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I. INTRODUCTION

Before the EU Courts, nearly all applications for interim relief—including those made in major competition law cases—are heard by a single Judge, who is either the President or his delegate.[2] While this rule is also applied in many Member States, the audacity of vesting a single person with the power to suspend decisions adopted by the full College of the European Commission, sometimes after years of complex proceedings, is noteworthy. If a suspension is not sufficient to ensure effective judicial protection, the Presidents can even address direct orders to the Commission.

In almost every case, the Presidents decide on their own whether they must strike quick and hard or, on the contrary, hold their horses. Clearly this is not an easy task, which probably explains why the case law on interim relief displays a recurring tension between audacity and caution.

- On the one hand, the Presidents sometimes do not shy away from using their impressive powers even when this means that they must make findings that are entirely at odds with the decision of the European Commission. One of the best examples of such audacity is the *IMS Health* case, in which the President of the (then) Court of First Instance ("CFI") found that it was urgent to suspend a Commission decision ordering interim measures, *i.e.*, measures which by definition, in the Commission's view, needed to be applied urgently.[3]
- On the other hand, in many cases the Presidents appear to have been extremely cautious, in particular when they refused a suspension of the challenged decision that would have provisionally preserved the applicant's interests without causing any significant harm to the public interest or to third parties.

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[1] Formerly *référendaire* and *Chef de cabinet* of the President of the (then) Court of First Instance (2003-2007). For recent articles on EU interim relief, *see e.g.*, M. Jaeger, *Le référé devant le président du Tribunal de l'Union européenne depuis Septembre 2007*, 171 JOURNAL DE DROIT EUROPÉEN, p. 1977 (2010); F. Castillo de la Torre, *Interim Measures in Community Courts: Recent Trends*, COMMON MARKET L. REV, p. 273; É. Barbier de La Serre & M. Lavedan, *Interim measures ordered by EU Courts in EU competition law cases*, 1 CONCURRENCES 41914 (2012).

[2] Since November 1, 2012 the Judge hearing applications for interim relief at the Court of Justice is the Vice-President of the Court (Article 1 of the Decision of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court (OJ 2012, L 300, p. 47)). In this piece we will collectively designate the Judges hearing applications for interim relief as the "Presidents."

[3] Case T-184/01 R *IMS Health* v *Commission* [2001] ECR II-3193. On appeal the President of the ECJ upheld the order (Case C-481/01 P(R) *NDC Health* v *IMS Health and Commission* [2002] ECR I-3401).

There are more orders reflecting the second trend—caution—than ones showing audacity. This unbalance has created some frustration among private litigants. The common wisdom in some legal circles has even become that "before the EU Courts one never gets interim relief."

In our view this statement is unfair and unduly pessimistic. It is clearly very difficult—in fact exceptional—to obtain interim relief before the EU Courts. This is true in general and in competition law cases in particular, as from mid-1999 to January 2013 the President of the General Court dismissed close to 80 percent of the applications for interim relief made in competition law cases.[4] Yet, litigants should not despair. After all interim relief was granted in 20 percent of these cases, which is not insignificant. In addition, and above all, there are several aspects of the law on interim relief—at least three fundamentals—that make it a wise, open, and powerful piece of EU procedural law (II).

That being said, it is submitted that effective judicial protection would be significantly enhanced—without causing excessive harm to the public interest—if two problematic fundamentals of the case law were reconsidered and fixed (III). As a matter of law and practice, there may not be so much that needs to be changed to ensure more effective, and balanced, judicial protection.

II. THREE GREAT FUNDAMENTALS

A. The Golden Rule: Pragmatism

Since 1952 there have been only 10 Presidents of the Court of Justice ("ECJ") and four Presidents of the General Court. This means that since that date, out of more than 170 Judges and Advocates General, only 14 men (as no woman has been elected President so far) and their occasional delegates have imprinted their mark on the law of interim relief.[5]

Yet the law of interim relief has substantially evolved over the last 60 years. In particular, while originally the Presidents applied an openly casuistic method that looked slightly disorganized, they now follow a more stable methodology. As is well known, interim measures may now be granted only if three cumulative conditions are met:

- the action in the main proceedings appears, at first sight, not to be manifestly unfounded (*fumus boni juris*);
- the measures are urgent, which means that in their absence the applicant would personally suffer serious and irreparable harm; and
- the balance of the interests at stake (including those of third parties) weighs in favor of the granting of interim measures.

