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Interim Measures in Antitrust Investigations – Note by BIAC

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This document reproduces a written contribution from BIAC 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>

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1. *Business at OECD* (BIAC) appreciates the opportunity to make this written contribution to the Working Party No. 3 Roundtable on Interim Measures in Antitrust Investigations.

1. Introduction

2. Recently, interim measures¹ in competition matters have gained renewed attention from competition enforcement authorities, scholars, and practitioners. In particular, the European Commission's (EC) recent imposition of interim measures for the first time in almost two decades—banning Broadcom from enforcing or entering into exclusive contracts in the EC's abuse of dominance investigation in October 2019—brought the issue to the forefront. A number of recent OECD Competition Committee meetings on other topics also touched upon some aspects of interim measures in an indirect way.² In this paper, BIAC discusses recent discussions and proposals to reform the European Union's interim measures procedures to make it easier and faster for the EC to issue interim measures in antitrust investigations.³ BIAC recommends that competition enforcement authorities use interim measures judiciously and sparingly as they were originally intended.

3. Commentators generally appear to support the proposition that there may be room for more frequent use of interim measures in appropriate cases.⁴ However, some observers view that the costs of false positives can be significant,⁵ while others appear to disregard

¹ OECD Call for Contributions Re: Roundtable on “*Interim Measures in Antitrust Investigations*” (Feb. 14, 2022) (on file with author) (“Interim measures are protective and corrective tools that may be adopted while investigating possible infringements. The main objective of interim measures is preventing anti-competitive harm that may occur before a decision on the merits.”).

² OECD, Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings, DAF/COMP(2010)11 (Oct. 5, 2011), <https://www.oecd.org/daf/competition/48825133.pdf> (roundtable held in June 2010); *Abuse of Dominance in Digital Markets*, OECD, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm> (roundtable held in December 2020); and *The Role of Competition Policy in Promoting Economic Recovery*, OECD, <https://www.oecd.org/competition/role-of-competition-policy-in-promoting-economic-recovery.htm> (roundtable held in December 2020).

³ The Call for Contributions for this session explicitly excludes interim measures in the merger control and private enforcement contexts.

⁴ Despoina Mantzari, *Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets*, (Mar. 2020), <https://ssrn.com/abstract=3544877>; Alexandre Ruiz Feases, *Sharpening the European Commission's Tools: Interim Measures*, 16 EUR. COMPETITION J. 404 (2020); Heike Schweitzer, *The New Competition Tool: Its Institutional Set-Up and Procedural Design*, Expert Report (2020), https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420574enn.pdf; Alex Burnside & Adam Kidane, *Interim Measures: An Overview of EU and National Case Law*, e-Concurrences Interim Measures, Art. No. 86718-9 (June 7, 2018), www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law.

⁵ Bo Vesterdorf, *Revival of Commission Interim Measures?*, CPI ANTITRUST CHRON. (Oct. 2019), <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/10/CPI-Vesterdorf.pdf>; Marcel Meinhardt & Sinem Süslü, *Interim Measures in Competition Law – Curse or Blessing?*, KLUWER COMPETITION LAW BLOG (Dec. 1, 2021),

or discount such costs even though they mention such costs.⁶ BIAC believes that such costs and other potentially adverse consequences should not be lightly dismissed.

4. BIAC recommends that competition enforcement authorities and legislative bodies take a well-balanced approach and use interim measures judiciously, as they were intended to be used in emergency situations. BIAC also believes that considerations of due process and procedural fairness should be more carefully scrutinized in situations where agencies are empowered to impose interim measures.

2. Current EU Standard and Reform Proposals for Easier and Faster Issuance of Interim Measures

2.1. Current EU Standard for Issuance of Interim Measures

5. In the EU, currently, as codified in Article 8 of Regulation 1/2003, the EC may impose interim measures upon its finding of a “prima facie” infringement and “urgency” due to the risk of “serious and irreparable damage to competition.”⁷ Such measures are binding on the accused infringer until suspended or vacated by the court on judicial appeal. In theory, the EC may also withdraw or revoke the order when the circumstances that warranted the order are no longer present or valid.

6. Proponents of reforms argue that interim measures are a necessary and effective tool, especially as to the digital economy. They further believe that the current EU system on interim measures is not conducive or receptive to fast action. They sometimes perceive that both the substantive and procedural standards of enforcement are too high and cumbersome and advocate substantially lowering them.⁸

7. For example, Alexandre Ruiz Feases states that “[t]he literature generally encourages the Commission to use them more frequently, and I share the enthusiasm for this tool.”⁹ He further notes:

*[I]t is ironic that this tool, which represents a success episode of the Commission, slipped into the shadows for almost two decades: between its decisions in IMS Health in 2001 and Broadcom in 2019, the Commission showed no interest in interim measures. The question is why. Is it just due to a matter of policy agenda, or are there other reasons or obstacles that explain the rare use of interim measures?*¹⁰

8. Some proponents of lower standards may be accepting the prima facie case too readily. Each case is different. If digital economy cases take too long, that might raise a legitimate question as to the liability and remedy issues in the first place. Perhaps, the EC is having difficulty both factually and theoretically. Advocating an easier and faster

<http://competitionlawblog.kluwercompetitionlaw.com/2021/12/01/interim-measures-in-competition-law-curse-or-blessing/>; Mel Marquis, *Interim Measures*, in GLOBAL DICTIONARY OF COMPETITION LAW (Concurrences Art. No. 12304), <https://www.concurrences.com/en/dictionary/Interim-measures>.

