REVIVAL OF COMMISSION INTERIM MEASURES?

BY BO VESTERDORF[1]

1 Former judge and president of the General Court of the European Union (then the Court of First Instance). Consultant to Herbert Smith Freehills LLP and to the Danish law firm Plesner.

CPI ANTITRUST CHRONICLE
OCTOBER 2019

I. INTRODUCTION

From 2001 until now the Commission has refrained from using its powers under Article 8 of Regulation 1/2003 to take a decision imposing interim measures in any case. In a fairly recent comment to the press the current Competition Commissioner, Ms. Vestager, has announced that the Commission is considering making use of those powers again in appropriate new cases. This announcement has now been followed up by the Commission, which has opened an investigation into Broadcom and has sent a Statement of Objections to the undertaking seeking to impose interim measures against suspected exclusivity practices.[2,3]

In the recent press comment, the Commissioner said that it is a serious problem that investigations into many important antitrust cases are often protracted to the extent that once a final decision is taken – most often ordering the addressee to cease or change anticompetitive behavior – the order *de facto* becomes moot because the damage to competition has already happened or the market in the meantime has changed. In such cases, it is argued that it would be very helpful for the Commission to be able to impose interim measures early in the investigation in order to preserve the competitive situation and avoid irreversible negative impact on the market to the detriment of competition and thus consumers.

Much has already been said about the Commission's hesitation to adopt interim measures and the difficulties for the Commission in this regard.[4] In the following, I shall largely limit myself to some reflections of a judicial policy character and not discuss in much detail the legal conditions which the Commission must comply with when imposing interim measures.[5]

2 See Commission press release of June 26, 2019.

3 According to PaRR report of August 13, 2019, a number of complainants have asked the Commission to impose interim measures on Google to prevent alleged anticompetitive behavior by Google via its search tool.

4 To mention just some articles on this topic see: "Injunctive Relief as an Antitrust Violation or as an Enforcement Tool: An EU Antitrust Perspective," by Yves Botteman & Jean-Francois Guillardeau, CPI Antitrust Chronicle March 2013 (1), see also: "Interim Measures; An overview of EU and national case law," by Alec J. Burnside & Adam Kidane, e-Competitions, Concurrences # 86718.

5 For the sake of transparency, I should mention that I was the president who issued the order in the *IMS Health* interim measure case of 2001.

II. CONSEQUENCES OF INTERIM MEASURES

One of the first important things to remember when considering whether to impose interim measures is that they may, naturally depending on their form, impose very important burdens and obligations of the undertaking in question. Interim measures may have serious economic consequences but more importantly, they may have serious negative consequences on the undertaking's position on the market and they may indeed lead to even irreversible market changes. In other words, changes that cannot be undone even if the undertaking at the end of the investigation, or after judicial review by courts, is found not to have infringed competition law. This, in particular, may be so in cases where interim measures impose restrictions on or prevent the normal use of IP rights by its owner.[6] Furthermore, it should be kept in mind that such a new practice, if implemented rigorously, might have a chilling effect on innovation. Undertakings might hesitate somewhat before investing heavily in innovative technology if they come to fear that launching new products or practices in the market might be stopped dead almost from the get-go. Without the risk of interim measures, undertakings at least have a chance to recoup some of the investments, either because the investigation against them does not result in finding any anticompetitive infringement or before a final antitrust decision ordering a stop might be taken. Such considerations must be combined with the fact that under EU competition law and the case law of the courts any undertaking is considered innocent until proven guilty.[7]

This is the more so in view of the fact that interim measures are being considered to be imposed at an early stage of the investigation. At this stage, facts may not be completely and fully investigated, the situation of the market place and of competitors may also not be fully explored. Furthermore, the undertaking under investigation has not yet been given access to a full and complete file allowing it to examine and comment on all evidence against it, which means that the undertaking's rights of defense are curtailed. Fortunately, it appears from the Commission's administrative practice, from before 2001, that it is well aware of this. It therefore makes sure, as now seen in the *Broadcom* case, that the alleged infringer is heard before a decision is taken, by sending the undertaking a statement of objections which gives the undertaking the possibility to comment on all aspects of the case as it stands at that specific moment and, thus, also to inform the Commission of possible/likely negative consequences for the undertaking.