However there is one rule that is even more fundamental than these three basic conditions: this is the principle according to which "the judge dealing with the application for interim measures must not apply" the conditions "mechanically and rigidly […], but must take

[4] Excluding State aid cases (source: Court of Justice website).

[5] These figures include the Judges of the former Court of Justice of the European Steel and Coal Community (ECSC), but exclude those of the Civil Service Tribunal (as the latter does not hear competition law cases).

account of the factual and legal circumstances specific to each case […] and determine, in the light of those specific circumstances, the manner in which those conditions […] are to be examined."[6]

Interim relief is therefore casuistic in nature, and rightly so: a litigant always has the right to show that his specific situation justifies a departure from what *prima facie* looks like irreversible case law. As noted by Advocate General Jacobs, "[p]roceedings for interim measures are quintessentially proceedings in which pragmatic considerations are rightly taken into account."[7]

Revolutions rarely happen in the world of interim relief, but a recent order delivered in a competition law case—*Akzo Nobel*—shows that the casuistic method is alive and kicking.[8] Until that order, the disclosure of confidential information was rarely considered as constituting irreparable harm: even though "the bell cannot be unrung," the Presidents generally analyzed the consequences of the disclosure to determine whether these consequences themselves constituted irreparable harm. In other words, what mattered was whether the harm potentially caused by the disclosure—not the disclosure itself—could or could not be repaired.[9] Yet, in *Akzo Nobel*, the applicants were able to demonstrate that, in their specific case and in view of the fundamental nature of the right invoked (the protection of professional secrecy), it was urgent to prevent disclosure for the own sake of keeping the information confidential.

Akzo Nobel is just one of the many orders in which the Presidents dismissed a rigid application of the law.[10] There is therefore always reason for hope: pragmatism remains the golden rule of the law on interim relief.

B. Super Interim Relief

Article 105(2) of the Rules of Procedure of the General Court provides that "[t]he President […] may grant the application even before the observations of the opposite party have been submitted." He may adopt the order—and withdraw it—even on his own motion.

The value of Article 105(2) is probably underestimated, as it may not be apparent to all litigants that the President regularly relies on this provision to immediately suspend a decision. He generally issues such orders either where he needs to have:

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[6] Case T-95/09 R *United Phosphorus* v *Commission* [2009] ECR II-47*, ¶¶73 *et seq*.

[7] F.G. Jacobs, *Interim measures in the law and practice of the Court of Justice of the European Communities*, in R. Bernhardt (dir), *Interim measures indicated by international courts*, Bd. 117 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT, p.37 (1998).

[8] Case T-345/12 R *Akzo Nobel and Others* v *Commission*, not yet reported, ¶¶24-33; *See also*, although the consequences of the disclosure were analyzed, Case T-164/12 R *Alstom* v *Commission*, not yet reported, ¶¶45-49.

[9] Case T-198/03 R *Bank Austria Creditanstalt* v *Commission* [2003] ECR II-4879, ¶¶50 *et seq*., and Case T-201/04 R *Microsoft* v *Commission* [2004] ECR II-4463, ¶¶252 *et seq*.; Case C-7/04 P(R) *Commission* v *Akzo Nobel* [2004] ECR I-8739, ¶¶36-44.

[10] Case C-232/02 P *Commission* v *Technische Glaswerke Ilmenau* [2002] ECR I-8977, ¶¶54 to 61, Case C-481/01 P(R) *NDC Health* v *IMS Health and Commission* [2002] ECR I-3401, ¶¶55 to 61; Order in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I 441, ¶41; Case T-132/01 R *Euroalliages and Others* v Commission [2001] ECR II-2307,¶¶ 69 *et seq*. (quashed on appeal); Case T-69/06 R *Aughinish Alumina* v *Commission* [2006] ECR II-58*,¶ 77.

> enough time to be sufficiently informed so as to be in a position to judge a complex factual and/or legal situation raised by the application before him, or where it is desirable in the interests of the proper administration of justice that the status quo be maintained pending a decision on the application, to adopt provisional interim measures.[11]

It is difficult to imagine a broader test.

