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*Research Paper Series: 1/2020*

**Interim Measures in EU Competition Cases:  
Origins, Evolution and Implications for Digital  
Markets**

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**April 2020**

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<https://www.ucl.ac.uk/cles/research-papers>

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ISBN 978-1-910801-32-1

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Faculty of Laws, UCL  
London, WC1H 0EG  
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# Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets

Despoina Mantzari\*

## Key Points

- Interim measures are among the most powerful and intrusive enforcement tools that are available to competition authorities in the EU because, pending the outcome of investigations, they can be used to ensure that effective competition is maintained and irreparable damage averted.
- The revival of interim measures in Broadcom may ultimately displace the Commission's increased reliance on Article 9, Regulation 1/2003 commitment decisions for a supposedly swift resolution of complex cases.
- Interim measures may be more suitable than commitment decisions in digital markets with network effects, where there is a serious risk that a competition law infringement will have an irreversible impact on competition and the market structure, but their use may be hampered by the significant constraints imposed by EU Courts on the ability of the Commission to adopt interim relief.

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*So in the years ahead, one of the greatest challenges that we'll face, as competition enforcers, will be to stop big tech companies from wiping out competition, by nudging markets past the point of no return. The best answer to that will be to move fast. But in a Union of law, where companies have an absolute right to defend themselves, there will always be limits to how fast we can move. This is why I expect that the decision we took a few weeks ago, to impose interim measures on Broadcom, is a sign of things to come. Before last month, we last used interim measures in 2001. But I don't expect to wait another 18 years before we do it again. In Broadcom's case, we were dealing with a familiar threat to competition – an exclusivity arrangement that stopped Broadcom's customers buying chips from anyone else. And it was also pretty clear that if we didn't act, the market could soon tip – because several of the companies that buy these chips will soon run tenders for new supplies. Not every future case will be so clear cut, of course. But it's important that we have this tool available – because it can make a vital difference in the cases where it's appropriate.*

Commissioner Vestager, 'Digital power at the service of humanity', Conference on Competition and Digitisation, Copenhagen, 29 November 2019

## **I. Introduction**

On 16 October 2019, for the first time in nearly two decades, the European Commission imposed interim measures on Broadcom, the world's leading supplier of chipsets used for TV set-top boxes and modems, ordering the company to stop applying certain provisions contained in agreements with six of its main customers pending a final decision on the merits of the case.<sup>1</sup> This was perceived as a necessary measure to prevent serious and irreparable harm to competition likely to be caused by Broadcom's conduct, which *prima facie* ('at first sight') infringes EU competition rules. The decision marks the first time the European Commission imposed interim measures under Regulation 1/2003.<sup>2</sup> The statutory basis for doing so is found in Article 8 of the Regulation:

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<sup>1</sup> Commission, 'Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets', IP IP/19/6109 (Brussels, 16 October 2019), available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6109](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109).

<sup>2</sup> 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 [2003] OJ L1/ 1.

1. *In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.*
  
2. *A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.*

The decision to impose interim measures was taken in the context of a formal antitrust investigation to assess whether Broadcom restricted competition in various markets for these chipsets by means of certain practices, including exclusivity, tying, bundling, interoperability degradation and abusive IP-related strategies.<sup>3</sup> Simultaneously, the Commission issued a Statement of Objections, where it preliminarily concluded that interim measures with respect to certain aspects of Broadcom's conduct – namely, Broadcom's alleged use of exclusive purchasing obligations and grant of rebates conditioned on exclusivity or minimum purchases – may be required to ensure the effectiveness of any final decision taken by the Commission in the future.<sup>4</sup> The Commission relied on a *prima facie* finding that (i) Broadcom is dominant in three different markets (TV set-top boxes, fibre modems and ADSL modems) and that Broadcom is, at first sight, infringing competition rules by abusing its *prima facie* dominant position. In fact, as the Commission highlights in its press release, the adoption of interim measures was also motivated by the fact that Broadcom's conduct would likely affect a number of tenders that would be launched in relation to the upcoming introduction of the WiFi 6 standard. The Commission considered that this would be likely to lead to other chipset suppliers being unable to compete on the merits with Broadcom. The Commission concluded that, if Broadcom's ongoing conduct were allowed to continue, it could ultimately result in serious and irreparable harm to competition in the form of exit or marginalization of Broadcom's competitors. The interim measures were imposed one year after the opening of the case.

Over the years, the Commission had 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). This is notwithstanding multiple investigations involving dynamic technology markets, where the imposition of interim

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<sup>3</sup> Commission, 'Antitrust: Commission opens investigation into Broadcom and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets' IP/19/3410 (Brussels, 26 June 2019), available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_3410](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3410).

<sup>4</sup> Ibid.

measures may have been appropriate. At Member State-level, the use of interim measures is patchy, with some national competition authorities ('NCAs') – most notably France – regularly employing interim measures while others are more hesitant to do so.<sup>5</sup> Recent statements, however, by the Commission and a number of NCAs suggest that there is a renewed appetite to make greater use of interim measures in their enforcement activities.<sup>6</sup> Additionally, the ECN Plus Directive requires Member States to give NCAs powers comparable to those of the Commission to adopt interim measures.<sup>7</sup> Recital 38 also makes it clear that Member States are free to adopt more intensive interim measures powers.

The greater use of interim measures is also put forward in a number of reports on competition law and the digital economy, such as the so-called 'Furman Report' on unlocking digital competition<sup>8</sup> and the BRICS report.<sup>9</sup> Indeed, it is broader concerns about the length of Commission investigations in digital markets that led to the revival of this powerful enforcement tool, which lay dormant since 2001 when parties in *IMS Health* successfully obtained the suspension of the Commission's interim measures with the Court setting a high legal threshold for their use.

The time is, therefore, ripe to consider the origins and evolution of interim measures in EU Competition Law and reach some broader conclusions about the future use of this tool, especially in the context of digital markets, which have forced competition authorities to rethink their overall approach to enforcement. It will be argued that EU Courts have imposed significant constraints on the ability of the Commission to adopt interim relief. Broadcom, however, presents a very good opportunity to review and adjust the requirements arising from

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<sup>5</sup> For an analysis see Alec J Burnside and Adam Kidane, 'Interim Measures: An overview of EU and national case law' – Concurrences, N 86718 7 June 2018, available at: <https://www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law>.

