

# INTERIM MEASURES IN ANTITRUST INVESTIGATIONS

OECD Competition Policy Roundtable Background Note



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# Foreword

This note explores how interim measures are being applied in the context of antitrust investigations, as well as the implications for competition policy.

It identifies the legal standards and key principles that shall be observed when pursuing interim measures. The note also considers how certain procedural rules play a key role for this enforcement tool.

Next, the note considers several competition policy challenges when pursuing interim measures. It identifies theories of harm and market characteristics that can make interim measures more appropriate and effective. It also considers the various interests and costs associated with interim measures, and it analyses how judicial review influences these considerations.

Finally, it explains how interim measures can interact with other enforcement tools and it considers the scope and advantages of international co-operation.

This note concludes that interim measures can be a powerful tool to improve the effectiveness of antitrust enforcement and to preserve competition during antitrust investigations. Their use should be carefully considered though, with the objective of mitigating risks of false positives and false negatives, in addition to preserving due process.

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# 1. Introduction

Interim measures are granted by public authorities or courts with a protective and corrective objective, i.e. providing temporary relief pending the outcome of a case. In general, interim measures are only granted in exceptional circumstances. They typically require meeting two key conditions: the likelihood of success on the merits (*fumus boni iuris*) and the urgency to prevent harm (*periculum in mora*).

For the purpose of this background note, interim measures are temporary measures that may be adopted while investigating potential infringements of competition laws.<sup>1</sup> The main objective of interim measures is preventing anti-competitive harm that may occur before a decision on the merits. Interim measures are not unique to antitrust enforcement though. Other areas of law where interim measures are frequently used include litigation and arbitration for civil and commercial matters, intellectual property and consumer protection. Sectoral regulators (e.g. financial markets regulators, and banking and insurance authorities) are also entrusted with powers to directly impose or to seek the adoption of interim measures.

Ensuring an optimal use of this powerful tool in antitrust enforcement is rather complex. On the one hand, interim measures can bring substantial benefits to the investigative actions of competition authorities. In a sub-set of cases, interim measures could indeed be a way to ensure effectiveness of enforcement actions and to preserve competition during antitrust investigations. On the other hand, interim measures can be very intrusive and – if used wrongly or excessively – can do serious harm to competition and ultimately to consumers. Therefore, they are a tool to employ with caution.

While interim measures have been in the toolbox of many competition authorities for decades, in the last years, concerns regarding the effectiveness of enforcement and the length of investigations – especially in fast-changing markets – have revamped the debate as to the optimal use of this tool.<sup>2</sup> Calls for an increased adoption of interim measures mainly concern investigations into potential abuses of dominance.

Moreover, reform proposals have been advanced in several jurisdictions. These proposals head in two directions: (1) conferring competition authorities additional powers to impose interim measures, in particular when dealing with digital markets; and (2) revising (i.e. lowering) legal standards or sharpening procedures to speed up the adoption of interim measures.

This background note builds on work already undertaken by the OECD Competition Committee. A number of Competition Committee roundtables have touched on issues relevant for this topic. Most recently, the OECD held roundtables on *Abuse of dominance in digital markets* (OECD, 2020<sup>[1]</sup>), *The role of competition policy in promoting economic recovery* (OECD, 2020<sup>[2]</sup>), *Commitment Decisions in Antitrust Cases* (OECD, 2016<sup>[3]</sup>), and *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings* (OECD, 2010<sup>[4]</sup>).

This note focusses on the use of interim measures in the context of antitrust investigations, in particular against abuses of dominance and anticompetitive agreements. It does not discuss interim measures in merger control and other competition authority proceedings (such as interim authorisations of co-operation agreements, where applicable). While acknowledging the central role of courts, the paper does not contain a detailed analysis of judicial review standards for interim measure decisions, nor does it cover interim orders that courts may impose against competition authorities' decisions or in private enforcement cases. This background note is organised as follows:

- **Section 2.** sets out the powers to impose interim measures and the enforcement cases characterised by interim measures.
- **Section 3.** describes the key principles, legal conditions and procedural rules applicable to interim measures.
- **Section 4.** considers the fundamental policy considerations when pursuing interim measures, the impact of judicial review, as well as the interaction of interim measures with other enforcement tools.
- **Section 5.** concludes.

## 2. Interim measures across jurisdictions

This Section provides an overview of the role of interim measures in competition laws. It looks at whether competition authorities have the direct or indirect power to impose interim measures. Then it identifies the enforcement cases in which interim measures are more likely to be imposed.

### 2.1. Powers to impose interim measures

There are various interim measures that can be adopted in antitrust investigations. While in some jurisdictions there is a high degree of discretion as to the type of interim measures that can be imposed, in others the toolbox is limited. A key distinction can be made between interim measures contemplating a requirement to act (positive injunctions) and interim measures requiring to refrain from acting (negative injunctions or cease-and-desist orders). In the United States, for instance, interim measures so far mean essentially maintaining the *status quo* both in the context of merger control and conduct cases.<sup>3</sup>

Many competition authorities are entrusted with the power of directly (and unilaterally) imposing interim measures. The power to impose interim measures may also stem not from an explicit legal basis, and be rather implied in the authority's powers to prevent final decisions from being ineffective.<sup>4</sup>

While interim measures have been in the toolbox of many competition authorities for decades, for others this power is of more recent introduction. The 2013 ECN Recommendation *on the power to adopt interim measures*<sup>5</sup> and the 2019 ECN+ Directive<sup>6</sup> contributed to expand this power (see Box 1). As result, interim measures have become an integral part of the competition enforcement toolkit at European Union (EU) level (Burnside and Kidane, 2018, p. 6[5]).<sup>7</sup>



### Box 1. ECN Recommendation on interim measures and ECN+ Directive

#### ECN Recommendation on the power to adopt interim measures

In 2013, the ECN competition authorities adopted a recommendation on interim measures “to ensure effective enforcement of the EU competition rules”. It acknowledges that interim measures are an important tool to (1) ensure that no irreparable damage occurs while an investigation is ongoing; and (2) avoid that the power to take decisions on the merits becomes “ineffectual”.

Among other principles, it recommends (1) an explicit legal basis; (2) common (minimum) requirements; (3) proportionate and temporary measures with an effective duration; (4) flexible and efficient procedures; and (5) ensuring effective compliance.

#### ECN+ Directive

In December 2018, the European Parliament adopted the ECN+ Directive, which primarily aims at strengthening the powers of national competition authorities, as well as at guaranteeing a more effective application of EU competition rules.

Article 11 requires that EU “Member States shall ensure that national competition authorities are empowered to act on their own initiative to order by decision the imposition of interim measures ..., at least in cases where there is urgency due to the risk of serious and irreparable harm to competition, on the basis of a *prima facie* finding of an infringement”. It also states that “such a decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken”. Finally, EU “Member States shall ensure that the legality, including the proportionality, of the interim measures ... can be reviewed in expedited appeal procedures.”

The ECN+ Directive also envisages – within two years from the date of transposition (i.e. February 2021) – an analysis by the European Commission of “whether there are means to simplify the adoption of interim measures” to enable competition authorities “to deal more effectively with developments in fast-moving markets”.

Sources: [https://ec.europa.eu/competition/ecn/recommendation\\_interim\\_measures\\_09122013\\_en.pdf](https://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf); and <https://eur-lex.europa.eu/eli/dir/2019/1/oj>.

Despite this convergence at EU level, differences remain across jurisdictions. In some jurisdictions such as Israel, Lithuania,<sup>8</sup> Japan, and the United States,<sup>9</sup> competition authorities do not have the power to directly impose interim measures, but they may ask courts to impose these measures. Moreover, in a few jurisdictions where the power to impose interim measures is reserved to courts, competition authorities may not have the right to seek interim measures, with such right being reserved to complainants. This is, for instance, the case of South Africa, where the power to impose interim measures is reserved to the specialised court (i.e. the Competition Tribunal) and the right to seek interim measures is exclusively for complainants, and not for the competition authority (Lianos and Ivanov, 2019, p. 419<sub>[6]</sub>).<sup>10</sup>

### Box 2. Interim relief in antitrust cases and the role of the courts

In most jurisdictions, courts have the power to review competition authorities' decisions, including interim measures. In some jurisdictions, courts also have the power to impose interim measures upon the competition authority's request.

The role of courts in interim measures is much broader though. Importantly, pending an appeal, courts may impose interim measures against competition authority's decisions. These include, among others, court orders wholly or partially suspending the effects of (1) decisions on the merits (including fines), (2) requests for information, (3) decisions regarding confidentiality, and (4) decisions on interim measures, which result in interim relief granted against other interim measures.

Finally, in most jurisdictions, courts can impose interim measures in private enforcement cases.

Source: (OECD, 2010<sup>[4]</sup>)

Finally, in some instances (e.g. in the United States), interim measures can also be the result of a voluntary agreement between the competition authority and investigated parties, with the latter agreeing to refrain from engaging in practices that would interfere with any effects of the (potential) remedies that may be imposed.<sup>11</sup>

## 2.2. Enforcement cases

Even if competition authorities have the power to impose interim measures, their adoption in enforcement cases varies substantially across jurisdictions.<sup>12</sup> These differences are often the result of diverging legal standards (see Section 3.1), different procedural requirements (see Section 3.3) and different standards of judicial review (see Section 4.4).

