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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Colombia

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Economic analysis and evidence in abuse cases

Economic analysis and evidence of market power

- Contribution from Colombia –

1. This contribution seeks to answer the following question: What role, if any, do economic analysis play in the assessment of national competition cases, specifically those where it is required to prove a certain level of market power?
2. As will be described, the assessment of economic tools to conclude the existence of anticompetitive conducts has become a very useful instrument for the Colombian Competition Authority in the last years.
3. As a preliminary remark, it is important to note that, although some of the cases that will be presented within this document do not correspond to investigations regarding abuse of dominant position, they do to unilateral conducts which require an assessment of market power, making it possible to highlight the different economic methodologies applied by the Superintendence of Industry and Commerce when deciding different anticompetitive conducts.
4. Also, this document will present the economic analysis followed by the Competition Authority in a recent case where the Superintendent of Industry and Commerce accepted a proposed *warranties* or commitments scheme. This case is of most interest to this contribution bearing in mind the broad economic content of the decision taken by the Colombian Authority.
5. For the above, firstly, a brief summary of the legal concept of market power according to the Colombian Competition Regime will be presented.
6. Secondly, this contribution will analyze a recent vertical restraints case¹ in which the Superintendence of Industry and Commerce made use of economic analysis to determine the existence of market power of the investigated undertakings, emphasizing that the existence of market power cannot be established solely on the basis of market shares, but other factors, such as the existence of potential competition, entry barriers and other economic indicators, must be taken into account.
7. Thirdly, reference will be made to one of the latest decisions of the Superintendence of Industry and Commerce², which corresponds to a case of excessive prices. This decision becomes relevant, because, as will be shown, despite being a conduct that in Colombia does not require the presence of an economic agent with a dominant position, the Superintendence of Industry and Commerce delimited the elements that, in its opinion, must be present when sanctioning excessive pricing behavior, which includes a broad economic analysis in order to correctly define the relevant market, establish the presence of an economic agent with a high market power, and the existence of prices that may be considered excessive.

¹ Superintendence of Industry and Commerce, Res. 420 of 2019.

² Superintendence of Industry and Commerce, Res. 65851 of 2021.

8. Finally, there will be a reference to a recent investigation³, which was closed in 2021 by the Superintendent of Industry and Commerce due to the acceptance of a *warranties* or commitments scheme. What is relevant in this case is that the Competition Authority, in a case of abuse of dominant position, made use of economic analysis to determine the viability of the proposed commitments, seeking to establish their possible positive effects on the market.

1. Colombian legal framework

9. According to the Colombian competition law⁴, a dominant position may be defined as the “*possibility to determine, directly or indirectly, the market conditions*”. In other words, as has been mentioned in the past by the Colombian Competition Authority, the dominant position represents such a market power that it grants the ability for an undertaking to determine or influence, unilaterally, the corresponding economic variables, such as price, quantities and quality of a product⁵.

10. On that sense, in order to determine the existence of a dominant company, the analysis of different economic variables is required (product and geographic market definition, supply and demand substitutability assessment, entry barriers, etc.).

11. Now, although Article 50 of Decree 2153 of 1992 establishes a series of conducts that are sanctioned as abuse of dominance, Colombian legislation provides that there may be other types of conducts committed by companies that, without having been considered dominant, hold a certain degree of market power that allows them to act unilaterally, affecting market structures and consumer welfare⁶.

12. The foregoing, since market power is a concept capable of presenting degrees in accordance with the greater or lesser capacity of the suppliers or demanders to control prices. It is also a quality that can be possessed at the same time by several agents acting independently, which is not the case with the dominant position, since it can only be held in a market by a single undertaking (or, eventually, by a group of undertakings who act jointly)⁷.

13. That being said, it is important to note that, as has been highlighted by the Superintendence of Industry and Commerce, multiple market’s elements must be taken into account to conclude that an undertaking has certain degree of market power which allows it to determine market conditions. Thus, it has been recognized the importance to define the relevant market, which would allow the Authority to conclude if a company has market power, having the possibility to affect, unilaterally, economic indicators such as price, quantity and quality.

14. In the cases that will be presented below are some examples of the elements that have been mentioned by the Superintendence of Industry and Commerce as essential to conclude the existence of market power, as well as a description of the economic assessment made on each case to reveal the presence of those elements.

³ Superintendence of Industry and Commerce, Res. 36870 of 2021.