In practice the gates of Article 105(2) are not wide open, but in a number of cases the President ordered the provisional suspension of decisions only a few days, or even a few hours, after they were challenged before the General Court. In *1.garantovaná* for instance, the President used that provision to order the suspension of a decision imposing a fine for more than 18 months, pending clarification of the applicant's financial situation.[12] Article 105(2) was used in many other cases, and therefore significantly contributes to effective judicial protection.[13]

C. Procedural Flexibility

The Presidents are free to organize the interim relief proceedings as they see fit. They obviously remain bound to comply with the general procedural principles that apply in all judicial proceedings, like the right for each party to present observations on the evidence submitted by the other parties. However, beyond these fundamental principles, they enjoy a high degree of discretion. They may organize several rounds of written pleadings. They may decide to rule on the application without organizing any oral hearing. If they believe that an oral hearing (or several) is (are) necessary to clarify the situation, they may organize it (them) immediately after the application has been lodged. They may also rule on applications to intervene at the very end of the proceedings, or even avoid ruling on them if, in their final order, they grant the form of order sought by the applicant for leave to intervene.

The Presidents may also try to settle the interim relief case instead of adopting a formal order granting or dismissing the application. Such settlements are not uncommon,[14] and precedents show that in these cases the Presidents may act as mediators. For instance, in *Schneider* and *Tetra Laval*, two cases in which the applicants had (legally) implemented a transaction which later on was prohibited by the European Commission, the President of the then CFI convinced the Commission to extend the deadline imposed on the undertakings in exchange of a withdrawal of their application for interim relief.[15]

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[11] Case T-184/01 R *IMS Health* v *Commission* [2001] ECR II-2349, ¶ 20, quoting Case 221/86 R *Group of the European Right* v *European Parliament* [1986] ECR 2579, ¶9, Case 194/88 R *Commission* v *Italy* [1988] ECR 4547, ¶3, Case C-195/90 R *Commission* v *Germany* [1990] ECR 2715, ¶20, and Case T-12/93 *CCE Vittel et CE Pierval* v *Commission* [1993] ECR II-449, ¶33.

[12] Case T−392/09 R *1.garantovaná* v *Commission* [2011] ECR II-33*.

[13] See *e.g.*, Case T-184/01 R *IMS Health* v *Commission* [2001] ECR II-2349; Order of 3 November 2010 in Case T-486/10 R *Iberdrola* v *Commission*, not reported; Case T−345/12 R *Akzo Nobel and Others* v *Commission*, cited above; Case T-52/12 R *Greece* v *Commission*, not reported yet.

[14] *See e.g.*, Case C-243/89 R *Commission* v *Danemark*, not published; Case T-42/98 R *Sabbatucci* v *Parliament* [1998] ECR II-3043, ¶¶19 to 21; Case T-254/99 R *Maia* v *Commission*, not reported; Case T-62/02 R *Waardals* v *Commission*, not reported, and Case T-376/05 R *TEA-CEGOS* v *Commission*, not reported.

[15] Case T-80/02 *Tetra Laval* v *Commission* [2002] ECR II-4519, ¶25.

To conclude on the great fundamentals of the law of interim relief, we believe that the three features described above—*i.e.*, pragmatism on the substance, super interim relief, and procedural flexibility—provide the Presidents with all the necessary tools to ensure effective judicial protection. This is a great *acquis* of EU law. However, what is needed now is a change of two other fundamentals that seem excessively restrictive.

III. TWO FUNDAMENTALS THAT NEED A RETHINK

A. Why So Much Caution?

The overwhelming majority of applications for interim relief are dismissed. In 2011 for instance, the President of the General Court granted only two of the 52 applications on which he ruled that year.[16] In itself this figure is not very informative, as it says nothing about the objective value of these 52 applications. The fact remains that, over the years, the Presidents have been extremely cautious and, in certain cases, too conservative.

The main reason for their self-restraint is quite easy to understand: the suspension of a Commission decision must remain an exceptional measure, as granting interim relief too generously would likely paralyze the Commission's action. Yet, even with this constraint in mind, there are features of the case law on interim relief that appear to be unnecessarily conservative.

