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Interim measures: A new enforcement pathway?!

Toni Pitesa (Sidley Austin LLP) · Thursday, April 9th, 2020

After nearly two decades, on 16 October 2019 the European Commission ("**Commission**") dusted off one of its most powerful enforcement tools, i.e. interim measures, amid its investigation against Broadcom. The application of interim measures was triggered by the perceived need of preventing the harmful consequences of Broadcom's *prima facie* (*i.e.*, at first sight) abusive conduct in markets related to the supply of chipsets for TV set-top boxes and modems.[1]

The *Broadcom* decision, which is still yet to be published in full text, certainly signals a new competition enforcement pathway. The Commission is set to "*make the best possible use*"[2] of interim measures from now on, particularly in digital markets, with foreseeable consequences for the complexity and effectiveness of antitrust proceedings. Against this backdrop, it is worth exploring the reasons behind this sudden epiphany as well as the practical significance of the Commission's change of course.

The main features of interim measures

As a starting point, the main features of interim measures should be outlined. Such provisional measures represent a highly incisive tool ensuring the effectiveness of ongoing investigations, specifically in circumstances where the grave nature of the infringement combined with the duration of the proceedings do not allow timely intervention, thus resulting in the risk of an irremediable damage to competition. By definition, interim measures require a preliminary, high level – i.e. *prima facie* – competitive assessment, allowing the Commission a relatively fair discretion in imposing any such measures in terms of type and scope.

Under Article 8 paragraph 1 of Regulation 1/2003[3] two cumulative requirements have to be satisfied for the imposition of interim measures. Firstly, an urgency situation related to a risk of serious and irreparable damage to competition and/or consumers must exist. Secondly, there must be *prima facie* evidence of an infringement. For the first requirement, the damage does not need to be imminent, and it should be considered "irreparable" when it could no longer be remedied by the Commission's final decision.[4] For the second requirement, serious doubts regarding the legality of the conduct are sufficient to trigger the adoption of the measures.[5]

If those requirements are met, the Commission may adopt a wide variety of far-reaching measures. These include positive measures, such as supply obligations in "refusal to deal" cases,[6] and negative measures, in particular cease-and-desist orders, such as those applied in the *Broadcom*

decision. However, the decision imposing interim orders must serve an instrumental function, *i.e.*, to ensure the effectiveness of the final decision. Therefore, pursuant to Article 8 paragraph 2 of Regulation 1/2003, the order must be temporary and comply with the principle of proportionality, also when renewed.

Against this background, the key questions are: Why has the Commission made rare use of such an instrument so far? Why does it want to enhance the use of interim measures going forward? And, in particular, what has changed? The following considerations will try to shed some light on those interrogatives.

Why has the Commission made rare use of this instrument so far?

It is self-evident that interim measures are one of the most underexploited instruments within the Commission's antitrust toolkit. Since the Court of Justice of the European Union ("**CJEU**") legitimised their use in antitrust investigations in the 1980 *Camera Care* case***[7]***, the Commission has adopted interim measures in only eight decisions, mostly in the context of abuse of dominance proceedings. The last decision before *Broadcom* dates from 2002, during the Commission's investigation in the *IMS Health* case.[8]

Such underuse may be explained by three interrelated reasons.

Firstly, in imposing interim measures the Commission tends to favour what seem to be clear-cut cases. Those are the best candidates for satisfying the two conditions set out in Article 8 paragraph 1. In past decisions the Commission has indeed mainly focused on refusal to supply practices and vertical restrictions with manifest foreclosure effects. In a similar vein, the anticompetitive conduct investigated in *Broadcom* is based on two sets of contractual clauses imposed by Broadcom on its customers: the first set of clauses allegedly aimed at strengthening Broadcom's dominance in the markets for systems-on-a-chip for TV set-top boxes, fibre modems and xDSL modems; the second set of clauses allegedly aimed at leveraging Broadcom's dominance into the separate market for systems-on-a-chip for cable modems.

