

Colombia

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General

1 Legislation

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

Dominant firms in Colombia are subject to the general competition regime of the country, that is, Law 155 of 1959, Decree 1302 of 1964, Decree 2153 of 1992 and Law 1340 of 2009. There are also specific regulations for certain sectors, such as, public utilities, health, television, transportation and banking. The general regime also applies to each sector, specific regulations notwithstanding.

2 Non-dominant to dominant firm

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

Colombian antitrust regulation of a firm's unilateral conduct (as opposed to agreements with other parties) is directed at firms who are in possession of a dominant position in the market and abuse such position. Generally speaking, companies that lack a dominant position in the market may legally engage in conduct that would be sanctioned as illegal if performed by firms possessing a dominant position.

3 Object of legislation

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

Colombian law establishes that the antitrust authority must protect the free participation of enterprises in the market, consumer welfare and economic efficiency. However, there are a few exceptions, such as Law 590 of 2000, which protects small and medium-sized business by banning illegal interference with a competitor's entry to a market. It can also be argued that the prohibition against price discrimination protects small companies in certain instances.

4 Non-dominant firms

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

There are rules that apply to the unilateral conduct of non-dominant firms, namely, restrictive practices that do not require market power by the firm committing the infraction, as follows:

- violating the rules on advertising contained in the consumer protection statute;
- influencing a company to increase the prices of its products or services or to refrain from cutting prices; and
- refusing to sell or provide services to a company, or discriminate against it, when it is understood as retaliation for their pricing.

5 Sector-specific control

Is dominance regulated according to sector?

Yes. Even though the general provisions concerning illegal conduct for dominant firms apply in all sectors, the following sectors have additional specific provisions: public utilities, financial sector, health sector, television and transportation.

6 Status of sector-specific provisions

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

They are complementary.

7 Enforcement record

How frequently is the legislation used in practice?

Notwithstanding the fact that Colombian authorities are active enforcers of legislation concerning abuse of dominant position, illegal horizontal agreements and merger control generate the majority of antitrust enforcement activity in the country.

8 Economics

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

Economics play an increasingly important role in the application of dominance provisions. Not only does the antitrust authority (the Superintendence of Industry and Commerce (SIC)) include economists in its enforcement teams, but parties are beginning to use economic experts to establish the degree of dominance that is being exercised as well as the economic impact of the alleged illegal conduct.

9 Scope of application of dominance provisions

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

They apply to every market participant, including governmental entities that participate in the market.

10 Definition of dominance

How is dominance defined?

It is defined as the possibility to directly or indirectly determine the conditions of a given market.

11 Market definition

What is the test for market definition?

The test for market definition is demand side substitution within the geographic area in which products compete with one another, with supply side substitution being used in entry analysis, but not in market definition.

12 Market-share threshold

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

There is no market share threshold to establish dominance in the general competition regime. The public utility law establishes a threshold of 25 per cent, above which a company will be understood to be dominant.

13 Collective dominance

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

Collective dominance is not addressed directly by the antitrust laws.

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?

There is no specific regulation of dominant purchasers in Colombian law and SIC has never, to our knowledge, prosecuted a dominant purchaser for abuse of dominant position. However, general rules against abuse of dominance also apply to purchasing power.

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?

Abuse is not defined in the law, which makes it difficult to administer the general prohibition of abusing dominant position. Effects-based analysis exists mainly in vertical restrictions and merger control. Abuse of dominance is not necessarily effects-based. There are four specific types of conduct in the general competition regime that constitute abuse of dominant position, which are price discrimination, tying agreements, predatory pricing and interfering with a third party's attempt to enter a market (market foreclosure).

16 Exploitative and exclusionary practices

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

Yes. Even though it seems designed specifically for exclusionary practices, the antitrust authority has made reference to exploitative practices as well.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Colombian law, generally, simply establishes that certain types of conduct constitute abuse of dominant position when performed by firms who, in fact, possess a dominant position in the market. In this regard, there must be a causal link between the conduct that constitutes abuse of the dominant position and the effective dominance position held in the market by the subject that performs such conduct.

