INTERIM MEASURES IN COMPETITION CASES
BEFORE THE EUROPEAN COMMISSION AND COURTS

LEX MUNDI – EUROPEAN REGIONAL CONFERENCE

10 May 2002, Copenhagen

Dr. Edurne Navarro Varona
INDEX

1. INTRODUCTION ...............................................................................................................3

2. INTERIM RELIEF BY THE EUROPEAN COMMISSION ...................................................3
   2.1. LEGAL BASIS ...............................................................................................................3
   2.2. CONDITIONS FOR THE ADOPTION OF INTERIM MEASURES ..................................5
       2.2.1. Apparent existence of an infringement ........................................................................5
       2.2.2. Risk of serious and irreparable damage to individuals or to the public interest ..............5
   2.3. NATURE AND CHARACTERISTICS OF INTERIM MEASURES ...................................7
   2.4. PROCEDURE ...............................................................................................................8
   2.5. DECISION ....................................................................................................................9
   2.6. PROPOSED AMENDMENT OF REGULATION 17/62 ......................................................10
   2.7. CASE BY CASE ANALYSIS ........................................................................................10
   2.8. UNDERTAKINGS AND COMMITMENTS ......................................................................16

3. INTERIM MEASURES PROCEEDINGS BEFORE THE ECJ AND CFI .........................17
   3.1. LEGAL BASIS ..............................................................................................................17
   3.2. SUBSTANTIVE CONDITIONS .......................................................................................17
       3.2.1. Prima facie case ....................................................................................................18
       3.2.2. Urgency ..................................................................................................................18
   3.3. NATURE OF INTERIM RELIEF .....................................................................................19
   3.4. PROCEDURE ...............................................................................................................20
   3.5. CASE BY CASE ANALYSIS ........................................................................................21

4. CONCLUSION ....................................................................................................................34
1. **INTRODUCTION**

The EU Commission (the “Commission”) and the European Courts (Court of Justice and Court of First Instance of the European Communities, “ECJ” and “CFI”) may adopt interim measures in their procedures, including those in application of EU competition rules.

The paper will analyse the nature, conditions and characteristics of this sort of measures, which will be illustrated by their practical application in specific cases.

2. **INTERIM RELIEF BY THE EUROPEAN COMMISSION**

2.1. **Legal basis**

Although there is no express reference to “interim measures” in Regulation 17/62, the European Courts have acknowledged the possibility that, under certain circumstances, the Commission adopts interim measures which "are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist".

The legal basis for that purpose could be found in Article 3 of Regulation 17/62 (which refers to the Commission’s capacity to issue “decisions” and “recommendations”).

---

3. *Ibid.* paras. 13-14. The applicant, Camera Care, brought a complaint against Hasselblad and Victor Hasselblad A/B, claiming that the termination by Hasselblad of the supply agreement which had existed between the parties until then and the refusal to supply photographic equipment and spare
"It is recalled that Article 3 (1) of the Regulation provides that: <where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertaking concerned to bring such an infringement to an end> Paragraph (1), may <address to the undertakings concerned recommendations for termination of the infringement>.

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 Community’s competition policy”.

In addition, the Commission has been expressly granted the power to order interim measures by specific regulation, such as Regulation (EC) 659/1999, on the application of rules on State aids control, and Regulation (EEC) 3975/87, concerning the application of competition rules to the air transport sector.

parts, made it impossible to obtain cameras or spare parts from other intermediaries and, consequently, its sale and repair business was in jeopardy. Camera Care asked the Commission to adopt interim measures, but its petition was rejected on the grounds that there was no certitude that such power was granted to the Commission by Regulation 17/62. However, the ruling of the ECJ acknowledged this possibility by widely constructing the powers conferred to the Commission by Article 3 of Regulation 17/62. In the same line, see also Cosimex GmbH v. Commission, Case T-131/89R, [1990] ECR II -1, para. 11.

Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 89 (former Article 93) of the EC Treaty. OJ 1999 L 83/1. Articles 10 and 11 provide that, in case of unlawful aid, the Commission is empowered to adopt interim measures addressed to Member States, which may take the form of information, suspension or recovery injunctions. In particular, it is stated that, for recovery injunctions to apply, the following conditions should be met: (i) there must be no doubts about the aid character of the measure concerned; (ii) there must be an urgency to act; and (iii) there must be a serious risk of causing substantial and irreparable damage to a competitor. In this sense, see also Korn Fahrzeuge und Technik, notified under number C (2000) 520, OJ 2000 L 298/21; Dessauer Geräteindustrie GmbH, notified under number C (2000) 515, OJ 2001 L 1/10.

Council Regulation (EEC) 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, as amended by
2.2. **Conditions for the adoption of interim measures**

In *La Cinq* the CFI recalled the conditions which must concur in order to grant interim measures. The CFI annulled the decision of the Commission that had rejected the application for interim measures made by *La Cinq*, and set forth the criteria to be applied when considering an application for interim measures. Accordingly, these could only be granted provided the following conditions were fulfilled: (i) the practices are *prima facie* to constitute an infringement of antitrust rules; and (ii) they are likely to cause serious and irreparable damage.

2.2.1. **Apparent existence of an infringement**

The practices focused by the interim measure action must be *prima facie* likely to constitute an infringement of competition rules (*fumus boni iuris*). However, no certainty in this respect is required. In this sense the CFI overruled the Commission in *La Cinq*, which had stated in its decision that the infringement had to be “clear and flagrant”. The CFI only required the probability of an *a priori* infringement.

