GETTING THE DEAL THROUGH

GCR
GLOBAL COMPETITION REVIEW

Dominance

in 37 jurisdictions worldwide

2014

Contributing editors: Thomas Janssens and Thomas Wessely

Published by
Getting the Deal Through
in association with:

Agmon & Co, Rosenberg Hacohen & Co, Law Offices

Amarchand & Mangaldas & Suresh A Shroff & Co

Bae, Kim & Lee LLC

DLA Piper Norway DA

Dryllerakis & Associates

ELİG Attorneys-at-Law

Elvinger, Hoss & Prussen

Engling, Stritter and Partners

Freshfields Bruckhaus Deringer

Gilbert + Tobin

Magalhães e Dias – Advocacia

Markiewicz & Sroczyński GP

Marques Mendes & Associados

Mboya Wangong'u & Waiyaki Advocates

Merilampi Attorneys Ltd

Meyerlustenberger Lachenal

Posse Herrera Ruiz

SimmonsCooper Partners

Stikeman Elliott LLP

Ţuca Zbârcea & Asociaţii

Urenda, Rencoret, Orrego y Dörr

Valdés Abascal Abogados SC

Webber Wentzel

Zaid Ibrahim & Co

10th anniversary edition

Dominance 2014

Contributing editors: Thomas Janssens and Thomas Wessely

Getting the Deal Through is delighted to publish the fully revised and updated 10th anniversary edition of *Dominance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 37 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editors Thomas Janssens and Thomas Wessely of Freshfields Bruckhaus Deringer for their continued assistance with this volume.

Getting the Deal Through
London
December 2013

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2013
No photocopying: copyright licences do not apply.
First published 2003
10th edition
ISSN 1746-5508

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of December 2013, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Colombia

Jorge Andrés de los Ríos Quiñones
Posse Herrera Ruiz

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The applicable legislation is set forth under the National Constitution, article 333, which establishes the right of free economic competition and determines that Colombian authorities must prevent dominant players in the markets from abusing their position. The Colombian Constitution and the applicable laws do not prohibit the existence of dominant power but the abuse of such power.

The behaviour of dominant firms is regulated under Law No. 155 of 1959, Decree No. 2153 (1992), Law No. 1340 (2009) and Decree 19 (2012), which modified the procedure of investigations against anti-competitive conducts. These rules apply in conjunction with Decree 4886 of 2011 that sets forth the functions and competences of the Colombian competition agency, the Superintendency of Industry and Commerce (SIC). The SIC is in charge of investigating cases relating to abuse of dominance through a special division which is led by the Deputy Superintendent of Competition Matters (the Deputy Superintendent). The Deputy Superintendent is responsible for opening, conducting the investigation and collecting the evidence. After conducting the investigation the Deputy Superintendent will issue a report addressed to the Superintendent of Industry and Commerce in which he or she will recommend the imposition or otherwise of sanctions against the investigated parties. It is important to highlight that the Deputy Superintendent is not able to impose sanctions or to absolve the investigated parties. Only the Superintendent of Industry and Commerce is the competent official to make a final decision with regards to the outcome of the antitrust investigation.

The SIC is the sole authority in Colombia in charge of enforcing competition rules and is a public entity with administrative and financial autonomy, which belongs to the central government.

In regards to abuse of dominant position, Decree No. 2153 (1992) defines a dominant position as the possibility of a person or a firm to determine, directly or indirectly, the market conditions. In this sense, achieving or holding a dominant position is not prohibited, always provided that such dominance is not the result of anti-competitive behaviours. Colombian law does not prohibit the dominant position in the market but the abuse of it. Article 50 of Decree 2153 (1992) has a list of conducts that are deemed to be abuse of a dominant position.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

Article 8 of Law 155 (1959) provides that market players cannot implement or carry out practices, procedures or systems intended to monopolise distribution. There is some discussion concerning the applicability of this article, taking into account that the legal regime does not prohibit monopolies or dominant positions but the abuse of market power. Hence, becoming a dominant player in the market as a result of performing efficient trade practices within the boundaries of the law should not raise any concerns with the competition authority. On the contrary, the implementation of trade practices by companies aiming at the foreclosure of the market may be subject to the enforcement of the competition policy, even in the case that such company does not hold a dominant position but has the potential to obtain market power through such practice or behaviour.

