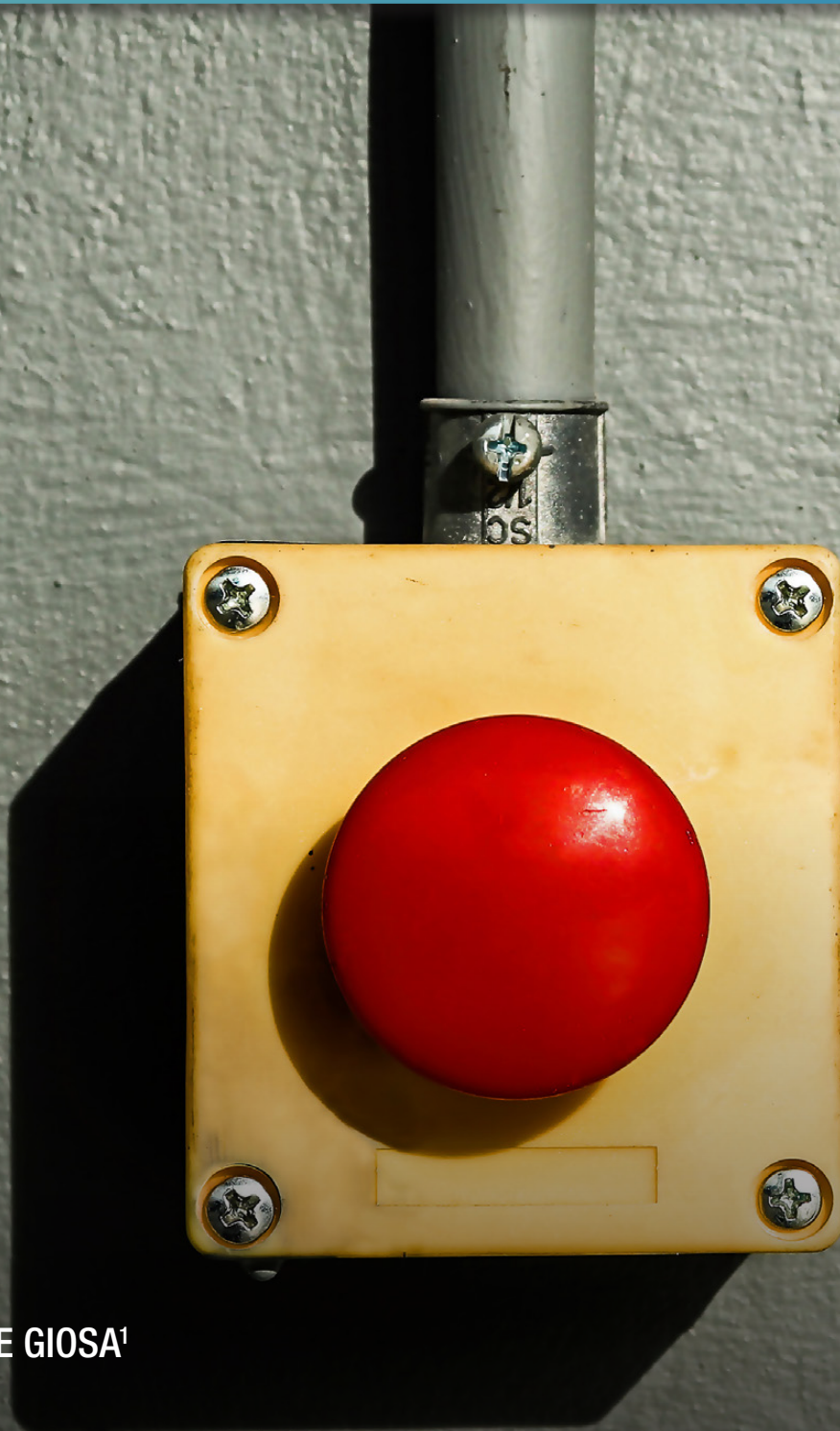


# INTERIM MEASURES: A REMEDY TO DEAL WITH PRICE GOUGING IN THE TIME OF COVID-19?



BY PENELOPE GIOSA<sup>1</sup>



<sup>1</sup> Lecturer in Law at the University of Portsmouth, Member of the Centre for Competition Policy ("CCP"), University of East Anglia.