2.2.2. **Risk of serious and irreparable damage to individuals or to the public interest**

Interim measures should only be granted if there is proven urgency to prevent the occurrence of a situation likely to cause serious and irreparable damage to the party applying for the adoption of the measures or to the public interest (*periculum in mora*).
In order to establish whether a “serious” damage may be caused a case by case analysis shall be carried out, bearing in mind the particular circumstances. The ECJ has stated that damage is deemed to be “irreparable” if it could no longer be remedied by a subsequent decision during the administrative procedure before the Commission. Therefore, there is “irreparable” damage even if it could be further repaired by a judgement before either national or European Courts.\(^9\)

The concept of public interest is, as held in Camera Care,\(^10\) related to the preservation of the EU competition policy objectives, as well as the interest of Member States and their citizens.

With regard to “urgency”, the case must call for immediate action on the part of the Commission, in order to avoid either a “serious and irreparable damage” to the party seeking the adoption of interim measures or a situation that is intolerable for the public interest. In Port of Roscoff,\(^11\) following a complaint of the Irish Continental Group (“ICG”) to have access to the port of Roscoff (Brittany) for the purpose of commencing a ferry service between Ireland and Brittany in the summer of 1995, the Commission ordered interim measures obliging CCI Morlaix to take the necessary steps to grant such access until the end of the summer season. The Commission took into consideration the special circumstances involving the holiday period for the provision of these ferry services.

---

\(^8\) Ibid., para. 62.

\(^9\) Ibid., para. 80. The Commission refused to grant interim measures considering that the damage could be avoided through proceedings before national courts. The CFI ruled that the Commission - by denying the interim measures requested by La Cinq- went beyond what the case law requires to appreciate, which is the existence of a risk of “irreparable harm”. Requiring that such harm could not be remedied by any other "subsequent decision" was considered excessive.


\(^11\) Irish Continental Group v. CCI Morlaix, IP 1995/05/16.
Likewise, in *Mars / Langnese-Iglo and Schoeller Lebensmittel*, the Commission imposed interim measures following a complaint by this company, which alleged that its access to the German market for single-item ice-cream was illegally barred. The urgency of this case was mainly related to the seasonal nature of the product concerned (ice creams).

2.3. **Nature and characteristics of interim measures**

Interim measures are conservatory and temporary by nature.

- **Conservatory**

The measures must be kept within the limits and not exceed what is strictly necessary to remedy a situation. Among the various measures available, those that create the least difficulties for the undertakings to which they are to apply should be chosen. The measures must aim at safeguarding the interests of the applicant or the public interest and maintaining the situation as it was before the commission of the alleged infringement.

In addition, the measures must come within the framework of the final decision which may be adopted, and not exceed its scope.

The Commission will decide on the appropriate measures to be adopted without being limited by the specific measure requested by the companies seeking interim relief. Thus,
the Commission may adopt either positive measures or prohibition orders, such as, i.e. granting a license, access to essential facilities, or the cessation of predatory conduct.

- Temporary

The measures must be temporary or interim and can only be valid until a decision is adopted on the substance or until a higher instance annuls them.

2.4. Procedure

Interim measures will be requested once the proceedings have been initiated by the Commission or jointly with a formal complaint alleging the infringement of Article 81 or 82 (ex 85 and 86) of the EC Treaty.

Nevertheless, it should be noted that the Commission may also order interim measures ex officio. The Commission is not entitled to grant interim measures “inaudita parte”. The essential safeguards guaranteed to the parties concerned by Regulation 17/62 shall be maintained. In particular, the undertaking against which interim measures may be adopted shall have the right to be heard and reply in writing to the Commission's objections. Furthermore, it shall be granted an oral hearing prior request. Likewise, third parties that show sufficient interest

---

16 Port of Roscoff, op. cit. note 11.
to be heard should also be taken into consideration, and the Advisory Committee will also be consulted.\(^9\)

Therefore, interim measures cannot be granted immediately and may therefore suppose an undesirable enlargement of the proceeding. Although in certain cases interim measures have been adopted within a reasonable period of time (ten weeks in ECS/AKZO\(^{20}\)), the practice of the Commission shows that the average period required for granting interim measures may vary from three to eight months.\(^{21}\)

2.5. **Decision**

The Commission decision granting or refusing the adoption of interim measures must be motivated and may be appealed before the European Courts. In its decision, the Commission may also request the applicant to give a guarantee for the event that no infringement is finally found. Furthermore, should the undertakings concerned fail to comply with the Commission decision ordering interim measures, the Commission may be entitled to impose periodic penalty payments from 50 to 1,000 Euro per day, as provided in Article 16.1 of Regulation 17/62.

---


\(^{21}\) Three months in *BBI / Boosey & Hawkes*, Case IV/32.279, OJ 1987 L 286/36; six months in *Distribution system of Ford Werke*, *op. cit.* note 13; or eight months in *NDC/IMS Health*, *op. cit.* note 15. In other cases (vid. *Ecosystem SA v. Peugeot SA*, Case IV/33.157, OJ 1992 L 66/1), the Commission needed almost one year to order interim measures.
2.6. **Proposed amendment of Regulation 17/62**

A new proposal adopted by the Commission, which intends to replace Regulation 17/62\(^{22}\) includes an explicit provision, which confers the Commission powers to adopt decisions ordering interim measures.

Pursuant to Article 8 of the proposal, the Commission may adopt interim measures “*in cases of urgency due to the risk of serious and irreparable damage to competition*” and “*on the basis of a prima facie finding of infringement*”.