<sup>6</sup> See e.g. CMA (2019), 'Annual Report and Accounts 2018/2019' available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/818478/CMA\\_Annual\\_Report\\_and\\_Accounts\\_2018\\_19\\_web\\_accessible\\_proof.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818478/CMA_Annual_Report_and_Accounts_2018_19_web_accessible_proof.pdf).

<sup>7</sup> Directive 2019/1 of the European Parliament and of the Council to empower the competition authorities to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3, art. 11.

<sup>8</sup> Unlocking Digital Competition – Report of the Digital Competition Expert Panel (March 2019) available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf): 'That is why we are recommending changes that would enable more use of interim measures to prevent damage to competition while a case is ongoing, and adjusting appeal standards to balance protecting parties' interests with the need for the competition authority to have usable tools and an appropriate margin of judgement. The goal is to place less reliance on large fines and drawn-out procedures, instead enabling faster action that more directly targets and remedies the problematic behaviour', at p. 6.

<sup>9</sup> 'Digital Era Competition: A BRICS view' (2019), available at: <http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf>, s. 4.5.1.

past rulings.<sup>10</sup> This is owing to the clear-cut nature of the alleged infringements which allow the Commission to more easily meet the evidentiary requirements of the test. But novel theories of harm that characterize competition law enforcement in digital markets may hamper the employment of this tool in the future. Thus, there is an increased possibility of the Commission continuing to rely on Article 9 commitment decisions in such cases, if the Court is not presented with an opportunity to relax its restrictive precedent.

The article is structured as follows. Section II discusses the origins of interim measures, Section III examines the substantive requirements for ordering interim relief, Section IV explores the reasons for the paucity of this tool and contrasts the Commission's approach with that of France and the UK, Section V reflects on the interplay between commitment decisions and interim measures in digital markets and Section VI concludes.

## **II. The Birth of Interim Measures: the ECJ ruling in *Camera Care***

Initially, the Commission claimed it had no power to order interim measures for infringements of, what was at the time, Articles 85/86 EEC Treaty. Indeed, Regulation No 17 did not expressly confer upon the Commission, after receiving applications under Article 3 of the Regulation or when proceeding on its own initiative under the same provision, the power to adopt interim measures pending the time when it is in a position to adjudicate upon the substance of the case. But the European Court of Justice (ECJ) in the *Camera Care*<sup>11</sup> case decided against AG Warner that there was an implied power conferred on the Commission to order interim measures to prevent infringement decisions from becoming 'ineffectual or even illusory' because of the action of certain undertakings.<sup>12</sup> In other words, the Court's reasoning sought to safeguard and strengthen the effectiveness (*effet utile*) of EU Competition Law. The Court elaborated further on the test stressing that interim measures can be ordered when 'the [anticompetitive] practice...has the effect of injuring the interests of some Member States, causing damage to other undertakings, or of unacceptably jeopardizing the Community's competition policy'.<sup>13</sup> The mentioning of 'causing damage to other undertakings' clearly encouraged undertakings to seek interim measures. The Court, however, was quick to impose certain limits on the power to adopt interim measures: the remedy could only be used 'in cases

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<sup>10</sup> Broadcom reportedly intended to appeal the decision but has not done so thus far.

<sup>11</sup> Order of the Court of 17 January 1980, *Camera Care Ltd v Commission*, Case 792/79 R, EU:C:1980:18, at para. 18.

<sup>12</sup> *Ibid.*, para 18.

<sup>13</sup> *Ibid.*, para. 14.

proved to be urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest'.<sup>14</sup> The measures also had to be 'of a temporary and conservatory nature and restricted to what is required in a given situation'<sup>15</sup> and be made in such a 'form' so as to allow and enable judicial review of their legality by the Court.

Following the ruling of the ECJ, the Commission's power to adopt interim measures became expressly acknowledged in Council Regulation 1/2003. In contrast, however, to the *Camera Care* ruling, Article 8(1) of Regulation 1/2003 empowers only the Commission, acting on its own initiative, to impose interim measures, thus precluding third parties from asking for interim measures – a development which can be explained by the decentralization rationale underpinning Regulation 1/2003. This is a very important limitation, which distinguishes the powers of the Commission from those of NCAs, which, pursuant to Article 5 of Regulation 1/2003, are entitled to adopt decisions ordering interim measures 'on their own initiative or on a complaint'. Furthermore, as we shall see below, the substantive test excludes damage to individual undertakings, since Article 8(1) only refers to damage to competition. The following section delves into the evidentiary and procedural hurdles that must be overcome in order to impose interim measures.

### **III. Interim Measures: Substantive and Procedural Requirements**

Interim measures are a powerful, but also very intrusive enforcement tool that may have unintended consequences for competition and the undertakings-addressees. This is chiefly because the investigated firm is required to change its conduct *before* an infringement is found. Naturally, therefore, there are several substantive and procedural requirements that need to be met before imposing them. It will become apparent, *inter alia*, that the Court in *IMS Health* tightened the conditions for imposing interim measures which in turn might explain the paucity of employing this enforcement tool.

*First*, interim measures are warranted when: i) there is a *prima facie* finding of infringement, and, ii) some urgency due to the risk that competition will be seriously and irreparably damaged. Irreparable means that there is a real risk that the harm to competition cannot be undone by a final decision imposing remedies.<sup>16</sup> However, because Commission

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<sup>14</sup> *Ibid.*, para. 19.

<sup>15</sup> *Ibid.*, para. 19.

