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Interim Measures in Antitrust Investigations – Note by Croatia

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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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Introduction

1. During the proceedings in competition law cases sometimes occur situations which cause risk of serious and irreparable damage to competition and thus, require urgent action. In order to prevent such serious and irreparable damages, competition authorities including Croatian Competition Agency have the power to impose interim measures in the on-going competition proceedings. The interim measures are imposed on the basis of a *prima facie* finding of infringement of competition rules and when the occurred irreparable damage cannot be adequately remedied by final decision at the conclusion of the proceeding. On one side, interim measures present useful instrument when quick remedy action needs to be taken, but on the other side, they should be applied with caution and in more exceptional circumstances unlike some other instruments, such as commitments. The purpose of this contribution is to explain definition and legal regime for interim measures in Croatian competition law and competences for adoption of decisions on interim measures. It also presents some recent developments in revising legal standards for interim measures in national law. Furthermore, the paper will present types and duration of interim measures as well as types of competition infringements in which they are mostly applied. The emphasis will be put on some of their characteristics and their comparison with other instruments, commitments. Finally, it looks at the practical experience of Croatian Competition Agency (further: CCA) of using interim measures in its case law with several examples of decisions on interim measures imposed by the CCA.

1. Legal basis for imposing interim measures

2. Croatian Competition Act regulates interim measures in Article 51 and it provides that the CCA can initiate the proceeding against an undertaking and make a decision adopting an interim measure in case of urgency where there is sufficient circumstantial evidence and existing risk of serious and irreparable damage to competition and particularly on the basis of a *prima facie* finding of the infringement of this Competition Act or Article 101 or 102 Treaty on the functioning of the EU (further: TFEU).¹ From this provision it is clear that the CCA has the power to directly impose interim measures without the need to seek the court to issue the order for interim measures. The trigger for the interim measures can and usually are based on the complaint submitted to the CCA, but the decision to adopt interim measures is adopted *ex officio* by the CCA. The interim measures have been introduced in the competition legal system very early (since the competition law in 2003), but the provisions have been revised to some extent. Recent developments in revising legal standards for interim measures in national law are contained in last amendments of the Competition Act from April 2021 which introduced also some changes in the provision on interim measures. The content of the decision on interim measures is more elaborated and it is added that the CCA will inform the European Competition Network about the imposition of an interim measure where infringement of competition has been committed within the meaning of Articles 101 and/or 102 TFEU.

¹ Croatian Competition Act, Official Gazette, No. 79/09; 80/13; 41/21; <https://www.aztn.hr/ea/wp-content/uploads/2015/05/COMPETITION-ACT-2021-consolidated-text-1.pdf>

This provision has been introduced in order to align national legislation with relevant EU *acquis* and to transpose so called ECN+ Directive.²

2. Types of interim measures and duration

3. Duration of the interim measures used to be six months, in other words the interim measures should not have exceeded a period of six months which could have been prolonged if the CCA finds it necessary in a particular case until recent changes of the Competition Act which extended this period up to 12 months. Now, the CCA can set the duration of the relevant measure that, as a rule, may not exceed a period of twelve months. However, the same derogation remained, the duration of the interim measure can be renewed if the CCA finds it necessary in a particular case.

4. In relation to the type of interim measures, the CCA has full discretion regarding the type of interim measures it can impose. Based on the provision of Article 51 of the Competition Act, the CCA can order the undertaking or the association of undertakings to cease-and-desist the behaviour concerned, insist on meeting particular conditions or impose other proportionate measures necessary to eliminate the anticompetitive effects and set the duration of the relevant measure. It can also advise the undertaking that in case of its failure to comply with the decision of the CCA on the imposed interim measure, it can be imposed a fine or a periodic penalty payment in line with the provisions of Competition Act. Very often the interim measures included order to supply certain products under similar terms offered to other undertakings, the order to immediately return the authorized dealer in the selective distribution system, to modify provisions of agreements or other general terms of business, the obligation not to terminate the contractual relation, order to stop applying discriminatory pricing list, obligation to allow access to the essential facility etc.

