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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Switzerland --

15-17 June 2016

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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SWITZERLAND

1. Power to adopt decisions with amicable settlements and the COMCO's experience

1.1 *Legal requirements for adopting decisions with amicable settlements*

1. The OECD background paper mentions Switzerland as a jurisdiction that does not possess powers to adopt commitment decisions.¹ However, the paper refers to Switzerland's amicable settlements, which include the possibility of future commitments. The paper points out that the Swiss agency only uses those commitments as a mitigating factor in the calculation of fines.² It is true that in cases where the COMCO has to impose sanctions and consequently needs to adopt an infringement decision, it may "only" consider the cooperation in context of an amicable settlement as a mitigating factor in the calculation of fines. However, in cases of unlawful restrictions of competition that are not subject to direct sanctions, commitments in an amicable settlement – if the COMCO approves the amicable agreement – may render further investigations unnecessary and hence terminate the case. In these cases, amicable settlements are very similar to commitment decisions. Nevertheless, since in most of the cases there are at least indications of unlawful restrictions of competition, which allow further sanctioning, amicable agreements regularly do not terminate the case, but the Secretariat of the COMCO has to continue the investigation in order to decide whether there was an infringement or not.

2. The main requirement for entering into negotiations about an amicable agreement is that the COMCO respectively its Secretariat has opened an investigation and is considering a restraint of competition unlawful. According to Article 29 Cartel Act, the Secretariat of the COMCO may, in cases where it considers a restraint of competition unlawful propose an amicable settlement to the companies involved about ways to eliminate the restraint. The proposal for commitments may also come from the companies involved. Once the Secretariat of the COMCO is satisfied that the commitments offered adequately address its competition concerns, it concludes the respective amicable agreement with the committing parties. The COMCO has to approve the amicable agreement between its Secretariat and the companies involved in an order (Article 30 para. 1 Cartel Act). The Secretariat makes its proposal to the COMCO to approve the amicable agreement usually together with a proposition for appropriate measures.

3. Unlike commitment decisions in other jurisdictions,³ amicable settlements in Swiss antitrust law are not only possible in investigations for alleged abuses of dominant positions and vertical anti-competitive agreements but also in investigations for cartels. They are thus applicable in all investigations for unlawful restrictions of competition according to Section 1 Cartel Act. However, they are not possible in cases of mergers and acquisitions according to Section 2 Cartel Act.

4. Like commitments in most jurisdictions, amicable agreements in Swiss antitrust law are included in formal decisions.⁴ However, in contrast to commitment decisions, these decisions usually comprise a statement about an infringement. This is because amicable settlements are also applicable in investigations for unlawful restrictions of competition that are subject to sanctions. In cases where the COMCO has to impose sanctions, it consequently needs to adopt an infringement decision. In

¹ OECD background paper, para. 8.

² OECD background paper, endnote 12.

³ OECD background paper, para. 1.

⁴ OECD background paper, para. 3.

these cases, an amicable settlement will thus not render unnecessary a full investigation.⁵ In this context, amicable settlements have more in common with the settlement decisions mentioned in box 2 of the OECD background paper than with commitment decisions.⁶ In particular, they are applicable to cartels and they require the establishment of an infringement.⁷ However, unlike most settlement procedures, amicable settlements are also allowed in cases of abuse of dominance and vertical agreements and they do not require an admission of liability for the infringement. In conclusion, the Swiss agency does not distinguish between commitments and settlements, but operates with amicable settlements in all types of cases of unlawful restrictions of competition.

1.2 *Number of (infringement) decisions with amicable settlements*

5. As aforementioned (see above, 1.1.), since the introduction of direct sanctions for the most harmful restrictions of competition (cartels, vertical agreements on prices and territorial restrictions, unlawful practices of dominant companies) in 2004, the COMCO has to approve amicable settlements concerning these restrictions in infringement decisions.⁸ According to the statistics of the COMCO, it has adopted 30 infringement decisions with an imposition of sanctions since 2004. In 12 of these 30 infringement decisions (40%), it approved an amicable settlement between the companies involved and its Secretariat. In addition, it approved an amicable settlement in seven infringement decisions without imposing sanctions.

1.3 *Shorter and less expensive proceedings*

6. According to the statistics of the COMCO (see above, 1.2.), the investigations with an amicable settlement compared to such without resulted in a shorter duration of the proceedings of seven months on average. Furthermore, the costs of proceedings in investigations with amicable settlements were less than in those without. In investigations with amicable settlements, the costs of the proceedings were on average around 40 % of the amount of the costs in proceedings without amicable settlements (CHF 200'000 towards CHF 490'000). The main reason for shorter and less expensive proceedings is, that in cases with a settlement, the settling parties usually agree on a reduced density of argumentation in the infringement decision. Thus, the investigations are reduced to the minimum necessary in order to establish an infringement.

