THE DOMINANCE AND MONOPOLIES REVIEW

Fifth Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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PREFACE

Previous editions of the *Dominance and Monopolies Review* spoke of the law of abuse of dominance undergoing evolutionary – rather than revolutionary – change. Although we do not yet see competition lawyers mounting the barricades, abuse of dominance law appears to be entering a phase of more rapid development. Increasing international protectionism in industrial policy, overlapping parallel investigations, novel theories of harm deployed in rapidly changing markets, and around 100 jurisdictions applying competition law (often in starkly different ways) mean that it is harder than ever before for businesses to understand how to regulate their conduct.

This Fifth Edition of *The Dominance and Monopolies Review* is, therefore, more welcome than ever. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, as well as providing a review of the regime's enforcement activity in the past year and a prediction for future developments. From the thoughtful contributions of the specialist chapter authors, this editorial – as in previous years – attempts to identify a common theme to global competition enforcement. This year's theme is 'fairness'.

Competition regulators have recently emphasised that they see the role of competition enforcement as ensuring that everyone has a 'fair chance', creating 'fair conditions' in the markets, 'keeping markets fair' and sending 'a message of fairness'. It is fair enough in political discourse to explain competition policy in simple terms, but using them as criteria for a finding of infringement creates serious risks of antitrust populism, endangering the rule of law. It is not always clear what is meant by 'fair'. Fairness can mean different things to different people in different countries at different times – for example, equality (everybody should receive the same), equity (rewards are somehow allocated in proportion to deservedness) or need (those with the greatest need are protected).

And some concepts of fairness can be diametrically opposed to the goals of competition law. Equality of outcomes (i.e., the notion that everyone should receive an equal share) contradicts the purpose of competition. Equality of resources, cooperation, and sharing of information may facilitate the ultimate evil of antitrust – collusion. Equality of treatment (in the EU at least) is inconsistent with the principle that only dominant companies are subject to special responsibilities. And fairness in the sense of sharing assets conflicts with the rule that only essential facilities and state monopolies have a duty to assist rivals. Indeed, requiring such asset-sharing depresses innovation and investment in resources. The invocation of 'fairness' appears to be a tool to justify political intervention in the decision-making process, and creates the risk of arbitrary decision-making.

This is not to say that fairness has no role in competition law. But in our view, fairness is best achieved by relying on the following more precise and better-defined concepts: consumer welfare and allocative efficiency as the goal of competition law; competition on the merits

as the criterion for assessing a firm's unilateral conduct; proportionality and 'useful effect' as benchmarks for remedies; and due process and the rule of law as the hallmark of a proper procedure for applying the law.

The developments from the last year described below illustrate how 'fairness' can be applied in different ways in the antitrust context. While ostensibly these cases may refer to fair pricing, fair conduct, or fair processes, at core they are about one of the four concepts outlined above.

The first development is the return of unfair or excessive pricing cases – at least on the eastern side of the Atlantic. In the UK, the Competition and Markets Authority (CMA) imposed a record £85.2 million fine on Pfizer (as well as a £5.2 million fine on Flynn Pharma) for increasing the price of an anti-epilepsy drug by 2,600 per cent overnight. The EU Commission has recently opened a probe into Aspen Pharma's pricing of cancer drugs, with its press release referring to 'unjustified price increases of up to several hundred per cent'. (The Italian authority has already adopted an infringement decision against Aspen concerning the same conduct.) And Gazprom's recently proposed commitments to the EU Commission include price review mechanisms based on competitive price benchmarks. In *Facebook*, the German antitrust authority is reviewing Facebook's imposition of allegedly unfair privacy terms.

The renewed focus on excessive pricing is not only limited to Europe. In China, an authority has imposed fines on five gas suppliers that were determined to be charging customers unfairly high prices. In Israel, declarations of excessive pricing have led to class actions against Tamar (in the natural gas market) and Tnuva (in the dairy product market).

By contrast, Patricia Brink of the US Department of Justice recently discussed whether excessive prices are a matter for competition enforcement. She stated, 'in the United States, both historically and at present, the answer is an unequivocal no'. Ms Brink pointed to the statement by Justice Scalia in *Trinko* that the opportunity to charge monopoly prices is what attracts business acumen, induces risk taking, promotes innovation and encourages economic growth.

