

INTERIM RELIEF IN EU COMPETITION LAW: A MATTER OF RELEVANCE

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Abstract: *Competition law is the main regulatory tool to ensure that markets deliver maximum welfare to consumers. Competition law can achieve this goal only if infringements are detected and remedied in an effective and timely manner. While businesses move and react at an ever faster speed, competition law enforcement is often stalled in multi-year proceedings and remedies imposed at the end of those proceedings rarely undo the harm caused to competition in the meantime. Under those circumstances, it is surprising that the European Commission as the lead competition authority in Europe does not regularly adopt interim measures. This article reviews the conditions under which interim measures may be imposed in the course of European competition law proceedings. While calling for a cautious approach in order to avoid undermining the market participants' incentives to compete, it shows that some of the conditions to the imposition of interim measures as they result from the European Courts' case law are excessively restrictive and could be softened.*

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1. INTRODUCTION

One of the merits of the *Google* case is that it is triggering useful discussion about some features of the EU competition enforcement process, such as the limitations of commitments (vs infringement) decisions for setting legal precedents and developing competition law,² the shortcomings of the commitments negotiation process regarding consultation of interested third-parties,³ and the

² MLex, 20 October 2014, "Increase in EU settlements risks sidelining courts, victims, Wahl says". On this topic, see i.a. Schweitzer, Heike, *Judicial Review in EU Competition Law*, in *Research Handbook on EU Antitrust Law*, Edward Elgar Publishing, 2012. Available at SSRN: <http://ssrn.com/abstract=2129147>; Wagner-von Papp, Florian, *Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the 'Struggle for Competition Law'*, *Common Market Law Review*, Vol. 49, No. 3, 2012. Available at SSRN: <http://ssrn.com/abstract=2262864>

³ The Commission did not seek comments from all interested third parties on Google's third set of proposed commitments. Rather, the Commission only invited companies and organisations that had submitted a formal complaint in the proceedings to comment on the proposed commitments, and it did so indirectly: it issued so-called "pre-rejection letters" pursuant to Article 7(1) of Commission Regulation No 773/2004, informing the complainants of the reasons why the Commission considered that the proposed commitments appeared to address its competition concerns and why the Commission intended to reject the complaints, and offering complainants an opportunity to comment on the Commission's views – see Statement by Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Brussels, 5 February 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm. This approach encourages interested third parties to lodge formal complaints with the Commission in order to have an

relationship between competition law enforcement and regulatory initiatives in matters affecting directly broad, non-competition policy issues such as access to information.⁴ ⁵ Among the many questions raised by the proceedings in the *Google* case, one relates to interim measures: it is quite puzzling that throughout the multi-year, unsuccessful negotiations of remedies, the “commitments” option was put forward as being commanded by the need for a swift resolution in the fast-moving markets in which Google operates, yet the possibility of ordering interim measures to remedy the presumptively anti-competitive practices pending a final decision was apparently never considered.⁶

opportunity to submit comments on proposed commitments aimed at remedying competition concerns. See BEUC, 31 March 2014, “BEUC joins Google/EU antitrust investigation” *available at* <http://beuc.eu/publications/beuc-joins-google-antitrust-investigation/html>. The Commission’s approach drew strong criticism from i.a. third parties, members of the European Parliament and individual Commissioners. See, e.g., Reuters, 13 February 2014, “Third of EU commissioners oppose Google antitrust deal: officials”; El Mundo, 24 February 2014, “Google enfrenta a Joaquín Almunia con la Eurocámara”; ICOMP, “Openness if Key”, 31 January 2014, *available at* <http://www.i-comp.org/blog/2014/openness-key/>; FairSearch, 11 February 2014, “Responses to Google’s tentative settlement with the European Commission”, *available at* <http://www.fairsearch.org/general/responses-to-googles-tentative-settlement-with-the-european-commission/>.

⁴ See Statement by Commissioner Vestager on Google antitrust investigations at the European Parliament (ECON committee meeting), Brussels, 11 November 2014, *available at* http://europa.eu/rapid/press-release_STATEMENT-14-1646_en.htm

⁵ At the time of writing, proceedings in Case COMP/39.740 are still on-going.

⁶ See, e.g., Statement of Vice-President Almunia on the Google antitrust investigation, 21 May 2012, SPEECH/12/372 *available at* [http://europa.eu/rapid/press-release_SPEECH-12-](http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm)

Why? Is the adoption of interim measures subject to excessively strict requirements? If so, should those requirements be softened and how could they be without compromising the goal and nature of interim relief in the overall set of instruments available to implement successfully European competition policy? These are some of the questions which this short paper proposes to explore.

Section 1 provides a brief overview of the tools available to remedy infringements of European competition law as well as the practice of the European Commission and some national competition authorities regarding interim relief. *Section 2* discusses the constraints bearing on the Commission when it comes to imposing interim relief, as they emerge from the judgments of the European courts. *Section 3* offers some thoughts on the current practice and suggestions to encourage recourse to interim measures in appropriate cases.

2. INTERIM RELIEF IN THE EUROPEAN COMPETITION REMEDY TOOLBOX: THEORY AND PRACTICE

The success of competition policy as an instrument aimed at ensuring that markets deliver their full potential in terms of consumer welfare rests on a combination of many institutional, procedural and substantive factors. One of those factors relates to the remedies that are imposed in case of breach of

372_en.htm: “I believe that these fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement.”

competition law. Consider two jurisdictions which both prohibit abuse of dominant position. In jurisdiction A, courts and competition authorities can only impose a cease-and-desist order to remedy such abuse. In jurisdiction B, courts and competition authorities can impose not only a cease-and-desist order but also behavioral or structural measures on the dominant undertaking to make good the harm to competition and consumers caused by the abuse. All other things being equal,⁷ dominant undertakings doing business in jurisdiction B naturally have less incentives to engage in abusive conduct than undertakings in jurisdiction A since they know that they will be ordered to return any illegally obtained commercial and market gains. In addition, remedies that restore the “but for” competitive situation - that is, the competitive dynamics that would prevail in the absence of the abuse - are capable of generating more benefits to consumers than mere cease-and-desist orders. This is all the more so in markets where economies of scale or of scope provide a competitive advantage to the undertakings concerned such that past abuses continue to distort competition in favor of dominant, albeit

possibly less efficient, undertakings long after a mere cease-and-desist order is enforced.