# CPI ANTITRUST CHRONICLE SEPTEMBER 2020

## Price Gouging and the COVID-19 Crisis – This Time Is (a Little) Different

By Michael A. Salinger



## Uncertainty in U.S. Price-Gouging Law Compliance and Defense

By Ann O'Brien & Brady Cummins



## Price Gouging Amidst the COVID-19 Pandemic

By Vic Domen & Daniella Torrealba



## Robbin' Hood

By Harry First



## Price Gouging in a Time of Sea Change

By Timothy Snail & Mary Beth Savio



## The New Transatlantic Attack on High Prices: Price Gouging

By Tilman Kuhn, Kathryn J. Mims  
& Lily Kim



## Toward a *Per Se* Rule Against Price Gouging

By Ramsi A. Woodcock



## Interim Measures: A Remedy to Deal with Price Gouging in the Time of COVID-19?

By Penelope Giosa



## Price Gouging Under Brazilian Competition Law: Better Left Dormant?

By Carlos Ragazzo & João Marcelo Lima



Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for  
access to these articles and more!

CPI Antitrust Chronicle September 2020

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)  
Competition Policy International, Inc. 2020<sup>©</sup> Copying, reprinting, or distributing  
this article is forbidden by anyone other than the publisher or author.

## I. INTRODUCTION

During the coronavirus (COVID-19) pandemic, the price of products in high-demand, such as face masks and sanitisers, has been heavily inflated. As firms are struggling to cope with the high demand and fluctuations in their costs, governments and the general public urge National Competition Authorities (“NCAs”) and the European Commission to lead the fight against firms charging excessive prices to consumers.<sup>2</sup> In the same vein, Commissioner Vestager stated that the European Commission will stay even more vigilant than in normal times if there is a risk of virus-profiteering and that COVID-19 should not be a shield against competition law investigations.<sup>3</sup>

In this context, it has been suggested<sup>4</sup> that NCAs should take prompt action against firms’ price hikes through interim measures, especially after the recent interim measures decision in *Broadcom*.<sup>5</sup> Likewise, NCAs, such as the Competition and Markets Authority (“CMA”) in the UK, have demanded repeatedly the greater use of interim measures. Indeed, it is important for antitrust enforcers to be able to apply provisional remedies by means of interim relief, in addition to commitment and prohibition decisions. Provisional remedies can avoid market developments that enforcers cannot easily remedy at a later stage, when a final decision is adopted. However, as this article will show, it is questionable whether the adoption of interim measures is an easy and effective way to deal with Coronavirus-related profiteering in the EU. Though interim measures require only a *prima facie* finding of an infringement and can order the maintenance or the restoration of market conditions in favour of the public interest, the European Commission has made rare use of this remedy and as a result, we have only little insights how it applies. Moreover, the practical and conceptual difficulties that excessive pricing cases in the time of COVID-19 involve make rather problematic the fulfilment of the substantive requirements for granting interim measures, particularly the requirement for irreparable harm to competition.

2 A price is excessive if “it has no reasonable relation to the economic value of the product supplied.” See Case 27/76 *United Brands v. Commission of the European Communities*, [1978] ECR 207; [1978] 1 CMLR 429.

3 Kyriakos Fountoukakos, Peter Rowland & Dafni Katrana for Herbert Smith Freehills “Exploring Opportunities: The Impact of COVID-19 on Competition Law in the Pharmaceutical Sector (Europe)” <https://www.herbertsmithfreehills.com/latest-thinking/exploring-opportunities-the-impact-of-covid-19-on-competition-law-in-the>.

4 George S. Cary, Maurits Dolmans, Bruce Hoffman, Thomas Graf, Leah Brannon, Richard Pepper, Henry Mostyn, Alexis R. B. Lazda, Savannah Haynes, Kristi Georgieva & Jan Przerwa “Exploitative abuses, price gouging & COVID-19: The cases pursued by EU and national competition authorities,” April 30, 2020, e-Competitions Competition Law & Covid-19, Art. N° 94392 <https://www.concurrences.com/en/bulletin/special-issues/competition-law-covid-19-en/exploitative-abuses-price-gouging-covid-19-the-cases-pursued-by-eu-and-national-en/nh20>.

