

Competition Law in Latin America

A Practical Guide

Edited By

JULIÁN PEÑA & MARCELO CALLIARI



Wolters Kluwer

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Summary of Contents

Editors and Contributors	v
Preface	xxv
CHAPTER 1	
The Second Wave of Latin American Competition Law and Policy <i>D. Daniel Sokol</i>	1
CHAPTER 2	
Competition Lifecycles in Latin America <i>William E. Kovacic</i>	7
CHAPTER 3	
The Failed Search for the Soul of Competition Policy <i>Ignacio L. De Leon</i>	19
CHAPTER 4	
Competition Policy and Growth: Evidence from Latin America <i>Esteban Greco, Diego Petrecola, Carlos A. Romero & Juan P. Vila Martínez</i>	51
CHAPTER 5	
International Cooperation between Competition Agencies <i>Eduardo Perez Motta & Mateo Diego Fernandez</i>	67
CHAPTER 6	
Histories of Competition Law in Latin America <i>Andrés Palacios Lleras & Juan David Gutiérrez</i>	75
CHAPTER 7	
The Use of Economic Analysis in Latin American Competition Policy <i>Manuel A. Abdala & Lucía Quesada</i>	87

Summary of Contents

CHAPTER 8		
Competition in Regulated Markets in Latin America: Overview and Challenges		
<i>Gesner Oliveira & Germán Orjuela</i>		101
CHAPTER 9		
Competition Law in the Information and Communications Technologies Industry in Latin America: The Need for a New Approach		
<i>Pablo Márquez</i>		117
CHAPTER 10		
Competition Law in Central America and the Years to Come		
<i>Edgar Odio-Rohrmoser</i>		141
CHAPTER 11		
Competition Law in Argentina		
<i>Julián Peña & Federico Rossi</i>		161
CHAPTER 12		
Competition Law in Brazil		
<i>Marcelo Calliari, Joana Temudo Cianfarani & Marcel Medon Santos</i>		189
CHAPTER 13		
Competition Law in Chile		
<i>Juan Cristóbal Gumucio Schönthaler & Guillermo Frene Candia</i>		225
CHAPTER 14		
Competition Law in Colombia		
<i>Alfonso Miranda Londoño</i>		263
CHAPTER 15		
Competition Law in Mexico		
<i>Amilcar Peredo, Sara Gutiérrez & Gabriel Gonzalez</i>		299
CHAPTER 16		
Competition Law in Peru		
<i>Alfredo Bullard</i>		327
CHAPTER 17		
Competition Law in Uruguay		
<i>Juan Manuel Mercant & Javier Napoleone</i>		351
Index		371

Table of Contents

Editors and Contributors	v
Preface	xxv
CHAPTER 1	
The Second Wave of Latin American Competition Law and Policy <i>D. Daniel Sokol</i>	1
CHAPTER 2	
Competition Lifecycles in Latin America <i>William E. Kovacic</i>	7
§2.01 Introduction	7
§2.02 The Time for Assessment	10
§2.03 Lifecycles	13
[A] Early Ascent Followed by Decline	13
[B] The Flat Line	14
[C] Gradual Upward Progression	14
§2.04 Factors Accounting for Implementation Success	15
[A] Funding	15
[B] Human Capital	15
[C] Matching Commitments to Capabilities	15
[D] Learning	15
[E] Political Support	16
[F] Collateral Institutions	16
[G] International Cooperation	16
[H] Periodic Assessment and Upgrades	16
§2.05 Conclusion	17

Table of Contents

CHAPTER 3

The Failed Search for the Soul of Competition Policy

<i>Ignacio L. De Leon</i>	19
§3.01 Cognitive Dissonance in Antitrust Theory	23
§3.02 Unfathomable Competition Metrics	27
§3.03 Legal Uncertainty as By-Product of Antitrust Policy Tinkering	29
§3.04 Obsession with Pre-merger Control	34
§3.05 Antitrust Legal Formalism over Economic Substance	37
§3.06 The Neglected Role of Competition Advocacy	38
§3.07 Gauging Innovation Capabilities: A New Focus for Competition Policy	41
§3.08 Conclusion: An Old Policy, a New Rhetoric	43
Bibliography	46

CHAPTER 4

Competition Policy and Growth: Evidence from Latin America

<i>Esteban Greco, Diego Petrecolla, Carlos A. Romero & Juan P. Vila Martínez</i>	51
§4.01 Introduction	51
§4.02 Competition Law in LACs	52
§4.03 Economic Growth and Competition Policy	54
[A] Applied Literature on Competition Policy and Growth	55
[B] Economic Structure and Competition Policy Indicators	56
[C] Competition Policy and Growth in LACs	60
§4.04 Conclusions	64
Bibliography	65

CHAPTER 5

International Cooperation between Competition Agencies

<i>Eduardo Perez Motta & Mateo Diego Fernandez</i>	67
§5.01 Geographical Dimension	68
[A] Multinational Cooperation	68
[B] Regional Cooperation	68
[C] Bilateral Cooperation	70
§5.02 Topical Dimension	70
[A] Recommendations, Guidelines or Discussions	70
[B] Cooperation in Specific Cases	71
[C] Capacity Building	72
§5.03 Conclusions	73