⁴ Article 45 (5) Decree 2153 de 1992.

⁵ Superintendence of Industry and Commerce, Res. 420 of 2019.

⁶ Superintendence of Industry and Commerce, Res. 53403 of 2013.

⁷ *Ibíd.*

2. Economic Analysis in recent Cases

2.1. GENERAL MOTORS Case

15. In this case, the Superintendence of Industry and Commerce had to determine whether GENERAL MOTORS (hereinafter, “GM”) had market power in Colombia’s selling and distribution of motor vehicles sector and if it has abused of it by blocking access of other vehicle brands. GM sells and distributes its brand CHEVROLET through authorized car dealers. Each of the distributors must sign a contract with GM, which includes an exclusivity clause that prevents them to incorporate new companies to sell other brands than CHEVROLET. In that sense, one distributor filed a complaint due to GM’s refusal to renovate the contract because the distributor failed to comply with the exclusivity clause, arguing that GM had dominant position and sufficient market power to block access to other brands in the selling and distribution motor vehicle sector in Colombia.

16. The Competition Authority pointed, through Resolution No. 56350 of 2018, confirmed by Resolution No. 420 of 2019, that although GM imposed a vertical restriction to its distributors throughout a mono brand policy, this situation did not have the potentiality to affect competition in the market of selling and distribution of new motor vehicles in Colombia.

17. Now, what is relevant for this contribution, is that the Authority argued that market power is not determined solely by market shares, needing the analysis of a broader number of elements to consider the existence of a substantial market power. In fact, in its ruling the Superintendence not only analyzed CHEVROLET’s position in all categories and segments of the market, but also other market indicators such as entry barriers, marketing schemes, efficiencies, etc.

18. It was said that, to conclude the existence of substantial market power, first, it is necessary to define the relevant market, which requires the use of different economic tools in order to define product and geographic relevant market. Second, the Competition Authority must examine different elements as market shares, potential competitors, entry barriers and other economic indicators.

19. In fact, in this case, once the relevant market was defined as the "*distribution and selling of new motor vehicles in Colombia*"⁸, the Authority concluded that, although CHEVROLET sold 61.3% of "mini" vehicles and 39.3% of "small" category vehicles in the market, GM did not have market power to consider its behaviour as potentially restrictive of competition. Even though the Superintendence of Industry and Commerce recognized the existence of some elements that could be seen as entry barriers, the reality was that those elements did not affect the dynamic of entry of new brands in Colombia and/or the expansion of existing ones. Actually, the import of vehicles increased and new brands entered the market. In addition, the Superintendence found that GM distributors had the opportunity to turn to other suppliers and, when they concluded their contract, continued to market through other brands. In fact, GM market share fluctuation and decrease showed the null effects of its mono-brand policy and the extension of the inherent obligations.

20. Finally, the Superintendence of Industry and Commerce decided to close the investigation against GM because, even though, the Authority found that it imposed restrictions to its distributors, there was no evidence that it had sufficient market power to determine conditions or to block access of other brands in the market of distribution and

⁸ Superintendence of Industry and Commerce, Res. 56350 of 2018.

selling of new motor vehicles in Colombia, in which case its conduct should be considered anticompetitive.

2.2. INMADICA Case:

21. Through Resolution No. 19922 of 2020, the Deputy Superintendence of Competition Protection, initiated an investigation against the company INMADICA ANDINA S.A. (hereinafter, "**INMADICA**") for allegedly having incurred in the anti-competitive behavior of excessive prices, by unjustifiably increasing prices of its products (medical protection equipment) due to the pandemic derived from the COVID-19 virus.

22. However, the Superintendent of Industry and Commerce closed the investigation, considering that the necessary requirements to sanction an undertaking for the imposition of excessive prices had not been met.

23. For the Colombian Authority, only the presence of several verified market conditions could justify the intervention of the competition authority. Those elements, in general terms, are:

1. That the investigated undertaking has significant market power.
2. The presence of high and non-transitory entry barriers;
3. The absence of a specific regulatory agent.
4. That the competition authority intervention be carried out exclusively in those situations in which it is exhaustively demonstrated that the excessive price does not respond to the free interplay of supply and demand.

