

PROCEDURAL ASPECTS OF COLOMBIAN COMPETITION LAW

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ABSTRACT

This paper explains the administrative procedure conducted by the Colombian Competition Authority for the enforcement of competition law. The analysis begins with a general framework about the evolution of the statutory provisions on competition law in Colombia and the nature of the Competition Authority. The next chapter addresses each of the three stages of this procedure: the preliminary inquiry, the investigation and the decision making. The powers of the Authority during the first stage are examined, noting their secrecy and surprise features. Then it mo-

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ves to the investigation stage, proposing a definition of the legal effects of the statement of objections and of the courses of action by investigated parties. Two special devices are also considered, the offering of commitments and the benefits for collaboration under the leniency program. After that, the decision making stage is reviewed.

The following chapters deal with specific issues related to the right of defence. The protection of confidential information and business secrets is examined, as well as the self-incrimination and professional secrecy privileges. The Colombian competition regime provides for fines on individuals as to enhance deterrence. In this subject, the Authority's standard practice and its different results are highlighted. The final chapter addresses the judicial review of the Authority's decisions, defining its nature and purpose, and summarizing judicial precedents already set by the administrative courts.

Key words: Competition law enforcement, administrative procedure, inspections, dawn raids, statement of objections, commitments, leniency, confidential information, business secrets, access to the file, self-incrimination, legal privilege, fines on individuals, judicial review.

ASPECTOS PROCESALES DEL DERECHO COLOMBIANO DE LA COMPETENCIA

RESUMEN

Este artículo explica el procedimiento administrativo adelantado por la Autoridad Colombiana de Competencia para aplicar las normas de competencia. El análisis inicia con un marco general que explica la evolución normativa del derecho de la competen-

cia y la naturaleza de la Autoridad de Competencia. El siguiente capítulo analiza cada una de las tres etapas de este procedimiento: la averiguación preliminar, la investigación y la decisión. Las facultades de la Autoridad durante la primera etapa son examinadas, resaltando sus características de secreto y sorpresa. A continuación se analiza la etapa de investigación, proponiendo una definición de los efectos legales del pliego de cargos contenido en la resolución de apertura de investigación, así como de las actitudes del investigado. Dos mecanismos son explicados, la terminación mediante compromisos y garantías y los beneficios por colaboración bajo la figura de la delación. Posteriormente se revisa la etapa de decisión.

Los siguientes capítulos se refieren a temas específicos del derecho de defensa. La protección de la información confidencial y secretos comerciales es examinada, así como los derechos a no autoincriminación y al secreto profesional. El régimen colombiano de competencia establece multas para las personas naturales, como mecanismo para incrementar la disuasión. En este punto, la práctica corriente de la Autoridad y sus diferentes resultados son resaltados. El capítulo final se refiere a la revisión judicial de las decisiones de la Autoridad, definiendo su naturaleza y objetivo, y resume los precedentes hasta ahora establecidos por las cortes.

Palabras clave: *Aplicación del derecho de la competencia, procedimiento administrativo, inspecciones, pliego de cargos, apertura de investigación, compromisos, garantías, delación, información confidencial, secretos comerciales, acceso al expediente, autoincriminación, secreto profesional, multas a personas naturales, revisión judicial.*

JEL Classification: H83, K21, K23, L40

INTRODUCTION

This paper examines the administrative procedure conducted by the Colombian competition authority for the enforcement of competition law. The Colombian case in competition law is worth considering for several reasons. The Colombian economy is one of the most important in Latin America, it is now viewed as one of the fastest growing in the region with a low and stable inflation, and as a major destination for foreign investment. Furthermore, in 2013 Colombia formally began the accession process to become a member of the Organization for Economic Cooperation and Development - OECD, during which the competition authority has also been subject to evaluation. Previously, this authority was subject to a 2009 peer review and a 2012 follow-up study by the OECD.

Colombia's constitutional and legal provisions are clear in stating that the defence of competition involves both private and public interests, which are channelled either through private enforcement by aggrieved parties before the courts or by public enforcement in the form of administrative proceedings of a public authority. This public enforcement underscores the fact that protection of competition is a State's duty, to be performed according to the Governmental economic policy under its own proceedings and powers.

Several doubts have been raised as to whether such administrative proceedings afford enough protection to individuals' rights, and in some instances such doubts have turned into proposals to adopt a judicial-based enforcement of competition law. This paper shows that nowadays the administrative activity may no longer be considered as an expression of unlimited power against defenceless citizens as a number of steps and stages must be conducted before issuing an administrative decision. These are clearly designed to protect the investigated parties' right of defence.

The administrative activity is firmly rooted in the legal traditions of continental law countries, so instead of substituting this administrative-based procedure with a judicial procedure, Colombian legislation has opted for introducing procedural safeguards originated in judicial trials as a response to the aforementioned doubts. As a result, the administrative procedure in competition law has been subject to reforms and amendments designed to protect the right of defence of companies and individuals, so it largely resembles a judicial trial.

Despite these improvements, there are several features of the administrative procedure on competition law still in conflict with a complete protection of the right of defence. In order to consider the strengths and deficits of administrative activity in this area, this paper initially presents a brief description of the evolution of competition law in Colombia and the structure of the competition authority.

Then, the three stages in which the applicable procedure is divided are showed, namely: preliminary inquiry, investigation, and decision. The first of these stages epitomizes the traditional image of administrative authorities endowed with broad powers and virtually subject to no effective control. Meanwhile, the second stage rather depicts an authority limited and bound by the accused parties' right of defence, called to observe procedural rules when collecting evidence. This contrast portrays the conflict between two legally protected elements: the administrative duty to discover and fine covert anticompetitive behaviours on the one hand, and the need to protect the accused parties' right of defence and presumption of innocence on the other. As further described throughout this paper, the introduction of procedural instruments taken from rules of judicial procedures has been one of the ways for balancing these two opposing interests.

After this general review, a number of specific issues will be reviewed in further detail. The protection of business secrets and confidential information is examined, the inexistence of privile-

ges against self-incrimination is assessed, and the protection of legal professional privilege is noted.

Two particular features of the Colombian public enforcement of competition law are then introduced: the fines imposed on officers of the investigated companies and the judicial review, highlighting several major precedents created by the judiciary and the purposes and limits of this form of control.

Merger review follows a special procedure, which is not addressed in this paper. Therefore, whenever reference is made to administrative proceedings, these must only be construed as the proceedings for investigating and fining anticompetitive agreements and abuses of dominant positions.

Bibliography in this area is scarce, so the sources used in this paper are the constitutional and statutory applicable provisions, case-law developed by the Constitutional Court, judgments issued by administrative courts, and the practice of the Competition Authority expressed in its administrative decisions (referred to as “Decision”). Given the numerous legislative changes, preference is given to the most recent Decision, as they are based on statutes currently in force.

CHAPTER 1

EVOLUTION OF COMPETITION LAW IN COLOMBIA AND PUBLIC ENFORCEMENT

Competition law prohibits unilateral and multilateral practices in restraint of competition, known as abuses of dominant positions and anticompetitive agreements, and is enforceable by interested parties before civil courts. The fact that there is public interest in maintaining competition in the market place makes this body of law different from others that govern private practices and contracts, and supports the existence of a public enforcement by means of cease orders and fines imposed on offenders by cer-

tain specialized State's agency. The recent adoption of competition law, especially when compared with the ancient contract and damages laws, has made public enforcement the most important way to promote public awareness of the existence of these rules, at least until private enforcement is consolidated.

In order to begin with the study of public enforcement of competition law, this chapter introduces the evolution of this body of law in Colombia, while the nature and composition of the Competition Authority is examined.

1. EVOLUTION OF STATUTORY PROVISIONS

Law 155, enacted in 1959, was the first piece of legislation on anticompetitive practices in Colombia, which prohibited agreements, and practices restricting competition and introduced a merger control procedure. However, this Law was plainly disregarded during the 1960's to the 1980's, as the country was following an economic policy designed at restricting imports as a means of fostering national industry. This led to an environment of reduced competition within which price controls and anticompetitive behaviours became common.

The Political Constitution of 1991 replaced the one previously in force, originally enacted in 1886. This new Constitution introduced a chapter on economic issues, which article 333 refers to freedom of economic activity and economic competition as the basis of the economy, while recognizing the State's intervention in the market. Pursuant to article 333, the Colombian State is empowered to prevent unlawful restrictions of economic freedom and abuses of dominant positions in national markets. This provision is regarded as the constitutional basis of competition law in the Colombian legal framework.

In order to implement the reforms introduced in 1991, the President was temporarily vested with exceptional legislative

powers for an 18-month term to modify the then-existing legislation. Pursuant to such exceptional presidential powers Decree 2153 of 1992 was issued, whereby substantive and procedural competition law provisions were updated and amended. Decree 2153 not only regulated the Competition Authority's powers of investigation, but also the fines and orders to be imposed on perpetrators and the procedure to conduct such investigations.

Law 155 and Decree 2153 constituted the legal framework of competition law according to which the Authority started the exercise of its duties of fining cartels and other anticompetitive agreements, as well as abuses of dominant positions, and enforcing merger control. After an initial period, the Competition Authority saw its procedural rules and powers to impose fines expanded by means of Law 1340 of 2009. These rules addressed concerns on procedural fairness, largely induced by constitutional jurisprudential developments and academic criticism, while fines were increased to enhance deterrence of anticompetitive conducts.

Two additional statutes must be mentioned. Decree 4886 of 2011 defines the powers and duties of the Authority, while Decree 19 of 2012 introduced several amendments to its rules of procedure.

As an administrative entity, the Competition Authority and any of its procedures, investigations and powers are mainly regulated by the rules of Administrative Procedure. In 2011, the Code of Administrative Procedure, enacted in 1984, was substituted by a new version, which expands the rules on administrative procedure, and for the first time, defines rules for punitive administrative procedures carried out by administrative authorities. These rules were needed since the previous Code of Administrative Procedure contained rather general administrative procedural rules and none at all on procedures for imposing punitive sanctions.

The enactment of a new Political Constitution promoted the effective application of competition law while constitutional jurisprudence issued since has led to a stronger enforcement of due process in administrative proceedings. This is reflected in substantial modifications of the Competition Authority's rules of procedure and the adoption of a new Code of Administrative Procedure.

2. THE COMPETITION AUTHORITY

The Superintendence of Industry and Trade is the Colombian Competition Authority (hereinafter, the "Authority"). Among the different types of public authorities found in the Colombian State, there are the so-called superintendences, which are entities entrusted with duties of inspection and surveillance in the areas of their remits. The Authority is empowered by statute to exercise inspection and surveillance in several market-related matters: (i) Data protection, (ii) Consumer Protection, (iii) Protection of Competition, (iv) Intellectual Property, (v) Metrology. Additionally, it has been vested with judicial functions in specific areas.

Each of these matters is assigned to a specific division of the Superintendence, each headed by a Deputy Superintendent. As such, the division led by the Deputy Superintendent for Protection of Competition (hereinafter, the "Deputy") is in charge of the application of competition law. Mainly economists, accountants and lawyers, in charge of conducting the investigative stage of administrative proceedings on competition law infringements compose this division.

The Superintendent of Industry and Trade (hereinafter, the "Superintendent") heads the Superintendence. Supported by its own staff of advisors in economic and legal matters, the Superintendent decides competition cases presented by the Deputy.

Under this structure, the Deputy carries out the investigation of competition infringements, while the Superintendent adopts the decisions.

Currently, the Superintendence of Industry and Trade is the only administrative body legally empowered to enforce competition law. However, in the past, there were several sector regulators and/or authorities entrusted with competition duties, such as the financial superintendent, the utilities superintendent, the ports and transport superintendence, the television authority, among others. This system consisted in multiple specialized authorities created in the early nineties with the deregulation and privatization of certain industries and came to an end with the passage of Law 1340 of 2009, which designated the Superintendence of Industry and Trade as the single competition authority in Colombia.

The Authority is a technical organism with financial and administrative autonomy, dependent of the Ministry of Commerce, Industry and Tourism. The Superintendent is appointed by the Minister, while the Deputy is appointed by the Superintendent. Neither of them holds office for a fixed period and may be freely removed by their nominators. There are no specific requirements to be nominated to any of these two positions, and in several occasions competition law experts have been appointed to hold them.

Although the Superintendent must follow the general directions given by the Minister and the President of the Republic, according to the political platform and ideology of the Government in turn, he enjoys a high level of autonomy in exercising its duties and leading the Superintendence. The Minister is not considered as the Superintendent's hierarchical superior, and is not entitled to hear appeals against his decisions or to reverse them.

Decisions issued by the Superintendent may be challenged by means of a petition for reconsideration, whereby the party under investigation (i.e. the defendant or respondent) asks its reversion or modification. This request is filed before and decided by the

Superintendent, and does not constitute an appeal as long as is not decided by any hierarchical superior officer.

The Superintendent is the head of the Authority and appoints the Deputy Superintendents, including the Deputy Superintendent for the Protection of Competition. In this way, he defines the general policies to be followed by the Authority and the enforcement priorities when prosecuting anticompetitive practices. However, the Superintendent is not entitled to hear appeals or to reverse decisions of the Deputy, and to such extent, the Deputy also enjoys a degree of autonomy to conduct the investigative phase of competition procedures. Certain decisions issued by the Deputy may be challenged before himself through a petition for reconsideration.

It also must be said that the Final Decision issued by the Superintendent is subject to judicial review, which is not an appeal but a legal action brought before administrative courts seeking its annulment. This judicial control is considered in the last chapter hereto.

CHAPTER 2 THE ADMINISTRATIVE PROCEDURE CONDUCTED BY THE AUTHORITY

One of the novel aspects of Decree 2153 of 1992 was the provision for specific rules of administrative procedure to be followed by the Authority when enforcing competition law. While the Code of Administrative Procedure in force at that time devoted only two articles to the administrative procedure which loosely referred to this issue, the procedural rules in Decree 2153 introduced a framework with three separate stages, each with its own specific purpose, with mechanisms of defence for the defendants and with a clear list of powers of investigation vested in the Authority. As

such, this procedure was a development of the constitutional right to due process under the theory of administrative law.