Article 7.1 of Regulation 1 empowers the Commission to impose “any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.”⁸ While the final limb of the provision is open to interpretation, it arguably contemplates – and it certainly does not prohibit – the adoption of remedies aimed at restoring the “but for” competitive situation.⁹ The Court ruling in *UFEX* supports that proposition.¹⁰ Indeed, *UFEX* makes it clear that the Commission is entitled under EU competition law to take

⁸ The full provision reads as follows: “Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102] of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.”

⁹ See Maier-Rigaud, Frank P. and Hellstrom, Per and Bulst, Friedrich Wenzel, Remedies in European Antitrust Law, *Antitrust Law Journal*, Vol. 76, pp. 43-63, 2009, at p. 58: “In other words, to bring an infringement *effectively* to an end, a remedy must not only bring a certain conduct to an end, but must also remedy the distortive effect the behavior has had on the market concerned. The aim should be to re-establish the competitive situation, i.e., the competitive process that would have prevailed *but for* the infringement.”. Available at SSRN: <http://ssrn.com/abstract=1830110>

¹⁰ Judgment of the Court of 4 March 1999, *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission*, Case C-119/97 P, EU:C:1999:116.

⁷ This includes the sanctions (e.g., fines) that can be imposed for infringement of competition law, the ability to detect the abuse, the likelihood that proceedings will be initiated to review the legality of the dominant undertakings' conduct, the assessment of that conduct by authorities in both jurisdictions, the speed with which enforcement proceedings are completed, and the scope of the legal review of the competition authorities' decision by national courts. On the difference between “remedies” and “sanctions”, see OECD, Remedies and Sanctions in Abuse of Dominance Cases, DAF/COMP(2006)19 (15 May 2007), available at <http://www.oecd.org/dataoecd/20/17/38623413.pdf>, at p. 20.

action – and thus, to impose remedies – in order to neutralize or eliminate the on-going anti-competitive effects of anti-competitive practices that have ceased.¹¹

Yet, in the vast majority of cases – in particular, Article 7 cases – the Commission only imposes cease-and-desist orders which prohibit implementation of the impugned practice from the date on which the decision takes effect.¹²

¹¹ *Ufex* arose from the European Commission's rejection of the complaint lodged by SFEI, DHL International, Service CRIE and May Courier seeking a declaration that La Poste, the French Post Office, had breached European competition rules. Following a preliminary investigation, the Commission reached the conclusion that there was insufficient evidence that the alleged infringements were continuing and it rejected the complaint for lack of Community interest. The applicants claimed that the ending of anti-competitive practices did not justify the rejection of the complaint where the structural imbalances caused by those practices have continued. According to the applicants, "action by the Commission in such circumstances is indeed part of its task of ensuring that a system of undistorted competition in the common market is established and maintained" (at para. 83). The Court upheld the applicants' claim and ruled that "[i]f anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and 86 of the Treaty to act with a view to eliminating or neutralizing them (see, to that effect, Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraphs 24 and 25). In deciding to discontinue consideration of a complaint against those practices on the ground of lack of Community interest, the Commission therefore cannot rely solely on the fact that practices alleged to be contrary to the Treaty have ceased, without having ascertained that anti-competitive effects no longer continue and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest" (at paras. 94 and 95).

¹² The recent Article 7 Decision against Motorola concerning Motorola's enforcement of its standard essential patents is a notable exception: Article 2 of the Decision requires Motorola not only to bring the infringement to an end but also "[to] eliminate any anti-competitive effects resulting from the infringement"

Furthermore, it is well known that enforcement proceedings by the Commission take several years – on average, the length of investigations leading to infringement or commitment decisions in Article 101 or Article 102 cases other than cartel cases in the past five years exceeds two and a half year from the formal initiation of proceedings.¹³ For the victims of anti-competitive practices, the combination of these two factors raises the question whether it is worth devoting time and resources to the filing of complaints and active participation in enforcement proceedings conducted by the European Commission, as compared to other legal avenues such as proceedings before national or non-European competition authorities or proceedings before national courts. The question is very serious and recent developments in the European Commission's enforcement practice suggest that the

found by the Commission (that is, the institution of proceedings for, and the enforcement of, an injunction against Apple in Germany based on standard-essential patents subject to a FRAND licensing commitment given by Motorola to ETSI). See Commission Decision of 29 April 2014, Case AT.39985 - Motorola - Enforcement of GPRS standard essential patents, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

¹³ It should be noted that the average duration of the investigation actually is longer than 30 months. Firstly, proceedings are formally initiated several months after the complaint is formally filed or the Commission actually starts investigating the impugned practice or agreement. For instance, in *Intel*, AMD filed its initial complaint in October 2000. AMD submitted a supplementary complaint in November 2003. The Commission formally initiated proceedings in July 2007. Similarly, in *Rambus*, Hynix and Infineon filed a complaint with the Commission in December 2002 and the Commission formally initiated proceedings in July 2007. Secondly, several proceedings that are on-going at the time of writing and that may lead to the adoption of an infringement or a commitment decision were formally initiated more than 30 months ago.

Commission is fully aware of and willing to tackle it or, at least, some aspects of it. Thus, the frequent recourse to Article 9, commitments decisions – as opposed to Article 7, infringement decisions – is in part aimed at shortening the duration of enforcement proceedings.¹⁴ However, the efficacy of this measure is limited because it depends on the goodwill of the dominant undertaking whose incentives are not naturally aligned with those of the Commission and the complainants.¹⁵ Furthermore, the Article 9 avenue is not appropriate in all circumstances.¹⁶

¹⁴ Proceedings leading to the adoption of commitments decisions pursuant to Article 9 of Regulation n° 1 usually are shorter than Article 7 proceedings because the Commission does not issue a statement of objections in Article 9 proceedings (which implies that a number of subsequent procedural stages, including access to file, submission of a response to the statement of objections, and hearing are avoided) and the adoption of negotiated remedies makes the process leading to the adoption of the decision (including the drafting of the decision) significantly less cumbersome.

