Organisation for Economic Co-operation and Development

DAF/COMP/WP3/M(2022)1/ANN1/FINAL

Unclassified **English - Or. English**

24 May 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Summary of Discussion of the Roundtable on Interim Measures in Antitrust Investigations

Annex to the Summary Record of the 135th meeting of Working Party 3

21 June 2022

This document prepared by the OECD Secretariat is a detailed summary of the Roundtable on Interim Measures in Antitrust Investigations, held by Working Party 3 on 21 June 2022.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm

Please contact Mr Antonio CAPOBIANCO if you have questions about this document.
Email: Antonio.CAPOBIANCO@oecd.org

JT03519608

Summary of Discussion of the Roundtable on Interim Measures in Antitrust Investigations

1. Introduction by the Chair

1. On 21 June 2022, the OECD Working Party 3 held a roundtable on interim measures in antitrust investigations chaired by Jonathan Kanter. Five expert speakers took part in the discussion:

- **Juliette Caminade,** Vice-President at Analysis Group;
- **Ian Forrester,** Former Judge at the General Court of the European Union;
- **Lars Kjolbye**, Partner at Latham & Watkins;
- **Marcela Mattiuzzo,** Partner at VMCA;
- **Rod Sims,** Former Chairman at the ACCC.

2. **The Chair** stressed the transformational context in the world of competition policy in which the roundtable was taking place. He also thanked the Ukrainian delegation for its presence and contribution to the roundtable. He then introduced the topic, stressing the need to stop anti-competitive conduct before it occurs, or before markets have tipped and there is no longer the opportunity for competition to thrive. In this context, interim measures allow enforcers to move faster and avoid the difficulties of unwinding transactions. Merger control thus stands out as the ultimate example of interim measures: it allows for enforcement before markets have suffered harm.

3. **The Chair** highlighted the need to consider ex ante enforcement along the typical options of ex ante regulation and ex post enforcement. He then asked the Secretariat to present the background paper prepared for this session.

2. Background paper by the Secretariat

4. **The Secretariat** started its presentation by defining interim measures, which can be understood as temporary measures that may be adopted during the investigation of potential infringements of competition laws. Interim measures are thus a powerful instrument for competition authorities, which have two main objectives: preventing anti-competitive ham before reaching a decision on the merits and ensuring the effectiveness of that final decision.

5. Interim measures have been at available to competition authorities for decades, although their adoption varies substantially across jurisdictions. However, they have recently gained more attention in a context of rapid changing markets and concerns over the effectiveness of enforcement and the length of antitrust investigations. These concerns have revamped the debate on the use of interim measures, with jurisdictions promoting reforms in two main directions: granting competition authorities more powers to impose interim measures (especially in digital markets) and speeding up the adoption of interim measures by lowering legal standards and sharpening procedures.

6. In terms of legal standards for the adoption of interim measures, the Secretariat explained that most jurisdictions share two conditions: the likelihood of an infringement and the urgency to prevent serious and irreparable harm. Based on their purpose, interim

measures need to remain a flexible tool that can adapt according to new information collected by the competition authority or new market developments. Furthermore, the situations of urgency in which interim measures are adopted requires immediate implementation and thus it is essential to ensure compliance by the targeted companies. As in all other areas of antitrust enforcement, the principle of proportionality should guide the adoption of interim measures.

7. The Secretariat then addressed the likelihood and incentives of competition authorities to impose interim measures, which is based on three aspects. First, legal tests to assess the two conditions for interim measures. Second, procedural rules safeguarding the rights of defence of the parties, which vary across jurisdictions. And third, judicial review of interim measures. As a last point, the Secretariat stressed that interim measures do not operate in a vacuum and should be linked to other tools available to competition authorities, in order to ensure efficient antitrust enforcement. Notably, interim measures could be used to leverage commitment negotiations, test the market to refine potential remedies or to tackle enforcement challenges in fast changing markets.

3. Roundtable Discussion

8. **The Chair** thanked the Secretariat for its presentation, and briefly mentioned the relevance of the intersection between regulation and enforcement, in the sense that interim measures could mitigate the need for regulation. He then invited Juliette Caminade to take the floor.