5. Looking at the practice of EU countries including Croatia, it derives that in most of the cases, the interim measures were ordered in the abuse of dominance cases, predominantly in the cases of refusal to deal and preventing the entry of new competitors on the market. Besides abuse of a dominant position cases, interim measures were often applied in some vertical agreements which contained certain prohibited provisions and vertical restraints. In Croatia, such as selective distribution agreements excluding certain authorised distributors from the system of selective distribution and thus, limiting competition. When looking at the markets where the interim measures were ordered, it is not easy to extract some typical markets but from the overview of European practice in last decade, the interim measures were mostly imposed in the following sectors: energy, telecom, postal services, pharmaceuticals and press. In Croatia, those markets include: distribution of motor vehicles and spare parts, funeral services, water supply, telecom and construction stone supplier market.

² Directive (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market; OJ L 11, 14.1.2019.

3. Interim measures-necessary but limited remedy

6. The main advantage of using interim measures derives in the situations where immediate danger or damage cannot be avoided by any other means and the quick response is indispensable. This tool is important to avoid market developments that could be very difficult to reverse by a decision taken only at the end of the proceedings. Such situations occur when there is sufficient proof that the imminent negative effect on competition and consumers would appear if it is not stopped. Criteria to assess and decide to apply interim measures are likelihood of immediate danger for competition and consumers. In that respect, national competition authorities are empowered to act on their own initiative to order by decision the imposition of interim measures on undertakings and associations of undertakings, at least in cases where there is urgency due to the risk of serious and irreparable harm to competition, on the basis of a *prima facie* finding of an infringement. However, due to the risk of harm for consumers or undertakings this instrument should be used with caution and only in certain particular cases with careful assessment. Therefore, such decisions have to be proportionate and they should apply for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken. Careful analysis of *prima facie* evidence of imminent harm and danger for competition and consumers is indispensable in each case and the competition authorities should not rush in using over eagerly this instrument. Rather it should be kept for limited situations where it is immediately obvious that only such measures are necessary and can stop further negative effects on competition.

4. Relation between interim measures and commitments

7. If one compares interim measures with other instruments applied in competition law like commitments, one similarity is that both instruments are often used in potential or actual abuse of a dominant position cases. In both instruments certain time limits are used, in interim measures maximum duration of the interim measures and in commitments, specified period in which the undertaking in question should comply with the commitments. However, there is one important difference. Whereas interim measures serve only as temporary decision with the aim to remove immediate danger and harm with limited duration and decision on interim measures is not the final decision terminating the competition proceeding. While, commitments decisions mark the finalization of the proceeding by accepting the proposed commitments, conditions and obligations by undertakings as appropriate to eliminate the negative effects on competition due to the party's actions or a failure to act. The commitment decision also obliges the undertaking concerned to furnish evidence from which it is evident that it has undertaken the commitments concerned, on the basis of which the CCA decides that there are no legal grounds to any further actions against the undertaking concerned. In interim measures this decision to apply the instrument is adopted earlier, immediately after assessment of imminent danger or harm. Some cases with interim measures end up with commitments as final decision and in that respect, there is a correlation between interim measures and commitments. Such cases in the practice of the CCA are described in the next chapter.

5. Practical application of interim measures in Croatian practice and court review

8. In last 10 years, the CCA imposed interim measures in three cases in the funeral services, motor vehicles and water supply markets. Between 2006 and 2016 in total 24

interim measures have been imposed.³ Hence, interim measures are not so regularly used but only when the criteria of imminent harm or danger is established with careful analysis in each case. Some of the criteria used in the practice of the CCA include limiting the access to the market concerned for the competing undertakings by tying the prices, exclusionary practices, negative effect on the consumers relating to the choice of products, price and quality, prevented undertakings from the provision of services which they had been discharging before changed provisions entered into force, preventing final consumers from freely choosing the provider of the services concerned, significant and irreparable harm for competition when the undertaking concerned was authorized dealer or repairer for years and harm for the consumers.

