The Dominance and Monopolies Review

Fourth Edition

Editors
Maurits Dolmans and Henry Mostyn

Law Business Research

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This article was first published in The Dominance and Monopolies Review, 4th edition
(published in June 2016 – editors Maurits Dolmans and Henry Mostyn).

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Fourth Edition

Editors
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Law Business Research Ltd

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-18-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANJARWALLA & KHANNA

ANJIE LAW FIRM

BAKER & MCKENZIE LLP

CASTRÉN & SNELLMAN ATTORNEYS LTD

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ SC

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EDITORS' PREFACE

This new edition of *The Dominance and Monopolies Review* tracks the evolution of abuse of dominance rules around the world.[1] The sheer range of global enforcement – from established agencies, such as the EU and the US FTC, to intensifying enforcement in India, China and emerging economies – makes identifying common trends difficult. But books such as the *The Dominance and Monopolies Review* make the task of comparatively analysing developments manageable.

This editorial picks out four such developments. First, the approach competition authorities over the world have taken to assessing product design improvements. Second, the possible expansion of abuse of dominance rules to cover privacy issues. Third, the application of abuse of dominance concepts to essential patents. And fourth, and probably most important, the evolution of the 'object versus effect' dichotomy under Article 102 TFEU.

The first trend is most evident in the different approach that global authorities have taken to reviewing Google's search result designs. In previous years, the US Federal Trade Commission, as well as courts in Brazil and Germany, have found that Google's search result designs improve quality and are pro-competitive.[2] In August 2015, the Taiwanese Fair Trade Commission (TFTC) – which has not shied away from enforcing competition laws against high-tech multinational companies such as Microsoft, Intel and Apple in the past[3] – reached a similar conclusion. The TFTC reviewed Google's display of a map in its search results and

1 The editors and their firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

2 Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc, FTC File Number 111-0163, 3 January 2013; District Court of Hamburg, Ref 408 HKO 36/13 *Verband der Wetterdienstleister v. Google*, order of 4 April 2013; and *BUSCAPE v. Google*, 18th Civil Court of Sao Paulo, Lawsuit no. 583.00.2012.131958-7, Summary Judgment Ruling.

3 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

found that the design provides 'convenience to users and is in line with users' benefits. It's hard to say it's anticompetitive and adopt the refusal to trade concept in this case.'[4] And in Canada, the Competition Bureau completed its 'extensive' investigation of Google, finding that Google's designs and algorithmic changes 'improve user experiences' and are 'beneficial to consumers'. The Bureau found no evidence that Google's designs 'had an exclusionary effect on rivals'.[5]

Likewise, the High Court of Justice of England and Wales in the *Streetmap* litigation, discussed in the United Kingdom chapter of this book, found that Google's display of a map in its search results is lawful. Mr Justice Roth held that displaying a map was 'pro-competitive' and an 'indisputable' product improvement.[6] Showing a map was not reasonably likely to have an appreciable effect on competition in the market for online maps, and, even if it had such an effect, the design change was in any event objectively justified because it improved quality. Alternative solutions to creating this improvement, such as showing rivals' maps in search results, were not 'effective or viable' because they would, among other things, create delays and reduce quality.[7] These cases are important because they involve a range of jurisdictions and products, and were based on alleged theories of harm that applied well beyond the specific facts of the case.

By contrast, in April 2015, the EU Commission issued a statement of objections focused on the allegation that Google favours its own comparison shopping service in its search results. The design the EU Commission challenges is an ad format for merchant product offers that Google shows with pictures and prices. Google's response to the statement of objections argued and showed that this design constitutes a product improvement valued by users and advertisers. It therefore represents competition on the merits.[8]

Interestingly, the statement of objections appeared to contemplate as a remedy that Google should show ads 'sourced and ranked by other companies within [Google's] advertising space'.[9] But showing rivals' ads would seem, on its face, to lead to the same quality problems as showing rivals' maps that Roth J found in *Streetmap*. And showing rivals' ads should be legally justified only where a company has a duty to supply its rivals (i.e., where an input is indispensable and there is no other way for rivals to reach customers), as the TFTC held in its investigation. Yet given the many ways that websites can attract traffic, from direct traffic to apps, and from social networks to partnerships with others sites, the statement of objections did not argue the essential facility standard applied to Google. If a duty to supply

4 PARR, 'Taiwan regulator finds no antitrust infringement in Google's search, Play Store practices', 5 August 2015, available at: http://app.parr-global.com/intelligence/view/1287782.