¹⁵ The undertaking subject to the investigation may be inclined to offer commitments that do not actually put the putative infringement to an end. Thus, the Commission has rejected the three sets of commitments successively offered by Google as failing to address the Commission's competition concerns (see, e.g., <http://www.computerworld.com/article/2487093/search/eu-to-reject-google-s-latest-efforts-to-avoid-an-antitrust-fine.html>). The issuance of a statement of objections – which does not prevent the subsequent adoption of a commitments decision (see e.g. Commission Decision of 16 December 2009, Case COMP/C-3/39.530 – Microsoft (tying)) – in which the Commission provides some indications as to the remedies and the fine it could impose, may provide incentives to offer adequate commitments.

¹⁶ Thus, the Preamble of Regulation n° 1 expressly acknowledges that “commitment decisions are not appropriate in cases where the Commission intends to impose a fine” (at para. 13), which should be the case where the dominant undertaking is or should be aware of the illegal nature of the impugned practice and that practice is causing serious harm to competition and

Another tool available to the Commission to address the risk that the duration of enforcement proceedings compound the anti-competitive effects of the impugned practice is the power conferred by Article 8 of Regulation n° 1 to impose “interim measures.” Article 8 stipulates that:

“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 as this is necessary and appropriate.”

The first regulation implementing the competition provisions of the Treaty did not expressly contemplate the adoption of interim measures. The European Court of Justice inferred that authority from the power to bring infringements to an end under Article 3 of Regulation n° 17, the then applicable regulation implementing the Treaty competition provisions. As the Court ruled in *Camera Care*, “the Commission must also 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. The powers which the Commission holds under Article 3(1) of Regulation No

consumers. 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 by the regulator.

17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.”¹⁷

Article 8 of Regulation n° 1 codifies that power as well as the conditions governing its exercise, namely (i) a *prima facie* finding of infringement, (ii) urgency due to the risk of serious and irreparable harm to competition.¹⁸

Despite the power conferred by Article 8 of Regulation n° 1 and the recognition that the duration of enforcement proceedings may seriously undermine the effectiveness of the Commission’s enforcement efforts, the Commission in the thirty-five years since *Camera Care* has adopted interim measures in less than 10 instances.¹⁹ The most recent

decision ordering interim measures is *IMS Health* and it dates back to 2002. This is a very low number compared to the total number of enforcement proceedings (other than cartel cases) that have been completed over the same period.

The European Commission’s practice is at variance with that of many national competition authorities. In December 2013, the European Competition Network adopted a recommendation recognizing that decisions imposing interim measures are an important tool to ensure the effectiveness of competition law and that accordingly, all ECN jurisdictions should provide for the adoption of interim measures by law.²⁰ The laws of all ECN jurisdictions indeed give that power to national competition authorities or to national courts.²¹ As the ECN recommendation notes, “many Authorities have made use of this tool to date in a variety of sectors, including energy, telecommunications, distribution of motor vehicles, food, postal services, newspapers,

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

¹⁸ Prior to the adoption of Regulation n° 1, the condition of “urgency” referred to the likelihood of “serious and irreparable damage to the party applying for [the] adoption [of interim measures] or intolerable damage to the public interest” – see *La Cinq v Commission*, Case T-44/90, EU:T:1992:5, at para. 28. Even where the Commission acted upon application from a private party, the Commission balanced the interests of the applicant with those of all other stakeholders, in particular the undertaking to which the interim measures would apply, with a view to ensuring that interim relief would promote competition and consumer welfare. See, e.g., Commission Decision of 3 July 2001 (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures), pp. 18 et seq., paras. 187-201, in particular paras. 199-201; Commission Decision of 18 August 1982 (IV/30.696 - Distribution system of Ford Werke AG - interim measure), OJ 1092 L 256., at paras. 45 and 46.

¹⁹ The cases in which the Commission has imposed interim measures are listed in the Annex. Note that the Commission has rejected several applications for interim measures – see, e.g., Commission Decision of 14 August 1990 (Case IV/33.249, *La Cinq SA/Union Européenne de Radiodiffusion*); on appeal: *La Cinq v Commission*,

Case T-44/90, EU:T:1992:5; Commission Decision of 21 December 1993 (Case IV/34.689, *Sea Containers v. Stena Sealink - Interim measures*), OJ 1994 L 15, at pp. 8-19.

²⁰ ECN Recommendation on the power to adopt interim measures (December 2013) available at http://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf

²¹ For an overview of national regimes in force in October 2012, see ECN Working Group Cooperation Issues and Due Process, Decision-Making Powers Report (31 October 2012), available at <http://ec.europa.eu/competition/ecn/documents.html>. Note that in Estonia (the only ECN jurisdiction which at the end of October 2012 did not have or plan to have the power to order interim measures, according to the above-mentioned report), the Competition Authority has since been empowered to order interim measures. See Competition Act, §63⁶ at <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/511072014007/consolide>

advertising and pharmaceuticals. In terms of the type of infringements for which interim measures have been adopted, it seems that interim measures have most often been imposed in the abuse of dominance cases, especially in refusal to supply cases. Interim measures have also been adopted with respect to other types of infringements, most notably, with respect to vertical restraints. Some Authorities have considered interim measures to be useful in cases of decisions of associations of undertakings recommending that their members change prices or limit supplies.”²² Clearly, the practice of the ECN authorities varies. Some of them seem to share the European Commission’s reluctance to impose interim measures.²³ However, most national authorities with a strong enforcement record regularly consider and impose – sometimes on their own initiative – interim measures.²⁴

Against that background, the Commission’s poor record regarding interim relief – and the negative signal its practice is sending to companies harmed by anti-competitive practices – has two main consequences. Firstly,

it undermines the effectiveness of the Commission’s enforcement activities. Undertakings targeted by an investigation often (though not always) continue implementing the practices under investigation throughout the proceedings, consistent with their defense that those practices are lawful and efficient. The pursuit of the impugned practice over the course of a multi-year investigation may very well prove successful in eliminating competition and in erecting barriers to entry, in particular in markets characterized by scale or network effects. Given the Commission’s reluctance to impose remedies aimed at restoring the “but for” situation, failure to adopt interim measures actually increases the risk that the Commission’s enforcement action may have very little effect and that competition remain distorted to the benefit of the infringer long after the proceedings are completed and a cease-and-desist order is imposed.