The conflicting positions, however, are not necessarily irreconcilable. In the CMA's *Pfizer/Flynn* decision, the drug at issue, phenytoin sodium, was first synthesised in 1908 and has not changed since then. Flynn acquired the distribution rights in 2012, at the time phenytoin sodium was debranded (and, therefore, no longer subject to price regulation). Around 48,000 patients in the UK still take the capsules, and these patients cannot be changed to a new manufacturer's product without risking therapeutic failure and toxic side effects. The CMA considered that the 2,600 per cent price increase at the time of debranding was excessive compared to the costs incurred and a reasonable rate of return. In these circumstances, it is quite difficult to see on its face how the decision risks restricting innovation or investment in the way that worried Justice Scalia in *Trinko*. The CMA's reasoning is that the fact epilepsy patients are locked in to one manufacturer's drug permitted the excessive price hike; the price had nothing to do with risk taking, investment, or innovation because there had not been any in very many years.

This is presumably what Advocate General Wahl had in mind when, in his recent opinion in the Latvian collecting society case, he advised that an excessive price cannot exist in a free and competitive market. Concerns only arise if there are legal barriers to entry or expansion and there is a legal monopoly (which, in effect, existed in the CMA case because official guidance prohibited switching patients to a different manufacturer's drug).

Indeed, the excessive-pricing cases are rare examples of enforcement against exploitative abuses – where a firm uses its market power or privileged position to extract rents from consumers directly, thereby reducing consumer welfare. As Advocate General Wahl recently advised, the prices are abusive because 'being excessively high, they exploit customers'. That requires there to be an excess (a 'significant difference') between the price actually charged and the competitive price, and for there to be no valid justification for the difference. In our view, referring to a more amorphous 'unfairness' standard makes this already difficult task only more tricky.

The second development concerning fairness is the continued focus on the licensing of standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. In 2015, China's NDRC fined Qualcomm $975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission (KFTC) followed suit, fining Qualcomm $854 million. In essence, Qualcomm engaged in a variety of interrelated behaviours that together excluded rivals from the market and allowed Qualcomm to impose unfair terms and conditions: a refusal to license SEPs to rival modem chipset makers, thus requiring device makers who buy and use these chipsets to take a licence directly from Qualcomm. Qualcomm then imposed unfair terms on device makers, including a royalty-free cross-licence that provided it with a unique advantage over rival chipset makers (Qualcomm was the only chipset maker that could offer its customers the full package of SEPs and non-SEPs, including patents from all other device makers). If device makers objected to the demand to cross-license their patents for free, Qualcomm refused to supply chipsets. 'No license, no chips', as the US Federal Trade Commission put it in a parallel claim against Qualcomm.

The Taiwan Fair Trade Commission is investigating similar conduct. Likewise, in January 2017, in conjunction with Apple initiating litigation against Qualcomm, the US FTC sued Qualcomm for its SEP licensing practices. Finally, the European Commission is poised to adopt decisions against Qualcomm for selective predatory pricing and loyalty rebates. This series of investigations and cases on three continents is worth watching closely.

In a related development, a UK court has ruled, for the first time, on what constitutes a FRAND rate. Mr Justice Birss held that that there is only one FRAND rate, and this should be determined (as a first step) by looking at a wide range of comparable licences.[1] In terms of the interaction with competition law, the judge found that there is no correlation with what is a contractual FRAND offer and what is anticompetitive. For a price to be excessive under Article 102 TFEU, it has to be 'substantially more than FRAND' (i.e., the price can be 'unfair' and in breach of the contractual FRAND promise, but still not 'unfair' according to competition law). Conversely, the judge found that a price can be discriminatory and in breach of the contractual FRAND promise only if it also violates competition law – a discrepancy that remains puzzling and may be explored on appeal.