5 The European Commission ordered Broadcom (Case AT. 40608), the world leader in the supply of chipsets for TV set-top boxes and modems, to unilaterally cease to apply the anticompetitive provisions identified by the Commission. See Commission press release of October 16, 2019 [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6109](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109).



The article is structured as follows: Section II discusses the first European case on interim measures as well as their regulatory framework before and after the adoption of Regulation 1/2003. Section III analyses the *prima facie* condition and shows that despite the relatively low threshold that the EU Courts set for a *prima facie* condition, there are still various hurdles making it difficult for the European Commission to prove there is “at first sight” infringement of competition rules. Section IV deals with the second substantive requirement for granting interim measures, i.e. the urgent need for protective measures due to the risk of serious and irreparable harm to competition. As this section will show, it is difficult for the European Commission to satisfy the requirement for irreparable harm in excessive pricing cases, because both the prohibition and the commitment decisions are effective remedies in the European Commission’s antitrust enforcement toolkit for the reasons explained below. In section V, the article ends with a summarising conclusion.

## II. INTERIM MEASURES BEFORE AND UNDER REGULATION 1/2003

The European Coal and Steel Community Treaty (“ECSC Treaty”) was the first that contemplated the application of interim measures in Article 66(5) in order to safeguard the interests of competing undertakings and of third parties. In virtue of this article, the European Commission issued its first decision on margin squeeze and adopted an interim measure against an undertaking in a dominant position. In that case, it was held that the dominant firm had an obligation to arrange its own prices to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term.<sup>6</sup> Despite this decision and the explicit provision in the ECSC Treaty, the first antitrust Regulation 17<sup>7</sup> did not contemplate the remedy of interim measures. The Court of Justice soon wanted to fill this legislative gap.

The power of the European Commission to grant interim measures in the context of the application of the competition rules of the Treaty was firstly established in 1980 in the *Camera Care* case.<sup>8</sup> In that case, the Court of Justice clarified in paragraph 28 of its judgment that protective measures may be granted only where the practices of certain undertakings are *prima facie* such as to constitute a breach of the Union rules on competition in respect of which a penalty could be imposed by a decision of the Commission. Furthermore, such measures are to be taken only 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.

In legislation, interim measures were enshrined with the adoption of Regulation 1/2003.<sup>9</sup> Article 8 of the Regulation contemplates what the Court of Justice in *Camera Care* case held, i.e. that 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. The Regulation brought about two major changes in relation to the regime developed by the case law. The first change was that the European Commission could order interim measures on its own initiative, enabling in this way the *ex officio* initiation of the procedure by the Commission, without needing the prior request of a complainant.<sup>10</sup> This is a development that has paved the way for further use of interim measures by the European Commission and from a procedural perspective, it enables the Commission to take swift action whenever there is urgency, like in the case of COVID-19. The second change was that the risk of serious and irreparable harm should amount to harm to competition, thus demonstrating that the order of interim measures focuses henceforth on the safeguarding of the public interest and not of individual rights.<sup>11</sup> This has been another step in the right direction, as it makes the remedy of interim measures comply with the rationale of Articles 101 and 102 TFEU (“Treaty on the Functioning of the European Union”), which is not the protection of individual undertakings but the protection of competition in the market. Moreover, this change extends the protective scope of interim measures, which cover not only harm to the competition structure, but also harm

6 National Coal Board, National Smokeless Fuels Ltd and the National Carbonizing Company Ltd, 79/185/ECSC (1976) OJ L 35/6.

7 Council Regulation No. 17, First Regulation Implementing Articles 85 and 86 of the Treaty (1959-62), OJ Spec. Ed. 87.

8 Case T-44/90 (1992) La Cinq v. Commission, ECR II-1, (1992) 4 CMLR 449.

9 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1, last amended by Council Regulation (EC) 1419/2006, (2006) OJ L269/1.

10 Gábor Gál & Konstantina Strouvali “Interim Measures” in Ekaterina Rousseva (ed), *EU Antitrust Procedure* (Oxford University Press, 2020), p. 295.

