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Interim Measures in Antitrust Investigations – Note by France

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Introduction

1. The challenges posed by the digitalisation of the economy have underscored the importance for competition authorities of having effective means of action to respond to rapid market changes.

2. In this respect, interim measures appear to be a particularly well-suited tool as regards competition concerns in digital markets, where rapid intervention is sometimes the only way to prevent the behaviour of a dominant player from eliminating competition, or fatally damaging commercial partners that are highly dependent on its ecosystem.

3. Beyond the issues specific to the digital economy, the *Autorité* (and before it the *Conseil de la concurrence*) has had the opportunity to test the flexibility and effectiveness of interim measures on numerous occasions and in various sectors. With more than thirty decisions issued since the 2000s (for an average investigation time of six months), the *Autorité* has adopted more interim measures than any other competition authority in the European Union.

4. The relevance of this tool appears all the more important today as the modalities of its implementation have recently been extended with the transposition into French law of the ECN+ Directive[1], which gave the *Autorité* the power to start interim measure proceedings ex-officio.

5. The *Autorité* intends to build on its experience to make the best use of this tool, while ensuring that recourse to it is reserved for cases that justify it.

6. Indeed, while interim measures are a powerful tool for maintaining the economic public order, their implementation by the *Autorité* is subject to strict conditions originating in law and case law (**1.**). The correct implementation of the injunctions imposed, which must satisfy the principles of necessity and proportionality, is monitored by the *Autorité* until the adoption of the decision on the merits of the case (**2.**).

1. The legal conditions applicable to the interim measures ordered by the *Autorité de la concurrence*

1.1. The conditions resulting from article L. 464-1 of the French Commercial Code (*Code de commerce*) and the case law and doctrine to date of the *Cour de cassation* (French Supreme Court)

7. Article L. 464-1 of the French Commercial Code (Code de commerce) provides that (freely translated) "*the Competition Authority may, at the request of the Minister of the Economy, the persons referred to in the last paragraph of Article L. 462-1 or companies, or on its own initiative and after hearing the parties involved and the representative of the Minister of the Economy, take any interim measures that are requested of it or that appear*

[1] Ordinance No 2021-649 of 26 May 2021 on the transposition of 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.

necessary. Such measures may be taken only if the practice in question causes serious and immediate harm to the general economy, to the sector concerned, to the interests of consumers or, as the case may be, to the complainant company. [...]".

8. The first condition, which is procedural, is stated in Article R. 464-1 of the French Commercial Code (*Code de commerce*): a request for interim measures may only be made in conjunction with a complaint on the merits of the case to the *Autorité de la concurrence*.

9. With regard to the conditions of implementation, the wording of Article L. 464-1 sets out a first series of cumulative criteria: the reported practice must (i) cause serious and immediate harm (ii) to the general economy, to the sector concerned, to the interests of consumers or to the complainant company. It should be noted that the various interests envisaged under (ii) constitute alternative conditions; it is therefore sufficient that only one of these scenarios be fulfilled to allow the interim measures to be ordered.

10. These legal criteria have been supplemented by the case law and doctrine to date of the *Cour de cassation* (French Supreme Court).

11. On the one hand, the Commercial Chamber, in a ruling of 8 November 2005[2], added an additional condition not expressly mentioned in the French Commercial Code (*Code de commerce*): the reported practice must be likely to constitute an anticompetitive practice. In this respect, the same panel stated in a ruling of 9 October 2012 that (freely translated) "*when the Autorité receives a request for interim measures, it must first verify whether the facts invoked are substantiated by sufficiently conclusive evidence and, if not, reject the complaint, with the consequence that the request for interim measures will be rejected, without it being examined*"[3].

12. On the other hand, the Court established a causal link criterion by considering that the reported facts had to be (freely translated) "*the direct and certain cause*" of the serious and immediate harm to the interests protected by Article L. 464-1 of the French Commercial Code (*Code de commerce*)[4].

1.2. The assessment of legal and case law criteria in the recent decision-making practice of the *Autorité de la concurrence*

13. An analysis of the *Autorité*'s recent decision-making practice shows that the merits of the requests for interim measures submitted to it are assessed strictly on a case-by-case basis. Since 2017, the *Autorité* has issued only two decisions ordering interim measures, compared to around 20 rejection decisions.

