

Unclassified

English - Or. English

13 May 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 Belgium

21 June 2022

This document reproduces a written contribution from Belgium 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.

JT03495293

Belgium

1. Powers and standards to impose interim measures

1.1. Has your authority the power to directly impose interim measures in antitrust investigations? Can interim measures be imposed ex officio and/or upon complaint? Would the authority need to seek a court order for interim measures?

1. Articles IV.71-73 of the Code of Economic Law (CEL) organise the interim measures procedure.
2. Interim measures can only be granted in respect of restrictive practices for which a case has been opened and that are the object of an investigation.
3. They can be imposed by the Competition College of the BCA at the request of a complainant, of the Competition Prosecutor General (Auditeur Général) or of the Minister with competence for the sector concerned. (art. IV.72, §1).
4. In all recent cases, there has been a complaint with a request for interim measures that was filed with the President after the opening of the case by the Auditeur Général.
5. The authority does not need to seek a court order.

1.2. Does your authority regularly make use of the power to impose (or seek) interim measures? If so, in which cases have interim measures been imposed in the last years?

6. The BCA regularly makes use of its powers in respect of interim measures. It took since the reform of the interim measures procedure in 2013 24 interim measures decisions (granting or refusing; 14 in the last three years).
7. Measures have e.g. been imposed or refused in respect of boat trips on the river Meuse (refused), broadcasting equipment (granted), the bumper pool association (granted), components for electric meters (granted), the distribution of cars (granted), the distribution of pharmaceuticals (refused), football competition (refused), jumping competitions (granted), merger control (refused), navigation software (refused), printers (refused), sharing of telecom infrastructure (granted), television rights for cyclocross competitions (granted).

1.3. Does your authority enjoy full discretion regarding the type of interim measures (e.g. positive injunctions and cease-and-desist orders) it can impose? What are the most common interim measures imposed in your jurisdiction? Are there any legal and practical differences in imposing interim measures contemplating a requirement to act (positive injunctions) and interim measures requiring to refrain from acting (negative injunctions or cease-and-desist orders)?

8. The BCA can impose any measure the College considers appropriate to suspend restrictive practices that are the object of an investigation when it is urgent to avoid a situation that may cause serious and imminent prejudice to the affected undertakings that would be difficult to repair, or harmful to the general economic interest (article IV.71 CEL).

9. The College has imposed a variety of positive and negative injunctions such as the suspension of clauses or rules that were *prima facie* possibly in infringement of competition law, granting provisional access to infrastructure, ordering the supply of components at certain conditions, suspending an agreement in order to give the sector regulator time to finalise its assessment, etc.
10. There are no legal or practical differences in imposing interim measures contemplating a requirement to act (positive injunctions) and interim measures requiring to refrain from acting (negative injunctions or cease-and-desist orders).

1.4. What are the main criteria to set the duration of interim measures? Does the law set a maximum length? Do interim measures produce immediate effects? If so, are there exceptions?

11. Interim measures have immediate effect unless they are suspended by the Market Court. The duration can not extend beyond the date of the final decision on the complaint.

1.5. What are the key principles that your authority should observe when imposing interim measures? What are the legal standards to impose interim measures? Are there any conditions that are particularly difficult to meet?

12. Constant case law (already developed by the Brussels Court of appeal before the establishment of the BCA and consistently confirmed since then) requires that it should not be manifestly unreasonable to consider that a practice might be in infringement of competition law.
13. And the measures must avoid a situation that may cause serious and imminent prejudice to the affected undertakings that would be difficult to repair, or harmful to the general economic interest (article IV.71 CEL).

1.6. What are the degree of probability and the evidentiary standards to show a *prima facie* infringement?

14. Please see the response sub (1.5).

1.7. What is the requisite standard to show urgency? Is your authority required to show irreparability of the harm? Is the assessment of irreparable harm related to competition or to competitors/third parties? To what extent is your authority required to assess likely effects and to take into account potential efficiencies/objective justifications?

- The measures must be necessary in order to avoid or limit serious and imminent prejudice to the affected undertakings that would be difficult to repair, or harmful to the general economic interest.
- The Legislator changed in 2013 the concept of irreparable harm to harm that would be difficult to repair (*difficilement réparable*).
- In order to assess the potential usefulness and the urgency of the measures it imposes, the College must assess their likely effects taking into account efficiencies. In order to make its *prima facie* assessment it must take into account objective justifications substantiated by the defendants.

1.8. How does your authority ensure effective compliance and monitoring with the interim measures being imposed?

15. Compliance with College decisions is monitored by the Investigation and Prosecution Service (*Auditorat*) and decisions granting interim measures always organise a two step clarification/complaint/termination procedure: first before the Auditeur Général, and in case of continued disagreement before the College.
16. In some cases, the College appoints a trustee in order to monitor compliance with measures.

2. Key policy considerations

2.1. What are the main considerations (and related costs for your authority) when assessing whether to impose interim measures? What is the impact of proceedings for interim measures on the main investigations?

