Interim measures

Interim Measures: An overview of EU and national case law

PROCEDURES, FRANCE, GERMANY, UNITED KINGDOM, INVESTIGATIONS / INQUIRIES, INTERIM MEASURES, ALL BUSINESS SECTORS, FOREWORD, EUROPEAN UNION

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

Alec J. Burnside | Dechert (Brussels) Adam Kidane | Dechert (Brussels)
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Alec Burnside is a partner and Adam Kidane a senior associate in the Brussels office of Dechert LLP.

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1. Introduction

Interim measures are among the most powerful enforcement tools that are available to antitrust regulators in the European Union ("EU"). Pending the outcome of investigations, which typically run into several years, interim measures can be used to ensure that effective competition is maintained, and irreparable damage that is incapable of being remedied is averted [7]. For instance, in dynamic markets with rapidly evolving technologies, there may be an acute risk that a competition law infringement will have an irreversible impact on competition and the market structure. In particular, an antitrust regulator may find it difficult to devise a remedy at the conclusion of proceedings that restores an industry to its competitive status quo ante due to fast-paced technological developments, e.g., the adoption of new standards.

Yet the European Commission ("Commission") has over the years become increasingly reluctant to impose interim measures in cases involving potential infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). In fact, it has never used the powers codified in Regulation 1/2003 [2]. This is notwithstanding multiple investigations involving dynamic markets where the imposition of interim measures may have been appropriate. At Member State-level, the use of interim measures is patchy, with some national competition authorities ("NCAs") regularly employing interim measures whereas others, in the same way as the Commission, are more hesitant to do so. Recent statements by the Commission and a number of NCAs suggest that there is a renewed desire to make greater use of interim measures in their enforcement activities. However, these statements have been tempered frequently by a recognition that there are significant evidentiary and procedural hurdles that must be overcome in order to impose interim measures.
The purpose of this foreword is to provide an overview of the law and practice governing the use of interim measures in the EU and three key Member States, namely France, Germany and the United Kingdom (“UK”); and in doing so, identify the factors underlying the inconsistent application of interim measures across those jurisdictions.

2. Use of interim measures at EU level

This section summarises the legal basis of the Commission’s power to adopt interim measures, looks at how it has been applied in practice and is divided into three parts. The first part of this section discusses the case law that originally established the power of the Commission to impose interim measures and the subsequent codification of that power as part of the reform of the EU competition regime (a); the second part of this section examines how the Commission has used its power to adopt interim measures decisions in Article 101 and 102 proceedings and explores the factors underlying the limited use of interim measures, in particular the impact of the IMS case (b); and the third part of this section concludes with a brief discussion of potential reforms that have been mooted by the Commission (c).

a. Legal background

The Commission’s power to award interim measures was initially drawn from the judgment of the Court of Justice in Camera Care[3]. In Camera Care, the Court held that the Commission’s power under Article 3(1) of Regulation 17 to bring an infringement of Articles 85 and 86 (now Articles 101 and 102 TFEU) to an end included the power to order interim measures [4]. In particular, the Court recognised that the Commission must be able “within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings.” [5]

The Court of Justice judgments in Camera Care and Ford set forth a two-pronged test that the Commission was required to satisfy in order to impose interim measures: (i) the conduct of an undertaking must give rise to a prima facie breach of EU competition law; and (ii) the measures can only be adopted in “cases of proven urgency” and must be necessary to prevent a situation that is likely cause serious and irreparable damage to the party applying for their adoption, or intolerable damage to the public interest [6]. In La Cinq, the General Court (then the Court of First Instance) clarified that the requirement of a prima facie breach does not require the Commission to demonstrate a clear and flagrant breach of competition rules; rather it needs to establish the probable existence of an infringement [7]. As to the requirement of urgency, the Court confirmed that irreparability can be established, even if the parties affected by the conduct have recourse to national or EU courts [8]. A further requirement is that the interim measures must be of a “temporary and conservatory nature and must be limited to what is necessary in the given situation.” [9] Moreover, the measures must come within the framework of the final decision which may be adopted, and not exceed its scope [10].

In terms of procedure, the Court of Justice confirmed that when adopting interim measures the Commission is bound to maintain the essential safeguards contained in Regulation 17, in particular the right to be heard and to reply in writing to the Commission’s objections [11]. This includes the right to an oral hearing. The Court also confirmed that the decision must be made in such a form that a party is capable of appealing it [12]. In addition, interested third parties must be given an opportunity to be heard in writing, and the Commission must consult the Advisory Committee [13].
Article 8 of Regulation 1/2003 codified the Commission's power to adopt interim measures [14]. The conditions for their adoption broadly mirror those set forth in Camera Care and Ford. In particular, the Commission, acting on its own initiative, may order interim measures where the following conditions are satisfied: (i) a *prima facie* finding of an infringement; and (ii) urgency due to the risk of serious and irreparable damage to competition. However, two key points of departure from the rules and case law under Regulation 17 deserve attention. First, the substantive test for the adoption of interim measures excludes damage to individual undertakings since Article 8 only refers to damage to competition. It follows that damage to individual undertakings cannot form the basis of an interim measures decision, unless there is a wider impact on the competitive process. The narrowing of the type of potential harm that warrants regulatory intervention limits the legal scope for the initiation of proceedings. Second, the Commission has stated that the wording of Article 8 excludes applications for interim measures by complainants (i.e., interim measures may only be adopted *ex officio* by the Commission) [15]. Instead, applications for interim measures should be made to national courts, or NCAs where they have the power to adopt interim measures.

