

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

In the decision published yesterday in the matter "Sanction Order: Hors-Liste Medikamente (Preisempfehlungen)" (2C\_149/2018 of 4 February 2021), the Federal Supreme Court substantiates the concept of concerted practices and clarifies some open questions in this context.

Published: 22 April 2021

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## Concerted practices according to Article 4 para. 1 CartA

Pursuant to Article 4 para. 1 CartA agreements affecting competition are binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect. According to the Federal Supreme Court, a concerted practice is considered as agreement if a conscious and deliberate cooperation between the companies concerned exists.

As the Federal Supreme Court states, the concept of concerted practices consists of two elements: Coordination on the one hand and market conduct based on this coordination on the other hand. Furthermore, a concerted practice would require a causal link between the coordination and the market conduct.

According to the Federal Supreme Court, a concerted practice within the meaning of Article 4 para. 1 CartA is based on the exploitation of information that is not readily accessible under normal

market conditions, but is only available as a result of a deliberate exchange of information of market participants. According to the Federal Supreme Court, the concept of "concerted practices" does not require an exchange of intentions, nevertheless a minimum amount of communication, a contact ("*Fühlungnahme*") is necessary. Even unilateral conduct with regard to information by an undertaking is deemed to be sufficient if competitors are expected to adapt their market behaviour accordingly.

The second element of the concerted practices is the implementation of the coordination. Pursuant to the Federal Supreme Court, this successful coordination must, in general, be reflected in a more or less visible, actual market conduct. Thus, the market conduct must be influenced by the concerted practice.

With regard to the causal link, the Federal Supreme Court states that if coordination is proven, there is a rebuttable presumption that the undertakings involved have taken the exchanged information into account in determining their market conduct. This applies in particular if the coordination 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; however, generally further indications are necessary in order to assume a unilateral behaviour. With these two relaxation of the burden of proof regarding the causal link, the Federal Supreme Court follows the case law of the European Court of Justice.

Finally, a concerted practice only constitutes an agreement within the meaning of Article 4 para. 1 CartA if it has a restraint of competition as its object or effect.

## In particular price recommendation

In its judgement 2C\_149/2018 on 4 February 2021, the Federal Supreme Court had to assess whether vertical price recommendations for Viagra constitute a concerted practice within the meaning of Article 4 para. 1 CartA.

It clarifies that adherence to the price recommendation is not sufficient in itself in order to assume a concerted practice. However, following the court, in addition to adherence, pressure or further elements are not necessarily required. Rather, an overall assessment shall be carried out. The interaction between coordination and market conduct has to reach a certain qualitative level in order to assume a concerted practice in the case of vertical price recommendations.

Finally, the Federal Supreme Court states in this context that the requirements regarding the actual adherence to the recommended prices shall not be too high.

In the present case, the Federal Supreme Court confirmed that the electronic transmission of the price recommendations constituted a coordination. Furthermore, an intensive communication had taken place between the manufacturer and the points of sale, resulting at least in the reduction of uncertainties about the reactions of other market participants to the manufacturer's own behaviour. Furthermore, according to the Federal Supreme Court, the degree of adherence of the points of sale in question was higher than a degree of adherence of 50 %, meaning that the success of the coordination - a corresponding market conduct - can be affirmed. The Federal Supreme Court then considered the coordination as causal with regard to the market behaviour. In particular, it relied on the relaxation of the burden of proof with regard to the causal link in the case of a proven coordination and the uniform behaviour of the market participants as an indication of concerted practice. Furthermore, the price recommendation had a restraint of competition as its object or effect. Therefore, unlike to the lower instance, the Federal Supreme



Court concluded that the vertical price recommendations constituted a concerted practice within the meaning of Article 4 para. 1 CartA, that must be assessed under Article 5 CartA in a next step.

Please do not hesitate to contact us in case of any questions.

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