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Interim measures in the UK: Lessons From the Online Auction Platform Case

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Abstract

Interim measures have the potential to be an effective and cost-efficient way for businesses with limited budgets to change the behaviour of companies that raise competition concerns. The threshold for interim measures was lowered in the UK, and the UK competition authority (the CMA) has made clear it is open to receiving more applications. The CMA dealt with an application for interim measures in the online auction platform case, which ultimately resulted in the company under investigation offering commitments. However, the procedural and evidentiary standards for a successful interim measures case remain high and applicants should not underestimate the burden and cost of embarking on the process. This paper considers these issues, with particular focus on the implications for business of making an application for interim measures or defending one, as a company subject to a complaint.

1. Introduction

This paper considers the potential for interim measures in the UK and draws from the example of an antitrust investigation by the UK Competition and Markets Authority (**CMA**) in the online auction platform market (**the online auction platform case**). Following the opening of an investigation by the CMA into ATG Media, BidonThis, a competitor to ATG Media, made an application for interim measures, which ultimately resulted in ATG Media offering commitments to address the competition concerns that had been identified by the CMA. As a result, the CMA's 2018/2019 annual report expressly identified interim measures as a tool they will use more, referring to the online auction platform case as an example. Interim measures can be an effective and cost-efficient way for smaller companies in fast moving markets, and with limited budgets, to try to change the behaviour of companies whose behaviour raises competition concerns without having to go through a protracted and expensive CMA investigation. However, the UK competition authority remains cautious about accepting applications and the costs of an application can affect the approach of both an applicant and a company subject to a complaint.

This paper provides an overview of the context in which interim measures are applied in the UK (**Section 2**), including the statutory changes lowering the threshold and the recent history of interim relief in the UK, as well as the still high evidentiary threshold required to meet the test and the time taken to accept an application. We then look at the use of interim measures in practice, drawing from the online auction platform case (**Section 3**).

We then go on to consider the implications for business of making an application and defending one as a company subject to a complaint (**Section 4**). Finally, we briefly consider the use of interim relief across Europe, and what lessons there may be for the UK (**Section 5**) before then concluding (**Section 6**).

2. The UK approach to interim measures

A lower statutory threshold for intervention

In 2014, the legal threshold for the CMA to impose interim measures was lowered. Previously, the UK competition authority[1] was allowed to impose interim measures only if it 'considers that it is necessary for it to act… as a matter of urgency for the purpose of preventing serious, irreparable damage.' This was interpreted as requiring that the conduct in question would lead to the undertaking exiting the market or going out of business.[2] The change removed this latter requirement by replacing 'preventing serious, irreparable damage' with 'preventing significant damage'.[3]

The UK competition authorities pushed for the change in recognition of the fact that undertakings can suffer significant harm where there is no threat of exit. Specifically, it was argued that the lower threshold would prevent further harm to consumers and the economy, particularly for alleged abuses of a dominant position where the incentive of the dominant firm may be to delay an investigation.[4] The dominant firm, it was argued, can continue to harm an entrant which is subject to the alleged conduct during the course of an investigation. Concurring with the competition authority, the UK Government believed that without a change to the threshold, interim measures would be little used, and abusive conduct may materially weaken competitors before final decisions are reached.[5,6]

Interim measures therefore represent an opportunity for complainants of alleged anti-competitive conduct to obtain protection where there is a genuine concern. They can also preserve the competition authority's ability to act on any infringement decision, given the requisite time to investigate may jeopardise this ability where '*significant damage*' is occurring, particularly where investigations take multiple years. If the alleged anti-competitive conduct is causing damage, a longer investigation may increase the risk of that harm becoming significant (and potentially irreparable).[7]

In order to ensure the desired benefits from the change to the statute are realised, the change must, in practice, lead to a greater number of (successful) applications over the long-term. As a result of the change, interim relief ought to become more accessible to complainants,

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1 The CMA combined the functions of the Office of Fair Trading (**OFT**) and Competition Commission (**CC**) on 1 April 2014 by virtue of the Enterprise and Regulatory Reform Act 2013.

2 *A Competition Regime for Growth: a consultation on options for reform: The OFT's response to the Government's consultation (OFT1335)*, June 2011, paragraph 4.82.

3 Section 43 of the Enterprise and Regulatory Reform Act 2013 amended section 35(2)(a) of the Competition Act 1998. Section 35(2)(b) of the Competition Act, providing for interim measures to 'protect the public interest' remained unchanged.

4 *A Competition Regime for Growth: a consultation on options for reform: The OFT's response to the Government's consultation (OFT1335)*, June 2011, paragraphs 4.81 to 4.84.

5 *Growth, Competition and the Competition Regime: Government Response to Consultation*, March 2012, paragraph 6.66.

6 The UK Government also noted that the change would make the test consistent with the tests used in some UK regulatory regimes before the regulator can make a provisional enforcement order. For example, the test for imposition of a provisional enforcement order in section 23(3) of the Postal Services Act 2000 requires Ofcom to have regard to "the extent to which any person is likely to sustain loss or damage as a result of anything likely to be done or omitted in contravention of the license condition before a final order may be made". Similar wording is included in section 25(3)(a) of the Electricity Act 1989 and section 28(3)(a) of the Gas Act 1986.

