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Sharpening the European Commission's tools: interim measures

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ABSTRACT

The European Commission is looking for new tools to enforce competition law faster and more effectively. In this context, the article explores interim measures. These allow the Commission to intervene when the anticompetitive harm must be addressed quickly. Although the antitrust community generally encourages the Commission to use interim measures more frequently, there is room to discuss how to make them sharper. For this purpose, this article studies whether there is any obstacle that may be impeding the Commission from using interim measures and explores aspects that can be reformed to enhance the effectiveness of this tool. The conclusion is that, while there is no need to make any fundamental change for the Commission to use interim measures, three aspects can be amended: the standard of "irreparable damage", the notion of victims, and the procedure. For each of them, the article offers two options for reform drawing from other jurisdictions.

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I. Introduction

The European Commission is endeavouring to find ways of speeding up the enforcement of EU competition law. The need to address market failures in digital markets requires competition authorities to be equipped with adequate tools that allow them to intervene as swiftly as possible. Consider, for example, market tipping in digital contexts with strong network effects: once the market has tipped, it turns into a monopolistic structure where antitrust intervention becomes more difficult and less effective. This is one of the reasons why the Commission has recently

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launched two public consultations on the creation of a new competition tool to deal with structural competition problems and on the elaboration of an ex ante regulation for digital platforms.[1]

These public consultations represent the competition law system to come: one that it is faster and strives for effectiveness. But what about the tools that are already at the Commission's disposal? Among the various instruments to enforce competition law there is one that allows the Commission to implement remedies quickly: interim measures. This tool is useful when competition is being seriously damaged and the Commission must intervene as soon as possible. Truth be told, the Commission has already acknowledged the potential of interim measures. In July 2017, a few days after concluding the investigation of *Google Shopping*,[2] Commissioner Vestager stressed that the Commission needs more powerful weapons to tackle competitive concerns in the digital economy, emphasizing the usefulness of interim measures.[3] The interest for this tool was later reflected on the ECN+ Directive, which requires Member States to empower their national competition authorities (NCAs) to issue interim measures *ex officio*.[4] It is worth noting that, in a note accompanying the directive, the Commission said that it will study means of simplifying interim measures procedures within the European Competition Network by 2023. Moreover, the 2019 interim measures decision in *Broadcom*,[5] the first one after nearly two decades, is proof of a renovated appetite for this tool.

It is therefore timely to open up a discussion about the adequacy of interim measures; an instrument that can contribute to make antitrust intervention faster and more effective. The new regulation and competition tool that the Commission plans to adopt are appealing and, surely, will spark off heated debates about their purpose and scope. In the meantime, interim measures are the way to go. The literature

[1]Commission, 'Antitrust: Commission consults stakeholders on a possible new competition tool' (Press release IP/20/977); Commission, 'Commission launches consultation to seek views on Digital Services Act package' (Press release IP/20/962).

[2]*Google Search (Shopping)* (Case AT.39740) Commission decision 2018/C 9/08 [2018] OJ C9/11.

[3]Rochelle Toplensky, 'EU Considers Tougher Competition Powers', *Financial Times* (London, 2 July 2017) <www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895> accessed 29 July 2020.

[4]Article 11 of Directive (EU) 1/2019 of the European Parliament and the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3. See also para 38 of the Preamble.

[5]*Broadcom* (Case AT.40608) Commission interim measures decision of 16 October 2019. The decision is still not public at the time of writing, but a summary of the case can be seen at Commission, 'Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets' (Press release IP/19/6109).

generally encourages the Commission to use them more frequently, and I share the enthusiasm for this tool.[6] Nevertheless, there is room for exploring interim measures in greater detail. The Commission has expressed its willingness to issue more interim measures decisions, but it has still said nothing about how to reform this instrument and make it more powerful. Against this backdrop, the purpose of this article is twofold: first, to see whether there is any obstacle that impedes the Commission to issue interim measures more frequently that calls for changes; and, second, to study potential paths of reform to increase the effectiveness of this tool.

The argument is structured as follows. Section II provides some background to the Commission's interim measures decisions. Given that this instrument has not been used for almost twenty years, it is relevant to visit the old cases and explore what could have stopped the Commission from adopting interim measures. To this end, this section maps out different obstacles signaled in the literature and by NCAs, and asks to what extent these obstacles can be overcome by the Commission. Section III moves on to explore what issues of interim measures can be reformed to make them more effective. In particular, the section studies three aspects: the legal standard of "irreparable damages", the notion of victims, and the procedure to adopt interim measures. For each of them, the section presents two alternatives for policy-makers to consider. The goal is not to dictate what the Commission should do, but rather to offer a menu of options with their respective pros and cons that will satisfy conservative and progressive experts of the antitrust community to a different extent. Section IV concludes.

[6]See, generally, Jean-Yves Art, 'Interim Relief in EU Competition Law: A Matter of Relevance' (2015) 1 Italian Antitrust Review 55; Alex J Burnside and Adam Kidane, 'Interim Measures: An Overview of EU and National Case Law' [2018] Concurrences No 86718; Marc Bourreau and Alexandre De Streel, 'Digital Conglomerates and EU Competition Policy' (2019), 30–31 <https://ssrn.com/abstract=3350512> accessed 29 July 2020; Despoina Mantzari, 'Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets' (2020) <https://ssrn.com/abstract=3544877> accessed 29 July 2020. Furthermore, competition authorities from different jurisdictions are encouraging the use of interim measures. See, inter alia, German Monopolies Commission, 'Competition Policy: The Challenge of Digital Markets' (2015) Special Report No. 68, para 509; Isabelle de Silva, 'The Future of Competition Law: Time to Change or Time to Adapt?', Keynote Speech at the 46th Fordham Competition Law Institute Annual Conference 2019, 6–7 <www.autoritedelaconcurrence.fr/sites/default/files/2019-09/keynote_article_fordham.pdf> accessed 29 June 2020; the Belgian, Dutch and Luxembourg Competition Authorities, 'Joint Memorandum on Challenges Faced by Competition Authorities in a Digital World' (10 October 2019). For a less enthusiastic view on the power of competition authorities to issue interim measures, see Mario Siragusa, 'Interaction between Public and Private Enforcement of Competition Law' in Philip Lowe, Mel Marquis and Giorgio Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement* (Hart Publishing 2016) 588–89.