1.4 *Types of cases in which decisions with amicable settlements have been adopted*

7. The COMCO has adopted decisions with amicable settlements in cases of all different types of restrictions of competition covered by Section 1 Cartel Act (cartels, abuse of dominance cases and vertical agreements). Since 2004 out of 18 cases with amicable settlements, nine were cartels (50 %) seven were abuse of dominance (39 %) and two were vertical agreements (11 %).⁹

1.5 *No industry sector more often subject to decisions with amicable settlements*

8. In our jurisdiction, there has been a rather balanced use of amicable settlements in the different industry sectors.

⁵ OECD background paper, para. 27.

⁶ OECD background paper, 7.

⁷ OECD background paper, 7.

⁸ Before the introduction of direct sanctions 2004 there were also cases in which the investigations were terminated because of reaching an amicable settlement without an infringement respectively a non-infringement decision, see CARLA BEURET, Die einvernehmliche Regelung im schweizerischen Kartellrecht, DIKE 2016, para. 282.

⁹ BEURET (Fn 11), Appendix B.

2. Commitments

9. According to the OECD background paper, despite the fact that structural measures tend to be more effective, many commitment decisions include behavioral remedies. This raises the question of monitoring compliance with the binding commitments.¹⁰

2.1 *Type of commitments accepted*

10. The COMCO accepts both types of commitments, structural and behavioral. According to Article 29 Cartel Act, the Secretariat of the COMCO may accept any commitments to eliminate the restraint of competition that it considers unlawful. Thus, the commitments may be about the future conduct of the company (behavioral commitments) or the structure of the market (structural commitments). Nevertheless, until now there have only been behavioral commitments. In cartel cases, the companies generally committed themselves to stop exchanging relevant information with competitors. In abuse of dominance cases, there were e.g. commitments to continue to supply goods and in cases of vertical agreements, producers have e.g. committed themselves to refraining from resale price maintenance or to allowing dealers in general to sell their products online.¹¹

2.2 *How to ensure that commitments are suitable and proportionate*

11. In the COMCO's experience, an efficient way to ensure that commitments are suitable and proportionate is by accepting general commitments to refrain from the behavior considered an unlawful restraint of competition. E.g., a producer commits himself to allowing the authorized dealers in a selective distribution system in general to sell his products online.¹² However, there were cases that required measures that are more complex in order to restore competition. For example, in a case of abuse of dominance, the commitments regarding the continuation of supply were very detailed.¹³

2.3 *Market-tests*

12. The COMCO has market-tested commitments in cases of abuse of dominance in the past.¹⁴ It is not standard procedure to market-test commitments in cases with amicable settlements. Nevertheless, there are cases in which the opinion of different market players is necessary in order to assess whether a concrete commitment is suitable and proportionate. Therefore, we decide in every particular case whether market testing is appropriate.

2.4 *Monitoring compliance with amicable settlements and sanctions for breaches*

13. In general, it is the duty of the COMCO and its Secretariat to monitor compliance with amicable settlements (Article 45 Cartel Act). The Secretariat conducted respective market surveys in the past.¹⁵ However, the COMCO may also appoint independent companies to monitor compliance. For example, it appointed an audit company to monitor the compliance with an amicable settlement in a case of abuse of dominance and in a cartel case.¹⁶

¹⁰ OECD background paper, 11 f.

¹¹ RPW 2009/3, 196 ff., *Elektroinstallationsbetriebe Bern*; RPW 2012/3, 615, *Komponenten für Heiz-, Kühl- und Sanitäreanlagen*; RPW 2014/1, 267 Rz 414, *Swatch Group Lieferstopp*; RPW 2009/2, 143 ff., *Sécateurs et cisailles*; RPW 2014/2, 407 ff., *Jura*.

¹² RPW 2014/2, 407 ff., *Jura*.

¹³ RPW 2014/1, 267 Rz 414, *Swatch Group Lieferstopp*.

¹⁴ RPW 2007/2, 193 Rz 16, *Richtlinien des Verbandes Schweizerischer Werbegesellschaften VSW über die Kommissionierung von Berufsvermittlern (Publigroupe)*; RPW 2014/1, 270 Rz 417 ff., *Swatch Group Lieferstopp*; RPW 2005/1, 128 Rz 22 f., *ETA SA Manufacture Horlogère Suisse*.

¹⁵ RPW 2005/1, 128 Rz 20, *ETA SA Manufacture Horlogère Suisse*.

¹⁶ RPW 2014/1, 267 Rz 414, *Swatch Group Lieferstopp*; RPW 2006/1 65, Rz 119, lit. c, *Kreditkarten - Interchange Fee*.