This chapter explains each of the three consecutive stages in which the administrative procedure followed by the Authority is organized: (i) Preliminary Inquiry, (ii) Investigation and (iii) Decision-Making Phase. To this effect, the relevant features are considered and the issues related to the right of defence are analyzed in further detail.

1. FIRST STAGE PRELIMINARY INQUIRY

The investigation conducted by the Authority begins with an informal stage aimed at finding evidence as to the existence of an infringement of competition law and at deciding if such alleged infringement shows merits to open the second stage, which is the investigation.

1.1. INITIATION OF ADMINISTRATIVE PROCEDURES

The administrative proceedings conducted by the Authority for the enforcement of competition law may initiate in two ways: by complaints or by the Authority's own initiative.¹

Complaints may be lodged by any individual, whether a legal or natural person. Usually, those who are affected by anticompetitive practices file the complaints, although the complainant does not need to show any specific interest in the decision to be adopted on the alleged infringement. Also, filing a complaint does not require the submission of evidence, though the complainant may elect to do so. Thus, complaints might range from a simple description of the facts and alleged perpetrators to more complex documents stating and preliminarily proving precise facts.

1 Article 52 of Decree 2153 of 1992.

On the other hand, the Authority is empowered to give way to the administrative proceeding at its own initiative, acting *ex officio*, pursuant to any source of information that indicates the existence of an anticompetitive conduct. Among others, such information may stem from news in the press, facts observed in other investigations, reports submitted by sector regulators or even studies of specific markets carried out by the Economic Department of the Authority.

1.2. PROCESSING THE COMPLAINTS

Upon reception of the complaint, the Authority evaluates its content in order to define if a preliminary inquiry is to be launched. To this effect, the complaint must meet three cumulative criteria: admissibility, significance and priority.²

a. Admissibility

The Authority is to reject a complaint if the behaviour, as per the complainant's description, does not qualify as an infringement of competition law, case in which the complaint is considered inadmissible. This situation may occur when complainants wrongly assess the facts, or the applicable substantive provision.

Another ground to declare a complaint as inadmissible is the expiration of the statute of limitations. The Authority is under the duty of conducting the investigation and fining anticompetitive behaviours within a defined time period counted as of the date of the alleged infringement. If this period expires without the Authority having produced a definitive decision on the matter, its powers consequently conclude.

The Code of Administrative Procedure, in its previous and current versions, sets the expiration period in three years, and that

2 Ibidem.

rule applies to all administrative authorities whenever no specific provision provides for a different term. In fact, this occurred in 2009, when Law 1340 extended that period to five years, as an acknowledgement of the difficulties that arise in the investigation of anticompetitive practices, most of which are complex and usually concealed, such as cartels. Therefore, the Authority is to reject the complaint, without further investigation, when the facts mentioned occurred more than five years before, case in which its ability to impose fines has already expired.

b. Significance requirement

Since its inception in 1992, the administrative procedure introduced the “significance requirement”, pursuant to which the Authority should receive complaints for competition law infractions and process only those cases which may be considered meaningful in nature. Consequently, the Authority is entitled to conduct a prior assessment of the relevant market and the extent to which the alleged infraction affects competition therein, and to prosecute only those complaints which are considered significant and to discard those matters of minor importance.

This provision is important because the Political Constitution sets forth, as a fundamental right of every person, the right to submit petitions before the authorities and to obtain due response in a defined time-period.³ Without the significance requirement, the Authority would be compelled to conduct a preliminary inquiry of all complainants lodged before it, in order to uphold the complainant’s right to petition, which could result in an undue burden on the Authority.

Thus, an upfront rejection may take place if the Authority considers that the alleged infraction fails to meet the significance requirement, according to the facts stated in the complaint

3 Article 23 of the Political Constitution.

and the information available to the Authority at the time. Nonetheless, a ruling on the significance of the alleged infraction may also be reached after conducting the preliminary investigation, after relevant information, including economic data, has been gathered.

There is no statutory definition of significance, and the rules of procedure only indicate that the Authority must process complaints which are significant to reach its statutory objectives, namely, undertaking's freedom to participate in the market, consumer welfare and economic efficiency. However, during the first years of application of competition law by the Authority, the Council of State (Colombia's highest Court in administrative matters) had the opportunity to deliver two rulings addressing the meaning of the significance concept.⁴ Plaintiffs to those cases challenged the validity of Authority's decisions not to conduct an investigation pursuant to their complaints.

The Council of State considered that the Authority is under the duty to carry out the initial assessment of the complaint, to evaluate the facts and evidence submitted by the complainant. Pursuant to such assessments, the Authority must decide if the alleged infringements are significant and important with regard to its statutory objectives and therefore, merit an investigation. It also acknowledged that there is a certain degree of discretion when making assessing significance, which allows the Authority to develop criteria to that effect.

Also, the Council of State concluded that the Authority had complied with its legal duty of conducting the initial assessment of the complaint. It also clarified that not all complaints must lead to an investigation, confirming the understanding that the Autho-

4 Council of State, Judgment of 20 February 1997, Case 3488, Fernando Londoño v Superintendence of Industry and Trade (hereinafter "the Authority"); Council of State, Judgment of 23 July 1998, Case 4198. Apollo Química Industrial Ltd v the Authority.

rity is able to select which cases to pursue, based on the importance of the relevant practice.

The Authority has resorted to the significance requirement in numerous instances to reject a complaint or to close a preliminary inquiry. Although a standard definition has not been adopted, the concept may be summarized as the degree to which an anticompetitive practice affects competition in the market place. Such degree has been determined according to several factors, developed on a case-by-case basis, which define the importance of the alleged infractions and decide if a given conduct deserves the analysis of Authority's personnel and an allocation of resources.⁵

Perpetrators' market shares are one of the most frequently used parameters. The Authority has not committed with a fixed market share to be deemed as a threshold, although no cases have been considered significant when the parties involved account for less than 5 - 10% of the market. In this sense, this practice might be considered as a *de minimis* rule. Other factors include the length of the practice, its foreseeable impact on final consumers, the types of products and geographical markets involved, the qualitative and quantitative aspects of the conduct, the existence of alternative sources of supply, and the number of complainants in comparison with the total number of customers. In some cases of abuses of dominant positions, the decision on significance has been based on the very finding of dominance of the accused company.⁶

5 See, among others: Decision 230022 of 2013, Football Players Association; Decision 53099 of 2012, Mobile Calls; Decision 32150 of 2012, Aceper; Decision 76589 of 2011, Aesa.

6 For example, in Decision 76588 of 2011, related to an alleged tying by rice mills against rice farmers, the Authority concluded that the market share of the companies involved in the practice were not significant and this situation consequently impeded a finding of dominance on the accused companies.

Also, in Decision 44313 of 2011, referred to a possible predatory pricing by a supermarket in the fresh eggs market, the Authority considered that the defendant's

The legal effects of a decision declaring an alleged practice as “not significant” were defined in 2009, when Law 1340 stated that such a decision does not constitute a ruling on the lawfulness of the behaviour which has given way to the complaint. It only expresses the Authority’s stance on the importance of the behaviour in relation to its statutory objectives, without expressing a decision on the merits of the case. This consideration entails the following consequences:

- Even if the Authority has declared an alleged practice as “not significant”, it eventually may, given a change in circumstances, consider that the behaviour has become significant and decide to investigate it. This could happen if the behaviour becomes recurrent, if there is an increase of the perpetrator’s market share, or if market concentration or entry barriers increase, just to name a few.
- As provided under Law 1340, a decision in this sense may not be challenged by the alleged perpetrators under the prohibition of double jeopardy (*non bis in idem*) or the *res judicata* doctrine.
- The decision does not curtail the affected parties’ rights to take the case to the courts, under any of the existing legal actions.

Given the importance of this matter, it is advisable for the Authority to issue guidelines on the concept of significance, which may include the definition of minor importance practices, to be outlined in terms of participants’ market shares.

behaviour did not pose a significant impact on the market, given its reduced market share and the presence of numerous competitors able to exert discipline on its behaviour under free market competition conditions. These reasons also supported the conclusion that it did not hold a dominant position and was not able to recover present losses with future excessive benefits, thus no predatory pricing could be found.

c. Priority

In 2012 a new element was introduced in the rules for processing complaints. It is the concept of priority, pursuant to which, the Authority is allowed to set its priorities for investigation. Consequently, once a complaint is filed, the Authority is to decide not only whether it is admissible and significant, but also whether it deserves to be prosecuted according to its enforcement priorities.⁷

Until now the Authority has not made public its list of priorities, therefore it seems advisable to elaborate on factors such as the gravity of the infringement (for example, prosecuting hard core cartels and bid rigging) and the importance of certain sectors of the economy.

The significance and priority requirements support the view that the Authority's administrative procedures on competition law must be seen as the execution of a public policy in economic matters, according to the Government's purposes and ideology. For this reason the Authority is empowered to choose which anticompetitive practices are to be prosecuted, according to their perceived importance and sets of imperatives.

Likewise, these administrative procedures may not be considered as a conflict resolution mechanism for injured parties seeking redress from anticompetitive practices. Redress must be sought before the Courts through the relevant legal actions.

1.3. COMPLAINANTS' RIGHTS

The Authority conducts all the stages defined in the procedural rules prior to the issuance of a final decision. It bears the burden of proof, and drives the administrative procedures. The complaint is only seen as a means for setting off the administrative

7 Article 155 of Decree 19 of 2012, amending procedural rules laid down in Article 52 of Decree 2153 of 1992.

activity. Thus the complainant plays a limited role in administrative proceedings, and enjoys a reduced number of rights, not comparable with those vested on plaintiffs in adversarial judicial proceedings.

The results of the preliminary investigation are informed to the complainant, and if they consist in the closing of the proceeding he is entitled to file for reconsideration. Complainants may desist or abandon the complaint, but this does not entail an automatic termination of the proceedings because the Authority is to decide if the case merits further examination for protecting general interests, according to the facts of the case and the significance of the behaviours involved, and if so, may continue the proceeding at its own initiative.⁸

The complainant is entitled to request anonymity from the Authority, which will be granted if the latter considers that the former may suffer commercial reprisals or retaliations for having filed the complaint. In this case, the Authority must keep the complainant's identity undisclosed.⁹

Apart from the above, the complainant has no other procedural rights during the investigation, which means that he is not entitled *ab initio* to access the file or to be summoned to intervene during any of the following stages of the proceedings. However, the complainant may file a petition once the investigation has been formally opened requesting recognition as an interested third party, provided that it fulfils the relevant criteria to do so, event in which it will be afforded the rights of third parties, as explained below.

8 Decision 36700 of 2011, Frigosinu; Decision 24034 de 2007, Centro Comercial Entretenimiento.

9 Article 15 of law 1340 of 2009.

1.4. Preliminary Inquiry

Once the requirements of admissibility, significance and priority of the complaint have been met, the Authority opens a preliminary inquiry. The opening may also occur by decision of the Authority acting *ex officio*. In both cases, the opening takes the form of a written decision that summarizes facts known at that stage. This decision is not addressed to any specific individual (not even the suspected perpetrators, if any) and therefore is not served on anybody.

In case that multiple complaints related to the same infringements are lodged, the Authority must join them under a single preliminary inquiry.¹⁰ The decision of opening proceedings is not subject to any specific legal requirements, and its formal content has changed with time. Currently, it is issued in the form of an internal memorandum signed by the Deputy, defining the basic aspects of the suspected infringement and instructing the Head of the Working Group on Competition to support the inquiry.

During this stage, the Deputy's Unit collects evidence, acting according with the Authority's powers of investigation, as defined by Decree 4886 of 2011, to wit:¹¹

- To practice on-site inspections, collect information and evidence which is legally admissible to prove the facts of the case.
- To request information, reports, company books and ledgers from natural and legal persons, required for the proper performance of its duties.
- To interrogate under oath any person whose testimony may be useful to clarify the facts under investigation.

10 Decision 12905 of 2011 – Opening of investigation Water and Sewage Company of Bogotá.

11 Sections 62, 63 and 64, Article 1 of Decree 4886 of 2011.

These powers of investigation are granted in a general manner to the Authority, therefore they are to be exercised during the preliminary inquiry and investigation stages alike. However, they are deployed in different ways in each of these two stages.

As will be explained below, the decision of opening an investigation contains the statement of objections against the suspected perpetrators, which is formally served to them. This entitles them to participate in the administrative proceeding as accused parties. From that moment on, collection of evidence must be ordered through a written decision issued by the Authority, which is mandatorily notified to the accused parties and incorporated to the file.

This does not happen during the preliminary inquiry. Prior to the opening, no accused parties have been named or summoned to the administrative procedure, so when the Authority orders the collection of evidentiary materials, such a decision is not previously informed to any potential perpetrator. In practice, this situation allows the Authority to order and collect any means of admissible evidence without the eventual opposition or presence of the suspected perpetrators.

Then, during the preliminary inquiry the Authority is endowed with broad powers to conduct announced inspections at the premises of any company, even if it is not considered as a suspected perpetrator. The same applies to the powers for requesting information and interrogating individuals, who may be summoned to depose on the facts under inquiry. In a correlative manner, all individuals and legal persons are under the duty of collaborating with the Authority, complying with its requests for information and summons for testimony, and allowing on-site inspections. These inspections do not require prior notice.¹²

12 Reconsideration Decision 59518 of 2010, Procables.

The Authority has no powers to enter premises by using force or to affix seals when conducting on-site inspections, but it is allowed to impose fines upon all those who refrain from complying with its instructions, including orders issued to collect evidence.

