



Merger Control

First Edition

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Introduction to Colombian Merger Control

The Merger Control legislation in Colombia is set forth mainly in Law 155, 1959, Decree 2153, 1992, Law 1340, 2009, Circular No. 10 of the Superintendence of Industry and Commerce, Resolution 69901, 2009, which refers to the economic thresholds for review, and Resolution 35006, 2010, which contains the guidelines for the presentation of antitrust filings pursuant to the New Competition Law, 1340, 2009. Merger regulations for specific sectors are contained in other statutes.

The Organic Statute for the Financial System (Decree 663, 1993) governs mergers in the financial and insurance sectors. Legislation for mergers between airlines is basically contained in article 1866 of the Commerce Code and article 3.6.3.7.3 of the Colombian Aeronautic Regulation - RAC.

1.1 The National Competition Authority - SIC

The Superintendence of Industry and Commerce (hereinafter the Superintendence or the SIC) is the National Competition Authority in Colombia and is also the main authority for merger control. The SIC is an administrative entity controlled by the Government. The Superintendent can be freely appointed and removed from office by the President of Colombia.

Pursuant to article 2 of Law 1340, 2009, the SIC has been now granted the power to review mergers in all sectors of the economy with two exceptions: (i) reorganisation operations in the financial sector which are reviewed by the Financial Superintendence, which must hear the opinion of the SIC and must apply the conditions that the SIC recommends, if any; and (ii) operational agreements between airlines, which are reviewed by the Aeronautic Authority.

1.2 Scope of Application of the Merger Control Regulation

According to article 9 of Law 1340, 2009, merger transactions that have to be **informed** and require previous authorisation (waiting period) from the SIC in Colombia are those that: (i) are entered into by companies that are dedicated to the same activities, or participate in the same vertical value chain; (ii) together or separately had operational income or own assets in Colombia, in the year previous to the transaction, in an amount that meets the thresholds that the SIC has established. Right now the notification thresholds are defined in Resolution 69901, 2009, in an amount, in monthly minimum wages, equivalent to approximately USD \$40 million; or (iii) have an individual or joint participation in the relevant market of 20% or more.

If the economic thresholds pointed out in (ii) are met but the market participation threshold is not, then the transaction is deemed authorised, and needs only to be previously **notified** (no waiting period) to the SIC. Mergers that do not meet the above-mentioned economic thresholds are not subject to merger control.

Clearance is not required when the transaction is carried out between companies that belong to the same corporate group.

According to article 9 of Law 1340, 2009, all transactions that consist of acquisitions, mergers, consolidations or integrations (whatever the legal form of the transaction) between companies dedicated to the same activities or participating in the same vertical value chain, which assets and sales individually or jointly meet the economic thresholds, and have a 20% or more market participation as explained above, require to be **informed** to the SIC and previously authorised (waiting period). If the economic thresholds are met but the joint or individual participation of the companies in all the markets in which they participate is below 20%, the transaction is deemed as authorised and needs only to be **notified** to the SIC (no waiting period). The new 2009 law has made it totally clear that the SIC will review both horizontal and vertical transactions. Currently there is a discussion going on as to whether merger control applies to conglomerate mergers in which there is no market overlap, but it seems that this is not the case, since the new 2009 law did not refer to those cases.

The interpretation of the SIC is that a merger transaction amounts to an entrepreneurial concentration that needs authorisation from the competition authority, when the companies involved (two or more) cease to participate independently in the market and are therefore **permanently** controlled by the same management or decision centre, whatever the legal structure designated for that purpose.

The SIC has not issued any particular doctrine on when joint ventures are caught; however, as pointed out above, the

interpretation of the SIC is that there is an entrepreneurial concentration when control over two companies or undertakings that were participating independently in the market is acquired **permanently** by the same management or decision centre, whatever the legal structure designated for that purpose. In this sense, only joint ventures that create a sort of **permanent** undertaking should be subject to merger control.

