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Interim Measures in Antitrust Investigations – Note by Peru

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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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1. This contribution is aimed at providing a general view on the powers and rules applicable to interim measures that can be granted by Commission for the Defense of Free Competition of Indecopi (hereinafter, “the Commission”) before or after formal charges have been introduced by the prosecutorial body, the Directorate for Investigation and Promotion of Free Competition of Indecopi (hereinafter, “the Directorate”) and before a final decision is issued by the Commission in the administrative proceedings started by the Directorate and followed against defendants for alleged anticompetitive behavior as provided by the Peruvian Competition Act.¹ The contribution will also cover key policy considerations regarding the assessment and introduction of interim measures.

1. Powers and rules applicable to the introduction of interim measures

1.1. The roles of the Directorate and the Commission

2. Before addressing the legal standards and procedural requirements to impose interim measures (a.k.a. precautionary measures or preliminary injunctions) in the context of investigations on anticompetitive behavior carried out by the Peruvian Competition Authority (Indecopi), it is necessary to explain the various stages of the administrative investigation and sanctions procedures and the authorities that intervene in them.
3. The preliminary investigation for alleged anticompetitive conduct can be initiated by a complaint or ex officio. The authority in charge of this investigation is the Directorate, which will determine whether to initiate an administrative sanctioning procedure. With the beginning of an administrative sanctioning procedure, formal charges for anti-competitive conduct are introduced against the defendants, which will be notified with the relevant law and the facts that will be the matter of discussion.
4. During the administrative procedure, on the one hand, the defendants can challenge the hypothesis formulated against them, offering evidence and arguments to be analyzed by the Directorate and the Commission, and, on the other hand, the Directorate continues to carry out evidentiary actions that are necessary for the assessment of the facts under investigation. Finally, the Commission is the authority has the power to confirm or rule out the charges, once it has analyzed all the evidence collected during the procedure.

1.2. General provisions on interim measures granted by the Commission

5. According to the Peruvian Competition Act, the Commission may grant, at the request of the Directorate or at the request of the plaintiff, a precautionary or interim measure aimed at ensuring the effectiveness of the administrative decision. This interim measure can be issued at any stage of the procedure and even before it formally starts.
6. To grant a precautionary measure, the Commission must verify compliance with the following requirements: (i) Showing the plausibility of the complaint (similar to a *prima*

¹ The Act for the Repression of Anticompetitive Behavior was enacted by means of Legislative Decree 1034 (2008) and subsequently modified by means of Legislative Decrees 1205 (2015) and 1396 (2018), as well as the Act 31112 (the Peruvian Pre-Merger Review Act of 2021).

facie infringement); (ii) The danger in the delay of the final pronouncement; and (iii) the feasibility of the measure requested. It should be noted that for precautionary measure to be granted, these requirements must be presented concurrently. Thus, in the absence of any of them, the request for an interim measure must be declared unfounded.

7. One of the main steps in the determination of the Commission about whether granting a precautionary measure is appropriate is to verify that the reported facts are presented as plausible, which is a standard similar to showing a *prima facie* infringement. In other words, while the administrative authority does not seek, at this stage of the procedure, to have a degree of firm conviction regarding the infringement before reasonable doubt, it will require that –on the surface– the prosecutorial hypothesis is plausible and consistent with the evidence introduced, so there is a relatively high probability that the accused party has committed the administrative offense, and so granting the precautionary measure is appropriate.
8. The requirement of a relatively high probability becomes important since there is no bond required to the moving party. Indeed, in contrast with other procedural systems, no grant or offering of an amount of money will be secured to warrant the affected party with a precautionary measure the compensation for the damages that may arise from its execution.
9. The requirement of plausibility is of vital importance since the issuance of precautionary measures may result in restrictions of the rights and freedoms of those affected by them. As precautionary measures can lead to significant restrictions on the freedoms of contracting and business, as well as the right to property (for example, when ordering the provision of a certain good or the granting of access to a certain facility), such restrictions must always be subject to the limits of reasonableness and proportionality.