5 See the Canada chapter of this book; and Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google, 19 April 2016, available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

6 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 84. Leave to appeal denied, *Streetmap v. Google*, Court of Appeal (per Richards LJ), A3/2016/1210, 27 May 2016. See the United Kingdom chapter of this book.

7 Ibid., paragraphs 155, 166 and 171.

8 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

9 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

rivals is imposed beyond the essential facility situation, this would very substantially change the law and commercial practice, potentially dampening investments in new solutions and assets to the detriment of consumers.

In India, the Director General of the Competition Commission issued a preliminary report challenging various aspects of Google's search and ad businesses. The report is, in the words of former Commissioner Ashok Chawla, 'only a beginning'; it allows Google to be heard on the preliminary concerns before the Commission comes to a final decision.[10] Given the thriving competition evident in India's online sector,[11] the CCI's action arguably risks condemning a product improvement without evidence of competitive or consumer harm. As David Balto commented, the 'question is whether Indian regulators will risk chilling innovation and harming competition in such a vibrant sector, particularly as there has been no harm to Indian consumers'.[12]

As to the second development, in March 2016, the German Bundeskartellamt initiated proceedings against Facebook on suspicion that its terms of services on the use of user data constitute an abuse of dominance.[13] Intriguingly, the press release suggests that the Bundeskartellamt views Facebook's use of data to be an exploitative abuse – allegedly, because Facebook's conditions of use violate data protection provisions. The Bundeskartellamt's investigation will look at whether Facebook unlawfully collects 'large amounts of personal user data' that enables its advertisers 'to better target their advertising activities'.[14] Of course, companies using customer data to better target their ads is not a new (or even online-specific) phenomenon.[15] But the Bundeskartellamt proceedings are the first case of which we are aware where it has been suggested that this may constitute an abuse of dominance.

On its face, the Bundeskartellamt's investigation has some appeal: why should extracting and using personal data in a way that harms consumers be any different to charging an excessive price or imposing unfair terms? That Facebook's terms of service may also violate data protection laws is no barrier – a dominant company setting fire to its rival's factory to solidify its dominance can also be an abuse of dominance, even if it also violates other laws. But it is arguably an inefficient use, and perhaps even a misuse, of regulatory powers to use

10 *Economic Times*, 'Probe Report on Google only a 'beginning' says CCI chief Ashok Chawla', 18 September 2015, available at: http://articles.economictimes.indiatimes.com/2015-09-18/news/66677418_1_cci-chief-ashok-chawla-investigation-arm-director-general-google-case.

11 See, e.g., *The Economist*, *India Online*, 'The battle for India's e-commerce market is about much more than retailing', 5 March 2016, available at: www.economist.com/news/leaders/21693925-battle-indias-e-commerce-market-about-much-more-retailing-india-online?cid1=cust/ednew/n/bl/n/2016033n/owned/n/n/nwl/n/n/NA/n.

12 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

13 Bundeskartellamt Press Release. 2 March 2016. www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.htm. See the Germany chapter of this book.

14 Ibid.

15 *Forbes*, K Hill, 'How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did', 16 February 2012, available at: www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#306f377a34c6.

competition law to pursue privacy goals. This appears to be what the Court of Justice had in mind when it held that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.'[16] Indeed, the goals of privacy law – to protect individuals from government and enterprise control – differ from the goals of competition law, which is to protect the generation of consumer welfare through the competitive process.

More fundamentally, it seems questionable whether – as some have suggested[17] – data always have the inherent qualities of a 'currency' or are the 'oil' of the new economy. For example, data are not fungible; they have no durable value; and they are not freely transferrable.[18] Moreover, consumers do not give data as 'payment' because data are (typically) non-rivalrous: if I tell a service that I live in Hampstead, like to sail, and enjoy Robertson Davies' Deptford trilogy novels, nothing prevents me from telling that to another service. The data are not 'used up' like oil. Accordingly, the value that a service like Facebook might derive from data comes not from the data as such (which is ubiquitous),[19] but from the skill in extracting information from the data, translating that information into usable knowledge, and turning that knowledge into action.[20] How the Bundeskartellamt grapples with these various issues, including in its joint study on 'big data' with the French competition authority, could prove one of the more fascinating developments of 2016 and beyond.

The third development concerns the circumstances in which the owner of an SEP can seek injunctive relief for a violation of its IP. As discussed in the European Union chapter of

16 Case C-238/05, *Asnef-Equifax*, paragraph 63. See also COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 164 'Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.'