The key procedural features of interim measures proceedings have remained unchanged since the entry into force of Regulation 1/2003. In particular, the same procedural safeguards that were in Regulation 17 and Regulation 99/63 have been retained [16]. This includes the Commission's obligation to issue a statement of objections and grant access to its file; and the right of the parties concerned to be heard and respond to the Commission's objections in writing and in an oral hearing (if requested).

b. EU practice

A review of the Commission's decisional practice reveals that it has made very little use of its power to adopt interim measures. Indeed, before Regulation 1/2003 came into force, the Commission adopted interim measures in only eight cases following Camera Care out of a total of thirteen cases where they were considered [17]. Two cases were resolved before the Commission imposed interim measures. In Eurofix-Bauco v Hilti, undertakings were accepted pending the outcome of the investigation [18], whereas in Sea Containers v Stena Sealink, the parties entered into an arrangement obviating the need for interim measures [19]. Following the entry into force of Regulation 1/2003, there have been no interim measures decisions. Interim measures were most recently adopted in 2001 in the IMS case [20]. However, the Commission withdrew the decision following three separate judgments of the EU courts which resulted in the suspension of the interim measures [21].

The small number of interim measures proceedings is attributable to a combination of procedural and substantive factors.

First, the removal of the right of complainants to request interim measures has meant that the Commission is no longer forced to consider applications. There has only been one case – in over 20 years between Camera Care and the entry into force of Regulation 1/2003 – where an interim measures decision was adopted *ex officio*, namely Ford Werke [22]. Absent an increase in the Commission's willingness to initiate Article 8 proceedings, there was bound to be a drop in the number of decisions [23]. Unfortunately, such a willingness in the Commission's enforcement practice did not materialise. Indeed, the Commission has arguably *de facto* shifted the administrative burden to national courts and NCAs since Regulation 1/2003 entered into force. This is to some extent reflected in paragraph 80 of the Complaints Notice, which in addition to confirming that Article 8 Regulation 1/2003 removes the right of complainants to apply for interim measures, suggests that those seeking interim relief should apply to national courts or NCAs “*which are well placed to decide on such measures.*” [24] This was followed by the 2013...
European Competition Network ("ECN") Recommendation on Interim Measures which provides, inter alia, that all “ECN jurisdictions should provide explicitly in their legal framework for effective means to order interim measures to protect competition.” [25]

Second, given the Commission's limited resources, some form of prioritisation is necessary. Philip Lowe, ex-Director General for Competition, and Frank Maier-Rigaud noted over a decade ago that the reluctance to use Article 8 powers may be due to the fact that proceedings “appear as increasing the burden of investigation, since they add a full-blown procedure (and likely judicial review) to the main investigation.” [26] The Commission's decisional practice shows that proceedings under Regulation 17 took up to almost a year, which is time and effort that could be dedicated to the main investigation. [27] It has even been suggested that the Commission's approach is that it will take officials as long as the underlying investigation to demonstrate that interim measures are warranted in cases that give rise to novel issues [28]. Moreover, there is a real risk of judicial challenge – most decisions granting interim measures have been appealed – which would place a further strain on resources. Faced with this trade-off, there may be an understandable preference to avoid potential delays to the adoption of the final decision [29].

Third, the Commission must discharge a high evidentiary burden in order to satisfy the substantive test for issuing interim measures. In 2017, Competition Commissioner Margrethe Vestager pointed to the “very high bar of irreparable harm” as a reason the Commission has not initiated any Article 8 proceedings [30]. Various commentators have suggested that this has been further compounded by the EU courts imposing exacting requirements on the adoption of interim measures in IMS Health [31]. In that case, IMS Health successfully applied to the CFI for interim relief and the Commission's interim measures decision was suspended – initially on an ex parte basis – pending the outcome of IMS Health's action for annulment [32]. The Commission's interim measures decision involved ordering IMS Health to license a brick structure it developed to gather information on sales and prescriptions of pharmaceutical products in Germany (the “1860 brick structure”) to two new market entrants, NDC and AsyX [33].

In its order confirming the suspension of the Commission's decision, the CFI held that the scope of its power to order interim relief in judicial proceedings did not fall to be interpreted differently in cases involving interim measures decisions (as opposed to final decisions) [34]. In this regard, the Court noted that the mere fact that an interim measures decision is driven by an urgency to take protective measures confers no special status for the purpose of interim relief applications [35]. In particular, it rejected the Commission's plea that since its decision was based on complex economic assessments IMS Health would need to “establish a stateable case that the Commission...manifestly erred in its consideration of all of the requisite conditions.” [36] The CFI held that it was sufficient to demonstrate “ the existence of serious doubts as to the correctness of the legal analysis that underlies the [Commission's] prima facie conclusion.” [37] This condition was satisfied since the Court found that the Commission's extensive interpretation of the Magill judgment, at the very least, gave rise to “a serious dispute” as to the validity of the fundamental legal conclusion underpinning its decision that could only be resolved in the main judgment [38].

In addition, the CFI held that compelling IMS Health to license its 1860 brick structure may have resulted in an irreversible weakening of its market position and potentially restricted its freedom to define its business policy, thus giving rise to a real and tangible risk of serious and irreparable harm [39]. Accordingly, the Court found that IMS Health's application for interim relief satisfied the urgency requirement. Finally, the CFI concluded that the balance of interests favoured the suspension of the interim measures decision and the unimpaired preservation of
IMS Health’s copyright. This finding was driven by three factors, namely the public interest in protecting intellectual property rights (as reflected in Article 295 of the Treaty of Rome); doubts over the correctness of the Commission’s interpretation of the Magill judgment; and the risk of serious and irreparable harm to IMS Health.

The CFI’s order was upheld by the Court of Justice. In doing so, the President of the Court of Justice underlined that a judge hearing an application for interim relief enjoys broad discretion in determining whether the conditions governing the adoption of interim measures have been satisfied. In particular, there was no justification for placing limits on that discretion in applications contesting a Commission interim measures decision by requiring an applicant to demonstrate an especially strong prima facie case or manifest errors of assessment as regards the urgency of its application.