2.7. **Case by case analysis**

Although the Commission is empowered to order interim measures in relation to the infringement of Articles 81 and 82 of the EC Treaty, it is worth noting that, since *Camara Care*,\(^{23}\) only a few decisions have been adopted by the Commission granting interim relief.

- **Ford Werke**\(^{24}\)

As a reaction to the different costs of right-hand drive cars between the German and British markets, a certain number of British customers purchased those vehicles from German dealers. Ford AG sent to German dealers a circular stating that right-hand drive car orders would cease being satisfied.

The Commission adopted a decision requiring Ford AG to withdraw its circular and to inform its German Ford dealers that the product (right-hand-drive cars) were still part of Ford AG’s agreed delivery range.

---

\(^{22}\) Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) 1017/68, 2988/74, 4056/86 and 3975/87, COM (2000) 582 final.

\(^{23}\) *Op. cit.* note 2
• **ECS/AKZO**\(^{25}\)

ECS was a small independent producer of benzoyl peroxide, an organic peroxide that is used both as a catalyst in plastic manufacture and as a bleach for the treatment of flour, as well as for other flour milling additives. AKZO UK, a subsidiary of AKZO Chemie, manufactured organic peroxides (including benzoyl peroxide) as well as a wide range of milling additives. ECS initiated an expansion of its activities of benzoyl peroxide from the flour milling application to the plastic sector, first in Germany and then in the United Kingdom. Following the expansion of ECS, AKZO UK started selling benzoyl peroxide at predatory prices and jointly offering ECS’ large customers benzoyl peroxide and other additives at lower prices with the aim to exclude ECS from the market.

ECS complained about AKZO UK’s behaviour before the Commission, and requested the adoption of interim measures. Although during the interim procedure AKZO UK raised its prices, the Commission considered that there was no security in relation to its future behaviour. Therefore, it adopted a decision granting interim measures which requested AKZO UK to cease offering its products at predatory prices. Likewise, the Commission prohibited AKZO UK from offering or supplying the products to any buyer in the United Kingdom at prices or on terms different from those offered or given to other comparable buyers.

• **BBI/Boosey & Hawkes**\(^{26}\)

Boosey & Hawkes (“B&H”) manufactured and sold musical instruments, and was at the time the case was raised the only British manufacturer of brass wind instruments. Gabriel’s

Horn House ("GHH") and RCN Music, were the major retailer and repairer of brass band instruments respectively. GHH and RCN founded a new company, BBI, with the purpose of manufacturing and marketing a wide range of instruments for brass bands.

In order to keep its position, B&H adopted various measures aimed at preventing the establishment of BBI in the market, such as refusing supplies of instruments, spare parts and other materials to GHH and RCN.

The applicants argued that B&H’s behaviour would lead them to bankruptcy. The Commission considered that this behaviour could constitute an abuse of dominant position, ordering B&H to resume supplies of instruments, spare parts and other materials to GHH and RCN, in the same terms as before the constitution of BBI, including reasonable prices and the usual discounts or rebates. Furthermore, B&H was requested to inform the Commission about any change in its list of prices and conditions of trade.

- **Eco System / Peugeot**

Eco System was a re-seller car company established in France, which purchased cars in other Member States at lower prices and imported them into France for re-selling to clients. Eco System filed a complaint before the Commission against the practices carried out by Peugeot, which had sent a circular to all its dealers in Belgium, Luxembourg and France trying to prevent Eco System from buying cars from its dealers.

On 26 March 1990, the Commission issued a decision adopting interim measures and ordering Peugeot to suspend its circular and enable Eco System to carry out its business under normal market conditions.

---


27 ***
• **Mars / Langnese-Iglo and Schoeller Lebensmitte**\(^{28}\)

The Commission imposed interim measures following a complaint filed by Mars in order to prevent Langnese-Iglo and Schoeller Lebensmittel from enforcing contractual rights binding retailers to purchase ice cream exclusively from them. The practices against which Mars lodged the complaint were the "freezer exclusivity" and the "outlet exclusivity" comprised in the contracts that Langnese-Iglo and Schoeller entered into with retailers. As a result of these two practices, retailers were bound exclusively to only one ice cream producer.

The Commission considered that these practices substantially restricted access to the market and therefore, there was a *prima facie* infringement of Community competition rules. Moreover, the fact that Mars was prevented to enter the market constituted a serious and irreparable damage.

• **Port of Roscoff**\(^{29}\)

Irish Continental Group (“ICG”), a ferry operator, lodged a complaint against Chambre de Commerce et d'Industrie de Morlaix (“CCI Morlaix”), on the grounds that the latter had abused its dominant position by refusing access to the port facilities in the port of Roscoff (Brittany). The Commission considered that this port was an element without which ICG would have no possibility to run its activity, and adopted interim measures in order to grant ICG access to the port facilities.

Since the port of Roscoff was, at that moment, the only one capable of providing adequate facilities in France for ferry services between Brittany and Ireland, the Commission


considered that the refusal to grant ICG access to these facilities during the vacation period could lead this company to suffer serious and irreparable harm.

- **B&I-Sealink**

Following a complaint by B&I (an Irish ferry operator) the Commission established that Sealink (a British ferry operator which was also the port authority at Holyhead, Wales) abused its dominant position when it modified its schedule in a way that the change would affect the loading and unloading operations carried out by B&I, as a consequence of the reduction of the time available. The Commission adopted a decision ordering Sealink to apply another schedule or to return to the original one. The Commission appreciated the existence of a risk of an "irreparable damage", which could result from increased interruptions in the loading and unloading procedures and the effects of this on the services provided. The duration of the measure was limited to the peak summer season or until the date of coming into force of any schedule agreed by both parties. The Commission on 8 July 1992 received a notification of an agreement, and as a result thereof, Sealink withdrew its application for suspension and annulment previously filed before the CFI.

