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UNLOCKING THE POWER OF THE EUROPEAN COMMISSION TO ORDER INTERIM MEASURES UNDER REGULATION 1/2003: AN INQUIRY INTO THE NATURE OF THE TOOL

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Abstract

Is the long-forgotten power of the Commission to order interim measures a satisfactory tool to safeguard the effective enforcement of EU competition law? It is not possible seriously to consider the claim without exploring the essential properties that characterize the power and that must inform its exercise. The decisional practice is scarce, and the related case law consists of a handful of judicial decisions, the latest of which is over 20 years old. What precisely is the role of the Commission's interim powers within the EU system of competition law enforcement currently in force? The present article attempts to reveal the nature of the tool in the light of multiple elements found relevant for the interpretation and application of Article 8 of Regulation 1/2003. Along the way, misapprehensions with the potential to undermine interim action by the Commission are identified.

1. Introduction

The Commission's interim measures in *Broadcom*,[1] roughly two decades after its previous interim decision,[2] heralds a wind of change in the institution's willingness to make use of this power in Article 101 and Article 102 TFEU proceedings. *Broadcom* follows an apparent broad consensus that proceedings are generally too slow to safeguard the effective application of competition rules. This fear is especially acute regarding the gap between intervention and the fast moving development of digital markets,[3] with *Google Search*

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1. Decision of 16 Oct. 2019, AT.40608 *Broadcom*.
2. Decision of 3 July 2001, COMP D3/38.044 *NDC Health/IMS Health*.
3. See e.g. Kadar "European Union competition law in the digital era", 13 *Zeitschrift für Wettbewerbsrecht* (2015), 342–363, at 346–347; Bourreau and de Streel, "Digital conglomera tes and EU competition policy", *SSRN Electronic Journal* (2019), 33–34; Marsden and

(Shopping) being frequently mentioned as an example of ineffectual competition law enforcement in the sector.[4] The threat of possible systemic failure has led to several policy reports urging authorities to make robust use of interim measures to avoid serious and irreparable harm.[5] In tandem, Commission Vice-President Margrethe Vestager has also committed to resorting to interim measures more often.[6] Notwithstanding, the question remains whether interim measures can deliver on their advocates' promises.

Interim measures are a striking power. The Commission may command undertakings to perform or refrain from certain acts at a stage where the outcome of the investigation is still uncertain and the obligations may last several years.[7] They have been used to require undertakings to resume supplies,[8] restrain from reducing selling prices,[9] provide access to infra-structures,[10] or cease applying exclusive dealing obligations.[11] Originally, the Commission did not hold an express power to order interim measures. Nevertheless, in a remarkable judicial construction based on the

Podszun, "Restoring balance to digital competition – Sensible rules, effective enforcement", Konrad-Adenauer-Stiftung (2020), p. 80.

4. Decision of 27 June 2017, AT.39740 *Google Search (Shopping)*. The Commission fined Google for favouring its own comparison shopping service in its general search results pages and demoting rivals. Around 1.7 billion search queries have reportedly been analysed (IP/17/1784). However, by the time the infringement decision was adopted, after over 6 years of investigation, Google's competitors had grown too weak to compete. In this respect, see e.g. Caminade, Chapsal and Penglase, "Interim measures in antitrust investigations: An economic approach", 17 *Journal of Competition Law and Economics* (2020), 437–457, at 438; Podszun "Private enforcement and gatekeeper regulation: Strengthening the rights of private parties in the Digital Markets Act", (2021) JECLAP, at 3 and 6; Tremolada, "Interim measures in digital markets: An enforcement tool rediscovered", 42 ECLR (2021), 598–610, at 599.

5. See e.g. Digital Competition Expert Panel, "Unlocking digital competition" (2019), pp. 104–105; Commission "Competition Law 4.0", "A New Competition Framework for the Digital Economy" (2019), summary para 18; CERRE, "Digital markets and online platforms: New perspectives on regulation and competition law" (2020), p. 50; Joint Paper of the heads of the national competition authorities of the EU, "How national competition agencies can strengthen the DMA" (2021), para 5; OECD "Handbook on competition policy in the digital age" (2022), p. 64.

6. Statement 19/6115.

7. Leubsdorf, "Preliminary injunctions: In defense of the merits", 76 *Fordham Law Review* (2007), 33–47, at 34, observes that preliminary injunctions involve much guesswork in application.

8. Decision of 29 July 1987, IV/32.279 *BBI/B&H*; Decision of 26 March 1990, IV/33.157 *Ecosystem/Peugeot*.

9. Decision of 29 July 1983, IV/30.698 *ECS/AKZO*.

10. Decision of 11 June 1992, IV/34.174 *Sealink/B&I*; Decision of 16 May 1995, IV/35.388 *ICG /CCI Morlaix*.

11. Decisions of 25 March 1992, IV/34.072 *Mars/Langnese*; AT.40608 *Broadcom* cited *supra* note 1.

effet utile of EU law,[12] the ECJ inferred this power from the logic of the enforcement system. This was done in *Camera Care* in the early 1980s.[13] Article 8 of Regulation 1/2003 has enshrined the Commission's interim powers,[14] by largely integrating the case law that had developed in the meantime.[15] According to Article 8(1), the Commission may impose interim measures if two cumulative conditions are met.[16] First, there must be urgency, inasmuch as the conduct poses a risk of serious and irreparable damage to competition pending the investigation. Second, the conduct being investigated must *prima facie* infringe Articles 101 or 102 TFEU. Furthermore, it derives from Article 8(2) and the case law that the Commission's action must be limited in time and comply with the principle of proportionality. Consequently, interim measures must be adequate and necessary to remove the threat to competition. Moreover, they must take account of conflicting interests, so that their adverse effects do not considerably outweigh their benefits.[17]

Despite being confirmed by the ECJ and legislation, the circumstance that interim measures have rarely been ordered in over 40 years casts doubt on their real significance.[18] The belief that the duration of competition proceedings

12. The *effet utile* tenet implies that priority is given to the interpretation that best safeguards the result prescribed by EU law, account taken of the wording, context, and goals of the provisions at issue. See e.g. Lenaerts and Gutierrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Bruylant, 2020), pp. 13–73; Cruz Vilaça, "Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour" in Rosas, Levits and Bot (Eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer, 2013), pp. 279–306 at p. 280, underlines the crucial role of the principle in EU law.

13. Case 792/79 R, *Camera Care*, EU:C:1980:18, concerning a situation where a disruption in supplies by a manufacturer of photographic equipment threatened the business of a customer engaged in the repair, hire, and sale of those products.

14. Regulation 1/2003 on the implementation of the rules on competition laid down in Arts. 101 and 102 TFEU, O.J. 2003, L 1/1.

15. Case 792/79 R, *Camera Care*; Joined Cases 229 & 228/82 R, *Ford*, EU:C:1982:320; Joined Cases 228 & 229/82, *Ford*, EU:C:1984:80; Case T-23/90 R, *Peugeot*, EU:T:1990:31; Case T-23/90, *Peugeot*, EU:T:1991:45; Case T-44/90, *La Cinq*, EU:T:1992:5; Joined Cases T-24 & 28/92 R, *Langnese-Iglo*, EU:T:1992:71; Case T-184/01 R, *IMS Health*, EU:T:2001:200; Case T-184/01 R, *IMS Health*, EU:T:2001:259. Yet, one noteworthy adjustment is noted *infra* at section 3.

16. See e.g. Case T-44/90, *La Cinq*, para 30.

17. The need for EU institutions to observe proportionality derives, first and foremost, from Art. 5(4) TEU and from Art. 52(1) CFR. See e.g. Opinion of A.G. Kokott in Case C-441/07 P, *Alrosa*, EU:C:2009:555, paras. 42 and 46; Tridimas, *The General Principles of EU Law* (OUP, 2006), p. 139; Möller "Proportionality: Challenging the critics", 10 *International Journal of Constitutional Law* (2012), 709–731, at 711; Warin, *Individual Rights Under European Union Law* (Nomos, 2019), pp. 84–85.

18. Decisions of 18 Aug. 1982, IV/30.696 *Ford*; IV/30.698 *ECS/AKZO* cited *supra* note 9; IV/32.279 *BBI/B&H* and IV/33.157 *Ecosystem/Peugeot* cited *supra* note 8; IV/34.174

compromises their effectiveness has already triggered sector-specific regulation for digital markets. Also driven by competition tenets, the Digital Markets Act (DMA),[19] has been explained by enabling swifter intervention when compared with competition law enforcement.[20] Interestingly, the power for the Commission to impose interim measures under the DMA mirrors Article 8 of Regulation 1/2003.[21]

An adequate reflection on the strengths and weaknesses of the existing legal framework requires a close enquiry about the scope of interim measures and the role they can realistically play in securing the effective application of competition rules across all sectors and especially those requiring swifter action to prevent the consolidation of anticompetitive effects.[22] A wide array of possible reasons for the scarce imposition of interim measures have been put forward,[23] accompanied by several suggestions of reform to facilitate the

Sealink/B&I cited *supra* note 10; IV/34.072 *Mars/Langnese* cited *supra* note 11; IV/35.388 *ICG/CCI Morlaix* cited *supra* note 10; COMP D3/38.044 *NDC Health/IMS Health* cited *supra* note 2; AT.40608 *Broadcom* cited *supra* note 1.

19. Regulation 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act), O.J. 2022, L265/1.

20. See e.g. Jenny, "Competition law enforcement and regulation for digital ecosystems: Understanding the issues, facing the challenges and moving forward", (2021) *Concurrences*, 38–62.

21. Art. 24 DMA.

22. Case T-201/04, *Microsoft*, EU:T:2007:289, para 562, and Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, para 108, suggest that interim measures are particularly relevant in certain markets. In the same vein, see e.g. Lowe and Maier-Rigaud, "Quo vadis antitrust remedies" (*Fordham Competition Law Institute,* 2008), 597–611, at 609 (on likely irreversible effects in dynamic markets); Art, "Interim relief in EU competition law: A matter of relevance", 1 *Italian Antitrust Review* (2015), 55–74, at 61 (on successful exclusion in markets with scale or network effects); Despoina, "Interim measures in EU competition cases: Origins, evolution, and implications for digital markets", 9 JECLAP (2020), 487–498, at 495 (on urgency being easily established in digital markets).

