Professional Perspective

Practicalities & Pitfalls of Interim Measures by EU Courts

Juan Rodriguez and André Garcia do Fôjo, Sullivan & Cromwell

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Contributed by Juan Rodriguez and André Garcia do Fôjo, Sullivan & Cromwell

European Union (EU) law increasingly governs critical aspects of companies' business in the EU. Companies operating in the EU must comply with a wide range of laws and decisions adopted by EU institutions and regulatory bodies (EU Measures). They include laws and regulatory decisions in diverse areas, such as, for example, competition law, state aid, public procurement, foreign subsidies, pharmaceutical and environmental standards, public health, agriculture and fisheries, banking and financial regulation and trade sanctions. The EU regulatory landscape has undeniably become complex.

Companies may be affected by EU Measures in a number of ways: alleged EU Law infringers may find themselves dragged into long and burdensome administrative proceedings, subjected to heavy fines, or to the imposition of limits on their operations. In particular, EU institutions may impose heavy fines for breach of competition law, impose anti-dumping duties on non-EU producers who sell their products in the EU at "dumped" prices, recover sums of money or other benefits received by companies in breach of state aid rules, or withdraw a financial institution's authorization to operate.

EU Law provides redress against such decisions via litigation in the General Court and in the Court of Justice (EU Courts). In particular, so-called "interim measures" ordered by the EU Courts are an effective way to prevent imminent and irreparable harm to companies that are subject to EU Measures that they believe to be in violation of EU Law.

Judicial Redress & Interim Measures

Judicial Redress v. EU Measures

The EU Courts review the legality of EU Measures and may annul them—wholly or partly—if the measure infringes EU Law. Companies and individuals may bring an action for annulment of the measure in question in the General Court. For example, a company may seek annulment of a European Commission (Commission) decision imposing a fine for breach of competition law, or blocking or authorizing a merger.

Parties may subsequently appeal an unfavorable judgment of the General Court to the Court of Justice—within two months and 10 days, and only on points of law. Actions for annulment and appeals are "main actions,"—they resolve the dispute on the merits.

Lack of Suspensory Effect of Actions

However, the practical value of main actions is severely undermined by their lack of suspensory effect, i.e., the challenged decision remains in effect even if a party challenges it in the EU Courts—EU Measures are presumptively legal. Moreover, on average, it takes approximately 16 to 20 months for the General Court to dispose of a case, while it takes approximately 16 months for the Court of Justice to adjudicate on appeal.

In competition matters, particularly in the field of merger control, proceedings typically take even longer. During that time, the contested decision may have caused great damage to the parties concerned, thereby making a favorable judgment in the main action devoid of any purpose given that the damage to the parties has already been done.

The (Possible) Solution – Interim Measures

The EU Courts can order "interim measures" to protect parties from the harmful effects of the EU measure they are challenging until the relevant EU Court has delivered judgment in the main action, i.e., they provide provisional legal protection. Interim measures are ancillary to main actions. Therefore, applications for interim measures are admissible only when the applicant challenges the contested decision on the merits in one of the EU Courts.

To obtain an interim measures order, applicants must show that they cannot wait for the outcome of the main action without suffering serious and irreparable damage. To prevent such damage and to ensure the full effectiveness of the judgment in the main action, EU Courts may, by way of interim measures: order the suspension of the operation of the contested EU Measure, and/or prescribe any other necessary measures.

Exceptionally, EU Courts may immediately grant ex parte interim relief on a precautionary basis—i.e., even before hearing from the opposing party in the dispute—until a final decision on the interim proceedings is delivered. If the General Court dismisses the application for interim measures, the applicant may appeal that order on points of law in the Court of Justice. If the General Court dismisses the main action, a party appealing against the judgment to the Court of Justice may request the Court of Justice to suspend the operative part of the General Court's judgment.