11 *Ibid.* 290; See also Draft Regulation implementing Articles 81 and 82 of the Treaty, COM (2000) 582 final-CNS 2000/243-Explanatory Memorandum, Article 8; Commission Notice on handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004) OJ C 101/65, points 16 and 80, Staff Working Paper on Regulation 1/2003, SEC (2009) 574 final, point 111.

to consumers.<sup>12</sup> Such a possibility unties the European Commission's hands, as it has the freedom to pause anticompetitive conducts, such as exploitative excessive pricing, that harm the consumers without necessarily harming other market players.

### III. *FUMUS BONI IURIS- PRIMA FACIE* FINDING OF AN INFRINGEMENT

The first requirement for granting interim measures is the *prima facie* finding of an infringement. Prior to the adoption of Regulation 1/2003, the European Commission has not applied a very high *prima facie* standard. In *Peugeot*, the Court held that serious doubts regarding the legality of the conduct are sufficient to trigger interim measures.<sup>13</sup> In *La Cinq*, the *prima facie* requirement was held to be "the probable existence of an infringement."<sup>14</sup>

The relatively low threshold that the EU Courts set for a *prima facie* condition arguably makes it easier for antitrust enforcers to establish excessive pricing under the urgent circumstances that COVID-19 has caused. It is sufficient for the European Commission to prove that there is exploitative excessive pricing at first sight or that its conclusions about the excessive pricing at first sight are not wrong.<sup>15</sup> Yet, the threshold for defending the adoption of interim measures against applications for suspension is still high, as interim orders may have negative consequences on the business activity of the undertakings involved. Hence, it is not an exaggeration to say that the procedural requirements for the adoption of interim measures outweigh the *prima facie* condition. To be more specific, the Commission must open proceedings according to Article 2 of Regulation 773/2004. Then, it must adopt a Statement of Objections and give the opportunity to the undertaking at issue to be heard.<sup>16</sup> This is done by giving the undertaking access to the relevant file of the case and by enabling it to reply to the Statement of Objections and have an oral hearing.<sup>17</sup> Moreover, the European Commission must consult the Advisory Committee before adopting any interim orders.<sup>18</sup> As a result, the interim measure procedure can take on average three to eight months.<sup>19</sup> This means that the European legislator gives with one hand and takes away with the other. The lengthy interim measure procedure makes it impossible for the European Commission to take urgent action and apply promptly the relevant remedy, negating in this way the mission of an interim relief to ensure the effectiveness of competition law enforcement in a timely manner. Perhaps, this is one of the reasons that we have not seen widespread application of this remedy in the EU, despite the apparent price gouging that COVID-19 has caused.

In addition to this, after the adoption of Regulation 1/2003, it is doubtful which the exact scope of the *prima facie* condition is, as there has been only one interim measures decision.<sup>20</sup> The decision has not been published yet and it has not been reviewed by the national courts of the EU Member States. Moreover, Broadcom, the undertaking against which the European Commission imposed interim measures, offered commitments to meet the concerns expressed by the Commission in its preliminary assessment, without admitting any of the conduct subject to the investigation. The lack of experience with the application of Article 8 of Regulation 1/2003 probably makes the European Commission quite reticent to impose interim measures against firms that charge excessive prices in the time of COVID-19, as the exact scope of the *prima facie* condition had repeatedly been a ground for appeal in interim measures decisions.

Furthermore, there may be major difficulties for the European Commission to come up with a *prima facie* finding of infringement, when the undertaking's activity does not violate the discrete prohibitions of Articles 101 and 102 TFEU, i.e. when the price gouging is genuinely unilateral and not collusive, due to an abnormal level of demand, in terms of both the number of consumers who desire the item and the sense of urgency that increases that desire or when there is not only one dominant company in the market setting excessive prices on goods and services

---

<sup>12</sup> Case IV/30.696 *Distribution System of Ford Werke* (1982) OJ L 256/20, para 42, declared void in joined cases 228 and 229/82 *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v. Commission* of the European Communities, ECLI:EU:C:1984:80.

<sup>13</sup> Case T-23/90 *Peugeot v. Commission*, EU:T:1991:45, paras 21 and 63.

<sup>14</sup> Case T-44/90 *La Cinq v. Commission*, ECLI:EU:T:1992:5, paras 32, 59, 62, 66.

<sup>15</sup> See the Order of the President of the Court of First Instance in Case T-184/01 *R IMS Health v. Commission*, ECLI:EU:T:2001:259.