Secondly, all other things being equal, undertakings harmed by anti-competitive practice are incited to bring their complaint to those competition authorities which are prepared to entertain applications for interim measures. In other words, differences in the authorities’ readiness to consider and to grant interim measures (as well as differences in the substantive and procedural conditions governing the grant of interim measures) encourage forum-shopping. Potential complainants consider many factors in selecting the jurisdiction where they propose to file their complaint, and the location of the anti-competitive effects of the impugned practice definitely ranks at the top of the list. However, the nature of the remedies that can be imposed by the authority, including the

²² ECN Recommendation on the power to adopt interim measures (December 2013) available at http://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf, at para. 3.

²³ For instance, the German Federal Cartel Office has not ordered interim relief in any single case since 2008. Similarly, the UK competition authorities have granted interim measures only once since 2005 and the Office of Fair Trade later withdrew the interim measures order after the addressee lodged an appeal (*London Metal Exchange v Office of Fair Trading*, 26/4/2006).

²⁴ For instance, the French competition authority had imposed interim relief in 12 cases in the period from 2007 through 2013. The Spanish authority has reportedly done so in six cases over the same period; the Italian, in three instances since 2006.

likelihood of obtaining interim relief, also is a very important consideration in deciding whether and where the complaint ought to be filed. This is no different than the situation observed at the international level where authorities with a strong enforcement record are those that tend to attract complaints targeting multi-jurisdictional practices. There is no reason to lament about it – as a matter of fact, the ability “to effectively bring the infringement to an end” (which, as the Court confirmed in *Camera Care*, includes the adoption of interim measures in appropriate circumstances) is one of the three conditions taken into account in order to decide whether a competition authority is well placed to deal with a case pursuant to the Commission Notice on cooperation within the Network of Competition Authorities.²⁵

3. WHY IS THE COMMISSION NOT CONSIDERING INTERIM MEASURES MORE OFTEN?

The situation described above raises the question why the Commission does not order interim measures more often. A reason often offered is that the Court ruling in *IMS Health* – the last instance in which the Commission imposed interim relief – is setting excessively strict requirements on the adoption of interim measures.

IMS Health relates to the licensing of a geographic segmentation structure used to collect and report data about sales of pharmaceutical products enabling

pharmaceutical companies to build and manage their sales territories. According to the Commission, the geographic segmentation structure developed by IMS Health in Germany (the so-called “1860 brick structure”) and protected by copyright pursuant to German copyright law constituted a *de facto* standard for the provision of sales data report services.²⁶ The Commission found that IMS Health’s refusal to license its structure to competing providers of sales data report services 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. The Commission concluded 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”²⁷ 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. One month after the adoption of the decision ordering interim measures, IMS Health brought an action for annulment of that decision and further sought an order suspending its operation.²⁸ The President of the General Court (then, the

²⁶ Commission Decision of 3 July 2001 (Case COMP D3/38.044, NDC Health/IMS Health – Interim measures), OJ 2002 L 59, pp. 18 et seq., at para. 89.

²⁷ *Id.*, at para. 201.

²⁸ On 6 August 2001, IMS Health brought an action for annulment of the Commission decision imposing interim measures and also applied for interim measures (suspension) in respect of the operation of that decision. See *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259, at paras 30 and 31.

²⁵ Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101, pp. 43 et seq., at para. 8.

Court of First Instance) provisionally granted IMS Health's application for suspension²⁹ on an *ex parte* basis.³⁰ He subsequently confirmed his order and suspended the operation of the Commission's interim measures decision until such time the Court would rule on the application for annulment of that decision³¹ (which never happened because the Commission withdrew the interim measures decision in the meantime³²).

In reviewing the application for suspension, the President of the Court of First Instance first emphasized that the review exercised by the judge hearing an application for suspension brought in respect of a decision of the Commission imposing interim measures does not differ from that applicable to proceedings for interim measures relating to final decisions

of the Commission.³³ In verifying whether the validity of the Commission's interim assessment – in particular, its provisional assessment of the legality of IMS Health's refusal to license its geographic segmentation structure – raised serious doubts and therefore justified a *prima facie* case for suspension, the judge observed that the Commission had adopted an "extensive interpretation" of the *Magill* judgment³⁴ and that, although that interpretation might be correct,³⁵ it raised at least "a serious dispute" which only the judgment in the proceedings for annulment could resolve.³⁶ Furthermore, the judge hearing the application for suspension found that there was "a real and tangible risk" that execution of the Commission interim measures decision could cause "serious and irreparable harm to the applicant of a nature likely to exceed the

²⁹ "Suspension" is used in this paper to cover generally any interim relief that the European Courts may order upon application by the addressee of the Commission decision imposing interim measures, including variations of such interim measures pending judgment on substance.

³⁰ *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:200.

³¹ *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259. On appeal, the President of the Court of Justice confirmed the order of the President of the Court of First Instance – see *NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc.*, Case C-481/01 P (R), EU:C:2002:223.

³² Commission Decision of 13 August 2003 (Case COMP D3/38.044, *NDC Health/IMS Health: Interim measures*), OJ 2003 L 268, at p. 69. The Commission withdrew the interim measures decision 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. The Court of First Instance then held that there was no need to rule on the application for annulment of the interim measures decision – see *IMS Health, Inc. v Commission*, Case T-184/01, EU:T:2005:95.

³³ *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259, at paras. 60-74.

³⁴ *Id.*, at para.102. 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. Note that IMS Health's competitors had informed the judge that the details of the sales-data services offered by them would differ considerably from those offered by IMS Health (Order, at para. 128) and the judge's finding on urgency were based on his view that, as a result of the interim measures ordered by the Commission and competition between IMS Health and its licensees pending judgment in the main case, IMS Health's clients might "undertake the expense necessary to accept sales-data in a non-1 860-brick-compatible format" (*idem*). Thus, while the Commission took the view that the "new product" condition was not an indispensable part of the legal test (which obviously was the decisive issue for the assessment of the "prima facie" condition by the judge), the submissions before the judge seemed to indicate that this condition was actually fulfilled.

³⁵ *Id.*, at para. 104.

