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Interim measures and enforcement of competition law: **A vital but rarely used power of the competition authorities with the aim of securing competition during investigations**

- Formal or informal enforcement?
 - Fines or damages are irrelevant if competition is irreversibly restricted on the market in the meantime!
- Effective enforcement of competition rules
 - Article 101 & 102 are targeting agreements and behavior that has occurred
 - A need for powers that counteracts this situation – stops the effects for a interim period while the competition authorities investigates

Background to the power

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- Competition law investigations can be complicated, need many administrative resources and may last several years
- Serious and irreparable damage can occur to competition in the time while the authorities assesses the merits of a case or complaint
- Undertakings have ample resources and may be determined to kill a competitor
- The power of imposing interim measures gives the competition authorities a possibility to counteract such “bad” behavior

The power – interim measures

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- The authorities suspects but do not yet have the evidence that there are impediments to competition and a breach of the competition law rules
- Preserve status quo on the market affected – impose interim measures
- Equals “stop-the-clock”, “stand-still”; “gun-jumping” etc. in merger control and state aid law

Conditions for imposing interim measures

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- Regulation 1/2003, article 8 (equals most other jurisdictions)
 1. Prima facie finding of infringement
 2. Urgency due to the risk of serious and irreparable damage to competition
 3. Balancing of the interest of the applicant and the undertaking under investigation
 4. A limited time period (interim)

Condition no. 2: Risk of serious and irreparable damage to competition

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- The aim of competition law:
 - Protection of competition – not competitors
- The aim of interim measures:
 - Protection of competitors as a precondition for competition
 - A killed undertaking can not be revived (brought back to life)
- Purpose of interim measures is to maintain status quo
 - A broad interpretation of the notion "competition"
 - Targeting concrete undertakings might be counteracted by imposing interim measures if there is a risk for serious damage to competition

Considerable differences can be observed

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- Some jurisdictions
 - Many examples on the use of interim measures: Exclusivity clauses, refusal to supply, collective boycott, predatory pricing
- Other jurisdictions
 - Sparingly use of interim measures: Sweden – taxi stands at Arlanda Airport (2010)
- Some jurisdictions
 - No use of interim measures
- Possible implication
 - Competition is secured differently – or not secured at all ...
- What is the possible background for these differences?

Possible reasons for using interim measures sparingly

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- Problems are solved by informal contacts with the potential offender
 - Undertakings behave in an orderly manner when contacted by the authorities
- Substance: Conditions 1-3 are not fulfilled
- Procedural requirements: Supplementary conditions for using interim measures
- Competition authorities looks at the economy in general
 - Undertakings are referred to the civil courts
- Applications for interim measures might not be often seen
 - But they are not needed either
- Tradition: A competition authority might be hesitant to use a new power

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Discussion



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