

Unclassified

English - Or. English

15 June 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Interim Measures in Antitrust Investigations – Note by the European Union

21 June 2022

This document reproduces a written contribution from the European Union submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

Sabine ZIGELSKI
Sabine.Zigelski@oecd.org, +(33-1) 45 24 74 39.

JT03497751

European Union

1. Introduction

1. Prior to the entry into force of Regulation 1/2003, the power to impose interim measures in the field of EU antitrust law was not provided for by EU legislation. The European Commission (“Commission”) could however rely on the judgment in *Camera Care*, in which the Court of Justice (“CJ”) stated that “[t]he Commission must also be able [...] to take protective measures” in competition matters.¹ Since then, the Commission has used interim measures mostly in cases concerning abuse of dominance,² and vertical restraints.³

2. In the pre-Regulation 1/2003 era, the Commission considered interim measures relatively often and adopted them in eight cases.⁴ In two cases, the Commission’s refusal to grant interim measures was appealed before the CJ, respectively the General Court (“GC”).⁵ The case law has shaped the test for interim measures, which consists of two legs. It requires, firstly, that the practice of an undertaking gives rise to a *prima facie* infringement of EU antitrust law; and, secondly, that the interim measures are necessary to prevent a situation that is likely to cause serious and irreparable damage (“urgency”).⁶

3. Article 8 of Regulation 1/2003 finds its origins in the same two-legged test.⁷ It established for the first time specific secondary law governing the adoption of interim measures in the field of EU antitrust law. It states, in its paragraph 1, that “[i]n 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.” Paragraph 2 adds that “[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.” Article 8 of Regulation 1/2003 thus essentially incorporates the test under the case-law, mentioned above, but differs notably in two respects. Firstly, serious and irreparable damage must exist as regards *competition*, so that, unlike before,⁸ serious and irreparable damage for individual undertakings is no longer necessary, or sufficient. Secondly, interim measures are imposed by the Commission *on its own initiative*.

¹ CJ, Case 792/79 R, *Camera Care*, EU:C:1980:18, paragraphs 18-19.

² Commission Decision of 29 July 1983, ECS/AKZO, OJ 1983 L 252/13; Commission Decision of 29 July 1987, BBI/Boosey & Hawkes, OJ 1987 L 286/36; Commission Decision of 11 June 1992, Sealink/B&I – Holyhead; Commission Decision of 16 May 1995, Irish Continental Group/CCI Morlaix; Commission Decision of 3 July 2001, NDC Health/IMS Health, OJ 2002 L 59/18.

³ Commission Decision of 18 August 1982, Distribution system of Ford-Werke AG, OJ 1982 L 256/20; Commission Decision of 26 March 1990, Ecosystem/Peugeot; Commission Decision of 25 March 1992, Mars/Langnese and Schoeller; Commission Decision of 11 June 1992..

⁴ See references in footnotes 2 and 3 above.

⁵ CJ, Case 792/79 R, *Camera Care*, EU:C:1980:18; GC, Case T-44/90, *La Cinq*, EU:T:1992:5.

⁶ CJ, Case 792/79 R, *Camera Care*, EU:C:1980:18, paragraphs 14 and 19; and Cases 228/82 and 229/82 *Ford Werke AG and Ford of Europe Incorporated*, EU:C:1982:320, paragraphs 4 and 13; see also GC, Case T-44/90, *La Cinq* EU:T:1992:5, paragraph 28.

⁷ See M. Kadar, *The Use of Interim Measures and Commitments in the European Commission’s Broadcom Case*, 2021, JECLP, p. 444.

⁸ CJ, Case 792/79 R, *Camera Care*, EU:C:1980:18, paragraphs 14 and 19; and Cases 228/82 and 229/82 *Ford Werke AG and Ford of Europe Incorporated*, EU:C:1982:320, paragraphs 4 and 13; see also GC, Case T-44/90, *La Cinq* EU:T:1992:5, paragraph 28..

Complainants have no standing to request the Commission to impose interim measures under Article 8 of Regulation 1/2003.