II. Background

A. Fading into oblivion

The incorporation of interim measures into the Commission's toolkit exemplifies the contribution of the Court of Justice of the European Union (CJEU) to the enforcement of competition law. The story begins in the early 1980s with Camera Care, a retailer of photographic equipment, filing a complaint with the Commission against Hasselblad, a manufacturer of cameras and accessories. The main charge was that Hasselblad had interrupted the supply of its goods which were essential to Camera Care. The applicant argued that this disruption was causing it substantial damage and loss of business and asked the Commission to adopt interim measures as a quick relief.[7] In a letter addressed to Camera Care, the Commission regretted that it could not take its request forward.[8] The reason was Article 3 of Regulation 17/62,[9] which authorized the Commission to take decisions to bring competition law infringements to an end but it was silent on its power to adopt interim measures. The case was brought to the CJEU where the Commission lobbied in the oral hearing and written submissions for interpreting Article 3 broadly. This implied empowering the Commission to adopt interim measures to guarantee the efficacy of competition rules in clear-cut cases, such as boycotts or refusals to supply.[10] This argument was controversial because it meant granting the Commission more powers than those established in the Treaties. AG Warner, indeed, advised that this issue should be addressed to the Council and not to the CJEU.[11] However, the court sided with the Commission and stated that interim measures were necessary for the sake of competition policy.[12]

Camera Care, thus, shows the CJEU's willingness to provide the Commission with more tools to ensure the effective application of EU competition law.[13] The case was a success story for the Commission and, for several years, it made good use of interim measures. The clearest examples are refusal to supply cases where the Commission ordered the defendants

[7]Case 792/79 R *Camera Care v Commission* [1984] ECR 119, 124.
[8]ibid, para 3.
[9]Council Regulation No 17 of 7 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204.
[10]*Camera Care* (n 7) 126.
[11]Case 792/79 R *Camera Care v Commission* [1984] ECR 119, Opinion of AG Warner, p 137.
[12]*Camera Care* (n 7) paras 14–15.
[13]Anthony Arnull, *The European Union and Its Court of Justice* (OUP 1999) 445; Michelle Cini and Lee McGowan, *Competition Policy in the European Union* (2nd edn, Palgrave Macmillian 2008) 55–56.

to resume the supply of their goods.[14] Although more marginally, the Commission also adopted interim measures in other types of infringements. For instance, in *Mars/Langnese and Schöller*, the Commission prohibited Langnese and Schöller from enforcing their exclusive dealing agreements with retailers which foreclosed the upstream market for ice cream.[15] The purpose was to enable the complainant, Mars, to access the market temporarily. In *Sealink/B&I*, the Commission required Sealink to give the same treatment to B&I regarding the use of port facilities as that given to vessels of its own subsidiary.[16] In *ECS/Akzo*, the Commission prevented Akzo to charge its buyers in the UK prices below the sum of its production costs to rule out the possibility that it engaged in predatory pricing behaviour until a final decision was made.[17]

The Commission was not, however, successful in every case. In *La Cinq*, for example, the Commission had rejected the request for interim measures made by La Cinq, a French broadcasting provider, which had not been admitted as member in the association called European Broadcasting Union.[18] In view of the complainant, this discriminatory exclusion from the association was seriously damaging its business. The General Court (GC) followed this argument in the appeal and considered that the Commission had applied the legal standard for interim measures too strictly. The Commission had said in its decision that it could not find a flagrant breach of competition law to order interim measures. The GC, however, stated that such a flagrant breach was unnecessary: it was sufficient to establish that the existence of a competition law infringement was probable.[19] In any event, the outcome of *La Cinq* did not discourage the Commission. On the contrary, the Commission interpreted the court's words as an extension of its powers as it had clarified that the

[14] *Ford Werke* (Case IV/30.696) Commission decision 82/628/EEC [1982] L256/20 (although this decision was modified by order of the CJEU in Joined Cases 229 and 228/82 R *Ford v Commission* [1982] ECR 3091, and it was finally annulled in Joined Cases 228 and 229/82 *Ford v Commission* [1984] ECR 1129); *BBI/Boosey & Hawkes* (Case IV/32.279) Commission decision 87/500/EEC [1987] OJ L286/36; *Eco System/ Peugeot* (Case IV/33.157) Commission decision 92/154/EEC [1992] OJ L66/1 (later confirmed in case T-23/90 *Peugeot v Commission* [1991] ECR II-653); *Irish Continental Group/CCI Morlaix (Roscoff)* (Case IV/35.388) Commission decision C(95)787 final, of 16 May 1995. Another refusal to supply case was *Sea Containers/Stena Sealink* (Case IV/34.689) Commission decision 94/19/EC [1994] OJ L15/8; however, the Commission finally did not impose interim measures in this case as the two undertakings made an agreement to solve the dispute during the investigation. See para 79 of the decision.

[15] *Mars/Langnese and Schöller* (Case IV/34.072) Commission decision of 25 March 1992 (not publicly available). The decision was modified by order of the GC in Joined Cases T-24/92 R and 28/92 R *Langnese-Iglo v Commission* [1992] ECR II-1839.

[16] *Sealink/B&I—Holeyhead* (Case IV/34.174) Commission decision of 11 June 1992.

[17] *ECS/Akzo* (Case IV/30.689) Commission decision 83/462/EEC [1983] OJ L252/13.

[18] *La Cinq SA/Union Européenne de Radiodiffusion* (Case IV/33.249) Commission decision of 14 August 1990 (not publicly available).

[19] Case T-44/90 *La Cinq v Commission* [1992] ECR II-1, para 62.

bar to find prima facie infringements was lower than the one that the Commission had applied.[20]

A few years later, coinciding with the first steps taken to elaborate Regulation 1/2003, the Commission changed its approach and interim measures faded into oblivion. This happened right after the 2002 defeat in *IMS Health*. This case concerned the use of IMS Health's database called "1860 brick structure" through which IMS provided pharmaceutical companies with regional sales data. IMS suspected that two competitors in Germany were using copies of its database and it brought an application for copyright infringement before German courts. In the meantime, NDC, another competitor, requested IMS access to the database. IMS refused the request, which led NDC to ask the Commission to order interim measures and get provisional access to the database. The Commission granted such measure. It argued that NDC, together with another competitor called AzyX, would leave the market unless they got access to the 1860 brick structure.[21] The GC, however, upheld the appeal of IMS. The main argument to overturn the Commission's decision was the lack of evidence that there was an appreciable impact on final consumers that warranted quick remedies through an interim measures decision.[22]

After *IMS Health*, the Commission's power to issue interim measures was legislated in Article 8 of the current Regulation 1/2003. Having said that, it is ironic that this tool, which represents a success episode of the Commission, slipped into the shadows for almost two decades: between its decisions in *IMS Health* in 2001 and *Broadcom* in 2019, the Commission showed no interest in interim measures. The question is why. Is it just due to a matter of policy agenda, or are there other reasons or obstacles that explain the rare use of interim measures? The rest of the section explores this query.

B. Mapping out obstacles to interim measures

A look into case law and academic debates on interim measures both at the EU and national levels reveals that there is a variety of obstacles that might explain the reluctance for this tool. These obstacles are related to enforcement costs, the non-existence of *ex parte* procedures, the difficulties for the competition authority to find prima facie infringements, and the intensity of judicial review.

[20]Commission, '22nd Report on Competition Policy 1992' (Brussels, Luxembourg 1993), para 325.
[21]*NDC Health/IMS Health* (Case COMP D3/38.044) Commission decision [2002] OJ L59/18, paras 193–201.
[22]Case T-184/01 R *IMS Health v Commission* [2001] ECR II-2349, para 145.

The first obstacle concerns administrative costs. For instance, two former officials of the Commission suggested that interim measures increase the burden of investigation because new resources must be allocated for this purpose.[23] This is perhaps why the Director General of DG Competition at the time of *Camera Care* considered that this case was a poisoned chalice, as it meant extra work for the staff.[24] That is to say, the authority needs time to investigate the matter, study the market, and decide which remedy suits best at the expense of other tasks.[25] The Commission indicates that the average length for interim measures decisions is about three to eight months.[26] However, as *Broadcom* illustrates, the length can be longer as it took the Commission one year since the beginning of the investigation to adopt interim measures.