The original drafting of the statute on the Authority's powers provided for the possibility to impose fines on infringements of competition law as well as for failures to observe the Authority's instructions. While such wording was in force, the Council of State delivered a judgement stating that fines may be imposed not only upon anticompetitive practices but also on failures to comply with the Authority's orders when given to obtain evidence of the existence of such practices. The Council of State considered both behaviours equally wrong. The ruling pointed out that a different interpretation would encourage parties under investigation to oppose on-site inspections, thereby depriving the Authority of the opportunity to gather evidence against it.¹³

The 2009 reform addressed this point, making the Authority's powers clear to impose fines for failure to comply with requests of information, instructions and orders and for obstruction of its investigations.

Several cases exemplify the use of these corrective powers. The Authority has repeatedly levied fines on companies that have opposed on-site inspections, or impeded their completion by requesting the Authority's officials to leave the premises. It has also fined companies that refused to produce copies of documents arguing their confidential nature or even arguing the fact that no company officer was present during the inspection to authorize collection of documentary evidence.¹⁴

13 Council of State, First Section. Judgment of 17 May 2002. *Gillette de Colombia v the Authority*. Case 1999-0799.

14 Reconsideration Decision 38459 of 2012, *Constructora Arkgo*; Decision 14371 of 2012, *Constructora Inca*; Decision 13484 of 2012, *Jumex*; Decision 142 of 2012,

Prior to imposing fines, the Authority sends a request for explanations, this is an informal term for a statement of accusation that gives the accused party the right to file and request evidence and to propose a defence. In some instances, said evidence has shown problems with postal services which prevented the Authority's order from being fulfilled timely by the addressees.¹⁵ In other cases, it has been proven that the information was delivered with minor delays which were not fined.¹⁶

1.5. RATIONALE FOR THE PRELIMINARY INQUIRY

As mentioned above, the Authority is endowed with certain investigative powers which are exercised during the preliminary inquiry and the investigation alike. However, the first of these two stages has been designed as a unilateral procedure, since the rules of procedure do not require the Authority to serve the opening of the preliminary inquiry on the suspected perpetrators or to summon them to participate. This rule applies even if at the beginning of the preliminary inquiry the Authority has already identified some of the suspects or if they are identified as the inquiry moves forward. In this sense, the preliminary inquiry is conducted by the Authority on its own, without the participation of any defendant exercising rights of defence.

Monmeros; Decision 5455 of 2011, Inproarroz; Reconsideration Decision 18023 of 2010, Apuestas en Linea; Reconsideration Decision 59518 of 2010, Procables; Decision 56772 of 2010, Electricaribe; Reconsideration Decision 65616 of 2009, Cementos Oriente; Decision 34566 of 2008, Frigosinu; Decision 7222 of 2008, Lacteos Cesar; Decision 14305 of 2008, Lacteos Primavera; Reconsideration Decision 13248 of 2007, Frachise System Colombia; Decision 23435 of 2001, Frontier; Decision 5249 of 2000, Expreso Ibague; Decision 5010 of 1999, Gillete Colombia.

15 Decision 37136 of 2011, Frigouraba; Decision 5133 of 2012, Ashosval.

16 Decision 37136 of 2011, Frigouraba; Decision 5133 of 2012, Ashosval; Decision 37135 of 2011, Proyecting; Decision 26408 of 2012, Acemi.

By acting in such a unilateral manner, the Authority is not constrained by the presence of the alleged perpetrator, enjoying wide powers to order and collect all sorts of admissible means of evidence. The Authority acts confidentially (as its proceedings are not disclosed to the public) and by surprise (given that it requires no previous announcement to obtain evidence and carry out on-site inspections). These two features might seem rare in light of the transparency and right of defence requirements, but it must be noted that they also exist in the first stages of criminal proceedings, when prosecutors and police investigators work undercover while building a case. They also exist in other local administrative proceedings, such as in the foreign exchange control regime, which was deemed constitutional by the Constitutional Court.¹⁷

The secrecy and surprise features of the Authority's powers are designed to counteract the generally recognized difficulty in prosecuting cartels, caused by the fact that their perpetrators are aware of their illegality, leaving no trace of them and destroying any remaining evidence, reason why direct evidence is rarely found.¹⁸ Without the surprise factor the perpetrators would have an opportunity for tampering, altering or concealing evidence or even for training witnesses as to the manner in which testimonies are to be deposed.¹⁹ The preliminary inquiry emphasizes the need of finding evidence of covert behaviours. To such ends, it endows the Authority with broad powers to gather sufficient information and evidence by identifying the elements of the infringement with an advanced degree of accuracy, so as to bring charges against the perpetrators.

17 Constitutional Court, Judgment C-010 de 2003.

18 Administrative Tribunal of Tolima. Judgment of 22 January 2010. *Proccarroz et al. v the Authority*. Case 2008-000006.

19 Decision 18023 of 2010 and Reconsideration Decision 56641 de 2010, *Apuestas en Línea*; Reconsideration Decision 59518 of 2010, *Procables*.

The secrecy of the preliminary inquiry might be viewed as a transparency deficit, especially in light of certain Constitutional Court rulings stating that defendants in administrative procedures must be informed of their existence since the beginning.²⁰ Nonetheless, these decisions have noted that the purpose of these transparency and publicity requirements is to prevent surprising the defendant with proceedings in which he was not given the right of defence.²¹

Accordingly, once the authority has gathered an adequate amount of evidence as to make an accusation, the procedure continues with the formal opening of the investigation. During that stage, the emphasis shifts to the parties under investigation, who enjoy the right to be previously informed of all evidence to be gathered and to request and submit evidence for their defence.

1.6. LIMITS TO THE USE OF POWERS OF INVESTIGATION

Pursuant to the rules of procedure, evidence gathered by the Authority must meet certain qualifications in order to be regarded as legally collected evidentiary material. On-site inspections, and all such other means of evidence conducted therein must be legally admissible to prove the facts under investigation, testimonies must be useful to clarify facts, while requests for information must relate to documents required for the proper performance of

20 Constitutional Court, Judgments T-80A of 2011 and T-706 of 2012.

21 This deficit may also exist when the Authority's procedure is compared with the European Commission's procedure and the duties of the Hearing Officer. See: Nicolo Zingales. *The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?* The Competition Law Review Volume 7, 1. 2010.

However, the European Commission's procedure differs from the proceedings conducted by several national competition authorities. See: Maciej Bernatt. *Can the Right To Be Heard Be Respected without Access to Information about the Proceedings?* Deficiencies of National Competition Procedure. Yearbook of Antitrust and Regulatory Studies VOL. 2012, 5(6)

the Authority's proceedings. All these qualifications can be summarised by saying that evidence should be legally admissible and relevant to the case.

According to the Authority's Guidelines for On-site Inspections, officials appointed to perform them may request all information and testimonies as they may deem admissible and necessary. The minutes of the inspection must indicate the information requested and that which was produced, the commitments to deliver information not available at the inspection, the conditions under which it took place and any obstruction or any other fact that might constitute a failure to comply with the Authority's instructions.

But in practice, in the case of an on-site inspection, the Authority's written order is limited to mentioning the date in which it is going to take place and the Authority's officials appointed to perform it, not including a summary of the facts to be proven. A similar situation occurs with requests for information which only contain a list of documents to be produced without indicating the facts to be evidenced by them.²²

This makes it impossible to define whether information, documents or testimonies requested by the Authority's designated personnel are relevant and legally admissible. Also, since these concepts are of a legal nature, it is advisable that a lawyer be present during inspections. Nonetheless, the company under inspection is not informed of its right to be assisted by a lawyer nor prudential time is given to have him present once it has started.²³

22 This situation allows the so-called "*fishing expeditions*", a practice under severe criticism in Europe. See: Marta Michalek. *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*. http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/MM_Fishing.pdf

23 See, for example, submission of fined companies in Reconsideration Decision 38459 of 2012, Constructora Arkgo; and in Decision 14371 of 2012, Constructora Inca.

For this reason, it is advisable for the Authority to include a brief explanation of the facts under investigation, and to inform the company whose premises are under inspection of the mechanisms to contest the validity of requests for information and to allow it to be assisted by a lawyer. In addition, the Authority must implement a mechanism allowing addressees of requests of documentation and information to oppose them, challenging their relevancy and legal admissibility. This might be obtained by allowing addressees to file a request for reconsideration or explanation of such orders. The Authority must also respond to said oppositions when deciding on the imposition of fines for refusing to comply with the relevant orders or requests, by giving full answer to the pleas invoked by the accused party, and is not allowed to give a mere recitation of its statutory powers.

The issues already mentioned are also a source of debate in the European Union competition law procedure. Several authors have noted that the Commission's broad powers, limited controls and requirements might not be in accordance with the right of privacy and the privilege against self-incrimination. Besides, there is a limited control of inspections, since the investigated company has no access to the file and the Commission is not required to identify the suspected infringement.²⁴

24 See: John Temple Lang. *Legal problems of digital evidence*. Journal of Antitrust Enforcement, Vol. 2, No. 1 (2014); Lorenzo Piazza. *The Revision of the Commission Explanatory Note on European Commission Surprise Inspections*. Journal of European Competition Law & Practice, 2013, Vol. 4, No. 5; Didier Theophile and Igor Simic. *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*. Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6; Giacomo Di Federico. *Deutsche Bahn: What the Commission Can and Cannot do in Dawn Raids*. Journal of European Competition Law & Practice, 2013, Vol. 5, No. 1.

2. SECOND STAGE: INVESTIGATION

2.1. OPENING OF AN INVESTIGATION

After conducting the preliminary inquiry, the Deputy decides whether sufficient evidence on the alleged infringement has been collected and if it seems to support an accusation against the suspected perpetrators. If the answer is affirmative, the Authority opens an investigation. Otherwise, it closes the proceedings.

The opening of an investigation reflects the Authority's preliminary view that an infringement of competition law has occurred. It is preliminary in the sense that the alleged perpetrators have not had the opportunity to accept or deny the facts or to controvert the evidence collected by the Authority during the preliminary inquiry.

The decision of starting an investigation contains a statement of objections, and constitutes an accusation made by the Deputy against the alleged perpetrators, charging them of committing one or several infringements under competition law.

The new Code of Administrative Procedure introduces specific rules for punitive administrative proceedings, which, among others, require a statement of objection to be issued when opening the investigation stage. Such statement must indicate, in a clear and precise manner, the facts considered as an infringement, the legal or natural persons under investigation, the rules infringed and the penalties to be imposed or any other legal consequences that may ensue.²⁵

Before the passing of this new Code, there was a debate as to the extension and purpose of the preliminary inquiry. Some argued it was a short stage confined only to finding signs or indications of the possible existence of an infringement of com-

25 Article 47 of the Code of Administrative Procedure.

petition law, not designed to collect evidence of the suspected infringement.²⁶ Now, the rules introduced by the new Code make it clear that the preliminary inquiry must last as long as needed, until the Authority reaches a clear and precise identification of the anticompetitive behaviour to be investigated. This also implies that the Authority is not allowed to open an investigation without a proper recognition of the facts that constitute the infringement, sufficiently delimited in time, the place and the manner in which they occurred. All these facts must be supported in evidence legally collected during the preliminary inquiry.

According to the foregoing, the purpose of the investigation stage is to give to the accused parties the opportunity to contest the evidence already collected by the Authority, and to obtain all such new admissible evidence necessary to confirm or reject the accusations made by the Deputy.

2.2. LEGAL EFFECTS OF THE STATEMENT OF OBJECTIONS

The introduction of a statement of objections in the administrative procedure rules laid in the new Code of Administrative Procedure constitute an example of the adoption of procedural devices originated in judicial procedures. With this procedural requirement, the legislative branch clearly recognizes the need for organizing administrative procedures in a manner that resembles traditional court procedures.

Several authors on civil and criminal procedural law have commented on the effects attributed to the claims in lawsuits and to criminal indictments, consisting in the definition of the extent of the judicial debate and the content of the judgment. Based on these comments, it is proposed that the statement of objections entails the following legal effects:

26 Submission of the investigated parties, Reconsideration Decision on nullities 30226 of 2004, Brick Producers.

a. Identifies the defendants, summoning them to participate in the proceedings and affording them procedural rights.

Following the statement of objections, the administrative procedure ceases to be unilateral and turns into a bilateral relationship between the Authority and the defendants (accused/investigated parties), which are henceforth entitled to exercise their defence rights. The legal and natural persons named in the statement of objections are the addressees of the final decision to be delivered by the Superintendent. Thus, such final decision must express a reasoned pronouncement in respect to each of the persons named in the statement, without adding or excluding any of them. It is for the Deputy, during the investigation stage, to modify the list of defendants either by including or excluding persons, by means of supplementary statements of objections.

b. Defines the facts under investigation, thereby limiting the scope of the accused parties' defence as well as the content of the final decision.

Respondents may defend themselves against the facts charged in the statement of objections, either by denying occurrence or implications, without having the need to defend from facts not included therein. In case the Deputy decides to expand the investigation by adding new facts, it must do so by issuing a supplementary statement of objections. However, in case of investigation of an ongoing practice, the facts developing after the statement of objections are not considered as new facts.

The definition of facts under investigation also defines the application of the statute of limitations. As previously mentioned, the Authority must issue its final decision (including requests for reconsideration) and serve it upon the addressees within a five-year term. Such a period is counted as from the moment in which the alleged infraction took place, and in case of continued infrac-

tions, it runs as from the date of the last act of occurrence. In recent decisions, the Authority has considered that in bid rigging offences, such an expiration period is counted as from the termination date of the contract awarded during the relevant bid.²⁷

c. Defines the infringement of competition law to be investigated.

The statement of objections defines which competition law rules were infringed by the accused parties with the facts under investigation. Also, it contains a brief on the reasons why the Deputy considers that such an infraction exists. In this manner, the statement of objections encloses the legal debate as to the existence of the anticompetitive practice.

d. Allows defendants to know and oppose to evidence already collected.

Evidence collected during the preliminary inquiry is made known and available to the investigated parties, allowing them to exercise their rights of defence by challenging the validity or the meaning ascribed to such evidence, to request new evidence to contradict it and the cross-examine witnesses.

e. Defines the facts to be proven and the evidence to be collected.

By defining the facts under debate, the statement of objections allows the Authority to decide which means of evidence may be regarded as relevant to the investigation and legally admissible thereunder.