Two features of the standard of review established by the EU courts in IMS Health place a significant burden on the Commission. First, Commission’s ability to adopt interim measures in complex or novel cases involving conduct that do not give rise to clear-cut infringements of Articles 101 and 102 is hampered. This was recently highlighted by Vestager when she noted that “where you would want to apply interim measures is where you have novel cases and the problem of doing interim measures... is that you still have to prove that it is needed.” In particular, there is an increased risk that an applicant challenging the interim measures will be able to successfully demonstrate that there is a serious dispute regarding the correct interpretation of competition rules. The Commission’s preliminary assessment, where there is an ongoing investigation, is not going to be based on a full and final appreciation of the facts and law. It follows that building a compelling case that is sufficiently robust to withstand an appeal is going to be difficult. Second, interim measures, notwithstanding their temporary and conservatory nature, will in most situations require a change in behaviour that may lead to potentially irreversible market developments. In theory, this lowers the evidentiary bar for applicants challenging interim measures to satisfy the urgency requirement.

Taken together, the high threshold for the adoption of interim measures and the risk that they will be set aside on appeal has had a chilling effect on the Commission’s willingness use its Article 8 powers.

**c. Potential reform**

Recent statements by the Commission have given proponents of the increased use of interim measures in complex drawn-out antitrust investigations some cause for optimism. The reason interim measures have recently come back into the Commission’s focus has been partly in response to questions over the length of its investigation in the Google Shopping case, which took over six years. In 2017, Vestager indicated that the Commission was studying the use of interim measures noting that if “you have a tool...then of course you should consider why is it that it’s never used.” On more than one occasion, she has pointed to the high evidentiary and administrative burden as contributing factors. As part of its review, the Commission has been looking at enforcement practices in other EU Member States with a view to learning how to have a more “workable tool.”

In this regard, Vestager has cited the frequent use of interim measures in France which “could be an inspiration” for the EU. The fact that the Commission is looking to draw on the experience of the French Competition Authority (“FCA”) may be due to the latter’s success applying interim measures in cases involving fast-moving sectors and digital markets. This includes a 2010 decision imposing interim measures on Google following a complaint from Navx alleging an abuse of dominance after its AdsWords contract was terminated.

However, there are no concrete plans to change the rules at the EU-level just yet: Vestager has underlined that the Commission has “a lot of thinking to do” and would like to ensure that it is thorough in its approach. There is of course the separate question of whether there would still be a case for the increased use of interim measures, if...
Article 101 and 102 proceedings are reformed so that they are more streamlined and better-suited to handling cases that require speedy resolution. This question is not the focus of this foreword, but it does warrant further discussion.

3. Use of interim measures in France, Germany and the UK

The ECN Recommendation on Interim Measures is indicative of a consensus view at EU and Member State level that interim measures are an integral part of the competition law enforcement toolkit. This is further reflected in the inclusion of interim measures as one of the “core minimum effective powers” to take decisions in the Commission’s proposed ECN+ Directive that is intended to further empower NCAs. In particular, Article 10 provides that Member States shall ensure that NCAs are able to adopt interim measures ex officio.

As a minimum, the ECN Recommendation on Interim Measures provides that NCAs should be empowered to adopt them where there is (i) urgency due to the risk of serious and irreparable harm to competition, and (ii) there are reasonable grounds to suspect that an infringement has occurred. Article 10 of the proposed ECN+ Directive provides for the same minimum legal threshold. However, neither the ECN Recommendation on Interim Measures nor the proposed ECN+ Directive are intended to preclude Member States from adopting wider criteria for the imposition of interim measures. Indeed, the degree of convergence across Member States is limited both in terms of the rules governing the use of interim measures and the enforcement practice of NCAs. This was alluded to by Vestager when she observed that although some NCAs are “very experienced and good” in their use of interim measures, their powers are subject to a different legal threshold.

The remainder of this section examines the legal frameworks and the enforcement practices of NCAs in three key Member States, namely France, Germany, the UK.

a. France

Articles L. 462-6 and L. 464-1 of the French Commercial Code (“FCC”) empower the FCA to adopt interim measures where the conduct that forms the basis of the complaint may: (i) constitute an antitrust infringement; and (ii) seriously harm the economy as a whole, the industry/sector affected by the conduct, consumer welfare, or the interests of the complainant(s). A request for interim measures must be filed together with a complaint on the merits of the case, which is admissible and sufficiently supported by evidence. It follows that, unlike the EU, a complainant may request interim measures. A fast-track procedure, which typically takes no longer than six months, is applied to requests for interim measures.

The FCA stands out as the NCA that has made the most effective use of its power to adopt interim measures. Between 2007 and 2017 alone, the agency adopted interim measures in a total of 15 cases, almost twice the number of decisions adopted by the Commission since Camera Care. Most recently, the FCA imposed interim measures on Engie (previously GDF Suez), the French energy incumbent, following a complaint from Direct Energie that it was engaging in predatory pricing practices.

In 2014, the FCA ordered interim measures in two cases. The first was the result of a complaint by beIN Sports alleging that the agreement between the French Rugby National League and Group Canal Plus awarding the latter exclusive rights for broadcasting Top 14 matches for a period of five years breached competition rules. The FCA considered that the exclusion of beIN Sports from the bidding process as result of pressure from Canal Plus was anticompetitive and potentially harmful to the interests of clubs, broadcasters and viewers. In the second case, Direct Energie complained that GDF Suez abused its dominant position by using infrastructure dedicated to
regulated tariffs – a public service regulated by the State – to market its services to private customers on the open market. The infrastructure, which included a customer database, website and customer platform, remained in the hands of GDF Suez (the former gas monopoly) after the liberalisation of the energy sector. It follows that GDF Suez control of the infrastructure was not the result of competition on the merits, and using the infrastructure to market gas on the open market gave it an unfair advantage over its competitors. Accordingly, the FCA imposed interim measures on GDF Suez ordering it to grant access to parts of its database.