Another angle of costs is the litigation that can follow the interim measures decision.[27] This point was raised by the UK national competition authority (NCA) in *London Metal Exchange*. Here, Spectron, an electronic trading service provider, had complained about the exclusionary practices of its rival London Metal Exchange (LME). More concretely, Spectron argued that LME was offering services below cost via its platform and had engaged in price discrimination by charging the same trading fees but with additional services.[28] Moreover, LME wanted to expand the trading business hours of its electronic platform to the Asian segment of the market, where Spectron was particularly active.[29] Spectron argued that it would be forced to leave the market if LME continued with its expansion plan and exclusionary practices. Finally, the NCA ordered interim measures limiting LME's trading hours to stop its expansion to the Asian market.[30] LME challenged the interim measures decision and, before the court, there was a discussion about litigation costs. More concretely, the NCA argued that future costs awards were a decisive factor when it comes to interim measures, as they might refrain the NCA from using this tool.[31] The court

[23]Philip Lowe and Frank Maier-Rigaud, 'Quo Vadis Antitrust Remedies', *Fordham Competition Law Institute* (Juris Publishing 2008) 609.
[24]John Temple Lang, 'The Strengths and Weaknesses of the DG Competition Manual of Procedure' (2013) 1 Journal of Antitrust Enforcement 132, fn 35.
[25]Another commentator has also pointed out that interim measures decisions increase the costs of translating documents as they must be translated into the other official languages of the EU as well. See Andreas Nordsjo, 'Regulation 1/2003: Power of the Commission to Adopt Interim Measures' (2006) 27 European Competition Law Review 299, 307.
[26]Commission, 'Antitrust Manual of Procedures' (Brussels, March 2012), ch 17, para 20.
[27]Burnside and Kidane (n 6) 4.
[28]OFT's Direction given pursuant to Section 35 of the Competition Act 1998, *London Metal Exchange*, of 27 February 2006, paras 16–18.
[29]ibid, para 31.
[30]ibid, para 54.
[31]*The London Metal Exchange v Office of Fair Trading* [2006] CAT 19 (8 September 2006), para 165.

responded by saying that the NCA ought not to be deterred by future costs awards if it made sure that its interim measures were sound.[32] Finally, the court was not convinced by the justifications for interim measures in this case and ordered the NCA to cover litigation costs.[33] Leaving aside the question of whether the NCA's argument was convincing, the reality is that it has not used interim measures since this case.[34]

Although there is some strength in these arguments, a cost increase due to the use of interim measures must not be exaggerated. Any increment in expenses should not imply much larger costs than the regular expenditure that any competition authority already has in its daily routine. For example, personnel working on a case can be also in charge of assessing the appropriateness of interim measures in the selfsame case. That is to say, the use of interim measures does not necessarily call for multiplying the number of staff and case handlers. Moreover, although it is true that interim measures can take long to decide, sometimes it can be quicker than one might expect. As the Commission itself acknowledges, in *ECS/Akzo* the measures were adopted in ten weeks.[35] Thus, it is difficult to see why interim measures should imply a major rise in expenditure that cannot be easily managed by the Commission. Nor should one overestimate the deterrent effect of losing appeals. Granted, competition authorities are exposed to costs awards, but this is a risk that they also take when it comes to infringement decisions. From this perspective, it is not clear why losing appeals concerning interim measures has a larger deterrent effect than losing appeals about infringement decisions. Competition authorities, indeed, may have more to gain than to lose from interim measures decisions, as they may increase their leverage vis-à-vis undertakings. The reason is because, far from incentivizing undertakings to challenge interim measures before courts, they may feel compelled to offer commitments if the competition authority presents a solid interim measure decision.[36] This is the case of Broadcom, which has recently offered commitments after the Commission's interim measures.[37]

The composition of Article 8 of Regulation 1 may also be a stopper to adopt interim measures. According to this legal provision, the

[32]ibid, para 167.
[33]ibid, para 175.
[34]Thus far, the UK NCA has only rejected a request for interim measures lodged by Worldpay in the context of multilateral exchange fees. See the summary of the CMA's interim measures decision of 27 March 2015.
[35]Commission, 'Antitrust Manual of Procedures' (n 26).
[36]Lowe and Maier-Rigaud (n 23) 610.
[37]Commission, 'Commission seeks feedback on commitments offered by Broadcom concerning TV set-top box and modem chipset markets' (Press release IP/20/755).

Commission can take interim measures decisions when acting on its own initiative but it does not allow explicitly undertakings to request them. The fact that complainants do not have a right to interim measures is in stark contrast with the situation prior to Regulation 1. According to the CJEU in *Camera Care*, undertakings could ask the Commission to adopt interim measures and appeal if they did not agree with the Commission's decision.[38] This is what happened in *La Cinq*, where the Commission's rejection of an interim measures request was followed by an appeal of the complainant. Moreover, Article 8 differs from the Commission's White Paper on the modernization of Articles 101 and 102 TFEU where it was said that interim measures would encourage victims to approach the Commission.[39] Quite the opposite, the current design of Article 8 discourages victims and leads them to seek relief from national courts.[40] See, for example, *Unlockd v Google* in the UK, where Unlockd asked the courts and not the NCA to adopt interim measures.[41] In this case, Unlockd had developed a smartphone application that displayed ads in Android users once they unlocked their devices. In exchange for seeing the ads, users would earn credits to be redeemed for other services such as mobile data or premium content. After being available to download from Google Play Store for two years, Google banned Unlockd's app because, Google said, it infringed Google's advertisement policy. According to the UK Competition Act, interim measures can only be adopted by initiative of the NCA in an ongoing investigation.[42] Unlockd, then, sought interim relief from the court, which accepted the request. The design of Article 8 of Regulation 1 is very similar to the interim measures regime in the UK, and it seems fair to contend that undertakings only have the incentive to go to courts rather than to the Commission.

[38] *Camera Care* (n 7), paras 20–21. See, in this regard, John Temple Lang, 'The Powers of the Commission to Order Interim Measures in Competition Cases' (1981) 18 CMLR 49, 57–58.

[39] Commission, 'White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty' (Brussels, 28 April 1999), para 118.

[40] Temple Lang (n 24) 146.

[41] *Unlockd Ltd and Others v Google Ireland Ltd and Others* (Roth J, Chancery Division 8 May 2018). This decision is not available yet, but a brief summary can be seen here: Rosalind English, 'Win (for Now) for App Developer against Google' (*UK Human Rights Blog*, 11 May 2018) <https://ukhumanrightsblog.com/2018/05/11/win-for-now-for-app-developer-against-google/> accessed 29 July 2020. However, shortly after Unlockd moved into voluntary administration. The UK court gave Unlockd time to seek third party funding for the claim, but finally Unlockd dropped its claim and it had to pay some of the litigation costs to Google. See Matthew Garrahan, 'Unlockd Blames Google as It Falls into Administration' *Financial Times* (London, 12 June 2018) <www.ft.com/content/99963ace-6e55-11e8-852d-d8b934ff5ffa> accessed 29 July 2020; Case *Unlockd Ltd and Others v Google Ireland Ltd and Others* [2019] CAT 17 (21 May 2019).

