Florence Competition Summer Conference
"***Effective remedies vis-à-vis digital platforms: competition policy and sector regulation at a crossroad***"
Panel discussion – *The role of interim measures vis à vis online platforms under competition policy v. sector regulation*
25 June 2021

Check against delivery

I am delighted to be part of this discussion on interim measures, and their role vis-à-vis digital platforms.

- It is a **timely issue**, although **not an entirely new one**.
  Since digital giants started to appear and to shake up the economy on a global scale, competition enforcers have tried to come up with a relevant procedural strategy. You may remember that, at first, commitments were touted as an appropriate response. Soon enough, in France, we held that interim measures were a tool of choice.
  We were **well-placed to advocate for the use of interim measures** because France has been a **pioneer** when it came to include them in day-to-day competition enforcement.
  The French competition authority, then called *Conseil de la concurrence*, was endowed **since its inception in 1986** with the power to issue such interim measures[1].
  In **2001**, a law modernized the competition toolbox and enabled the *Conseil* to order not only what the complainant had requested, but **any measure** it saw fit[2].
  This all took place **way earlier than in many other jurisdictions**. For instance Germany[3] had competition interim measures in 2005, Italy[4] in 2006, and Spain in 2007[5].

- **Why did we believe early on that interim measures would be relevant *vis à vis* digital giants**? Maybe because we not only had this tool, we have also **actively used i**t.

  The objective of interim measures is to swiftly intervene to avoid serious harm being caused to the competitive functioning of the market, before we can rule on the merits of the case. These features make it **especially relevant in dynamic markets**, where the positions of actors are destabilized.
  Interim measures first proved useful to address competition concerns on **markets that had just been open to competition**, in order to avert the risk of preemption by the incumbent or dominant firm.

[1] Ordonnance n° 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence
[2] Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques
[3] *Gesetz gegen Wettbewerbsbeschränkungen* (Act Against Restraints of Competition, "GWB"), 7th Amendment, Section 32a
[4] Section 14(1) of Decree Law No. 223/2006
[5] Competition Act 15/2007 of 3rd July 2007

It was the case for instance in France in **the telecom sector**. From 2001 to 2004, six different interim orders were imposed on the incumbent telco operator, now known as Orange[6].
Most often, the main concern was to ensure the effective opening of the land line and Internet markets, in particular as the first broadband offers were being launched. Somehow you could say this **paved the way for the emergence and expansion of digital platforms later** on.

A decision of **2008** marked a **transition of interim measures from the telecom sector to digital players**[7].
A new mobile communications operator applied to the then *Conseil de la concurrence* for interim measures **against Apple and Orange** regarding their **exclusivity agreement** for the distribution of **iPhones** in France. The *Conseil* found the deal was **likely to stifle competition** in a sector where competition was already not sufficient, and ordered that any exclusivity provision between the undertakings concerned be **suspended**.

- It was around that time that **the digital economy became the epitome of fast-moving markets**, and interim measures started to be used to **address newly-arising competition concerns**.

As early as in **2010**, the *Autorité* issued its **first interim against Google in the online advertising sector**[8].

This case illustrated **a trend of enforcement in digital markets**. Competition enforcers used to focus on exclusionary abuses, that is: conducts excluding a rival from the market. This was the prevailing situation in those telecom cases I mentioned earlier.

Now with **tech giants**, the attention shifted to **exploitative abuses**. When market power is such that a firm can put its trading partners into near-dependency, its conduct can distort competition among them, even on markets where this dominant player has no interest of its own.

The Google Ads case of 2010 was a **pioneering one** involving discriminatory practices by Google, and it **exemplifies this theory of harm**.
NavX, a small company selling databases to locate road radars, filed a complaint with the *Autorité* after its AdWords account was suddenly suspended by Google for an alleged violation of its content policy.
In June 2010, the *Autorité* ordered Google to re-establish the customer account of NavX and **to ensure the transparency of its content policy**.

[6] Decisions 01-MC-06 of 19 December 2001, 01-MC-07 of 21 December 2001, 02-MC-03 of 27 February 2002, 03-MC-02 of 5 March 2003, 04-MC-01 of 15 April 2004, and 04-MC-02 of 9 December 2004
[7] Decision 08-MC-01 of 17 December 2008
[8] Decision 10-MC-01 of 30 June 2010

In response, Google offered a **series of commitments** consolidating the improvements brought about by our interim measures, and **volunteered to extend these improvements and clarification** to **all contents**, **all advertisers** and **all countries** where AdWords services were offered. The *Autorité* made this commitments binding through another decision, some months later.
The NavX decision served to avert the risk of foreclosure for firms whose expansion heavily depended on online advertising. It shows how interim measures allow **competition enforcers to have a good grip on digital market**.