Conditions for Granting Interim Measures

Given the potentially far-reaching nature of interim measures, the EU Courts require applicants to meet exacting conditions in order for their application to succeed. First, an application for interim measures must satisfy certain admissibility requirements. Second, to succeed, the applicant must show that all three of the following conditions are satisfied: fumus boni juris, urgency, and balance of interests leaning in favor of the applicant.

Admissibility

Before applying for interim measures, the applicant must have brought a main action it the EU Courts, which must not be manifestly inadmissible upon a cursory look by the judge hearing the interim measures application. This is to spare the EU Courts from spending time on interim measures applications where the main action manifestly has no chance of succeeding.

Formally, an application for interim measures must be submitted separately from the claimant's application commencing the main action and must show that the applicant has an interest in obtaining the measures sought, i.e., if granted, the interim measures order would change the applicant's legal position—by conferring an advantage that the applicant otherwise would not enjoy.

Fumus Boni Juris

The applicant must establish that its main action has a chance of succeeding. To that effect, it is sufficient that one of the pleas in support of the main action does not appear, from the outset, unfounded. Therefore, for example, where one of the pleas gives rise to complex legal issues which cannot be resolved definitively by a judge through interim measures, or where the resolution to the legal issue at stake is not immediately obvious.

Urgency

The applicant must show that the continuation in force of the EU Measure it is challenging in the main action will likely cause serious and irreparable damage to its interests pending the judgment in the main action. The serious and irreparable damage in question must be such as would result from a refusal to grant the interim measures in the event that the action in the main proceedings was subsequently successful.

The seriousness of the damage depends on the nature of the alleged damage and the specific circumstances of the applicant; *irreparable damage* generally means damage that cannot be remedied by a favorable judgment in the main action—for example, because success in the main action would not undo the harm suffered by the applicant having to comply with the EU Measure at issue until judgment in the main action—or that can be financially compensated, i.e., pure financial loss without certain aggravating factors is insufficient to be "irreparable".

Balance of Interests (Proportionality)

The applicant must show that its interest in obtaining the interim measure outweighs the interests involved in the continued operation of the EU Measure it is challenging in the main action. The judge's order to grant, or to refuse, interim relief is likely to produce effects for all the interested parties. In the balance of interests test, the judge weighs the risks to each party in each of the possible outcomes—i.e., granting the requested interim measures order, or refusing to grant it.

Interim Measures in the Context of Specific Proceedings

Merger control

The EU Merger Regulation (EUMR) empowers the Commission to take a number of different decisions: the Commission may approve transactions unconditionally, subject to conditions, or prohibit the transaction. The Commission may review transactions following their referral from a national competition authority or refer transactions to national competition authorities.

The Commission may also issue interim measures to restore and maintain competitive conditions pending its merger review, require the undoing of an already completed transaction and impose fines and periodic penalty payments for parties' failure to comply with the EUMR. All of these decisions can be challenged in the General Court–and, on appeal, the Court of Justice–and parties challenging such decisions may also request the suspension of their immediate effects or other appropriate interim measures.

For example:

- **Unconditional Approvals**. Where the Commission has approved a merger, certain third parties, such as competitors, affected by the transaction may request the suspension of the Commission's approval decision.
- **Conditional Approvals.** Where the Commission has approved a merger subject to remedies, certain third parties affected by the remedies may apply for the suspension of the relevant part of the Commission's decision, e.g., where a company needs to sell an asset to a suitable buyer, an interested third party may seek the suspension of the Commission's decision approving the purchaser of the assets in question.
- **Restorative Measures**. Where the Commission has blocked a transaction but the parties already implemented it in breach of the EUMR, the Commission may take measures to restore the situation prevailing prior to the implementation of the transaction, namely the divestment of all of the target's shares or assets by a specified deadline. Parties to the transaction may apply for the suspension of a Commission decision. To illustrate how important this can be in practice, the outcome of the much publicised acquisition by Illumina of Grail is likely to turn on whether Illumina succeeds in obtaining an interim measures order from the General Court or Court of Justice suspending the deadline by which the Commission requires it to dispose of the shares it owns in Grail.

