ICN CHECKLIST FOR AN EFFECTIVE USE OF INTERIM MEASURES IN THE CONTEXT OF UNILATERAL CONDUCT PROCEEDINGS

Introduction

"Interim measures" are defined as temporary remedies adopted by competition agencies or courts with a protective and corrective objective, i.e. providing temporary relief while investigating potential competition law infringements[1]. Such measures do not anticipate the final assessment on the merits, but are intended to ensure the effectiveness of competition law by preventing immediate harm that may occur during antitrust investigations and may be difficult or impossible to reverse.

While interim measures have long been in the toolbox of many competition agencies, the recent challenges raised by fast-changing and innovative markets have revived interest of the ICN community in urgency procedural tools.

Experience in a significant number of jurisdictions shows that interim measures can provide appropriate remedies to preserve competition pending a resolution on the merits. Drawing on the contributions of ICN members[2], the present Checklist identifies key principles devised to assist in the introduction and implementation of an effective interim measures regime. Those elements should be considered when designing or amending the interim measures regime of a competition agency.

This document focuses on the use of interim measures in the context of antitrust proceedings, and more specifically unilateral conduct, including but not limited to abuse of dominance. It does not address interim measures which may be adopted in other areas of competition law, such as merger control. The following elements exclusively relate to legal regimes in which competition agencies are entrusted with the power of directly adopting interim measures. They do not discuss interim measures that courts may order upon request of competition agencies and/or complainants.

I. Procedural framework

1. ***Ex-officio*/upon third parties' request proceedings**. Among jurisdictions where competition agencies have the power to issue interim measures, a distinction can be made between regimes in which interim measures can be imposed (i) *ex officio* only, or (ii) *ex officio* and upon third parties' request. The power to act *ex officio* is an important feature as it allows competition agencies to impose interim measures without having to rely on third parties' complaints. This ability can be useful to overcome the potential reluctance of undertakings, being either competitors or business partners, to refer a complaint, *i.e.* for fear of commercial retaliation. At the same time, the power to initiate interim measures proceedings upon third parties' request can improve the use of this tool by encouraging third parties to file complaints and provide information on potential competition infringements and imminent or on-going harm that are not easily detectable by competition agencies. Competition agencies should not be bound by the complaint with regards to the scope and type of the alleged anticompetitive practices and the suggested measures. *Ex officio* only regimes

[1] For reference, see the OECD, Background note, "Interim Measures in Antitrust Investigations", 2022.
[2] In particular, the responses to the questionnaire sent in 2024 to ICN member agencies and NGAs in the framework of the Unilateral Conduct Working Group.

should not preclude third parties from informally bringing to the attention of competition agencies relevant information and competition concerns that may lead to the opening of *ex officio* interim measures proceedings.

2. **Balance between accelerated proceedings and adversarial procedure.** Interim measures regimes should seek a balance between, on the one hand, accelerated proceedings aimed at effectively preventing immediate harm and, on the other hand, the rights of defence and other legitimate interests of the party(ies) involved. For this purpose, interim measures procedures usually grant the defendant access to the file and the right to be heard by way of written observations and/or oral hearing before a decision is adopted. In a few jurisdictions, competition agencies have the power to impose interim measures without hearing the defendant prior to the decision (*inaudita altera procedure*). However, the procedure in these jurisdictions only applies under specific conditions and does not preclude the defendant from submitting oral and written observations to the competition agency after the decision to impose interim measures has been adopted. In consideration of the parties' observations, the competition agency can in this framework either confirm, amend or revoke the interim measures decision. In any case, in the vast majority of jurisdictions, defendants have the right to appeal interim measures decisions and seek a suspension order before the judicial authority (see below under **IV. Subsequently to the interim measures decision**).

3. **Procedural framework ensuring prompt assessment of interim measures.** Interim measures proceedings generally differ from proceedings on the merits, especially with respect to procedural deadlines which are significantly shorter in interim measures proceedings in order to respond to the urgency of preventing harm to competition. In some jurisdictions, interim measures proceedings can also include simplified statements of objections. In the event the procedure is mainly oral or in the particular framework of the *inaudita parte procedure* mentioned above, a statement of objections may not be required. Procedural fairness and due process should be ensured. At the same time, excessively lengthy and/or complex proceedings can hinder the effectiveness of interim measures and reduce the incentives and ability of competition agencies to use this tool and of third parties to request interim measures from competition agencies.

4. **Consultation of third parties through public consultations/market tests.** Depending on the applicable legal framework, competition agencies may have the possibility to consult third parties/perform market tests of the envisaged measures. While this ability can help designing more appropriate measures, the opportunity of consulting third parties and the consultation process should be carefully assessed as they can potentially increase the length of the procedure and, as a result, reduce the effectiveness of the interim measures.

