

## SECCIÓN II

### ARTÍCULOS DE AUTORES NACIONALES



## ANTITRUST MERGER POLICY IN COLOMBIA \*

ALFONSO MIRANDA LONDOÑO\*\*

### *ABSTRACT*

*The merger control legislation in Colombia is set forth mainly in Law 155, 1959, Decree 1302, 1964, Decree 2153, 1992, Law 1340, 2009, and Circular No. 10 of the Superintendence of Industry and Commerce.*

*The characteristics and procedure for merger control was substantially changed by Law 1340, 2009.*

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\* Wrote for initial publication in the Cornell International Law Journal, 2009.

\*\* Is a lawyer from the Javeriana University Law School in Bogotá, Colombia. He specialized in Socioeconomic Sciences at the same University, in Banking Law at Los Andes University (also in Bogotá) and obtained his Masters Degree in Law (LL.M) from Cornell University (1987). He is the Director of the Law and Economics Department at the Javeriana University Law School, the co-founder and Director of the Centre for Studies in Competition Law – CEDEC, and a Professor of Competition Law at the Javeriana University. He is the partner that leads the Competition Law practice at *Esguerra Barrera Arriaga*. E-mail: amirandal@cable.net.co.

*With the entry into force of Law 1340 of 2009, the Superintendence of Industry and Commerce is now the unique National Competition Authority in Colombia and also the main authority for merger control. Pursuant to article 2 of Law 1340, 2009, SIC has been now granted the power to review mergers in all sectors of the economy with two exceptions regarding the reorganization operations in the financial sector and the operational agreements between airlines.*

*According to article 9 of Law 1340, 2009, the merger transactions that require previous authorization from SIC in Colombia, are those that meet certain thresholds, introducing a new figure, the legally called, notification, for companies that reach the quantitative assets and/or income thresholds, but do not have an individual or joint participation in the relevant market of 20% or more.*

*Regarding the possibility to submit remedies, 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, so that when SIC finds that the proposed transaction may pose undue restrictions to competition, but believes there are options to correct such distortion, it will authorize the merger provided certain remedies are undertaken.*

*Today, third parties could present documents or express their opinions concerning a merging transaction, although SIC is not compelled to take them into account. The maximum for the penalties that could be imposed by the SIC increased dramatically; the SIC may enforce amounts to USD\$ 20'000.000 for the companies and USD\$ 450.000 for the administrators.*

**Key words:** *Integration; thresholds; notification; remedies; penalties.*

## ***LA POLÍTICA DE CONTROL DE INTEGRACIONES EN COLOMBIA***

### RESUMEN

La legislación de control de integraciones en Colombia se encuentra contenida principalmente en la Ley 155 de 1959, el decreto 1302 de 1964, el decreto 2153 de 1992, la Ley 1340, 2009, y la Circular N° 10 de la Superintendencia de Industria y Comercio. Las características y el procedimiento establecido para el control de integraciones fue sustancialmente modificada por la Ley 1340, de 2009.

Con la entrada en vigencia de la Ley 1340 de 2009, la Superintendencia de Industria y Comercio es ahora la única autoridad nacional de competencia en Colombia y también la principal autoridad de control de integraciones. De conformidad con el artículo 2 de la Ley 1340 de 2009, se facultó a la SIC para examinar las operaciones de integración en todos los sectores de la economía, con dos excepciones, relacionadas con las operaciones de reorganización en el sector financiero y los acuerdos operativos entre compañías aéreas.

Según el artículo 9 de la Ley 1340 de 2009, las transacciones que requieren autorización previa de SIC en Colombia, son las que cumplen determinados umbrales cuantitativos, sobre ingresos y activos; al respecto, la nueva norma introdujo una nueva figura, la notificación. Ésta se encuentra diseñada para las empresas que cumplen con los umbrales, pero no tienen una participación individual o conjunta en el mercado de referencia del 20% o más. En cuanto a la posibilidad de presentar condicionamientos, es importante que las empresas se identifiquen de manera temprana en el proceso de revisión efectuado por la autoridad, si la operación debe someterse a condicionamientos, con el fin de ser ofrecidos a la entidad, de modo que en el momento en que la SIC considere que la operación propuesta puede plantear restricciones indebidas a la competencia, pero crea que hay opciones para corregir tales distorsiones, se autorizará la fusión, siempre y cuando ciertas medidas se lleven a cabo.