Colombian law offers two definitions of control: one is found in the Commerce Code and applies to corporations; the other is in the Competition Law and refers in a broader way to undertakings. According to the broader definition, control is the possibility of influencing directly or indirectly the business policy of a company or undertaking, the initiation or termination of the activities of the company, the variation of the activities to which the company is dedicated, or the use or disposal of the essential assets needed for the activities of the company.

The definition of corporate control includes both internal and external control. Pursuant to article 261 of the Commerce Code, internal control shall be considered to exist when a company, directly or through other subsidiaries, owns more than 50% of the capital stock of another company or owns or commands enough voting stock to appoint the majority of its directors. External control, on the other hand, exists when, by way of a contract or other relationship different from the ownership of stock, one person or company can exercise a dominant influence over a corporation.

The Merger Antitrust Legislation does not apply to transactions that do not imply the acquisition of control.

Overview of Merger Control Activity

2.1 Principal cases

In the past few years, the SIC cleared some big acquisitions: the sale of the national telecommunications company – *Telecom*, to the Spanish operator - *Telefónica*; the transaction '*Procter & Gamble – Gillette*'; the sale of the supermarket chain - *Carulla*, to the French controlled chain - *Éxito*ⁱ; the sale of the main national newspaper *El Tiempo*, to the Spanish *Planeta Group*; the sale of the national steel producer – *Acerías Paz del Río*, to the Brazilian conglomerate *Grupo Votorantim*; the sale of the only PVC resin producer – *Petco* to the Mexican manufacturer – *Mexichem*, and the subsequent sale of the main PVC tube manufacturer – *Amanco*, also to *Mexichem*; the acquisition of *Petro Rubiales* by *Pacific Stratus Energy*; the sale of *Aluminio Reynolds Santodomingo* to the *Arfel Group*; the sale of *Bavaria* to *SabMiller*; the sale of the drugstore business of *Exito/Cafam* to *Olimpica*; and the transaction between *Colgate* and *Unilever* for the sale of the detergent brands, *inter alia*. In the case of the main cigarette manufacturer *Coltabaco*, the SIC initially approved the transaction presented with *Phillip Morris* as a buyer, but the companies could not comply with the structural conditions imposed and the merger failed. Now, recently, the transaction was approved with *BAT* as a buyer.

However, not all of the important transactions were cleared. The SIC objected to the *Procter & Gamble – Colgate* transaction, related mainly to the *Fab* brand, and the *Postobón – Quaker* transaction, related to the *Gatorade* brand. In both cases the main debate between the SIC and the petitioners was related to the definition of the relevant market. In the *P&G – Colgate* transaction, the SIC decided, at the last moment, to narrow the relevant market of powder detergents, departing from the market for washing products (including powder and bar soap) presented by the companies.ⁱⁱ

In the *Postobón – Quaker* transaction, the SIC narrowed the relevant market to include only isotonic beverages. In this case the SIC not only forbid the transaction, but also launched an investigation in order to establish whether the parties had closed the transaction before the SIC approved the deal.ⁱⁱⁱ

2.2 General statistics

The general record of the SIC for merger review is as follows:

Year	Informed	Notification	Authorised	Remedies	Objected
1998	132	0	132	0	0
1999	118	0	118	0	0
2000	126	0	123	2	0
2001	121	0	93	3	0
2002	104	0	70	9	1
2003	62	0	47	3	0
2004	97	0	90	2	3
2005	103	0	98	3	0
2006	112	0	98	4	3
2007	83	0	62	3	1
2008	81	0	74	2	0
2009	76	13	53	0	0
2010	10	59	32	0	1
2011	36	19	0	0	0
Total	1,261	91	1,090	31	9

From this table we can see that in 13 years the authority has reviewed 1,352 transactions. From the total number of transactions presented, the authority made a decision in 83.57% of the cases, which means that 16.42% of the transactions were desisted.

The authority cleared 80.62% of the transactions, objected or prohibited only 0.66% and conditioned 2.29%.

