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European Commission Imposed Interim Injunctive Relief against Broadcom – Questions Remain as the Dispute Over *Prima Facie* Abuse of Dominant Position Comes to a Close

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On October 16, 2019—in a landmark decision—the European Commission ("EC") imposed interim measures, a form of interim injunctive relief, against Broadcom during an ongoing antitrust investigation.

The EC found that Broadcom abused its *prima facie* dominant position in certain markets for chipsets used in television set-top boxes and modems, and ordered Broadcom to stop applying exclusivity and quasi-exclusivity provisions in certain agreements with its key customers. With the imminent launch of a large number of tenders and the introduction of the WiFi 6 standard for modems and television set-up boxes on the horizon, the EC found that an urgent intervention against Broadcom was warranted in order to prevent serious and irreparable harm to competition until the EC reached a final decision in Broadcom's antitrust investigation.

The EC determined that without interim measures, Broadcom's practices would likely hinder competition by marginalizing other chipset suppliers and ultimately forcing them to exit the market.[2] Customers would then face higher prices, reduced choices, and less innovation.[3]

This is the first case in nearly two decades in which the EC has ordered interim measures. The EC last imposed interim measures on IMS Health in 2001,[4] but the interim measures did not survive judicial review by the General Court, EU's lower court. Before *IMS Health*, the EC rarely ordered interim measures. In the last forty years, the EC has imposed interim measures in only nine

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[2] Statement of October 16, 2019, by Commissioner Vestager to impose interim measures on Broadcom in TV and modem chipset markets.

[3] *Ibid.*

[4] General Court, case T-184/01 R – *IMS Health*, decision of October 26, 2011.

cases—six of which were abuse of dominance cases—and four of the nine cases were appealed to the General Court, with only one surviving judicial scrutiny.

This seemingly forgotten tool has been rediscovered to enforce competition rules in fast moving markets, with remarkable success: on April 1, 2020, after Broadcom challenged EC's decision, Broadcom offered commitments to remedy the regulator's concerns. On October 7, 2020, the EC declared the commitments binding, after they had been amended and improved by Broadcom following a market test.

In view of the current challenges that various competition authorities face in technology and digital markets across the EU, it is possible that interim measures will be used more often in the future, both at the EU and the member state level. On October 16, 2019, Commissioner for Competition Margarethe Vestager stated that she was "committed to making the best possible use of this important tool" whenever necessary. Even though the interim measures imposed against Broadcom will continue to undergo judicial scrutiny by the General Court, the interim measures proved to be an important tool in quickly resolving a complex antitrust investigation and ending what was expected to be a long fight between the parties without a clear outcome on the merits.

I. EC's Antitrust Investigation against Broadcom

In October 2018, the EC initiated an in-depth investigation into Broadcom's exclusivity practices on the suspicion that the practices restricted competition in breach of EU competition rules. The EC found that Broadcom is the world's leading supplier of certain chips—including the so-called "systems-on-a-chip" used in television set-top boxes and internet modems—that are essential for transmitting television signals and ensuring that consumers can access the Internet and television content.

On June 26, 2019, the EC (i) announced that it formally opened an antitrust investigation into Broadcom's practices, and (ii) issued a Statement of Objections that confirmed its intention to impose interim measures against Broadcom. A few months later on October 16, 2019, after giving Broadcom the right to be heard, the EC ordered interim measures against the company while the antitrust investigation was pending.

II. Interim Measures Imposed against Broadcom

The EC imposed interim measures on the first three of Broadcom's practices, subject to the pending antitrust investigation.

The EC found *prima facie* evidence that Broadcom was dominant in three different systems-on-a-chip markets: (i) television set-top boxes, (ii) fibre modems, and (iii) xDSL modems. The EC further found that Broadcom had *prima facie* abused its dominant position in two ways: (1) by conditioning commercial advantages (like rebates and early access to its technology and premium technical support) on exclusive or quasi-exclusive purchasing, and (2) by leveraging its *prima facie* dominant position in markets in which Broadcom did not have a *prima facie* dominant position by granting customers commercial advantages conditioned on the customer exclusively or quasi-exclusively purchasing systems-on-a-chip from Broadcom.