2.5 *Monetary sanctions for breaches of amicable settlements*

14. The Cartel Act provides monetary sanctions for breaches of amicable settlements. The COMCO charges companies that breach an amicable settlement to their advantage up to 10 per cent of the turnover they achieved in Switzerland in the preceding three financial years (Article 50 Cartel Act). Any person who willfully violates an amicable settlement is liable to a fine not exceeding CHF 100'000 (Article 54 Cartel Act). So far, the COMCO did not have to impose sanctions because of the breach of an amicable settlement.

3. **Judicial review of decisions with amicable settlements and relationship with private enforcement**

15. According to the OECD background paper, it appears that judicial review of commitment decisions has been very limited in many jurisdictions.¹⁷ Moreover, unlike infringement decisions, commitment decisions do not need to establish an infringement of competition law or include a detailed description of the facts of the case and of the preliminary concerns of the agency. The paper mentions that this might have a direct impact on the likelihood of successful follow-on damages actions.¹⁸

3.1 *Appeals against decisions with amicable settlements*

16. Despite a preamble in most amicable settlements, according to which there are no grounds of appeal if the COMCO approves the settlement and the sanction imposed by the latter does not exceed a certain range, decisions with amicable settlements have been the subject of appeals in the past.¹⁹ However, this tends to be the exception rather than the rule. The amicable settlement itself cannot be the subject of an appeal, but only the decision, in which the COMCO has approved the amicable settlement. So far, the courts did not have to decide any case, in which the companies challenged their commitments in an amicable settlement and they therefore did not yet have to decide about legal standing in this context. In one of the appeals, the appellant claimed that there was no ground for an infringement decision and an imposition of sanctions because of the amicable settlement. The court however, decided that in cases of restrictions of competition that are subject to direct sanctions, an amicable settlement cannot terminate the investigations, but that in these cases an infringement decision is necessary to decide on the sanctions.²⁰

3.2 *Substantive legal standard applied by courts*

17. Since all decisions with amicable settlements that have been subject to appeals were infringement decisions with an imposition of sanctions, the substantive legal standard applied by the courts is the same as in infringement decisions without amicable settlements.

3.3 *Problematic consequences of limited judicial review*

18. Amicable settlements may insofar present issues of limited judicial review, as the companies usually do not appeal the respective infringement decision even in cases where the legal situation is unclear. However, since amicable settlements are part of an appealable infringement decision by the COMCO, limited judicial review is less an issue than it is one in context with commitment decisions.

¹⁷ OECD background paper, 22 f.

¹⁸ OECD background paper, 22 f.

¹⁹ Judgements of the Swiss Administrative Federal Court, RPW 2010/2 329, *Publigroupe SA et al./WEKO*; B-8404/2010 of 23 September 2014, *SFS unimarket AG/WEKO*; B-8399/2010 of 23 September 2014, *Siegenia-Aubi AG/WEKO*; B-8430/2010 of 23 September 2014, *Paul Koch AG/WEKO*; RPW 2010/3, 592 ff., *Jelmoli Bonus Card AG/WEKO*.

²⁰ Judgement of the Swiss Administrative Federal Court, RPW 2010/2 329, *Publigroupe SA et al./WEKO*.

As aforementioned, decisions with amicable settlements have been the subject of appeals in the past (see above 3.1.). Furthermore, since the COMCO usually approves amicable settlements in an infringement decision after a full investigation of the case (see above, 1.1.), these decisions – even though they are less subject to judicial review than infringement decisions without amicable settlements – have at least some precedential value.

3.4 *Amicable settlements and private enforcement of antitrust damages*

19. We should mention in advance that while private enforcement of antitrust damages is possible according to Chapter 3 Cartel Act, it has rarely been an issue in the past. Nevertheless, in cases where the amicable settlement has to be approved in an infringement decision (see above 1.1.), it is possible for the plaintiff to rely on this infringement decision to file a damage claim.

4. Benefits and risks associated with the use of amicable settlements

20. According to the OECD background paper, commitment decisions are associated with significant benefits for the agency, the investigated company and the public alike. These include procedural economy and swifter restoration of effective competition in the market. However, the paper also mentions that an extensive use of commitment decisions can lead to reduced legal certainty and predictability, it lacks deterrent effect and it might lead to a reduced level of procedural safeguards and transparency.²¹

4.1 *From the perspective of the COMCO the benefits associated with the use of amicable settlements have not fully materialized*

21. The benefits generally associated with commitment decisions have not fully materialized in our jurisdiction for the following reasons: The Swiss amicable settlement was introduced in the Cartel Act of 1995 in order to terminate cases in an efficient way and to free personal resources to be invested in other cases.²² The idea was that in cases where the competition authority considered a restriction of competition to be unlawful, it could propose an amicable settlement to the companies involved about ways to eliminate the restriction. Once the companies had committed themselves to implementing concrete measures to restore competition, the grounds for a continuance of the investigation were eliminated and the case could be terminated. Thus, the desired benefit was that the amicable settlement would ultimately render a full investigation unnecessary. This benefit materialized as long as our authority did not impose direct sanctions for unlawful restrictions of competition.

