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**Working Party No. 3 on Co-operation and Enforcement**

**Interim Measures in Antitrust Investigations – Summaries of contributions**

This document reproduces summaries of contributions submitted for Item 2 of the 135<sup>th</sup> OECD Working Party 3 meeting on 21 June 2022.

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

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## *Summaries of contributions*

This document contains summaries of the various written contributions received for the discussion on Disentangling Consummated Mergers – Experiences and Challenges (138th Meeting of the Competition Committee on 22-24 June 2022). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

## *Argentina*

This written contribution deals with interim measures within the specific scope of Antitrust.

As a warm-up, a conceptualisation of these procedural remedies is provided, highlighting their particular usefulness in the framework of the antitrust investigations carried out by the National Commission for the Defence of Competition of Argentina.

The issuing of interim measures in all types of proceedings requires proving the plausibility of the right and the danger of delay. However, in the particular scope of the antitrust system, the measure must be issued to safeguard the legal interest protected by the Antitrust rules, i.e., the general economic interest.

An analysis is made through the evolution of the regulatory framework. The progress of the system in its constitutional aspect and its consequent influence within competition law are considered. Such progress materialised in several legislative reforms, which led to the enactment of Acts 25 156 and 27 442, whose particularities and differences are analysed herein.

To illustrate the use of this tool, two cases involving the National Commission for the Defence of Competition and the Antitrust Enforcement Authority are discussed.

In particular, the Dow case and the case law resulting from the Whatsapp/Facebook case are highlighted. These are two important precedents, not only because of their impact on the respective markets and their social implications but also because the interim measure in the "Whatsapp/Facebook" case was upheld by the courts.

It is worth noting that, although the interim measures were originally specifically regulated for anti-competitive conduct proceedings, their application was also extended to merger proceedings. This situation is highlighted in section V of this contribution.

To summarise the influence and importance of interim measures in antitrust matters, a brief conclusion is drawn on the challenges in the use of this tool.

## *Belgium*

In application of articles IV.71-73 of the Code of Economic Law (CEL) interim measures can only be granted in respect of restrictive practices for which a case has been opened and that are the object of an investigation. They can be imposed by the Competition College of the BCA at the request of a complainant, of the Competition Prosecutor General (Auditeur Général) or of the Minister with competence for the sector concerned. (art. IV.72, §1).

The hearing must in principle be organised within one month after the request, and the College must decide within one month after the hearing.

The BCA regularly makes use of its powers in respect of interim measures. It took since the reform of the interim measures procedure in 2013 24 interim measures decisions (granting or refusing; 14 in the last three years).

The BCA can impose any measure the College considers appropriate to suspend restrictive practices that are the object of an investigation when it is urgent to avoid a situation that may cause serious and imminent prejudice to the affected undertakings that would be difficult to repair, or harmful to the general economic interest (article IV.71 CEL).

Constant case law (already developed by the Brussels Court of appeal before the establishment of the BCA and consistently confirmed since then) requires that it should not be manifestly unreasonable to consider that a practice might be in infringement of competition law.

In practice the more decisive considerations are the assessments of the potential prejudice for the applicant in case measures are refused but the authority decides in the main case that there has been an infringement, and of the prejudice to the defendant in case measures are granted but the authority decides in the main case that there has been no infringement (article IV.73, §2 CEL).

## BIAC

Recently, interim measures<sup>1</sup> in competition matters have gained renewed attention from competition enforcement authorities, scholars, and practitioners. In particular, the European Commission's (EC) recent imposition of interim measures for the first time in almost two decades—banning Broadcom from enforcing or entering into exclusive contracts in the EC's abuse of dominance investigation in October 2019—brought the issue to the forefront. A number of recent OECD Competition Committee meetings on other topics also touched upon some aspects of interim measures in an indirect way.<sup>2</sup> In this paper, BIAC discusses recent discussions and proposals to reform the European Union's interim measures procedures to make it easier and faster for the EC to issue interim measures in antitrust investigations.<sup>3</sup> BIAC recommends that competition enforcement authorities use interim measures judiciously and sparingly as they were originally intended.

Commentators generally appear to support the proposition that there may be room for more frequent use of interim measures in appropriate cases.<sup>4</sup> However, some observers view that the costs of false positives can be significant,<sup>5</sup> while others appear to disregard or discount such costs even though they mention such costs.<sup>6</sup> BIAC believes that such costs and other potentially adverse consequences should not be lightly dismissed.

