

Interim Measures in Abuse of Dominance Investigations: Recent Developments in Latin America

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I. Introduction

The topic of “Interim Measures in Abuse of Dominance Investigations: Recent Developments in Latin America” was recently discussed during the OECD-IDB Latin American and Caribbean Competition Forum (“LACCF”) held in Santo Domingo, Dominican Republic (October 9-10, 2024), which gathers senior competition officials from Latin American and the Caribbean (“LAC”) countries.³

Interim measures are indeed available in many Latin American countries and have been recently enforced by LAC competition authorities, especially in abuse of dominance cases. Recent examples include markets such as instant messaging services in Argentina, digital platform services in Brazil and financial services in Chile, Colombia, Dominican Republic, Peru, and Paraguay. In Costa Rica, a “Guideline of Interim Measures Procedure” is being considered to enhance legal certainty and predictability. These experiences from the region can help us better understand when the use of interim measures can be most effective.

This paper will provide an overview of the legal frameworks related to interim measures in Latin America, including legal requirements and enforcement powers, then examine recent enforcement experiences from the region, before concluding with final remarks.

II. Overview of Legal Frameworks in Latin American Jurisdictions

In short, interim measures are protective and corrective tools that may be adopted by competition authorities while investigating potential infringements of competition laws, most commonly in abuse of dominance cases.⁴ Their primary objectives are to (i) prevent anticompetitive harm that may occur between the opening of an investigation and the decision on the merits, and (ii) contribute to the effectiveness of competition enforcement.⁵

Most LAC jurisdictions have a specific legal framework for interim measures in competition cases.⁶ While some of them have benefited from these provisions for many years (e.g. Argentina since 1999), others have only recently adopted a competition law framework providing for such measures (e.g. Aruba in 2024). In certain countries, recent reforms have also improved pre-existing legal frameworks for interim measures (e.g. Mexico in 2024 and El Salvador in 2021).

The legal frameworks for interim measures in LAC jurisdictions provide both the common requirements to impose interim measures and, in certain countries, one additional requirement related to a financial guarantee to mitigate potential damages that may result from the interim order (or its suspension).

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³ This paper is an adjusted version of the OECD Background Note prepared by the same authors for the Latin American and Caribbean Competition Forum

(LACCF) and available here:

www.oecd.org/competition/latinamerica.

⁴ Interim measures may also be used in other areas of competition law enforcement (e.g. merger control) but the scope of this note is limited to abuse of dominance cases, which seem more relevant to LAC jurisdictions.

⁵ OECD (2022), *Interim Measures in Antitrust Investigations*,

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations-2022.pdf>.

⁶ At least 19 LAC jurisdictions have specific legal frameworks for interim measures in competition cases.

A. Legal Requirements

Imposing interim measures typically needs the fulfilment of two common requirements: (i) the likelihood of infringement (*fumus boni iuris*) and (ii) the urgency to prevent harm (*periculum in mora*). These conditions are also present in most LAC legal frameworks, but some nuances are noted, either in their legal definition or their application.

Concerning the first requirement, most jurisdictions provide for a high threshold to fulfil this condition (i.e. demonstrating the likelihood of infringement). In Chile, for example, the law requires “at least a severe presumption of the claimed right or the denounced events” (Article 25 of Law Decree n. 211 of 2018), while the laws in Brazil and Mexico indicate that there should be “evidence or a reasonable concern” of “acts or facts” of the existence of an infringement (Article 84 of Law 12,529 from 2011, and Article 12 of Federal Competition Law from 2014, respectively).

As for the second requirement, most jurisdictions require an urgency to prevent harm (*periculum in mora*) as an element for granting interim measures. This is sometimes referred to as the need to ensure the effectiveness of final decisions, as explicitly indicated in certain jurisdictions (e.g. Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Paraguay and Peru). However, jurisdictions differ on whether this condition requires showing harm to *competition and/or consumers* (e.g. Argentina and Honduras) or whether it is sufficient to show harm to *competitors and/or suppliers* (e.g. El Salvador and Nicaragua).