⁶ Mantzari, *supra* note 4; Feases, *supra* note 4.

⁷ Council Regulation (EC) No 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 O.J. (L 1) 1, art. 8.

⁸ See Mantzari, *supra* note 4; Feases, *supra* note 4.

⁹ Feases, *supra* note 4, at 405-406 (internal citation omitted).

¹⁰ *Id.* at 409.

temporary provisional remedy system without addressing the more important questions as to whether there exists a legitimate competition violation in the first place and how to conduct the underlying main investigation on a much more timely basis would not help develop court-tested jurisprudence on digital market competition issues.

9. While proponents of reforms generally portray the Article 8 codification negatively as the EU Parliament's accepting the EU Court's unduly restrictive scope of interim measures, there may be an alternative view that recognizes it as a positive development. For instance, in her timely piece entitled *Interim Measures: A Remedy to Deal with Price Gouging in the Time of COVID-19?*, Penelope Giosa notes the codification this way:

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.¹¹

10. Former General Court Judge Vesterdorf's explanations of the current standard is instructive and helps to understand and assess various reform proposals. For example, on the prima facie showing requirement, Vesterdorf explains that:

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 evidence to demonstrate a reasonably high likelihood of the existence of an infringement.¹²

11. On the urgency prong, rather surprisingly, Vesterdorf observes that the EC, as a public enforcer, would receive more deference and could have a relatively easier time to satisfy it as long as all the procedural rules have been fully complied with. But then he also adds a caveat that the EC must clearly explain why it is urgent and justifies interim measures:

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.

¹¹ Penelope Giosa, *Interim Measures: A Remedy to Deal with Price Gouging in the Time of COVID-19?*, CPI ANTITRUST CHRON (Sept. 2020), <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/09/08-Interim-Measures-A-Remedy-to-Deal-with-Price-Gouging-in-the-Time-of-COVID-19-By-Penelope-Giosa.pdf>, at 6.

¹² Vesterdorf, *supra* note 5, at 4.

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.¹³

2.2. Reform Proposals

12. Some proponents of reform propose to change both the substantive standard and the procedural requirements. On the other hand, some commentators believe that the “*prima facie* showing” prong of the substantive standard is not unduly restrictive and instead advocate lowering just the “urgency” standard.¹⁴

13. While he favors changes to certain aspect of the current EU interim measure system, Feases does not propose a wholesale overhaul. In particular, among other things, Feases does not think it is justified to lower the intensity of judicial review: “It is true that the Commission lost the appeals in *Ford Werke*, *La Cinq* and *IMS Health*, but general calls for lowering the intensity of judicial review of interim measures are not justified.”¹⁵

14. Indeed, Feases offers a critical but more neutral assessment:

*The gist of the discussion is that, even though there might be some obstacles that may have refrained the Commission from using interim measures, the real weight of these obstacles is not considerable. This means that the lack of interim measures is probably more a question of policy and enforcement agenda than an issue of the existence of serious impediments and the need for profound reforms.*¹⁶

¹³ Vesterdorf, *supra* note 5, at 4-5.

¹⁴ Feases, *supra* note 4, at 413 (“However, this is not a valid reason to explain the lack of interim measures either, as the standard of “*prima facie* infringements” is not as high as it might seem.”).

¹⁵ *Id.* at 415.

¹⁶ *Id.* at 416.

15. Feases cites the Furman Report¹⁷ as support for limiting the accused infringer's access to the EC's investigation files as a way to enable faster issuance of interim measures: "This has been proposed by the UK NCA and the Furman Report on competition and digital markets."¹⁸ However, the Furman Report is more circumspect, stating:

*The CMA has identified the potential to make more use of interim measures through confining file access to documents clearly relevant to the interim measure. This process improvement has the potential to make interim measures more practicable, without compromising companies' legitimate procedural expectations. However, if it proves legally contentious for the CMA to narrow access in this way, it is possible that the CMA's rules will have to change. This would likely require secondary legislation. In addition, as considered in the following section, the standard of appeal against interim measures should be changed in parallel to any change to that for final decisions, to maintain consistency.*¹⁹

16. At the same time, Feases recognizes that limiting access to file may sound great conceptually but could be difficult to administer in practice: "In other words, the practical difficulty for the Commission would be to distinguish between key documents related to the interim measures and other documents that, albeit crucial for the rest of the antitrust procedure, are less relevant to the interim measures."²⁰

17. Feases also makes an important observation that, by definition, interim measure are interim or provisional.

*We cannot forget that interim measures are provisional in nature, which means that they should be easily lifted if the Commission concludes that there is no infringement of competition law at the end of the investigation. This implies that the Commission's power to design remedies for interim measures is limited to behavioural remedies. However, this does not mean that the remedies are not costly for the undertaking subjected to them.*²¹

18. Although the argument that a competition enforcement authority can and will readily lift its interim measures if its full underlying main investigation exonerates the accused infringer sounds assuring in theory, however, it could ring hollow in practice. One wonders if it really happens or would happen in reality? Because of limited experience at the EU-level since the adoption of Article 8 of Regulation 1/2003, it is difficult to assess the likelihood. Even if it did, it is not clear whether the harm done to competition by the EC's well-intentioned but improper and hasty imposition of interim measures could be properly remedied.