Actualmente, los terceros pueden presentar documentos o expresar sus opiniones acerca de una operación de integración, aunque la SIC se encuentra obligada a tenerlos en cuenta. El máximo para las sanciones que podrían ser impuestas por la SIC aumentó de manera cuantiosa, pudiendo fijar multas de hasta USD \$ 20'000.000 para las empresas y USD \$ 450,000 para los administradores.

**Palabras clave:** Integración; umbrales; notificación; condicionamientos; sanciones.

## 1. BRIEF INTRODUCTION TO COLOMBIAN COMPETITION LAW

Like most countries in Latin America, Colombia issued a first tear of antitrust legislation at the end of the fifties, under the political and academic influence of the U.S. and the European Union. However, Competition laws were not applied in this first era, mainly due to the economic protectionist model, which did not favor a competition environment.

The year 2009 marks the 50<sup>th</sup> anniversary of the expedition of the first Competition Law in Colombia, Law 155 of 1959. This first law which is still largely in effect, was first modified in 1963, then developed by Decree 1302 of 1964, and suffered a major addition with the issuance of Decree 2153, 1992.

It must be recognized that even though Colombia had a Competition Law since 1959, because of the protectionist economic model widely applied in Latin America, these laws were not really effective until the nineties, post *Washington Consensus*, when Colombia included a principle of Free Competition in article 333 of the 1991 Constitution<sup>1</sup>,

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1 “**Article 333.-** Economic activity and private initiative must not be impeded within the limits of the public good. No one may require permits or licenses to exercise economic activity except when authorized by law.

changed the economic model in order to open the markets to international trade and issued Decree 2153, 1992, which represents a modern approach to Competition Law.

### 1.1. EVOLUTION AND REFORMS IN THE REGION

It is clear that Competition Law in Latin America and specifically in the Andean Countries is steadily evolving, due to integration treaties: Not only CAFTA was approved by the U.S. Congress, but following Peru, the Andean countries are struggling in their own negotiation of a FTA.

In preparation for the implementation of the FTA with the U.S., many Latin American countries have been discussing or passing new Antitrust Laws. At a supranational level, the Andean Community of Nations – CAN issued Decision 608, which replaced the old Antitrust Statute, Decision 285. According to the more recent Decision 616, meanwhile Ecuador and Bolivia issue their competition law, Decision 608 will apply directly within those countries.

This decision has been recently implemented by President Correa in Ecuador, by means of Decree No. 1614 issued in March 14<sup>th</sup>, 2009, by which he ordered the application of Decision 608 from CAN and appointed his First Subsecretary of Competition, within the Ministry of Commerce.

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Free economic competition is a right of every person which entails responsibilities. The enterprise, as a basis of development, has a social function that implies obligations. The state will strengthen cooperative organizations and stimulate business development.

The state, by means of the law, will prevent impediments to or restrictions of economic freedom and will curb or control any abuses caused by individuals or enterprises due to their dominant position in the national marketplace.

The law will limit the scope of economic freedom when the social interest, the environment, and the cultural patrimony of the nation require it.”

## 1.2. EVOLUTION AND REFORMS IN COLOMBIA

### 1.2.1. LAW 962, 2005

In 2005 Congress issued Law 962, which orders the application of civil procedure to unfair trade cases tried before the Superintendence of Industry and Commerce (hereinafter referred to as SIC).

This was a long awaited reform that has brought stability and clarity to unfair competition cases that were before tried within a mixture of administrative and civil procedure, which raised a great deal of procedural and constitutional issues, therefore distracting the authority from the main questions that unfair trade cases pose.