27 Reconsideration Decision 8917 of 2013, Prisons (bid rigging).

f. Allows participation of interested third parties.

The decision to open an investigation, which contains the statement of objections, must be published in the Authority's website. Also, is mandatory for defendants to publish a summary in a newspaper, in order to inform the public about the investigation and to allow interested third parties to be admitted to the proceedings.

Pursuant to the above, it must be said that the statement of objections fixes the facts and infringements to be investigated and identifies the accused parties, allowing them to exercise their rights of defence. The content of this statement binds the Authority and no different parties or facts may be investigated or referred to in the final decision, unless a supplementary statement is duly issued to that effect. The degree of precision with which the Deputy must identify the facts and the infringements to be investigated has been a matter of debate in a number of cases, where the defendants have claimed that the statement of objections does not define in a precise manner the facts under investigation, but the Authority has considered that it is not possible to demand a full account of the facts because they are to be defined during the investigation.²⁸

2.3. COURSES OF ACTION BY DEFENDANTS

The statement of objections is served to each of defendants, as identified therein. Once notice has been served, a 20-day period for each of them to respond to the statement is granted. Resorting again to comments of civil and criminal procedural law authors, it is posed that the defendant may assume any of the following courses of action:

28 Decision 53403 of 2013, Claro Mobile Communications.

a. Remain in silence. There is no obligation for the parties under investigation to respond to the statement of objections. No specific consequence is attached to their silence, and more importantly, it does not imply confession or acceptance of the accusations or any other liability. This attitude does not prejudice the exercise of other procedural rights, such as attending the oral hearing, rejoining the Deputy's Report, or requesting reconsideration of the final decision.

This stance underscores the fact that the burden of proof rests on the Authority, who should gather sufficient evidence to rebut the defendant's presumption of innocence, even if it decides to remain in silence. Therefore, its silence does not relieve the Authority from producing enough evidence to substantiate an accusation.

b. Challenge the objections and submit and request evidence. This posture implies an express denial of the charges, as the accused contends that the facts defined in the statement did not occur or were committed by someone else. Also, the defendant may allege that the facts do not constitute an infringement of competition law by expressing differing views on the legal doctrines on which the Deputy built the accusation.

In respect to the evidence, the accused may: (i) submit written evidence in his possession, such as documents, reports, financial statements and expert's reports; (ii) request the Authority to order collection of other means of evidence, such as declarations by witnesses and inspections; and (iii) contest either the validity of or the meaning ascribed to evidence gathered during the preliminary inquiry, during which, as stated previously, the Authority acts unilaterally.

The latter is the mechanism available to the respondents to know and oppose to evidence collected during the preliminary inquiry and is one of the main strategies practiced when exercising the right of defence.

c. *Offering of commitments.* The defendant is entitled to make an offering of commitments, whereby it undertakes to cease or modify the behaviours seen as anticompetitive by the Authority. In case the offering is accepted, the Authority issues a final decision making them legally binding and closing the proceedings. This stance does not constitute acceptance of the accusation.

d. *Acceptance of the charges.* The defendant acknowledges the occurrence of the facts and admits the infringement. No further investigation is needed, since the accused has accepted the accusation, and therefore, the case goes directly to the decision-making stage. In case that the statement of objections contains multiple accusations, the accused may accept some charges and deny others, case in which the investigation will continue in respect of those which have been denied. According to the statutorily defined fining criteria, the Authority may grant a reduction in the fine as recognition of the defendant's cooperation.

e. *Application for leniency.* The respondent not only accepts the charges but also supplies relevant evidence to prosecute other participants in the anticompetitive practice. The application is processed according to the special rules for leniency, laid down in Decree 2896 of 2010, and may lead to full immunity from fines (first applicant only) and reductions of up to 70% of the fine (for subsequent applicants).²⁹

In contrast to administrative procedure in the European Commission, Colombian legislation does not provide for settlements with the Authority. While a settlement allows the authority and the defendants to settle their claims with a reduced fine and a declaration on the occurrence of the infringement, the offering of commitments, as regulated in Colombia, entails an early termination of the procedure, with no fines and no final decision

29 See: William Burgos. *Procedimiento en las actuaciones por la presunta violación de las normas de protección de la competencia*. Con-Texto, Revista de Derecho y Economía, 32 (2010).

on the occurrence of the anticompetitive practice defined in the statement of objections.³⁰

Given their importance and novelty, offering of commitments and application for leniency are considered in further detail in the following sections.

2.4. OFFERING OF COMMITMENTS

This mechanism allows the parties (Authority and accused) to terminate the proceedings in an alternative manner, without reaching a final decision while adopting measures designed to restore competition in the market-place. The mechanism was drafted in vague terms in the original design of the Authority's rules of procedure in 1992, but its understanding and operation has been shaped over the years through the Authority's practice, and it was fine-tuned in the 2009 legal reform.³¹

During the 20-day period to respond the statement of objections, the defendant may offer a commitment consisting in ceasing or modifying the behaviour under investigation, in order to remove the anticompetitive elements identified by the Authority.

The rules of procedure require the defendant to pose "sufficient guarantees" of its commitment, which has been construed as a payment guarantee, usually in the form of an insurance policy or a performance bond issued by a bank, for an amount equal to the fine that would have been imposed by the Authority had the

30 Molly Kelley, *Settling for Settlement: The European Commission's New Cartel Settlement Procedure*. Washington University Global Studies Law Review. Volume 9, 4. 2010.

31 For the evolution of the commitments and guarantees, see: Alfonso Miranda Londoño. *El ofrecimiento de garantías en el derecho de la competencia*; Carlos Andrés Uribe Piedrahíta y Fernando Castillo Cadena. *El otorgamiento de garantías en el derecho de la libre competencia (un análisis jurídico y económico)*. Revista Derecho de la Competencia. Vol. 2 # 2, 2006. Cedec. <http://centrocedec.org/publicaciones/>

investigation concluded unfavourably for the defendant. Also, in some cases in which it was not possible for the accused to produce any of these guarantees, a promissory note has been accepted.³²

Calling on the guarantee was the mechanism to collect a fine in case of breach of the commitments, as the investigation had been terminated without any fines. With the passing of Law 1340 of 2009, the breach of commitments is punished as an anticompetitive practice in itself and the Authority is empowered to fine it directly. For these reasons, the guarantee may be excused and such a decision being adopted on a case-by-case basis.³³

Commitments may vary according to the types of behaviour under investigation. They may consist on a positive obligation, such as granting access to essential facilities, or defining standard policies on prices or contractual rules, or changing a network configuration. In some other instances, the commitments have consisted in eliminating exclusivity clauses in distribution contracts, or even the definition of prices to be charged to customers. Such commitments are usually coupled with ancillary obligations to verify compliance, mostly in the form of periodical reports of information.³⁴

Once an understanding has been reached, the Authority issues a decision making the commitments legally binding upon the defendants and closing the proceedings. In the decision, the Superintendent summarizes the actions or abstentions the accused must observe, the schedule for its implementation and the

32 Decision 4282 of 2010, San Andres Port Society.

33 Decision 53977 of 2012, EPM; Decision 44009 of 2010, Cabot Colombiana; Decision 43253 of 2010, Coltel.

34 A full review of the commitments practice in European Union Competition Law can be found in: Suzanne Rab, Daphne Monnoyeur, and Anjali Sukhtankar. *Commitments in EU Competition Cases Article 9 of Regulation 1/2003, its application and the challenges ahead*. Journal of European Competition Law & Practice, 2010, Vol. 1, No. 3.

period during which they must remain in force, usually three to five years, and the verification mechanisms. Also, the decision refers to the types, amount and duration of the guarantee, if it has been required. A summary of the decision must be published in a newspaper.³⁵

Not all offerings of commitments are to be accepted by the Authority. This is a discretionary decision, adopted pursuant to the enforcement strategies and goals defined by the Superintendent, who may decide not to accept them in a given case and instead continue the investigation and impose fines, if they apply, to promote deterrence.³⁶ Therefore, acceptance of the commitments and the termination of the proceeding is neither a duty of the Authority nor a right of the defendant. Also, requests for reconsideration may not be lodged against a decision rejecting commitments.³⁷

In case of presumed breach of the commitments, the Authority notifies the breaching party, which is then entitled to respond and submit relevant explanations. In such cases, the Authority only analyses whether the commitments, as agreed, were fulfilled or not, without reopening the original proceedings. This means that the acceptance of commitments closes the debate on the existence of the infringement charged in the statement of objections.

In its response, the defendant may not resort to arguments about the effect of the originally investigated behaviour upon competition, as this would reopen the original case, or to the anticompetitive nature of its current behaviour. Only explanations aimed at proving due compliance with the commitments are considered acceptable.

35 Article 17, Law 1340 of 2009.

36 In the European context, see: Piero Cavicchi. *The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from Alrosa*. Europa-Kolleg Hamburg Institute for European Integration. Discussion Paper No 3/11.

37 Decision 4338 of 2012, Colinversiones.

Finally, it is worth mentioning that in the European context, the *Alrosa* case clarified a number of important aspects of commitments. The European Commission is to decide whether the commitments address the competition concerns under investigation, which means that its purpose is not to punish the infringement, since they are just a mechanism for procedural efficiency. The commitments may go well beyond of what is necessary to restore competition, it is up to the defendant to define their content in order to assure the closing of the investigation and avoid fines, while the courts are not entitled to assess other less burdensome alternatives.³⁸

2.5. LENIENCY - BENEFITS FOR COLLABORATION

One of the most relevant developments of Law 1340 of 2009 was the empowering of the Authority to grant benefits for collaboration to anticompetitive practices participants who inform of its existence and/or provide evidence for prosecution. This provision was developed by Decree 2896 of 2010, which sets out the procedure to handle applications for benefits.

While Law 1340 refers to leniency for anticompetitive practices, Decree 2896 narrows down the scope of application of this device, stating that it only applies to cartels and anticompetitive agreements, excluding abuses of dominant position. Law 1340 provides that leniency may not be granted to the instigator of the infringements, defined as the person who exercises coercion or active influence on other persons to participate in it. Thus, the party considered as primarily responsible for the infraction is excluded from the benefits. For this reason, dominant companies in cases of abuse are not admitted to the leniency program, given that these are unilateral behaviours in which the perpetrator is solely responsible for the infringement.

38 Judgment of the European Court of Justice in Case C-441/07 P, *Commission v. Alrosa*, of 29 June 2010.

The benefits are granted in the form of immunity or reduction in fines. While full immunity is granted to the first applicant who meets all requirements of the Authority, following applicants may only receive reductions in the corresponding fine, which is adjusted according to their order of application: the first reduction is up to 70% of the applicable fine; the second reduction, up to 50%, and subsequent applicants may obtain a reduction of up to 30%.

Applications for benefits may be submitted before the Authority has knowledge of the infringement, by denouncing its existence (whistle-blower). Also, they may be filed once the proceedings have started, during the preliminary inquiry and investigation stages, until the Deputy delivers its report, case in which the collaboration will be considered successful if the applicant produces evidence or information not yet known by the Authority. Such application may be done either in writing or in a meeting held with the Deputy, by drafting the relevant minutes. The date and time of the application is recorded to define the order in which applications were lodged.

The applicant may not be the instigator of the cartel, and must identify the person who was. He also must acknowledge participation in the cartel, immediately cease its participation and provide the Authority with information as to the purpose, activities, functioning, participants, products and geographical area concerned and length of the cartel. Also, the applicant and the Deputy define commitments for furnishing additional information in a defined schedule.

If such commitments are met, a collaboration agreement is executed, whereby the applicant undertakes to supply all information requested by the Authority during the investigation, to cause all its employees and directors to depose all testimonies as requested by the Authority, to refrain from concealing or tampering with the evidence, and to cease its participation in the investigated infringement. In the final decision, the Superintendent

decides whether the applicants complied with their undertakings, and grants the immunity or reduction in fines.

This device is recent and until now the Authority has not issued decisions based on it, but at the moment of writing this paper, there is an ongoing investigation based on leniency applications³⁹. Several doubts will pose this leniency mechanism, such as the probative value of corporate statements prepared by applicant's officers that incriminates competitors, the possibility of offering commitments by those applicants that do not obtain full immunity but only a reduction in fine, and the access to the file by injured third parties seeking compensation for damages.⁴⁰

2.6. ADMISSION OF INTERESTED THIRD PARTIES

Administrative proceedings have traditionally been understood as a bilateral relationship between a public authority (the Public Administration) and the individual or corporation under investigation. They are not conceived as adversarial cases between plaintiffs and defendants, even if they are initiated pursuant to a complaint lodged by any aggrieved party.

The former Code of Administrative Procedure, issued in 1984, already provided for the participation of interested third parties in administrative proceedings.⁴¹ Later, Law 1340 of 2009 set forth specific rules on this issue, allowing third parties having a direct and individual interest to request leave to participate in the

39 Investigation on the diapers cartel. Statement of Objections 47965 of 2014.

40 Some of these issued are currently under debate in the European context. See: Luis Ortiz Blanco and Konstantin Jorgens. *Important Developments in the Field of EU Competition Procedure*. Journal of European Competition Law & Practice, 2011, Vol. 2, No. 6; Ingrid Vandendorre and Thorsten Goetz. *EU Competition Law Procedure*. Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6; Ingrid Vandendorre and Thorsten Goetz. *EU Competition Law Procedural Issues*. Journal of European Competition Law & Practice, 2013, Vol. 4, No. 6.

41 Article 14 of the former Code of Administrative Procedure.

proceedings, not to obtain any form of individual redress, but to contribute with the Authority in the clarification of an alleged infringement, given their knowledge of the relevant market.⁴² Thereby, the Authority is able to take into account the points of view of all stakeholders and deliver an adequate decision. Competitors, consumers and recognized associations of consumers are deemed by the procedural rules as interested third parties.

A third party having no direct and individual interest in the results of the case may not be admitted to the proceedings.⁴³ The general interest of defending the public welfare by preserving competition in the market place is not enough for this purpose, since the Authority with its proceedings protects such interest.