- Clearly, **what makes interim measures effective has not changed over time** since the early days of the opening up of regulated markets. **What indeed has changed is the economy itself**, as it **globalized and digitized**, and that change has made this procedure **ever more relevant**.

  The **benefits of interim measures are well known**.
  It is a **swift** procedure, processed within less than 6 months, with a **time limit to file an appeal** limited to ten days, and the Court must adjudicate the appeal within one month.
  If the undertaking concerned **fails to comply**, the *Autorité* can impose a heavy **fine**. Back in 2004, a firm was fined 20 million € by the *Conseil* for this reason, and when it appealed the decision, the review court imposed twice that amount[9].
  While acting fast, **procedural fairness** is untouched. The *Autorité* abides by due process and the companies concerned appear at a full hearing and can file written submissions beforehand.
  In the past 20 years, the *Autorité* has issued **31 interim orders**, more than any other NCA in the EU.

- So if the **benefits are obvious**, and the rise of the **digital platforms is calling for swift intervention**, **what stops other enforcers from using it more?**
  From a legal perspective, maybe **the standard of proof** is the answer.

  Within the **EU**, the standard of proof for the adoption of interim measures varies between jurisdictions, from the mere possibility of an infringement to an infringement being "presumed".
  This can **adversely affect the effectiveness** of this procedure. A standard that in practice requires the finding of a manifest or obvious infringement hinders the capacity of the agency to deal with a range of cases. It is especially so when an abuse is suspected, because it would most often require a complex evaluation of effects. Precisely, abuse is usually the type of case that attracts applications for interim measures.

[9] CA Paris, 11 January 2005, France Télécom

In **France**, the standard of proof was **at first set at a high level**. Interim measures were quite a new thing, so the Courts ruled with **reference to similar procedures** that they were more used to.
The Court of cassation set the standard of proof along the same lines as for **interlocutory injunctions in civil claims**: the practices at stake had to be "evidently illicit" or "manifestly illicit"[10].
Ten years later, the Paris Court of appeal chose to refer to **European law standards**, but to the same effect. By way of two decisions, it referred to the notion of a "***prima facie* infringement"**[11].

Things **changed** shortly afterwards.
The Court of cassation made it clear that the notion of **procedural autonomy** prevailed. Even if the competition enforcer applies EU law to the substance of the case, **French law applies to the conditions for granting the interim order**.
By a decision of 2004[12], it quashed the Court of appeal's decision. In very clear terms, the Court stated also in its annual report for that same year that **the powers of the French competition authority to issue interim measures are "more flexibly interpreted and of such a nature as to facilitate"** said measures.
Finally, the Court of cassation expressly ruled in a 2005 decision that interim measures can be ordered when the facts "***appear to be likely to constitute***" an anticompetitive practice.[13]
Still, this standard is combined with a **strict approach to causality**, namely that the infringement must be "the direct and certain cause" of and harm the former[14].

The **underlying idea** is that a request for interim measures can only be filed together with a complaint on the merits. Therefore, it is **only at the later stage of its substantive decision that the *Autorité* will need to characterize the practices** at stake.
An *a contrario* illustration can be found in a decision of March this year, in the sector of targeted advertising[15].
Several associations of **digital advertising market players** sought an **interim order against Apple** in view of **changes to its operating system**. They claimed new transparency features to be implemented on apps on iOS, which will require users' consent to the tracking of their data, constitute **unfair trading conditions**, and possibly self-preferencing on the part of Apple.
The *Autorité* looked into the matter **thoroughly**, and considered that the introduction of the new framework **does not appear to reveal an abuse of dominance**. The investigation

[10] Cour de cassation, Sony France, and JVC video, 7 April 1992
[11] CA Paris, 26 June 2002, Pharma-Lab, and 18 July 2002, Pharmajet
[12] Cour de cassation, 14 December 2004, Pharma-Lab
13 Cour de cassation, TPS, 8 November 2005
14 Cour de cassation, 8 November 2005, Neuf Télécom
[15] Decision 21-D-07 of 17 March 2021

continues **on the merit** but for now, the preliminary analysis of the case did not warrant the issuance of an urgent interim order.

- Due to this favourable legal environment, we have been able **to take decisive action through interim measures vis-à-vis digital platforms**.