CHAPTER 6

Histories of Competition Law in Latin America

<i>Andrés Palacios Lleras & Juan David Gutiérrez</i>	75
§6.01 Introduction	75
§6.02 The Pieces and the Whole	76
[A] Developmental (1910s–1990s)	78

[B]	Neoliberal (1990s–2000)	79
[C]	Institutionalist (2000: Present Day)	81
§6.03	Conclusions	83
CHAPTER 7		
The Use of Economic Analysis in Latin American Competition Policy		
	<i>Manuel A. Abdala & Lucía Quesada</i>	87
§7.01	Competition Policy and Economic Analysis in Latin America	87
§7.02	Some Examples of Economic Analysis and Agency Decisions in Recent Latin American Cases	90
[A]	LAN Airlines (Chile) and TAM Airlines (Brazil) Merger	91
[B]	Bid-Rigging in the Pharmaceutical Industry in Mexico	93
[C]	Waste Management Provision in Bogota	94
[D]	Cablevisión and Multicanal Merger in Argentina	96
§7.03	Summary and Conclusions	98
CHAPTER 8		
Competition in Regulated Markets in Latin America: Overview and Challenges		
	<i>Gesner Oliveira & Germán Orjuela</i>	101
§8.01	Introduction	101
§8.02	Overview of Competition in Latin America	102
§8.03	Overview of Regulated Markets in Latin America	105
[A]	Water and Sanitation	109
[B]	Electricity	109
[C]	Gas	110
[D]	Telecommunications	110
[E]	Transportation	111
§8.04	Regulatory Agencies Reform: International Experience	111
§8.05	Conclusions	113
	Bibliography	114
CHAPTER 9		
Competition Law in the Information and Communications Technologies Industry in Latin America: The Need for a New Approach		
	<i>Pablo Márquez</i>	117
§9.01	Introduction	117
§9.02	Competition Law in ICT: From the Telecommunications Sector to the ICT Ecosystem	119
[A]	The Telecom Sector	119
[B]	The Fall of the Telecom Sector: From Telecom to ICT	120
[C]	The New ICT Industry/Ecosystem: Dynamics and Challenges for Competition Authorities	121
[D]	The Characteristics of the ICT Ecosystem: Challenges for Competition Authorities	122

Table of Contents

§9.03	Dominance, Abuse of Dominance and Its Enforcement in ICTs	123
§9.04	Agreements between Competitors: From Illicit Collaboration to Competition	130
§9.05	Mergers: The Path to Consolidation in the Different Layers of the Ecosystem	132
§9.06	Conclusion: The Need of a Framework of Competition Law Analysis for Communications Markets in Latin America	137
CHAPTER 10		
Competition Law in Central America and the Years to Come		
	<i>Edgar Odio-Rohrmoser</i>	141
§10.01	Introduction	141
§10.02	General Conditions of Competition in the Region	143
§10.03	International Cooperation	144
§10.04	The Competition Law in Each Country	145
	[A] Cartels	150
	[B] Unilateral Conduct	150
	[C] Merger Review	152
	[D] Cases	153
	[E] Authorities	155
	[F] Investigation and Procedures	155
§10.05	Possible Developments	157
	Bibliography	158
CHAPTER 11		
Competition Law in Argentina		
	<i>Julián Peña & Federico Rossi</i>	161
§11.01	Introduction	161
§11.02	Cartels	162
	[A] Relevant Legislation	162
	[B] Extraterritoriality	164
	[C] Investigations	164
	[1] Authorities	164
	[a] Policy, Politics and Institutions	164
	[b] Resources and Priorities	165
	[c] Inter-agency Cooperation	166
	[2] Procedure	166
	[D] Sanctions and Remedies	168
	[1] Administrative Sanctions	168
	[2] Criminal Sanctions	169
	[3] Private Actions and Follow-On Actions	169
	[E] Leniency	170
	[F] Appeal	170
	[G] Precedent Cases	171

	[1] Cement Cartel	173
	[2] Medical Oxygen Cartel	173
	[3] Automobile Cartel	174
§11.03	Unilateral Conduct	174
	[A] Relevant Legislation	174
	[B] Assessment of Dominance	174
	[C] Abuse of Dominant Position	175
	[D] Investigation (Authorities, Procedure, Powers, Burden of Proof, Appeal)	177
	[E] Sanctions and Remedies	177
	[F] Precedent Cases	177
	[1] YPF	177
	[2] Trisa	177
	[3] Clorox	178
§11.04	Merger Review	179
	[A] Relevant Legislation	179
	[B] Authorities	180
	[C] Triggering Events and Thresholds	180
	[1] Qualitative Threshold: Acquisition of Control or Substantial Influence	180
	[2] Quantitative Thresholds	181
	[D] Exemptions	182
	[E] Pre-merger Control Regime or Post-merger Control Regime	182
	[F] Intra-group Transactions	183
	[G] Substantive Test for Assessing Mergers	183
	[H] Notification Procedure and Timetable	186
	[I] Consequences of a Failure to File	186
	[J] Third Party Involvement in Notification Process	186
	[K] Remedies	187
	[L] Penalties	187
	[M] Appeal	187
	[N] Specific Industries	187
CHAPTER 12		
Competition Law in Brazil		
	<i>Marcelo Calliari, Joana Temudo Cianfarani & Marcel Medon Santos</i>	189
§12.01	Introduction	189
	[A] The Brazilian Antitrust Legislation	190
§12.02	Cartels	190
	[A] Relevant Legislation	190
	[B] Extraterritoriality	191
	[C] Investigations	192
	[1] Authorities	192

