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Interim Measures in EEC Competition Cases

by
Virginia Morris[†]

INTRODUCTION

The power of the Commission of the European Economic Community (EEC) (hereinafter the Commission) to order interim measures in competition cases arising under articles 85 and 86 of the Treaty of Rome (hereinafter the Treaty)¹ was established in the 1980 *Camera Care* decision.² In that case, the European Court of Justice (hereinafter the Court) first determined that the Commission had the implied authority under the Treaty Regulations to grant such measures. The Commission's power to order interim measures in competition cases is not specifically granted by the Treaty. Furthermore, EEC Council Regulation No. 17 of 1962, the main implementing regulation for the Commission's enforcement of competition rules, is also silent on the question of provisional measures. This silence is particularly striking in light of the earlier European Coal and Steel Community Treaty (hereinafter the ECSC Treaty), which expressly grants authority to the Commission to adopt interim measures.³ Thus, *Camera Care* warrants close study as an important evolution in the enforcement of EEC competition rules.

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1. Treaty Establishing the European Economic Community, March 25, 1957, 294-297 U.N.T.S. 2 (French, German, Italian, Dutch); *reprinted in* 1979 Gr. Brit. T.S. No. 15 (Cmd. 7460) (official English version), arts. 85 and 86 [hereinafter cited as the Treaty of Rome]. Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." See article 85 for examples of restrictive agreements. Article 86 prohibits "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it . . . in so far as it may affect trade between Member States." See article 86 for examples of conduct which may constitute an unlawful abuse.

2. *Camera Care Ltd. v. Commission* (No. 792/79), [1980] 1 E.C.R. 119, [1980] 1 C.M.L.R. 334.

3. The European Coal & Steel Community Treaty, which contains similar provisions prohibiting anti-competitive conduct, includes a specific reference to interim measures. European Coal and Steel Community Treaty, April 18, 1951, 261 U.N.T.S. 140, arts. 65 (restrictive agreements), 66(1) (concentration), and 66(5) (interim measures) [hereinafter cited as the ECSC Treaty]. See also *National Carbonizing Co. Ltd. v. Commission* (No. 109/75R), [1975] 2 C.M.L.R. 457.

In *Camera Care*, the Court set down guidelines for the Commission providing conditions under which a grant of provisional measures is appropriate.⁴ The *Camera Care* decision thus expanded the Commission's authority, while at the same time imposing limits on that authority.

Since that landmark decision, the Commission has imposed interim measures in two competition cases. In *ECS/AKZO*,⁵ which involved an alleged abuse of a dominant market position under article 86, the Commission ordered AKZO to discontinue its predatory and discriminatory pricing policies. In *Ford-Werke AG*,⁶ which involved an alleged restrictive distribution agreement under article 85, the Commission ordered Ford to re-establish its supply of right-hand drive cars to German dealers. Although the Court subsequently annulled this interim decision,⁷ the case further defined the Commission's power to adopt interim measures in competition cases.

Given the Commission's recently-established authority in this area, it is reasonable to expect an increase in the number of interim measures cases in the future. It is thus important to understand the extent of the Commission's power, the conditions under which it may exercise this power, and the situations in which it is likely to grant interim measures. This Article will examine the Court's *Camera Care* guidelines and their application by the Commission in the *AKZO* and *Ford* cases, including a discussion of some of the unsettled issues in this area of EEC competition law.

I

THE COMMISSION'S POWER TO ORDER INTERIM MEASURES

A. *The Camera Care Decision*

The Commission's power to grant interim measures was first established in *Camera Care v. Commission*. *Camera Care*, a photographic equipment company based in Northern Ireland, filed a complaint⁸ with the Commission against Hasselblad (GB) Ltd. and Victor Hasselblad A/B of Sweden (hereinafter Hasselblad) for an alleged refusal to supply Hasselblad cameras and spare parts in violation of articles 85 and 86 of the Treaty.⁹ It requested that the Commission take interim protective measures against the refusal to supply, which allegedly jeopardized the company's camera sale and repair

4. See text accompanying notes 18–19, *infra*.

5. *ECS/AKZO* (interim measures), 26 O.J. EUR. COMM. (No. 252) 13 (1983), [1983] 3 C.M.L.R. 694.

6. *Ford-Werke AG* (interim measures), 25 O.J. EUR. COMM. (No. 256) 20 (1982), [1982] 3 C.M.L.R. 267.

7. *Ford of Europe Inc. and Ford Werke AG v. Commission* (Nos. 228/82 & 229/82), [1984] 1 C.M.L.R. 649.

8. Any natural or legal person who claims a legitimate interest may file a complaint with the Commission concerning alleged infringements of the competition rules. See Reg. No. 17/62 of 1962, 5 J.O. COMM. EUR. (No. 210/62) 57 [hereinafter cited as Reg. No. 17], art. 3, [1959–1962] O.J. EUR. COMM. 57 (Special Edition 1959–1962).