<sup>16</sup> Case T-44/90, *La Cinq v Commission*, EU:T:1992:5, at para. 80.

decisions imposing interim measures are adopted in the course of the administrative proceeding and are based on provisional findings, the Commission cannot be expected to establish the existence of the infringement of competition law with the same degree of certainty as applicable in a final decision following a thorough investigation and the hearing of all interested parties. As the Court emphasized in *Peugeot*, there is a valid case for the imposition of interim measures by the Commission if the legality of the alleged agreement or conduct under EU competition law raises ‘serious doubts’.<sup>17</sup> One could argue that in the case of Article 102 TFEU, there is a need to establish *prima facie* capacity to foreclose and foreclosure effect in light of all the circumstances.<sup>18</sup> It is, however, difficult to see how the *prima facie* condition can be reconciled with the effects-based approach that now dominates most of Article 102 TFEU type of infringements.<sup>19</sup>

Article 8(1) also refers to cases of urgency. Urgency, however, is not an autonomous condition, but an element of the condition of risk of a serious and irreparable harm. In other words, the conditions of ‘urgency’ and ‘*prima facie* case’ are interdependent: the stronger the *prima facie* case, the lower the threshold of competitive harm justifying a finding of urgency.<sup>20</sup> Furthermore, the assessment of urgency must be based on a broad perspective, weighing the effects of the alleged practice and of the interim measures contemplated by the Commission on all stakeholders, including the undertakings concerned and consumers.<sup>21</sup> Overall, the test under Article 8(1) of Regulation 1/2003 is still broad, but narrower than that of the *Camera Care* in the sense that it will be satisfied only in instances involving damage to competition and not competitors.

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<sup>17</sup> Ibid, at paras 58 to 63: ‘The requirement of a finding of a *prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy ... The Commission was thus fully entitled to take the view that, at first sight, there were serious doubts as to the legality of the circular in relation to the Treaty competition rules and that it could therefore adopt provisional measures pending a decision on the substance.’

<sup>18</sup> See Case C413/14 P, *Intel Corporation v European Commission*, EU:C:2017:632.

<sup>19</sup> See inter alia, Pablo Ibáñez Colomo, ‘The Future of Article 102 TFEU after Intel’ (2018) 9(5) *Journal of European Competition Law & Practice* 293; ‘*Post Danmark II*: The Emergence of a Distinct “Effects-Based” Approach to Article 102 TFEU’ (2016) 7(2) *Journal of European Competition Law & Practice* 113.

<sup>20</sup> To this effect see Andreas Nordsjo, ‘Regulation 1/2003: Power of the Commission to adopt interim measures’ (2006) 27 (6) *European Competition Law Review* 299.

<sup>21</sup> See, Order of the President of the Court of 29 September 1982, Joined cases 228/82 and 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission of the European Communities*, EU:C:1982:320. For an analysis of the notion of urgency see Paolissa Nebbia, ‘The Notion of ‘Urgency’ in Interim Proceedings Concerning Competition Law: Some Thoughts after the Microsoft Order’, (2007) 28 *European Competition Law Review* 271.

*Second*, the Commission, when adopting interim measures decisions, is strictly bounded by the principle of proportionality, as much as it does with its prohibition decisions.<sup>22</sup> As emphasized by the Court, the interim measures must be of a temporary and conservatory nature and must be restricted to what is required in the given situation.<sup>23</sup> This implies that the more permissive approach undertaken by the CJEU in the *Alrosa*<sup>24</sup> ruling with regards to the principle of proportionality does not apply in the case of interim measures. In *Alrosa* the CJEU confirmed that the general principle of proportionality applies to commitment decision proceedings, nonetheless in a different way than to Article 7 infringement decisions. Under Article Under Article 7, any behavioural or structural remedies cannot go beyond what is necessary and suitable to address the competition problem at issue. By contrast, under Article 9, the Commission must satisfy itself only that the commitments offered address the competition concerns identified, and that the undertaking has not offered less onerous commitments that also address those concerns adequately.<sup>25</sup>

*Third*, the Commission cannot impose interim measures without providing to the parties the opportunity to be heard and respond to the Commission's objections in writing and in oral hearing (if requested), as encapsulated in Article 27 of Regulation 1/2003.

*Finally*, pursuant to Article 8(2), an interim measure has to be limited in time, although it can be renewed, insofar as this is necessary and appropriate. The Commission, pursuant to Article 23 (2) (b), may impose a very substantial fine of 10% of the turnover against companies that violate a decision ordering an interim measure.

#### **IV. Why the Paucity?**

A review of the Commission's decisional practice<sup>26</sup> reveals that there has been very little use of its power to adopt interim measures. This 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 has fewer applications to consider. Indeed, the Commission

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<sup>22</sup> Joined cases 228/82 and 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v*

*Commission of the European Communities*, EU:C:1984:80

<sup>23</sup> *Ibid*, para. 2.4.

<sup>24</sup> Case C-441/07 P, *Commission v. Alrosa Co. Ltd.*, EU:C:2010:377.

<sup>25</sup> *Ibid*, para. 41.

<sup>26</sup> See accompanying Annex.

has shifted the administrative burden to national courts and NCAs since Regulation 1/2003 entered into force, which are ‘well placed to decide on such measures’.<sup>27</sup>

*Second*, another plausible reason might be that the Commission lost the *IMS Health* case – the last instance where it imposed an interim relief – before the President of the then Court of First Instance – CFI (now General Court). As we shall see, the likelihood that the addressee of a positive order would immediately seek suspension before the EU Courts coupled with the procedural and evidentiary requirements imposed on the Commission in establishing the *prima facie* infringement of competition law as well as urgency create important disincentives for employing Article 8.(1).<sup>28</sup> On both issues, *IMS Health* gives broad discretion to the judge hearing the application for interim measures to reach a different conclusion than the Commission and requires that the Commission invest a lot of resources to build a compelling case and to anticipate and respond to the arguments which the addressee of the decision could raise in an application before the Courts. This may increase the burden of investigation, since interim measures ‘add a full-blown procedure (and likely judicial review) to the main investigation’.<sup>29</sup>

The facts of *IMS Health* are well known. In ordering interim measures, the Commission argued that IMS Health’s refusal to license its 1860 brick structure that 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 AzyX, was a *prima facie* abuse of IMS Health’s dominance in the German regional sales data services market and would force those competing providers to withdraw from the market, leading to a complete foreclosure of the market for the foreseeable future.<sup>30</sup> The Commission stated that ‘there is in this case the risk of serious and irreparable harm and intolerable damage to the public interest which establishes the urgent need to grant protective interim measures’<sup>31</sup> and it ordered IMS Health on a provisional basis and pending a decision in the main proceedings to grant a license to all actual competitors in the market for German regional sales data services. A month after the adoption of the decision ordering interim measures, IMS Health brought an action for annulment of that

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<sup>27</sup> Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] C 101/65, para. 80.