  Again in **January 2019**[16], we ordered interim measures against Google with respect to its **Ads rules**, to the effect that they be made **clearer** and be implemented in a **non-discriminatory manner**. Like NavX before, **Amadeus** complained that Google had suspended several of its Adwords accounts.
  In this case, advertising on Google generated most of business made by Amadeus. The **effects** of Google's behaviour on the sustainability of its trading partner's business were so serious as to be **lethal**.
  This is another interesting aspect of the standard of proof: the likely harm to arise out of the practice at stake must affect either the **general economy**, the **sector** concerned, **consumers**' interests or the **plaintiff** itself.
  The *Autorité* ordered **a set of interim measures**:
  - a **clarification** of Google Ads' rules to the type of service offered by this advertiser
  - a **review of the procedure** for the suspension of Ads' accounts in the sector
  - a **re-examination** of the campaigns run by Amadeus in light of these clarified rules and, as the case may be, a reinstatement of these ads.

  At the end of the same year, the *Autorité* issued a **150 million € fine against Google**[17] **also in relation with Google Ads rules** imposed on advertisers. We found them to be non-objective, non-transparent and discriminatory. In that particular **case,** the request for interim measures had been rejected, because the standard of proof was not met.
  This shows how interim measures are **one part of a procedural toolbox**. The different tools are to be **combined** to reinforce the effectiveness of enforcement, especially towards platforms.

- Another **recent, major decision** that sought to discipline the behaviour of a platform was a case brought against Google by **news agencies and press publishers**[18]. It again illustrates the **effectiveness of interim measures**, in part because they **can be creative, well targeted to the needs of a particular situation**.

  The **background** of this decision lies in a **law of 2019**[19] that implements in France a European directive on so-called **related rights**. Its purpose is to allow for **fairer**

[16] Decision 19-MC-01 of 31st January 2019
[17] Decision 19-D-26 of 19 December 2019
[18]
[19] Loi n° 2019-775 du 24 juillet 2019 *tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse*

conditions for publishers and news agencies to negotiate with platforms on how revenue is shared between them.
Google **changed its policy** regarding how content generated by press publishers is displayed in search results, pretending it was a consequence of this law. It decided it would **no longer display their content unless publishers authorised Google to use it for free**.
In practice, news agencies and press publishers felt they had **no choice**. Therefore, they filed a **complaint** and requested **interim measures** so that Google would be ordered **to negotiate in good faith the remuneration for the re-use of their content**.

As I said, it can happen that the **standard of proof** for issuing interim measures is not met. But here, we did find there was **a likely abuse of this dominance,** because Google had imposed **unfair terms** on press publishers for displaying their protected content and tried to **circumvent** the law.
We also found there was an immediate and serious harm to the press sector**. This industry faces a difficult economic situation and the** aim of the law **was precisely** to improve the revenue **they derive from the content they produce**.

We **ordered** that Google negotiate in good faith with publishers and news agencies what is owed to them for the re-use of protected content, under transparent, objective and non-discriminatory conditions. The order lasts until the *Autorité* has ruled on the merits of the case. In the meantime, we will be monitoring how it is being implemented.

- This decision illustrates very accurately a final aspect of the French regime of interim measures, which is about their **content**.

Interim orders are efficient because they **adjust to the nature of the competitive harm** they mean to prevent. Market players have a **variety of conducts**, we can impose an equally **diversified range of orders**, as long as they are **proportionate**. The **Courts have approved** this approach.
I will mention for instance a case in the energy market. Our order was issued in September 2014[20] in the context of the liberalisation of a market, but it is **a very good example of how interim measures can be fully relevant *vis à vis* digital platforms**.
A newcomer had complained that the incumbent gas supplier Gaz de France was using its database of customers on regulated tariff from its former legal monopoly to offer them deals on the open market for gas and electricity. These advantages could not be replicated, and there was an immediate risk of pre-emption of the market.
We ruled that **Gaz de France had to disclose to other gas providers some designated customer data**, so that the offers of its rivals would also reach them.

[20] Decision 14-MC-02 of 9 September 2014

Except for some minor amendment, **the decision was upheld** in Court. The order was found to be proportionate, as it **did not exceed the perimeter of the conduct** at stake, and was t**he only way to address the serious and immediate harm** observed[21].

This for sure is a sign that **competition enforcement is not helpless** in the face of the conduct of digital platforms. We can contribute to safeguarding the contestability of markets, provided that we **keep a close watch** on those that could be affected, and **use our new power to start interim proceedings on our own initiative**, as permitted by the **ECN +** directive[22].

[21] CA Paris, 31st October 2014, GDF Suez

[22] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market