It is also important to note that, since the economic threshold was raised in 2006, the number of transactions was reduced by 25% and when it was raised again in 2009 it was reduced by an additional 22%. Also, since Law 1340, 2009 created the new **notification** (no waiting period) procedure, the number of transaction that are **informed** (waiting period) has been reduced significantly: in 2009, already 14% of the total transactions were notified; and in 2010 the figure of notifications was 85% of the total transactions reviewed. This means that in 2010, approximately 85% of the transactions that met the economic threshold created a market concentration below 20%, or so the interested parties claim, because we have no statistics as to the number of those notifications that are actually under investigation for failing to inform the transaction.

New Developments in the Assessment of Mergers

The highlights in the evolution of the SIC's doctrine regarding mergers during the past few years are the following:

- In 2009 the SIC issued Resolution 69901 raising again the economic thresholds for antitrust filing. It is now mandatory to inform those operations in which the value of the assets or sales of the merging companies in Colombia (individually or jointly considered) are equal or superior to US \$40 million. The application of these thresholds has reduced the number of informed transactions significantly as previously said.
- Since the *Pavco – Ralco* transaction, the SIC started to impose structural as well as behavioural conditions in order to subdue restrictions on competition and authorise complex transactions. Structural conditions require divestiture of brands, installed capacity, etc. Behavioural conditions, on the other hand, require the elimination of exclusivity, obligation to supply, etc. Nowadays the SIC applies all kinds of conditions but prefers the structural ones. This practice will continue, for the new 2009 law allows for the application of conditions.^{iv}
- The *Cementos Andino - Cementos Argos* transaction was authorised by the SIC based on the *Failing Industry Doctrine*. Even though this kind of defence had been considered before, it was only until the cement merger that the SIC laid down the characteristics and requisites for the application of the *Failing Industry Doctrine*.^v
- The SIC developed a doctrine for the review of vertical concentrations. It also concluded that operations such as the sale of a brand or the creation of a new company by two previous competitors amount to an economic concentration that needs authorisation from the SIC. As mentioned before, under the new 2009 law, it is clear that vertical integrations will be reviewed if they meet the thresholds. It is important to point out that the 20% market participation threshold will trigger the need to **inform** (waiting period) the transaction to the authority, if the threshold is met in any of the vertical markets affected by the merger.
- During the years previous to Law 1340, 2009, the SIC claimed jurisdiction over mergers between public utilities companies. It also disputed the review of mergers between Cable TV companies. As mentioned before, the new law leaves no doubt in the sense that the SIC is the merger authority in the mentioned sectors of the economy.
- In recent cases the SIC has challenged the decision of the interested parties to file a short **notification** (no waiting period) and has initiated investigations in order to establish if the parties should have filed **information** which requires a previous authorisation (waiting period) of the merger, before it can produce effects in the Colombian market.
- In 2010 the SIC decided the merger between the *Regional Port of Buenaventura, TECSA and the Port Operators*, in which it accepted for the first time the efficiency exception provided by the law, for those merger transactions that create an important concentration of the market but result in efficiencies and reduction of costs that cannot be achieved otherwise. The transaction was approved without conditions, based on the efficiency exception.

Evolution of the Substantial Review test and Economic Techniques Applied

There is no explanation in the law of the reasoning and analysis that the SIC should use in merger cases, and the guidelines that the authority issued in 2009 do not shed light to that effect. However, through the analysis of cases, it is possible to identify some general points in the analysis:

- The SIC defines the general market based on the product market and the geographic market. The product market will be defined narrowly using the hypothetical monopolist test (*SSNIP Test*), in order to isolate the group of products (goods or services) that behave as perfect or imperfect substitutes of the product affected by the merger. In the supermarket cases, *Éxito – Carulla; Éxito – Cafam and Éxito/Cafam – Olímpica*, the SIC used the *Isochronal Test* in order to define the relevant geographic market of the different supermarket chains within the large cities. The isochronal was rated at ten (10) minutes for the time of transportation.
- The SIC will consider and evaluate the competitive pressure that arises from perfect and imperfect substitutes, as well as from potential competition coming from national or international players. In 2011, the SIC authorised the *Caterpillar – Bucyrus* transaction, in which the authority considered competitive pressures from a relevant market larger than Colombia, which comprised of a substantial part of Latin America.
- The SIC will calculate the participation of the merging companies in the relevant market and apply concentration

indexes like HHI and CR4 in order to evaluate the effect of the merger. In markets that present a *leader – follower* structure, the SIC has also used the *Stackelberg Model* in order to assess market power before and after the merger takes place.

- The SIC will then evaluate the different kinds of barriers for entering the market including import tariffs and duties, transportation costs, excess capacity, cost of building a plant in the country, etc., in an effort to evaluate the contestability of the market or the likelihood of entry of new competitors.
- If the parties have proposed conditions to the transaction, the SIC will evaluate them and discuss them with the merging parties. In some cases the SIC will modify substantially the conditions offered by the parties and in general will prefer structural to behavioural remedies. Most likely, the SIC will require the divestment of part of the business.

It is not very clear what particular set of circumstances will trigger an objection or a conditioned approval; but most likely it will be a negative mixture of the above elements. This means that a merger that increases concentration in the relevant market to a high degree, with no perfect or even imperfect substitutes of the product, no potential competition in sight, high barriers to entry, scarce contestability and no possible structural remedies, will probably be prohibited. Having said that, it is important to remember that in its whole history, the SIC has prohibited less than 1% of the informed mergers.

As said before, for some years now the SIC has been applying reasoning and analysis similar to those developed both in the European Union and the United States. There is much debate as to the use of economic tools, such as the concentration indexes, which were prepared for developed economies, without adjustment to the size and specific characteristics of the Colombian economy. It has to be considered that most markets in a developing economy are small and already concentrated, but this circumstance does not mean that there is no competition or that it will become impossible for new competitors to enter the market.

From the patterns of merger cases that have been objected or conditioned, it is possible to deduct that the SIC has moved from the “*Market Dominance Test*” it used initially, into a more comprehensive “*Substantially Lessening of Competition Test*”. It is now clear under the new 2009 law that the SIC has the capacity to review vertical mergers. There is much debate in regard to the possibility of the authority to review conglomerate mergers.

Non-competition issues, such as convenience, political considerations, loss of labour, etc., are not relevant in the merger review process and will not be considered or discussed by the SIC.

As said before, the substantive test for clearance is not described in the law. It has been developed by the SIC based on the US and EU experiences and guidelines. The SIC defines the relevant market based on the product market and the geographic market. The product market will be defined narrowly using the hypothetical monopolist test (*SSNIP Test*). The geographic market has been defined using the *Isochronal Test*. The SIC will consider the competitive pressure that arises from perfect and imperfect substitutes, as well as from potential competition coming from national or international players. The SIC will calculate the participation of the merging companies in the relevant market and apply concentration indexes like HHI and CR4 in order to evaluate the effect of the merger. In some cases, the SIC has also used the *Stackelberg Model*.

The SIC will study the barriers to entry and the contestability of the market. In its analysis, the SIC will take into consideration actual and potential competition including imports and the possibility of new entrants to the market. In case that the data shows that the transaction produces an important increase in concentration and that it can substantially lessen competition, the SIC will consider possible remedies. Remedies have to be presented and substantiated by the merging parties.

There is no doubt that, during the past few years, the SIC has gone a long way in the study and control of mergers, as recent cases indicate. However, there is a great deal of uncertainty as to what kind of analysis the SIC or any of the other authorities is going to apply in the review of mergers.

In compliance with the new 2009 law, the SIC should issue guidelines for mergers, which help to explain and illustrate its decision-making process, for the benefit of the parties to the merger. The guidelines that were issued in 2009 only explain the procedure and the information gathering process, they do not shed light over the substantial test that SIC will apply.