Interim measures in abuse of dominance cases can be found across many jurisdictions (e.g. Argentina, Belgium, Brazil, Croatia, the EU, Finland, France, Greece, India, Italy, Luxembourg, Poland, Portugal, Turkey, and the UK). In this context, so far interim measures have been mainly adopted in refusal to supply,<sup>13</sup> exclusive dealing and predatory pricing cases. Interim measures have also been adopted while investigating alleged anticompetitive agreements, in particular vertical agreements and decisions of associations of undertakings recommending prices or limiting supply. Moreover, competition authorities have adopted interim measures pursuant to expiration of previously imposed commitments to mitigate risks of enforcement gaps.<sup>14</sup>

Finally, interim measures can be imposed in the context of merger control reviews. The use of interim measures is more frequent in *ex post* and voluntary regimes to ensure that competition is preserved in the interim period while the impact of the transaction is under assessment.<sup>15</sup> In *ex ante* and mandatory regimes, interim measures can still be imposed to ensure the effectiveness of the standstill obligation (against alleged breaches of such obligation).<sup>16</sup> In exceptional circumstances, through interim measures, a waiver of the standstill obligation may be granted. Additional scenarios of interim measures in the context of merger control include (1) actions against breaches of a "consent decree" (e.g. in the United States) or remedies imposed (e.g. in the EU); (2) for divestiture remedies, hold-separate orders and monitoring trustees that can prevent assets from deteriorating pending divestiture; and (3) competition authorities seeking interim relief from a court prohibiting a merger until a court has had a chance to hold a more comprehensive hearing in the case (OECD, 2010, pp. 473-475<sup>[4]</sup>).

## 3. Key criteria for interim measures

This Section outlines legal standards and key principles applicable to interim measures. First, it analyses the two widely-adopted conditions of likelihood of infringement and urgency to prevent serious and irreparable harm, and how the interpretation of these conditions (and the respective evidentiary standards) has an impact on the chances and incentives for imposing interim measures. Then, it looks at the key principles to observe when pursuing interim measures. Finally, it considers how certain procedural rules play a key role for this enforcement tool.

### 3.1. Legal standards

Competition authorities comply with legal and evidentiary standards when adopting or seeking interim measures. While standards are not uniform across jurisdictions, most of them require similar conditions.<sup>17</sup> Imposing interim measures typically requires meeting two key conditions: the likelihood of infringement (*fumus boni iuris*) (see Section 3.1.1) and the urgency to prevent harm (*periculum in mora*) (see Section 3.1.2). These conditions suggest a necessary link of interim measures with proceedings on the merits (Arnaudo, 2016<sup>[7]</sup>).

#### Box 3. The standards for preliminary injunctions in the United States

While preliminary injunctions are available as a tool in federal litigation, the US Federal Rules do not prescribe a uniform standard.

Courts usually apply four factors: (1) probability of success on the merits; (2) threat of irreparable injury; (3) balance of hardships (or balancing the equities; i.e. whether the harm will be greater than the harm the defendant will suffer if the injunction is granted); and (4) protection of the public interest.

The way these factors have been articulated by U.S. courts diverges though, and their application may depend on whether the case is a government enforcement action or private litigation. For instance, in government cases enforcing a federal antitrust statute, courts may presume the public interest. Some courts also consider whether the preliminary injunction would preserve the status quo.

Sources: (Denlow, 2003<sup>[8]</sup>; OECD, 2010, pp. 473-475<sup>[4]</sup>)

While the two legal conditions are cumulative, in practice, a trade-off may take place in each concrete case (Schweitzer, 2020, p. 46<sup>[9]</sup>). For example, if there is an extreme urgency or if the size of the potential harm is very large, competition agencies (and courts) might be more flexible on the likelihood of infringement. Similarly, the stronger the *prima facie* case is, the lower might be the threshold to show urgency to prevent harm.<sup>18</sup> This is an important practical point.

The way these conditions are interpreted – and the respective evidentiary standards – have an impact on the likelihood (and incentives) of competition authorities imposing interim measures.<sup>19</sup> In general, where such conditions are narrowly interpreted, the exceptional character of interim measures is even more

prominent. On the contrary, lower standards may reflect a less risk-averse policy preferring false positives to false negatives.<sup>20</sup> Finally, the exact standards are uncertain in those jurisdictions where the case law on interim measures remains limited.

### 3.1.1. Likelihood of infringement

In most jurisdictions, the first condition for interim measures is the need to establish a likelihood of infringement (*fumus boni iuris*). Therefore, in general, it is not required to establish a clear breach of competition law.

The “probability” aspect is the result of the fact that competition authorities do not operate with full information, and the set of available information may differ compared to the end of the investigation (Caminade, Chapsal and Penglase, 2020<sup>[10]</sup>) as well as at different stages of the investigation. The provisional nature of the findings should be made clear in interim measures decisions, also in light of parties’ due process rights as well as of judicial review (Art, 2015<sup>[11]</sup>; Tremolada, 2021, p. 609<sup>[12]</sup>).

This condition does not generally apply just to the conduct being investigated, but it extends to other steps of the analysis equally subject to a *prima facie* assessment such as market definition, market shares and dominance.

The degree of probability (or likelihood) seems to diverge across jurisdictions. These divergences result in different evidentiary standards, which – it could be argued – may go beyond *prima facie* findings. For example, depending on the degree of probability, interim measures could require an assessment of the likely effects on competition of the alleged anticompetitive conduct;<sup>21</sup> an exercise that could be particularly complex when interim measures are considered at an early stage of investigations or against conduct not fully implemented.<sup>22</sup> Moreover, where subject to a high degree of probability, potential efficiencies or objective justifications may have to be contemplated in the overall assessment.<sup>23</sup>

### 3.1.2. Urgency to prevent serious and irreparable harm

The second condition for imposing interim measures is the urgency to prevent serious and irreparable harm.<sup>24</sup>

“Urgency” essentially means that the harm is currently happening or imminent. Showing foreseeable harm in the (near) future with an adequate degree or probability should be considered sufficient to meet urgency standards.<sup>25</sup> Urgency considerations are also interlinked with the applicable procedures. First, an expected lengthy timeframe for reaching a decision on the merits could be a clear indication of the urgency to act. Second, if interim measures are taken after lengthy procedures, investigated parties might argue that there is no real urgency (Ruiz Feases, 2020, p. 415<sup>[13]</sup>).

“Serious and irreparable harm” implies that the conduct is causing (i.e. causal link) a harm that cannot be adequately repaired or reversed by the decision on the merits. In other words, the decision on the merits (or the final judgement in a judicial system) would not be effective. Evidence of serious and irreparable harm would typically include showing that competitors already have a clear plan or have undertaken steps for exiting the market, and showing that re-entering the market could be particularly difficult based on past cases in the industry or due, for instance, to economies of scale (Kadar, 2021, p. 449<sup>[14]</sup>).<sup>26</sup> For serious and irreparable harm, there are two main divergences across jurisdictions (Steenbergen, 2017<sup>[15]</sup>):

#### *Irreparability of the harm v irreversibility of the harm*

In general, in jurisdictions with an irreparability standard, for interim measures to be imposed the harm caused by the investigated conduct could not be repaired even through financial compensation. In jurisdictions with an irreversibility standard, for interim measures to be imposed it is sufficient to show that it would not be possible to reverse the *status quo* in the market.<sup>27</sup>

A strict interpretation of irreparability would require that there is no chance to recover damages even through a follow-on action (Ruiz Feases, 2020, p. 417<sup>[13]</sup>). However, this interpretation might be applicable only in those jurisdictions (see below) where the assessment of the harm is very much focussed on competitors or interested third parties. In other words, when the assessment contemplates irreparable changes of market conditions, interim measures should be feasible even when the harm to specific parties could be repaired through actions for damages.

### *Harm to competition v harm to certain interested parties*

Jurisdictions diverge on whether for interim measures it is required to show damage to competition (and ultimately to consumers) that results from irreparable changes to market conditions and from the “loss of freedom” (such as exit<sup>28</sup> or marginalisation of competitors, and reduced consumer choice), or whether it is sufficient to consider damages to individual firms such as competitors or other third parties (i.e. suppliers or customers).<sup>29</sup>

A policy choice to only assess the harm to competition seems to reflect a clear focus on safeguarding the public interest (Giosa, 2020<sup>[16]</sup>).<sup>30</sup> On the one hand, this could mitigate risks of false positives. On the other hand, it may result in interim measures being imposed less frequently and only in well-advanced investigations (Steenbergen, 2017<sup>[15]</sup>).

Furthermore, demonstrating the overall impact on the market rather than on a certain competitor (or customer/supplier) may be a more burdensome exercise.<sup>31</sup> It could be questioned the extent to which harm to competition can be inferred by showing harm to competitors (O’Donoghue and Padilla, 2020<sup>[17]</sup>). In this regard, evidence of the harm limited to a competitor does not necessarily imply that the objective of competition law shifts from broader consumers and competition to competitors as – in particular at early stages of the investigation – evidence of harm to a specific competitor may actually signal a wider problem on the market (Ruiz Feases, 2020, pp. 422-423<sup>[13]</sup>).

Finally, there are jurisdictions where both harms are considered. For instance, the UK prescribes as alternative tests to show that interim measures are necessary to prevent significant damages to a person or a category of persons or to protect the “public interest”, i.e. a particular industry, consumers or competition in general. France has also a similar test, with the competition authority imposing interim measures if the conduct may harm the interests of the complainant(s), consumers, a sector or the economy as a whole.<sup>32</sup> In theory, these alternative tests should confer more scope to intervene with interim measures (Ruiz Feases, 2020, p. 423<sup>[13]</sup>).<sup>33</sup>

## 3.2. General principles in designing interim measures

Given their potential effects, in addition to the above conditions, important principles should be taken into account when designing interim measures.<sup>34</sup>

### **3.2.1. Temporary, reversible and adaptable**

Interim measures can be seen as remedies of a temporary nature to the extent they produce their effects while pending (“in the interim” of) a resolution of the case on the merits.<sup>35</sup> The time length of interim measures can be based on various criteria, including the expected time to reach a decision on the merits or specific market conditions (e.g. the time needed for competitors to “breathe”). In some jurisdictions, such as in Germany,<sup>36</sup> competition laws prescribe a maximum duration. Similarly, in South Africa, if an interim order has been granted and a hearing has not been concluded within six months, the Competition Tribunal may extend the interim order for up to an additional six months.<sup>37</sup> In other jurisdictions, such as in Brazil, interim measures may be granted without a specific time limitation, meaning they may last for the entire length of administrative proceedings.



