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Foreword

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Dear readers,

It is a pleasure to present to you another edition of our biannual Newsletter of the OECD Regional Centre for Competition (RCC) in Latin America and the Caribbean, hosted by INDECOPI in Lima.

In this first semester of 2024, the RCC held two workshops in Lima: the Workshop on "Due Process and Procedural Safeguards" (13-15 March 2024) and the Workshop on "Enforcement Tools and Techniques to Fight Cartels" (4-6 June 2024). Together they gathered more than 60 competition officials from Latin America and the Caribbean in Lima who benefited from the RCC training activities, the exchanges of experience and an ongoing effort to build trust amongst competition authorities in the region.

In addition, this edition benefits from an exclusive interview given by Alejandra Giuffra, President of the *Comisión de Promoción y Defensa de la Competencia* (CPDC), the competition authority in Uruguay. Amongst other updates and ideas, she provides further information on two recent merger prohibitions imposed by the CPDC in past months.

Last but not least, three written contributions complete this newsletter with recent updates from the region, including on a new e-notification mechanism for merger control launched by CADE in Brazil and developments on the "Rewards Program" in Peru, a sort of whistleblowing system to fight cartels and managed by INDECOPI. These contributions also aim to foster exchanges and promote co-operation between competition authorities.

Please feel free to contact us for any information, suggestions or assistance.

Enjoy your reading!

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This Newsletter benefited from the assistance of Arturo Chumbe (INDECOPI) and Gabriela Berbert-Born (OECD).

Section I
RCC activities and updates

RCC activities

Workshop on "Due Process and Procedural Safeguards" (13-15 March 2024)

The Workshop "Due Process and Procedural Safeguards" (13-15 March 2024) gathered around 30 participants from 14 jurisdictions in Latin America and the Caribbean. The event benefited from the expertise of Amanda Athayde (Brazil), Carlos Mena (Mexico), Vanessa Facuse (Chile), Richard McKewen (US) and Paulo Burnier (OECD), in addition to senior officials from the region.

Throughout the workshop, competition experts from several jurisdictions shared their experiences on the topic of due process and procedural safeguards, including managing information, access to leniency documents, right of defence, also in light of the new OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement (2021). A hypothetical case exercise completed the training with practical inputs to participants.

Workshop on "Enforcement Tools and Techniques to Fight Cartels" (4-6 June 2024)

The Workshop "Enforcement Tools and Techniques to Fight Cartels" (4-6 June 2024) gathered more than 30 participants from 15 jurisdictions in Latin America and the Caribbean, mostly senior competition enforcers involved with cartel cases. It benefited from the expertise of guest speakers including Alfonso García Jiménez (Spain), Eugenia Pérez-Abad (Portugal) and Nolan Mayther (US).

The workshop explored available enforcement tools and techniques to fight cartels including the use of big data to detect possible infringements and gather evidence. Screening techniques such as "Cerebro" in Brazil and "Brava" in Spain were discussed, allowing experts to learn from these experiences and seek for similar tools to be used in their countries. A hypothetical case exercise also was developed to combine theory and practice, as this is a key feature of the RCC capacity building methodology.

Planning for 2024

The activities of the RCC will cover the following topics in the second semester of 2024:

Date	Topic	Audience
19-20 September	**Workshop on "Competition Law for Judges"**: it will provide an overview of competition law for judges of the region including main enforcement areas (e.g. merger control, cartels and abuse of dominance) and key challenges of judicial review (e.g. judicial requests for dawn raids, interim measures, and judicial standards to review administrative sanctions).	The main audience is judges involved or interested in competition law enforcement in Latin American jurisdictions.
8-10 October	**Heads of Agency Meeting during the Latin American and Caribbean Competition Forum (LACCF):** it will gather heads of competition authorities from the region, and serve to present the RCC activities, collect inputs for future topics and promote exchanges at high-level senior officials.	The main target audience is of heads of competition authorities from Latin America and the Caribbean.
20-22 November	**Workshop on "Economics of Competition Law"**: it will cover both the fundamentals of economics for competition law, in addition to key special topics such as monopsony power, economics of digital platforms, efficiency defences, and quantification of competition benefits.	It targets chief economists and senior economists from competition authorities of the region.

