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

Working Party No. 3 on Co-operation and Enforcement

Interim Measures in Antitrust Investigations – Note by Latvia

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This document reproduces a written contribution from Latvia submitted for Item 2 of the 135th OECD Working Party 3 meeting 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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1. Powers and standards to impose interim measures

1.1. Has your authority the power to directly impose interim measures in antitrust investigations? Can interim measures be imposed ex officio and/or upon complaint? Would the authority need to seek a court order for interim measures?

1. 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 Law¹ 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.

2. 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.

3. 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 is the first instance court for competition cases. An appeal with the Court has to be lodged within 10 days of the decision². 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.³ Examination of the appeal is conducted in an expedited procedure within 14 days⁴, including a Court hearing.

¹ Competition Law of Latvia. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

² Article 30(3) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

³ 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>

⁴ Article 31(1) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

1.2. Does your authority regularly make use of the power to impose (or seek) interim measures? If so, in which cases have interim measures been imposed in the last years?

4. The CC has made use of the power to impose interim measures once the last 5 years. Interim measures were imposed in an Article 102 TFEU investigation into a possible abuse of dominance in the waste management market in Riga municipality⁵.

1.3. Does your authority enjoy full discretion regarding the type of interim measures (e.g. positive injunctions and cease-and-desist orders) it can impose? What are the most common interim measures imposed in your jurisdiction? Are there any legal and practical differences in imposing interim measures contemplating a requirement to act (positive injunctions) and interim measures requiring to refrain from acting (negative injunctions or cease-and-desist orders)?

5. According the Article 30(2) of the Competition Law the means of interim measures is a decision, which imposes an obligation upon market participants within a specified time period to perform specific activities or prohibits specific activities. Therefore the law does not prescribe for specific measures and provides for a full discretion to impose positive and negative obligations, which according to the facts of the case are the most appropriate to preserve effective competition on the market.

6. The CC has imposed both positive and negative obligations. The CC has ordered to suspend operation of the contract in part, which *prima facie* was in breach of Article 102 TFEU, as well as to revoke notices of termination of previous contracts, and accordingly inform contracting parties. The CC also ordered to submit a clear plan on how addressee of the decision were planning to comply with the rules of effective competition in the market in question.

7. There is no material, procedural or practical difference, when contemplating either negative or positive obligations.

1.4. What are the main criteria to set the duration of interim measures? Does the law set a maximum length? Do interim measures produce immediate effects? If so, are there exceptions?

8. Decision to impose interim measures takes effect upon notification of the decision to the addressee.⁶ An appeal of a decision on interim measures does not suspend the effect of the decision on interim measures and its enforcement.⁷ Effect and enforcement of the interim measures' decision does not differentiate from that of a final decision. The law does not foresee exceptions. Duration of interim measures will take into account all the relevant factors and can be set until the final decision is adopted, which is the maximum length.

⁵ CC 09.11.2019. press release. Available in English <https://www.kp.gov.lv/en/article/competition-council-adopts-decision-imposing-interim-measures-regarding-waste-management-riga>

⁶ Article 27.¹ of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

⁷ Article 31(2) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

1.5. What are the key principles that your authority should observe when imposing interim measures? What are the legal standards to impose interim measures? Are there any conditions that are particularly difficult to meet?

9. The key principles to impose interim measures are stipulated in the Competition Law.
10. First, there has to be sufficient evidence, which testifies to the possible infringement of the EU competition rules.
11. Second, non-termination of this infringement may cause significant harm to the competition.
12. Third, that harm would be irreversible, making it impossible to effectively reverse by imposing obligations at the time of the adoption of the final decision.⁸
13. The measure has to be proportionate and strike a balance between legitimate interests of addressees of the decision and the public interest to preserve effective competition on the market. For the measure to be effective, it also must be timely. If the measure is considered too late, that increases associated costs either for addressees or the market.