The temporary nature can be of limited relevance in practice because in many jurisdictions interim measures are renewable.<sup>38</sup> The possibility to renew interim measures is essential to their effectiveness, in particular where the need to prevent serious and irreparable harm persists.<sup>39</sup> Renewals of interim measures should not be automatic, and should be subject to a revised assessment.

In many jurisdictions, interim measures are also reversible.<sup>40</sup> First, reversibility makes remedies such as asset divestments more difficult to apply through interim measures. Therefore, even where there is no legal limitation to imposing such remedies, interim measures would most likely be of a behavioural nature (O'Donoghue and Padilla, 2020<sup>[17]</sup>).<sup>41</sup> Second, reversibility may be easier to meet in practice when (1) interim measures are limited to maintaining the *status quo* or (2) the alleged anticompetitive conduct is the result of a contractual relationship between economic actors and, consequently, interim measures either only apply to future contracts or suspend the *prima facie* anticompetitive clauses of ongoing contracts.

Finally, interim measures can also be further adapted, based both on new information gathered in the ongoing investigation or as result of market developments.<sup>42</sup> This is another important feature to ensure the continuing effectiveness of this tool.

### **3.2.2. Immediate effects and enforceability**

Since interim measures are imposed in situations of urgency, they generally require an immediate (or within a very short time frame) implementation. Immediate implementation may be subject to exceptions when the addressees can file an appeal against the interim measure decision, successfully obtaining an interim order by the court suspending its effects.

For an effective use of this tool, it is crucial to ensure compliance with interim measure decisions. Periodic reports by the addressees often facilitate monitoring by competition authorities.<sup>43</sup> Reporting requirements should be detailed in interim measure decisions. Monitoring is also essential for the renewal or amendment of the measures (Maier-Rigaud and Lowe, 2008, p. 602<sup>[18]</sup>).

Competition laws often prescribe consequences – generally monetary fines – for violations of/non-compliance with interim measure decisions.<sup>44</sup> The power to impose periodic fines in case of delays with implementing interim measures can also serve as an important deterrent because such delays can be particularly harmful in this context. In some jurisdictions, however, competition authorities may not have the power to directly impose sanctions, and they have to seek sanctions against the parties in court.

### **3.2.3. Proportionality**

The principle of proportionality generally applies to all types of measures, including interim measures.

First, the magnitude of interim measures depends on the supporting evidence gathered at the relevant stage of the investigation. In this regard, Schweitzer (2020<sup>[9]</sup>) warns that interim measures should be more cautious where the evidence is less comprehensive.

Second, the assessment of urgency to prevent serious and irreparable harm should reflect proportionality principles (Maier-Rigaud and Lowe, 2008, p. 606<sup>[18]</sup>), establishing for which market segments there is a need to urgently intervene, rather than imposing measures covering the whole scope of investigation.<sup>45</sup> As a result, interim measures are often narrower than all concerns being investigated or only apply to certain *prima facie* anticompetitive agreements or practices being investigated. In other words, in light of this principle, it can be argued that interim measures should not exceed the remedies that a competition authority would impose in its final decision.<sup>46</sup>

Last, proportionality – together with reversibility (see above) – may favour the adoption through interim measures of behavioural remedies over remedies difficult to reverse (such as asset divestitures). Moreover, proportionality may be easier to fulfil in practice when competition authorities impose “passive” measures, i.e. measures not requiring an active form of conduct by the addressees (Kadar, 2021,

p. 449<sup>[14]</sup>). Nevertheless, these principles do not necessarily require interim measures to be strictly limited at preserving the *status quo* (Schweitzer, 2020, p. 48<sup>[9]</sup>; Arnaudo, 2016, p. 5<sup>[7]</sup>).

### 3.3. How procedural rules can impact interim measures

Competition authorities shall comply with fundamental procedural requirements for imposing interim measures. These requirements vary across jurisdictions and they can have an impact on incentives to pursue interim measures.

#### 3.3.1. *Ex officio v upon complaint*

Among jurisdictions where competition authorities have the power to directly impose interim measures, a first distinction can be drawn between competition regimes conferring authorities the power to impose interim measures (1) *ex officio* only, i.e. excluding applications for interim measures by complainants (e.g. EU<sup>47</sup> and Germany<sup>48</sup>); or (2) *ex officio* and upon request (e.g. Brazil, France<sup>49</sup>, Portugal, Spain and the UK). These two frameworks have important policy implications. That said, even in *ex officio* only jurisdictions, parties may still be able to bring to the attention of competition authorities (substantiated) concerns that may trigger an urgent intervention through interim measures. At the same time, there is no obligation on the authority to formally deny requests for interim measures (Arnaudo, 2016, p. 12<sup>[7]</sup>).

The power to act *ex officio* can be an important element to reinforce the effectiveness of this tool<sup>50</sup> with competition authorities having the advantage of being able to impose interim measures even without a formal complaint.

However, where competition authorities can only act *ex officio* this may result in practical disadvantages such as a more lengthy evidence-gathering process (e.g. through a large number of requests for information). This suggests that a practical effect of an *ex officio*-only regime is to have fewer interim measure cases.<sup>51</sup> *Ex officio*-only regimes may also indicate the limited relevance of private interests (and harms) (Arnaudo, 2016, p. 10<sup>[7]</sup>).

Moreover, even in jurisdictions where complaints cannot be submitted to competition authorities, parties can usually pursue interim relief through private litigation. Courts and competition authorities are not exact substitutes for complaints though. First, legal costs for litigation (as well as potential cross-claims for damages or the requirement to post a bond) can be substantially higher. Second, there may be differences in the legal standards between competition authorities and courts, with courts often more focussed on the harm to the plaintiff rather than the harm to competition.<sup>52</sup>

Enforcement regimes where competition authorities can impose interim measures upon complainants' requests create valuable incentives to employ this tool. Statistics at EEA level show that, between 2015 and April 2020, 70% of interim measures were adopted upon complaint.<sup>53</sup> The possibility of interim measure complaints also can give rise to forum shopping (Art, 2015, p. 61<sup>[11]</sup>), in particular in favour of those jurisdictions where case law shows that there is a likelihood of obtaining interim relief, with a possible impact on complaints on the merits too. Complainants' incentives can be also influenced by whether a competition authority's public concern to act through interim measures stems from preventing harm to competition or harm to specific interested parties (see Section 3.1.2).

In "upon complaints" regimes, competition authorities may incur extra administrative costs to assess complaints, especially where formally required to reject them and where the refusal to adopt interim measures may be subject to judicial review. Competition authorities should also prevent the misuse of this exceptional tool by rivals. To attenuate these risks, some jurisdictions require an interim measure complaint to be accompanied by a complaint on the merits supported by sufficient evidence.

Finally, in most of these jurisdictions, parties may have the option to file interim measure complaints both to the competition authority and to courts. While parties can usually pursue these two options in parallel, as previously indicated, courts are more inclined to focus on the harm to the claimant, whereas competition authorities mostly take an approach based on a broader theory of harm. This means that the respective scope of analysis by courts and competition authorities may differ.

### 3.3.2. Stage of the investigation

Interim measures are generally imposed in the context of ongoing investigations. A distinction can be found between jurisdictions where interim measures can be imposed even prior to the opening of a formal investigation and jurisdictions requiring a formal investigation. These differences in the procedure have clear implications on competition authorities' incentives for imposing interim measures, and on whether the *prima facie* and urgency conditions can be met.

There may be cases where the requirement to open formal proceedings may cause interim measures to be ineffective as irreversible changes in the market might have already occurred.<sup>54</sup> The opening of a formal investigation, however, can be an essential step where it triggers procedural safeguards (see Section 3.3.3). It can also serve as a well-delineated reference in terms of defining – for instance – the scope of the market and *prima facie* issues for interim measures. In practice, the difference may not be so crucial when the adoption of an interim measure decision occurs shortly after the opening of a formal investigation.

Where a formal investigation is required, in some instances interim measures can be imposed immediately after the opening of the investigation; in others such decisions require the adoption of formal charges (i.e. a statement of objections).

The imposition of interim measures in well-advanced investigations cannot be excluded as the dynamics of industries might change throughout the course of (multi-year) investigations and require the adoption of interim measures not imposed at an earlier stage (Art, 2015<sup>[11]</sup>).

### 3.3.3. Procedural safeguards

Interim measures might represent an “exception” to the principle of presumption of innocence (Kadar, 2021, p. 451<sup>[14]</sup>), in particular in those jurisdictions where the competition authority holds the power to directly impose interim measures and the actual decisions whether to impose interim measures are taken by the same administrative body assessing the merits of the case. Such concerns are, however, largely mitigated by three elements: (1) stringent legal and evidentiary criteria for imposing interim measures (see Section 3. ), (2) the possibility to appeal interim measures decisions (and, in most instances, to seek a suspension order) (see Section 4.4), and (3) procedural safeguards.

With regard to the last point, the adoption of interim measures requires indeed a balancing exercise between an expedited procedure to urgently (and effectively) act to prevent serious and irreparable harm and the rights of defence of the parties involved. Interim measure procedures generally contemplate essential safeguards to preserve such rights. For instance, to impose interim measures, the European Commission is required to issue a statement of objections, give the addressee the opportunity to submit a response,<sup>55</sup> grant access to the file,<sup>56</sup> as well as an oral hearing (if requested by the relevant party), even though within a timeframe (and with deadlines) shorter than in main proceedings. Other jurisdictions opted for a more expedited procedure.<sup>57</sup> In Portugal, the competition authority may impose (at least provisional) interim measures *inaudita altera parte*.<sup>58</sup> Similarly, in Italy, there are two procedures for interim measures in antitrust investigations, essentially differentiated by whether the relevant parties have been granted the opportunity to respond to allegations. The *inaudita altera parte* procedure is limited to instances of extreme urgency. In cases of interim measures *inaudita altera parte*, the measures are of a provisional nature and subject to confirmation after the parties' response to the allegations.<sup>59</sup>

While due process rights are undeniably important for a very intrusive tool such as interim measures, it cannot be disregarded that particularly burdensome procedures influence competition authorities' decisions whether to devote substantial resources to pursue interim measures. This is particularly true for complex and resource-intensive cases, where investigations are already well-advanced or there are concerns that interim measure proceedings may also delay the main investigation. Moreover, lengthy procedures may further reduce the incentives of affected parties to seek the use of this tool through public enforcement, in particular where interim measures proceedings are much faster in courts than before competition authorities.

