Interim Measures in EU Competition Cases: Origins and Evolution

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‘Digital power at the service of humanity’

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‘So in the years ahead, one of the greatest challenges that we’ll face, as competition enforcers, will be to stop big tech companies from wiping out competition, by nudging markets past the point of no return. The best answer to that will be to move fast. But in a Union of law, where companies have an absolute right to defend themselves, there will always be limits to how fast we can move.

This is why I expect that the decision we took a few weeks ago, to impose interim measures on Broadcom, is a sign of things to come. Before last month, we last used interim measures in 2001. But I don’t expect to wait another 18 years before we do it again. In Broadcom’s case, we were dealing with a familiar threat to competition – an exclusivity arrangement that stopped Broadcom’s customers buying chips from anyone else. And it was also pretty clear that if we didn’t act, the market could soon tip – because several of the companies that buy these chips will soon run tenders for new supplies. Not every future case will be so clear cut, of course. But it’s important that we have this tool available – because in can make a vital difference in the cases where it’s appropriate.’

Overview

1. Broadcom and the Rebirth of Interim Measures
2. The Birth of Interim Measures: the *Camera Care* ruling
3. Interim Measures: Substantive Requirements
4. Why the Paucity? Procedural and Substantive Rationales
5. Rapid Resolution? The Interplay between Commitments (A.9) and Interim Measures (A.8) in Digital Markets
6. Implications

Broadcom and the Rebirth of Interim Measures

- 16 October 2019: EC imposed interim measures on Broadcom, first time since 2001 (*IMS Health*)

Article 8, Regulation 1/2003

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

The Birth of Interim Measures: The *Camera Care* ruling

The *Camera Care* ruling

- Initially, EC claimed to believe it had no power to order interim measures for infringements
  - Regulation 17 did not expressly confer upon the EC commission the power to adopt interim measures
- ECJ, in *Camera Care* (Case 792/79 R): Implied power to order interim measures to prevent infringement decisions from becoming 'ineffectual or even illusory because of the action of certain undertakings'.
  - 'there may be a need to adopt interim measures when the [anticompetitive] practice … has the effect of injuring the interests of some Member States, causing damage to other undertakings, or of unacceptably jeopardizing the Community's competition policy'.
  - 'in cases proved to urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest.'
  - The measures also have to be 'of a temporary and conservatory nature and restricted to what is required in a given situation' and be made in such a 'form' to allow and enable judicial review of their legality by the Court.
- NB: Article 8(1) of Regulation 1/2003 only refers to the Commission 'acting on its own initiative'; undertakings no longer enjoy a legal right to apply for such orders (de-centralisation rationale)

Substantive Requirements

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- Risk of serious and irreparable damage to competition
  - That is, damage to competition which could no longer be remedied by the decision adopted by the EC upon the conclusion of the proceedings
- Prima Facie finding of an infringement
  - EC decisions imposing interim measures are adopted in the course of the administrative proceedings and are based on provisional findings. EC cannot be expected to establish the existence of the infringement of competition law with the same degree of certainty as applicable in a final decision (*La Cinq v Commission*, Case T-44/90, EU:T:1992:5, at para. 80). It is sufficient that the infringment is likely. (*Automobiles Peugeot SA and Peugeot SA v Commission*, Case T-23/90, EU:T:1991:45, at para. 61)

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- Urgency
  - Not an autonomous conditions: The conditions of ‘urgency’ and ‘prima facie case’ are interdependent: the stronger the prima facie case the lower the threshold of competitive harm justifying a finding of urgency
  - The assessment of urgency must be based on a broader perspective, weighing the effects of the impugned practice and of the interim measures contemplated by the Commission on all stakeholders, including the undertakings concerned and consumers
- Proportionality
  - Interim measures need to respect the principle of proportionality (Joined cases 228/82 and 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission of the EC* [1984] ECR 1129).
- Procedural rights
  - Article 27 (1) of Regulation No 1/2003: before issuing interim measures, ‘the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard’.
- Limited in time, although it can be renewed, insofar as this is necessary and appropriate (Art. 8(2)).

The Commission may impose a very substantial fine of 10% of the turnover against companies that violate a decision ordering interim measures (Article 23(2)(b)).