Table of Contents

	[a] CADE's General Superintendence (General Superintendence)	192
	[b] CADE's Department of Economic Studies (Department of Economic Studies)	192
	[c] CADE's Tribunal	192
	[2] Policy, Politics and Institutions	193
	[3] Resources and Priorities	193
	[4] Inter-agency Cooperation (International)	194
[D]	Procedure	194
	[1] Initial Phase of the Proceeding, Service of Process and Presentation of Defense	195
	[2] Evidentiary Phase	196
	[3] General Superintendence's Issuance of Legal Opinion	196
	[4] Remittance of the Proceeding to the Tribunal	196
	[5] Tribunal's Trial	196
	[6] Request for Clarification	196
	[7] Judicial Appeal	197
[E]	Sanctions and Remedies	197
	[1] Sanctions	197
	[a] Administrative Sanctions	197
	[b] Criminal Sanctions	199
	[c] Private Actions and Follow-On Actions	199
	[2] Remedies	199
	[3] The Cease and Desist Agreements (Settlements)	199
	[4] Settlement's Benefits	200
	[a] Timing of a Request for Settlement	200
	[b] Procedure	200
	[c] Requirements for Settlements in Hardcore Cartel Cases	201
[F]	Leniency	202
	[1] Enforcement	202
	[2] Benefits and Types of Leniency	203
	[3] Full Immunity	203
	[4] Partial Immunity	203
	[5] Leniency Plus	204
	[6] Requirements	204
	[7] Procedure	205
	[8] Appeal	206
[G]	Precedent Cases	206
§12.03	Unilateral Conduct	207
	[A] Relevant Legislation	207
	[B] Assessment of Dominance	208

[C]	Abuse of Dominant Position	208
[D]	Investigation	209
	[1] Authorities, Procedure, and Investigative Powers	209
	[2] Burden of Proof	210
	[3] Appeal	211
[E]	Sanctions and Remedies	211
	[1] Remedies in Unilateral Conducts	211
	[2] Settlements in Unilateral Conducts	212
	[3] Precedent Cases	212
§12.04	Merger Review	215
[A]	Relevant Legislation	215
[B]	Authorities	215
[C]	Triggering Events and Thresholds	216
[D]	Exemptions and Intra-group Transactions	217
[E]	Pre-merger Control Regime	218
[F]	Substantive Test for Assessing Mergers	219
[G]	Notification Procedure and Timetable	219
	[1] Filing Preparation and Notification	219
	[2] Review Phase	220
	[3] Timetable	221
[H]	Consequences of a Failure to Notify	221
[I]	Third Party Involvement in Notification Process	221
[J]	Remedies and Ancillary Restraints	221
[K]	Penalties	222
[L]	Appeal and Judicial Review	222
[M]	Specific Industries	223
CHAPTER 13		
Competition Law in Chile		
<i>Juan Cristóbal Gumucio Schönthaler & Guillermo Frene Candia</i>		225
§13.01	Introduction	225
	[A] Competition Legal Framework	225
	[B] The Evolution of the Chilean Competition System	226
	[C] The Current Organic Structure	227
	[D] Future Developments	228
§13.02	Cartels	228
	[A] Relevant Legislation	228
	[B] Extraterritoriality	230
	[C] Investigations	230
	[1] Authorities	230
	[a] Policy, Politics and Institutions	230
	[b] Resources and Priorities	233
	[c] Inter-agency Cooperation (International)	233

Table of Contents

	[2] Procedure	234
	[a] Procedure before the FNE	234
	[b] Procedures before the TDLC	236
	[D] Sanctions and Remedies	237
	[1] Administrative Sanctions	237
	[2] Criminal Sanctions	238
	[3] Private Actions and Follow-On Actions	238
	[E] Leniency	240
	[F] Appeal	241
	[G] Precedent Cases	241
§13.03	Unilateral Conduct	243
	[A] Relevant Legislation	243
	[B] Assessment of Dominance	243
	[C] Abuse of Dominant Position	244
	[1] Exploitative Practices	244
	[2] Exclusionary Practices	245
	[3] Predatory Practices	246
	[4] Unfair Competition	248
	[D] Investigation	249
	[1] Authorities	249
	[2] Procedure	250
	[3] Powers	251
	[4] Burden of proof	251
	[5] Appeal	252
	[E] Sanctions and Remedies	252
	[F] Precedent Cases	252
§13.04	Merger Review	253
	[A] Relevant Legislation	253
	[B] Authorities	254
	[C] Triggering Events and Thresholds	254
	[D] Exemptions	254
	[E] Pre-merger Control Regime or Post-merger Control Regime	254
	[F] Intra-group Transactions	255
	[G] Substantive Test for Assessing Mergers	255
	[H] Notification Procedure and Timetable	256
	[1] Operation Submitted to the TDLC	256
	[2] Transactions Submitted to the FNE	258
	[I] Consequences of a Failure to File	260
	[J] Third Party Involvement in Notification Process	260
	[K] Remedies	260
	[L] Penalties	261
	[M] Appeal	261
	[N] Specific Industries	261