1.2.1. Rejection decisions

14. The vast majority of rejections are due to a lack of evidence, thereby prompting the rejection of the complaint on the merits of the case and, with it, of the request for interim measures formulated as a secondary consideration, in accordance with the above-mentioned ruling of the Cour de cassation (French Supreme Court) of 9 October 2012 (see *supra*).

[2] Cass. Com, 8 November 2005, *Neuf Télécom* No. 04-16.857.

[3] Cass. Com, 9 October 2012, *Euro Power Technology*, No. 10-28.718.

[4] Cass. Com, 4 October 2016, *Orange*, No. 15-14.158.

15. During the period under review, only four decisions rejected requests for interim measures, at the same time instructing that the investigation into the merits of the case be pursued.

16. In two decisions, the *Autorité* ruled that the serious and immediate harm alleged by the complainants had not been proven. The first case concerned a complaint from a law firm denouncing the practices of the Toulouse Bar Association Council aimed at limiting its access to the market for legal services[5]. In this case, the *Autorité* rejected the request for interim measures after noting, among other things, that the Bar Association Council had finally registered the complainant as a member of the Bar and that the complainant was therefore able to operate[6]. The second case related to alleged predatory pricing practices implemented by EDF, reported by an electricity supplier[7]. In this case, the *Autorité* was of the opinion that the conditions of Article L. 464-1 were not met, on the ground that the complainant company had won major calls for tender against EDF, that its success rate had remained stable and that it had not been demonstrated that it was in a critical situation likely to jeopardise its survival on the market[8].

17. In another case concerning the notarial property advertisement sector[9], the *Autorité* rejected a request for interim measures on the grounds that the alleged infringement was not directly related to the reported facts, but to a choice made by the complainant[10]. This decision is in line with the *Autorité*'s decision-making practice, according to which the conduct of the complainant company may be taken into account in assessing the harm to its interests[11].

18. Finally, in the ongoing Apple "ATT" case[12], the *Autorité* considered that none of the facts reported by the complainants were likely to constitute an anticompetitive practice, on the basis of the evidence presented in the proceedings, and therefore rejected the request

[5] Decision 18-D-12 of July 18, 2018 relating to a request for interim measures filed by AGN Avocats Développement in the legal services sector.

[6] Decision 18-D-12, cited above, §66-67.

[7] Decision 21-D-03 of February 18, 2021 regarding a request for interim measures by Plüm Energie in the sector of the supply of electricity in France.

[8] Decision 21-D-03, cited above, §92-93.

[9] Decision 21-D-15 of June 24, 2021 regarding a request for interim measures submitted by Notariat Services in the notarial property advertisement sector.

[10] Decision 21-D-15, cited above, §127-130. In this case, the complainant accused the operator of a national website for notarial property advertisements of having cut the computer gateway linking the website to its software for notarial property negotiation. However, the *Autorité* noted that the difficulties encountered by the complainant were not due to this cut-off, but to the complainant's refusal to develop a multicast functionality that was a condition for the activation of a new gateway. Furthermore, there was no evidence in the case that the development of such a feature would place the complainant in a critical situation in the near future.

[11] See 'Etude thématique de l'Autorité de la concurrence sur les mesures conservatoires', 2007, p. 76; see also, by way of illustration, Conseil de la concurrence, Decision 09-D-12 of March 18, 2009).

[12] Decision 21-D-07 of March 17, 2021 regarding a request for interim measures submitted by the associations Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet in the sector of advertising on mobile apps on iOS.

for interim measures[13]. However, it maintained the investigation into the merits of the case in order to verify whether Apple's implementation of the ATT prompt could not be considered as a form of discrimination for its own benefit ("self-preferencing")[14].

1.2.2. The decisions ordering interim measures

19. In light of the introductory developments, it is interesting to note that the two decisions for interim measures issued by the *Autorité* since 2017 concern the digital sector.

20. In its Decision 19-MC-01[15], the *Autorité* granted the request of Amadeus, a company operating directory assistance services, which complained that Google had suspended some of its AdWords accounts and refused most of its advertisements.