Why the Paucity?

Case	Commission Interim Measures Decision	European Courts Interim Measures Proceedings relating to Commission Interim Measures Decision	Commission Final Decision	European Courts – Annulment proceedings against Commission Interim Measures Decision
Ford Werke	18 August 1982	29 September 1982	16 November 1983	28 February 1984
ECS / AKZO	29 July 1983	No appeal	14 December 1985	No appeal
BBI / Boosey & Hawkes	29 July 1987	No appeal	No appeal	No appeal
EcoSystem/Peugeot	26 March 1990	21 May 1990	4 December 1991	12 July 1991
Mars/Langnese-Iglo and Schoeller Lebensmittel	25 March 1992	16 June 1992	23 December 1992	Case withdrawn
Sealink	11 June 1992	No appeal	No appeal	No appeal
ICG/CCI Morlaix	16 May 1995	No appeal	No appeal	No appeal
NDC Health/IMS Health	3 July 2001	ECJ – 11 April 2002	Proceedings discontinued	Case withdrawn

Why the Paucity? Procedural and Substantive Rationales

- Procedural Factors
  - Removal of the right of complainants to request interim measures; the EC Commission is no longer forced to consider applications; shifted to NCAs and national courts
  - Proceedings under Article 8 may increase the burden of investigation, since they add a full-blown procedure (and likely judicial review) to the main investigation.
- Substantive Factors
  - *IMS Health* Case: Commission lost; no prima facie case was made because the case concerned a 'novel theory of harm'; high evidentiary burden; broad discretion to the judge hearing the application for interim measures to reach a different conclusion than the Commission
  - Claim for damages, if eventually a Court finds that the interim measures decision was unjustified. However, under EU law, the error would have to be shown to constitute a manifest and serious breach, and a loss and a causal link would have to be shown (*Schneider Electric*)
  - Danger of false positives ('picking winners')

Rapid resolution? The Interplay between Commitments and Interim Measures in Digital Markets

Digital Markets: Need for Rapid Intervention

- Digital markets
  - Often direct but also indirect network effects
  - First mover advantage, lock-in
  - If there is exclusionary conduct at the early stages, this may result in an 'unassailable position'
  - Rapid intervention may be necessary to prevent irreparable harm

But:

  - Where rapid intervention seems necessary, because there would be high persistent costs for false negatives, there will also be a high cost of false positives – picking winners.

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- In fast-moving markets, the quick resolution of the cases have led the Commission to frequently make use of Article 9 commitment decisions under the assumption that this procedure saves time and resources
- Article 9 advantages:
  - Proceedings leading to the adoption of commitments decisions usually are shorter than Article 7 proceedings because the Commission does not issue a statement of objections
  - Quick intervention before irreparable harm is done in fast-moving markets, especially where there are network effects
  - Flexible remedies (quasi-regulation)
- Article 9 disadvantages:
  - Not appropriate in all circumstances: 'commitment decisions are not appropriate in cases where the Commission intends to impose a fine' (at para. 13)
  - Where the practice at issue raises novel issues of competition policy or competition law that deserve clarification by the regulator.

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- So far, there is little evidence of substantial time/resource savings through commitments (see *Google Shopping*)
- In some cases, the time saving to prevent irreparable harm plays a substantial role for choosing Art. 9
- But, Art. 8 is precisely tailored for ‘swift intervention’ to prevent irreparable harm. The condition of ‘urgency’ should also be more easily satisfied in digital markets, where the market advantage illegally obtained through the implementation of anti-competitive practices may quickly become unassailable due to network effects

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- Vestager: ‘where you would want to apply interim measures is where you have novel cases and the problem of doing interim measures... is that you still have to prove that it is needed’
  - *Lessons from IMS Health:* any decision that imposes interim measures that adopts a novel interpretation the Article 101 or Article 102 TFEU provisions, can fulfil the ‘prima facie’ conditions for suspension by the courts as applied in IMS Health. This could be a problem in many of the digital cases, where novel theories of harm may be involved (e.g. Google shopping).

Implications

Interim Measures as a leverage for Commitments?

Consensual Interim Measures?