Also, it is important to bear in mind that the law establishes an ex ante control aimed at preventing wrongful dominant positions in the case of concentrations or business integrations.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The main object of the legislation is the protection of competition in the markets. The laws are not strictly addressed to protect competitors but the competition process. According to article 3 of Law 1340 of 2009 the enforcement of competition law has the purpose of ensuring free participation and access of firms to the markets, consumer welfare and economic efficiency.

The law also aims to protect small and medium-sized firms, preventing the creation of artificial barriers to entry to the markets and to distribution channels.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

According to article 48 of Decree 2153 (1992), the following behaviours by a firm or individual, even if they are not dominant, are considered contrary to free competition:

- infringing the rules on advertising contained in the consumer protection statute;
- causing a firm to increase its prices of its products or services, or influencing a firm to halt its intention to reduce prices; or
- refusing to sell or provide services to a firm or discriminating against it, as retaliation for its pricing policy.

These types of conducts are prohibited under the Competition Law and may be subject to investigation and sanction if have the potential to restrict free competition.

On the other hand, article 1 of Law 155 of 1959 prohibits all kind of conducts that may restrict or limit the production, supply, distribution or consumption of any product or that have the purpose of restricting free competition or setting or maintaining unfair prices.

5 Sector-specific control

Is dominance regulated according to sector?

There are specific laws that aim to encourage competition in some economic sectors as well as to control behaviour of those who have a dominant position in specific activities.

© Law Business Research Ltd 2013

Examples of these sector-specific laws are found in telecommunications, television, public utilities and ports. Despite the existence of sector-specific laws, the SIC, through the Deputy Superintendent, has exclusive competence to conduct administrative investigations related to the abuse of dominance. Since 2009, when Law No. 1340-09 came into effect, the SIC obtained exclusive competence to conduct antitrust investigations and impose sanctions if applicable. This has been considered as a positive change in the antitrust legislation because it avoids the conflicts of competence that used to exist before. As a consequence, the SIC is the sole antitrust authority and no other regulatory entity may start investigations or impose sanctions as a consequence of a violation of the antitrust regime.

Nevertheless, within an investigation, the SIC may request from the regulatory or sector-specific entities information or opinions. Such opinions would not be binding on the SIC. Likewise, the regulatory bodies may at any time intervene in the antitrust process to provide information that may give support to the SIC for its analysis.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

In general, sector-specific laws legislate on the technical aspects of an industry and may refer to general regulations on economic competition in all non-technical aspects. If a situation has not been foreseen by sector-specific laws but by general regulations, then the general regulations will apply.

7 Enforcement record

How frequently is the legislation used in practice?

Since Decree No. 2153 of 1992 was issued, the regulations on competition law have increasingly been applied. Also, the SIC has become a technical entity with good and increasing expertise in economics and in competition law. As regards abuse of dominance, there are some precedents that have been relevant for the case study and analysis of the evolution of the competition law in Colombia.

8 Economics

What is the role of economics in the application of the dominance provisions?

The economic component is crucial and its importance in investigations and their outcomes, has been increasing significantly during the last 10 years. Currently, the SIC involves in its investigations officials with academic and professional background in economics for the purpose of analysing and studying the cases.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

According to Law No. 1340 of 2009, competition laws are applied to any market player that performs an economic activity or affects the development of this activity, regardless of the form or legal nature of the alleged offender, whether it is an individual or a legal entity, or a profit or non-profit organisation. It covers, for instance, corporations, partnerships, and trade associations, individuals operating as sole traders, state-owned corporations and non-profit-making bodies. Hence, the dominance provisions may apply to public entities.

10 Definition of dominance

How is dominance defined?

Dominance is defined by the legislation as the possibility of determining, directly or indirectly, the market conditions. The SIC has considered that dominance exists when a company has the capacity to behave independently from all market players such as competitors, customers, consumers or suppliers.

11 Market definition

What is the test for market definition?

SIC follows the same criteria used in the pre-merger control. This definition is made from two angles. The first is the product dimension, which refers to the group of products that may be considered as close substitutes due to their nature, quality, uses, price and product characteristics among other aspects. The second is related to the geographic area in which homogenous competition conditions exist. The SIC applies the SSNIP test for the market definition analysis.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

The competition law does not provide a particular market-share threshold for considering that a firm has a dominant position in the market. The only case in which the market-share threshold is defined is in public utilities. Law No. 142 of 1994 on public utilities considers that a dominant position exists when a public utilities company serves 25 per cent or more of the users in the market. Such presumption of dominance is in relation to the end-user rather than competitors.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

No. In Colombia, legislation on the concept of collective dominance does not exist.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Colombian legislation is applied equally to suppliers and purchasers. Hence, the provisions on abuse of dominance apply also to dominant purchasers.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

The Colombian legislation does not define the term 'abuse'. It follows an ex ante and ex post approach. Nevertheless, article 50 of Decree No. 2,153 of 1992 has a list of conducts that are deemed to be abuse of dominance. Such conducts may be classified as follows:

- predatory pricing;
- discriminatory price and commercial conditions for equivalent operations;
- tying; and
- exclusionary conducts aiming at eliminating competition by obstructing or preventing market access by third parties.