The workshops will be hosted by INDECOPI in Lima, while the LACCF will be hosted by Pro-Competencia in Santo Domingo.

OECD regional updates

Accession countries

On 25 January 2022, the OECD Council decided to open accession discussions with six candidate countries, *inter alia*, **Argentina**, **Brazil** and **Peru** from Latin America. Accession Roadmaps were adopted for **Brazil** and **Peru** on 10 June 2022, setting out the terms, conditions and process for accession to the OECD. Both countries are undergoing the technical review phase of the process. With regard to Argentina, an Accession Roadmap was adopted on 26 March 2024, and publicly launched by the OECD Secretary-General in Buenos Aires on 29-30 August 2024.

OECD accession has proven to be a transformative process and catalyst for reform, with its overarching objective being supporting candidate countries in identifying how they can deliver better results for their people by moving closer to OECD standards, best policies and practices. Throughout the accession process, the OECD will work closely with each of the candidate countries to support the adoption of long-lasting reforms to align with OECD standards, best policies and best practices. Further information including the Accession Roadmaps may be accessed *here*.

Country Projects on Public Procurement

The OECD is committed to supporting governments to design public procurement procedures that promote competition and reduce the risk of rigging bids and training the public sector in detecting bidding cartels. The OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the OECD Recommendation on Fighting Bid Rigging in Public Procurement. In Latin America, **Argentina**, **Brazil**, **Mexico** and **Peru** have sought the OECD's support to improve their procurement practices and step up their fight against bid rigging.

Country Projects on Competition Assessment

The OECD is also committed to supporting governments to conduct a competition assessment of the laws and regulations in various sectors of the economy. In recent years, this has been done with **Brazil** in relation to the transportation sector including ports and civil aviation sub-sectors. The final report published in 2022 is available *here*, in English and Portuguese. Similarly, **Colombia** has carried out a competition assessment exercise in the beverages sector with the support of the OECD. The final report published in 2022 is available *here*, in Spanish. Further information about the OECD work on competition assessment including the OECD Competition Assessment Toolkit is available *here*.

Latin America and the Caribbean Competition Forum (LACCF)

The **LACCF 2024** will be hosted by Pro-Competencia on 8-10 October in Santo Domingo, Dominican Republic. It will cover three substantive sessions: (i) Competition, Fintechs and Open Banking; (ii) Interim Measures in Abuse of Dominance Investigations; and (iii) Ex Officio Investigations. In addition, side events will complete the week, namely the National Competition Day of Dominican Republic, the Ibero-American Forum on Competition, and the Meeting of the Group of Competition Agencies of America – GrACA. More information of the LACCF including agendas, OECD background notes and country contributions are available at the LACCF website: *www.oecd.org/en/events/2024/10/latin-american-and-caribbean-competition-forum-2024.html*.

Section II
Interview with heads of agencies

Interview with Ms. Alejandra Giuffra, President of CPDC in Uruguay

ALEJANDRA GIUFFRA is the President of the *Comisión de Promoción y Defensa de la Competencia* (CPDC) in Uruguay since 2019. She has previously worked as legal adviser to the CPDC (2010-2019) and as a lecturer at the University of the Republic of Uruguay (2010-2012), amongst other professional experiences. She is a lawyer by training and holds a PhD in Law and Social Sciences.

Paulo Burnier: First of all, congratulations for the work that you have been doing at the CPDC, with recent efforts to increase the enforcement track record. In terms of merger control, the Commission has recently announced the prohibition of two mergers. What message do you send with these recent enforcement actions? Should we expect more cases like these in the coming years?

