BÄR & KARRER

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Swiss Federal Administrative Court: Mere Attendance at one Cartel Meeting is not Sufficient to find an Infringement

The Swiss Federal Administrative Court (FAC) has annulled a fine imposed by the Swiss Competition Commission (ComCo) against Immer AG (Immer) for allegedly participating in a cartel on door fittings. The FAC held that the fact that Immer had participated in one meeting with competitors which discussed prices was not sufficient to support a finding of a concerted practice.

Facts and Decision of ComCo

Immer distributes door fittings and participated in one meeting with other distributors of these products. At this meeting, among other things, the other distributors discussed and agreed wholesale margins. While, prior to the meeting, Immer had sensed that the other distributors would discuss prices, Immer did not realise that they would do so at this particular meeting. In a hearing before ComCo, Immer also stated that it had difficulties in following the discussion between the other distributors because it did not know the basis of their calculations. In the aftermath of the meeting, Immer did review its prices but did not change them.

ComCo argued that Immer had participated in a concerted practice to fix prices because Immer had attended the meeting without distancing itself from the discussions and had not notified the meeting to the competition authorities.

Judgment of Federal Administrative Court

The FAC rejected that reasoning. The FAC held that ComCo had neither established an agreement nor a concerted practice.

No Agreement

The FAC held that the finding of an agreement would require at least an implied statement of commitment to an agreement. Such statement, however, could in general not be derived from the mere silent attendance at one single meeting.

The FAC found no evidence of any intention by Immer to commit itself to the agreement of the other dealers. In that regard the FAC noted that the meeting covered other subject matters as well. The FAC further held that the invitation to the meeting (which included the agenda item "prices of brand products") could not be interpreted

as an offer to agree on prices that was accepted by accepting the invitation to the meeting. Consequently, there was no agreement involving Immer.

Concerning the standard of proof, in earlier decisions (in the context of defining the relevant market and proving the existence of a dominant position), both the FAC and the Federal Supreme Court had held that where a full proof would not be possible due to the complexity of the economic facts and the lack of empirically verifiable data, a lower standard of proof would apply. In the case at hand, the FAC made it clear that no such difficulties of proof would exist in relation to establishing an intention to commit oneself to an agreement; consequently, the regular standard of proof (i.e. full proof) would apply.

No Concerted Practice

The FAC then assessed whether Immer had engaged in a concerted practice. The FAC held that a concerted practice would require (i) a concertation between undertakings, (ii) a parallel behaviour on the market and (iii) a causal connection between the concertation and the parallel behaviour on the market.

As regards the first requirement, the concertation, the FAC held that while Immer had not engaged in a mutual exchange of information, it had received pricing information from the other distributors and then internally reviewed its prices after the meeting. Based on these facts, the FAC assumed a concertation.

As regards the second requirement, the parallel behaviour on the market, the FAC found that Immer had not changed its pricing after the meeting which is why no parallel behaviour on the market would exist. The FAC also held that there were no indications that under normal conditions prices would have been lowered.

Given that the second requirement for a concerted practice was not fulfilled, the FAC did not deal with the third requirement of a causal connection between the concertation and the parallel behaviour on the market. The FAC, however, raised the question whether a presumption of a causal connection between the concertation and the parallel behaviour (as under EU competition law) would be compatible with the presumption of innocence. In earlier judgments in the mountings for windows and window-doors case, the FAC had stated that ComCo has to prove beyond any doubt a causal connection between the concertation and the parallel behaviour.

Outlook

Overall, the judgment of the FAC is to be welcomed. It suggests that the FAC is willing to look into the facts of the case rather than deciding based on abstract criteria when assessing whether there is an agreement or concerted practice.

The judgment of the FAC's is less convincing, however, as regards the assumption of a concertation due to a unilateral sharing of information that had no effect on the pricing policy of Immer. As set out above, the FAC assumed a concertation between Immer and the other distributors because Immer had received pricing information from the other distributors and had subsequently reviewed its prices. From the FAC's judgment it does not follow why this should amount to a concertation given that Immer did not change its prices. From the judgment it is not clear what the subject matter of the concertation should be.

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