



## **ECN RECOMMENDATION ON THE POWER TO ADOPT INTERIM MEASURES**

By the present Recommendation the ECN Competition Authorities (the Authorities) express their common views on the power to adopt interim measures. It contains the general principles which the Authorities consider relevant to ensure the effective enforcement of the EU competition rules within the ECN.

This Recommendation may serve as guidance to all those involved in shaping the legal framework for enforcement of Articles 101 and 102 TFEU. It is without prejudice to the legal frameworks of those ECN jurisdictions which already provide for these general principles or which go beyond the scope of the present Recommendation.

### **I. INTRODUCTION**

1. Decisions ordering interim measures can be an important tool for competition authorities by ensuring that while an investigation is on-going no irreparable damage is caused to competition, which cannot be remedied by any decision which may be taken at the conclusion of the proceedings. The adoption of interim measures may also avoid that the power to take decisions at the conclusion of competition enforcement proceedings becomes ineffectual.
2. Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

expressly enables national competition authorities to adopt interim measures when applying Articles 101 and 102 TFEU.<sup>1</sup>

3. Many Authorities have made use of this tool to date in a variety of sectors, including energy, telecommunications, distribution of motor vehicles, food, postal services, newspapers, advertising and pharmaceuticals. In terms of the type of infringements for which interim measures have been adopted, it seems that interim measures have most often been imposed in the abuse of dominance cases, especially in refusal to supply cases. Interim measures have also been adopted with respect to other types of infringements, most notably, with respect to vertical restraints. Some Authorities have considered interim measures to be useful in cases of decisions of associations of undertakings recommending that their members change prices or limit supplies.
4. In general most jurisdictions provide for an explicit legal basis which permits Authorities to adopt interim measures. In order to ensure that this is the case through-out the ECN, it is desirable all jurisdictions expressly provide for the adoption of interim measures by law. In proceedings which may lead to the adoption of interim measures, the rights of defence of the undertakings concerned should be ensured and addressees of decisions ordering interim measures should have the right to effective judicial review, in accordance with Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union where applicable. Such judicial review should take account of the urgency inherent in situations where interim measures are granted.
5. Most jurisdictions share similar substantive requirements for the adoption of interim measures. To ensure the effectiveness of the interim measure tool, it is desirable that all Authorities should be able, as a minimum, to adopt interim measures where the following cumulative requirements are met: (i) urgency due to the risk of serious and irreparable harm to competition; and (ii) there are reasonable grounds to suspect that

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<sup>1</sup> OJ L1/1, 4.1.2003.

an infringement has occurred. This Recommendation is not intended to exclude the use of wider criteria for the grant of the interim measures. The recommended standard which is recommended is based on the following considerations:

- (i) Urgency due to the risk of serious and irreparable harm to competition. The element of urgency is found in the majority of jurisdictions, either by way of an explicit reference in the applicable law or by way of interpretation in the relevant jurisprudence. This is widely interpreted as the need to act immediately in order to hinder any possible harm to the public interest/ competition, otherwise the adverse effects of an alleged infringement could not be effectively addressed in a decision of the respective Authority at the conclusion of proceedings. Some Authorities have set a limited timeframe between the occurrence of the alleged infringement and the request for granting an interim measure (a time period of three to six months).

The requirement of serious and irreparable harm to competition is found in the vast majority of jurisdictions. Certain jurisdictions extend this notion to cover harm to general economic interests, the public interest, the economy in general or the economy of the sector concerned or the interests of consumers. Some jurisdictions also provide for harm to the interests of natural or legal persons such as undertakings in general, or a category of natural and legal persons or an individual natural or legal person as an additional ground for the adoption of interim measures by Authorities, whereas other jurisdictions view this as a task for national courts.

- (ii) The substantive standard to be met with regard to the alleged infringement ranges in the ECN from a possibility to a probability or presumption of infringement. These notions have been developed in case-law, e.g., a “*possibility of infringement*” was distinguished from “*a reasonably strong presumption of infringement*”<sup>2</sup>; conversely, a “*probability of infringement*” was said not to amount to a “*clear and obvious*”

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<sup>2</sup>

Cour de Cassation (French Supreme Court), 8 November 2005, *Neuf Télécom e.a*, 04-16.857.

