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When the chips are down

EU seeks to impose interim measures in *Broadcom*

by **Alec Burnside, Clemens Graf York von Wartenburg** and **Adam Kidane**

In a potentially ground-breaking move, the European Commission (the Commission) recently announced its intention to use its powers to impose interim measures in an investigation targeting chipmaker Broadcom. Interim measures are a form of temporary injunctive relief that may be adopted by the European Commission and competition authorities in EU member states. They should be distinguished from the power of the General Court to grant interim measures (also referred to as interim relief) in judicial proceedings. This article is focused on interim measures in the context of administrative proceedings before the Commission and competition authorities in EU member states.

If the Commission does impose interim measures it would be the first use of these EU powers in 18 years. The Commission is investigating whether Broadcom's practices in the supply of components for TV set-top boxes and modems amount to an abuse of dominance. The proposed interim measures are aimed at preventing Broadcom from causing harm to competition during the period of the Commission's investigation. The Commission has, in the past, been reluctant to use interim measures largely due to the significant evidentiary and procedural hurdles it must overcome. This reluctance was in part attributable to a series of damaging reversals in the EU courts in the *IMS Health* case, which was the last time the Commission adopted interim measures. However, recent statements by officials have pointed towards a renewed desire to make use of this tool. This development comes amid growing calls for the use of interim measures in antitrust investigations to prevent potentially irreversible competitive harm, in particular in fast-moving technology markets. This case is widely viewed as a test of the effectiveness of the Commission's powers to adopt interim measures and may have significant future policy implications.

Background

Pending the outcome of Commission antitrust investigations, which typically run into several years, interim measures are a powerful enforcement tool that can be used to ensure that effective competition is maintained, and irreparable damage that is incapable of being remedied is averted. The Commission's power to award interim measures was initially drawn from the judgment of the EU Court of Justice in *Camera Care* in 1980. Although the Commission did not have express powers to impose interim measures at the time, the Court held that its powers under Regulation 17 to bring infringements of Articles 85 and 86 (now Articles 101 and 102 TFEU) to an end implicitly included the power to order interim measures. This power was subsequently codified in Article 8 of Regulation 1/2003, which provides that the Commission, acting on its own initiative, may order interim measures where the following conditions are satisfied: (i) a *prima facie* finding of an infringement; and (ii) urgency due to the risk of serious and irreparable damage to competition.

The conditions for the adoption of interim measures in Regulation 1/2003 broadly mirror those developed in the case law under Regulation 17. However, the current regime arguably narrowed the scope for the adoption of interim measures in two respects. First, the substantive test for the adoption of interim measures was no longer satisfied simply by damage to individual undertakings, but also requires wider harm to the competitive process. Second, the wording of Article 8 excludes applications for interim measures by complainants. In this regard, it is noteworthy that prior to entry into force of Regulation 1/2003 there was a single case where the Commission adopted an interim measures decision ex officio, namely *Ford Werke*.

As to procedure, there are a number of safeguards that must be observed by the Commission. This includes the Commission's obligation to issue a statement of objections and grant access to its file; and the right of the parties concerned to be heard and respond to the Commission's objections in writing and in an oral hearing (if requested). In addition, the parties have a right of appeal to the General Court.

Commission practice

Prior to the entry into force of Regulation 1/2003 the Commission used its power to adopt interim measures in only a limited number of cases. In particular, interim measures were ordered in just eight cases following *Camera Care*, out of a total of 13 cases where they were considered. Two cases resolved before the Commission imposed interim measures. In *Eurofix-Bauco v Hilti*, undertakings were accepted pending the outcome of the investigation; whereas in *Sea Containers v Stena Sealink*, the parties entered into an arrangement obviating the need for interim measures. Since the entry into force of Regulation 1/2003, there have been, remarkably, no interim measures decisions at all.

Interim measures were most recently adopted in 2001 in the *IMS Health* case. Those measures required IMS Health to license a brick structure it developed to gather information on sales and prescriptions of pharmaceutical products in Germany to two new market entrants. However, the Commission withdrew the decision following three separate judgments of the EU courts which resulted in the suspension of the interim measures.[1] The standard of review established by the EU courts in *IMS Health* added to the Commission's already significant evidentiary burden. In particular, the Court of First Instance (now the General Court) held that the scope of its power to order interim relief in judicial proceedings did not fall to be interpreted differently in cases involving Commission interim measures decisions (as opposed to final decisions). In doing so, it found that the fact that a Commission interim measures decision is driven by an urgency to take protective measures confers no special status on such decisions. It also rejected the Commission's plea that, since its decision was based on complex economic assessments, IMS Health would need to establish a "stateable case" that the Commission manifestly erred in its assessment; rather, an applicant only needs to demonstrate "a serious dispute" regarding the correct interpretation of competition rules.

In addition, interim measures, notwithstanding their temporary and conservatory nature, will in most situations require a change in behaviour that may lead to potentially irreversible market developments. In principle, this may lower the bar for applicants challenging interim measures to meet the requirement that action by the court is urgent. For instance, in *IMS Health*, the court held that compelling IMS Health to license its 1860 brick structure may have resulted in an irreversible weakening of its market position and potentially restricted its freedom to define its business policy. Accordingly, the court found that IMS Health's application for interim relief satisfied the urgency requirement.

