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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Colombia

- Session II -

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Abuse of dominance in digital markets

- Contribution from Colombia –

1. This contribution shows the established legal framework for assessing potential abuses of dominance in Colombia. We depart from a (1) description of our current competition law regime and (2) some case examples concerning abuse of dominance to address the question on the (3) adequateness of our normative framework to effectively capture and enforce potential harmful distortions to competition in digital markets. The Superintendence of Industry and Commerce (SIC, henceforth), as an administrative authority that enforces Consumer, Competition and Data Protection regimes, is well aware that (4) some business strategies used by dominant digital firms may be potentially damaging to consumers and to the markets. We also recognize that some of their activities may raise concerns in different areas of the law, thus the need to be attentive to their behavior and compliance with norms from the abovementioned regimes, (5) for they may play a relevant role when assessing compliance of competition standards.

2. The key question we aim to answer with the contribution concerns (6) whether the current tools available for the assessment of abuse of dominant cases are fit for the particular challenges raised by the different and dynamic features in digital markets. Specifically, (7) we will develop on the adequateness and flexibility of Colombia's general normative framework for addressing novel market dynamics and will (8) comment on the enhancement of traditional analytical tools for determining whether a position is dominant, to approach market definition, the evaluation of the effects of a certain activity or strategy and eventual negotiation of remedies.

1. Legal and practical context of abuse of dominance enforcement in Colombia

3. In Colombia, dominance is defined as "the possibility of determining, directly or indirectly, the conditions of a market" [1]. The SIC has developed the definition as the capacity to substitute market mechanisms by significantly and unilaterally modifying the competition variables in relation to a market properly defined in its product, geographic and temporal dimensions. Similarly, the SIC has specified that the dominant position is not defined through a fixed calculation. In fact, the potential evaluation of the dominance position takes into account the particular conditions of each investigation beyond quantitative considerations and contrasting with the hypothesis of competitive behavior. The SIC has extensive doctrinal development on the definition of dominance and on the considerations to determine whether the abuse seeks to exploit or exclude other market players. Thus, the SIC has maintained a homogeneous but evolutionary line of analysis that begins by recognizing that a relevant market constitutes a space (not necessarily physical) in which companies compete effectively and that it comprises singular characteristics, which are linked to the dynamics of competition that can be stable or change in time.

[1] Section 5 of Article 45 Decree 2153 of 1992

4. In addition to the afore-mentioned, the Colombian Constitutional Court's Ruling No. C-032 of 2017, M.P. Alberto Rojas Ríos, is a very helpful jurisprudential benchmark for the identification of the Regime for the Protection of Free Competition in Colombia. The Regime is integrated by the following basic norms: Law 155 of 1959, Decree Law 2153 of 1992, Law 256 of 1996, Law 1340 of 2009 and Decree 4886 of 2011. The importance of these ruling lies in the fact that the Constitutional Court sets forth some of the ideas of a classificatory and broad nature on which Colombia's Competition Regime is grounded. For example, that the category "market" is dynamic and active and that, as such, its content encompasses the notion that commercial practices and market dynamics are much faster than those of regulation and law. This idea is fundamental because it supports the assertion that the current Colombian regulatory framework in this field is designed precisely to enable the National Competition Authority to exercise its inspection, surveillance and control functions not only over current market conditions, but also over any economic dynamics that may arise. The authority is normatively equipped to face the challenges brought about by the new dynamics of digital markets, and it is also equipped to advance in the development of tools that allow it to better identify whether some of these dynamics could affect any of the provisions contained in the Regime.

2. Assessment of competition in abuse of dominance cases

5. The SIC has experience conducting investigations for abuse of dominant position in traditional markets. In general, the analytical process to determine the existence of a dominant position is developed as follows: first, the signs related to the alleged anti-competitive distortion are analyzed. Second, the market in which the anti-competitive behavior would actually be present is defined through an evaluation of the product dimensions, geographical scope and temporality. Third, the capacity of the market agent under investigation to unilaterally distort the competition variables is determined. Fourth, the hypothesis of anomalous behavior is contrasted with the competitive counterfactual. Finally, the behavior is typified under the Colombian legal system.

6. With regard to the possible difficulties that may arise when addressing anti-competitive behaviors in digital markets, it is worth noting that the general prohibition of Article 1 of Law 155 of 1959 plays a key role in addressing all kinds of practices, procedures or systems aimed at limiting or distorting competition, which otherwise would be difficult to fit into a particular normative circumstance. This provision is aligned with the Article 50 of Decree 2153 of 1992, - Abuse of dominance-, insofar as its purpose is not to define in an exhaustive manner what should be understood by abuse of a dominant position, but rather it is limited to establishing an indicative list of conducts that - if proven - would be restrictive of free competition, as an undue exercise of the dominant position in the market. Since other behaviors that may constitute abuse by agents holding market power may eventually be established, it is precisely in this scenario that the general prohibition addressed in Article 1 of Law 155 of 1959 takes on particular relevance.

7. This enables the SIC to address behaviors that could be harmful to competition and evolve from the dynamics of the markets themselves. By way of example, the SIC has issued a statement of charges invoking the general prohibition as a flexible strategy to strengthen compliance with competition law. For instance, in the *Fedegan*[2] statement of charges, the Superintendence [3]reproached the establishment of technical regulations that

[2] Superintendence of Industry and Commerce, Res. No. 56800/2009.

[3] Superintendence of Industry and Commerce, Res. No. 36655/2012.

discriminated against imported vaccines. Second, in the *'Portability case'*, there were allegations of deliberate misrepresentation of market information. Third, in the *Sayco*[4] case, the general prohibition was charged with "abuse of the right as a practice that limits the exploitation of works by users". Finally, although it is not a case related to the abuse of a dominant position, in the *Notebooks*[5] case the general prohibition was addressed to consider limitations to competition in relation to the regulation of marketing strategies, ii) merchandising, iii) financial and credit, iv) supply and indirect distribution of notebooks in downstream marketing channels. Then, the general prohibition is a flexible tool that imposes on the SIC the additional task of proving the causal relationship between the alleged anomalous behavior and the violation to the competition protection regime. But at the same time allows it to go ahead identifying novel restraints on competition which in the context of the digital economy is extremely helpful.

8. Addressing the problem of restrictions to competition in digital markets implies having robust databases and contrasting elements that the SIC does not have. The SIC is developing algorithms for collecting information to build data sets that provide warning signals about the behavior of economic agents in digital markets. Thus, it is expected to obtain prospective information on markets that will facilitate the strengthening of preventive work against behaviors contrary to free competition.

3. Conclusions

9. The SIC has a flexible body of regulations that facilitate addressing competition issues in digital markets. Thus, any behavior that has the character of exploiting and excluding agents in the market can be addressed under the illustration of the general prohibition of Article 1 of Law 155 of 1959 and Article 7 of Law 256 of 1996. The figure is effective for the competition authority, but it imposes the burden of substantiating the causality of the anomalous behavior with the alleged infringement of the regime of free economic competition.

10. The use of data science tools to capture and automate warning signals about the dynamics of digital markets allows for the generation of early warning signals of possible anti-competitive behavior.

[4] Superintendence of Industry and Commerce, Res. No. 20964/2012.

[5] Superintendence of Industry and Commerce, Res. No. 7897/2015.