# 4. Policy considerations for effective interim measures

Section 3 described legal standards, key principles and procedural rules applicable to interim measures in antitrust investigations. This Section goes beyond legal frameworks, outlining important policy considerations when pursuing interim measures. First, it identifies theories of harm and market characteristics that can make interim measures more appropriate or effective. Second, it considers the various interests and costs associated with interim measures. Third, it analyses how judicial review influences these considerations. Fourth, it explains how interim measures can interact with other enforcement tools. Last, it considers the scope and advantages of international co-operation in this context.

## 4.1. Theories of harm and markets in which interim measures may be effective

Given their exceptional character and potential effects, interim measures are usually applicable only in a sub-set of cases.

The *prima facie* legal standard (see Section 3.1.1) may suggest that cases based on well established (and undisputed) theories of harm are better suited for interim measures. This is mostly relevant for jurisdictions where: (1) interim measures decisions are subject to high evidentiary standards (Mantzari, 2020<sup>[19]</sup>); (2) a strict judicial review applies, with courts more inclined to suspend and annul such decisions (see Section 4.4); and (3) competition authorities are particularly concerned with false positives.

Nevertheless, there may be significant benefits attached to applying interim measures to new forms of conduct, in particular in digital markets (as further described below). First, when reviewing interim measures, courts may impose a lower burden of proof compared to decisions on the merits (see Section 4.4), and they can provide guidance on novel theories of harm, which can be helpful beyond the specific case. Second, as further discussed below, interim measures can serve to leverage negotiated solutions, which would relieve authorities from having to meet strict(er) requirements in these cases.

Interim measures may also be particularly appropriate in antitrust investigations concerning products or services that have characteristics leading firms to compete to be the supplier of a whole product or service market, rather than for shares (competition for-the-market) (OECD, 2019<sup>[20]</sup>), because of the large magnitude of irreparable harm that anticompetitive conduct may cause in such markets. These include tender markets, in particular the ones characterised by exclusivity elements, where entry is more difficult and damages more likely, as well as fast-moving markets that are characterised by fast tipping (Mantzari, 2020, p. 494<sup>[19]</sup>; Tremolada, 2021, p. 598<sup>[12]</sup>),<sup>60</sup> Moreover, interim measures may be particularly effective in markets (1) where economies of scale are very important, and continuing the investigated conduct would make it very difficult for competitors to challenge a dominant firm and for market developments to be reversed; and (2) where market players need to plan their business strategies significantly in advance.

In the last years, there have been increasing calls for more frequent and faster use of interim measures in digital markets (OECD, 2020, p. 58<sup>[21]</sup>; Digital Competition Expert Panel, 2019, pp. 14, 104<sup>[22]</sup>) (Digital Competition Expert Panel, 2019, p. 14; 104<sup>[22]</sup>; Lianos and Ivanov, 2019, p. 40<sup>[6]</sup>), in particular in complex



cases where markets can tip before a decision on the merits is reached. The policy debate also raised questions as to whether the legal, evidentiary and procedural standards for interim measures should be changed at least for specific markets more prone to tipping.<sup>61</sup>

As the examples in Box 4 show, there are a number of recent antitrust investigations in digital markets where interim measures have been contemplated or imposed.

#### **Box 4. Examples of investigations in digital markets with interim measure considerations**

##### **Brazil**

In 2021, the Administrative Council for Economic Defense (CADE) received two complaints against iFood (a food delivery application) concerning its alleged abusive practices related to exclusive contracts with restaurants and bars, causing the exclusion of competitors. CADE imposed interim measures ordering iFood to refrain from signing new contracts containing exclusivity clauses, and from amending ongoing contracts without exclusivity clauses.

##### **France**

Between 2019 and 2021, the French Autorité de la Concurrence (Autorité) imposed interim measures against Google in three cases. Two cases derived from complaints about Google's advertising platform AdWords (now Google Ads). Two companies that relied on Adwords to promote their services, Amadeus and Navx, complained to the Autorité about sudden and discriminatory suspensions of their commercial relations with Google's AdWords. In both cases, the Autorité ordered Google to clarify AdWords rules and to review Amadeus and Navx's situations under the clarified rules. In the third case, press publishers and a news agency filed complaints to the Autorité arguing that Google's implementation of the new copyright law was an abuse of dominance. In particular, they claimed that Google unilaterally decided that it was not going to display news snippets in its services unless the publishers granted an authorisation to use their content free of charge. The Autorité granted interim relief demanding that Google negotiate in good faith with respect to the use and remuneration of such content. Subsequently, the Autorité fined Google for not complying with such interim measures.

##### **Japan**

In 2020, the Japan Fair Trade Commission (JFTC) filed a court petition for urgent injunctions against Rakuten before the Tokyo District Court. Rakuten, an electronic commerce and online retailing company, had proposed the program "Shipping Inclusive Program Measures" by which all merchants of Rakuten would be prevented from collecting delivery fees from customers. Rakuten indicated that, due to the COVID-19 pandemic, it gave retailers the choice to participate or not in the program. Therefore, the JFTC withdrew its motion for urgent injunction.

##### **South Africa**

In 2002, GovChat, a messaging platform developed by the government to communicate with citizens about the Covid-19 pandemic and emergency social relief, filed a complaint against Facebook (now Meta). According to GovChat, it was threatened with removal from WhatsApp's paid business messaging platform. Thus, in parallel with the ongoing case before the Competition Commission, it filed an urgent application to the South African Competition Tribunal, requesting interim measures to prohibit Facebook from off-boarding GovChat from WhatsApp. The Competition Tribunal ordered Facebook not

to remove GovChat from the WhatsApp platform. It also ordered GovChat to not expand its services nor add more clients through the WhatsApp platform.

### Turkey

In 2021, the Turkish Competition Authority initiated an ex officio abuse of dominance investigation against Facebook/WhatsApp and imposed an interim measure after WhatsApp amended its terms of use and privacy policy to require its users to share data with other Facebook companies. The interim measure suspended the implementation of WhatsApp's amended privacy policy and required WhatsApp to announce the suspension to all its users.

Sources:

<https://www.gov.br/cade/pt-br/assuntos/noticias/cade-impede-ifood-de-celebrar-novos-contratos-de-exclusividade-com-restaurantes>;  
<https://www.autoritedelaconurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press>;  
<https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/31-january-2019-online-advertising-directory-enquiry-services-0>;  
<https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-de-la-concurrence-ordonne-google-de-mettre-en-oeuvre-de-maniere>;  
<https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html>;  
<https://www.comptrib.co.za/open-file?FileId=52581>;  
<https://www.comptrib.co.za/Content/CaseFiles/1202/8800001-2021-01-22-GovChat-Interim-Arrangement-MediaRelease.html>.

A factor supporting more intensive use of interim measures is that, in digital cases, it may be easier to meet the condition of urgency to prevent serious and irreparable harm (see Section 3.1.2) for three key reasons. First, ongoing anticompetitive conduct in digital markets may generate a greater (i.e. serious) harm because of the above-mentioned characteristics of these markets (Tremolada, 2021, p. 600<sup>[12]</sup>). Second, the asymmetry of the magnitude of the two potential harms (to competition and to the investigated party(ies)) pending antitrust investigations could be greater. In other words, small changes in markets can affect less severely large players while irreparably harming (e.g. causing market exits of) small competitors or new entrants (Caminade, Chapsal and Penglase, 2020, p. 452<sup>[10]</sup>). Third, “urgency” might also be easier to show because irreversibility of the harm can be more pronounced in dynamic digital markets with network effects (Mantzari, 2020, p. 495<sup>[19]</sup>; Maier-Rigaud and Lowe, 2008, p. 609<sup>[18]</sup>).

Nevertheless, digital markets are subject to fast technological (and business) changes, adding complexity and increasing asymmetries of information between investigated parties and authorities contemplating interim measures. For instance, in particular in digital zero-price markets, quantifying the likely harm in terms of lower quality or less innovation may be a complex exercise (OECD, 2018<sup>[23]</sup>; OECD, 2013<sup>[24]</sup>). Moreover, the risk (and related cost) of false positives – and of ultimately “picking winners” in winner-takes-all/most markets – may be higher (Mantzari, 2020, p. 495<sup>[19]</sup>) and wrongly imposed interim measures against large players may result in a great aggregate harm to consumers.<sup>62</sup> That said, the fact that interim measures should be adaptable (see Section 3.2.1) can mitigate these concerns. Additional information provided by interested parties may help to revise interim measures previously imposed, also reducing information gaps in digital markets (Cordeiro et al., 2021, p. 200<sup>[25]</sup>).

## 4.2. Interim measures in times of crisis

Interim measures can be a useful tool for competition authorities to employ in markets that are rapidly changing due to a crisis or an economic shock, to avoid irreparable harm to competition. In particular, in times of crisis, before a decision on the merits is taken, the market structure might have completely changed and competitors may have been driven out of the market (OECD, 2020<sup>[21]</sup>), unless a timely intervention prevented this outcome. In this context, interim measures' effectiveness depends even more than usual on how fast competition authorities can intervene while complying with all legal and procedural standards.

