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Interim Measures in Antitrust Investigations – Note by Switzerland

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. In general, timely decisions are critical to protecting competition. Where there is a risk that competition will be undermined by *faits accomplis*, rapid intervention is required.¹ Based on our experience, the adoption of interim measures speeds up competition law procedures.² In Switzerland, the hurdles for issuing interim measures are rather high. Nevertheless, the Swiss Competition Commission (COMCO) has imposed interim measures on several occasions over the last years. As the track record shows, interim measures are an important instrument of COMCO in ensuring effective competition.³

1. Powers and Standards to Impose Interim Measures

2. There is **no explicit legal basis** for interim measures in either the Swiss Cartel Act or the Swiss Act on Administrative Procedure. Nonetheless, according to undisputed doctrine and constant case law, the COMCO may take interim measures in antitrust investigation proceedings.⁴ Because interim measures do not conclude a procedure, they are qualified as interim rulings.⁵

3. The COMCO is conducting administrative antitrust proceedings. In those proceedings, interim measures are to be ordered if this serves the **public interest** in protecting effective competition.⁶ If, on the other hand, primarily private interests are at stake, the civil courts may be requested to adopt interim measures in civil antitrust proceedings.⁷

4. The COMCO may impose interim measures *ex officio* or **at the request of the parties**.⁸ In practice, the impulse for issuing interim measures regularly comes from an interested party who submits a corresponding request. However, in most cases, the COMCO carries out its own investigations in addition to the reports received before taking interim measures. This is probably due to the fact that complainants often focus on their individual concerns, and one complaint alone is usually not sufficient to meet the standard of proof of *prima facie* evidence.⁹

5. The purpose of imposing interim measures is to ensure the effectiveness of a definitive order to be made later. The COMCO enjoys full discretion regarding the **type of**

¹ Annual Report 2021 of COMCO, Foreword from the President, available at <https://www.weko.admin.ch/weko/en/home/praxis/annual-reports.html>.

² ANDREAS HEINEMANN, Competition law in need for speed, *Concurrences* 2021/4 p. 3.

³ MARC FRÉDÉRIC SCHÄFER, Vorsorgliche Massnahmen im Kartellrecht – aus verwaltungsrechtlicher Perspektive, forthcoming in: SZK – Schweizerische Zeitschrift für Kartellrecht 2/2022.

⁴ BGE 130 II 149, E. 2.1, *Sellita vs ETA und WEKO*.

⁵ BGE 130 II 149, E. 1.1, *Sellita vs ETA und WEKO*.

⁶ BGE 130 II 149, E. 3.3, *Sellita vs ETA und WEKO*.

⁷ BGE 130 II 149, E. 2.4, *Sellita vs ETA und WEKO*.

⁸ PATRIK DUCREY, Vorsorgliche Massnahmen im Kartellverwaltungsrecht, sic! 3/1998 S. 281 ff., 284.

⁹ See SCHÄFER, (Fn 3), with an overview of *ex officio* and requested measures.

interim measures: It can issue safeguarding measures in order to secure existing conditions or positive measures in order to create new conditions.¹⁰ The issuance of positive measures is insofar limited, as the final decision should not be anticipated (see below).

6. The following **conditions** must be met for the COMCO to be able to issue interim measures:

7. First, there must be a threat of a **disadvantage** for effective competition that **cannot be easily remedied**. In particular, serious and irreversible structural changes in the market concerned - waiting until the final decision would entail such a disadvantage. With regard to the private interests of a party involved, such a disadvantage can only be taken into account to the extent that it also impairs effective competition.¹¹ If private interests are paramount, civil antitrust proceedings should be sought. Furthermore, there must be a causal connection between the disadvantage and the restriction of competition at issue.¹²

8. Second, there must be **urgency**, i.e., it must prove necessary to issue the measures in question immediately. This is the case, if it must be assumed that before the main decision is taken a serious structural market change contrary to effective competition will occur, which cannot or cannot easily be reversed.¹³

9. Third, the interim measures have to be **proportionate**. This is the case if the measures are suitable for averting the likely existing or occurring disadvantage for effective competition and if it is necessary for this purpose, i.e., if no milder means are available for safeguarding the endangered interest in protecting effective competition. In addition, the weighing of the various interests must tip the scales in favour of interim measures. The public interest in effective competition must be balanced against the private interest of the addressee of the interim measures in its economic freedom.¹⁴ Finally, interim measures must neither prejudice nor make impossible the situation to be regulated by a final order.