During the 15-day period following publication of the opening of an investigation, interested third parties may file their application requesting recognition in such capacity and leave to participate in the case, by stating the grounds of their direct and individual interest.⁴⁴ The accused parties are given the opportunity to rejoin those applications, and then the Deputy decides.

Interested third parties are admitted to request evidentiary material, to submit evidence in their possession and arguments regarding the infringement under investigation. They are also informed about the offering of commitments and the Deputy's report on the merits of the case, and admitted to file rejoinders in respect to each one of them. In addition, they are granted access to the file, saved for reserved information.

Furthermore, a conciliation hearing is to take place between the complainant, interested third parties and the defendants, as

42 Article 19 of Law 1340 of 2009.

43 Decision 398 of 2004, Supermarkets. An association of producers is not an interested third party, since it only represents the interests of its members, having no direct interest in the final decision.

44 Judgment of the Superior Tribunal of Bogotá, Civil Chamber, 24 February 2011. Constitutional Action CEETTV SA v the Authority. Case 2010 690-02.

a mechanism to promote direct solutions of individual disputes caused by the alleged infringement. The success or failure of this conciliation hearing has no consequences whatsoever in the results of the administrative proceedings and does not change its nature into any sort of judicial dispute.⁴⁵

2.7. DECISION ON EVIDENCE

Once the defendants and interested third parties have filed their requests on evidence, the Deputy issues a Decision on Evidence. On the one hand, such decisions admit those means of evidence (usually in the form of documents) submitted by each party, provided that they are relevant to the case. On the other hand, the Decision orders the collection of evidence which production has been requested by the parties. This Decision on Evidence may be challenged by means of a request for reconsideration filed by a party who deems it has been affected.

The party requesting the collection of evidentiary material must indicate its purpose, that is to say, the facts that intend to be proven with such pieces of evidence, so the Authority is able to decide on relevance and admissibility. To this effect, in the request of evidence the party must state a summary of the facts to be observed during inspections, or the facts a given witness must testify about.

The decision on evidence also sets out the schedule for collecting the evidentiary material, and defines the dates and times for summoning witnesses and performing onsite inspections. This schedule may be adjusted with additional decisions, which are informed to the parties. In this manner, the respondents may be present during the taking of evidence and oppose, if required, to the way in which they are performed.

The taking of evidence largely follows the rules set forth in the Code of Civil Procedure, which is applied *mutatis mutandi* to

45 Article 33 of Law 640 of 2001.

administrative proceedings given their non-adversarial but rather inquisitive nature. An important and frequently requested piece of evidence is the testimony of individuals whose deposition was collected during the preliminary inquiry, in order to have the opportunity to cross-examine them.⁴⁶

When all the evidence ordered by the Deputy's decision has been collected, the investigation stage is concluded and the decision-making stage begins.

3. THIRD STAGE: DECISION-MAKING

the purpose of this stage is to submit and discuss arguments about the facts that have been evidenced, and whether they constitute an infringement of competition law. This stage is initially conducted before the Deputy and then before the Superintendent.

3.1. PROCEEDINGS BEFORE THE DEPUTY

The stage starts with the Deputy's summoning of the parties for the oral hearing, at which each of the defendant and interested third parties are given the opportunity to make oral representations of their arguments on the case. The hearing is presided by the Deputy and its advisors attend, and its purpose is to persuade them about the course in which their report should be delivered.

Each party is allowed to deliver a verbal explanation as to which facts were proven or not, and the legal arguments as to the existence of the infringement. Thus, this is an important mechanism for each party to exercise the right of defence by arguing their case supported on collected evidence, before the Deputy delivers its conclusion.⁴⁷

46 Decision 53403 of 2013, Claro Mobile Communications.

47 This hearing was introduced by Decree 19 of 2012, and it constitutes a novelty in administrative procedures.

The oral hearing is another example of the adoption of judicial institutions into administrative proceedings. In fact, the right of the parties in a judicial case to present their final submissions to the judge is one of the faces of the right of defence and is widely recognized in continental procedural law (criminal and civil). These final submissions constitute the opportunity to discuss the evidentiary material already collected and incorporated into the file, and must not be confused with hearings held in earlier stages of the process, which purpose is to collect such evidence or to hear or cross-examine witnesses.⁴⁸

Having heard all these statements, the Deputy issues a report on the merits of the case. This is a reasoned report as to the existence of the facts and the liability of each of the persons named in the statement of objections, along with the competition law theories supporting such findings. The Deputy himself may not close the investigation and must deliver a report in all cases. Thus, the report contains a recommendation on either closing the case or declaring the occurrence of an alleged infringement, case in which it also recommends the fines to be imposed and orders to be issued on the defendants.

48 The introduction of the oral hearing also reflects the influence of the European Commission's Best Practices Notice. But several remarks have been raised against the oral hearing conducted within the European Commission's administrative procedure on competition law, since it is not public and not held before the decision-maker. Also, the absence of an opportunity to cross-examine witnesses has been notably criticized. But it seems that these critics are originated in a misunderstanding of the nature and purpose of the oral hearing, caused for viewing it only through the lens of an adversarial common-law based trial. See: Anne MacGregor and Bodgan Gecic. *Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings*. Journal of European Competition Law & Practice. 2012, Vol. 3, No. 5.; Jaime Flattery. *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing*. The Competition Law Review. Volume 7, Issue 11, December 2010.

3.2. PROCEEDINGS BEFORE THE SUPERINTENDENT

With the delivery of its report, the Deputy finishes its statutory duties on the case and the Superintendent assumes competence to make the final decision. The Deputy's report is made available to the respondents and interested third parties, who have a 20-day period to file their rejoinders, as an additional exercise of their right of defence before the decision-maker.

In their rejoinders, each party has the opportunity to dispute all of the Deputy's conclusions. As a result, the meaning ascribed to the pieces of evidence and the legality of the collection can be challenged, and the existence of the facts under investigation and the participation of the accused may be disputed. Also, competition law theories applicable to the case are grounds to contest the report.

The Superintendent receives the file containing the case along with the rejoinders of the defendants and interested third parties, considers all of them and delivers a decision. Usually, it contains summaries of the procedure, of the Deputy's report and of the defence statements of the parties. It then moves to decide on the existence of the infringement, by expressing the economic and legal basis of the decision. If applicable, the decision also refers to the graduation of fines to be imposed, and indicates the desist orders directed to the perpetrators.

Prior to delivering its decision, the Superintendent hears the non-binding opinion of the Advisory Committee, a standing body comprised by five experts in business, economic or legal matters appointed by the President of the Republic.⁴⁹

Once the decision is delivered, the respondents are allowed to bring a request for reconsideration before the Superintendent, asking for the modification or revocation. To this effect, new evidence may be requested and collected under the Superintendent's

49 Article 25 of Decree 4886 of 2011.

own initiative, provided it appears to be necessary to deliver the reconsideration decision. Investigated parties are not allowed to request or submit new evidence in this stage.⁵⁰

Pursuant to the above, there is a clear division of functions between the Deputy and the Superintendent. The Deputy must carry out the investigation and deliver a supported report to the Superintendent, whom in turn, must evaluate the evidence and arguments of the defendants and the Deputy alike, and deliver the relevant decision. This separation aims to keep the boundaries between the investigation and the decision-making stages, to avoid potential biases from the officials who undertake the collection of evidence and to guarantee independence of the decision-maker. This independence has led to several cases in which the Superintendent has acquitted companies although the Deputy had previously recommended the imposition of a fine.⁵¹

By law, the final Decision is presumed valid, and the only way to rebut this presumption is by bringing a legal action before the administrative court to have it annulled. There is a four-month limitation period, within which such actions must be lodged, but even if the action is brought the decision is deemed valid until a judgment annuls it.

As the decision is regarded valid, the Authority is empowered to implement it directly. To this effect, it possesses powers to launch a collection procedure to obtain payment of the fine. The presumption of validity of the Decision and the ability to directly collect the fines are special features of the administrative activity

50 Reconsideration Decision 30 of 2012, Consorcio Vial Colombiano.

51 This separation has been recommended, among others, by the ICC. See: International Chamber of Commerce - Commission on Competition. *Recommended framework for international best practices in competition law enforcement proceedings*. Document No. 225/666 – 8 March 2010. Conversely, it has been mentioned that the European Commission combines the functions of investigator and decision-maker, although subject to judicial review. See. Koen Lenaerts. *Due process in competition cases*. *Neue Zeitschrift für Kartellrecht*, Vol. 1, No. 5, May 2013.

for the protection of the general welfare.

Having exposed the administrative procedure followed by the Authority, the following chapters address specific topics related to the due process and defence rights. The Authority's powers to order collection of confidential information and business secrets are assessed while recent related judgments are examined in further detail. Then, the privilege against self incrimination is considered and the inviolability of lawyer-client relationship is reviewed.

CHAPTER 3

CONFIDENTIAL INFORMATION AND BUSINESS SECRETS

This chapter considers two aspects of the protection of confidential information. The first aspect relates to the powers of the Authority to request secret or confidential information. The second is the access to the file and protection of confidential information contained therein

3.1. POWERS OF THE AUTHORITY TO REQUEST SECRET OR CONFIDENTIAL INFORMATION

The protection of business secrets and confidential information of companies under investigation has been a matter of debate, since it involves a conflict between two interests. On the one side there is the interest of all companies in keeping their private information confidential, a valid interest pursuant to the legal provisions that protect private documents and business secrets, defined mainly by commercial and procedural laws. On the other side, there is the power of the public authorities to demand and obtain all types of information, even if considered private, secret or confidential, for the exercise of statutory duties in discovering and fining cartels, and ultimately, the protection of the general good.

Article 15 of the Constitution deals with several issues related to the protection of privacy and private information. The first part of this provision refers to the fundamental right of personal and family privacy, setting forth that correspondence and other forms of private communications are inviolable, and can only be intercepted or recorded by judicial order, in cases and with the formalities prescribed by law.

This provision also deals with the previously mentioned conflict by stating that for tax and judicial purposes and for the State's duties of inspection, surveillance and intervention, submitting account books and other private documents may be ordered, as prescribed by law.

In this manner, the Constitution solves the conflict by favouring the administrative and judicial authorities, which can be statutorily empowered to request accounting books and private documents, regardless of their confidential nature. Also, it may be concluded that this provision refers only to information related to economic activities, conclusion that may be inferred from the fact that the provision refers to accounting books which are designed to keep accurate registries of financially relevant business information. Equally, in the case of data, documents and correspondence related to the personal, intimate or family related spheres of natural persons, the principle of inviolability applies. Thus, a prior judicial order for interception of this type of information is required.

Given that the Authority is organized as a superintendence, empowered to exercise inspection and surveillance for the application of competition law, it is authorized to require account books and private documents, including those considered confidential.⁵²

52 Article 3 of Decree 4886 of 2011 enlists the duties of the Superintendent, including in its section (6) the duty of surveillance of competition law in national markets, in respect of anybody that performs an economic activity or that might affect such performance, regardless of its legal nature.

Several statutory provisions further develop this constitutional rule:

- Pursuant to articles 60 and 61 of the Code of Commerce, commercial books and documents are classified and only can be examined by their owner and by duly authorized persons. However, they expressly indicate that officials from the public administration and the judiciary are allowed to order their submission and examination in a number of cases, including the exercise of surveillance duties.
- Article 27 of the Code of Administrative Procedure provides that the confidential nature of information or documents may not be opposed to administrative authorities legally empowered to request them for the proper exercise of their duties. However, these authorities must ensure the confidentiality of such information and documents is maintained.
- It must also be said that prior to the 1991 Constitution, Law 57 of 1985 regulated access to official documents (i.e. documents produced by public authorities). As per its article 20, the classified nature of an official document does not excuse its delivery when requested by another public authority, which in turn, must keep it under confidentiality.⁵³

In accordance with this framework, the Authority is empowered to practice on-site inspections during which it may collect all relevant evidence. Also, it is empowered to issue requests for information to individuals and corporations, for the production of data, reports, accounting books and commercial documents.⁵⁴

53 Although Law 57 of 1985 only refers to official documents, its article 20 has been wrongly quoted in cases of reserved documents of private individuals and corporations.

54 Sections 62 and 63 of article 1 Decree 4886 of 2011.

The addressee of such an order must comply with it, even if the information requested is legally defined as confidential or secret, as happens with industrial secrets, accounting books and private documents. If any of these types of information are requested, its holder may request the Authority to label it as confidential. The secret document along with its non-confidential summary must then be submitted, while the Authority must create a classified file for the former and an ordinary file for the latter.

In several occasions the Authority has imposed fines on companies that refused to supply information or documents requested during on-site inspections, arguing their confidential character. In the relevant decisions, the Authority recalled its powers to collect documents, even if regarded as confidential.⁵⁵ Such refusals were deemed as an obstruction to the on-site inspections, and were fined accordingly.

In line with the confidentiality duty, the Authority has also developed the practice of releasing a public, non-confidential version of its decisions, in which secret data is deleted. The original version of its decisions is only handed to its addressees.

On the other hand, there are several consequences for breaching the confidentiality or secrecy of classified documents and information. The use and disclosure of confidential information is criminally punishable, subject to penalties under the Criminal Code.⁵⁶ If the Authority's officials commit the breach, they are also subject to disciplinary sanctions as such breaches are specifically defined as a disciplinary offence under the Disciplinary Code, which regulates behaviour of public servants.⁵⁷

55 Decision 18023 of 2010, Apuestas en Línea. Decision 14372 of 2012 confirmed by Reconsideration Decision 38459 of 2012, Constructora Arkgo.

56 Article 194 of the Criminal Code.

57 Paragraph 1, article 15, Law 1340 of 2009.

Over the last few years, the Authority has been using an investigatory technique for on-site inspections, consisting in taking copies of hard disks drives and of information stored in business email accounts of employees of accused companies. This technique has opened a debate as to whether such information is confidential, and if a court order is required, given that this is a form of correspondence.