5. **Interim measures proceedings in conjunction with proceedings on the merits.** In many jurisdictions, the opening of interim measures proceedings has to be made in conjunction with a formal investigation on the merits. In the framework of proceedings initiated upon third parties' request, this means that third parties have to file a formal complaint on the merits in addition to their request for interim measures. Although this condition may help ensuring that third parties provide relevant and serious evidence to competition agencies, the requirement to file a formal complaint on the merits should not be excessively burdensome as to discourage affected parties from submitting requests for interim measures in a timely manner.

6. **Transparency of legal framework.** Clear and transparent legal frameworks, covering both procedural and substantive aspects, are likely to improve the incentives to use or request this tool

and the awareness of all parties involved. The release of public versions of interim measures decisions should also be considered in order to help undertakings understand the legal requirements and their interpretation by competition agencies. In addition, guidelines on procedural and/or substantive issues can provide guidance to potential complainants and defendants.

7. **Duration of interim measures proceedings.** Interim measures proceedings are by design significantly shorter than proceedings on the merits. Interim measures proceedings typically last less than a year, although the duration may vary significantly depending on the specificities of the case. Some regimes prescribe a maximum duration of interim measures proceedings. The starting point of such duration differs across jurisdictions (i.e. the date of the decision to initiate interim measures proceedings or the date of the complainant's request). While such frameworks can help ensuring that interim measures are adopted in a timely manner, the maximum duration set forth by law and/or case law should remain reasonable in order not to hinder the incentives of competition agencies to initiate such proceedings.

II. Legal criteria for adopting interim measures

8. **Standard of proof.** The legal standard for imposing interim measures can be governed by law and/or by case law. Imposing interim measures generally requires meeting two cumulative conditions: (i) the likelihood of anticompetitive conduct (*fumus boni iuris*) and (ii) the urgency to prevent immediate harm (*periculum in mora*). In some jurisdictions, a causal link between the reported conduct and the alleged harm is also required.

(i) **Likelihood of anticompetitive conduct.** In interim measures proceedings, establishing the likelihood of an infringement should not require competition agencies to demonstrate a violation of competition law to the same level of certainty as in a decision on the merits. As interim measures are usually imposed at an early stage of the investigations, on the basis of a preliminary assessment, establishing an infringement to a certain degree of probability should be considered sufficient to fulfil the *fumus boni iuris* condition. The degree of probability differs among jurisdictions: some may rely on *prima facie* findings, while others may require different evidentiary standards. The interpretation of these criteria can have a significant impact on the ability and incentives of competition agencies to impose interim measures. In any event, interim measures decisions should clearly indicate the provisional nature of the findings.

(ii) **Urgency to prevent immediate harm.** The *periculum in mora* condition usually requires competition agencies to show the existence of an immediate harm (*i.e.* a harm which is currently happening or can be foreseen in the near future with a sufficient degree of probability). In some jurisdictions, the standard of proof also refers to "serious" and/or "irreparable" harm. The notion of "irreparable harm" generally implies that the damage caused by the alleged conduct cannot be repaired by the decision on the merits. Legal regimes also diverge on whether competition agencies are required to demonstrate an immediate damage to certain undertakings and/or a public interest (which for instance can be, either alternatively or cumulatively, a particular market or industry, consumers or competition in general).

9. **A specific standard of proof for imposing interim measures.** As it derives from the above, the standard of proof for imposing interim measures is generally lower than the one for establishing an infringement of competition law in a decision on the merits. This is due to the fact that interim measures aim at guaranteeing the effectiveness of a potential infringement decision, while not prejudging the outcome of the proceedings on the merits.

III. Types of measures that can be adopted by competition agencies

10. **Transversality.** Enforcement cases in a significant number of jurisdictions that have contributed to this document show that interim measures have been successfully adopted in a wide array of sectors and product markets, including, *inter alia*, digital, telecom, transport, energy, semi-conductors, pharmaceutical, chemical, automobile, finance, insurance, banking, advertising, press, retail, food delivery, real estate, lottery games, waste treatment, sports and funeral services. Therefore, it appears important not to limit the use of interim measures to specific sectors. While interim measures can be used in any sector to prevent immediate harm to competition, they may be particularly well-suited in fast-changing/prone to tipping markets in which competitive harm can be difficult or impossible to repair due to certain market features, such as high barriers to entry, network effects and/or economies of scale. In this respect, recent case law shows that interim measures can be appropriate to preserve competition in digital markets, including AdTech, search services, e-commerce and messaging. Some agencies have also highlighted the relevance of interim measures to preserve competition in recently liberalized markets where incumbents may use their dominant position to prevent new entrants from entering the market.

11. **Scope of infringements covered.** Interim measures should potentially apply to any type of competition law infringements[3], provided that the applicable procedural and substantive criteria are fulfilled. Case law shows that interim measures have been used by competition agencies to address a wide range of practices, including refusal to supply or provide access to a market, unfair commercial conditions, exclusive dealing and predatory or excessive pricing.