The Paris Court of Appeal subsequently rejected the appeals lodged by Group Canal Plus and GDF Suez claiming that the measures ordered by the FCA gave rise to irreversible effects. In doing so, it held that the FCA is in fact empowered to order interim measures with potentially irreversible effects, provided that there is no other remedy that can address the immediate and serious harm to the interests at stake [63].

There are a number of explanations for the significant disparity in the use of interim measures between the Commission (and other NCAs), on the one hand, and the FCA, on the other.

First, complainants are able to apply for interim measures. A review of the FCA's enforcement statistics shows that it receives a high number of requests for interim measures. This may in part be due to the fact that a fast-track procedure is used to handle requests, thus increasing the attractiveness of the remedy. Between 2007 and 2010, there were over 100 requests for interim measures. Experience of handling such many requests means that the FCA is arguably more comfortable using interim measures since it is able to tap into the considerable institutional knowledge it has built up over the years [64].

Second, according to Commission statistics, the FCA is the most active enforcer of Articles 101 and 102 TFEU. Between May 2004 and 31 December 2017, the FCA handled a total of 630 cases [65]. To put this into perspective, over the same period, the German Federal Cartel Office (“FCO”) and the UK Competition & Markets Authority (“CMA”) handled 468 and 191 cases, respectively. So there have been more opportunities for the FCA to apply interim measures.

Third, the applicable threshold under the FCC for the adoption of interim measures subjects the FCA to a lower evidentiary burden than the Commission. The French Supreme Court has clarified that interim measures may be imposed where the conduct in question is likely to infringe competition law [66]. This is a considerably lower standard of intervention than the requirement to demonstrate a prima facie breach of competition law under Article 8 Regulation 1/2003. In addition, the fact that the interim measures may give rise to irreversible effects does not preclude the FCA from adopting a decision, thus firmly tilting the balance of interests in favour of the complainant [67].

Fourth, the influence of the FCA's previous President, Bruno Lasserre, on the prevailing enforcement culture at the FCA should not be understated. Lasserre consistently advocated for the increased use of interim measures by antitrust regulators, and called on ECN members and legislators to go beyond citing "interim measures as a necessary tool" when adopting new policies or revising competition rules [68]. In particular, he appreciated the value of interim measures as a tool to counter the risk of potentially irreversible foreclosure effects [69]. This recognition of the importance of interim measures is reflected in the enforcement practice of the FCA, most notably, in its willingness to take risks by applying interim measures in difficult cases including those involving innovative and fast-moving markets [70]. There are no signs that this is about to change under the leadership of the current FCA President, Isabelle de Silva.
b. Germany

The FCO’s power to adopt interim measures is enshrined in Section 32a of the Act Against Restraints of Competition (“GWB”). [71] Section 32a GWB provides that the FCO may adopt interim measures ex officio in urgent cases “if there is a risk of serious and irreparable damage to competition” as a result of an infringement of Part 1 of the GWB, or such an infringement is imminent [72]. The GWB is silent on whether and to what exact extent the FCO needs to demonstrate that a prima facie infringement of competition law has taken place. Based on the official explanatory notes to the 7th amendment of the GWB, the most widely-held view is that the requirements are similar to those set out in Art. 8 of Regulation EC 1/2003 [73]. However, it has also been suggested that interim measures may only be adopted if there are no serious doubts that a prohibition order will be adopted after the conclusion of the main proceedings. [74] In any event, the facts must be sufficiently established to permit the summary examination of the case. Although the evidentiary burden for interim measures is significantly lower than it is for the principal claim on the merits, the exact standard of proof remains uncertain, due to the lack of relevant case law.

In addition, a complainant is able to apply to the courts for interim measures where it has made a request under Section 33 of the GWB for a defendant to refrain from an antitrust violation. More specifically, complainants can apply for interim measures in two situations, namely where (i) there is an ongoing antitrust infringement [75], or (ii) an antitrust infringement is imminent. [76] The standard of proof for interim measures is lower than it is for the principal claim on the merits. However, an applicant for interim measures must demonstrate that (i) it has a prima facie claim, and (ii) urgency, i.e., its claim would be impossible or severely jeopardised without injunctive relief. The German Code of Civil Procedure (“CCP”) provides for different forms of interim relief including orders requiring the defendant to refrain from the potentially infringing conduct or perform a certain action, e.g., deliver specific goods or services or provide access to an essential facility [77].

At the time of writing, there have been no published decisions of the FCO imposing interim measures in connection with a potential infringement of Part 1 of the GWB; or court judgments that clearly address the evidentiary requirements for interim measures. [78] However, there have been growing signs of a policy rethink in recent years, primarily driven by the challenges of regulating the digital economy.

In its Annual Report for 2015/2016, the FCO suggested easing the requirements for the adoption of interim measures noting that they are a suitable tool for preventing competitive harm, notably in platform markets that are typically dominated by very few market participants and network effects may ultimately lead to market monopolisation [79]. In 2016, the President of the FCO, Andreas Mundt, urged regulators to consider whether they had the “right tools” to tackle challenges arising in fast-moving online markets [80]. In particular, he noted that authorities needed to take a “close look” at whether they should be making more use of their powers to adopt interim measures [81]. In discussing the reluctance of the FCO to use interim measures, Mundt pointed to the risk of companies suing the FCO for damages “if we got [the interim measures] wrong” and suggested that this fear may be hindering the FCO from intervening in cases where action may be warranted [82].