<sup>28</sup> Philip Lowe and Frank Maier-Rigaud, ‘Quo Vadis Antitrust Remedies’, in B Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law 2007* (Juris Publishing, New York 2008), at 609.

<sup>29</sup> *Ibid.*

<sup>30</sup> Case COMP D3/38.044, Commission Decision of 3 July 2001, NDC Health/IMS Health: Interim measures, OJ 2002 L59, at para. 89.

<sup>31</sup> *Ibid.*, para. 201.

decision and further sought an order suspending its operation.<sup>32</sup> The President of the CFI provisionally granted IMS Health's application for suspension on an *ex parte* basis. He subsequently confirmed his order and suspended the operation of the Commission's interim measures decision until the Court ruled on the application for annulment of that decision.<sup>33</sup> However, the Commission withdrew the interim measures decision in the meantime on the ground that, following changes in the situation of the complainants, there was no longer any urgency requiring the imposition of interim measures before the adoption of the decision in the main proceedings.<sup>34</sup>

The main reason why the Commission lost the case before the CFI was: i) due to 'serious doubts' raised over the correctness of the Commission's legal assessment that, according to the President of the Court, could only be resolved in the judgment on the merits, and, ii) the risk of serious and irreparable harm to IMS Health. The Court held that compelling IMS Health to licence its 1860 brick structure may have resulted in an irreversible weakening of its market position and potentially restricted its commercial freedom, thus giving rise to a real and tangible risk of serious and irreparable harm.<sup>35</sup> Accordingly, the Court found that IMS Health's application for interim relief satisfied the urgency requirement. The contentious issue, however, related to the Commission's 'extensive' interpretation of the *Magill* judgment,<sup>36</sup> which informed its provisional assessment of the legality of IMS Health's refusal to licence its geographic segmentation structure. This extensive interpretation resulted from the Commission's view that the prevention of the emergence of a new product or service for which there is potential consumer demand is *not* an essential element of the test of 'exceptional circumstances' in which, according to *Magill*, a copyright holder may be required to license it to competitors. But the submissions before the judge seemed to indicate that this condition was actually fulfilled. Finally, the CFI concluded that the balance of interests favored the suspension of the interim measures decision and the preservation of IMS Health's copyright. This finding derived from a holistic assessment of three factors, namely the public interest in protecting intellectual property rights, doubts over the correctness of the Commission's

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<sup>32</sup> See Case T-184/01 R, *IMS Health Inc. v Commission*, EU:T:2001:259, at paras 30 and 31.

<sup>33</sup> *Ibid.*

<sup>34</sup> Case COMP D3/38.044, Commission Decision of 13 August 2003, NDC Health/IMS Health: Interim measures, OJ 2003 L 268.

<sup>35</sup> See Case T-184/01 R (n 28), para. 128-131.

<sup>36</sup> *Ibid.*, para. 102.

interpretation of the *Magill* judgment and the risk of serious and irreparable harm to IMS Health.<sup>37</sup>

The CFI's order was upheld by the ECJ. The President of the ECJ laid down the standard of review to be applied in applications for interim relief.<sup>38</sup> First, he emphasised that the review exercised by the judge hearing an application for suspension brought in respect of a decision of the Commission imposing interim measures can meaningfully be undertaken only if the Court is empowered to review thoroughly all the relevant factual and legal circumstances of the case. Limits similar to those applying to review by the Court, in the context of annulment proceedings, of complex economic or technical assessments made by the Commission, should not apply to the control exercised by the judge hearing an application for suspension with respect to a Commission decision imposing interim relief. As noted by Jean-Yves Art, the main difference between *IMS Health* and earlier cases is that the judge's findings on all conditions for the grant of interim measures 'seemed guided by his own views of the relationship between competition and the exercise of intellectual property rights, different from those of the Commission, and appear to have led to considerable relaxation of the conditions under which the European Courts may suspend Commission decisions ordering interim relief'.<sup>39</sup> The *prima facie* case for suspension of the Commission decision in *IMS Health* was based on the judge's view that the Commission had adopted an extensive interpretation of *Magill*. The same applies to his findings on urgency, where the judge emphasized the fundamental importance of copyright for society and in the overall balance of interests in the case. Overall, the central lesson from *IMS Health* is that interim measures may be appropriate in clear-cut cases, but not where the law is unclear, especially if the applicable remedy forces the company to relinquish good core elements of its business model. Only clear-cut cases would satisfy the *prima facie* requirement for suspension by the EU Courts. In addition, in such clear-cut cases an applicant would arguably more easily be able to successfully demonstrate that there is a 'serious dispute' regarding the correct interpretation of competition rules.

*Third*, another, perhaps less plausible, reason explaining the paucity of interim measures may be that, if eventually a Court finds that the interim measures decision was unjustified, there may be a claim for damages. However, under EU law, the error would have

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<sup>37</sup> Ibid, para. 143-149.

<sup>38</sup> See Case C-481/01 P (R), *NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc.*, EU:C:2002:223, at paras. 55-61.

<sup>39</sup> Jean-Yves Art, 'Interim Relief in EU Competition Law: A Matter of Relevance' (2015) 1 *Italia Antitrust Review* 55.

to be shown to constitute a manifest and serious breach and a loss and a causal link would have to be demonstrated.<sup>40</sup> It seems likely that the Court would take into account, in assessing whether there was a ‘manifest and serious breach’, the assessment by the Commission on a *prima facie* basis, as well as the possibility for the undertaking concerned to ask for a judicial interim decision.

*Fourth*, the danger of false positives and the concomitant risk of ‘picking winners’ may also account for the Commission’s reluctance to impose interim measures.