SIC will be willing to carry out an investigation for the abuse of dominance position, only if the market dominance position of the alleged infringer is proved. To reinforce this assumption, in 2012, SIC sanctioned an important Colombian airline for abusing its dominant position. The investigation was limited to certain flight routes on which this airline held a dominant position. The remaining flight routes were left outside the investigation.

18 Defences

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

Defences may be addressed to prove that the company does not hold a dominant position in the market or that it did not incur in the conduct that is specifically prohibited in the law. Failing these two defences, the offence is generally punishable. Abuse of dominant position offences in Colombia establish requirements such that situations that are generally used as defences in other jurisdictions, such as meeting competition or market entry, make the conduct not punishable, because it fails to meet the requirements for illegality. Efficiency gains are, generally, not a proper line of defence in dominance cases.

Specific forms of abuse**19 Price and non-price discrimination**

Price and non-price discrimination are prohibited when they are aimed at limiting competition. During the past few years, SIC has issued several rulings in which some firms have been penalised for price and non-price discrimination. One of the most relevant cases occurred in 2012, when SIC penalised a water supply company for price discrimination. SIC sanctioned the conduct performed by the company, arguing that its conduct was against free competition because there was no justifiable reason to apply a different price for the sale of water to some firms that compete with the company in the market of commercialisation of water.

20 Exploitative prices or terms of supply

The Colombian antitrust authority has interpreted the general prohibition to restrict competition as containing a prohibition against exploitative prices. In a recent decision, SIC determined that exploitative or excessive prices are those that do not hold a reasonable relationship with the 'economic value that inspires them', which, to SIC, means that the reasonableness of a price must be measured in the light of costs or with the objective of the specific revenue. SIC wandering into this territory, lacking any regulation on the matter, seems to represent a slippery slope of unpredictable consequences.

21 Rebate schemes

Colombian competition law does not specifically address rebate schemes.

22 Predatory pricing

Predatory pricing is considered an abuse of dominant position when a dominant firm lowers prices below costs with the intention of eliminating one or several competitors, or preventing their entry or expansion. In one case SIC sanctioned a bubble gum producer and distributor because it determined that being a dominant firm, it lowered the price of one of its products below the average total costs during 2002 and 2003, with the intention of eliminating or reducing the market share of one of its direct competitors.

23 Price squeezes

There is no specific regulation or precedent for price squeezes under Colombian law. However, a recent decision concerning resale price maintenance described one of the perils of the conduct as being the possibility that upstream market power might be transferred to lower levels of the chain. Under this rule, SIC could very well hold price squeezes to be illegal.

24 Refusals to deal and access to essential facilities

Refusals to deal are banned in a very limited way, when they constitute retaliation for pricing policies. There is no general prohibition against refusing to deal, although in cases of high market power or near monopolies they could be covered by the general prohibition to restrict competition.

In industries where there exists an essential facilities doctrine, such as public utilities and telecommunications, owners of essential facilities, mainly networks, have a duty to deal with competitors and third parties, allowing them access to the networks.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing and single branding arrangements are illegal when they foreclose the market and, thus, become an entry barrier.

Non-compete provisions are generally illegal, except for those that are ancillary to the sale of a business and are agreed to for a limited, reasonable, period of time.

26 Tying and leveraging

Tying and leveraging, in the general regime of competition, are considered as an abuse of dominant position when the dominant firm subordinates the supply of a product to the acceptance of additional obligations, which, by their nature, are not related to the object of the principal sale.

27 Limiting production, markets or technical development

These types of conduct are not defined as abuse of dominant position but, rather, mentioned in the general prohibition. There are no precedents in Colombia for these types of conduct as abuse of dominant position.

28 Abuse of intellectual property rights

Abuse of intellectual property rights is not specifically addressed by Colombian competition law and is subject to the general competition regime.

29 Abuse of government process

There are no rules in Colombia regarding abuse of government process.

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

Colombian law demands that any operation where two companies or business units are to be integrated, regardless of the legal form of the integration (merger, stock acquisition, certain joint ventures, franchise agreements, asset acquisition or others), be previously authorised or 'cleared' by the SIC, in the following circumstances:

- when the companies or business units participate in the same economic activity (horizontal operations); or
- when the business units participate in the same 'value chain' (vertical operations).