CHAPTER 14		
Competition Law in Colombia		
	<i>Alfonso Miranda Londoño</i>	263
§14.01	Introduction	263
§14.02	Cartels	266
	[A] Relevant Legislation	266
	[1] Horizontal Price fixing	266
	[2] Horizontal Agreements to Allocate Costumers or Territories	267
	[B] Extraterritoriality	268
	[C] Investigations	269
	[1] Authorities	269
	[a] Policy, Politics and Institutions	270
	[b] Resources and Priorities	270
	[c] Inter-agency Cooperation (International)	271
	[2] Procedure	271
	[D] Sanctions and Remedies	273
	[1] Administrative Sanctions	273
	[2] Criminal Sanctions	273
	[3] Private Actions and Follow-On Actions	274
	[E] Leniency	274
	[F] Appeal	275
	[G] Precedent Cases	275
	[1] Case 6839/2010-Sugar Cane Mills	276
	[2] Case 51694/2008: Cement	276
	[3] Case 27762/1999: Milk	276
	[4] Case 08732/2002: Gas Stations	276
§14.03	Unilateral Conduct	277
	[A] Relevant Legislation	277
	[B] Assessment of Dominance	277
	[C] Abuse of a Dominant Position	278
	[1] Predatory Pricing	278
	[2] Price Discrimination	278
	[3] Tying	279
	[4] Horizontal Discrimination Anti Competitive Abuses	279
	[5] Regional Predatory Pricing/Leveraging	279
	[6] Obstruction or Blocking Access to Market or Distribution Channels	280
	[D] Investigation (Authorities, Procedure, Powers, Burden of Proof, Appeal)	280
	[E] Sanctions and Remedies	281
	[F] Precedent Cases	281
	[1] Case 22624/2005: Adams Chewing Gum	281
	[2] Case 33361/2011-Beer-Bavaria	281

Table of Contents

	[3] Case 15653/2001: Ice Cream Cones-Induga	281
	[4] Case 53403/2013: Mobile Calling Services – Comcel	282
	[5] Case 3694/2013: Electric Meters-EBSA	283
§14.04	Merger Review	284
	[A] Relevant Legislation	284
	[B] Authorities	284
	[C] Triggering Events and Thresholds	285
	[D] Exemptions	287
	[1] Efficiencies	287
	[2] Failing Industry Defense	288
	[E] Pre-merger Control Regime or Post-merger Control Regime	289
	[F] Closing the Transaction during the Waiting Period	289
	[G] Intra-group Transactions	290
	[1] Company Group	290
	[2] Shared control	290
	[H] Substantive Test for Assessing Mergers	291
	[I] Notification Procedure and Timetable	293
	[1] Mergers Carried without Previous Clearance	293
	[2] Process and Timing	293
	[J] Consequences of a Failure to File	295
	[K] Third Party Involvement in Notification Process	295
	[L] Remedies	296
	[M] Penalties	296
	[N] Appeal	296
	[O] Specific Industries	297
	[1] Aeronautic Industry	297
	[2] Financial and Insurance Industries	297
CHAPTER 15		
Competition Law in Mexico		
	<i>Amilcar Peredo, Sara Gutiérrez & Gabriel Gonzalez</i>	299
§15.01	Introduction	299
§15.02	General Aspects of the New Mexican Competition Regime	300
	[A] New Structure and Operation of COFECE	300
	[B] Essential Changes	301
	[C] Changes in Procedures	302
	[1] Opinions	302
	[2] Specialized Courts and Legal Actions	302
	[3] Limitation Periods	303
§15.03	Cartels	303
	[A] Relevant Legislation	303
	[B] Extraterritoriality	304
	[C] Investigations	304

	[1] Authorities	304
	[a] Policy, Politics and Institutions: Resources and Priorities	304
	[2] Resources and Priorities	304
	[a] International Inter-agency Cooperation	304
	[3] Procedure	305
	[a] Investigation Procedure	306
	[b] Dawn Raids	309
	[c] Administrative Proceeding	309
	[D] Sanctions and Remedies	310
	[1] Administrative Sanctions	310
	[2] Criminal Sanctions	311
	[E] Immunity/Leniency	313
	[1] Appeal	314
	[2] Precedents	314
§15.04	Unilateral Conduct	315
	[A] Relevant Legislation	315
	[1] Assessment of Dominance	316
	[a] Market Definition/Market Shares	316
	[b] Quantitative and Other Measures	316
	[2] Investigation (Authorities, Procedure, Powers, Burden of Proof, Appeal)	317
	[3] Sanctions and Remedies	317
	[a] Resources and Priorities	318
§15.05	Merger Review	318
	[A] Relevant Legislation	318
	[B] Economic Thresholds	318
	[C] Exemptions	319
	[D] Pre-merger Control Regime or Post-merger Control Regime	320
	[E] Intra-group Transactions	321
	[F] Notification Procedure and Timetable	321
	[G] Consequences of a Failure to File	322
	[H] Third Party Involvement in Notification Process	322
	[I] Remedies	322
	[J] Penalties	322
	[K] Appeal	323
	[L] Specific Industries	323
§15.06	Conclusions/Final Comments	324
CHAPTER 16		
Competition Law in Peru		
	<i>Alfredo Bullard</i>	327
§16.01	Introduction	327
§16.02	Cartels	328