4. In the post-Regulation 1/2003 era, the Commission’s policy towards interim measures has further evolved. Early on, the Commission considered that “national courts are usually better placed than the Commission to adopt interim measures”⁹. In addition, given that the applicable rules for the imposition of interim measures at national level varied across the Member States,¹⁰ the Commission proposed a minimum standard for the adoption of interim measures by national competition authorities (“NCAs”), which led to the adoption of the corresponding Article 11 of Directive 2019/1.¹¹

5. Subsequently, the increased prominence of digital and other high-tech markets, in which competitive harm can often be irreparable due to the existence of high barriers to entry, led the Commission to progressively rethink this conservative approach to interim measures. In 2017 and 2018, the Commissioner for Competition of the Commission stated that she was “looking at broader powers to impose [...] interim measures” and indicated that the Commission is “not shy of using them”.¹² Subsequently, on 16 October 2019, the Commission adopted the first interim measures decision under Regulation 1/2003, in the *Broadcom* case.¹³

2. Types of interim measures

6. In its decisional practice, the Commission has imposed a variety of interim measures, notably depending on the infringement and market concerned. For example, the Commission adopted a decision requiring to withdraw an agreement and inform its competitors on its policies;¹⁴ prohibited the offer or supply of products at different prices or terms;¹⁵ ordered to resume supplies as it would lead its competitors to exit the market;¹⁶

⁹ See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty OJ 2004 C 101/65, point 16.

¹⁰ See ECN Recommendation on the power to adopt interim measures (December 2013), available at https://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf; Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003, COM (2009) 206 final, paragraph 111; Commission staff working document, Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues, Accompanying the document Communication from the Commission to the European Parliament and Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, SWD/2014/0231 final, paragraph 59.

¹¹ Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM/2017/0142 final - 2017/063, p. 16; Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 L 11/3.

¹² Global Competition Review, ‘An interview with Margrethe Vestager’, 21 May 2018, available at <https://globalcompetitionreview.com/interview-margrethe-vestager-2>; Financial Times, ‘EU considers tougher competition powers’, 2 July 2017, available at <https://www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895>.

¹³ Commission Decision of 16 October 2019, *Broadcom*, Case AT.40608.

¹⁴ Commission Decision of 18 August 1982, *Distribution system of Ford Werke AG*, OJ 1982 L256/20.

¹⁵ Commission Decision of 29 July 1983, *ECS/AKZO*, OJ 1983 L 252/13.

¹⁶ Commission Decision of 29 July 1987, *BBI/Boosey & Hawkes*, OJ 1987 L 286/36.

prohibited the enforcement of exclusionary agreements;¹⁷ granted access to specific facilities.¹⁸

7. In its *Broadcom* decision, the Commission combined different types of interim measures. *Broadcom* was ordered to unilaterally cease to apply the anticompetitive provisions identified by the Commission and to inform its customers that it will no longer apply such provisions; it was also ordered to refrain from applying the same provisions or provisions having an equivalent object or effect in other agreements with these customers, as well as to refrain from implementing punishing or retaliatory practices having an equivalent object or effect.

3. The test to adopt interim measures under Regulation 1/2003

8. In line with Article 8(1) of Regulation 1/2003, interim measures can, by definition, only apply in cases where (i) a prima facie infringement can be established and (ii) where it is possible to show a degree of urgency due to the risk that competition will be seriously and irreparably damaged. In this context it should be noted that the conditions of the “prima facie infringement” and “urgency” are interdependent in that the strength of the “prima facie infringement” case may be taken into account in the assessment of urgency.¹⁹ In addition, (iii) interim measures need to be proportionate to what is necessary in the case at hand.

3.1. Prima facie infringement

9. In *La Cinq*, the General Court (“GC”) found 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”²⁰. The Commission merely needs to consider whether the facts and legal situation indicate “at first sight” that the undertaking has infringed Article 101 or 102 TFEU;²¹ or in other words, whether there are “serious doubts” as to the compatibility of the undertaking’s conduct with those Articles.²² Furthermore, in *IMS Health*, the GC confirmed that the Commission “is not obliged to establish, as a matter of probability, the existence of a prima facie violation of the [Union] competition rules before adopting a decision imposing interim measures”.²³ Since a decision imposing interim measures “is inherently not based on a full and final appreciation of the facts and law in question”,²⁴ the Commission is not required to show that it is more likely than not that the practice in question ultimately amounts to an infringement of Article 101 or 102 TFEU.

10. In *Broadcom*, the Commission recalled the case law mentioned above and concluded, on the basis of a variety of factors, that the conduct in question was prima facie capable of affecting competition, namely that it was capable of excluding competitors

¹⁷ Commission Decision of 25 March 1992, Mars/Langnese and Schoeller.

¹⁸ Commission Decision of 16 May 1995, Irish Continental Group/CCI Morlaix.

¹⁹ CJ, Case C-481/01 P(R), NDC Health v IMS, EU:C:2002:223, paragraph 63; CJ, Case C-445/00 R, Austria v Council, EU:C:2001:123, paragraph 110.

²⁰ GC, Case T-44/90, La Cinq EU:T:1992:5, paragraph 1.

²¹ See GC, Case T-184/01 R, IMS Health, EU:T:2001:259, paragraph 67; GC, Case T-23/90, Peugeot, EU:T:1991:45, paragraphs 21 and 63.