Secondly, the Court of First Instance in *IMS Health* rendered it easier to challenge the adoption of interim measures. According to the Court, an applicant who is seeking the suspension of a decision imposing interim measures has to establish the invalidity of such decision only on a *prima facie* basis. Evidence of the existence of "*serious doubts*" concerning the validity of the Commission's decision is indeed sufficient to obtain the latter's suspension, the reason being that, as a matter of logic, the applicant "*should not be required to demonstrate a particularly strong or serious stateable case against the validity of what, after all, constitutes a prima facie evaluation by the Commission of the existence of an infringement.*"[9] Moreover, when examining the application for suspension, the Court will carry out a balancing exercise of the parties' interests, by specifically considering the risk of serious and irreparable damage to the applicant's competitive situation. Therefore, the Commission is required to proceed with extreme caution and foresight when imposing measures, in that their grounds have to be sufficiently robust to withstand an appeal.

Thirdly, and lastly, the scarce use of interim measures has also been attributed to the additional investigative burden that proceedings under Article 8 pose on the Commission. The Commission is required to issue a Statement of Objections, provide access to the file and afford the parties the

right to be heard. This may not only have an impact on the Commission's enforcement resources but especially on the length of the proceedings.

All of this brings us to the next question.

Why does the Commission now want to enhance the use of interim measures?

The *Broadcom* decision represents a test case of what seems to be a new enforcement trend. The Commissioner for Competition, Margarethe Vestager, has on different occasions recalled the importance of applying interim orders especially within digital markets. Several Member States and national competition authorities are following the same pathway. To name a few, the French competition authority on 31 January 2019 imposed interim orders against Google's conduct within online advertising markets, and Germany is in the process of amending its antitrust legislation to encourage the use of interim measures against digital platforms.[10]

This eagerness of resorting to interim measures seems to be guided by two factors. Firstly, by a more interventionist approach embraced by some antitrust authorities, increasingly determined to fight off competition law infringements through all effective means. Secondly, and more specifically, by their stated desire of stepping up scrutiny over big tech companies. The overall narrative is that digital markets are prone to certain critical factors such as extreme returns to scale and network effects, and that in the context of an anticompetitive conduct those factors, if triggered, may significantly enhance the chances of irreversible damage to competition.

A good example – and probably one of the driving motives of the Commission's tougher stance – is *Google Shopping*. Admittedly, the behavioural remedies imposed on Google in respect of its self-preferencing practices, after a seven-year investigation, turned out not to produce the originally anticipated payoffs.[11] In fact, the remedies did not constrain Google's cemented dominance, suggesting that the Commission should have considered early intervention with provisional measures to avoid crossing a 'point of no return', where the competitive process is too damaged to be revitalized (unless structural remedies are imposed, of course).

Despite such considerations, however, the factors plaguing the application of interim measures explored above still hold. In fact, they appear even more valid when it comes to fast-moving markets. Competition issues in digital markets are indeed far from being considered clear-cut, and their potential anticompetitive effects are anything but predictable. The head of the Antitrust Policy and Case Support Unit in DG Competition, Maria Jaspers, pointed out that, to avoid costly and irretrievable mistakes, interim orders should be used when there is a clear theory of harm.[12] This *may* actually give an idea of why the Commission did not impose interim orders on Google in relation to the *Google Ad Sense* investigation, involving contractual exclusivity clauses.

Further, the burden of bringing Article 8 proceedings capable of withstanding challenge on appeal has not yet been lowered by any legislative intervention, and the *IMS Health* case law still sets a high bar for defending the adoption of interim orders against applications for suspension. In the UK, where similar issues hamper the imposition of the measures at hand, the Furman Report suggested to streamline both the procedure before the Competition and Markets Authority – by confining file access to documents that are clearly relevant – as well as the procedure before the Competition Appeal Tribunal – by excluding the possibility of a full-merits review of the challenged decision.[13]

Conclusion

All things considered, nothing appears to have changed to justify the Commission's change of course. This is purely a matter of enforcement priorities. Competition issues in the digital economy constitute a core part of the platform of reforms and initiatives announced by the Commission, shaping in particular the overhaul, and as in this case the simple evocation, of the enforcement tools. It remains to be seen how the Commission will juggle all these factors when applying interim measures for the first time in digital markets. However, we can probably expect this to occur only after the most controversial theories of harm and procedures will be redefined.