³⁶ *Id.*, at para. 106

inevitable, short-lived disadvantages inherent in the adoption of such protective measures”³⁷ (i.e., the interim relief ordered by the Commission). According to the President of the Court, such serious and irreparable harm consisted in the irreversible weakening of IMS Health’s market position arising from the (hypothesized) development of rival sales data report services possibly based on a non-infringing geographic segmentation structure which IMS Health’s clients having experienced the benefits of competition for the duration of the Commission interim measures decision might finance and switch to, as well as the changes to IMS Health’s business policy that might result from competition by rivals provisionally licensed to use its geographic segmentation structure.³⁸ Finally, having regard i.a. to the public interest in respect for intellectual property rights and the doubts about the validity of the Commission’s interpretation of *Magill*, the President of the Court found that the balance of interests inclined in favor of ordering the suspension of execution of the Commission interim measures decision.³⁹

On appeal, the President of the Court of Justice ruled that the judge hearing an application for interim relief enjoys a broad discretion in determining whether the conditions of *prima facie* case and urgency under Article 104(2) of the Rules of Procedure of the Court are satisfied. Furthermore, the President held that there is no reason why the judge’s discretion should be limited when the application concerns a decision of the

Commission imposing interim measures. Specifically, the President rejected the applicant’s view that 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 also apply to the control exercised by the judge hearing an application for suspension with respect to a Commission decision imposing interim relief. Even though the Commission in such a decision only conducts a preliminary analysis of the impugned practice, the President expressly rejected the view that the applicant seeking suspension of that decision ought to show “an especially strong *prima facie* case” or demonstrate “manifest errors” in the Commission’s assessment of urgency.⁴⁰

The principle emphasized by both orders that the judge hearing an application for suspension enjoys a broad discretion in determining whether there is a *prima facie* case for suspension and whether implementation of the challenged decision pending the ruling in the main proceedings raises a risk of serious and irreparable harm to the applicant (including whether the balance of interests leans in favor of the applicant) is not new. As the President of the Court of First Instance noted, earlier judgments rendered in proceedings for interim measures already established that point.⁴¹ The main difference between *IMS Health* and earlier cases is that the judge’s findings on all conditions for the grant of interim measures in

³⁷ Id., at para. 132

³⁸ Id., at paras. 128-131

³⁹ Id., at paras. 143 and 144.

⁴⁰ See *NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc.*, Case C-481/01 P (R), EU:C:2002:223, at paras. 55-61.

⁴¹ See *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259, at paras 56-75.

IMS Health seemed guided by his own views of the relationship between competition and the exercise of intellectual property rights, different from those of the Commission,⁴² and appear to have led to considerable relaxation of the conditions under which the European Courts may suspend Commission decisions ordering interim relief.

Any decision that imposes interim measures in respect of a situation that does not squarely fall within the scope of the European Courts' consistent case law on Article 101 and Article 102 TFEU can arguably fulfil that "*prima facie*" condition for suspension by the courts as applied in *IMS Health*. Indeed, the enforcement of Article 101 or Article 102 TFEU in any novel situation and, more generally, any novel

interpretation of those provisions is capable of giving rise to divergence of views between the Commission and the addressee of the decision, as demonstrated by the addressee's bringing of annulment proceedings against that decision. In the absence of objective criteria to distinguish "serious doubts" from uncertainties or ambiguities that fall below that threshold, any such dispute can be regarded as "serious" and thus satisfy the "*prima facie*" requirement for suspension by the European courts.

Furthermore, *IMS Health* shows that the condition of "urgency" justifying suspension of the interim relief granted by the Commission is fulfilled when enforcement of the interim measures may have possible effects on the structure and dynamics of competition that would survive annulment of the interim measures decision. This test – which is much broader than the 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 – is met even if those possible effects do not stem directly from the decision and instead may result from business decisions made by the beneficiaries of the interim measures or by third parties affected by the implementation of those measures. In any event, the test as applied in *IMS Health* is likely to be satisfied where 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.⁴³

⁴² As mentioned above, the *prima facie* case for suspension of the Commission decision in *IMS Health* is entirely based on the judge's view that the Commission had adopted an extensive interpretation of *Magill*. Furthermore, in his findings on urgency, the judge emphasized the fundamental importance of copyright for society and emphatically (and correctly) rejected the view that copyright could be reduced "to a purely economic right to receive royalties" pending the judgment in the annulment proceedings (*IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259, at para. 125). The same considerations about the importance of copyright underlie the judge's findings on the balance of interests – *id.*, at para. 144: "where there is, on the face of it, a clear public interest underlying the applicant's effort to enforce and profit from the specific subject-matter of its copyright in the 1 860 brick structure, the inherently exceptional nature of the power to adopt interim measures would normally require that conduct whose termination or amendment is targeted by such measures fall clearly within the scope of the Treaty competition rules (...) In this context, where the abusive nature of the applicant's conduct is not unambiguous having regard to the relevant case-law and where there is a tangible risk that it will suffer serious and irreparable harm if forced, in the meantime, to license its competitors, the balance of interests favours the unimpaired preservation of its copyright until judgment in the main action."

⁴³ As mentioned above, this is the situation in which to date, interim measures have most often been imposed.

Accordingly, the Commission's hesitancy to consider interim measures since *IMS Health* may probably be attributed to the likelihood that the addressee of a positive order would immediately seek suspension before the European courts and to the consequent constraints this imposes on the Commission in establishing the *prima facie* infringement of competition law as well as urgency: 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 accordingly 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.

In an article published in 2008, Philip Lowe, then Director General for Competition, and Frank Maier-Rigaud from NERA suggested that one reason why the Commission has rarely ordered interim measures may be that "proceedings under Article 8 appear as increasing the burden of investigation, since they add a full-blown procedure (and likely judicial review) to the main investigation. Procedural requirements are quite substantial (statement of objections; right of the parties to be heard; probable judicial challenge). The resources spent on the Article 8 procedure are thus not used for the main investigation, and this may delay the adoption of the final decision."⁴⁴ Beyond the procedural steps involved in the interim measures proceedings – which are similar to those applicable in

jurisdictions like France which are less loath to impose interim measures – it seems that the evidentiary requirements which those steps are intended to address and the resources which the Commission would need to invest in order to meet them as a result of the constraints arising from *IMS Health* may actually be the reason why the Commission has since been reluctant to order interim relief.