There is some discussion as to whether or not exploitative practices can be perceived as abuse of dominance. According to the SIC such conducts could be considered as a kind of abuse when the dominant player takes advantage of its position to impose unfair prices as a consequence of the lack of competitors and rivalry in the market.

© Law Business Research Ltd 2013

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse does not exist per se. However, exploitative and exclusionary practices could be considered as abuse of dominance if the investigated party holds a dominant position and the conducts subject to the investigation entail exclusionary or exploitative effects and a substantial lessening or prevention of competition. The analysis of such conducts must be performed on a case-by-case basis.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Abuse comes as a result of dominance. In other words, there can be abusive situations but if dominance in the market could not be demonstrated, it would not be considered as abuse of dominance, despite that the conduct may be perceived as any other anti-competitive conduct different from abuse of dominance.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

In a case in which abuse of dominance is investigated, the parties under investigation would be allowed to defend themselves by presenting any of the following arguments:

- there is no existence of market dominance;
- although there is dominance, the conduct is not abusive; or
- competition in the relevant market is not prevented or lessened by the conduct.

The Colombian provisions accept all means of evidence including documents, testimonies, expert testimony and any other proof that the investigated party considers could demonstrate that it does not have a dominant position and its behaviour does not have a significant effect in the market. In most cases, the analysis conducted by the SIC in its investigations has the purpose, inter alia, of determining the nature of the conduct, the intention or purpose of those that perform the conduct, and the effects created in the market. Therefore, efficiency gains may be argued as a defence and if the efficiencies are evidenced, the SIC may accept them as a valid defence.

Specific forms of abuse

19 Price and non-price discrimination

Both price and non-price discrimination can be considered abusive. Non-price discrimination exists when discriminatory conditions are applied to equivalent operations that place the consumer or supplier in an unfavourable situation in respect to another consumer or supplier under equivalent conditions. In the same sense, they exist when a sale is made to a buyer in conditions different to those in which the same product is offered to another buyer. Both of these types of conduct are sanctioned when performed with the intention of decreasing or eliminating market competition. This kind of behaviour might be presented with regard to price as well as with any other element of negotiation.

Price discrimination may exist when a product is sold in a certain part of the national territory at a different price to that offered in another part of the national territory when the competitor has the intention of decreasing or eliminating competition in that part of the country and the offered price does not correspond to the cost structure of the transaction. It has to be kept in mind that discriminatory conduct in sales or product marketing might be the result of agreements, and in that case they are sanctioned as anti-competitive agreements that restrict competition. They can also be unilateral acts, as when discrimination against a company results from retaliation to the pricing policy of a company.

The SIC has considered that discrimination only exists when both subjects to which differentiation is presented are under the same business and commercial conditions in the market.

20 Exploitative prices or terms of supply

It is an abuse of dominance to make the supply of a product contingent on the acceptance of additional duties (terms of supply) that, by the nature of the transaction, are not included in the negotiation. Likewise, abuse exists when the product is sold to a buyer under different conditions without justification (terms of supply).

On the other hand, inequitable or excessive prices have been defined as exploitative conduct in which a dominant company takes advantage of consumers through the disproportionate use of its market power in order to charge excessive prices. This situation would not necessarily be considered anti-competitive, taking into account that there are no legal provisions related to exploitative prices. Likewise, there is no precedent in which the SIC has imposed sanctions due to exploitative prices.

21 Rebate schemes

Rebate schemes are not considered abuse of dominance per se. Nevertheless, when rebate schemes are part of a predatory pricing scheme that is perpetuated through time and this is not a result of a transitory situation, the conduct may be considered as an abuse of dominance. Likewise, rebate schemes may result in discriminatory conducts between two or more customers under equivalent conditions.

22 Predatory pricing

Predatory pricing is subject to sanctions when the dominant party in the market decreases prices below costs with the intention of preventing the entry, the expansion or the exclusion of a competitor in the market.

