

**Briefing January 2018**

## Swiss Federal Administrative Court: Mere Adherence to Recommended Resale Prices does not Constitute Resale Price Maintenance

The Swiss Federal Administrative Court (FAC) has annulled a decision of the Swiss Competition Commission (ComCo). ComCo had fined Bayer (Schweiz) AG (Bayer), Eli Lilly (Suisse) SA (Eli Lilly) and Pfizer AG (Pfizer) for allegedly having engaged in resale price maintenance by issuing recommended resale prices. ComCo had mainly argued that, as the recommended resale prices had been adhered to by the vast majority of the pharmacies, they would constitute an unlawful resale price maintenance. The FAC annulled ComCo's decision, holding that the rate of adherence was smaller than alleged by ComCo and that the mere adherence to recommended resale prices would not constitute a resale price maintenance. The FAC further held that in the case at hand the recommended resale prices would act as recommended maximum prices, hence not restricting competition.

### Facts and decision of ComCo

Bayer, Eli Lilly and Pfizer had issued recommended resale prices for prescription drugs that are not reimbursed under the mandatory health insurance (so-called hors-liste drugs). Bayer, Eli Lilly and Pfizer had neither exercised pressure nor offered incentives to adhere to the recommended resale prices.

On 2 November 2009, however, ComCo decided that these price recommendations constituted a (vertical) concerted practice regarding a resale price maintenance between each of Bayer, Eli Lilly and Pfizer and the pharmacies for the following reasons, among others:

The main argument of ComCo was that more than 80% of the pharmacies had sold these drugs at the recommended resale price.

ComCo also argued that, by adhering to the recommended resale prices, the pharmacies had continued a market wide cartel that was dissolved in 2000 (and that the recommended resale prices would correspond to the margin structure of that dissolved cartel).

ComCo further argued that an adherence to the recommended resale prices would be in the interest of both Bayer, Eli Lilly and Pfizer and the pharmacies themselves.

### Judgement of Federal Administrative Court

In its judgement of 19 December 2017, the FAC rejected ComCo's reasoning and annulled the fines imposed on Bayer, Eli Lilly and Pfizer.

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**No Concerted Practice**

The FAC first held that the high adherence rate alleged by ComCo was not based on a robust analysis.

The FAC then concluded that the mere adherence to recommended resale prices would not constitute a resale price maintenance in any event. In that regard, the FAC explicitly referred to EU competition law.

**No Restriction of Competition**

The FAC also stated that the recommended resale prices would not restrict competition concluding that the recommended resale prices would act as recommended maximum resale prices without unduly restricting the freedom of the pharmacies to set their prices.

**Outlook**

This judgement of the FAC is important not only for the pharmaceutical industry but also for many other industries where recommended resale prices are issued. The judgement clarifies that a mere adherence to recommended resale prices does not constitute a resale price maintenance. ComCo's so-called hors-liste decision had created considerable legal uncertainty as regards the legality of recommended resale prices. While in later cases, ComCo had moved away from its position in the hors-liste-case, the FAC's recent judgement is a welcome clarification.

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does not Constitute Resale Price Maintenance**

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