23. See e.g. Art, ibid., taking the view that the ECJ imposed excessive constraints on interim measures; Feases, "Sharpening the European Commission's tools: Interim measures", 16 *European Competition Journal* (2020), 404–430, attributing the paucity to various reasons, such as enforcement costs, no *ex parte* procedures, difficulties in establishing *prima facie*, the intensity of judicial review, the high standard of irreparable damage, extensive rights of defence; for Caminade et al., op. cit. *supra* note 4, at 438, the Commission's conservative approach is rooted in not wanting to err on the side of over-enforcement, forbidding conduct that ultimately is not considered an infringement; Despoina, op. cit. *supra* note 22, mentions a combination of substantive and procedural hurdles, including the inappropriateness of interim measures unless the law is clear; Kadar, "The use of interim measures and commitments in the European Commission's Broadcom Case", 6 JECLAP (2021), 443–451, at 444–445, advances a threefold explanation: complainants cannot seek interim measures under Regulation 1/2003; the ECJ suspension of the interim measures ordered in *IMS*; a shift in the Commission's focus from timeliness to appropriateness of enforcement.

use of the tool.[24] Some of the explanations cannot be accepted without reservations. For example, the understanding that demonstrating serious and irreparable damage poses an unsurmountable burden on the Commission overlooks the fact that the ECJ has been steadily granting interim relief in all areas of EU law based on an identical threshold.[25] Moreover, the not so long approved "ECN+ Directive" allows Member States to retain that exact condition in relation to the interim powers of national competition authorities, showing that the EU legislature considers the requirement appropriate.[26] It is also noteworthy that this threshold has been lowered in the UK to "significant damage", but the change has not been accompanied by an increase in interim measures by the Competition and Markets Authority.[27] In a similar vein, the frequently advanced proposition that one single order by the ECJ, in *IMS*,[28] discouraged the Commission from ever again using its interim powers does not come across as entirely convincing. The ECJ suspension of the obligation to license copyright imposed by the Commission was made under the view that only in certain exceptional circumstances could competition law trump intellectual property rights. That specific situation stands in contrast with case law that, globally considered, has affirmed the existence of the Commission's interim powers absent an explicit legal basis,[29] and has set aside restrictive interpretations of the applicable conditions to avoid emptying those powers.[30] To borrow the words of one commentator, the ECJ preferred "to trim down an overenthusiastic Commission [interim measures] decision rather than annul it completely".[31]

The debate would benefit from taking a step back and resisting pushing for sensitive reforms, notably from the standpoint of the undertakings' procedural guarantees, which can be either ineffective or even counterproductive. A

24. See e.g. "Rapport d'information 3127 sur les plateformes numériques à Assemblée Nationale déposé par la Commission des Affaires Économiques" (2020), pp. 57–58, proposing to align the EU rules with French law, where interim measures are more frequent; Digital Competition Expert Panel, op. cit. *supra* note 5, p. 139, recommending to streamline processes and to limit judicial review in the UK; Feases, op. cit. *supra* note 23, advancing several options for improvement.

25. See e.g. Case T-184/01 R, *IMS*, EU:T:2001:259, para 116; Case C-791/19 R, *Commission* v. *Poland (Régime disciplinaire des juges)*, EU:C:2020:277, para 82.

26. Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, O.J. 2019, L 11/3.

27. Digital Competition Expert Panel, op. cit. *supra* note 5, p. 104.

28. Case T-184/01 R, *IMS*.

29. Case 792/79 R, *Camera Care*.

30. Case T-23/90, *Peugeot*, and Case T-44/90, *La Cinq*.

31. Sharpston, *Interim Relief and Substantive Relief in Claims under Community Law* (Butterworth-Heinemann, 1993), p. 90. For examples, see Joined Cases 229 & 228/82 R, *Ford*, and Joined Cases T-24 & 28/92 R, *Langnese*.

preliminary question is the nature of the Commission's interim powers within the current legal framework. Only when the fundamental traits of these powers have been fully apprehended will it be feasible to establish the factors that might unjustifiably refrain the Commission from imposing interim measures. Answering that question is the objective of the present article. Calamandrei emphasized in his seminal work on interim proceedings in Italy[32] that the field of interim measures is extremely fertile in unexpected practical problems requiring a solid preparation in the underlying theoretical principles.[33] A scarce decisional practice in the EU has generated little interest in the study of the foundations of interim measures. The literature thus adheres without much hesitation or comment to questionable tenets with the potential to undermine interim action by the Commission. This article adds to that analysis by exploring the essential properties that characterize interim powers under Regulation 1/2003, bringing to light looming misconceptions and supporting a more forceful use of the tool.

The enquiry will take into account the power of the ECJ to award interim relief. Such power was already established at the time of *Camera Care* and helped shape the Commission's interim powers.[34] Of course, there are differences in the way these institutions exercise their competences given their distinct functions within the EU legal order.[35] However, their respective interim powers share the fundamental aim of ensuring that a final decision will be fully effective and are governed by identical conditions,[36] justifying that many analogies be drawn between the two.[37] Moreover, given the shortage of

32. Calamandrei, *Introduzione allo Studio Sistematico dei Provvedimenti Cautelari* (Cedam, 1936) – Spanish translation, *Introducción al estudio sistemático de las providencias cautelares* (Ediciones Olejnik, 2018).

33. Ibid., pp. 27–28. A.G. Tesauro has noted the pioneering role of Italian and German doctrine on the study of interim proceedings; Opinion in Case C-213/89, *Factortame*, EU:C:1990:216, p. 2457.

34. Arts. 185 and 186 EEC. See e.g. Case C-20/81 R, *Arbed*, EU:C:1981:61, para 13. Borchardt, "The award of interim measures by the European Court of Justice", 22 CML Rev. (1985), 203–236, provides an overview of the principles applicable.

35. Arts. 17 and 19 TEU. The ECJ essentially grants interim relief to guarantee full and effective judicial protection. See e.g. Case T-249/17, *Casino and others*, EU:T:2020:458, paras. 46–81; Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014), p. 563; Cruz Vilaça, "Interim measures in judicial proceedings as an instrument of protection for individuals in European Community Law" in *EU Law and Integration, Twenty Years of Judicial Application of EU Law* (Hart, 2014), pp. 133–165, at p. 133. The Commission imposes interim measures within its mission to establish effective compliance with competition law. See Lowe and Maier-Rigaud, op. cit. *supra* note 22, at 599.

36. See e.g. Case C-791/19 R, *Commission* v. *Poland*, para 82; Case 792/79 R, *Camera Care*, para 18.

37. For Lang, "The powers of the Commission to order interim measures in competition cases", 18 CML Rev. (1981), 49–61, at 49, the Commission's interim powers equate to those of the ECJ. At national level, a parallel is often established between the interim powers of the

studies specifically on EU law, elements pertaining to national and international interim proceedings will be considered.[38]

The remaining sections of this article will treat four main essential properties attributed to the Commission's interim powers in competition cases.

First, urgency is the *raison d'être* of interim measures. They are explained by the imperative to intervene swiftly pending an investigation to remove the danger of negative changes to market conditions difficult to reverse so that the effectiveness of a final prohibition decision be preserved. The concern that the time allocated to interim proceedings will delay the treatment of the case must not lose sight of the fact that in urgent situations the alternative will rarely amount to simply adopting a final decision sooner. Allocating all resources to ordinary proceedings may well lead to infringement decisions being unable to perform their function of restoring competition.

Second, interim measures are measures of protection. Prior to Regulation 1/2003, the Commission could impose interim measures to safeguard the interests of an individual complainant. Interim action must today always aim at safeguarding the EU public interest in a system of undistorted competition, which is something to be defined by reference to the mission of competition law and transcending the sum of the individual interests of the persons affected. The injury the system faces is an element to consider in the process of weighting the several interests involved inherent in interim proceedings. Despite the complexity of this exercise, once urgency has been established, the pendulum may more easily swing in favour of interim intervention than before, given that the public interest is broader than the protection of individual interests.

Third, interim measures are ancillary measures. They are a procedural instrument aimed at preserving the ability of another procedural instrument to fulfil its function and restore competition effectively. Although a link must exist between the measures ordered, the ongoing investigation, and the powers of the Commission to terminate infringements, interim measures do not demand the intractable task of ascertaining the specific obligations that may

judiciary and of the administration. See e.g. in the UK, Case *LME/OFT*, CAT (2006), para 138; in Portugal, Lopes Luís, "As medidas provisórias no CPA" in Amado Gomes, Neves and Serrão (Eds.), *Comentários ao Novo Código do Procedimento Administrativo*, 5th ed. (AAFDL, 2020), pp. 61–95.

38. Slusny, "Les mesures provisoires dans la jurisprudence de la Cour de Justice des Communautés Européennes", 1 Rev.belge dr.int (1967), 127–153, at 129 and 133, explains that interim proceedings were a constant in several legal orders, including those of the 6 founding Member States and in international litigation, and argued that EU law provisions drew inspiration from that almost universal tradition.

be included in a final decision. Such requirement would be incompatible with the promptness of interim proceedings and would render them redundant.

Fourth, interim measures are provisional measures. They offer a temporary solution to be replaced by a final decision, settling the Commission's position on the existence of an infringement and on the appropriate remedies to bring it effectively to an end. Nonetheless, interim measures may legitimately entail definitive effects, including, in certain situations, market developments difficult to reverse.

Finally, it is advanced that the Commission's interim powers have been inadequately characterized as aimed at preserving the *status quo*. Regulation 1/2003 does not lay down a catalogue of admissible interim measures and reality may have to be shaped in novel ways. Ultimately, the decision to order interim measures, the choice of the measures, and the trade-offs the tool implies, will be arbitrated considering the concrete circumstances of each situation, the strength of the case and the likely losses for the various interests at play, in accordance with the demands of the principle of proportionality. The latter will be the guiding light for the Commission's interim action.

