Competition - Colombia

Competition laws: achievements and challenges for the future

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Introduction

Colombian antitrust laws have evolved in several phases. The first phase commenced with the enactment of Law 155/1959, which introduced the first comprehensive regulation of antitrust law in Colombia, and ended with Special Decree 2153/1992, which reorganised the national competition authority and divided anti-competitive conduct into several categories, including general prohibitions, anti-competitive agreements, anti-competitive acts and abuse of dominant position.

The 1991 Constitution was issued during this phase – an event with great significance for competition law in Colombia, as the new Constitution established free competition as an economic right.

The second phase commenced with the issuance of Decree 2153/1992; Colombia is still in this phase, which has now lasted for 20 years.

Law 1340/2009: main provisions

During this period, Law 1340/2009 was also issued. The most important innovations of this law were as follows:

- appointment of the Superintendence of Industry and Commerce (SIC) as the national competition authority, with almost exclusive jurisdiction for the application of Colombia's competition laws;
- clarification of the rules for the application of special competition regimes in coordination with the general competition regime;
- stronger application of competition advocacy and coordination between public authorities for the purpose of applying competition laws;
- modification of the thresholds and procedures for merger review;
- introduction of a requirement that, if a party under investigation decides to offer the SIC a settlement, it can do so only during the initial stages of the procedure, so that the SIC does not progress through the entire investigation only to have to consider a settlement proposal at the end;
- introduction of a leniency programme aimed at fostering collaboration between the companies and administrators involved in anti-competitive conduct. Effective and timely cooperation could lead to partial or total immunity from the sanctions that the SIC can impose;
- more active participation of third parties in the investigation of anti-competitive practices and in merger review procedures;
- an increase in the fines that can be charged by the SIC. The maximum fine now stands at approximately $31.5 million,(1) or the equivalent of 150% of the profits generated through the anti-competitive conduct. Natural persons can also be charged with fines of up toS$630,552;(2)
- extension of the statute of limitations for imposing fines in antitrust investigations from three to five years; and
- special mechanisms for state intervention in the agricultural sector. Eventually, these mechanisms may be used in order to exclude conduct and situations from the scope of application of competition laws.

Recent competition laws

Several laws were issued after Law 1340/2009 came into effect. Although they are not considered as important as Law 1340/2009, a couple of recently enacted statutes introduced some interesting changes.

Article 27 of the Anti-corruption Statute (1474/2011) applies criminal law to bid-rigging agreements in public sector bids. Before the law was introduced, bid-rigging agreements were considered as anti-competitive practices only under Article 47(9) of Decree 2153/1992; now they are categorised as a crime if the bid affects state funds. Consequently, antitrust law has ventured into the field of criminal repression of anti-competitive conduct. According to the second paragraph of the above-mentioned article, persons accused of such criminal infractions that are accepted onto a leniency programme by the SIC are eligible to obtain certain benefits within the criminal procedure, including:

- a 33% reduction in the imposed penalty;
- a 40% reduction in the imposed fine; and
- a five-year restriction prohibition against contracting with state entities.

Meanwhile, the main objective of the Anti-bureaucracy Statute (019/2012) is to introduce efficiency into 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 on Articles 83 and 84 of the Constitution, which include the principle of good faith, and prohibits public authorities from requesting permits or licences other than those imposed by law, for the activities of private persons and companies.

In addition, the Anti-bureaucracy Statute modifies certain procedures that must be followed in investigations and procedures carried out by the SIC. Article 155 modifies the procedure for the investigation of anti-competitive practices (previously regulated in Article 52 of Decree 2153/1991). The new article establishes explicitly the term that is granted to parties under investigation so that they can exercise their right to defend themselves during an investigation for anti-competitive practices, once a resolution to open a formal investigation has been notified to them.

Once the opening resolution has been notified, the parties under investigation have a 20-day term to request and file evidence, present their defensive arguments and propose a settlement (if they decide to do so). Before this rule was imposed, the SIC generally granted 15 days, but would also grant extensions as needed, depending on the circumstances.

The fixed 20-day rule is inconvenient, as it ties up both the parties under investigation and the authorities. In complex investigations, this term can be too short for the purposes of preparing a defence and evaluating the possibility and sufficiency of a settlement proposal.