The Authority has recognized the fact that employees of a company normally use their business email accounts not only for company purposes, but also for sending and receiving personal messages. Thus, in these email accounts personal and company information may be found, it being clear that only personal mail is protected under the constitutional provision that requires a previous court order for its collection.

There is a case that deserves special comment. The Authority conducted two different proceedings involving the publicly-owned Water and Sewage Company of Bogotá, a utilities company whose premises were subject to an on-site inspection. During such inspection a number of senior officials' email accounts were copied, although the Authority allowed each email account holder to filter and exclude personal emails.

The Water and Sewage Company of Bogotá filed two separated judicial actions for the immediate protection of its fundamental rights in these administrative proceedings, each was decided by different chambers of the Superior Tribunal of Bogotá, with opposing results. The first judgment ruled that emails are a form of correspondence, and therefore may not be intercepted without previous court order. This decision was later clarified, in the sense that the court order is required only when no voluntary access to the emails is given to the Authority.⁵⁸ The second judgment

58 Judgment of the Superior Tribunal of Bogotá, Land Chamber, of 15 April 2013, clarified on 10 May 2013. Constitutional Action of Water and Sewage Company of Bogotá v The Authority, Case 2013-156.

was issued only a few days later, upholding the arguments of the Authority, stating that it is statutorily empowered to search and copy business emails, whereby no previous court order is required, since they do not contain personal information.⁵⁹

These judicial actions are provided for in the Political Constitution as a mechanism for defending fundamental rights, and the Constitutional Court (highest court in constitutional matters) is empowered to select judgments of lower courts and to review them. But the Constitutional Court did not select these two judgments for review, leaving the question of the need for a previous court order to inspect emails unanswered.

At this point, it must be added that pursuant to the Code of Commerce, merchants must keep copies of their correspondence, regardless of the transmission mechanism (paper-based or electronic-based). Correspondence is deemed as part of their accounting books and business records, and is therefore subject to inspection by the Authority. In fact, data messages are equivalent to written documents, provided that they may be accessed for future reference, and are legally admissible as evidentiary material, as they are regarded as documents.⁶⁰

In connection with the foregoing, the Supreme Court ruled that emails transmitted through corporate accounts are not regarded as private correspondence, given that the main purpose of these accounts is the transmission of information and data messages related to the ordinary activities of the company. These emails have legal value as evidence admissible in court proceedings.⁶¹

59 Judgment of the Superior Tribunal of Bogotá, Civil Chamber, of 30 April 2013. Constitutional Action of Water and Sewage Company of Bogota v The Authority, Case 2013-084.

60 Articles 6 and 10 of Law 527 of 1999, which refers to data messages and electronic commerce.

61 Judgment of the Supreme Court, Civil Chamber, of 24 September 2007. Case 23001.

3.2. ACCESS TO THE FILE AND PROTECTION OF CONFIDENTIAL INFORMATION CONTAINED THEREIN

The Political Constitution provides that everyone has the right to access public documents, except in cases restricted by law.⁶² In developing this constitutional provision, the Code of Administrative Procedure sets the principle of transparency, pursuant to which, everyone is entitled to obtain knowledge of the files pertaining administrative activity, save express legal exceptions.⁶³

Accordingly, this Code allows all individuals to obtain copies of documents recorded in public offices. However, it defines certain documents as classified or secret, which are not to be released to the public, namely: (i) Business and industrial secrets, (ii) documents related to national security and defence, (iii) documents covered by professional secrecy, (iv) documents involving privacy rights of individuals, such as medical or employment records, and (v) documents relating to the financial aspects of the State's public debt.

Law 57 of 1985 defined the procedure for taking to the judiciary administrative decisions rejecting access to documents based on their classified nature. This procedure has now been incorporated in the new Code of Administrative Procedure, effective as of 2012. Pursuant to it, the public authority's decision must mention the relevant statute that defines the requested documents as classified. In case the petitioner insists in its application, the public authority must send the case to the administrative court for a final decision. This judicial procedure has been used in several occasions and the judgments delivered therein have clarified the issue of access to the file in Authority's proceedings.

Article 12 Law 155 of 1959 (the first piece of legislation dealing with anticompetitive practices in Colombia), defined the classified nature of the investigations conducted by the Authority.

62 Article 74 of the Political Constitution.

63 Section 8, Article 3 of the Code of Administrative Procedure.

This Law has been subject to several derogations and modifications, including its procedural rules, which were replaced almost entirely by Decree 2153 of 1992, leaving doubts as to whether the classified provision remained in force. The Courts' rulings on this issue may be summarized as follows:

During the preliminary inquiry, the Authority's files are classified and no access is granted to any individual or corporation. During this stage no parties have been officially accused, and therefore no one is entitled to exercise rights of defence. This reasoning applies even to those who are deemed as suspects of an alleged infringement.⁶⁴

Once the investigation is formally opened and the statement of objections is released, the parties under investigation are identified and allowed to defend themselves from the accusation. Therefore, they are authorized to access the file, which means its physical review and taking of copies (photocopies or electronic copies) in order to acquire knowledge of the evidence pursuant to which they are accused and to contest it or to request additional evidence. The Courts have consistently held that proper access to the file is essential for the right of defence, highlighting that no accusation may be based on secret files.⁶⁵

The defendant is allowed to obtain copies of all files, regardless of the source of the information or documents contained therein. It may consist of information in the public domain, or information obtained from the investigated parties themselves, or even from third parties, stored in ordinary and classified files alike.

64 Access to the file is a matter of debate in several jurisdictions. For a review of this subject-matter in the European Union context see: Gaetane Goddin, *Access to Documents in Competition Files: Where do we Stand, Two Years after TGI?* *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 2.

65 See the following judgments of the Administrative Tribunal of Cundinamarca: Judgment of 19 July 2007 *Bavaria v the Authority*, Case 2007-0198; Judgment of 27 April 1999, *Sociedad Agroindustrial UVE v the Authority*, Case 1999- 0241; Judgment of 14 April 1999, *FCB Publicidad et al v the Authority*, Case 990240.

However, in a recent decision of the Authority, confirmed by the Administrative Court, the defendants were not granted access to a classified file, which contained secret information of several companies which were not under investigation. In this event, the access is granted to the public version prepared by the owner of the classified information, although the procedure available to the parties to confirm that such public version corresponds to the secret documents it is not yet clear.⁶⁶

Upon accessing classified files, the accused is bound to maintain such information secret, not revealing it to any other individual, adopting reasonable measures to protect it, and to use it only for defence purposes against the accusation. This last aspect means that the accused is not allowed to exploit any business secret or any other classified information to which he has been given access, because that use would not be considered as part of the defence and would be regarded as unauthorized use, making him civil and criminally liable.

Interested third parties are granted access to the ordinary files, but not to files labelled as classified, since they are under no accusation and have no right of defence. In the case of members of the general public, including complainants not admitted as interested third parties, access is only granted the public files of the investigation.⁶⁷

Finally, it must be mentioned that obtaining copies of the file follows a time-consuming procedure, since the investigated party must file a written request, and bear the cost of the copies as

66 Supplementary Statement of Objections 15294 of 2013, delivered in the Sugar Producers (II) case, and the judgment of the Administrative Tribunal of Cundinamarca quoted therein.

67 See the following judgments delivered by the Administrative Tribunal of Cundinamarca in insolvency actions brought against the Authority: Judgment of 17 July 2003, plaintiff Cable Unión de Occidente, case 2003-00547; Judgment of 15 June 2004, plaintiff Hugo Velandia, case 2004-1215; Judgment of 1 October 2009, plaintiff British American Tobacco, case 2009-00335.

defined by the Authority. Given that all investigated parties are interested in getting copies of the file, it seems advisable that the Authority provides, at its own initiative, electronic copies of the files (in CD or DVD) to the parties, following service of the statement of objections.

CHAPTER 4

SELF INCRIMINATION AND PROFESSIONAL SECRECY PRIVILEGES

4.1. PRIVILEGE AGAINST SELF-INCRIMINATION

As explained, the Authority is empowered to collect documents and take testimonies from the respondents when conducting its proceedings against anticompetitive practices. Thus, the fining decision may well be based on evidence collected from the accused itself. This situation has raised questions as to the applicability of the privilege against self-incrimination, and the ability of the parties under investigation to refuse supplying incriminatory evidence or testimonies.

Article 33 of the Political Constitution provides for the privilege against self-incrimination, stating that no one may be compelled to testify against himself or his spouse, life partner or closest relatives. This privilege prohibits the exercise of coercion on witnesses to make them accept the commission of a crime, or to inculcate their closest relatives from committing a crime.

This privilege underscores the fact that testimonies must be given in a free and voluntary manner, otherwise they are invalid. The use of force to compel the acceptance of a crime vitiates the testimony, rendering it null as evidence. It is a development of the right to due process, applicable to administrative and judicial proceedings alike, provided for in article 29 of the Constitution.

The Constitutional Court has constantly held that this privi-

lege only applies to criminal and police matters, which are the gravest means of punishment for wrongdoings in a society. This interpretation has stemmed from historical analysis of the development of such privilege in the different constitutions adopted in Colombia during the nineteenth century, and the comprehensive assessment of its constitutional meaning.⁶⁸

This privilege does not apply to civil proceedings, within which the taking of witness testimonies and parties' sworn depositions is permitted, even if they are asked about facts that lead to an acceptance of liability. In this way, the deposing party may be driven to confess. That is, the acceptance of personal facts and which entail either an adverse consequence for him, or favour the other party.

The reasons in support of the confession in civil procedures are the duties of good faith and loyalty, which are binding upon the parties. That is, the parties are to collaborate with the main purpose of the proceedings, which is finding the truth. For these reasons, the parties giving a deposition must answer truthfully, even if this implies acceptance of liability, which means that this duty renders inadmissible any form of deceits or intents to conceal the truth.

The Criminal Code provides prison sentences in cases of perjury (false testimony) to be imposed to everyone who fails to tell the truth or conceals a part of it, when deposing under oath in administrative or judicial proceedings.⁶⁹

When taking depositions from witnesses and parties under investigation, the Authority must apply the requirement set forth in the Code of Civil Procedure for this type of evidence. Therefore, such testimonies must be given under oath, and the deposing par-

68 Such historical analysis is found in several Judgments of the Constitutional Court. See Judgments C-258 of 2011, C-559 of 2009 and C-426 of 1997.

69 Article 442 of the Criminal Code.

ty may be driven to confess its participation in anticompetitive conducts. In practice, several cases have been solved with this type of evidence, along with all other means of evidence and economic analysis.

Also, the Code of Civil Procedure attaches procedural consequences when a party fails to attend a testimonial hearing, fails to answer assertive questions, or gives evasive answers. Pursuant to them, the Authority considered the failure of an indicted individual to attend a summoning for deposition as a circumstantial evidence of the infraction.⁷⁰

In case that any of the questions of the Authority are related to facts considered as crimes, the deposing party is excused from answering, but if the party chooses to answer, its response is not under oath. This provision is important in bid rigging in public sector procurement, since this behaviour is also punished as a crime with the passage of Law 1437 of 2012.⁷¹ For this reason, defendants summoned to give a deposition must be assisted by a lawyer, to control whether any question involves criminal liability.

As a result of the above, privilege against self-incrimination does not apply in administrative proceedings aimed at investigating anticompetitive practices. The Authority is empowered to use as means of evidence to prove these practices, documents and testimonies of employees of the company under investigation as well as confessions from its officers.⁷² All of this stems from the fact that the legislator decided that the Authority's proceedings are of an administrative nature and its evidence is collected pur-

70 Articles 204 and 205 of the General Code of Procedure. See Decision 11651 of 2012, Fendipetroleo.

71 Article 27 of Law 1474 of 2011.

72 This point differs from the European Commission's procedure. Among others, see: Javier Ruiz Calzado and Gianni De Stefano. *Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements*. In: *Constitutionalising the EU Judicial System*, Essays in Honour of Pernilla Lindh.

suant to civil procedural rules, in which such a privilege against self-incrimination does not apply.⁷³ In addition, the incriminatory character of a document may not be claimed to refuse answering a request for information made by the Authority.

4.2. PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE

This area relates to the secrecy which covers the client - lawyer relationship. The protection of this secrecy comes from the Constitution itself, which provides that professional secret is inviolable.⁷⁴ Analyzing this provision, the Constitutional Court has mentioned that in a client-lawyer relationship, a client discloses its private facts and data, pursuant to the trust on which such relationship is based. Professional secrecy aims to enhance public confidence in the legal profession and the proper development of social activities, for this reason it imposes a full duty on keeping such private facts and data under secret, along with professional counselling given by a lawyer.⁷⁵

It must be noted that the Constitution provides for the inviolability of professional secrecy, without exempting any administrative or judicial authorities from abiding by it. Also, the expression “inviolable” is strong enough to avoid any doubt as to the extension of this right. Therefore, no action from any sort of authorities may reduce or affect professional secrecy.

A clear manner in which this right is materialised is through the exception of the duty of testifying. As a general rule, every person has the duty of deposing its testimony when asked by a competent judicial or administrative authority. However, lawyers are exempted from this duty pursuant to professional secrecy

73 See Decisions: 58408 of 2009 Colanta; Decision 54693 de 2013 Grupo Nule Bienestarina; Decision 30226 of 2004 Brick Producers.

74 Article 74 of the Political Constitution.

75 Constitutional Court, Judgments C-032 of 1998, C-411 of 1993, T-073A of 1996.

(privilege), which means they may not be summoned to give testimony as to the facts under investigation if they are known through a client-lawyer relationship.⁷⁶ Also, the Law on disciplinary offences of lawyers makes the violation of professional secrecy one of such offences, punishable thereunder.⁷⁷

Despite these legal provisions, the Authority only recognizes the secrecy to communication with external lawyers, but not with in-house counsels. This stance follows the one adopted by the European Commission, which considers that an in-house lawyer is not independent from his employer, as he needs to take its commercial strategies into account, and for this reason the privilege is only granted to external lawyers.⁷⁸

However, this approach deprives the investigated company of the right of being advised and even defended by its own in-house counsel, forcing it to hire external lawyers, thereby interfering with its own administration. No distinction should be made regarding external lawyers or in-house counsel. Both of them exercise the legal profession, are equally bound by the Law on disciplinary offences of lawyers and by the duty of secrecy. Therefore, documents and memoranda produced by either in-house counsels or external lawyers (regardless of their physical or electronic support) should not be collected or incorporated into the case file.