[42] Section 35 of UK Competition Act 1998.

The question, however, is to what extent the lack of *ex parte* procedures is an obstacle that explains the absence of interim measures decisions. One might argue that this is important as it does not spur the Commission to take the initiative regarding this tool. However, it is also true that *ex parte* procedures are not strictly necessary. The Commission can still open an interim measures procedure if it observes signals in markets and in other complaints. For instance, in *London Metal Exchange*, the UK NCA took into account the complaint of Spectron to order interim measures despite the fact that, as Article 8 of Regulation 1, UK competition law does not explicitly allow for *ex parte* procedures either.[43] Furthermore, notwithstanding the configuration of Article 8, the Commission has used interim measures in *Broadcom*. Thus, the lack of *ex parte* procedures should not be an impediment to resort to interim measures.

The reform of interim measures in Germany suggests that the requirement of finding prima facie infringements may also deter competition authorities to use this instrument. Thus far, as under EU competition law, German competition law allows the NCA to adopt interim measures only in prima facie infringements. However, the German government has recently proposed to replace the requirement of "prima facie infringements" with "predominantly probable" infringements.[44] At first sight, it seems that the standard will be lower and, if the proposal is finally accepted, one might assume that the number of interim measures in Germany will boost more rapidly than at the EU level.

However, this is not a valid reason to explain the lack of interim measures either, as the standard of "prima facie infringements" is not as high as it might seem. Recall that, in *La Cinq*, the Commission argued that the complainant had not shown that there was a flagrant breach of competition law, but this was reversed by the GC. In particular, the court stated that the degree of certainty about the existence of an infringement cannot be the same as the level of certainty required to reach a final

[43]Nonetheless, the UK NCA explains that it welcomes applications for interim measures. See Competition & Markets Authority, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (18 January 2019), s 8.

[44]The draft bill of the German Competition Act is available at <www.d-kart.de/wp-content/uploads/2019/10/GWB-Digitalisierungsgesetz-Fassung-Ressortabstimmung.pdf> accessed 29 July 2020. The editors of D-Kart Blog have prepared an English version of the proposal available at <www.d-kart.de/en/blog/2019/10/14/der-referentenentwurf-zum-gwb/> accessed 29 July 2020. I assume any error in the translation. For a general comment on the German proposals, see Rupprecht Podszun and Fabian Brauckmann, 'Germany's Pressing Ahead: The Proposal for a Reformed Competition Act' [2019] Competition Policy International.

decision upon conclusion of the investigation.[45] To illustrate this point more clearly, it is useful to rephrase it in terms of probability. For example, let us agree in that, in order to establish an infringement of Article 102 TFEU, the Commission must make sure that the evidence shows that the infringement is more likely to have happened than not; that is to say, 51% of probability that the infringement has taken place.[46] If, according to *La Cinq*, the level of certainty for interim measures cannot be the same, this means that the probability to implement interim measures is lower than 51%, which is not high.[47] It follows that, in practice, the German proposal will not yield any different result than the current understanding of "prima facie infringement" by the EU courts.

The last concern that the Commission might have is the level of intensity of judicial review. As established in *Camera Care* and Article 8 of Regulation 1, parties subject to interim measures are entitled to appeal. The question for the Commission, however, is how much the EU courts can review. This worry has been voiced by the UK NCA, which has reiterated that courts should not admit appeals that attack the merits of interim measures decisions. The Furman Report acknowledges this claim and suggests that courts change their approach in judicial review of interim measures.[48] This might make sense from the perspective of the UK, as national competition law allows appeal courts to review decisions in full merits.[49]

On the other hand, the defeat of the UK NCA in *London Metal Exchange* was not because the court looked into the merits of the case. Rather, the court examined the procedure followed by the NCA to assess the evidence and it perceived a mismatch between the requirement

[45] *La Cinq* (n 19), para 61. See also Commission, 'Antitrust Manual of Procedures' (n 26), ch 17, para 13.

[46] Pablo Ibáñez Colomo and Alfonso Lamadrid de Pablo, 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017) 363. The question of which standard, if likelihood (51 percent probability that there is an infringement of competition law) or capability (when anticompetitive effects are plausible), applies to Article 102 TFEU is controversial but it falls outside the scope of this article. For an overview of the debate, see generally Pablo Ibáñez Colomo, 'The Future of Article 102 TFEU after Intel' (2018) 9 Journal of European Competition Law & Practice 293.

[47] Gábor Gál and Konstantina Strouvali, 'Interim Measures' in Ekaterina Rousseva (ed), *EU Antitrust Procedure* (OUP 2020) paras 9.20–9.22. For an argument stating that the CJEU raised the standard again in *IMS Health*, see Art (n 6) 68–69.

[48] Jason Furman and others, 'Unlocking Digital Competition - Report of the Digital Competition Expert Panel' (UK CMA 2019) paras 3.130, 3.136–39.

[49] UK Competition Act 1998, Schedule 8. For the sake of completeness, in the UK the NCA has opened a wider debate about the degree of judicial review of its decisions by national courts. For an overview of this debate, see, Nazzini, 'A Reform Too Few or a Reform Too Many: Judicial Review, Appeals or a Prosecutorial System under the UK Competition Act 1998?' (2020) Journal of Antitrust Enforcement (Forthcoming).

of urgency to impose interim measures and how the NCA handled the procedure. More concretely, the main problem for the court was that it took the NCA almost two months to consider whether LME's strategy to expand to the Asian market called for a quick intervention on the grounds of the public interest. This delay is important in interim measures cases. If the competition authority needs too much time only to see whether the measures are necessary, the delay may reveal that the matter is not urgent and, therefore, that there is no basis for interim measures.[50] The problem in *London Metal Exchange*, thus, had more to do with the NCA's procedure and the urgency of interim measures rather than on the degree of intensity of judicial review.

Moreover, a quick review of the case law in interim measures shows that, generally, EU and national courts are quite lenient towards competition authorities. For example, in *Amadeus v Google*, the French NCA had required Google to organize sessions to explain Google Ads users the rules that they had to follow for this service. The reason was that Google had terminated Amadeus' contract of Google Ads because, according to Google, Amadeus did not comply with the rules for using Google Ads.[51] In the appeal the court considered that the remedy was irrelevant to respond Amadeus' position after Google's conduct, but it confirmed the interim measures decision and the rest of remedies imposed by the French NCA.[52] Similarly, in *Mars/Langnese and Schöller*, the Commission had ordered Langnese and Schöller to not enforce their exclusive dealing agreements with retailers. This remedy made sense since the relevant product in this case was ice cream and it had to be decided in summer season, which is crucial to market the product. Thus, the remedy would allow Mars, another ice cream manufacturer, to enter the upstream market for ice cream temporarily. The GC, however, considered that the remedy was too broad as it concerned all the retailers that were tied-in by Langnese's and Schöller's exclusive agreements. The GC then lifted the prohibition regarding service stations, but it maintained it concerning other retailers.[53] It is true that the Commission lost the appeals in *Ford Werke, La Cinq* and *IMS Health*, but general calls for lowering the intensity of judicial review of interim measures are not justified.[54]

[50]Temple Lang (n 38) 52.
[51]This case is discussed in greater detail below.
[52]Arrêt de la Cour d'Appel de Paris du 4 avril 2019, paras 87–88.
[53]Joined Cases T-24/92 R and 28/92 R *Langnese-Iglo v Commission* [1992] ECR II-1839, paras 32–34.
[54]Federal Ministry for Economic Affairs and Energy (BMWi), 'A New Competition Framework for the Digital Economy: Report by the Commission "Competition Law 4.0".' (BMWi, 2019) 72.