17 'Personal data is the currency of today's digital market', speech by Vice Commissioner Reding, 'The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age – Innovation Conference Digital, Life, Design', Munich, 22 January 2012. Available at: http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm.

18 As one study found, '90 per cent of the data in the world today has been created in the last two years [...] 70 per cent of unstructured data is stale after only 90 days.' RIS, Analytics Insights Deliver Competitive Differentiation (July 2013) (quoting Citi Research 2013 Retail Technology Deep Dive).

19 Every few days, humanity now generates five exabytes worth of data. This roughly corresponds to the volume of data produced in the entire period between the dawn of time and 2003. See 'La concurrence dans l'economie numerique', Fabien Curto Millet, A Quoi Sert La Concurrence. See also EU Commission, 'Digital Economy – Facts & Figures', March 2014: 'The digitization of products and processes has made a huge and exponentially increasing amount of data available'.

20 See, e.g, EU Commission Expert Group on Taxation of the Digital Economy, 13 and 14 March. ('The existence of data alone is not sufficient to generate value; the value comes from maximising the efficacy of use from the actual data; but the challenge is deciding at which point and where the value is created. Furthermore, the data that is the lifeblood of the digital economy is increasingly being generated by users, rather than the companies themselves.')

this book, on 6 July 2015, the Court of Justice issued its *Huawei* ruling, setting out a test that aims to strike the balance between maintaining effective free competition and safeguarding proprietors' IP.[21] The ruling confirms at the highest judicial level that EU competition law matters in SEP licensing. In particular, where SEP holders are in a dominant position, and commit to grant licences on FRAND terms in the context of a standardisation procedure, they are subject to special conditions before they can seek an injunction against potential infringers without violating Article 102 TFEU.[22]

The *Huawei* judgment, however, leaves a number of issues unaddressed, including when an SEP holder will be considered dominant in the first place. The judgment provides no guidance on what amounts to FRAND terms. Instead, it requires national courts to play a greater role by assessing whether offers made by parties are objectively FRAND. And the judgment, intriguingly, by relying on a theory of harm based on 'legitimate reliance', leaves open the possibility that the principles apply beyond SEPs to other essential IPRs.

The first national decision applying the Huawei ruling was the Düsseldorf Regional Court's decision in *SISVEL v. Qingdao Haier Group*. The Court held that Qingdao was infringing SISVEL's patents in certain mobile telecommunication standards. Qingdao raised the FRAND defence set out in *Huawei*. The Court found, however, that Qingdao had not provided appropriate security nor rendered accounts when SISVEL rejected Qingdao's counter-offer. The *Huawei* conditions were therefore not satisfied. The Court left open the question whether SISVEL's offer was FRAND in the first place. That is, the Court found that the rendering of accounts and security must be complied with independently of the specific details of the offer and the counter-offer. Arguably, this finding conflicts with the Court of Justice's requirement in *Huawei* that the SEP holder's offer, and the SEP user's counter-offer, must be on FRAND terms.[23]

How national courts apply the *Huawei* ruling – including the issues of whether a SEP confers a rebuttable presumption of dominance, and what constitutes FRAND prices and terms, and whether similar principles could apply to patent assertion entities' use of non-SEP essential patents – is likely to be one of the hotly litigated issues of 2016 and onwards. In the UK, for example, the UK High Court in *Unwired Planet v. Huawei* is scheduled in October 2016 to determine how to apply FRAND licensing principles for patents said to be essential to 2G, 3G and 4G.

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21 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*.

22 These conditions are as follows: (1) SEP holders must alert SEP users of the alleged infringement; (2) SEP users must indicate a willingness to conclude a licence on FRAND terms; (3) SEP holders must present a detailed written offer for a licence on FRAND terms; (4) SEP users must respond promptly and in good faith, and not engage in delaying tactics; (5) if the SEP user does not accept the offer, it must submit, promptly and in writing, a specific counter-offer on FRAND terms; (6) if no agreement is reached, an SEP user that is already using the technology must provide appropriate security and be able to render accounts; (7) the amount of the royalty may, by common agreement, be determined by a independent third party; and (8) SEP users can challenge validity, essentiality, and infringement in parallel to licensing negotiations and also after conclusion of the licence agreement.

23 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*, paragraphs 63 and 65.