7 The time lapse between the CMA opening an investigation and issuing a decision varies depending on the case. However, GCR estimates 2.5-3 years as the average length of a CMA investigation for abuse of dominance (see GCR Rating Enforcement 2018 of the UK CMA, https://globalcompetitionreview.com/benchmarking/rating-enforcement-2018/1175093/united-kingdoms-competition-and-markets-authority). Clearly in other circumstances, investigations can be much longer.

who may be poorly-resourced compared to dominant incumbents. However, at the same time, the lower legal test creates a number of significant risks, in particular, increasing the risk of third-party complainants potentially seeking to game the system. The CMA's assessment of an interim measures application, including the procedure it follows and the evidence it requires, must therefore reflect these. As we outline below, these latter two factors in assessing an application (the procedure and evidence) are both factors that beset the UK competition authority's previous experience of interim measures.

As outlined below, these factors will likely continue to limit the speed with which the CMA can move in assessing applications and restrict it from taking a bolder approach despite the intention signalled by the change in legal threshold.

Learning from mistakes

Interim measures have never been successfully applied in the UK. In 2006, the OFT issued the UK's only interim measures direction during an investigation into an alleged abuse of a dominant position by the London Metal Exchange (**LME**).[8] The decision was appealed to the Competition Appeal Tribunal (**CAT**) but the OFT subsequently withdrew its direction following a more detailed assessment of the application and new information it received from this. However, the CAT awarded costs to the LME and in its decision was heavily critical of the OFT. The CAT described the OFT's investigative process as 'superficial and flawed', and the decision on interim measures as 'ill-founded' and adopted by the OFT based on only a limited understanding of the market.[9] In coming to this assessment the CAT was dismissive of the reliance by the OFT in making its decision on information provided only by the applicant, without testing this with third parties.[10]

The new threshold has seen a limited number of additional applications

Prior to BidonThis's application, there had been only one other application for interim measures to the CMA since the change to the threshold. In 2015 the CMA rejected a request by Worldpay, a payment services provider to retailers, for interim measures against Visa UK in relation to its interchange fees.[11] The CMA concluded that it was unlikely there would be significant damage to Worldpay or merchants in the absence of urgent intervention.

Other regulatory authorities have legal competency to grant interim measures. Ofcom and other sector regulators may impose interim measures by virtue of section 35 of the Competition Act 1998, the same competence which allows the CMA to grant such measures. This accompanies Ofcom's competence to take 'urgent action' under section 98 of the Communications Act 2003 for alleged breaches of conditions to electronic communications networks and services.

While Ofcom has yet to impose interim measures in a competition case it has received applications, both under the old and new legal threshold.[12] For example, in May 2013, BT

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8 The OFT was concerned that LME may have been about to abuse its dominant position by extending the hours of trading on its electronic trading platform LME Select. The interim measures direction was based on preventing serious, irreparable damage to the applicant and protecting the public interest.

9 See the CAT's judgement on costs in *The London Metal Exchange v OFT* [2006] CAT 19, paragraphs 144 and 170.

10 *Idem*, paragraph 134. The CAT also noted the reliance of the OFT on information provided informally in the initial application, while subsequent more balanced information was provided in response to a formal section 26 request, which outlines the sanctions that can be imposed if the applicant submits false or misleading information.

11 Worldpay requested that Visa be required to align interchange fees that apply in the UK for domestic debit and credit card transactions with those that would apply to cross-border acquired transactions from 1 January 2015 further to commitments Visa made to the European Commission in February 2014. See: CMA decision in relation to an application by Worldpay UK Limited for a direction pursuant to section 35 of the Competition Act 1998, paragraph 7.

12 Ofcom has imposed interim measures in non-competition cases – for example in the dispute between Thus and BT about payment terms for Partial Private Circuits (PPCs), Interconnect Extension Circuits (IECs) and

submitted a complaint to Ofcom against Sky, alleging an abuse of a dominant position regarding the wholesale supply of Sky Sports 1 and 2.[13] As part of the complaint, BT requested that Ofcom consider whether it was necessary to grant interim measures under section 35 of the Competition Act 1998. This application was rejected in July 2013. In January 2015, Virgin Media made an application requesting that Ofcom require the Premier League to suspend the forthcoming auction of audio-visual rights to broadcast live Premier League matches, until Ofcom had reached the next stage of its process in March 2015. Ofcom rejected the application as it did not consider the auction would prevent it from imposing an appropriate remedy to prevent harm to consumers occurring as a result of its investigation.[14]

Prior to the change in legal test, Gamma Telecom also submitted a complaint to Ofcom in October 2004 alleging an abuse of dominance by BT, requesting that Ofcom apply interim measures. This request was also denied by Ofcom.[15] Interim measures were also considered, but not imposed, following an Ofcom investigation against BT in 2004 regarding potential anti-competitive exclusionary behaviour.[16]

What is 'significant damage'?

