Latin America Enforcement Update: Colombia

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Abuse of dominance is prohibited under Article 50 of Decree 2153, which lists six different conducts defined as abuse of dominance.[2] In addition, anti competitive conducts that are not defined there, can in any event be investigated by the Superintendence of Industry and Commerce ("SIC") SIC under the general prohibition stated in Article 1 of Law 155, considered together with Article 46 of Decree 2153.

1. EBSA Case (March 21, 2013)

Article 50(6) of Decree 2153 expressly forbids the abuse of dominance aimed to impede or deter entry of third parties to the markets and/or distribution channels.

Recently, SIC has decided an investigation against *Energía de Boyaca S.A.* EBSA *(Case 3694/2013, EBSA)* for the commission of this conduct.

EBSA is the only provider of the energy service for the department of Boyacá in Colombia. EBSA holds a dominant position of 99,9% of the market in that region. Additionally, the competition authority determined that there were high barriers to the entry of potential competitors mainly due to the high investments needed in order to compete.

The energy supply requires, among others, the usage of electric meters designed to measure the *Khw* consumed in a certain period of time. Such devices must be calibrated in the laboratory in order to properly perform their services.

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[2] Article 50 of Decree 2153 lists six forms of abuse of dominance, which can only be incurred by persons or companies that enjoy a dominant position. The abusive conducts are: predatory pricing, vertical discrimination, tying arrangements, horizontal discrimination, regional predatory pricing, and creating artificial barriers to entry.

Calibration of electric meters consists on the verification of the device's correct measurement of the amount of energy consumed by the final user.

The electric meter market, although complimentary to the energy market, is completely independent. There is a laboratory fully owned by EBSA that performs electric meter calibration. Unlike the energy market, there are several laboratories not owned by EBSA that also provide calibration services.

On November 2010, EBSA issued an internal ordinance *Acto de gerencia 092* which required that electric meters calibrated by laboratories different from EBSA's had to pay a *homologating fee.* Such charge did not have to be assumed whenever the electric meter was calibrated by the EBSA wholly owned subsidiary.

The SIC started an administrative query in order to define whether EBSA incurred in an abuse of dominance by creating artificial barriers to the market for electric meters.

EBSA justified the charge, arguing among others, the necessity to upload the information to their own database and to perform an adequate traceability. The time and work incurred by EBSA would be recovered with the fee charged.

EBSA also denied being dominant in the electric meter market, and therefore argued that could not abuse any such position.

The SIC determined that because the calibration of electric meters was a complimentary service associated to the energy supply, EBSA could determine market conditions in both markets and therefore could be liable of abuse of dominance in any of these markets. Such situation also showed the almost nonexistent power of negotiation held by EBSA's competitors in that market.

Additionally, SIC found that there were other associated costs charged to third parties (such as a registration fee) that already covered any cost incurred by EBSA for the homologation process.

The SIC concluded that by charging the mentioned fee EBSA was obtaining an illegal competitive advantage that caused the effect of imposing an undue burden to competing laboratories. The authority ordered EBSA to refrain from charging the *homologating fee* and imposed a fine to the company.

2. **Induga Case (May 23, 2013)**

Article 50(5) of Decree 2153, determines that selling a product in a specific region at different prices than those to which the product is offered in other regions of the country, is an abuse of the dominant position when the intent or the effect of the practice is to increase the barriers to entry the market.

In 2001, the SIC decided an investigation *(Case 15653/2001, Induga S.A.)* against a manufacturer of ice cream cones based in Medellín, with national presence and a dominant position based in its superior technology: Induga. When a new company in Barranquilla started to compete aggressively, Induga, allegedly, started to sell its products in the Atlantic coast at a price lower than the one applied in the rest of the country, including Medellín.

The SIC concluded that Induga was a dominant firm and that its conduct amounted to an abuse of dominance in the form of *regional predatory pricing,* for it was not reasonable that the price of the cones in Medellín (the base of the factory) was higher than the price in the coast, taking into consideration the costs of product's transportation. It must be noted that, as said before, the SIC focused in the price discrimination and did not refer to the issue of prices below cost.

The decision was challenged before the administrative jurisdiction; the Council of State issued its judgment on May 23, 2013.

This High Court considered that Induga did not have a dominant position in the ice cream cones market. It established that, when defining the relevant market, the SIC did not consider other products with which consumers tend to replace ice cream cones, such as plastic recipients. If these products were included in this analysis, it would have been concluded that Induga did not have a dominant position.

The Council of State established that, even if Induga did have a dominant position, it was demonstrated that this company did not sell its products in the Atlantic coast at a lower price than the one applied nation-wide. Hence, there was no infraction of the antitrust laws.

3. Comcel Case (September 03, 2013)

Article 50(6) of Decree 2153 expressly forbids firms with dominant positions from performing any unilateral conduct aimed to impede or deter entry of third parties to the markets and/or distribution channels. The SIC recently sanctioned *Comunicación Celular S.A.- Comcel* for incurring in this anticompetitive conduct (*Case 53403, Comcel*).

The relevant market that was analyzed in this particular case was the one of "Outgoing mobile calling services[3]" in Colombia.

Allegedly, Comcel performed a series of anticompetitive conducts in the field of Mobile Number Portability[4] (henceforward, MNP); this process allows users from different cellular companies to switch providers without changing their cellphone numbers. The MNP promotes free competition within the mobile calling services providers, since it encourages them to create strategies and improve services in order to attract new consumers and avoid loosing actual ones.

Comcel was sanctioned with a fine of approximately US$28.570.000, for executing two main conducts:

1. *Locking cell phones that the company operated*[5]: Comcel prevented users from connecting their phones with other providers, since their phones could only be unlocked when they fulfilled certain requirements. Consequently, this company influenced its consumers' decisions, so that they would not switch providers. It was not proven that many damaging effects were produced, since only a few complaints about locked phones were brought forward in the process. The SIC, however, argued that the mere possibility of a harmful effect suffices for the

[3] Voz saliente móvil
[4] Proceso de Portabilidad Numérica
[5] Bloqueo de las bandas de los teléfonos operados por Comcel

conduct to be significant, and, hence, for this authority to penalize it. In this particular case, it was considered that locking the cell phones that the company operated had a great potency for affecting the market.

2. *Bulging MNP results*[6]*:* Comcel gave its distributors great incentives to increase their portability outcomes. This led to the carrying of unreal procedures: Users that did not have the intention of performing a MNP process, had their cell phone lines transferred from other operators to Comcel. Although Comcel did not execute this deed directly, this company was fully aware of this conduct. This company used a fraudulent strategy to alter MNP results, so that it appeared to be the operator with the greatest amount of transfers. The latter falsely affected the position of the company in the market, regarding users' decisions, especially because the results were broadly exposed. Additionally, Comcel's competitors lost some of the numbers they had been assigned. This conduct violated Article 1 of Law 155, which contains the general prohibition of anticompetitive practices.

A third allegation was exposed before the SIC, which consisted on the non-delivery of the personal identification number to the users that aimed to transfer their lines to another cell phone operator. This number is necessary to perform an MNP process. The SIC considered that this was not an anticompetitive practice. Rather, it considered that it was an issue of consumer protection.

[6] Abultamiento de las cifras sobre los resultados de los procesos de portabilidad numérica entre operadores.