Table of Contents

	[A] Relevant Legislation	328
	[B] Extraterritoriality	329
	[C] Investigations	329
	[1] Authorities	329
	[2] Inter-agency Cooperation (International)	330
	[3] Procedure	330
	[D] Sanctions and Remedies	331
	[1] Administrative Sanctions	331
	[2] Criminal Sanctions	332
	[3] Private Actions and Follow-On Action	332
	[E] Leniency	333
	[F] Appeal	335
	[G] Precedent Cases	335
§16.03	Unilateral Conduct	336
	[A] Relevant Legislation	336
	[B] Assessment of Dominance	337
	[1] Relevant Market	337
	[2] Market Power/Dominant Position	337
	[C] Abuse of Dominant Position	338
	[D] Exclusionary Practices Typified in the LRCA	338
	[1] Predation	338
	[2] Discrimination	339
	[3] Tying	340
	[4] Refusal to Deal	341
	[5] Abuse of Legal Procedures or Sham Litigation	342
	[E] Investigation	342
	[1] Initiative	342
	[2] Powers	342
	[3] The Procedure	343
	[4] Sanctions and Remedies	343
	[5] Appeal to the Competition Tribunal	344
	[F] Precedent Cases	345
§16.04	Merger Review	345
	[A] Relevant Legislation and Authorities	345
	[B] Triggering Events and Thresholds	346
	[C] Exemptions	346
	[D] Substantive Test for Assessing Mergers	346
	[E] Notification Procedure and Timetable	347
	[F] Consequences of a Failure to File	348
	[G] Third Party Involvement in Notification Process	348
	[H] Remedies and Penalties	349
	[I] Appeal	349

CHAPTER 17	
Competition Law in Uruguay	
<i>Juan Manuel Mercant & Javier Napoleone</i>	351
§17.01 Introduction	351
§17.02 General Overview of the Law	353
[A] Main Principles	353
[B] Applicability of the Rule of Reason	353
[C] Determination of the Relevant Market	354
§17.03 Anti-competitive Practices	354
§17.04 Cartels	354
[A] Relevant Cases	356
§17.05 Unilateral Conducts	357
[A] List of Anti-competitive Conducts	357
[B] Relevant Case	359
§17.06 Proceedings and Sanctions	360
[A] Procedure	360
[1] Preparatory Measures	360
[2] The Investigation	360
[B] Sanctions	361
[C] Ancillary Consequences	362
[D] Leniency	363
[E] Appeal	363
§17.07 Pre-merger Analysis	364
[A] Economic Concentrations	364
[B] Pre-merger Notification	365
[C] Exemptions to the Pre-merger Notification Obligation	366
[D] Consequences for Failing to Notify the Commission	367
[E] Concentrations Subject to Prior Authorization	367
[F] Consequences for Failing to Obtain Prior Authorization from the Commission	368
Index	371

CHAPTER 14

Competition Law in Colombia

Alfonso Miranda Londoño

§14.01 INTRODUCTION

Colombia is organized as a centralized republic under a presidential system of government based on the rule of law and the exercise of checks and balances by the different branches of power. The country has sound democratic institutions and a constitutional history for almost 300 years.

State intervention in the economy was introduced into the constitutional doctrine of the country since the 1930s. Such intervention has permitted the exercise of economic freedom within the “*Social Market Economy*” established by the 1991 Political Constitution.

Colombia, like most countries in Latin America, issued its first antitrust legislation at the end of the fifties, following the example of the United States and the European Union. However, the laws were not applied in this first era, mainly due to the economic protectionism of the Latin-American governments before the nineties, which were at odds with a truly competitive environment.¹

Evolution of Colombia’s Antitrust Laws can be divided into two main periods. The first period began with Law 155 of 1959 (Law 155), which contained the first comprehensive regulation of Antitrust Law in Colombia, and ended with Special

1. Throughout most of the twentieth century, Colombia just as other nations in Latin America implemented a development policy called “Protectionism” as per the recommendations of the Economic Commission for Latin America and the Caribbean – ECLAC (CEPAL in Spanish). This institution was created under the name of ECLA by means of a resolution adopted by the Economic and Social Council 106 (VI) on February 25, 1948 and it has been operating ever since. Subsequently the range of functions was extended so that the Caribbean countries could be included and it began to operate under the name Economic Commission for Latin America and the Caribbean – ECLAC (the Spanish acronym CEPAL was not replaced) by virtue of Resolution 1984/67 of July 27, 1984.