The Covid-19 crisis could have represented an opportunity to boost the use of interim measures (Costa-Cabral et al., 2020, pp. 11-13<sup>[26]</sup>). During the crisis, a few authorities adopted interim measures to prevent serious and irreparable harm from anticompetitive conduct such as price gouging and no-poaching agreements. Interim measures have also been adopted to counter the uncertainty of how markets would evolve, making it particularly hard to consult on proposed commitments.

### Box 5. Examples of interim measures during the Covid-19 pandemic

#### Portugal – Portuguese Football League

In May 2020, the Portuguese competition authority imposed interim measures ordering the Portuguese Professional Football League to immediately suspend an agreement to not recruit or hire other clubs' football players who unilaterally terminated their employment contract ("no-poach agreement"). The agreement had invoked issues related to the Covid-19 pandemic. In particular, there were concerns that players could terminate their employment contracts in response to salary cuts and the extension of the league season, which were measures adopted to mitigate the impact of Covid-19 on football clubs. The no-poach agreement would have had an immediate impact on the upcoming "transfer window" for players.

In April 2022, the Portuguese competition authority issued a final infringement decision imposing a total fine of approximately EUR 11.3 million.

#### UK – Atlantic Joint Business Agreement

In September 2020, the UK Competition and Markets Authority (CMA) decided to issue interim measures, which effectively extended for three years certain terms of the commitments negotiated between the parties (i.e. American Airlines and International Consolidated Airlines Group) and the European Commission in 2010. These interim measures are the result of the CMA not being able to complete its investigation before the expiry of various agreements due to the uncertainty created by the Covid-19 pandemic on the aviation sector, which would have resulted in an "enforcement gap".

In April 2022, due to the continued impact of Covid-19 on the aviation sector and the fact that recovery is taking longer than anticipated, the 2020 interim measures were further extended until March 2026.

Sources:

<https://www.concorrenca.pt/index.php/en/articles/covid-19-adc-imposes-interim-measure-portuguese-football-league-suspends-no-poach>;  
<https://www.concorrenca.pt/index.php/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time>;  
<https://www.gov.uk/cma-cases/investigation-of-the-atlantic-joint-business-agreement>.

Despite a few timely and effective initiatives, interim measures have remained an exceptional tool and their use has not significantly increased.

### 4.3. Balancing of interests and costs

Interim measures require a balancing exercise, with the objective of mitigating risks of false positives (or Type I errors) – which is the main concern if interim measures are widely imposed as result of over-enforcement – and false negatives (or Type II errors) – which is the main concern with a more conservative approach to the adoption of interim measures, resulting in under-enforcement.

While performing this balancing exercise, there are two fundamental aspects to take into account. The legal standards reflect these aspects (see Section 3.1). First, the probability that the investigated conduct is anticompetitive should be considered. Second, and more relevant for the balancing exercise, the

magnitude of irreparable harm should be assessed, taking into account not only the harm that not imposing interim measures can cause on competition (or competitors/third parties), but also the harm – both commercial and reputational – that (wrongly) imposing interim measures may cause on the addressees, even though the law may not explicitly require it (Maier-Rigaud and Lowe, 2008, p. 602<sup>[18]</sup>; Caminade, Chapsal and Penglase, 2020<sup>[10]</sup>).<sup>63</sup> An important policy question is whether the balance should be between the public interest in preserving competition and the “private” harm that interim measures can cause to the investigated parties, or whether it should also consider the harm that interim measures may cause more broadly to the competitive landscape.

### Box 6. An economic model for interim measures

Caminade, Chapsal and Penglase have developed an economic model to inform competition authorities’ decisions of whether to pursue interim measures. The key parameters are the following:

- Interim measures may be considered when the expected irreparable harm to consumers (or to the plaintiff) from wrongly failing to impose interim measures outweighs the expected irreparable harm to consumers (or to the defendant) from wrongly imposed interim measures.
- The balance is more towards interim measures if (1) the probability that the conduct will be found anticompetitive is high; and (2) there is asymmetry between the harms, with Type II harm higher than Type I harm.
- Increases of these two harms may not be symmetric during the course of an investigation and, therefore, this balance may change – for instance – if the likelihood of market tipping or of competitors exiting the market substantially increases over time.
- Competition authorities should have a minimum threshold for the probability of conduct to be anticompetitive to avoid imposing interim measures when the magnitude of irreparable harm is high, but the *prima facie* case is weak.

Source: (Caminade, Chapsal and Penglase, 2020<sup>[10]</sup>)

Moreover, there are “costs” associated with the enforcement and non-enforcement of interim measures.

First, there are (additional) administrative costs resulting from an increasing investigative burden and for designing appropriate interim measures. The length of proceedings and procedural safeguards have a clear impact on such costs. This may partially explain the reluctance to use this tool in certain jurisdictions.<sup>64</sup> Other administrative costs stem from the direct or indirect monitoring of interim measures. Litigation proceedings following an interim measure decision can also considerably increase administrative costs. However, even though this may not be valid across jurisdictions, parties may be less inclined to appeal interim measure decisions because of their provisional nature and the possibility of modification (Cordeiro et al., 2021, p. 204<sup>[25]</sup>). Finally, when an interim measure decision is quashed, the exposure to cost (and damage<sup>65</sup>) awards may trigger concerns similar to those resulting from wrong decisions on the merits (Ruiz Feases, 2020, p. 411<sup>[13]</sup>).

Second, there are reputational costs (and benefits) involved for competition authorities. From this perspective, some commentators have argued that not imposing interim measures in cases where they would be appropriate may be preferred as reputational costs would seem to be lower than in cases of interim measures wrongly imposed because these costs are asymmetrical (i.e. only paid if interim measures are taken) (Caminade, Chapsal and Penglase, 2020, p. 449<sup>[10]</sup>). At the same time, interim measures can also bring reputational benefits, in particular where these measures are not suspended and ultimately upheld by courts. A successful track record of interim measures can be a powerful tool for enforcers as it may deter anticompetitive behaviour and lead to quick resolutions of cases raising concerns (see Section 4.5).

## 4.4. Judicial review

In jurisdictions where competition authorities directly impose interim measures, these decisions are generally appealable. This is also mostly true for jurisdictions where only courts can issue interim relief orders, even though the scope of appeal may be narrower.<sup>66</sup>

An effective and timely review can contribute to procedural fairness in competition enforcement, in particular to preserve the parties' rights of defence.<sup>67</sup> The scope of review for interim measures, however, is a debated topic, mainly due to the fact that review standards are relevant for competition authorities' decisions whether to pursue interim measures, and they can influence their risk aversion.<sup>68</sup>

Where interim measure decisions are subject to full judicial review or courts enjoy broad discretion, competition authorities may be required to (1) invest meaningful resources to build a compelling case and to anticipate a response to arguments that could be raised in an application before the courts (Art, 2015, p. 66<sup>[11]</sup>); and (2) devote substantial resources to the litigation, which may further delay work on the case itself. Moreover, an increased use of interim measures may trigger stricter standards by reviewing courts, in particular in jurisdictions without a well-established case law.

### Box 7. The proposed reform in the UK

#### The 2019 Digital Competition Expert Panel report

The UK Digital Competition Expert Panel report noted that appeals need to strike a balance between “the rights of defendants to protection against over-enforcement” and “the rights of those who would suffer from the under-enforcement”. With regard to interim measures, it noted that “[i]f an interim measure can be appealed on the merits, the [competition authority] will be less likely to use them, particularly if they may delay work on the case itself, and it recommended that “the review ... should be changed to more limited standards and grounds” coupled with “more independent ... decision-making structures” within the competition authority.

#### The consultation on ‘Reforming competition and consumer policy’

In April 2022, the UK government published its response to the consultation on ‘Reforming competition and consumer policy’ launched in July 2021.

The UK government considers that the current framework “prioritises the prevention of interim measures being applied erroneously, without sufficient regard to the risk that interim measures are not applied when they are warranted”. Therefore, it intends to amend the framework “so that appeals against interim measures decisions should be determined according to the principles of judicial review, rather than considering the full merits of decisions”, for the following reasons:

- Speed matters and applying interim measures is likely to take longer if appeals consider the full merits.
- An interim measure decision involves a significant degree of technical judgement, including the balance of harms.
- It is not necessary to come to a definitive view on the proper interpretation of competition law in order to apply interim measures.

Note: Other commentators see with a degree of scepticism calls for lowering judicial review standards for interim measures decisions (Ruiz Feases, 2020, p. 415<sup>[13]</sup>).

Sources: (Digital Competition Expert Panel, 2019, pp. 105-108<sup>[22]</sup>), <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response>.



Moreover, in practice, if appeals against interim measures are successful, there may be a risk of undermining the main case with potential spill over effects on the decision on the merits, in particular where interim measures are based on novel theories of harm. At the same time, a negative outcome for interim measures may serve as an indication that the case being pursued may be flawed (may not withstand judicial scrutiny) and, therefore, bring the investigation to an end, saving resources earlier in the proceedings.

Finally, it is important to ensure that urgency considerations are taken into account and that the judicial review process is expedited.<sup>69</sup> An excessive length of court proceedings may have a crucial impact on interim measures' effectiveness, as well as creating strong disincentives for competition authorities. This is particularly relevant when parties can apply for (and are often granted) interim relief suspending interim measures (Mantzari, 2020, p. 491<sup>[19]</sup>). The power to suspend interim measure decisions – where the party seeking the suspension need establish only a *prima facie* case that the assessment is wrong or that it raises serious doubts<sup>70</sup> – may result in strong disincentives to pursue interim measures (Art, 2015, p. 65<sup>[11]</sup>).

#### 4.5. Interim measures' interaction with commitments and remedies

Most competition authorities can accept remedies (or “commitments”)<sup>71</sup> proposed by the parties to address concerns identified during antitrust investigations. In general, if accepted, these commitments are binding on the party who submitted them and no competition infringement is established (OECD, 2016<sup>[27]</sup>).

Interim measures and commitments can be seen as complementary tools in antitrust investigations.