On 20 March 2017, the German Ministry for Economy published its White Paper on Digital Platforms, which recommends lowering the evidentiary threshold for interim measures [83]. The Paper specifically notes that interim measures would be particularly effective in cases where the restriction of competition can be easily remedied, e.g., by suspending specific contractual clauses. At the time of writing, a legislative proposal tabling the relevant amendments has not yet been published and it is unclear when this will take place.
Interim measures directions ("IMDs") may be adopted by the CMA acting on its own initiative or following an application by a complainant. Reforms in the Enterprise and Regulatory Reform Act 2013 ("ERRA"), which came into force on 1 April 2014, overhauled the UK competition law regime. The amendments to the Competition Act 1998 ("Competition Act") included a revised test for the adoption of IMDs, which lowered the threshold for intervention by the CMA.

Under the terms of the amended Section 35 of the Competition Act, the CMA may issue an IMD where it has begun but not completed an investigation of a suspected antitrust violation, and the following conditions are met: (i) it has a "reasonable suspicion" that an antitrust infringement has taken place [84]; and (ii) the CMA considers it is necessary to act as a matter of urgency to prevent "significant damage" to a particular person or business, or protecting the public interest. The urgency requirement under the previous test was framed by reference to "preventing serious, irreparable damage." Accordingly, at least in theory, there is greater scope for the CMA to adopt interim measures post-ERRA than was previously the case.

However, at the time of writing, there has only been one case in which an IMD has been adopted since the Competition Act came into force, namely London Metal Exchange in 2006 which pre-dates the ERRA [85]. In that case, the Office of Fair Trading ("OFT" now the CMA) issued an IMD to the London Metal Exchange ("LME") to prevent it from extending its trading hours on its electronic trading platform following a complaint from Spectron Group alleging predatory and discriminatory pricing [86]. LME appealed the IMD to the Competition Appeal Tribunal ("CAT"), but the direction was withdrawn by the OFT before the appeal was heard following the receipt of substantial and material new evidence [87]. Although the CAT only issued a judgment on costs, it nonetheless criticised the OFT’s investigative process as "superficial and flawed and the IMD consequently ill-founded." Moreover, the CAT held that the quality of evidence on which the OFT relied, which included uncorroborated evidence provided by Specton, "fell below the standard which should normally be required by an authority such as the OFT when carrying out its functions under section 35 of the Act." [89]

The CAT’s judgment in London Metal Exchange may have discouraged the OFT from using its powers to issue IMDs, but the lowering of the threshold of intervention post-ERRA has still not resulted in an increase in IMDs. It has also not led to an increase in the appetite of potential complainants to apply for IMDs. At the time of writing, there has only been one application by a complainant requesting the adoption of an IMD, which was rejected by the CMA [90]. The lack of IMD decisions may be attributable to the trade-off between the effectiveness of the IMD and the time and effort required to conduct an investigation and building a sufficiently robust case [91]. However, it is also symptomatic of a wider issue, namely the relatively small number of cases handled by the CMA. Indeed, the CMA has previously faced criticism from a number of quarters for not taking enough enforcement action. This criticism was echoed in a 2016 report of the UK National Audit Office ("NAO"), which highlighted that the CMA faces significant challenges in increasing the low number of enforcement decisions under the prohibitions in the Competition Act (and EU equivalents) [92].

The NAO’s criticism appears to have had its desired effect: since 2016 there has been a renewed focus and commitment to enforcement at the CMA. In its 2016/17 Annual Report, the CMA indicated that it “sharply stepped up the pace, scale and impact” of its enforcement [93]. This has been reflected in a substantial increase in the number of new cases that have been opened. The CMA launched 10 new cases in 2016/17 (against a target of four); whereas in the five years between April 2010 and March 2015 it opened an average of 6.8 cases per year. [94] This commitment to increased enforcement is reflected in the 2017/2018 Annual Plan, which includes a target of opening a minimum of six new investigations [95]. There is also a recognition that “online and digital
transaction represent a large and growing part of the economy and underpin most other economic activities." Accordingly, the CMA has vowed to continue to be active in the digital sphere by investing in its in-house expertise and has indicated that it expects to undertake further enforcement work in this area.

The prospect of increased enforcement in fast-moving digital markets may present more opportunities for the CMA to adopt IMDs. In 2016, Alex Chisholm, the former Chief Executive of the CMA, giving evidence before the House of Lords EU Committee on competition law and online platforms, confirmed that the CMA “need to be ready, where justified, to take speedy action through so-called interim measures or in securing voluntary behavioural changes through commitments, where necessary.” More recently, in 2018, Andrea Coscelli, the current Chief Executive of the CMA, has indicated that the agency is “actively looking” into applying more IMDs. In particular, he identified the possibility of using them in some of the digital cases before the CMA.

3. Conclusion

The advent of the digital age has caused the heads of EU antitrust agencies to increasingly question whether they are equipped with the right tools to effectively enforce competition rules. In particular, digital markets represent a paradigm shift, and regulators have been forced to rethink their approach to applying Articles 101 and 102 TFEU (and their national equivalents). Against this background, antitrust proceedings have become lengthier and more complex, making them ill-suited to cases necessitating a fast resolution. Unless regulators are able to make effective use of their power to adopt interim measures, their ability to act swiftly and prevent potentially irreversible damage to competition will be severely hampered. 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.

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 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.

[1] Interim measures are a form of temporary injunctive relief that may be granted by the European Commission and competition authorities in EU Member States. In addition, the General Court is empowered to grant interim measures (also referred to as interim relief) in judicial proceedings. This foreword is focused on interim measures in the context of administrative proceedings before the European Commission and competition authorities in EU Member States.