19. BIAC believes that expanded powers (to more readily and easily issue interim measures) must be accompanied by strong (if not stronger) due process and checks-and-balances mechanisms. While not directly on point, Aman Rizvi's review of the EC's New Competition Tool (NCT) proposal offers timely and useful guidance on the importance of procedural safeguards and a proper checks-and-balances mechanism for interim measure

¹⁷ *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [hereinafter Furman Report].

¹⁸ Feases, *supra* note 4, at 426 (internal citations omitted).

¹⁹ Furman Report, *supra* note 17, ¶ 3.127.

²⁰ Feases, *supra* note 4, at 427-428.

²¹ *Id.* at 428.

reforms.²² After discussing the stated rationale of the NCT idea and how the EC might have gained new power to study a given market and impose structural or behavioral remedies not because of any particular anticompetitive conduct but based on the market structure itself, Rizvi cautions that:

But giving regulators such power is risky. At worst, a market investigation tool could allow competition authorities to dictate the structure of markets by fiat. On the other hand, when such tools operate under legal uncertainty, competition authorities may be timid in using them. This would hobble the tool's effectiveness and frustrate expectations.

*Competition authorities in six countries have market investigation powers: the United Kingdom, Mexico, Iceland, Greece, Italy, and Romania. Some of these countries' experiences suggest the tool works best with strong procedural safeguards and under a clear legal framework. They show that procedural due process is especially important in mitigating the risk of officials using the tool to micromanage the economy.*²³

3. Considerations for Sound Reform

20. BIAC believes that various factors need to be carefully assessed before serious reform measures are considered and adopted.

21. Proponents of more frequent and aggressive use of interim measures in essence propose to disregard the current European Court of Justice case law and the EU's own rules and instead rewrite the rules to make it much easier and simpler to resort to what (at least until now) has been generally recognized as an "exceptional" or "extraordinary" measure to be used sparingly and judiciously.

22. One could wonder if the EC already has wide latitude, why has it not resorted to it more often? What explains a gap of almost two decades? Proponents of drastic reforms suggest that the hurdles were too high. However, it may well have been plausible that the EC had good sense and judgment to keep it as an exceptional measure for judicious use.

23. Regardless of whether the EC's non-use was because of its fear of losing judicial appeals again or because it has not seen a matter suitable for this tool,²⁴ one should not automatically—or at least presumptively—assume that today's "digital economy" requires

²² Aman Rizvi, *The Importance of Procedural Safeguards for the EU's New Competition Tool Proposal*, HSL ANTITRUST ASS'N (Apr. 23, 2021), <https://orgs.law.harvard.edu/antitrust/2021/04/23/the-european-commission-and-the-new-competition-tool/>.

²³ *Id.* (internal citations omitted) (emphasis added).

²⁴ Commentators have offered various explanations. See Marquis, *supra* note 5 ("Unlike some national authorities (notably the Autorité de la concurrence in France—where the legal standards are more permissive), the Commission had let its interim measures power 'fade into oblivion' since 2001, mainly due to: (i) the restrictive wording of Article 8 of Regulation 1/2003, (ii) the exacting standards of the EU Courts, (iii) the frequent use of the Article 9 commitment procedure, and possibly (iv) the risk of type I errors.").. See also Yves Botteman & Jean-Francois Guillaudeau, *Injunctive Relief as an Antitrust Violation or as an Enforcement Tool: An EU Antitrust Perspective*, CPI ANTITRUST CHRON. (Mar. 2013), <https://www.competitionpolicyinternational.com/assets/Uploads/BottemanGuillaudeauMAR-131.pdf> (offering reasons why the EC has not used interim measures much since 2000, one reason being Article 9 Commitments mechanism becoming more efficient and effective; on the other hand calling interim measures "a cumbersome tool for antitrust enforcement").

more aggressive and frequent use of interim measures by public enforcement authorities including the EC and national authorities of the EU Member States and other public enforcement authorities around the globe. BIAC has previously stated in its comments to the December 2020 roundtable on abuse of dominance in digital markets that:

*Legal certainty and predictability of investigation and enforcement of abuse of dominance prohibitions should apply in the same way as for enforcement activity in non-digital markets. Where there are legitimate competition concerns, enforcement action should be taken in a manner that is proportionate and effectively addresses that failure or those concerns but does not necessarily chill innovation or hinder investment. As in non-digital markets, this requires a solid understanding of the unique characteristics of and business incentives in digital markets. . . . Competition authorities should only take enforcement and/or remedial action where a firm has abused its dominance and any such actions should be based on sound economic and factual underpinnings that justify intervention.*²⁵