17. The College has to decide whether there is a *prima facie* case and whether the conditions in respect of prejudice and urgency are met (see response to question 1.5).
18. In practice the more decisive considerations are the assessments of the potential prejudice for the applicant in case measures are refused but the authority decides in the main case that there has been an infringement, and of the prejudice to the defendant in case measures are granted but the authority decides in the main case that there has been no infringement (article IV.73, §2 CEL).

2.2. What kind of cases are best suited for interim measures? Are interim measures more appropriate for well-established or novel theories of harm? In which markets can interim measures be most effective?

19. It is always easier when there is established case law of the BCA, the European Commission or other ECN authorities that an agreement or practice constitutes an infringement. The effectiveness depends more on the type of practice than on the market.

2.3. Do the characteristics of digital markets call for the adoption of more interim measures? Should the thresholds for interim measures be the same in the context of digital markets as in traditional markets?

20. We see no reason to make a distinction between digital and more traditional markets.

2.4. Should interim measures be considered an effective complement or substitute for ex ante regulation, in particular in digital markets?

21. They can be a complement.

2.5. What is the interplay between interim measures and other enforcement tools such as commitments and remedies? Are interim measures an effective tool for negotiating commitments? Can interim measures serve as a tool to design remedies?

22. The BCA has a well developed transaction practice with fines and remedies. The BCA is less likely to accept commitments when that would deny the victims of infringements arguments in court.

23. An interim measures decision, including well reasoned decisions refusing interim measures (stating e.g. that there could well be an infringement but that other conditions for the granting of measures were not fulfilled) indicate to the parties and the Auditorat the way the College assesses a case. It has in our experience facilitated the negotiation of transactions.

2.6. Where third-party requests for interim measures are allowed, does your authority observe an increased number of complaints on the merits?

24. Third parties can not request for interim measures. Third parties to a transaction can file a complaint with a request for interim measures, but they are then party and not third party in the main case and the interim measure procedure.

2.7. What procedural steps are required to impose interim measures? Is any of these requirements particularly burdensome? Is there an expedited procedure for imposing interim measures?

25. The hearing in an interim measures procedure must take place within one month after the filing of the request, and the College must decide within one month after the hearing (article IV.72 CEL). These deadlines can only be extend by a couple of weeks.
26. The applicant can not respond in writing to the written observations of the defendant and can in principle not submit new documents after the filing of his request.
27. This means that the applicant must file a well documented request.

2.8. Do interim measures raise due process issues? What are the key safeguards in place to ensure the rights of defence? Is the body/authority deciding on interim measures also responsible for the decision on the merits?

28. The applicant can not submit new evidence after filing his request (article IV.7, §3 CEL).
29. The defendant can file written observations and argue his case at the hearing. The applicant can not submit new evidence after filing his request.
30. The decisions of the College can be suspended by and appealed before the Market Court (specialised chamber in the Brussels Court of appeal).
31. It is unclear whether the body deciding on interim measures can decide the main case, as is the established practice for the judiciary. There is one decision of the Market Court that can be interpreted in the same sense. We were, however, waiting for a Cour de Cassation judgement on the practice in the judiciary, and considered it to be more prudent to sit in the main case in an other composition. Now that we have learned that the case before the Cour de Cassation has been withdrawn, we must reconsider this issue.

2.9. What is the role of courts with regard to interim measures in your jurisdictions? How does the standard and the speediness of judicial review impact on decisions whether to impose interim measures? Are courts open or reluctant in granting interim measures?

32. With regard to the BCA, the standards for the *prima facie* case, prejudice and urgency have all been defined by the Market Court and prior to its establishment by the Court of appeal of Brussels.

33. We can not give a general assessment of the practices of the courts in respect of interim measures cases, but refer to a well developed case law on *actions en cessation* under the unfair trade practices legislation.

2.10. Does your authority have experience in co-operating with other competition authorities in the context of interim measures? Please describe. Are there particular obstacles to co-operation relating to interim measures?

34. Not on cases.
35. There are no particular obstacles to co-operate with other ECN competition authorities.

2.11. Have you observed an increased adoption of interim measures during COVID-19? If so, for what type of cases?

36. No.

2.12. Has your authority conducted any study on the effects that interim measures have (or could have) had in specific cases/markets? Have you observed any cases in which interim measures were insufficient, disproportionate or could have been avoided?

37. No.

2.13. Has your jurisdiction undertaken reforms or considered proposals to reform interim measures? If so, please elaborate on these developments.

38. There has been an in-depth reform in 2013 (enactment of the CEL establishing the present BCA).
39. Under the previous legislation, requests were filed with the Auditorat which investigated the case and decided whether or not to bring the request for the President of the then Competition Council who decided as a single judge (the Council was an administrative tribunal). The procedures were deemed to be cumbersome. The Legislator decided to replace the procedure by what is in essence a copy of the interim measures procedures before the judiciary.
40. The Legislator has in 2019 codified the practice of the College in respect of the assessments of the potential prejudice for the applicant in case measures are refused but the authority decides in the main case that there has been an infringement, and of the prejudice to the defendant in case measures are granted but the authority decides in the main case that there has been no infringement (article IV.73, §2 CEL).