



# Interim Measures under Regulation 1/2003: the Broadcom decision

**Massimiliano KADAR**

GCLC Lunch Talk

2 December 2019

*The views expressed in this presentation are personal and do not necessarily reflect those of the European Commission*

# Overview

1. Introduction
2. Legal framework & conditions
3. The Broadcom interim measures decision
4. Conclusions



# Introduction

- **Regulation 17: no provision for interim measures**
  - Art. 3(1): *Where the Commission, upon application or upon its own initiative, finds that there is an infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertaking concerned to bring such infringement to an end.*
- **Camera Care (792/79R):**
  - §18: *The powers which the Commission holds under Article 3(1) of Regulation No 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions (...)*
- **La Cinq (T-44/90): two concurrent conditions**
  - Prima facie infringement of EU competition law
  - In cases of proven urgency, in order to prevent the occurrence of a situation likely to cause serious and irreparable damage to the party applying for their adoption or intolerable damage to the public interest.

## Art. 8 of 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.*
- **Explicit provision for interim measures:**
    - Recital 11: to ensure that Treaty provisions are applied
    - Conditions as defined by the Court of Justice in La Cinq
      - Except: urgency due to risk of damage to competition
    - See also Art. 17.2 of Regulation 773/2004 → rights of defence must be respected

# The Broadcom Decision

- On 16 October 2019, the Commission adopted a decision imposing interim measures on Broadcom
- Broadcom is the the world leader in the supply of chipsets for TV set-top boxes and modems, including so-called systems-on-a-chip (SoCs)
- First time the Commission adopts a Decision after IMS (2001) and first time for a Decision under Article 8 of Regulation 1/2003
- Decision follows beginning of investigation in October 2018 and SO on interim measures on 26 June 2019
- CAVEAT: all findings on infringement are *prima facie*



# Dominance

- The Decision *prima facie* finds Broadcom to be dominant in 3 product markets:
  - SoCs for set-top boxes (STBs)
  - SoCs for xDSL modems
  - SoCs for fibre modems
- Dominance established in light of:
  - High market shares
  - Barriers to entry (including economies of scale)
  - Lack of buyer power

# Prima facie abuse

- Clauses included in contracts between Broadcom and six STB and modem original equipment manufacturers:
  - Provisions **strengthening Broadcom's dominance**:
    - Exclusive or quasi-exclusive purchasing obligations
    - Commercial advantages (e.g. rebates, early access to technology and premium technical support) conditional on the customer buying exclusively or quasi-exclusively from Broadcom
  - Provisions **leveraging Broadcom's dominance in cable modem SoCs**:
    - Clauses granting commercial advantages (price and non-price advantages) in dominated markets conditional on customers buying SoCs for cable modems exclusively or quasi-exclusively from Broadcom

## Prima facie analysis of abuse

- Regardless of presumption of anticompetitive effects for at least part of the conduct, Commission carried out a *prima facie* analysis of the effects of Broadcom's conduct *inter alia* based on:
  - Size and importance of the relevant customers
  - Conditions and duration of the agreements
  - Contemporaneous evidence found in internal documents of customers and competitors
- Price-cost AEC test was not necessary in this case and would have been anyway unsuitable
- Objective justification assessed and dismissed on *prima facie* basis

## Urgency (1)

- Broadcom's conduct would likely affect future tenders launched by service providers
- Competitors would be unable to compete on the merits for those tenders
- This would result in the exit or marginalisation of Broadcom's competitors
- Once competitors have exited, re-entry would be unlikely (if not impossible)

**→ Conduct is likely to result in serious and irreparable harm to competition**



## Urgency (2)

- Thorough assessment of urgency requirement based *inter alia* on:
  - Likely future tendering behaviour of service providers
  - Upcoming introduction of WiFi 6 standard for modems and STBs
  - Economies of scale, which makes it unlikely that market developments can be reversed
  - Evidence from competitors concerning the likelihood of exit or marginalisation
  - Evidence of past exit confirming challenging state of the market and low likelihood of re-entry

# Interim measures

- Decision imposes on Broadcom within 30 days to:
  - (i) Unilaterally cease to apply the anticompetitive provisions identified by the Commission and to inform its customers that it will no longer apply such provisions; and
  - (ii) Refrain from agreeing the same provisions or provisions having an equivalent object or effect in other agreements with these customers, and refrain from implementing punishing or retaliatory practices having an equivalent object or effect
- Interim measures are proportionate to the objective of protecting competition in the interim and limited in time (3 years or end of investigation)

## Conclusions

- Interim measures are "*One way to tackle the challenge of enforcing our competition rules in a fast and effective manner*"
- They are key in preventing irreparable harm to competition, particularly when market characteristics are suitable (e.g. economies of scale, network effects)
- Parties maintain full rights of defence both in interim measures and substantive proceedings
- Whenever necessary, Commission is committed to make best possible use of this tool

# Back-up

- **Interim measures adopted by the European Commission prior to October 2019**

<b>Date</b>	<b>Case</b>	<b>Conduct</b>
1982	Ford-Werke	101 TFEU
1982	ECS / Akzo	102 TFEU
1987	BBI / B&H	102 TFEU
1990	Peugeot	101 TFEU
1992	Ice cream (X2)	101 TFEU
1992	Sealink	102 TFEU
1995	Roscoff	102 TFEU
2001	IMS	102 TFEU