III. LEGAL CONDITIONS FOR IMPOSITION OF INTERIM MEASURES

In view of the above considerations, interim measures should only seriously be considered in cases where there is a very high and sufficiently demonstrable risk of irreversible damage to competition in general, and thus not just to complainant competitors. That this is clear follows, indeed, already from the seminal decision of the Court of Justice ("ECJ") in *Camera Care*.[8] In this case, the ECJ for the first time held that the Commission has the power to impose interim measures in competition proceedings. The ECJ held that interim measures may only be adopted if (1) indispensable to ensuring the effectiveness of any subsequent infringement decision and (2) necessary as a matter of urgency to avoid serious and irreparable harm to a competitor or the public interest. Furthermore, the ECJ stressed that such measures must be of a "temporary and conservatory nature and restricted to what is required in the given situation."

The power to impose interim measures recognized by the Court in that judgment has now been expressly laid down in Article 8 of Regulation 1/2003. This provision stipulates two legal conditions that the Commission must meet in order to be able to legally impose interim measures. *First*, it must be necessary in order to avoid the risk of serious and irreparable damage to competition and, *second*, it must be based on a *prima facie* finding of infringement. It is interesting to note that the article only refers to harm to competition and not to competitors. It is likely that the reason for this restriction, compared to the finding in *Camera Care*, is that the order by the President of the General Court (then the Court of First Instance) ("GC"), as confirmed on appeal by the President of the ECJ, expressly held that it is the need to protect competition rather than to protect particular competitors that is important. This is also supported by the fact that, under Article 8 of Regulation 1/2003, the Commission "acting on its own initiative" may take such decisions. This means that complaining competitors do not have a right to demand interim measures. They do, however, of course have the possibility of suggesting interim measures to the Commission and to try to convince it to do so.

6 As was the case in *IMS Health v. Commission*, Case T-184/01, ECLI:EU:T:2001:200.

7 See Art. 48 of the Charter of Fundamental Rights on the presumption of innocence.

8 *Camera Care v. Commission,* Case 792/79R, [1980] ECR 119.

IV. *PRIMA FACIE* FINDING OF AN INFRINGEMENT

Even though, as indicated above, I shall refrain from a detailed legal analysis of the two conditions to be met by the Commission when it wants to impose interim measures, I shall make a few brief remarks in this regard.

First, as regards the *prima facie* finding of an infringement, in the 1992 judgment in *La Cinq*[9] the Commission based its conclusion regarding the absence of a probable infringement on the fact that "an initial summary examination of the facts does not show that there has been clear and flagrant infringement (*prima facie* infringement) of Articles 85(1) and 86 of the Treaty." The applicant La Cinq had requested that the Commission should adopt interim measures against EBU which La Cinq accused of infringing competition law. The Commission rejected the request and the decision was brought before the Court of First Instance (now the GC). The GC annulled the Commission's decision finding that "the requirement of a finding of a *prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision" must satisfy. If that were so, it would seriously limit the number of cases in which interim measures could be imposed even if they were manifestly necessary to put a provisional stop to certain behavior at an early stage of the investigation. This would in reality frustrate the enforcement powers of the Commission. Thus, the GC found that the Commission had based its reasoning on an erroneous interpretation of the law.

In the later *IMS Health* case, the Commission argued in its defense of the decision imposing interim measures that the applicant, in order to obtain the annulment, would have to show that the Commission had made manifest errors of assessment of the two cumulative conditions, namely the existence of a prima facie case and urgency. Neither the GC nor the ECJ (on appeal) found any basis for that interpretation, stating, *inter alia*, that "nor is there any other convincing reason why an applicant should be required to demonstrate a particularly strong or serious stateable case against the validity of what, after all, constitutes a *prima facie* evaluation" by the Commission.

While, as it follows from *La Cinq*, the Commission's powers in this regard are not limited to "clear and flagrant cases," it is on the other hand also clear that the Commission needs to present evidence based on facts which makes a finding of an infringement at least more likely than not. The burden of proof lies with the Commission and in the light of the seriousness of such an intrusion in the rights of the undertaking in question, which is presumed to be innocent at this stage, the Commission must present sufficient evidence to demonstrate a reasonably high likelihood of the existence of an infringement.