While the primary purpose of interim measures is preventing serious and irreparable harm, they can also serve as effective means to leverage commitment negotiations, which, in most jurisdictions, depend on the good will of investigated parties (Mantzari, 2020, p. 495<sup>[19]</sup>; Cordeiro et al., 2021<sup>[25]</sup>; Maier-Rigaud and Lowe, 2008, p. 610<sup>[18]</sup>; Kadar, 2021, p. 451<sup>[14]</sup>).<sup>72</sup> Hence, interim measures can remove parties' incentives to delay these negotiations because (1) they face reputational risks connected with interim measures; and (2) they can better assess business risks resulting from potential infringement findings (Steenbergen, 2017<sup>[15]</sup>).<sup>73</sup> Moreover, when facing the threat of unilaterally imposed interim measures, investigated parties may also better appreciate the benefits of negotiated commitments.<sup>74</sup>

Interim measures may also contribute to better inform competition authorities in commitment negotiations as they would have to frontload investigative work in order to design adequate interim measures (Kadar, 2021, p. 451<sup>[14]</sup>). In addition, where interim measures result in successful commitment negotiations at an early stage, this has a positive impact on competition authorities' resources.

Interim measures and commitments could also be seen, from a practical viewpoint, as alternative tools to ensure efficient antitrust enforcement (Lianos and Ivanov, 2019<sup>[6]</sup>) and to achieve a swift resolution of complex cases (Mantzari, 2020, p. 494<sup>[19]</sup>) by restoring market contestability. This may be especially true when commitments are not the most appropriate tool such as in cases where authorities intend to impose a fine.<sup>75</sup> Interim measures might also be a valid alternative to commitments for novel cases, in particular where commitments – as already mentioned – result in no conclusion as to whether there has been an infringement. However, at least at first sight, there seems to be a conflict with the need for interim measures to establish a likelihood of infringement.<sup>76</sup>

Finally, considerations on final remedies in (subsequent) infringement decisions should not have a decisive influence on case-specific decisions regarding interim measures. These decisions should remain largely guided by the key criteria set out above (see Section 3. ). Moreover, the scope between interim measures and final remedies may vary significantly, with interim measures often more limited than final remedies. That said, interim measures may serve the additional purpose of “market testing” and refining potential remedies for the final decision (Ruiz Feases, 2020, p. 428<sup>[13]</sup>; Maier-Rigaud and Lowe, 2008, p. 610<sup>[18]</sup>).<sup>77</sup>

## 4.6. Interim measures and regulatory initiatives in digital markets

Interim measures and *ex ante* regulation do not always share the same rationale and purpose, but they can both be effective tools to address competitive concerns. There are several policy considerations with regard to the potential interaction between these tools.

Where regulatory instruments are not available, interim measures can provide a timely relief and tangible effects on the market (Maier-Rigaud and Lowe, 2008, p. 609<sup>[18]</sup>). Indeed, in certain jurisdictions where the shift towards a regulatory approach is limited, interim measures remain a powerful tool to tackle enforcement challenges in fast-changing markets (e.g. Argentina, Brazil and Turkey).

On the contrary, in other jurisdictions, the shift towards a regulatory approach in digital markets could mitigate the need for interim measures, as (other) regulatory solutions may be preferred. Regulatory initiatives, however, may also establish new interim measure powers for competition authorities and regulators. In this context, interim measures represent a precautionary and timely intervention tool, where proceedings may still delay intervention before irreparable harm occurs.<sup>78</sup> Furthermore, regulation may reinforce existing powers by introducing a less burdensome procedure for interim measures in markets that are prone to fast tipping. In this regard, for instance, Schweitzer (2020, p. 47<sup>[9]</sup>) argues that with regulatory/quasi-regulatory proceedings of a non-criminal (or quasi-criminal) nature, it should be possible to attenuate the procedural safeguards compared to antitrust investigations where authorities comply with presumption of innocence principles.

### Box 8. The EU Digital Markets Act (DMA) proposal

In December 2020, the European Commission proposed the Digital Markets Act (DMA), a legislative initiative for *ex ante* regulation in digital markets. The objective of the proposal is “to allow platforms to unlock their full potential by addressing at EU level the most salient incidences of unfair practices and weak contestability so as to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment.” The DMA intends to regulate digital gatekeepers by imposing certain obligations.

One of the tools envisaged in the current DMA proposal is interim measures. Article 22 provides that – in the context of proceedings opened in view of the possible adoption of a decision of non-compliance – the European Commission may impose interim measures against digital “gatekeepers” on the basis of (1) a *prima facie* infringement of one (or more) of the obligation(s); and (2) urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers. Article 22 further specifies that this decision “shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate”.

Note: European Commission: Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act, DMA), submitted on 15 December 2020;

Sources: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>; (Crawford, Rey and Schnitzer, 2020<sup>[28]</sup>); (Motta and Peitz, 2020<sup>[29]</sup>).

#### 4.7. International co-operation

Interim measures may produce their effects beyond a single jurisdiction, in particular when imposed in the context of investigations against parties with global activities or against *prima facie* anticompetitive conduct or agreements covering multiple countries.

Interim measures in one jurisdiction can also have important spillover effects not only on other countries' economies, but also on ongoing antitrust investigations in other jurisdictions. International co-operation is key in these proceedings, whereas the need for speed can make it more difficult to ensure effective co-operation. Divergences in the procedures may result in interim measures imposed at different stages of the analysis. Therefore, procedures for interim measures should remain sufficiently flexible to allow competition authorities to be effective in cases brought to the attention of more than one authority.<sup>79</sup>

In the context of parallel investigations of the same (or similar) conduct, forms of co-operation such as "joint investigation teams", or "lead jurisdiction" models may be beneficial for interim measures. In this regard, should a lead agency impose interim measures producing effects across jurisdictions, this may contribute to (1) preserve the effectiveness of enforcement across several jurisdictions; and (2) free other authorities from diverting resources from their main investigations to interim measure proceedings. Some of these considerations have been raised in the *OECD Hearing on Enhanced Enforcement Co-operation*<sup>80</sup> in 2014 and they will be further discussed in the *OECD Hearing on Thinking out of the Competition Box: Enforcement Co-operation in Other Policy Areas* in June 2022.

## 5. Conclusion

Interim measures can be a powerful tool to improve the effectiveness of antitrust enforcement and to preserve competition during antitrust investigations. Nevertheless, interim measures should not be seen as a tool operating in a vacuum. They can influence the outcome of antitrust investigations and, more importantly, they may produce market effects difficult to reverse in practice. Therefore, the use of interim measures should be carefully considered on a case-by-case basis.

Interim measures require a balancing exercise, with the objective of mitigating risks of false positives and false negatives. Competition authorities considering whether to adopt or to seek the adoption of interim measures are essentially confronted with two questions: (1) Are the expected benefits of an interim measure greater than its costs? (2) Should the competition authority be risk neutral or risk averse in how it balances these expectations?

The way the two legal conditions of likelihood of infringement (*fumus boni iuris*) and urgency to prevent serious and irreparable harm (*periculum in mora*) are interpreted – and the respective evidentiary standards – have an impact on how these questions are addressed and, consequently, on the likelihood (and incentives) of imposing interim measures. Procedural rules are an equally important factor in deciding whether to pursue interim measures, taking into consideration the need to ensure rights of defence and due process. Judicial review – and, more broadly, courts (e.g. through private enforcement) – also play a fundamental role in this regard.

The fast-changing nature of digital markets increased calls for more frequent adoption of interim measures. Indeed, subject to meeting the legal and evidentiary standards, interim measures may be particularly appropriate in antitrust investigations concerning products or services that have characteristics leading to fast tipping. In this context, interim measures can bring substantial benefits to the investigative actions of competition authorities. Interim measures are not, however, the ultimate solution to speed up investigations in digital (and other fast tipping) markets. In fact, they might create – in some instances – the wrong incentive to slow down main proceedings.

Interim measures remain a very powerful tool and their use should be carefully considered. If wrongly adopted, they can do serious harm to competition and consumers as well as damage the action (and reputation) of competition authorities with potential spillover effects on the main investigation and beyond. Therefore, cases based on well-established – rather than novel – theories of harm may be better suited for interim measures. In other circumstances, while interim measures remain a valid tool for timely relief, regulatory solutions may be preferred.

# Endnotes

<sup>1</sup> Depending on their nature and procedure, interim measures are also identified with different terms such as “conservatory measures”, “emergency measures”, “temporary restraining orders”, and “preliminary injunctions”.

<sup>2</sup> See e.g. Financial Times, 2 July 2017, *EU considers tougher competition powers*, available at [www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895](http://www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895).

<sup>3</sup> US antitrust agencies can seek both temporary restraining orders and preliminary injunctions. A temporary restraining order is a remedy to preserve the *status quo* until courts can hold a hearing, and it may be issued even without notice to (or appearance by) the adverse party. It has a limited duration, and it is generally non appealable. For a preliminary injunction, more evidence is required and the affected party must be given an opportunity to contest the application. This order may be of indefinite duration, and it is immediately appealable (U.S. Department of Justice - Antitrust Division, n.d., pp. IV-8<sup>[37]</sup>).

<sup>4</sup> This was also the case in the EU prior to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1, 4.1.2003, p. 1–25* (EU Regulation No. 1/2003). See Order of the Court of 17 January 1980, *Camera Care v Commission*, Case 792/79 R: EU.C:1980:18, para. 18

<sup>5</sup> See ECN Recommendation *on the power to adopt interim measures*, available at [https://ec.europa.eu/competition/ecn/recommendation\\_interim\\_measures\\_09122013\\_en.pdf](https://ec.europa.eu/competition/ecn/recommendation_interim_measures_09122013_en.pdf).

<sup>6</sup> 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* (ECN+ Directive).

<sup>7</sup> For instance, in 2022, the Irish competition authority was granted the power to impose interim measures (“prohibition notices”) in the context of antitrust investigations. See Competition (Amendment) Bill 2022, Section 15H, available at <https://enterprise.gov.ie/en/Legislation/Legislation-Files/Competition-Amendment-Bill-2022.pdf>.