### 1.2.2. LAW 1340, ISSUED JULY 24<sup>TH</sup>, 2009

During the past 18 years SIC, acting as general and residual competition authority has applied Decree 2153, 1992 in numerous cases related to anti competitive agreements, unilateral anti competitive conduct, abuse of dominance and merger control. The experiences gathered by SIC, both positive and negative, have helped to decant and mature the area and served as input for a reform of the Competition Laws, which was finally achieved by Congress in July 24<sup>th</sup> of this year, by issuing Law 1340, after more than 24 months of discussions.

The principal feature of the new law is the appointment of SIC as the “*National Competition Authority*”. The new Law grants SIC, the sole power to apply Competition Laws in all areas including specialized sectors such as Public Utilities, Banks and Insurance, Transportation and Ports, etc.

This reform gives SIC the antitrust enforcement faculties granted by Colombian Law to the Superintendence of Public Utilities, the Superintendence of Banks, the Superintendence of Ports and Transportation, the National Television Commission and the Aeronautic Authority.



The Law increases the fines that SIC can impose to companies that breach Competition Laws. Currently the fines can go up to U.S. \$450.000 for the companies and U.S. \$60.000 for the administrators. According to the new law, the sanction for the companies could go up to U.S. \$20 millions and the sanctions for the administrators can go up to U.S. \$450.000. This is undoubtedly an important change in antitrust enforcement, that will draw the attention and care of the administrators and companies that can be subject to costly fines.

The new law expands from three to five years the statute of limitations for antitrust investigations. This will allow SIC investigating antitrust practices performed during larger periods of time, without the danger of caducity.

It requires that in case the investigated party decides to offer SIC a settlement, it will only have the opportunity to propose it during the first stages of the procedure, so that SIC does not have to go through the whole investigation only to have to analyze a settlement proposition at the end.

It also includes a leniency program aimed to press collaboration from the companies and the administrators involved in anti competitive conducts. Effective and timely cooperation from companies and persons involved in the investigated conducts can grant them partial or total immunity from the sanctions that SIC can impose.

Finally, the law modifies the merger review procedure in order to give it more transparency and implement a two stage review that allows for a fast track authorization (30 days) in less difficult cases and a longer review period (3 months) in more complex cases. If SIC fails to decide within the review period, the merger is deemed automatically authorized.

Undoubtedly, the described changes will foster the increasingly active role that Competition Law has nowadays in Colombian economy.

### 1.3. PRINCIPAL CASES

It must be noted that SIC is in charge of controlling anticompetitive and unfair trade practices, applying consumer protection laws and administrating the trademarks and patents' registry. SIC is an administrative authority. In 1998 it was also given judicial authority to decide unfair trade and consumer protection cases.

During the years 2004 to 2009, SIC has shown intense activity in all fronts, but the most notorious cases during the past years have been related to mergers and anticompetitive practices. Despite the existence of many competition authorities and regimes, before the new 2009 law was issued, it must be recognized that so far it has been SIC, who has produced the main developments in Colombian Competition Law.

Since 1992, when its new structure was laid down, SIC has enjoyed the benefit of independent Superintendents who have remained in office for long periods and have been applying the law in *crescendo*, constructing a seasoned doctrine that has caught the public eye due to the importance of the cases and the impact they produce in the economy.

Among many other transactions SIC cleared some big acquisitions: the sale of the national telecommunications company - *Telecom*, to the Spanish operator - *Telefonica*; the transaction *Procter & Gamble - Gillette*, the sale of the supermarket chain - *Carulla*, to the French controlled chain - *Éxito*<sup>2</sup>; 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

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2 Carulla - Éxito. Resolution 34904 of December 18 of 2006.

the main cigarette manufacturer *Coltabaco* to *Phillip Morris* and the sale of *Bavaria* to *SabMiller*<sup>3</sup>.

However, not all the important transactions were cleared. 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 SIC and the petitioners was related to the definition of the relevant market. In the P&G - Colgate transaction SIC decided, at the last moment, to narrow the relevant market of powder soap, departing from the market for washing products (including powder and bar soap) presented by the companies<sup>4</sup>.