24. Considering the economic literature, Colombia case law and the international doctrine, the Superintendence of Industry and Commerce developed a set of minimum and necessary criteria to determine when a price can be considered as excessive. This assessment comprises two stages:

25. The first one, consists of defining the relevant market and evaluating its structure, in order to establish whether the investigated undertaking has a high market share, the presence of high entry barriers and of different endogenous and exogenous factors that may have an impact on the demand and supply of the relevant product/service. Only in cases where an agent has a high market share and high entry barriers and structural situations persist, the criteria of the second group shall be analysed.

26. The second stage consists of establishing whether or not the price charged is excessive. At this point, the economic analysis plays a primary role, since it is necessary to make use of different standards that have been developed to conclude the excessiveness of the price, based on Price-cost margins, competitors' prices, and earlier prices of the investigated undertaking, among others.

27. Thus, the economic analysis is presented as a fundamental tool to determine the minimum criteria necessary to conclude the existence of excessive prices according to the Colombian regulation.

28. Considering the above-mentioned elements, the Superintendence of Industry and Commerce, in its decision, decided not to penalize **INMADICA**, concluding it did not engage in the anti-competitive practice of excessive pricing. This decision, from an economic point of view, was based on a precise definition of relevant market, which corresponded to the marketing of medical personal protection equipment (PPE), such as safety glasses, facial protection masks, protective masks with filter and body protection suits, in the national territory.

29. Based on the evidence, the Superintendence of Industry and Commerce concluded that there were not sufficient elements to determine the actual occurrence of the practice consisting of excessive pricing. Having assessed the criteria corresponding to the relevant market definition, it became clear that there were no significant entry barriers which would make it impossible for the supply and demand forces to have the capacity to counteract the alleged unjustified increase in prices and the evidence of actual effects on consumer welfare. In addition, there was no evidence of exploitative or exclusionary effects, which would support the intervention of the Competition Authority. Finally, although an analysis of the PPE prices was carried out, the changes observed were due to well-defined economic circumstances and not to the alleged excessive pricing practices.

30. To sum up, this case clearly established that, while in Colombia excessive pricing conducts do not constitute an abuse of a dominant position, the Superintendence of Industry and Commerce has to analyze different elements, such as the existence of a significant market power, which require a deep economic analysis. As was previously mentioned, the following criteria have been established in order to possibly conclude the existence of an anticompetitive practice for the establishment of excessive prices.

Criteria based on relevant market definition	
Criterion No. 1	Identification of the relevant product market (substitutability from supply and demand). This, as has traditionally been done, will not only have an approximation to the size of the market, but, in turn, will estimate whether it is concentrated, asymmetrical and/or dominated. Likewise, the analysis carried out in this criterion will allow to identify the product(s) that can be considered substitutes.
Criterion No. 2	The identification of the relevant geographic market will delimit the area of influence of the agent and, therefore, its active competitors.
Criterion No. 3	Time series of the average price whose temporality allows to identify, if it exists, periods of seasonality. In this way, the capacity of the agent to influence the price could be established on a preliminary basis.
Criterion No. 4	Average price time series of goods and/or services considered substitutes and/or their competitors.
Criterion No. 5	The description of the endogenous and exogenous factors that affect the demand and supply of the good turns out to be decisive to identify the causes of price variation and whether these are of a permanent or transitory nature. Thus, it seeks to inquire about its provenance and durability.
Criteria based on excessive price	
Criterion No. 6	Historical values of investments. Investments involve changes in costs which, in the short term, can generate transient increases in the prices of the good and/or service.
Criterion No. 7	Difference between significant and persistent price and total cost over time, accompanied by a profitability analysis. Consider, also, a quantitative analysis of the time series of the average price of the good. This should include, according to the set of information available, the comparison of this series respect to the time series of the average price of the goods identified as substitutes in criterion No. 4, and/or with respect to the time series of the average price of the good under analysis in different geographic markets and/or with respect to the time series of the average price of the good offered by its competitors.

2.3. TAXI IMPERIAL Case:

31. The Superintendence of Industry and Commerce carried out an administrative investigation, through Resolution No. 80403 of 2020, against TAXI IMPERIAL S.A.S. (hereinafter, "**TAXI IMPERIAL**") for having allegedly incurred in the behaviors established as abuse of dominance (Tying and market-blocking restraints), in the market of individual passenger transportation at El Dorado International Airport of Bogotá.

32. The foregoing, since **TAXI IMPERIAL** apparently imposed a series of requirements to the taxi drivers who were registered and authorized to provide the individual passenger transport service at El Dorado International Airport, in addition to those provided for in the contracts signed with the airport operator.