9. **Juliette Caminade** started her presentation by disclaiming that her company had cases for and against many of the delegations present in the discussion. She explained that her presentation would focus on a simplified economic model, aiming to help decision-makers navigate the adoption of interim measures. She stressed that the model was very simplified and which can be adapted to each jurisdiction's criteria. Her presentation on the model was based on three basic economic concepts: balance, urgency and irreparability. Balance refers to the idea that authorities need to balance the risk of over-enforcement by taking an unwarranted interim measure (a type I error) and the risk of under-enforcement by waiting too long and not adopting the interim measure (a type II error). Urgency refers to the imminency of the harm. And irreparability refers to irreversibility of the harm.

10. Caminade stressed that irreparable harm on consumers and defendants can also arise from over-enforcement. For this reason, the optimal decision rule and its economic model play a key role. This rule determines that authorities should consider implementing an interim measure when the expected irreparable harm to plaintiffs and consumers from incorrectly failing to impose an interim measure is higher than the expected irreparable harm to defendants and consumers from incorrectly imposing an interim measure. The absolute size of each of these risks is irrelevant, what matters is the balance or asymmetry between the two.

11. Interim measures have started to be used more often, and there are two critical factors behind an appropriate interim measure regime. First, reliable estimates of parameters at stake are needed. And second, a consistent and rigorous methodology for imposing interim measures is required. Some industries where irreparable harms are greater could require a larger number of interim measures, such as the digital industry. However, Caminade stressed that authorities risk over-enforcement and reputational costs if they apply interim measures inappropriately. For this reason, she suggested that authorities might want to set a threshold in terms of the likelihood of anticompetitive behaviour

occurring. Furthermore, she stressed that the optimal decision model she presented is extremely linear, and authorities could resort to more complex analyses.

12. Caminade argued that instead of only focusing on interim measures, authorities should also examine why investigations take too long. Is it because of inefficiencies in the system or is it because it is complex to make a decision, which therefore takes time? Last, she explained that network effects and winner-takes-all dynamics could make an interim measure regime more valuable in digital markets, as irreversible harm is more likely. However, she cautioned that inappropriate interim measures would harm consumers and that these are still developing innovative markets, and for this reason interim measures should be considered on a case-by-case basis.

13. The **Chair** thanked Caminade for her presentation and asked her to expand on the weighing of risks and probability at the interim measure phase versus at the decision phase.

14. **Caminade** answered that the model she presented referred to the probability of the conduct in question to be found illegal and anticompetitive.

15. **The Chair** then queried on the two probabilities being weighed, irreparable harm and likelihood of success, and asked Caminade up to what extent the probability of irreparable harm can be lower than reaching a decision or proving a case.

16. **Caminade** reiterated that the model is very simplified, and that the weighing of possibilities had always been a struggle, since the model is purely linear but the economic reality of weighing possibilities in non-linear. For this reason, the probability of harms cannot be really calculated, and she recommended considering the interval of errors around the harms.

17. **The Chair** moved on to ask on the difficult unwinding of transactions.

18. **Caminade** explained that this issue comes down to irreparability. Interim measures are fit for mergers, since these are transactions that are hard to unwind.

19. **The Chair** argued that in markets with network effects or more prone to tipping, the difficulty of unwinding becomes even more substantial. To avoid this tipping of markets, the Chair stated that the balance should lean towards overenforcement of interim measures.

20. **Caminade** answered that the tipping of markets is a challenging matter, since tipping might have occurred for the right reasons and interim measures to reverse the tipped market might be detrimental.

21. **The Chair** laid out the difficult choice between waiting for a firm to grow to unwind its growth and intervening sooner through interim measures that avoid market tipping.

22. **Caminade** agreed this is a complicated choice since it is hard to predict tipping.

23. **The Chair** pointed out to the enforcers’ high priority of intervening before the market has tipped and avoiding the unwinding of anti-competitive behaviour. He also stressed that our economy is becoming more prone to tipping effects (not only in digital markets), and therefore there is a greater need for interim measures. The Chair invited Rod Sims to take the floor.

24. **Rod Sims** stressed that he no longer works for the ACCC. He started his presentation by showing his support for the increasing adoption of interim measures, due to the current context of severe under-enforcement risks and the growing accumulation of market power. He also stressed that the adoption of interim measures will vary among

prosecutorial and administrative enforcement regimes, and that prosecutorial enforcement brings more challenges in terms of interim measures.