21. The *Autorité* considered, on the one hand, that the reported practices were likely to be discriminatory and to have anticompetitive effects. On the other hand, the evidence submitted by Amadeus showed that the suspensions of accounts imposed by Google had a significant impact on its volume of calls, turnover and profitability. Indeed, the decision notes that the practices implemented by Google put Amadeus in a critical situation in the absence of other sources of revenue that could have mitigated the impact. In this respect, it is mentioned that Amadeus' volume of calls and revenues fell by 90%, making it highly unlikely that it would continue to operate in the short term[16].

22. In light of these elements, the *Autorité* considered that the serious and immediate harm to the interests of the complainant was proven, justifying the order of interim measures. This analysis was upheld by the *Cour d'appel de Paris* (Paris Court of Appeal), which had to rule on the legality of the decision[17].

23. The second decision concerns practices implemented by Google in the press, online public communication services and online advertising sectors[18].

24. This decision falls in the context of the transposition into French law of Directive No. 2019/790 of 17 April 2019 on "related rights," the aim of which was to create the conditions for balanced negotiation between publishers, news agencies and public communication services. However, following the adoption of this law, Google unilaterally decided that it would no longer display excerpts from articles, photographs and videos within its various services, unless publishers gave it permission to do so free of charge.

25. At the end of its preliminary investigation, the *Autorité* first established that the reported practices were likely to be anticompetitive, by imposing on publishers potentially unfair and discriminatory trading conditions that constituted a circumvention of the law on related rights.

26. Secondly, the *Autorité* considered that the reported practices had the effect of causing serious and immediate harm to the press sector.

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[13] Decision 21-D-07, cited above, §173-175.

[14] Decision 21-D-07, cited above, §162-163.

[15] Decision 19-MC-01 of January 31, 2019 on the request by Amadeus for interim measures.

[16] Decision 19-MC-O1 Amadeus, cited above, §174.

17 Cour d'appel de Paris (Paris Court of Appeal), 4 April 2019, No. 19/03274.

[18] Decision 20-MC-01 of April 9, 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

27. With regard to the examination of seriousness[19], the decision first notes the decline of the paper press and the fall in associated advertising revenues, obliging publishers and press agencies to develop their digital activities to ensure their survival. In this context, the practices of Google, which is the main source of traffic redirected to the sites of press publishers, threatened the economic viability of operators in the sector. The seriousness of the harm was further accentuated by the fact that the practice pertained to a sector that plays a vital role in a democratic society[20]. The immediate nature of the harm is due to the recent nature of the practices and the particularly decisive period for the press sector in which they occurred[21]. Finally, the causal link was proven insofar as the identified harm was directly linked to Google's methods of implementing the law on related rights, which deprive news publishers and press agencies, at a time when their digital activities appear to be an essential lifeline for their survival, of any possibility of negotiating and valorising their newly recognised right[22].

28. The *Cour d'appel de Paris* (Paris Court of Appeal), in a ruling dated 8 October 2020, upheld the decision of the *Autorité* on these points[23].

1.2.3. The main lessons learned from a review of recent decision-making practice

29. Analysing these different precedents shows that the cumulative conditions requiring the imposition of interim measures are, on the one hand, demanding in themselves and, on the other, strictly assessed by the *Autorité*.

30. The complainant requesting interim measures must therefore not only provide evidence of the potentially anticompetitive nature of the practices, but also tangible proof that the practices cause serious and immediate harm to at least one of the various interests considered. As can be seen from the foregoing, the latter condition is subject to a particularly stringent examination *in concreto* by the *Autorité*, which aims to limit the use of interim measures to only those cases that justify them.

2. The content of interim measures and their follow-up by the *Autorité de la concurrence*

2.1. The content of interim measures in the light of the principles of necessity and proportionality

31. When the conditions for implementation are met, the content of the interim measures must satisfy the principles of necessity and proportionality.

32. Article L. 464-1 of the French Commercial Code (*Code de commerce*) provides that interim measures (freely translated) "*may include the suspension of the practice concerned and an injunction to the parties to return to the status quo ante. They must remain strictly limited to what is necessary to deal with the emergency pending the decision on the merits".*

[19] Decision 20-MC-01, cited above, §273 et seq.