2. An urgency rationale for interim measures

The Commission's interim powers under Regulation 1/2003 are first and foremost characterized by the urgency that explains their very existence. Urgency is linked to a "risk of serious and irreparable damage to competition" associated to the conduct being investigated. The intensity and nature of the damage, in that it must be "serious and irreparable", follows the case law issued on the matter prior to the Regulation,[39] and echoes the urgency condition applicable to the exercise by the ECJ of its own power to grant interim relief.[40] Urgency is, as a matter of fact, the universal soul of interim measures proceedings.[41] The mechanism has proliferated across legal systems so that basic institutions continue to respond satisfactorily to the needs of our contemporary societies, marked by an acceleration of time.[42]

39. See e.g. Case T-44/90, *La Cinq*, paras. 28–29.

40. See e.g. Case T-184/01 R, *IMS*, para 116, and Case C-791/19 R, *Commission* v. *Poland*, para 82.

41. See e.g. Amado Gomes, *Textos dispersos de Direito do contencioso administrativo* (AAFDL, 2009), p. 311.

42. See e.g. Sierra, "Provisional court protection in administrative disputes in Europe: The constitutional status of interim measures deriving from the right to effective court protection. A comparative approach", 10 ELJ (2004), 42–60, at 50–51; Arruda Alvim, *Tutela provisória*, 2nd ed. (Saraiva Jur, 2017), p. 21.

It is not unusual to see concerns being expressed with regard to interim proceedings by reason of the additional resources and procedural acts that are required to impose interim measures. This factor has been put forward as an explanation for the Commission's lack of interest in using a tool that would delay the treatment of the case.[43] The regime governing interim powers must naturally be aligned with their function, which implies striking the right balance between the undertakings' procedural guarantees and the need to adopt a decision within a tight timeframe. It is possible to ponder whether such an equilibrium requires streamlining interim proceedings to guarantee that interim intervention by the Commission is effective.[44] Regardless of such ongoing reflection, in the face of an urgent situation the alternative to interim measures is hardly simply the adoption of a final decision sooner. In the hypothesis where, at the stage when urgency is detected, the Commission's position is already clearly defined and the evidence is solid, the better course seems to be, indeed, not to consider interim measures.[45] However, in the arguably much more common scenario where that is not the case, the absence of interim measures may well imply that all resources are allocated to ordinary proceedings – not known for their swiftness[46] – which, by the time a breach of the rules on competition is established, have lost, to a greater or lesser extent, their ability to accomplish their objective.[47]

In the realm of competition law, an investigation into a suspected breach of Articles 101 or 102 TFEU may lead, if the Commission does not abandon the case or makes a finding of inapplicability of those provisions, to the adoption of a prohibition decision under Article 7 of Regulation 1/2003, accompanied by the behavioural or structural remedies found proportionate to the infringement committed and necessary to bring it effectively to an end. Alternatively, as per Article 9 thereof, commitments offered by the undertakings to meet the competition concerns expressed by the Commission

43. See e.g. Lowe and Maier-Rigaud, op. cit. *supra* note 22, at 609, noting that interim measures add a full-blown procedure and likely judicial review to the main investigation; for Kadar, op. cit. *supra* note 3, at 359, the pursuit of interim measures may delay the adoption of a final decision on the substance of the case by at least some months; Jaspers observed during the Workshop "Interim measures and EU competition proceedings: Is there a case for reform?" (Concurrences, 2018), that interim measures will not necessarily guarantee speed often causing extra delays.

44. See e.g. Feases, op. cit. *supra* note 23, at 425–429.

45. See e.g. Ferry "Interim relief under the Rome Treaty – The European Commission's powers", 2 *European Intellectual Property Review* (1980), 330–335, at 333.

46. Ibid., at 335.

47. For Lang, "The strengths and weaknesses of the DG Competition Manual of Procedure", 1 *Journal of Antitrust Enforcement* (2013), 132–161, at 145–146, the failure to use interim powers is one of the Commission's most serious failures in competition law, denoting an excessive concern with administrative convenience over effectiveness in safeguarding competition.

in a preliminary assessment may be made binding. Nonetheless, the road to the adoption of a final decision on the substance of a case may be long. Sometimes, competition is adequately safeguarded if ordinary proceedings run their course.[48] In other situations, the period indispensable to deal with the case might turn out to be incompatible with what is required to protect the result prescribed by competition rules effectively, because damage materializes in the interim.[49] A final decision arrives too late, losing its ability to work as a suitable instrument for the protection of competition.[50]

Camera Care and subsequent case law shows that the confirmation of the Commission's authority to impose interim obligations on undertakings is justified by the concern that their behaviour at a time when the institution is still unable to adjudicate on the substance of the case may render ineffectual or illusory the prospect of restoring competition in the market.[51] A parallel may be drawn with the power of the judiciary to grant interim relief. In the same way as in judicial proceedings, also in competition proceedings handled by the Commission, the interests of certainty and sound decision making must be reconciled with the interests of effectiveness, since there is little point in taking a decision after years of investigation which is materially irrelevant by virtue of the time that has elapsed.[52] It has been pointed out that the establishment of interim proceedings lies on a delicate medium line between two conflicting concerns: adopting a swift decision, that may be erroneous; and adopting a careful and thorough decision, but that may be useless.[53] The tool essentially promotes fast intervention enabling the adoption of a sound final decision in full respect of the fundamental procedural guarantees applicable.[54] Interim measures, therefore, come across as measures seeking to neutralize the corrosive impact that the passage of time bears on competition

48. Lang, op. cit. *supra* note 37, at 51–52.

49. According to Ullrich, in annotation of Joined Cases 228 & 229/82, *Ford* v. *Commission*, 21 CML Rev. (1984), 579–593, at 585, interim measures enable the Commission to impose obligations on undertakings while it grapples with the procedural legal requirements and its own internal decision-making procedures.

50. Calamandrei, op. cit. *supra* note 32, p. 43.

51. See e.g. Case 792/79 R, *Camera Care*, paras. 12–18; Joined Cases 228 & 229/82, *Ford*, para 19.

52. Slusny, op. cit. *supra* note 38, at 131; Castillo de la Torre "Interim measures in community courts: Recent trends", 44 CML Rev. (2007), 273–353, at 273; Cruz Vilaça, op. cit. *supra* note 35, at p.156. The link between interim measures and the full effectiveness of EU law was emphasized by the ECJ in e.g. Case C-213/89, *Factortame*, EU:C:1990:257, paras. 20–23.

53. See e.g. Carvalho Gonçalves, *Providências Cautelares* (Almedina, 2019), p. 82.

54. Calamandrei, op. cit. *supra* note 32, pp. 45–46. Bourreau and de Streel, op. cit. *supra* note 3, 33, consider that interim measures reduce the time lag between intervention and market evolution without sacrificing due process and the quality of the final decision.

proceedings by withholding adverse market developments that it will be difficult to undo.[55]

The analysis of the Commission's decisional practice sheds light on the type of situations where intervention pending an investigation has been deemed urgent.

In several cases, urgency has been grounded on the fact that the continuation of the suspected conduct would result in the elimination of competition and one company completely dominating the market. In *Broadcom*, the Commission found that the world leader in the supply of chipsets for TV set-top boxes and modems foreclosed access to strategically important customers through the negotiation of exclusive or quasi-exclusive purchasing obligations and commercial advantages. Without interim measures prohibiting the enforcement of the clauses, Broadcom would gain a quasi-monopoly position in the short to medium term, as its key competitors would be marginalized or forced to exit the relevant markets with unlikely perspectives of re-entry.[56] Previously, in *ECS/AKZO*, the entry of ECS in the plastics sector led AKZO to offer selective price reductions to customers or to sell its products at excessively low levels to force the competitor out of the market. The Commission considered that the behaviour imposed sustained pressure on ECS's margins and seriously affected its financial position. A finding of abuse of dominance would be ineffective if the company had meanwhile been compelled to cease trading and AKZO obtained a near monopoly.[57] In *BBI/B&H*, the manufacturer of musical instruments B&H, confronted with the creation by its customers of the competing joint venture BBI, retaliated by withholding supplies. The Commission took the view that the behaviour endangered the viability of the joint venture and the business of the participant companies. A finding that B&H abused its dominant position would be illusory if in the interim the firms had been put out of business and B&H confirmed as the sole producer of instruments suitable for brass bands in the EU.[58]

In other occasions, urgency has been tied to different motives. In *Ford*, the Commission expressed concerns in relation to a circular halting supplies of right-hand drive vehicles to German distributors to prevent those vehicles from being sold in the UK where the prices were higher. Even a brief interruption in supplies could have a long-term effect on parallel imports in the EU, as customers could not be expected to delay their purchases until the

55. See e.g. Case T-44/90, *La Cinq*, para 80, and Recital 38 of Directive 2019/1 cited *supra* note 26.

56. AT.40608 *Broadcom* cited *supra* note 1, paras. 431–506.

57. IV/30.698 *ECS/AKZO* cited *supra* note 9, paras. 33 and 34.

58. IV/32.279 *BBI/B&H* cited *supra* note 8, paras. 22–23.

adoption of a final decision.[59] Thereafter, *Sea Containers/Sealink* dealt with the seemingly discriminatory conditions under which Sealink, who owned and operated the port of Holyhead, provided slot times, creating difficulties for the introduction of a new fast ferry service. The Commission emphasized that "[w]here an undertaking is denied the opportunity to provide a new product or service to a market and that opportunity is likely to diminish considerably in value in the absence of interim measures, there is sufficient urgency to justify interim measures".[60] On another situation concerning the port of Holyhead, in *Sealink/B&I*, the Commission considered that the introduction of a new timetable for the summer season could unlawfully disrupt the services B&I provided. To establish urgency, the Commission relied on the argument that it would take the firm a considerable time to recover from customer dissatisfaction and a commercial reputation for delay and inefficiency which was particularly harmful in the ferry business.[61]

The case law on the ECJ's power to grant interim relief shows that it is not necessary to establish the occurrence of serious and irreparable damage with absolute certainty. It suffices that its occurrence prior to the adoption of a final decision on the substance of the case is foreseeable with a sufficient degree of probability.[62] Moreover, the notion of irreparable damage is often interpreted to comprise damage that is difficult to repair.[63] Identical tenets should extend to the Commission's interim powers.

