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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. Legal framework

1. The existing power of the Antimonopoly Office of the Slovak Republic (hereinafter referred as “the AMO” or “the Office”) to impose an interim measure was introduced last year within the transposition of the *Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* (hereinafter referred as “Directive 2019/1”). According to the Directive 2019/1, the purpose of interim measures is to enable all competition authorities to respond to developments in rapidly changing market. Until the transposition, the AMO had the power to impose an *interim measure*¹ under the Act No. 71/1967 Coll. on Administrative Proceedings (Administrative Procedure Act) as amended (hereinafter referred as “Administrative Procedure Act”). According to the Administrative Procedure Act, an interim measure is also an instrument used to ensure the proper and undisturbed process of administrative proceedings, but it lays down general conditions for all administrative authorities other than the interim measures provided for in the Directive 2019/1. Pursuant to Directive 2019/1, an interim measure is a tool used to ensure that, while an investigation is ongoing and before the final decision on the matter is taken, the infringement being investigated does not seriously and irreparably harm competition. The application of interim measures within the meaning of the Directive 2019/1 is linked to a certain standard of finding of an infringement, namely the “*prima facie*” finding of an infringement of Article 101 or Article 102 TFEU.

1.1. Legal requirements

2. The regulation of interim measures was transposed into Article 31 par. 1 letter a) of the Act No. 187/2021 Coll. on the Protection of Competition and on Amendment and Supplement to Certain Act (hereinafter referred as “Act on the Protection of Competition”). Act on Protection of Competition sets the same “*prima facie*” standard as the Directive 2019/1, being referred to as a “reasonable presumption”. According to par. 1 letter a) of the Act on the Protection of Competition the power to impose an interim measure should thus be applied in cases where there is a “*reasonable presumption that there has been a breach of the prohibition of agreements restricting competition or the abuse of a dominant position has been infringed, where there is also a risk of serious and irreparable distortion of competition*”. The seriousness and irreparability of the distortion of competition must be assessed according to the circumstances of the individual case.

3. Par. 1 letter b) of the Article 33 of the Act on the Protection of Competition provides for the regulation of the mentioned interim measures from the Administrative Procedure Act, which, in the context of the Act on Protection of Competition, is more of a procedural tool. It applies to the proceedings of the AMO, in order to ensure the proper and undisturbed course of the administrative proceedings.

4. According to the Article 31 par. 2 of the Act on Protection of Competition, the AMO may impose (only to the undertaking) positive injunctions (interim measures contemplating a requirement to act) and cease-and-desist orders (interim measures

¹ Before the Act on Protection of Competition came into force in June 2021, interim measures were referred to as *preliminary measures*.

requiring to refrain from acting). The AMO may also order the seizure of *res* which are to be destroyed or rendered unnecessary or which are necessary for taking evidence. The AMO has limited experience in regard of imposing interim measures. Since the adoption of the Directive 2019/1 and the Act on Protection of Competition, which is in force since June 2021, the AMO has not imposed any interim measures pursuant to the new legislation. Before that, the AMO imposed interim measures in few cases - in the latest, the AMO imposed positive injunctions to fulfil the obligations set out in the decision.

5. Although, the legislative provision differentiate interim measures to positive and negative type, for purpose of the evidentiary threshold, there is no difference in requirements whether these are positive or negative injunctions and it is meant to be more as an example.

1.2. Key requirements

6. To impose an interim measure, the AMO must initiate an investigation and administrative proceedings. The information and documents obtained during the investigation must give rise to a reasonable suspicion that the undertaking's conduct may have infringed the prohibition regarding agreement restricting competition or abused a dominant position and that there is a risk of serious or irreparable distortion of competition. The irreparability of the harm has to be shown by the AMO and regarding the irreparability, the legislative text refers to competition (it is not excluded that this would refer also at the same time to competitors). The purpose of this measure is to prevent irreversible changes in the market before the conduct in question is assessed in the administrative procedure. The purpose of this interim measure is therefore to protect the status quo.

7. The AMO's power to impose such a measure does not require a court order. The power to impose interim measures is formulated as the discretion of the AMO however, the AMO can impose interim measures not just from its own initiative but it is likely possible to impose a measure upon a complaint. There is no right to a request for the imposition of interim measures. Since the adoption of the provision, and in particular since the last case of the AMO imposing interim measure, which has been highly publicized, the number of submitted applications has increased.