25. Sims presented the case of ACCC's response during the Covid-19 pandemic, in which the Authority intervened to authorize anti-competitive behaviours which ensured a coordinated response to the crisis. He explained that this intervention serves as an example of a successful interim measure. However, he argued that interim measures become more challenging for the fields in which the ACCC acts as a prosecutorial enforcer, such as merger control. He pointed out to a merger case in the IVF sector, in which the Authority was granted an injunction to reverse the proposed transaction. This court victory helped sent a message to Australian companies to not carry on with mergers without first seeking the approval of the enforcer.

26. In cases of anticompetitive unilateral conducts, Sims expressed his concerns for delays in court proceedings which could help consolidate the anticompetitive incumbent behaviour and repel new entrants. For this reason, he defended the use of injunctions as a tool to tackle anticompetitive unilateral practices.

27. Sims then addressed the move towards ex ante regulation in digital markets, arguing that the regulations brought forward in many jurisdictions are needed and that they will likely give rise to litigation and interim measures. This new context will blur the line between ex ante regulation and ex post enforcement. As a concluding remark, he encouraged the adoption of interim measures, even in prosecutorial regimes in which their adoption can be time consuming.

28. **The Chair** stressed that there is legislation in the United States that would create ex ante regulation for digital markets. He argued that these new regulations could also be approached as new enforcement tools, which feeds into Sims' remark that difference between enforcement and regulation are blurring.

29. **Sims** agreed and explained that digital and technological markets require a more tailored enforcement, as traditional ex post enforcement is not enough.

30. **The Chair** then asked Sims to elaborate on his claim that over enforcement is not really possible in the current context.

31. **Sims** argued that in his experience as an enforcer at the ACCC he had not really witnessed a risk of over enforcement that chilled competition. He claimed that the idea of chilling competition is overdone, as business are quite robust in pursuing their self-interests. Sims also stated that a more aggressive use of interim measures could help in protecting consumer welfare standards.

32. The Australian expert also pointed out to the bias towards competition that he tried to bring forward to judges. The high evidentiary burdens that authorities face challenge this bias towards competition, thus leading to underenforcement.

33. **The Chair** stressed the different treatment received by privately requested interim measures and publicly requested interim measures. In this regard, when public authorities request the interim measures there tends to be a consideration of irreparable harms.

34. **Sims** emphasised that in competition cases, judges tend to align with companies' claims, rather than with the ACCC, due to confidence in the functioning of the market economy.

35. **The Chair** proceeded to open the floor to delegations, raising questions on the functioning of their interim measures regimes. He invited the European Commission to share its experience with the ECN+ Directive and its interim measures standards.

36. **The European Commission** introduced the ECN+ Directive, which harmonizes the tools of competition authorities to enforce the core competition provisions of the TFEU. The delegate reminded that it is Regulation 1/2003 that shapes enforcement proceedings. However, national enforcers have parallel competences, and in some cases, they can become better enforcers than the Commission. In this context, the ECN+ Directive sets minimum requirements for the adoption of interim measures, thus harmonizing standards across the European Union.

37. Before the enactment of Regulation 1/2003, interim measures standards were set in case law. The Camera case in the late 1970s set up the precedents in this regard, which were then incorporated into Article 8 of the Regulation 1/2003. This Regulation contains the two requirements that already been discussed by the Chair: the *prima facie* identification of a serious competition infringement and the urgency due to an irreparable harm to competition. A third requirement outside the Regulation has been set by case law: the principle of proportionality, referring to the balance between the interest of the targeted company and the public interest. As a concluding remark, the European Commission delegate mentioned the 2019 Broadcom case, in which this interim measure framework has been applied.

38. **The Chair** then asked Belgium to take the floor.

39. **Belgium** shared the low standards for the adoption of interim measures that its case law foresees. In this regard, the enforcer is only required to prove that it is not manifestly unreasonable to consider that there might be an infringement. Decisions on interim measures need to be adopted withing a period of two months. However, this does not mean that interim measures can be adopted freely: there is a decisive balancing of the potential prejudice to the applicant in case interim measures are refused and the potential prejudice to the defendant in case interim measures are adopted and no infringement is finally found. This case law standards have been codified in a 2019 regulation, which has replaced the notion of irreparable harm by "difficult to repair" harm.