22. However, with the introduction of administrative sanctions for the most harmful restrictions of competition in Article 49a para. 1 Cartel Act in 2004 this changed.²³ Since then, in cases of indications of unlawful horizontal and vertical agreements according to Article 5 para. 3 and 4 and unlawful practices of dominant companies according to Article 7 Cartel Act, the competition authority – despite an amicable settlement – has to continue to investigate the case in order to decide in an infringement decision whether it was an unlawful restriction of competition, which allows for further sanctioning or not. Since it is not possible to terminate these cases without establishing an infringement, an amicable settlement may not terminate the proceedings. Thus, the intended objective of terminating cases with amicable settlements is not reachable in these cases. Furthermore, since the amicable settlement does not require that the involved companies admit an infringement nor that they make an acknowledgement of liability for the infringement, it generally does not facilitate the establishment of an infringement.

²¹ OECD background paper, 17 f.

²² Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) vom 23. November 1994 (BBl 1995 I 468), 602 (https://www.admin.ch/opc/de/federal-gazette/1995/index_6.html) .

²³ AS 2004 1385 (<https://www.admin.ch/opc/de/official-compilation/2004/1385.pdf>).

4.2 *Procedures with amicable settlements are shorter and less costly*

23. Even if the amicable settlement does not render a full investigation unnecessary, it generally allows to reduce the density of argumentation in the infringement decision, in particular in cases where all companies are part of the amicable agreement.²⁴

24. There is evidence that amicable settlements generally lead to shorter and less expensive proceedings (see above, 1.3.). In our experience, this is mostly due to the fact, that those companies, who are committing themselves to implementing measures to eliminate restrictions of competition, are generally willing to cooperate with the competition authority in order to terminate the procedure within a reasonable timeframe. In recent cases, companies that were part of an amicable agreement usually wanted to keep procedural and legal costs as low as possible. Therefore, even if they did not agree with the legal assessment of the competition authority, they had little incentive to write a lengthy statement to the statement of objections. From this point of view, these companies de facto played a rather passive role in the proceedings. Furthermore, the costs of the proceedings incurred by the COMCO were less than half as much on average as in proceedings without amicable settlements (see above, para. 1.3).

4.3 *Possible benefits from the perspective of the companies*

25. From the perspective of the companies amicable settlements may be attractive in cases with sanctions because the COMCO rewards them with a reduction of fines. In the past, the cooperation in context of an amicable settlement has led to reductions of fines of 3-25 % of the basic amount of the sanction according to the Swiss Cartel Act Sanctions Ordinance.²⁵ Having regard to the fact that the companies also conclude amicable agreements in cases without sanctions (7 out of 30 cases) there must be further benefits for the companies. The shorter and less expensive proceedings mentioned hereinbefore (see above, 4.2.) may be an important argument for an amicable settlement. But also the benefits mentioned in the OECD background paper like the quicker resolution of cases,²⁶ positive publicity and the improved quality of remedies²⁷ are likely to have a positive impact on the decision of a company to enter into an amicable settlement with the COMCO.²⁸

4.4 *General conditions for negotiations about an amicable settlement*

26. Besides the legal basis for amicable settlements in Article 29 Cartel Act, there are no further guidelines. However, the Secretariat of the COMCO has defined general conditions for negotiations about an amicable settlement. It hands out these general conditions to the companies interested in an amicable settlement. They provide for example, that the settlement be only about future behavior of the committing company. Furthermore, they exclude any negotiations regarding the sanction for any anti-competitive behavior in the past. In this context, the framework conditions mention that the Secretariat of the COMCO may inform the companies involved about the range of a possible sanction. In addition, they provide that the COMCO will take into account cooperation of the companies in connection with the amicable settlement as mitigating factor in the calculation of fines (see above, 4.3).

²⁴ RPW 2009/3, 196 ff., Rz 2, *Elektroinstallationsbetriebe Bern*, where all parties were part of the amicable agreement and RPW 2015/2, 193 ff., Rz 306, *Tunnelreinigung*, where all parties were part of the agreement.

²⁵ Article 3, 4 and 6 of the Swiss Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, CASO).

²⁶ OECD background paper, para. 30 f.

²⁷ OECD background paper, para. 32 f.

²⁸ BEURET (Fn 11), 112 f.