1.3. Duration of the measure

8. According to the Act on Protection of Competition, the Office shall specify in the decision imposing interim measure the period for which it is imposed; otherwise, the interim measure shall cease to have effect on the date of termination of the proceedings, upon the entry into force of the final decision, or upon repeal of the interim measure. The Office may extend this period to the extent necessary, even repeatedly.

9. The Office shall revoke the interim measure as soon as the reason for which it was imposed ceases to exist.

1.4. Review and expedited procedures

10. According to the Directive 2019/1, Member States should also ensure that the legality of such measures, including their proportionality, can be reviewed in expedited appeal procedures. Therefore, significant changes were introduced in this regard which did not exist before.

11. Whereas the AMO has second instance administrative proceedings, an appeal may be lodged against the first-instance decision imposing interim measure, which is subject to

review by the Council of the Antimonopoly Office of the Slovak Republic (hereinafter referred as “Council of the AMO”) as a second-instance administrative, decision-making body. Afterwards, the decision of the Council of the AMO is, in accordance with Slovak legal framework, directly reviewable by an administrative court on the basis of an administrative legal action filed in accordance with the Act no. 162/2015 Coll. Rules of Administrative Court Procedure as amended (hereinafter referred as “Administrative Court Procedure”). However, if the administrative courts ruled for a disproportionately long time, it would be disadvantageous not only for the addressee of the decision - the undertaking, but also for the market situation itself. Due to the fact that the interim measures are to be taken on a temporary basis, the judicial review of the decision should end before the administrative procedure itself and in such a time that the interim measure can fulfil its purpose, resp. intended effect.

12. For this reason, a time-limit was set in the Act on Protection of Competition for bringing an administrative action at one month from the delivery date of the first-instance decision to the addressee. The Council of the AMO shall decide on the appeal against the first-instance decision within three months from the date of referral of the appeal and the administrative file on the matter. According to the Administrative Court Procedure, the administrative court has to review the decision imposing an interim measure in 3 month’s period from the date of the delivery of the defendant’s (AMO’s) statement on this legal action. The same period applies to the cassation court, which decides on a cassation complaint lodged against a first-instance court decision.

2. Interim measures in practice²

13. AMO has rather limited experience with interim measures. In cases, where interim measures were imposed, they were not subject to substantial judicial review. Therefore, we do not have any relevant jurisprudence in this regard.

14. It is also important to note, that interim measures, that AMO adopted so far, were adopted pursuant to the previous legislative framework. No interim measures were adopted since new legislative framework is in force (1st June, 2021).

15. When considering imposition of interim measures, it is important that the legal conditions for imposition of interim measures are met. The most significant is the presence of a risk of serious and irreparable distortion of competition. Considering our experience, the adoption of interim measures may influence the length of the main proceedings. The main proceedings may last longer, the costs of the proceedings may rise. This is due to the fact, that the decision has to be delivered and of course, justified. Interim measures may be appropriate in novel cases, as well as in well established theories of harm, irrespective of the market.

16. In the context of fast-moving market, especially in digital markets, it might seem that the necessity of interim measures increases. We may certainly agree that the situation on fast-moving markets may change in a really short time, compared to the time that is consumed by the investigation, collection of data, market analysis, proceedings itself including the exercise of the right to defence on the side of undertaking, the factor of urgency is present, it can be really important to act promptly. However, this might still be of relevance in other markets. In our last case for example, AMO imposed interim

² Please note, that the following statements are based on so far experience and that these cannot be taken as binding for the AMO towards its future practice and application of its powers but rather as open views and food for thought offered by smaller competition authority.

measures³ in the proceedings concerning undertaking – operator of the industrial park and the producer of certain energies and medias (hereinafter referred only as “energies”). This operator applied such trading conditions of supply of energy and media on customers seated (or having production) within the industrial park, due to which these customers had to take all the energy and media from the undertaking that produces them, and at the same time, they were denied to produce certain energy or media on their own or to have them provided by third parties. AMO started investigations for possible breach of abuse of dominant position by the operator. The operator cut off the supply of energies to one of the biggest customers, producer of product used in automotive industry, several times. The uninterrupted supply of energies is crucial for the production of this undertaking. The aim of the interim measure was to secure the supplies of energies and also to prevent the undertaking for which the cut in energies could end up in being eventually forced to leave the market as a result of the conduct. At the same time, the aim was also to prevent irreversible changes that could occur before the AMO assesses the adequacy of the trading conditions within the administrative proceedings in question. In the past, AMO imposed interim measures mainly in abuse of dominance cases, in telecom market and in the market concerning pharmacies.