As to the fourth development, the previous edition of this book commented on the threatened re-emergence in Europe of form-based analysis, at the expense of the economic analysis of foreclosure effects in abuse cases, following the General Court's decision in *Intel*. We suggest that a close reading of recent EU case law, including the Court of Justice's decision in *Cartes Bancaires*, reveals that the exemption from the obligation to show anticompetitive effects applies only in a limited set of circumstances – specifically, for conduct that is 'by its very nature' abusive. This means, effectively, that based on past practical experience and economic theory, the conduct is always restrictive and harmful to consumers, and never justified except in unusual circumstances.

This reading is reinforced by recent decisions of the Court of Justice and national courts. In *Post Danmark II*, the Court of Justice confirmed that even in the case standardised, retroactive, conditional rebates applied by a statutory monopoly in a market protected by high barriers to entry,[24] anticompetitive effects must be 'likely' or 'probable'. [25] The Court also rowed back from Advocate General Kokott's fulmination against the as-efficient competitor test – a 'disproportionate use of the resources of the competition authorities and the courts' – finding the test to be 'one tool amongst others for the purposes of assessing whether there is an abuse'.[26]

The Court did state, however, that 'fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified'.[27] But the statement is limited to conduct that it is 'by its very nature abusive'.[28] Under consistent EU case law, these exceptional cases are already exempted from the requirement to show anticompetitive effects – so the judgment in this sense is not that surprising. In addition, the Court's rationale for dismissing an appreciability threshold was that 'the structure of the market has already been weakened by the dominant undertaking, so any further weakening of the structure of competition may constitute an abuse of a dominant position.'[29] The reasoning is therefore limited to cases where the effects of the conduct are alleged to occur on the same market as which the company is dominant. The finding would not apply, for example, to related-market abuses. In the *Streetmap v. Google* judgment discussed above, Roth J distinguished *Post Danmark II* for this precise reason. Roth J held that it would be 'perverse' to find that a product improvement on a dominant market 'contravenes competition law because it may have a *non-appreciable* effect on a related market where competition is not otherwise weakened'.[30]

Roth J's finding for related market abuses appears axiomatic. As the editors of this book, we would see the law go further: like leading commentators, [31] we consider that there

24 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraph 73.

25 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraphs 67 and 74.

26 Ibid., paragraph 61.

27 Ibid., paragraph 73.

28 Ibid., paragraph 73.

29 Ibid., paragraph 72.

30 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 98. Emphasis in original.

31 See, e.g., Whish & Bailey, *Competition Law* (8th edition, 2015), page 212; and Faull & Nikpay, *The EU Law of Competition* (3rd edition, 2014), paragraph 4.929.

should be a *de minimis* threshold in all Article 102 cases, as there is for Article 101 and the assessment of mergers. This would neither undermine existing rules concerning 'by nature' abuses, nor lead to unreasonable burdens on the European Commission or national competition authorities. And it would remove the contradiction that EU competition law may theoretically apply to conduct that cannot be shown to have even a miniscule effect on competition.

We would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fourth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions 2016 holds for the next edition of this book.

Maurits Dolmans and Henry Mostyn
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London
June 2016

Chapter 1

ARGENTINA

Camila Corvalán[1]

I INTRODUCTION

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, which was inspired by the provisions of the United States Antitrust Law. This was replaced by Act No. 12,906, which was itself replaced by Act No. 22,262 in 1980. The enforcement of Act No. 22,262 led to the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC).[2]

The provisions envisaged by Act No. 22,262 were mostly focused on the analysis of anticompetitive conduct; in this law some anticompetitive conducts could be sanctioned with imprisonment and there was no mergers and acquisitions control. Finally, on 25 August 1999, Act No. 22,262 was abrogated and a new antitrust regulation was enacted: Act No. 25,156 (the Antitrust Law).

The Antitrust Law was complemented by Decree No. 89/2011, which was later amended by Decree No. 396/2001. The Antitrust Law and the decrees were complemented by regulations regarding the procedures established by them.[3] Some of the sections of the Antitrust Law were modified in September 2014 with the sanction of Act No. 26,993. The new regulation abrogated imprisonment and established a mergers and acquisitions control procedure. Further, the Constitution of Argentina promotes the effective competition between markets in Argentina.

The above is the complete regulatory plexus that currently controls both anticompetitive conduct and mergers and acquisitions procedures in Argentina.

Currently, the relevant authority that enforces the Antitrust Law and its complementary regulations is the Secretary of Trade of the Ministry of Production, assisted by the CNDC.[4]

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1 Camila Corvalán is an associate at Estudio Beccar Varela.