For instance, can it be accepted that harm caused by an illegal decision may be repaired through an action for damages—and therefore does not qualify as irreparable harm—when the chances of success of such an action are objectively very weak because of the Commission's wide margin of appreciation when it adopted the illegal decision? While in *Euroalliages* the President of the (then) CFI held that this was not acceptable, the President of the ECJ disagreed and quashed his order.[17] In our view this has created a loophole in effective judicial protection.

There are many other examples of highly conservative rules applying to the assessment of urgency (*e.g.*, the very restrictive conditions under which an irreversible evolution of the market may constitute urgency).[18] As a whole, the law on interim relief has become so strict that the Presidents now have ample room to relax the condition of urgency without unduly interfering with the European Commission's prerogatives, nor opening the floodgates of litigation. In fact, in several Member States the conditions for interim relief are more open than under EU law, including in public law proceedings, and there is no indication that the Judiciary or the administrative services of these Member States have collapsed.[19] The EU Courts should therefore err on the side of more, rather than less, generosity.

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[16] Court of Justice of the European Union, *Annual Report 2011*, p. 205.

[17] Case C-404/01 P(R) *Commission* v *Euroalliages* [2001] ECR I-10367, ¶¶67 *et seq.*; Case T-132/01 R *Euroalliages and Others* v Commission [2001] ECR II-2307, ¶¶69 *et seq.*

[18] *See e.g.*, Case C-391/08 P(R) *Dow Agrosciences and Others* v *Commission* [2009] ECR I-219*, ¶¶75 *et seq.*

[19] *See e.g.*, the relatively broad wording and interpretation of: (i) Article L. 464-8 of the French Commercial Code (which allows the President of the Paris Court of Appeals to suspend decisions of the French Competition Authority if their application triggers "manifestly excessive consequences"); and (ii) Article L. 521-1 of the French Code of Administrative Justice (which, according to the French Council of State, incorporates a balance of interests; CE 21 March 2011 *Commune de Beziers*, n° 304806).

The Presidents should feel further emboldened by the fact that the suspension of a Commission decision is not always a dramatic move. On this point as well, the Rules of Procedure provide for ample flexibility. As the President of the General Court often recalls when he suspends a decision, pursuant to Article 108 of the Rules of Procedure, on application by a party his "order may at any time be varied or cancelled on account of a change in circumstances."[20] This acts as an important safety valve.

B. Urgency: The Lonesome Condition

The overwhelming majority of interim relief applications are dismissed for lack of urgency. From mid-1999 to January 2013, approximately 83 percent of the orders of the President of the General Court dismissing an application for interim relief in a competition law case were based on lack of urgency and did not analyze the balance of interests.[21]

In our view the condition of urgency has now become too strict and—more importantly—too isolated from the other conditions for interim relief.

The crux of the problem lies in the fact that, in most cases, the alleged urgency is examined independently of the *fumus boni juris* and the balance of interests. This has not always been the case. There are many orders, including quite recent ones, in which the condition of urgency was analyzed in combination with the balance of interests.[22] In the same spirit, several orders acknowledge that the urgency invoked by the applicant must be given a special weight if the *fumus boni juris* is serious.[23] In other words, the case law acknowledges that, at least in certain cases, the conditions for interim relief interact with each other.

In our view this broad, flexible approach should prevail in all cases. For instance, as a matter of principle, we do not see any compelling reason why serious harm that is merely difficult to repair (*i.e.*, not strictly irreparable) cannot justify interim relief if, in addition to the existence of such harm, there is a certain likelihood that the challenged decision is illegal and the balance of all the interests at stake (including those of third parties) tips in favor of a suspension.

In fact we strongly believe that, in interim relief cases, the core of the Presidents' task is—or at least should be—the balance of interests.[24] The balance of interests is by far the best device one can think of to take into account all the circumstances of the case, which as noted above is probably the only golden rule of interim relief. Of course, a strong degree of urgency may still be

[20] Conversely, Article 109 of the Rules of Procedure allows a party whose application was dismissed to make a new application based on fresh facts.

[21] Source: Court of Justice website.

[22] Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum* 187 v *Commission* [2003] ECR I-6887, ¶¶130 et seq. (which interestingly, mentions "*harm reparable only with difficulty*", and not "*irreparable harm*", *See* ¶141); Case C-320/03 R *Commission* v *Austria* [2003] ECR I-11665, ¶¶90 *et seq.*

[23] Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, ¶110; Case T-257/07 R II *France* v *Commission* [2008] ECR II-236, ¶127.

