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The standard of review by courts in competition cases – Note by Switzerland

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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Switzerland

1. Legal framework and standard of review

1.1. Introduction

1. Switzerland uses an administrative system in the public competition law enforcement. The Swiss Competition Commission (COMCO) adopts an administrative decision in response to a motion proposed by its Secretariat, which investigates all the cases. The first judicial instance is the Federal Administrative Court (FAC). Administrative decision can be challenged due to a violation of federal law (including the excess or abuse of discretionary powers), an incorrect or incomplete determination of the relevant facts or an inadequate ruling. FAC can perform a full review on the merits. The second judicial instance is the Federal Supreme Court (FSC). In contrast to the FAC, the FSC usually reviews only the application of the law, unless the previous instance evaluated the facts arbitrarily or the establishment of the facts is based on a violation of law and is relevant for the outcome.

2. In principle, all decisions are appealable. This means that not only final decisions may be appealed, but also some interim orders, e.g. an interim order to provide information or a summon for interrogation. Examples for final decisions that may be appealed are orders on the creation of rights and obligations as well as on the imposition of sanctions, orders on the recognition of business secrets, as well as orders on the publication of a decision. Not subject to appeal are the opening or closing of enforcement proceedings, a simple request for information, the statement of objections as well as the performance of a search of private and business premises (only the decision to seize documents is appealable).

1.2. Standard of review

3. The FSC ruled that the administrative fines imposed by COMCO have criminal character in the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which is why the guarantees of Articles 6 and 7 ECHR apply to cartel sanction procedures.¹ The ECHR *inter alia* requires a full review of factual and legal questions by an independent court. Since the Secretariat, which investigates all the cases, and COMCO, the decision-maker, are part of the same administrative body, the FAC as the first judicial instance must be able to review all relevant facts and to apply all relevant provisions in order to verify whether any sanction is compatible with statutory and constitutional law (particularly the principle of proportionality).

4. However, the full review on the merits and the legality does not disallow the Court to refer to the assessment of the previous instance. Particularly in areas such as competition law requiring special technical expertise, the judicial instance should be allowed to rely on the technical expertise of COMCO and reach the same conclusions as the latter, as long as the requirements of Article 6 ECHR are met.

¹ Decision of the FSC of 29 June 2012, 139 I 72 *Publigroupe*, consid. 4.4.

5. Regarding the review of economic evidence, the FSC – in the context of the assessment of the market position – pointed out that the analysis of market conditions is complex, the data often incomplete and the collection of supplementary data difficult. It referred to the market definition and the question of substitutability from the point of view of the other side of the market. The FSC deemed hardly ever possible to assess precisely the extent of substitutability. Rather, it considered necessary to make certain economic assumptions. In this context, the FSC concluded not to overstate the standard of economic evidence in the sense of a full-proof standard, but one based on a certain logic of economic analysis appearing correct, comprehensible and thus convincing.²

6. In settlement decisions, COMCO decides *ex officio* on the legality of the behavior and on possible sanctions. Therefore, COMCO makes an infringement decision also in cases with settlements. Settlements commit the undertaking to eliminate the restraint of competition. COMCO approves the commitments with an administrative decision, which is subject to appeal. In practice, appeals in settlement cases are rare, since the main purpose of a settlement is to complete the procedure with the settlement. However, if there is an appeal, the standard of review remains the same as in cases without a settlement. This is a possible disadvantage for COMCO because in cases with settlements the reasoning of the decisions is usually less extensive.

1.3. Average duration of a court case

7. The FAC reviews administrative decisions from a broad field of subjects. Overall, the average duration of proceedings before the FAC is 284 days. Two thirds of all cases are closed within a year or less. However, judgements in competition law cases take generally more time since they often raise unprecedented judicial questions and are based on complex facts. On average, decisions in the field of competition law were for 3.4 years before the FAC while other decisions of COMCO had a duration of 1.2 years. However, these figures only relate to closed proceedings. There are proceedings pending before the courts that last far longer than that average duration. Decisions before the FSC take on average 2.3 years.

8. The oldest case has already been pending for more than 8 years before the FAC. The long duration is a burden for the parties and harms effective enforcement of competition law, as unresolved questions are detrimental to legal certainty. Lengthy court proceedings concerning aspects of procedural law harm effective investigation. In a case, a party challenged the summon of a witness on the grounds that a former employee should testify as a party. The court blocked the interrogation for more than two years until it decided that it is legal.

9. The duration of cases before the courts is perceived as long. In 2018, the Swiss parliament has charged the Federal Council to simplify the cartel proceedings before the courts and to speed them up by introducing deadlines in the relevant legislation.³

² Decision of the FSC of 29 June 2012, 139 I 72 *Publigroupe*, consid. 8.3.2.

³ Motion 16.4094, Improvement of the Position of the SME in Cartel Proceedings.

