted practice consists of three elements that must be assessed separately: (1.) a coordination that is the consequence of a direct or indirect contact between undertakings; (2.) success of that coordination that materializes in a certain market behaviour; and (3.) a causal link between the coordination and its success.

An undertaking that provides information regarding its prices must be particularly vigilant.[9] As a rule, a recommended price constitutes a concerted practice (and thus an agreement affecting competition within the meaning of Art. 4(1) CartA) if the coordination that it creates reaches a certain qualitative degree of success. An overall assessment must be conducted: a certain degree of compliance with a given coordination may be sufficient to prove that a concerted practice exists, although pressure to make the coordination work may also be required in addition, depending on the specificities of the case at hand.[10]

1. Coordination

A concerted practice in the sense of Art. 4 (1) CartA exists when there is an illegitimate *coordination* among market participants regarding their future conduct. Quoting the *ICI* judgment of the CJEU, the FSC recalled that a concerted practice—contrary to an agreement—does not require a concurrence of wills.[11]

A concerted practice must be distinguished from mere parallel behaviour, where undertakings spontaneously react in the same way or imitate each other. Parallel behaviour relies on information that can be obtained by observing the behaviour of market participants, knowledge of which is a prerequisite for a company to be competitive. A concerted practice, on the other hand, is based on exploiting pieces of information that are not freely accessible under normal market conditions (i.e., competition on the merits), but that are available following a conscious exchange of information between market participants. This information exchange enables coordination between market participants by reducing or eliminating the uncertainty that exists with regard to the reactions to a company's competitive behaviour. What is crucial is the actual exchange of information relating to the market strategy of a company, the way the information is exchanged being irrelevant.[12] No bilateral or multilateral exchange is needed: unilateral information behaviour may also be considered as coordination if such behaviour leads competitors to adapt their market conduct, following the recommended price.[13]

Relying on *Eturas*, the FSC stated that communication—and thus coordination—takes place whenever a manufacturer notifies a recommended price for its product—Viagra in the present case—to the operator of an electronic database system, and when the consequence of this conduct is that the recommended price appears to retailers when they scan the product barcode, so that their attention can be drawn to the price.[14] Indeed, in *Eturas*, the CJEU ruled that coordination exists from the moment

7 Judgment 2C_149/2018 (n 4), para 4.2.
8 Judgment 2C_149/2018 (n 4), para 4.4.1.
9 See already Joined Cases 100 to 103/80 *SA Musique Diffusion française and others v Commission*, EU:C:1983:158 para 75.
10 Judgment 2C_149/2018 (n 4), para 4.5.1. See also Case C-74/14, *'Eturas' UAB e.a. v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42, para 36.
11 Judgment 2C_149/2018 (n 4), para 3.4.2.1 and Case 48/69 *Imperial Chemical Industries Ltd. v Commission*, EU:C:1972/70, paras 64, 67.
12 Judgment 2C_149/2018 (n 4), para 3.4.2.2. See also *Eturas* (n 10), para 44; Carsten Grave and Jenny Nyberg, 'Art. 101 Abs. 1 AEUV', in Ulrich Loewenheim, Karl M. Meesen, Alexander Riesenkampff, Christian Kersting and Hans Jürgen Meyer-Lindemann (eds), *Kartellrecht, Kommentar zum Deuschen und Europäischen Recht* (4th edn, C.H. Beck 2020) para 312.
13 Judgment 2C_149/2018 (n 4), para 3.4.2.3.
14 Judgment 2C_149/2018 (n 4), para 5.2.2.

a participating undertaking is aware of the electronic communication sent by an external system administrator, unless the undertaking dissociates itself from the content of the measure or does not comply with it[16].

Pfizer knowingly and willingly communicated the price for Viagra to the retailers through the electronic database system; this behaviour enabled the points of sale to become aware of the 'recommended price' when they read the product barcode. Pfizer could thus assume that the points of sale would need to make an additional effort if they wanted to deviate from the communicated price. On the other hand, the retailers could assume that the price displayed by the system was an optimal retail price, based on market research carried out by Pfizer, and they were aware that each had equal access to the same price information. Therefore, the points of sale at least tacitly agreed with Pfizer's 'recommended price' as a result of its communication through the database system.

Assessed together, Pfizer's behaviour resulted in the reduction or elimination, at the downstream level, of the uncertainties about the reactions of other market participants to their own behaviour.

Interestingly, in an *obiter dictum* the FSC assessed the possible consequences of the fact that Pfizer had been contacted by certain dealers who pressured the company to provide them with recommended prices. The Court explained that this additional contact could lead to qualify the recommended price as an agreement properly so-called instead of a concerted practice: the request made to Pfizer to set prices would have been accepted by Pfizer through the issuance of the recommended price.[16]

2. Success of the coordination

The existence of coordination between undertakings is not sufficient, in itself, to qualify a conduct as a concerted practice. Unlike an agreement properly so-called, which affects competition in the absence of any specific conduct by the parties, coordination has to materialise in a certain market behaviour for a concerted practice to exist.