Antitrust Investigations

In antitrust investigations, the Commission seeks to establish whether a company has breached EU competition law, e.g., by entering into anti-competitive agreements prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU), or by abusing its dominant position on a market in contravention of Article 102 TFEU.

During its investigation, the Commission requests information from companies under investigation, and may impose fines if the they supply incorrect, incomplete or misleading information, or simply do not supply the information by the applicable deadline. Where the Commission finds that a company breached EU competition rules, it may impose fines and/or obligations on the company to take, or refrain from, certain action.

Lastly, the Commission must publish its final decisions identifying the company and describing in great detail the anticompetitive practices involved–such decisions form the basis for private damages actions by customers and other parties who allege that they suffered loss as a result of the infringing conduct. In this context, parties may request interim measures in the following circumstances:

- **Duty to Bring an Infringement to an End**. When the Commission has found that companies have breached EU competition law and must cease certain commercial practices, they may apply for the suspension of these obligations.
- **Fines**. To avoid immediate recovery of the fines imposed by the Commission, the companies concerned may apply for the suspension of the relevant part of the Commission's decisions. In practice, the Commission agrees not to recover the fine while the action for annulment of the fine is pending before the General Court if the company provides a bank guarantee. However, the Commission is not bound to do so, and the company may not be able to obtain a bank guarantee, leaving interim measures as the only way to avoid having to pay the fine before the main action has come to an end.

- **Confidential Information Disclosed in Commission Decisions**. When the Commission is preparing to publish a decision finding that a company has breached EU competition law, the company may object to the disclosure of certain information it considers confidential, and the public disclosure of which would harm the company. To that end, the company may apply to the General Court for interim measures to prevent immediate publication of the sensitive information, e.g., business secrets. In the absence of interim relief, the information would be irreversibly disclosed to the general public, including potential follow-on damages claimants.
- **Requests for Information**. In the context of an antitrust investigation, the Commission sends numerous requests for information to the companies under investigation. If the recipient of the request considers the nature and the scope of such requests to be unnecessary and/or disproportionate, it may apply for the suspension of the obligation to comply with the request or for other appropriate measures.

State Aid

Where the Commission finds that a Member State has granted unlawful aid—in violation of article 107 TFEU—, the Member State in question must recover the aid, with interest, from the beneficiaries without delay. Equally, national courts may order immediate recovery of the aid. The suspension, by an interim measures order, of a Commission decision finding aid unlawful under EU state aid rules would prevent recovery proceedings from being initiated against the aid beneficiary.

Banking & Financial Services Regulation

In the EU, the European Central Bank (ECB) directly regulates and supervises certain large credit institutions. Credit institutions—such as banks—operating in the EU must comply with numerous complex EU regulations and ECB decisions. The ECB may impose fines on credit institutions for breach of EU banking and financial law of up to twice the profits gained or losses avoided because of the breach, or up to 10% of the credit institution's turnover in the last fiscal year.

Companies fined by the ECB also face reputational risk given that ECB decisions imposing fines are published on the ECB's website. A bank may apply for interim measures to suspend the obligation to pay the fine and the publication of the decision finding an infringement, until the General Court has decided the merits of the case.

The ECB may also withdraw the authorization of a bank to operate in the EU on account of serious breaches of EU Law, e.g., breach of anti-money laundering rules, breach of certain reporting obligations, or even due to the lack of "good repute" of qualifying shareholders of a credit institution. Given that the immediate effect of such a decision potentially may result in the liquidation of the bank concerned, the bank may find it appropriate to apply for the suspension of the ECB's withdrawal decision until the General Court has decided the merits of the case.

Pharmaceuticals

Companies planning to sell their pharmaceutical products in the EU may apply for a "single marketing-authorization," which is valid in all EU Member States. Holders of single-marketing authorizations need then to apply periodically for renewal of their authorizations. The Commission may unconditionally approve, approve subject to conditions, or reject such applications.

A Commission non-renewal decision prevents the company concerned from marketing its products in all EU Member States. A company in that situation may apply for an interim measures order to suspend the non-renewal decision until the General Court has decided the merits of the case.

