

BRIEFING APRIL 2021

SWISS FEDERAL SUPREME COURT RULES THAT RECOMMENDED RESALE PRICES OF PFIZER REPRESENT UNLAWFUL RESALE PRICE MAINTENANCE

The Swiss Federal Supreme Court (FSC) has concluded that recommended resale prices issued by Pfizer Ltd. (Pfizer) constituted unlawful resale price maintenance. Pfizer had made the recommended prices available to the pharmacies through a third-party database that was connected to the cash registers of the pharmacies. Pfizer had neither exercised pressure nor offered any incentives to adhere to the recommended resale prices. However, 89.3% of the pharmacies had fully or partly applied the recommended resale prices. The judgement raises doubts as to whether recommended resale prices are still lawful at all under Swiss competition law as the FSC relied heavily on the argument that the recommended resale prices had been repeatedly communicated to the pharmacies.

FACTS

Pfizer had issued recommended resale prices for prescription drugs that are not reimbursed under the mandatory health insurance (so-called hors-liste drugs). These recommended resale prices were made available to the pharmacies via a product database operated by a third party (e-mediat). The database was connected to the cash registers of the pharmacies. This meant that the cash registers showed the recommended resale price as the default price (which could, however, still be changed by the pharmacy). 89.3% of the pharmacies had fully or partially applied the recommended resale prices. Pfizer had neither exercised pressure nor offered any incentives to adhere to the recommended resale prices. However, Pfizer had been pressured by the pharmacies to provide them with recommended resale prices.

JUDGEMENT OF FEDERAL SUPREME COURT

The FSC [ruled](#) that the recommended resale prices of Pfizer constituted a concerted practice between Pfizer and the pharmacies. The FSC held that there was a concertation, a conduct in the market and a causal connection between concertation and conduct.

CONCERTATION

As regards the concertation, the FSC relied heavily on the argument that the recommended resale prices had been constantly communicated to the pharmacies through the

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third-party database. The FSC ruled that Pfizer could have assumed that the pharmacies would know the recommended resale prices via the third-party database and that the pharmacies would not change the default price at their cash registers due to the additional effort this would involve. The FSC went on to state that the pharmacies had accepted this way of communication. The FSC concluded that the pharmacies and Pfizer had engaged in a tacit coordination on the resale price. In reaching this conclusion, the FSC drew an analogy from the [Eturas](#) case at the European Court of Justice. The FSC also referred to the fact that Pfizer had been pressured by the pharmacies to issue recommended resale prices which would constitute a further communication between Pfizer and the pharmacies in question.

CONDUCT ON THE MARKET

The FSC then went on to hold that the concertation had led to a coordinated conduct on the market. The FSC stated that 89.3% of the pharmacies had applied the recommended prices fully or partially, the critical threshold being 50%.

CAUSAL CONNECTION BETWEEN CONCERTATION AND CONDUCT

In applying the [Anic](#)-presumption for the first time, the FSC then held that there was a causal connection between the concertation and the conduct. The FSC also held that a parallel conduct could indicate a concerted practice. Furthermore, the FSC held that the standard of proof required to establish a concerted practice should not be set too high.

CONCLUSIONS

The judgement raises questions around the legality of recommended resale prices under Swiss competition law. The FSC relied heavily on the argument that the price recommendations had been repeatedly communicated to the pharmacies. However, recommended resale prices are by their very nature communicated to resellers. Therefore, communication of the recommended resale prices to resellers is no useful criterion to differentiate between lawful and unlawful recommended resale prices.

One way to make (some) sense of the judgment is to read it narrowly. Under a narrow reading, the communication of recommended resale prices over third-party platforms that are connected to the cash register systems of the reseller would be problematic. This in turn means that suppliers should refrain from providing their recommended resale prices to third party database providers.

The judgement is likely to have implications beyond the assessment of recommended resale prices, especially in the area of information exchange. As the FSC seems to be willing to accept a lower standard of proof, it can be expected that the competition authorities will take a tougher stance on information exchange in general.

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