9. When interim measures are imposed, parties have their rights of defence guaranteed by the claim they can submit to the court against final decision and where the interim measure has not been granted based on the request of the parties or of third persons, this refusal has to be elaborated in the separate decision, and again explained in the final decision on the merits completing the case.

10. Examples of relevant cases with interim measures are shortly presented below.

5.1. CCA vs. *Flora VTC Virovitica*⁴, 2016.

11. In the proceeding against the undertaker Flora VTC from Virovitica the CCA had to establish whether the undertaking in question has been engaged in abusive behaviour on the basis of the applicable Prices for Funeral Services in the Town of Virovitica taking into account its dominant position in the provision of burial services on cemeteries in the territory of the town of Virovitica that may result in distortion of competition in the funeral supplies and mortuary equipment market. On the basis of the Prices for Funeral Services adopted on 23 October 2015 Flora VTC has tied the price of the burial service (as a public service) to the sales of its own funeral supplies and mortuary equipment (as a commercial service) thereby limiting the access to the market concerned for the competing undertakings. This behaviour leads to market foreclosure and involves exclusionary practices and it has also a negative effect on the consumers relating to the choice of products, price and quality. In other words, such a practice may create a belief that other undertakings in the funeral supplies and mortuary equipment market are less competitive than Flora VTC. For that reason, the CCA in April 2016 adopted an interim measure ordering Flora VTC the disapplication of the part of the Prices for Funeral Services giving 10% discount on the burial service if a client also buys funeral supplies from the undertaking concerned. In addition, Flora VTC was ordered to stop advertising the discount concerned in any form and to remove such content from all the existing signs, posters, fliers, business cards i.e. any form of sales promotion. The interim measure was imposed for the period of six months.

12. This case ended with commitment decision adopted in September 2016, soon after the initiation of the proceeding Flora VTC offered the disapplication of the part of the Prices for Funeral Services giving 10% discount on the burial service if a client also bought funeral supplies from the undertaking concerned. Flora VTC offered also to make this decision public on its website, thus restoring the situation before the challenged 10 % discount entered into force. The CCA assessed that it is appropriate to accept commitments offered by Flora VTC as it found that the nature of the commitments and their ability to quickly

³ 18 decisions for interim measures were adopted at the same date relating to the same undertaking.

⁴ Case Flora VTC, more details on the case can be found on the web site of the CCA: <https://www.aztn.hr/en/cca-accepts-commitments-by-flora-vtc/>

and effectively solve the competition concerns are sufficient to address the identified competition concerns and eliminate possible anticompetitive effects in the relevant market in the sales of funeral supplies and mortuary equipment in the territory of the town of Virovitica. Such a decision also takes into consideration the interests of the economic operators who can continue to perform the same activities in the market, whereas it enables the users of these services to freely choose the undertaking that will provide them with funeral supplies and mortuary equipment.

5.2. CCA vs. *Vodoopskrba i odvodnja d.o.o. Zagreb*, 2014.⁵

13. Based on the initiative of the undertaking Brunat d.o.o., the CCA adopted a decision to start the proceeding against the undertaking *Vodoopskrba i odvodnja d.o.o. Zagreb*. In the proceeding the CCA investigated whether certain provisions of general and technical conditions for the provision of water services that the undertaking *Vodoopskrba i odvodnja d.o.o.* adopted in July 2013 represented abuse of a dominant position on the relevant public water supply market with effects on the market in the provision of services involving water meter and telemetry devices installation for the measurement of water consumption, providing data for billing and reporting, in the territory the city of Zagreb, Samobor, Sveta Nedjelja and the municipality of Stupnik. In the course of the proceeding, the CCA primarily analysed the provisions of General Terms which introduced the obligation for the existing inside water meters in the old buildings to be connected with the automatic water meter reading network (AWMR network). AWMR is a system of long distance reading which *Vodoopskrba* has only started to introduce in the old buildings. For the undertakings which so far have been involved in the installation of telemetry devices, reading and billing of so collected data on water consumption, have been as of 1 January 2014 prohibited to install telemetry devices in the old buildings whereas new competitors have been prevented from entering the market. Moreover, on 1 January 2014 also started a transitional period in which these undertakings are still allowed to perform distant readings from local networks. Upon the expiration of this transition period distant reading would have been exclusively provided by *Vodoopskrba i odvodnja*.