To navigate the risks and potential benefits outlined above, the CMA has provided detailed guidance on how it will assess whether conduct is likely to cause significant damage. Damage is considered 'significant' where the ability to compete effectively in the market is likely to be restricted, such that this is causing significant damage to their commercial position. Damage can include actual or potential financial loss (relative to the applicant's size and financial resources) and the scale of loss relative to its overall revenue. It can also include actual or potential foreclosure (of input supply or access to customers) or damage to goodwill or reputation.[17] The CMA explicitly notes that damage need not lead to a firm exiting the market but may be temporary, distinguishing the new test clearly from the previous 'irreparable' threshold. The CMA must be satisfied, however, on the balance of probabilities, that it is necessary to act to prevent significant damage, and that there is a causal link between the suspected anti-competitive behaviour and any damage.[18]

The need for speed: 'urgent action'

The CMA must also consider it necessary to act urgently to prevent significant damage or protect the public interest.[19] The CMA considers that it must be likely that this damage will occur in the near future and is not damage that could be prevented through a final direction relating to an infringement. The CMA stresses the time critical nature of the interim measures process throughout its guidance, and therefore expects applicants to act promptly in applying for interim relief so that any delay does not contribute to the urgency of the requirement for interim measures.[20]

Intra-building Circuits (IBCs) products, Ofcom imposed interim measures against BT, requiring BT to offer adjustments to the current payment terms to customers. Case: CW/00916/08/06 Decision of 26 January 2007.

13 Ofcom Competition Act investigation into British Sky Broadcasting Group plc potential abuse of a dominant position regarding the wholesale supply of Sky Sports 1 and 2 – Case: CW/01106/05/13 – Application for interim measures under section 35 of the Competition Act 1995 Decision of 31 July 2013.

14 Ofcom Competition Act investigation into the sale of live UK audio-visual media rights to Premier League matches – Case: CW/01138/09/14 – Application for interim measures under section 35 of the Competition Act 1998 Decision of 4 February 2015.

15 Ofcom Competition Act investigation into the complaint from Gamma Telecom Limited against BT Wholesale about reduced rates for wholesale calls from 1 December 2004 – Case: CW/00802/11/04 – Application for interim measure under section 35 Competition Act 1998 Decision of 22 April 2005.

16 Case: CW/00760/03/04

17 See Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), CMA, March 2014 ('CA98 Guidance'), paragraphs 8.13 to 8.14.

18 *Idem*, paragraphs 8.15 and 8.19.

19 Section 35(2) of the Competition Act 1998.

20 CA98 Guidance, paragraph 8.9.

3. The Online Auction Platforms case

Background

In August and September 2016, the CMA received two complaints (including one from BidonThis) alleging that ATG Media had engaged in anti-competitive conduct in relation to the provision of live online bidding (**LOB**) auction platform services. LOB auction platform services are relatively new intermediaries that enable bidders to bid in real time in a 'live' auction taking place at a physical site operated by an auction house, which auctions products on behalf of sellers. The platforms are online aggregators that host live auctions run by multiple auction houses. Live bidding in a physical auction was previously only available by attending in person or by telephone.

ATG Media was alleged to have imposed restrictions on its auction house customers, preventing them from offering bidders a lower price using a competing third-party platform or the auction house's own platform than that through ATG Media platform. In other words, ATG Media did not want to be undercut by competing auction platforms offering a more competitive deal to auction houses. Alongside this, ATG was alleged to have imposed exclusivity requirements on some auction houses preventing them from using third party platforms and restricting marketing by third party platforms.

The CMA opened a formal investigation into ATG Media on 22 November 2016. The CMA raised concerns that ATG Media may have infringed either or both of the Chapter I or Chapter II prohibition of the Competition Act 1998 as a result of: (i) exclusivity conditions; (ii) clauses that required the auction house to offer 'no less favourable terms' to bidders using competing, or their own, LOB auction platforms and (iii) restrictions on advertising or promotions of competing LOB auction platforms. The CMA also noted that ATG Media was likely to have a dominant position in the market for the supply of LOB auction platform services to auction houses in the UK.

On 20 December 2016, BidonThis was granted formal complainant status.[21] The main advantage of acquiring this status is that formal complainants have the opportunity to become involved at key stages of the investigation.[22] For example, the CMA will consider providing formal complainants with access to the same information available to businesses under investigation at the outset of a formal investigation, and/or will allow formal complainants to comment on the provisional findings in the Statement of Objections. This can be very useful for complainants as it enables them to have a far better understanding of how the CMA's case is progressing. The CMA does not require parties to be formal complainants in order to request interim measures.[23]

The interim measures application and offering of commitments

BidonThis submitted an initial application for interim measures on 10 November 2016. BidonThis therefore offered interim measures *before* the CMA formally opened its investigation, on 22 November 2016. The application for interim measures was then resubmitted with additional information and documents on 1 December 2016, following the launch of the investigation. This contrasts with the Worldpay and LME decisions, in which investigations were already underway when the CMA/OFT first considered the applications for interim measures.[24] While unclear the impact this had on the application, strategically if an applicant is to persuade the CMA of the urgency of its application it

21 Formal complainant status is granted by the CMA to any person who submits a written, reasoned complaint to the CMA, who requests formal complainant status and whose interests are, or are likely to be, materially affected by the subject-matter of the complaint. See *CA98 Guidance*, paragraph 5.12.

