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# Commission seeks interim measures for the first time in 18 years

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On 26 June 2019, the European Commission announced that it has [opened](#) a formal investigation to determine whether US chipmaker, Broadcom, is abusing its allegedly dominant position in the markets for modem and TV chipsets through its imposition of exclusivity requirements on customers (amongst other alleged breaches of competition law). In parallel, the Commission issued a Statement of Objections notifying Broadcom of its intention to impose an interim measures order restraining its allegedly exclusionary practices pending conclusion of the investigation.

This is the first time in nearly two decades that such interim measures have been pursued by the Commission. It also comes at a time when the Commission is coming under pressure to ensure competition law enforcement is timely and effective, particularly in respect of fast-moving digital markets. Part of the challenge has been to determine whether existing enforcement tools are adequate for dealing with the issues arising with digitisation. The fact that the Commission turned here to an existing but much under-used power therefore marks this out as an interesting test case.

### European Commission interim measures regime in antitrust cases

Under Article 8(1) of Regulation 1/2003, which codified precedent first set out in the 1980 European Court of Justice *Camera Care v European Commission* case, the Commission has the power to order interim measures on the basis of a *prima facie* finding of infringement where there is an urgent need to respond to a risk of serious and irreparable damage to competition. *Broadcom* marks the first time since the *IMS Health* case in 2001 (and the first time since the passing of Regulation 1/2003) that the Commission has sought to rely on these powers.

The Commission in *IMS Health* ordered IMS, which at the time was the leading supplier of pharmaceutical sales data, to license the use of its copyrighted data collection system to its competitors in Germany. IMS appealed to the Court of First Instance (now the General Court), which issued a temporary order suspending the interim measures pending the Commission's final decision. Two competitors of IMS unsuccessfully appealed the Court of First

Instance's order to suspend interim measures to the Court of Justice. The Commission eventually withdrew the order in 2003, following from a substantive ruling in favour of IMS Health by a German court.

In its Statement of Objections issued to Broadcom last month, the Commission set out that Broadcom was likely to hold a dominant position in various modem and TV chipset markets and that certain agreements between Broadcom and some of its customers contain exclusivity clauses that may marginalise or eliminate competitors (and, in turn, stifle innovation in those markets). The Commission arrived at the preliminary conclusion that an interim measures order is indispensable due to the risk of serious and irreparable harm to competition occurring before the end of its investigation. It reasoned that such measures are necessary to ensure the enforceability and efficiency of future decisions by the Commission following the end of the investigation.

Broadcom now has the opportunity to reply to the Statement of Objections and attend an oral hearing in Brussels before the Commission can proceed to impose the interim measures.

### Interim measures: a tool for dealing with challenges posed by the "new" economy?

The Commission has recently come under pressure, from both national competition authorities and academics, to make use of its powers to impose interim remedies, particularly in relation to the fast-moving digital economy. Similarly, in the UK the Furman Report commissioned by the Competition and Markets Authority also recommended increased use of interim measures as a means to ensure more

effective competition law enforcement in digital markets.

The main concern raised by commentators is the length of investigations. On average, antitrust investigations take several years to conclude. By the time the Commission makes a final decision, it is argued that it may be too late as a means to address the antitrust issue in question because by then the affected market may have tipped in the infringing party's favour. In digital platform markets in particular, there is a risk that an incumbent may irreversibly change the market in its favour in a relatively short period of time.

As it stands, the extent to which the Broadcom matter reflects a broader change in the Commission's attitude regarding the use of Article 8 powers in antitrust cases is unclear. However, the Commission is following an approach championed by the French Competition Authority for some time. As far back as 2015, the President of the French Competition Authority, Mr Bruno Lasserre, argued that interim measures are especially appropriate in the digital economy. To this end, the French Competition Authority ordered interim measures against Google in January 2019 during its investigation of alleged anti-competitive practices directed at Amadeus, a directory enquiry services provider.

Giving weight to this view, Guillaume Lorient, the director responsible for digital telecoms and media at DG Competition in the Commission, said earlier this week that "antitrust enforcement must and does adapt to the challenges of the new economy, new practice and new conduct". In this context, he believed

that "it is extremely important to be flexible and use the tools we have". In respect of Broadcom, he noted that the interim measures would prevent the market "tipping" in Broadcom's favour during the course of the investigation.

### **Moving forward: a lower threshold for invoking Article 8 powers?**

Under the current framework, there is significant evidential and procedural burden that must be met by the Commission in order to justify imposing interim measures. In particular, it is a hard standard to prove that conduct is causing, or will cause, serious and irrevocable damage to competition. According to a [Commission official](#), this has dissuaded the use of interim measures in the past and attempting to do so can actually slow down investigations.

Compounding this is the high risk of judicial challenge. Most Commission interim order decisions have been appealed, with defending appeals in IMS Health having proved costly to the Commission. It is expected that Broadcom will challenge the Commission's decision were the Commission to proceed with the order. Such considerations have led various commentators to advocate reducing the threshold for invoking Article 8 powers. For example under UK competition law, the equivalent threshold was amended by the Enterprise and Regulatory Reform Act 2013 from "serious and irreparable damage" to "significant damage". It remains to be seen whether EU competition law will follow suit in lowering the bar to the use of this regulatory enforcement tool.



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