9. *Camera Care Ltd. v. Commission* (No. 792/79), [1980] 1 E.C.R. 119, 127.

business.¹⁰ The Commission sent Camera Care a letter informing the company that the Commission would investigate the complaint against Hasselblad. The letter also informed Camera Care that the Commission could not adopt the requested interim measures because there was no legal basis for such action in Community competition law.¹¹

Following receipt of this letter, Camera Care brought an action in the Court against the Commission, requesting that the Court either: (1) annul the Commission's letter as violative of article 173 of the Treaty, or (2) find that the Commission's refusal to adopt interim measures violated article 175 of the Treaty.¹² Camera Care further requested that the Court grant interim relief pursuant to its powers under article 186 of the Treaty.¹³

The main issue addressed in the Court's decision was whether the Commission had the authority to adopt interim measures even though such authority was not expressly conferred by either the Treaty or its implementing regulations. The Court held that article 3 of Regulation 17 gave the Commission the implied power to grant interim measures,¹⁴ based on the conclusion that the broad powers of the Commission must necessarily be accompanied by authority to adopt measures assuring the ultimate effectiveness of its acts.¹⁵ The Court stated that the Commission must be able to make its decisions "in the most efficacious manner best suited to the circumstances of each given situation," including the possibility that the decision may comprise "successive stages . . . preceded by any preliminary measures which may appear necessary at any given moment."¹⁶ The Court therefore refused to order interim measures under its own powers and referred the case back to the Commission.¹⁷

However, the Court limited the Commission's authority by establishing the following guidelines for determining the appropriateness of interim measures:¹⁸

(1) the provisional measures must be *indispensable* to ensure the effectiveness of a possible final decision;

10. *Id.*

11. *Id.* at 128.

12. Article 173 allows the Court to review the lawfulness of Commission decisions, while article 175 allows review of an alleged failure to act on the part of the Commission. Because of doubt as to whether or not a Commission letter constitutes a decision, Camera Care based its action upon both articles. The case was decided without resolving this issue. *See* Treaty of Rome, *supra* note 1, arts. 173 & 175.

13. *Id.* at art. 186 ("The Court of Justice may, in any cases referred to it, make any necessary interim order").

14. Article 3(1) provides that the Commission, upon a finding of infringement of the Treaty, may require the parties "to bring such infringement to an end." Paragraph 3 further provides that the Commission may, prior to a formal decision, make "recommendations" for termination of the infringement. *See* Reg. No. 17, *supra* note 8, art. 3.

15. *Camera Care Ltd. v. Commission* (No. 792/79), [1980] 1 E.C.R. 119, 131.

16. *Id.*

17. *Id.* at 132.

18. *Id.* at 131.

(2) there must be an *urgent* need to prevent serious and irreparable damage or to avoid a situation which is intolerable for the public interest;

(3) the Commission must consider the *legitimate interests* of all the undertakings concerned before deciding to adopt interim measures;

(4) the interim measures must be *temporary and conservatory* in nature and restricted to what is required by the circumstances of each case;

(5) the Commission must comply with the *essential procedural safeguards* of Regulation 17, in particular, article 19 which concerns the parties' right to a hearing; and

(6) the decision must be in a *form* which may be reviewed by the Court at the request of an injured party.

In addition, although not specifically laid down as a guideline in *Camera Care*, the Commission in practice requires sufficient evidence of a *prima facie* case before imposing interim measures.¹⁹

The conditions set forth by the Court in *Camera Care* establish a framework for future decisions involving interim measures in EEC competition cases. It is thus useful to look at the application of these guidelines in subsequent cases in order to understand the present status of the law. The remainder of this Article will trace the application of the *Camera Care* guidelines through the two cases in which the Commission has imposed provisional measures.

B. *The Ford and AKZO Cases*

The *Ford* case involved both a Main Dealer Agreement, which regulated Ford's distribution of cars in Germany, and a circular, whereby Ford informed its German dealers that it would no longer supply them with right-hand drive cars.²⁰ The Main Dealer Agreement was allegedly inconsistent with article 85(1) of the Treaty because it prohibited selected Ford dealers from dealing in competing makes, selling vehicles to dealers outside the distribution system, and undertaking certain marketing activities outside the marketing area assigned to the dealers.²¹ For this reason, Ford had applied to the Commission under article 85(3) for an exemption from the general prohibition of article 85(1).²²

19. See *infra* text accompanying notes 83-100.

20. Ford-Werke AG (interim measures), 25 O.J. EUR. COMM. (No. 256) 20, 20-22 (1982).

21. *Id.* at 25. See also Treaty of Rome, *supra* note 1, at art. 85(1).

22. Under article 85(3) of the Treaty of Rome, restrictive agreements which fall within the prohibition of article 85(1) may receive an exemption due to the presence of four mitigating conditions:

- (1) the improvement of production or distribution of goods, or the promotion of technical or economic progress;
- (2) consumers receive a fair share of the resulting benefits;
- (3) no unnecessary restrictions; and
- (4) no possibility of eliminating a substantial part of competition in the product concerned.