In addition to the two general – and common – requirements for the use of interim measures,

certain LAC jurisdictions (e.g. Nicaragua, Paraguay, and Venezuela) require a third – and uncommon – condition to impose interim measures: a financial guarantee from the interested party, most often the company that requests and will benefit from the interim measure. The rationale is to compensate the company affected by the interim measure in case it is either revoked by judicial courts or not confirmed by the final administrative decision on the merits.⁷ In other words, the idea is to protect companies from interim measures wrongly imposed.

This last requirement can play a significant role in the incentives for the use of interim measures. In Mexico, the possibility to provide a financial guarantee (*caución*) has been at the core of the recent reform enacted in 2024 to encourage the use of interim measures by COFECE while providing greater certainty to companies.⁸ While the primary objective of this condition is to ensure that potential damages emerging from an interim measure wrongly imposed can be more easily recovered, it also poses a range of challenges to the competition authorities (e.g. how to calculate the amount) and involved companies (e.g. financial capability and willingness to pay the amount).

B. Enforcement Powers

The reach of the enforcement powers related to interim measures in abuse of dominance cases also plays an important role in application of this instrument. In LAC jurisdictions, it covers at least the following dimensions: the competent enforcer (who), the types of interim measures (what), timing considerations (when) and procedural safeguards and sanctions for non-compliance (how).

⁷ For further reference, see: Fernandes Lopez (1996), *Medidas cautelares en el Derecho de la competencia*, pp. 143-152, <https://anuariocompetencia.fundacionico.es/files/original/e4de6850e3a77c290cbebe46ef992e2e82712c8d.pdf>.

⁸ Acuerdo No. CFCE-033-2024 por el que se modifican las disposiciones regulatorias de la Ley Federal de Competencia Económica. Available at: <https://www.cofece.mx/wp-content/uploads/2024/02/DOF-21febrero2024-01.pdf>.

In most LAC jurisdictions, the competent enforcer for imposing interim measures is the competition authority and a judicial authorization is generally not required. However, a judicial authorization is necessary in at least one LAC jurisdiction (i.e. in Uruguay, where a judicial authorization is required to impose positive injunctions but not negative injunctions). In LAC competition authorities composed by two bodies (within the same institution, i.e. one body in charge of investigations and the other in charge of adjudication), the adjudicative body is most often the one competent to impose interim measures (e.g. Argentina, Mexico, Paraguay, Peru). In a few countries, both bodies have this power (e.g. Brazil and Costa Rica in case of SUTEL) and may also provide for the possibility of appeals from one body to another (e.g. Brazil). In Chile, the competent enforcer is the TDLC, while the FNE can request interim measures but not impose them.

As for who can request interim measures, they may be granted either upon request of third parties or *ex officio* by the competition authorities. Only a couple of LAC jurisdictions seem to be an exception to this, in which interim measures are either dependent on a third-party request (i.e. Nicaragua) or limited to *ex officio* actions (i.e. Honduras). In countries where interim measures are limited to *ex officio* initiation, this seems less relevant since companies can often bring potential abuse cases to the attention of competition authorities who can then decide to make use (or not) of their *ex officio* enforcement powers.

As for the types of interim measures, most LAC jurisdictions foresee the possibility of both positive and negative injunctions (i.e. requirements to act and to refrain from acting). While some frameworks contain more detailed lists of possible types of injunctions (e.g. Peru) others have more succinct provisions, only implicitly allowing for positive injunctions (e.g. Venezuela). Examples of positive injunctions include a duty to provide access to a certain essential facility, while negative injunctions may cover an obligation to

not enter into new contracts containing exclusivity clauses.

Interim measures are also intrinsically related to timing issues. Firstly, this tool is particularly useful when the *length* of the main proceeding is inadequate to prevent anticompetitive harm. Secondly, for them to fulfil their objective, they need to be granted – and, if necessary, adjusted – at the *appropriate timing*. Thirdly, since they produce their effects *while pending* (“in the interim” of) a resolution of the case on the merits, they are remedies of a *temporary* nature. These three aspects – which can impact the incentives to pursue interim measures as well as their effectiveness – are influenced by certain elements present (or absent) in the legal frameworks of jurisdictions.