Toni Pitesa is an associate at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. *This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Please let us know if you have any questions or comments.*

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[1] European Commission, *Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets*, press release, press release, 16 October 2019 (link).

[2] European Commission, *Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets*, 16 October 2019 (link).

[3] 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 (link).

[4] Judgment of the Court of First Instance of 24 January 1992, *La Cinq SA v Commission of the European Communities*, Case T-44/90, EU:T:1992:5, par. 79 (link).

[5] Judgment of the Court of First Instance of 12 July 1991, *Automobiles Peugeot SA and Peugeot SA v Commission of the European Communities*, Case T-23/90, EU:T:1991:45, par. 63 (link).

[6] See e.g. Commission Decision of 29 July 1987, IV/32.279 – *BBI/Boosey & Hawkes*: Interim measures, para. 24 (link).

[7] Order of the Court of 17 January 1980, *Camera Care Ltd v Commission of the European Communities*, Case 792/79 R, EU:C:1980:18 (link).

[8] Commission Decision of 3 July 2001, Case COMP D3/38.044 — *NDC Health/IMS Health*: Interim measures (link).

[9] Order of the Court of 26 October 2001, *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259, para. 66 (link).

[10] Mlex, *German competition-law changes to tackle Big Tech abuses likely within a year, Mundt says*, 3 March 2020 (link).

[11] Reuters, *EU's Vestager says Google's antitrust proposal not helping shopping rivals*, 7 November 2019 (link).

[12] Mlex, *EU Commission hunting 'ideal case' for antitrust interim order, EU official says*, 8 June 2018 (link).

[13] Furman Report, digital competition expert panel, *Unlocking digital competition: Report of the Digital Competition Expert Panel*, March 2019, par. 3.121 et seq. (link).

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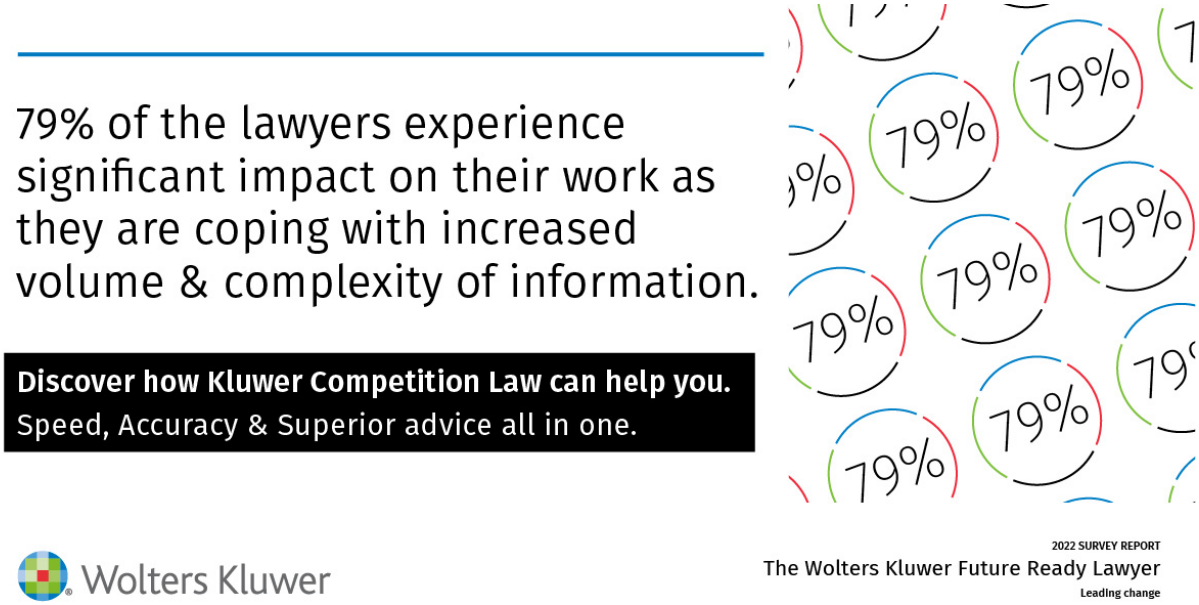

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