4. SOME SUGGESTIONS TO ENCOURAGE APPROPRIATE RECOURSE TO INTERIM MEASURES

Interim measures are warranted where there is a risk of serious and irreparable damage to competition, that is, damage to competition which could no longer be remedied by the decision adopted by the Commission upon the conclusion of the proceedings.⁴⁵ Failure to consider the adoption of interim measures for reasons unrelated to the specific circumstances of the case may have very negative consequences for all the stakeholders, including the undertakings affected by the impugned practice, consumers and the Commission itself whose final decision may not eliminate the harm to competition caused by the impugned practice in the course of the investigation. It is the responsibility of the Commission and of the European courts who may review decisions of the Commission ordering interim measures to ensure that such measures are adopted whenever appropriate. We offer below some thoughts about possible changes to that might encourage the Commission to consider interim measures where appropriate.

⁴⁴ Philip Lowe and Frank Maier-Rigaud, *Quo Vadis Antitrust Remedies*, 2007 *Fordham Comp. L. Inst.* 597-611 (B. Hawk ed. 2008), at 609.

⁴⁵ See *La Cinq v Commission*, Case T-44/90, EU:T:1992:5, at para. 80.

At the outset, it is clear that the judge hearing the application for suspension enjoys broad discretion in assessing whether the conditions for suspending the Commission decision ordering interim relief are fulfilled. This is true even though first, the judge has to review and decide issues which are quite similar to those assessed by the Commission in the decision imposing interim measures and second, in practice, suspension of that decision by the judge usually has the same effect as annulment of the decision.⁴⁶ Despite those features which

⁴⁶ This is because the average duration of annulment proceedings in competition matters before the General Court is not shorter than the average duration of Commission investigations in competition cases, so that the Commission can come to a final decision superseding the provisional measures decision – and the Court interim measures order relating to that decision – before the proceedings for annulment of the provisional measures decision are completed. Over the past five years, the average duration of annulment proceedings before the General Court in competition matters has been around 46 months – see at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001frc.pdf>. Based on our computation, the average duration of investigations leading to commitments or infringement decisions in Article 101 and 102 cases other than cartels during the same period slightly exceeded 30 months as from the formal initiation of proceedings (as mentioned above, the actual duration of enforcement proceedings usually is longer than 30 months because formal initiation of the proceedings usually takes place months after the filing of the complaint or the initiation of the investigation *but* for the present purposes, the duration of the enforcement proceedings should be computed as from the adoption of the interim measures decision which usually takes place shortly after the formal initiation of proceedings). Thus, in three of the four cases in which proceedings were brought against a Commission interim measures decision, the Commission completed the competition proceedings and adopted a final decision which superseded the interim measures decision (or withdrew the interim measures decision due to market developments) *before* the Court ruled on the action for annulment of that interim measures decision. The fourth case – in which the Court ruled on the application for annulment of the interim measures decision shortly

are common to annulment and interim measures proceedings, the limitations applicable to the Court's review of complex economic assessments by the Commission in annulment proceedings do not apply in interim measures cases. Proceedings brought pursuant to Article 278 TFEU require the court to assess for itself whether the specific conditions for the grant of interim measures set by Article 104(2) of the Rules of Procedure of the Court, that is, the *prima facie* case and urgency, are fulfilled. The assessment of those two conditions can meaningfully be undertaken only if the court is empowered to review thoroughly all the relevant factual and legal circumstances of the case. The judge hearing the application for interim measures must benefit from the discretion necessary to verify whether the legality of the Commission decision *prima facie* raises serious doubts and whether execution of that decision pending the judgment in the annulment proceedings is likely to cause serious and irreparable harm to the applicant.⁴⁷

before the Commission adopted a final decision in the competition proceedings – is the only case in which the Court rejected the application for interim measures relating to the Commission interim measures decision. Accordingly, in all cases in which the Court ordered interim measures, those measures turned out to be definitive.

⁴⁷ The one exception to this principle concerns the situation where the applicant would claim that there is a *prima facie* case for the imposition of interim measures by the Court on the ground that the Commission erred in the assessment of complex economic or technical situations in the context of the Commission's provisional assessment of the impugned agreement or conduct or in the assessment of the risk of serious and irreparable harm to competition. In a situation where the *prima facie* case for interim measures by the Court is based on alleged errors of assessment of complex economic or technical situations by the Commission, the discretion of

This being said, *IMS Health* appears excessively to constrain the power of the Commission to impose interim measures in the appropriate circumstances. This is mainly because *IMS Health* gives little credit (if any) to the provisional nature of the Commission findings of facts or of law underlying the *prima facie* case in the decision imposing interim measures.

Commission decisions imposing interim measures are adopted in the course of the administrative proceedings and are based on provisional findings. Accordingly, 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 marking the end of multi-year proceedings including a thorough investigation and the hearing of all interested parties.⁴⁸ Rather, as the

the judge in assessing such claim should be limited to reviewing whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. The reason is that interim measures proceedings are ancillary to the main, annulment proceedings brought against the interim measures decision of the Commission and the grounds on which the applicant may rely to establish the *prima facie* case – that is, the reasonable possibility of annulment of the Commission decision – can only be grounds of appeal that the European courts may consider in the annulment proceeding. Arguments which exceed the scope of review by the courts in annulment proceedings cannot support a *prima facie* case in interim measures proceedings.

⁴⁸ See *Automobiles Peugeot SA and Peugeot SA v Commission*, Case T-23/90, EU:T:1991:45, at para. 61: “It must be pointed out that in proceedings relating to the legality of a Commission decision imposing provisional measures, 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.” See also *La Cinq v Commission*, Case T-44/90, EU:T:1992:5, at paras. 61 and 62.

Court emphasized in *Peugeot*, there is a valid case for the imposition of interim measures by the Commission if the legality of the impugned agreement or the impugned conduct under EU competition law raises “serious doubts.”⁴⁹

The judge hearing the application for suspension in *IMS Health* acknowledged that the Commission could impose interim measures where it has serious doubts about the legality of the impugned conduct. However, it is questionable whether *IMS Health* complies with the legal standard set by *Peugeot*. In *IMS Health*, the judge hearing the application for suspension found that the Commission’s extensive interpretation of the law supporting the *prima facie* case for interim measures “may be correct,” yet the judge suspended the execution of the Commission decision on the ground that the correctness of that interpretation raised a “serious dispute.” The judge’s assessment and his conclusion would be no different if the Commission’s findings regarding the validity of *IMS Health*’s refusal to license were definitive. Under the test set by *Peugeot*, the judge should have explained why there were at least serious doubts as to whether the Commission could entertain serious doubts about the validity of that interpretation.⁵⁰ This

⁴⁹ *Automobiles Peugeot SA and Peugeot SA v Commission*, Case T-23/90, EU:T:1991:45, at para 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.”