According to the foregoing, it is advisable for the Authority to observe the secrecy of in-house counsel communication, which means that when conducting on-site inspections, the Authority should not be allowed to see or take copies of physical or elec-

76 Articles 208 and 209 of the General Code of Procedure

77 Law 1123 of 2007.

78 See: Luis Pais Antunes. *Just Another Brick in the Wall: Communications with In-house Lawyers Remain Unprotected by Legal Privilege at the European Union Level*. *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 1; Julia Holtz. *Legal Professional Privilege in Europe: a Missed Policy Opportunity*. *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 5.

tronic documents of requests of legal advice sent to lawyers and/or legal counsel given by them as a reply, whether they consist of final advice or preparatory memoranda, drafts of contracts or agreements. Also, when searching officer's email accounts, holders must be permitted to filter emails from internal lawyers.

CHAPTER 5 FINES ON INDIVIDUALS

One important feature of Colombian competition law is that it provides fines not only on infringing companies but also on its officers and directors. This provision has been used extensively by the Authority, which in almost all investigations prosecutes company directors. Fining individuals is viewed as a strategy to increase deterrence, by directly punishing the authors of the infringement. In this chapter, the statutory provisions on fines for individuals are considered, the Authority's development of an automatic liability on investigated companies' general managers is reviewed and the shortcomings of such stance are highlighted.

The fining regime for individuals was initially regulated under Decree 2153 of 1992, and was reformed by Law 1340 of 2009, by increasing the applicable fines and adding modes of conduct for imposing the fines. The applicable fines are of an economic nature, that is to say, a payable sum of money. No prison sentences apply, since imprisonment pertains exclusively to criminal matters and is inadmissible in administrative proceedings. Other types of sanctions, such as disqualification or removal from office, are not foreseen in the law. The legislation defines an upper limit of fine, so the Authority graduates in each case the applicable fine, according to the fining criteria in force.

In the 1992 version of the fining provisions, there was a non-exhaustive list of individuals who could be fined, such as administrators, directors, officers and fiscal auditors. Following the

2009 reform, such list was eliminated and nowadays the statute provides for fines on every individual who by incurring in any of the legally defined conducts, participates in the infringement.

These conducts are expressed as verbs such as: performing, authorizing or tolerating the practice. The 2009 reform added two verbs, facilitating and collaborating. Therefore, in order to impose a fine, the Authority must produce enough evidence to demonstrate that an individual incurred, at least, in one of these five conducts, all of which are wide enough to cover nearly all forms of behaviour.

a. Officers during the preliminary inquiry

Pursuant to Colombian companies' law, the individual appointed to manage the company's business is known as its "legal representative", using the expression "legal" as a reference to the statutory source of its duties of representative, which authorizes him to execute and sign all types of agreements on behalf of the company.

In Colombia, the existence and representation of companies must be registered before the Chamber of Commerce of the place of incorporation, and are evidenced pursuant to a public certificate issued by such chamber. Therefore, the identification of the legal representative of a company (i.e. highest officer, often called president or general manager) is demonstrated with such certificate, which also states the dates in which the officer assumes and retires from office.

During the preliminary inquiry, the standard practice of the Authority is to obtain a certificate of existence and representation for each investigated company, and to indict the individual registered as its legal representative in the statement of objections. However, this conclusion does not come from any inquiry into the individual's behaviour, but originates only in the fact of

being the company's general manager. When opening the investigation, the Authority applies a sort of automatic accusation, pursuant to which, the anticompetitive practice entails two investigations, one for the infringing company and other for its highest officer.

The statement of objections is devoted in its entirety to presenting the case against the alleged infringing company, by defining with high degree of precision the facts, supporting evidence and legal provision infringed. After doing so, the legal representatives of the accused companies are charged as suspected perpetrators, without identifying the facts and supporting evidence of such accusations.

In several cases, this automatic accusation has been based on a provision in the Code of Commerce, which makes the company's officers liable from damages caused to the company intentionally or by negligence, adding that in cases of breach of law or statutory duties, the officer's negligence is presumed. By misconstruing this legal provision, the Authority has considered that a breach of law committed by the company implies automatic liability of its officers.⁷⁹ Only in very recent statements of objections, the Deputy has named specific officers as defendants, based on evidence of their participation in the infringement, so it remains to be seen whether this methodology becomes the new applicable pattern.⁸⁰

79 The relevant provision is Article 200 of the Commercial Code. See Deputy's Decision 8254 of 2012, opening investigation and statement of objection against EBSA; Deputy's Decision 4359 de 2012, opening investigation and statement of objections against Gases Occidente. Also, see Final Decision 4907 of 2013, Gases Occidente.

80 Statement of Objections 69518 of 2014 (toilet paper cartel); Statement of Objections 47965 of 2014 (diapers cartel); Supplementary Statement of Objections 15294 of 2013 (sugar cartel).

b. Officers in the investigation and the final decision

This standard procedure means that no preliminary inquiry is carried out in respect of individuals, as they are investigated without any evidence which confirms their participation in the infringement, in any of the legally defined modes of conduct. This practice might contradict the required standard of evidence of the statement of objections, and the issue has been raised in multiple cases.⁸¹

This standard procedure has produced different outcomes, namely:

- *Proven liability*: In some instances, the investigation is able to gather enough evidence to confirm the officer's participation in the anticompetitive practice, in a way that corresponds to one or several of the modes of conducts foreseen by law. For example, an officer who participates in a price-fixing meeting with competitors is liable for performing the infringement. But if the president of a certain company authorizes its vice president to attend the meeting, the former is liable for authorizing and the latter for performing the infringement. Also, if the vice president attends the meeting without previous knowledge of the president, but afterwards informs him about the results, and the president does not oppose to such infringement, the latter will be liable for tolerating it.
- *Presumed liability*. In certain Decisions, the Authority has stated that the general manager of a company is under the duty of diligence, being responsible for having knowledge of, and directing the company's activities. Therefore, under such a capacity a company president has been found liable either

81 An individual fined by the Authority raised this point in its request for reconsideration. However, in the reconsideration Decision the Authority did not accept it. Reconsideration Decision 68967 of 2013, Nule Hogares.

for performing, authorizing or even for tolerating an infringement. This is a form of presumed liability, which legality raises doubts and which has not been applied in recent years.⁸²

- *Acquittals*: In other events, the Authority has acquitted an indicted officer from the charges given the absence of evidence. This outcome shows that the Authority failed to meet the burden of proof in the preliminary inquiry, suggesting that the accusation was ill founded and that there was no reason for indicting the officer.⁸³ In certain events, this occurred because the relevant individual was not even holding office when the infringement took place.⁸⁴
- *Evidence of infringing individuals not under investigation*: Finally, there have been some cases in which the Authority has found evidence of infringing individuals who were not called to the investigation. Only until recently they have indicted by means of a supplementary statement of objections,⁸⁵ although in the past they had been left out of the investigations. For example, in a notable case in the cement industry, the final decision clearly states the name of a vice-president of one of the infringing companies who framed a plan to allocate markets

82 This sort of presumed liability was applied in: Decisions 7951 of 2002, 7950 of 2002 and 8027 of 2002, referred to Gas Stations; Decision 2485 of 2002, Satena; Decision 25420 of 2002, Adiconar; Decision 25402 of 2002, Maritime Agencies; Decision 8328 of 2002, EPM.

83 In several cases, the Authority decided not to impose any fine on the general manager of the investigated company, given the lack of evidence of their involvement in the infringement. See: Decision 4907 of 2013, Gases Occidente; Decision 6839 of 2010, Sugar Producers, in respect of several (not all) of the individuals indicted; Decision 29631 of 2008, Mobile telephony operators; Decision 22624 of 2004, Cadbury Adams, when not evidence was found in respect of members of the board's liability; Decision 29302, Andevip.

84 Decision 53992 of 2012, Water and Sewage Company of Bogota; Decision 4946 of 2009, Chocolate Producers; Decision 27759 of 1999, Real state agencies.

85 Decision 15294 of 2013, indicting a number of officers from the investigated companies.

and presented it in a covert meeting with competitors. This individual, who was liable for performing and facilitating the agreement was neither investigated nor fined, despite the existence of full evidence against him.⁸⁶ In a sugar cartel case, the final decision clearly mentions that the files contained evidence of several officers involved in price fixing and market allocation infringements, although they were not prosecuted.⁸⁷

These cases exemplify the main problem that this standard procedure is creating, which is under-enforcement. By automatically accusing the president or general manager of the company (registered as legal representative), the Authority is not prosecuting the actual authors of the infringements, a result that seriously undermines deterrence. The individual who conceives the anti-competitive plan and sets it into motion does not need to hold the highest position within the company. In large corporations, second and third-rank officers may enjoy a great deal of autonomy in performing their duties and engage in anticompetitive practices. In a few cases, the Authority has come to the conclusion that the general manager of a company only possesses general knowledge of the way in which company's businesses are conducted, while its employees are the ones who are actually orchestrating anticompetitive behaviours. Hence, these employees should be the targets of the investigations.

Thus, it is proposed that a full preliminary inquiry should be carried out in respect of the officers to be accused, with the view of gathering evidence of its involvement in the infringement and meeting the burden of proof. The statement of objections must define the modes of conduct under which the officers are being accused and define the evidence supporting the accusation.

86 Decision 51694 of 2008, Cement Producers.

87 Decision 6839 of 2010, Sugar Producers.

CHAPTER 6 JUDICIAL REVIEW

Public Administration in Colombia is bound by the rule of law. This makes its decisions subject to judicial review in order to assure the proper application of law and the respect of individuals' rights. To such ends, administrative actions and decisions are subject to administrative law, considered as a specific body of law, which differs from civil law and is applicable to all citizens.

Also, the public administration does not appear before ordinary judges, since its affairs are decided by specialized courts, the so-called administrative courts, which are an individualized and hierarchically organized branch within the judiciary. In this chapter, the adversarial nature of judicial review and its consequences are noted, a summary of relevant rulings in procedural and substantive competition law is introduced in order to highlight the importance of this mechanism, and conclusions are drawn with regard to its current application and expected results.

6.1. The Purpose of Judicial Review.

Administrative courts hear controversies between individuals and public authorities, including disputes related to the legality of administrative decisions. If following a trial it is demonstrated that the contested decision is not in conformity with the applicable legal provisions, either on substantial or procedural grounds, the court can declare it null and void, meaning that it no longer produces any effect.

This form of judicial review is not automatic and is not an appeal, since the judiciary does not review the case to produce a new decision on its merits. It is instead a legal action before the judiciary, seeking the annulment of an administrative decision which validity is contested and therefore, the judgment is a

limited ruling on whether the administrative decision is valid or null. The consequences of this form of control are very serious: If the contested decision is annulled, the Authority loses all the proceedings and the resources devoted to its production.

Among the several legal actions provided for under the Code of Administrative Procedure, the action for annulment and restitution of rights is the one that can be used to effectively control the Authority's actions. The causes for annulment of an administrative decision are: (i) errors in law, (ii) factual mistakes, (iii) lack of jurisdiction, (iv) irregular procedures, (v) violation of the right of defence or of the right to be heard, and (vi) misuse of powers.⁸⁸

Legal standing to apply for judicial review is granted to the party aggrieved by the contested decision, that is to say, the fined individuals or companies, who assume the position of plaintiffs by suing the Authority, who is the defendant at trial. The case is handled by the Administrative Tribunal, whose decision may be appealed by either party before the Council of State (highest administrative court). But if the contested fines are below than the statutory threshold, the first instance is decided by an administrative judge while the second instance goes to the Administrative Tribunal.⁸⁹

The judgment provides for the annulment of the contested decision (and the reconsideration decisions, if such were the case), and the mechanism to restoring the plaintiff's rights, which include the order not to pay the imposed fine, or the order to the Authority to reimburse any paid penalties, plus the accrued interests. As a new restoring instrument, the courts are authorized to issue new provisions replacing those accused of nullity, or to modify

88 Article 137 of the Code of Administrative Procedure.

89 This threshold corresponds to 300 minimum legal monthly wages.

or reform them.⁹⁰ Under such power, the court may reduce the amount of fines imposed by the Authority, if viewed as excessive according to the nature and extension of the infringement. This however has not happened yet.

Plaintiffs may also claim payment of damages suffered as a consequence of the contested decision (provided it is nullified). The judiciary has recognized the fact that the Authority's annulled decision may cause unjust damages to a plaintiff; however, it has not ordered any of such payments for lack of sufficient evidence proving that the annulled decision was an actual and direct source of claimed damages.⁹¹ The judgment also provides for costs of the judicial procedure, which are to be borne by the defeated party, pursuant to the rules of civil procedure.⁹²

As previously mentioned, during the administrative proceedings the burden of proof rests on the Authority. Once it has reached the final decision following the statutory procedure, its decision is presumed valid by virtue of law, and the facts mentioned therein are deemed as true and correct.

Therefore, at trial it is the plaintiff's duty to rebut that presumption, by invoking one or several grounds on which the actions for annulment may be based. Each plea submitted by the plaintiff must state the breached applicable statutory provisions along with the reasons and explanations of the alleged breach. The mere indication of broken rules is not enough to meet this requirement.