Conversely, the considerations pertaining to the irreparable character of purely pecuniary damages are not transposable.[64] The focus of judicial interim proceedings is on the protection of the rights of individuals. According to well-established case law, if the damage alleged by the applicant is of a purely economic nature it will not, in principle, be regarded as irreparable unless the losses in question can threaten its survival, because the applicant will

59. IV/30.696 *Ford* cited *supra* note 18, para 44. The ECJ set aside the Commission's decision, but not because of errors in the analysis of urgency. See Joined Cases 229 & 228/82, *Ford*, examined *infra* section 4.

60. Decision of 21 Dec. 1993, IV/34.689 *Sea Containers/Stena Sealink*, para 58. The Decision rejected the application for interim measures because the firms reached an understanding. An identical reasoning was advanced by the Commission in IV/34.072 *Langnese,* cited *supra* note 11. It considered that the enforcement of exclusivity agreements would prevent Mars from penetrating the market for single-item ice-cream at a time when competitors were about to introduce, or had recently introduced, new products comparable to its own. See European Commission, XXIInd Report on Competition Policy 1992 (1993), para 312.

61. IV/34.174 *Sealink/B&I* cited *supra* note 10, paras. 57–61.

62. See e.g. Case C-149/95 P(R), *Atlantic Container Line and others*, EU:C:1995:257, paras. 37–38; Case C-791/19 R, *Commission* v. *Poland*, para 82.

63. See e.g. Case C-76/89 R, *RTE*, EU:C:1989:192, para 18; Case T-115/92 R, *Hogan* v. *Parliament*, EU:T:1993:26, para 17; Case T-148/21 R, *Paccor Packaging*, para 24.

64. For an opposite view see e.g. Feases, op. cit. *supra* note 23, at 416–420, linking the standard of irreparable damage under Regulation 1/2003 to the viability of private enforcement.

normally be able to obtain financial compensation for that damage once a final judgment is delivered.[65] Concerning Article 8 of Regulation 1/2003, as the next section explores, the Commission's intervention is primarily driven by the concern to protect the EU public interest in a system of undistorted competition, a concept which transcends the individual interests of the persons affected by the practices being investigated. Therefore, the urgency condition set out in that provision is met where the absence of interim measures opens the door to sufficiently important market developments that will be difficult, or even impossible, to reverse at the end of the investigation, irrespective of whether financial harm caused to specific persons may be repaired through actions for damages.[66]

On this point, Regulation 1/2003 reinforced the existing case law.[67] In *La Cinq*, the television channel sought interim measures from the Commission to obtain access to EBU, an association of broadcasting organizations, and to its Eurovision network. The Commission rejected the request, advancing that urgency had not been established since La Cinq could make good any financial damages suffered in actions before national courts.[68] The ECJ considered that the Commission had misinterpreted the condition of irreparable damage which should be assessed considering the possibilities for remedial action within the context of the administrative procedure and not by reference to other possible avenues.[69] A different understanding "would make it almost impossible to verify the fulfilment of such a condition, and this would, in practice, amount to depriving of all substance the power granted to [the Commission] to adopt interim measures".[70]

3. Protecting the EU system of undistorted competition with due regard for all interests involved

The previous section looked at the adverse impact of time on competition proceedings. It was established that the competence to order interim measures is dictated by the concern to shield competition law enforcement from drifting into irrelevance. The present section aims at ascertaining the object of

65. See e.g. Case T-184/01 R, *IMS*, paras. 119 and 121; Case T-764/21 R, *Atesos medical and others*, EU:T:2022:91, para 35.

66. In this sense see e.g. "Interim Measures in Antitrust Investigations", OECD Competition Policy Roundtable Background Note (2022), pp.12–13.

67. See on the topic e.g. Nordsjo, "Regulation 1/2003: Power of the Commission to adopt interim measures", 27 ECLR (2006), 299–308, at 302–303.

68. Case T-44/90, *La Cinq*, para 77.

69. Ibid., paras. 78–80.

70. Ibid., para 81.

protection of interim powers. This enquiry is not only of theoretical interest, but also has important practical implications. In fact, by virtue of the principle of proportionality, the Commission's interim action is ultimately dependent on a balancing exercise, whereby the consequences of ordering interim measures must be balanced against the consequences of not doing so in the light of all the interests involved.[71] The case law has stressed that the imposition of interim measures incorporates a balancing test inasmuch as the disadvantages caused by them must not considerably outweigh their benefits.[72] Hence, it is critical to determine in each case the concerns at play.

It derives from Regulation 1/2003 that the objective of removing the danger that competition suffers serious and irreparable damage pending an investigation is pivotal in the exercise by the Commission of its interim powers. Their protective function is therefore well encapsulated in the idea that they enable the Commission to fulfil the normative content of Articles 101 and 102 TFEU in successive stages within a comprehensive procedural legal framework.[73] More precisely, through pre-emptively avoiding the most detrimental consequences arising from the suspected infringement while the conduct is still being investigated,[74] the measures guarantee that a final decision will be able to deploy its effects fully and that competition will be effectively protected. From this standpoint, interim measures come across as a key procedural instrument for the realization of the Commission's task as guardian of a system of undistorted competition within the EU and of its underlying goals as mandated by the Treaties.[75] The present article does not intend to take part in the discussion about the mission of competition law. The debate has been lively and ongoing with several tenets being advanced, such as preventing the degeneration of the competitive process,[76] promoting efficiency in the use of resources,[77] promoting consumer welfare,[78] protecting economic freedom,[79] achieving market

71. See *supra* note 17. Cruz Vilaça, op. cit. *supra* note 35, at p. 148.

72. See e.g. Case T-23/90 R, *Peugeot*, para 24; Case T-184/01 R, *IMS*, paras. 117 and 141.

73. See e.g. Case 792/79 R, *Camera Care*, para 17.

74. Lowe and Maier-Rigaud, op. cit. *supra* note 22, at 600.

75. According to Protocol 27 annexed to the EU Treaties, the establishment of an internal market as set out in Art. 3 TEU includes a system ensuring that competition is not distorted.

76. See e.g. Recital 9, of Regulation 1/2003; Case C-8/08, *T-Mobile Netherlands and others*, EU:C:2009:343, para 38.

77. See e.g. Moura e Silva, *Direito da Concorrência,* 2nd ed. (AAFDL, 2020), p. 149.

78. See e.g. Case C-882/19, *Sumal*, EU:C:2021:800, para 36; Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (OUP, 2020), p. 16.

79. See e.g. Monti, "Article 81 EC and public policy", 39 CML Rev. (2002), 1057–1099, at 1064.

integration,[80] obtaining fair societal outcomes,[81] or, in light of the mounting concerns over the conduct of titan digital companies, a renewed focus on dispersing the concentration of economic and political power.[82] It is plausible that multiple aims may be linked to competition law,[83] and that the substantive legal framework is sufficiently flexible to adjust to new settings and learning.[84] What is important to bear in mind is that the Commission's enforcement action through interim measures pursues some conception of the public interest inherent in securing in the EU a system of undistorted competition.[85]

The willingness to link interim measures clearly to the public good has led the legislature to depart from the case law in one noteworthy aspect.[86] Pursuant to Article 8(1) of Regulation 1/2003, the Commission orders interim measures on its own initiative and in situations where it can demonstrate a risk of serious and irreparable damage to competition.[87] The view taken is that the Commission is an administrative authority that acts in the public interest, a notion that cannot be reduced to the sum of the individual interests of the persons affected by anticompetitive practices.[88] This explains that a proposal

80. See e.g. Case C-56/64, *Consten and Grundig*, EU:C:1966:41, at p. 340; Ibáñez Colomo and Kalintiri, "The evolution of EU antitrust policy: 1966–2017", 83 *Modern Law Review* (2020), 321–372, at 331–332.

81. See e.g. Gerbrandy, "Rethinking competition law within the European Economic Constitution", 57 JCMS (2019), 127–142, at 127.

82. See e.g. Gerber, "Constitutionalizing the economy: German neo-liberalism, competition law and the 'new' Europe", 42 ACJL (1994), 25–84, at 36–37; Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (CGR, 2018).

83. Sources generally mention more than one objective.

84. See e.g. Ezrachi, "Sponge", 5 *Journal of Antitrust Enforcement* (2017), 49–75, at 50; Gerbrandy, "Changing competition law in a changing European Union, The constitutional challenges of competition law", (2019) *Competition Law Review*, 33–50, at 49; Shapiro "Antitrust: What went wrong and how to fix it", 35 *Antitrust* (2021), 33–45, at 33–34.

85. Case T-184/01 R, *IMS*, para 141, underscores that the Commission's interim powers are explained by the public interest in the maintenance of effective competition; Moura e Silva, op. cit. *supra* note 77, p. 160, argues that effective competition is protected as a public good; Dunne, "Public interest and EU competition law", 65 *The Antitrust Bulletin* (2020), 256–281, at 256, notes that competition law is a variety of public interest law; for Podszun, op. cit. *supra* note 4, at 7, competition authorities primarily pursue the public good.

86. Calamandrei, op. cit. *supra* note 32, p. 140, emphasizes that interim intervention shares the main features of genuine police power.

87. By comparison e.g. the UK Competition and Markets Authority may act to prevent significant damage to the public interest, a particular person or category of persons (Section 35(1) and (2) of Competition Act 1998). ECN, Recommendation on the power to adopt interim measures (Dec. 2013), p. 3, offers an overview of applicable standards.