In the Postobón - Quaker transaction SIC narrowed the relevant market to include only isotonic beverages. In this case SIC not only forbid the transaction, but also launched an investigation in order to establish whether the parties had closed the transaction before SIC approved the deal<sup>5</sup>. It must be noted that under Colombian Law, economic integrations have to be cleared by the authority before they produce effects in the market<sup>6</sup>. Failure to inform the transaction is considered a breach of competition laws that will cause fines to the companies<sup>7</sup>. If in addition to that SIC comes to the conclusion that the transaction must be prohibited, a judge could decide that the deal is absolutely void because of an illicit object, which has important economic consequences under the Colombian Civil Code.

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3 In the past few weeks it was disclosed by the media that Philip Morris will attempt now the acquisition of the only other cigarette manufacturer in Colombia - Protabaco, which would give the U.S. manufacturer 100% of the production capacity in Colombia. Immediately British American Tobacco has issued public statements opposing to the transaction for antitrust reasons. It promises to be a very interesting legal battle.

4 *Procter & Gamble - Colgate*. Resolution No. 28037, issued on November 12th, 2004.

5 *Postobón - Quaker*. Resolution No. 16433, issued on July 23rd, 2004.

6 Concept No. 00001365 of 2000, from SIC.

7 Decree 2153 of 1992, article 2 No. 2, article 4 No. 5,16 and 2. Law 1340, 2009, article 25.

There are no statistics regarding foreign-to-foreign transactions. The general record of SIC for merger review is as follows:

<b>Year</b>	<b>Notified</b>	<b>Authorized</b>	<b>Remedies</b>	<b>Objected</b>
1998	132	132	0	0
1999	118	118	0	0
2000	126	123	2	0
2001	121	93	3	0
2002	104	70	9	1
2003	62	47	3	0
2004	97	90	2	3
2005	103	98	3	0
2006	112	98	4	3
2007	83	62	3	1
<b>Total</b>	<b>1058</b>	<b>931</b>	<b>29</b>	<b>8</b>

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

- In August 2006, SIC issued a new merger regulation that raised the thresholds for notification of mergers. 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 \$20 million. The application of these thresholds has reduced the number of informed transactions in 40%.
- Since the Pavco - Ralco transaction SIC started to impose structural as well as behavioral conditions in order to subdue restrictions on competition and authorize complex concentration operations. Structural conditions require divestiture of brands, installed capacity, etc. Behavioral conditions, on the other hand, require the elimination of exclusivity, etc. Nowadays 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<sup>8</sup>.

- The “Cementos Andino” - “Cementos Argos” transaction was authorized by SIC based in the *Failing Industry Doctrine*. Even though this kind of defense had been considered before, it was only until the cement merger that SIC laid down the characteristics and requisites for application of the *Failing Industry Doctrine*<sup>9</sup>.
- SIC developed a doctrine for 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 authorization from SIC. As mentioned before, under the new 2009 law, it is clear, that vertical integrations will be reviewed if they meet the thresholds.
- During the past two years SIC has claimed jurisdiction over mergers between public utilities companies. It has also disputed the review of mergers between Cable Tv. companies. As mentioned before, the new law leaves no doubt in the sense that SIC is the merger authority in the mentioned sectors of the economy.

SIC has also issued important decisions in the front of anti-competitive practices. The four main supermarkets in Colombia (*Éxito*, *Carulla*, *Olimpica* and *Carrefour*) were charged with abuse of dominant position, following an accusation by their suppliers. SIC presided over a complex negotiation that ended with the settlement of the case and the signing of a “*good practices*” agreement between the main associations for commerce and industry.

Something similar happened in the “*credit card case*”, in which the two companies that own the credit cards networks were charged with

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8 Pavco - Ralco. Resolution 4861 of February 27 of 2004, Resolution 22338 of August 8 of 2003, Resolution 5013 of March 10 of 2004.

9 Cementos Andino - Cementos Argos. Resolution 13544 of May 26 of 2006.

the cartelization of the commissions. The case also ended with a settlement in which not only the investigated companies but also the banks that own the credit cards networks, compromised to important disclosure and other measures in order to guarantee that each network will set the commissions independently.