[24] *See also* on this point R. Mehdi, *Le juge communautaire et l'urgence*, in H. Ruiz Fabri, J.-M. Sorel (dir), *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales : regards croisés*, Pedone, Paris, 2003, p. 57. For old precedents showing the importance of the balance of interests, *see e.g.*, Case 18-57 R *Nold* KG v *High Authority* [1957] ECR 233.

required, as urgency must remain at the heart of interim relief. There is no reason to suspend a Commission decision in the absence of a certain amount of imminent danger.

However, there is no reason either to impose the tremendously high threshold of urgency that currently applies. The Presidents should not be prevented from balancing all the interests at stake for the sole reason that the personal harm invoked by the applicant is, for instance, very serious but merely difficult to repair.[25] The balance of interests test is flexible enough to avoid opening the floodgates of interim relief and guarantee the protection of the Commission's interests: when the Presidents ponder the various interests at stake, nothing prevents them from assigning more weight to public interests than to private ones, as they have already done in many State aid cases for instance.[26] In a number of orders where the Presidents have balanced the interests at stake, they found that they did not weigh in favor of the applicant, even though urgency was clearly established.[27]

Unfortunately, most orders adopted during these last 20 years follow a narrower approach than the one defended above. However there is reason for hope. First, as noted above, the casuistic approach that is inherent to interim relief cases leaves open the possibility of rejuvenating the balance of interest. Second, in the recent *Akzo* order, the President made a combined analysis of the balance of interests and the alleged urgency.[28] It is too early to know whether this marks a real change, or whether this concerns only the disclosure of confidential information, but this is clearly a welcome development.

IV. CONCLUSION

There are certain fields of EU competition law where interim relief will rarely play an important role. For instance, the expedited procedure is normally much more adapted than interim relief to deal with urgent situations arising from potentially illegal merger control decisions.[29] Yet interim relief constitutes a major guarantee of effective judicial protection in virtually all the other areas of EU competition law. As noted above, the law as it stands is now unbalanced, as it is excessively harsh on applicants. Due to this imbalance, the Presidents have ample scope to relax the conditions for interim relief without unduly harming the Commission's interests.

There is no reason to be pessimistic on this front. While on certain aspects—in particular procedural ones—the case law has become stricter over the last few years,[30] in other respects it has evolved towards more generosity. For instance, when the applicant seeks the suspension of

[25] Some orders tend to acknowledge that harm that is merely difficult ro repair may constitute urgency (*see e.g.*, Case T-346/06 R *IMS* v *Commission* [2007] ECR II-1781, ¶¶141 *et seq.*).

[26] *See e.g.*, Case T-198/01 R *Technische Glaswerke Illmenau* v *Commission* [2002] ECR II-2153, ¶ 113 (and the references mentioned).

[27] *See e.g.*, Case C-208/03 P-R *Le Pen* v *Commission* [2003] ECR I-7939, ¶¶105-111 (noting the risk that the disqualification of the appellant from holding office following a criminal conviction that has become definitive would be deprived of all its effect if the measure was suspended).

[28] Case T−345/12 R *Akzo Nobel and Others* v *Commission*, cited supra, ¶¶24-33.

[29] On this aspect, *see* É. Barbier de La Serre, *Accelerated and Expedited Procedures before the EC Courts: A Review of the Practice*, COMMON MARKET L. REV 783 (2006).

[30] *See e.g.*, the restrictions concerning the submission of evidence after the filing of the application of interim measures (*see e.g.*, Case T-30/10 R *Reagens* v *Commission* [2010] ECR II-83*, ¶¶51).

the obligation to pay a fine, the Presidents now seem more inclined to consider that there may be divergences of interests within a group of companies that justify not taking into account the financial situation of the whole group.[31] However, what is needed now is a more fundamental change of approach that goes beyond mere gradual changes: not an *aggiornamento*, but at least an upgrade of the balance of interests.

[31] Case T-385/10 R *ArcelorMittal Wire France and Others* v *Commission* [2010] ECR II-262*, ¶¶40-42.