40. **The Chair** asked for clarification on the period required to adopt interim measures and asked on the duration of proceedings to rule on underlying infringements.

41. **Belgium** answered that since its enforcement of competition rules is administrative, there is no need to resort to court proceedings. In this context, the adoption of decisions usually takes between one and two years, and interest in the final decision usually decreases after the adoption of interim measures.

42. **The Chair** then invited the Ukrainian delegation to take the floor.

43. **Ukraine** stressed that it is important to deploy a full range of legal instruments to ensure that market conflicts are resolved quickly. Ukraine explained that, as for other jurisdictions, interim measures entail both challenges and opportunities. In this regard, interim measures risk being perceived by society as excessive interventions in the economic activity of undertakings. For this reason, and parallel to interim measures, the Ukrainian Authority has developed conde recommendations as an alternative instrument, which function as voluntary pledges to stop the infringement of competition laws. The Ukrainian delegate explained that the country's on-going antitrust reform plans to grant competition enforcers the power to impose interim measures at their own initiative, without requiring a request from applicants.

44. **The Chair** introduced former judge Ian Forrester and invited him to take the floor.

45. **Ian Forrester** stressed that interim measures are increasingly valuable and necessary in the application of competition rules. Interim measures become even more relevant in a context of extraordinarily lengthy decisions, which makes their judicial review

very complicated. Forrester argued that length and prolixity of decisions are inimical to enforcement and judicial review. He also explained that in high-tech markets, competition is better approached as a matter of regulatory conduct rather than punishment.

46. Forrester presented the two key questions that arise from the judicial review of interim measures: first, whether the authority is legitimised to impose them; and second, whether the facts justify the remedy that was imposed. He then criticised the extreme length of competition decisions, which derives from authorities worrying over judicial review and the omission of information in their decisions. In this context, competition decisions are written not to inform but to protect their authors. Forrester considered that this approach is inappropriate, especially for the case of high-tech markets. He recalled that as a judge he received many decisions which did not focus on core infringements, but rather told a story with too much decoration that was inimical to judicial understanding. For this reason, competition decisions would benefit from being briefer and more focused on the core questions.

47. Forrester then presented his view that digital markets should not be approached in punitive way, but rather through a regulatory angle, as fines could demonise market actors and create distractions from the market conducts that are trying to be changed. He then brought forward the option of introducing a final public review of the Commission's competition decisions, in order to avoid a slow judicial review. As a concluding remark, he stressed that competition enforcement should not aim for perfection, but rather adequacy and clarity, and the adoption of interim measures should be based on concise and easily readable decisions.

48. **The Chair** agreed that too much decoration in decisions is inimical to digital understanding. He then asked Forrester why he thought interim measures are so rare.

49. **Forrester** answered that a potential explanation is authority's timidity. **The Chair** then added that this could also be labelled as risk aversion, and that risk aversion leads to lengthy decisions with a lack of clarity.

50. **Sims** intervened to add that besides timidity, there is also a lack of clarity of thought behind the authorities' lengthy decisions.

51. **Forrester** added that the more competition enforcement is seen as punishment, the harder it is to look at it as a matter of market regulation.

52. **Lars Kjølbye** took the floor to add that besides decisions being too long, investigations are also excessively unfocused. The lack of a clear investigative vision hinders runs against the urgency of interim measures.

53. **The Chair** mentioned the notion of consumer welfare standard that is being discusses in the United States and the need for clarity.

54. **Forrester** highlighted the utility of a potential judicial contribution to the resolution of competition disputes, mentioning the case of the European Courts' power to convoke parties to explore settlements.

55. **The Chair** introduced Lars Kjølbye and gave him the floor to present.

56. **Kjølbye** disclosed the jurisdiction in which his law firm is currently involved in competition cases, and he also informed that he had previously represented Broadcom in a case relating to interim measures imposed by the European Commission. He stressed that a possible reason for the small adoption of interim measures could be that they disrupt the speed of the main decision.

57. **The Chair** mentioned that precisely when interim measures become too long and ultimately replicate a full decision, they become too long for courts to review.