From a procedural perspective, interim measures require competition authorities to find a balance between an expedited procedure to urgently (and effectively) act to prevent irreparable harm while respecting the rights of the parties involved to defend themselves. As a result, interim measure procedures should contemplate essential safeguards and principles to minimally preserve the rights of defence and due process. Likewise, administrative decisions imposing these measures should be subject to further judicial review – both to ensure fairness from a procedural standpoint as well as to mitigate risks of inaccurate decisions from a substantive standpoint.

III. Enforcement Experiences

This section will focus on the application of the legal frameworks in LAC jurisdictions. They reveal at least some common challenges and a couple of particular sectors in which interim measures are used more frequently.

A. Balancing Risks and Benefits

A first common challenge is to balance the risks and benefits of interim measures in abuse of dominance cases. To start, the definition of legal requirements and their application,

including the adopted evidentiary standards, has an impact on the use of interim measures. As noted in past OECD work on this topic, when such conditions are narrowly interpreted the exceptional character of interim measures is more prominent.

In terms of statistics in the LAC region, Argentina, Brazil, and Chile have a significant enforcement track record and had more interim measures rejected than accepted. In Argentina, the Ministry of Economy has granted 16 out of 41 requests in the period 2015-2024 (39 percent requests granted). In Brazil, CADE has granted 19 out of 45 requests in the period 2013-2022 (42 percent requests granted). In Chile, the TDLC has granted 29 out of 59 requests in the period 2015-2024 (49 percent requests granted including 3 granted then revoked by TDLC at a later stage), although not all of them are related to abuse of dominance cases.⁹

These countries' experiences indicate that the legal provisions and/or their interpretation may influence the number of interim measure cases. In addition, competition authorities may have some flexibility on how to interpret their own legal tests and thus enforcing interim measure provisions. As seen in previous OECD work, this process requires a delicate balancing of various factors including the timing of interventions, the average duration of investigations in abuse of dominance cases, and information asymmetry, in addition to

considerations of the rights of defence, due process implications, and the overall effectiveness of competition policy.¹⁰

B. Financial Sector and Fast-Moving Markets

In recent years, a number of cases in the financial market have been subject to interim measures in LAC countries including Argentina, Chile, Colombia, Dominican Republic, Peru, and Paraguay during 2022-2024, particularly in the electronic payments market. The cases seem to be related to the same business practice and competition concern, which may explain similar enforcement responses across the region. It is interesting to note that the interim measures granted by LAC competition authorities often cross-mentioned other LAC decisions on the same or similar matters, which points to greater convergence or at least co-ordination of competition enforcement actions in the region.¹¹

In addition to the financial sector, a number of cases involving digital markets have been subject to requests for interim measures in LAC jurisdictions. Examples include the market for text messaging services in Argentina, where an interim measure was imposed against WhatsApp and Facebook by the Secretariat of Commerce from the Argentine Ministry of Economy, following CNDC's recommendation in 2021; and the market of food delivery apps in Brazil, where an interim measure was imposed against iFood by CADE in 2021.¹²

⁹ The numbers benefited from public enforcement data from competition authorities and related literature including Severin, Daniela H.; Gil, Rodrigo L. (2022), "Las medidas cautelares y prejudiciales precautorias en la jurisprudencia del TDLC", Investigaciones CeCo, www.centrocompetencia.com/category/investigaciones.

¹⁰ OECD (2022), *Interim Measures in Antitrust Investigations*, <https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations-2022.pdf>.

¹¹ Argentina: opinion from CNDC in October 2023 (<https://www.visa.com.ar/content/dam/VCOM/regional/lac/SPA/argentina/Homepage/Resolucioon-2023-2084-APN-SC-MEC/Resoluci%C3%B3n%202023-2084-APN%20SC%20MEC.pdf>); Chile: decision from TDLC in May 2022 and general instructions in August 2022 (https://www.tdlc.cl/wp-content/uploads/2022/08/ICG_5-2022.pdf); Colombia:

decision from SIC in July 2022 (https://www.sic.gov.co/sites/default/files/files/2022/RESOLUCI%C3%93N_48720_DEL_27-07-2022_-_MEDIDAS_CAUTELARES_-_DECRETA_-_VERSI%C3%93N_PUBLICA.pdf); Dominican Republic: decision from Pro-Competencia in April 2023 (<https://procompetencia.gob.do/wp-content/uploads/2023/04/de-004-2023-firmada-y-sellada-vp.pdf>); Paraguay: decision from CONACOM in September 2023 (<https://conacom.gov.py/el-directorio-de-la-conacom-hizo-lugar-a-medida-cautelar-en-el-expediente-cpr-n-2-2023/>); Peru: decision from INDECOPI in April 2024.

