

Unclassified

English - Or. English

17 November 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Colombia

- Session IV -

1-2 December 2022

This contribution is submitted by Colombia under Session IV of the Global Forum on Competition to be held on 1-2 December 2022.

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JT03507945

Remedies and Commitments in Abuse Cases

- Contribution from Colombia¹ –

1. This contribution seeks to make a brief account of the latest Colombia's developments regarding remedies and commitments in abuse of dominant position cases.
2. As we will see, national free competition regime stipulates as an anticompetitive conduct the abuse of dominant position in a relevant market². In this way, the Competition Authority, the Superintendence of Industry and Commerce, has the possibility of, in addition to imposing a monetary sanction, ordering the implementation of remedies that may be considered useful to improve the market conditions³.
3. Likewise, the Superintendence of Industry and Commerce has the possibility of accepting commitments from the dominant agent, provided that certain requirements are met, in order to close the investigation without having to impose a sanction⁴.
4. Hence, to develop the above, this document will be divided into five parts. In the first part, the regulatory framework regarding the figure of abuse of dominant position in Colombian legislation will be explained.
5. In a second moment, we will outline the procedure established by the Colombian competition law regarding the submission of commitments by the investigated undertaking in order to close the administrative procedure for abuse of dominant position, as well as the requirements that the competition authority has determined must be met so that said commitments are considered enough to file the investigation. In this regard, two cases that took place in recent years will be explained.
6. Third, this paper will describe the regulatory framework that allows the Superintendence of Industry and Commerce to impose the obligation for the dominant undertaking to comply with some remedies in order to improve the competitive conditions in the relevant market. Likewise, some practical cases will be presented.
7. Fourth, the paper will emphasize on the importance of economic analysis in anticompetitive conducts analysis, particularly, in abuse of dominance cases.
8. Finally, one of the latest reforms that the Colombian legal regime has undergone will be presented, consisting on the incorporation of a Compliance Directorate that will be in charge of monitoring compliance with both the remedies and the commitments that are imposed and accepted in the framework of investigations for abuse of dominant position.

¹ Superintendence of Industry and Commerce

² Article 50 Decree 2153 de 1992.

³ Articles 1 and 3 Decree 4886 of 2011

⁴ Article 16 Law 1340 of 2009.

1. Colombian legal framework on Abuse of Dominant Position

9. According to the Colombian competition law⁵, 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 product⁶.

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, Article 50 of Decree 2153 of 1992 establishes a series of conducts that are sanctioned as abuse of dominance, including (i) predatory pricing; (ii) tying; (iii) market allocation; (iv) margin squeeze; among others.

12. In recent years, the Superintendence of Industry and Commerce has analysed eventual abuses of dominant position in different markets (port services, beer distribution, provision of public transport services). Some of these investigations have been closed⁷, however, it is relevant, as will be presented later, that some of them⁸ were closed precisely due to the acceptance by the authority of commitment schemes presented by the dominant undertakings.

13. Likewise, and as will be seen later, in the past the Superintendence of Industry and Commerce has also imposed, in the framework of investigations for abuse of dominant position, the obligation on dominant agents to fulfil remedies⁹, in order to correct or prevent¹⁰ future commissions of abuses within the relevant market.

2. Commitments in Abuse cases

14. Article 16 of Law 1340 of 2009 added the possibility for those investigated by abuse of its dominant position in a relevant market to present commitments so that the Superintendent of Industry and Commerce could close the investigation without imposing a fine.

15. It is important to note that the commitment procedure implemented in Colombia has some special characteristics with respect to other jurisdictions. For example, in Europe commitments are not accepted in cases of anti-competitive agreements¹¹. However, in Colombia, in principle, this restriction was not established, allowing the Superintendent of

⁵ Article 45 (5) Decree 2153 de 1992.

⁶ Superintendence of Industry and Commerce, Res. 420 of 2019.

⁷ Superintendence of Industry and Commerce, Res. 11168 of 2020.

⁸ Superintendence of Industry and Commerce, Res. 36870 of 2021 and Res. 50340 of 2022.

⁹ Superintendence of Industry and Commerce, Res. 76278 of 2016.

¹⁰ OECD. *Remedies and Sanctions in Abuse of Dominance Cases*. 2006.

¹¹ Antitrust: Commission introduces settlement procedure for cartel. Available on: https://ec.europa.eu/commission/presscorner/detail/it/MEMO_08_458

Industry and Commerce to analyse and accept commitments in the framework of investigations for possible agreements or other anti-competitive conducts¹².