1.6. What are the degree of probability and the evidentiary standards to show a *prima facie* infringement?

14. The Competition Law does not explicitly make a reference to establishing a *prima facie* infringement in order to impose interim measures. As mentioned in the previous answer, there has to be sufficient evidence, which testifies to the possible infringement. In abuse of dominance cases, before deciding on a possible infringement, the CC – first – has to delineate the relevant market and – second – show the dominant position of the undertaking in that market. According to the decisional practice of the CC these two elements are to be shown clearly and to the requisite standard of a final decision.
15. In the decision regarding waste management market in Riga municipality, the CC collected all the relevant and available evidence *ex officio* and from the parties under the investigation. Having exhausted all channels of gathering evidence and having also not identified any evidence to the contrary on top of establishing infringement according to the standard set in the Competition Law, the CC proceeded with imposing interim measures. Parties did not produce or submit any materially new evidence later on in the investigation following imposition of interim measures.

1.7. What is the requisite standard to show urgency? Is your authority required to show irreparability of the harm? Is the assessment of irreparable harm related to competition or to competitors/third parties? To what extent is your authority required to assess likely effects and to take into account potential efficiencies/objective justifications?

16. Pursuant to Article 30(1) of the Competition Law the requisite standard for urgency is significant and irreversible harm to the competition in the market. It is a protected general

⁸ See: Article 30(2) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

public interest, which does not specifically zoom in on the irreparability of individual harm to harmed competitors or third parties.

17. Likely effects, potential efficiencies and objective justifications of the conduct by the dominant undertaking are considered as part of the showing a possible infringement of the EU competition rules. In the decision regarding waste management market, the CC considered all such evidence put forward by the parties the same way it would address them in a final decision.

1.8. How does your authority ensure effective compliance and monitoring with the interim measures being imposed?

18. For compliance and monitoring of interim measures the Competition Law prescribes the same enforcement tools as for the obligations foreseen in the final decision. First, the decision is public and all the interested parties are informed, that the dominant undertaking has been ordered to positively or negatively act on the market. In case of non-compliance, the CC will be informed promptly from the interested parties. Second, the CC may request information ex officio and, if interim measures are not observed, impose financial penalties for non-compliance.

2. Key policy consideration

2.1. What are the main considerations (and related costs for your authority) when assessing whether to impose interim measures? What is the impact of proceedings for interim measures on the main investigations?

19. One consideration when assessing imposing interim measures is whether harm to competition due to the conduct of the undertaking under investigation will be possible to reverse with the final decision of the CC. If the harm to competition at a later point in time is irreversible and the harm is substantial, then there are sufficient grounds for considering interim measures.

20. Another consideration is the evidence in the case file and whether it is sufficient to demonstrate infringement to the requisite legal standard, precisely delineate the relevant market and establish dominance of the alleged infringer. Latter two are important in cases of a possible abuse of dominance cases.

21. Interim measures are a part of the administrative procedure, which has been initiated to investigate a possible infringement of Articles 101 or 102 TFEU, and is part of that case file.

2.2. What kind of cases are best suited for interim measures? Are interim measures more appropriate for well-established or novel theories of harm? In which markets can interim measures be most effective?

22. Interim measures are better suited in the abuse of dominance cases. The CC would favour adopting interim measures by applying well-established theories of harm. In the CC's decisional practice interim measures have been applied in waste management market for foreclosure of the market.

2.3. Do the characteristics of digital markets call for the adoption of more interim measures? Should the thresholds for interim measures be the same in the context of digital markets as in traditional markets?

23. From a legal point of view of competition principles and rules, there is no distinction between digital markets and traditional market. The Competition Law treats both markets equally. Distinction should be addressed by sectoral legislation, if general competition enforcement tools are not sufficient.

2.4. Should interim measures be considered an effective complement or substitute for ex ante regulation, in particular in digital markets?