1.3. Goals and means for interim measures

10. The rules on interim measures in the Competition Act are intended to allow the claimant to request the administrative authority to issue an act that ensures effective compliance with its final decision. In this context, precautionary measures always imply a preliminary judgement on the merits of the claim. Therefore, the Commission, depending on the case, can issue various types of precautionary measures that may include obligations to perform and action or to refrain from do so.
11. The Act, as examples, indicates that it is possible to order the cessation of activities, mandatory dealing, the imposition of contractual conditions, the suspension of the effects of contracts and other private instruments, the adoption of positive behaviors and any other measure that contributes to preserving competition and avoid the damage that could be caused by the allegedly anti-competitive conduct. However, this list is not exhaustive. Thus, the Commission has full authority to decide on the appropriate measure that will allow it to ensure the effectiveness of the final decision and avoid the damage that the alleged infringement could otherwise produce in the market.

1.4. Standards in the determination of the appropriate interim measure

1.4.1. Proportionality and reasonableness of interim measure

12. The decision adopted by the Commission must necessarily comply with the principle of reasonableness and proportionality recognized in our legal system. In simple terms, under these principles, the decisions of the competition authority, when they establish conditions, obligations to perform and act or refraining from doing so, or any other measure of restriction of a right, must be exercised under the limits of the power conferred by law,

maintaining the due proportion between the means to be used and the public ends that must be protected so that they respond to what is strictly necessary.

13. In granting a precautionary measure, the Commission must verify the concurrent compliance with the following requirements: (i) The plausibility of the complaint (as noted, this is similar to establishing a *prima facie* infringement); (ii) The danger in delay of the final pronouncement; and (iii) the possibility of the request. It should be noted that for the granting of the precautionary measure these requirements must be presented concurrently, so that, in the absence of any of them, the request for a precautionary measure must be rejected.
14. The authority does not seek, at this stage of the procedure, to have a degree of full conviction regarding the right invoked, being only necessary to verify that the reported facts are presented as plausible. Therefore, it is necessary that a fair degree of certainty is met, causing the authority to be preliminary convinced that the complaint is plausible. In other words, the threshold is met when the Commission considers that the complaint, on its face, establishes a relatively high probability that the accused party has committed the administrative offense.
15. However, the fact that a relatively high probability is required does not mean that the final decision will necessarily coincide with the facts supporting the interim measure, nor is the Commission bound to issue a final decision finding an infringement. It is legally possible that, after a precautionary measure has been issued in a procedure, the complaint is ultimately rejected. This is because the Commission will issue a final decision after careful analysis of all the evidence and elements of judgment in the file, when a higher degree of knowledge and certainty is required. In this final stage, the authority will be certain that the accused party has or has not engaged in the alleged anticompetitive conduct.
16. In short, the Competition Act ensures that rights and freedoms could not be limited without there being a high degree of certainty that said limitation is necessary to protect free competition in the allegedly affected market and the measure to be applied is proportional to such end. For this reason, the plausibility requirement is a high standard to be fulfilled - even more so if the request is filed before the start of an administrative sanctioning procedure- but is also necessary to justify an early intervention by the authority.

1.4.2. Danger in delay

17. The danger in delay consists of the possibility that the final decision in the sanctioning procedure would be deemed ineffective if an interim measure is not issued immediately. In other words, preemptive intervention is necessary when the damage could become irreparable if a measure is not adopted guaranteeing compliance with the final decision of the Commission. Conversely, if the effectiveness of the final decision would not be meaningfully affected by the regular unfolding of the administrative procedure, and so it can continue its normal course without jeopardizing compliance with the final decision, no interim measure should be granted.
18. The requirement of danger in delay must be shown by the complaining party and it must directly link to an irreparable damage to the competitive process (and not only to the complainant). Due to the short term in that the authority must decide on a request for a precautionary measure, it must have sufficient information to adequately analyze the grounds that support the request, as well as the evidence that accompanies said request. In this regard, it is understood that the complainant is in a better position to prove that there is a danger in delay that could produce an irreparable damage to competition in the affected market.