16. On that sense, through the years the Superintendence of Industry and Commerce has establish the different criteria that it takes into account when studying commitments. Thus, the competition authority has said that the commitments in Colombia **(i)** cannot aimed exclusively at complying with the law; **(ii)** they must be effective to cease or modify the allegedly anticompetitive behaviours; **(iii)** they should preferably be structural; and **(iv)** they must comply with the policy for the promotion and protection of competition¹³.

17. These criteria are used by the authority, regardless of the type of conduct being investigated. However, the analysis of each of them will undoubtedly depend to a large extent on the characteristics of each market and the particularities of the agents investigated.

18. Thus, in recent years, the Superintendence of Industry and Commerce has had the opportunity to analyse commitments in the framework of investigations that were being carried out for possible abuses of dominant position. Some of these cases will be presented hereunder, in order to evidence the analysis carried out by the authority regarding the proposed commitments and to demonstrate the reason why it considered them enough to close the respective investigations.

2.1. Taxi Imperial Case (2021)

19. 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 behaviours established as abuse of dominance (tying and market-blocking restraints), in the market of individual passenger transportation at El Dorado International Airport of Bogotá.

20. **TAXI IMPERIAL** apparently imposed a series of requirements on 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.

21. Those requirements, apparently consisted of obliging 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**.

22.

23. However, the investigation was closed, since the Superintendent of Industry and Commerce approved a set of commitments aimed at eliminating the existence of any anticompetitive and abusive practice within the relevant market, increasing both economic efficiencies and consumer welfare¹⁴.

¹² Article 52 Decree 2153 of 1992

¹³ Superintendence of Industry and Commerce, Res. 28689 of 2020, Res. 36870 of 2021 and Res. 50340 of 2022.

¹⁴ Superintendence of Industry and Commerce, Res. 36870 of 2021.

24. The approved commitments 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.

25. 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' welfare. Also, from the service providers' perspective, these commitments are established as an incentive to compete under equal conditions, which has the potential to attract a great supply. In sum, the commitments will generate greater efficiencies and increase social welfare levels.

26. 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.

27. 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 proposed commitments.

2.2. Bavaria Case (2022)

28. Through Resolution No. 23369 of 2022, the Superintendence of Industry and Commerce opened an investigation against **BAVARIA & CIA S.C.A.** (hereinafter "**BAVARIA**"), for allegedly having incurred in the conduct provided in numeral 6 of article 50 of Decree 2153 of 1992 as an abuse of dominant position, in the market for the production, import and marketing of beer in Colombia

29. **BAVARIA** would have apparently used its dominant position in the market to block the entry of new competitors through a significant and disproportionate increase in exclusivity clauses with its distributors.

30. The conduct executed by **BAVARIA** would have the potential to obstruct or prevent third parties and new agents from accessing or growing within the market. The foregoing conduct presumably resulted in the configuration of an abuse of dominant position that would have had the purpose of limiting free economic competition in the relevant market.

31. However, **BAVARIA** requested the early filing of this investigation through an offer of commitments to modify its business policy and behaviour in the market. Thus, the dominant company proposed the Superintendence of Industry and Commerce, among others, to reduce in a high percentage the number of exclusivity clauses signed with its distributors. Likewise, the dominant undertaking proposed to implement a series of measures aimed to improve the competition within the market, such as allowing smaller competitors to use its distribution chain.

32. Through these measures, **BAVARIA** seeks to prevent current or potential competitors from finding it impossible to access the market, benefiting the competitive structure and, therefore, the final consumer.

33. For the Superintendence of Industry and Commerce, the commitments offered met the established requirements, since:

- Indeed, the commitments go beyond a simple compliance with regulations and seek to boost competition within the market. In fact, the commitments seek, among other things, the elimination of artificial entry barriers that could have been causing by **BAVARIA**'s behaviour in the market.
- The modification of a business policy, through a significant decrease of exclusivity clauses, represent a structural commitment that seeks to eliminate any possible entry barrier that was being generated in the relevant market.

34. On that sense, the Superintendence of Industry and Commerce found that the offered commitments were based on the public policy of protection and promotion of competition and aimed to achieving an increase in efficiency and competitiveness in the Colombian beer market.

2.3. Conclusions on Abuse Cases Commitments

35. As can be seen from the two cases analysed before, the Superintendence of Industry and Commerce understands that in cases of abuse of dominant position, given the characteristics and nature of the investigated agent, sometimes a commitment scheme can allow increasing the efficiencies of the market in a way that the imposition of a monetary sanction probably could not.