The Commission indicated that the distribution system would probably have received an exemption had it not been for the circular.²³ It found that the purpose of the circular, which directly conflicted with any possible article 85(3) exemption, was to maintain higher prices in the United Kingdom and to protect United Kingdom dealers from lower-priced parallel imports.²⁴ The Commission therefore adopted a provisional decision which ordered Ford Germany to withdraw the circular, inform German dealers that right-hand drive cars still formed part of their delivery range, and refrain from taking any action which would have an effect similar to that of the circular.²⁵ In a subsequent proceeding, Ford successfully brought an action in the Court challenging the Commission's adoption of interim measures.²⁶

The *ECS/AKZO* case involved an alleged abuse of a dominant market position. Engineering and Chemical Supplies, Ltd. (hereinafter ECS), a small chemical producer, complained to the Commission that the companies of the AKZO group were acting in violation of article 86 of the Treaty, which prohibits abuses of a dominant market position.²⁷ The AKZO group was the leading producer of organic peroxides in the EEC market, with approximately a fifty percent market share. ECS's market share was estimated at about one percent.²⁸ ECS alleged that following its expansion into the plastics sector, senior executives of AKZO threatened to force it from the market by selling below cost unless ECS withdrew from the plastics sector. AKZO allegedly carried out its threat when ECS refused to withdraw.²⁹

ECS claimed that AKZO's price cutting caused ECS to lose a substantial part of its business and forced ECS to match AKZO's prices, creating a real risk that ECS would have to cease trading altogether.³⁰ The Commission granted interim measures, ordering AKZO not to sell below certain prices until the final decision was reached.³¹

C. *Application of the Camera Care Guidelines*

Indispensability. Under the *Camera Care* guidelines, the Commission may adopt interim measures in competition cases if they appear necessary to ensure an effective final decision.³² In particular, the Commission has the power to prevent companies from taking actions that would render ineffective

23. Ford-Werke AG (interim measures), 25 O.J. EUR. COMM. (No. 256) 20, 25-26 (1982).

24. *Id.* at 26.

25. *Id.* at 28.

26. Ford of Europe Inc. and Ford-Werke AG v. Commission (Nos. 228/82 & 229/82), [1984] 1 C.M.L.R. 649, 674.

27. ECS/AKZO (interim measures), 26 O.J. EUR. COMM. (No. 252) 13, 14 (1983). See also Treaty of Rome, *supra* note 1, at art. 86.

28. *Id.* at 14.

29. *Id.*

30. *Id.* at 17.

31. *Id.* at 20.

32. Camera Care Ltd. v. Commission (No. 792/79), [1980] 1 E.C.R. 119, 131.

or illusory a final decision to terminate a competition infringement.³³

In the *Ford* appeal, the Court found that “indispensable” protective measures must not go beyond what the Commission could order in a final decision:

[t]he protective measures which the Commission may adopt as interim measures are those which appear indispensable in order to prevent the exercise of the power to make decisions given by article 3 from becoming ineffectual or even illusory because of the action of certain undertakings. It follows that the interim measures must come within the framework of the final decision which may be adopted by virtue of Article 3.³⁴

The Court annulled the Commission’s decision because the interim measure exceeded what the Commission could have ordered in a final decision.³⁵ A decision by the Commission in the main proceeding could have: (1) refused to grant an exemption for the dealer agreement, (2) made an exemption subject to certain conditions, or (3) required Ford Germany to terminate the operation of the dealer agreement.³⁶ The Commission had no authority, however, to order Ford Germany to supply right-hand drive cars to its German dealers even if the distribution system were found to have violated article 85 or had failed to receive an exemption.³⁷ In short, *Ford* clearly demonstrates that the Commission’s power to adopt interim measures is limited by the scope of its authority in adopting a final decision.

The question of indispensability arose in a different context in the *ECS/AKZO* case. The day before the Commission hearing, AKZO raised certain predatory prices, which it admitted were below cost, and argued that protective measures were no longer necessary.³⁸ However, the company made no attempt to alter its discriminatory pricing policy which affected the customers of ECS. In rejecting AKZO’s argument against protective measures, the Commission pointed out that AKZO had not offered any assurances as to its future conduct.³⁹ Thus, under the *ECS/AKZO* standard, interim measures may still be considered necessary if voluntary compliance by the alleged anticompetitive party fails to encompass all of the alleged infringements or to assure future compliance.

Despite the Commission’s decision in *ECS/AKZO*, it may be possible for a company to avoid the additional costs associated with interim proceedings, and the perhaps more extensive obligations contained in a provisional decision, by agreeing to suspend or amend the conduct in question, without

33. *Id.*

34. *Ford of Europe Inc. and Ford-Werke AG v. Commission* (No. 228/82 & 229/82), [1984] 1 C.M.L.R. 649, 673.

35. *Id.* at 674.

36. *Id.* at 663 (opinion of Advocate General Slynn).

37. *Id.* at 674.

38. 26 O.J. EUR. COMM. 13, 17 (1983).

39. *Id.* at 19.

prejudice to the defense in the main proceeding.⁴⁰ This voluntary undertaking could be subject to review or amendment on the basis of joint consultation in the event of a significant change in circumstances.⁴¹

Urgency. Interim measures may be adopted by the Commission only in cases of proven urgency, in order to avoid: (1) serious and irreparable damage to the party requesting protective measures, or (2) a situation which is intolerable for the public interest.⁴²

In *Ford* the requisite urgency was found in the threat to the public interest.⁴³ The Commission noted that the purchase of a car often represents a very important purchase which cannot be delayed. Furthermore, the Commission stated that "even a brief interruption in supplies of right-hand drive vehicles could have a long-term effect on parallel imports" given the delivery period and the present state of the market for these vehicles.⁴⁴ Thus, the Commission concluded that interim measures were urgently needed.⁴⁵