Decree 2153 of 1992 (Decree 2153). The 1991 Political Constitution was issued during this first phase. This event had an enormous significance for Competition Law in Colombia, because the new Constitution established Free Economic Competition as a key political principle.

The second period began when Decree 2153 was issued and continues to this day. This second phase is marked by a consistent progress in the enforcement of the law, and in the development of the case law, the doctrine and the technical capability of the Authority, which is now more experienced and mature, with a prominent position among its peers in Latin America.

Decree 2153 reorganized the Competition Authority and structured competition infringements into several categories including (i) the general prohibition; (ii) anti-competitive agreements; (iii) anti-competitive acts; (iv) abuse of a dominant position; and (v) violation of the merger control regulations.

In 2009 Congress enacted Law 1340 (Law 1340) which introduced major modifications to Colombian Competition Law:

- 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 program 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 important increase in the fines as explained later.
- 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.

Anti-competitive practices are analyzed under the general prohibition contained in Article 1 of Law 155 of 1959, read together with Article 46 of Decree 2153, and the prohibitions against specific actions are contained in Decree 2153 of 1992: Articles 47 (horizontal and vertical agreements), 48 (unilateral conducts) and 50 (Abuse of a

Dominant Position). The National Competition Authority, the Superintendence of Industry and Commerce (SIC) is in charge of enforcing these provisions.

The structure of the Colombian competition laws allows for the application of two different systems of analysis to the investigation of anti competitive conducts, that resemble the *per se rule* and the *rule of reason*.²

While the legislation specifically lists certain types of prohibited conducts, anti-competitive conducts that do not fall under the specific categories may be investigated by the SIC as an infringement of the general prohibition against anti-competitive behavior using a system that resembles the *rule of reason*. Accordingly, the SIC will take into consideration the relevant market, the nature, purpose and effect of the conduct and balance the pro-competitive versus the anti-competitive effects of the conduct in order to establish if it results in a violation of the general prohibition.

On the other hand, the conducts specifically described in the legislation are investigated according to the specific characteristics and elements of each conduct in a sort of *per se rule* of analysis. This means that when the Authority studies a specifically prohibited conduct, it will focus on the demonstration of the elements of such conduct that are considered by law as anti-competitive; and will not accept explanations of legal or economic nature trying to demonstrate that the investigated conduct is not illegal. For example, section 6 of Article 47 of Decree 2153 prohibits agreements that limit technical development or intend to do so. The Authority will not accept evidence or arguments trying to demonstrate that the conduct caused no harm or that it was done with a beneficial intent or effect, because the law has defined such conduct as anti-competitive.

The main focus of the authority has been the fight against cartels. There are, however, cases on unilateral conduct, abuse of dominance and the enforcement of the merger review regulations.

These functions are the core of what Law 1340 calls “*Competition Protection*,” but the SIC is an authority with many other functions: It has been granted administrative and judicial capacity to decide unfair competition and consumer protection cases; it is

2. The *per se* rule of analysis has been the focus of academic debate, but the Competition Authority in Colombia as well as the Colombian Council of State seem to have solved it already. In fact, in 2000, ANDEVIP (Case 29302/00 – ANDEVIP) was sanctioned by the SIC. This case involved a group of security companies that agreed on a price. They based their defense by arguing that the Superintendence of Surveillance and Private Security had issued a regulation stipulating that charging less than ten minimum monthly legal wages was equivalent to breaching tax and labor laws. Regardless of this circumstance, the SIC proceeded to sanction the company as it considered that there had been a price fixing agreement. During the course of the reconsideration plea and the judicial administrative stage, the companies involved disputed the position of the SIC and claimed that having entered into an agreement was not tantamount to acting against the law as their purpose was not to restrict free competition. The first instance ruling revoked the decision of the SIC as it considered that entering into a price fixing agreement was not enough to impose a sanction and that the SIC had to prove that the purpose of the law was in fact breached (in particular, welfare of the consumer, efficiency and market access). Such stance actually posed a threat to the *per se* rule of analysis in Colombian Antitrust Law. Subsequently, the ruling was reversed by the Council of State, which ruled that demonstrating the conduct of the prohibited behavior was enough to impose sanctions.

also the data protection, intellectual property and metrology (measurements and standards) authority.

In the area of Competition Protection some of the most significant cases have been related to the agricultural sector (sugar, rice, chocolate, onions, milk) and to other key economic activities, such as cement, fuel and telecommunications. It seems that in the immediate future, the authority will focus in the application of the so called “*Anti Corruption Statute*,” which makes bid rigging in public contracting both an anti-competitive agreement and a criminal offense.

§14.02 CARTELS

[A] Relevant Legislation

Article 1 of Law 155 and Article 46 of Decree 2153 prohibit, in general, all conducts that limit free competition, and Article 47 of Decree 2153 forbids specific horizontal and vertical agreements. Among other agreements, it prohibits price fixing, discrimination, horizontal territory and customer allocation, quota arrangements, technology or raw materials limitations, obstruction or blocking access to market distribution, tying and bid rigging.

