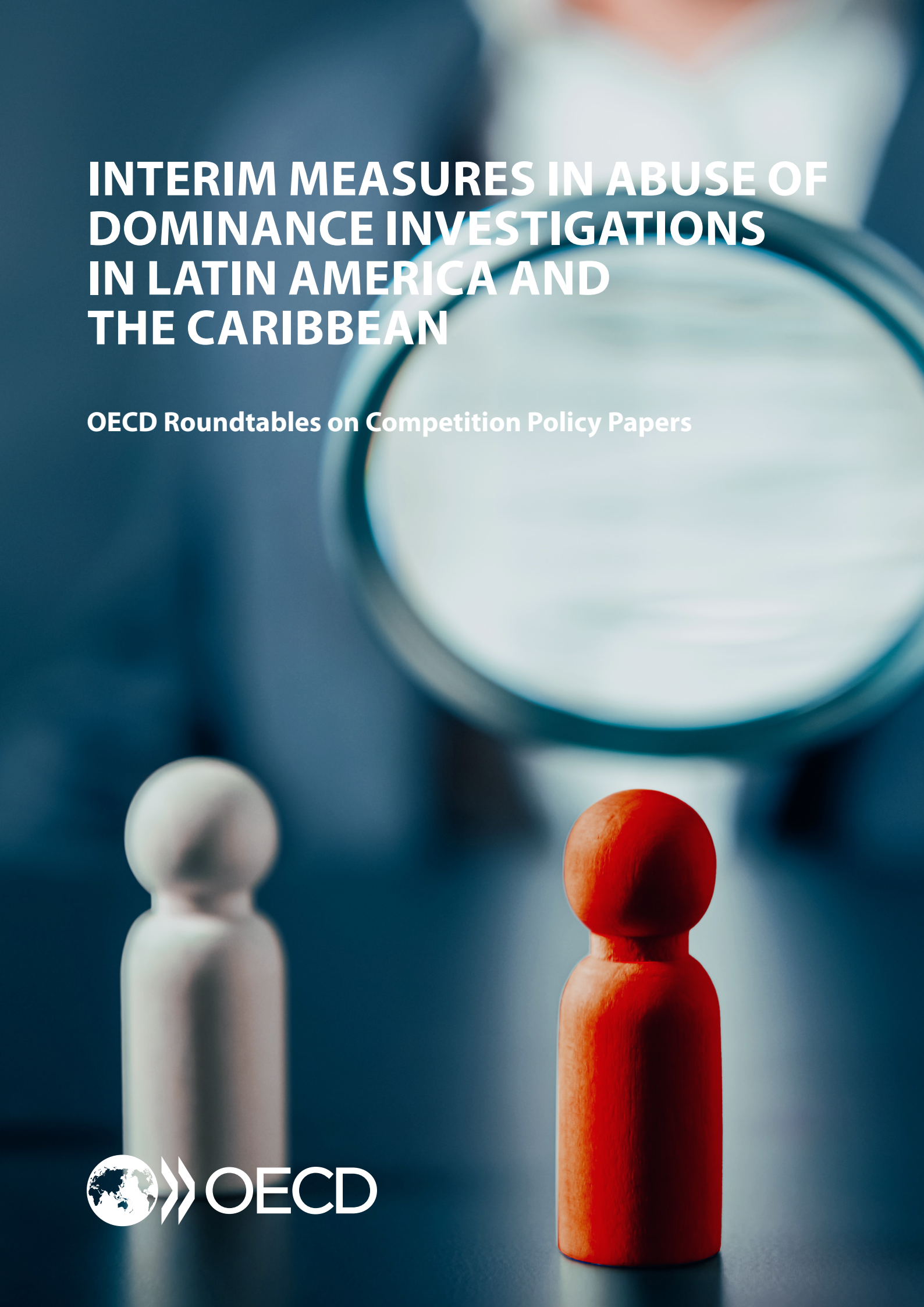
INTERIM MEASURES IN ABUSE OF DOMINANCE INVESTIGATIONS IN LATIN AMERICA AND THE CARIBBEAN

OECD Roundtables on Competition Policy Papers



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Foreword

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. In Latin America and the Caribbean (LAC) countries, most competition authorities dispose of interim measures in their legal frameworks, and many have used them in the past years (e.g. Argentina, Brazil, Chile, Colombia, Dominican Republic, Paraguay and Peru). This paper provides an overview of the state of play of interim measures in the region covering legal frameworks, recent enforcement experiences, as well as challenges and particularities of LAC countries. As a general message, the paper highlights that interim measures represent a powerful tool for competition authorities and should be carefully used to mitigate enforcement errors and related reputation risks.