[5] Ibid.


[8] Ibid, paragraphs 79-80. The General Court referred to Camera Care v Commission, op cit, paragraph 18, which only mentioned damage which could no longer be remedied by a decision under Article 3 Regulation 17.


[12] Ibid.


[16] Regulation 1/2003, Article 27; and Council Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Regulation 773/2004), OJ 2004 L123/18. Article 17(2) provides that the Commission may shorten the time-limit for responding to a statement of objections to one week (Article 11(2) of Regulation 99/63).


[21] COMP D3/38.044 NDC Health/IMS Health: Interim Measures, OJ 2002 L59/18. The three cases were: (i) an ex parte suspension of the interim measures decision following an appeal by IMS pending the adoption of the final order on interim measures by the Court of First Instance ("CFI") (Case T-184/01 R IMS Health Inc. v Commission (interim measures – ex parte) [2001] ECR II-2349); (ii) the final order of the CFI suspending the interim measures decision (Case T-184/01 R IMS Health Inc. v Commission (interim measures) [2001] ECR II-3193); and (iii) order of the Court of Justice upholding the CFI's order following an appeal by the complainant, NDC Health (Case C-481/01 P (R) NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc., [2002] ECR 1-3401). See James Killick, The European Commission imposes interim measures on the world leader in data collection on pharmaceutical sales and prescriptions considering that its refusal to grant license constitutes an abuse of dominance (IMS Health), 3 July 2001, e-Competitions Bulletin July 2001, Art. N° 38052

[22] Case Distribution system of Ford Werke AG – interim measure, op cit. The Commission received an application from the Bureau European des Unions de Consommateurs pursuant to Article 3 of Regulation No 17, for the initiation of proceedings against four car manufacturers, including Ford AG (paragraph 21). However, the application was not accompanied by a request for interim measures.

[23] See Nordsjø, Regulation 1/2003: power of the Commission to adopt interim measures, op cit: "It is difficult to foresee more exactly what impact Regulation 1/2003 will have on the frequency of the application of this legal remedy. Various factors may suggest a continued reversal, and perhaps an even more reverse position."

[24] Complaints Notice, op cit. See also Article 5 of Regulation 1/2003, op cit, which expressly enables NCAs to adopt interim measures when applying Articles 101 and 102 TFEU.


[27] Varona and Durantes, Interim Measures in Competition Cases before the European Commission and Courts, op cit. For instance, in Ecosystem/Peugeot – Provisional measures, op cit, it took the Commission just under one year to adopt an interim measures decision.

[28] PaRR, Vestager flags difficulties in applying interim measures for EU-level cases - Studienvereinigung Brussels, 12 March 2018. See also MLex, Vestager looks into using ‘interim’ orders to speed up probes, 16 March 2017.

[29] Lowe and Maier-Rigaud, Quo Vadis Antitrust Remedies, op cit.


[31] See for example Yves Botteman and Jean-François Guillerdeau, Injunctive Relief as an Antitrust Violation or an Enforcement Tool: An EU Antitrust Perspective, CPI Antitrust Chronicle, March 2013(1); and Jean-Yves Art, Interim relief in EU competition law: A matter of relevance, September 2016, Concurrences Review No 3-2016, Art. No 80361

[32] Case T-184/01 R IMS Health Inc. v Commission (interim measures – ex parte), op cit; and IMS Health Inc. v Commission (interim measures), op cit.

[33] NDC and AsyX used the 1860 brick structure until they were successfully sued by IMS Health for copyright infringement. NDC subsequently filed a complaint with the Commissions alleging IMS Health’s refusal to license the 1860 brick structure constituted an abuse of dominance. The Commission’s decision to adopt interim measures was based on, inter alia, its view that the 1860 brick structure constituted a de facto industry standard and the refusal to grant access to the brick structure was likely to eliminate all competition (IMS Health Inc. v Commission (interim measures), op cit, paragraph 26).

[34] IMS Health Inc. v Commission (interim measures), op cit, paragraph 60: “There is no reason to suppose that the scope of the power granted pursuant to Article 104 of the Rules of Procedure to the judge hearing an application for interim relief, as interpreted by the President of the Court of Justice in Commission v Atlantic Container Line in respect of a final Commission decision applying the Treaty competition law rules and adopted on the basis of the express powers it enjoys under Regulation No 17, falls to be interpreted differently where the decision in respect of which interim relief is sought constitutes, instead, an interim decision adopted on the basis of the Camera Care case-law.” See note 1: the power of the CFI to grant interim relief in judicial proceedings is distinct from the power of the Commission to adopt interim measures decisions in administrative proceedings.

[35] Ibid, paragraph 66.

[36] Ibid, paragraph 56. This is the applicable standard of review in actions for annulment.

[37] Ibid, paragraph 67.
The Commission’s interim measures ordering IMS Health to enter into compulsory licensing arrangements turned on a non-cumulative interpretation of the conditions set forth in the Magill judgment that are necessary to give rise to ‘exceptional circumstances’ where a refusal to license IP rights may constitute an abuse of dominance, namely: (i) the IP holder is the only source of an indispensable input and its refusal to license prevents the emergence of a new product, for which there is a potential consumer demand, that is not offered by the IP holder; (ii) such refusal is arbitrary and not capable of being objectively justified; and (iii) as a consequence of the refusal, the IP holder excludes all competition for that product (Case C-241/91 RTE and ITP v Commission [1995] ECR I-743, paragraphs 50-57). In particular, the Commission considered that exceptional circumstances may arise even where IMS Health’s refusal to license its data did not prevent the emergence of a new product (IMS Health Inc. v Commission (interim measures), op cit, paragraph 100).

