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Hurry Up and Wait?

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In this issue we have a range of articles and perspectives on how interim measures can work in antitrust proceedings. I would like briefly to look at the simple fundamental question of whether the European Commission should be making more use of the powers it has in this field.

The debate is undoubtedly timely in Europe but we have also seen recently in the United States a clearer articulation of reasons for hesitating to act at all in high technology markets because of the risk that excessive intervention might discourage innovation. Incoming FTC Commissioner Wright spelled out this "error cost" approach in a speech in Beijing on February 23, 2012[2] that is well worth reading. While the overall thrust of the argument runs against intervention there is also recognition of the dangers of inactivity.

However, while regulators may have the luxury of engaging in such an analysis in reaching their "final" decision, there are cases where there may well be a need to act more promptly. And while it may seem counter-intuitive to some, it is precisely in those fast moving markets that some interim intervention may be needed because of the risk that by the time the case is finally resolved there may have been irreparable harm to the market.

Swift action and antitrust law in Europe are not inevitably incompatible. For instance, the Commission analyzes some 300 - 400 mergers each year. While most of them are manifestly straightforward, there are still a significant number that raise real issues of potential lasting and harmful changes to market structure. Nevertheless the Commission is widely believed to do a good job of coming to the right decision in most of those cases within the six months allotted to it, and even in cases which involve complex and fast-evolving technology.

On the other hand, in cases of abuse of dominance and anticompetitive behavior it generally seems unable to resolve cases in under two years and actually takes significantly longer than that in most technology sector cases. For instance the investigation of Google, in which I should declare an interest on behalf of a complainant, is fast approaching its fourth birthday since complaints were first filed, without any clear end in sight. It seems very likely therefore that the error of under-intervention is already occurring on a systematic basis in the tech sector and a solution needs to be found.

If as an enforcer you are excessively fearful of making an error and opening yourself up to legal challenge, you can always minimize that risk by doing nothing or by constantly seeking more data to inform some ultimate decision. But administrations exist to make decisions and

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[2] *See* Joshua Wright, *Evidence-Based Antitrust Enforcement in the Technology Sector*, 3 CPI ANTITRUST CHRON. (March, 2012), *available* at https://www.competitionpolicyinternational.com/evidence-based-antitrust-enforcement-in-the-technology-sector/.

they need to accept a certain level of risk. I would go further and submit that an administration that does not risk, and even commit, a small percentage of errors is unlikely to be doing its job properly. Therefore, accepting that they might occasionally take a "wrong" decision, or at least one that some time later with hindsight might be seen to have been sub-optimal, they need to make sure that when they act they do so surgically, with the aim of preserving the status quo so far as possible and doing minimal harm.

The power to grant interim measures, in Article 8 of Regulation 1 of 2003,[3] is an own-initiative power, meaning that it is not necessary for a complainant (assuming there is one) to make a request. Given that the power in Article 8 has never been exercised and we have not seen any interim measures cases launched by the Commission for over a decade, one might question the degree of "initiative" being displayed in this area. Does the examination of each case begin with a frank assessment of whether it merits interim action, and if not why not? We see endless discussion of the need to weigh efficiencies and dynamism in relation to market analysis, but those qualities seem to be lacking in this area of enforcement. Indeed we are presumably asked to believe that not once in the past ten years has the Commission encountered a single case of a prima facie infringement of European antitrust law that presented a risk of serious and irreparable harm. Frankly that strains credulity.

I have suggested elsewhere[4] that if there is really no political will to make use of Article 8 it ought to be scrapped. But before taking that step it would be good to have a realistic and open debate on the topic. Perhaps DG Competition could also be encouraged to look at how their colleagues behave in other policy areas. For instance, and I am not suggesting the two are directly comparable, we can observe the readiness of officials in DG Trade to adopt interim dumping duties. The justification for acting long before any dumping or harm has been established is to protect the Community industry which otherwise might suffer irreversible harm.

Alternatively, those charged with assessing the case for interim action within DG Competition might look closer to home. There has been no lack of creativity and activism in other parts of "the house" when it comes to questions such as fine calculation, attribution of strict liability for subsidiaries, challenges to use of intellectual property—the list runs on.

The reticence over interim measures is puzzling because I have no doubt that those who work in DG Competition genuinely want to be effective. Who would want to spend four or five years of their career designing a new stable door while the horse disappears over the horizon? When you consider that any case is only formally opened once the services have convinced themselves of the existence of real concerns, the lack of an apparent sense of urgency thereafter is hard to explain. How much more satisfying it would be to conduct an intensive analysis, oblige companies to demonstrate impact on a balance of probabilities, and then craft a protective measure limited in scope. And back that up with a commitment to conclude the substantive case within a reasonable time frame, so that both the incentive to challenge the interim measure and the prospects of successful challenge are reduced to a minimum.

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[3] *Available* at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:HTML.

[4] *See* http://www.sidley.com/files/Publication/78f01249-3cf8-4041-8b03-981c3c3e5749/Presentation/PublicationAttachment/a8bae115-9f1e-42e5-851e-98ccec768ef6/Mlex%20-%20Use%20it%20or%20lose%20it.pdf.

There would of course be legal challenges to interim measures but those would at least be helpful in clarifying the criteria for intervention. If a decision is carefully reasoned, has weighed competing interests, and has manifestly adopted the least prescriptive of remedies, it ought to stand a good prospect of surviving judicial review. And in the long run the revival of a credible threat of interim measures as part of the antitrust arsenal should deter the more egregious forms of misbehavior and lead to more efficient use of scarce resources.

Undoubtedly there is someone out there advising a client with a good case for interim measures. Perhaps they will allow optimism to triumph over experience and put forward a case that the guardian of the Treaties will find it impossible to ignore.