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Use it or lose it

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We are all familiar with the aphorism that "justice delayed is justice denied." Another is that "drastic times need drastic measures."

Yet so often when it comes to enforcement by the European Commission of the antitrust rules, we see a marked reluctance to make full use of the powers given it to act swiftly and decisively to nip anticompetitive behaviour in the bud. Why is this, and is it a serious problem?

Many antitrust agencies have been granted the power to adopt interim measures, allowing them to intervene with a protective remedy while pursuing their substantive investigation. Regulation 1 of 2003 includes in Article 8 the power for the commission "in cases of urgency due to the risk of serious and irreparable damage to competition [...] acting on its own initiative [...] on the basis of a prima facie finding of infringement" to act by decision to prevent that damage from occurring. However in the decade that Regulation 1 has been in force, the commission has not once applied Article 8.

The EU now comprises 27 member states, more than 500 million citizens and over 20 million businesses, many of which are sizeable. It is responsible for some 20 percent of global trade. It is an economic union in which the competition rules are specifically intended to be used to eliminate trade distortions, maintain competition and perfect the single market. Meanwhile a typical competition case handled in Brussels takes more than two years from case opening to decision, with many taking far longer – indeed the length of the case is often in direct proportion to its seriousness and to the impact of the behaviour being examined. The market structure might be irretrievably altered while the case proceeds. That is why a recourse to interim measures is a necessary part of the antitrust arsenal.

Is it explicable that the commission has not once in the past 10 years encountered a single instance where there was a credible threat of imminent serious and irreparable harm as a result of anticompetitive behaviour? Even if the current legal test presents quite a high hurdle, one would not have thought it insuperable. However, the lack of utilisation has led to an assumption that the criteria are too hard to satisfy.

The refusal to take interim measures represents a curious policy choice, because if it existed as a credible threat it could deter some of the more harmful abuses, particularly by dominant companies. But as matters presently stand, those who knowingly breach the rules have every incentive to play a long game, safe in the knowledge that by the time they ultimately face a prohibition decision they will have pocketed the fruits of their wrongdoing, and that it is very unlikely they will face penalties exceeding the possible gains.

One could ask why the commission sought these powers when in retrospect the institution seemed to have little intention of exercising them. Of course, to some extent it is in the nature of an administrative body to focus on competences and extending theoretical jurisdiction rather than enforcement. After all, the hard-won ability to impose structural remedies has also been largely neglected, even though it could at least, at the end of the process, provide a means of redressing the failure to act earlier and reverse the impact on market structure.

But the lack of utilisation of the interim measures option is more perplexing. And the development of this area of EU antitrust law was neither inevitable nor even predictable. Back at the start of the 1980s there were indications that it would evolve in a quite different direction. When the European Court of Justice ruled in the Camera Care case in January 1980, it stated clearly that*: It is obvious that in certain circumstances there may be a need to adopt interim protective measures when the practice of certain undertakings in competition matters has the effect of injuring the interests of some member states, causing damage to other undertakings or of unacceptably jeopardising the [EU]'s competition policy.*

At face value, that did not seem too stringent a test to satisfy. The court appeared to be inviting the commission to take action to protect both competition and competitors in a manner that took due account of the fact that it might take some time to pursue a full investigation and arrive at a reasoned decision. It could even have been interpreted as an invitation

from one institution to another to push the door further open in the interests of effective and timely enforcement. But that invitation, if such it was, has not been taken up.

I don't want to get diverted by a lengthy history lesson or legal analysis. Anyone who wants to plough through the relatively few cases up to IMS Health should feel free.[1] How we got here is of lesser importance than recognising where we are now and considering how to deal with that. On the positive side, the lack of case law since 2001 does have certain advantages, since that also means there is no court interpretation of Article 8 that ought to constrain it beyond its natural meaning.

Where we stand at present, is that legal advisers almost always counsel their clients against seeking interim relief. They do so because they know that if they raise the possibility with the case team they will be told that they can make the request if they insist, but that it will be counter-productive as the case team will only have to spend time and resources considering and then inevitably rejecting the request. The advisers will simply have slowed down progress and handed a psychological and tactical victory to the target of the complaint. The impact on any parallel litigation could be even more serious if the court sees that the commission has concluded that the alleged harm was not imminent, serious or irreparable.

However, you could say that the negative impact on litigation exists in any event. Certainly we see few instances where national courts are prepared to take decisive action until the conclusion of the commission investigation, and while litigation may be commenced to avoid limitation arguments, it is routinely stayed while awaiting a commission conclusion. Even where a national court might have been prepared to issue interim injunctions the threat of cross-undertakings in damages, at least in the courts of England and Wales, is normally sufficient to deter the plaintiff. The commission, of course, could have acted by decision without any cross-undertaking being required.

Some have argued that there is a good reason why the commission takes a different approach to that adopted by at least some of the EU's national competition authorities (NCA). They point to the fact that the test, as now enshrined in Article 8, is one of harm to "competition" as a whole, whereas some NCAs are ready to intervene in respect of threatened harm to individual customers or competitors even when they are enforcing EU law as opposed to their national competition law. A good example is the UK, which permits [Section 35(2) Competition Act 1998] intervention to protect not only the public interest but also the interests of individual complainants.[2]

It is true that Article 8 of Regulation 1, in the eyes of at least some commentators, incorporated a retrograde step when it explicitly based itself on harm to competition as a whole rather than harm to competitors, and opened up the possibility of a "gap" in enforcement between the commission and NCAs when looking at the same conduct. But I would question whether there ought in reality to be such a significant distinction. By definition it will be appropriate for DG Competition to deal with those cases that have an impact across the EU as a whole, rather than in individual member states. A small competitor that comes forward with evidence that its business is suffering, is essentially pointing to harm to the competitive process as a whole, of which it is in all likelihood just one victim. As long as the commission's response is also focussed on the competitive structure rather than the special pleading of a single competitor, there seems no reason why it should not be able to act.

If there is no intention to make use of Article 8, why not acknowledge that reality and do away with it?

In my opinion, the commission needs to make a New Year's resolution that it will take an interim-measures case in 2013. It should find the best and strongest case in its files and ensure that the measures it adopts are the conservative minimum necessary, so that it will not be accused of over-reaching and will be confident of its ability to resist any appeal. The restitution of a credible threat of interim measures should in the long run save resources and promote enforcement through self-assessment. On the other hand, if there is no intention to make use of it, why not acknowledge that reality and do away with Article 8? ■

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Footnotes

1 Notable examples amongst the relatively few cases in which interim relief was awarded in the two decades between the Camera Care case and the advent of Article 8 include Case IV/30.696 Ford Werke, Case IV/34.072 Mars, Case IV/34.174 B&I – Sealink and Case D3/38.044 IMS Health.

2 For a good summary of national laws on interim measures, see the article by Eric Barbier de la Serre and Marguerite Lavedan, "Interim measures and competition law: an overview of EU and national case law," March 2011, e-Competitions, N°34845, www.concurrences.com