- **NDC/IMS Health**

IMS and NDC are US companies that provide pharmaceutical companies with sales data services in the German market. Pharmaceutical companies use these data to evaluate sales performances or calculate the market share for their products. To manage data, IMS developed the "1860 Brick Structure" which is a technology creation dividing the German

---


territory in 1860 "bricks" or geographic areas, avoiding the identification of sales to individual pharmacies.

IMS refused to license the use of its "1860 Brick Structure" to NDC and Azyx (a Belgian company, also present in that market) claiming that it had a copyright in that structure and was not obliged to license it to competitors. However, the Commission stated that there were "exceptional circumstances" that could justify interim measures ordering IMS to license the use of the “1860 Brick Structure” to its competitors in non-discriminatory, commercially reasonable terms. In particular, the Commission took into consideration that the “1860 Brick Structure” was indispensable for NDC and Azyx to carry on their business, inasmuch as there was no actual or potential substitute for this system. Therefore, IMS' refusal to licence it would foreclose the market to potential new entrants and eliminate all prospect of competition in Germany. Furthermore, both NDC and Azyx German operations were in very precarious financial positions, and there was a serious risk that they would withdraw from the market in the near future.

The Commission decision ordering IMS to license the “1860 Brick Structure” has been recently suspended by order of the President of the CFI of 10 August 2001, confirmed on 26 October 2001. The latter considered that a temporary suspension of the Commission decision was justified. It had regard to the complex factual and legal issues raised by the application. In particular, the potentially very important consequences that IMS could suffer as a result of a decision of the Commission fixing the terms for a compulsory license of the copyright on the “1860 Brick Structure”, as well as the serious encroachment on its property rights that any decision in this sense would constitute, were

---

32 Order of the President of the CFI of 10 August 2001, IMS Health v. Commission, Case T-184/01 R (not yet reported).
taken into consideration. It is worth noting that the first order was adopted without waiting for the observations of the Commission. On 11 April 2002, the President of the ECJ upheld the Order of the President of the CFI, confirming that protecting the intellectual property rights of IMS was justified. In any event, the examination by the President of the ECJ is limited to questions of law.

2.8. **Undertakings and commitments**

Further to the decisions adopted by the Commission granting interim measures, in certain circumstances the latter has also accepted undertakings or commitments offered by the parties if they were deemed sufficient to re-establish a harmful situation.

In *Eurofix-Bauco*, two small UK companies active on the nail market filed a complaint against Hilti, a large company specialised in the manufacturing and distribution of nail guns, alleging an abuse of dominant position, since Hilti was tying the supply of Hilti cartridge strips to the purchase of nails. The Commission initiated an interim procedure, but Hilti offered an undertaking to stop tying the sale of both products. The Commission finally accepted the undertaking proposed, suspending the procedure for the adoption of interim measures.

Likewise, in *Sea Container v. Stena Sealink* the Commission rejected an application for interim measures, since the parties came to an arrangement following Commission intervention. Sea Containers, a company operating ferry services between Great Britain and France and Ireland, filed a complaint against Stena Sealink, a British ferry operator, which was also the port authority at Holyhead, Wales, alleging that Stena Sealink had

---

abused its dominant position by refusing to grant Sea Container access to the Holyhead harbour on a reasonable basis.

During the procedure, the Commission expressed its intention to order interim measures against Stena Sealink, obliging it to grant Sea Containers access to Holyhead. However, the parties reached an agreement, by which Sea Containers could access Holyhead facilities in non-discriminatory terms. Further to this agreement, the Commission considered that there was no longer a justification to adopt a formal decision granting interim measures.

3. **INTERIM MEASURES PROCEEDINGS BEFORE THE ECJ AND CFI**

3.1. **Legal basis**

Articles 243 and 244 (ex Articles 185 and 186) of the EC Treaty entitle the ECJ, as well as the CFI,\(^{35}\) to adopt interim measures. Thus, the said courts may, if they consider that circumstances so require, order the suspension of a contested act or Commission decision, or prescribe any necessary interim measure.

3.2. **Substantive conditions**

Pursuant to Articles 242 and 243 of the EC Treaty, the application for interim measures must state (i) the pleas of fact and law establishing a *prima facie* case, and (ii) the circumstances giving rise to urgency.

\(^{35}\)Article 225(2) of the EC Treaty extends to the CFI the provisions applicable to the ECJ. In this sense, see also Order of the President of the CFI of 13 May 1993, *Compagnie Maritime Belge Transports NV v. Commission*, Case T-24/93 [1993] ECR I-543, para. 18:

“By virtue of the combined provisions of Articles 185 and 186 of the EEC Treaty and Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.”
These two criteria are cumulative and failure to fulfil any of them may result in the refusal of the Court to grant interim measures.

3.2.1. *Prima facie case*

Since the application for interim measures shall not prejudge a decision on the substance, the *prima facie* case criteria will mainly refer to the reasonable chances of the main action to succeed.\(^{36}\)

Therefore, the assessment in this regard will basically consist of examining whether the arguments put forward by the applicant can be dismissed at that stage in the procedure without a more detailed examination.\(^{37}\) Thus, it is sufficient that the arguments stated by the applicant “were not entirely ungrounded”\(^{38}\) or “manifestly devoid of all foundation”.\(^{39}\)

3.2.2. *Urgency*

Urgency is an essential factor, since, according to the case law of the ECJ and the CFI, the conditions for a *prima facie* case to exist are more easily met.