Assessing the success of the coordination typically means assessing whether a more or less visible behaviour exists in the market, although internal measures may also prove that an implementation has taken place. The decisive factor is the degree of compliance with the recommended price, i.e. to the coordination.

Two degrees of compliance must be distinguished. The first degree of compliance relates to the number of retailers that apply the recommended price; it is relevant to determining whether a concerted practice within the meaning of art. 4 (1) CartA exists. The second degree of compliance relates to the number of units sold at the recommended price by the retailers; this analysis is relevant to determining whether the recommended price—i.e., the concerted practice within the meaning of Art. 4 (1) CartA—constitutes an unlawful agreement affecting competition within the meaning of Art. 5 CartA.[17]

The first degree of compliance aims at determining, *among the retailers that sell Viagra*, how many follow the recommended price and are thus party to the concerted practice. The decisive element is whether or not the price of Viagra deviates from Pfizer's recommended price.[18]

The FSC has ruled that a concerted practice is deemed to exist when at least 50 per cent of the points of sale comply with the recommended price. Again citing *Eturas*, the FSC explained that a retailer is deemed to follow an independent pricing policy—and thus not follow a recommended price—when it offers general or systematic discounts, i.e., where it systematically charges a price that is different from the recommended price. On the other hand, if a point of sale solely grants selective discounts (for example, a pharmacist who sold Viagra to all her customers in accordance with the recommended price, except to one of her friends), it is deemed to follow the recommended price;[19] this is the case when a retailer provides selective discounts in fewer than 50 per cent of instances.[20]

In the case at hand, the ComCo found that 89.3 per cent of pharmacies and 81.7 per cent of physicians had set the prices for Viagra in accordance with the recommended price that had been electronically transmitted, while the remaining 10.7 and 18.3 per cent, respectively, had set their prices independently. The degree of compliance to the recommended price was thus far above the required compliance rate of 50 per cent:[21] the coordination was (extremely) successful.

3. Causal link

A concerted practice exists whenever there is a causal link between the coordination and its success, irrespective of other causes.

In the case at hand, the FSC found that a direct causal link existed between the coordination and the market behaviour in view of the fact that the coordination lasted

15 *Eturas* (n 10), paras 46, 49–50.
16 Judgment 2C_149/2018 (n 4), para 5.2.3.
17 Judgment 2C_149/2018 (n 4), para 5.3.3.
18 Judgment 2C_149/2018 (n 4), para 5.3.4.
19 Judgment 2C_149/2018 (n 4), para 5.3.5 and *Eturas* (n 10), para. 50.
20 Judgment 2C_149/2018 (n 4), paras 5.3.6.3 *cum* 5.3.5.
21 Judgment 2C_149/2018 (n 4), para 5.3.7.

for years and that the price of Viagra was set according to this coordination.[22]

The direct proof of the causal link was confirmed by two legal presumptions. On the one hand, as soon as the existence of coordination is proved, a rebuttable presumption applies that an undertaking took into account the exchanged information when it determined its market conduct. In the case at hand, in view of the retailers' degree of compliance with Pfizer's recommended price—which was deemed to constitute coordination—it could be assumed that the coordination played a causal role for the market behaviour.[23]

On the other hand, parallel behaviour does not exclude the existence of concerted practice, although further evidence is then necessary.[24] Equivalent behaviour regarding prices can be considered as evidence of concerted practice when such behaviour materializes in competition that does not exhibit normal market conditions. Relying again on the *ICI* judgment of the CJEU, the FSC stated that this presumption applied where the parallel behaviour enabled the undertakings concerned to reach a price equilibrium at a level different from that to which competition would have led.[25] For the Court, the compliance rates observed by the points of sale (89.3 per cent of pharmacies and 81.7 per cent of physicians) did not correspond to normal market conditions: on the one hand, not all retailers in Switzerland have the same cost structures; on the other hand, the retailers were not able to observe the price information of their competitors, as the market is not transparent. The parallel conduct of the retailers could therefore only be explained by the coordination.[26]

4. The object and effect of restraining competition

Having defined Pfizer's recommended price as a concerted practice, the FSC concluded its assessment by stating that the concerted practice constituted an agreement affecting competition that had as its object the restraint of competition (Art. 4[1] CartA). For the FSC, Pfizer's recommended price made competition impossible or more difficult and pursued the goal to eliminate competition.

Where an agreement has a restraint of competition as its object, it is not necessary to prove any anti-competitive effect.[27] The (short) second part of the analysis of the FSC was therefore unnecessary.