23 Price squeezes

Colombian law has a general prohibition on all kinds of agreements that restrict or limit production, supply, distribution and consumption of products; and in general, all kind of conducts aiming at limiting free competition or determining unfair prices. Following from this prohibition, price squeezes may be perceived as a means to restrict competition and as a form of abuse of dominance but there is no detailed legal provision referring to price squeezes.

24 Refusals to deal and access to essential facilities

Refusals to deal and denial of access to essential facilities are not considered an abuse of dominance per se. Nonetheless, refusals to deal and denial of access to essential facilities can be investigated as an abuse of dominance if the refusing party holds a dominant position and has the intention to restrict or lessen competition.

In a recent case (Resolution 56488 of 2013), the SIC establishes that the refusal to grant access to an essential facility may be considered as an anti-competitive conduct if the following conditions are met:

- that the undertaking who refuses has the control over the essential facility;
- that the facility is essential and objectively necessary for competitors (current or potential) in the sense that such facility could not reasonably be duplicated;
- that the owner of the facility refuses or denies the access;
- that there is no objective reason for denying access to the facility; and
- that the denial of access may trigger the elimination of competition in the relevant market.

It is worth noting that in specific sectors such as telecommunications, the regulation guarantees access to essential locations and foresees

© Law Business Research Ltd 2013

the possibility for the regulatory authority to settle the conditions of interconnection when the competitors do not reach an agreement.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions and single branding are not considered an abuse of dominance per se. These types of conducts could be sanctioned using the regulations on unfair competition when the conduct is performed with the intention to monopolise the distribution or to obstruct the entry of new competitors onto the market. It could also be considered as an anti-competitive conduct according to the provisions set forth in Law 155 of 1959 and Decree 2153 of 1992.

According to some precedents of the SIC, an undertaking with market power may execute exclusive dealings, always provided that such a deal does not entail the effects of restraining access to market.

26 Tying and leveraging

Tied sales are considered an abuse of dominance when the practice has as its object or effect the subordination of the supply of a product to the acceptance of additional obligations that by their own nature do not constitute the object of business. In this case, whoever performs the conduct shall hold a dominant position in the relevant market.

27 Limiting production, markets or technical development

As pointed out above, limiting production, supply or distribution of products or services is prohibited. Hence, if a market player with dominant position performs conducts aiming at limiting production, markets or technical development, this may be considered as an anti-competitive behaviour.

28 Abuse of intellectual property rights

Such action is not considered abuse of dominance behaviour per se. However, such action may constitute an infringement and may be investigated by the competition authority when there is restraint to the access of technical developments and when it is the result of anti-competitive agreements.

29 Abuse of government process

Such action is neither conceived as abuse of dominance behaviour nor as a specific restrictive action conduct.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Mergers and acquisitions are not perceived as abuse of dominance practices. Nevertheless, mergers and acquisitions are subject to the ex ante control of the SIC if the merger operation fulfils certain conditions, such as exceeding the threshold provided by law in terms of market share, income and assets. In merger control analysis the SIC could determine whether there is any potential for undue restrictions to competition as a consequence of the proposed transaction.

31 Other types of abuse

In Colombia, abuse of dominance behaviour is very specific and is stated by the law. Nonetheless, it is worth mentioning that article 1 of Law 155 of 1959 sets forth a general prohibition, according to which all practices, procedures or systems aiming at restraining competition or imposing unfair prices are forbidden.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The prohibition of abuse of dominance is specific and covers the cases mentioned previously and only the SIC may impose sanctions for infractions of this provision. In the case of the regulatory authorities, they cannot impose sanctions for infractions of abusive practices. However, regulatory authorities may take measures to prevent abuse of dominance through instructions that promote competition, allow access to essential facilities or regulate prices and rates.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

As mentioned above, the agency in charge of studying and investigating the cases related to dominance is the SIC, through the Deputy Superintendent. The SIC is the only authority in the country in charge of enforcing competition law.

When the competition authority has knowledge of an alleged violation of competition law in cases that involve sectors under surveillance and regulation of other entities (for instance, public utilities), the SIC should inform the sector-specific regulatory and control entities about the antitrust facts of which the SIC has knowledge. This enables these entities to issue a technical opinion on the matter in question without prejudicing the possibility that the regulatory and control entities have to intervene at any moment during the actions of the SIC. The opinions issued by the regulatory bodies are not binding on the SIC.