2 Act No. 22,262, Section 6.

3 Resolution No. 40/2001; Resolution 26/2006; Resolution 164/2001.

4 Section 17, Act No. 25,156.

The CNDC is the agency that investigates both anticompetitive conduct and mergers and acquisitions procedures by formal requirement of the Secretary of Trade. The Secretary of Trade has full power to investigate and decide on the existence of anticompetitive conduct, either at the request of a party or *ex officio*.[5]

Investigations of anticompetitive conduct or analyses of mergers and acquisitions made by the CNDC end up with a non-binding recommendation to the Secretary of Trade. The Secretary of Trade will make the final decision in the case, subject to analysis. The decisions of the Secretary of Trade may be appealed by parties to the judicial courts.

II YEAR IN REVIEW

In April 2015, the Secretary of Trade of the Ministry of Production and the CNDC (the Antitrust Authorities) investigated the case *Clorox Argentina SA s/Infracción Ley 25.156 (C.1122)*.[6] This case was initiated by a claim filed by a local producer of bleach named Queruclor SRL Company (Queruclor) against Clorox Argentina SRL Company (Clorox).

Queruclor's claim was based on refusal to sell and the elimination of discounts or bonuses on their products to wholesalers that sell both Queruclor and Clorox bleaches. This refusal implied that, in practice, wholesalers must choose between commercialising Queruclor or Clorox bleach. In this particular market, the wholesale sector represents 58 per cent of the market. Queruclor stated in its claim that Clorox's behaviour implies a patent abuse of dominant position. This conduct, stated Queruclor in its claim, implied a real prejudice for the company itself and for consumers, who as a consequence of the conduct have to pay more for the product in question.

The CNDC defined, as a first point of the analysis, the market involved in the investigation. The market involved was defined as bleach, a homogenous product where competition is mainly focused on the price of the good.[7] Further, the CNDC determined that Clorox held 50 per cent of the market share in the relevant market, consequently holding the dominant position.

The dominant position of Clorox, according to the Antitrust Authorities, allowed it to impose higher prices and limit the amount offered in the Argentine domestic market of bleach, directly harming the welfare of consumers. The Antitrust Authorities framed the above-mentioned as an exclusionary conduct.

Clorox was sanctioned by the Secretary of Trade with a fine of 50 million Argentine pesos; further, as a complementary sanction, the Secretary of Trade imposed on Clorox the publication of the resolution regarding the investigation in the largest newspaper of Argentina for one day. Finally, the Secretary of Trade obliged Clorox to arbitrate the means to prevent conducts, acts or behaviours of any kind that involved a restriction on the commercialisation of bleach.

To set the amount of the fine imposed on Clorox, the Secretary of Trade took into account the responsibility of Clorox against the unlawful conduct, the degree of knowledge

5 Section 20, the Antitrust Law.

6 Secretary of Trade, National Commission for the Defence of Competition, 17 April 2015 *Clorox Argentina SA s/ Infracción Ley 25.156 (C.1122).*

7 Secretary of Trade, National Commission for the Defence of Competition, 17 April 2015 *Clorox Argentina SA s/ Infracción Ley 25.156 (C.1122)*, page 58.

of matter derived from the regulator in the consummation of their economic activity, the company's ability to pay, the company's assets, the company's size and the background of the company regarding conduct, acts and behaviours before the Antitrust Authorities. The decision of the Antitrust Authorities was appealed. This case is currently being analysed by judicial courts.

III MARKET DEFINITION AND MARKET POWER

According to legislation and usual practices in Argentina, the analysis of anticompetitive acts, conduct or behaviours follows a procedure in which, as a first issue, the definition of the scope of relevant product and geographic market involved in the investigation is highlighted. Following this, the Antitrust Authorities focus mainly on the analysis of market power and market shares of the companies involved in the case.

The relevant market in an investigation will comprise two basic dimensions: the relevant market of the product involved and the relevant geographical market where the conduct, act or behaviour is taking place. The assessment of the impact of an investigation will be largely determined by the relevant market definition, the market power involved and the market shares of the companies involved in the case.

The relevant market of the product shall comprise of all products and services that consumers consider interchangeable or substitutable by reason of their characteristics, price and intended use. More precisely, sets of products or services constitute the same relevant market when said services or products are substitutes, from both the demand[8] and supply[9] side.