IV. Pfizer's 'recommended price' as an unlawful vertical agreement (Art. 5 [1], [4] CartA)

The second degree of compliance with the recommended price examines the number of units that are sold at this price by the points of sale and answers the question of whether the recommended price—which may represent a fixed, a minimum or a maximum price—is an unlawful agreement affecting competition within the meaning of Art. 5 CartA.[28]

The FSC recalled that, under art. 5 (4) CartA, only fixed or minimum vertical price agreements are presumed to eliminate effective competition and thus to significantly restrict competition within the meaning of Art. 5 (1) CartA. It then stated that Pfizer's recommended price—which was previously defined as an agreement (of concerted practice) affecting competition within the meaning of Art. 4 (1) CartA (see above under *III.B.*)—was to be defined as a fixed price agreement,[29] thereby contradicting the FAC which, contrary to the ComCo, had concluded that Pfizer's recommended price was not a fixed price agreement, but a maximum price agreement. The FSC stated that it would be incorrect to define a recommended price that was followed by 70 per cent of the physicians and by 60 per cent of the pharmacies as a maximum price agreement.[31]

The FSC did not apply by analogy Article 4 (a) of Commission Regulation 330/2010[31] , which states that a recommended price amounts to a fixed price if pressures are exerted by the seller. Besides the fact that Art. 5 (4) CartA does not include any such rule, Pfizer's 'recommended price' was a concerted practice that did not benefit from the block exemption.[32]

22 Judgment 2C_149/2018 (n 4), para 5.4.1.
23 Judgment 2C_149/2018 (n 4), para 5.4.2.1. See also C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, paras 51, 61.
24 Judgment 2C_149/2018 (n 4), para 3.4.4. See also Case C-89/85, *Ahlström Osakeyhtiö and Others v Commission*, paras 71–72.
25 *Imperial Chemical Industries* (n 11), paras 64, 67.
26 Judgment 2C_149/2018 (n 4), para 5.4.2.2.
27 Marc Amstutz, Blaise Carron and Mani Reinert, 'Art. 4 I LCart' in Vincent Martenet, Christian Bovet and Pierre Tercier (eds), *Commentaire romand: Droit de la concurrence* (2nd edn, Helbing Lichtenhahn 2013) para 78. The reasoning is the same in EU law, cf. Richard Whish and David Bailey, *Competition Law*, (10th edn, OUP 2021) 125.
28 However, it says nothing about the number of parties that are party to the agreement affecting competition (Art. 4 [1] CartA), cf. Judgment 2C_149/2018 (n 4), para 5.3.4.
29 Judgment 2C_149/2018 (n 4), para 6.5.
30 Judgment 2C_149/2018 (n 4), para 6.4.5.
31 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.
32 Judgment 2C_149/2018 (n 4), para 6.4.6. In addition, it must be underscored that Regulation 330/2010 (n 31) deals generally with questions of justification, but not with the definition of a concerted practice.

V. Conclusion

The definition of agreements affecting competition within the meaning of Art. 4 (1) Cart—which covers both agreements properly so-called and concerted practices—is consistent with the notions defined by Art. 101 TFEU. For this reason, the FSC was justified in relying on the doctrine and case law related to EU law to assess Pfizer's 'recommended price' and to qualify it as a concerted practice.

Because behaviour such as that in the case at hand has not yet been addressed under EU law, the FSC's analysis is of particular interest for the practice of the European competition authorities. The assessment of the FSC seems indeed perfectly aligned with an analysis that would have been conducted under EU law. It is therefore incorrect to assume, as certain Swiss commentators did[33], that the FSC would have assessed Pfizer's conduct in a different—more restrictive—manner than is the case under European Union law.

The FSC underscored that Pfizer's recommended price could not be compared with recommended prices that are set out in catalogues, such as in the car industry. Where recommended prices are set out in catalogues, the manufacturer does not repeatedly communicate the price to the retailer through the sale system.[34] In addition, Pfizer's behaviour enabled distributors on the downstream level to know precisely which recommended price was received by each of its competitors—the other Viagra retailers.

The parallels that could be drawn with the *Eturas* case are of particular interest. The E-TURAS booking system, owned by Eturas, was used by Lithuanian travel agencies as an online booking system. This system entailed a technical restriction which limited the discount rates that could be offered to the clients of the travel agencies to 3 per cent. Travel agencies were informed about the restriction of the discount rate by a message that was sent through an internal E-TURAS messaging system. For the CJEU, 'participation in a concertation [could not] be inferred from the mere existence of a technical restriction implemented in the system [. .], unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action'.[35]

In the case that was taken up by the FSC, retailers knew the recommended price and they acted in accord with it. To determine whether a recommended price—or an automatic discount—qualifies as concerted practice, the decisive element is thus not the recommended price in itself, but the conduct of both the issuer and the respondent to the recommended price. Pfizer accepted that a concerted practice would result from the way retailers would use the recommended price, considering that this price would automatically appear when a package of Viagra would be scanned. The uncertainty that exists in any competitive relationship did therefore at least partly disappear and the competition conditions deviated from competition on the merits; intra-brand competition was restricted. Pfizer's conduct linked to the reaction of the retailers was rightly defined as a concerted practice which qualified as a vertical fixed price agreement that had as its object the restriction of competition (Art. 5 [1], [2], [4]). It is irrelevant that a company described the recommended price as being 'non-binding'. In other words, companies that coordinate prices with their retailers cannot escape from competition law liability by describing recommended prices as 'non-binding'.

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33 Simon Hirsbrunner, 'Wo das Bundesgericht von der EU lernen kann' *NZZ* (Zurich, 2 July 2021) 18.

34 Judgment 2C_149/2018 (n 4), para 5.6.

35 *Eturas* (n 10), para 45.