In sum, the above procedural and evidentiary hurdles have led to the paucity of the interim measures tool, especially in cases in digital markets which would require rapid intervention. Instead, the Commission relies on Article 9 commitment decisions for a swift resolution of such cases. Indeed, it is quite astonishing that the possibility of ordering interim measures to remedy the presumptively anticompetitive practices pending a final decision was apparently never considered in major, multi-year investigations, such as *Google Shopping*.<sup>41</sup> In fact, the reason why 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, Commissioner 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.’<sup>42</sup> 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.<sup>43</sup> 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 2019 decision imposing interim measures on Google, following a complaint from Amadeus, an operator in the direct enquiry services market, regarding Google’s sudden suspension of some of its Google Ads accounts under non-transparent, non-objective and discriminatory conditions,<sup>44</sup> and a 2010 decision imposing interim measures on Google

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<sup>40</sup> Case T-351/03, *Schneider Electric SA v Commission of the European Communities*, EU:T:2007:212.

<sup>41</sup> Case AT. 39740, *Google Search (Shopping)* Commission Decision of 27 June 2017.

<sup>42</sup> Financial Times, ‘Commission considers tougher competition powers’ 2 July 2017, available at: <https://www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895>.

<sup>43</sup> *Ibid.*

<sup>44</sup> FCA, ‘The Autorité de la concurrence has ordered interim measures against Google’ (31 January 2019) available at:

following a complaint from Navx alleging an abuse of dominance after its AdsWords contract was terminated.<sup>45</sup> Another interesting example of the FCA utilising interim measures is the case regarding Apple's distribution agreement with Orange for the sale of Apple's iPhones. In late 2008, the FCA suspended Apple's 5-year exclusive distribution agreement for iPhones between Apple and France Telecom's Orange, pending an 'in-depth' investigation into the merits of the case. The Paris Court of Appeal upheld the FCA's decision granting interim measures.<sup>46</sup> The suspension allowed Orange's competitors to purchase iPhone devices from Apple and sell them. However, the threshold for the adoption of interim measures subjects the FCA to a lower legal threshold than the Commission. Articles L. 462-6 and L.464-1 of the French Commercial Code 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 complainants. [...]. This is a considerably lower standard of intervention than the requirement to demonstrate a *prima facie* breach of competition law under Article 8(1) Regulation 1/2003. A fast-track procedure, which typically takes no longer than six months, is applied to requests for interim measures.<sup>47</sup>

In the UK, interim measures directions 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, which came into force on 1 April 2014, overhauled the UK competition law regime. The amendments to the Competition Act 1998 included a revised test for the adoption of interim measures, which lowered the threshold for intervention by the CMA.<sup>48</sup> Previously, the UK competition authority was allowed to impose interim measures

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<https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/31-january-2019-online-advertising-directory-enquiry-services-0>

<sup>45</sup> FCA, 'Online Advertising Market' (30 June 2010) available at:

<https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/30-june-2010-online-advertising-market>

<sup>46</sup> For an analysis see Marie Leppard, 'The Reform of the UK Competition Regime: What can be learnt from France' (2012) *Competition Law* 219.

<sup>47</sup> See Burnside and Kidane (n 5) above.

<sup>48</sup> In 2006, the Office of Fair Trading issued the UK's only interim measures direction during an investigation into an alleged abuse of a dominant position by the London Metal Exchange (LME). The OFT was concerned that LME may have been about to abuse its dominant position by extending the hours of trading on its electronic trading platform LME Select. The interim measures direction was based on preventing serious, irreparable damage to the applicant and protecting the public interest. The decision was appealed to the Competition Appeal Tribunal, but the OFT subsequently withdrew its direction following a more detailed assessment of the application and new information it received from this. However, the CAT awarded costs to the LME and in its decision was heavily critical of the OFT. The CAT described the OFT's investigative process as 'superficial and flawed', and the decision on interim measures as 'ill-founded' and adopted by the OFT based

only if it ‘considers that it is necessary for it to act...as a matter of urgency for the purpose of preventing serious, irreparable damage’. This was interpreted as requiring that the conduct in question would lead to the undertaking exiting the market.<sup>49</sup> Legislative change removed the latter requirement by replacing ‘preventing serious, irreparable damage’ with ‘preventing significant damage’. The change was motivated from the recognition of the fact that undertakings can suffer significant harm even where there is no threat of exit. The prospect of increased enforcement in fast-moving digital markets may present more opportunities for the CMA to adopt interim measures. The CMA’s 2017/2018 annual report expressly identified interim measures as a tool they will be using more, referring to the online auction platform market case as a recent example of enforcement.<sup>50</sup> The case originated from two complaints received by the CMA in August and September 2016 respectively alleging that ATG Media had engaged in anticompetitive conduct in relation to the provision of live online bidding auction platform services. Such services are relatively new intermediaries that enable bidders to bid in real time in a ‘live auction’ taking place at a site operated by an auction house which auctions products on behalf of sellers. The platforms act as online aggregators that host live auctions run by multiple auction houses. ATG Media was alleged to have imposed restrictions on its auction house customers, preventing them from offering bidders a lower price using a competing third-party platform or the auction house’s own platform than that through ATG Media platform. ATG was also alleged to have imposed exclusivity requirements on some auction houses preventing them from using third party platforms and restricting marketing by third party platforms. Following the opening of an investigation by the CMA into ATG Media, BidonThis, a competitor to ATG Media, made an application for interim measures, which ultimately resulted in ATG Media offering commitments to address the competition concerns that had been identified by the CMA.<sup>51</sup>

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on only a limited understanding of the market; See, *The London Metal Exchange v OFT* [2006] CAT 19, paras.144 and 170.

<sup>49</sup> OFT 1335, ‘A Competition Regime for Growth: a consultation on options for reform: The OFT’s response to the Government’s consultation’, June 2011, paragraph 4.82

<sup>50</sup> CMA, Competition and Markets Authority Annual Report and Accounts 2017/2018, HC 1112, page 39, available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728268/CMA\\_Annual\\_Report\\_and\\_Accounts\\_2017\\_18.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728268/CMA_Annual_Report_and_Accounts_2017_18.pdf)

<sup>51</sup> For an analysis of the case, Helen Parker et al, ‘Interim Measures in the UK: Lessons from the Online Auction Services Case’ (2019) 12(46) *International In-house Counsel Journal* 1.