22 *Idem*, paragraph 5.13.

23 See *CA98 Guidance,* paragraph 8.6 which provides that any person who considers that the alleged anti-competitive behaviour of another business is causing them significant damage may apply to the CMA to take interim measures.

24 The Mastercard/Visa investigation had been open since May 2004 against Visa and December 2005 against Mastercard. Worldpay applied for interim measures in 2014.

seems sensible to make the application as quickly as possible. In addition, the early application provides the CMA with much of the requisite evidence for it to make a decision to open a full investigation as early as possible in any event. In the online auction platform case the CMA was able to move quickly in opening the investigation – following initial complaints in August 2016, the CMA made a decision to prioritise the case in October 2016 and opened the formal investigation in November 2016. BidonThis submitted its complaint a month after it became aware of the conduct and the interim measures application two months after that.[25]

Given the strength of ATG Media's position in the relevant market, the CMA was concerned that ATG Media's practices and contractual provisions could restrict competition by (i) foreclosing the market to competitors (such as BidonThis) and new entrants, thereby limiting their ability and incentive to grow and (ii) softening price competition between competing platforms, reducing choice for consumers and preventing rival platforms from competing with ATG Media on price.[26] The CMA also noted that ATG Media had deliberately targeted auction houses that had either used, or expressed an interest in using, a competing platform charging a lower commission.[27] Consequently, there was a reasonable suspicion that ATG had used its market power, commercial relationships and contractual arrangements with customers to deliberately restrict terms to prevent BidonThis, and other platforms, from developing into effective competitors.

On 8 May 2017, shortly before the CMA was due to issue its final decision on the interim measures application, ATG Media made an offer of commitments to the CMA (**the Commitments**), which the CMA provisionally accepted on 30 May 2017.[28] Following a public consultation process, the CMA formally accepted revised Commitments on 29 June 2017.[29] Under the Commitments, ATG Media agreed not to restrict any auction house from (i) using or contracting with a competing LOB auction house, (ii) charging lower fees to a competing LOB auction house, or (iii) advertising or promoting the services of a competing LOB auction house. ATG Media also agreed to contact all relevant auction houses in writing to inform them that their existing contracts would be amended and to reassure them that they would not enforce any previous arrangements. The Commitments will apply for five years, which the CMA considered a sufficient period of time for rival platforms to establish themselves in the market.[30]

The CMA noted that by accepting the Commitments in this case, it was able to resolve the competition concerns quickly and that this can be particularly important in online markets 'to facilitate entry and expansion by challengers with innovative business models and new technologies'.[31] From case opening to accepting Commitments, resolving the competition concerns, it took a period of just over six months – significantly faster than a standard CMA case. This of course is efficient for all parties involved.

Applying for interim measures was, ultimately, a commercial win for BidonThis. The final Commitments offered by ATG Media resolved the immediate competition concerns and enabled BidonThis (and other competitors to ATG) to compete freely. However, it was not

25 Although not identified as a reason for the CMA's decision not to impose interim measures in the WorldPay case, it is interesting to note that, whilst the European Commission accepted commitments from Visa Europe on 26 February 2014, Worldpay only submitted its application for interim measures to the CMA to align interchange fees that apply in the UK on 22 September 2014 – almost seven months later.
26 Case number 50408: CMA Decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services, decision of 29 June 2017, paragraph 3.14.
27 *Idem*, paragraph 2.29.
28 Case number 50408: CMA Notice of intention to accept binding commitments offered by ATG Media in relation to live online platform services, decision of 30 May 2017.
29 Case number 50408: CMA Decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services, decision of 29 June 2017.
30 *Idem*, paragraph 4.14.
31 *Idem,* paragraph 4.16.

without some cost to the business. It is therefore important for companies considering whether to apply for interim measures and fighting interim measures applications against them to carry out a full assessment of the implications. The practical implications of interim measures for business is set out in more detail below.

Interestingly, the CMA also consider the online auction platform case as an example of a successful interim measures case. The CMA acknowledge that it was not actually necessary to impose interim measures, as shortly before the CMA's final decision was due ATG Media gave the Commitments permanently ending the practice. However, the CMA consider this an example of how 'when faced with an interim measures application in a fast-moving market, we were able to resolve the problem within just over 6 months.'[32] It is clear that, from the CMA's perspective, the application for interim measures was fundamental to achieving a successful and expeditious outcome, even without a final decision having to be made. The logical conclusion is that an interim measures application may act as a sufficient threat to elicit formal commitments from the party under investigation far more quickly than would be the case in a standard investigation. For small companies and start-ups, particularly those operating in fast moving markets, this could make the difference between success and failure.

4. Interim Measures in Practice: Implications and Lessons for Business

Full-scale CMA investigations are very costly for applicants

The purpose of interim measures is to enable companies to obtain relief from potentially anti-competitive behaviour where this behaviour is damaging a business. In effect, a complainant is shielded from the damaging effects of the potentially anti-competitive behaviour while the CMA carries out a full investigation. However, an application for interim measures, where the complaint has merit, may also encourage the company under investigation to offer commitments earlier than could be the case in a standard investigation, and this of course has considerable benefits.