But not all investigations have ended in settlement. SIC imposed the largest fine in its history (over one million dollars) to the *Rice Grinders*, who were found guilty of establishing a cartel in order to buy rice at low cost from the producers. A fine was also imposed to *Cadbury Adams* for predatory pricing. In the past few months SIC has issued sanctions against the *Cement* and *Chocolate* industries, which are pending on the decision of a reconsideration plea filed by the companies.

All these decisions seem to strengthen the position of SIC and its role before the public opinion.

## 2. MERGER CONTROL IN COLOMBIA

The merger control legislation in Colombia is set forth mainly in Law 155, 1959, Decree 1302, 1964, Decree 2153, 1992, Law 1340, 2009, and Circular No. 10 of the Superintendence of Industry and Commerce. It is expected that SIC will issue a set of merger guidelines within the following few months in order to develop and explain the implications of the new Law 1340, 2009. Merger regulation for specific sectors is contained in other statutes.

Mergers in the financial and insurance sectors are governed by the Organic Statute for the Financial System (Decree 663, 1993). 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. Mergers between television operators are governed by Law 182, 1995.

## 2.1. THE NATIONAL COMPETITION AUTHORITY - SIC

The National Competition Authority in Colombia, SIC, is also the main authority for merger control. As mentioned before, 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, SIC has been now granted the power to review mergers in all sectors of the economy with two exceptions: **(i)** Reorganization operations in the financial sector which are reviewed by the Financial Superintendence, which must hear the opinion of SIC and must apply the conditions to the that SIC recommends, if any; and **(ii)** operational agreements between airlines, which are reviewed by the Aeronautic Authority.

It is important to point out that the Law; especially Law 1340, 2009, has also given SIC other powers and responsibilities<sup>10</sup>:

- It is the National Competition Authority with powers to investigate and sanction anticompetitive practices in all sectors of the economy.
- SIC applies consumer protection law, area in which it exercises administrative and jurisdictional powers, which allow it to impose sanctions for violation of the law and provide for indemnification of damages to consumers.
- SIC is the trademark and patent authority. It maintains the industrial property registry.
- In 1998 SIC was given administrative and judicial functions to decide unfair trade cases. Pursuant to Law 1340, 2009, SIC also decides administrative unfair trade cases in special sectors like Television and public utilities.

According to article 9 of Law 1340, 2009, all transactions that consist of acquisitions, mergers, consolidations or integrations (whatever the

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10 Decree 2153 of 1992, art. 2. Law 1340, 2009.

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 merger control thresholds, and have a 20% or more market participation as explained below, require authorization. The new 2009 law has made it totally clear that 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 is not the case, since the new 2009 law did not refer to those cases.

The interpretation of SIC is that a merger transaction amounts to an entrepreneurial concentration that needs authorization 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 center, whatever the legal structure designed for that purpose.

SIC has not issued any particular doctrine on when joint ventures are caught; however, as pointed out above, the interpretation of 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 center, whatever the legal structure designed 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.

As mentioned before, transactions that do not imply the acquisition of control are not caught by the Merger Antitrust Legislation.

## 2.2. AUTHORIZATION OF THE SIC

According to article 9 of Law 1340, 2009, The merger transactions that require previous authorization from 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 made sales or own assets in Colombia, in the year previous to the transaction, in an amount that meet the thresholds that SIC has established. Right now the notification thresholds are defined in Resolution 22195, 2006, in an amount in monthly minimum wages, equivalent to USD \$20'000.000. It is expected that SIC will increase the thresholds in order to review only the bigger operations. **(iii)** Have an individual or joint participation in the relevant market of 20% or more.

Mergers that do not meet the above-mentioned thresholds are considered as generally authorized and only need to leave a note in the minutes of their board of directors stating that the transaction falls within the General Authorization System.