[1] *Horizontal Price fixing*

Colombia is no exception as to what entails the most basic violations of competition legal rules and in that sense, horizontal price fixing is one example. Agreements entered into with the purpose or effect of directly or indirectly fixing prices are deemed per se unlawful. There’s no distinction in the law between horizontal and vertical price fixing, both types being clearly prohibited and deemed per se illegal.

Directly or indirectly fixing prices is considered by the SIC as equally harmful just as doing it in terms of maximum or minimum prices. A transportation association was sanctioned back in 2004 by the SIC because the companies that belonged to the association entered into an agreement which sought to protect customers from excessive pricing (Case 21821/2004 – Transportation Companies).

In the case of other types of defenses submitted with respect to the per se rule illegality of horizontal price fixing, a 2000 case is worth noting. Back in that year, the SIC issued a decision against real estate agents that subscribed an agreement which set out a commission by which they charged their customers 3% (Case 27759/1999 and 7508/2000 Realtors). The defendants stated that there was a commercial custom that under the terms of the Code of Commerce was mandatory. The SIC did not agree and considered that no commercial custom could go against the law and imposed fines on all companies that took part in the price fixing agreement. In the end, the decision was upheld by the SIC.

Not less important is the fact that as per Article 45 (1) of Decree 2153, for purposes of antitrust laws, an agreement is defined as contract, convention, concerted practice of conscious parallelism and the SIC has conducted investigations regarding

express and tacit agreements. As well, there have been tacit collusion investigations based on concerted practices and conscious parallelism.

[2] *Horizontal Agreements to Allocate Customers or Territories*

Article 47 (3) of Decree 2153 expressly prohibits agreements with the purpose or effect of allocating markets among producers or distributors. Hence, horizontal market allocation agreements, which include customer, supplier or geographic market allocation are per se illegal. Back in 1999, the guarantees presented in the course of an investigation initiated against cement manufacturers and their corresponding association (Colombian Cement Institute – ICPC (17464/1999 – Cement – ICPC) due to an alleged horizontal market distribution agreement which violated Article 47 (3) of Decree 2153 and an agreement to share confidential and commercially sensitive information thereby violating Article 1 of Law 155. SIC sought to prove that the cement companies had portioned the country among themselves and also that they monitored the compliance of the agreement by submitting to ICPC a weekly report about locations and customers where sales took place and also by receiving a report from the Institute informing each other about the same pieces of information.

The companies based their rationale on the features of the product and the cost of transportation which caused their selling the product, above all, in areas close to the plant. They offered a guarantee comprising among other elements, an information protocol that did not enable them to monitor sales by their competitors. The investigation was closed and no sanctions were imposed.

Agreements having the purpose or effect of assigning, distributing or limiting the sources of supply of raw materials are prohibited by Article 47 (5) of Decree 2153. The Sugar Cane Manufacturers Case is a good example (Case 6839/2007 – Sugar Cane Mills): the SIC considered that the sugar cane growers had portioned the sugar cane growers in a way that they could only sell the crops to the mills that had been assigned. The Sugar Cane Manufacturers were also sanctioned for an alleged agreement that established a formula. In the end, the manufacturers proved that no agreement had been entered to allocate lands and that it was due to the features of the process and the potential degradation of the raw material that each mill was required to purchase the crops from close farms. The SIC accepted the argument and the proceedings did not continue.

There's no express prohibition against vertical market distribution (e.g.: vertical territorial exclusivity granted by a manufacturer to its distributors) which does not mean that such agreements are permitted from the legal standpoint. They are just not illegal per se and they can always be the object of an investigation as per the general prohibition set forth in Article 1 of Law 155 along with Article 46 of Decree 2153 (Rule of Reason analysis).

Postobon, Panamco (Coca-Cola) and Bavaria (Case 19644/2000 – Soft Drinks), three soft drinks manufacturers, were investigated in 1999 by the SIC. It was argued that the producers and the distributors had entered into vertical and horizontal price fixing agreements and also into horizontal and vertical market allocation thereby

violating Article 47 (1) and (3) of Decree 2153 respectively. As to the first allegation, the companies that were investigated submitted that the manufacturers had imposed the price of sale to retailers on the distributors. As to market allocation, they submitted that no horizontal agreement had been entered but that they merely granted territories to their distributors for cost reduction purposes and efficiency (in their distribution channels) and inter-brand competition increases. Their submissions were successful and the authority accepted their arguments in the sense that there had been no per se violation and that as per the Rule of Reason, unilaterally imposing prices on their distributors and awarding territories for logistics purposes in fact represented pro-competitive effects and promoted inter-brand competition. The SIC terminated the investigation with no sanctions and it also accepted the price imposed on the distributors and the logistics related vertical market allocation.

Under Article 19 of Law 256, manufacturers and distributors can be investigated as a result of exclusivity clauses agreed on between them which are deemed an unfair trade practice. In fact, entering into exclusive dealing clauses in supply contracts in order to or with the effect of impeding access of competitors to the market or monopolizing distribution channels.