Ibid, paragraphs 100-106. The Commission’s interim measures ordering IMS Health to enter into compulsory licensing arrangements turned on a non-cumulative interpretation of the conditions set forth in the Magill judgment that are necessary to give rise to ‘exceptional circumstances’ where a refusal to license IP rights may constitute an abuse of dominance, namely: (i) the IP holder is the only source of an indispensable input and its refusal to license prevents the emergence of a new product, for which there is a potential consumer demand, that is not offered by the IP holder; (ii) such refusal is arbitrary and not capable of being objectively justified; and (iii) as a consequence of the refusal, the IP holder excludes all competition for that product (Case C-241/91 RTE and ITP v Commission [1995] ECR I-743, paragraphs 50-57). In particular, the Commission considered that exceptional circumstances may arise even where IMS Health’s refusal to license its data did not prevent the emergence of a new product (IMS Health Inc. v Commission (interim measures), op cit, paragraph 100).


Ibid, paragraphs 140-149.

Ibid.


Ibid, paragraph 58. Under Article 104(2) of the Rules of Procedure of the Court of First Instance, a judge must ascertain whether an applicant has shown (i) urgency, and (ii) its pleas of fact and law establish a prima facie case for ordering interim relief.

Ibid, paragraph 59.

PaRR, Vestager flags difficulties in applying interim measures for EU-level cases - Studienvereinigung Brussels, op cit. She added that “the problem here is new questions that make it much more tricky to do interim measures with the legal thresholds that we have.”

MLex, Vestager looks into using ‘interim’ orders to speed up probes, op cit; Case AT. 39740 Google Search (Shopping).

Financial Times, EU considers tougher competition powers, op cit.

MLex, Vestager looks into using ‘interim’ orders to speed up probes, op cit; Financial Times, EU considers tougher competition powers, op cit; and PaRR, Vestager flags difficulties in applying interim measures for EU-level cases - Studienvereinigung Brussels, op cit.

MLex, Vestager looks into using ‘interim’ orders to speed up probes, op cit; and Financial Times, EU considers tougher competition powers, op cit.

MLex, Vestager looks into using ‘interim’ orders to speed up probes, op cit.

[52] Ibid.


[55] See Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (“ECN+ Directive”), COM (2017) 142 of 22 March 2017. See Wouter Wils, The European Commission’s “ECN+” Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers, November 2017, Concurrences Review N° 4-2017, Art. N° 84881, pp. 60-80

[56] Ibid, Article 10.


[58] PaRR, Vestager flags difficulties in applying interim measures for EU-level cases - Studienvereinigung Brussels, op cit.

[59] Interim measures are intended to prevent irreversible harm to competition as a result of suspected infringements of Articles L. 420-1, L. 420-2, which correspond with Articles 101 and 102 TFEU, or L. 420-5 FCC, the prohibition against unfair pricing practices.


[61] FCA, Engie, Decision No 16-MC-01, 2 May 2016. See also French Competition Authority, The French Competition Authority imposes several interim measures on an energy provider suspected of abuse of dominance (Engie), 2 May 2016, e-Competitions Bulletin May 2016, Art. N° 79417


[64] The number of interim measures decisions has decreased since 2009, which coincides with the year the French Competition Council became the FCA. Since 2009, there have been around 40 requests for interim measures, of which seven have resulted positive decisions; whereas there were six decisions granting interim measures in 2007 alone. Three of the decisions granting interim measures post-2009 have involved former State energy incumbents. However, there have been no substantive changes to the laws governing the award of interim measures, and the drop in the number of requests and positive decisions is more likely to be a function of the FCA’s case load.
French Supreme Court, No. 04-16.857, Neuf Telecom c/ France Telecom, 8 November 2005, Bulletin 2005 IV N° 220 p. 236. In its judgment the French Supreme Court rejected the standard set forth in the earlier judgment of the Paris Court of Appeal (29 June 2004) which required a reasonably strong presumption of an infringement. See Marie Koehler de Montblanc, Imposed conditional measures: The French Supreme Court holds that the Competition Council may impose conditional measures if the facts seem likely to constitute practices contrary to Articles L. 420-1 or L. 420-2 of the commerce code (Société Neuf Télécom), 8 November 2005, Concurrences Review N° 1-2006, Art. N° 27314

Cases Canal Plus v BeIn Sports, op cit; and GDF Suez v Direct Energie, op cit.

MLex, Antitrust authorities should use ‘interim measures’ in fast-moving markets, Lasserre says, 10 December 2014. See also Bruno Lasserre, Keynote Remarks, 42nd Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute, 1 October 2015: "The necessity to establish hard law provisions on interim measures stands out as a particularly important objective. Synchronizing the time of regulation with the time of doing business has indeed become an even more pressing issue for competition agencies faced with fast-moving markets in a digitalized economy. In this demanding context of new business models and disruptive innovations, interim measures may serve as a powerful tool in offering fast-track yet temporary solutions to remedy matters of urgency and prevent potential market pre-emption."

Global Competition Review (GCR) Magazine, Where others fear to tread, Volume 18 – Issue 3, 5 March 2015: “Interim measures are an important instrument when there is a risk of foreclosure that can bring irreversible effects. We don’t hesitate to stop behaviour, to change contracts, to modify strategies after a preliminary assessment of three or four months... I think sometimes it’s better to take risks in investigating high-profile cases and difficult cases, even if you don’t succeed, rather than not doing anything. There’s a cost in not doing, of saying "well, the standard is too high, I won’t succeed in this case." That cost is sometimes higher than investing in a difficult case which, at the end, is closed without a fine or remedies."

Ibid. See also Lasserre, Keynote Remarks, op cit; and FCA, Navx, op cit

Section 60 of the GWB also empowers the FCO to adopt interim measures, but this is a lex speciali and only applies to specific procedures including, inter alia, merger control procedures.