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<sup>1</sup> OECD Call for Contributions Re: Roundtable on “*Interim Measures in Antitrust Investigations*” (Feb. 14, 2022) (on file with author) (“Interim measures are protective and corrective tools that may be adopted while investigating possible infringements. The main objective of interim measures is preventing anti-competitive harm that may occur before a decision on the merits.”).

<sup>2</sup> OECD, Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings, DAF/COMP(2010)11 (Oct. 5, 2011), <https://www.oecd.org/daf/competition/48825133.pdf> (roundtable held in June 2010); *Abuse of Dominance in Digital Markets*, OECD, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm> (roundtable held in December 2020); and *The Role of Competition Policy in Promoting Economic Recovery*, OECD, <https://www.oecd.org/competition/role-of-competition-policy-in-promoting-economic-recovery.htm> (roundtable held in December 2020).

<sup>3</sup> The Call for Contributions for this session explicitly excludes interim measures in the merger control and private enforcement contexts.

<sup>4</sup> Despoina Mantzari, *Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets*, (Mar. 2020), <https://ssrn.com/abstract=3544877>; Alexandre Ruiz Feases, *Sharpening the European Commission's Tools: Interim Measures*, 16 EUR. COMPETITION J. 404 (2020); Heike Schweitzer, *The New Competition Tool: Its Institutional Set-Up and Procedural Design*, Expert Report (2020), [https://ec.europa.eu/competition/consultations/2020\\_new\\_comp\\_tool/kd0420574enn.pdf](https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420574enn.pdf); Alex Burnside & Adam Kidane, *Interim Measures: An Overview of EU and National Case Law*, e-Concurrences Interim Measures, Art. No. 86718-9 (June 7, 2018), [www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law](http://www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law).

<sup>5</sup> Bo Vesterdorf, *Revival of Commission Interim Measures?*, CPI ANTITRUST CHRON. (Oct. 2019), <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/10/CPI-Vesterdorf.pdf>; Marcel Meinhardt & Sinem Süslü, *Interim Measures in Competition Law – Curse or Blessing?*, KLUWER COMPETITION LAW BLOG (Dec. 1, 2021), <http://competitionlawblog.kluwercompetitionlaw.com/2021/12/01/interim-measures-in-competition-law-curse-or-blessing/>; Mel Marquis, *Interim Measures*, in GLOBAL DICTIONARY OF COMPETITION LAW (Concurrences Art. No. 12304), <https://www.concurrences.com/en/dictionary/Interim-measures>.

<sup>6</sup> Mantzari, *supra* note 4; Feases, *supra* note 4.

BIAC recommends that competition enforcement authorities and legislative bodies take a well-balanced approach and use interim measures judiciously, as they were intended to be used in emergency situations. BIAC also believes that considerations of due process and procedural fairness should be more carefully scrutinized in situations where agencies are empowered to impose interim measures.

## *Brazil*

The Brazilian antitrust authority can adopt interim measures in order to cease the harm, preserve competition and protect consumers, whenever the *fumus boni iuris* and *periculum in mora* legal prerequisites are fulfilled. This document presents two recent interim measures imposed by CADE in digital markets. In iFood's Enquiry, the main issue raised by the plaintiffs rested on exclusivity clauses imposed to restaurants. By favouring restaurants with exclusivity agreements, iFood supposedly influenced restaurants to adhere to its more restrictive business model, foreclosing the market for other platforms. In Facebook-Cielo case, an agreement between the two companies to establish a new payment method through WhatsApp Business was broadly announced by the press. Cade imposed the interim measure based on the concern that there was a great risk of exclusive dealing, whether *de facto* or granted by an agreement, possibly excluding Cielo's competitors from the new payment method and reducing consumer's options. After the parties clarified they did not pursue a relationship of exclusivity, Cade lifted the interim measure. The examples illustrate the challenges posed to antitrust authority in the context of digital markets. The context of the high-speed development of innovative businesses models and of highly dynamic markets increases the pressure on the antitrust authority to seek timely and suitable solutions.

## *Colombia*

This contribution is about the use of interim measures in antitrust investigations by the Colombian Superintendence of Industry and Commerce (SIC). The document describes the framework for the application of interim measures within the administrative procedure in Colombia, provides relevant aspects and objectives of the measure, and includes a case example as guidance on how this tool has been applied when enforcing competition law in Colombia.

## *Costa Rica*

In the framework of Costa Rica accession process to the Organization for Economic Cooperation and Development (OECD), Costa Rica's competition policy underwent a reform that strengthened two competition authorities, Superintendence of Telecommunications (SUTEL), a sectoral authority specializing in telecommunications, and the Commission to Promote Competition (COPROCOM), the procedures, instruments, and tools at its disposal to fulfil its obligations.