²² See, to that effect, GC, Case T-23/90, Peugeot, EU:T:1991:45, paragraphs 58 to 63.

²³ GC, Case T-184/01 R, IMS Health, EU:T:2001:259, paragraph 68.

²⁴ GC, Case T-184/01 R, IMS Health, EU:T:2001:259, paragraph 68.

which were as efficient and attractive to consumers as Broadcom from the point of view of, among other things, price, choice, quality or innovation.²⁵ The Commission found that regardless of their precise categorisation, the restrictions imposed by Broadcom would have the same object or effect, that is to force or induce customers to obtain exclusively (or at least almost exclusively) their requirements of the relevant products from Broadcom.²⁶ It went on analysing the *prima facie* effects of Broadcom's conduct on this basis.

3.2. Urgency

11. Article 8 of Regulation 1/2003 requires the urgency to result from the risk of serious and irreparable damage to competition. This means, firstly, that interim measures are only urgent if, to avoid the risk of the aforementioned serious and irreparable damage to competition, they need to take effect before a decision on the substance of the case could be taken.²⁷ Secondly, it is necessary, but sufficient, that the damage in question resulting from the implementation of the conduct at stake represents a tangible risk,²⁸ or appears likely (i.e. foreseeable with a sufficient degree of probability), particularly when it depends on the occurrence of a number of factors.²⁹ Directive 2019/1 provides for the same standard, as a minimum threshold for the imposition of interim measures under national competition laws.³⁰ While purely hypothetical damage cannot be taken into consideration, it is not necessary to establish it with absolute certainty. The Broadcom decision has also shown that according to the Commission, urgency does not necessarily mean imminence.³¹ Although in earlier cases the exponential effects of short-term disruption has been a major aspect,³² limiting the use of interim measures only to cases where harm is imminent would deprive the tool of its "*effet utile*". This is particularly the case when it comes to intervention in digital and other high-tech markets, in which harm may indeed be irreparable but often takes place only progressively over the months and years that would be required to fully investigate the conduct on its merits. Thirdly, damage is irreparable if it could no longer be remedied by the decision to be adopted by the Commission upon the conclusion of the administrative procedure.³³

²⁵ Commission Decision of 16 October 2019, Broadcom, Case AT.40608, recital 363.

²⁶ Commission Decision of 16 October 2019, Broadcom, Case AT.40608, recital 362.

²⁷ C. Emin and M. Kadar, Comment to Article 8 of Regulation No 1/2003, in: Regulation 1/2003 and EU Antitrust Enforcement: A Systematic Guide, Dekeyser, Gauer, Laitenberger, Wahl, Wils and Prete (eds), Kluwer, forthcoming, 6.2.1., with reference to Joined Cases 76, 77 and 91/89 R RTE v Commission, EU:C:1989:192, paragraph 12.

²⁸ GC, Case T-184/01 R, IMS Health v Commission, EU:T:2001:259, paragraph 144; CJ, Case C-481/01 P(R), NDC Health v IMS, EU:C:2002:223, paragraphs 68-69.

²⁹ CJ, Case C-149/95 P(R), Commission v Atlantic Container Line and Others, EU:C:1995:257, paragraph 38.

³⁰ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 L 11/3.

³¹ Commission Decision of 16 October 2019, Broadcom, Case AT.40608, recital 427; also see CJ, Case C-149/95 P(R), Commission v Atlantic Container Line and Others, EU:C:1995:257, paragraph 38.

³² As was the case in Commission Decision of 16 May 1995, Irish Continental Group/CCI Morlaix, Commission Decision of 11 June 1992, Sealink/B&I – Holyhead and Commission Decision of 25 March 1992, Mars/Langnese and Schoeller due to seasonal conditions, and in Commission Decision of 18 August 1982, Distribution system of Ford-Werke AG, OJ 1982 L 256/20 due to the impact of delays in supplies.

³³ CJ, Case 792/79 R, Camera Care v Commission, EU:C:1980:18, paragraph 14; GC, Case T-44/90 La Cinq v Commission, EU:T:1992:5, paragraph 80.

12. The *Broadcom* case provides again a good example of what needs to be demonstrated to find urgency in practice. In that case, the Commission concluded that there was an urgent need to prevent irreparable damage to competition that would have likely occurred if Broadcom's conduct had been allowed to continue pending a final Commission decision on the substance of the case. This was essentially because Broadcom's competitors were like to either exit the market or become increasingly marginalised. Such exit or marginalisation would have been unlikely to be reversed, not least due to the existence of economies of scale, which would have provided Broadcom with an even stronger incumbent advantage.