This paper was prepared by Paulo Burnier da Silveira and Gabriela Berbert-Born, and benefited from comments by Ori Schwartz, Antonio Capobianco and Marcelo Guimarães (all from the OECD Competition Division). It was prepared as a background note for discussions on “Interim Measures” taking place at the 2024 Latin American and Caribbean Competition Forum (LACCF) being held on 9-10 October 2024 in Santo Domingo, Dominican Republic. The OECD is thankful to the Brazilian Administrative Council for Economic Defence (CADE) who kindly provided a voluntary contribution in support of the LACCF’s work this year.

The opinions expressed and arguments employed herein are those of the authors and do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

Table of contents

BOXES

1 Introduction

This year's OECD-IDB Latin American and Caribbean Competition Forum (LACCF) will explore the use of interim measures in Latin American and the Caribbean (LAC) countries. 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.[1] 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 (OECD, 2022).

Interim measures are indeed available in many LAC jurisdictions and have been recently enforced by LAC competition authorities, especially in abuse of dominance cases. Recent examples include a range of economic sectors such as instant messaging services in Argentina,[2] digital platform services in Brazil[3] and financial services in Chile,[4] Colombia,[5] Dominican Republic,[6] Peru[7] and Paraguay.[8] In Costa Rica, a "Guideline of Interim Measures Procedure" is being considered to enhance the legal certainty and predictability in its use.[9] The experiences from the region can also help to better understand when the use of interim measures can be most effective, for instance in particular sector(s).

This note intends to complement the OECD Background Note entitled "Interim Measures in Antitrust Investigations" prepared for related discussions in 2022, with focus and updates related to LAC countries. It is also limited to abuse of dominance investigations, not covering interim measures in other enforcement areas. For this purpose, the paper will begin with a summary of the key points of the discussions held at the OECD in 2022 including main takeaways. Then, the paper will provide an overview of the legal frameworks in LAC countries covering both the requirements to grant interim measures, as well as particularities related to enforcement powers. Finally, the paper will comment on recent enforcement developments in the region including a number of cases related to financial sector and the role of judicial review.

2 Key points of previous OECD work on interim measures

The OECD discussions held in 2022 benefited from a Background Note prepared by the OECD Secretariat, a note prepared by Professor Juliette Caminade that focused on economic aspects, in addition to twenty written contributions from OECD delegations and presentations from five expert speakers.[10] This section indicates a few key points taken from these discussions, which shed light on when and how interim measures can be most effectively used by competition authorities.

Firstly, interim measures can be effective in protecting a competitive environment and ensuring effectiveness of competition law while an investigation of abuse of dominance is still ongoing (e.g. to suspend the effects of certain contract clauses or to grant provisional access to an essential infrastructure). At the same time, interim measures represent a powerful tool to competition authorities and should be carefully used to mitigate enforcement errors and related reputational risks. Indeed, they entail risks of enforcement errors including both type-1 errors (i.e. false positives / overenforcement) and type-2 errors (false negatives / underenforcement). This exercise requires competition authorities to carefully balance the trade-offs between speed and accuracy, which may include several factors such as the timing of interventions, the average length of the investigative procedures, the degree of asymmetry of information, the right of defence and due process implications, as well as the effectiveness of competition law enforcement and overall competition policy.

Secondly, interim measures generally require the fulfilment of two conditions: the likelihood of the infringement (*fumus boni iuris*) and the urgency to prevent harm (*periculum in mora*). The interpretation of these two legal conditions varies across jurisdictions, reflecting different evidentiary standards to grant interim measures. Concerning the likelihood of the infringement, it is sufficient to show that an infringement would be likely in certain jurisdictions. As for the urgency to prevent harm, some jurisdictions require a strict standard of irreparability whereas others consider this condition met when the harm would be difficult to repair, most commonly in relation to a harm related to competition (and not to competitors). For instance, urgency can be proved by showing that a particular entrant risks to be eliminated or that tipping is causing other players to exit the market. Furthermore, when the investigated conduct has been in place for a period of time, urgency may require showing what has changed in the market for an immediate intervention, particularly when the interim measure is not taken quickly. In addition, procedural issues and requirements may also vary, for instance whether competition authorities have the direct power to impose interim measures or need to seek approval by judicial courts, whether measures can be imposed *ex officio* or upon request by the parties or third parties, and the types of measures available (i.e. negative injunctions or positive injunctions).