14. For all the mentioned reasons, the CCA also adopted a decision on interim measure and ordered the undertaking *Vodoopskrba i odvodnja* to temporarily cease-and-desist the application of the provisions under the General and Technical conditions for water supply services which prevent the undertakings from the provision of services which they had been discharging before the challenged provisions entered into force and preventing final consumers from freely choosing the provider of the services concerned. Besides, the CCA ordered *Vodoopskrba i odvodnja* to continue issuing the licences for the installation of water meters in the old buildings which are to be connected to the automatic measurement system which is not connected to the AWMR network and to ensure that at least one apartment with an inside water meter which is not included in the AWMR network should be connected to the automatic measurement system. The CCA determined the interim measure in duration of six months and undertaking *Vodoopskrba i odvodnja* was obliged to display decision on interim measure visibly on its home web site.

⁵ The case CCA v. *Vodoopskrba i odvodnja d.o.o. Zagreb*, <https://www.aztn.hr/en/water-supply-and-sewage-operator-challenged-to-abuse-a-dominant-position/>

5.3. CCA v. Peugeot Hrvatska d.o.o. Zagreb, 2014.⁶

15. In the proceeding initiated against Peugeot Hrvatska the CCA had to establish whether the criteria for joining the authorised repairers' network had been transparent and known in advance to all undertakings fulfilling the qualitative criteria. Upon the initiative of the undertaking Auto Maksimir, the CCA initiated ex officio proceeding against the undertaking Peugeot Hrvatska in order to determine whether it has abused its dominant position in the provision of repair and maintenance services and resale of spare parts for Peugeot motor vehicles in the territory of the Republic of Croatia. The investigation of the proceeding focused on the question whether the criteria for joining the authorised repairers' network had been transparent and known in advance to all undertakings fulfilling the qualitative criteria and competing in the authorised repairers market. At the same time, it analysed whether the conduct of the undertaking Peugeot Hrvatska led to unfair foreclosure of the market for particular undertakings and whether by doing so it applied dissimilar conditions to equivalent transactions with other undertakings thereby placing them at a competitive disadvantage.

16. Within the proceeding the CCA adopted an interim measure ordering the undertaking Peugeot Hrvatska to take back the undertaking Auto Maksimir back in the authorised repairer's network from which it had been excluded on 31 December 2013. It has been established that the exclusion from the repairers' network may cause significant and irreparable harm for competition, given that the undertaking concerned has been the Peugeot motor vehicles repairer for years and the behaviour concerned may also cause harm for the consumers. In this case, the interim measure was also set for six months.

5.4. Judicial review

17. Against the decision imposing an interim measure no appeal is allowed but the action can be taken against the decision of the CCA by filing a complaint for an administrative dispute at the High Administrative Court of the Republic of Croatia. In other words, decision on interim measures can be challenged only jointly when challenging final decision of that particular case in which the interim measure was ordered.

6. Conclusion

18. The interim measures are useful tools in the situations where imminent danger for competition and consumers occurs and causes harm. Still, some caution should be taken and assess it carefully in every case with firm establishment that such harm and negative effects can only be resolved with immediate action and not with measures at the end of the competition proceeding. Mostly interim measures are applied in cases of alleged abuse of a dominant position and in vertical agreements with problematic provisions from competition law point of view. They can also be good for new digital markets as it has been proven that they are adequate for fast moving and growing markets. In that respect, there is a need to explore if the usually used interim measures are adequate also for digital markets or if some new types of interim measures should be developed in order to address

⁶ Case CCA v. Peugeot Hrvatska; <https://www.aztn.hr/en/open-proceeding-and-interim-measure-for-peugeot-hrvatska/>

imminent harm coming from big digital platforms. Newly adopted Digital Markets Act⁷ on the level of the EU envisages that the European Commission can impose interim measures in the case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers. The future practical implementation of the DMA will give some response on that question.

⁷ REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), Article 22 Interim measures; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>