To satisfy the urgency condition, the applicant must be likely to suffer serious and irreparable harm. However, it is worth noting that it is not necessary to establish “*with absolute certainty*” that the harm is imminent. It is sufficient that the harm in question is “*foreseeable with a sufficient degree of probability*”.\(^{40}\)


\(^{38}\) Ibid.


\(^{40}\) Op. cit. note 37.
Urgency will then be assessed in relation to the need to prevent that the party seeking interim relief suffers serious and irreparable harm, before judgement is given on the substance of the case.\textsuperscript{41} In its decision, the court shall balance the various interests involved and examine whether a decision which estimates the main action would allow reversing the current situation and, conversely, whether the adoption of interim measures would prevent this decision being fully effective in case the main application was dismissed.\textsuperscript{42}

It is in any event for the applicant to prove urgency, providing evidence that he could not await the outcome of the main proceedings, could suffer harm which would involve serious and irreparable consequences, which could not be made good by enforcement of any judgement in the main proceedings.\textsuperscript{43}

3.3. **Nature of interim relief**

Further to the conditions of *prima facie* case and urgency, interim measures must be provisional, inasmuch as they must not prejudge the points of law or fact at issue or neutralise in advance the effects of the decision subsequently to be given as regards the


\textsuperscript{43} *Gestión Telesicno*, op. cit, note 41; Order of the President of the CFI of 16 February 1995, *Amicale des Residents du Square D'Auvergne v. Commission*, Case T-5/95 R, [1995] ECR II-255; Order of the President of the CFI of 12 May 1995, *Chemins de fer, British Railways. v. Commission*, Cases T-79-80/95, [1995] ECR II-1433. In this sense, see also Order of the President of the CFI of 13 May 1993, *Compagnie Maritime Belge Transport NV v. Commission*, Case T-24/93 R, [1993] ECR II-543, paras. 32 to 35. The application for suspension was dismissed since the applicant merely Stated that the implementation of the Commission decision would have unforeseeable consequences, failing to prove that those constitute an actual risk of a serious and irreparable damage rather that an uncertain and future risk against which the applicant could asset its right before the Court, should the risk materialize.
main action.\textsuperscript{44} In addition, interim measures must not exceed the scope of the judgement than could be adopted by the court in the main proceedings.\textsuperscript{45} Likewise, the judge hearing the applications for interim measures may not order measures that are irrevocable.\textsuperscript{46} Therefore, any order of interim measures given by the ECJ or the CFI may at any time be varied, extended or cancelled, taking into account the special circumstances at any given moment.\textsuperscript{47}

3.4. **Procedure**

An application for interim measures must only be presented if there is a main action pending before the court. The application for suspension of the effects of a given act or Commission decision on the grounds of Article 244 may be filed only by the party which is challenging that act or decision in proceedings before the court.\textsuperscript{48} However, any party to the main proceedings may request the application for other interim measures on the grounds of Article 245.\textsuperscript{49}

Interim measures are adopted by an order of the President of the ECJ or the CFI, as the case may be, before which the main action has been brought.

The adoption of interim measures must follow a summary procedure, where the parties concerned are granted a short period of time to make their observation. Furthermore, the President of the Court may summon the parties to a hearing and request additional

\textsuperscript{44} Commission v. Atlantic Container Line AB and other, op. cit. note 37.
\textsuperscript{45} Gestevisión Telecinco, op. cit. note 41.
\textsuperscript{46} Könecke v. Commission, Case 44/75 R, [1975] ECR 637, para. 4.
\textsuperscript{48} Ibid. Articles 83 and 104(1), respectively.
\textsuperscript{49} Ibid.
information. Nevertheless, it is worth noting that the President of the Court may order interim measures even before the defendant has submitted its observations.\footnote{IMS Health v. Commission, op. cit. note 32.}

3.5. **Case by case analysis**

Most orders of the Presidents of the CFI and ECJ granting interim relief in the field of competition refer to applications pursuant to Article 244 of the EC Treaty for suspension of a previous Commission decision, which declared or rejected the existence of an infringement of Articles 81 or 82 of the EC Treaty. Likewise, suspension may be requested as regards the application of the rules on merger control\footnote{Council Regulation (EEC) 4064/89, of 21 December 1989 on the control of concentrations between undertakings, OJ 1989 L 395/1, as amended.} and State aids.\footnote{Articles 87 to 89 (ex 91 to 94) of the EC Treaty.}

With regard to suspension, a number of cases also seek an order suspending the obligation to provide a bank guarantee ensuring payment of the fine imposed by the Commission in the challenged decision.

However, only in few cases an action has been brought under Article 245 of the EC Treaty seeking the adoption of protective interim measures other than suspension, such as, i.e., in *Gestevisión Telecinco*\footnote{Op. cit., note 41.} or *Atlantic Container*.\footnote{Op. cit., note 37.}


The Dutch association of undertakings in the building and construction industry ("SPO") notified its statutes to the Commission, requesting an exemption pursuant to Article 81(3)
of the EC Treaty. However, the Commission refused granting such exemption since it considered that those rules contained certain provisions that restricted competition within the meaning of Article 81(1) of the EC Treaty. Such provisions referred mainly to the obligation of prior notification to SPO of the intention of any member to submit a price tender; the celebration of meetings of builders which had notified tender prices; the comparison of contract cost elements at those meetings; etc. SPO requested the CFI a suspension of the Commission decision, alleging that an immediate application of the latter would cause serious and irreparable damage to the competitive relations in the Dutch building and construction market.