The gist of the discussion is that, even though there might be some obstacles that may have refrained the Commission from using interim measures, the real weight of these obstacles is not considerable. This means that the lack of interim measures is probably more a question of policy and enforcement agenda than an issue of the existence of serious impediments and the need for profound reforms. In fact, *Broadcom* indicates that the Commission's enforcement strategy may be veering near the approach of the French NCA, which has issued a significant number of interim measures during the last decade.[55]

III. A menu of options to make interim measures more effective

Even if there are no obstacles that stop the Commission from using interim measures more frequently, the question is whether there is still space to change some aspects of this instrument to make it more effective. This section explores this question by focusing on three key points of interim measures: the legal standard of "irreparable damages", the notion of victims, and the procedure to adopt interim measures.

A. The standard of "irreparable damage"

Article 8(1) of Regulation 1 allows the Commission to impose interim measures when there is a "risk of serious and irreparable damage to competition". That is to say, the harm must not only be minor (serious), but there must also be a risk that it will be irreparable upon conclusion of the antitrust investigation. The challenge for the Commission, thus, is to differentiate cases where the harm can be repaired with remedies after reaching a definitive decision from those cases that cannot wait. While this may be easy in certain cases such as refusals to continue to deal, it is not difficult to think of scenarios where the standard of "irreparable damage" becomes harder to meet and where competition authorities prefer not to intervene too soon via interim measures. If the standard is too high, then our task is to find ways to lower it. There are two

[55]For instance, in the past years the French NCA has issued multiple interim measures decisions in a variety of sectors such as online advertisement (Décision 10-MC-01 relative à la demande de mesures conservatoires présentée par la société Navx; Décision 19-MC-01 relative à une demande de mesures conservatoires de la société Amadeus), the energy sector (Décision 14-MC-02 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité; Décision 16-MC-01 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans le secteur de l'énergie), or more recently in the press sector (Décision 20-MC-01 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse).

options in this regard: relaxing the interpretation of irreparability (option 1) or reforming Article 8 to change the standard (option 2). Let us consider them both.

Option 1 suggests being more flexible in the interpretation of "irreparable damage" The whole point of this standard is that provisional remedies serve to avoid that the harm caused by the alleged anticompetitive conduct becomes irreparable by the time a final decision is made by the Commission.[56] This is why the GC reiterated in *La Cinq* that, if there is any chance to recover damages later through a follow-on action, interim measures are not justified.[57] This interpretation, nevertheless, can be too strict for situations where there is more uncertainty about the possibility of a successful follow-on action or the success of remedies upon conclusion of the investigation. However, if the Commission relaxes the interpretation of irreparability, it will open the possibility to intervene with interim measures even in those cases where, although damages could be repaired with private enforcement, the status quo of the market cannot be restored. This option is particularly interesting when it comes to certain scenarios such as tipping markets. Once a market has tipped, its structure becomes more monopolistic and it is almost impossible for competition authorities to restore the status quo, regardless of whether any firm damaged by any anticompetitive conduct of a dominant firm can successfully seek damages. Accommodating the standard of irreparability to new situations such as market tipping has already been suggested by other commentators,[58] and it would contribute to make interim measures more effective.

Option 2, on the other hand, offers to reform Article 8(1) of Regulation 1. This implies replacing "irreparable damage" with another legal standard that sets the bar lower. This is indeed what some national jurisdictions are currently doing and what the French NCA recommends the Commission to do.[59] For example, in 2014, the UK lowered the standard from "serious and irreparable harm" to "preventing significant damage".[60] Note that the

[56] *Camera Care* (n 7), para 14.
[57] *La Cinq* (n 19), paras 77, 82–83.
[58] Peter Alexiadis and Alexandre De Streel, 'Designing an EU Intervention Standard for Digital Platforms' [2020] EUI Working Paper RSCAS 2020/14, 44–45 <https://ssrn.com/abstract=3544694> accessed 29 June 2020.
[59] Autorité de la Concurrence, 'Contribution de l'Autorité de la concurrence au débat sur la politque de concurrence et les enjeux numériques' (19 February 2020) 7 <www.autoritedelaconcurrence.fr/sites/default/files/2020-02/2020.02.28 _contribution_adlc_enjeux_num.pdf> accessed 29 June 2020.
[60] Section 35 of the UK Competition Act 1998 as amended by the Enterprise and Regulatory Reform Act 2013.

element of significant harm remains but the requirement of irreparability disappears. In the same vein, with the implementation of the ECN+ Directive, the German government has proposed to change their legal standard to "necessity for the protection of competition" or when there is an "imminent threat of serious harm to another undertaking".[61] Arguably, this proposal complies with the ECN+ Directive, which requires Member States to allow their NCAs to order interim measures "at least in cases where there is urgency due to the risk of serious and irreparable harm to competition". The goal of the directive is to facilitate the adoption of interim measures by NCAs and, from this perspective, the clause *at least* leaves open the possibility to establish lower legal standards.

We still have to wait to see what the UK and German NCAs do with their new legal standard. Thus far, the UK NCA has only refused to adopt interim measures in one case because it did not see a significant harm on the undertaking requesting the measures.[62] In the meantime, it is possible to judge the possible effects of their reforms by reference to France. According to French competition law, the NCA can adopt interim measures if the alleged anticompetitive practice is causing "serious and immediate harm", which is very similar to the new German and UK formulae. To illustrate the extent to which the tool of interim measures is more effective when the standard is lowered, suffice to apply the current EU standard to one French case.

To do so, let us take *Press Publishers v Google*, the most recent interim measures decision of the French NCA. In 2019, the French government transposed the Directive 790/2019 on copyright and related rights in the Digital Single Market.[63] The aim of this new law is to strike a balance between Internet operators such as Google and press publishers, so the latter can be remunerated by the former for displaying press content in search engines.[64] The idea is to allow press publishers to choose what content is shown in online search result pages and negotiate a remuneration for their content. Google, however, reacted to the new law by announcing the press editors that they will not get paid even though they choose to continue showing their content through Google's search services. For

[61] See n 44.
[62] See the summary of the CMA's decision in relation to an application by Worldpay (n 34).
[63] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92. The French law is Loi no. 2019–775 du 24 juillet 2019.
[64] Décision 20-MC-01 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse (*Press Publishers v Google*), para 77.

Google, the reason is that the result pages should not be conditioned upon commercial exchanges with press publishers not to lose the trust of users on the quality of the search engine.[65] For publishers, not appearing in Google's search results is not an option since most of their ads-related income comes from traffic of users diverted through search engines.[66] Thus, they accepted Google's conditions but filed a complaint with the French NCA arguing that Google had imposed unfair trading conditions and had engaged in discriminatory practices, since Google decided not to negotiate fares with any press publisher regardless of the particular circumstances of each of them.