58. **Kjølbye** stressed that he did not mean to say that the burden of adopting interim measures is now so hight that there is no difference between them and the main investigation. Regarding the conditions for their adoption, the expert reminded that interim measures are conservatory in nature, and that it is urgency and the risk of irreparable harm that justify their adoption. Interim measures need to ensure that victims of infringement have not died by the time the main decision is adopted, and thus need to be adopted based on urgency. The identification of a *prima facie* infringement ensures that the preliminary case on the merit is sufficiently solid.

59. **The Chair** asked Kjølbye on his point of infringement victims dying, focusing on those cases in which the public and the competitive processes are the victims.

60. **Kjølbye** replied that the victim is competition and not a particular competitor. But when it comes to interim measures and their case for urgency, there is usually a new market entrant that is at threat of being eliminated. Therefore, when urgency is properly defined, it will be clear to assess which particular aspect of competition is being threatened. He then made reference to a French case in the sport newspaper market and to the European Commission's Intel case to portray examples of new entrants being threatened and interim measures being needed.

61. **The Chair** questioned whether authorities could justify interim measures when the anticompetitive conduct has been taking place for a while and creating cumulative harm.

62. **Kjølbye** expressed his doubts, as the possibility described by the Chair would lack a sense of urgency because the anticompetitive conduct has been in place for a long time.

63. **The Chair** then asked up to what degree theories of harm determine the need for interim measures. He explained that he had witnessed a tendency in conduct case to regard foreclosure as the main harm to competition. He questioned whether this approach is coherent with our current reality, in which anticompetitive practices are as much about foreclosing competition downstream as they are about building moats around dominant firms.

64. **Kjølbye** argued that the Chair's point is fair for digital markets, in which barriers for new entrants are not so much about building competitive services but being able to monetise them. The most common method for monetisation is advertising, a market that is currently dominated by two main players. In this context, rapid interventions by authorities are essential.

65. **The Chair** shared that in his experience competition is now coming not from direct competitors, but from technologies or firms that reduce the depth of the moats surrounding dominant firms.

66. **Kjølbye** agreed that for digital markets it is a misconception to believe that service most similar to the dominant incumbent's is the closest competitor. In these markets, the way to gain consumers is by being different, and therefore is different services that should be regard as potential competitors.

67. **The Chair** stressed the role of interim measures in the emerging of these new different services that can challenge incumbents' monopoly power.

68. **Kjølbye** reinstated that his point on the urgency of interim measures entails that authorities need to convey an argument based on theories of harm on why they cannot wait for the imposition of interim measures. The better this urgency narrative is conveyed, the lower the standard for building a *prima facie* case.

69. **The Chair** questioned whether in instances of anticompetitive cumulative harm (rather than direct foreclosure or single instance harm) it would be possible to prove urgency at some point.

70. **Kjølbye** replied that there is no need to prove that there is a cumulative harm that is worsening for adopting interim measures. In the case that there is a worsening of a cumulative harm, authorities should wait for their final decision.

71. **The Chair** then asked whether this argument entails that there is never a basis for the adoption of interim measures if the harm is already there.

72. **Kjølbye** explained that this is not the conclusion of his argument. Authorities will be able to impose interim measures if they can prove that the cumulative harm is increasing. In this regard, market trends pointing to the risk of tipping could serve as justification of urgency. The expert argued that higher legal standards for the main decision will lead to a higher threshold for fixing the prima facie case for interim measures.

73. **Forrester** added that the judicial reversal of public authorities' decisions is healthy and criticized what he labelled as a zero tolerance for judicial setbacks.

74. **The Chair** recalled some of the points made by Forrester in his interventions, namely that "judicial setbacks are perfectly healthy", "too much decoration is inimical to understanding", "losing is a way of gathering strength" and that "fines are a distraction". He then opened a chapter of discussion focusing on the procedural aspects of interim measures and their impact on on-going investigations and judicial review. He invited Switzerland and the United Kingdom to take the floor and present their experiences.

75. **Switzerland** clarified that its standards for the imposition of interim measures in antitrust cases are high. In this regard, three requirements apply: threat of a competitive disadvantage that cannot be easily remedied, urgency of the intervention and proportionality of the measures. Still, the country's authority has imposed interim measures in twenty-three cases in the past years. The Swiss delegate stress that the authority applies interim measures and commitments as combinable measures, and that in a recent case interim measures were designed on previous commitments.