24. BIAC counsels caution and prudence before a public competition enforcement authority's expanding the use of interim measures hastily, largely as a response to a populist sentiment of the day. Penelope Giosa's succinct analysis of the inappropriateness of interim measures against Coronavirus-related price gouging practices despite the popular public sentiment to promptly punish and prohibit price gougers preying on the helpless during the Coronavirus pandemic is not only interesting but also quite relevant to the ongoing debate on interim measures and digital markets.²⁶ While not perfectly analogous, this article may serve as a cautionary tale against hastily applying interim measures against certain business models and practices in the digital economy. Regarding the prima facie infringement requirement, Giosa notes that "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."²⁷ Regarding the irreparable harm requirement, Giosa observes that "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."²⁸

3.1. Proper Goals and Scope of Interim Measures

25. BIAC believes that the proper goals and scope of interim measures should be kept in mind. This will help assess if the proposed reform proposals are sound and justified. By definition, interim measures are provisional, temporary, and preliminary.²⁹ They are not meant to cure all of the perceived or suspected but yet unproven allegations.

²⁵ OECD, Abuse of Dominance in Digital Markets—Contribution from BIAC, DAF/COMP/GF/WD(2020)38, ¶ 2 (Nov. 25, 2020), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)38/en/pdf) [hereinafter BIAC Abuse of Dominance].

²⁶ Giosa, *supra* note 11.

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ EUR. COMPETITION NETWORK, ECN RECOMMENDATION ON THE POWER TO ADOPT INTERIM MEASURES, ¶ 6, https://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf ("Interim measures, by their nature, are temporary and protective. In line with the principle of proportionality, they must be restricted to what is necessary in the circumstances of the case.").

26. There may be another goal or utility of interim measures. It will help competition enforcement authorities to learn from it. Feases states that:

No doubt, interim measures are an interesting tool for the Commission to keep markets competitive. The appeal of this instrument does not only lie in the fact that it allows the Commission to intervene quickly, but also in that it maximizes the learning capacity of the authority: given that these measures are adopted at early stages of antitrust investigations, the Commission can use them to test the efficacy of a particular remedy. If, during the investigation, it observes that the remedy has not addressed the anticompetitive problem properly, the remedy can be redesigned when it comes to adopting the final decision.³⁰

27. On the other hand, BIAC believes that using interim measures as a threat or enticement to extract commitments from the accused infringer is not a proper goal. The *Broadcom* case may have achieved this goal or result. However, it would not necessarily mean that it is a proper goal. In reality, competition enforcement authorities around the globe may implicitly use various approaches to entice or encourage companies to offer commitments, voluntarily change their practices, or otherwise not vigorously contest enforcement authorities' allegations. Opening a formal investigation, issuing a Statement of Objections after an investigation in the EU, filing a lawsuit in court in the U.S., and any other official actions by competition enforcement authorities in reality send a strong message and force companies to consider its options carefully. However, that would not justify listing or glorifying it as one of the explicitly stated goals (and perhaps the only real reason) of interim measures. As we explain below, lowering standards for issuing interim measures with an explicit goal of pressing companies to propose commitments could cause a moral hazard.

28. However, others think differently and want to use interim measures to entice the accused infringer to offer commitments. For example, Schweitzer's Expert Report on the New Competition Tool states that:

*The introduction of interim measures into the "markets regime" is also discussed in the UK. In this context, Lord Tyrie has argued that the power to impose interim measures pending full investigation would "provide a stronger incentive for these firms to listen, engage and take steps to address the CMA's concerns in advance of formal work, than currently". This is in line with the French experience in infringement proceedings: The more active use of, and greater ease in adopting interim measures which is characteristic for the French model has tended to increase the companies' willingness to cooperate and their interest in a consensual settling of the proceedings by way of voluntary commitments. In the EU, the *Broadcom* proceedings appears to confirm this experience: following the imposition of an interim measure, *Broadcom* has proposed commitments. Finally, this is in line with the experience in the field of enforcement of intellectual property rights, where provisional measures for the immediate termination of infringements will frequently lead to a settlement of the case.³¹*

3.2. Need for Reforms

29. BIAC wonders whether it is really necessary to drastically lower the current standard for interim measures. The *Broadcom* case may show that the current system is

³⁰ Feases, *supra* note 4, at 428.

³¹ Schweitzer, *supra* note 4, at 45.

already sufficient. The EC felt confident that interim measures were appropriate in that case. Even though the EC and Broadcom resolved the dispute by Broadcom's offering a commitments before the court decided the appeal, one could credibly argue that the theory of harm alleged in the *Broadcom* case was a well-settled one rather than being a novel theory.

30. The fact that the EC has not used the interim measures tool in almost two decades may be not because the standard for issuance is unduly restrictive but because of other reasons such as its much more frequent use of Article 9 commitment mechanism and possibly its belief that interim measures were not appropriate in so-called digital market matters with novel theories harm. After all, that ought to help explain why those cutting-edge digital market matters are taking a much longer time to complete and go through judicial reviews.

