# COMPETITION LAWS IN COLOMBIA
# ACHIEVEMENTS AND CHALLENGES FOR THE FUTURE

**BY**

***Alfonso Miranda Londoño***[1]

The evolution of Antitrust Laws in Colombia can be divided into two main phases, which can be, in turn, subdivided into many others depending on the depth and detail in which the analysis is conducted.

The first phase began with Law 155 of 1959, which contained the first comprehensive regulation of Antitrust Law in Colombia, and ended with Special Decree 2153 of 1992, which reorganized the Competition Authority and structured the anticompetitive conducts in several categories including the general prohibition, the anticompetitive agreements, the anticompetitive acts and the conducts of abuse of the dominant position. The 1991 Political Constitution was issued during this phase. This event had an enormous significance for Competition Law in Colombia, because the new Constitution established Free Economic Competition as an economic right for everyone that imposes responsibilities.

The second phase began when Decree 2153 of 1992 was issued, and it can be said that we are still living in this new phase, that has now lasted for twenty (20) years. During this time period, Law 1340 of 2009 was issued. The most important aspects of this law are the following:

- The Superintendence of Industry and Commerce (hereinafter referred to as SIC) was appointed as the National Competition Authority with an almost exclusive jurisdiction for the application of the Competition Laws in Colombia.

- The law clarifies the rules for the application of Special Competition Regimes in coordination with the General Competition Regime.

- The law calls for a stronger application of Competition Advocacy and coordination between public authorities, for the purposes of application of the Competition Laws.

- The Law modifies the thresholds and the procedure for merger review.

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[1] Alfonso Miranda Londoño is a lawyer from the Javeriana University Law School in Bogotá, Colombia. He specialized in Socioeconomic Sciences at the same University, in Banking Law at Los Andes University (also in Bogotá) and obtained his Masters Degree in Law (LL.M) at Cornell University (1987). He is the Director of the Law and Economics Department at the Javeriana University Law School, the co-founder and Director of the Centre for Studies in Competition Law – CEDEC, and a Professor of Competition Law at the Javeriana University. He is also the partner that leads the Competition Law practice at Esguerra Barrera Arriaga.

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

- The Law includes a leniency program aimed to foster collaboration from the companies and the administrators involved in anti-competitive conducts. Effective and timely cooperation from companies and the natural persons involved in the investigated conducts, can grant them partial or total immunity from the sanctions that SIC can impose.

- The Law allows a more active participation of third parties in the investigations for anti-competitive practices and in the merger review procedures.

- The fines that can be charged by the SIC were increased considerably. Now, they can go up to US $31.527.647[2], or to the equivalent of 150% of the profits generated by the anti-competitive conduct for the companies. Natural persons can also be charged with fines that can go up to US $630.552[3].

- The new law expanded the statute of limitations for imposing fines in antitrust investigations from three (3) to five (5) years.

- Lastly, the Law created special mechanisms for State intervention in the agricultural sector. Eventually, these mechanisms may be used in order to exclude conducts and situations from the application of competition laws.

Several laws have been issued after the application of Law 1340 of 2009 started. Though they don't have the importance of the mentioned law, they introduced interesting changes that are worth describing.

The first one is Law 1474 of 2011, better known as the "Anticorruption Statute". Article 27 of this law applies criminal law to bid rigging agreements in bids related to the public sector. Before the law, bid-rigging agreements were considered only as anti competitive practices under number 9 of article 47 of Decree 2153 de 1992, and now they are categorized as a crime when the affected bid affects State funds. As a direct consequence of the issuing of this law, Colombian Antitrust Law ventures in the field of the criminal repression of anti-competitive conducts, with the consequences that this decision carries.

According to the second paragraph of the mentioned article, the persons accused of this criminal infraction that are accepted in a leniency program by the SIC, are also eligible for obtaining benefits within the criminal procedure, consisting in the reduction of a third of the imposed penalty, a reduction of 40% of the

[2] Before this law was issued, the maximum fine that could be imposed to the companies was of US$ 630.552.
[3] Before this law was issued, the maximum fine that could be imposed to the administrators was of US$ 94.583.

imposed fine and a five (5) year restriction prohibition to contract with State entities.

The second statute that has introduced changes to the Competition Laws is Law-Decree 019 of 2012, better known as the "Anti – Bureaucracy Statute". Its general objective is to introduce efficiency in administrative proceedings in order to eliminate unnecessary steps, delays and permits. In order to accomplish this objective, the statute eliminates or modifies unnecessary procedures and requirements in State proceedings. It is based in articles 83 and 84 of the Politic Constitution, which include the principle of "good faith" and prohibits public authorities to require permissions, requisites or licenses in addition to those imposed by law, for the activities of private persons and companies.

The named decree modifies some of the procedures that must be followed in the investigations and procedures carried out by the SIC:

- Article 155 of the decree modifies the procedure for the investigation of anti-competitive practices, which was previously regulated in article 52 of the Decree 2153 of 1991. The new article establishes explicitly the term that is granted to the investigated parties in order to exercise their right to defend themselves during an investigation for anti-competitive practices, once the resolution that opens a formal investigation is notified to them.

  According to the named rule, once the opening resolution is notified, investigated persons have a term of twenty (20) days to request and file evidence, to present their arguments of defense and to offer a settlement if they decide to do so. It is important to explain that before this rule was imposed, the authority would generally grant fifteen (15) days, but would also grant extensions, as needed depending on the circumstances.