As a result of these findings, the EC ordered Broadcom to: (i) unilaterally stop applying the above clauses in its agreements with six television set-top box and modem manufacturers; (ii) inform its customers that it will no longer apply such provisions; and (iii) refrain from employing provisions with the same effect in other agreements with the same customers, without taking any alternate punitive or retaliatory practices.

Other Broadcom practices—such as allegedly abusive IP-related strategies and deliberate degradation of the interoperability of Broadcom products with other products—were not encompassed by the interim measures, but would have otherwise been investigated as part of the broader antitrust investigation.

The interim measures were valid for up to three years (or until the end of the main antitrust investigation), and Broadcom had thirty days to comply. On December 23, 2019, however, Broadcom brought an action challenging the interim decision before the General Court.[5] In its application, Broadcom claimed that the EC committed several errors of law and fact in finding a *prima facie* infringement and introduced an "unknown urgency concept", that did not establish an urgent need for interim measures.

III. Broadcom's Commitments

In a spectacular move three months later, Broadcom offered a sweeping set of commitments to meet EC's concerns—without admitting any infringement of antitrust rules. In a communication published on April 30, 2020,[6] the EC declared its intention to make Broadcom's commitments binding and initiated a market test by inviting interested third parties to submit comments. Following such test, Broadcom amended its proposed commitments, and on October 7, 2020, the EC adopted a decision to make the commitments binding for seven years—an increase from the five years originally offered by Broadcom in April.

The commitments cover a broader range of products and customers than originally envisaged by the interim measures and apply globally (except China). Broadcom agrees to suspend globally (except China) any existing agreements and to not enter into new agreements with customers (original equipment manufacturers, "OEM") that obligate or induce them to obtain more than 50% of their requirements for products included in the interim measures—systems-on-a-chip for television set-top boxes, fibre modems and xDSL modems. Broadcom also commits to suspend any agreements that condition the supply of any products (subject to the interim measures) on the purchase of another of these products—and any other products (not originally subject to the interim measures, including systems-on-a-chip for cable modems, front end chips and WiFi chips for inclusion in set-top boxes and modems) for more than 50% of the customers' total requirements.[7]

At the EEA level, Broadcom commits to all the aforementioned commitments with the difference that no minimum percentage applies. To avoid circumvention, the commitments also apply to Broadcom's European indirect customers (e.g., telecommunication operators and cable

[5] Official Journal of the European Union C 61 of February 24, 2020, page 55.
[6] Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40608 – *Broadcom*, Official Journal of the European Union C 142 of April 30, 2020, page 4 *et seq*.
[7] Case AT.40608 – *Broadcom*, Commitments under Article 9 of Regulation 1/2003.

service providers) who have a say on the choice of chipsets to be incorporated in the devices they buy from OEMs.

Under Article 9 of Regulation 1/2003 ("Regulation"), companies may offer commitments to meet the competition concerns expressed by the EC. The EC may make these commitments binding by adopting a decision that would effectively end the proceedings subject to reopening if there were material changes to the facts, the companies acted contrary to the commitments or the decision was based on erroneous or misleading information. To this end, Broadcom will be required to report on the implementation of the commitments within two weeks from the date of their implementation and thereafter on a biannual basis, and later on an annual basis. Should Broadcom no longer be dominant in the relevant markets this would constitute a material change, in which case the EC would review the commitments.

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IV. Conditions for Imposing Interim Measures

Article 8 of the Regulation grants the EC the power to act "on its own initiative" and adopt interim measures on the basis of a *prima facie* finding of an infringement in "cases of urgency due to the risk of serious and irreparable damage to competition." This power had not been used under the Regulation until the Broadcom case.

Before the Regulation was enacted, the EU's highest court—the European Court of Justice ("ECJ")—acknowledged in its 1980 *Camera Care* decision[8] that the EC had implied powers under the European Treaty to impose interim measures to stop abuse of a dominant position.