In contrast, the necessary urgency in *ECS/AKZO* was based on the possibility of serious and irreparable damage to the party requesting protective measures. The Commission examined the existing financial state, commercial structure, and customer base of ECS and concluded that there was a "grave likelihood of its [ECS] being compelled to cease trading" as a result of AKZO's pricing policies.⁴⁶ The elimination of ECS as a competitor would have given AKZO a near monopoly in the supply of certain products in a substantial part of the EEC.⁴⁷ A decision to terminate infringements would be of little use to ECS once it was compelled to cease trading as a result of the anticompetitive practices of AKZO. In addition, the Commission stated that the case involved a particular element of urgency because AKZO continued its predatory pricing policies even after the Commission had initiated its investigation.⁴⁸

Although not raised in these cases, the "irreparable damage" component of the urgency requirement raises important issues in EEC competition law. Some doubt exists regarding the possibility of a company receiving

40. The provisional decision in the *ECS/AKZO* case required AKZO to comply with a detailed minimum price list with regard to the sale of certain products. The company was also required to send the Commission a copy of "every offer, order, invoice and credit note and other equivalent document" on a monthly basis. Failure to comply with the terms of the decision would result in a penalty of 1,000 ECU per day. 26 O.J. EUR. COMM. 13, 20-21 (1983).

41. A company's voluntary undertaking to amend its conduct pending a final decision should also be subject to review at the initiative of the parties or the Commission. See *Introduction to Hearing on Interim Measures*, [1980] C.M.L.R. 369, 370.

42. *Camera Care Ltd. v. Commission* (No. 792/79), [1980] 1 E.C.R. 119, 131.

43. *Ford-Werke AG*, 25 O.J. EUR. COMM. (No. 256) 20, 27 (1982).

44. *Id.*

45. *Id.*

46. 26 O.J. EUR. COMM. (No. 252) 13, 19 (1983).

47. *Id.*

48. *Id.*

compensation for damages caused by violations of EEC competition rules.⁴⁹ Community law contains no basis for damage awards by either the Commission or the Court in these cases. The Commission, however, has for some time taken a favorable position concerning private damage actions in national courts for infringements of articles 85 and 86.⁵⁰ Nevertheless, until the availability of damages is established, a company seeking interim measures may argue that its damage is irreparable due to the uncertainty of receipt of compensation in the national courts.

Furthermore, in cases where the unlawful conduct or the resulting damage occurs in several Member States, there may be some question as to the competence of a national court to award comprehensive damages. Substantially greater legal costs and time would be required if the injured party were forced to file an action for damages in each of several Member States. Thus, a company seeking interim protection may argue that interim measures are urgently needed to prevent serious and irreparable harm based on the uncertainty of receiving full compensation for damages arising before entry of the final decision.

Legitimate Interests. In deciding whether to impose interim measures, the Commission must consider the legitimate interests of the undertakings concerned.⁵¹ The balance of the conflicting interests of the parties should favor immediate action in order to justify a provisional decision granting protective measures.⁵²

The interests which must be considered prior to adoption of interim measures will depend on the facts and circumstances of each case. In *Ford*, the Commission found that the interest of consumers in obtaining lower-priced cars and the interest of German dealers in selling right-hand drive cars in the present market conditions outweighed the consequences of the provisional decision on Ford Germany and United Kingdom dealers.⁵³ In *ECS/AKZO*, the likelihood that ECS would be forced to cease trading due to AKZO's pricing policies was found to justify the burden imposed on AKZO by the interim decision requiring changes in AKZO's pricing policies.⁵⁴

Although the interests which may be affected by a provisional decision will vary greatly from one case to the next, the fact that the continued existence of a competitor is seriously threatened by anticompetitive conduct should nearly always justify the adoption of protective measures. In cases in which the Commission is acting on its own initiative to prevent a situation

49. Korah, *Commission Has Power to Grant Interim Relief*, 5 E.L. REV. 135, 138 (1980).

50. See 16 O.J. EUR. COMM. (No. C 67) 54 (1973) (the Commission's Reply to question 519/72 from Mr. Vredeling confirming the possibility of private damage actions in EEC competition cases.) See also Temple Lang, *Compliance with the Common Market's Antitrust Law*, 14 INT'L LAW. 485, 490 (1980).

51. *Camera Care Ltd. v. Commission* (No. 792/79), 1980 E.C.R. 119, 131.

52. *Id.* at 130.

53. 25 O.J. EUR. COMM. (No. 256) 20, 27 (1982).

54. 26 O.J. EUR. COMM. (No. 252) 13, 19-20 (1983).

which is intolerable for the public interest, the public interest should clearly outweigh the burdens imposed on the anticompetitive party. The public interest in these cases would include the legitimate interests of consumers and competitors in the present market situation, the interests of the Member States, and the Community interests in promoting competition and a common market. For instance, restrictions on imports or exports within the European Community, a clear violation of the competition rules, contravene the fundamental goals of a common market and would justify the adoption of interim measures.

Despite the procedural safeguards that an appeal provides, interim measures would be less justified in cases involving uncertain areas of the EEC's competition rules, due to the limited nature of interim measures proceedings. The need to reach a decision concerning interim measures in a relatively short period of time would generally be inconsistent with time-consuming arguments about uncertain or developing areas of EEC competition law. Furthermore, a party should not be subject to interim measures which may involve substantial burdens and periodic penalties unless there is sufficiently clear evidence of an infringement of the competition rules.⁵⁵

Temporary and Conservatory Measures. The protective measures imposed by the Commission against a probable infringement must be temporary and conservatory in nature, limited to what is required by the circumstances of the case.⁵⁶ The requirement that interim measures be temporary is reasonable because such measures are intended only to ensure the effectiveness of a final decision, not to determine conclusively the merits of the case. Similarly, interim measures should be conservatory because their purpose is to preserve the *status quo ante* pending a final decision. These limiting parameters avoid the adoption of unnecessarily broad measures which may unduly restrict the business activities of the party against whom they are adopted.