36. However, for the acceptance of the commitments, and to prevent them, on the contrary, from increasing the power of the dominant agent in a given market, the Superintendence makes use of different tools and economic analyses that allow effectively concluding that the acceptance of the commitments will bring the desired benefits in the market.

3. Remedies in Abuse cases

37. International doctrine has defined the figure of “*remedies*” as the tool available to the authorities that does not seek to sanction anticompetitive conduct, but rather has the purpose of stopping the conduct, its negative effects and restoring competition¹⁵ and prevent future limitations to it¹⁶.

¹⁵ OECD. *Remedies and Sanctions in Abuse of Dominance Cases*. 2006.

¹⁶ Wagner-von Papp, F. “*Remedies, Sanctions and Commitments*”, in Research Handbook on Abuse of Dominance and Monopolization. Edward Elgar Publishing. 2021. P. 3

38. In Colombia, for cases of restrictive practices of competition, such as abuse of dominant position, the authority has the ability to impose remedies that seek to stop anticompetitive conduct.

39. Thus, article 1 of Decree 4886 of 2011¹⁷ establishes that the Superintendence of Industry and Commerce has the function of ensuring the observance of the provisions regarding free competition in the markets. Likewise, article 3 of Decree 4886 of 2011¹⁸ provides that the Superintendent of Industry and Commerce has the legal power to order offenders to modify or terminate conduct that is contrary to the provisions on protection of competition.

40. In other words, the aforementioned regulations empower the Superintendence of Industry and Commerce to issue the remedies that are necessary to ensure compliance with the provisions on the protection of free competition in national markets¹⁹.

41. Considering the foregoing, in Colombia, the Competition Authority has made use of the figure of remedies on different occasions, including cases of abuse of a dominant position. Next, the **SAYCO** case will be presented, in which, in addition to the imposition of a monetary sanction, the investigated party was ordered to comply with some remedies that sought to stop the anticompetitive conduct and avoid its negative effects in the future.

42. Likewise, a recent case will be presented, **SUZUKI**, which, although it did not correspond to an abuse of a dominant position, was an investigation of vertical restraints carried out by virtue of the existence of a company policy according to which the undertaking limited competition in the markets of public tenders for the sale of motorcycles to different State entities. What is relevant in this case, in light of what is analysed in this contribution, is that the Superintendence of Industry and Commerce determined the need to order the implementation of a compliance program as a remedy to eliminate the existence of said business policy and its materialization in the national market.

3.1. SAYCO case (2016)

43. Through Resolution No. 20964 of 2012, the Superintendence of Industry and Commerce opened an investigation against SOCIEDAD DE AUTORES Y COMPOSITORES DE COLOMBIA (SOCIETY OF AUTHORS AND COMPOSERS OF COLOMBIA) (hereinafter “**SAYCO**”) to determine if it violated the provisions of articles 1 (general prohibition) and 8 (monopolization of distribution) of Law 155 of 1959 and in paragraphs 3 (tying) and 6 (obstruct or prevent third parties from accessing markets) of article 50 of Decree 2153 of 1992.

44. Following an administrative investigation by the competition authority, it was concluded that the relevant market in this case was the “management of economic copyright regarding the public communication of musical works”.

45. Now, regarding the dominant position of **SAYCO**, it was proved that it was the only Collective Management Company for Copyright of musical works in Colombia. In addition, the high requirements for the incorporation of a new Collective Management Company for Copyright in the country represented a barrier to market entry. Likewise, it was considered that collective management was an essential service in those cases in which the number of owners and users of musical works were high. For this reason, the broad

¹⁷ Recently modified by Article 1 of Decree 092 of 2022.

¹⁸ Recently modified by Article 3 of Decree 092 of 2022.

¹⁹ Superintendence of Industry and Commerce, Res. 76278 of 2016.

power of **SAYCO** as the sole company that provided this service, added to the entry barriers for new competitors, allowed the investigated undertaking to have independence to set market conditions. Thus, it was concluded that **SAYCO** had a dominant position in the relevant market.

46. Now, regarding the analysed conduct, it was proved that the copyright holders who wanted to have the quality of partners in **SAYCO** were forced, by contact, to grant the management of all the uses of the right of public communication, banning the possibility for the owners of copyright to manage their rights individually.

47. For the Superintendence of Industry and Commerce this conduct was an abuse of **SAYCO**'s dominant position in the market. However, in addition to the imposition of an economic fine, the Colombia Competition Authority ordered **SAYCO**, as a remedy, to make the corresponding adjustments in its contracts and its business policies, in order to ensure the effective possibility that any copyright owner could in the future manage their economic rights in ways other than collective management.