Remedies and Ancillary Restraints

It is important for the merging companies to identify early in the review process if the transaction should be subject to remedies in order to offer them, at least in a general way, so that the authority is aware of the intention or willingness of the parties to discuss them. In those cases, when the SIC finds that the proposed transaction may pose undue restrictions to competition, but believes there are options to correct such distortion, it will authorise the merger provided certain remedies are undertaken.

Such conditions or remedies have ranged from elimination of exclusivity for distributors to the obligation of producing for a competitor at variable cost, allowing a competitor to use a percentage of installed capacity, and even the obligation

to divest part of the business. The SIC has proven to prefer structural remedies, such as divestments, to conduct or behavioural remedies.

The SIC customarily requires that the parties comply with structural remedies within a certain time limit (generally, less than one year). Compliance of behavioural remedies is also required for a limited period of time (generally, no more than three years). Pursuant to article 11 of Law 1340, 2009, the SIC must review periodically if the parties have complied with the conditions and obligations imposed. Traditionally, the SIC has required that an external auditor verifies the full compliance of the remedies and presents reports to the authority from time to time. Finally, the SIC requests that the merging parties put a bank or insurance bond in place to guarantee the full compliance of the remedies.

The SIC has not made distinctions in regard to the imposition of remedies in foreign-to-foreign mergers.

Important Changes in Merger Control

Law 1340, 2009, substantially changed merger control.

6.1 Change in the authority

As explained above, Law 1340, 2009 appointed the SIC as the National Competition Authority, with the capacity to decide over mergers in all sectors of the economy, but for the transactions in the financial sector and the aeronautic sector, which are decided by the Financial Superintendence and the Aeronautic Authority respectively, with the particularities previously described.

6.2 Change in the thresholds

Law 1340, 2009, added the market participation threshold to the previously existing economic thresholds. As has been explained above, the market participation threshold divides the transactions in which the interested parties have a joint or individual market participation equal or superior to 20% of the market, in which they need to be informed (waiting period), from those other transactions in which the interested parties have a joint or individual market participation below 20% of the market, in which they need to be notified (no waiting period).

6.3 Procedure is divided into two stages

Pursuant to Law 1340, 2009, the merger review procedure is now divided into two stages. It is considered that mergers that pose no threat to competition and need no conditions should be decided in Stage I, whereas complex transactions that restrict competition will pass to Stage II and probably will need conditions in order to avoid objection or prohibition. The duration of Stage I is one (1) month and the duration of Stage II is three (3) months.

6.3.1 Stage I

SIC Resolution 35006, 2010 points out the specific information that the merging parties must provide to the SIC. The list is very detailed. It includes information concerning the transaction itself, the companies involved, market conditions, other competitors, consumers, barriers to entry, and other information that may aid the SIC to properly evaluate the effects of the transaction. It is important to note that the SIC can abstain from considering the merger until the information is complete. The main steps in this stage are as follows:

- The petitioners file a pre-evaluation petition, together with a succinct description of the transaction.
- Within the following three (3) days, the SIC will evaluate if the transaction needs to be reviewed. In case it decides the transaction does not need review, it will end the proceedings.
- If the transaction needs review, within the three- (3) day period, the SIC will order the publication in a newspaper of ample circulation so that any interested parties can file the information they deem relevant for the analysis of the transaction.
- The petitioners can request to the SIC to abstain from the publication, for reasons of public order, and the SIC may accept the petition and maintain the transaction and the procedure confidential.
- The SIC has thirty (30) working days (45 calendar days in most cases)^{vi} to study the transaction and decide whether the transaction poses no risk to competition, in which it will approve it; or if the review proceedings must continue.