1.4.3. Duration of the interim measure

19. The Act does not establish a minimum or maximum duration that an interim measure can last. However, it is understood that this measure must be effective at most until the final decision that it seeks to guarantee is issued and that one of the requirements that justify ordering this type of measures is the danger in the delay that could occur if it is not immediately adopted.
20. To determine the duration of an interim measure, the Commission will assess the situation that is sought to be guarded and the correction needed to safeguard competition in the markets. When choosing the type of measure to impose, as well as its duration, the Commission must ensure that it is effective and proportional to protect competition and, at the same time, reduce unwanted secondary effects. For these reasons, each precautionary measure will depend on the characteristics of each specific situation under evaluation.
21. It should be noted that an interim measure may be challenged if new circumstances arise. It can also be modified or revoked at any time during the procedure if the initial conditions for which it was granted change.

1.5. Recent experience of Indecopi on interim measures

22. It is worth mentioning that, in the experience of Indecopi, it has been extremely unusual for the Commission to order precautionary measures, which may be the consequence of the degree of plausibility required by the Act for these measures to be considered.
23. Since 2020, two requests for precautionary measures have been filed, accompanying two complaints for alleged abuses of dominant position. However, these requests were not granted because the plausibility requirement was not met. In fact, in neither of those cases evidence of alleged anti-competitive conduct was identified, so an administrative sanctioning procedure was not started, and both complaints were dismissed.
24. Next, more details of these two cases where precautionary measures were requested are presented:

1.5.1. Investigation in the cement market (2020)

25. In 2020, a company dedicated to the sale of construction materials, filed a complaint against a company that distributes construction materials, for allegedly committing acts of abuse of dominant position. Specifically, the complainant pointed out that the defendant would be selling cement to them under significantly more onerous conditions than to other sub-distributors and that it would have artificially put them in debt, as ways of pressuring them to stop buying cement from another supplier of its brand. Moreover, Codimak pointed out that Pacasmayo and the producers that are part of the association of cement producers had started a campaign to discredit its cement brand.
26. As an interim measure, the complainant requested that Pacasmayo be ordered to sell cement to Codimak at the price applied to the other sub-distributors and that Pacasmayo be ordered to cease the refusal to sell, reactivating the line of credit previously granted to Codimak.
27. The Commission, after evaluating the evidence and information available at that stage, determined that the complainant did not show that it was plausible that the price differences observed responded to a situation exclusively or mainly imposed on Codimak and other companies because of them selling cement “WP”. Moreover, evidenced showed that the main cements marketed by Codimak were of brands other than “WP”. Thus, a strategy of differentiated prices forcing Codimak to stop selling “WP” could hardly have an impact on

the competition that it represents for Pacasmayo. Accordingly, the application for interim measures was rejected.

1.5.2. Investigation in the digital payments market (2022)

28. In 2021, a company offering foreign businesses payment acceptance services in Peru, filed a complaint against a company that develops and manages digital payments, for an alleged abuse of a dominant position. The challenged conduct consisted of the allegedly arbitrary, discriminatory, and unjustified implementation of a payments program, which determined that transactions involving a business located outside the jurisdiction of the Peruvian acquirer will be subject to new pricing rules. According to the complainant, the imposition of the program would make the processing of international transactions through agents like its company more expensive to them than the traditional cross-border mechanism and, therefore, more profitable only for the defendant.
29. The complainant requested as a precautionary measure that the defendant be ordered to suspend the implementation of the program with respect to the complainant, and disapply the new rates and any type of penalties, fines, or sanctions to it, until the Commission rules on the merits of the controversy.
30. After evaluating the request and the evidence available up to that moment, based on the legal requirement that for an abuse of dominant position to occur, and exclusionary effect must be shown; the Commission determined that it was not apparent that the complainant and the defendant were direct or indirect competitors, so the policy could not generate said exclusionary effect. The service offered by the defendant is a platform of payments while the complainant would offer the service of accepting payments to international merchants. As such, there is no competitive relationship between both agents since they participate in different markets. In fact, the complainant needs access to the defendant's network to offer its services, so there exists rather a complementary or vertical relationship between the complainant and the defendant's local acquirer that allows it to access its brand payment network.
31. Accordingly, the Commission found no basis to grant the request for interim measures, as it did not meet the plausibility requirement, since a high probability that the facts attributed to the defendant could evidence an abuse of dominance was not shown.