In *Ford*, the Commission restated the proposition that "the measures to be adopted must be of a temporary and conservatory nature and restricted to what is required in the given situation."⁵⁷ The interim measure in that case was temporary in that it applied only until a final decision was reached, and it was conservatory in that it simply re-established the status quo prior to the date on which the circular was distributed.⁵⁸

In *ECS/AKZO*, the Commission again recognized that "the measures to be adopted must be of a temporary nature, designed to restore the status quo . . . prior to the date when threats were first made to ECS."⁵⁹ It therefore ordered *AKZO* to comply with a list of minimum prices for certain products.

55. See *infra* notes 83-100 and accompanying text for a discussion of the requirement of evidence of a prima facie case.

56. *Camera Care Ltd. v. Commission* (No. 792/79), [1980] 1 E.C.R. 119, 131.

57. 25 O.J. EUR. COMM. (No. 256) 20, 28 (1982).

58. *Id.* But see text accompanying note 35.

59. 26 O.J. EUR. COMM. (No. 252) 13, 19 (1983).

It reserved the possibility, however, of altering the minimum prices or any other terms of the decision.⁶⁰ This order thus indicates the Commission's willingness to alter provisional measures if changes are required to preserve the status quo due to a change in circumstances.⁶¹

Essential Procedural Safeguards. The Commission's power to impose interim measures must be exercised in conformity with the essential procedural safeguards of Regulation 17 and, in particular, with those of article 19 which guarantee the parties' right to be heard.⁶² The parties must be informed of the alleged infringements in a statement of objections containing the legal and factual basis for the complaint.⁶³ In addition, the parties have to be given an opportunity to respond to the allegations in writing and at a hearing before the Commission.⁶⁴ The parties are normally given at least two weeks in which to submit their views in writing. Finally, the parties are entitled to a hearing if the Commission intends to impose a fine or a periodic penalty.⁶⁵

After the Court's decision to send the dispute in *Camera Care* back to the Commission to decide the appropriateness of interim measures, the Commission issued a statement to Camera Care and Hasselblad concerning the procedures it would apply to hearings on interim measures.⁶⁶ The parties were invited to make written submissions.⁶⁷ The Commission noted, however, that the oral proceedings would be of particular importance because of the limited time provided for written statements.⁶⁸ The parties were also invited to "produce as far as possible an agreed statement of facts" and any evidence by means of signed witness statements.⁶⁹

EEC regulations require some further procedural safeguards. For instance, Commission decisions must be limited to the objections on which the

60. *Id.* at 20.

61. See *Introduction to Hearing on Interim Measures*, *supra* note 41, at 369-70. "In deciding upon the duration of any interim measures, the Commission may set a particular time limit by which the matter must be reviewed again, or may order interim measures to remain in force until final decision of the Commission. In either event, the Commission would always consider an application, from either of the parties involved, for review of the interim measures if circumstances have changed. The Commission would also be free to do so on its own initiative."

62. *Camera Care Ltd. v. Commission* (No. 792/79), [1980] 1 E.C.R. 119, 131.

63. See Reg. No. 99/63 of 1963, 7 J.O. COMM. EUR. (No. 2268) 63, art. 2, (1963-1964) O.J. EUR. COMM. 47 (Special Edition 1963) [hereinafter cited as Reg. No. 99/63]. See also C.S. KERSE, *EEC ANTITRUST PROCEDURE* 29, 92 (1981).

64. Reg. No. 17, *supra* note 8, art. 19; Reg. No. 99/63, *supra* note 63, arts. 3, 7, 9 & 11. See also *Introduction to Hearing on Interim Measures*, *supra* note 41, at 369-70.

65. Reg. No. 99/63, *supra* note 63, art. 7. In the final decision the Commission may impose a fine for the unlawful conduct and order the termination of the infringement. The decision may also provide for periodic penalties in the event of noncompliance. As discussed in the text accompanying note 73, *infra*, the Commission's power to provide for periodic penalties in interim decisions is not clear.

66. See *Introduction to Hearing on Interim Measures*, *supra* note 41, at 369-70.

67. *Id.*

68. *Id.*

69. *Id.* at 370.

parties have had an opportunity to comment.⁷⁰ Also, in deciding the question of interim measures, the Commission is required to consider the legitimate interests of the undertakings concerned. Therefore, the parties should be informed not only of the Commission's intention to consider interim measures, but should be given an opportunity to put forward statements concerning their interests which may be affected by the provisional measures.⁷¹

The Commission also has indicated that it may order the party requesting the protective measures to provide a suitable bond or guarantee to indemnify the party who must comply with the interim measures against any loss which may result if the Commission subsequently decides that there has been no infringement of competition rules.⁷² Although such guarantees were not required in *Ford* and *ECS/AKZO*, the Commission has required guarantees in interim decisions under the ECSC Treaty.⁷³ While the *Camera Care* decision did not expressly recognize the Commission's power to require guarantees in granting provisional measures, this authority would seem to be an inherent, essential element of the power to grant interim measures while protecting the interests of all the parties.

