



THE RISE OF THE INTERIM MEASURES?

by Ricardo Bordalo Junqueiro
Head of Practice Partner of the Competition & EU practice, Ricardo has been involved in various operations, particularly in the electronic communications, energy, pharmaceutical, financial, media and infrastructure sectors, as well as accompanying economic regulation matters in the electronic communications sector.

by Leonor Bettencourt Nunes
Leonor Bettencourt Nunes joined VdA in 2019. She is Associate at the Competition & EU area of practice.



contacts:

rbj@vda.pt

lbn@vda.pt

+351 21 311 3400

Introduction
The European Commission (EC or Commission) has seemingly opened a new chapter of competition law enforcement with its decision of 16.10.2019 in the Broadcom case . This has been one of the few times ever that the Commission adopted such measures, coming nearly 20 years after the IMS Health case (the last time interim measures were enforced), and the first time under Article 8 of Regulation no. 1/2003 . The case was recently closed with the

adoption of a commitments decision, in 7.10.2020, and publication of the non-confidential version of the interim measures decision, thus shedding more light to the details of the case. The case has been stirring up legal discussion and raising questions of whether the resort to this tool will be more frequent. However, it should also be questioned whether more frequency is desirable and adequate to assure competition is not distorted.

A recent trend?

While this could pass as another isolated event, EC Commissioner Vestager has signalled the intention to use interim measures for faster and more effective antitrust enforcement, especially in fast-moving markets . This is in line with a trend of stricter competition enforcement, which has also been followed by some national competitions authorities (NCAs). In January 2019, the French Competition Authority resorted to the enforcement of

an interim decision, by ordering Google to promptly review and clarify the rules of its Google Ads platform. The decision concerned a potential abuse of dominant position by Google in view of the sudden termination of commercial relations under conditions that are neither objective nor transparent. The Portuguese Competition Authority has also made use of interim measures recently – for the second time in its history – in a case relating to the COVID-19 pandemic, in which it ordered the Portuguese Professional Football League to suspend an alleged “no-poach” agreement referring to the hiring of football players of clubs from the First and Second Leagues, who unilaterally terminate their employment contract in view of the Covid-19 pandemic.

The use of interim measures is expected to be further revamped by the implementation of the ECN+ Directive in national jurisdictions. This may be the case of Germany, as the proposal for the amendment of the competition act is intended to streamline the adoption of interim measures, given that the previous stricter regime was pointed as the cause for the absence of such enforcement by the German Competition Authority.

Applying interim measures: Benefits and dangers

In the case of Broadcom, the leading designer, developer and provider of chips for fixed video and broadband devices at a global level, the EC considered that there was prima facie evidence that the undertaking abused its dominant position by engaging in exclusive or quasi-exclusive dealings with

key customers, which would cause serious and irreparable harm to competition. The EC ordered Broadcom to immediately stop its conduct, while the in-depth investigation on the case continued, and refrain from implementing practices having an equivalent effect.

The EC’s test case has proved fruitful, as the closing of the file with a commitments decision, about a year afterwards, further reinforced the option to impose interim measures. As has been pointed out by the Commission, the main advantage of interim measures is that they provide a faster enforcement pathway specifically pertinent in cases relating to tech and digital markets, which evolve at a faster pace than the investigation and sanctioning of antitrust practices. However, interim measures may only be suitable for a restrictive number of more clear-cut cases, as there is also a risk of competition distortion in provisional remedies to address conduct that is not yet fully investigated to markets having an economic trajectory which may be quite difficult to predict. These measures, despite being provisional, may have longer lasting effects in market conditions. In addition, there must be further caution not to compromise the standards of proof and sound investigation and the rights of defence of undertakings concerned.

Conclusion

Considering the outcome of the Broadcom case and similar moves by national competition authorities, the imposition of interim measures will arguably become more frequent. While these can constitute powerful tools to tackle competition harm in fast-moving

markets, competition enforcers must apply them carefully, in order not to induce competition distortions by themselves. It must be also assured that these fast solutions are enforced in compliance with the fundamental legal principles applicable. This is surely part of the explanation why the use of interim measures has been so rare in the past.

1. Case AT.40608 – Broadcom, Interim Measures Decision of 16.10.2019, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40608/40608_2791_11.pdf
2. Case D3/38.044 — NDC Health/IMS Health, Interim measures Decision of 3.07.2001, available at: <https://eur-lex.europa.eu/legal-content/EN/T>
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.
4. See, for instance the Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_6115
5. Press Release of 31.01.2019: The Autorité de la concurrence has ordered interim measures against Google, available at: <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/31-january-2019-online-advertising-directory-enquiry-services-0>
6. Press Release of 26.05.2020: Covid - 19: AdC imposes interim measure on the Portuguese Football League that suspends no-poach agreement, available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202008.aspx?lst=18&Cat=2020.
7. CPI, Germany’s Pressing Ahead: The Proposal for a Reformed Competition Act, available at: <https://www.competitionpolicyinternational.com/germanys-pressing-ahead-the-proposal-for-a-reformed-competition-act/XT/?uri=CELEX%3A32002D0165>.