76. In the Swiss experience, the time savings resulting from interim measures are not significant. This is because of the inquisitorial nature of competition enforcement in the country, which makes it hard to find the right balance between rapid interventions and the sufficient investigation of facts. Furthermore, court appeals tend to difficult the rapid implementation of interim measures, as they suspend the investigation. The delegate then presented two recent cases to highlight how due to rule of law factors, rapid intervention by authorities is not always possible, even in the case of interim measures.

77. The **United Kingdom** focused its contributions on current reforms of interim measures. The delegate explained that the country's authority, the CMA, has the power to impose interim measures in situations of urgency in which the measures are needed to prevent significant harms. These powers were reformed in 2014, before then the legal threshold to impose interim measures had been set at the standard to prevent serious irreparable harms. The CMA has only imposed interim measures in one case in the aviation sector.

78. The delegate argued that, in their current form, interim measures are not effective because they cannot be implemented quickly to prevent tipping. Notably, under the current regulation, the CMA is obliged to provide full access to the case file in the adoption of interim measure. Access to the case file is usually time-consuming and thus delays the adoption of the interim measures. For this reason, the government is currently reviewing the extent of the access to the file granted for the adoption of interim measures. Lastly, the

British delegate addressed the judicial scrutiny of interim measures, which also tends to contradict the urgent purposes. For this reason, the government is also studying a lower review intensity so that interim measures can be adopted more quickly.

79. **Portugal** explained that in the past two decades, its competition authority has only imposed interim measures in two cases. None of these have suffered judicial setbacks. Portugal then addressed the suspensive effect of appeals, which Portuguese law excludes in order to ensure the proper functioning of interim measures. Lastly, Portuguese legislation requires a non-binding opinion from the regulator when the proposed interim measures concern a regulated sector, allowing for a clear view of whether the remedy will be effective.

80. **Latvia** presented its administrative enforcement procedure, in which interim measures are adopted by the competition authority and can then be reviewed by courts. However, judicial review needs to take place within fourteen days since the adoption of the interim measure. Judicial review occurs in one single instance, and it has no suspensory effects on the decision. The adoption of decisions requires compliance with due process standards.

81. **BIAC** expressed its strong support for due process and procedural fairness in competition proceedings, two dimensions which are profoundly impacted by interim measures. The delegate warned that if applied too early in the investigation proceeding, interim measures can have a negative impact on companies. Furthermore, BIAC pointed out to a stand-off between the main proceedings and interim measures. Authorities should provide evidence on the *prima facie* infringement and the urgency of their intervention. And in a context of more frequent adoption of interim measures, there should also be stronger due process. As a concluding remark, BIAC stressed that interim measures are to be lifted once the authority rules on the infringement, and that these measures are not designed to deal with cases more swiftly.

82. The **Chai**r then gave the floor to France and Sweden, so that they could present which case in their experience benefit most from interim measures.

83. **France** argued that the digitalization of the economy has proven the need for authorities to resort to tools that allow for a rapid reaction. In this context, interest for interim measures has grown. The French delegate agreed that it is hard to accuse authorities of over-enforcing these measures, and that digital markets are more prone to their adoption because of their specific idiosyncrasies. Under French case law, multiple pre-requisites and interests are considered for the imposition of interim measures. Cases in digital markets usually fulfill those pre-requisites because of the impact of network effects, which creates a greater risk of competitors being pushed out of the market. The delegate then presented two cases of interim measures in the jurisdiction and concluded that the prominence of interim measures in digital markets should not make us forget that they need to be deemed necessary and proportionate on case-by-case basis.