A full-scale CMA investigation, even with interim measures in place, would have quickly become debilitating for BidonThis due to the ongoing commercial uncertainty, the legal costs and the significant time and resources required from a small business. A quick resolution through commitments can save both time and cost. However, importantly, the offering of commitments by a company under investigation does not result in an infringement decision. For a complainant confident that there is a strong case against the alleged infringing company this can be frustrating. An infringement decision would likely result in the same (or even more restrictive) behavioural commitments, and a public admission of liability, demonstrating to the wider industry that the CMA investigation was necessary and offering the prospect of damages. Ultimately the CMA will be the final arbiter of whether any commitments offered address the competition concerns, regardless of how iron clad the applicant considers their complaint to be.

While avoiding a full-scale CMA investigation clearly has advantages for a business, there are still significant costs associated with making an interim measures application, and going through a process to finalise commitments. For BidonThis, the process required significant engagement from the CEO for the equivalent of a month, in addition to dealing with the commercial implications on clients, providing industry specific knowledge and allocating significant internal resources to deal with the information requests and queries from the CMA. There are also the legal costs incurred, which are not recouped as part of the CMA process. BidonThis consider all these costs were necessary in order to obtain a successful outcome, and to ensure that the company could remain on the market as a credible competitor. However, the requirement for detailed evidence gathering and

32 CMA Executive Director Michael Grenfell speech, "UK competition enforcement – where next?" 29 November 2017, https://www.gov.uk/government/speeches/uk-competition-enforcement-where-next.

significant engagement with the CMA should not be underestimated, and, in reality, may not be viable for all small businesses.

Despite changes to the legal threshold, the CMA's interim measures process remains costly and slow

The legal changes were meant to make the interim measure process significantly easier and more efficient for applicants with credible complaints. However, there are a number of issues limiting the speed with which the CMA can react to implement interim measures in cases with merit.

First, there are procedural requirements that limit how fast the CMA can issue a direction as it must collect evidence from the applicant,[33] and requires engagement with third parties to verify the evidence submitted. The CMA must also give notice to the person(s) it proposes to issue directions in order to provide them reasonable opportunity to inspect documents in the file and to make representations.[34]

Second, the CMA must undertake significant analysis of the application and accompanying evidence (from the applicant, defendant and third parties) to determine whether significant damage is occurring. The economic evidence required to meet the threshold remains high.[35] The CMA notes that it will assess whether conduct is causing or is likely to cause significant damage with regard to a range of factors, including the nature of the market(s) in question and the dynamics of competition within the market(s), the effect the conduct is having or is likely to have on a particular business or categories of businesses in the market(s), or the effect that the conduct is having or is likely to have on the public interest.[36]

Clearly a balance needs to be struck between the urgency of the case, and the need to meet the required evidentiary threshold. In an ideal world, the CMA would obtain sufficient economic evidence to satisfy the need to move quickly. However, in practice the time required to gather and review the requisite evidence to sufficiently mitigate appeal risk will inevitably slow the CMA process. Complainants therefore face a double challenge – a delay in obtaining interim measures while also being required to provide ever increasing volumes of economic data and evidence – while those subject to a complaint have every strategic advantage in extending the process as much as possible.

These time-consuming steps may seem unavoidable as there will always be a risk that the impact of the direction may be difficult to reverse if it is shown through a full investigation that no infringement has occurred. The CMA must be alive to complainants gaming the system, particularly those seeking an excuse for commercial failure. Indeed, we would support the CMA's cautious approach to evidence and procedure and hesitancy to shift the balance towards the complainant.

However, the process has to reflect the intention of the legal change, regardless of one's view of the merits of the change. Based on BidonThis's experience, it is not clear that the CMA has shifted its procedure or evidentiary threshold to make it easier for complainants and to reduce its own work involved in the assessment. In the online auction platforms case, the CMA, no doubt (rightly) concerned not to repeat the OFT's past failings, went to extensive lengths to verify the submissions of the applicant and to collect and analyse a considerable amount of evidence, including on the likelihood of an infringement, whether the suspected infringing conduct had caused significant damage, and if urgent steps needed to be taken to prevent that damage. One would hope that, with additional experience and a

33 This will commonly involve sequential requests where there is an initial application and the CMA subsequently seeks all information submitted by the applicant under a section 26 request.
34 Section 35(3) of the Competition Act.
35 The CMA notes that applicants should provide as much information and evidence as possible to demonstrate their case for interim measures. See CA98 Guidance, paragraph 8.8.
36 CA98 Guidance, paragraph 8.13.

greater volume of applications, the effects of the reforms either: (i) make the CMA more willing to take on additional cases for which the evidence would not have justified doing so previously (so the legal change lowers the evidentiary threshold); or (ii) the CMA will more efficiently filter applications with merit reducing the procedural burden on complainants. In either case, the CMA must recognise the greater space the legal changes give it to assume different procedural or evidentiary requirements without increasing risk of appeal.