31. The term "digital markets" tend to be used rather loosely. This could obscure the critical fact that a properly defined market is a must before any anticompetitive conduct is found and condemned. BIAC previously noted that:

There is no universally accepted definition of the "digital economy," "digital sector," or "digital markets." Digital markets can be defined narrowly (e.g., as online platforms and those activities that exist as a result of such platforms) or broadly (e.g., all activities that use digitized data or are provided over the internet). Digital markets, even broadly defined, may not operate in isolation from non-digital equivalents. Accordingly, competition authorities should consider whether properly defined, digital markets include only digital substitutes, or whether reasonable "bricks and mortar" substitutes should be considered.³²

3.3. Due Process Considerations

32. BIAC believes that procedural due process is an exceedingly critical requirement. It lends legitimacy to the outcome of the process. Conceptually, both proponents and critics of drastic reforms state that due process is important. For example, Alec Burnside observed that:

Provided that the procedural rights of parties to proceedings are respected, there is scope for an increase in the use of interim measures in most ECN jurisdictions. There [are] growing signs that the rules and procedures governing the use of interim measures may be reformed, notably in the EU and Germany. However, it remains to be seen whether these reforms will be implemented in the near term and if any such changes will increase the effectiveness of interim measures as an enforcement tool.³³

33. However, some proponents of drastic reforms actually appear to believe that rigorous procedural due process requirements are unnecessary, cumbersome, counterproductive, and superfluous. For example, they appear to blame various procedural requirements—need for SO, access to file, hearing—as non-essential distractions.

34. It would be a mistake to treat interim measure proceedings as totally separate and different from the underlying main investigation. Rather, as the EC continues its underlying main investigation, it can continue to build on and refine the SO it issued for the imposition of interim measures. After all, it will have to complete its underlying main investigation

³² BIAC Abuse of Dominance, *supra* note 25, ¶ 4 (internal citations omitted).

³³ Burnside & Kidane, *supra* note 4.

and update its preliminary or provisional findings and theories of harm laid out in the SO for interim measures. At that stage it is possible that the accused company may offer a commitment as an efficient means to resolve the dispute. However, if the EC's goal was to force or entice the accused infringer to offer a commitment rather than continuing its main investigation with the goal of completing as soon as it can, then we may have a problem.

35. The fact that some proponents want to be able to impose interim measures much earlier in the main investigation further exacerbate the due process problem. "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."³⁴

36. Both proponents and critics of potential reforms to lower the substantive and procedural standards for interim measures recognize the importance of due process and safeguarding the accused's right of defense. However, some of the reform proposals would seriously undermine the existing due process and procedural safeguards. Their proffered justifications for shortcuts do not appear to be compelling enough.

3.4. Effectiveness of Interim Measures

37. In the EU, there is somewhat limited experience with interim measures, because the EC has not utilized this tool for almost two decades until the *Broadcom* case in late 2019. Some Member States, particularly France, had more experience. There is some question as to how effective interim measures may have been in various situations. Put it differently, looking at the Member States' recent experience, certain types of conduct and practices may be more suitable for interim measures.

38. So while Alec Burnside appears to recognize the need for reform discussions, he is not totally convinced that it will necessarily "increase the effectiveness of interim measures as an enforcement tool."³⁵

39. Lowering substantive and procedural requirements would not necessarily ensure or increase the effectiveness of interim measures. Based on their actual experience with national competition authorities, some commentators explain that even when national level requirements for interim measures are not particularly high, national competition authorities do not necessarily handle the situation right. For example, Marcel Reinhardt and Sinem Süslü explain a number of Swiss examples that raise serious questions.³⁶ In particular, even with or precisely because of its low thresholds (that actually raise serious due process concerns), Swiss experience casts doubt on the claim that prompt and easy interim measures will be more effective:

Interim measures are back on the Swiss Competition Commission's radar, especially in dominance cases. The background of this latest development is the authority's desire to accelerate its proceedings and ensure the efficacy of competition law. However, the most recent cases show that interim measures are not always suitable for this purpose – especially in dynamic markets this kind of regulation appears to be more of a curse than a blessing.

³⁴ Vesterdorf, *supra* note 5, at 3.

³⁵ Burnside & Kidane, *supra* note 4.

³⁶ Meinhardt & Süslü, *supra* note 5.

....

ComCo seems to acknowledge that its lengthy investigation procedures, which can easily last up to seven years, are problematic. It is, however, questionable whether ComCo is looking for the solution in the right place.

....

It is sufficient for ComCo to establish these facts in a credible manner. The threshold for the ordering of interim measures is thus rather low. This is problematic for two reasons in particular:

The main issue is that ComCo only needs to conduct a summary review before imposing interim measures. As part of this summary review, ComCo must assess whether the conduct in question could have harmful effects on effective competition. This is done without examining the market and the behaviour of the market participants in greater detail. At the time interim measures are issued, ComCo generally does not yet have an in-depth insight into the markets and is unable to anticipate how dynamic markets will develop. However, this does not prevent ComCo from issuing orders that not only severely restrict the company concerned in its economic freedom for several years, but may in hindsight also have an adverse effect on the markets and other market participants. ComCo has considerable discretion in deciding which measures to impose. Therefore, interim measures –at least in the context of competition law– cannot be considered mild. Rather, they represent a serious regulatory intervention that can shape market conditions over a period of several years. But this is not ComCo’s task. ComCo’s task is to prevent abusive behaviour and not to regulate markets through premature intervention.