24. Based on the speed at which new regulation arrives, interim measures may be considered as an early substitute. But in a longer term, interim measures should be considered as a complementary tool, especially if the competition problem manifests in the market more often.

2.5. What is the interplay between interim measures and other enforcement tools such as commitments and remedies? Are interim measures an effective tool for negotiating commitments? Can interim measures serve as a tool to design remedies?

25. In its practice in abuse of dominance cases the CC has found, that in case an undertaking is cooperating, then submission of commitments is more motivated by prevention of a possible and eventual penalty, if instead of commitments' decision the conduct in question is addressed by a final decision finding an infringement.

26. Design of remedies is a function of whether there are competition concerns regarding future conduct in the market, after the interim measure decision is replaced by the final resolution or decision in the case. In that regard final decision can echo interim measures decision if remedies are still appropriate to impose.

2.6. Where third-party requests for interim measures are allowed, does your authority observe an increased number of complaints on the merits?

27. The CC imposes interim measures ex officio. Third parties do not have a standing in the interim measures proceedings. See also answer to question 1.1.

2.7. What procedural steps are required to impose interim measures? Is any of these requirements particularly burdensome? Is there an expedited procedure for imposing interim measures?

28. Interim measures are imposed in the same procedural framework and safeguards, as a final decision imposing remedies or legal obligations. The speed of the investigative procedure at the CC is at the full discretion of the authority. Expedited procedure is regulated in the law for the procedure of judicial review. Please see answers to questions 1.1. and 1.4.

2.8. Do interim measures raise due process issues? What are the key safeguards in place to ensure the rights of defence? Is the body/authority deciding on interim measures also responsible for the decision on the merits?

29. Procedural safeguards and due process is identical to cases if the CC would adopt a final decision. The only difference, which is regulated in the law, is the standard of proof of the infringement and irreversibility of the harm, that the decision has to demonstrate, and the speed of the judicial review. The CC decides on both – interim measures and the final decision on the merits.

2.9. What is the role of courts with regard to interim measures in your jurisdictions? How does the standard and the speediness of judicial review impact on decisions whether to impose interim measures? Are courts open or reluctant in granting interim measures?

30. Court reviews the validity of the decision of the CC to impose interim measures. The Court may either uphold the decision or annul it. There is no possibility to replace the decision of the authority by a decision of the Court. Court does not grant interim measures.

31. The speed of the judicial review of the interim measures' decision is regulated. Application of the party, to whom the decision has been addressed, has to be examined by the Court within 14 days after that application has been lodged with the Court.⁹ However, judicial review does not as such suspend operation of the interim measures' decision and obligations imposed therein.¹⁰ See also answer to question 1.1.

2.10. Does your authority have experience in co-operating with other competition authorities in the context of interim measures? Please describe. Are there particular obstacles to co-operation relating to interim measures?

32. No. There is no experience in cooperating regarding imposition of interim measures.

2.11. Have you observed an increased adoption of interim measures during COVID-19? If so, for what type of cases?

33. No. The last interim measures' decision was adopted in the waste management market in 2019 prior to Covid-19 outbreak.

2.12. Has your authority conducted any study on the effects that interim measures have (or could have) had in specific cases/markets? Have you observed any cases in which interim measures were insufficient, disproportionate or could have been avoided?

34. No studies have been conducted.

⁹ Article 31(1) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

¹⁰ Article 31(2) of the Competition Law. Available in English <https://likumi.lv/ta/en/en/id/54890-competition-law>

2.13. Has your jurisdiction undertaken reforms or considered proposals to reform interim measures? If so, please elaborate on these developments.

35. With the obligation to transpose ECN+ Directive¹¹ into the national legislation, currently the draft law foresees two changes to the current regime for interim measures.

36. First, the standard of proof for finding the infringement has been lifted to finding a *prima facie* infringement. See also answers to questions 1.5. and 1.6.

37. 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. See also answer to question 2.9.

¹¹ 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.