[20] Decision 20-MC-01, cited above, §277.

[21] Decision 20-MC-01, cited above, §279 et seq.

[22] Decision 20-MC-01, cited above, §287.

[23] Cour d'appel de Paris (Paris Court of Appeal), 8 October 2020, No. 20/08071.

33. This requirement is reflected in particular in the above-mentioned decision issued in the Google "Amadeus" case, as well as in the case law of the *Cour d'appel de Paris* (Paris Court of Appeal) relating thereto.

2.1.1. The interim measures ordered by the Autorité in the Google "Amadeus" case

34. In this case, the complainant listed the interim measures it considered necessary to remedy the harm it was suffering. These measures not only required Google to provide advertisers with objective, transparent and non-discriminatory Adwords procedures, but also, in particular, the restoration of Amadeus' Adwords account to the state it was in prior to the start of the practices, under daily penalty payment.

35. However, at the end of its examination, the *Autorité* considered that these measures taken as a whole were neither strictly necessary nor strictly proportionate to the seriousness and immediacy of the potentially anticompetitive practices[24]. It is therefore interesting to note that a verification of necessity and proportionality is not carried out *in abstracto*, but is carried out with regard to the seriousness and immediacy of the potentially anticompetitive practices, as characterised by the *Autorité*.

36. In this case, the *Autorité* considered it necessary to obtain, pending the decision on the merits, guarantees relating to the objective, transparent and non-discriminatory application of the Google Ads rules to Amadeus, as to all providers of paid electronic information services with which it has a competitive relationship. The *Autorité* therefore issued a series of injunctions, including a requirement that Google undertake a review of the compliance of the campaigns offered by Amadeus' non-suspended accounts with the clarified rules and, where appropriate, allow Amadeus to run its advertisements in non-discriminatory conditions.

37. The requirements of necessity and proportionality therefore prompted the *Autorité* in this case to depart, in part, from the interim measures requested by the complainant to order the measures that it considered truly necessary in view of the seriousness and immediacy of the situation.

2.1.2. Verification by the Cour d'appel de Paris (Paris Court of Appeal)

38. In its appeal against the above-mentioned decision of the *Autorité*, Google first argued that the measures imposed were not interim measures, insofar as they were not temporary and consisted of "atypical" injunctions that went beyond the rules set forth in Article L. 464-1 of the French Commercial Code (Code de commerce).

39. On this point, the *Cour d'appel de Paris* (Paris Court of Appeal) agreed with the *Autorité*, considering, first, that the measures handed down were indeed temporary, as they were imposed as an interim measure pending a decision on the merits and, second, that although Article L. 464-1 provides that interim measures (freely translated) "*may include the suspension of the practice concerned as well as an injunction to the parties to return to the previous state*", the text of the law only cites examples, meaning that "*the Authority is*

[24] Decision 19-MC-O1 Amadeus, cited above, §179-182. In particular, the *Autorité* reiterated Google's freedom to define the AdWords content policy. It also noted that on the basis of the evidence submitting during the proceedings, no practice likely to cause serious and immediate harm to the interests of consumers could be identified. Finally, it noted that Amadeus still had non-suspended accounts that could be used to run campaigns in accordance with the Google Ads Rules, subject to Google's prior manual review of the proper application of the said rules.

free to take interim measures, depending on the circumstances of the case, which do not suspend the practice concerned or order the parties to return to the previous state".

40. With this recital, the Review court thereby confirmed the *Autorité*'s power to take any measure necessary to confront the emergency, in compliance with the principles of necessity and proportionality. This very clear position of the *Cour d'appel de Paris* (Paris Court of Appeal) is intended to guarantee the flexibility and therefore the effectiveness of the interim measures which, in this case, were "*precisely intended to rectify the practices that the Autorité considered likely to be anticompetitive*".

41. In this case, the *Cour d'appel de Paris* (Paris Court of Appeal) found that the measures ordered by the *Autorité* were necessary and proportionate, with the exception of one of them[25]. It therefore overturned the *Autorité*'s decision on this one element.