88. See e.g. Ferry, op. cit. *supra* note 45, at 333; Nebbia "The notion of 'urgency' in interim proceedings concerning competition law: Some thoughts after the *Microsoft* Order", 4 ECLR (2007), 271–277, at 273; Gál and Strouvali, "Interim measures" in Rousseva (Ed.), *EU Antitrust Procedure* (OCL, 2020), at 9.31.

during the legislative procedure to identify those who would suffer the damage in question as being a group of consumers or one or more undertakings has not been retained.[89] The Commission's resources should not be diverted to resolve disputes between the parties, because courts are regarded as better placed to safeguard the rights of individuals. These considerations supported the understanding that complainants should not enjoy a formal right to seek interim measures from the Commission under Regulation 1/2003.[90] Before the entry into force of the Regulation, the case law granted wider latitude to the Commission. The institution could impose interim measures on the basis of serious and irreparable damage to the party seeking their adoption, or based on intolerable damage to the public interest, equated with the interest of the Member States or the EU's interest in the efficacy of its competition policy.[91] The broader yardstick led to fluctuations in the Commission's decisional practice which at times alluded to factors pertaining to damage to competition to justify its interim action,[92] and, on other occasions, largely grounded its intervention on narrower considerations relating to the damage caused by the conduct to an individual applicant.[93]

The modification introduced by Regulation 1/2003 has ramifications for the balancing of the interests involved that interim proceedings presuppose. Once the Commission meets the urgency threshold, the losses for the EU interest in a system of undistorted competition must be considered during that exercise.[94] In turn, given that safeguarding competition is a high-ranking concern in the EU legal order,[95] it may be thought that shielding the system from serious and irreparable damage is likely to prevail in a great number of

89. Report by the European Parliament on the Proposal for a Council regulation on the implementation of the rules on competition laid down in Arts. 101 and 102 TFEU (Final A5-0229/2001), p. 34.

90. Proposal for a Regulation on the implementation of the rules on competition laid down in Arts. 101 and 102 TFEU, explanatory memorandum on Art. 8, O.J. 2000, C 365E/284; Notice on the handling of complaints by the Commission under Arts. 101 and 102 TFEU, para 80, O.J. 2004, C 101/65.

91. See e.g. Case 792/79 R, *Camera Care*, paras. 14, 15 and 19; Case T-184/01 R, *IMS*, para 53.

92. See e.g. COMP D3/38.044 *NDC Health/IMS Health* cited *supra* note 2, paras. 195–201.

93. See e.g. IV/34.174 *Sealink/B&I* cited *supra* note 10, paras. 47–51.

94. In AT.40608 *Broadcom* cited *supra* note 1, para 512, the Commission considered that the public interest in avoiding serious and irreparable damage to competition should be weighed against the impact of the interim measures on Broadcom.

95. A.G. Cosmas observed that Arts. 101 and 102 TFEU serve the general interest of ensuring undistorted competition and occupy an important position in the system of the EU legal order; Opinion in Case C-344/98, *Masterfoods*, EU:C:2000:249, para 105; Hellström, Maier-Rigaud and Wenzel Bulst, "Remedies in European antitrust law", 76 *Antitrust Law Journal* (2009), 43–63, at 49, note that the objective of safeguarding competition is a very high-ranking one since free competition is a basic principle underpinning the EU's economic policy.

situations over other conflicting interests. At the very least, the assessment may more easily lean towards the imposition of interim measures than if the Commission acts to avoid damage to a particular person or category of persons.

That said, the requirement to weigh up the consequences linked to interim decisions remains a complex task, entailing delicate considerations and lending itself to many dilemmas, particularly when any option endangers several private or public interests.[96] Moreover, while interim measures aim at avoiding the consolidation of anticompetitive effects, it cannot be excluded that they also negatively impact market conditions.[97] It has been observed that "[it] would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."[98]

The difficulty of the endeavour is illustrated by the suspension of the copyright licensing obligation the Commission provisionally imposed in *IMS*.[99] The case touches on the interplay between intellectual property rights and competition law, marking the beginning of a period of almost 20 years without seeing the Commission ordering interim measures. It also shows the interaction between the Commission's and the ECJ's interim powers, as IMS sought judicial interim relief against the Commission's interim decision in connection with a main application seeking its annulment. In judicial and administrative interim proceedings identical conditions, *prima facie* and urgency, are assessed from different angles, the protection of competition or the protection of the rights of the applicant, with the analysis overlapping in its last stages when the various interests are balanced against each other.

The ECJ found that IMS had established a *prima facie* case for the suspension of the interim obligation requiring the firm to license to its competitors its copyright in Germany covering a "1 860 brick structure" used to provide sales data to the pharmaceutical industry. IMS had advanced serious grounds for doubting the correctness of the Commission's position.[100] The Court considered that the execution of the licensing obligation was likely to cause IMS serious and irreparable damage due to market developments that

96. Leubsdorf, "The standard for preliminary injunctions", 91 *Harvard Law Review* (1978), 525–566, at 541; Möller, op. cit. *supra* note 17, at 730.

97. See e.g. Nordsjo, op. cit. *supra* note 67, at 302; Caminade et al., op. cit. *supra* note 4, at 452–455, observe that interim intervention can lead to permanent changes with negative consequences on competition, such as lost innovation as a result of incorrectly "picking winners".

98. Lord Diplock in *American Cyanamid Co (No 1)* v. *Ethicon Ltd* [1975] UKHL 1.

99. Case T-184/01 R, *IMS*.

100. Ibid., paras. 73 and 91–106.

could negatively affect the value of its copyright and which would be very difficult to reverse.[101] Finally, the ECJ proceeded to weighing up the interests involved, diverging on several points from the Commission's assessment of the situation. It underlined the essential role of intellectual property rights in promoting innovation and competition, the public interest inherent in the protection afforded by those rights, as well as the "exceptional circumstances" in which a licensing obligation could be imposed under competition law.[102] It was further unconvinced that the obligation aimed to protect the public interest in the maintenance of effective competition, as the Commission claimed. This essentially concerned the individual interests of two IMS competitors,[103] and they did not face exclusion from the market either, because it was possible to continue to compete using versions of IMS's brick structure or given the financial strength of the economic group.[104] The ECJ therefore concluded that the balance of interests inclined in favour of halting the Commission's interim decision.

In difficult cases, the Commission may have to be ingenious and look for compromise solutions seeking to minimize rather than neutralize completely losses for competition. A course of action seeking to establish a middle ground is not at all unprecedented within the context of interim relief proceedings.[105] Conversely, simply to disregard interim measures in the face of doubt and uncertainty is effectively to condemn the tool to oblivion since, as the following sections develop, the power to order interim measures relies by definition on a mere perfunctory and non-definitive analysis of the conduct being investigated.

Against this background, the protection of the EU system of undistorted competition established in the Treaties while having due regard for the several interests involved corresponds to the second essential property of the Commission's interim powers.

101. Ibid., paras. 123–130.

102. Ibid., paras. 142–144.

103. On appeal, the ECJ confirmed that the balance of interests favoured suspending the licence obligation, although underlining that the interests of competing undertakings could not be excluded from Art. 102 TFEU as they could not be separated from the maintenance of an effective competition structure. Case C-481/01 P(R), *NDC Health* v. *IMS*, EU:C:2002:223, paras. 84–85.

104. Case T-184/01 R, *IMS*, paras. 145–146.

105. Joined Cases T-24 & 28/92 R, *Langnese*, paras. 28–34, illustrate how the ECJ has used its interim powers in this fashion. See section 5 *infra*.

4. The ancillary character of interim powers

The above considerations explained that the Commission's interim powers aim at preventing the materialization of serious and irreparable damage to competition during an investigation. By doing so, interim measures safeguard the EU public interest in a system of undistorted competition and the objectives that may be linked to that system. The third essential property attributed to interim measures is their ancillary character *vis-à-vis* the ongoing investigation.

Contrary to proceedings intended to obtain a definitive decision more rapidly based on a streamlined analysis,[106] interim proceedings are not self-standing. Interim measures are imposed in the context of an ongoing investigation on whether Articles 101 or 102 TFEU have been breached, and work as a procedural instrument to secure the utility of a future final decision adopted in the main proceedings. In other words, they are not an end in themselves but are means to an end. Thus, a sufficiently close link between the interim measures and the pending investigation is of the essence.[107] Concerning the interim powers of the judiciary, this logic stems from Articles 278 and 279 TFEU, which only admit applications for interim measures related to a main action pending before the ECJ. The crucial factor is that the interim measures and the main action be so linked as cause and effect that the former appear as the inevitable consequence of the latter.[108]

The case law has attempted to reflect this interconnection requirement also on the Commission's interim powers in competition cases, declaring that the interim measures "must come within the framework of the final decision which may be adopted by the Commission".[109] Yet, in a field characterized by provisions written in general terms, this assertion has proved problematic and the ECJ soon corrected its initial approach. The very first time the Commission used its interim powers, in *Ford*, the ECJ started to examine in considerable detail the potential outcome of the ongoing investigation and to compare it with the scope of the interim decision.[110] The measures required that Ford withdrew a circular sent to its German dealers discontinuing supplies

106. See e.g. Art. 53(4) and (5) of the Court of Justice's Rules of Procedure, O.J. 2012, L 265; Commission Notice on a simplified procedure for treatment of certain concentrations under Regulation 139/2004, O.J. 2013, C 366/5.

107. See e.g. Castillo de la Torre, op. cit. *supra* note 52, at 276; Lopes Luís, op. cit. *supra* note 37, at p. 63; Gál and Strouvali, op. cit. *supra* note 88, at 9.2.