Finally, to ensure compliance with the provisional decision, the Commission has provided for periodic penalties for each day of noncompliance.⁷⁴ Though the decision of the Court in *Camera Care* did not specifically recognize the power of the Commission to order periodic penalties in provisional decisions, it seems reasonable to conclude that such measures are essential for two reasons: (1) to guarantee compliance with the provisional order, and (2) to guarantee the effectiveness of the Commission's right to impose both provisional and final decisions in competition cases pursuant to article 3 of Regulation 17.⁷⁵ The Commission did impose periodic penalties of 1,000 ECU per day of non-compliance in both *Ford* and *ECS/AKZO*.⁷⁶

Form. The interim measures of the Commission must be adopted in the form of a decision which may be reviewed by the Court at the request of "any

70. Reg. No. 99/63, *supra* note 63, art. 4. *Camera Care* also requires compliance with essential procedural safeguards in interim proceedings. *Camera Care Ltd. v. Commission* (No. 762/79) [1980] 1 E.C.R. 119, 131.

71. This condition is inherent in the Court's requirement that the Commission consider all of the legitimate interests of the undertakings concerned before the adoption of any interim measures. For example, in the statement of the Commission to the parties in *Camera Case*, the Commission indicated that Hasselblad had been notified of the relief requested by *Camera Case*. See *Introduction to Hearing on Interim Measures, supra* note 41, at 369-70.

72. *Introduction to Hearing on Interim Measures, supra* note 41, at 369-70.

73. See, e.g., *National Coal Board, National Smokeless Fuels, Ltd. and the National Carbonizing Ltd.*, 1976 O.J. EUR. COMM. (No. L 35) 6.

74. See, e.g., *Ford-Werke AG* (interim measures) 25 O.J. EUR. COMM. (No. L 256) 20, 28 (1982); *ECS/AKZO*, 26 O.J. EUR. COMM. (No. L 252) 13, 21 (1983).

75. See Reg. No. 17, *supra* note 8. See also Temple Lang, *The Powers of the Commission to Order Interim Measures in Competition Cases*, 18 C.M.L.R. 49, 59-61 (1981).

76. *Ford-Werke AG* (interim measures), 25 O.J. EUR. COMM. (No. 256) 20, 28 (1982); *ECS/AKZO*, 26 O.J. EUR. COMM. (No. 252) 13, 21 (1983).

party who considers he has been injured.”⁷⁷ The provisional decision must include the factual and legal considerations which serve as the basis for the decision in order to enable the Court to review the legality of the decision.⁷⁸ Any natural or legal person for whom the decision is of a direct and individual concern may request the Court to review the Commission’s decision under article 173 of the Treaty. Thus, the interim measures of the Commission may be challenged by the persons to whom the decision is addressed or by other persons for whom the decision is of a direct and individual concern.⁷⁹

The Court has broad powers to review decisions of the Commission under article 173 of the Treaty “on grounds of lack of competence, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.”⁸⁰ The Commission’s interim decisions may be challenged: (1) if the Commission exceeds its authority as limited by the Court’s decision in *Camera Care*, (2) if the interim proceedings fail to comply with an essential procedural safeguard, or (3) if the decision is inconsistent with the substantive competition laws of the European Community.⁸¹ In addition to reviewing the legality of the Commission’s interim decision, the Court has unlimited jurisdiction to review any penalties imposed for noncompliance with the provisional decision. The Court may cancel, reduce, or increase the amount of the penalty.⁸²

Prima Facie Case. Although not mentioned specifically in the *Camera Care* case, European Community law generally requires that there be sufficient evidence of a prima facie case before interim measures may be granted. This is true for the Commission in competition cases arising under the ECSC Treaty,⁸³ as well as for the Court pursuant to article 186 of the Treaty.⁸⁴

During the *Camera Care* proceedings, the Commission stated that it would follow the same principles which guide the Court in deciding interim measures cases under article 186.⁸⁵ Such an approach would include the need for a prima facie case in order for the Commission to impose interim measures.⁸⁶ Referring to Hasselblad’s alleged refusal to supply in violation of

77. *Camera Care Ltd. v. Commission* (No. L 792/79), [1980] 1 E.C.R. 119, 131.

78. The Commission is required to state the reasons for its decisions. See Treaty of Rome, *supra* note 1, art. 190.

79. Kerse indicates that a person challenging a decision of the Commission before the Court should be required to show the possibility of a “direct loss or injury” as a consequence of the decision. C.S. KERSE, *EEC ANTITRUST PROCEDURE* 29, 223 (1981).

80. See Treaty of Rome, *supra* note 1, art. 173.

81. *Id.*

82. *Id.* at art. 192; Reg. No. 17, *supra* note 8, art. 17.

83. See ECSC Treaty, *supra* note 3.

84. Treaty of Rome, *supra* note 1, art. 186; *Camera Care Ltd. v. Commission* (No. 792/79) [1980] 1 E.C.R. 119, 125.

85. [1980] 1 E.C.R. 119, 125. See *Introduction to Hearing on Interim Measures*, *supra* note 41, at 369–70.