6.3.2 Stage II

- If the procedure continues, the SIC will inform the regulation and the control agencies in the special sectors involved in the merger transaction. Those entities will have the opportunity to offer the SIC their technical advice in regard to the transaction under study, within ten (10) working days of the notification, and can also participate in the proceedings at any point. Their opinion is not binding for the SIC, but if the SIC is going to depart from that opinion, it must justify that decision.
- Within fifteen (15) days of the continuation of the proceedings, the authorities and other interested parties must file with the SIC any information they deem relevant for the decision. They can also propose conditions and other measures that can help to mitigate the anticompetitive effects of the transaction.
- The SIC can request the authorities and interested parties to add, explain or clarify the information they have filed.
- Within this fifteen- (15) day period, the petitioners can know the information filed by the authorities and third parties, and can disprove it.

- Within the three (3) months following the date in which the parties have filed all the information requested, the SIC will have to make one of three possible decisions: simple authorisation; conditioned authorisation (clearance with remedies); or objection.
- According to Colombian Law, in case the SIC surpasses this deadline, the transaction is considered automatically approved (positive administrative silence) and the Authority loses competence over the case. However, it must be pointed out that there have been only a couple of such cases in twenty (20) years, which means it is most unlikely to occur.
- In case that at any time within the proceedings the parties to the merger remain inactive for two (2) months, the SIC will consider that the petition for authorisation of the transaction has been desisted.

6.4 Consequences of Gun Jumping

Mergers carried out without previous clearance from the SIC are considered an infraction of antitrust laws and the companies and their administrators are subject to fines. Fines are expressed in minimum monthly wages. The maximum fine that the SIC may enforce amounts to USD \$20 million for the companies and USD \$450,000 for the administrators.^{vii} In addition to that, in case the SIC considers that the transaction produces an undue restriction on competition and must be prohibited, it could order to reverse the operation. Finally, it must be considered that an operation carried out in violation of competition laws can be declared by a judge absolutely null and void, which can have important economic repercussions. It must be pointed out that for merger purposes, the SIC is not a judicial authority. Such a declaration has to be obtained through an ordinary process before the general jurisdiction.

It is therefore important that a foreign merger does not produce effects in the Colombian territory until it has been approved by the SIC. There is not yet a clear doctrine in regard to the closing of foreign transactions before obtaining clearance with the SIC, with a “*carve out provision*” for Colombia. However, it is advisable to have such a clause and any other elements that help to assure the SIC that the transaction will not have effects in Colombia before it has been cleared by the SIC.

6.5 Involvement of other parties or authorities

Third parties have not been admitted to participate in the merger review process, that is, they are not allowed to review information revealed by the merging parties, they are not notified of the decisions and are unable to file a reconsideration plea. Although third parties can present documents or express their opinions, the SIC is not compelled to take them into account. However, if considered necessary, SIC may ask third parties to render testimony or to disclose information that might prove useful in order to review the transaction.

Pursuant to paragraph 3 of article 4, of Law 155, 1959, all the information included in the antitrust filing by the parties is strictly confidential. The public official who discloses any information regarding the procedure shall be removed from office and criminally prosecuted.

The Colombian economy is open to foreign investment. However, there are exchange, tax, labour, securities and special sector requirements that need to be checked with the local council before entering into a transaction.

Next Steps

Because of the wideness of the Merger Control Rules, it is important that the SIC issues additional guidelines that deal with the substantial test that the authority will apply, including the definitions and requisites for the application of the *Efficiency Exception* and the *Failing Industry Defence*.

* * *

Endnotes

- Carulla – Exito*. Resolution 34904 of December 18th, 2006.
- Procter & Gamble – Colgate*. Resolution No. 28037, issued on November 12th, 2004.
- Postobón – Quaker*. Resolution No. 16433, issued on July 23rd, 2004.
- Pavco – Ralco*. Resolution 4861 of February 27th, 2004, Resolution 22338 of August 8 of 2003, Resolution 5013 of March 10 of 2004.
- Cementos Andino – Cementos Argos*. Resolution 13544 of May 26th, 2006.
- According to article 62 of Law 4, 1913, unless explicitly stated otherwise, when laws and official acts refer to terms of days, they are understood as working days.
- Law 1340, 2009, Article 25.

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