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Interim Measures in Competition Law - Curse or Blessing?

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Interim measures are back on the Swiss Competition Commission's radar, especially in dominance cases. The background of this latest development is the authority's desire to accelerate its proceedings and ensure the efficacy of competition law. However, the most recent cases show that interim measures are not always suitable for this purpose - especially in dynamic markets this kind of regulation appears to be more of a curse than a blessing.

Nowadays companies operate in a fast-paced world. Products and markets that are relevant today may no longer be so in three to seven years' time. The question is how this fast pace of markets can be reconciled with the enforcement of competition law? The following example shows why it is important to keep up with the pace of ever-changing markets:

In 2005, the Swiss Competition Commission ("**ComCo**") opened an investigation against the Swiss telecommunications and internet provider Swisscom because of its pricing policy for ADSL (*Asymmetric Digital Subscriber Line*) services. Four years later, ComCo found that Swisscom held a market-dominant position in the broadband market and that it had abused this position by means of a margin squeeze. Another ten years later, the Swiss Federal Supreme Court confirmed ComCo's decision. However, by the time the Supreme Court rendered its ruling, the ADSL service in question was no longer of any significance. Neither for Swisscom's competitors nor for end consumers. Within 14 years, the ADSL telecommunications transmission technology had become outdated and was replaced by high-bandwidth technologies with a superior transmission speed. This is just one example where criticism has been voiced that ComCo and the courts are engaged in economic history, rather than economic reality.

But how can this problem be addressed? At least ComCo seems to have found the answer to this question in interim measures. Previously, ComCo was rather reluctant to order interim measures. In the past two years, however, ComCo has more frequently resorted to this procedural instrument - especially in dominance proceedings. Recently, even the president of ComCo has been advocating the use of interim measures in order to accelerate competition law procedures and ensure the efficacy of competition law.^[1]

ComCo seems to acknowledge that its lengthy investigation procedures, which can easily last up to seven years, are problematic. It is, however, questionable whether ComCo is looking for the solution in the right place.

Under Swiss competition law, the purpose of interim measures is either to preserve an existing situation or to temporarily safeguard interests that are at risk. There are four prerequisites for the ordering of interim measures: First, it must be credible that a waiver of the measure would threaten effective competition with a disadvantage that could not be easily remedied. Second, it must prove necessary to take the measure in question immediately. Third, the measure must be proportional. And finally, the finding of an antitrust violation in the ongoing investigation must appear probable.

It is sufficient for ComCo to establish these facts in a credible manner. The threshold for the ordering of interim measures is thus rather low. This is problematic for two reasons in particular:

The main issue is that ComCo only needs to conduct a summary review before imposing interim measures. As part of this summary review, ComCo must assess whether the conduct in question could have harmful effects on effective competition. This is done without examining the market and the behaviour of the market participants in greater detail. At the time interim measures are issued, ComCo generally does not yet have an in-depth insight into the markets and is unable to anticipate how dynamic markets will develop. However, this does not prevent ComCo from issuing orders that not only severely restrict the company concerned in its economic freedom for several years, but may in hindsight also have an adverse effect on the markets and other market participants. ComCo has considerable discretion in deciding which measures to impose. Therefore, interim measures –at least in the context of competition law– cannot be considered mild. Rather, they represent a serious regulatory intervention that can shape market conditions over a period of several years. But this is not ComCo’s task. ComCo’s task is to prevent abusive behaviour and not to regulate markets through premature intervention.

The second issue is that ComCo generally orders its interim measures with immediate effect. For the company concerned, this means that it can only oppose the ComCo order by filing an appeal with the Federal Administrative Court and requesting the non-enforcement of the interim measure for the duration of the appeals procedure. As a result of such an appeals procedure, the ComCo investigation is even further delayed.

In the end, ComCo’s approach is counterproductive. It makes interim measures –at least in the most recent cases– appear more like a curse than a blessing. This is not only for the company concerned but for effective competition as such:

Swatch Group: In 2013, ComCo had concluded its investigation relating to Swatch Group’s plan to stop supplying mechanical watch movements. The investigation had aimed to establish whether the intended implementation of Swatch Group’s new supply policy constituted an unlawful abuse of a dominant position under competition law. ComCo and the Swatch Group concluded a settlement agreement that provided for the phasing out of the supply of mechanical watch movements by December 31,

2019. In the intervening period, it was expected that a competitor to the Swatch Group would establish itself in the market and be able to meet the demand for mechanical watch movements from independent watch manufacturers. ComCo, however, reserved the right to reassess the obligation to supply should market conditions develop in a manner that is substantially different from what was expected.

In 2018, ComCo opened such a reassessment procedure. Because ComCo deemed a decision before the end of 2019 not possible, it ordered interim measures. These prohibited the Swatch Group from supplying mechanical movements to third-party customers until December 31, 2020, at the latest. Only SMEs were excluded from this supply ban. According to ComCo, the supply ban aimed at securing the investments that the Swatch Group's competitors had made in past years. ComCo feared that third-party customers who had switched to alternative sources of supply in recent years would change their sourcing strategy and (re)source their needs from the Swatch Group in the future if the latter repositioned itself as a supplier of mechanical movements for selected third party customers as of January 1, 2020.