Third, clearly the damage must be occurring within the anticipated timeline for making a decision. If the CMA anticipates issuing a Statement of Objections within, for example, 18 months of opening a case, the incremental time in which damage is prevented potentially becomes very limited. Furthermore, while the CMA can investigate the interim measures application and the main proceeding of the cases in parallel, in practice, if the CMA spends the first six month of its investigation pursuing an interim measures application, the prospect for it to meet its standard case timetable is clearly reduced.

The impact of the interim measures application on BidonThis

The effect of the commitments on BidonThis was not immediate – it took around six months following the Commitments being accepted by the CMA for auction house customers to return to BidonThis. BidonThis believes this period of time was necessary for auction houses to feel confident that there would be no adverse repercussions from ATG Media if they were to contract with BidonThis.

Although BidonThis believes the reaction of the industry has been mainly very positive, it also believes it has suffered some negative repercussions from certain industry participants for having initiated the CMA investigation, in particular smaller auction houses. Many auction houses are family run businesses and they have very small teams dealing with the day to day running of the auction house. None of these auction houses have in-house legal advisers and they are simply not set up to deal with the volume and complexity of information requests they received from the CMA as part of the investigation. BidonThis was also required to provide detailed evidence to the CMA on conversations and meetings that had taken place with these auction houses, in order to demonstrate how damaging the restrictions imposed by ATG Media were. Many auction houses felt betrayed that details about their business had been provided to the CMA, and further frustrated by the need to verify this information. They considered it to be a time-consuming and risky process for their business with no obvious upside. There remain some auction houses that refuse to do business with BidonThis as a result.

However, while this is unfortunate, BidonThis remains convinced that it was a necessary process to go through in order to effect a positive and lasting change on the industry. In July 2018, BidonThis merged with the UK Auctioneers and the Auction Room to create the UK Auctioneers Group – now the second largest provider of LOB services in the auction platform market. As a result of the Commitments, the UK Auctioneers Group is free to offer any price point to their auction house customers. Similarly, auction houses are free to advertise all viable alternative LOB platforms, and list all different rates available so bidders have complete transparency of all options that are available to them. Overall, BidonThis therefore considers the interim measures process to have been worthwhile, in particular given what it believes to be the very positive outcome for the industry.

In the interests of guiding other businesses who may find themselves on the receiving end of potentially anti-competitive behaviour and are considering making an application for interim measures, BidonThis has identified three key practical lessons from its own experience. These are set out below.

Lesson 1: Continued involvement is key to success

As a complainant, it is extremely important to be involved on an ongoing basis with any interim measures case, and it may be advisable to request formal complainant status. There are two key reasons for this. First, the CMA may be unfamiliar with the market in question. Every industry has nuances and complications that may not be immediately apparent, and this is particularly the case in fast moving markets. Unfortunately the CMA does not operate in sectoral teams which means the competition authority is always on a steep learning curve to understand the industry. This can be frustratingly slow, particularly where businesses operate in smaller sectors that the CMA is unfamiliar with. BidonThis spent a considerable amount of time ensuring that the CMA fully understood the implications of ATG Media's behaviour. When ATG Media first offered commitments, they did not work and, in the view of BidonThis, could have been more damaging for the industry than beneficial. BidonThis therefore actively engaged in the consultation process to ensure the Commitments that were agreed dealt with all the competition concerns and worked for the industry as a whole.

Second, all documentation must be carefully reviewed to ensure confidential business information is protected, and a consistent approach to confidentiality is taken. There may be information which should be redacted as it has no bearing on the case and is not essential to share. If certain information is highly sensitive it may be advisable to request that it is shared only within a confidentiality ring,[37] meaning that only nominated legal and economic advisers will have access to it. This provides a significant added layer of protection for both the business and its customers. The CMA takes confidentiality seriously and will do everything within its power to protect the information provided to it. However, human error can occur in any scenario and as a business it is essential that steps are taken to reduce any risk. Therefore, regardless of the approach taken, it is imperative that every submission is checked and rechecked thoroughly by both the business and by legal advisers.

Lesson 2: Stay fair and balanced.

There is no point considering embarking on an interim measures process if the goal is simply to destroy a competitor or if your business is failing for commercial reasons. The CMA's stated aim is to make markets work well for consumers, businesses and the economy. It is not the role of the CMA to champion any particular business. An open, fair and competitive market must therefore be the ultimate goal for any complainant, otherwise there is a risk that any motivation for action will be misaligned with the stated goals of the CMA. By co-operating closely with the CMA, and providing honest and frank information, the CMA process can work in parallel with those efforts of the complainant, with the result being a fair and competitive environment for the complainant to operate in. Had BidonThis not adopted this approach, the interim measures process would have likely fallen apart, or failed, and the process could have been much longer and therefore at much greater cost.

Lesson 3: Be realistic about costs and the possible outcomes of the case

It is important to recognise that it is the CMA bringing the case, not the complainant, and the CMA process does not have regard to any costs incurred by a complainant for their involvement. As set out above, the costs of making an interim measures application should not be underestimated. The commercial impact will likely be significant, with large staff costs and lost opportunity cost from the day to day running of the business – and this is before any external legal costs that are incurred. The impact on customers also need to be considered and fear of retribution from a dominant company, or any negative impact on your own future business with customers, means it can often be most sensible to keep them as far removed and sheltered from the process as possible. Customers will typically not be

37 CA98 Guidance, paragraph 7.14.

as open to complain (or be known as complainants) as a competitor that is directly targeted by the conduct, and the CMA has very limited protections in place for customers to prevent retribution from a dominant company other than the investigation itself, which customers are often reluctant to come forward and engage on.

