

Broadcom: The EC Adopts Interim Measures For The First Time Since 2001

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In June 2019, the European Commission (EC) opened investigations into Broadcom to assess whether or not Broadcom might be restricting competition in various chipsets and components markets. Less than four months after, the EC rendered its decision to impose interim measures to prevent risk of serious and irreparable damage to competition. The EC's Broadcom decision is the first time in 18 years that interim measures have been imposed.

Legal basis

The interim measures were initially born from a judgement of the European Court of Justice (Case 792/79 R, Camera Care v Commission). Regrettably, this potential powerful tool has not been as successful as might have been hoped; it was last used as long ago as 2001 (Case COMP D3/38.044 - NDC Health/IMS Health), despite being a formally established enforcement tool, by way of Article 8 of Regulation 1/2003.

In order to be appropriate, interim measures need to fulfil two conditions:

1. There must be a prima facie infringement of EU competition rules; and
2. There must be an urgent need for protective measures due to the risk of serious and irreparable harm to competition.

On 16 October 2019, the European Commission announced that they considered these two conditions to be fulfilled in relation to their Broadcom investigation.

On the first condition, the EC noted that Broadcom presumably is in a dominant position in three distinct markets, namely the markets of systems-on-a-chip for: (i) TV set-top boxes, (ii) fibre modems and (iii) xDSL modems. Moreover, Broadcom allegedly violated Article 102 of the Treaty on the Functioning of the European Union ("Article 102") by imposing contractual clauses containing exclusive or quasi-exclusive purchase obligations on six of its suppliers. The six agreements examined by the EC allegedly allowed Broadcom to strengthen its dominant position in the markets of systems-on-chip for TV set-top boxes, fibre modems and xDSL modems. In addition, the alleged anticompetitive practices would have allowed Broadcom to leverage its dominance into the market for cable modem chipsets in which they may not yet be dominant, by granting commercial advantages to customers in the markets in which Broadcom is dominant. These practices therefore constitute a prima facie infringement of Article 102.

As per the urgency requirement, the adoption of interim measures against Broadcom seems to have been guided by the upcoming introduction of the WiFi 6 standard, which should generate a "large number of tenders" in the next few months/years, according to Commissioner Vestager. Admitting that a final decision would come too late to prevent severe and irreparable damages to competition, the EC considered that the urgency requirement was satisfied.

Content of the interim measures

The EC ordered Broadcom to:

1. unilaterally cease to apply the anticompetitive provisions identified by the Commission and to inform its customers that it will no longer apply such provisions; and
2. refrain from agreeing the same provisions or provisions having an equivalent object or effect in other agreements with these customers, and refrain from implementing punishing or retaliatory practices having an equivalent object or effect.

These measures, which have to be limited to a specific time period and may be renewed in so far this is necessary and appropriate, have to be implemented by Broadcom before 16 November 2019 and remain in place for three years.

Perspectives

Commissioner Vestager's statement on the EC's Broadcom action infers that there may be more interim measures to come in the future: *"Interim measures are one way to tackle the challenge of enforcing our competition rules in a fast and effective manner. And this is why they are so important. Especially in fast-moving markets. Whenever necessary, I am therefore committed to making the best possible use of this important tool".*

Interim measures might also inspire national competition authorities to use their equivalent tools, especially on tech markets where it is arguable that "traditional" investigations are not concluded quickly enough to prevent irreparable harm. In this regard, we note that the Enterprise and Regulatory Reform Act 2013 provided a more flexible framework for the CMA to adopt such measures, albeit that these new provisions have not yet been used by the regulator. Across the Channel, the French competition authority (Autorité de la concurrence) is a bit more familiar with interim measures, having used article 464-1 of the Commerce Code several times a year (see e.g. the interim measures taken against Google on 31 January 2019).