Finally, the ECN Recommendation in interim measures<sup>52</sup> regards the latter as an integral part of the competition law enforcement toolkit in the Member States. Overall, against the backdrop of the digital age, a consensus view seems to be emerging on the clear benefits of interim measures to prevent serious and irreparable harm to competition, especially in fast-moving markets. The revival of interim measures may ultimately displace the Commission's increased reliance on Article 9 commitment decisions for a supposedly swift resolution of complex cases. With this in mind, the following section will explore the interplay between commitments decisions and interim measures in digital markets.

## **V. Implications for Digital Markets: The Interplay between Commitments and Interim Measures**

Article 9 of Regulation 1/2003 empowers the Commission to accept commitments offered by undertakings after a preliminary assessment, provided that these commitments meet the Commission's concerns. If the Commission accepts the commitments, it makes them binding on the undertakings and concludes that there are 'no longer grounds for action' (the 'commitment procedure', as opposed to the 'infringement procedure' under Article 7). The advantages and disadvantages of relying on Article 9 commitment proceedings are well documented in the literature.<sup>53</sup> First, proceedings leading to the adoption of commitments decisions usually are shorter than Article 7 proceedings, because the Commission does not issue a statement of objections in Article 9 proceedings and the adoption of negotiated remedies makes the process leading to the adoption of the decision significantly less cumbersome. The commitment procedure may also allow for more 'flexible' remedies that could perhaps not have been imposed in an infringement decision. By 'flexible', we refer to remedies that would have not passed the proportionality test had they been imposed in an infringement decision. The obvious examples relate to the structural commitments in the energy sector.<sup>54</sup> Significant

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<sup>52</sup> ECN Recommendation on the power to adopt interim measures (December 2013), available at [https://ec.europa.eu/competition/ecn/recommendation\\_interim\\_measures\\_09122013\\_en.pdf](https://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf)

<sup>53</sup> See e.g. Niamh Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10(2) *Journal of Competition Law and Economics* 399; Javier Tapia and Despoina Mantzari, 'The Regulation/Competition Interaction' in I Lianos and D Geradin (eds) *Handbook on European Competition Law-Substantive Aspects* (Edward Elgar 2013) pp. 588-627; Florian Wagner von Papp, 'Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the "Struggle for Competition Law"' (2012) 49(3) *Common Market Law Review* 929.

<sup>54</sup> See e.g. Commission Decision, E.On Gas, 2010 O.J. (C 278) 9; Commission Decision, RWE Gas Foreclosure, 2009 O.J. (C 133) 10; Commission Decision, ENI, 2010 O.J. (C 352) 8; Commission Decision, German Electricity Wholesale Market & German Electricity Balancing Market, 2009 O.J. (C 36) 8; Commission Decision, Swedish

advantages are also presented for the undertakings involved, as they avoid possible fines, reputational damages, and the finding of an infringement that could be relied on by claimants in follow-on-private enforcement actions. Overall, commitment decisions present a win-win situation for both the Commission and the undertakings concerned: for the Commission because it can concentrate its scarce resources on other infringements; for the undertakings, because the quick resolution saves litigation and reputational costs. But other affected parties may also benefit from the avoidance of a lengthy investigation and contentious court battle which would have rendered any remedy meaningless because competitors might have by then exited the market.

However, the Article 9 avenue is not appropriate in all circumstances. The preamble of Regulation 1/2003 expressly acknowledges that ‘commitment decisions are not appropriate in cases where the Commission intends to impose a fine’,<sup>55</sup> which should be the case in, for example, hard core cartels or where the dominant undertaking is or should be aware of the illegal nature of the alleged practice. Furthermore, because Article 9 decisions do not include any finding of infringement, they are not appropriate where the practice at issue raises novel issues of competition policy or competition law that deserve clarification. Moreover, the eagerness of undertakings to use commitment procedure may result in disproportionate commitments. Most crucially, by opting for the resolution of a case via commitment decisions in cases which present novel theories of harm in technology markets, as the Commission has done in ‘patent ambush’,<sup>56</sup> (that is the alleged misuse of standard-setting processes to secure inclusion of patented technology within industry-wide standards) or in the e-books case,<sup>57</sup> less guidance is provided for future cases and this, arguably, increases uncertainty. Furthermore, commitment decisions do not always lead to a swift impact on the market – the *Google Shopping* case spanning over 8 years being a telling example.<sup>58</sup> In fact, the negotiation and market testing process may actually take longer than an Article 7 prohibition decision.

In contrast, Article 8 can provide a solution in dynamic markets with rapidly evolving technologies, where there may be an acute risk that the market may tip to a single winner. This

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Interconnectors, 2010 O.J. (C 142) 28; Commission Decision, *Distrigaz*, 2008 O.J. (C 9) 8; Commission Decision, 2010 O.J. (C 133) 5; Commission Decision, *Gaz de France*, 2010 O.J. (C 57) 13; Commission Decision, *Long Term Electricity Contracts France*, 2010 O.J. (C 133) 5; Commission Decision, *CEZ*, 2013 O.J. (C 251) 4. For an analysis see *Tapia and Mantzari* (n 53) above.

<sup>55</sup> Council Regulation (EC) No 1/2003, para. 13.

<sup>56</sup> Commission Decision, *Rambus*, 2010 O.J. (C 30) 17.

<sup>57</sup> Commission Decision, Case COMP/ 39.847—E-BO (*Penguin*), C (2013) 4750 final (July 25, 2013).

<sup>58</sup> See (n 41) above.

is owing to the characteristics of digital markets, which are characterised by direct and indirect network effects, first-mover advantages, and lock-in.<sup>59</sup> In many cases, digital markets are subject to ‘tipping’ in which a winner will take most of the market. Furthermore, if there is exclusionary conduct at early stages, this may result in an ‘unassailable position’ and thus rapid intervention may be necessary to prevent irreparable harm. This entails that the condition of ‘urgency’ should be more easily satisfied in digital markets with network effects. However, where rapid intervention seems necessary, because there would be high persistent costs for false negatives, there will also be a high cost of false positives.