Thirdly, the design of effective and well-target interim measures can be a complex exercise. In this context, certain principles are useful to guide competition authorities when designing and implementing interim measures. These principles include adaptability, reversibility, proportionality, and enforceability of interim measures. Indeed, interim measures should remain flexible, with the possibility to amend their scope depending on the changes in the market or new findings during the investigations, as well as being reversible when necessary. The principle of proportionality entails that interim measures should focus on the case-specific issues under investigation, striking a balance between the private interest of the affected

party and the public interest of preserving effective competition. Competition authorities should also be able to ensure that interim measures are being followed, for instance by having the powers to impose sanctions and request information from market players.

Lastly, interim measures can influence the outcome of investigations, so their interaction with negotiated solutions, final remedies and regulation should be carefully considered by competition authorities, particularly when they may leverage commitments or settlement negotiations. In certain markets, interim measures emerge as a powerful tool for competition authorities although their use may be less useful in the current context of a growing shift towards a regulatory approach.

3 Overview of legal frameworks in LAC jurisdictions

Most LAC jurisdictions have a specific legal framework for interim measures in competition cases.[11] 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 since early 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).

This section provides an overview of LAC's legal framework related to interim measures. It will first cover the general requirements to impose interim measures including certain nuances and particularities (e.g. requirement of a financial guarantee in certain jurisdictions), then address the extension of the enforcement powers which also present certain differences amongst LAC jurisdictions.

3.1. Legal requirements

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).

3.1.1. Common requirements: likelihood of infringement and urgency to prevent harm

As indicated in OECD previous work, imposing interim measures typically requires 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 the definition of the legal requirements or their application.

Concerning the first requirement, most jurisdictions provide for a high threshold to fulfil this condition (i.e. demonstrating the likelihood of the infringement). In Chile, for example, the legislation 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 legal frameworks 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). In Honduras, interim measures are also "subject to the existence of evidence" of the infringement (Article 40 of Law Decree n. 357 of 2005). One exception is Curaçao that provides a lower legal threshold for the Fair Trade Authority of Curaçao (FTAC) to impose such measures: "should the FTAC have any suspicion of a dominant position (…) it may, in urgent cases (…) impose one or more of the obligations referred to in Article 4.2" (Article 4.4. of Competition Act, the National Ordinance of 2016). Similarly, Aruba's legislation also uses the word suspicion: "if the Authority has a reasonable suspicion (…)" (Article 2.8 of Ordonnance n. 103 of 2020) to permit the use of interim measures.

As for the second requirement, most jurisdictions require an urgency to prevent harm (*periculum in mora*) as an element to grant interim measures. This is sometimes referred to the need to ensure the effectiveness of final decisions as explicitly indicated in the legal frameworks of certain jurisdictions (e.g.

Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Paraguay and Peru). However, jurisdictions differ on whether this condition requires to show 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).

Box 1. Legal requirements to grant interim measures in key LAC countries

Brazil: "(…) if there is any evidence or a reasonable concern that the respondent's actions, directly or indirectly, have caused, or might cause, harm to the market that is irreparable, difficult to repair, or that renders the final result of the proceeding ineffective" (Article 84 of Law n. 12,529 of 2011).

Chile: "(…) interim measures necessary to avoid negative effects of the conducts submitted to its decision, and to protect the common interest. (…). To impose them, the requesting party must present precedents that indicate serious presumption of the claimed rights. The TDLC, when it deems necessary, may require a financial guarantee from the requiring company to cover for any damages that may arise" (Article 25 of Law Decree n. 211 of 2018).

Colombia: "conducts that may be contrary to the provisions on the protection of competition and unfair competition" (Article 3 of Decree 4886 of 2011).

Mexico: "order the suspension of acts or deeds that constitute a probable illegal conduct under this Law and impose other injunctive measures, as well as determine surety for the lifting of such measures (Article 12 of the Federal Economic Competition Law).

3.1.2. Additional requirement in certain jurisdictions: financial guarantee

In addition to the two general – and common – requirements for the use of interim measures, certain LAC jurisdictions 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 (FERNANDEZ LOPEZ, 1996). In other words, the idea is to protect companies from interim measures wrongly imposed.

The precise delimitation of this condition varies within the jurisdictions that adopt this requirement. In certain countries, the financial guarantee is mandatory when the interim measure is requested by a third party, while not necessary only when the interim measure is imposed ex officio by the competition authority (e.g. Paraguay). In other countries, the competition authority may request a financial guarantee, meaning that it has a discretion on when to require this condition (e.g. Chile, Colombia, Dominican Republic, Venezuela and Andean Community).

Furthermore, certain jurisdictions allow the company subject to an interim measure to lift the order through the payment of a financial guarantee, or by providing a counter-payment for the same purpose when it was previously done by the company requesting the interim measure (e.g. Mexico, Paraguay and Venezuela).