The underlying purpose of the FRAND undertaking is to secure a fair and reasonable reward for innovation while avoiding a hold-up and holdout. Competition law can intervene to prohibit the conduct of SEP owners if they use their market power gleaned through the standard to restrict competition (e.g., through premature litigation). The touchstone for

1 The judge held that the FRAND terms are the terms that a truly willing licensor and truly willing licensee would agree upon in the relevant negotiation in the relevant circumstances absent irrelevant factors, such as hold-up and holdout.

the assessment is whether the conduct deviates from competition on the merits and harms the competitive process. The difference in what is 'fair' in the contractual FRAND promise and in competition law contexts (identified by Mr Justice Birss) confirms the inherent ambiguity underlying 'fairness' as a concept. The concepts developed in SEP cases could also appropriately be applied in other cases where IP owners violate legitimate expectations and use hold-up techniques to extract unreasonable royalties.

The third development concerns the debate, discussed in previous editorials, of the circumstances in which a full effects analysis is necessary to prove an abuse of dominance. Advocate General Wahl's Opinion in *Intel*, discussed in the EU chapter of this book, affirms the general proposition that competition law analysis should not be purely abstract and should not deal with mere possibilities. Outside the narrow exceptions of 'by nature abuses', a 'fully-fledged effects analysis must be performed'. This is because, ultimately, 'EU competition rules seek to capture behaviour that has anticompetitive effects'. (In *Unwired Planet,* Mr Justice Birss similarly recently held that outside 'by nature' abuses, 'a close analysis of the actual effects would be required'.)

The move to a more rigorous effects analysis is mirrored in other jurisdictions. In Australia, proposed new legislation will introduce an effects standard for assessing unilateral conduct. The Competition Commission of India in *XYZ v. REC Power Distribution Company Ltd* confirmed that establishing a denial of access abuse in India requires proving 'anti-competitive effect/distortion in the market in which denial has taken place'. This reinforces older statements from the Indian Competition Appellate Tribunal in *Schott Glass* that, unless the conduct at issue harms competition and, ultimately, consumers, there can be no abuse. And in the KFTC's *Qualcomm* decision, the exclusionary effects caused by Qualcomm's conduct were an important part of the case, with the KFTC insisting on such proof as a precondition to finding an infringement.

In these instances, the courts' and authorities' enforcement is not guided solely by seeking to achieve a 'fair' outcome. Rather, the cases examine the factual, legal and economic circumstances to assess whether there is a deviation from competition on the merits and harm to the competitive process. Those are the circumstances in which an abuse of dominance can properly be established.

The fourth development on 'fairness' relates to the continued international focus on due process. Here, the picture is mixed. In relation to competition law in Korea, for example, Gregory Sidak wrote a colourful open letter to President Trump criticising the KFTC's decision in the *Qualcomm* case as being based on an 'autocratic brand of due process.' But a review of the KFTC's process in that case shows that it complied with and perhaps even surpassed many international norms on due process: for example, Qualcomm received access to the authority's file, had the opportunity to rebut the KFTC's preliminary concerns, appeared at multiple hearings and could cross-examine witnesses. The investigative team was completely separate from the decision-makers (the Commissioners), and the latter all read the entire file and attended all hearings. Qualcomm can also appeal the decision to an active and discerning judiciary – which has several times in the past overturned KFTC decisions. This is a contrast with the European Commission, where the case team is directly involved in both investigation and decision-making, and the Commissioner for Competition (let alone the College of Commissioners that decides the cases) does not read the file and does not attend the hearing. As explained in previous prefaces, this situation creates a serious risk of confirmation bias and, thus, undermining due process.

In contrast to Korea, there are troubling developments in India, where the government has passed legislation to dissolve the specialist Competition Appellate Tribunal (COMPAT), and replace it with a more general tribunal focused on company law. Worryingly, the legislation follows a number of high-profile instances of the COMPAT overturning decisions made by the Competition Commission of India (CCI) on due process grounds (e.g., *Hiranandani* and *GSK*). Even more worryingly, the legislation permits the government to remove tribunal members at any time by paying them three month's salary. These developments undermine one of the most basic principles of 'due process' in competition enforcement – that a full appeal on facts and law to an independent judiciary must always be available.

In conclusion, in our view it is unhelpful to discuss 'fairness' as the yardstick of competition law enforcement. Fairness is too subjective and vague a criterion for authorities to decide cases, or for firms to determine their commercial conduct. Experiments conducted by Kahnemann, Knetsch and Taylor show that humans have irrational conceptions of what constitutes a fair price.[2] For example, consumers perceive changes in price as unfair even if they are rational, reasonable and good for consumers in the long run. And consumers were almost unanimous in concluding that any increase in price because of a decrease in competition – for example, because of a store temporarily closing – was unfair. Importing these irrational biases into competition policy creates serious risks or arbitrary and inefficient results.

