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English - Or. English

24 May 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Executive Summary 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 Executive Summary by the OECD Secretariat contains the key findings from 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>

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JT03519609

Executive Summary of the Roundtable on Interim Measures in Antitrust Investigations

By the Secretariat*

On 21 June 2022, Working Party No. 3 held a roundtable on interim measures in antitrust investigations.

Based on the background note prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. Interim measures can be an effective tool to protect competition and safeguard effectiveness of the enforcement action while the competition authority is investigating potential infringements. Interim measures are mainly of conservative nature, and their application is becoming increasingly complex.

A large number of competition authorities have (explicit or implied) powers of directly imposing or ask courts to impose interim measures. Interim measures have two main objectives: (1) preventing anticompetitive harm that may occur before a decision on the merits; and (2) contributing to the effectiveness of enforcement.

Most authorities have ample discretion as to the type of interim measures. Except for a few jurisdictions, interim measures are not limited to negative obligations, but encompass obligations to act. Designing effective and well-targeted measures is a complex exercise, especially in cases where the conduct under investigation is the result of long-lasting commercial relationships encompassing various products and geographic areas under different terms. Interim measures recently imposed include suspension of contract clauses, granting provisional access to infrastructure or essential input, obligation to supply at certain conditions, and termination of contracts. In the context of criminal enforcement, interim measures include seizing of assets, disqualification from tenders, and revocation of professional licenses.

In some jurisdictions, interim measures can also serve to impose obligations on merging parties while reviewing concentrations.

Concerns regarding the effectiveness of enforcement – in particular for lengthy investigations in fast-changing markets – have revamped the debate as to the optimal use of this tool, triggering proposals for additional interim measure powers as well as for revising legal standards and procedures.

2. While standards for imposing interim measures are not uniform, most jurisdictions require two conditions: the likelihood of the infringement and the urgency to prevent harm.

The interpretation of the two legal conditions of likelihood of infringement and urgency to prevent harm – as well as the requisite evidentiary standards – have an impact on the likelihood and incentives to apply interim measures.

* This executive summary does not necessarily represent the consensus view of the Competition Committee. It does however identify key points from the discussion at the Roundtable, including the views of the expert panellists and the participants' oral and written contributions.

Standards for the likelihood of infringement differ across jurisdictions. In general, the tougher is the legal standard in the case on the merits, the higher the standard is for interim measures. Nevertheless, the standard of proof must be necessarily lower than the one required in the case on the merits. In certain jurisdictions, it is sufficient to show that an infringement would be likely or at least not manifestly unreasonable.

As to the urgency to prevent harm, while certain jurisdictions apply a strict standard of irreparability, others admit interim measures also in cases where the harm would be difficult to repair. In general, the stronger the urgency is, the lower would be the evidentiary standard for likelihood of infringement. Moreover, some jurisdictions focus on the harm to competition or the competitive process, while others also consider the harm to a specific party (e.g. a competitor) or to a certain category. Urgency can be proved by showing that a particular entrant is at threat to be eliminated or that tipping is causing other players to exit the market. When the conduct under investigation has been in place for a period of time, urgency may require to show what has changed in the market for an immediate intervention, in particular when interim measures are not taken swiftly.

3. Adaptability, reversibility, enforceability and proportionality of interim measures are key principles that competition authorities must comply with when designing effective interim measures.

Interim measures are temporary in nature. The tool should remain flexible with the possibility to amend measures, depending on changes in the market or on new findings in the investigations. Some jurisdictions require a maximum duration for interim measures, which can be extended by a substantiated decision. In practice, however, reversibility of interim measures (and of their effects) could be problematic when, for instance, measures even of behavioural nature can substantially change the structure of markets.

Interim measures should also be necessary and proportionate, remaining focussed on the key case-specific concerns and striking a balance between the legitimate interests of addressees and the public interest in preserving effective competition.