Before the enactment of the 2019 Competition Reform Act, Law 9736, regarding interim measures, Law 8642 states: *"during the procedure, Sutel may impose the interim measures necessary to ensure the outcome of a sanctioning procedure (...)"*. That power to issue interim measures at any stage of the procedure was reserved by the law only to the Council of SUTEL, for which it had to apply in a supplementary manner the provisions of Law 6227 and the *Contentious-Administrative Procedural Code*, Law 8508. This regulations only establish the power to impose precautionary measures when requested by a party.

In a second stage, Law 9736 introduced significant reforms, SUTEL Council continued to be the decision-making body of the sectoral competition authority, but it created a new procedure for analyzing and sanctioning infringements to competition regulations was introduced, a new organizational structure and a new system of interim measures, all adjusted to the needs of the application of competition regulations. Regarding interim measures, Law 9736 also establishes a special regime and provides that they may be issued, at any time during each stage of the special procedure, by the respective body (that is, both the Head of Investigation, the Head of Instruction such as the Council of SUTEL), *ex officio* or at the request of the plaintiff or any other interested. As to the content of the interim measures, the new law states that it is possible to issue those that are: *"...appropriate and necessary to protect and provisionally guarantee the object of the special procedure and the effectiveness of the possible resolution"*.

As it can be seen, **the reform significantly modernized the system of interim measures in the field of competition. It extended the competent authorities to issue them, including the possibility to impose them not only to the Superior Body but to the heads of the investigation and instruction stages, such as those entitled to request them.** It also clarified the scope of these possible measures for the specific case of competition procedures.

Despite having been empowered since its creation to issue interim measures in competition proceedings, SUTEL's experience has been limited, which makes it difficult to determine the scope, effectiveness, and follow-up actions required. Prior to the reform introduced by Law 9736, two requests for interim measures were registered, both in procedures related to vertical restraints, which were rejected by SUTEL Council on the grounds that not all the standards were met. Since its implementation, two requests have been submitted, both during the preliminary investigation phase, one for alleged vertical restraints and the other one related to a possible case of bid rigging. None was imposed by the Head of investigation, since it was also considered, in both cases, that not all the standards requirements were met.

For purposes of legal certainty, and the efforts to generate internally the necessary capacities for the correct application of the new competition regulations, according to the commitments assumed as a country in the process of accession to the OECD, *a Guideline of Interim Measures Procedure* is being prepared. In terms of its possible content and

effectiveness, SUTEL must develop capacities and experience for the issuance of the most effective interim measures for each case, as well as the follow-up actions required.

## Croatia

During the proceedings in competition law cases sometimes occur situations which cause risk of serious and irreparable damage to competition and thus, require urgent action. In order to prevent such serious and irreparable damages, competition authorities have the power to impose interim measures in the on-going competition proceedings. The interim measures are imposed on the basis of a *prima facie* finding of infringement of competition rules and when the occurred irreparable damage cannot be adequately remedied by final decision at the conclusion of the proceeding. On one side, interim measures present useful instrument when quick remedy action needs to be taken, but on the other side, they should be applied with caution and in more exceptional circumstances unlike some other instruments, such as commitments.

In last 10 years, the CCA imposed interim measures in three cases, so, interim measures are not so regularly used but only when the criteria of imminent harm or danger is established with careful analysis in each case. Some of the criteria used in the practice of the CCA include limiting the access to the market concerned for the competing undertakings by tying the prices, exclusionary practices, negative effect on the consumers relating to the choice of products, price and quality, prevented undertakings from the provision of services which they had been discharging before changed provisions entered into force, preventing final consumers from freely choosing the provider of the services concerned, significant and irreparable harm for competition when the undertaking concerned was authorized dealer or repairer for years and harm for the consumers.

Interim measures are mostly applied in cases of alleged abuse of a dominant position and in vertical agreements with problematic provisions from competition law point of view. They can also be good for new digital markets as it has been proven that they are adequate for fast moving and growing markets. In that respect, there is a need to explore if the usually used interim measures are adequate also for digital markets or if some new types of interim measures should be developed in order to address imminent harm coming from big digital platforms.

## *European Commission*

Prior to the entry into force of Regulation 1/2003, the power to impose interim measures in the field of EU antitrust law was not provided for by EU legislation. It was the case law that shaped a two-legged test for interim measures. Under that regime, the Commission adopted interim measures in eight cases concerning abuse of dominance and vertical restraints. Article 8 of Regulation 1/2003 finds its origins in that two-legged test of the case law. In the post-Regulation 1/2003 era, the Commission's policy towards interim measures has further evolved, leading to the adoption of the first interim measures decision under Regulation 1/2003 in the *Broadcom* case.