2.2. The follow-up of interim measures through the example of the Google "related rights" case

2.2.1. The rules applicable to non-compliance with injunctions imposed as an interim measure by the Autorité

42. As we have seen, the *Autorité* is free, as long as the conditions for implementation are met, to issue any injunction (positive or negative) as an interim measure, justified by the seriousness and immediacy of the harm, in compliance with the principles of necessity and proportionality.

43. This power, when effectively exercised, implies a particular effort on the part of the *Autorité* to follow up on its interim decisions in order to verify that the injunctions imposed are properly executed until the adoption of decisions on the merits of the case.

44. The penalty for non-compliance with injunctions is provided for in Article L. 464-3 of the French Commercial Code (*Code de commerce*), which provides that non-compliance with interim measures may be punished by a fine (freely translated) "*within the limits set forth in Article L. 464-2*".

45. Moreover, the modalities for implementing the injunctions laid down in the decisions of the *Autorité* imposing interim measures, and in particular the deadline for their implementation, form an integral part of the injunctions. As a result, (freely translated) "*the late execution of an injunction may therefore be sanctioned under Article L. 464-3 of the French Commercial Code (Code de commerce)*"[26].

46. In order to ensure such follow-up, the *Autorité* may order the companies subject to interim measures to send one or more implementation reports at regular intervals until the publication of the decision on the merits of the case.

[25] In this case, this was the measure requiring Google to organise specific training for staff, which, according to the Court, did not appear necessary given the other measures taken relating to the clarification of rules and the establishment of a prior warning.

[26] Decision 04-D-47 of October 12, 2004 regarding the implementation of Decision 03-D-12 of March 3, 2003, paragraph 13. See also Decision 05-D-08 of March 9, 2005 regarding the implementation of Decision 02-D-36 of June 14, 2002 on practices identified in the optical glasses distribution sector, paragraph 16, and Decision 05-D-09 concerning the implementation of Decision 03-D-07 of March 9, 2003 on practices identified in the transfer of purchase markets for vertical road signs, paragraph 16.

2.2.2. The recent case of non-compliance with injunctions in the Google "related rights" case

47. The interim measures ordered by the *Autorité* in the above-mentioned "related rights" case gave rise to a particularly striking application of these principles.

48. In the above-mentioned decision of 9 April 2020 (see *supra*), the *Autorité*, after finding that Google's practices were likely to be anticompetitive and caused serious and immediate harm to the press sector, imposed seven injunctions as interim measures, aimed at rebalancing the balance of power between the various press players and the digital platforms and setting out an imperative negotiating framework adapted to the circumstances of the case[27].

49. These injunctions required Google to negotiate in good faith with the publishers and news agencies that had requested to enter into negotiations for the reuse of their content which was protected by the law on related rights, as well as an obligation to provide the publishers and news agencies with the information necessary for a transparent assessment of the remuneration due, and compliance with the principle of neutrality in the negotiations. The decision also required Google to send regular reports on the implementation of the interim measures.

50. However, following a referral from trade associations representing a very large number of press publishers, the *Autorité* found, after an investigation lasting less than a year, that Google had not complied with several of the injunctions issued in the decision of 9 April 2020[28].

51. This decision was an opportunity for the *Autorité* to recall the principles applicable in this regard.

52. This refers, firstly, to the decision-making practice, according to which (freely translated), "*commitments, like injunctions, must be interpreted strictly*"[29]. However, the *Autorité* recalls that this principle (freely translated) "*cannot have the effect of limiting the assessment of compliance with an injunction or a commitment to purely formal considerations. As such, the effect of the infringement on the competition, which the injunctions were intended to preserve will, where appropriate, be taken into account, if the parties have attempted to circumvent the injunctions, which has the effect of limiting the*

[27] In a ruling dated 8 October 2020, the *Cour d'appel de Paris* (Paris Court of Appeal) upheld the *Autorité*'s decision and all of the injunctions, with the exception of the injunction relating to the neutrality of negotiations, the wording of which was clarified by the Court.

[28] Decision 21-D-17 of July 12, 2021 on compliance with the injunctions issued against Google in Decision 20-MC-01 of April 9, 2020.