Alejandra Giuffra: A pre-merger authorization regime was adopted in April 2020, with the legal reform introduced by Law 19,833. This provides the CPDC with the powers and responsibility to approve, reject or approve with restrictions the economic transactions that lead to concentration and meet the requirements established by the legislation. Laster, the Law 20,212 from 2023 introduced the double threshold notification requirement. These legal reforms provided the Commission with a moder regime to control economic concentrations, including more efficient tolls which are aligned to international best practices such as the double threshold mechanism for merger notifications. As for expectations, I expect the Commission to undergo a maturation process, particularly when assessing in-depth merger cases, drawing on the experiences of competition authorities from other jurisdictions with greater capacity and more expertise in the field. In the two recent cases mentioned in your question, the exchanges held between the CPDC and competition authorities from South America were highly beneficial to Uruguay.

Paulo Burnier: Looking to the future, what are the main challenges you see for the CPDC in Uruguay, and how can the OECD support competition law and policy in Uruguay?

Alejandra Giuffra: The competition authority has seen its powers increase in recent years, particularly in terms of investigation and sanctioning practices. We believe that as this process will continue. In addition, the authority would benefit from improvements in its current institutional setup to ensure a greater technical and budgetary autonomy. As you know, the Commission was created as a decentralized body within the Ministry of Economy and Finance in Uruguay. Given the progress made by the authority over the years, it is time to consider an organizational structure better suited to the significant powers it exercises today.

Paulo Burnier: Thank you very much for your time, Alejandra. Please do count with us at the OECD to improve competition policy in Uruguay. Best wishes and let's stay in touch.

Section III
Contributions from experts

Brazil: The new E-Notification system for merger control

by Alexandre Barreto[1] and Rodrigo Monteiro Ferreira[2]


What is the E-Notifica System? One way to answer would be to say that it is the electronic system of Brazil's economic defense body, the Administrative Council for Economic Defense (CADE), aimed at notifying mergers and acquisitions.

But... is that really all it is? Or could it be much more than this simplistic definition might suggest? What is the relationship between E-Notifica and the Federal Constitution of Brazil? With free competition? With consumer protection? With state intervention in the economy and the free will of economic agents? With the role of the state as an active agent for the welfare of society?

Given these questions, one might ask: "What, in fact, is the E-Notifica System? What is its relationship with consumer protection, free competition, state intervention in the economy, and the welfare of society?"

This short article aims to address this question. To answer it, however, something that may seem obvious is necessary, but often is not: to "start at the beginning", which entails the following: (i) first, clarify the reason for the existence of CADE itself as a state agent aimed at combating violations of economic order; (ii) second, it will be necessary to clarify the trade-off between CADE's mission and state intervention in the economy. Once these two crucial points are addressed, it will be possible to answer the question posed in this article.

Regarding the first point, the reason for CADE's existence, it is worth noting that the Federal Constitution of Brazil of 1988 established that:

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> *"Art. 5. All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security, and property, as follows: XXXII - the state will promote, as provided by law, consumer protection; (…)*
>
> *Art. 170. The economic order, based on the valorization of human labor and free enterprise, aims to ensure a dignified existence for all, according to the dictates of social justice, observing the following principles: IV - free competition; V - consumer protection;*
>
> *Art. 174. As a normative and regulatory agent of economic activity, the state shall, as provided by law, exercise the functions of supervision, encouragement, and planning, with this being determinant for the public sector and indicative for the private sector".*

The concern of the original constituent with the themes of consumer protection and free competition (a derivative of the first) is clear. Law 12.529, of November 30, 2011 (Law 12.529/11), is the federal law that came to structure the Brazilian Competition Defense System (of which CADE is a part, along with the Economic Monitoring Department of the Ministry of Finance) and to provide for the prevention and repression of violations against the economic order:

> *"Art. 1. This Law structures the Brazilian Competition Defense System - SBDC and provides for the prevention and repression of violations against the economic order, guided by the constitutional dictates of freedom of initiative, free competition, social function of property, consumer protection, and repression of economic power abuse.*
>
> *Sole paragraph. The collectivity is the holder of the legal goods protected by this Law.*
>
> *Art. 3. The SBDC is formed by the Administrative Council for Economic Defense - CADE and the Economic Monitoring Department of the Ministry of Finance, with the responsibilities provided in this Law.*
>
> *Art. 4. CADE is a judicial entity with jurisdiction throughout the national territory, which constitutes a federal autarchy, linked to the Ministry of Justice, with headquarters and jurisdiction in the Federal District, and powers provided in this Law".*

The purpose of CADE, therefore, is directed, through the powers conferred by Law 12.529/11, to act in pursuit of the constitutional objective of ensuring a dignified existence for all, with consumer protection and free competition being essential principles for pursuing this goal.

In its Article 36, Law 12.529/11 stipulates:

> *"Art. 36. An infringement of the economic order, regardless of fault, are the acts in any form expressed, that have the object or may produce the following effects, even if they are not achieved:*
>
> *II - dominate the relevant market of goods or services;*
> *IV - exercise a dominant position abusively.*
>
> *§ 1. The conquest of market resulting from a natural process based on the greater efficiency of an economic agent compared to its competitors does not constitute the illicit provided in item II of the caput of this article.*
>
> *§ 2. A dominant position is presumed whenever a company or group of companies is capable of unilaterally or coordinately altering market conditions or when controlling 20% (twenty percent) or more of the relevant market, which percentage may be altered by CADE for specific sectors of the economy".*

It is CADE's role, therefore, to act as a supervisory agent in the repression of economic violations of (i) inorganic dominance of relevant markets of goods or services (i.e., resulting from the realization of "concentration acts" such as mergers, acquisitions, incorporations, and joint ventures, and not a result of greater efficiency of the economic agent compared to its competitors) and (ii) abusive exercise of this dominant position.

To achieve this purpose more efficiently, Law 12.529/11 established the prior control of mergers, prioritizing the preventive nature of not allowing inorganic dominant positions that harm the consumer's right to free markets and free competition to materialize. That is, merger acts that meet the mandatory notification criteria of Article 88 of Law 12.529/11 must be reviewed by CADE before being completed, to prevent the above-described violations from occurring.

And it is exactly here that we delve into the second point raised at the beginning of the text, which is the trade-off between (i) CADE's mission as a preventive agent against the economic violations outlined above and (ii) the state intervention in the economy necessary for this.

State intervention in the economy is a controversial issue. Extremely synthetically: (i) there are schools of thought that advocate the ideals of total absence of the State in the economy; (ii) there are others that advocate the exact opposite, total intervention; (iii) and there are those that advocate a balanced approach.

Far from intending to determine here which currents are more "right" or "wrong" it is essential to clarify that the search for balance motivated the proposal for creating the E-Notifica System.

In other words, it is believed that achieving the constitutional objectives of consumer protection and free competition should minimally impact the activities of economic agents, with CADE's intervention, in preventing the violation of inorganic market dominance (and its undesirable consequences), being as swift and efficient as possible, not unduly burdening the players operating in the economy.

Without the E-Notifica System, the prior analysis of mergers occurs more "manually", so to speak, suggesting it is more challenging to achieve the desired efficiency and speed.

The interpretation (as well as the consequent concatenation of information into a coherent, and simultaneously concise, textual chain) of the notified data and necessary for a conclusive analysis of a merger act notifiable to CADE is not a trivial task.

It is a great challenge. Several elements are necessary for this task to be undertaken with a reasonable degree of success, such as: (i) deep knowledge of competition defense theory; (ii) text interpretation skills; (iii) knowledge of economic theory; (iv) writing skills; (v) targeted knowledge of Brazilian competition rules. The volume of notifications is something that also cannot be disregarded, revolving around 50 to 60 notifications per month in the year 2024 (on average, up to this moment), which requires a constant and highly trained and capable team.

E-Notifica aims precisely to become a fundamental tool for optimizing/facilitating the enormous challenge related to CADE's role as an authorizing agent for the consummation of mergers, with two structuring axes:

1) Electronic Form.
2) Automatic Technical Opinion.