The CMA may also decide to settle the case, for example by accepting commitments, if this provides the quickest and most effective way to solve the competition concerns. As explained above, this means there will be no infringement decision and no apportioning of blame. Neither the complainant nor the company under investigation can be considered as the 'winner' of the process – ultimately the outcome of the case is a better functioning market. Although this does not make for snappy PR headlines (as the complainant cannot decisively claim to be on the 'winning side') the ultimate effect on the complainant's business, and the industry as a whole, will be positive and this should be considered as a success.

5. Lessons from Europe

Despite the CMA (and BidonThis) considering the online auction case to be a success, the CMA still has yet to issue a successful interim measures decision. With the exception of Estonia, Denmark and Ireland, all European competition authorities have the competence to issue preliminary measures in urgent situations.[38] Supporting this position, in 2013, the European Competition Network recommended that all Member States should have the power to order interim relief in accordance with the irreparable harm standard requiring an immediate remedy.[39] An analysis of the application of interim measures by the European Commission and other Member States is beyond the scope of this paper. However, we briefly note some reflections that highlight the opportunity for the CMA and for potential complainants in the UK.

In many Member States, the legal threshold remains similar to the old UK threshold.[40] This is also the case for the legal test applied by the European Commission (**EC**),[41] laid out initially in judgements by the European Courts.[42] The EC has only seldom granted interim relief,[43] and never since its powers were set out formally in Regulation 1/2003. Not dissimilar to the UK, the EC had a chastening experience in one of its cases. In *IMS Health*, the General Court suspended and then overturned the EC's decision to impose interim measures, raising concerns in its first order that IMS did not have an adequate opportunity

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38 Autorité de la concurrence, *Report on interim measures,* page 46, http://www.autoritedelaconcurrence.fr/doc/etudes_ra07.pdf

39 ECN Recommendation on the Power to Adopt Interim Measures 2013, page 6, http://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf.

40 For example, the legal threshold in Germany and Belgium remains serious and irreparable damage or harm.

41 Article 8 of Regulation 1/2003 provides that in 'cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.'

42 The European Court of Justice ruled as early as 1980 that the EC may adopt interim measures by decision where it appears that such measures would be: (i) indispensable to ensuring the effectiveness of any subsequent infringement decision and (ii) necessary as a matter of urgency to avoid serious and irreparable harm to a competitor or the public interest. See Order of the Court of 17 January 1980 in Case 792/79R, Camera Care v Commission, [1980] ECR 119, Id., paragraphs 18 and 19.

43 For example, Ford Werke AG - Interim Measure OJ [1982] L 256/20 (decision annulled on appeal to the Court of Justice (Cases 228/82 and 229/82 *Ford Werke AG v Commission*; ECS/AKZO OJ [1983] L 252/13; BBI/Boosey and Hawkes - Interim Measures OJ [1987] L 286/36; *Ecosystem SA v Peugeot SA* [1990] 4 CMLR 449, upheld on appeal Case T-24/90 *Peugeot v Commission*; Langnese-Iglo/Mars, unreported decision of 25 March 1992; see XXIInd Report on Competition Policy (1992), point 195 (this decision was suspended in part in Cases T-24/92 and 28/92 R *Langnese-Iglo GmbH v Commission*); Sealink/B&I-Holyhead - Interim Measures [1992] 5 CMLR 255; *Sea Containers v Stena Sealink* - Interim Measures OJ [1994] L 15/8; *Irish Continental Group v CCI Morlaix* [1995] 5 CMLR 177; and NDC Health/IMS Health - Interim Measures OJ [2002] L 59/18 (decision subsequently withdrawn: Commission Press Release 1P/03/1159, 13 August 2003). See R. Whish & D. Bailey, *Competition Law* (9th Edition, Oxford University Press, 2018), page 263, footnote 74.

to rebut the reasoning for the EC's decision and that the decision was not intended to restore the status quo ante.[44] Soon after the *IMS Health* court proceedings, on December 16, 2002, Regulation 1/2003 was adopted and empowered the EC to adopt interim measures. Similar to the UK, both prior to the change in the legal threshold and even following it, the high standard imposed on the EC by the European courts in *IMS Health* likely leads to a reluctance to use its interim measures powers. However, the EC is restricted compared to the UK in three respects. In addition to the high 'serious and irreparable harm' threshold, the EC must also (i) conduct an assessment of the irreparable damage to competition (as opposed to a damage to a single competitor) should no immediate relief be granted and (ii) be able to demonstrate a *prima facie* infringement case,[45] whereas the CMA must only have a reasonable suspicion of an infringement.[46] In practice, if the interim measures decision is challenged and the EC lose the case (only on the application for interim measures), they clearly end up in a much worse position than before as regards the main proceedings on the substance. If applying interim measures risks seriously jeopardising the infringement decision the EC's reluctance to impose them is understandable.