Leaving aside the merits of the case, it is worth looking at how the French NCA applied the standard of "serious and immediate harm". First, it considered that Google's conduct was causing a serious harm to the press sector by looking at the performance of the industry in the past year. The NCA noted that printed newspapers sales are in decline and so is the income from advertising. Moreover, the NCA looked at Google's rapid reaction to see whether the harm was immediate. Google's announcement to press publishers was made on 25 September 2019 and the new Google's policy was meant to be valid from 24 October 2019, the same day that the French law entered into force. According to the NCA, the timing of Google's action was made in a key moment for the viability of press publishers, which sufficed to conclude that the harm was immediate.[67] Furthermore, the urgency in this matter to impose interim measures stemmed from the speedy transposition of the directive into national law. The government did not exhaust the two-year period for transposing the directive but it did so only in three months.[68] Finally, the NCA required Google to negotiate with press publishers fares under fair, objective and non-discriminatory criteria.

Now that we know the facts and reasoning of the French NCA, it is interesting to ask if this NCA would have succeeded in implementing interim measures in this case under the "irreparable damage" standard. Recall that one of the keys in this standard is to see whether the complainant has the possibility of recovering damages later. The question in *Press Publishers v Google*, thus, is to what extent press agencies and editors would not be able to recover damages from Google once the antitrust investigation concluded. Granted, it might be argued that the prompt

[65]ibid, para 94.
[66]ibid, paras 18 and 116.
[67]ibid, para 282.
[68]ibid, paras 76 and 284.

transposition of the Directive 790/2019 into French law shows that there is certain urgency to regulate the sector. However, this is different from the concept of "irreparable damage", which refers to the possibility that Google compensates the complainants if the NCA concludes that there is a breach of competition law. Therefore, it seems fair to say that the NCA would have struggled with the application of the "irreparable damage" standard in this case.

In sum, the standard of "irreparable damage" reduces the effectiveness of interim measures, and the two options discussed offer a chance to improve it. Certainly, those antitrust experts that are more conservative and sceptical about granting the Commission more powers would reject option 2. Admittedly, option 1 allows to accommodate interim measures to new challenges and conservatives may be sceptical as well, but option 2 seems to provide the Commission with a greater leeway than option 1. This is so because option 1 requires to test the Commission's new interpretation of irreparability in the EU courts, which may be more reluctant than the Commission to accept interim measures in situations of uncertainty. It is true that the CJEU has acknowledged the necessity for quicker interventions in specific contexts, such as when there are significant network effects.[69] From this perspective, experts willing to provide the Commission with more powerful tools would go for option 2 where EU courts would not need to check whether there was a situation that could not be repaired or restored, but only whether the impact of the alleged anticompetitive conduct is significant or not. The problem, however, is that option 2 calls for legislative intervention. Given that this may be an arduous and lengthy process, option 1 seems to stand as the most optimal choice even for those who are more progressive and that initially would choose option 2.

B. The notion of victims

Another potential area of reform to make interim measures sharper concerns the notion of victims. In fact, together with the elimination of *ex parte* procedures, this is another issue that changed with Regulation 1. According to *Camera Care*, the Commission could use interim measures when the harm affected either the interim measures seeker or

[69]See Alexiadis and De Streel (n 58) fn 192, who make this point citing the CJEU's judgment in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601. See also Federal Ministry for Economic Affaires and Energy (n 54) 70-73.

the public interest,[70] whereas under Article 8 of Regulation 1 the serious and irreparable damage must affect competition. This was one of the controversies that arose during the preparation of Regulation 1. The European Parliament suggested establishing that interim measures could be imposed "in cases of urgency due to the risk of serious and irreparable damage to a group of consumers or to one or more undertakings".[71] The reason for this, according to the European Parliament, was that it was preferable to have a more precise description of who suffers from the damage in question. Finally, it was the Commission's initial draft of Article 8 that prevailed,[72] which resulted in the phrasing that we know today.

Truth be told, the current version of Article 8 makes sense from the view of the case law. As noted earlier, the Commission lost the appeal in the *IMS Health* case at the time of elaborating Regulation 1, and one of the contentious points in *IMS Health* was the notion of victims. In particular, the Commission said that the refusal to access the database of IMS affected not only the complainant, NDC, but also another rival, AzyX; and, consequently, the public interest was also affected because the refusal of IMS was likely to eliminate all competition.[73] The GC, however, considered that the Commission linked the public interest to the interests of IMS Health's rivals. The court stated that even though IMS continued to exercise its copyright until a final decision was made by the Commission, there was no evidence that suggested that there was an appreciable impact on final consumers.[74] Note, thus, the depart in *IMS Health* from *Camera Care* in interpreting who is the victim of the alleged anticompetitive conduct, which can be explained by the shift of competition policy towards the more economic approach and consumer-centrism.[75]

Be that as it may, what is clear is that the current configuration of Article 8 and focus on harm to competition also reduces the effectiveness of interim measures as a tool for the Commission to intervene quickly. More concretely, under Article 8 the number of scenarios where the

[70] *Camera Care* (n 7), para 19.
[71] Report on the proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (FINAL A5-0229/2001), of 21 June 2001, p 34.
[72] Article 8 of the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty") [2000] OJ C365E/284.
[73] *NDC Health/IMS Health* (n 21), paras 193–201.
[74] *IMS Health v Commission* (n 22) para 145.
[75] Anne C Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 131.

Commission can use interim measures is dramatically reduced: in quick procedures, it is not the same to demonstrate the impact of the alleged anticompetitive conduct on one company (e.g. loss of market share) than harm on the whole market (e.g. market foreclosure). The question is, therefore, how to improve this aspect of interim measures. There are two options in this regard: being more flexible in the interpretation of harm to competition (option 1) or modifying Article 8 of Regulation 1 (option 2). As in the case of the legal standard of "irreparable damages", option 2 may please those in favour of a more aggressive enforcement of EU competition law; whereas option 1 may be more suitable for those who are more cautious.

On the one hand, option 1 suggests that the Commission could reinterpret the concept of "harm to competition" in interim measures cases. This implies that the Commission focuses on whether one particular undertaking is suffering significant damage, and infers from there that there is a risk that competition is being harmed by the alleged anticompetitive conduct. It is true that, in some cases, the damage to competition is self-evident. For instance, in *Mars/Langnese and Schöller*, Mars could not enter the ice cream market due to Langnese's and Schöller's exclusive dealing agreements. Putting aside the fact that Mars was particularly affected by these agreements, one could safely infer from the extension of Langnese's and Schöller's networks that they could be foreclosing the market for other ice cream manufacturers and, therefore, competition was being damaged. Having said that, it is plausible to think of scenarios where the relationship between the damage suffered by the complainant, the alleged anticompetitive conduct, and harm to competition, is more vague. Consider, for instance, competition law infringements in digital markets that involve novel theories of harm such as self-preferencing: the complainant may have sufficient grounds to bring a case based on its own experience (e.g. a supplier against Amazon) but the link between the conduct and harm to competition may be more diffuse (e.g. the complainant may not know how Amazon deals with other suppliers). Option 1, therefore, provides the Commission with more room to consider whether a case calls for interim measures.