Ensuring monitoring and compliance is important. Having the possibility to impose fines, including periodic fines, for failures to comply or delay in complying with interim measures is key for an effective use of this tool.

4. Procedural aspects can contribute to the effectiveness of, as well as the incentives for using interim measures.

Interim measures need to be timely to be effective. A distinction can be drawn between jurisdictions where competition authorities have the power to directly impose interim measures, and jurisdictions where the power to impose interim measures is reserved to courts. In prosecutorial regimes, it can be more complex to use this tool because of the need to engage in resource-intensive court proceedings while advancing with the main investigation. Even in some administrative jurisdictions, interim measures are not being effective because the procedure is not sufficiently fast. In fact, interim measures do not always speed up the process, in particular where the standards and procedures essentially replicate the ones for the case on the merits.

Some procedural requirements are, however, important safeguards to preserve due process, with most jurisdictions granting parties the right to be heard. There are a few jurisdictions where interim measures may be taken before hearing the interested parties, in cases of extreme urgency.

Some jurisdictions recognise the importance of applications for interim measures by private parties. Others, on the other hand, allow interim measures to be imposed *ex officio* only, and the competition authorities do not have the burden to formally decide on complaints.

Interim measure decisions are generally appealable. The scope and speed of judicial review influences the incentives to use interim measures. Some jurisdictions have expedited judicial review, limited to assess the legality of the decision with no suspensory effects, while others subject an interim measure decision to a full-merit appeal suspending the effects of the decision.

5. Interim measures can influence the outcome of investigations, so their interaction with negotiated solutions, final remedies and regulation should be carefully considered.

First, while the primary purpose of interim measures is to prevent serious and irreparable harm, they can also serve as effective means to leverage commitment or settlement negotiations. However, interim measures do not always expedite these negotiations.

Second, while considerations on final remedies should not have a decisive influence on interim remedies, interim measures can serve the additional purpose of refining potential remedies in the case on the merits.

Third, depending on the magnitude of the shift towards a regulatory approach in fast-changing markets, interim measures may be less needed. At the same time, interim measures remain a powerful tool to tackle enforcement challenges. They could mitigate the need for *ex ante* regulation and they can still be valuable when regulation can lead to lengthy litigation.

6. Interim measures are becoming increasingly necessary in the application of competition rules. However, they remain an exceptional remedy in limited circumstances.

The decision making process for interim measures requires to balance risks of over-enforcement (by taking interim measures when not needed) and of under-enforcement (by not taking interim measures when needed). To calculate harm and costs of taking a wrong decision, authorities should consider probability, magnitude and asymmetry of the two harms (to competition and to the addressees of interim measures), as well as reputational costs for using interim measures inappropriately.

Most interim measure cases so far were taken in abuses of dominance cases. These cases largely concern exclusionary theories of harm such as foreclosure through exclusivity clauses, tying and refusal to deal (e.g. to supply existing customers). Interim measures are also imposed in vertical restraint cases (such as selective distribution agreements) and, in some jurisdictions, they have been used in cartel investigations (including bid rigging) cases.

Interim measures may be more beneficial in industries where the irreparable harm can be grater. Recent cases concern traditional sectors such as ports, waste management and water management, as well as digital markets.

Market dynamics in digital markets may make interim measures more frequent (and necessary). For instance, it may be easier to prove the likelihood of infringement where network effects increase market power and facilitate foreclosure of competitors and commercial partners.

Network effects can also influence the assessment of irreparability and urgency as harm can occur faster. Additionally, there is a question whether network effects can drive more asymmetry, making potential harm greater.

Some jurisdictions advocate for intervening more often with interim measures before markets tip, weighing probabilities in the sense of over-enforcement. Interim measures could protect the ability of firms to exist and grow in these markets, even for challengers

that do not provide exactly the same services as the incumbent. A few jurisdictions, however, are more reluctant in applying interim measures in complex and fast-changing markets, in particular where cases are based on novel – rather than well-established – theories of harm.