The two-legged test requires, firstly, that the practice of an undertaking gives rise to a *prima facie* infringement of EU antitrust law, and, secondly, that the interim measures are necessary to prevent a situation that is likely to cause serious and irreparable damage to competition ("urgency"). As regards the finding of a *prima facie* infringement, the case-law provides that the level of certainty required cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy. The Commission merely needs to consider whether the facts and legal situation indicate "at first sight" that the undertaking has infringed Article 101 or 102 TFEU, or in other words, whether there are "serious doubts" as to the compatibility of the undertaking's conduct with those Articles. As regards the requirement of urgency, it is only satisfied if, to avoid the risk of serious and irreparable damage to competition, the interim measures need to take effect before a decision on the substance of the case could be taken. In this context, urgency does not necessarily mean imminence, as the recent *Broadcom* case has shown.

It should be noted that the conditions of the "prima facie infringement" and "urgency" are interdependent in that the strength of the "prima facie infringement" case may be taken into account in the assessment of urgency. Furthermore, the principle of proportionality has to be respected. This means notably that any interim measure must be restricted to what is necessary in the given situation. In this respect, the public interest in avoiding a serious and irreparable damage to competition needs to be weighed against the likely impact of the envisaged interim measures on the undertaking concerned.

To adopt interim measures, the Commission must open proceedings pursuant to Article 2 of Regulation 773/2004. Article 27 of Regulation 1/2003 applies to interim measure cases so the undertaking against which interim measures may be adopted must have the right to be heard and reply in writing to the Commission's objections. In its decisional practice, the Commission has already adopted various types of interim measures. For example, it ordered to withdraw an agreement and inform its competitors on its policies, prohibited the offer or supply of products at different prices or terms, prohibited the enforcement of exclusionary agreements or granted access to specific facilities.

While the system for imposing interim measures has allowed the Commission to intervene in certain appropriate cases, including under Article 8 of Regulation 1/2003, the ongoing evaluation of Regulation 1/2003 will look into whether adaptations are warranted in order to foster an effective use of this tool, also taking into account the experience of NCAs. Even pending such evaluation, the Commission is committed to ensuring that effective competition is preserved in digital and non-digital markets and to making the best use of the current framework for interim measures to that end.

## *France*

The challenges posed by the digitalisation of the economy have underscored the importance for competition authorities of having effective means of action to respond to rapid market changes.

In this respect, interim measures appear to be a particularly well-suited tool as regards competition concerns in digital markets, where rapid intervention is sometimes the only way to prevent the behaviour of a dominant player from eliminating competition, or fatally damaging commercial partners that are highly dependent on its ecosystem.

Beyond the issues specific to the digital economy, the *Autorité* (and before it the *Conseil de la concurrence*) has had the opportunity to test the flexibility and effectiveness of interim measures on numerous occasions and in various sectors. With more than thirty decisions issued since the 2000s (for an average investigation time of six months), the *Autorité* has adopted more interim measures than any other competition authority in the European Union.

The relevance of this tool appears all the more important today as the modalities of its implementation have recently been extended with the transposition into French law of the ECN+ Directive<sup>7</sup>, which gave the *Autorité* the power to start interim measure proceedings ex-officio.

The *Autorité* intends to build on its experience to make the best use of this tool, while ensuring that recourse to it is reserved for cases that justify it.

Indeed, while interim measures are a powerful tool for maintaining the economic public order, their implementation by the *Autorité* is subject to strict conditions originating in law and case law. The correct implementation of the injunctions imposed, which must satisfy the principles of necessity and proportionality, is monitored by the *Autorité* until the adoption of the decision on the merits of the case.

These principles have found recent illustrations in the digital sector, through two cases where interim measures were ordered: the Google “Amadeus” case (decision no. 19-MC-01) and the Google “related rights” case (decisions no. 20-MC-01 and no. 21-D-07).

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<sup>7</sup> Ordinance No 2021-649 of 26 May 2021 on the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

## *Israel*

In June 2022, Working Party No.3 on Co-operation and Enforcement will hold a Roundtable on "*Interim Measures in Antitrust Investigations*". Interim measures, as defined therein, are "*Protective and corrective tools that may be adopted while investigating possible infringements. The main objective of interim measures is preventing anti-competitive harm that may occur before a decision on the merits*"<sup>8</sup>. The discussion concerning interim measures has recently risen within the international competition community, *inter alia* on the backdrop of the challenges posed by the dynamic digital economy sector. However, the use of this tool in the context of antitrust enforcement – its essentiality alongside the challenges it may pose – is continually deliberated in additional contexts as well.