Instead, we should stick to the more objective and precise concepts of consumer welfare, competition on the merits, proportionality and due process. These concepts, which capture the same goals as 'fairness', are less ambiguous, relatively well defined in case law and less susceptible to lead to outcome-focused – instead of fact-driven – results.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fifth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions – or even revolutions – 2017 holds for the next edition of this book.

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Cleary Gottlieb Steen & Hamilton LLP
London
June 2017

2 Kahnemann, Knetsch, and Taylor, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, *American Economic Review*, Vol. 76, No. 4 (September 1986), pp. 728–741.

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. Notwithstanding the above-mentioned, it is worth mentioning that currently a bill of the Antitrust Law is being analysed by the Argentine Congress.

Currently, the relevant authority that enforces the Antitrust Law and its complementary regulations is the Secretary of Trade, led by Mr Miguel Braun, which formally depends on the Minister of Production Mr Francisco Cabrera, assisted by the CNDC (mainly comprising economists and lawyers). The CNCD is currently led by Mr Esteban Manuel Greco, who assumed the leadership of the agency in February 2016. Under Resolution No. 190/2016, the Secretariat of Trade delegates powers to the CNDC.[4]

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, Resolution No. 190/2016.

Further, 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 the year in review, according to public sources,[6] the antitrust authorities closed the investigation of 27 anticompetitive cases. These 27 cases involved the analysis of claims and investigations initiated *ex officio* for possible anticompetitive conduct (including but not limited to abuse of dominant position). All cases were closed without sanctions, except one that is open for review.[7] Mostly, the cases were closed because the antitrust authorities accepted the explanations given by the company under investigation.

Notwithstanding the above, the antitrust authorities opened new investigations. Last August, the antitrust authorities, through the CNDC, filed an essay with a competitive analysis regarding the credit card and electric payments market. In this essay, the CNDC stated that the company PRISMA has a dominant position in some of the sub-markets involved in the above-mentioned markets.

Further, and on the grounds of such essay, the CNDC suggested to the Secretary of Trade and the Argentine Republic Central Bank to investigate such markets and promote effective competition with concrete measures. PRISMA, and some private banks, filed a proposal to divest and lower the commission charged to shops. The CNDC is still analysing this proposal.

Likewise, the CNDC opened investigations in 10 more markets: aluminium, steel, petrochemicals, mobile communications, oil, milk, meat, laundry detergents and interurban passenger and air transport.

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. Further to the analysis of the market shares of the companies, the antitrust authorities also focused their attention on barriers to entry, efficiency gains, technological advantages, chain of commercialisation and market power, among other things.

5 Section 20, the Antitrust Law.

6 www.cndc.gob.ar.

7 *Cooperativa limitada de provisión de servicios públicos y vivienda de Puerto Madryn (servicoop) s/ infracción Ley 25,156* (i.e. *Limited cooperative of provisions of public services and housing of Puerto Madryn in re. breach Antitrust Act. 25,156*).

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 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 Antitrust 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, and including the leniency programme, that are still not enforced in our current legislation.

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.

The Antitrust Law does not prohibit conducts *per se*; conducts must be analysed in all cases by the rule-of-reason criteria, and the antitrust authorities must prove – for sanctioning – an actual or potential damage to the general economic interest.

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 mostly 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.

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.

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*.

12 Section 4 Antitrust Act No. 25,156.

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 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

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

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.

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.

Further and as stated before, in February 2016, Mr Esteban Greco took office as the president of the CNDC. Mr Greco as a first step, undertook CNDC internal audits. He has also released the results of internal audits that were performed with regard to anticompetitive conduct. Mr Greco acknowledged that the antitrust authorities, in past years, have failed to comply with the terms established under the Competition Act as regards conduct and merger control cases. Specifically regarding anticompetitive cases, he stated that conduct cases that were initiated with an aim differing from the protection of market competition will be dismissed and closed.

14 Section 51, the Antitrust Law.

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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