To impose interim measures under the Regulation, the EC must find that the following two conditions have both been met.

First, the conduct must give rise to a "reasonably strong" *prima facie* breach of EU competition law.[9] There need not be "clear and flagrant infringement"[10] of competition rules or "certainty that a final decision must satisfy."[11] Rather, the EC (merely) needs to establish the "probable existence of an infringement."[12]

Second, the interim measures must be "urgent"[13] and aimed at avoiding "a situation likely to cause serious and irreparable damage"[14] or (as the ECJ stated in *Camera Care*) "is intolerable for the public interest."[15]

If these two conditions are met, the EC can impose interim measures "of a temporary and conservatory nature" that are "restricted to what is required in the given situation."[16]

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[8] ECJ, case 792/79 R – *Camera Care*, decision of January 17, 1980.
[9] General Court, case T-184/01 R – *IMS Health*, decision of October 26, 2011, para. 52.
[10] General Court, case T-44/90 – *La Cinq*, decision of January 24, 1992, para. 62.
[11] General Court, case T-44/90 – *La Cinq*, decision of January 24, 1992, para. 61; General Court, case T-23/90 – *Peugeot*, decision of May 21, 1990, para. 61.
[12] General Court, case T-44/90 – *La Cinq*, decision of January 24, 1992, para. 78.
[13] ECJ, case 792/79 R – *Camera Care*, decision of January 17, 1980, para. 19. In *IMS Health*, the General Court found that urgency existed if "serious and irreparable damage" was established, see para. 54.
[14] European Court, case 792/79 R – *Camera Care*, decision of January 17, 1980, para. 19.
[15] *Ibid.*
[16] *Ibid.*

The EC did not make its written decision to impose interim measures against Broadcom publicly available. It would have been interesting to see how the EC's analysis in Broadcom would have evolved antitrust thinking in fast moving markets. The EC's investigation against Broadcom implicated practices *beyond* the exclusive dealings and exclusivity rebates that the ECJ and General Court have generally held to be anticompetitive, *see, e.g.*, the ECJ's 2017 landmark judgment in *Intel*.[17] The EC's press release in Broadcom of October 16, 2019 suggests that conditioning non-pecuniary advantages (such as access to technology and premium technical support) upon exclusive or quasi-exclusive purchasing obligations *prima facie* breaches competition law. Judicial review of the interim measures may or may not provide an answer to this question. However, it becomes evident that the interim measures adopted by the EC have already proven effective as they helped quickly address competition concerns in a fast-moving market and avoided protracted litigation in restoring competition.

V. Interim Measures: A Double-Edged Sword

Interim measures are a double-edged sword. The consequences of ordering them must be well balanced against the consequences of their absence.

On the one hand, interim measures must aim to preserve the *status quo*[18] in the market. Interim measures should only be implemented if they are "indispensable for the effective exercise" of the EC's powers to eliminate the proliferation of antitrust violations during the pendency of proceedings.[19] As investigations become increasingly complex and take several years to conclude, interim measures are the only powerful enforcement tool to ensure that effective competition is protected during the pendency of an antitrust investigation.[20] Final decisions cannot apply retroactively to undo the competitive harm that may occur during the pendency of an investigation.

On the other hand, interim measures can be "very intrusive" and dangerous. Maria Jaspers, head of antitrust policy at the EC, acknowledged that "wrong interim measures could do serious harm to competition, especially where that interim measure would change market structures."[21] To avoid potential harm, the decision to impose interim measures must be based on substantiated theories of harm and a complete understanding of the relevant circumstances. The EC must aim to protect the structure and competitive dynamics and not just the interests of an individual party affected by the investigation.[22]

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[17] *See* Pomana, Shechter, Schaper, *Loyalty Rebates in the EU (after Intel) and the U.S.*, American Bar Association Section of Antitrust Law Distribution, vol. 22, no. 1 of February 2018, p. 12 *et seq*.

[18] ECJ, case 792/79 R – *Camera Care,* decision of January 17, 1980, E.C.R. 1980, p. 119 (125).