33. Those requirements, apparently consisted of forcing the owners of the vehicles providing the service to acquire a "GPS Tablet" or electronic device, unilaterally indicated by **TAXI IMPERIAL**, directly from one of its shareholders (VESHER TECNOLOGY SA). Likewise, the service providers were required to carry out the corresponding replacement of the vehicle for the model and brand previously indicated by **TAXI IMPERIAL**.

34. The investigation was closed, since the Superintendent of Industry and Commerce approved a set of *warranties* or commitments aimed at eliminating the existence of any anticompetitive and abusive practice within the relevant market, increasing both economic efficiencies and consumer welfare⁹.

35. The approved *warranties* or commitments¹⁰ included the following obligations for the investigated company:

- To develop, optimize and consolidate **TAXI IMPERIAL** website, implementing new functionalities that represent, for market participants, the possibility to access the service in a more efficient, dynamic and transparent way, through technological tools;
- To create a new APP, currently non-existent on the market, that can be downloaded and executed from all types of smartphones, tablets and / or any electronic device, with different functionalities that will seek to increase the innovation and quality of the service.
- To develop and implement a complete Compliance Program, based on applicable regulation on free competition best practices, which included the commitment that **TAXI IMPERIAL**, as any person directly or indirectly associated to the company, will promote and guarantee competition in the relevant market.

36. In essence, from an economic perspective, the offered and subsequently accepted commitments, eliminate the economic incentives to continue with the allegedly anticompetitive conduct. The creation of the new APP and the improvements to the website contribute to reduce information asymmetries and, therefore, the elimination of market failures, with important positive effects on consumers. Also, from the service providers perspective, these warranties are established as an incentive to compete under equal conditions, which has the potential to attract a great supply. In sum, the warranties will generate greater efficiencies and increase social welfare levels.

37. For the Superintendence of Industry and Commerce, the approved commitments were aimed at boosting the market efficiencies, eliminating the possible entry barriers and allowing both competitors and final users to participate without incurring in additional transactional costs, increasing consumer welfare.

38. This case is an example of the way the Colombian Competition Authority make use of different economic tools in abuse cases, not solely to define relevant markets or to conclude the existence of market power, but to determine the economic viability of a proposed warranties scheme.

⁹ Superintendence of Industry and Commerce, Res. 36870 of 2021.

¹⁰ According to Article 16 of Law 1340 of 2009, the Superintendence of Industry and Commerce may close an investigation for anticompetitive practices, in the event that the investigated undertaking presents warranties or commitments that, in the Authority's opinion, are sufficient to counteract the possible negative effects of the anti-competitive conducts under investigation.

3. Conclusions

39. To sum up, the Colombian Competition Authority has been making use of different criteria and tools of an economic nature when analyzing anticompetitive conducts such as abuse of dominant position and other unilateral conducts based on illegal market power exercise.

40. The economic analysis has made it possible to strengthen the study of the Authority when defining the relevant markets, the existence of market power, and has even been used to determine the viability of commitments schemes.

41. As could be seen in the above presented cases, in each one of them the economic analysis was essential when analyzing the anticompetitive conduct under investigation.

42. Indeed, in the case of **GM**, economic analysis played a determining role, since in that case, the study of the anti-competitive nature of the restriction imposed by **GM** on its distributors to incorporate independent companies for the marketing of vehicles other than the **CHEVROLET** brand, required prior proof of the existence of a sufficient market power. Situation that required the use of economic tools that allowed to account for the above.

43. On the other hand, on the **INMADICA** case, the economic analysis was essential to jointly assess the different factors that, in the opinion of the Superintendence of Industry and Commerce, must be met for the intervention of the competition authority in cases of excessive pricing.

44. Specifically, this Authority stated that an economic analysis to determine the existence of market power may focus on a broad number of elements, such as market share, the description of the economic agents involved, the endogenous and exogenous factors affecting demand and/or supply, the circumstances in which they occur, its exploitative and exclusionary effects, conduct duration and the presence of barriers to entry/exit the market.

45. Finally, in the **TAXI IMPERIAL** case, through the use of economic tools, the competition authority was able to verify that the efficiencies and the increase in consumer welfare derived from the commitments proposed by the investigated undertaking, effectively outweighed the negative effects of a conduct apparently anti-competitive

46. Having in mind all the above, it can be stated that in Colombia, economic analysis plays a fundamental role in the assessment of national competition cases, specifically those where it is required to assess market power.