As mentioned before, it is mandatory for merging parties to request authorization (when the thresholds are met) and obtain clearance from the Authority, before the merger operation produces its effects in the Colombian market. This means that it is possible to negotiate and sign the contracts and documents that carry out the transaction, if such documents and contracts include as a condition precedent to their effectiveness, the antitrust clearance. There is no compulsory waiting period. Clearance is not required when the transaction is carried out between companies that belong to the same corporate group.

### 2.3. FOREIGN MERGERS

Colombia applies the effects theory, which means that SIC will review transactions entered into abroad, when they produce an effect in the Colombian Market. Foreign mergers are subject to the same legislation as local or domestic mergers. According to the doctrine of the SIC, foreign mergers require clearance in Colombia when both parties to the merger sell their products in the Colombian territory, directly or through another company. According to the former doctrine of SIC, clearance was not necessary for foreign mergers when the products of one or both of the merging parties were sold in Colombia by independent companies that assumed the risk and took the decisions associated to the import and sale of the products. Nevertheless, after the *SABMiller - Bavaria* merger, this doctrine can be considered overruled. In this case SIC requested an antitrust filing, even though the products and brands of *SABMiller* were sold by independent importers and not under the control of the company.

### 2.4. PROCEDURE BEFORE SIC

The procedure for merger control was substantially changed by Law 1340, 2009.

#### 2.4.1. NOTIFICATION AND CLEARANCE TIMETABLE

Colombian merger control requires **previous** notification of merger operations. This means that the operation **must not enter into effect in Colombia**, before it has been cleared by the SIC. Agreements may be executed, but they must declare that they will only be performed if SIC grants clearance to the transaction. Both parties are responsible for making the notification and presenting all relevant information before SIC.

### **a. Mergers carried without previous clearance**

Mergers carried out without previous clearance from 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 SIC may enforce amounts to USD \$20'000.000,00 for the companies and USD \$450.000 for the administrators<sup>11</sup>. In addition to that, in case 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 is important to point out that for merger purposes 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 the foreign merger has no effect in the Colombian territory until it has been approved by SIC. There is not yet a clear doctrine in regards to the closing of the foreign transactions before obtaining clearance with 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 SIC that the transaction will not have effects in Colombia before it has been cleared by SIC.

### **b. Time period and trait**

- The petitioners file a pre-evaluation petition, together with a succinct description of the transaction.
- Within the following 3 days, 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.

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11 Law 1340, 2009, Article 25.

- If the transaction needs review, within the 3 days period SIC will order a 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 SIC to abstain from the publication, for reasons of public order, and SIC may accept the petition and maintain the transaction and the procedure confidential.
- SIC has 30 working days (45 calendar days in most cases)<sup>12</sup> to study the transaction and decide whether the transaction poses no risk to competition, case in which it will approve it; or if the review proceedings must continue.
- If the procedure continues, 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 SIC their technical advise in regard to the transaction under study, within 10 working days of the notification, and can also participate in the proceedings at any point. Their opinion is not binding for SIC, but if SIC is going to depart from that opinion, it must justify that decision.
- Within 15 days of the continuation of the proceedings, the authorities and other interested parties, must file with SIC any information they deem relevant for the decision. They can also propose conditions and other measures that can help to mitigate the competitive effects of the transaction.
- SIC can request the authorities and interested parties to add, explain or clarify the information they have filed.

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12 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.

- Within this 15 days period, the petitioners can know the information filed by the authorities and third parties, and prove against it.
- Within the 3 months following the date in which the parties have filed all the information requested, SIC will have to make one of three possible decisions: simple authorization; conditioned authorization (clearance with remedies); or objection.
- According to Colombian Law, in case 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 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 2 months, SIC will consider that the petition for authorization of the transaction has been desisted.

#### 2.4.2. PRESENTATION OF THE PETITION

There is no format to request authorization from SIC. However, Decree 1302, 1964 points out specific information that the merging parties must provide to SIC. This list of information has been expanded and detailed by SIC through its general or unified regulation (Circular Letter No. 10). 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 SIC to properly evaluate the effects of the transaction. It is important to note that SIC can abstain from considering the merger until the information is complete.