Practicalities

Below are some points to be borne in mind by parties considering requesting interim measures from the EU Courts:

Probability, Not certainty

Applicants do not have to prove that they would suffer serious and irreparable damage with absolute certainty—they need only to show that their risk of suffering such damage is "foreseeable with a sufficient degree of probability."

All Conditions Must Be Satisfied

Fumus boni juris, urgency and balance of interests are cumulative conditions in that all must be satisfied. This means that an application must be dismissed by EU Courts if one of these conditions is not satisfied. The judge hearing the case is free to determine the manner and order in which the conditions are to be examined.

In practice, urgency is examined first, and most applications are dismissed for lack of urgency. By way of exception, if the challenged decision appears to be manifestly illegal—lacking even the appearance of legality—the judge hearing the interim measures application must suspend the operation of the decision immediately without having to examine whether the other conditions for the suspension are satisfied.

Economic and Financial Losses

As a general rule, purely financial loss is not considered to be "irreparable" given that the applicant may—at least in theory—subsequently obtain compensation if the main action succeeds. Exceptions to this include:

- Damage is such that, in the absence of interim measures, the applicant's financial viability would be at risk.
- Economic and financial losses which cannot wholly be compensated or quantified.
- Irremediable loss of substantial market share by the applicant.
- Imminent risk of the applicant's disappearance from the market.

Procedure

Generally, applications for interim measures are heard by a single judge. The President of the General Court, or the Vice-president of the Court of Justice, as the case may be, rules on interim measures.

In complex or particularly high profile cases, they may refer the case to a larger formation of the EU Courts. They enjoy broad discretion to conduct the proceedings, e.g., it is for the judge alone to decide whether a hearing or other interlocutory measures—so-called measures of organisation or inquiry—are appropriate. For example, an applicant does not have an automatic right to a hearing or to make additional submissions.

Once the application for interim measures has been lodged with the court, the opposing party has the opportunity to submit its response within a short deadline set by the judge—typically two weeks.

Timing

There is no statutory deadline by which an applicant has to submit an application for interim measures—applications can be lodged while the main action is pending. They should be lodged in parallel with the main action as an untimely interim measures application may be considered by the judge as indicating lack of urgency.

In terms of sequencing, as interim measures are urgent proceedings, they have priority within the workload of the EU Courts. Depending on the circumstances of the case, interim measures proceedings may be concluded within several weeks or a couple of months. The EU Courts may—ex parte—immediately suspend the operation of the contested decision until they have ruled on the application for interim measures.

Preserving the Status Quo

As an alternative to ex parte interim measures orders—by which the EU Courts immediately grant relief on a precautionary basis—the judge hearing the interim measures application may ask whether the institution that took the decision, such as the Commission, agrees to refrain from implementing the decision until order has been made in the interim measures proceeding.

If the institution agrees, the status quo is preserved until the judge rules on the application for interim measures. This mechanism is used because it is an efficient way of safeguarding the interests at stake while the judge rules on the application for interim measures and it can be faster than making an ex parte order.

It is particularly relevant in cases where it appears from the outset that the applicant may immediately suffer irreversible harm, e.g., imminent publication of a Commission decision finding that the applicant has breached EU competition law which allegedly contains sensitive confidential information—such as business secrets or information covered by professional secrecy—regarding the applicant.

Appeals v. Orders Dismissing Applications

Where the President of the General Court dismisses an application for interim measures, the applicant may appeal to the Vice-President of the Court of Justice on points of law—within two months and 10 days from service of the General Court's order on the applicant.

Pitfalls

Statistically, applications for interim measures have not been very successful. In 2021, only three out of 54 interim measures applications to the EU Courts were successful—based on the last available annual report of the EU Courts. However, many fail solely for procedural reasons or for being poorly substantiated. Therefore, in most cases, the substance of the applicant's arguments is not assessed by the EU Courts.