Box 2. Legal provisions related to financial guarantee for interim measures in LAC countries

Andean Community (CAN): "The General Secretariat may require the establishment of a bond, counter-guarantee, or collateral for the granting of such measures" (Article 31 of Decision n. 608 of 2005).

Chile: "(…). The TDLC, when it deems necessary, may require a financial guarantee from the requiring company to cover for any damages that may arise" (Article 25 of Law Decree n. 211 of 2018).

Dominican Republic: "When the interested parties are those who request the interim measure to the Commission, they may be required to provide the corresponding bond" (Article 64 Law 42-08 of 2008).

Mexico: "The Economic Agent may request the Board of Commissioners that, through the expedite procedure provided for in the Regulatory Provisions, a surety be established so as to reverse the measures foreseen in the previous article. The surety shall be sufficient to repair the damage that may be caused to the process of free market access and economic competition if the resolution obtained is adverse to its interests. The Commission shall issue the respective technical criteria for the establishment of sureties" (Article 136 of Federal Economic Competition Law of 2014).

Nicaragua: "(...) the interested party must provide a guarantee in any form, which shall be declared sufficient by the President of the Board of Directors, to cover any damages and losses that may arise from the referred measure" (Article 44 of the Ley de Promoción de la Competencia n. 601/2006).

Paraguay: "If the interim measure is requested by a party, the Board shall, prior to its granting, require from this party a sufficient guarantee in the amount determined by the National Competition Commission (CONACOM). (…). "The affected party may provide a counter-guarantee equivalent to the guarantee provided by the interested party, in which case the interim measure will cease to have effect" (Article 60 of Law No. 4,956 of 2013).

This 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.[12] In Peru, the impossibility of INDECOPI to require financial guarantees to grant interim measures has been indicated as one of the reasons for the current practice of requiring a high threshold to fulfil the condition of likelihood of infringement (*fumus boni iuris*).[13] In other words, a financial guarantee could allow, in certain cases, a re-calibration of the risks involved in the errors of type-1 (overenforcement) and type-2 (underenforcement).

In sum, 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).

3.2. Enforcement powers

The extension 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).

3.2.1. Who: competent enforcer

In most LAC jurisdictions, the competent enforcer to impose interim measures is the competition authority and a judicial authorisation is generally not required. However, a judicial authorisation is necessary in at least one LAC jurisdiction (i.e. in Uruguay, where a judicial authorisation 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.

Whitin the Andean Community, the supranational legislation coexists with the national legislation of member-states that benefit from interim measures provisions for competition cases (i.e. Colombia, Ecuador and Peru), with CAN's General-Secretariat in charge at the supranational level (i.e. cross-border cases) and national competition authorities at country level (i.e. effects limited to the concerned country). As for Bolivia, who does not benefit from legal provisions for interim measures, CAN's competition framework provides that national authorities can apply CAN's provisions, which allows Bolivia to supplement the absence of a national framework.

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* (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.

3.2.2. What: 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 exemplificative 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.

Although both types of orders are generally available, each type may require different conditions and procedures. For instance, a judicial court authorisation is required in certain countries for positive injunctions but not negative injunctions (e.g. Uruguay). In other countries, interim measures are limited to negative injunctions (e.g. Honduras and Nicaragua). This distinction is also relevant when considered that interim measures are generally adaptable and may be subject to changes during its implementation phase in light of new information or changes in the market.

3.2.3. When: timing considerations

By nature, interim measures are 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.

Regarding the first point, certain LAC jurisdictions provide a maximum timeframe for the investigation (e.g. 6 months in Paraguay and 12 months in Dominican Republic). These legal provisions may have been influenced by the Spanish Competition Act, which provides for a similar provision (i.e. 24 months to reach a final administrative decision including the investigation phase). This is an element that points to a reduced need for interim measures given that these timeframes are often relatively short (i.e. 6-24 months). However, most LAC jurisdictions do not have such time limitations and practice shows that abuse of dominance cases can take several years. In these cases, the element of urgency plays a more prominent role to mitigate a potential ongoing harm. For this reason, the expected timeframe of the investigation should be factored by competition authorities when assessing the requirement of urgency to grant an interim measure (see also, Caminade et al. 2020).