  The fixed twenty (20) days rule is not convenient, because it ties up both the investigated parties and the authorities. The truth is that in complex investigations, this term can be short for the purposes of preparing the defense and evaluating the possibility and sufficiency of a settlement proposal.

- The same article points out that once the evidence is gathered, the involved parties are summoned to a hearing. During this hearing, they have the opportunity to present their defense in an oral argument. Before the Decree 019 was issued, this opportunity did not exist. This modification is consistent with the tendency of our legal system to become oral.

  Once the mentioned hearing is held, the Superintendent Delegate for Competition Protection presents the Motivated Report before the Superintendent of Industry and Commerce. In the Motivated Report, the Delegate analyzes the evidence and presents the Superintendent with a recommendation to impose sanctions or to acquit the investigated companies and natural persons.

According to the mentioned Decree, the investigated parties and the third parties interested in the investigation, are granted a term of twenty (20) days in order to present their final allegations before the Superintendent. This term did not exist previously.

The Decree also grants to the Superintendent the possibility to accept in full the recommendations of the Delegate in the Motivated Report, in order to acquit the investigated parties by means of a summary decision. This possibility did not exist before.

The Decree reiterates that the investigated parties have the opportunity to offer a settlement to the SIC in order to obtain the anticipated termination of the investigation without sanctions. The settlement has to be offered within the period of twenty (20) days that the law grants to the investigated parties to present their defense and request and file evidence.

- Law 1340 of 2009 ordered the SIC to issue guidelines indicating the criteria it would use as a base for analyzing the obligations imposed to the investigated parties and the instruments they can use as guarantee these obligations. The obligation to issue those guidelines was abolished.

- Article 156 orders the investigated parties to make a publication in a journal of national or regional circulation and in the web page of the SIC[4] informing of the beginning of a merger process, the opening of an investigation, the imposition of sanctions and the acceptance of a settlement offer. The publication in the webpage of the SIC was not required before this law was issued.

- Article 157 grants the status of interested party to any person or company that is able to demonstrate a direct and individual interest in the results of an investigation for anti-competitive practices. These persons are allowed to file arguments and evidence related to the case, within the next fifteen (15) days following the publication of the investigation regarding the investigation if the web page of the SIC.

- Article 158 modifies the procedure for the notification of decisions to open an investigation, resolve pleas, impose sanctions and accept settlement proposals. Nowadays, the notifications of the mentioned decisions are made personally or by notice letter. In practice, once the decision is issued, the SIC issues a letter inviting the addressee to present himself before the SIC within the next five (5) days and receive the notification personally.

  If the personal notification has not taken place within the mentioned period, the SIC will dispatch a notice letter to the personal address, fax number or e-mail of the addressee, recorded in the file. This notice letter

[4] Before this decree was issued, this requisite was not required

must specify the date of the decision and the authority that issued it, the type of pleas and the term for filing them, and a warning stating that the decision will be considered as notified at the end of the next day in which the notice letter is delivered to its final destination. The notice letter will be sent with a full copy of the corresponding Administrative Act.

If the addressee's information is unknown, the notice will be published on the web page of the authority and will be posted in a place of public access for a term of five (5) days, with a warning that the decision will be considered as notified once that term has expired. The notification of these decisions will be recorded in the file.

- Lastly, article 159 allows the Superintendent of Industry and Commerce to maintain in reserve the identity of the persons that apply for the leniency program.

Once the main changes introduced by the recent reforms to the Competition Laws have been explained, it becomes important also to briefly explain the modifications that should be introduced to our Competition Laws in order to endow it with better instruments that will allow the authority to accomplish its mission to protect free competition in the Colombian markets.

In that sense, there are three important modifications that the Colombian Competition Laws need:

- The authority should be plural and not dependent on the opinions of only one person, the Superintendent, as happens nowadays. The authority could be structured, for instance, in the form of a Competition Commission, which would add independence and impartiality to the institution, and would allow it to resist the attempts of different economic or political sectors or, by the State itself to capture or influence its decisions.

- The authority must be independent from the Government. Its members must be appointed using a system of checks and balances, based on their academic standing and their professional experience. The members of the Commission must have fixed term that does not depend on the independent decision of the President of Colombia as happens today.

- The authority or public official that makes the decision to open and handle the investigation (actually the Superintendent Delegate for Promotion of Competition) should be different and independent from the authority or public official that issues the final decision (Actually the Superintendent of Industry and Commerce). Currently, the Superintendent Delegate for the Promotion of Competition is a subordinate of the Superintendent of Industry and Commerce who can appoint and remove him freely.

  Additionally, the Delegate participates in the preparation of the final decisions that will be signed by the Superintendent, situation that

impedes the absolute independence that should exist between the entity that investigates and the entity that decides if there was an infraction. This principle of independence and neutrality is consistent with article 10 of the Universal Declaration of Human Rights. According to this article *"Everyone is entitled, in conditions of full equality, to be heard publicly and with justice, by an independent an impartial tribunal, for the determination of its rights and obligations o for the examination of any accusation against him…"*

In order to accomplish this objective, a Competition Tribunal should be created. The Commission would present the investigations to the Tribunal in order to give the investigated parties a greater assurance regarding the independence and neutrality of the final decision maker, as happens in several jurisdictions.