2. Courts' access to competition expertise

2.1. The courts' actions to acquire sufficient expertise in competition law and economic matters

10. In Switzerland, the courts assessing competition law cases take different approaches to acquire sufficient expertise. First, the judges and the court clerks dealing with competition law cases are “learning by doing”. Second, they regularly attend competition law conferences. Third, they employ lawyers with preexisting knowledge in competition law. The FAC employs an economist. Fourth, the courts may get expert opinions on factual issues. With respect to legal issues, the principle of “iura novit curia” applies according to which the court determines the relevant law and applies it on its own authority. Finally, civil courts must refer to COMCO for expert opinions/reports when the legality of a restraint of competition is in question in the course of civil proceedings.

2.2. COMCOs action to strengthen competition expertise

11. In general, based on the separation of executive and judicative powers, COMCOs possibilities to make an impact on the courts' assessment of competition law cases are rather limited. Where it is possible, COMCO takes action. At the initiative of the ministry of economy, informal discussions regarding the duration of court cases are taking place between the ministry of economy, the FAC and COMCO.

12. Furthermore, COMCO supports the strengthening of civil cartel proceedings. So far, persons hindered from entering or competing in a market by an unlawful restraint of competition have rarely used the possibility to bring a civil action. Possible reasons are the high costs in connection with civil proceedings and limited prospects of success possibly due to insufficient expertise in competition law. In order to strengthen civil cartel proceedings, COMCO, in the sense of an awareness raising campaign, informed the cantonal civil courts about their obligation to get expert reports from COMCO when the legality of a restraint of competition is questioned in the course of civil proceedings.

2.3. There is no specialized competition court in Switzerland

13. Currently, competition law cases are subject to judicial review by the FAC as first judicial instance and by the FSC as second and last judicial instance in Switzerland. The FAC consists of six divisions. The judges are appointed to one of the six divisions. Each division is responsible for specific areas of law. Division II handles cases relating to the economy, education and competition. It consists of eight sections. One of them is dealing with cartel law and price supervision. The other sections are dealing *inter alia* with public procurement, intellectual property, agriculture, animal protection, supervision of financial institutions and stock exchanges, money laundering, education/examination, unemployment insurance, gambling casinos/games. This is to say that the judges in Division II are dealing with a wide variety of issues. Cartel law is only one of them within their field of competence.

14. Until 2006, a Federal Appeals Commission for Competition Issues was competent for the judicial review of competition law cases. Some of the judges of the appeals commission were expert judges. As part of a judicial reform, the federal appeal commission was replaced by the FAC and most of the judges that worked for the appeal commission changed to the FAC.

15. In 2012, the Federal Council proposed to set up a Competition Court. In its Federal Council Dispatch to the parliament regarding the amendment of the Cartel Act and a Federal Law on the Organization of the Competition Authority, the Federal Council stated that since the introduction of direct sanctions for the most harmful violations of the Cartel Act, the decisions of COMCO have a criminal-law-like character. The Federal Council considered problematic that COMCO, as a commission with interest bound members⁴, may impose administrative sanctions amounting to millions of Swiss francs. The Federal Council therefore suggested to set up an independent competition authority that conducts the investigation and makes the motions as well as an independent court that decides on the motions and thus on the case. The Federal Council suggested to set up a competition court with expert judges, that are independent and neutral in economic and political terms. The competition court should have been integrated in the FAC. From the perspective of the Federal Council, one of the advantages of that institutional reform would have been the reduction of the instances procedure. In the current system, there are three instances: first, the Secretariat of COMCO that conducts the investigation and makes the motion and COMCO who decides on the case, second, the FAC that fully reviews the decisions of COMCO, and finally, the FSC that usually only reviews the application of law. According to the plans of the Federal Council, there should have been only two instances: First, the investigating competition authority and the decision-making competition court and second, the reviewing FSC. In 2014, the Swiss parliament rejected the institutional reform together with all the other suggestions to amend the Cartel Act. Thus, we still have three instances and there is no competition court in place.

16. Currently, there are no major institutional reforms in prospect. In December 2016, a member of the Swiss parliament made a motion in order to improve the situation of SME in cartel proceedings and suggested deadlines for the courts and party compensations.⁵ The Swiss parliament accepted the motion and instructed the Federal Department of Economic Affairs, Education and Research to prepare a proposal for new legislation.

2.4. Advantages and disadvantages of our review system

17. From the point of view of the Secretariat of COMCO, the current system with two judicial instances, the FAC, which is competent to fully review COMCO decisions on the merits, and the FSC, which usually only reviews questions of law, is satisfying. In general, the courts' decisions are of high quality. However, some of the court proceedings take rather long. For reasons of legal certainty, it is important that the judicial review of COMCO decisions takes place in a reasonable time frame. Especially in connection with issues regarding the legality of investigative measures, e.g. of witness examinations, it is crucial for COMCO to get a quick response from the courts.

⁴ The Cartel Act demands that the majority of the members of COMCO are independent experts - usually professors of law or economics. Representatives of business associations and consumer organizations take the other seats. This composition ensures both that objective criteria are given priority when electing the Commission members and also that the Commission has the expertise required to take objective well-founded decisions (please see: www.weko.admin.ch > COMCO > Commission).

⁵ See above, footnote 3.