108. Case C-18/65 R, *Gutmann*, EU:C:1965:41.

109. See e.g. Joined Cases 229 & 228/82, *Ford*, para 19, and Case T-23/90, *Peugeot*, para 20.

110. The ECJ followed A.G. Slynn who observed that the Commission's interim action could not exceed what it could do in a final decision; Opinion in Joined Cases 228 & 229/82, *Ford*, EU:C:1983:379, at pp. 1169–1170. In the same vein, see more recently Jaspers' remarks during the Workshop cited *supra* note 43.

of right-hand drive vehicles, as these were being redirected to the UK where the prices for such vehicles were higher. The ECJ considered, based on the elements in the file at that stage, that the ongoing investigation related to a distribution agreement between Ford and its dealers under Article 101 TFEU, whilst the circular constituted a unilateral act which could not fall foul of that provision. Any final decision in the case, and therefore any linked interim measures, could only concern the distribution agreement and not the circular.[111] These considerations could be read as implying that the Commission had not shown *prima facie* the existence of an infringement. However, the measures were not criticized on these grounds. Instead, the ECJ set aside the Commission's interim decision for lack of competence, strictly arguing that the measures did not come within the framework of a possible final decision. Interestingly, when the time came for the ECJ to review the legality of the Commission's final decision, it became apparent that the contentious circular fell within the scope of Article 101 TFEU after all, as it should be regarded as forming part of the contractual relations between Ford and its dealers.[112] Subsequently, in *Peugeot*, the Commission imposed interim measures to halt a circular sent by Peugeot to its dealers instructing them not to accept orders from a trade intermediary that was exporting vehicles purchased in Belgium and Luxembourg to France. When examining if the measures came within the framework of a possible final decision, the ECJ was satisfied that the Commission had not exceeded its competences since the lawfulness of the circular in the light of Article 101 TFEU constituted the subject matter of both the main and the interim proceedings without enquiring any further.[113]

It is easy to see that interim proceedings would be made redundant, and the Commission's interim powers deprived of their substance, if the link required between the interim measures and the ongoing investigation was construed too narrowly and implied determining with precision the admissible content of a final decision. Not only does Article 7 of Regulation 1/2003 establish broad boundaries for the Commission's prohibition decisions,[114] but according to Article 8(1) of Regulation 1/2003 interim measures are ordered based on a *prima facie* finding of infringement, a condition that in the words of the ECJ "cannot be placed on the same footing as the requirement of certainty that a

111. Joined Cases 228 & 229/82, *Ford*, paras. 20–21.

112. Joined Cases 25 & 26/84, *Ford*, EU:C:1985:340, para 21.

113. Case T-23/90, *Peugeot*, paras. 54–57.

114. On the discretion the Commission enjoys, see e.g. Joined Cases 6 & 7/73, *Commercial Solvents*, EU:C:1974:18, para 46; Case T-201/04, *Microsoft*, para 1276; Lianos, "Competition law remedies in Europe. Which limits for remedial discretion?", CLES Research Paper series 2/2013; Ritter, "How far can the Commission go when imposing remedies for antitrust infringements?", 7 JECLAP (2016), 587–598.

final decision must satisfy",[115] and that does not equate to a "clear and flagrant infringement".[116] Especially following the economics-based approach that has been guiding competition law enforcement since the 1990s,[117] the establishment of an infringement and of the related remedies is a challenging exercise which is conceptually and in practice at odds with the urgency that underpins the Commission's interim powers.[118] This is all the more so in the digital sector, where controversies as to the appropriate treatment of the cases are frequent and the possibility to craft unprecedented remedies is on the table.[119]

Therefore, if ordering interim obligations relies on a hypothesis of infringement, and if they may coincide, empirically, with the obligations included in a final decision,[120] one must not lose sight that their purpose is to remove the danger of serious and irreparable damage the conduct poses for competition pending the investigation. Only the decision adopted at the end of the proceedings, after a complete investigation, is meant and will be able to establish the definitive contours of a breach of the competition rules and the appropriate remedies to bring it effectively to an end.[121]

Case law on the ECJ's power to award interim relief confirms that the limits of interim action are not inherently tied to the specific obligations that a future decision may impose, even if in judicial proceedings the potential scope of the final judgment appears more easily determinable by reference to the function of the pending main action and the applicant's claims.[122] The clearest illustration of that is the possibility afforded to the ECJ to order interim measures on Member States in connection with infringement actions

115. Case T-23/90, *Peugeot*, para 61.

116. Case T-44/90, *La Cinq*, paras. 60–62.

117. See e.g. Jenny, op. cit. *supra* note 20, at 31; Gerbrandy, op. cit. *supra* note 81, at 130–131.

118. Remedies definition is a complex exercise that must consider their theoretical suitability to address a competition distortion and their practical implementation. See Lowe and Maier-Rigaud, op. cit. *supra* note 22, at 598. See generally e.g. Case T-577/14, *Gascogne* v. *European Union*, EU:T:2017:1, para 66, noting that actions on competition law exhibit a greater degree of complexity than other types of cases.

119. See e.g. Gal and Petit "Radical restorative remedies for digital markets", 37 *Berkeley Technology Law Journal* (2021), available at <ssrn.com/abstract=3687604> (all websites last visited 11 Sept. 2022); Ibáñez Colomo, "Product design and business models in EU antitrust law" (2021), available at <ssrn.com/abstract=3925396>, 5.

120. The proceedings in *ECS/AKZO* illustrate that interim obligations may be defined in stricter terms, by reference to specific prices references (*supra* note 9), than the obligations included in the final decision; Decision of 14 Dec. 1985, IV/30.698 *ECS/AKZO*.

121. See e.g. Calamandrei, op. cit. *supra* note 32, pp. 74–78; Case C-426/13 P(R), *Commission* v. *Germany*, EU:C:2013:848, para 52.

122. Lenaerts et al., op. cit. *supra* note 35, pp. 571–572, observe that the ECJ must be able to order all the necessary measures to secure the full effectiveness of the action in the main proceedings.

notwithstanding the fact that, by virtue of the declaratory nature of such proceedings, the ECJ is unable to impose any specific obligations upon them in the final judgment.[123] *Mutatis mutandis*, the Commission should be entitled to impose interim measures provided the measures chosen appear relevant to ensure that full effect is given to a final decision in the case, account taken of the subject matter of the ongoing investigation and of the powers the Commission holds to terminate competition law infringements.

The demands of the principle of proportionality appear implicitly to ensure the indispensable link between interim measures and the main proceedings in such a way that it is then superfluous to take the ancillary nature of interim proceedings as an additional requirement which must be examined separately. In fact, if an interim measure proves adequate and necessary to fight the serious and irreparable damage to competition arising from the conduct found *prima facie* unlawful under investigation, the measure in question is obviously intended to ensure that a final decision in the case is fully effective. It is unclear whether the Commission also adheres to this understanding. The decision in *Broadcom* still states that the interim measures must come within the framework of a final decision which may be adopted by the Commission, even if such statement is merely followed by the examination of the proportionality of the measures envisaged without additional remarks.[124]

5. Measures which are "interim"

The present section addresses the fourth property characterizing the Commission's interim powers, that is the provisional nature of the measures imposed.

The ECJ has declared that the obligations the Commission may impose pending an investigation must be of a temporary nature.[125] Article 8(2) of Regulation 1/2003 has incorporated this requirement, stipulating that interim measures apply for a specified period of time and may be renewed if necessary

123. See e.g. Case 31/77 R, *Commission* v. *United Kingdom*, EU:C:1977:86; Case C-121/21 R, *Czech Republic* v. *Poland (Mine de Turów)*, EU:C:2021:420, paras. 28–30.

124. *Broadcom*, cited *supra* note 1, paras. 511–519. The observations submitted by the EU delegation to the OECD for the round table on interim measures in antitrust investigations suggest that to be proportionate interim measures must meet that requirement, but no reasoning is given. "Interim Measures in Antitrust Investigations – Note by the European Union", DAF/COMP/WP3/WD(2022)13, p. 6.

125. See e.g. Case 792/79 R, *Camera Care*, para 19; Case T-23/90, *Peugeot*, para 19.

and appropriate.[126] Accordingly, in *Broadcom* the Commission determined that the measures would apply for a time period of three years, until the date of adoption of a final decision on the substance of Broadcom's conduct, or until the closure of the Commission's investigation concerning that conduct, should either of these events occur prior to the end of the three-year period.[127] The limited duration of interim obligations is intertwined with the ancillary nature of interim powers. Interim measures are grounded on a preliminary assessment of the compatibility of the practices under investigation with the rules on competition which is destined to be replaced by a subsequent decision having the final say on the matter. Therefore, interim proceedings are essentially a holding operation,[128] to safeguard competition during the time it will take the Commission to ascertain the outcome of the investigation. For this reason, interim measures come across not merely as "temporary", in the sense that their duration is limited in time, but essentially as "provisional", in that they are intended to apply during the period preceding a consecutive event, the adoption of a final decision.[129]

Importantly, the provisional character of interim measures offers justification for the possibility to compress the undertakings' rights and freedoms before a full investigation with the related overarching procedural guarantees has been finalized.[130] The ECJ has underlined in this regard the inevitable, but short-lived disadvantages arising from the Commission's power to order interim measures.[131] These considerations naturally raise the question of the sort of effects such measures may entail. Interim decisions will not survive, from a legal point of view, the adoption of a decision at the end of the investigation. They are intended to produce effects only up until this point in time. However, even time-limited interim obligations may lead to a situation that may not be possible to reverse at a factual level. It is not unusual to find assertions in the literature to the effect that the Commission is prevented from ordering interim measures that may lead to market developments in the structure or dynamics of competition that will be irreversible or very difficult

126. Interim measures should remain in force only insofar as the conditions underlying their adoption continue to be met. The Commission's initial legislative proposal, cited *supra* note 90, stipulated that interim measures could be adopted for no more than one year, with a possibility of renewal.

127. Art. 4 of *Broadcom,* cited *supra* note 1.

128. Thirlway, "Provisional measures: How 'provisional' is 'provisional'?" in Palombino, Virzo and Zarra (Eds.), *Provisional Measures Issued by International Courts and Tribunals* (Springer, 2021), p. 19.

129. Calamandrei, op. cit. *supra* note 32, p. 36.

130. Lynce de Faria, *Tutela Cautelar Antecipatória no Processo Civil Português* (Universidade Católica Editora, 2016), pp. 290–291. Freedom to conduct a business and the right to property are enshrined in Arts. 16 and 17 of the EU Charter.

131. See e.g. Case T-23/90 R, *Peugeot*, para 25; Case T-184/01 R, *IMS*, para 117.

to reverse at a later stage.[132] The provisional nature of interim measures implies, indeed, that they are not designed as a tool to routinely set in stone a solution that cannot be revoked or changed in another direction and that would make the ongoing investigation devoid of any purpose.[133] This is not to say, however, that definitive effects linked to interim measures are all inescapable and unacceptable.[134] In contrast with certain national regimes, Regulation 1/2003 is silent on the question of the reversibility of interim measures.[135] Moreover, the case law has emphasized that any interim decision, either to order or to refuse interim measures, is usually likely to produce certain definitive effects and that it is vital to balance the risks attaching to each of the possible solutions.[136]

To begin with, the impact of interim measures does not need to be self-effacing.[137] By enacting Article 8 of Regulation 1/2003, the legislature has acknowledged that the EU interest in the maintenance of effective competition may require the adoption of protective measures that impinge on the rights and freedoms of undertakings whose conduct is still under investigation.[138] Thus, where the undertakings concerned are unsuccessful in claiming damages from the Commission if an interim decision gets overturned,[139] they will be required to withstand fully the inherent adverse effects caused by the provisional obligations imposed on them, at least during the time these obligations remain in force.