<sup>16</sup> Gál & Strouvali, *supra* note 10, p. 303.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Broadcom*, Case AT. 40608, see [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40608](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40608).

in high demand. Where there is an oligopoly and the firms proceed to tacit coordination regarding the prices they charge, which falls short of an agreement or concerted practice, usually the European Commission avoids the condemnation of their parallel behaviour as abusive because in principle it does not want to act as a price regulator.<sup>21</sup> This is why the European Commission has initiated only few investigations of high prices under Article 102 TFEU. In the same vein, there are practical and conceptual difficulties of proof associated with finding exploitative excessive pricing, or otherwise exploitative abuse of collective dominant position by charging prices which are higher than they would be in a competitive market. Some of these difficulties include the market share threshold of the infringing undertakings, which shall be 40 percent and more in order to establish their dominant position in the market, the calculation of the difference between the dominant firms' production costs and the price of the product/service, as well as the several methods used to analyse excessive pricing.<sup>22</sup> Hence, these hurdles may make it hard for the European Commission to show that the relevant undertaking infringes "at first sight" competition rules, thus interim measures should be taken.

## IV. RISK OF SERIOUS AND IRREPARABLE HARM TO COMPETITION

The second requirement for granting interim measures is the urgent need for measures due to the risk of serious and irreparable harm to competition. The requirement of emergency is met, if there is likelihood of serious and irreparable harm. As explained above when talking about the *prima facie* condition, there is no need for certainty that the harm is imminent, but it is enough for the European Commission to prove that the harm is foreseeable with an adequate degree of probability.<sup>23</sup> The concept of serious and irreparable harm requires severity of harm, which is assessed on a case-by-case basis, as well as irreversibility of market conditions that render the application of interim measures necessary in order to secure effective enforcement.<sup>24</sup> Even though it may not be difficult for the European Commission to show that excessive pricing can cause serious harm to consumers, it may be difficult for it to prove that the high standard of irreparability is met. This is because in case of price gouging the market developments are reversible, in the sense that a prohibition or commitment decision may be able to reverse the harm. It is well known that prohibition decisions have a strong deterrent effect on the infringing undertakings at issue, but also on the other market players, especially when the European Commission imposes fines as well. Prohibition decisions establish irrefutable evidence before the national courts of EU Member States that the infringing undertakings at issue were responsible for breaching Article 101 and/or 102 TFEU. Hence, as soon as the addressees of prohibition decisions are notified for its adoption, the way for injunctions or damage awards against them is open before the national courts of the EU Member States.<sup>25</sup>

As far as the commitment decisions are concerned, the European Commission issues them when it intends to adopt a decision requiring that an infringement be brought to an end, and the companies under investigation prefer to offer commitments in order to remove the European Commission's competition concerns as expressed in a preliminary assessment.<sup>26</sup> Commitment decisions may also be preferable if the case is not one where a fine would be appropriate or when efficiency reasons justify that, the Commission limits itself to making the commitments binding, and does not issue a formal prohibition decision.<sup>27</sup> In the time of COVID-19, commitment decisions could be a good remedy for exploitative excessive pricing because they restore undistorted conditions of competition in the markets in a swift and effective manner, as the administrative process for commitment decisions is generally short.<sup>28</sup> Commitment decisions can be either behavioural or structural and can be limited in time, meaning that the European Commission is able to reassess them if a material change takes place in the meantime.<sup>29</sup> They do not establish an

<sup>21</sup> Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 2012), p. 580.

<sup>22</sup> For further information about the practical and conceptual difficulties to pursue excessive pricing cases in the time of COVID-19, see Penelope Giosa "Exploitative Pricing in the Time of Coronavirus - The Response of EU Competition Law and the Prospect of Price Regulation" *Journal of European Competition Law & Practice*, Ipa029, <https://doi.org/10.1093/jeclap/lpaa029>.

<sup>23</sup> Case C-149/95 *P (R) Commission v. Atlantic Container*, ECLI:EU:C:1995:257, para 38; Case C-471/00 *P(R) Commission v. Cambridge Healthcare*, ECLI:EU:C:2001:218, para 108.

<sup>24</sup> Gál & Strouvali, *supra* note 10, p. 298.

<sup>25</sup> *Ibid.* 210.