On this backdrop, this contribution will discuss the use of an interim measure within the context of the Israeli competition regime. It will do so, specifically with reference **the temporary seizing of money and property** within the context of criminal investigations and procedures. To this end, we will discuss the normative framework and considerations involved in imposing such measure<sup>9</sup>.

Prior to elaborating on the above, this paper will put forth the general context of criminal investigations and prosecution of cartels and bid-rigging offences under the Israeli competition regime; and on this backdrop explore why the use such interim measure is an essential tool in the antitrust criminal enforcement toolbox.

In addition, this contribution will provide a brief overview of the Israel Competition Authority's (the "ICA") **advocacy efforts** with regard to **disqualification from public tenders and revoking of professional licenses**, following criminal investigations. While such advocacy efforts are not part of the enforcement regime, in essence and rationales the discussion regarding disqualification and revoking of licenses is a neighboring discussion to that of interim measures within the Israeli competition enforcement regime. In essence, disqualification and revoking of licenses, serve the same objectives as interim measures by preventing anti-competitive harm that may occur before a decision on the merits. Thus, discussion about these advocacy efforts are included in this contribution as well, and shall be addressed as an interim measure for the purpose of this paper.

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<sup>8</sup> Chairman's letter, 14 February 2022, calling for contributions in the context of the roundtable on "*Interim Measures in Antitrust Investigations*" (COMP/2022.026).

<sup>9</sup> The scope of this contribution does not include reference to other interim measures, such as in the context of Israeli civil and administrative competition regimes, including the mergers regime.

## *Japan*

Typical of the IT and digital sectors, complex and rapidly evolving markets have created many new challenges for competition authorities. One of the most important and difficult tasks for competition authorities is to resolve competition problems quickly, before problematic market structures take hold and it becomes difficult to restore competitive environment.

The Japan Fair Trade Commission (Hereinafter referred to as "JFTC".) has been tackling these issues flexibly and proactively in accordance with the characteristics of each case, and one of the tools of the JFTC to do so is the "urgent injunction", which is an interim measure based on the Antimonopoly Act (Hereinafter referred to as "AMA").

An urgent injunction is issued by the court, upon petition by the JFTC, to suspend an act that may violate the AMA when the court finds an urgent necessity to do so. Recently, the JFTC filed a petition to the court seeking an urgent injunction against suspected violation of the AMA by Rakuten Group, Inc. (Hereinafter referred to as "Rakuten".), a large digital platform operator in Japan.

In the contribution paper, we would like to introduce the outline of the urgent injunction system and related cases. We would also like to touch upon the relation with other tools of the JFTC to ensure the prompt elimination of suspected violations.

The JFTC has been handling cases of suspected AMA violations in the fast-moving digital market with an emphasis on restoring competitive environment in a timely manner, and the urgent injunction, which is an interim measure, can be positioned as one of the complementary tools to do so.

The JFTC will continue to take measures in the most appropriate manner, including the urgent injunction system, on a case-by-case basis considering market characteristics, to reliably and promptly eliminate suspected violations.

The paper highlights the several recommendations made by the CCSA to relevant authorities which bring about a more integrated, yet competitive transport sector. The engagements to bring about this transformation are ongoing

The CCSA trusts that this submission adds to the discourse and provides insights on this topic, from the perspective of an agency with a developmental mandate.

## *Latvia*

Interim measures are one of the enforcement tools that the Competition Council of Latvia ('CC') can apply. Article 5 of the Regulation 1/2003 and Article 30 of the national Competition Law<sup>10</sup> grants the CC power to adopt decisions ordering interim measures in investigations into possible infringements of Article 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'). Powers to order interim measures only extend to possible infringements impacting cross border trade with Latvia within the European Union ('EU') and do not cover investigations into national equivalents of abuse of dominance or prohibited agreements, or mergers.

The CC can adopt interim measures decision after an investigation has been launched into the alleged infringement of the EU competition rules. Parties are not precluded to lodge a complaint or submit relevant evidence regarding the necessity to order interim measures. However, interim measures are imposed on ex-officio basis.