These two mechanisms were designed to make feasible the standardization of notifications and the analysis of mergers.

Based on standardizing the necessary and essential information for an assertive analysis, through fields present both when filling out the Electronic Form and in the upcoming Automatic Opinion, the idea is that the evaluation document will be created instantly.

It is noteworthy that implementing the E-Notifica System is only possible due to a whole critical mass accumulated by CADE's technical team as a result of almost 6,000 notifications carried out under the aegis of Law 12.529/11, allowing the most diverse situations present when analyzing a merger act (substitution of economic agent, horizontal overlap, vertical integration, conglomerate effects, coordinated power, rivalry, lack of causality, among other aspects) to be previously anticipated and encompassed in a single system that allows for the generation of a conclusive analysis document much faster than any manual procedure could.

Thus, it is hoped that CADE's (and consequently the State's) intervention in the economy will be as surgical, brief, and efficient as possible, ensuring the well-being of all and, at the same time, becoming a negligible time burden on the activities of economic agents.

Contextualizing the reason for the emergence of the E-Notifica System, it becomes possible to answer the question of what E-Notifica is with much more breadth: “The E-Notifica System is the electronic system of the Brazilian economic defense body, CADE, which serves as an essential tool for an optimal balance between (i) its institutional mission as an inhibitor of economic violations related to inorganic market dominance (thus contributing to the pursuit of the constitutional objectives of a just society and dignified existence for all) and (ii) its necessary intervention in the economy to achieve this end”.

Moreover, E-Notifica also embodies an important step for the Brazilian antitrust body towards its necessary adaptation to the challenges of an increasingly technological world.

E-Notifica, therefore, represents the natural and urgent evolution of competition defense analysis in an increasingly digital context.

E-Notifica represents the future.

Peru: The journey of implementing the Rewards Program in Peru

by Annie Saravia Quiñones[3]

Introduction

The planning and execution of collusive anticompetitive practices have become increasingly sophisticated over time, making their detection more complex as well. In a context where competition authorities have limited resources, the task of detection and/or sanctioning can be a constant challenge, necessitating the implementation of tools that assist the authority's efforts.

Peru, aware of these challenges, approved a program in 2018 aimed at complementing its efforts to detect and pursue anticompetitive practices by providing a financial reward to those who provide decisive information to detect, investigate, and sanction violations subject to absolute prohibition under the Law on the Repression of Anticompetitive Conduct. Five years after its implementation, this article reviews the characteristics of this program and presents the initial results obtained following its implementation, funding, and execution.

The Rewards Program

To implement the program, the Directorate worked on drafting guidelines, taking as references programs implemented by agencies in the United Kingdom, Hungary, and others. In February 2020, the program was officially launched with the publication of guidelines that established the procedure, requirements, and maximum amounts of the reward to be granted. In our experience, for the program to be positively perceived by the public, a proper promotional campaign is necessary. In the case of Peru, a publicity campaign was launched in May 2021 through radio and television, print and digital press, and social media like Facebook and YouTube, among others. The campaign featured a video simulating a cartel meeting, emphasizing that it was illegal behavior, and concluded with information about the rewards program. The period during which this campaign was aired saw the highest number of applications.

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As mentioned earlier, this program is only applicable to conduct subject to absolute prohibition, such as price-fixing, production limitation agreements, customer allocation, and bid-rigging. This is because in the case of cartels, determining liability only requires proving the existence of an agreement, without the need for a deep analysis of the impact or efficiencies. Additionally, these types of conduct, which have the most harmful effects on the market, are the hardest to detect and sanction as they increasingly use sophisticated tools to remain clandestine. Therefore, it is necessary to implement additional mechanisms for investigation and evidence gathering.

Regarding who can apply to this program, it has been established that only individuals who somehow possess evidence of the cartel and are in a position to provide it to the authority can submit an application. These individuals may include secretaries, family members, distributors, or workers without decision-making power who played a peripheral role in the cartel, meaning they did not participate in the planning and execution of the conduct. Certain individuals are excluded from the program, such as compliance officers, public officials in relation to information obtained in the course of their duties, among others.