<sup>8</sup> In Lithuania, the need to seek interim measures from courts is limited to “active” measures, i.e. orders requiring firms to perform certain actions. See Article 26 of the Lithuanian Law on Competition, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=q8i88mf0v>.

<sup>9</sup> See, for instance, (U.S. Department of Justice - Antitrust Division, n.d., pp. IV-7-31<sup>[37]</sup>) noting that “preliminary relief is particularly appropriate in Section 7 cases, but it is also available in other types of cases, including actions brought under Sections 1 and 2 of the Sherman Act.”

<sup>10</sup> Article 49C of the South African Competition Act. See also (Lewis, 2013, pp. 50-55<sup>[33]</sup>).

<sup>11</sup> In practice, parties agree mainly to avoid litigation and reputational costs.

<sup>12</sup> There are jurisdictions where interim measures are rarely imposed by competition authorities, despite courts regularly imposing similar measures in private enforcement cases.



For statistics on interim measures decisions by type of cases and by sector in the European Economic Area (EEA) between 2015 and April 2020, see (PaRR Analytics, 2020<sup>[38]</sup>).

<sup>13</sup> ECN Recommendation *on the power to adopt interim measures*, para. 3.

<sup>14</sup> For instance, the UK CMA in *Atlantic Joint Business Agreement* (see <https://www.gov.uk/cma-cases/investigation-of-the-atlantic-joint-business-agreement>).

<sup>15</sup> See (OECD, 2014, p. 20<sup>[39]</sup>) (“If the merger has already been completed, interim measures will normally be addressed to the acquirer and they would aim at prohibiting any further activity towards the integration of the target’s business, without the prior consent of the competition authority. If the merger has not yet been completed, interim measures would be addressed to both the acquirer and the target company and, depending on the stage of integration, the competition authority may aim at (i) preventing the exchange of sensitive information between the parties; (ii) preventing any attempt to further integrate the two businesses; (iii) preventing any joint commercial activity of the merging parties; and (iv) preventing any employment decision that might affect the target company.”)

In *Virtus Health/Adora Fertility* (2021), the Australian Federal Court granted the Australian Competition & Consumer Commission (ACCC) request for an urgent injunction to stop the consummation of Virtus Health’s acquisition of Adora Fertility pending proceedings before ACCC. According to the ACCC, the limited information provided by the parties was not sufficient to grant an early merger clearance. Nonetheless, Virtus Health expressed its intentions to complete the transaction (see <https://www.accc.gov.au/media-release/accc-seeks-urgent-injunction-to-halt-virtus-acquiring-adora-fertility-clinics>).

In *Facebook/Giphy* (2020), under the UK’s voluntary filing regime, the parties closed the transaction without the CMA approval. In June 2020, the CMA opened a formal investigation to examine the transaction, imposing – as routinely does – an interim enforcement order (IEO) with several obligations to essentially prevent Facebook from integrating Giphy’s business before the conclusion of the investigation. Subsequently, the CMA fined two times Facebook for failure to comply with its obligations under the IEO (see <https://www.gov.uk/cma-cases/facebook-inc-giphy-inc-merger-inquiry>).

<sup>16</sup> In *Illumina/Grail* (2021), Illumina announced that it had completed its acquisition of Grail, while the European Commission was investigating the concentration, and the merging parties were subject to a standstill obligation. In October 2021, the European Commission adopted interim measures to prevent the potentially irreparable detrimental impact as well as possible irreversible integration of the merging parties (see [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_5661](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5661)).

<sup>17</sup> The ECN+ Directive attempts at harmonising these standards at EU level, leaving at the same time the possibility for national authorities to adopt lower standards.

<sup>18</sup> Many US courts allow for some balancing so that a stronger showing on one factor may compensate, to a degree, for a lesser showing on another factor. See e.g. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (allowing for a weaker claim on the merits “the more net harm an injunction can prevent”). But see also *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (even with balancing, factors like likelihood of success and irreparable harm still “require a showing of more than mere possibility”).

<sup>19</sup> Standards may be different between private antitrust litigation and public enforcement.

<sup>20</sup> It appears that, despite lowering its standards in 2014, the application of interim measures remains quite limited in the UK. See the Enterprise and Regulatory Reform Act 2013 and previously Section 35 of the 1998 Competition Act, available at [www.legislation.gov.uk/ukpga/2013/24/contents/enacted](http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted).

<sup>21</sup> In practice, the European Commission engaged in a *prima facie* assessment of the likely effects on competition in *Broadcom*, based on several evidence including internal documents, market studies and

responses to information requests (Kadar, 2021, pp. 447-448<sup>[14]</sup>).

More broadly, commentators argued that it is difficult to reconcile the *prima facie* condition with the effects-based approach to many anticompetitive conduct (Mantzari, 2020, p. 490<sup>[19]</sup>; Tremolada, 2021, p. 601<sup>[12]</sup>).

<sup>22</sup> See e.g. the 2020 *Rakuten* case in Japan, in which the JFTC was seeking interim measures against Rakuten for a commercial policy announced but not implemented yet (see JFTC, Press Release of 28 February 2020, available at [www.concurrences.com/IMG/pdf/japanese\\_ftc\\_the\\_jftc\\_has\\_filed\\_a\\_petition\\_for\\_an\\_urgent\\_injunction\\_against\\_rakuten\\_inc.\\_press\\_release\\_originally\\_28\\_february\\_2020\\_updated\\_10\\_march\\_2020.pdf?58289/3076af3fc77a1ec039696bb6e7c107717f67dbbd](http://www.concurrences.com/IMG/pdf/japanese_ftc_the_jftc_has_filed_a_petition_for_an_urgent_injunction_against_rakuten_inc._press_release_originally_28_february_2020_updated_10_march_2020.pdf?58289/3076af3fc77a1ec039696bb6e7c107717f67dbbd)).

<sup>23</sup> The European Commission looked at *prima facie* objective justification arguments in *Broadcom* (European Commission Decision of 16 October 2019, Case AT.40608 – *Broadcom*, available at [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40608/40608\\_2791\\_11.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40608/40608_2791_11.pdf)).

The burden of proof is usually on the investigated parties to demonstrate (at level of *prima facie*) efficiencies or objective justifications.

<sup>24</sup> There are exceptions to this fulfilment of this condition. In the US system, for instance, courts have recognised that an antitrust agency acting as plaintiff does not need to show irreparable harm as this is implied in the threatened violation of the statute with declared public interests (see *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980)). Therefore, when antitrust agencies show a probable success on the merits, they may not need to separately show irreparable harm (Marquis, n.d.<sup>[36]</sup>).

In the United States, the procedure that applies to the Federal Trade Commission has some differences with the procedure applicable to the Department of Justice (Marquis, n.d.<sup>[36]</sup>).

<sup>25</sup> For instance, it seems that the European Commission's position is that the possibility to impose interim measures to be effective should not be limited to instances of imminent damage, but extend to "progressive and incremental market developments, as long as such damage is serious and irreparable" (see Case AT.40608 – *Broadcom*, recital (468)). See also (Kadar, 2021, p. 448<sup>[14]</sup>).

<sup>26</sup> See Art (2015, pp. 59-70<sup>[11]</sup>) arguing that the assessment is alike to the counterfactual analysis conducted in merger control cases and that on issues of causation and evidentiary requirements "the learnings of merger control can largely be transposed to interim measures proceedings".

<sup>27</sup> In the UK, the Enterprise and Regulatory Reform Act 2013, Section 43 substituted "serious, irreparable harm" with "significant damage". In France, an irreversibility standard applies.

<sup>28</sup> See e.g. recent *Rappy v iFood* case (Administrative Inquiry No. 08700.004588/2020-47) in Brazil (Cordeiro et al., 2021, p. 202<sup>[25]</sup>).

<sup>29</sup> In general, in jurisdictions where competition authorities only consider harm to competition, the harm to individual firms remains addressable through the courts system.

<sup>30</sup> See also (Arnaudo, 2016<sup>[7]</sup>) with regard to Italy.

<sup>31</sup> From the investigated parties' perspective, it may be more difficult to rebut arguments with regard to harm to competition, compared to rebutting claims on the balancing of harm to one (or more) competitor(s) (O'Donoghue and Padilla, 2020<sup>[17]</sup>).

<sup>32</sup> Article L- 464-1 of French Commercial Code.

<sup>33</sup> The assessment of harm on a certain competitor/customer/supplier may be more appropriate where practices are investigated under abuse of economic dependence (or similar) provisions.

<sup>34</sup> These principles also apply in jurisdictions where competition authorities enjoy a wide discretion as to the type of interim measures.

<sup>35</sup> In the United States, courts may grant preliminary injunctions of “indefinite duration”, i.e. until the completion of a trial on merits (*pendente lite*), even though they have the power to dissolve or modify preliminary injunction orders (U.S. Department of Justice - Antitrust Division, n.d., pp. IV-13<sup>[37]</sup>).

<sup>36</sup> Section 32a)(2) of the German Act against Restraints of Competition.

<sup>37</sup> Article 49C(5) of the South African Competition Law.

<sup>38</sup> See e.g. Article 8(2) of EU Regulation No. 1/2003.

<sup>39</sup> ECN Recommendation *on the power to adopt interim measures*, para. 7.

<sup>40</sup> In Brazil, for instance, a study conducted by CADE showed that, between 2015 and 2020, 73% of the applications for interim measures were denied because of irreversibility risks (Cordeiro et al., 2021, p. 200<sup>[25]</sup>). However, the irreversibility principle does not apply across all jurisdictions. For instance, in France, the competition authority seem to be able to impose interim measures with irreversible effects.

<sup>41</sup> Despite their behavioural nature, these measures may still have the objective of preserving the structure of the market.