The SIC may:

- start investigations or give cause to the claims filed by any third party;
- request information from the investigated parties, competitors and non-competitors and third parties, as many times as it considers necessary;
- collect any kind of information or evidence;
- grant the legal terms to the parties that exercise the right of defence;
- direct and conduct the investigation;
- order precautionary measures to cause immediate suspension of the conduct, as described in question 8;
- impose fines; and
- accept remedies addressed to close the investigation.

Additionally to the above, it is important to note that administrative investigations conducted by the SIC for abuse of dominance behaviours are performed as follows:

The process of investigation starts at the initiative of the Deputy Superintendent or by a complaint filed before the SIC by any third party (this may include competitors, customers or even a public entity). The investigation then proceeds as follows.

Preliminary investigation

The Deputy Superintendent may start a preliminary investigation in order to determine whether or not there is merit for opening a formal investigation. In this phase, the Deputy Superintendent may request information from the different players (competitors, suppliers, customers, regulatory bodies, etc) or may conduct field visits to collect evidence that may enable it to open an investigation. (This preliminary investigation does not have a specific time frame.)

© Law Business Research Ltd 2013

Formal investigation
If the Deputy Superintendent finds out that the conduct is producing or has the potential to produce a significant anti-competitive effect in the market, and there are merits for investigating the matter, he or she will open an administrative investigation. The Deputy Superintendent will open the investigation through a resolution in which will be described the supposed anti-competitive conducts and the investigated parties are identified. Once the investigation is opened, the resolution will be served to the investigated parties who, within 20 working days may provide or request the evidence that will support the defence.

Publications
For the sake of publicity and transparency, Decree 19 of 2012 establishes that certain publications have to be made during the process. The publication could be on the SIC's website, in newspapers, or both. Notice of the following stages of the investigation must be published:

- the start of an investigation;
- the sanctions that may be imposed as a result of the investigation; and
- the remedies accepted by the SIC in the investigation.

Intervention of an interested third party
The purpose of the above-mentioned publications is to inform the public in general of the proceedings and so that any third party (ie, competitors, consumers, etc) can provide useful information to the Deputy Superintendent and intervene in the investigation. Competitors, consumers or those who can prove a direct interest in the investigation, may be part of the proceedings as interested third parties and can intervene during the 15 working days following the publication of the notice on the SIC's web page by providing any comments or evidence they possess.

Anticipated termination of the investigation through the offer of remedies
Before the term for providing and requesting evidence elapses, the investigated parties have the possibility to offer remedies aiming to close the investigation in advance without sanctions. If the remedies are accepted, the Superintendence will specify the conditions for compliance and will determine the mechanisms for verification. The breach of the commitments arisen from the accepted remedies would be considered an infringement of the antitrust regulations, and therefore, sanctions may apply. It is important to highlight that the remedies could or could not be accepted by the SIC and the fact of offering remedies does not oblige the SIC to close the investigation. This is highly relevant as for many years the offer of remedies was perceived as a means of terminating the investigations without adverse consequences to the investigated parties. Likewise, many practitioners find in the possibility of offering remedies a way to avoid the discussion on whether or not the conduct subject to the investigation is or is not anti-competitive. As a change in the SIC's doctrine in recent decisions, the SIC has denied the remedies and established that closing an investigation through the acceptance of remedies would only occur in very exceptional cases in which it is not clear that the conduct subject to investigation could be considered as anti-competitive. On the other hand, there are others who believe that the remedies should be considered as an effective mechanism to remove all the possible anti-competitive effects that the conduct may occasion without engaging in a long investigation.

Evidentiary phase
If the remedies are not accepted, the Deputy Superintendent will conduct the evidentiary phase with the involvement of the investigated parties and the interested third parties. In the evidentiary phase, the Deputy Superintendent will call, one time only, a hearing where the investigated parties and third parties could present their arguments and defences on the facts subject to the investigation.

Report for the Superintendent of Industry and Commerce
Once the evidentiary phase is terminated, the Deputy Superintendent will present a report for the Superintendent of Industry and Commerce in which he or she provides recommendations on whether or not to impose sanctions against the investigated parties. The investigated parties and the interested third parties may pronounce and make their comments in regards to such report.

Precautionary measures
The SIC can order, as a precautionary measure, the immediate suspension of any conduct that may be considered against the regulations.