In some cases, it has been necessary to obtain more information about the cartel's behavior before determining whether an applicant can access the rewards program. For example, we received an application from a majority shareholder of a company that had been included in the cartel's communications, but we were not sure whether the company had been involved in the conduct or not.

To qualify for a reward, the applicant must present information that contributes to the detection, investigation, and sanctioning of anticompetitive conduct within the scope of the program. To date, applicants have provided testimonies, emails, instant messaging, meeting recordings, and the exact location of documents recording the cartel, among others. It is worth noting that sometimes applicants are unclear about which documents might be relevant to the investigation, so it is essential for the authority to work closely with the applicant to obtain as much evidence as possible. Furthermore, the information provided by applicants has been used as the basis for requesting judicial authorization to lift the secrecy of communications, through which crucial evidence for investigations has been obtained.

Citizens interested in participating in the program can make a preliminary inquiry or submit a formal application. In both cases, the Directorate conducts a preliminary assessment to determine whether they meet the established requirements. It is important to highlight that the Directorate has the discretionary power to accept or reject applications, as it prioritizes those related to markets that are part of the basic family basket or that cause greater harm to the state or consumers.

To calculate the reward amount, the Directorate estimates a base amount based on the expenses and risks incurred by the applicant (such as airfare, security, legal advice, time spent, among others) and an estimate of 5 % of the possible fine to be imposed. The sum of these amounts should not exceed S/ 200,000.00. An additional variable amount of up to S/ 200,000.00 may be granted in cases of especially active cooperation, such as waiving anonymity, or to cover extraordinary costs incurred by the applicant.

The payment is made in three parts: 10 % upon signing the commitment, 30 % when the administrative sanctioning procedure begins, and the final 60 % when the accused pay the fines and/or economic contributions within the framework of cessation commitments. It is essential to have a clearly established procedure for making the payment. In the case of Indecopi, in August 2020, the Board of Directors established the internal procedure for making payments to applicants while safeguarding the confidentiality of their identity through Directive No. 004-2020-DIR-COD-INDECOPI.

Results After the First Five Years

As of the end of June 2024, the Directorate has received approximately two hundred and fifty (250) preliminary inquiries and fifty-one (51) applications. Currently, there are nine (9) applications in process, and one (1) commitment has been signed and fully paid. The main markets targeted by the applications are related to basic family basket products and health services.

OECD: Interim measures in abuse of dominance cases

by Paulo Burnier and Gabriela Berbert-Born[4]

Introduction

Interim measures are enforcement tools available to competition authorities to prevent harm to competition that may occur before a final decision on the merits, most often related to an ongoing business practice that may potentially constitute an abuse of dominance infringement.

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 in various sectors of the economy including financial and digital markets (e.g. Argentina, Brazil, Chile, Colombia, Dominican Republic, Paraguay and Peru). These enforcement 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.

This short contribution will provide a summary of the key points of the discussions held at the OECD in 2022 including main takeaways, in addition to some recent enforcement experiences in Latin America.[5]

OECD discussions in 2022

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.

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[5] This contribution is a short version of the Note prepared by the OECD Secretariat to the next OECD-IDB Latin American and Caribbean Competition Forum (LACCF) that will devote a specific session to this topic with focus on LAC countries.

The key points of this discussion can be summarized as per below.

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.

Balancing risks and benefits

Indeed, a key challenge is to balance the risks and benefits of interim measures in abuse of dominance cases – and this is also present in Latin America countries. 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). 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).

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. 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.

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. 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).

This experience 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.

Conclusion

Interim measures in abuse of dominance investigations can serve as a relevant tool to prevent harm to competition and should be carefully enforced by competition authorities in their exercise to seek for a balance between the need for rapid action and both the accuracy of the intervention and the imperative of procedural fairness.

Recent 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. As it will be discussed in the next OECD-IDB LACCF, judicial review also 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.

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