With this in mind, parties should avoid the following pitfalls:

Failure to Submit an Application in a Separate Document

While this is a simple rule, applicants often include their request for interim measures in the application that starts the main action. Failure to submit separately will automatically result in dismissal of the application.

Incomplete or Imprecise Applications

The body of the application for interim measures should contain all of the essential elements —of fact and law. These elements should be supported by documentary evidence where appropriate.

Annexes should be used only to supplement or support the essential arguments contained in the body of the application. References to annexes should be specific and precise. Applicants should not rely on general references to annexes, the possibility of a hearing to supplement a vague written application, or on the opportunity to present additional submissions to the EU Courts.

Applications for interim measures should be concise, and in any event must not exceed 25 pages. Thus, it may be challenging for applicants to successfully present their case within the page limitation.

Lack of Supporting Evidence

Each plea should be supported by evidence, as the applicant must prove the facts that form the basis of its claim. Vague, general assertions and unsubstantiated claims will be immediately set aside by the EU Courts, as they do not permit an assessment of the damage that is being claimed.

Where economic/financial loss is alleged, the application should clearly include: the most recent turnover information of the applicant—including turnover of the group to which it belongs; quantification of damage; and an explanation on how the damage affects the applicant—and its group as a whole—overall financial situation. In that regard, complete and up-to-date financial information should be provided with the application.

Damage Is Hypothetical or Concerns Third Parties

The relevant damage must not be purely hypothetical or based on uncertain events. Also, perhaps axiomatically, applications for interim measures must be based on the applicant's risk of suffering damage, not on a third-party's risk.

Absence of Causal Link

Thegranting of interim measures is justified only when the contested decision is the decisive cause of the alleged serious and irreparable damage. If the applicant fails to convince the judge of this—or to rebut the frequent arguments by the opposing party that the applicant's damage results from events or factors other than the contested decision—the judge will dismiss the application for lack of causation.

Challenging Factual Assessments in Appeals

Parties appealing to the Vice-President of the Court of Justice against an order of the President of the General Court dismissing an interim measures application often challenge the factual assessments made by the President of the General Court. Such arguments are inadmissible. The Vice-President of the Court of Justice only reviews points of law unless the factual assessments made by the President of the General Court clearly distorted the evidence adduced by the applicant.

Conclusion

Interim measures are increasingly relevant in the context of the growing EU regulatory landscape. They can provide effective and speedy judicial redress against unlawful EU Measures.

However, given the exceptional nature of these proceedings, and in particular the urgency and limited procedural rights that they involve, parties should carefully draft applications, making sure that they contain all the essential elements to support their claims. Applicants should assume that they only have "one shot" to present their case to the judge.

Juan Rodriguez

Juan Rodriguez is a partner at Sullivan & Cromwell since 2007, co-leads the European Competition Group and is co-head of the Sullivan & Cromwell's Antitrust Group. Juan Rodriguez has extensive experience in advising companies in all aspects of EU competition law, including merger control, cartels, and state aid, international trade and foreign direct investment. Juan Rodriguez represents companies in litigation in the EU courts, most recently Fiat in the Grand Chamber of the Court of Justice of the European Union in its successful appeal against the judgment of the General Court in the state aid "tax rulings" case. In addition to being qualified in England and Wales, he is a member of the Paris Bar. He speaks fluent French.

André Garcia do Fôjo

André Garcia do Fôjo is an associate in Sullivan & Cromwell's European Competition Group. André's practice covers all aspects of EU competition law, including merger control, cartels, and state aid, litigation in the EU courts, international trade, foreign subsidies and EU regulation. Prior to joining Sullivan & Cromwell, André was a *référendaire* (legal adviser) for several years to Judge Rosario Silva de Lapuerta, vice-president of the Court of Justice of the European Union. In that position, he worked on EU competition law cases, including cartel, abuse of dominance, merger control and state aid cases, and EU regulatory cases. André was also responsible for handling interim measures proceedings in cases before the Court of Justice of the European Union, including in the first environmental inter-State dispute in the Court's history. He is fluent in Portuguese, French and English.