¹² In relation to CADE's experience in Brazil, see: Athayde, A., C. S. Zazur, and J. Ferreira (2022), *Interim Measures in the Recent Experience of Brazil's Antitrust Enforcement*, SSRN, <https://ssrn.com/abstract=4237603>; and Cordeiro, A. et al. (2021), *Brazil: Interim Measures as an Enforcement Policy in Digital Markets*,

In a nutshell, digital markets have also been subject to enforcement actions in LAC countries, which may require a careful follow-up on their future developments including aspects related to judicial review.

C. Judicial Review

Judicial review plays a key role in the context of interim measures. The main reason is that interim measures are most often subject to a follow-up judicial scrutiny, namely when the request is granted by competition authorities. In addition, this judicial review tends to be rapid rather than slow (as it is often the case for the review of final decisions on the merits, particularly in abuse of dominance cases), either to confirm or revoke the interim order.

In LAC jurisdictions, interim orders have been both upheld and revoked by judicial courts. Both types of judicial decisions may provide valuable guidance for competition authorities when assessing other interim measure requests.

A recent example of interim measures confirmed by judicial review comes from Argentina, namely the decision issued by the Secretariat of Commerce from the Ministry of Economy, following CNDC's recommendation, against WhatsApp and Facebook. The order was confirmed by the Argentine Court of Appeals (i.e. Federal Chamber for Civil and Commercial Matters) in two occasions: first in 2022 with relevant legal reasoning on the merits of the case and the use of interim

measures on competition cases, then in 2023 mainly in relation to the extension of the duration of the interim measure.¹³

Judicial decisions have also revoked interim measures imposed by LAC competition authorities, for instance in Ecuador,¹⁴ Brazil,¹⁵ and Peru¹⁶ to name a few.

IV. Final Remarks

Interim measures represent a powerful instrument to competition authorities, providing a means to prevent harm while investigations are ongoing. Their application requires a careful balance between speed, accuracy, and procedural fairness. Recent enforcement experience in LAC countries, allied to regional cooperation and an open dialogue between competition authorities, can enhance the effectiveness of interim measures to foster competition and protect consumers in the region.

<https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/brazil-interim-measures-enforcement-policy-in-digital-markets>.

¹³ Decision by Argentine Federal Chamber for Civil and Commercial matters from 26 April 2022 (<http://scw.pjn.gov.ar/scw/viewer.seam?id=gC9n%2F4TP6PD6SSv8YkceNI6mhpOMzwbNTgkDIJ3akPo%3D&tipoDoc=sentencia&cid=157320>); Decision by Argentine Federal Chamber for Civil and Commercial matters from 11 August 2023 (https://www.argentina.gob.ar/sites/default/files/2023/08/doc1353516410_1_0.pdf).

¹⁴ See OECD (2021), Ecuador's Peer Review of Competition Law and Policy, "Concel case: incorrect determination of the relevant market and unjustified

finer" (Box 1, p. 97). Available at: <https://web-archive.oecd.org/2021-05-26/583640-ecuador-oecd-idb-peer-reviews-of-competition-law-and-policy-2021.pdf>.

For the decision of the Constitutional Court, see: <http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/8adac386-fdad-4d69-82f4-ee02da470694/1156-19-ep-auto.pdf?guest=true>.

¹⁵ For an example of judicial decision that annuls CADE's interim measure, see decision issued by a federal judge in the Federal District in July 2019 (Judicial Proceeding n° 1005826-43.2019.4.01.3400).

¹⁶ Decision of INDECOPI's Competition Tribunal n° 0450-2024/TDC-INDECOPI from April 2005. Administrative Proceeding n° 003-2003-MC2/CLC.