86. [1980] 1 E.C.R. 119, 125.

article 86, the Commission suggested:

For a prima facie case on the substance, as regards the refusal to supply, the applicant needs to show, prima facie, that it has defined the market correctly or substantially correctly, that Hasselblad (GB) is dominant on the market, that the refusal to supply is unjustified and that it affects trade between Member States.⁸⁷

Since the Commission itself supported the prima facie requirement, it is reasonable to conclude that it will apply this requirement in interim measures cases even though *Camera Care* did not make it a specific condition.⁸⁸ Indeed, in both *Ford* and *AKZO*, the Commission recognized and applied the prima facie requirement. Furthermore, as recognized by Advocate General Slynn⁸⁹ in his advisory opinion on appealing the *Ford* case, the necessity of a prima facie case is inherent in the conditions for interim measures laid down by the Court in *Camera Care*.

Although not said in terms, it is inherent in these conditions and of the essence of the power to grant interim relief, that at least a prima facie case is shown to justify the exercise of the power. There must be a sufficient sub-stratum of facts, and a sufficiently clear case in law to justify the order.⁹⁰

In *Ford*, the Commission stated that the "distinct likelihood" of an infringement is sufficient for a provisional decision, although it is not necessary to establish conclusively an infringement at this stage of the proceeding.⁹¹ After examining the effect of the Ford circular in conjunction with the Main Dealer Agreement, the Commission found that an infringement of EEC competition law was "highly probable".⁹² In particular, the distribution system had a direct potential effect on trade between Member States because it prevented cross-border competition in right-hand drive vehicles.⁹³

In *ECS/AKZO*, the Commission required "sufficiently clear evidence" of an infringement before it would adopt protective measures against the alleged predatory and discriminatory pricing policies of AKZO.⁹⁴ The Commission stated that there must be sufficient evidence for a preliminary finding of market dominance in a substantial part of the Common Market, an unjustified abuse of the dominant position, and a direct or potential effect upon the pattern of trade between Member States in order to grant the protective measures.⁹⁵

87. *Id.* at 126.

88. *See Introduction to Hearing on Interim Measures, supra* note 41, at 369-70. "It must appear that there is a reasonably strong prima facie case that there has been a violation of the rules of competition set out in the Treaty, if interim measures are to be ordered."

89. There are five Advocates General who assist the members of the European Court of Justice in Luxembourg. The Advocate General's Opinion contains an analysis of the legal and factual issues presented in the case to assist the Court in reaching its decision. *See C.S. KERSE, EEC ANTITRUST PROCEDURE* 29 (1981).

90. [1984] 1 C.M.L.R. 649, 661 (opinion of Advocate General Slynn).

91. 25 O.J. EUR. COMM. (No. 256) 20, 24 (1982).

92. *Id.* at 28.

93. *Id.* at 26-27.

94. 26 O.J. EUR. COMM. (No. 252) 13, 17 (1983).

95. *Id.* at 18-19.

In reaching a preliminary finding of market dominance, the Commission considered the financial resources of the AKZO group, the respective sizes of the companies concerned, and the nature and effectiveness of the abusive course of conduct.⁹⁶ The Commission indicated that it was not necessary to conclusively define the relevant product or geographic market for the purpose of a preliminary finding of dominance.⁹⁷ The AKZO group's position in each of the potentially relevant product markets in at least a substantial part of the Common Market (i.e., the United Kingdom and Ireland) was sufficient to justify a preliminary finding of a dominant market position.⁹⁸ For instance, as to the peroxide market the Commission held that, "AKZO's high market share and the low shares of the other producers would of itself create a sufficient presumption of a dominant position for the purpose of a decision ordering interim measures."⁹⁹ As to the flour additive market, the Commission found sufficient evidence of a dominant position on the basis of AKZO's economic power, which enabled AKZO to influence market prices and to eliminate a smaller competitor although AKZO did not have a high market share in quantitative terms.¹⁰⁰

Thus, after *Ford* and *AKZO*, it is clear that the adoption of interim measures in competition cases requires sufficient evidence of a prima facie case or the distinct likelihood of an infringement of the competition rules, even though such a requirement does not explicitly appear in the guidelines set forth in *Camera Care*.

III

UNSETTLED ISSUES

A. Third Party Rights

The position of third parties in interim proceedings remains uncertain. In general, persons with a sufficient interest in the proceedings must be given the opportunity to submit their views in writing within a specified time period of not less than two weeks.¹⁰¹ With regard to interim proceedings, this requirement would assure the Commission's consideration of all substantial interests which may be affected by the interim measures decision. The intervention of third parties, however, may prolong the interim proceedings and thereby threaten the effectiveness of the proposed protective measures.

For example, in the *Ford* case, several dealers in the United Kingdom sent telegrams to the Commission requesting an opportunity to express their

96. *Id.* at 18.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Reg. No. 99/63, *supra* note 63, arts. 5 & 11. For a discussion of the rights of third parties in EEC competition cases, see Temple Lang, *The Position of Third Parties in EEC Competition Cases*, 3 E.L. REV. 177 (1978).

views.¹⁰² Despite the dealers' initiative, the Commission did not respond to the requests, but indicated that it had considered the views expressed in the telegrams before adopting the interim decision.¹⁰³ When the case was reviewed by the Court, the Commission argued that, "even if the dealers are entitled to make written submissions in the main procedure, they had no right to insist on causing delay by making written submissions in the interim procedure."¹⁰⁴ In his advisory opinion to the Court's decision, Advocate General Slynn concluded that the Ford dealers were interested third parties within the meaning of article 19 of Regulation 17 and were thus entitled to the minimum two-week period for submitting written comments.¹⁰⁵ He believed that the Commission's failure to hear the interested third parties was in itself a procedural defect sufficient to annul the Commission's decision.¹⁰⁶ Nevertheless, the Court did not discuss the right of third parties in its decision, leaving third-party rights as one of the important unresolved questions concerning the Commission's power to adopt interim decisions.