As the competition proceedings are governed by the principles of the administrative procedure, the CC does not seek court order for interim measures. Adoption of the decision follows the same procedure and offers the same procedural rights as foreseen for a final decision. The CC issues statement of objections, to which the parties to the investigation can submit written replies. Oral hearing can be conducted, if requested by the parties. A decision ordering interim measures can be appealed before the Administrative Appeals Court ('Court'), which the first instance court for competition cases. An appeal with the Court has to be lodged within 10 days of the decision<sup>11</sup>. Pursuant Article 30(3) of the Competition Law decision can be appealed by the undertaking, which is the addressee of the interim measure. The law does not foresee for other parties to the investigation to bring an appeal.<sup>12</sup> Examination of the appeal is conducted in an expedited procedure within 14 days<sup>13</sup>, including a Court hearing.

With the obligation to transpose ECN+ Directive<sup>14</sup> into the national legislation, currently the draft law foresees two changes to the current regime for interim measures.

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<sup>10</sup> Competition Law of Latvia. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

<sup>11</sup> Article 30(3) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

<sup>12</sup> See also: 20.05.2020. decision of the Constitutional Court of Latvia not to initiate proceedings in complaint lodged by a third party to the investigation. Available in Latvian <https://www.satv.tiesa.gov.lv/decisions/kolegijas-2020-gada-5-maija-lemums-pieteikums-nr-67-2020/> Third party – pursuant Article 28 of the Administrative Procedure Law of Latvia. Available in English <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law>

<sup>13</sup> Article 31(1) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

<sup>14</sup> 11.12.2018. Directive 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

First, the standard of proof for finding the infringement has been lifted to finding a *prima facie* infringement.

Second, judicial review has to be conducted and a decision by the Court delivered within 14 days. Currently, the Competition Law allows for a slight interpretation, that judicial review itself can take up to 14 days, without specifying the timeframe for adopting Court's decision.

## Peru

The report “*Interim Measures in Antitrust Investigations*” prepared by the Peruvian Competition Agency INDECOPI 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 before or after formal charges have been introduced by the prosecutorial body, the Directorate for Investigation and Promotion of Free Competition of Indecopi 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. The contribution will also cover key policy considerations regarding the assessment and introduction of interim measures.

## *Portugal*

Interim measures can be an important tool to ensure that, during an antitrust investigation, the potential infringement does not seriously and irreparably harm competition. This importance has been recognized by both the Portuguese and EU legislators.<sup>15</sup>

Under the Portuguese Competition Act<sup>16</sup>, the AdC has the power to impose interim measures concerning an anticompetitive practice under investigation in order to prevent serious competition harm, which may be irreparable or difficult to repair, whenever the evidence available indicates that the practice is about to cause such harm.

In 2020 the AdC adopted interim measures in a case concerning a so-called “no-poach” agreement,<sup>17</sup> whereby football clubs of the Professional Football League in Portugal agreed not to hire players who unilaterally terminated their employment contract with other clubs invoking issues related to the Covid-19 pandemic.

Given the nature and characteristics of the agreement, as well as the potential harm to competition, its seriousness and irreparability – or difficult reparation –, the AdC ordered the immediate suspension of the agreement, requested the Football League to communicate the suspension to its member clubs and the public in general, and imposed on the Football League a periodic penalty payment for each day of delay in adopting the interim measures.

The AdC’s swift approach and decision to order the immediate suspension of the agreement was necessary to effectively prevent the reduction of competition between clubs and consumer harm.

Following a statement of objections in April 2021, the AdC adopted a final decision in April 2022, imposing fines on the Football League and the football clubs amounting to a total of 11.3 million euros. It concluded that the agreement reduced the quality of football matches and thereby harmed consumers, by reducing the competitive environment and pressure between the clubs and preventing the recruitment of players, resulting in the loss of players in national competitions.

While so far the AdC’s experience in imposing interim measures has been limited to a few instances, the AdC will continue considering the application of this type of measures whenever they are deemed necessary and appropriate.

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<sup>15</sup> Regarding EU legislation, see Regulation (EC) no. 1/2003 and Directive (EU) 2019/1.

<sup>16</sup> Article 34 of Law no. 9/2012, of 8 August. Courtesy English translation available at: [https://www.concorrenca.pt/sites/default/files/documentos/legislacao/Law\\_19\\_2012\\_bilingual\\_en\\_0.pdf](https://www.concorrenca.pt/sites/default/files/documentos/legislacao/Law_19_2012_bilingual_en_0.pdf).