The UK's approach to interim measures represents a change in government policy that is intended to shift the balance of an application towards a complainant. The UK should therefore now be assessing and accepting more interim measures applications than the EC, which is still subject to a more onerous standard. At the moment, there has been no divergence in approach or outcomes and this may reflect the CMA's (understandable) hesitancy to practically implement the legal changes or complainants not yet fully taking advantage of the opportunity of the lower threshold.

Some Member States also have a lower threshold than the old UK threshold.[47] One of these is the French competition authority (Autorité de la concurrence, or **Autorité**), which is well known to have extensive experience of granting interim measures.[48] While many of these decisions concern energy markets[49] more recently interim measures decisions have been issued in broadcasting and markets which could be considered as fast-moving such as online advertising.[50] The measures that the Autorité has granted include forcing companies to modify commercial pricing,[51] separate business communication of its public and private service subsidiaries,[52] suspend exclusive agreements concluded between undertakings[53] and force operators to market certain products to competitors to allow them to effectively compete on the market.[54]

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44 The interim measures took the form of compulsory licensing of copyright under transparent, objective, and non-discriminatory terms and was based on the prima facie finding that IMS could not copyright-protect its regional sales data service as it was an industry standard similar to an essential facility. See Order of 10 August 2001, Case T-184/01 R *IMS Health v. Commission* [2001] ECR II-2349, paragraph 6. The GC followed this with a second order two months later which rejected an appeal from NDC Health, a competitor of IMS Health, who wished to challenge the suspension of the interim measures as ordered by the General Court in its first decision. Importantly, the Court also balanced the risk of serious and irreparable harm to IMS's business in the event of interim measures relative to the harm being experienced by the applicant. The President of the Court confirmed the suspension of the EC's decision ordering compulsory licensing (as at 2018).

45 See Article 8(1) Regulation 1/2003.

46 See section 35(1) of the Competition Act 1998.

47 For example, Portugal applies a threshold that in addition to damage that is imminent, serious and irreparable also includes "or difficult to rectify" while the Netherlands applies a threshold of 'Serious concerns of a probable infringement and immediate action must be proportionate to the interests of the affected parties in relation to the interests of preserving actual competition'; and

48 France applies a threshold of ''Serious and immediate prejudice to the economy in general, to the sector at stake, to the interests of consumers or to those of the complainant. See the Autorité de la concurrences' Annual Reports 2008-2018, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=15.

49 For example, see Decisions 16-MC-01, 14-MC-02, 09-MC-01, 07-MC-04, 07-MC-01.

50 See Decisions 14-MC-01 and 10-MC-01.

51 Decision 16-MC-01.

52 Decision 09-MC-01.

53 Decision 14-MC-01.

54 Decision 07-MC-05.

However, the process for granting interim measures in France does not appear less rigorous than that adopted by the CMA in the online auctions platform case. On average it takes four to five months from the receipt of the complaint to the interim measures decision (although the Autorité has taken up to 18 months).[55] The CMA took a slightly slower but not dissimilar amount of time in the BidonThis case. Drawing lessons from France, if the impact in the UK of a lower threshold is similar, we ought to see more frequent successful applications as the CMA takes greater risks in accepting applications, effectively giving the complainant the benefit of the doubt more often than previously (reflecting the lower legal threshold) and importantly potential complainants will have greater awareness and more confidence to make an application. However, we may not expect to see the procedural burden on applicants (or the CMA) fall significantly.

6. Conclusion

Interim measures have the potential to be an effective and cost-efficient way for companies, with limited budgets to change behaviour of competitors that raise competition concerns. The CMA is increasingly open to such applications.

However, interim measures are far from a panacea. The justification for imposing onerous measures on an undertaking against which there is no infringement finding needs to be carefully evaluated. In particular, the CMA is subject to procedural and evidentiary standards that restrict its ability to move fast and ease the process. There is good reason for the CMA to be hesitant to shift the balance towards complainants, including the difficulty of reversing interim measures if in fact no infringement has occurred and the opportunity for complainants to game the system or inappropriately seek relief from commercial failure through a CMA complaints process. While we would generally support such a cautious approach, it risks ignoring the intentions of the legal change to the threshold.

The extensive work undertaken by the CMA in the BidonThis case does not reflect the change to the threshold. This is entirely understandable as the CMA is (rightly) cautious given the fierce criticism and past mistakes of the OFT. However, if the legal changes are to be implemented practically, over time the CMA must shift to making procedural and evidentiary process easier and quicker for complainants. Lessons from France suggest the procedural process may not become easier but successful applications increase nonetheless because potential complainants become more aware and confident of submitting applications and the CMA more willing to take risks on a complainant's case.

Complainants need to be aware the CMA has not yet had significant experience of practically implement the legal changes and the evidential requirements to bring a successful interim measures case remain burdensome and should not be underestimated (and even under a changed system will still require significant work). Applications for interim measures should therefore be reserved for clear-cut violations and on a relatively straightforward fact pattern. For us this means applications should realistically only be made against clearly dominant companies or those affected by hard-core infringements.

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55 Autorité de la concurrence, Report on interim measures, http://www.autoritedelaconcurrence.fr/doc/etudes_ra07.pdf.

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