132. See e.g. Feases, op. cit. *supra* note 23, at 428, advancing that the only type of remedies which are unacceptable under interim procedures are structural remedies because they are not reversible; for Tremolada, op. cit. *supra* note 4, at 607, Reg. 1/2003 arguably does not allow the imposition of remedies that are difficult to reverse, such as asset divestiture.

133. See e.g. Case C-44/75 R, *Könecke*, EU:C:1975:72, para 4. The ECJ declared that it was not possible to order in interim proceedings a measure which would confront the judges responsible for the substantive decision with an irreversible situation. Castillo de la Torre, op. cit. *supra* note 52, at 341, argues that but for exceptional cases, the judge hearing an application for interim relief has to avoid rendering the main proceedings nugatory.

134. Lenaerts et al., op. cit. *supra* note 35, p. 574, note that interim measures may exceptionally bring about an irreversible situation. Similarly, Cruz Vilaça, op. cit. *supra* note 35, at pp. 136 and 159, observes that although interim measures aim at achieving a temporary outcome, in certain circumstances they will, in practice, deprive the main action of its purpose. The interim decision in Case 792/79 R, *Camera Care*, para 21, offers a notable example of permanent consequences linked to interim proceedings.

135. See e.g. OECD, op. cit. *supra* note 66, p. 14, indicating that in many jurisdictions the effects of interim measures must be reversible. This is the case of Brazil, but not of France. Spanish competition law explicitly prohibits the imposition of interim measures that may produce a damage of difficult or impossible reparation; Art. 54(2) of Ley 15/2007.

136. See e.g. Case C-791/19 R, *Commission* v. *Poland*, para 104.

137. Thirlway, op. cit. *supra* note 128, p. 10.

138. In this sense, see e.g. Case T-184/01 R, *IMS*, para 141.

139. This hypothesis is not implausible. See Case T-184/01 R, *IMS*, para 120. However, the analysis of this question goes beyond the scope of the present article.

Furthermore, it cannot be excluded that tackling damage to competition will demand interim measures entailing irreversible effects, and that, taking account of the various interests involved, such measures may be justified. The considerations in *Langnese* offer useful insights in this regard.[140] The ECJ found that the interim measures ordered by the Commission, which provisionally prohibited ice-cream manufacturers from enforcing exclusive dealing obligations included in agreements concluded with retailers, were liable seriously to undermine the manufacturers distribution systems and to create market developments that would be very difficult, if not impossible, to reverse. However, these potentially irreversible effects were not regarded as being completely incompatible with the Commission's interim powers. The ECJ proceeded by observing that, at the same time, not imposing those interim measures was likely to contribute to the consolidation of the existing structure of the market and render competition by other ice-cream manufacturers, such as Mars, increasingly difficult. Weighing the consequences for the interests in question, the ECJ searched for a compromise solution and upheld the measures imposed by the Commission on the ice-cream manufacturers with regard to the service station sector.[141] It later acknowledged, however, that allowing Mars access only to these sales outlets had brought limited success.[142]

Lastly, it is possible to think of factual configurations where the duration of the conduct investigated is relatively brief and well circumscribed in time. In these situations of extreme urgency, in the absence of an alternative expedited procedure, the Commission's interim powers may well amount, in practice, to a final response from the competition law enforcement system to the matter.[143] Again, the dispute in *Langnese* illustrates the point. Ruling on Langnese and Schöller's request to have the Commission's interim measures suspended, the ECJ observed, in its order of 16 June 1992, that any decision on the applicants' request for interim relief would, in practice, have the final say on the matter. This was due to the fact that having regard to the seasonal nature of the market the Commission's interim measures were intended to give Mars access to the applicants' exclusive sales outlets in the period between May and September of that year. In all likelihood, it would not be possible for the ECJ to reach a definitive ruling on the matter before the end of this period.[144]

140. Joined Cases T-24 & 28/92 R, *Langnese*.

141. Ibid., paras. 28–34.

142. Joined Cases T-7 & 9/93 R, *Langnese-Iglo*, EU:T:1993:13, para 42.

143. Disputes whose resolution will no longer be of any interest after a given moment in time are frequent in national civil and administrative procedures. See e.g. Lynce de Faria, op. cit. *supra* note 130, pp. 303–307.

144. Joined Cases T-24 & 28/92 R, *Langnese*, para 26.

In the light of the above, the understanding that the Commission is prevented from ordering interim measures with irreversible effects must be taken with more than a grain of salt.

6. The misleading role of the status quo

The case law alludes to the "conservatory" nature of the interim measures ordered by the Commission.[145] The reference has been equated to the preservation of an existing or preceding state of things on a factual or legal level, the so-called *status quo*,[146] and it has been used as a parameter for setting boundaries to the Commission's interim powers, even if not consistently. In *Ford*, the ECJ suspended the Commission's interim decision because its effects exceeded those of a conservatory measure, which should only maintain the flow of trade that existed before the issuing of the contentious circular.[147] Similarly, in *IMS*, the ECJ noted the risk that the licensing obligation exceeded the scope of the Commission's interim powers, because it was far from preserving the *status quo ex ante*.[148] The Commission's decisional practice shows that the matter has been a concern for the institution. The decisions in *Ford*, *ECS/AKZO*, and *IMS,* mention that the interim intervention is intended to maintain or restore the *status quo*.[149] However, the idea that interim measures should aim at preserving the *status quo* has not been retained in all situations. In *Langnese*, for example, the Commission provisionally prohibited certain ice-cream producers from enforcing exclusivity clauses in agreements with retailers, so as to enable a new competitor, Mars, to penetrate the ice-cream sector. Even if it considered it judicious to restrain the scope of the prohibition to the service station

145. See e.g. Case 792/79 R, *Camera Care*, paras. 18–19.

146. See e.g. Lang, op. cit. *supra* note 37, at 49, for whom interim measures protect the *status quo* as it was before the apparent infringement occurred; Idot, "Les mesures provisoires en droit de la concurrence: un nouvel exemple de symbiose entre le droit français et le droit communautaire de la concurrence", 4 RTDE (1993), 581–600, at 596, considers that the reference to the conservatory nature of interim measures in the case law means that their objective is to maintain or restore the *status quo ex ante*; Ibáñez Colomo, "What can competition law achieve in digital markets? An analysis of the reforms proposed" (2020), available at <ssrn.com/abstract=3723188>, 22, extracts from the considerations in Case T-184/01 R, *IMS*, para 25, that the purpose of interim relief is not to change the *status quo* so as to inject more rivalry.

147. Joined Cases 229 & 228/82 R, *Ford*, para 14.

148. Case T-184/01 R, *IMS*, para 25.

149. Decisions IV/30.696 *Ford,* cited *supra* note 18, para 45; IV/30.698 *ECS/AKZO,* cited *supra* 9, para 36; COMP D3/38.044 *IMS,* cited *supra* note 2, para 214.

outlets, the ECJ acknowledged the validity of pursuing such an objective within interim proceedings.[150]

The reference in the case law to the "conservatory nature" of interim measures should not be interpreted as intended to describe a different property of the tool. Neither should it be invoked to limit the Commission's range of interim action to the protection of some established state of affairs. That reference is best understood as underlining the protective rationale for interim powers, i.e. the need to keep alive the prospect of restoring competition at the end of the investigation if an infringement decision is adopted.[151] Scholars such as Calamandrei and Slusny have long observed that interim measures have been incorrectly equated with neutral measures intended to preserve a factual or legal situation until the adoption of a final decision.[152] Under common law, a historical preference for "keeping things as they are" found its roots in the protected status of possession, but it has received much criticism as an illogical and unjustified reason for limiting interim relief.[153] Leubsdorf has put forward that "the emphasis on preserving the *status quo* is a habit without reason".[154] The more general case law on interim proceedings corroborates this understanding, as the ECJ has shaped reality in profoundly novel ways through the award of interim relief,[155] accepting that an interim measure may be intended to preserve an already existing legal position or to create a new legal position.[156]

The current legal framework does not lend support to banning outright certain types of measures from the scope of the Commission's interim powers. Article 8 of Regulation 1/2003 has opted for a general clause, stipulating that the Commission "may . . . order interim measures", and does not lay down a catalogue of admissible interim measures excluding certain forms of interim intervention. In this respect, Article 8 contrasts with Article 278 TFEU, which allows the ECJ to order the suspension of a contested EU act, and mirrors

150. See Joined Cases T-24 & 28/92 R, *Langnese*, paras. 31–33, examined at section 5 *supra*.

151. Similarly, Cruz Vilaça, "La protection juridictionnelle des particuliers par des mesures provisoires en matière de concurrence" in *Judicial Protection of Rights in the Community Legal Order* (Bruylant, 1997), pp. 443–458, at p. 445, equates the "conservatory" feature of interim measures with the "protection" of the EU public interest; Gál and Strouvali, op. cit. *supra* note 88, at 9.34, observe that the conservatory nature of interim measures means that they aim at preserving the effective exercise of the Commission's functions.

152. Calamandrei, op. cit. *supra* note 32, pp. 48–49; Slusny, op. cit. *supra* note 38, at 131.

153. Leubsdorf, op. cit. *supra* note 96, at 534–535; Santarelli, "Preliminary injunctions in Delaware: The need for a clearer standard", 13 *Delaware Journal of Corporate Law* (1988), 107–135, at 115.

154. Leubsdorf, op. cit. *supra* note 96, at 546.

155. See e.g. Case C-121/21 R, *Czech Republic* v. *Poland*. Poland was ordered to cease lignite mining activities at the Turów mine immediately.