....

In the end, ComCo’s approach is counterproductive. It makes interim measures – at least in the most recent cases– appear more like a curse than a blessing. This is not only for the company concerned but for effective competition as such. . . .³⁷

40. They cite three concrete recent examples where ComCo’s presumably well-intentioned but poorly decided interim measure decisions distorted or are distorting the marketplace.³⁸

³⁷ *Id.* (emphasis added).

³⁸ *Id.* (Swatch Group matter (“ComCo’s decision was highly controversial. The authority was accused of reinforcing the positioning of a new dominant player, the Swatch Group’s competitor Sellita”; “It resulted in great legal uncertainty and additional expenses for the Swatch Group’s customers who already had placed their orders and who suddenly and involuntarily had to switch to other suppliers. ComCo’s intervention turned the existing market conditions upside down.”); Swisscom Fiber Optic Network matter (“In 2020, ComCo ordered interim measures in its investigation dealing with Swisscom’s expansion of its fiber-to-the-home (FTTH) optical fiber network. ComCo prohibited Swisscom from continuing the rollout. Market specialists have acknowledged that the interim measure will delay the fiber rollout to the detriment of end consumers.”); Mastercard/NCS matter (“In its latest decision, ComCo has imposed interim measures as part of its investigation into Mastercard’s alleged obstruction of SIX’s so-called National Cash Scheme (NCS). The NCS is a new scheme from SIX that regulates national ATM transactions. SIX alleges that Mastercard is obstructing the rollout of its NCS by refusing to link its debit card to the new system. Accordingly, ComCo’s interim measures aim at enabling card-issuing banks to prepare their debit cards technically for possible later activation of the NCS. With its interim measures, ComCo is once again intervening in a dynamic market whose development it can hardly

41. Thus, Reinhardt and Süslü conclude that:

It follows from these recent cases that interim measures are not necessarily an appropriate instrument to guarantee the efficacy of competition law. On the contrary, premature intervention by ComCo can have adverse effects on effective competition. A more appropriate means to ensure the efficacy of competition law would be to accelerate ComCo investigations and subsequent appeals proceedings in general. The revision of the Swiss Cartel Act proposed by the Federal Council will provide some remedy in this regard. The Federal Council plans to introduce new regulatory deadlines for ComCo and the appeals courts in order to speed up the proceedings under the Swiss Cartel Act. The revision is expected to come into force in 2023/24.³⁹

3.5. Appropriateness

42. Proponents of drastic reform proposals believe that the digital economy is especially suitable for interim measures that are promptly and more easily issued under their proposed procedures. The argument is that the digital economy is dynamic and changes fast, and therefore we need prompt interim measures before it is too late.

43. BIAC believes that novel theories of harm naturally take longer to test. Various digital markets and challenged practices often raise novel questions and novel theories of harm.

44. The appropriateness factor is not limited to the digital sector. One should not lose sight of the fact that interim measures should be general and applicable to all situations. If digital markets have special characteristics, then such characteristics should be part of the *prima facie* showing requirement and also “urgency, proportionality, necessity” requirement. The party that is seeking an exceptional measure such as interim measures should bear the burden.

45. Indeed, some commentators have noted that interim measures may not be suitable for digital market abuse cases, precisely for the same reasons the proponents of easier and faster interim measures cite as justifications. For example, Verheyden notes that:

Critics argue that interim measures are difficult to reverse and can lead to unintended consequences, especially if the Commission closes its investigation or loses a challenge in court. In cases where the conduct proves to be procompetitive, interim measures may themselves lead to competitive harm, albeit for a limited period, if reversible. For these reasons, the use of interim measures in rapidly evolving technology markets is particularly controversial.⁴⁰

anticipate at this stage. After all, since the Covid-19 crisis at the latest, ATM transactions and cash are playing an increasingly insignificant role. Cash is slowly ending its reign. Mastercard has appealed ComCo’s decision. Hence, it is to be expected that the interim measures will delay the actual investigation.”)).

³⁹ *Id.*

⁴⁰ Alexandre Verheyden & Henry de La Barre D’Erquelinnes, *European Commission Revises “Interim Measures” in Antitrust Investigations*, JONES DAY (July 2019), <https://www.jonesday.com/en/insights/2019/07/european-commission-revives-interim-measures> (emphasis added).

46. Based on the recent Swiss experience, Meinhardt noted, “However, the most recent cases show that interim measures are not always suitable for this purpose – especially in dynamic markets this kind of regulation appears to be more of a curse than a blessing.”⁴¹

47. Proponents often cite the possibility of tipping as a justification for prompt intervention while the underlying main investigation is still ongoing. BIAC notes that each case may be different. It is not clear how one can confidently say that a given market will face tipping unless competition enforcement agency intervenes with interim measures.

48. Moreover, we need to understand market tipping correctly. It may not necessarily mean that the winner has engaged in anticompetitive conduct.