Part 1 of the GWB contains the prohibition against anticompetitive agreements and the abuse of market power/dominance.

See for example Bornkamm/Tolkmitt in Langen/Bunte, Kartellrecht (2018), Section 32a GWB, Marginal no. 4; Kessler in Münchener Kommentar zum Kartellrecht (2015), Section 32a GWB, Marginal No 10; Bach in Immenga/Mestmäcker, Wettbewerbsrecht (2014), Section 32a GWB, Marginal No 5 et. seq.

See for example Rehbinder in Commentary on the GWB Loewenheim / Meessen / Riesenkampff / Kersting / Meyer-Lindemann, Section 32a GWB, Marginal No 3.

GWB, Section 33(2).

GWB, Section 33(1).
Based on publicly available information that covers the period prior to Section 32a of the GWB entering into force and the recent EDEKA/Tengelmann merger decision (Case no. B 2-96/14), the FCO has previously imposed interim measures in a limited number of merger cases, but those measures were subsequently annulled by the competent courts. Although the FCO adopted interim measures in the EDEKA/Tengelmann merger using its powers under Section 32a of the GWB, the FCO set aside the interim measures since the FCO had not initiated an investigation. The court did not address the question of the applicable standard of proof. See Florian Becker, The German Federal Court of Justice issues a landmark decision addressing the issue of “Wedding Rebates” demanded by undertakings with relative market power (Edeka), 23 January 2018, e-Competitions Bulletin January 2018, Art. N° 86432; Philipp Werner, Carsten Gromotke, Jurgen Beninca, The German Supreme Court issues landmark ruling on unfair trading practices (EDEKA), 23 January 2018, e-Competitions Bulletin January 2018, Art. N° 86555.


MLex, Mundt calls for ‘rethink’ of remedies, injunctions for Internet economy, 23 November 2016.

Ibid.

Ibid.


Section 35(1) of the Competition Act refers to an infringement of the Chapter I or Chapter II prohibitions, which correspond with Articles 101 and 102 TFEU, respectively.


Ibid, paragraph 6. The OFT concluded that it had reasonable grounds to suspect that LME abused its dominant position by (i) predation through the pricing and continued operation of LME Select, an electronic trading platform that competed with Spectron’s eMetal platform, whereby LME Select’s revenues were below some measures of its cost; and/or (ii) exclusionary price discrimination that did not reflect the nature of the services offered and allowed a zero margin for actual and potential competitors, such as Spectron (paragraph 16).

Case No 1062/1/1/06, London Metal Exchange v Office of Fair Trading, [2006] CAT 19. The evidence included responses from customers which indicated strong opposition to the IMD.

Ibid, paragraph 170.

Ibid, paragraphs 138-149. In this regard, the CAT considered that the power to adopt IMDs is comparable to the power of the High Court to grant an injunction in England and Wales, and that the evidence relied on for an IMD should be of a comparable quality to the evidence a court requires to grant an injunction. An application for a High Court injunction needs to be supported.
by evidence in the form of (i) a witness statement, which would include a statement of truth; (ii) a statement of case, provided that it is verified by a statement of truth; or (iii) the application, provided that it is verified by a statement of truth. The CAT found that a notice under Section 26 of the Competition Act (i.e., the OFT’s formal request for information) had similar significance to a witness statement supported by a statement of truth. However, some of the evidence provided by Spectron that was relied on by the OFT was not provided pursuant to a Section 26 notice, and the OFT failed to make enquiries with third parties to cross-check the reliability of the evidence submitted by Spectron.

90 See CMA, Summary of the decision of the Competition and Markets Authority in relation to an application by Worldpay UK Limited for a direction pursuant to section 35 of the Competition Act 1998, 27 March 2015. In December 2014, the CMA issued a decision rejecting an application by Worldpay UK Limited (“Worldpay”), a payment processing company, for the CMA to use its power to impose interim measures against Visa UK Limited. The CMA concluded that it was unlikely that there would be significant damage to Worldpay (or merchants) in the absence of intervention.

91 PaRR, UK CMA ‘actively looking’ to use interim measures more – DCCA Copenhagen, 9 March 2018

92 National Audit Office, The UK competition regime, Report by the Comptroller and Auditor General, National Audit Office; HC 737 Session 2015–16, 5 February 2016. The report noted that the UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015), compared with almost £1.4 billion of fines imposed by their German counterparts.


94 Ibid.

95 Ibid, paragraph 1.19.

96 Ibid, paragraph 1.20. At the time of the publication of the report, the CMA was investigating Ping Europe Limited for banning online sales of its golf clubs, which resulted in the adoption of an infringement decision and a fine of GBP 1.45 million (see CMA Case 50230, Online sales ban in the golf equipment sector, 24 August 2017). The report also referenced the CMA’s market study into digital comparison tools (see CMA, Digital comparison tools market study, Final Report, 26 September 2017). This led to the opening of a Chapter I (Article 101) investigation of a price comparison website’s contracts with home insurers, which contained ‘wide price parity’/’most favoured nation’ (MFN) clauses (see www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses ). In addition, the CMA recently accepted commitments from ATG Media, the leading supplier of online bidding services, in relation to suspected exclusionary and restrictive pricing practices (see CMA Case 50408, Auction Services - Decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services, 29 June 2017).

97 Ibid, paragraph 1.20.

[99] PaRR, *UK CMA ‘actively looking’ to use interim measures more – DCCA Copenhagen, op cit.* Coscelli also underlined that “[I]nterim measures is something we would love to do more of.” See also House of Lords European Union Committee, Brexit: competition and State aid, 12th Report of Session 2017-19, HL Paper 67.

[100] Ibid.