

EU Competition Law Development: Interim Injunctive Relief Back on the Menu

On 16 October 2019, for the first time in many years, the European Commission granted injunctive relief (known as “interim measures”) against a company that is being investigated for infringing European competition law. This is an important development, because it shows that the Commission is testing whether this long-unused tool is fit for purpose in fast moving, dynamic situations (often in tech markets) where there is a perceived need to act more quickly than has been the case to reduce the risk that the behaviour being investigated will cause irreparable harm.

The interim measures decision against Broadcom may presage not only a rebirth of the imposition of interim measures in European antitrust investigations but also a change of tack to European antitrust enforcement, especially with regard to tech regulation.

The last time the Commission imposed interim measures was 18 years ago in IMS Health (Case COMP D3/38.044 NDC Health/IMS Health). Those measures were overturned by the European Court of Justice as a result of doubts about the Commission’s legal assessment and the fact that there was no risk of serious and irreparable harm to IMS Health (Case T-184/01 R IMS Health Inc. v Commission). The event was sufficiently scarring to the Commission that it was disinclined to consider interim measures in antitrust cases due to the high bar set to impose them, namely only “in cases of urgency due to the risk of serious and irreparable damage to competition,” and only if the Commission is able to demonstrate a “prima facie finding of infringement” (Article 8 of Regulation 1/2003). If the Commission’s Broadcom interim measures decision survives the European Courts, we expect that disinclination to morph into inclination, especially when it comes to regulating tech.

Why Now?

Taking a cue from the French Competition Authority’s use of interim measures, Margrethe Vestager – the Commissioner for Competition – has voiced willingness for the Commission to use interim measures since May 2017. This development was a response to the growing criticism of the Commission’s inability to intervene to prevent anti-competitive harm in long drawn out Commission investigations. The Commission had for some time been looking for an “ideal case” to bring interim measures back into the fray. In 2018, it claimed that such a case would be one where the “theory of harm isn’t controversial, where it’s clear that it would be very difficult to remedy the harm in a final decision, so an action at an earlier stage would be needed” (as noted in a speech by Maria Jaspers, head of antitrust policy at the Commission).

Of late, a sense of urgency for the use of interim measures has emerged, particularly with regard to the tech sector. The Commission has often expressed that certain markets are too fast paced (e.g., due to fast innovation cycles), and/or too prone to monopolization (e.g., due to scale, or network effects), to render lengthy and increasingly complex antitrust proceedings incompatible to address the concerns. The Commission has called for a debate on the evidentiary threshold it has to meet to order to impose interim measures, calling for lower thresholds of evidence and timelier intervention.

The Commission and Broadcom Disagree at Every Step

The Commission's investigation of Broadcom focused on five areas relating to the manufacturing and sale of TV and modem chipsets: (i) exclusive purchasing obligations; (ii) the grant of rebates or other advantages conditioned on exclusivity or minimum purchase requirements; (iii) product bundling; (iv) so-called "abusive IP-related strategies"; and (v) deliberately degrading interoperability between Broadcom products and rival products.

The Commission imposed interim measures on the first two of those practices. It ordered the chip maker to cease the application of the exclusive and minimum purchasing requirements with six of its main customers for a period of three years or until the investigation is closed. This is where the case against Broadcom appears to fit the Commission's "ideal" mold: the Commission appears convinced that the prima facie abuse is "uncontroversial" (unlike the theory of harm espoused in IMS), narrowing the debate to the other criteria to order interim measures.

Prior to ordering the interim measures, the Commission sent Broadcom a Statement of Objections – informing Broadcom of its preliminary views on why it was warranted to impose the temporary cease-and-desist order – and heard Broadcom and other parties (customers and rivals) at a closed door oral hearing. Broadcom and the Commission appeared to disagree at every step. Foreshadowing the arguments likely to be raised on appeal, Broadcom disputed (i) that the impugned agreements gave rise to genuine exclusivity, (ii) the Commission's contention that the allegedly foreclosed demand resulted in the marginalization of rivals, (iii) the accuracy of the Commission's claims about the importance of tenders for devices implementing the technology (in other words, that the Commission's claims regarding the urgency of the intervention are without merit), (iv) the effective dismissal by the Commission of customers' favorable views of the impugned provisions suggesting that actual foreclosure is less significant than is claimed by the Commission, and (v) the Commission's view on the allegedly efficiency-enhancing nature of the impugned provisions.

Broadcom announced that it would appeal the Commission's decision to impose interim measures.

Interim Measures Are Back: What to Expect?

In addition to the appeal of the Commission's decision to impose interim measures, Broadcom is also likely to seek interim measures from the Court to suspend the interim measures decision. This means that Broadcom and the Commission will exchange arguments and receive the Court's views on the adequacy of the interim measures ordered relatively soon (in IMS, the Court ordered the suspension of the Commission's interim measures within a month of the lodging of the appeal).

The ball is now in Broadcom's court. Prevailing in a request to suspend the interim measures is challenging: Broadcom needs to prove, to a (high) evidentiary threshold, the manifest inadequacy of the Commission's interim measures. The success rate of such requests is generally low (albeit IMS is an example of a successful request). If Broadcom's request is rejected, it will still challenge the underlying interim measures decision in its main application. However, a judgment from the Court is unlikely to be delivered before 2021 or even 2022, which implies that the interim measures would be in force until then. This would likely embolden the Commission to follow suit in other cases, testing the boundaries of its powers pending a full investigation.

If Broadcom's appeal is upheld, however, the Commission might return to the status quo ante and keep interim measures locked inside its enforcement "toolbox," or seek to look for a better and easier case.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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