Regarding the second aspect, namely the appropriate timing of interim measures, it may concern when interim measures can be requested (i.e. which stage of the investigation) and possible deadlines for competition authorities to assess these requests. In general, interim measures can be requested (or imposed *ex officio*) during ongoing investigations (e.g. Argentina, Brazil, Colombia, Honduras, Paraguay and Peru), but can also be granted *prior* to the opening of a formal investigation in certain LAC jurisdictions (e.g. Chile, Ecuador, El Salvador and Uruguay). As for a maximum time to issue a decision after a request is submitted, at least a few jurisdictions establish specific deadlines for the competition authority: six days for Pro-Competencia in Nicaragua, eight days for CONACOM in Paraguay, and 20 working days for CAN's General-Secretariat in the Andean Community.

Finally, interim measures should be adaptable thought time, particularly to consider new elements collected during the investigation or as result of market developments. This is also an element of effectiveness of the tool and relevant for the region since most LAC jurisdictions do not provide for a maximum duration for these measures (apart from a few exceptions, such as Aruba and Curaçao where it is limited to a maximum duration of six months extendible once by an equivalent period).

3.2.4. How: procedural safeguards and sanctions for non-compliance

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 defence of the parties involved. As a result, interim measure procedures should contemplate essential procedural safeguards and principles to minimally preserve 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.

In this context, many LAC jurisdictions establish a period for companies to exercise their right of defence, allowing them to present their arguments before a decision of interim measure that could affect their activities (e.g. three days in Chile and six days in Nicaragua). In other jurisdictions, this period is not mandatory, given the element of urgency, and competition authorities can impose interim measures without having to hear the arguments of affected companies, also known as *inaudita altera parte* (e.g. Brazil and Dominican Republic).

In addition, sanctions for non-compliance are essential to ensure the effectiveness of administrative decisions including the implementation of interim measures, which is commonly available in LAC jurisdictions. In addition to sanctions available within the general framework of national procedural laws, a few LAC jurisdictions have specific provisions for interim measures in competition law, generally in the form of monetary sanctions such as daily fines for non-performance (e.g. Argentina, Brazil, Dominican Republic, Honduras and Mexico), and at least a couple provide the possibility of non-monetary sanctions such as prohibition to participate in public tenders (e.g. Argentina) and the temporary closure of the company (e.g. Ecuador).

4 Enforcement experiences in LAC jurisdictions

This section will focus on the application of the legal frameworks in LAC jurisdictions, including recent enforcement experiences that include a variety of countries: Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, Paraguay and Peru. In some of them, interim measures have been granted only once or twice (e.g. Dominican Republic, Peru and Paraguay), which may be related to a low number of interim measure requests and/or the legal test used for their enforcement. In any case, these experiences reveal certain common challenges in the region, as well as particular markets in which interim measures are more frequently used by competition authorities such as markets related to payment systems.

4.1. 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 this context, Peru has argued that a narrow interpretation of the Peruvian legal thresholds may explain why interim measures are rarely granted by INDECOPI on competition matters (only two interim measures were granted by INDECOPI on competition matters in the past 20 years, while at least eight requests have been submitted in this period).[14]

Similarly, Argentina, Brazil and Chile also have more interim measures rejected than accepted. In Argentina, the Ministry of Economy has granted 16 out of 41 requests in the period of 2015-2024 (39% requests granted). In Brazil, CADE has granted 19 out of 45 requests in the period of 2013-2022 (42% requests granted). In Chile, the TDLC has granted 29 out of 59 requests in the period of 2015-2024 (49% 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.

These country 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, information asymmetry, in addition to considerations of the rights of defence, due process implications, and the overall effectiveness of competition policy (OECD, 2022).

4.2. 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 market of electronic payment. The cases seem to be related to the same business practice and competition concern, which may explain the existence of 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 matter, which points to greater convergence or at least co-ordination of competition enforcement actions in the region.

Box 3. Interim measures in the electronic payment market: similar responses across LAC jurisdictions

Despite the diversity in both the legal frameworks and the evidentiary standards for imposing interim measures, several Latin American competition authorities have adopted similar interim measures in the market of electronic payment in recent years. The jurisdictions include both countries with greater track-record in granting interim measures (e.g. Chile, Colombia, and Argentina), as well as countries with less tradition in its use (e.g. Peru and the Dominican Republic).

In general, the interim measures aimed at addressing potential abusive practices committed by dominant companies of the global payment systems (e.g. Visa and Mastercard), which could be negatively impact local acquiring companies and consumers. The invoked theories of harm related to discriminatory practices, refusal to contract and/or market foreclosure, which could allegedly benefit the dominant companies.

Interestingly, many interim measures decisions cross-referenced other Latin American interim measure decisions. For instance, the decision issued in Colombia (July 2022) mentions the decision issued by Chile (August 2022). Similarly, both decisions – from Chile and Colombia – are mentioned in the interim order issued in Dominican Republic (April 2023). All three of them – Chile, Colombia and Dominican Republic – are referred in the decision by Argentina (October 2023). Finally, Paraguay's decision (September 2023) also refers to the Chilean decision.