⁵⁰ Admittedly, the President of the Court of First Instance found that assuming the application for suspension of a decision imposing interim measures

sets the bar for the *prima facie* case for suspension of the Commission's interim measures decision quite high. It does rightly so because the Commission has the power to impose interim measures on the basis of a *prima facie* case.⁵¹

It may be that in *IMS Health*, the judge hearing the application for suspension was led to apply a softer standard because the decision imposing interim measures did not sufficiently emphasize the provisional nature of the Commission's findings, in particular those relating to the (i)legality of IMS Health's conduct, and instead formulated those findings in quite definitive terms.⁵² Indeed, it is incumbent on the

must establish a "strong *prima facie*" case, this condition is met in *IMS Health* (at para. 106). However, this is unrelated to the provisional nature of the Commission's findings. Rather, the judge's finding responds to the argument (discussed above) that the judge hearing the application for interim measures must reconsider the same conditions as those found to be satisfied by the decision and that accordingly, the judge should be subject to the same standard of judicial review as that applicable to annulment proceedings against decisions based on complex economic assessments (see at para. 56).

⁵¹ It is worth noting that this conclusion is consistent with the principle set out by the President of the Court of First Instance and upheld on appeal by the President of the Court of Justice according to which the judge hearing the application for interim measures enjoys the same broad discretion in assessing whether the conditions set out in Article 104(2) of the Rules of Procedure are fulfilled, whether the application relates to a Commission decision imposing interim measures or a final decision laying definitive findings. In both cases, the degree of review by the judge hearing the application indeed is the same. However, the nature of the Commission's findings differs depending on the decision subject to the application, resulting in different standards in order to satisfy the conditions of Article 104(2).

⁵² See in particular paragraphs 70 and 74 of the Commission decision in *IMS Health* concerning the legal criteria to establish the existence of abuse and the issue whether these criteria are fulfilled, respectively.

Commission in the decision imposing interim measures to underline the provisional nature of the findings relating to the *prima facie* case for interim measures, for instance, by highlighting that on the basis of the preliminary investigation and having regard if applicable to the novelty of the issues raised by the case, the validity of the impugned conduct under EU competition law raises serious doubts. The key point is to avoid any suggestion in the decision imposing interim measures that the findings relating to the legality of the impugned conduct are definitive or quasi-definitive. Besides, it is incumbent on the judge hearing the application for suspension to acknowledge that Commission is empowered to impose interim measures where the validity of the impugned conduct under EU competition law raises serious doubts. Provided the Commission substantiates those doubts in the decision imposing interim measures, that decision should be immune from any *prima facie* finding for suspension by the Court on that ground.

As to "urgency," as indicated above, the Court's finding in *IMS Health* that implementation of the interim measures ordered by the Commission would cause serious and irreparable harm appears to lack strong supporting evidence (i.e., the alleged harm and/or its irreparable nature are largely speculative) and to be based on developments that would likely fail a counterfactual test (i.e., there is no causal link between the harm and the interim measures ordered by the Commission). The experience gained in prospective competition analysis through merger control enforcement should help avoid the recurrence of such errors. On both issues, that is, causation and evidentiary requirements

applicable to prospective competition analysis, significant progress has been made by both the Commission and the European Courts and the learnings of merger control can largely be transposed to interim measures proceedings while taking into account the different time periods within which interim measures and merger control proceedings respectively need to be completed.

“Urgency” has usually been the main hurdle to the adoption of interim measures.⁵³ The test laid down by Article 8 of Regulation n° 1 whether absent interim relief, there is a risk of “serious and irreparable harm to competition” pending the decision on substance, has shifted the focus away from the party applying for interim measures. The assessment of urgency must be based on a broader perspective, weighing the effects of the impugned practice and of the interim measures contemplated by the Commission on all stakeholders, including the undertakings concerned and consumers. Under this test, the key question should be whether taking into account all relevant circumstances, the market participants’ ability and incentives to compete (including the incentives to enter the market) are better served if the target of the investigation implements the impugned conduct until the end of the proceedings or if the Commission steps in and impose some interim relief. The test under Article 8 of Regulation n° 1 is thus broader than that focusing on the survival of

the undertaking seeking interim measures, and it conflates the assessment of the harm caused by the impugned conduct with the balance of interests. However, a proper application of that broader test will also reduce the risk of suspension of the Commission decision ordering interim relief, precisely because the interests of the undertaking subject to interim measures should be adequately weighted in the decision.⁵⁴

The condition of “urgency” should be more easily satisfied in markets featuring scale or network effects where the market advantage illegally obtained through the implementation of anti-competitive practices may quickly become unassailable and conversely, the handicap caused to the target of such practices grows over time.⁵⁵ As the investigation progresses, the Commission may form a better view, first, of the likely length of its own proceedings and, second, of the impact of the impugned conduct on competition over that period. While interim relief might not be warranted in the early days of the investigation, the dynamics of the industry may change this

⁵³ It is noteworthy that in *Ford, Peugeot/EcoSystem* and *IMS Health*, the judge hearing the application for interim measures took the view that the interim relief granted by the Commission would cause serious harm to the applicant, exceeding the transitory disadvantages arising from provisional, “conservatory” measures.

⁵⁴ As the Court ruled in *IMS Health*, “the conditions for the ordering of suspension of operation and interim measures must be the object of an overall examination” and “the strength or weakness of the pleas relied on to show a prima facie case may be taken into consideration by the judge in his assessment of urgency and, if appropriate, of the balance of interests” (*NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc.*, Case C-481/01 P (R), EU:C:2002:223, at para. 63). In other word, 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.

⁵⁵ See also Philip Lowe and Frank Maier-Rigaud, *Quo Vadis Antitrust Remedies*, 2007 *Fordham Comp. L. Inst.* 597-611 (B. Hawk ed. 2008), at 609.

assessment and require the adoption of interim measures in the course of the proceedings.