10. Optionally, the **prognosis in the main case** may be taken into account if it is clear. However, factual or legal ambiguities require restraint, as the necessary bases for a decision must first be obtained in the investigation. The anticipation of all or part of the probable outcome of the investigation is only justified if the prognosis for the decision is clear, that is to say, if there is *prima facie* an infringement. The more doubtful the outcome of the investigation appears to be, the higher the requirements are to be placed on the disadvantage to effective competition, the urgency and the proportionality of the order.¹⁵ In contrast to the investigation, in the procedure for adopting interim measures, there is only a summary examination of the factual and legal situation. This summary examination is usually based on probability considerations only. In particular, it is sufficient for the parties to make their alleged facts credible. In general, however, the higher the intervention by means of interim measures, the higher the requirements to be met by the evidence.¹⁶

11. Interim measures are **subject to appeal**. For this purpose, the complaining party must show that it is threatened with irreparable disadvantage. The irreparable disadvantage

¹⁰ MARKUS SCHOTT, in: Balser Kommentar zum Kartellgesetz (BSK-KG), Art. 39 N 94.

¹¹ BGE 130 II 149, E. 3.4, *Sellita vs ETA und WEKO*; DUCREY (Fn 8), 288.

¹² BGE 130 II 149, E. 3.4.4 *Sellita vs ETA und WEKO*; DUCREY, (Fn 8), 288.

¹³ SCHOTT, BSK-KG (Fn 10), Art. 39 N 98.

¹⁴ SCHOTT, BSK-KG (Fn 10), Art. 39 N 99.

¹⁵ RPW 2021/1, 242 Rz 101, *Netzbaustrategie Swisscom*.

¹⁶ RPW 2017/3 413, Rz 30 *Eishockey im Pay-TV – Interim Measures*.

asserted by the complaining party is of an individual nature and therefore differs from the irreparable harm to be dealt with in the interim measures. This applies in particular if the complaining party claims to be particularly affected by the interim measures ordered or, as the case may be, refused.¹⁷

12. When ordering interim measures, the COMCO usually **withdraws the suspensive effect of an appeal**. This is only logical, as the parties concerned often file appeals against interim measures. If the suspensive effect were not withdrawn by the COMCO, there would, in most cases, be an irresolvable contradiction with the urgency of the interim measures. For the withdrawal of the suspensive effect of an order to be justified, the reasons for the immediate enforceability of the order must be more weighty than those for waiting until a final decision on the interim measures. Such a necessity usually arises from the interim measures themselves.¹⁸

2. The practice of COMCO

13. In its published practice, the COMCO dealt with interim measures in 23 cases. In 11 cases, the COMCO rejected requested interim measures; in 14 cases, the COMCO issued interim measures.¹⁹ Of the interim measures adopted by the COMCO, the appellate bodies overturned two and confirmed five.²⁰ In the last twelve years, the COMCO dealt with the following interim measures.²¹

14. In 2010, the COMCO took interim measures against the credit card issuers *Visa and Mastercard* concerning the continued fixing of interchange fees. The adjustments led to a reduction of the interchange fees, bringing them in line with the European average.

15. In 2011, the COMCO ordered interim measures against the Swiss watch manufacturer *Swatch Group*. Swatch had intended to stop its supply of third companies with mechanical movements and other components for watches. The COMCO required Swatch to continue to supply them for the duration of the proceedings in a gradually reduced extent, allowing a slow phasing out. In 2013, the COMCO approved an amicable settlement with the Swatch. According to the settlement, Swatch had to supply its customers until the end of 2019 with a gradually diminishing quantity of mechanical watch movements and thereafter was no longer obliged to supply these parts. In the intervening period, it was expected that a competitor to Swatch would establish itself in the market and be able to meet the demand for mechanical watch movements from independent watch manufacturers. The COMCO reserved the right to take a new decision if by the start of 2020 there were insufficient alternative offers in the market to the watch movements produced by Swatch.

16. In 2013, in an investigation into the broadcasting of *live sport on Pay-TV*, three cable network operators applied for interim measures to be ordered and basically requested that certain programming and supply options be made freely available. The COMCO

¹⁷ See SCHÄFER (Fn 3).

¹⁸ See SCHÄFER (Fn 3).

¹⁹ For an overview see: SCHÄFER (Fn 3).

²⁰ See SCHÄFER (Fn 3).

²¹ Based on the annual Reports of COMCO 2010-2012, available at <https://www.weko.admin.ch/weko/en/home/praxis/annual-reports.html>.

rejected these applications because it considered the alleged disadvantages could be corrected in the final decision.

17. In 2017, in an investigation concerning the broadcasting of *ice hockey on Pay-TV*, the COMCO rejected a request from the telecom provider Swisscom to order interim measures because it did not find that the alleged refusal by its competitor UPC posed any threat of lasting and irreversible change in the structure of the TV platform market.