Having met the stage of defining the relevant market for the product, the next step is to do the same in geographical terms. Defining a geographic market involves the same

8 From the point of view of substitution of demand, which is to say from the perspective of the user or consumer, the analysis will look to determine for each of the products and services offered by the companies involved, the degree of substitution that exists between them and for goods and services offered by other companies. So that the replacement of the demand side is to be effective, consumers must evaluate the products as able to meet the same needs, under similar consumption opportunities. It is worth mentioning that substitutability from the user's point of view depends, then, on the attributes of the product or service and the similarities or differences that are observed for those offered by other vendors. The degree of substitution given in these attributes is usually the result of a qualitative analysis that assesses to what extent consumers or users of a service provided by a supplier 'replace' that supplier when it raises its prices close to 10 per cent in a steady manner or not transitory manner.

9 Once current competitors are determined and identified from the side of demand, CNDC analyses a second aspect to assess in the determination of the relevant market for the product associated with the probability of a new supplier entering the market in the short or medium term. This issue is known technically as 'supply-side substitutability'. This probability of entrance to the market involves several factors. The first is that other players exist, possibly at an international level, that potentially have an interest in entering the market, if conditions are checked for this; and the second, and most important, is the level of barriers to entry to the market.

considerations that have been mentioned above for the definition of the relevant market for the product, with the difference that the substitution estimate, in this case, is in terms of physical distances or capabilities of displacement, for the users as well as the producers.

The above-mentioned definitions will be followed by the analysis of market power and market shares of the companies involved in the investigation, as well as the analysis of barriers to entry into the market previously defined.

IV ABUSE

i Overview

The Antitrust Law applies to all behaviours that have effects in the Argentine territory. This means that the law is applied not only to acts and behaviours that occur in Argentine territory but also to certain acts or behaviours that take place in other countries and that have effects on the Argentine market. The current national government has declared that it intends to modify some of its sections – mostly the ones regarding thresholds for mergers and acquisitions notification.

The Antitrust Law does not prohibit conducts *per se*; conducts must be analysed in all cases by the rule-of-reason criteria.

Section 1 of the Antitrust Law establishes:

> *The following actions or behaviours are prohibited and shall be penalized according to the rulings of this Act: actions or behaviours, however expressed, relating to the production and exchange of goods or services, the purpose or effect whereof is to limit, restrict, forge or distort competition or access to the market or constituting abuse of dominant position in a market, so that damages may result to the general economic interest. This section comprises, to the extent the conditions of the foregoing paragraph are met, the obtention of significant competitive advantages through the infringement of other rules, as declared by an administrative act or final judgment.*[10]

Section 1 of the Antitrust Law focuses on unilateral actions, as well as bilateral or multilateral actions.

The two basic offences under the Antitrust Law are the limitation, restriction, distortion of competition or accessing to the market, and the abuse of dominant position. To be illegal, the two offences have to be able[11] to cause damage to the 'general economic interest'; this concept, while included in the Antitrust Law, is not defined in the text of the Antitrust Law and has been interpreted, on several occasions, by courts and scholars in various ways. Currently, the undefined term 'general economic interest' is likened to 'consumer welfare', which may be damaged if a conduct, act or behaviour has the potential to cause or increase in price or reduction of the offer of the relevant product defined in the framework of an investigation.

10 Section 1 of the Antitrust Law.

11 This concept was confirmed by the Supreme Court of Justice *in re A Gas y Otros c/AGIP Argentina SA y Otros s/ Infracción Ley 22.262*.

Section 2 of the Antitrust Law details 14 practices that are, to the extent that they fit in any event described in Section 1, anticompetitive. It is important to state that this list is not taxative; any conduct shall be considered anticompetitive when actions of Section 1 are involved.

Chapter 2, Section 4 of the Antitrust Law is exclusively focused on dominant position. The definition of dominant position is stated in the Antitrust Law as follows:

> *For the purpose of this Act, one or more persons are understood to have a dominant position when for a certain type of product or service it is the only one to offer or ask in the national market or in one or more parts of the world or, when not being the only one, it is not exposed to a material competition or, when due to the degree of vertical or horizontal integration it is in a position to determine the economic viability of a competitor sharing the market, in detriment of the latter.*[12]

To establish the effective existence of dominant position, Section 5 details a number of circumstances that shall be taken into account at the moment of analysing the position:

a The extent that the good or service involved can be replaced by other goods or services, either of local or foreign origin, and taking into consideration the conditions of the substitution and the time required to do so.

b The existence of regulatory restrictions that limit access to products or the offer, or demand in the markets involved.

c The extent that the allegedly responsible party may unilaterally have influence in the price formation or restrict the supply or demand in the market and the extent its competitors are able to counterbalance such power.