Sources:
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;
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Peru: Decision from INDECOPI in April 2024, https://media.licdn.com/dms/document/media/D4E1FAQHqHJcJG-Cwaw/feedshare-document-pdf-analyzed/0/1714051289388?e=1720656000&v=beta&t=5Ut2j1AxAtEpr0fPq4owCppSJ7a5bM7pAJo8PxKtnBI.

In addition to the financial sector, a number of cases involving fast-moving 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.

In the Brazilian case, the main discussion was related to the use of exclusivity clauses by iFood, the dominant player in this market, that could allegedly foreclose the market for new competitors providing food delivery services through apps. A key element of the discussion was the use of exclusivity clauses in

relation to key restaurants (also known as “must-have” restaurants, e.g. large chain of restaurants) given their relevance to local consumers including users of food delivery apps. In other words, the existence of these exclusivity clauses – between key restaurants and the dominant food delivery player – could hamper new entrants in the market of food delivery apps.

Box 4. Interim measures followed by settlement in the market of food delivery apps in Brazil (2023)

In 2021, the Administrative Council for Economic Defense (CADE) received two complaints against iFood – a dominant player in the Brazilian market of food delivery application – concerning its alleged abusive practices related to exclusivity contracts with partner restaurants. CADE imposed interim measures ordering iFood to refrain from signing new contracts containing exclusivity clauses and from amending ongoing contracts to include such provisions.

In 2023, CADE and iFood reached an agreement restricting the terms and conditions for exclusivity clauses (e.g. interdicting such contracts with chains of 30 or more establishments, limiting new exclusivity contracts to two years, and defining caps for such agreements in predefined geographical regions).

Source: CADE’s Press Release from 8 February 2023, https://www.gov.br/cade/en/matters/news/cade-signs-agreement-with-ifood-in-case-involving-exclusivity-deals-in-food-delivery-marketplaces.

The Brazilian case provides a fresh illustration of the interplay between the use of interim measures and commitment decisions, as explored in previous OECD discussions. Indeed, interim measures can also be used as a complementary tool to abuse of dominance investigations, and competition authorities should be mindful when using such tools to leverage expedite solutions given the enforcement risks associated to this strategy (OECD, 2022).

In a nutshell, fast-moving 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.

4.3. 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 rather rapidly 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 measure confirmed by judicial review was in 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.

Box 5. Interim measure against WhatsApp and Facebook confirmed by judicial courts in Argentina (2023)

In 2021, the Secretariat of Commerce from the Ministry of Economy in Argentina, following a recommendation issued by CNDC, issued an interim measure against WhatsApp and Facebook. Among other elements, the interim measure (i) ordered WhatsApp to refrain from updating its privacy rules for users in Argentina and (ii) prohibited WhatsApp from sharing users' data with other companies of Meta's group (former Facebook). The theory of harm suggested that this could increase Facebook's market power, potentially leading to both exploitative effects on users and market foreclosure for competitors.

In 2022, the Argentine Court of Appeals confirmed the interim measure. In its reasoning, the Court provided relevant guidance on the element of likelihood of the infringement, a requirement for interim measures that is not explicitly mentioned in the Argentine Competition Act. When analysing the defendant's argument that the conduct did not constitute a *prima facie* infringement, the Court clarified that "it is not necessary for the legal classification and framework of the conduct(s) being investigated to be determined with complete precision at the time of adopting an interim measure". As for the requirement to demonstrate harm or potential harm, the Court stated that "it is not necessary to quantify its impact, but only to preliminarily demonstrate that the conduct has the potential to cause such harm", which may also provide further guidance for interim measure cases in Argentina.

In 2023, the Court issued another decision, basically confirming the previous reasoning and extending the duration of the interim measures.

Sources:
Decision by Argentine Federal Chamber for Civil and Commercial matters from 26 April 2022, http://scw.pjn.gov.ar/scw/viewer.seam?id=qC9n%2F4TP6PD6SSv8YkceNl6mhp0MzwBNTqkDIJ3akPo%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.