<sup>42</sup> See, e.g. *Gympass* case (Voluntary Appeal No. 08700.007228/2021-88; and Administrative Inquiry No. 08700.004136/2020-65) in Brazil, <https://www.lexology.com/commentary/competition-antitrust/brazil/vmca/cade-suspends-exclusivity-contracts-on-wellness-platforms-market> and [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lSkjh7ohC8yMfhLoDBLddao4CLluheitNDM1fOgdMXqkCesuVxdtc2g9s-YxRgzQ5fNyBFaThd3HqZ\\_E1sjdqniC\\_Y8XxyjXUswHCn-rfMz](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lSkjh7ohC8yMfhLoDBLddao4CLluheitNDM1fOgdMXqkCesuVxdtc2g9s-YxRgzQ5fNyBFaThd3HqZ_E1sjdqniC_Y8XxyjXUswHCn-rfMz).

<sup>43</sup> See e.g. French competition authority in the *Google News* case requiring Google to submit compliance reports during the negotiations with publishers.

<sup>44</sup> The maximum amount of fines that can be imposed varies. In some jurisdictions, the maximum fine is equivalent to the one that can be imposed for breaches of decisions on the merits. In other jurisdictions, the maximum amount is lower than for the ceiling for breaches of decisions on the merits or equivalent to the maximum amount that can be imposed for procedural violations.

<sup>45</sup> See (O'Donoghue and Padilla, 2020<sup>[17]</sup>) calling for a more forensic approach.

<sup>46</sup> Maier-Rigaud and Lower (2008, p. 602<sup>[18]</sup>) notes that interim remedies may be still accompanied by “incidental flanking obligations that are aimed at managing the specific interim circumstances”.

<sup>47</sup> Article 8 of Regulation No. 1/2003. See also Commission Notice *on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ C 101, 27.4.2004, p. 65–77, para. 80 (“Article 8 of Regulation 1/2003 makes it clear that interim measures cannot be applied for by complainants under Article 7(2) of Regulation 1/2003. Requests for interim measures by undertakings can be brought before Member States' courts which are well placed to decide on such measures.”)

<sup>48</sup> Article 32(a)(1) of the German Act against Restraints of Competition. In Germany, interim measure complaints should be filed before courts.

<sup>49</sup> After transposition of the ECN+ Directive.

In France, the interim measures complaint should also be accompanied by a complaint on the merits. “Complaints” also encompass requests from the Minister of Economy and other institutions such as regulators.

<sup>50</sup> See in this regard ECN+ Directive, Article 11.

<sup>51</sup> For instance, Kadar (2021, p. 444<sup>[14]</sup>) notes (1) that one of the possible reasons why the European Commission largely refrained from imposing interim measures in the last two decades is the mechanism

introduced with EU Regulation No. 1/2003, removing the possibility to file complaints for interim measures; and (2) that interim measures adopted by the European Commission before this reform were largely triggered by third party complaints.

<sup>52</sup> For instance, in Brazil, CADE's Tribunal has acknowledged that requirements for granting interim measures before it and before Brazilian courts are not identical. This is mainly due to the configuration of the *periculum in mora* condition. While CADE has the power/duty to analyse any irreparable or difficult-to-repair damage to the market, courts must settle disputes between parties. See in this regard (Conselho Administrativo de Defesa Econômica, 2018<sup>[41]</sup>).

<sup>53</sup> (PaRR Analytics, 2020<sup>[38]</sup>).

<sup>54</sup> See in this regard, (Herbert Smith Freehills, 2019<sup>[31]</sup>)

<sup>55</sup> Even though the time prescribed to respond to a statement of objections in interim measure proceedings is often less than the time to respond to a statement of objections in main proceedings.

<sup>56</sup> The *UK Digital Competition Expert Panel report* considered – with regard to the UK regime – that procedural changes “would be beneficial in making interim measures more practicable”, recommending to mitigate the burden on competition authorities while preserving due process rights by granting, for instance, limited access to the case file, i.e. only to those documents relevant for the interim measures (Digital Competition Expert Panel, 2019, pp. 104-105<sup>[22]</sup>).

The UK government indicated that it intends “to amend the rules governing how the CMA provides access to its case file when taking interim measures decisions, to achieve a more proportionate process” (see ‘Reforming competition and consumer policy: government response’, 20 April 2022, available at [www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response](http://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response)). This classification within a case file, however, may not be that easy in practice in the context of an ongoing investigation (Ruiz Feases, 2020, p. 428<sup>[13]</sup>).

<sup>57</sup> With regard to France, see Tremolada (2021, p. 605<sup>[12]</sup>).

<sup>58</sup> Article 34 of the Portuguese Law No 19/2012.

This is also the case of other agencies such as the European Securities and Markets Authority (ESMA). See (Ruiz Feases, 2020, p. 426<sup>[13]</sup>) discussing the interim measures that ESMA can impose in financial markets.

<sup>59</sup> See, for instance, Italian Competition Authority, Comunicazione relativa all'applicazione dell'Articolo 14 bis della Legge 10 ottobre 1990, n. 287 (in Italian). See also (Arnaudo, 2016<sup>[7]</sup>).

<sup>60</sup> ECN+ Directive, recital (38).

<sup>61</sup> For instance, the *BRICS report* recommends to “ensure the adoption of an efficient procedural framework and a more targeted and intensive use of interim measures” in digital markets (Lianos and Ivanov, 2019, p. 40<sup>[6]</sup>).

Alexiadis and De Streel (2020<sup>[32]</sup>) view with scepticism any “fundamental changes to antitrust procedures as regards issues such as the burden of proof, the standard of legal review or the legal standard used to support the grant of interim relief”.

<sup>62</sup> This assessment may be different between large and small jurisdictions as interim measures imposed by small jurisdictions in digital markets may not be as effective on competition in global markets, while substantially harming domestic customers (Caminade, Chapsal and Penglase, 2020, pp. 452-454<sup>[10]</sup>).

<sup>63</sup> See e.g. in Germany, where the Bundeskartellamt shall not apply interim measures “to the extent that the undertaking concerned credibly demonstrates that the order would result in unfair hardship not justified by overriding public interests” (Article 32(a)(1) of the German Act against Restraints of Competition).

O'Donoghue and Padilla (2020<sup>[17]</sup>) note that “the threatened exit of all competitors ... should in most cases represent harm to competition that is likely to outweigh the harm caused to the respondent by an interim measures order”.

<sup>64</sup> For instance, Maier-Rigaud and Lowe (2008, p. 609<sup>[18]</sup>) noted, with respect to EU proceedings, that interim measures “add a full-blown procedure ... to the main investigations” and that “resources spent on [interim measures] are not used for the main investigation”.

<sup>65</sup> See Mlex, *Mundt calls for ‘rethink’ of remedies, injunctions for Internet economy*, 23 November 2016, available at [https://content.mlex.com/#/content/845371?referrer=search\\_linkclick](https://content.mlex.com/#/content/845371?referrer=search_linkclick).

<sup>66</sup> It appears that, for instance, the US Courts of Appeals’ standard of review of district court’s grant (or denial) of preliminary injunctions is abuse of discretion (Denlow, 2003, pp. 514-516<sup>[8]</sup>)

<sup>67</sup> ECN Recommendation *on the power to adopt interim measures*, para. 4.

<sup>68</sup> In most jurisdictions, reforms to limit judicial review would require legislative changes.

<sup>69</sup> See ECN+ Directive, recital (38).

<sup>70</sup> See (O'Donoghue and Padilla, 2020<sup>[17]</sup>).

<sup>71</sup> There is no uniform terminology for such consensual, early termination procedures in competition regimes. They are called “commitment decisions”, “consent decrees”, “consent orders”, “undertakings” or “written undertakings”.

<sup>72</sup> See also Letter from Lord Andrew Tyrie (at that time Chairman of the UK CMA) to the UK Secretary of State for Business, Energy, and Industrial Strategy, 21 February 2019, p. 17, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781151/Letter\\_from\\_Andrew\\_Tyrie\\_to\\_the\\_Secretary\\_of\\_State\\_BEIS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf).

In France, it has been reported that five out of seven cases in which interim measures were granted between march 2009 and march 2018 ended with commitments (Idot, 2018<sup>[30]</sup>). Nevertheless, the complementarity between interim measures and commitments may vary across jurisdictions as procedural aspects play a key role in the relation between these two tools.

<sup>73</sup> Steenbergen (2017<sup>[15]</sup>) notes that this effect is not limited to decisions imposing interim measures. Decisions rejecting requests for interim measures have similar benefits.

<sup>74</sup> In some instances, in practice, it may be sufficient to manifest the possibility to impose interim measures – and the opening of interim measures proceedings – to increase incentives to negotiate commitments.

<sup>75</sup> See e.g. EU Regulation No. 1/2003, recital (13).

<sup>76</sup> “[A] dilemma arises that could make it difficult for interim measures to emerge as an alternative to the use of commitments. While a key disadvantage of the latter procedure is (arguably) that new theories of harm in fast-evolving sectors may be resolved by commitments without a full litigation of the merits that could render valuable jurisprudence, it is precisely where the [authority] pursues novel legal theories that the Courts may be particularly reluctant to grant [or uphold] interim measures” (Marquis, n.d.<sup>[36]</sup>).

<sup>77</sup> The same reasoning applies to interim measures and remedies in merger control (OECD, 2003<sup>[40]</sup>).

Maier-Rigaud and Lowe (2008, p. 610<sup>[18]</sup>) argue that imposing behavioural remedies through interim measures could be a useful step to strengthen “the case for structural remedies to be imposed in a prohibition case if the [interim] measures fail to achieve all desired effects”.

<sup>78</sup> See (Schweitzer, 2020, pp. 44-45<sup>[9]</sup>).

<sup>79</sup> ECN Recommendation *on the power to adopt interim measures*, para. 9.

<sup>80</sup> For a summary of discussion, see [https://one.oecd.org/document/DAF/COMP/WP3/M\(2014\)2/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2014)2/ANN2/FINAL/en/pdf).

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