Although the CFI considered that certain aspects of the system set up by SPO clearly restricted competition, it took into consideration the existence of a risk of serious and irreparable harm. The implementation of the Commission decision would have implied important changes to the procedural framework for competition in the building and construction market. In particular, it could compromise any chance that the applicants might have of re-applying the contested rules in the event of a judgement annulling the said decision in the main proceedings.

Therefore, the President of the CFI ordered the partial suspension of the contested decision, but only in as far as strictly necessary to limit the serious and irreparable damage that the applicants could suffer by implementing such decision. In particular, the Commission decision was suspended in relation to those aspects of the SPO system which were not considered as clearly restrictive.
In March 1998, the Commission, following a complaint lodged by Mars in 1991, adopted a decision declaring that Van den Bergh Foods Ltd. (“Van den Bergh”) had infringed Articles 81 and 82 of the EC Treaty by making freezer cabinets available to retailers selling its ice cream on the condition that those freezers would be exclusively used for the sale of Van den Bergh’s ice-creams.

In parallel to the administrative proceeding carried out before the Commission, Mars brought an action before the Irish High Court for a declaration that the exclusivity requirements in Van den Bergh’s freezer cabinets was void. In 1992, the Irish High Court dismissed this action, establishing that Van den Bergh’s policy was not contrary to either domestic or Community rules of competition. Mars filed an appeal against this judgement before the Irish Supreme Court, which requested a preliminary ruling from the ECJ.

At the same time, Van den Bergh brought an action before the CFI, applying for the annulment of the Commission decision of March 1998. Furthermore, it requested the adoption of interim measures regarding the suspension of such decision.

The President of the CFI found that the conditions for interim measures to apply were fulfilled in this case, since the arguments of the applicant were not deprived of any foundation and it was urgent to avoid a serious and irreparable harm. In particular, it was considered that, on the one hand, the contested distribution system had been in force for years and an imminent application of the Commission decision would entail a complete change of the competition conditions in the market. On the other hand, the proceeding before the Commission had lasted more than seven years, mainly due to the Commission’s
attempts to persuade Van den Bergh to modify its ice-cream distribution system. In those circumstances, the President of the CFI considered that the Commission was not entitled to claim the immediate enforcement of the contested decision.

In addition, special account was taken of the apparent contradiction between the decision of the Commission and the Irish courts, given that the Irish High Court found that the Van den Bergh distribution system was not contrary to Articles 81 and 82 of the EC Treaty. Furthermore, the Irish Supreme Court had requested a preliminary ruling from the ECJ. Since the concurrence of different views (of the Commission and the national courts) was contrary to the general principle of legal certainty, the President of the CFI considered necessary to limit its adverse effects as much as possible, and ordered the suspension of the Commission decision until a judgement was issued on the main action.

- **Atlantic Container Line v. Commission**

On December 1994, the Commission adopted a decision rejecting the award of an individual exemption to the Trans-Atlantic Agreement (“TAA”). The TAA was an agreement entered into by a number of liner shipping operators in order to jointly provide intermodal transport services across the Atlantic, for the carriage of containers between Northern Europe and US, including both maritime transport and inland haulage. The Commission considered that such agreement constituted an infringement of Article 81(1)
of the EC Treaty, since it contained, *inter alia*, rules establishing freight rates, as well as a capacity management programme, artificially limiting the supply of transport in order to stabilise the market. Therefore, the parties to the agreement were requested to bring to an end the TAA and refrain in the future from entering any other agreement with a similar object or effect.

However, the President of the CFI suspended this decision. The applicants alleged that the Commission decision would have the effect of preventing the members to the TAA from joint fixing rates in respect of the inland portions of intermodal transport services, which had been common in Europe since the early 1970s. The interruption of such practice could have entailed important consequences for the operation of the transport market. As a result of the contested decision, a general collapse of maritime rates would have been likely to ensue, in which case certain carriers could have run up losses and disappeared from the market. The President of the CFI concluded that, as a general rule, where market conditions were modified by a Commission decision in the field of competition, the addressees of such decision would suffer a risk of serious and irreparable damage, since the framework in which they operate would undergo major changes. In particular, the application of the contested decision would imply a general drop in rates, which could affect the regularity of maritime transport.

This order was confirmed by an order of the President of the ECJ, dismissing an application of the Commission for interim measures, which would suspend the application of the order of the President of the CFI. The Commission alleged that the latter only took into consideration a mere possibility of harm resulting from the contested decision.

---


However, the President of the ECJ stated that it was not necessary to prove with absolute certitude that harm was imminent, and that it was sufficient that the harm in question was foreseeable with a sufficient degree of probability.

Further to the Commission decision of December 1994, the parties to the TAA notified the Commission a modified version of this agreement, the Trans-Atlantic Conference Agreement (“TACA”). In view thereof the Commission made public its intention to adopt a decision withdrawing the immunity for fines provided in Regulation 17/62. The parties to the TAA and TACA applied for protective interim measures, requesting the President of the CFI to address an order to the Commission to the effect that any potential decision to withdraw immunity from fines would only become effective after the final judgement of the CFI in the main action against the Commission decision of December 1994.