Judicial decisions have also revoked interim measures imposed by LAC competition authorities. In Ecuador, for instance, an interim order imposed by former SCPM (current SCE) against CONECEL (the Ecuadorian Telecommunications Consortium) was annulled by the Administrative District Tribunal for Contentious matters in 2017. The annulment was then confirmed by the National Court of Justice and the Constitutional Court in 2018 and 2019, respectively. In this case, the judicial courts annulled both the interim measures and the final decision on the merits, which had sanctioned CONECEL for abuse of dominance position in the telecommunication sector. A main argument for the judicial annulment was the incorrect definition of the relevant market by SCPM, which attributed a dominant position to CONECEL in two co-related markets, namely a 60% market-share in the market of installation of antennae and masts (upstream market) and a 69% market-share in the market of provision of mobile voice service (downstream market). As the definition of the relevant market was considered incorrect, the existence of a dominant position was not demonstrated.[15]

Similarly, interim measures were also overruled by Courts in Brazil and Peru.

In Brazil, a number of interim measures have been issued by CADE in the port sector, more precisely in the market of handling containers in port terminals. While some port operators charge a specific segregation and delivery service fee (SSE) to transfer the containers from their terminals to private terminals that offer storage services (and thus compete with port operators in this market), this can potentially increase rival costs and create an exclusionary effect.[16] Several judicial decisions have reviewed both interim measures and final decisions on the merits issued by CADE on this matter, while

most of them seem to overturn CADE's administrative decisions including those related to interim measures.[17]

In Peru, INDECOPI's Competition Tribunal (*Sala de Defensa de la Competencia*) revoked an interim measure imposed by INDECOPI's Competition Commission that ordered the company Quimpac to sell sodium hypochlorite to company Multipurpose in a given minimum volume (i.e. 20 tons of sodium hypochlorite per month) and provide public information on the final prices and conditions of these commercial sales. The main argument for this annulment was the lack of sufficient motivation to fulfil the requirement of urgency (*periculum in mora*): "concerning the requirement of urgency needed to impose interim measures, the Decision nº 068-2004-INDECOPI/CLC presents a clear lack of motivation"[18]. It is an important decision given that only two interim measures have been granted by INDECOPI in its history on matters related to abuse of dominance.

Box 6. Interim measure against Quimpac revoked by INDECOPI's Competition Tribunal in Peru (2004)

In April 2004, INDECOPI's Competition Commission granted an interim measure ordering the company Quimpac to sell sodium hypochlorite to company Gromul, at a price and volume freely determined by them through negotiation. In short, Gromul had claimed that Quimpac was abusing its dominant position by entering into an exclusive distribution agreement with its competitor (i.e. Clorox) and refusing to sell this product to the complainant.

In July 2004, INDECOPI's Tribunal (Sala de Defensa de la Competencia) revoked this interim measure, on the grounds that neither of the two requirements for granting it were fulfilled. The Tribunal found no *fumus boni iuris* in characterising Quimpac's dominant position considering that "the Commission has not conducted even a superficial analysis – characteristic of an interim measure – of the substitutability of sodium hypochlorite", an essential aspect for defining the relevant market. Similarly, the Tribunal considered there were "no elements to consider the likelihood of an abusive conduct consisting of the alleged discrimination". Likewise, the *periculum in mora* was understood to be absent, as the practice described by the complainant had already been occurring for a considerable time.

In October 2004, INDECOPI's Competition Commission granted another interim measure ordering Quimpac to sell sodium hypochlorite to Gromul, this time specifying a minimum volume (i.e., 20 tons per month). Additionally, Quimpac was required to provide public information on the final prices and conditions of its commercial sales to ensure that the product would not be sold at discriminatory prices (i.e. under different prices and conditions offered to competitors of Gromul). In this second decision, which was twice as long as the first, the Commission conducted a significantly more thorough analysis to substantiate both the likelihood of Quimpac's dominant position (including an analysis of product substitutability) and the existence of a discriminatory strategy. Conversely, the Commission justified the *periculum in mora* in the same manner as in the first decision: based on the losses Gromul was allegedly suffering due to the supposed discrimination, which could threaten its market presence, and the rapid advancement of Clorox (the company allegedly being favoured by Quimpac) in the market.

In April 2005, INDECOPI's Tribunal annulled this second measure. This time, however, the Tribunal recognised the likelihood of infringement as supported by the reasoning of the Commission in the new interim measure decision. On the other hand, the Tribunal found that the *periculum in mora* was not adequately motivated, as the Commission merely reiterated the arguments from the first interim measure, which had already been rejected by the Tribunal in its initial review decision.

These two decisions suggest that the Tribunal requires a higher and more robustly substantiated threshold of evidence – both in terms of *fumus boni iuris* and *periculum in mora* – when compared to other countries like Argentina. In this regard, Peru has indeed acknowledged in its writing contribution

to the OECD 2022 Roundtable that "it has been extremely unusual for INDECOPI to order interim measures, which may be the consequence of this [high] degree of plausibility" that is required in Peru.