3.3. Proportionality and balance of interest

13. Where a *prima facie* infringement and urgency are established, the principle of proportionality has to be respected. This means notably that any interim measure must be restricted to what is necessary in the given situation,³⁴ and adopted within the framework of a possible final decision that may be taken by the Commission at the end of formal proceedings.³⁵ Proportionality is assessed by weighing the public interest in avoiding a serious and irreparable damage to competition against the likely impact of the envisaged interim measures on the undertaking concerned.³⁶ In this regard, it should be taken into account whether it would be possible to reverse the situation that would be brought about by ordering interim measures and conversely whether a final decision in the case at stake would be prevented from being fully effective in the absence of interim measures.³⁷

4. Procedure and practicalities

14. To adopt interim measures, the Commission must open proceedings pursuant to Article 2 of Regulation 773/2004. Article 27 of Regulation 1/2003 applies to interim measure cases so the undertaking against which interim measures may be adopted must have the right to be heard and reply in writing to the Commission's objections. This means that the Commission must send a statement of objections ("SO") to the prospective addressee of the interim measures (see also Article 10 of Regulation No 773/2004) and grant access to its case file. Furthermore, under Article 27 of Regulation 1/2003, the undertaking has to be granted an oral hearing upon prior request. Article 17(2) of the Implementing Regulation 773/2004 allows, in cases of exceptional urgency, the time limits laid down for this procedure to be shortened to up to one week. Likewise, the views of third parties who show sufficient interest to be heard should be taken into consideration, and the Advisory Committee will also be consulted.

15. The *Broadcom* case illustrates this procedure and the possible timing. Having started a preliminarily investigation in 2018, the Commission had decided to initiate proceedings in the *Broadcom* case on 26 June 2019 and, on the same day, to adopt a statement of objections to which Broadcom replied on 23 July 2019.³⁸ An oral hearing took

³⁴ See, e.g., CJ, Case 792/79 R, *Camera Care v Commission*, EU:C:1980:18, paragraphs 18-19; CJ, joined Cases 228 and 229/82, *Ford v Commission*, EU:C:1984:80, paragraph 19; GC, Case T-23/90, *Peugeot v Commission*, EU:T:1991:45, paragraph 19.

³⁵ CJ, Joined Cases 228 and 229/82, *Ford v Commission*, EU:C:1984:80, paragraph 19.

³⁶ CJ, Case C-149/95 P(R), *Commission v Atlantic Container Line and Others*, EU:C:1995:257, paragraph 52.

³⁷ See CJ, Case C-76/89, *RTE v Commission*, EU:C:1989:192, paragraph 15 and Case , C-149/95 P(R), *Commission v Atlantic Container Line and Others*, EU:C:1995:257, paragraph 50.

³⁸ Commission Decision of 16 October 2019, *Broadcom*, Case AT.40608, recitals 7 to 12.

place on 20 August 2019, and a meeting of the Advisory Committee on 7 October 2019, before the adoption of the decision on 16 October 2019.³⁹

16. In addition, the *Broadcom* case shows, very practically, the possible monitoring instruments for interim measures. In *Broadcom*, the addressee had 30 days to inform the Commission of the measures it had put in place to ensure compliance with the decision, with such notification to be accompanied by supporting documentation. Pursuant to Article 24(1)(b) of Regulation 1/2003, the Commission could, by decision, impose on Broadcom periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them to comply with the decision ordering interim measures taken pursuant to Article 8.

5. Conclusion

17. The Commission's experience shows that interim measures can be adopted in suitable cases without compromising procedural rights. While the system for imposing interim measures has allowed the Commission to intervene in certain appropriate cases, including under Article 8 of Regulation 1/2003, the ongoing evaluation of Regulation 1/2003 will look into whether adaptations are warranted in order to foster an effective use of this tool, also taking into account the experience of NCAs.⁴⁰ Even pending such evaluation, the Commission is committed to ensuring that effective competition is preserved in digital and non-digital markets and to making the best use of the current framework for interim measures to that end. .

³⁹ Commission Decision of 16 October 2019, *Broadcom*, Case AT.40608, recitals 13 to 17.

⁴⁰ For instance, the procedure to impose interim measures under Regulation 1/2003 closely resembles the one for the adoption of prohibition decisions under Article 7, while other NCAs have specific procedures to adopt interim measures, see C. Emin and M. Kadar, Comment to Article 8 of Regulation No 1/2003, in: Regulation 1/2003 and EU Antitrust Enforcement: A Systematic Guide, Dekeyser, Gauer, Laitenberger, Wahl, Wils and Prete (eds), Kluwer, forthcoming, 4.3. and 6.1.