

Interim Measures in EU Competition Cases The Awakening of the Sleeping Beauty

Beauty, Beast or Blind Passenger?

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Purpose of interim measures

- Interim measures serve to avoid that the final decision finding an infringement is undermined because competition is seriously and irreversibly damaged while the investigation is ongoing.
- Interim measures must be temporary and conservatory in nature and restricted to what is required in the given situation. This is because interim measures are highly intrusive. The investigated firm is required to change its conduct before an infringement is found.

A closer look at the test

- *Prima facie infringement.*
 - All the elements required to find an infringement must be present but with lesser degree of certainty.
 - In the case of Article 102 TFEU, need to establish *prima facie* capacity to foreclose and foreclosure effect in light of all the circumstances (*Intel*).
- *Serious and irreparable damage to competition.*
 - “*Serious*” means that the likely impact must be greater than what is required to find an infringement, justifying the intrusiveness of the measure (compare *Post Danmark (II)*).
 - “*Irreparable*” means that there is a real risk that the harm to competition cannot be undone by a final decision imposing remedies.

Why was the beauty asleep?

- Strict conditions for imposing interim measures mean that most cases are not suitable for interim measures because they are complex and require detailed analysis of all the relevant facts and circumstances to satisfy conditions.
- In such cases, the basis for finding a prima facie infringement and serious and irreparable damage to competition is not evident.
- The intrusiveness of the measure is particularly high when existence and scope of an infringement is not clear-cut.

Application of IM in digitized economy

- Because digitization is changing business at a rapid pace, competition law increasingly ventures into uncharted territory.
 - Non-linear competition (new business models, innovation outside traditional markets).
 - Many products offered free of charge and capacity does not drive competition.
 - Services and not products increasingly drive economics and competition.
 - Activities are often interdependent and do not fit within relevant market boundaries.
- Thorough analysis of facts and circumstances is key to establishing competition concerns and remedies, generally making such cases ill-suited for interim measures.

Meeting the digitization challenge

- Frontload investigation of the business model and facts to understand conduct and likely impact.
- Frontload analysis of end-game to determine whether competition law is the appropriate tool.
- Consider interim measures in cases where there is a real and substantiated risk of market-tipping that would render available remedies ineffective.