Irrespective of where one stands on the use of interim measures, what seems to be an undisputed fact is that the *IMS Health* precedent discourages the use of interim measures in cases presenting novel theories of harm, as any decision that imposes interim measures that adopts a not so clear-cut, interpretation of Article 101 or Article 102 TFEU provisions, will fail to fulfil the *prima facie* condition and be suspended by the EU courts. This could be a problem in many of the digital cases in which the Commission is currently contemplating such measures, as novel theories of harm are likely to be involved.<sup>60</sup> Furthermore, *IMS Health* broadened the test of urgency from a traditional one based on the likelihood of the applicant being unable to survive or remain active on the relevant market pending judgment in the main proceedings to a situation where the test is met when the interim measures are intended to enable entry of new competitors, which is the case where the conduct justifying adoption of the interim measures is refusal of access to essential facilities. Echoing the above, Commissioner Vestager has, indeed, remarked on the high evidentiary threshold that the Commission must meet in order to satisfy the substantive test for issuing interim measures pointing to ‘very high bar of irreparable harm’ as a reason the Commission has not initiated any Article 8 proceedings.<sup>61</sup>

Arguably, the Commission revived interim measures in the *Broadcom* case, as in contrast to the above, the investigation concerned one of the most established theories of harm dating back to *Hoffman-La Roche*,<sup>62</sup> that of exclusivity obligations. This is a suitable test case which allows the Commission to meet the requirements of the test. A well-established theory makes it easier to show a *prima facie* case. It should also make it easier to claim a risk of serious and irreparable damage to competition because exclusivity-based conduct inherently creates a

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<sup>59</sup> See ‘Unlocking Digital Competition’ (n 8), Ch.1 for an excellent discussion.

<sup>60</sup> See (n 41) above.

<sup>61</sup> See (n 42) above.

<sup>62</sup> *Hoffman-La Roche v. Commission* (Case 85/76), EU:C:1979:36.

risk of exclusion. Furthermore, as procurement in this space often involves tenders, this entails that the damage to competition may be more likely and new entry far more difficult. It would be interesting to see how the Courts would react to a greater use of interim measures and whether there would be room to revise the quite restrictive *IMS Health* precedent.

And a final note of caution: Notwithstanding the advantages of making greater use of Article 8 interim decisions as opposed to Article 9 commitment procedures, one should not lose sight of the fact that interim measures can still be used as a leverage from the Commission so as to incentivise undertakings to offer commitments. There is evidence from the Commission's decision practice that this may be a possible outcome of interim measures. In *Eurofix-Bauco*,<sup>63</sup> the Commission initiated an interim proceeding against Hilti, following complaints by two small UK companies alleging an abuse of dominant position, since Hilti was tying the supply of Hilti cartridge strips to the purchase of nails, but Hilti offered to stop tying the sale of both products. The Commission finally accepted the undertakings proposal to suspend the procedure for the adoption of interim measures. Similarly, in *Sea Containers v Stena Sealink*,<sup>64</sup> the Commission rejected an application for interim measures, since the parties came to an arrangement following Commission intervention allowing Sea Containers to access Holyhead facilities in non-discriminatory terms. The Commission considered that there was no longer any justification to adopt a formal decision granting interim measures. Also, a recent example comes from the UK online auction platform case discussed above.<sup>65</sup> Shortly before the CMA was due to issue its final decision on the interim measures application, ATG Media made an offer of commitments to the CMA. This was, apparently, very welcomed by the CMA, with the authority highlighting that by accepting the commitments in this case, it was able to resolve the competition concerns quickly and that this can be particularly important in online markets.<sup>66</sup>

## **VI. Conclusion**

Interim measures are among the most powerful and intrusive enforcement tools that are available to competition authorities in the EU. Pending the outcome of investigations – which regrettably run into several years – interim measures can be used to ensure that effective

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<sup>63</sup> Cases IV/30.787 and 31. 488 *Eurofix-Bauco v Hilti*, OJ 1988 L65/19.

<sup>64</sup> Case IV/34.689 *Sea Containers v Stena Sealink*, OJ 1994 L15/8.

<sup>65</sup> See (n 55 and n 66) above.

<sup>66</sup> CMA Case number 50408, CMA Decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services, (29 June 2017), para. 4.16.

competition is maintained, and irreparable damage averted. This is especially the case in digital markets, where there is a serious risk that a competition law infringement will have an irreversible impact on competition and the market structure through, for example, barriers to entry in markets characterized by scale or network effects. Restorative remedies, that is remedies seeking to restore competitive dynamics that would prevail in the absence of the abuse, though, in principle, available in ‘bringing the infringement effectively to an end,’<sup>67</sup> are rarely used in practice.<sup>68</sup> Furthermore, it may be difficult to be devised due to the fast-paced technological developments. Interim measures can address such shortcomings and also have an important deterrent effect. Provided that the procedural rights of parties to proceedings are respected, there is scope for an increased use of interim measures by the European Commission. Of course, a cautious approach should be adopted that will not undermine the market participants’ incentives to compete.

But, as the article has argued, some of the conditions to the imposition of interim measures as they result from the EU Courts’ case law are excessively restrictive and could be softened, meaning satisfied more easily, if the EU Courts are presented with the opportunity to do so. *IMS Health* appears excessively to constrain the power of the Commission to impose interim measures, by inter alia giving little credit to the provisional nature of the Commission findings of facts or of law underlying the *prima facie* case in the decision imposing interim measures. However, if the EU Courts adopt a more lenient approach of what ‘serious and irreparable damage’ entails, then there is a risk of divergence between interim measures in competition law and interim measures in other areas of EU law that the Courts may be hesitant to take.<sup>69</sup> But still: If the European Commission is, indeed, willing to make more use of Article 8 interim measures to meet the digitization challenge, then it is useful and significant that the EU Courts will have the opportunity to review the requirements arising from past rulings.

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<sup>67</sup> Council Regulation (EC) No 1/2003, Article 7(1). See further Case C-119/97 P, *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission*, EU:C:1999:116 ; Case C-62/86 Akzo, ECLI:EU:C:1991:286, paras 155 and 157.

<sup>68</sup> For a notable exception see Commission Decision of 29 April 2014, Case AT.39985 – Motorola – Enforcement of GPRS standard essential patents. See further Cyril Ritter, ‘How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?’ (2016) 7 (9) *Journal of European Competition Law and Practice* 587.

<sup>69</sup> I am indebted to Andriani Kalintiri for raising this point.