*infringement*<sup>3</sup>. The substantive standard to be met with regard to the alleged infringement should be commensurate with the urgency which is inherent in an assessment of whether to adopt interim measures and should allow the Authority to act in an effective and expedient manner.

6. Interim measures, by their nature, are temporary and protective. In line with the principle of proportionality, they must be restricted to what is necessary in the circumstances of the case.
7. Within the ECN, there is a range of approaches with regard to the duration of interim measures. Some jurisdictions have set limits, for example, three months, six months or one year. In other jurisdictions, there is not a time limit, but usually a specified time period is set in the decision ordering interim measures. Finally, in some systems the decision ordering interim measures is valid until the conclusion of the proceedings or the adoption of the decision on the merits of the case by the Authority. In several jurisdictions, it is possible to renew or prolong the implementation of interim measures. The Authorities should be able to adopt decisions ordering interim measures of a duration which is effective so as to avoid serious and irreparable harm to competition. A decision ordering interim measures should only be valid until the conclusion of the proceedings or the adoption of the decision on the merits of the case by an Authority or until a higher instance annuls the decision on interim measures. To enhance the effectiveness of interim measures, decisions granting interim measures should be renewable insofar as is necessary and appropriate in each case.
8. In accordance with the urgency inherent in deciding whether to grant interim measures, it is important to ensure that the procedures relating to interim measures are effective and efficient.

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<sup>3</sup> Judgment of the Court of First Instance (First Chamber) of 24 January 1992. - *La Cinq SA v Commission of the European Communities*, paragraph 62

9. In some jurisdictions, interim measures are granted *ex officio*, whereas in others, applications for the adoption of interim measures can be made by individual natural or legal persons to protect their interests. It is desirable that the respective enforcement systems governing interim measures are sufficiently flexible to allow the Authorities to deal effectively with cases which are brought to the attention of more than one Authority.
10. Monitoring compliance with decisions ordering interim measures is key to guaranteeing the effectiveness of this enforcement tool. The Authorities should have at their disposal effective powers in order to monitor the implementation of their interim measures decisions. Effective monitoring mechanisms may include: (i) *ex-officio* monitoring by the Authority; (ii) monitoring based on complaints or information from market participants; (iii) regular reporting by the parties which are the addressees of the interim measures decision; (iv) monitoring based on cooperation with sector regulators; (v) use of trustees. The choice of mechanism to be used depends on the case at hand and may include a combination of different tools.
11. In cases of non-compliance with decisions ordering interim measures, the majority of Authorities has at its disposal means of sanctioning, for example the possibility to impose administrative fines. Some Authorities may in addition have means to compel compliance with decisions ordering interim measures, for example, through the imposition of periodic penalty payments. To underpin the effectiveness of interim measures, it is essential that effective sanctions may be imposed for non-compliance with decisions ordering interim measures and that effective means are at the disposal of Authorities in order to compel compliance.

## II. ECN RECOMMENDATION

### It is recommended that:

1. All ECN jurisdictions should provide *explicitly* in their legal framework for effective means to order interim measures to protect competition.
2. The Authorities should be able, as a minimum to adopt interim measures where the following cumulative requirements are met: i) urgency due to the risk of serious and irreparable harm to competition; and ii) there are reasonable grounds to suspect that an infringement has occurred.
3. Interim measures should be of a temporary and protective nature and should be restricted to what is necessary in the circumstances of the case.
4. The Authorities should be able to adopt decisions ordering interim measures of a duration which is effective so as to avoid serious and irreparable harm to competition. A decision ordering interim measures should only be valid until the conclusion of the proceedings or the adoption of the decision on the merits of the case by an Authority or until a higher instance annuls the decision on interim measures. A decision granting interim measures should be renewable insofar as is necessary and appropriate in each case.
5. The procedures related to interim measures should be efficient and effective.
6. The enforcement systems governing interim measures should be sufficiently flexible to allow the Authorities to deal effectively with cases which are pending before more than one Authority.
7. The Authorities should have at their disposal effective powers to monitor the implementation of decisions ordering interim measures.
8. In cases of non-compliance with decisions ordering interim measures, the Authorities should have at their disposal effective sanctions, notably fines, in addition to efficient

means to compel compliance with decisions ordering interim measures, for example through the imposition of effective periodic penalty payments set at an appropriate level.

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