Conservative competition experts may be very suspicious about option 1. One might reactivate the long-standing debate of "protecting competitors versus protecting competition" by arguing that such a reform of Article 8 would protect competitors.[76] As the GC said in *IMS Health*,

[76]A seminal work on this debate that is still up to date is Eleanor M Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 World Competition 149.

equating the interests of applicants of interim measures with the interest of competition goes against the spirit of Article 102. However, this argument would go far beyond the more modest purpose of interim measures. It cannot be emphasized enough that the aim of interim measures is to allow competition authorities to implement a quick, temporary remedy that, although does not fully fix the anticompetitive issue, it avoids that any damage caused by the alleged illegal conduct is exacerbated and impossible to address after the investigation. In other words, interim measures contribute to render competition law more effective. The fact that the measure is ordered even though there is only evidence that it harms a concrete undertaking does not necessarily mean that competition law is protecting competitors. At early stages of the investigation, evidence showing that one competitor may be in jeopardy by a conduct simply signals that there may be a wider competition problem that needs to be addressed and, thus, warrants interim measures. Later, if the authority concludes that competition has not been harmed, the measure can be always lifted.

Option 2, on the other hand, presents a more drastic alternative: reforming Article 8 of Regulation 1 and make explicit that the damages may be related to individual undertakings or public interest. In this regard, the French case can also be a source of inspiration: the French NCA can order interim measures if the conduct affects either (a) the undertaking seeking interim relief, (b) the health of the sector, (c) consumers, or (d) the economy in general.[77] This provides the French NCA with more leeway for intervention than the Commission has under Article 8.

To illustrate this point, let us consider *Amadeus v Google*, another interim measures decision in the French jurisdiction. This case was initiated by a complaint filed by Amadeus, a company running a directory enquiry service with a telephone number. Through this service, users can obtain the contact details of other people on demand and connect directly with the contact requested. Amadeus got most of its users through Google Ads, the advertising service of Google. In 2016, Google offered Amadeus a personalized service for an extra price that was designed to support start-ups with high-growth potential. In 2018, however, Google decided to suspend Amadeus' main account arguing that it did not comply with Google Ads' rules. According to Amadeus, Google's conduct put its business in danger as it cut out the flow of users coming from Google

[77] Article L-464-1 of Code de Commerce (French Commercial Code).

Ads and, therefore, would be forced to leave the market.[78] This was noticed by the French NCA that also observed that Amadeus' turnover had decreased more than 90% in one year.[79] The NCA also took into account the fact that Amadeus had tried to use alternative advertising channels, such as Bing and Facebook Business. This solution, however, did not ease Amadeus' situation.[80] In light of these circumstances, the NCA concluded that Google's conduct had a serious and immediate harm on Amadeus' interests and ordered the interim measures.

Note now that the French NCA placed the attention on Amadeus' loss of turnover. The NCA did not look at whether the rest of the market was affected or not. Google argued, indeed, that Amadeus' rivals barely used Google Ads to promote their services. However, this was irrelevant for the NCA. It is true that the anticompetitive conduct of Google was being investigated as an abuse of economic dependence prohibited under French competition law, which might justify that there was no need to see the potential effects of Google's conduct beyond Amadeus' position in the market. Having said that, the configuration of interim measures in French competition law allows the NCA, among other options, to focus exclusively on the damages that the complainant may be suffering. What is more doubtful is whether Amadeus would have succeeded if the legal regime of interim measures under French law were the same as in Article 8 of Regulation 1.

In the long term, option 2 seems safer and more stable than option 1. The French NCA does not need to wait for the appeal court to confirm any reinterpretation of damage to competition; its scope of action is more ample, rendering interim measures more effective. On the other hand, as in the case of the standard of "irreparable damages", option 1 would call for the confirmation of the EU courts. However, this seems unlikely. The current configuration of Article 8 has its basis in the interpretation of the EU courts in *IMS Health*, where they clearly departed from *Camera Care*. Confirming now a reinterpretation of Article 8 would mean that the EU courts rectify their own position and come back to *Camera Care*, which may not be probable. Option 1, thus, is quicker to implement than option 2 but its success is less certain. This means that advocates of a more progressive approach may be better off with option 2 which, albeit more lengthy than option 1, may

[78]Décision 19-MC-01 relative à une demande de mesures conservatoires de la société Amadeus (*Amadeus v Google*), paras 11 and 169.
[79]ibid, paras 171–72.
[80]ibid, para 173.

yield more satisfactory results in the long run. In fact, the reform of interim measures in Germany has taken the path offered by option 2. As mentioned above, the German proposal consists in changing the "irreparable damage to competition" standard to "necessity for the protection of competition" or "imminent threat of serious harm to another undertaking", multiplying the scenarios where the German NCA can intervene.

C. Procedure

One of the virtues of interim measures is that they allow authorities to intervene quickly. As noted earlier, the average time for the Commission in issuing interim measures decisions is about three to eight months. This is quick in comparison with the years that it may take to issue infringement decisions. Having said that, there is room to reform the procedure in order to enhance the effectiveness of interim measures. As the Commission has said itself, it is in the procedure for adopting interim measures where it is necessary to explore ways of reform.[81] The issue, then, is how to reengineer the procedure to make the decision-making process faster and interim measures a more powerful tool. In this regard, the article also offers two options but, unlike in the previous discussions, both would require legislative action: one involves limiting the right of parties to access the file (option 1), and the other consists in rethinking the procedure and the right of parties to be heard (option 2).

Before adopting any decision, the parties involved in an antitrust investigation have the right to access to the file.[82] Generally, this right entitles them to access all the relevant documents that the Commission has obtained or produced since they have received the statement of objections. Nonetheless, the right to access to the file is not absolute: its purpose is to guarantee the rights of defence of the undertakings in the Commission's procedures.[83] This means that this right does not grant access to business secrets or internal documents of the Commission

[81]Commission, 'Annual Competition Policy Report 2018', COM (2019) 339 final, 27.

[82]Article 27(2) of 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; Article 15 of Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18. See also Commission, 'Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004' (2005/C 325/07) [2005] OJ C325/7.

[83]Wouter Wils and Henry Abbott, 'Access to the File in Competition Proceedings Before the European Commission' (2019) 42 World Competition 255, 261–62.

and NCAs.[84] For completeness, it is worth pointing out that once the undertaking receives the statement of objections, it has usually four weeks to reply to the statement which starts to run from the date that it has effective access to the file.[85] In case of interim measures, this time can be shortened to one week.[86] Having said that, option 1 suggests to limit the right of access to the file. This has been proposed by the UK NCA and the Furman Report on competition and digital markets,[87] and it is something that the Commission can take into consideration at the EU level. The main idea is to confine this right to those documents that are clearly relevant for the interim measures, which may make the adoption of interim measures more practicable.[88] This would imply, therefore, that apart from confidential documents and those involving business secrets, undertakings subject to interim measures could only access documents containing crucial information that justify the adoption of interim measures.