[29] Decisions 20-D-07 regarding the compliance with the commitments contained in the decision of the *Autorité de la concurrence* n° 14-D-04 of February 25, 2014 regarding practices implemented in the online horse betting sector, paragraph 94, 15-D-02 dated February 28, 2015 concerning the compliance of the GIE "Les Indépendants" with the commitments made in *Conseil de la concurrence* decision 06-D-29 of October 6, 2006, paragraph 99, and 10-D-21 of June 30, 2010 on compliance by Neopost France and Satas with the commitments made in *Conseil de la concurrence* decision 05-D-49 of July 25, 2005, paragraph 69.

scope of the injunctions and producing the anticompetitive effects that the injunctions were intended to prevent"[30].

53. It is therefore not a question of the *Autorité* limiting itself to a superficial verification of compliance with the letter of the measures, but of ensuring that the disputed practices have not resulted in the injunctions being deprived of all or part of their scope. The *Autorité* logically deduces that verification of the compliance with injunctions ordered as interim measures, or commitments, must be assessed in the light of the reasons for the decision which justified their being imposed.

54. In light of these principles, the *Autorité* found that Google had failed to comply with several of the injunctions imposed as an interim measure, including the obligation to negotiate in good faith with publishers. On this point, the *Autorité* noted a range of practices applied by Google that consisted in shifting the negotiation of related rights to a new *Showcase* service, depriving publishers of the ability to negotiate remuneration only for protected content, reducing the scope of related rights in a way that is contrary to the law, which is nonetheless unambiguous, and adopting an excessively restrictive interpretation of the notion of revenue derived from displaying press content under the said law.

55. Google's failure to comply with the obligation to negotiate in good faith and with several other injunctions set forth in Decision 20-MC-01 resulted in a fine of €500 million, pursuant to Article L. 464-3 of the French Commercial Code (Code de commerce), as well as two injunctions aimed at ensuring effective compliance with the measures issued in the decision of 9 April 2020. In addition, to ensure the effective enforcement of the injunctions, the *Autorité* imposed a periodic penalty payment of €300,000 per day's delay upon expiry of the two-month period from the formal request for the reopening of negotiations, where appropriate, by each of the complainants.

56. This penalty reflects the exceptional seriousness of the infringements found and the fact that Google's behaviour led to a further delay in the smooth application of the law on related rights, which was intended to take better account of the value of the content of publishers and press agencies reused on the platforms.

3. Conclusion

57. The latest case law relating to interim measures highlight the effectiveness of this tool in dealing with urgent situations requiring rapid intervention to prevent harm to competition, particularly in digital markets.

58. For the *Autorité de la concurrence*, it is now a question of taking up the new prerogative conferred by the ECN+ Directive, which allows it to order interim measures on its own initiative.

59. This possibility represents an important step for the *Autorité*, which will make it possible to overcome the possible reluctance of certain players (SMEs, new entrants, etc.) to refer a complaint to it for fear of commercial retaliation.

60. Furthermore, it is interesting to note that the *Autorité* has recently had the opportunity, in the specific context of the Egalim law, to start interim measures ex-officio

[30] These principles derive from judicial and administrative case law relating to compliance with injunctions or commitments ordered by the *Autorité de la concurrence* (see in particular the ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 21 February 2006, SEMUP, RG No. 2005/14774, and the judgement of the French Administrative Supreme Court (Conseil d'Etat) of 21 December 2012, Groupe Canal Plus and others, No. 353856, paragraph 29).

with regard to the examination of joint purchasing agreements between mass-market retailers. This possibility has given the *Autorité* additional leverage to encourage the companies in question to submit commitments that address the competition concerns identified[31].

61. Many avenues remain to be explored in order to make the most of the possibilities offered by this tool, which the ECN+ Directive has made available to all EU competition authorities.

[31] Decision 20-D-22 of December 17, 2020, regarding practices implemented in the major food retailer sector by the Carrefour and Tesco groups, and Decision 20-D-13 of October 22, 2020 regarding practices implemented in the major food retailer sector by the Auchan, Casino, Metro and Schiever groups.