*Regarding tipping, many platforms do not tip. Tipping will not occur when products are highly differentiated or when multihoming is common. Market tipping is not a problem in itself. It may simply be the consequence of the efficiencies of the platform which comes to dominate the market and the dynamics and feedback effects that characterise platform that has achieved a monopoly position, that has benefitted from tipping, is nonetheless subject to potential competition, then perhaps we need not worry. Unfortunately, the evidence of the last 20 years indicates that once markets tip, gatekeepers are hardly ever disciplined by potential competition.*⁴²

49. If the process was fair and reasonable and participants competed fairly, and in the end consumers picked the same winner by an overwhelming margin, should this be an illegal result and condemned as anticompetitive? Indeed, in the U.S., where admittedly its monopolization jurisprudence is different from the EU’s abuse of dominance jurisprudence, the possession of monopoly power is not illegal unless it is accompanied by anticompetitive conduct (exclusionary or predatory conduct). Thus, it is not illegal if it was achieved “as a consequence of a superior product, business acumen, or historic accident.”⁴³

50. If other regular types of measures including remedial orders upon completion of the underlying main investigation can resolve the problem, then interim measures are not appropriate. Cease and desist orders and administrative fines can be appropriate as ex post remedies in some cases and should not be lightly dismissed as ineffective and inefficient just because the alleged relevant market is a digital sector.

3.6. Costs of False Positives

51. The most serious costs would be adverse economic effects of false positives. Former General Court Judge Bo Vesterdorf, reminds us of this critical consideration:

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.

⁴¹ Meinhardt & Süslü, *supra* note 5.

⁴² Jorge Padilla, Reviewing the Role of Technology Players: Essential Facilities or Evolving Business Models, Concurrences Law & Economics Webinars #1 (June 2020), <https://www.skadden.com/-/media/files/events/concurrences-synthesis-200605.pdf?1a=en>.

⁴³ United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

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.⁴⁴

52. Premature and inappropriate intervention via interim measures may chill innovation, distort the marketplace, and cause unknown consequences. Even those who support revising the current EU standard for interim measures recognize the potentially high costs of hasty over-enforcement:

We cannot forget that interim measures are provisional in nature, which means that they should be easily lifted if the Commission concludes that there is no infringement of competition law at the end of the investigation. This implies that the Commission's power to design remedies for interim measures is limited to behavioural remedies. However, this does not mean that the remedies are not costly for the undertaking subjected to them.⁴⁵

53. Another commentator tries to balance pros and cons this way:

Use or non-use of interim measures may create error costs. Such measures are potent and should generally be granted only on an exceptional basis. Where they are imposed by or requested by a competition authority, an inappropriately low standard of proof could cause serious disruption of business operations based on a relatively cursory investigation. However, the arguments supporting an increased use of interim measures as a rapid response tool are strong.⁴⁶

3.7. Moral Hazard

54. As noted above, BIAC believes that it is not proper to use interim measures as a bargaining chip to entice (or coerce) the accused infringer to offer commitments rather than going through the full and complete determination on the merits. Short of openly glorifying and touting the possibility of using interim measures to entice quick commitments, there could be an incentive to use interim measures as an unofficial, de facto short cut to full and complete investigations to determine whether their latest novel theories of harm can pass muster.

55. While the *Broadcom* case is generally hailed as a sign of the EC's new intention and commitment to use this tool more often and aggressively, as some astute commentators have noted, the *Broadcom* interim measures case does not really deal with cutting-edge novel theories of harm. For instance, Despoina Mantzari explains the significance of the *Broadcom* interim measures case as follows:

*Arguably, the Commission revived interim measures in the *Broadcom* case, as in contrast to the above, the investigation concerned one of the most established*

⁴⁴ Vesterdorf, *supra* note 5, at 3 (internal citations omitted).

⁴⁵ Feases, *supra* note 4, at 428.

⁴⁶ Marquis, *supra* note 5.

theories of harm dating back to Hoffman-La Roche, that of exclusivity obligations. This is a suitable test case which allows the Commission to meet the requirements of the test. A well-established theory makes it easier to show a prima facie case. It should also make it easier to claim a risk of serious and irreparable damage to competition because exclusivity-based conduct inherently creates a risk of exclusion. Furthermore, as procurement in this space often involves tenders, this entails that the damage to competition may be more likely and new entry far more difficult. It would be interesting to see how the Courts would react to a greater use of interim measures and whether there would be room to revise the quite restrictive IMS Health precedent.⁴⁷

56. Furthermore, Broadcom offered a commitment to the EC before the EU's General Court could rule on Broadcom's appeal. Thus, there is a limit on what the *Broadcom* example can teach us. Finally, the oft-quoted long-running investigations typically involve novel theories of harm, which must at least partially explain why the accused infringers continue to vigorously contest the EC's liability findings. If so, they are more likely to vigorously contest the imposition of interim measures rather than readily surrender to thinly-veiled interim measures.

57. There may be another type of moral hazard. Once interim measures are imposed under the proposed revised lower thresholds, then there could be less urgency or incentives to continue the underlying main investigation. In other words, the end game could intentionally or unwittingly become whether competition enforcement authorities could impose interim measures to entice the accused infringer to offer commitments before the court can suspend or vacate them.