B. *Role of the Advisory Committee*

The Commission is required to consult the Advisory Committee on Restrictive Practices and Monopolies, whose members represent the competent authorities of the Member States, before adopting a decision in the main proceeding.¹⁰⁷ In addition to attending the hearing in the main proceeding, the Advisory Committee submits a written opinion on the Commission's draft decision after a joint consultation on two weeks notice.¹⁰⁸ It is not clear if the Advisory Committee must be consulted in connection with a provisional decision concerning interim measures; like the procedures protecting third party rights, this requirement would result in a considerable delay which would seem inconsistent with the nature of interim measures proceedings.

In fact, the Commission did consult the Advisory Committee in both *Ford* and *ECS/AKZO*.¹⁰⁹ In the *Ford* case, the hearing before the Commission, which the members of the Advisory Committee were invited to attend, and the consultation with the Advisory Committee, occurred on the same day.¹¹⁰ However, on appeal to the Court, Ford argued that the Advisory Committee had not been provided a reasonable opportunity to give an opinion before the Commission adopted its decision.¹¹¹ The Commission's defense was that it was not required to consult the Advisory Committee with

102. [1984] 1 C.M.L.R. 649, 667 (opinion of Advocate General Slynn).

103. *Id.* at 667-68.

104. *Id.* at 668.

105. *Id.*

106. *Id.*

107. Reg. No. 17, *supra* note 8, art. 10.

108. *Id.*

109. *ECS/AKZO* (interim measures), 26 O.J. EUR. COMM. (No. 252) 13, 13 (1983). *Ford-Werke AG* (interim measures), 25 O.J. EUR. COMM. (No. 256) 20, 20 (1982).

110. [1984] 1 C.M.L.R. 649, 666 (opinion of Advocate General Slynn).

111. *Id.* at 665.

regard to interim decisions.¹¹² Advocate General Slynn, however, argued in his advisory opinion that the Advisory Committee must be consulted before the Commission adopts a provisional decision.¹¹³ He indicated that in some urgent cases a very brief consultation may be justified, but found that the Commission's procedure in *Ford* did not present a reasonable opportunity for consultation under the circumstances of the case.¹¹⁴ This question was not an issue in *ECS/AKZO*.

The EEC Regulations, which require close cooperation between the Commission and the Member States in competition cases, support a requirement of the presence of the Advisory Committee at interim hearings.¹¹⁵ The Members could be given an opportunity to comment on the proceedings at a joint consultation following the hearing. This process would assure consideration of the Member States' interests in deciding the question of interim measures with a minimum delay. Furthermore, the Committee would still have the opportunity to comment on the case before the Commission's adoption of a decision in the main proceeding. As with the rights of third parties, the role of the Advisory Committee in interim procedures is an important question which has yet to be answered by the Court.

C. Possible Solution to Unsettled Issues

As an increasing number of interim measures cases arise, the Commission may find it necessary to adopt new procedures to facilitate the exercise of this new power. Council Regulation 17 gives the Commission the authority to adopt implementing provisions concerning the hearings provided for in article 19 of the regulation.¹¹⁶ Furthermore, the Commission's implied power to impose interim measures would justify some modification of the existing procedural rules for the main proceedings, while still providing the essential procedural guarantees required by *Camera Care*. The Commission could adopt new procedures which would clarify, for example, third party rights and the role of the Advisory Committee.

In a Statement given to the parties following the Court's decision in *Camera Care*,¹¹⁷ the Commission demonstrated its willingness to amend its procedures in order to accommodate interim proceedings. The statement clearly indicates the Commission's intention to follow the stated procedures in future interim measures cases; however, the legal force of such a letter is uncertain. Finally, it must be remembered that the procedures adopted in interim measures cases are subject to review by the Court, which stressed the importance of procedural safeguards in *Camera Care*.

112. *Id.*

113. *Id.* at 666.

114. *Id.*

115. Reg. No. 17, *supra* note 8, art. 10.

116. See Reg. No. 17, *supra* note 8, art. 24 ("The Commission shall have the power to adopt implementing provisions concerning . . . hearings pursuant to Article 19(1) and (2)").

117. *Introduction to Hearing on Interim Measures, supra* note 41, at 369-70.

CONCLUSION

The Commission's authority to adopt interim measures in EEC competition cases is now clearly established. The requirements for interim measures have been defined by the Court in *Camera Care* and applied by the Commission in both *Ford* and *ECS/AKZO*. Many important questions remain unanswered, however. The extent to which the Commission will be able to deal effectively with an increasing number of requests for protective measures within the framework of the existing procedural regulations is unclear. The role of the Advisory Committee in interim procedures has not been clearly defined. The position of third parties in interim proceedings is uncertain. The Commission's authority to provide for guarantees and penalties in interim decisions has yet to be confirmed by the Court. Hopefully, the Commission's increased experience with regard to interim measures, as procedures are developed by the jurisprudence of the Commission and Court, will have a substantial beneficial effect on the enforcement of the competition rules in the European Community.