Sources: INDECOPI's Commission's Expedientes No. 007-2004 of March 2004 and No. 068-2004 of October 2004; INDECOPI's Tribunal Resolutions No. 286-2004 of July 2004 and No. 450-2004 of April 2005; Contribution from Peru to OECD Roundtable on Interim Measures in Antitrust Investigations (2022), https://one.oecd.org/document/DAF/COMP/WP3/WD(2022)20/en/pdf.

While these experiences indicate that interpretations of legal standards can vary across jurisdictions of the region, judicial cases can also reveal that legal tests can vary *within* the same jurisdiction. In countries like Brazil, although these requirements are defined similarly in the competition law and general civil procedural law, there are differences in how these legal standards are interpreted when applied by CADE and by judicial courts, for instance in relation to the requirement of *periculum in mora*. In 2018, both CADE and civil judges were simultaneously requested for interim measures in the same case. In order to avoid a "forum shopping" for interim measures, CADE clarified the differences of the legal approach given by the competition authority and civil courts: while judicial courts often look at the harm to the plaintiff, CADE has the duty to assess potential harm to the market.[19]

In sum, the judicial review of interim measures can provide valuable inputs and guidance to competition authorities, who should be able to carefully monitor and adapt their practice in light of the evolution of judicial cases and legal reasoning.

5 Conclusion

This note underscores both the key role and risks that interim measures can play in the enforcement of competition laws across Latin American and Caribbean (LAC) jurisdictions. These measures serve as relevant tools to prevent anticompetitive harm pending the resolution of abuse of dominance investigations, reflecting a balance between the need for swift action and both the accuracy of the intervention and the imperative of procedural fairness.

The legal frameworks across LAC countries indicate both the similarities and nuanced differences in the approach towards the use of interim measures. Key requirements such as demonstrating the likelihood of infringement and the urgency to prevent harm are generally present, though their interpretation and application vary, influencing the frequency and scope of interim measures granted. Moreover, the inclusion of an additional condition in certain jurisdictions (i.e. financial guarantees to either grant or lift the interim measure) illustrates the different options that jurisdictions may have to manage the risks associated with interim measures.

Last, enforcement experiences in LAC jurisdictions reveal varied outcomes and challenges, particularly in fast-moving markets where the dynamics of digital platforms and financial services pose unique regulatory dilemmas. In this context, judicial review plays a crucial role in scrutinising the legality and necessity of interim measures, contributing to the overall accountability and effectiveness of competition enforcement.

Looking ahead, enhancing the effectiveness and legitimacy of interim measures will require ongoing dialogue among stakeholders, continuous refinement of legal standards, and adaptive regulatory responses to evolving market dynamics. By navigating these complexities thoughtfully, competition authorities in LAC countries can strengthen their enforcement toolkit and uphold the principles of fair competition in rapidly evolving economic landscapes.

Endnotes

[1] 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.

[2] Interim measure imposed against WhatsApp by CNDC-Argentina in 2021.

[3] Interim measures imposed against iFood and Gympass by CADE-Brazil in 2021 and 2022, respectively.

[4] Interim measures imposed against Mastercard and Visa by TDLC-Chile in 2022.

[5] Interim measure imposed against Mastercard and Visa by SIC-Colombia in 2022.

[6] Interim measure imposed against Mastercard and Visa by Pro-Competencia-Dominican Republic in 2023.

[7] Interim measure imposed against Mastercard and Visa by INDECOPI-Peru in 2024.

[8] Interim measure imposed against Bancard and Visa by CONACOM-Paraguay in 2023.

[9] Contribution from Costa Rica to OECD Roundtable on Interim Measures in Antitrust Investigations (2022). Available at DAF/COMP/WP3/WD(2022)4.

[10] All documents are available at: www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm.

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

[12] 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.

[13] Contribution of Peru to OECD Roundtable on Interim Measures (2022).

[14] Contribution of Peru to OECD Roundtable on Interim Measures (2022).

[15] See OECD (2021), Ecuador's Peer Review of Competition Law and Policy, "Conecel case: incorrect determination of the relevant market and unjustified fines" (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.

[16] For more info, see OECD (2022), *OECD Competition Assessment Reviews: Brazil*, OECD Competition Assessment Reviews, https://doi.org/10.1787/d1694e46-en.

[17] 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 nº 1005826-43.2019.4.01.3400).

[18] Decision of INDECOPI's Competition Tribunal nº 0450-2024/TDC-INDECOPI from April 2005. Administrative Proceeding nº 003-2003-MC2/CLC.

[19] CADE's decision from October 2018 on Administrative Proceeding nº 08700.005723/2018-57.

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