BÄR & KARRER

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Swiss Federal Supreme Court Rules on the *In Dubio Pro Reo* Principle and Horizontal Price Fixing Agreements

The Swiss Federal Supreme Court (FSC) has annulled two judgments of the Swiss Federal Administrative Court (FAC) in the *mountings for windows and window doors* case. Referring to the *in dubio pro reo* principle, the FAC had held that the Swiss Competition Commission (ComCo) had failed to prove an agreement to fix prices. The FSC, however, ruled that the FAC had not taken evidence of all relevant facts for which reason the *in dubio pro reo* principle would not apply. In addition, the FSC held that agreements among competitors to fix prices would in general restrict competition significantly.

ComCo's decision

In 2010 ComCo fined, amongst others, Siegenia-Aubi AG (Siegenia-Aubi) and Koch AG (Koch) for allegedly participating in agreements to increase prices in 2006/2007. ComCo's investigation had been triggered by the same leniency applicant as *the mountings for windows and window-doors* investigation of the European Commission (EC).

Judgment of the FAC

In 2014 the FAC annulled the decision of ComCo. The FAC held that ComCo had not established whether the price increases in Switzerland had been caused by the information exchange between the Swiss subsidiaries or by the dictate of their European parent companies (which were parties to the EC's investigation) which were involved in the European cartel. After having conducted hearings, the FAC concluded that it could not fill all the gaps in the evidence at the expense of the appellants as this would infringe the principle *in dubio pro reo*.

Judgment of the FSC

In dubio pro reo is only applicable if evidence is taken of all relevant facts

In its judgments of 9 October 2017[1], the FSC disagreed with the FAC's conclusion. The FSC held that the FAC has full jurisdiction on questions of facts and law. The principle of *in dubio pro reo* could only be applied if evidence had been taken of all relevant facts. The FSC held that the FAC had not done so. The FSC held that the FAC could not content itself with stating that ComCo had not established all

[1] 2C_1016/2014 and 2C_107/2014, available at https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?lang=de.

relevant facts. Instead, the FAC had to take evidence of all facts to the extent ComCo had failed to do so. The FSC concluded that the FAC had failed to take evidence on all relevant facts. The FSC, therefore, annulled both judgments of the FAC and ordered the FAC to establish the facts.

Price fixing generally restricts competition significantly

The FSC also held that price fixing agreements among competitors would 'generally' restrict competition significantly; in other words, price fixing among competitors would generally be unlawful unless it could be justified on grounds of economic efficiency. This clarification follows the Colgate-Palmolive judgment of 28 June 2017 (see Bär & Karrer Briefing of April 2017) where the FSC held that absolute territorial protection (i.e. the restriction of passive sales) would in general restrict competition significantly.

The FSC's clarification has also to be seen against the background of the FAC having taken a less formal approach than the FSC by ruling that there would be no such thing as a per se significance in Swiss law.

Price fixing agreement not excluded by a 'dictate of pricing' of parent companies

The FSC further clarified that a 'dictate of pricing' of the European parent companies would not exclude an agreement among their Swiss subsidiaries. This clarification referred to the statement of the FAC that ComCo had not established whether the price increases in Switzerland had been caused by the information exchange between the Swiss subsidiaries or by the dictate of their European parent companies which were involved in the European cartel. The FSC held that the only decisive question would be whether the appellants had come to an arrangement to set the prices at a certain level.

The FSC did not comment on whether a causal link between the information exchange and the collusive conduct would be necessary to conclude that there was a concerted practice (as the FAC had ruled). The FSC's judgments cannot be read as negating the necessity of such a causal link between the information exchange and the collusive conduct. The FSC merely stated that a concerted practice could exist independently from the European cartel between the parent companies. The FSC did not state that a causal link between the information exchange and the collusive conduct would not be required.

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