156. Case C-465/93, *Atlanta*, EU:C:1995:369, paras. 11, 15 and 33.

instead Article 279 TFEU, which enables the ECJ to prescribe any necessary interim measures. Most strikingly, such a restrictive understanding of the possibilities for interim action by the Commission would be at odds with the case law's longstanding reliance on the need to safeguard the Commission's mission as guardian of the EU system of undistorted competition to affirm its interim powers even without a clear legislative basis and against the advice of the Advocate General.[157] Across all sectors, but particularly in fast-moving digital markets, to reduce interim intervention to the protection of some version of the *status quo* may offer a weak antidote to the serious and irreparable danger threatening competition pending an investigation. Even conventional solutions, such as non-discrimination obligations, mandatory sharing of data inputs, or forced interoperability,[158] would be difficult to envisage at an interim stage if they were to introduce innovative circumstances. Competition law provisions are flexible and, like remedies mandated at the end of the investigation, interim measures may also have to take many forms. Different types of interim measures may be warranted, to ensure that a final decision is effective.[159] To perform their function, interim measures may have to preserve, to return, or to introduce certain circumstances for the first time.[160] The measures required are to be appraised in each individual case in the light of the *prima facie* unlawful actions or omissions entailing the risk of serious and irreparable damage to competition. They may correspond to negative obligations (to refrain from doing something) or to affirmative obligations (to undertake a certain course of action).[161] The contrast between the Commission's interim decisions in

157. Opinion delivered by A.G. Warner in Case 792/79 R, *Camera Care*, EU:C:1980:4. In Case T-44/90, *La Cinq*, para 81, the ECJ rejected interpretations undermining the Commission's interim powers.

158. See e.g. Gal and Petit, op. cit. *supra* note 119, 3–4; Lancieri and Pereira Neto, "Designing remedies for digital markets: The interplay between antitrust and regulation", *Journal of Competition Law and Economics* (2021), 1–57, at 5. Ibáñez Colomo "'Regulatory' and 'antitrust' remedies in EU competition law" in Gerard and Komninos (Eds.), *Remedies in EU Competition Law: Substance, Process and Policy* (Kluwer, 2020), p. 74, observes that the protection of competition may require proactive forms of intervention, such as obligations to license IP rights, give access to infrastructures, redesign products, or to change business strategies.

159. Lenaerts et al., op. cit. *supra* note 35, pp. 572–573.

160. Lynce de Faria, op. cit. *supra* note 130, p. 74, notes that the scope of interim action has evolved beyond its more traditional role of crystallization so that the tool could continue to perform its function over time.

161. It is noteworthy that e.g. French law indicates more explicitly the broad possibilities for interim action. The *Autorité de la concurrence* may order undertakings either to return to a preceding situation or to suspend the practice concerned (Art. L464-1 of *Code de commerce*). Accordingly, Google has been required to negotiate in good faith with publishers and news

Sealink/B&I and *ICG/CCI Morlaix* illustrates these points.[162] In both cases, the measures intended to ensure that ferry operators had access under non-discriminatory conditions to port facilities owned and managed by competitors. In the first situation, the suspected infringement consisted in a change of schedule negatively affecting the services that B&I already provided from the port of Holyhead. To fight damage, the Commission considered it sufficient to order Sealink to refrain from implementing the new schedule. Conversely, in the second case, the behaviour under investigation consisted in a refusal by CCI Morlaix to grant access to the port of Roscoff to a new entrant, the firm ICG. In this situation, there was no existing or preceding situation that could work as reference scenario. Thus, the Commission had to trigger a new state of affairs to tackle the refusal, ordering CCI Morlaix to grant ICG access to the port under reasonable and non-discriminatory conditions. Even in this latter scenario, however, the Commission's hesitancy in altering the *status quo* is still perceptible as the decision states that interim measures enabling a new competitor to enter a market require stronger justification than those maintaining the situation of an already established competitor.[163] Yet, when it comes to determining the strength of the case required to enable interim intervention what matters is not the extent to which the *status quo* is affected, but the losses that interim measures may inflict relative to the losses that those measures seek to avoid.[164]

Against this backdrop, creative forms of interim action departing from the *status quo* should not be ruled out, as they may be necessary to guarantee that the tool is able to achieve its aims. The Commission should be able to explore those solutions.

agencies the remuneration due to them under a new law on related rights for the reuse of their protected contents following the EU directive on copyright and related rights; Decision 20-MC-01 of 9 April 2020.

162. IV/34.174 *Sealink/B&I* cited *supra* note 10; IV/35.388 *ICG/CCI Morlaix* cited *supra* note 10.

163. IV/35.388 *ICG/CCI Morlaix* cited *supra* note 10, para 52.

164. See, in this sense, e.g. Leubsdorf, op. cit. *supra* note 96, at 541; Cruz Vilaça, op. cit. *supra* note 151, at p. 452; Caminade et al., op. cit. *supra* note 4, at 455. Judge Posner noted that the objective of interim relief is to avoid irreparable damage and that to worry about whether it changes or preserves some previous state of affairs would be "merely to fuzz up the legal standard". *Chi. United Indus., Ltd.* v. *City of Chi.*, 445 F.3d 940, of 25 April 2006. Powers, "A status quo bias: Behavioral economics and the federal preliminary injunction standard", 92 *Texas Law Review* (2014), 1027–1051, observes that behavioural economics insights, notably loss aversion, the endowment effect, *status quo* bias, and omission bias, explain why some judges when faced with uncertainty unduly consider the impact of interim orders on the *status quo*. It is also noteworthy, in relation to the entry of new competitors that the fact that a market share is lost does not automatically cause serious and irreparable damage. See Case T-95/09 R, *United Phosphorus*, EU:T:2011:610, para 35.

7. Conclusion

The historical reluctance of the Commission towards interim measures leaves much room for apprehension that serious and irreparable damage has been and is being inflicted on the system of undistorted competition envisaged by the Treaties to the benefit of infringers and their possible dilatory tactics. Irrespective of interim intervention at the Member States level, either by national competition authorities or national courts, in the context of the decentralized enforcement of Articles 101 and 102 TFEU, the Commission remains the guardian of the EU rules on competition. It must ensure the effectiveness of its own decision making in the cases it pursues and not only establish precedents for the future.[165] Today, the reluctance *vis-à-vis* interim proceedings in the digital sector may be detrimental to Europe's desired digital sovereignty.[166] Billions in fines have attracted attention in recent times, but though fines offer punishment, their "curative" role is limited at best.[167] Of the several reasons advanced to explain the Commission's paucity in the field, one in particular comes across as convincing. With the advancement of the economic and effects-based approach in the application of competition law, the Commission took particular care in "getting the case right". That shift was difficult to reconcile with the use of a tool that, by definition, is based on a perfunctory and non-definitive analysis of the case.[168] Though these are legitimate concerns, it is also true, as Calamandrei illustrated, that to put all efforts into a presumably flawless final decision, yet one that will produce no meaningful effects, is similar to carefully preparing a medicine for a patient who is already deceased.[169] Such a poor result is especially problematic within the realm of the legal order established by the EU Treaties whose authority is very much intertwined with the effective realization of its goals.[170] What is more, the legal framework governing the Commission's interim powers, with its requirements of urgency in connection with a risk of serious and irreparable

165. See e.g. Lowe and Maier-Rigaud, op. cit. *supra* note 22, at 599.

166. On the importance of ensuring Europe's digital sovereignty when it comes to enforcing competition rules in the digital environment see e.g. the Study by the European Parliamentary Research Service (EPRS), "Digital sovereignty for Europe" (2020), pp. 7–8; Roberts, Cowls, Casolari, Morley, Taddeo and Floridi, "Safeguarding European values with digital sovereignty: An analysis of statements and policies", 10 *Internet Policy Review* (2021).

167. Lianos, op. cit. *supra* note 114, pp. 15–18.

168. Kadar, op. cit. *supra* note 23.

169. Calamandrei, op. cit. *supra* note 32, p. 43.

170. In this regard, see e.g. Bouveresse, "L'effectivité comme argument d'autorité de la norme" in Bouveresse and Ritleng (Eds.), *L'effectivité du droit de l'Union européenne* (Bruylant, 2018), pp. 63–85, at p. 65; Dubout, "Être ou ne pas être (du droit)? Effectivité et champ d'application du droit de l'Union Européenne" in Bouveresse and Ritleng, ibid., pp. 86–119, at pp. 92–93.

harm to competition, *prima facie* finding of infringement, and proportionality, does not easily open the door to unreasonable forms of interim action.

There is no magic elixir for the challenges that the effective application of the competition rules faces. However, considering the record of one single interim decision adopted over more than 20 years, it is clear that the tool could play a more significant role across all sectors. The view on the nature of the Commission's interim powers in competition cases submitted in this article will hopefully offer insights for a sound use of this procedural tool if the mechanism is explored more robustly in the future as Commission Vice-President Margrethe Vestager has announced.[171] The enquiry has shown that while ordering interim measures is not a trivial exercise, the scope for interim action within the current legal framework is wider than might be thought based on several misapprehensions.

Finally, the fact that in *Broadcom* the firm offered commitments removing the Commission's competition concerns is certainly a welcome outcome.[172] Regarding judicial interim proceedings, one of their merits is precisely to pave the way for the parties to agree on a provisional regulation of the conflict or even a solution that puts an end to the dispute.[173] Nevertheless, the possibility to close adequately the case by means of a commitment decision may not present itself in all situations. The exercise by the Commission of its interim powers would benefit from the development of the law in the field. This presupposes a steadier ordering of interim measures and that the cases eventually reach the ECJ. The existing case law, which amounts to little more than a handful of decisions, the latest of which is over 20 years old and is far removed from the intricacies of current times, can hardly offer valuable guidance either to the Commission or to the undertakings concerned.

171. See Statement cited *supra* note 6.

172. Decision of 7 Oct. 2020, AT.40608 *Broadcom*. The firm had challenged the Commission's interim decision in Case T-876/19, *Broadcom*, EU:T:2020:650. *Sea Containers/ Stena Sealink* offers another example of a situation where interim proceedings paved the way for an amicable solution.

173. See e.g. Cruz Vilaça, op. cit. *supra* note 35, at pp. 159–160.