2.1. Interim measures and *ex ante* regulation. Interplay with remedies.

17. We believe that interim measures may function as effective complement to *ex ante* regulation. This is due to the fact that where *ex ante* regulation exists in certain markets, the specific regulator has a high quality knowledge of “its” market and therefore, can better “react” or intervene. The problem with fast-moving markets is that the competition authority does not necessarily have a good knowledge about the market if it is a first complaint and the market has not been investigated before. To act swiftly and accordingly in an “unknown territory” – can be a huge challenge. Therefore, we believe that *ex ante* regulation or establishment of specific authorities with specific powers regarding fast moving markets can be beneficial for market players and end consumers and should be considered. The possibility is to establish specific divisions within national competition authorities that would closely monitor but this cannot be expected to work well in our conditions without significant, additional resources.

18. The undertaking that is facing the possibility of imposition of interim measures might be also considering its reputation. This can be a motivating or stimulating factor to offer commitments and it can be beneficial for the competition. Since the interim measures are usually imposed in the beginning of investigation, the first contact with possible offer of commitments of the undertaking comes much earlier compared to regular proceedings. However, it is important to note here, that this has never been the issue that the AMO would be considering imposition of interim measures. This also depends on the undertaking and its own business culture, and we haven’t observed it as a rule.

19. Interim measures can also serve as a basis for remedies, as in principle, they both regulate the future behaviour or conduct of undertaking. It might be the case especially with regard the behavioural remedies. However, the AMO has power to impose remedies only since June 2021, therefore, we do not have relevant experience to share in this regard.

20. As mentioned above, we have observed increasing number of requests for interim measures within the complaints after imposition interim measures in 2020 and the interests of media in this matter. However, since it is a discretion of the AMO whether to impose the interim measures, it does not make significant difference.

³ [Decision No. 2020/PRO/UPO/2/13 of 12.05.2020](#)

2.2. Procedural aspects

21. AMO has power to impose interim measures at any time of the proceedings and is not limited in time. The law differentiates between the phase of investigation and the formal proceedings. General rule for administrative procedure presumes that decision may be issued only in the proceedings that have been formally commenced. Therefore, the AMO has always formally initiated administrative proceedings before issuing decision imposing interim measures. Commencement of administrative proceedings means that the undertaking concerned has all the rights and duties of the party to proceedings and has full access to file⁴ at any time. Thus, the undertaking is well aware of the situation as it stems from the administrative file, the data and information AMO has collected (where relevant, also the complaint), before the interim measures are imposed.

22. In our view, the process of imposition of interim measures raises certain due process issues. With regard the last revision of the competition law, the discussions took place whether the AMO should formally inform the undertaking about the intention to impose interim measures and what interim measures, accompanied with its right to respond to it, i.e. right to be heard. While in such scenario the views of the undertaking can be considered, it can prolong the whole process and postpone the outcome. Especially in cases where there is urgency to act, the aim set by the legislator might be missed. Furthermore, this issue involves also the timing. If the undertaking should have a right to present its views - how much time should be given to present it? What is optimal in urgent cases? This is not an easy balancing exercise.

23. The outcome of the legislative process does not include explicit legislative obligation of the AMO to inform the undertaking and to provide a “call” to submit its views on interim measures. The law also does not provide suspensive effect of the administrative appeal against the decision imposing interim measures. At the same time, the action against such decision does not have suspensive effect. The legal provisions with the expedited review by the courts show the aim of the legislator to deliver the effect of interim measures promptly but at the same time to provide faster review of the decision which is important for the undertaking concerned.

⁴ Special rules may apply, such as access to leniency documents, etc.