5. CONCLUSION

There seems to be a growing mismatch between business life and the enforcement of competition rules designed to police it. Businesses evolve at an ever faster pace while competition law enforcement in Europe appears stalled by cumbersome and slow processes. This issue needs to be addressed for European competition law to remain as relevant as it has been in the past 25 years.

Some of the constraints that delay European competition law enforcement result from important progress in the protection of the right to due process, and those should be accepted. Some others are due to the institutional structure of the Commission. All or part of those that can be removed or attenuated should be, but this will require time. Furthermore, the Commission should also use the available tools to eliminate the negative effects of the extended duration of competition law proceedings. Firstly, the European Commission should exercise the power recognized by the European Court of Justice in *Ufex* to impose remedies that restore the competitive situation and dynamics that would prevail in the absence of the competition law infringement. Secondly, the Commission should consider imposing interim measures in order to avoid that the presumptively illegal practice cause irreparable harm pending the administrative proceedings.

Interim measures have rarely been imposed by the Commission, even in relation to agreements or practices in fast-moving

industries. The Commission and national competition authorities should refrain from granting interim relief too generously as this would risk undermining incentives to compete and innovate. However, it seems that the European Commission has put that tool on the backburner for an indefinite period of time. It is true that the European courts have imposed significant constraints on the ability of the Commission to adopt interim relief. With all due respect, we believe that for the reasons discussed in this paper, these constraints are excessive. The Commission should take the initiative and exercise its power to order interim relief in cases where it considers that the circumstances so warrant. The Court will then have the opportunity to review and, if it also sees it appropriate, adjust the requirements arising from past rulings.

ANNEX

| Case | Commission Interim Measures Decision | European Courts – Interim Measures Proceedings relating to Commission Interim Measures Decision | Commission Final Decision | European Courts – Annulment proceedings against Commission Interim Measures Decision |
|-------------------------|--------------------------------------|--|--|--|
| Ford Werke | 18 August 1982 ¹ | 29 September 1982 ² | 16 November 1983 ³ | 28 February 1984 ⁴ |
| ECS / AKZO | 29 July 1983 ⁵ | (No appeal) | 14 December 1985 ⁶ | (No appeal) |
| BBI / Boosey & Hawkes | 29 July 1987 ⁷ | (No appeal) | | (No appeal) |
| EcoSystem / Peugeot | 26 March 1990 ⁸ | 21 May 1990 ⁹ | 4 December 1991 ¹⁰ | 12 July 1991 |
| Mars | 25 March 1992 ¹² | 16 June 1992 ¹³ | 23 December 1992 ¹⁴ | Case withdrawn from the Register on 1 April 1993 |
| Sealink | 11 June 1992 ¹⁶ | (No appeal) | | (No appeal) |
| ICG / CCI Morlaix | 16 May 1995 ¹⁷ | (No appeal) | | (No appeal) |
| NDC Health / IMS Health | 3 July 2001 ¹⁸ | 10 August 2001 (ex parte) ¹⁹ 26 October 2001 (Court of First Instance) ²⁰ 11 April 2002 (Court of Justice) ²¹ | Proceedings discontinued (Interim Measures Decision withdrawn on 13 August 2003) ²² | Case withdrawn from the register on 10 March 2005 ²³ |

1. Commission Decision of 18 August 1982 (IV/30.696 - Distribution system of Ford Werke AG - interim measure), OJ 1092 L 256, pp. 20–28
2. *Ford Werke AG and Ford of Europe Incorporated v Commission*, Joined Cases 228 and 229/82R, EU:C:1982:320
3. Commission Decision of 16 November 1983 (IV/30.696 - Distribution system of Ford Werke AG), OJ 1983 L 327, pp. 31–39
4. *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission*, Joined cases 228 and 229/82, EU:C:1984:80
5. Commission Decision of 29 July 1983 (IV/30.698 - ECS/AKZO: interim measures), OJ 1983 L 252, pp. 13–21
6. Commission Decision of 14 December 1985 (IV/30.698 - ECS/AKZO), OJ 1985 L 374, pp. 1–27
7. Commission Decision of 29 July 1987 (IV/32.279 - BBI/Boosey & Hawkes: Interim measures), OJ 1987 L 286, pp. 36–43
8. Commission Decision of 26 March 1990 adopting (IV/33.157 Ecosystem/Peugeot - Provisional measures)
9. *Automobiles Peugeot SA and Peugeot SA v Commission*, Case T-23/90 R, EU:T:1990:31
10. Commission Decision of 4 December 1991 (Case IV/33.157 - Eco System/Peugeot), OJ 1992 L 66, pp. 1–12
11. *Automobiles Peugeot SA and Peugeot SA v Commission*, Case T-23/90, EU:T:1991:45
12. Commission decision of 25 March 1992 (IV/34.072 - Mars/Langnese and Schoeller - interim measures)
13. *Langnese Iglo GmbH and Schöller Lebensmittel GmbH & Co KG v Commission*, Cases T-24/92 R and T-28/92 R, EU:T:1992:71
14. Commission Decisions of 23 December 1992 (Case IV/31.533 – Schöller Lebensmittel GmbH ' Co. KG and Case IV/34.072 – Langnese-Iglo GmbH), OJ 1993 L 183, 26.7.1993, pp. 1-18 and pp. 19–37

15. Order of the President of the Court of First Instance of 1 April 1993 in Case T-24/92, Langnese-Iglo GmbH v Commission and Case T-28/92, Schöller Lebensmittel GmbH v Commission, OJ 1993 C 124, p. 13
16. Commission Decision of 11 June 1992 (IV/34.174 – Sealink/B&I – Holyhead : Interim measures), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/34174/34174_2_2.pdf
17. European Commission, 25th Report on Competition Policy (1995), COM(96)126 final, para. 43
18. Commission Decision of 3 July 2001 (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures), OJ 2002 L 59, pp. 18–49
19. *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:200
20. *IMS Health Inc. v Commission*, Case T-184/01 R, EU:T:2001:259
21. *NDC Health GmbH & Co. KG and NDC Health Corporation v Commission and IMS Health Inc.*, Case C-481/01 P (R), EU:C:2002:223
22. Commission Decision of 13 August 2003 (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures), OJ 2003 L 268, pp. 69-72
23. *IMS Health, Inc. v Commission*, Case T-184/01, EU:T:2005:95

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