[19] ECJ, case 792/79 R – *Camera Care,* decision of January 17, 1980, para 18.

[20] For example, the EC's formal investigations into Google's abusive practices related to its Android mobile operating system, its comparison shopping service, and online advertising took up to eight years, and the investigation into Qualcomm's abusive practices related to its 3G and LTE baseband chipsets took up to four years.

[21] Maria Jaspers, head of Antitrust Policy at the EC, in a speech of June 8, 2018 in Brussels on "Interim Measures & EU Competition Proceedings: Is there a Case for Reform?"

[22] *See* Commission Staff Working Paper – Report on the functioning of Regulation 1/2003, COM (2009), 206 final of April 29, 2009, para. 111. In *IMS Health*, the General Court found the EC to do the opposite and protect the interests of its competitors, and not the public interest. General Court, case T-184/01 R – *IMS Health*, decision of October 26, 2011, para. 145.

These considerations necessitate a high evidentiary burden for the EC to impose interim measures. The difficulty of appropriately balancing the various interests at stake may be why the EC rarely imposed interim measures in the past and only now imposed interim measures under the Regulation.[23]

VI. Interim Measures – A Path Going Forward?

The interim measures imposed against Broadcom mark an important development in EU competition law, as the EC—and other competition authorities at the member state level—tests whether the current competition rules are fit for fast moving markets. While the EC has so far supported the view that national courts are better situated to impose interim decisions,[24] the EC's decision paves the way for the EC to tackle the challenges of enforcing competition rules in rapidly evolving markets like the technology and digital sectors. This is also evidenced by the EC's ongoing public consultation for a potential "new competition tool" and whether interim measures should be included.

Recent developments at the member state level in Germany and France—driven by Directive 2019/1 (the ECN+ Directive)—give authorities new motivation to enforce competition rules through more effective means, including through interim measures. Even though Germany has not utilized its existing power to impose interim measures, Germany is now preparing to change its competition rules to more aggressively curtail competition harm caused by dominant companies in digital markets. Specifically, Germany plans to lower the current threshold of "serious and irreparable damage to *competition*" to "an imminent threat of serious harm to another *undertaking*."[25]

In France, the competition authority has imposed more interim measures, including in digital markets.[26] In 2019, the French competition authority imposed interim measures in nine cases, compared to eight cases in 2018 and only three cases in 2017.[27] In early 2019, the French competition authority imposed an interim measure against Google for likely abusing its market dominant position by blocking Amadeus, a French directory services provider, from running search ads. In April 2020, the authority imposed another interim measure against Google for refusal to negotiate compensation with news publishers, which was recently upheld in court. This increase in the utilization of interim measures illustrates the desire to take a harder stance against "big tech" companies.

For the EC, it will be interesting to see if interim measures are suitable for novel theories of harm in the digital sector, and whether the risks of a market tipping in favor of *prima facie* dominant companies justify their use. Interim measures are currently discussed within the framework of EC's consultation on a New Competition Tool.

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[23] In the past, the EC occasionally accepted commitments from parties subject to investigation that lasted until the EC completed its main proceedings. For example, in *Eurofix-Bauco v. Hilti*, the EC accepted that Hilti would stop tying certain sales or discriminating by discounts. *See* EC decision of December 22, 1987, OJ L 65/19, para. 29, 32, 100 *et seq*.

[24] *See* EU Commission Notice on the handling of complaints, OJ C 101/65 of April 27, 2004, para. 16 and 80.

[25] Emphasis added in view of above EU jurisprudence to protect competition as such, and not the individual interests of parties.

[26] French competition authority, Annual Report 2018, p. III, 8.

[27] French competition authority, Annual Report 2019, at p. 14, and Annual Reports 2017 and 2018, each at p. 10.

As the Broadcom case has shown, interim measures can be a powerful tool to encourage companies to proactively take corrective action and avoid multi-year investigations and proceedings. Clients active in fast moving technology and digital markets should anticipate that the EC may quickly intervene in the future and may consider numerous ways to make enforcement more effective, including interim measures.