If the plaintiff disagrees with the proven facts of the contested decisions, he must expressly oppose them by pleading a mistake of facts and submit or request the collection of evidence during

90 Article 187 of the Code of Administrative Procedure.

91 Council of State, First Chamber. Judgment of 23 may 2013, *Induga v the Authority*. Case 2001-01029.

92 Article 188 of the Code of Administrative Procedure.

the trial, to demonstrate they are not true. Additionally, when adducing errors in calculations or analysis, the plaintiff must signal and explain each one of them. These requirements originate in the adversarial nature of the administrative justice, where the judge only responds to expressly stated plaintiff's claims by ruling in favor of the prevailing party. Thus, if a given issue is not properly raised by the plaintiff, the judge may not rule on it, and he is not allowed to produce or complement plaintiff's claims.

The first cases heard by administrative courts only involved errors of law, so the debate was confined to the parties' views as to the scope of application and interpretation of statutory provisions. In those cases, the court delivered its decisions by stating a number of legal reasoning and conclusions, favouring the stance of the prevailing party.

But in a recent case, the plaintiff proved mistakes of facts, by challenging the correctness of facts adduced in the contested decision with new evidence collected during the trial, such as testimonies and experts' reports.⁹³

Plaintiffs usually submit extensive lists of pleas under several of the causes for annulment, but the courts usually classify them in chapters and consider each one separately. In doing so, the court first defines the applicable law and the way in which it should be construed, and then analyzes the relevant parts of the contested decision. In practical terms, this means that all aspects of the Authority's proceedings and decisions can be challenged before the judiciary, provided that they are duly raised and explained.

One serious shortfall of judicial review is the excessive delay of court procedures. Given the high number of cases and the wide variety of legal issues to be decided by administrative courts, each judgment takes several years to be delivered. One of the purpo-

93 See the Judgment in *Induga v the Authority*.

ses of enacting the new Code of Administrative Procedure was to reduce the number of cases before the judiciary, but its success in reducing litigation remains to be seen.

6.2. JUDICIAL PRECEDENTS SET BY THE ADMINISTRATIVE COURTS

Given the novel application of competition law in Colombia, the number of cases decided by the administrative courts is relatively small. These rulings have defined multiple precedents, which are grouped in the following categories:

a. Rulings related to administrative procedures.

The Council of State has issued several rulings regarding the procedural aspects of the Authority's administrative proceedings, to wit: the preliminary inquiry is an informal stage, not compulsory and could be omitted in those cases in which the Authority possesses the required information to deliver the statement of objections (*Colanta*).⁹⁴ The expiration of the Authority's powers is counted until the service of the Authority's final decision and its reconsideration (*Holcim*).⁹⁵ The Authority is empowered to impose fines for non-compliance with its orders requesting documents, even if they are considered as classified, and to perform on-site inspections (*Gillete*).⁹⁶ Circumstantial evidence is admitted to prove undercover facts (*Cadbury Adams*)⁹⁷ or parallel conducts

94 Council of State, First Chamber. Judgment of 23 January 2003. *Colanta v the Authority*. Case 2000-0665.

95 Administrative Tribunal of Cundinamarca. Judgment of 10 December 2012. *Holcim v the Authority*. Case 2010-00305.

96 Council of State, First Section. Judgment of 17 May 2002. *Gillette de Colombia v the Authority*. Case 1999-0799.

97 Administrative Tribunal of Cundinamarca. Judgment of 4 March 2010. *Cadbury Adams v the Authority*. Case 2006-00790.

(*Procearroz*) provided the relevant facts are duly proven and integrally evaluated.⁹⁸

Several judgments have dealt with claimed infringements of due process rights, but the courts have rejected them after concluding that the administrative proceedings conducted by Authority applied the special procedural rules of Decree 2153 of 1992, which in turn have been found in conformity with the constitutional requirements on due process.

b. Rulings related to substantive issues of competition law.

A number of administrative court's rulings have reached conclusions on substantive aspects of competition law, namely: intentionality is not required when proving anticompetitive agreements, as they are banned if their object or effects is to restrain competition (*Andevip*).⁹⁹ The assessment of restraints by object does not require an analysis of their effects in the relevant market (*Andevip*). Compliance with a public authority's recommendations is not an excuse for breaching competition law (*Andevip*). Market shares are not the single but the most important factor to be considered when finding dominance (*Cadbury Adams*). Business customs are not an excuse for breaching competition law, since they are only admitted as a source of law in private cases as long as they do not oppose to statutory law (*Real state agencies*).¹⁰⁰

98 Administrative Tribunal of Tolima. Judgement of 22 January 2010. *Procearroz et al v the Authority*. Case 2008-00006.

99 Council of State, First Chamber. Judgment of 28 January 2010. *Andevip et al v the Authority*. Case 2001-00364.

100 Council of State, First Chamber. Judgment of 22 November 2002. *Caceres Ferro v the Authority*. Case 2000-0563.

c. Primacy of literal approach over economic analysis.

In a number of cases plaintiffs have challenged before the courts the way in which the Authority applied certain statutory provision, demanding a more economic-oriented analysis. Until now, the administrative courts have applied a literal approach of statutory competition rules, without adventuring to apply economic-based approaches.

This has occurred in cases concerning to the application of certain local prohibitions of unilateral anticompetitive behaviours by non-dominant undertakings, in which the courts developed doctrine on the literal meaning of the provision while refusing to explore its economic rationale (*Medidores Tavira* and *Casa Luker*).¹⁰¹

This also happened in a predatory pricing case, in which the court rejected the plaintiff's claim calling for the use of incremental costs when finding predation. Instead, the court upheld the Authority's decision, built upon total average costs, arguing that the relevant statutory provision refers to "prices below costs" and therefore, no other concept of costs is to be applied (*Cadbury Adams*).

d. Rules on judicial procedure.

Administrative courts have wide expertise in managing the rules of judicial procedure. Several of their judgments have clarified the application of such rules when challenging authority's decisions. The most important rule is that the plaintiff, according with its pleas of law, facts, and the supporting evidence, defines the extent of the judicial review. Therefore, the judge does not consider points of law or facts not expressly raised by the plaintiff.

101 Council of State, First Chamber. Judgment of 19 November 2009. *Casa Luker et al v the Authority*. Case 2001-01261.

Council of State, First Chamber. Judgment of 9 October 2003. *Medidores Tavira v the Authority*. 2000-00657.

Facts mentioned in the contested decision are considered true and correct, unless challenged by plaintiff by filing evidence and requesting the collection of new means of evidence (*Colanta, Procearroz*). Experts' reports and qualified witnesses are admissible as means of evidence in judicial proceedings, to contest the facts upon which the decisions are based (*Induga*). The Authority is in its turn allowed to request the production of additional evidence to rebut the finding of expert's reports produced as per plaintiff's request (*Induga*). Confessions by plaintiffs' attorneys are admitted (*Andevip*).

In cases in which facts are not contested, the debate will be confined to the plaintiff's arguments. If the Authority prevails, the judgment largely restates the arguments of the contested decision (*Procearroz, Gas Stations*).¹⁰²

e. Controversial rulings

Before the enactment of Law 1340 of 2009, the Financial Supervisor was empowered to investigate and impose fines on anticompetitive agreements of banks and other financial and insurance companies. At that time, the Authority (Superintendence of Industry and Trade) lacked jurisdiction to conduct investigations for anticompetitive practices on financial companies. In spite of the above, the Authority opened an investigation on the interchange fee charged in payment card transactions, while all banks offered commitments to have such investigation closed which were wrongly made binding by the Authority.

Afterwards, the Financial Supervisor filed a petition before the Council of State, requesting a declaration of lack of jurisdiction of the Authority in that case. However, the Council of State confirmed the Authority's jurisdiction, based on the controversial

102 Council of State, First Chamber. Judgment of 30 November 2006. Rafael Ortiz (gas stations) v the Authority. Case 2002-00678.

argument that the banks had voluntarily offered commitments, and that such offerings had vested jurisdiction on the Authority, disregarding the principle of legality, pursuant to which the duties of public authorities are expressly set forth in written statutes issued by Congress.¹⁰³

Several decisions were issued by the Authority in that investigation, which were taken to the administrative courts. Unfortunately, the ensuing judgments did not correct the Authority's lack of jurisdiction and instead upheld its decisions.¹⁰⁴

6.3. CONCLUSIONS ON JUDICIAL REVIEW

Having outlined the main features and achievements of judicial review, the following conclusions can be drawn. The majority of the Authority's challenged decisions have been upheld by the judiciary, which confirms that administrative proceedings on competition law have been carried out guaranteeing rights to due process and in compliance of applicable substantive laws. Also, multiple precedents have been established, showing the importance of the judiciary in creating rules of law.

The Authority must prepare and be ready to defend its decisions as any other litigator in court. Once the administrative action has finished, the Authority no longer has procedural powers, and before the court, stands on equal footing as the plaintiff. During the trial, parties are allowed to request and file new evidence to support pleas of law and facts, and the judgment will favour the party prevailing before the court.

103 Council of State, Consult and Civil Service Chamber, Ruling of 5 March 2008, Case 2008-00007; and Ruling of 15 April 2010, Case 2010-00018.

104 Council of State, First Chamber. Judgment of 23 August 2012. *Credibanco v the Authority*. Case 2007-00202; Administrative Tribunal of Cundinamarca. Judgment of 7 July 2011. *Bancolombia v the Authority*. Case 2008-00137.

The extent of the ruling depends on the extent of the plaintiff's pleas and evidence, given the adversarial nature of administrative justice. Therefore, plaintiffs should be aware when filing their lawsuits, since the courts will not consider points not timely raised.

Judicial review of competition decisions is in its initial stage, and the courts have applied a literal approach to substantive competition rules. In the future, more economic analysis should be implemented, in order to obtain a proper application of certain local substantial rules.

CONCLUDING REMARKS

This paper has sought to explain the main features of the Colombian Competition Authority's proceedings for enforcement of competition law, highlighting three important elements: the existence of a constitutional framework safeguarding individual liberties, the protection of competition as a State duty for the general welfare, and the incorporation of judicial-originated institutions into the administrative activity.

To fulfil the State's duties in the defence of competition, and as a part of a wider economic policy, Congress has appointed a specific administrative authority which follows its own procedures in investigating and punishing anticompetitive practices. The Authority does not need to appear before the courts to exercise its statutory duties as it is empowered to discover covert offences, to summon defendants to the proceedings, to order the production of evidence and to reach decisions fining offenders.

These powers are bestowed to successfully prosecute cartels and other anticompetitive behaviours and they reflect the special position at which the Authority is placed for the protection of the general welfare. The Authority's procedure is organized in three different stages, each with its own features and purposes. The preliminary inquiry is a unilateral phase, in which the Authority acts

undercover and by surprise to collect evidence regarding secret infringements. Nonetheless, the Authority needs to implement mechanisms to allow addressees to control the validity and reasonability of orders of inspection and requests of information.

The second stage begins with the statement of objections, a figure imported from criminal procedures which defines the extent of the debate and the content of the final decision. In this stage there is no secrecy, since the defendant is granted access to the file, and allowed to controvert all means of evidence gathered in the preliminary inquiry, including cross-examination of witnesses to challenge their validity or the meaning ascribed to them. This is the way in which the secret nature of the preliminary inquiry is overcome.

The separation of duties between the Deputy and the Superintendent is the manner in which the investigative and decision-making functions are separated, as to avoid biases and guarantee independence of the decision maker. In fact, in several instances the Superintendent has decided in favour of the accused party, rejecting certain Deputy's fining recommendations.

The existence of these three stages shows that the Authority may not fine an anticompetitive practice without giving the offender knowledge of the accusation, the opportunity to oppose it, to submit and request the collection of evidence, to present its defence arguments before the Deputy delivers its report, and to file rejoinders against such report. All these procedural steps constitute the due process safeguards, as a guarantee of the rights of defence.

Therefore, the administrative procedure combines features of civil and criminal judicial procedure to ensure that the defendant is fined pursuant to a due process of law. Preference for either administrative activity or court-based enforcement no longer rests on the possibility of exercising adequate defence, as it exists in both of stances. Instead, it depends on the legal traditions of each country.

The current state of the Authority's procedure is the result of almost twenty years of practice and statutory amendments in both Authority's special rules and general administrative procedural law, under the influence of constitutional case-law of the Constitutional Court and academic analysis.

Some of these developments are seen as a novelty in administrative activity. For example, the Authority has developed extensive practice in early termination of investigations by making legally binding offerings of commitments, pursuant to which defendants undertake to cease, desist, or modify anticompetitive practices under investigation. Also, the Authority has been recently empowered to grant benefits for cooperation to companies who provide unknown information and evidence of infringements, but the success of this mechanism will depend on the actual probability of detection of these sorts of practices.

In these proceeding there is no privilege against self-incrimination, given that this particular issue is referred to civil procedural law, which emphasizes on the discovery of truth. As a result, the company under investigation may not excuse from supplying incriminatory evidence requested by the Authority, and its officers must depose under oath being liable for perjury in case of false statements. They may only be excused from answering under oath when the question implies criminal liability, which for example occurs in cases of bid rigging in public procurement, a recently criminalized practice.

In spite of these developments, certain issues deserve improvement. The statement of objections is still charging automatically the general manager of the investigated company, without conducting a full preliminary inquiry to identify which officer actually executed an infringement, with a clear result of under enforcement.

Finally, judicial review deserves a special comment. This is a control mechanism to which all administrative activity in Colom-

bia is subject. It is not an appeal but an examination of the legality of a contested administrative decision. As mentioned, during the administrative activity the Authority is placed at a higher position, but before the administrative courts both parties (the Authority and the fined company or individual) stand on equal ground. Given the adversarial nature of judicial review, each party must clearly state and substantiate its pleas, under the premise that facts or legal arguments that are not expressly contested are admitted. At trial, each party is allowed to request all such evidence deemed necessary to persuade the court and obtain a favourable judgment.

Until now, administrative courts have shown their experience in matters pertaining to administrative procedure rules, while following a literal approach when deciding on substantial provisions of competition law. A more economic-oriented analysis of these provisions is needed in order to increase the effectiveness of judicial review as a mechanism for protecting due process and the rights of defence, and for the advancement of public enforcement of competition law.

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ANNEX

FLOWCHART OF THE AUTHORITY'S ADMINISTRATIVE PROCEDURE