12. **Appropriate measures to prevent immediate harm.** The types of interim measures that can be ordered by competition agencies are generally not listed in and/or restricted by law and/or case law. Competition agencies should be able to order any type of measures they consider appropriate to prevent immediate harm, within the limits of applicable laws, including the legal principles of necessity and proportionality (see below). In practice, interim measures can be divided in two main categories: injunctions to refrain from acting (i.e. cease and desist orders) and requirements to act positively (*i.e.* access to infrastructure or technology, obligation to enter into agreements at fair and non-discriminatory conditions, etc.). An interim measures decision may combine both types of measures. When interim measures are imposed in the framework of a third party's request, competition agencies should not be bound by the request as to the types of measures they can order.

13. **Necessity/proportionality of interim measures.** Interim measures generally need to meet certain criteria related to the principles of necessity and proportionality. While interpretation differs across jurisdictions, proportionality usually implies that interim measures should not go beyond what is necessary to prevent immediate harm. The proportionality criteria may lead competition agencies to weigh the public interest at stake against the likely impact of the envisaged measure on the defendant.

14. **Temporary and adaptable measures.** The obligations derived from interim measures decisions are by design limited in time as they aim at preventing competitive harm pending the completion of the investigation on the merits. The appropriate duration of interim measures should be decided in light of the specificities of the case, including the nature of the measures and the expected time to reach a decision on the merits. While some jurisdictions prescribe a maximum duration to interim

[3] As stated in the introduction, the present checklist does not address interim measures that may be imposed in the framework of merger control proceedings.

measures, in most regimes interim measures are renewable, subject to a revised assessment. Interim measures are also typically adaptable in consideration of new evidence gathered in the wake of the interim measures decision. In some jurisdictions, interim measures must also be reversible. Such condition may have a limiting effect on the type of measures that can be ordered (for example, structural remedies are less likely to comply with reversibility).

IV. Subsequently to the interim measures decision

15. **Monitoring.** Monitoring the implementation of interim measures is key to ensure their effectiveness. In general, interim measures are directly monitored by competition agencies. In some jurisdictions, competition agencies can alternatively decide to appoint a monitoring trustee independent from the parties, while remaining involved in the monitoring process. This possibility may be useful in some instances to reduce the administrative burden on competition agencies, as monitoring interim measures can be time and resource-consuming. The administrative cost may be higher when the measures ordered are behavioral in nature and require the defendant to act positively, or when the practices at stake occur in complex and/or fast-changing markets. Monitoring the implementation of interim measures is not only important to ensure compliance but also to assess whether the measures should be amended, renewed or revoked. Periodic reports provided by the monitoring trustee and/or the defendant often facilitate monitoring by competition agencies. Reporting requirements should be detailed in interim measures decisions. As mentioned before, public versions of the decisions are useful, including to allow third parties to report potential breaches of interim measures and/or concerns regarding their adequacy.

16. **Non-compliance with interim measures.** In most jurisdictions, non-compliance with interim measures, whether it is intentional or negligent, is considered as a standalone and sanctionable infringement. When investigating an alleged breach of interim measures, competition agencies should only be required to demonstrate a violation of the interim measures obligations and not a competition law infringement on the merits. Non-compliance proceedings concerning interim measures are typically shorter than substantive proceedings. In some jurisdictions, a fast-track procedure for non-compliance cases may help improve the effectiveness of interim measures. When non-compliance is established, competition agencies should have the power to impose monetary fines on the undertaking concerned. While the methods of calculation differ across jurisdictions, the amount of fines should be sufficiently deterrent to ensure the credibility of the mechanism and to prevent future breaches. Periodic penalties payments, as an alternative or in addition to monetary fines, can improve the deterrent effect of sanctions of the non-compliance decision and the effective and timely implementation of interim measures. Periodic penalties are generally calculated on a daily basis.

17. **Interactions between interim measures and proceedings on the merits.** From a legal standpoint, the adoption or dismissal of interim measures does not directly affect investigations on the merits, since each procedure has a different purpose and is subject to different rules. However, the opening of interim measures proceedings may have practical impacts on proceedings on the merits. Decisional practice shows that interim measures can, in particular, facilitate the rapid gathering of information and accelerate proceedings on the merits, particularly by encouraging defendants to cooperate and put forward commitments to end the investigation on the merits. Interactions may also arise from the potential exposure of certain competition authorities that have ordered interim measures when the investigation on the merits concludes that there was no competition law infringement.

18. **Judicial review.** In general, undertakings have the ability to appeal interim measures decisions before the judicial authority, within the applicable procedural framework. In most jurisdictions, the appeal has by default no suspensory effect as it would defeat the purpose of interim measures, which are intended to respond to urgent situations. However, in many jurisdictions, the judicial authority has the power, under certain conditions (*i.e.* when there are serious doubts as to the legality of the measure), to order the suspension of the contested decision. In such case, expedited judicial proceedings are key to ensure the effectiveness of interim measures.

19. **Consequences of the annulment of a decision imposing interim measures.** From a legal standpoint, the annulment of a decision imposing interim measures has no direct impact on the investigation on the merits. It may, however, have a practical impact, depending on the legal framework, the specificities of the case and the reasons for the annulment.