<sup>17</sup> Decision (only in Portuguese) and press release (in Portuguese and English) available at: [https://extranet.concorrenca.pt/PesquisAdC/PRC\\_OR\\_INC\\_OR\\_PCC\\_Page.aspx?Ref=PRC\\_2020\\_1&isEnglish=True](https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?Ref=PRC_2020_1&isEnglish=True).

## *Slovak Republic*

The power to impose interim measures was part of the toolbox of the AMO for many years pursuant to the general act regulating the administrative procedure. In June 2021, the power to impose interim measures was introduced into the Act on Protection of Competition within the transposition of the *EU Directive empowering the competition authorities of the Member States to be more effective enforcers 2019/1 and to ensure the proper functioning of the internal market*. The provisions regulating interim measures stem from the conditions of the EU law. Although, the new provisions have not been applied in practice yet, AMO imposed interim measures under previous legal framework in several cases. The so far experience shows that the necessity or the urgency to act may arise in any sector, although, it might be more relevant in the context of fast-moving markets. The contribution elaborates on the key conditions of imposition of interim measures and provides some views derived from the experience.

## *South Africa*

South Africa's competition legislative framework is structured such that the Competition Commission of South Africa ("CCSA") is not expressly conferred with the power or entitlement to bring interim relief measures. That power vests in the South African Competition Tribunal ("Tribunal"), and complainants, within the context of a complaint which has been filed with the CCSA. The Competition Act No. 98 of 1998, as amended (the "Competition Act") under section 58, empowers the Tribunal to grant interdictory relief, however, whether this power can be extended to interim interdictory relief, has yet to be tested in our jurisprudence. The focus of the paper therefore relates to interim relief under section 49C.

Section 49C of the Competition Act allows a complainant alleging a contravention of any prohibited conduct under the Competition Act, to approach the Tribunal for interim relief from the harm alleged to be suffered as a result of such conduct. This interim relief (interdict or injunction) can be granted prior to the conclusion of the CCSA's investigation of the alleged contravention to protect the complainant's rights, in the interim.

Interim relief under section 49C of the Competition Act is an exceptional remedy which has only been granted in limited circumstances. The Tribunal grants such relief where it is "*just and reasonable*" to do so, considering amongst others, the three factors listed in section 49C(2)(b). These are the existence of a correct until proven otherwise (i.e., *prima facie*) right; the existence of serious or irreparable harm; and where the balance of convenience lies. These factors are to be reckoned holistically in determining whether granting interim relief would be just and reasonable.

The exceptional nature of relief under section 49C is evident in the Tribunal's historically cautious approach to granting such relief. This cautious approach can be attributed to the concern of imposing restrictive measures onto the business of a firm who has not determinatively been found in contravention of the Competition Act. This concern may be slowly diluting with the growing concern that an overly cautious approach will result in anti-competitive conduct continuing during an investigation and generate harm that cannot be compensated for, nor remedied.

The South African approach takes cognisance of this important balancing act, by empowering the Tribunal with a discretion as to whether the granting of the interim relief would be reasonable and just in the circumstances. Within this consideration, the Tribunal is to have regard to, *inter alia*, the balance of convenience in granting the relief. As a result of the exceptional nature of the relief, the preservation period is of a limited duration. Experience has shown that investigations into effects-based contraventions render the six-month period insufficient. This is exacerbated by the fact that section 49C envisages that the prosecution of such investigations would also be within this six-month window. This therefore renders the interim protection largely insufficient and cannot be said to offer interim protection pending the finalisation of the litigation.

## *Sweden*

In this paper, Sweden shares its experiences and lessons learned with the successful imposition of interim measures in two cases. The Swedish Competition Authority (SCA) has in recent times begun considering interim measures more often and has imposed such measures in two cases in the last few years, one concerning a likely abuse of a dominant position and one concerning likely anticompetitive agreements in vertical relationships.

The contribution begins by summarising the preconditions for interim measures according to the Swedish Competition Act. Following that, the two cases where interim measures were adopted are presented. Lessons learned from these two cases are then discussed, particularly with regard to questions of digital markets and the risk of “tipping”, the importance of clarifying the legal threshold for imposing interim measures, and how to identify a case where irreparable harm to competition may occur.

## *Switzerland*

The Swiss Competition Commission (COMCO) has imposed interim measures on several occasions over the last years. According to its published practice, the COMCO dealt with interim measures in more than 20 cases. This although the hurdles for issuing interim measures are rather high: There must be a threat of a disadvantage for effective competition that cannot be easily remedied. It must be urgent to issue interim measures. The measures have to be proportionate. At least, a positive prognosis in the main case is not mandatory, but may optionally be taken into account if it is clear.