If this, as I believe to be the case, is correct, it follows that it may be easier for an applicant who is asking the Court for interim measures against a Commission decision to establish that the first of the two cumulative conditions is fulfilled, namely the *prima facie* condition, than it is for the Commission to adopt interim measures. It follows, indeed, from well-established case law that the applicant only has to be able to convince the GC or the ECJ that it cannot be excluded, without further and full examination of the case by the full court, that the Commission's decision is illegal for one or more reasons. However, for the Commission to adopt such measures it must convince the court (the judge hearing the interim measures case) that an infringement is at least more likely than not to take place.

V. URGENCY

As regards the second of the two cumulative conditions, urgency in order to avoid serious and irreparable damage to competition, it follows from the case-law of the court, and this is confirmed by my own experience as an interim measures judge at the GC, that this is by far the most difficult part for applicant undertakings to prove when they apply for interim measures against a final Commission decision ordering them to do or cease something.

In cases where the Commission wants to impose interim measures, this condition is, I would submit, easier for the Commission to establish. This assumption is based on the relatively wide margin of appreciation which the Courts have recognized that the Commission has in complex economic cases. In practice, this means that once the Court in a given case has found (1) that the procedural rules have been followed correctly; and (2) that the Commission has examined all relevant facts and the court has found the evidence to be solid, it will not substitute its own appreciation for that of the Commission. This also applies in Commission decisions imposing interim measures when brought before the GC for judicial review.

9 Case T-44/90, *La Cinq SA v. Commission*.

However, in spite of this margin of appreciation, and in view of the gravity of imposing interim measures on an undertaking which has not (yet) been found guilty of infringing the competition rules, it must be clear that the Commission must demonstrate clearly and convincingly why it is urgent to intervene before a final decision can be made. It must describe clearly what the exact risk to competition is. It would hardly be enough for the Commission to assert that in the absence of interim measures there is a serious risk that some competitors might choose to exit the market or see their market shares being reduced with the consequence that there is less competition. This would have to be substantiated by some kind of convincing evidence or economic expertise. It might be useful to be able to present evidence of the situation in the market prior to and after the alleged infringing behavior started and to demonstrate that the negative impact on the market is most likely to be a consequence of the behavior in question. In cases where there is only a limited number of competitors, perhaps two to four, urgency to avoid irreparable damage might probably also be demonstrated if adoption of interim measures is necessary in order to avoid that the competitors or one of them is eliminated if such elimination would lead to serious and irreparable damage to competition. Such evidence must be carefully examined by the judge if such a Commission decision is brought before the Court. If the judge finds the evidence unconvincing, either incomplete or factually wrong, the decision must be annulled, as one of the two cumulative conditions (prima facie case and urgency) is not met.

VI. CONCLUDING REMARKS

That there is a case for considering once again to impose interim measures in certain cases, most likely in multinational abuse cases in certain high-tech areas, appears to me to be well founded. This may constitute an effective tool to avoid that rapid market developments, in the time between the opening of an investigation and the final decision a number of years later, render the final decision ineffective and thus irrelevant except, of course, for the possible fine imposed for the infringement.

As appears from the Commission's own long-time hesitation to use its powers to impose interim measures and from the statements from Commissioner Vestager, it may in certain cases prove difficult for the Commission to demonstrate sufficiently clearly that the cumulative conditions for imposing interim measures decisions are met. It might well in view of this possible complication be useful for the Commission to consider other avenues to avoid the problem. Perhaps a kind of leniency approach might be useful, inviting the alleged infringer to cease or change the alleged infringing behavior against a promise of a certain non-negligible percentage reduction of the fine if an infringement is finally established. A specific legal basis for the Commission to introduce this possibility could be introduced or it might even be possible for the Commission to accord such a reduction in the fine simply based on valuable cooperation by the undertaking. In cases in which the undertakings realize that they run the risk of important fines and perhaps doubt that they could contest the Commission's appreciation of a likely infringement and the urgency condition if they ask the GC to annul a Commission interim measures decision, they might well accept to change their behavior and obtain a reduction of the fine.

However, as useful and perhaps even necessary the imposition of interim measures may appear, it is necessary to keep in mind that measures of this kind may have serious and perhaps even life-threatening, market-related, consequences for the undertaking which at that point of the investigation is to be considered innocent. The imposition of interim measures by the Commission should therefore only be considered in cases posing a clearly serious and sufficiently well-documented risk to competition in the relevant market and not just to competitors.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.