2. Other policy considerations

2.1. Exceptionality on the application of interim measures

32. As has been explained, a party requesting an interim measure must comply with (i) showing a prima facie infringement; (ii) showing the risk or threat of an imminent irreparable damage; (iii) showing the requested measure is feasible, and (iv) paying a fee of half (0.5) the Tax Unit (around USD 600). As such, these requirements are necessary by the nature of the injunction requested and none are particularly burdensome. Moreover, the requesting party is not required to secure a bond to cover loss and damage arising from the interim measure. Despite these modest requirements, requests for interim measures have not been frequent.
33. Indeed, the Peruvian Competition Act has always allowed the complainant and third parties (with legitimate interest) to request for interim measures. Despite this, the number of proceedings derived from complaints (mostly alleging abuses of dominance) have been relatively low in comparison to the number of proceedings started ex officio (mostly

challenging alleged collusion). In the same manner, during COVID-19, an increased adoption of interim measures has not been observed.

34. In the exceptional cases where interim measures have been considered, the Commission has weighted the costs associated with the overseeing of the interim measure, its timeliness, the risks of not introducing the measure, and its reasonability against the alleged infringement.
35. It is worth noting, however, that as most infringements that Indecopi has prosecuted in the past ten (10) years are related to cartel behavior, most of times, the alleged anticompetitive conduct has ended before or during the preliminary investigation and before the administrative proceedings start, so in most cases there's no need to introduce measures to avoid further harm to competition.
36. Also, on instances of abuse of dominance complaints where Indecopi has assessed *ex parte* requests for interim measures, the Commission has been extremely reluctant to concede such measures, as abuse of dominance cases tend to be less clear from the start and require detailed analysis of market conditions and effects of the challenged behavior.
37. Finally, as interim measures have almost never been requested (just 6 times in the past 10 years) and none have been granted in that same period, and also considering that the body with powers to grant them is distinct and autonomous from the prosecutorial body that may ask for them, the use of interim measures have not been challenged based on due process concerns.

2.2. Interim measures and digital markets

38. The Directorate considers that interim measures will not generally be appropriate on instances of novel theories of harm, as there is less likely to be enough literature or experience to support such measures. Hypothetically though, injunctive measures may still be considered if there is a significant risk of harm to competition or consumer welfare arising from the challenged conduct.
39. The nature of digital markets by itself should not be reason enough to introduce more interim measures or do it more frequently. However, it is understood that these measures, when appropriate, would have a different scope and nature than those applicable to most other markets.
40. Interim measures are not a substitute for ex ante regulation. Indecopi powers are not designed nor aimed at complementing or supplementing the shortcomings of market regulation. In regulated markets, Indecopi intervention is only granted when the challenged behavior is not subject to the overseeing powers of specialized regulatory bodies. Interim measures cannot correct faulty regulation and are only applicable on a case-by-case basis (they will not have a general impact on regulated firms but only to those subject to the investigation).

2.3. Interim measures and other enforcement tools

41. Indecopi has not used interim measures as tools to negotiate commitments (settlements). Under Peruvian competition law, settlements are only discussed after an intention to settle has been formalized and the commitments in the context of settlements are offered by the investigated parties, afterwards, they are subject to negotiation with the administrative prosecutor and, if deemed adequate, approved by the Commission.

42. In the hypothetical of a settlement offer after an interim measure has been approved (which has not yet happened in an actual case), depending on the nature of the commitments, the injunctive measure may be replaced by those commitments, once approved.

2.4. Other considerations

43. Even though the judiciary has jurisdiction to review all decisions of Indecopi bodies, including those regarding interim measures, as these decisions have been sparsely taken, there is no experience that may give an idea of how prone or reluctant judges would be to confirm or revert interim measure decisions.
44. Also, regarding international cooperation, so far Indecopi has not had an experience in co-operating with other competition authorities in the context of interim measures.
45. Finally, as interim measures have almost never been imposed, to this date no study on the effects that interim measures have had in specific cases or markets has been made. Also, so far there have not been any initiatives, reforms or considered proposals to reform rules on interim measures.