This request was dismissed, since an application for interim measures seeking to forestall the application of a decision must be ancillary to a main action of appeal brought before the CFI challenging that decision. However, in the case at hand, a decision had not yet been adopted, and the Commission had issued a mere communication announcing its intention to withdraw the immunity from fines, which did not bind the applicants. Furthermore, the President of the CFI considered that in the event a decision was adopted, the applicants would be entitled to request suspension under Article 244 of the EC Treaty and, therefore, it would not produce irreversible effects before any judicial relief could have been obtained.

60 Op. cit. note 1, Article 15.5.
Telecinco, a company operating private television services in Spain, applied for interim measures in relation to a decision adopted by the Commission under Article 81(3) of the EC Treaty. Said decision granted an exemption to the internal provisions and other regulations of the European Broadcasting Union ("EBU"), concerning the acquisition of television rights to sports events, the exchange of sports programmes within the framework of the Eurovision system and contractual access to such programmes by third parties. Telecinco requested the suspension of such decision, but also the adoption of certain protective measures, such as the suspension of the Eurovision system.

However, the application was dismissed, considering that the adoption of the protective measures requested would exceed the jurisdiction of the CFI. Interim measures must fall within the scope of the final decision in the main proceeding, and the CFI’s decision on the substance could not have annulled in any event the Eurovision system. As regards suspension of the contested decision, Telecinco had failed to provide any figures showing the existence of a serious and irreparable harm, whereas the evidence put forward by EBU gave rise to doubts as to the reality of that harm.

The Bayer Group, an international manufacturer of pharmaceutical products, decided to discontinue serving orders of Adalat placed by wholesalers in France and Spain so as to prevent the increase of parallel trade from those Member States where Adalat was marketed at lower prices due to State intervention.

---

The Commission considered that such refusal to supply constituted a restrictive agreement between Bayer and wholesalers in France and Spain, contrary to Article 81(1) of the EC Treaty.

Bayer appealed before the CFI seeking the annulment and provisional suspension of the decision. Bayer alleged that it had not concluded any agreement with wholesalers in Spain or France containing a prohibition to export and that its behaviour was merely a unilateral action. In Bayer's view, by the contested decision the Commission had extended the scope of Article 81 of the EC Treaty to include unilateral refusal to supply, which in principle could only be prohibited in the case of companies with a dominant position under Article 82 of the EC Treaty. Furthermore, the imminent application of the decision would imply a considerable increase in parallel trade, resulting in irreparable losses for Bayer.

The President of the CFI concluded that the arguments provided by Bayer were not manifestly lacking foundation and that there was risk of serious damage, difficult to repair or, at least, disproportionate, and ordered the suspension of the contested decision.

- **Ferriere di Roè Volciano v. Commission**

As a general rule, the Commission will not oppose the suspension of a decision imposing a fine if the undertakings concerned provide a bank guarantee (covering the amount of both the fine and interest) ensuring the payment of the fine imposed while the case is pending before the courts.

However, in *Ferriere di Roè Volciano*, the President of the ECJ established the possibility to order the suspension of the obligation to provide such guarantee if certain “exceptional

---

circumstances” concurred. In particular, account was taken of the fact that the undertaking concerned could not possibly provide the necessary guarantee, or could only do so at the risk of being wound-up.\(^{65}\) It was also taken into account that the grounds of challenge put forward in the main application against the decision imposing the fine raised immediately particularly serious doubts as to the legality of the decision. In this case, the President of the ECJ took special account of the fact that Ferriere di Roè was a small company with heavy financial burdens.

The suspension of the obligation to provide a bank guarantee is, therefore, exceptional and rarely granted.\(^{66}\) Nevertheless, in certain cases, such as *Siderúrgica Aristrain*,\(^{67}\) the suspension was granted insofar as the amount of the fine imposed was disproportionate, given the applicant’s position within the group where the infringements took place. Likewise, in *Cascades SA v. Commission*\(^{68}\) a suspension for six months\(^{69}\) was granted having regard to the proposal submitted by the company in order to reach a more suitable position to provide the bank guarantee. Finally, in *Cho Yang Shipping Co Ltd v.
Commission, the President of the CFI concluded that the Korean economic recession constituted a special circumstance to justify the suspension of the obligation to provide a bank guarantee ensuring the payment of the fine imposed by the Commission.

- **SCP A and EMC v. Commission**

Interim measures are rather uncommon in relation to Commission merger decisions. Furthermore, it should be noted that a new expedited procedure of the CFI has been created to deal with cases of particularly urgent nature, such as the appeal against Commission decisions on mergers. However, this procedure is designed to lead with cases which do not lend themselves to the adoption of interim measures of the kind which may be ordered in proceedings for interim relief.

Nevertheless, in 15 June 1995, the President of the CFI ordered the suspension of the decision adopted by the Commission clearing the merger of the potash and rock salt business of Kali und Salz AG (“K+S”) and Mitteldeutsche Kali AG (“MdK”). This decision was conditioned to certain commitments; notably the divestiture of the interest of

---


73 Amendment of the Rules of Procedure of the CFI with a view to expediting proceedings, OJ 2000 L 322/4, which introduced an expedited (so called "fast track") procedure (new Article 76a). Those amendments entered into force on 1 February 2001. However, so far no company has had recourse to this new procedure.
K+S in Kali Export, a joint venture participated in a 25% stake by Société Commerciale des Potasses et de l’Azote ("SCPA"). Likewise, the parties to the operation committed to terminate the contractual distribution relation binding them to SCPA, a company wholly participated by Enterprise Minière et Chimique ("EMC").