Decision of the Superintendent of Industry and Commerce
Upon the report of the Deputy Superintendent, the Superintendent of Industry and Commerce will issue a decision in which it imposes sanctions or absolves the investigated parties. The investigated parties or the interested third parties are entitled to challenge the SIC's decision through a motion to appeal which has to be confirmed or revoked by the Superintendent of Industry and Commerce. With the final decision of the SIC, the administrative process ends. Against such decision the parties may file nullity and re-establishment of rights actions before the administrative courts.

34 Sanctions and remedies

What sanctions and remedies may they impose?

The decision of the competition authority in cases of abuse of dominance may include fines and the order to cease the abusive conduct.

According to Law 1340 of 2009, the fines imposed on corporations may be up to 100,000 times the monthly minimum wage or up to 150 per cent of the profit gained from the abusive conduct; and for individuals, 2,000 times the monthly minimum wage.

Additionally, the parties affected by the conduct can request compensation of damages from a judge through a civil action.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Following a finding of abuse of dominance all of the contracts executed by the dominant player during the period of abuse may be considered illegal and would not be binding on the other party. Also, all parties affected by such contracts could start legal actions aiming at the compensation of damages arising from the abusive conduct.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

The regulatory authorities can issue laws to promote competition. Before Law No. 1340 of 2009 came into force there were frequent cases in the telecommunications sector in which the regulatory authority forced interconnection between competitors. To the same end, private companies or individuals investigated by the competition authority may be required to cease an abusive conduct and grant access to a given facility or goods. Parties can also file a lawsuit before civil judges to claim compensation for damages caused by this kind of behaviour. In the same way, compensation for damages can be claimed before arbitration courts.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

This possibility is not foreseen under the antitrust regulations and therefore, within an antitrust investigation damages cannot be

© Law Business Research Ltd 2013

determined. Nevertheless, the possibility cannot be ruled out that after determining an abuse of dominance, an offended party can structure remedial actions against the offender, which would usually be done through the civil courts. Class actions may also proceed. The possibility of recovering damages depends on the ability of the affected party to prove the economic harm caused by the anti-competitive conduct within the civil procedure. In Colombia private claims based on antitrust conducts do not happen often.

38 Recent enforcement action

What is the most recent high-profile dominance case?

The most recent high-profile dominance investigations conducted by the SIC resulted in the following decisions.

Through Resolution No. 53403 of September 2013, the SIC imposed a fine of 88 billion Colombian pesos on the mobile operator Claro for (among other practices), abusing its dominant position (more than 60 per cent of the mobile communications market) by obstructing access to other mobile operators seeking to provide services to former Claro customers.

Through Resolution 3694 of February 2013, the SIC imposed a fine on Empresa de Energia De Boyaca SA ESP (EBSA), due to its abuse of dominance in the market for electric power supply in the Boyaca region. In this case, the SIC proved that EBSA, which has a dominant position in the market of electricity supply in the Boyaca region, used to subordinate the calibration of the electric power meter information to the payment of an additional fee by customers. This behaviour was designed to force consumers to use ESBA because ESBA imposed a substantially higher fee on customers wishing to calibrate their metres with another supplier.

Through Resolution 4907 of February 2013, SIC imposed a fine on Gases de Occidente SA ESDP due to its abuse of dominance in the natural gas market in the city of Cali. In this case, SIC proved that the company, which has a strong dominant position in that market, obstructed the entry of competitors onto the supplemental market of internal natural gas networks by requiring additional conditions, exceeding those established by law, to certify such networks and connect them to the main natural gas network. In this case, SIC considered that the abuse of dominance was very serious, because the origin of such dominance represented an abuse of the regulatory burdens on providers of household utilities.

POSSE HERRERA RUIZ

Jorge Andrés de los Ríos **jorge.delosrios@phrlegal.com**

Carrera 7 No. 71-52
Tower A, 5th floor
Bogotá
Colombia

Tel: +57 1325 7247
Fax: +57 1325 7113
www.phrlegal.com

© Law Business Research Ltd 2013

GETTING THE DEAL THROUGH

Annual volumes published on:

Acquisition Finance
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection & Privacy
Dispute Resolution
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Insurance & Reinsurance
Intellectual Property & Antitrust
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipbuilding
Shipping
Tax Controversy
Tax on Inbound Investment
Telecoms and Media
Trade & Customs
Trademarks
Vertical Agreements

For more information or to purchase books, please visit:
www.gettingthedealthrough.com

ABA Section of International Law
Your Gateway to International Practice

Strategic research partners of the ABA International section

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

INTERNATIONAL BAR ASSOCIATION

The Official Research Partner of the International Bar Association

DOMINANCE 2014 ISSN 1746-5508