84. **Sweden** presented two cases in which its competition authority has applied interim measure. The first involves a fitness aggregator platform, which had signed exclusivity agreements with several fitness studios in Stockholm. In a market with strong indirect network effects, the authority approached these exclusivity agreements as potential irreparable harm to competition if no action was taken, by tipping the market in favor of the platform. For this reason, interim measures were adopted, preventing the platform from applying the exclusivities with fitness studios. The second case presented by the Swedish delegation involved two companies that were in a contractual relationship in the market of housing prices data. During a contractual renegotiation, one of the companies refused to keep granting the other the right to publish housing price statistics. The Swedish authority

considered this action as a potential abuse of dominant position with a potentially irreparable harm, and consequently ordered the adoption of interim measures. The Swedish delegate concluded that both cases show digital markets can be more prone to irreversible competitive harms, due to the presence of indirect network effects which lead to market tipping. For this reason, the adoption of interim measure at an early stage of the investigation becomes an important tool for authorities.

85. The Chair thanked Sweden for discussing the role of feedback and network effects in the context of interim measures. He then opened the floor for Marcela Mattiuzzo to present on the procedural aspects of interim measures and their interplay with the main proceedings.

86. **Mattiuzzo** disclosed that she is currently involved in cases before the Brazilian competition authority, CADE. She explained that in the Brazilian jurisdiction, CADE can impose interim measures in conduct investigations without needing a previous court approval. The role of courts is limited to the review of interim measures. She mentioned that out of the nineteen injunctions imposed by CADE since 2012, fifteen have been interim measures imposed in conduct investigations and four were inductive releases granted in merger reviews. Interim measures adopted within conduct investigations mostly focused on abuses of dominance, and although many of these referred to digital markets, Mattiuzzo argued that the conversation should expand to all types of markets.

87. She explained that the prime objective of interim measures is to halt anticompetitive behaviour, but that in some cases they have become more complex. She presented a case similar to that of Sweden, which involved exclusivity agreements imposed by a fitness aggregator platform. In this scenario, CADE's interim measures did not only intend to halt the behaviour, but also ordered a binding bid on the addressees. This case showed how the nature of interim measures is becoming more complex.

88. In terms of judicial review, Mattiuzzo stressed that all interim measures adopted by CADE have been later reverted by courts. The Brazilian judiciary has become less welcoming of these measures.

89. **The Chair** commented that constant judicial setbacks might indeed be unhealthy. He then asked the expert if she expected CADE to reduce the adoption of interim measure in this defiant judiciary context.

90. **Mattiuzzo** replied that she does not necessarily foresee a decline in the use of interim measures, but rather a more conservative approach in terms of the scope of the measures to avoid their judicial reversal.

91. **Brazil**,**-** represented by CADE, added that its approach to interim measures has been very conservative, and that they are currently considering ten interim measures in different cases. The Brazilian delegate also stressed that there are other interim measures adopted by CADE which have not been appealed and are not subject to judicialization. Lastly, Brazil presented a case in a digital market which stressed the need for the adoption of interim measures in the context of the Covid-19 pandemic.

92. **Mattiuzzo** added that Brazilian courts are overwhelmed with enormous amounts of cases and lack an antitrust specialization. For this reason, decisions on interim measures should be clear and concise, ensuring that judges can understand them and reducing the risk of reversal.

93. **Brazil** pointed out that the decision on the case that was presented was concise and brief. Brazil also stressed the challenges of judicial review and the lack of specialization of judges in antitrust matters. In this context a recent understanding of the Supreme Court

acknowledges that CADE’s decisions should be respected by the judiciary due to the specialization of the authority.

4. Conclusion

94. The **Chair** invited expert speakers to share their concluding observations.

95. **Mattiuzzo** stressed the consensus on the growing need for interim measures. She also pointed out to the interaction between these measures and ex ante regulations.

96. **Kjølbye** argued that history repeats itself, and that should never forget the fact that competition authorities have tremendous powers which also carry the responsibility to build solid cases.

97. **The Chair** observed that in the context of markets with network effects and anticompetitive behavior emanating from moats around incumbents rather than downstream foreclosure, interim measures are becoming more important.

98. **Caminade** encouraged authorities to conduct a robust economic analysis of their interim measures, by focusing on what is considered as irreparable harm versus simple harm.

99. **Forrester** invited jurisdictions to consider having an administrative appeal instance inside the authority, preceding the judicial review of decisions. He also encouraged regulation over demonization, and authorities to be brave and concise in their decisions.

100. **Sims** expressed his view that courts should consider not reading excessively long decisions.

101. **The Chair** thanked delegations and expert speakers for their participation in the Roundtable.