Recent developments in Colombian competition law

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Like most countries in Latin America, Colombia issued a first tear of antitrust legislation at the end of the 1950s, under the political and academic influence of the US and the European Union. However, competition laws were not applied in this first era, mainly due to the economic protectionist model, which did not favour a competition environment.

The year 2009 marks the 50th anniversary of the expedition of the first competition law in Colombia, Law 155 of 1959. This first law which is still largely in effect, was first modified in 1963, then developed by Decree 1302 of 1964, suffered a major addition with the issuance of Decree 2153, 1992, and has now been enhanced by Law 1340, 2009.

It must be recognised that even though Colombia had a competition law since 1959, because of the protectionist economic model widely applied in Latin America, these laws were not really effective until the nineties, post Washington Consensus, when Colombia included a principle of Free Competition in article 333 of the 1991 Constitution,[2] changed the economic model in order to open the markets to international trade and issued Decree 2153, 1992, which represents a modern approach to competition law.

Evolution and reforms in the region

It is clear that competition law in Latin America and specifically in the Andean countries is steadily evolving, due to integration treaties: not only CAFTA and the Chilean agreements were approved by the US Congress, but following Peru, the Andean countries are struggling in their own negotiation of an FTA.

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

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

Evolution and reforms in Colombia

Law 962, 2005

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

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

Law 1340, issued July 24, 2009

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

The principal feature of the new law is the appointment of SIC as the National Competition Authority. The new law grants SIC, the sole power to apply competition laws in all areas including specialised sectors such as public utilities, banks and insurance, transportation and ports, etc.

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

The Law increases the fines that SIC can impose to companies that breach competition laws. Currently the fines can go up to US$450,000 for the companies and US$60,000 for the administrators.

According to the new law, the sanction for the companies could go up to US$25m and the sanctions for the administrators can go up to US$450,000. This is undoubtedly an important change in antitrust enforcement, that will draw the attention and care of the administrators and companies that can be subject to costly fines.

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

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

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

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

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

Principal cases

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

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

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

Among many other transactions SIC cleared some big acquisitions: the sale of the national telecommunications company – Telecom, to the Spanish operator – Telefonica; the transaction Procter & Gamble – Gillette, the sale of the supermarket chain – Carulla, to the French controlled chain – Éxito;[3] the sale of the main national newspaper El Tiempo, to the Spanish Planeta Group; the sale of the national steel producer – Acerías Paz del Río, to the Brazilian conglomerate Grupo Votorantim; the sale of the only PVC resin producer – Petco to the Mexican manufacturer – Mexichem, and the subsequent sale of the main PVC tube manufacturer – Amanco, also to Mexichem; the acquisition of Petro Rubiales by Pacific Stratus Energy, the sale of Aluminio Reynolds Santodomingo to the Arfel Group, the sale of the main cigarette manufacturer Coltabaco to Phillip Morris and the sale of Bavaria to SabMiller.[4]

However, not all the important transactions were cleared. SIC objected to the Procter & Gamble – Colgate transaction related mainly to the Fab brand, and the Postobón – Quaker transaction, related to the Gatorade brand. In both cases the main debate between SIC and the petitioners was related to the definition of the relevant market. In the P&G – Colgate transaction SIC decided, at the last moment, to narrow the relevant market of powder soap, departing from the market for washing products (including powder and bar soap) presented by the companies.[5]

In the Postobón – Quaker transaction SIC narrowed the relevant market to include only isotonic beverages. In this case SIC not only forbid the transaction, but also launched an investigation in order to establish whether the parties had closed the transaction before SIC approved the deal.[6] It must be noted that under Colombian law, economic integrations have to be cleared by the authority before they produce effects in the market.[7] Failure to inform the transaction is considered a breach of competition laws that will cause fines to the companies.[8] If in addition to that SIC comes to the conclusion that the transaction must be prohibited, a judge could decide that the deal is absolutely void because of an illicit object, which has important economic consequences under the

Colombian Civil Code.