## 2.5. REVIEW TEST

Pursuant to article 11 of Law 1340, 2009, SIC must prohibit or object to mergers that tend to produce an undue restriction to competition. Since every merger restricts competition to a certain degree, the challenge is to find out which mergers will tend to produce an undue restriction to competition.

According to article 5 of Decree 1302, 1964, it is presumed that a merger will produce an undue restriction to competition in the following cases:

- When the transaction is preceded by anticompetitive practices between the merging parties.
- When the transaction will give the merged entity the power to impose “Unfair prices”.

Apart from that it should be considered that according to article 12 of Law 1340, 2009 2153, 1992, SIC cannot object or prohibit those mergers in which the interested parties demonstrate with studies based in methodologies of recognized technical value, that the positive effects that the transaction will produce, exceed the negative impact of the operation for the consumers, and that the positive effects can not be achieved in any other way. This is called the efficiency exemption and is designed to justify authorization of mergers that create a great concentration of the market but also create efficiencies that will be shared with the consumers. The efficiency exception was already in effect in article 51 of Decree 2153, 1992.

It is important to point out that to this date SIC has never recognized or accepted that this exemption has been demonstrated in a merger.

It is also important to mention that SIC has accepted and applied, in at least in two cases, the so-called “*failing industry defense*”. In those cases SIC has authorized the mergers as a mechanism to save companies that were going bankrupt.

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

1. SIC defines the general market based in 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 from the merger.
2. 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.
3. 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.
4. 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.
5. If the parties have proposed conditions to the transaction SIC will evaluate them and discuss them with the merging parties. In some cases SIC will modify substantially the conditions offered by the parties and in general will prefer structural to behavioral remedies. Most likely, SIC will require divestment of part of the business.
6. In definite 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.

7. 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.
8. Having said that, it is important to note that in its whole history, SIC has prohibited less than 1% of the informed mergers.

As said before, for some years now 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 that does not mean that there is no competition or that it will become impossible for new competitors to enter the market.

From the lines of merger cases that have been objected or conditioned it is possible to deduct that 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 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 are not relevant in the merger review process and will not be considered or discussed by SIC.

As said before, the substantive test for clearance is not described in the law. It has been developed by SIC based in the US and EU experiences and guidelines. SIC defines the relevant market based in the product market and the geographic market. The product market will be defined narrowly using the hypothetical monopolist test (SSNIP test). 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. 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.

SIC will study the barriers to entry and the contestability of the market. In its analysis 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, 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 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 SIC or any of the other authorities is going to apply in the review of mergers.

In compliance with the new 2009 law, SIC will have to issue the guidelines for mergers, which will help to explain and illustrate its decision making process, for the benefit of the parties to the merger.

## 2.7. 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 SIC finds that the proposed transaction may pose undue restrictions to competition, but believes there are options to correct such distortion, it will authorize 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. SIC has proven to prefer structural remedies, such as divestments, to conduct or behavioral remedies.

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

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

Even though SIC has not given its opinion on this particular matter, it could be considered that reasonable ancillary restrictions may be permitted by the merger control authority.

## 2.8. 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 could present documents or express their opinions, 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, labor, securities and special sector requirements that need to be checked with local council before entering into a transaction.

## 2.9. JUDICIAL REVIEW

Decisions issued by superintendents, as is the case of the Superintendent of Industry and Commerce, are not subject to appeal, but only to a reconsideration plea before the same public official. The reconsideration plea has to be filed within five (5) working days after notification of the decision, and the Superintendent has to decide it within the following two (2) months, but this period can be extended because of the need to gather additional evidence.

The final decision issued by the SIC, can be challenged by means of a judicial action before the Administrative Jurisdiction. This action must be filed within the next four (4) months following the decision to object or prohibit the merger. However this alternative is not very attractive to the parties, because of the length of the procedure (6 to 10 years).

## 2.10. PENALTIES

Penalties will be imposed in case that the merging parties fail to inform a transaction that meets the criteria; and also in cases of gun jumping. The maximum fine that SIC may enforce amounts to USD\$ 20'000.000 for the companies and USD\$ 450.000 for the administrators.