The same article states that once evidence has been gathered, the parties will be summoned to a hearing. During this hearing, they have the opportunity to present their defence in an oral argument. Before the statute was issued, this opportunity did not exist. This modification is consistent with the move towards an oral legal system.

Once the hearing is held, the superintendent delegate for the protection of competition presents a report to the superintendent of industry and commerce. In the report, the delegate analyses the evidence and presents the superintendent with a recommendation to impose sanctions or acquit the parties under investigation.

The parties under investigation and any third parties interested in the investigation are granted a term of 20 days in which to present their final allegations before the superintendent. This term did not exist previously.

The statute grants to the superintendent the opportunity to accept in full the recommendations made by the delegate in his or her report, in order to acquit the parties under investigation by means of a summary decision. This provision did not exist before.

The statute reiterates that the parties under investigation have the opportunity to propose a settlement in order to terminate the investigation without sanctions. The settlement must be proposed within the 20-day period that the law grants to the parties to present their defence and request and file evidence.

Law 1340/2009 compelled the SIC to issue guidelines indicating the criteria that it would use as a base for analysing the obligations imposed on parties under investigation and the instruments that they can use to guarantee these obligations. The obligation to issue those guidelines was abolished.

Article 156 requires the parties under investigation to publish a notice in a journal of

national or regional circulation and on the SIC's website(3) which announces the beginning of a merger process, the opening of an investigation, the imposition of sanctions and the acceptance of a settlement offer. Publication on the SIC's website was not required before this law was issued.

Article 157 grants the status of interested party to any person or company that can demonstrate a direct and individual interest in the results of an investigation for anti-competitive practices. These parties are allowed to file arguments and evidence related to the case within 15 days of publication of an investigation notice on the SIC's website.

Article 158 modifies the procedure for the notification of decisions to open an investigation, resolve pleas, impose sanctions and accept settlement proposals. Decision notifications are handed out personally or by letter. In practice, once a decision has been issued, the SIC produces a letter inviting the addressee to present itself before the SIC within the next five days to receive the notification personally.

If the personal notification has not been handed over within the prescribed period, the SIC will dispatch a notice letter to the personal address, fax number or email of the addressee recorded in the file. This notice letter must specify:

- the date of the decision and the authority that issued it;
- the types of plea available and the term for filing them; and
- a warning stating that the decision will be considered as notified the day after the letter's delivery date.

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 SIC's website and will be posted in a public place for a term of five days, with a warning that the decision will be considered as notified once that term has expired. The SIC will record the notification of these decisions in its file.

Article 159 allows the superintendent of industry and commerce to conceal the identity of parties that apply for the leniency programme.

Future reforms?

The competition laws should be modified in order to assist the SIC in accomplishing its mission to protect free competition in the market.

Three important modifications would enhance the competition regim. First, the SIC should be comprised of more than one persion, and not dependent solely on the opinions of the superintendent, as is current practice. For example, the SIC could be structured in the form of a competition commission, which would increase its independence and impartiality and enable it to resist the attempts of different economic or political sectors or the state to influence its decisions.

Second, the SIC should be independent from the government. Its members should be appointed using a system of checks and balances, based on their academic standing and their professional experience. Members should be appointed for a fixed term which is not set by the president, as is current practice.

Third, the person who decides to open and handle investigations (ie, the superintendent delegate for the promotion of competition) should be independent from the person who issues final decisions (ie, 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 or her freely.

Additionally, the delegate participates in the preparation of final decisions that are signed by the superintendent – a situation that impedes the absolute independence and impartiality that should exist between the entity that investigates and the entity that decides. The principle of independence and neutrality is enshrined in Article 10 of the Universal Declaration of Human Rights, which states that:

> "*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 SIC would present investigations to the tribunal in order to give the parties under investigation greater assurance regarding the independence and neutrality of the final decision maker, as is the case in many other jurisdictions.

For further information on this topic please contact Alfonso Miranda Londono at Esguerra, Barrera & Arriaga by telephone (+57 1 312 2900), fax (+57 1 310 4715) or email (amiranda@esguerrabarrera.com).

Endnotes

(1) Before this law was issued, the maximum fine that could be imposed to the companies was $630,552.

(2) Before this law was issued, the maximum fine that could be imposed to the administrators was $94,583.

(3) Before this decree was issued, this was not required.