Operations that are reviewed by the antitrust authority may be approved, rejected or conditioned on the adoption of either structural or behavioural remedies, depending on the market impact that may result from them. Horizontal integrations are judged in the light of their capacity to increase market power or facilitate its exercise, which is determined from their effect on market concentration, entry barriers, possible coordinated effects, the presence or absence of supply side substitution, price elasticity of demand of the products or services involved and other factors that can account for market power.

Vertical operations are judged based on their ability to foreclose the market, making entry more difficult or more expensive for competitors or raising costs for competitors in one level of the chain.

It must be borne in mind that, in order to determine the obligation to obtain clearance or the impact of the operation, SIC will take into account not only those companies or businesses over which direct control is exercised, but also those where any kind of influence over the business decisions may be exercised, such as minority holdings in a company that allows veto power over decisions that may affect the market.

31 Other types of abuse

Colombian statute and case law have not entered into additional forms of abuse, although the general prohibition to restrict competition could eventually be used by the antitrust authority to develop a doctrine for conduct like strategic capacity construction, predatory product design or process innovation, failure to pre-disclose new technology, predatory advertising, excessive product differentiation and others.

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?

There is a direct prohibition as well as specific prohibitions for conduct that is considered to be an abuse of dominant position.

33 Enforcement authorities

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

The general antitrust authority in Colombia is the Superintendence of Industry and Commerce. There are two exceptions to its universal jurisdiction for antitrust matters in the country: the Financial Superintendence has the power to clear mergers between financial institutions when they are all under the surveillance of the Superintendence, and the Civil Aeronautics authority has the power to authorise certain agreements among airlines.

34 Sanctions and remedies

What sanctions and remedies may they impose?

SIC may impose, for each violation and to each legal entity that commits the conduct, fines of up to 100,000 minimum wages (approximately US\$26,773,064), or up to 150 per cent of the profits derived from the restrictive conduct. SIC may also order the conduct to cease.

Additionally, SIC may impose, on individuals who collaborate, facilitate, authorise or condone the commission of the types of conduct described in the general competition regime, fines up to 2,000 minimum wages (approximately US\$535,461).

No structural remedies are established by the law.

The highest fine ever imposed for abuse of dominance in Colombia was 91,450 minimum wages (approximately US\$22,399,780). This fine was imposed through Resolution 53403 of 2013, in which SIC determined that the dominant firm in the communications sector violated the general prohibition of the competition regime and obstructed access to marketing channels.

35 Impact on contracts

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

The antitrust authority may not annul a contract or a contractual clause, as it lacks the necessary judicial powers for it. However, it can order that conduct that constitutes an antitrust offence cease immediately, which, in practice, can do away with the enforceability of a contract or a contractual clause.

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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?

Private enforcement is possible in the sense that any person may submit a request for investigation of an antitrust violation and SIC is obligated to prosecute the offence if, after a preliminary investigation, it finds evidence that prosecution is warranted. Non-parties to the agreement may request injunction-like measures, although they have never been adopted in anti-trust investigations in Colombia. The remedy against antitrust violations consists of a fine of up to approximately US\$30 million and the order to cease the conduct. There is no established legal regime for claiming damages arising out of antitrust offences. Experts have suggested that the ordinary tort regime or the Unfair Trade Practices Law could be used for this purpose, but this has yet to be attempted in the country.

37 Availability of damages

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

As stated in the previous question, there is no established legal regime for claiming damages arising out of antitrust offences. Experts have suggested that the ordinary tort regime or the Unfair Trade Practices Law could be used for this purpose, but this has yet to be attempted in the country.

38 Recent enforcement action

What is the most recent high-profile dominance case?

At the end of 2013, a telecommunications company acting in the mobile telephone industry was fined a combined US\$45 million for abusing its dominant position, among other antitrust infractions. SIC found that the company was engaged in practices that were aimed at obstructing the market by creating barriers to number portability. This is the highest fine in the history of Colombian antitrust law, and the first one of this magnitude since fines were significantly raised in 2009.