18. In 2019, the COMCO ordered interim measures in the reassessment of the *Swatch Group* supply stop (see above). Because of indications that the market for Swiss-made mechanical watch movements had not developed as expected, the COMCO opened a reassessment procedure in 2018. Since a decision before the end of 2019 was not possible, the COMCO ordered interim measures until the time of the decision, but at the latest until the end of 2020. Swatch filed an appeal against the interim measures. The Federal Administrative Court (FAC), in an interim decision, decided not to suspend the measures. In 2020, the COMCO decided not to impose any new obligation to supply on Swatch and did not place any further restrictions on the supply of Swiss-made mechanical watch movements. Following this decision, Swatch withdrew its appeal against the interim measures.

19. In 2020, the COMCO opened an investigation into *Swisscom's network expansion strategy*. The case involves the question of the extent to which the modified design of the fibre-optic network infrastructure used by Swisscom can lead to a restriction of competition and to what extent this should be prohibited under competition law. In February 2020, Swisscom announced its new network development strategy. In areas where the expansion involved an optical fibre network only, it changed the design of the network so that competitors no longer had direct access to the network infrastructure. The COMCO saw the risk that Swisscom would exclude competitors from the market by building this form of optical fibre network. Therefore, it opened an investigation in December 2020. Moreover, at the same time, the COMCO ordered interim measures and prohibited Swisscom with immediate effect from expanding its optical fibre network in such a way that third parties can no longer have Layer 1 access from Swisscom exchanges. Swisscom appealed to the FAC against the interim measures. The FAC rejected the application from Swisscom to restore the suspensive effect of its appeal in an interim decision in January 2021 and confirmed in its decision of September 2021 the COMCO's interim measures on the optical fibre network expansion. The court took the view that Swisscom's network expansion with a single-fibre model could only be assumed to be abusive conduct by a dominant company. The FAC upheld the urgency of the interim measures because Swisscom would have secured an unchallengeable legal position for a long period of time due to the change from the existing optical fibre standard. Swisscom filed an appeal with the Federal Supreme Court (FSC). A decision by the FSC is still pending.

20. In 2021, the COMCO opened an investigation into *Mastercard* for possibly obstructing the National Cash Scheme (NCS) offered by SIX, ordering interim measures on the same day. Mastercard appealed against these measures to the FAC. In an initial interim decision, the court upheld the request from Mastercard to restore the appeal's suspensive effect. More than nine months after COMCO's order on interim measures, the court did not see sufficient urgency for the withdrawal of the suspensive effect anymore. However, it still left open whether there was urgency for the issuance of interim measures. The court's decision on the interim measures is still pending.

3. Key Policy Considerations

21. For the COMCO, **time** is an important factor when deciding on interim measures: Interim measures allow the competition authority to intervene quickly, whereas waiting until the final decision could cause hardly repairable damage. Interim measures are a tool to protect or quickly restore effective competition. For example, in the case of *Swisscom's network expansion strategy* (see above) the time factor played a major role when considering interim measures because Swisscom would have secured an unchallengeable legal position for a long period of time by changing from the existing optical fibre standard with a four-fibre-model to a single-fibre model. This example also shows that interim measures can be considered as an effective complement to *ex ante* regulation.

22. However, taking interim measures is **costly** for the COMCO: At the beginning of the investigation, the COMCO must issue an appealable order, which, in most cases, is contested before the courts. The court proceedings can take a long time and thus block the investigation of the COMCO. Furthermore, the requirements for issuing interim measures are rather high and hard to prove before the courts.

23. Due to the extent and complexity of administrative antitrust proceedings, it is generally difficult to find the right **balance between a quick intervention and a sufficient investigation** of the facts for the prognosis in the main case (see above). In general, there are multiple exchanges of writs and even market surveys by the Secretariat may be necessary in order to be able to issue interim measures. Thus, super-provisional measures might generally be excluded in administrative antitrust proceedings.

24. Based on the experience of the COMCO, there is an **interplay** between interim measures and **settlements**. In the investigations *Swatch supply stop* and *Creditcard Interchange Fees* (see above), the interim measures were designed based on commitments of the undertakings made within the framework of settlements.²² Whereas, in civil antitrust law, interim measures usually have a considerable precedent-setting effect: the parties often come to an agreement in the context of a settlement, which eliminates the need for ordinary proceedings; in cartel administrative law, proceedings with settlements are rarely shortened by interim measures. This is mainly due to the fact that the *official maxim* also applies to proceedings with settlements and the case facts must be clarified *ex officio*.²³

²² Annual Report of COMCO 2010, p. 4.

²³ See SCHÄFER (Fn 3).