SCPA and EMC argued that the withdrawal of K+S from Kali Export would entail the dissolution of the joint venture, and requested the suspension of the Commission decision. The President of the CFI considered that the application was not *prima facie* deprived of all foundation, and that there was a high risk of a serious and irreparable harm. The contested decision would entitle the dissolution of Kali Export and would be very difficult for SCPA an EMC to access the market and re-establish the joint venture after dissolution.

- **Hellenic Republic v. Commission**[^74]

In July 2000, the Commission adopted a decision considering that the aid granted by the Hellenic Republic to regulate debts of agricultural co-operatives was unlawful and incompatible with the Community rules on State aid. Furthermore, the Commission requested the Hellenic Republic to recover such aid.

The Hellenic Republic appealed this decision before the ECJ and requested suspension until a judgement was adopted under the main proceeding. It alleged that the recovery of such aid would affect hundreds of co-operative organisations with thousands of members, and would lead to very serious social and commercial upheaval, threatening social harmony and the reorganisation carried out in the agricultural sector in Greece.

However, the President of the ECJ dismissed this application, given that the Hellenic Republic failed to prove the existence of risk of a serious and irreparable harm. In fact, the arguments put forward by the applicant only contained general observations, without giving any particulars of the possible serious effects resulting from the contested decision. Moreover, the President of the ECJ stated that all Commission decisions ordering the recovery of an unlawful State aid entail adverse effects on the rights of the persons considered to be the recipients of such State aid and, therefore, these effects could not be regarded as constituting serious and irreparable damage in themselves.

The case law shows that the European Courts have been rather severe in assessing the existence of serious and irreparable harm in cases relating to Commission decisions applying State aid control rules. In particular, most applications for suspension of Commission decisions ordering the recovery of an unlawful State aid have been dismissed.\(^{75}\)

- **Commission v. Artegodan\(^{76}\)**

Artegodan is the holder in Germany of a marketing authorisation for a medicinal product called Tenuate retard, which contains amfepramone, a substance with weight control effects. On 9 March 2000, the Commission adopted a decision withdrawing the marketing

---


\(^{76}\) Order of the ECJ of 14 February 2002, *Commission v. Artegodan GmbH*, Case C-440/01 P(R), not yet reported.
authorisations for products containing amfepramone. Artegodan brought an appeal against this decision before the CFI and requested suspension together with the application of interim relief. The President of the CFI granted both the suspension of the Commission’s decision, by Order of 11 April 2000 and interim relief, taking into account, as regards urgency, that if Artegodan’s only marketing authorisation was suspended, the damage caused would be irreparable. Subsequently, the Commission introduced an application for cancellation of the Order granting interim relief under Article 108 of the CFI’s Rules of Procedure, which was dismissed by the President of the CFI. Article 108 of the CFI’s Rules of Procedure allows the CFI to cancel an interim relief decision in view of a change in circumstances.

By Order of the ECJ of 14 February 2002, the Order of the President of the CFI was repealed and thus the Commission decision concerning the withdrawal of the marketing authorisation ceased to be suspended. The ECJ considered that the Order of the President of the CFI had misinterpreted the concept of legal certainty in holding that, because the Commission did not bring an appeal in the period prescribed for it, it could not request under Article 108 of the CFI’s Rules of Procedure that its Order be suspended. On the substance, the ECJ considered that the pronouncements of the President of the ECJ in two parallel cases in which the amfepramone substance was considered a threat for human

---

77 Commission Decision C(2000) 453 concerning the withdrawal of marketing authorisations of medicinal products for human use which contain the following substance: “amfepramone”.
79 Order of the President of the CFI of 5 September 2001, Artegodan v. Commission, Case T-74/00 R, not yet reported.
81 Orders of 11 April 2001, Commission v. Trenker, Case C-459/00 P(R), [2001] ECR I-2823 and Case C-474/00 P(R), Commission v. Bruno Farmaceutici and Others, [2001] ECR I-2909. The President of the ECJ, based on the lack of therapeutic efficacy of amfepramone, held that the marketing authorisation for products containing this substance was not justified.
health constituted a sufficient change in circumstances, justifying the application of Article 108 of the CFI’s Rules of Procedure.

4. **CONCLUSION**

The Commission has been very restrictive in the award of interim measures in relation to competition cases, despite the efforts of the European Courts to widen the possibilities in this respect. Out of thirteen requests, only eight favorable decisions have been adopted since the ECJ ruling in the *Camera Care* case in 1980 confirmed the power of the Commission in this respect. Two cases were solved by the adoption of undertakings by the parties.

The procedures to obtain interim relief also tend to be lengthy, no deadlines are established, and in some cases it has taken almost a year for a decision to be adopted. However, the recent NDS/IMS Health decision and the new proposal adopted by the Commission intended to replace Regulation 17/62, which expressly states its powers to order interim measures, may point to a future shift of the Commission policy on interim measures.

The CFI or the ECJ, however, seem to have been less strict in the application of the basic requirements to grant interim measures, opening the door to a more flexible interpretation. However, the modalities of the measures adopted by the European Courts seem more limited, and have implied the mere suspension of the Commission’s decision. This is mainly due to the ancillary nature of interim measures, which limits the scope of action of
the order adopted. The Courts cannot grant measures which exceed the scope of the judgement that may be adopted in the main proceeding.

This prevents, for example, the parties involved in a merger from requesting the CFI to adopt effective interim measures in relation to a Commission decision which prohibited an operation. The interim measures which would suspend the contested Commission decision would not be satisfactory, since the CFI would not be in a position to authorize the operation which the Commission had prohibited.