Dominant position is not forbidden by the Antitrust Law – the prohibition is only focused on the abuse of such dominant position. The abuse of dominant position is a unilateral conduct and, therefore, is not reliant on any kind of contract or agreement with competitors or third parties. According to the Antitrust Authorities, unilateral conduct 'stumbles upon the difficulty of determining to what extent such conducts are part of a valid or competitive behaviour or constitute or result manoeuvres whose meaning is simply to create impediments to entry or reside of competitors in a market'.[13]

ii Exclusionary and exploitative abuse: price discrimination.

Practices that imply abuse of a dominant position usually involve those practices that obstruct the entry of potential competitors in the market and those that exclude existing competitors. Strictly, the abuse of a dominant position can be raised by exploitative or exclusionary conduct, acts or behaviours.

Abuse of a dominant position based on exclusionary conduct, acts or behaviours triggers a concern for the Antitrust Authorities that is based principally on the exclusion of one or more competitors in the market involved. In cases of abuse of dominant position based on

12 Section 4 Antitrust Act No. 25,156.

13 Secretary of Trade, National Commission on Defense of Competition, 'Clorox Argentina S.A. s/ Infracción Ley 25.156 (C. 1122)'.

exploitative conduct, the concerns of the Antitrust Authorities include price discrimination, imposition of exploitative prices and any other conduct that tends to differentiate prices and commercial conditions between competitors in the same market.

The Antitrust Law provides no guidelines on what market shares give rise to the existence of a dominant position on one or several markets.

In general terms, and considering the provisions established in Section 4 of the Argentine Antitrust Law, a company is considered to have a dominant position when it is the only supplier of certain goods or services, or when, as a consequence of the vertical or horizontal degree of integration, it is able to determine the economic feasibility of a competitor or participant on the market.

In effect, the CNDC has held that a position of dominance is the economic power that a company has to prevent effective competition from being maintained on a relevant market, thus enabling it to act to a great extent independently from its competitors, customers and consumers. It has also stated that a dominant position does not necessarily derive from an absolute dominance that may enable a company to exclude all competition, but it is enough for it to have a strong position that may allow it to act in a highly independent way.

Notwithstanding the above-mentioned as to the lack of a precise criteria in the Argentine legislation, the CNDC frequently adopts foreign criteria and precedents, namely the ones adopted by the EU Competition Commission, when considering the analysis of precedents.

In practice, such criteria may be used as guidelines when determining what shares may enable a company to act independently from its competitors. Following the practical approach usually adopted by the EU Competition Commission, it is possible to argue that shares lower than 30 per cent do not normally imply a position of dominance, while shares higher than 50 per cent do.

Defining what relevant markets are according to this analysis is no easy task. In most scenarios, the Antitrust Authorities may deem it necessary to perform a specific economic analysis on the products involved and the geographical areas in which such products are offered.

As said before, there is no specific prohibition in the Antitrust Law for having a position of dominance, just for the abuse of it. Therefore, companies that have a dominant position should avoid participating in what may be considered as abusive conduct. Such conduct may include, but is not limited to:

a refusing to accept orders without objective reasons that justify such refusals;

b selling at prices that are equal to or below cost;

c imposing abusive contractual conditions;

d lowering prices temporarily ('predatory pricing');

e applying temporary discounts or better conditions in specific areas with the aim of eliminating actual or potential competitors;

f applying different prices or sales conditions in similar scenarios (price discrimination); and

g subordinating the purchase or the sale (or the purchase or sale under certain conditions) to the condition of not using, buying, selling or providing goods or services offered by a third party, or subordinating the purchase of goods or services to the purchase of other goods or services.

The most important case in Argentine competition history regarding the abuse of a dominant position involved exploitative conduct, specifically, price discrimination, in the 2002 case *National Commission for the Defence of Competition v. Yacimientos Petroliferos Fiscales*.

Yacimientos Petroliferos Fiscales (YPF) is one of the largest suppliers of liquefied petroleum gas in Argentina, and was also the largest exporter of said product. The issue in this case was the pricing policy of YPF concerning its wholesale of liquefied petroleum gas (LPG). The CNDC objected that YPF commercialised LPG in the local Argentine market at a higher price than it did in the markets where the company exports the product. In addition, YPF prohibited the foreign companies that buy the product to re-exporting the product into Argentina.

In this case, the Secretary of Trade took into consideration the recommendation of the CNDC for the fine imposed, which amounted to 109 million pesos. The decision of the Secretary of Trade was questioned by YPF in the courts; the fine was confirmed by the Supreme Court.