There are no statistics regarding foreign-to-foreign transactions. The SIC general record 0 for merger review is outlined in Table 1.

Table 1: SIC general record for merger review

Year	Notified	Authorised	Remedies	Objected
1998	132	132	0	0
1999	118	118	0	0
2000	126	123	2	0
2001	121	93	3	0
2002	104	70	9	1
2003	62	47	3	0
2004	97	90	2	3
2005	103	98	3	0
2006	112	98	4	3
2007	83	62	3	1
Total	1,058	931	29	8

Source: Superintendence of Industry and Commerce

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

- In August 2006, SIC issued a new merger regulation that raised the thresholds for notification of mergers. It is now mandatory to inform those operations in which the value of the assets or sales of the merging companies in Colombia (individually or jointly considered) are equal or superior to US$20m. The application of these thresholds has reduced the number of informed transactions by 40%.
- Since the Pavco – Ralco transaction SIC started to impose structural as well as behavioural conditions in order to subdue restrictions on competition and authorise complex concentration operations. Structural conditions require divestiture of brands, installed capacity, etc. Behavioural conditions, on the other hand, require the elimination of exclusivity, etc. Nowadays SIC applies all kinds of conditions but prefers the structural ones. This practice will continue, as the new 2009 law allows for the application of conditions.[9]
- The Cementos Andino – Cementos Argos transaction was authorised by SIC based in the Failing Industry Doctrine. Even though this kind of defence had been considered before, it was only until the cement merger that SIC laid down the characteristics and requisites for application of the 'Failing Industry Doctrine'.[10]
- SIC developed a doctrine for review of vertical concentrations. It also concluded that operations such as the sale of a brand or the creation of a new company by two previous competitors amount to an economic concentration that needs authorisation from SIC. As mentioned before, under the new 2009 law, it is clear, that vertical integrations will be reviewed if they meet the thresholds.
- During the past two years SIC has claimed jurisdiction over mergers between public utilities companies. It has also disputed the review of mergers between Cable TV companies. As mentioned before, the new law leaves no doubt in the sense that SIC is the merger authority in the mentioned sectors of the economy.

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

Something similar happened in the 'credit card case', in which the two companies that own the credit cards networks were charged with the cartelisation of the commissions. The case also ended with a settlement in which not only the investigated companies, but also the banks that own the credit cards networks, compromised to important disclosure and other measures in order to guarantee that each network will set the commissions independently.

But not all investigations have ended in settlement. SIC imposed the largest fine in its history (over US$1m) to the Rice Grinders, who were found guilty of establishing a cartel in order to buy rice at low cost from the producers. A fine was also imposed to Cadbury Adams for predatory pricing. In the past few months SIC has issued sanctions against the Cement and Chocolate industries. The decision against the Cement industry is still pending on the decision of a reconsideration plea filed by the companies.

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

Notes:

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[2] "Article 333. – Economic activity and private initiative must not be impeded within the limits of the public good. No one may require permits or licenses to exercise economic activity except when authorised by law.
Free economic competition is a right of every person which entails responsibilities. The enterprise, as a basis of development, has a social function that implies obligations. The state will strengthen cooperative organisations and stimulate business development.
The state, by means of the law, will prevent impediments to or restrictions of economic freedom and will curb or control any abuses caused by individuals or enterprises due to their dominant position in the national marketplace.
The law will limit the scope of economic freedom when the social interest, the environment, and the cultural patrimony of the nation require it."

[3] Carulla – Exito. Resolution 34904 of December 18, 2006

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

[5] Procter & Gamble – Colgate. Resolution No. 28037, issued on November 12, 2004.

[6] Postobón – Quaker. Resolution No. 16433, issued on July 23, 2004.

[7] Concept No. 00001365 of 2000, from SIC.

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

[9] Pavco – Ralco. Resolution 4861 of February 27, 2004, Resolution 22338 of August 8, 2003, Resolution 5013 of March 10, 2004.

[10] Cementos Andino – Cementos Argos. Resolution 13544 of May 26, 2006.

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