ComCo's decision was highly controversial. The authority was accused of reinforcing the positioning of a new dominant player, the Swatch Group's competitor Sellita. The decision furthermore resulted in negative financial repercussions for the Swatch Group that was significantly excluded from participation in competition. After the decision, Swatch Group even threatened to sue ComCo for damages.

But the decision also had negative impacts on other market participants. It resulted in great legal uncertainty and additional expenses for the Swatch Group's customers who already had placed their orders and who suddenly and involuntarily had to switch to other suppliers. ComCo's intervention turned the existing market conditions upside down.

Swisscom Fiber Optic Network: In 2020, ComCo ordered interim measures in its investigation dealing with Swisscom's expansion of its fiber-to-the-home (FTTH) optical fiber network. ComCo prohibited Swisscom from continuing the rollout. Market specialists have acknowledged that the interim measure will delay the fiber rollout to the detriment of end consumers. The question arises as to whether ComCo's measures will set back technological progress by years or whether, by the time a decision is reached in the matter, the technology in question will be outdated anyway. Swisscom has appealed ComCo's decision. The Federal Supreme Court will have to decide whether ComCo's interim measures are permissible.

Mastercard / NCS:^[2] In its latest decision, ComCo has imposed interim measures as part of its investigation into Mastercard's alleged obstruction of SIX's so-called *National Cash Scheme (NCS)*. The NCS is a new scheme from SIX that regulates national ATM transactions. SIX alleges that Mastercard is obstructing the rollout of its NCS by refusing to link its debit card to the new system. Accordingly, ComCo's interim measures aim at enabling card-issuing banks to prepare their debit cards technically for possible later activation of the NCS. With its interim measures, ComCo is once again intervening in a dynamic market whose development it can hardly anticipate at this stage. After all, since the Covid-19 crisis at the latest, ATM transactions and cash are playing an increasingly insignificant role. Cash is slowly

ending its reign. Mastercard has appealed ComCo's decision. Hence, it is to be expected that the interim measures will delay the actual investigation.

It follows from these recent cases that interim measures are not necessarily an appropriate instrument to guarantee the efficacy of competition law. On the contrary, premature intervention by ComCo can have adverse effects on effective competition. A more appropriate means to ensure the efficacy of competition law would be to accelerate ComCo investigations and subsequent appeals proceedings in general. The revision of the Swiss Cartel Act proposed by the Federal Council will provide some remedy in this regard. The Federal Council plans to introduce new regulatory deadlines for ComCo and the appeals courts in order to speed up the proceedings under the Swiss Cartel Act. The revision is expected to come into force in 2023/24.

However, for the time being, interim measures are back on ComCo's radar, especially in dominance cases.

[1] Andreas Heinemann, Competition law in need for speed, in: Concurrences N° 4-2021 I, p. 2 et seq.

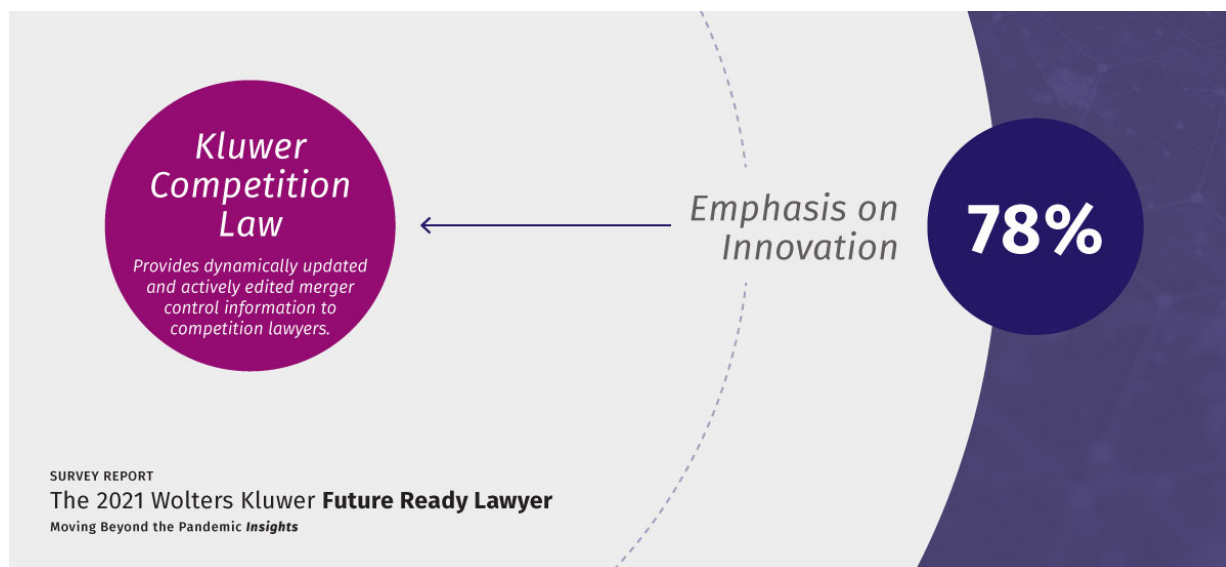
[2] Lenz & Staehelin represents Mastercard in this proceeding.

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