48. In other words, the competition authority made use of its power to order the application of remedies, looking to guarantee the end of the anticompetitive conduct and prevent its negative effects from continuing to materialize in the market.

3.2. SUZUKI case (2016)

49. Through Resolution No. 76592 of 2019 the Superintendence of Industry and Commerce opened an investigation against SUZUKI MOTOR DE COLOMBIA S.A. (hereinafter "**SUZUKI**") to determine if it violated the provisions of article 1 of Law 155 of 1959 (general prohibition of competition).

50. During the investigation, it was proved that **SUZUKI** exercised a vertical restraint over its distributors, controlling their participation in public tenders, keeping the right to choose which distributors had their authorization to present offers on the mentioned processes. Thus, it was possible to prove that said vertical limitation to the downstream market corresponded to a **SUZUKI**'s business policy, which was implemented on several occasions.

51. In the aforementioned context, the Colombian Competition Authority imposed economic fines to **SUZUKI** but, at the same time, it considered necessary to order, as a remedy, the implementation of a compliance program that allows the removal of the **SUZUKI**'s anticompetitive business policy. In this way, what the authority sought was to eliminate the commission of the sanctioned conduct and prevent it from being committed again in the future, hence to restore the levels of competition in the public tenders where the distributors of the **SUZUKI** brand participated.

3.3. Conclusions of Remedies in Abuse cases

52. To sum up, it is possible to establish that the Colombian competition law regime gives the possibility to the Superintendence of Industry and Commerce to impose, as remedies, different measures aimed at stopping anticompetitive behaviours and avoiding their future commission.

53. As seen above, these measures have been adopted by the authority both in cases of abuse of dominant position and in cases of vertical restraints, under the understanding that

the simple imposition of the economic sanction may not be enough to guarantee the reestablishment of the competitive conditions in the markets.

4. Importance of Economic Analysis in abuse of dominance cases

54. It is important to note that the assessment of economics tools to conclude the existence of anticompetitive conducts, particularly, in abuse of dominance cases, is a very useful instrument. In fact, this discipline provides to the Competition authorities the necessary elements to analyse the relevant affected markets and the potential and real effects on economic efficiency and social welfare.

55. As mentioned in previous sections, the proposed commitments in **TAXI IMPERIAL** and **BAVARIA** cases, considered enough to close the respective investigations, recognize that they should preferably be structural and, therefore, in order to guarantee the foregoing, it is essential to carry out an exhaustive economic analysis which accounts for a complete and correct characterization of the value chain and the economics agents who participate. Likewise, the economic analysis allows to determine the interactions between agents, in addition to other elements of Industrial Organization Theory related to concentration, dominance, efficiency and damage to social welfare.

56. For that reason, since 2012, the Superintendence of Industry and Commerce has an Economics Studies Group which functions, among others, include the monitoring of markets behaviour through sectoral studies. For example, for the first time in Colombia and considering as precedent the **SAYCO** case, an economic study about Collective Management Companies was made in October 2022²⁰.

57. The Collective Management of Copyright and Related Rights serves as a tool that seeks to guarantee greater efficiency in the administration and distribution of the collection generated using the works of copyright holders. Hence, the Collective Management Companies arise as private non-profit associations, constituted by the holders of Copyright, whose main purpose lies in the defence of their interests and objectives. In the Colombian case, there are seven Collective Management Companies which operation is regulated by the Chapter III of Law 44 of 1993, in accordance with the Andina Decision 351 de 1993.

58. Now, considering the qualitative and quantitative information provided by each of the Collective Management Companies, through a descriptive statistical analysis, it was evidenced that, for the period 2010- 2020, and despite the effects generated by the Covid-19 pandemic, the Collective Management Societies in Colombia have registered a stable behaviour in terms of collection, expenses and distribution of profits.

5. Compliance Directorate

59. Finally, it is worth mentioning that, in Colombia, since 2022, there is a compliance directorate within the Superintendence of Industry and Commerce. This directorate has as one of its main functions to follow up on the fulfilment of the commitments and remedies that are implemented in the framework of administrative investigations, including those of abuse of dominant position.

60. The creation of this directorate corresponds to the will of the authority to effectively monitor compliance with these measures, as well as to promote a compliance culture within the rules of free competition in the country.

²⁰ Grupo de Estudios Económicos. *Sobre la Sociedades de Gestión Colectiva*, 2022. Available at: <https://cutt.ly/VNrdHq0>