On the other hand, option 2 suggests not to limit the access to the file but to reengineer the procedure to adopt interim measures. Before making an interim measure decision, parties have also the right to be heard.[89] What option 2 suggests is to reverse the order and hear the parties once the interim measures have been adopted.[90] This is an alternative that can be already found in other instances than competition law. For example, the European Securities and Markets Authority (ESMA), an agency created as a reaction to the 2007 financial crisis to supervise and regulate EU financial markets, can issue interim measures before hearing the parties to prevent significant and imminent damage to the financial system, or to protect the integrity, transparency, efficiency and proper functioning of financial markets.[91] The right to be heard is still respected, but it is exercised after adopting the measures. If there is no urgency, ESMA can still take measures following a regular procedure where parties are heard before adopting any measure.

[84]Article 15(2) of Regulation 773/2004.
[85]Articles 10(1) and 17(1) of Regulation 773/2004.
[86]Article 17(2) of Regulation 773/2004.
[87]Furman and others (n 48) para 3.127.
[88]ibid.
[89]Article 27(1) of Regulation 1/2003.
[90]This point was already made in Francisco Costa-Cabral and others, 'EU Competition Law and COVID-19' [2020] TILEC Discussion Paper No DP2020-007, 11–13 <https://ssrn.com/abstract=3561438> accessed 29 July 2020.
[91]See, inter alia, Article 25 of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L302/1; and Articles 25L and 67 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1.

Likewise, the Italian NCA can follow a similar procedure to issue interim measures regarding consumer protection. During the COVID-19 crisis, the NCA has blocked several websites that sold HIV drugs that were advertised as beneficial for treating COVID-19 patients. The Italian Competition Aaw allows the NCA to issue an interim measures decision under a legal regime similar to Article 8 of Regulation 1.[92] However, in a soft law document, the Italian NCA acknowledges the need to act quickly in urgent matters. Accordingly, the NCA establishes a quick procedure to issue a provisional interim measure decision after which the parties will be heard. Later, the NCA can confirm or lift the provisional interim measures.[93] This provided the NCA with a fast track to block the websites that contained misleading information about COVID-19: the practices of these websites were brought to the attention of the NCA between 18 and 24 March 2020, the investigation was opened in 26 March of the same year, and just one day later the NCA ordered the blocking of the websites as interim measure without hearing the parties.[94] Granted, ESMA's power regarding interim measures and the action of the Italian NCA are about financial markets and consumer protection, but the stakes at play here are the same than in competition law: authorities that need to be equipped with quick tools to intervene in the market before it is too late.

Although both options would contribute to accelerate the procedure to use interim measures, the reforms that they suggest will not be easy to implement: both require legislative action with a proper amendment of Regulations 1/2003 and 773/2004 on competition law enforcement; together with a thorough review of the relevant Commission's soft law notices on antitrust procedures. Nonetheless, there is a fundamental difference between the two options regarding their effective implementation by the Commission. Option 1 would shorten the procedure by limiting the files to which the parties have access. However, this option can also lead to litigation involving the rights of defence, as the undertakings could argue that they have had no access to documents that, in their view, have also evidentiary value for the interim measures decision. In other words, the practical difficulty for the Commission would be to distinguish

[92]Article 14 of Legge 10 ottobre 1990, n. 287, Norme per la tutela della concorrenza e del mercato (Gazzetta Ufficiale del 13 ottobre 1990, n. 240) (Italian Competition Act 1990).

[93]Autoritá Garante della Concorrenza e del Mercato, 'Comunicazione relativa alla'applicazione dell'art. 14 bis della legge 10 ottobre 1990, N. 287' <www.agcm.it/dotcmsDOC/normativa/concorrenza/Comunicazione_misure_cautelari.pdf> accessed 29 June 2020.

[94]Provvedimenti adottti dall'Autorita il 27 marzo 2020, procedimenti PS11733 (*farmaciamaschile.it*) e PS11735 (*farmacia-generica.it*).

between key documents related to the interim measures and other documents that, albeit crucial for the rest of the antitrust procedure, are less relevant to the interim measures. Option 2, however, avoids potential disagreements between the Commission and the parties about what files are important. Rather, under this option undertakings still have full access to the file with the usual limitations (inter alia business secrets, internal documents) once an interim measure has been adopted.

A different question is if option 2 goes too far regarding remedies. The only type of remedies that are not acceptable under interim measures are structural remedies because they are not reversible. We cannot forget that interim measures are provisional in nature, which means that they should be easily lifted if the Commission concludes that there is no infringement of competition law at the end of the investigation. This implies that the Commission's power to design remedies for interim measures is limited to behavioural remedies. However, this does not mean that the remedies are not costly for the undertaking subjected to them. From this perspective, one might argue that option 2 is far more aggressive than option 1 because the undertaking will only have the opportunity to reply to the interim measures once these have been decided by the Commission. A way of softening option 2 would consist in making its proposal more nuanced following the example of ESMA and the Italian NCA: there could be two tracks, one faster for matters of utmost urgency where parties are heard later, and another one where parties are still heard before issuing the interim measure decision.

IV. Conclusions

No doubt, interim measures are an interesting tool for the Commission to keep markets competitive. The appeal of this instrument does not only lie in the fact that it allows the Commission to intervene quickly, but also in that it maximizes the learning capacity of the authority: given that these measures are adopted at early stages of antitrust investigations, the Commission can use them to test the efficacy of a particular remedy. If, during the investigation, it observes that the remedy has not addressed the anticompetitive problem properly, the remedy can be redesigned when it comes to adopting the final decision.

Nonetheless, there is still room to discuss the effectiveness of interim measures, however useful and attractive they may be. The Commission is well aware of this need and it is calling on the antitrust community to think of potential ways to make interim measures sharper. In this sense, this article has explored, first, whether there is the need for essential

reforms to remove any obstacle that might be impeding the Commission to issue interim measures more often. The upshot of the discussion is that there are no fundamental changes to make in this regard. *Broadcom*, in fact, is a good illustration that the use of this tool is more related to the Commission's enforcement agenda than to the existence of insurmountable difficulties. Having said that, this article has also gone beyond by exploring three key aspects about interim measures that can be improved: the legal standard of "irreparable damages", the notion of victims and the procedure. For each of them, the article has offered two options which entail either legislative action or reinterpretation of Article 8 of Regulation 1. To be sure, the options herein discussed are not incompatible with each other. For example, one may choose to reform Article 8 to replace the legal standard of "irreparable damage" but not to amend this legal provision regarding the notion of victims. In any event, the aim of this discussion was not to impose which reform should be put in place, but to present the pros and cons of several alternatives to improve interim measures as an antitrust instrument and upgrade the Commission's toolkit.

In this sense, the question remains as to what will be the place of interim measures in EU competition law if the Commission goes ahead with the new proposals; particularly with the new competition tool. It might be argued that, in the end, the reforms herein suggested will be devoid of substance since the new competition tool aims to tackle structural problems such as market tipping. However, another way of putting this legitimate question is whether the Commission needs any competition tool if it can enhance the effectiveness of interim measures. From this perspective, the Commission should really consider what is the added value of a new competition tool if interim measures are sharpened via any of the proposals presented in this article. Interim measures are already a versatile instrument which, after some reforms, can be really effective for the Commission to intervene in both traditional and digital markets.

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