## **ANNEX: The Commission's Decisional Practice on Interim Measures**

### **Ford Werke<sup>70</sup>**

In light of the different costs of right-hand drive cars between the German and British markets, a certain number of British customers purchased those vehicles from German dealers. Ford sent to German dealers a circular stating that righthand drive car orders would cease to be filled. The Commission adopted a decision requiring Ford to withdraw its circular and to inform its German dealers that the product (right-hand drive cars) was still part of Ford's agreed delivery range.

### **ECS/AKZO<sup>71</sup>**

The case involved ECS, a small independent producer of benzoyl peroxide and AKZO UK, a subsidiary of AKZO Chemie, which manufactured organic peroxides (including benzoyl peroxide) as well as a wide range of milling additives. ECS initiated an expansion of its activities of benzoyl peroxide from the flour milling application to the plastic sector. Following the expansion of ECS, AKZO UK started selling benzoyl peroxide at predatory prices and jointly offering ECS's major customers benzoyl peroxide and other additives at lower prices with the aim of excluding ECS from the market. ECS complained about AKZO UK's behaviour to the Commission and requested the adoption of interim measures. The Commission adopted a decision granting interim measures which requested AKZO UK to cease offering its products at predatory prices. The Commission prohibited AKZO UK from offering or supplying the products to any buyer in the United Kingdom at prices or on terms different from those offered or given to other comparable buyers.

### **BBI/Boosey & Hawkes<sup>72</sup>**

The case involved Boosey & Hawkes (B&H), a British manufacturer of brass wind instruments and Gabriel's Horn House (GHH) and RCN Music, the major retailer and repairer of brass band instruments respectively. GHH and RCN founded a new company, BBI, with the purpose of manufacturing and marketing a wide range of instruments for brass bands. Then, B&H adopted various measures aimed at preventing the establishment of BBI in the market, such as refusing

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<sup>70</sup> Case IV/30.696 Distribution system of Ford Werke AG-interim measure, OJ 1982 L256/20

<sup>71</sup> Case IV/30.698 ECS/AKZO: interim measures, OJ 1983 L 252/13.

<sup>72</sup> Case IV/32.279 BBI/Boosey & Hawkes: Interim measures, OJ 1987 L286/36.

supplies of instruments, spare parts and other materials to GHH and RCN. The applicants argued that B&H's behaviour would lead them to exit the market. The Commission considered that this behaviour could constitute *prima facie* an abuse of dominant position. It thus ordered B&H to resume supplies of instruments, spare parts and other materials to GHH and RCN, in the same terms as before the constitution of BBI, including reasonable prices and the usual discounts or rebates. Furthermore, B&H was requested to inform the Commission about any change in its list of prices and conditions of trade.

### **Eco System/Peugeot**<sup>73</sup>

The case involved Eco System, a reseller car company established in France, and Peugeot. Eco System filed a complaint before the Commission against the practices carried out by Peugeot, which had sent a circular to all its dealers in Belgium, Luxembourg and France trying to prevent Eco System from buying cars from its dealers. The Commission issued a decision adopting interim measures and ordering Peugeot to suspend its circular and enable Eco System to carry out its business under normal market conditions.

### **Mars/Langnese-Iglo and Schoeller Lebensmittel**<sup>74</sup>

The Commission imposed interim measures following a complaint filed by Mars in order to prevent Langnese-Iglo and Schoeller Lebensmittel from enforcing contractual rights binding retailers to purchase ice cream exclusively from them (via 'freezer exclusivity' and 'outlet exclusivity' practices). The Commission considered that these practices substantially restricted access to the market and therefore, there was a *prima facie* infringement of Community competition rules.

### **Port of Roscoff**<sup>75</sup>

Irish Continental Group (ICG), a ferry operator, lodged a complaint against Chambre de Commerce et d'Industrie de Morlaix ("CCI Morlaix"), on the grounds that the latter had abused its dominant position by refusing access to the port facilities in the port of Roscoff (Brittany). The Commission considered that this port was a facility without which ICG would have no

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<sup>73</sup> Case IV/33.157 Ecosystem/Peugeot – Provisional measures.

<sup>74</sup> Case IV/34.072 Mars/Langese-Iglo and Schoeller Lebensmittel–Interim measures

<sup>75</sup> Case IV/35.388 Irish Continental Group v CCI Morlaix (Roscoff).

possibility of running its activity and adopted interim measures in order to grant ICG access to the port facilities and avert serious and irreparable harm to ICG.

### **B&I Sealink<sup>76</sup>**

Following a complaint by B&I (an Irish ferry operator) the Commission established that Sealink (a British ferry operator which was also the port authority at Holyhead, Wales) abused its dominant position when it modified its schedule in a way that would affect the loading and unloading operations carried out by B&I, as a consequence of the reduction of the time available. The Commission adopted a decision ordering Sealink to apply another schedule or to return to the original one.

### **NDC/IMS Health<sup>77</sup>**

IMS and NDC are U.S. companies that provide pharmaceutical companies with sales data services in the German market. IMS developed the '1860 Brick Structure' to better manage sales data. IMS refused to license the use of its '1860 Brick Structure' to NDC and AzyX claiming that it had a copyright in that structure and was not obliged to deal with competitors. However, the Commission stated that there were 'exceptional circumstances' that could justify interim measures which would order IMS to license the use of the '1860 Brick Structure' to its competitors on the basis that the latter was indispensable for NDC and AzyX to carry on their business. Furthermore, both NDC and AzyX German operations were in very precarious financial positions, and there was a serious risk that they would withdraw from the market in the near future. As discussed above, the Commission decision ordering IMS to license the '1860 Brick Structure' was suspended by the CFI. The Court considered that a temporary suspension of the Commission decision was not justified in light of the consequences that IMS could suffer as a result of a Commission decision fixing the terms for a compulsory licence as well as the serious encroachment on its property rights. On appeal the President of the ECJ upheld the order of the President of the CFI, confirming that protecting the intellectual property rights of IMS was justified.

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<sup>76</sup> Case IV/34.174 Sealink/B&I – Holyhead: Interim measures

<sup>77</sup> Case COMP D3/38.044 NDC Health/IMS Health: Interim Measures, OJ 2002 L59/18.