<sup>26</sup> European Commission "Memo/04/217- Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour)" [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_04\\_217](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_04_217).

<sup>27</sup> *Ibid.*

<sup>28</sup> European Commission "Antitrust: Commitment Decisions- Frequently Asked Questions" [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_13\\_189](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_189).

<sup>29</sup> European Commission "Memo/04/217," *supra* note 26.

infringement and do not require any admission by the parties, as they only require commitments as to future behaviour.<sup>30</sup> This can be an incentive for firms to pursue the commitment route, as they know that in this way they will avoid any damage to their reputation as well as a formal finding of an infringement against them. In addition, the Court of Justice does not require a strict proportionality test for assessing the remedies imposed by the European Commission in a commitment decision, as it would do in case of interim measures or of a prohibition decision.<sup>31</sup> If a firm does not comply with the commitment decision, the European Commission is able to impose a fine up to 10 per cent of the firm's annual turnover without having to prove any violation of the competition rules.<sup>32</sup> Therefore, a commitment decision saves money and time. Moreover, the European Commission is able to impose periodic penalty payments of up to 5 per cent of the average daily turnover of a firm until it complies with the commitment decision.<sup>33</sup>

## V. CONCLUSION

Interim measures are cease-and-desist orders that can be issued when there is an imminent risk of serious and irreparable harm to competition. The adoption of Regulation 1/2003 and the direct provision for this remedy under Article 8 of this Regulation has brought several positive changes. The European Commission can now order interim measures on its own initiative, without needing the prior request of a complainant. In addition, after Regulation 1/2003 the scope of interim measures has embraced the harm to competition, enabling in this way the European Commission to seek interim relief, in case of harm to consumers.

These two major developments give the impression that interim measures are appropriate to deal with Coronavirus price gouging. However, this article has highlighted and explained the significant constraints on the ability of the European Commission to take interim measures in price gouging cases. Firstly, the threshold for defending the adoption of interim measures against applications for suspension is high and this is because their impact on the infringing undertakings may be great. Secondly, the interim measure procedure can take on average three to eight months, thus undermining the main goal of this remedy to ensure effectiveness of competition law enforcement in a timely manner. Thirdly, the explicit provision of interim measures under Regulation 1/2003 has caused uncertainty regarding the scope of the *prima facie* condition, as *Broadcom* is the only interim measures case after the adoption of Regulation 1/2003. This uncertainty is getting greater, if we also bear in mind that the exact scope of the *prima facie* condition had repeatedly been a ground for appeal in interim measures decisions. Fourthly, there are major difficulties that make it hard for the European Union to prove *prima facie* infringement of competition rules, when the undertaking's activity is not against the discrete prohibitions of Articles 101 and 102 TFEU.

The article has dealt with two cases, i.e. where the undertakings are in an oligopolistic market and they charge excessively high prices according to the conditions of the market on which they operate and where collectively dominant firms set unfairly high prices on goods and services in high demand. In the first case, the conduct of the undertakings may easily fall within the ambit of parallel behaviour, which is not caught by Article 101(1) TFEU and the European Commission avoids acting as a price regulator. In the second case, there are evidential difficulties in finding exploitative abuse of collective dominant position by charging prices, which are higher than they would be in a competitive market. Indicatively, it is difficult for the European Commission to prove that the infringing companies enjoy a position of dominance in the market, i.e. their market share threshold is 40 percent and more, because the sellers of goods in high demand due to the COVID-19 outbreak are often small businesses. Fifthly, it is hard for the European Commission to prove that the second procedural requirement for the adoption of interim measures, i.e. the irreparable harm to competition, is fulfilled. In case of price gouging, the market developments are reversible, as both prohibition and commitment decisions are suitable remedies to reset prices to a non-excessive level and reverse the relevant harm.

For all these reasons, the article concludes that interim measures as they currently stand, are not an easy and effective way to deal with Coronavirus-related profiteering in the EU.

<sup>30</sup> European Commission "Cartel case Settlement" [https://ec.europa.eu/competition/cartels/legislation/cartels\\_settlements/settlements\\_en.htm](https://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.htm).

<sup>31</sup> European Commission, *supra* note 28.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*



## CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit [competitionpolicyinternational.com](http://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