For the COMCO, time is an important factor when deciding on interim measures: Interim measures allow the competition authority to intervene quickly, whereas waiting until the final decision could cause hardly repairable damage. However, taking interim measures is costly: At the beginning of the investigation, the COMCO must issue an appealable order, which, in most cases, is contested before the courts. The court proceedings can take a long time and thus block the investigation of the COMCO.

Due to the extent and complexity of administrative antitrust proceedings, it is generally difficult to find the right balance between a quick intervention and a sufficient investigation of the facts for the prognosis in the main case.

## *Ukraine\**

For the AMCU the issue of effective responding to changes in the markets became especially relevant during the imposition of martial law and seems to be even more challenging in the postwar period. Today, it is important for the AMCU to achieve a result, related to the settlement of the conflict in the markets, in the shortest time possible and with optimal costs.

Thus, the AMCU plans to make active use (depending on the legal and factual grounds) of two tools to prevent irreparable damage to competition: i) to take interim measures (according to Ukrainian competition law, these are preliminary decisions) or ii) to provide binding recommendations to undertakings.

So far, the AMCU was very cautious in using interim decisions, in particular in cases on abuse of a dominant position, as well as in cases on protection against unfair competition. Instead, the AMCU uses recommendations more confidently.

Pursuant to Article 47 of the Law of Ukraine on Protection of Economic Competition, the AMCU can apply an interim decision: i) only on the initiative of the applicant; and ii) in the framework of an already opened case on violation of the legislation on protection of economic competition.

An important condition for the application of the interim decision must be to prove the irreversibility and impossibility of recovering the consequences of the violation of the law in view of the damage caused to the applicant. An interim decision may be made on: i) prohibition for a person (a defendant) to perform certain actions; ii) obligatory performance of certain actions.

An interim decision can be appealed: i) to the court; or ii) to the AMCU's body of the highest level. That is, interim decisions can be made not only by the central office of the AMCU, but also by regional offices of the AMCU. Accordingly, interim decisions made by regional offices of the AMCU can be appealed to the AMCU headquarters. In some cases, such a procedure for reviewing the grounds for the application of interim decisions is faster for the defendant than consideration in court.

The AMCU recommendations are a very effective tool. In fact, such a tool is used before the proceedings are instituted or in the early stages of an investigation in cases where the market behavior of the undertaking, although showing signs of infringement, has not yet caused significant harm to the public or individuals. The use of such tool saves public resources and effectively stops violations (of course, if the defendant agrees with the recommendations and voluntarily undertakes the corresponding obligations). The main purpose of the recommendations is to protect the public interest for effective competition in the market, although some of them may be provided to protect the private interest as well. Interim measures and recommendations are not identical tools, but have a common goal - to prevent negative consequences and irreparable damage to competition.

## *United States*

In the United States, the preliminary injunction is the primary interim measure that plaintiffs, including federal antitrust enforcement agencies (the “agencies”), utilize pending trial.<sup>18</sup> Preliminary injunctions are an embedded feature of the U.S. judicial system,<sup>19</sup> and can serve a critical role in providing a temporary injunctive remedy that “preserve[s] the relative positions of the parties until a trial on the merits can be held.”<sup>20</sup>

Federal statutes specifically provide for preliminary injunctions when necessary for the enforcement of the antitrust laws.<sup>21</sup> This tool can prevent antitrust defendants from causing irreparable harm to competition during the course of litigation. In doing so, preliminary injunctions play a valuable role in ensuring that litigation remains a viable tool for preserving competition.

Historically, preliminary injunctions in competition matters have been utilized most often in the context of mergers, but their availability and use are broader. This submission provides an overview of preliminary injunctions in the United States in the specific context of supporting federal enforcement of the competition laws. Most of the agencies’ experience in seeking preliminary injunctions to enforce the antitrust laws is with merger review, but a few cases involving conduct are summarized in this submission.

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<sup>18</sup> Other interim measures in the U.S. system, such as motions for stays pending appeal and temporary restraining orders (stop-gap pre-trial temporary injunctions issued by a judge, without prior notice to the defendant, to prevent immediate irreparable harm prior to a preliminary injunction hearing), are available to the agencies when necessary and appropriate but are not examined in this submission.

<sup>19</sup> Fed. R. Civ. P. 65(a)(1) (federal courts may issue preliminary injunctions).

<sup>20</sup> *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

<sup>21</sup> 15 U.S.C. §§ 4, 25, 26, 53(b)(2) (authorizing the enforcement agencies and private antitrust plaintiffs to seek preliminary injunctions).