V REMEDIES AND SANCTIONS

i Sanctions

Infringements of the Antitrust Law regarding the abuse of a dominant position may result in harsh consequences for both the infringing company and its individual employees. Under the current legislation, fines for infringement of the Antitrust Law range from 10,000 pesos to 150 million pesos.

To determine the amount of the fine, the Antitrust Authorities take into account:

a the loss suffered by all individuals who were affected by the unlawful activity;

b the benefit obtained by all the individuals who were involved in such an activity; and

c the value of the assets involved, and which belonged to said individuals at the time of the infringement.

In the case of reoffence, the fine could be doubled. Without prejudice to other penalties that may correspond, when verified acts that constitute abuse of a dominant position or where it is noted that a monopolistic or oligopolistic position in violation of the provisions of the Antitrust Law has been achieved, the Secretary of Trade may enforce conditions aimed to neutralise the distortionary aspects of competition or ask the judge that the offending companies are dissolved, liquidated, deconcentrated or divided.

Further, the companies are liable for the acts of their employees (even those who are not in a managerial position) that are performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of the surveillance commission who contribute, encourage or permit an infringement are joint and severally liable regarding the imposition of the fine.

In addition to all the sanctions described above, the individuals or legal entities that are injured by the acts and behaviours forbidden by the Antitrust Law may sue for damages in a court of competent jurisdiction in accordance with the laws of Argentina.

Finally, any agreements or terms and conditions that infringe the Antitrust Law may be declared null and void.

ii Behavioural remedies

As mentioned above, the Antitrust Authorities may enforce conditions aimed at neutralising the distortionary aspects of competition or may ask the judge that the offending companies be dissolved, liquidated, deconcentrated or divided.

VI PROCEDURE

Abuse of dominant position cases mostly occur through a filing made by any natural or legal person. Notwithstanding this, the investigation may also be initiated *ex officio* by the Antitrust Authorities.

The complaint must be filed before the Antitrust Authorities, detailing, among formal requirements, the complaint subject, the facts that found the complaint and the legal basis considered for filing the claim.

The procedure will be initiated by communicating the investigation to the denounced, who will have the possibility of answering it in relation to the facts or the legal basis investigated by the Antitrust Authorities.

Once the defence has been filed, the Antitrust Authorities may consider the explanations satisfactory or conclude that there is no merit in continuing with the investigation. Otherwise, the denounced will be notified to submit its disclaimer and to offer evidence to be produced.

The complainant should cooperate with the investigation, and the Antitrust Authorities may require information from other competitors in the relevant market. Furthermore, the authority may convene a public audience review at any step of the procedure if the investigation merits it, or in order to obtain more information on the investigation.

The Antitrust Authorities may enforce precautionary measures, such as ordering the cessation of the injurious conduct while the analysis of the investigation is taking place. This decision can only be taken when the Antitrust Authorities judge that the competition regime may be affected (at the complainant's request or *ex officio*). This last decision, regarding a precautionary measure, may be appealed by parties.

After the evidence is produced, the Antitrust Authorities must decide the case in 60 days, ending the administrative claim. Nevertheless, once the resolution is notified and published in the Federal Register, the interested parties may appeal it.

Despite this, the Antitrust Law gives the opportunity for the denounced to make an arrangement with the Antitrust Authorities, by which it commits to cease immediately the conduct that affects competition. In this last case, the Antitrust Authorities will investigate the enforcement of the arrangement for three years.

VII PRIVATE ENFORCEMENT

Section 51 of the Antitrust Law states that individuals and companies that have been affected by anticompetitive conduct have the right to sue in judicial courts and claim for damages.[14] At the time of writing there are few private actions that have been initiated to claim damages.

14 Section 51, the Antitrust Law.

As occurs in other laws within the area of antitrust, the private individual or company that sues in judicial courts must reveal not only the infringement relating to the Antitrust Law but also demonstrate and quantify the damage suffered as a result of the alleged practice.

There is still much to do and explore in relation to such actions in Argentina. It is expected that new cases will be initiated in the coming years.

VIII FUTURE DEVELOPMENTS

The current national government has declared that it intends to modify some of the sections of the Antitrust Law – mainly those regarding thresholds for mergers and acquisitions notification. Clemency programmes are also being analysed by the Antitrust Authorities.

Appendix 1

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Ms Corvalán received her college degree from the Catholic University of Argentina. She graduated with honours. Ms Corvalán took her graduate studies at the same university and specialised in competition law in Madrid, Spain. She worked as an editor of the Argentine journal *El Derecho* in parallel with her office work.

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