58. Not all commentators are concerned about it, however. For example, Burnside is less concerned about this potentially improper use or reliance on interim measures:

The experience of the FCA in applying interim measures demonstrates that regulatory efficiency does not only come from issuing decisions based on a robust assessment, but also from speed of action. It also shows that acting quickly does not entail sacrificing thoroughness. Similarly, concerns that there is a danger that interim measures may be viewed as a substitute for "speedy and swift and streamlined procedures in the main" seem misplaced. There is no reason why legislators and antitrust regulators cannot strive to ensure that effective tools are available where urgent action is required, and put in place a procedural framework that facilitates speed in the main proceedings.⁴⁸

3.8. Need for Checks and Balances

59. Unlike the situation in the U.S., in the EU and many other jurisdictions, competition enforcement authorities start out with already low hurdles. In the U.S., the Department of Justice's Antitrust Division and the Federal Trade Commission must convince the federal court to issue a temporary restraining order (TRO) and preliminary injunction (PI). Thus, there is a procedural safeguard for proper checks and balances. However, the EC and national enforcement authorities in the EU could issue binding orders including interim measures that will remain valid and controlling until and unless overturned by the court on judicial appeal. Thus, if the competition enforcement authorities can more easily and promptly issue interim measures on a bare minimum showing of potential problems, there

⁴⁷ Mantzari, *supra* note 4, at 47.

⁴⁸ Burnside & Kidane, *supra* note 4.

ought to be correspondingly increased checks and balances to deter too hasty decision-making (in essence, an abuse of their governmental powers) on the part of competition enforcement authorities.

3.9. Changing Regulatory Environments

60. Changing regulatory environments will change the regulatory landscape and may mitigate the need for faster responses from the EC. In particular, the upcoming adoption of the Digital Markets Act (DMA) and Digital Services Act (DSA) will impose certain new obligations on so-called “digital gatekeepers,” basically all of which are at the forefront of ongoing disputes with the EC over their business models and practices and novel theories of competitive harm. Rightly or wrongly, once the EU formally adopt these new laws and implement a new regulatory regime covering at least some aspects of the digital economy, the market participants’ rights, duties, and responsibilities will be readjusted. Some of the novel theories of harm may then have relevant statutory guidance or oversight, thus affecting the *prima facie* prong analysis. Similarly, certain situations may more readily satisfy the “urgency” prong. On the other hand, certain cases may become even less urgent than now to justify interim measures.

61. Interestingly, on the urgency side, the threat of a significant fine imposition (up to 10% plus possibly 20% for DMA infringements; and 6% plus up to 10% for DSA infringements) plus other remedial measures under the DMA and DSA might mitigate the need for interim measures. “The need for such a tool may be mitigated, but not eliminated, by a shift toward more *ex ante* regulation of so-called ‘gatekeepers’ in this sector.”⁴⁹

3.10. Other Areas for Improvement

62. BIAC believes that it will be useful to consider other areas for improvement rather than solely focusing on promoting interim measures as a cure-all solution. After all, interim measures ought to be “interim” while the underlying main investigation continues. There might be other areas that could be improved for the longer-term benefits.

63. Slowness of regular investigations is a problem of its own. Novel theories of harm for new products, practices, business models and ultimately new “antitrust markets” often make it necessary to take a long time to find, build and prosecute a case and then still go through a lengthy judicial review. While understandable, the perceived (or real) high thresholds for interim measures should not be blamed for the slowness of the underlying main investigations that are dealing with untested novel theories of harm.

64. Former General Court Judge Vesterdorf offers an interesting observation and suggestion:

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

⁴⁹ Marquis, *supra* note 5.

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.⁵⁰

65. In the U.S., interim measures (known as “preliminary injunctions” in the U.S.) are most often used in the merger control context. Indeed, it may be the only area where interim measures are regularly used by competition enforcement authorities in the U.S. The practice is well established. It is very effective and the costs of false positives are low because the transaction is suspended only for a reasonably short period of time (typically a few months until the court determines after a thorough, trial-like hearing). While the Call for Contributions specifically excludes the use of interim measures in merger control matter, there may be a valuable lesson as to why and how it has become a well-accepted practice in the U.S. in the merger control context but not so in the abuse of dominance context.

4. Conclusion

66. BIAC believes that interim measures should be used judiciously only when there is a prima facie showing of a potential infringement and to prevent a clear and irreparable harm to competition. Therefore, BIAC recommends that a reform proposal should not dismiss the current substantive and procedural requirements as too high and inconvenient obstacles. Rather, careful balancing should take place to prevent the high costs of false positives.

67. BIAC also notes that the imminent adoption of ex ante regulation regarding the digital economy may help mitigate the need for interim measures. Moreover, as some of the pending investigations and judicial review cases come to an end, there will be further clarity and guidance on the legality of what were once novel theories of antitrust harm. This may also help lessen the need for exceptional temporary measures in some of the future investigations. Furthermore, it should also help satisfy the current standard for interim measures in appropriate cases.

⁵⁰ Vesterdorf, *supra* note 5, at 5.