Moreover, given the Commission's limited resources, some form of prioritisation is necessary. Philip Lowe, ex-Director General for Competition, and Frank Maier-Rigaud noted over a decade ago that the reluctance to use Article 8 powers may be due to the fact that proceedings "appear as increasing the burden of investigation, since they add a full-blown procedure (and likely judicial review) to the main investigation."[2] The Commission's decisional practice shows that proceedings under Regulation 17 took up to almost a year, which is time and effort that could be dedicated to the main investigation.[3] It has even been suggested that the Commission's approach is that it will take officials as long as the underlying investigation to demonstrate that interim measures are warranted in cases that give rise to novel issues.[4]

Taken together, the high threshold for the adoption of interim measures and the risk that they will be set aside on appeal has had a chilling effect on the Commission's willingness use its Article 8 powers.

Calls for increased use of interim measures

In recent years, there have been growing calls for the increased use of interim measures. This development has largely been driven by the advent of the digital age: as the number and size of markets characterised by rapidly evolving technologies grows (in particular in markets that are prone to tipping), there is a greater risk that antitrust infringements will have on irreversible impact on competition and market structure. This has led to antitrust agencies increasingly questioning whether they are equipped with the right tools to effectively enforce competition rules. For instance, in 2017, the German Ministry for Economy published its White Paper on Digital Platforms, which recommends lowering the evidentiary threshold for interim measures. In the UK, the Furman Report on unlocking digital competition, published in March 2019, recommended streamlining the current procedures and administrative rules of the UK Competition and Markets Authority to facilitate the greater and quicker use of interim measures.

The competition authorities in Belgium and France already regularly employ interim measures. The French Competition Authority (FCA) in particular stands out as the national competition authority (NCA) that has made the most effective use of its power to adopt interim measures. Between 2007 and 2017 alone, the agency adopted interim measures in a total of 15 cases, almost twice the number of decisions adopted by the Commission since *Camera Care*. Notably, in 2010, the FCA adopted a decision imposing interim measures on Google following a complaint from Navx alleging an abuse of dominance after its AdsWords contract was terminated.[5] The greater use of interim measures by the FCA is in part due to the lower standard of intervention than the requirement to demonstrate a *prima facie* breach of competition law under Article 8 Regulation 1/2003. In particular, the French Supreme Court held that interim measures may be imposed where the conduct in question is likely to infringe competition law.[6] In addition, the fact that the interim measures may give rise to irreversible effects does not preclude the FCA from adopting a decision. From a procedural standpoint, complainants are able to apply for interim measures, and the existence of a fast-track procedure almost certainly increases the attractiveness of the remedy.

In Brussels, interim measures were recently brought back into the Commission's focus partly in response to questions over the length of its investigation in the *Google Shopping* case, which took over six years. Statements by Commissioner Margrethe Vestager have repeatedly underlined that the Commission would not shy away from using interim measures in appropriate cases, and that it was reviewing how the tool could be used more effectively. It is also known that the Commission has been looking for a suitable case in which to use its powers to test whether they can be operated successfully, or whether there is a need for legislative change.

The present case

According to its press release the Commission believes that Broadcom is likely to hold a dominant position in various markets for the supply of systems-on-a-chip for TV set-top boxes and modems; and that it may have abused its dominant position by entering into agreements with seven of its main customers that require those customers to purchase components exclusively (or almost exclusively) from Broadcom. The alleged practices may include, *inter alia*, imposing exclusive purchasing obligations as well granting rebates or other advantages that are subject to exclusive or minimum purchase requirements. The 2017 judgment of the Court of Justice in *Intel* may have given the Commission some confidence of the robustness of its preliminary conclusion that Broadcom has committed an infringement.[7] In particular, the judgment clarified the treatment of exclusivity rebates under Article 102 TFEU as well as the correct approach to be followed by the Commission in its assessment of exclusionary effects more generally. In particular, the judgment clarified the treatment of exclusivity rebates under Article 102 TFEU as well as the correct approach to be followed by the Commission in its assessment of exclusionary effects more generally.

Broadcom will have the opportunity to respond to the statement of objections, and as such it is not yet required to bring the alleged abusive conduct to an end. In a regulatory filing, Broadcom maintained that it complies with EU competition rules and that the Commission's concerns are "without merit", which suggests that it is primed to contest the charges levelled against its practices. If the Commission does adopt interim measures, Broadcom may well appeal. The outcome of an appeal will undoubtedly have significant ramifications for the future use of interim measures.

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Endnotes

1. The three judgments were: (i) an *ex parte* suspension of the interim measures decision following an appeal by IMS pending the adoption of the final order on interim measures by the Court of First Instance (Case T-184/01 R *IMS Health Inc v Commission (interim measures) – ex parte*; (ii) the final order of the Court of First Instance suspending the interim measures decision (Case T-184/01 R *IMS Health Inc v Commission (interim measures)*); and (iii) order of the Court of Justice upholding the order of the Court of First Instance following an appeal by the complainant, NDC Health (Case C-481/01 P(R) *NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc*).
2. Lowe, P and Maier-Rigaud, F, *"Quo Vadis Antitrust Remedies", International Antitrust Law & Policy: Fordham Competition Law,* 2007.
3. Navarro Varona, E and Gonzalez Durantes, H, *"Interim Measures in Competition Cases before the European Commission and Courts", European Competition Law Review*, [2002] 10 ECLR 51.
4. PaRR, "Vestager flags difficulties in applying interim measures for EU-level cases", Studienvereinigung Brussels, 12 March 2018.
5. FCA, *Navx*, Decision No 10-MC-01, 30 June 2010.
6. French Supreme Court, No 04-16.857, *Neuf Telecom c/ France Telecom*, 8 November 2005, Bulletin 2005 IV N° 220 p. 236.
7. Case C-413/14 P *Intel v Commission.*

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