There's a general prohibition under Article 1 of Law 155 and Article 46 of Decree 2153 (Rule of Reason analysis) by which non-competition agreements can be investigated. There has not been a broad development of this concept on the part of the SIC, but it is accepted that non-competition clauses can be included on certain occasions as long as they are reasonable, limited in time and have a meritorious object (e.g.: in a merger deal to avoid confusion or unfair trade practices).

There are, however, other restrictive agreements that are specifically prohibited and are considered as per se illegal:

- Agreements entered into with the purpose or effect of assigning production or supply quotas are considered per se illegal under Article 47 (4) of Decree 2153.
- Agreements entered into with the purpose or effects of limiting technical developments are considered per se illegal under Article 47 (6) of Decree 2153.
- Agreements entered into with the purpose or effect of abstaining of manufacturing a product or providing a service, or to affect the levels of production, are considered per se illegal under Article 47 (8) of Decree 2153.

[B] Extraterritoriality

As a matter of principle Colombian authorities including the SIC will exercise jurisdiction within the boundaries of the territory of the country and very rarely will they try to exercise jurisdiction abroad.

With regard to the application of Competition Laws, Colombia, as many other jurisdictions applies the effects theory, which means that any conduct that produces anti-competitive effects in Colombia can be investigated by the SIC. According to Article 2 of Law 1340:

The set of rules and regulations governing competition protection shall apply to whoever performs any economic activity or to anyone who affects or may affect such performance, regardless of its form or legal nature and in relation with those conducts that have or may have a total or partial effect upon the national markets, whatever the activity or economic sector may be. (Underlined)

This means that the SIC can investigate the conduct of persons who are acting abroad, if their actions affect competition in the Colombian markets. In these cases the SIC may face procedural problems related to service of process and to collection of fines, but in any event the authority will be able to stop the conduct and request the help of other authorities abroad depending on the positive commitment and other cooperation agreements it may have available for the case.

[C] Investigations

Violation of competition law in Colombia is subject to administrative investigations aimed to protect the constitutional principle of free competition in favor of the people. It is a general protection and therefore the authority can initiate the investigations officiously or following an accusation.

[1] Authorities

The principal feature of la 1340 is the appointment of the SIC as the National Competition Authority. The law grants SIC, the sole power to apply competition laws in all areas including specialized sectors such as public utilities, banks and insurance, transportation and ports, etc.

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

Pursuant to Law 1340, the SIC has been given the following powers and responsibilities:

- The SIC has the power to investigate and sanction anti-competitive practices in all sectors of the economy.
- In 1998, the SIC was given administrative and judicial powers to decide unfair trade and consumer protection cases.
- The SIC is the merger control authority in all cases and sectors except for the merger transactions in the financial sector and the airlines. In the first case, as will be described later in this document, the Superintendence of Banks studies the transactions; in the second case, the Aeronautic Authority – Aerocivil, decides the mergers.
- The SIC is the trademark and patent authority. It also maintains the industrial property registry.

- The SIC is in charge of the application of the data protection and metrology statutes. It also controls the chambers of commerce.

[a] *Policy, Politics and Institutions*

As in most Latin-American countries, in Colombia the main weight in the application of Competition Laws depends on the activity of the SIC, as said before, an administrative authority in charge of the application of competition laws in all sectors of the economy.

The SIC conducts investigations that are administrative in nature (not judicial) aimed to find out if there has been a violation of the competition laws, case in which the violation is prohibited and a fine is imposed.

The SIC has no capacity to order indemnification of damages to third persons affected by the anti-competitive behavior. It is also important to convey that with the exception of bid rigging in state contracts, the infringements of competition laws such as price fixing and quota arrangements are not considered criminal offenses.

[b] *Resources and Priorities*

Nowadays the SIC is perceived as an effective authority with increased strength for the application of competition laws. This is due to the legislative changes introduced by Law 1340, Decree 019, 2012 (Decree 019) and Law 1474, 2012, which *inter alia* have allowed the authority to marshal important resources for the application of Competition Laws.

While in 2009 the SIC had a budget of USD 16 million (4.5 of which were destined to investment), for the year 2014, the authority was assigned a budget of USD 59 million (28 of which were destined to investment), which means that the budget has been multiplied by three.

In 2006 the SIC had 390 public officials and by 2013 the entity was already 673 strong. But even more significant is the increase in the fines: In 2010 the SIC imposed USD 13 million in fines and in 2013 the fines amounted to USD 108 million. There is no doubt that thanks to this increased capacity and strength the SIC can face new challenges and protect competition in a more technical and effective way.

In the area of Competition Protection some of the most significant cases have been related to the agricultural sector (sugar, rice, chocolate, onions, milk) and to other key economic activities, such as cement, fuel and telecommunications. It seems that in the immediate future, the authority will focus in the application of the so called “*Anti Corruption Statute*,” which makes bid rigging in public contracting both an anti-competitive agreement and a criminal offense.

[c] *Inter-agency Cooperation (International)*

As National Competition Authority, the SIC develops important interaction and cooperation with other competition authorities as described here:

- Pursuant to Article 14th of Decision 608 of the Andean Community of Nations (CAN by its Spanish initials), the General Secretariat of the CAN will request the cooperation of the national authorities of the countries affected by the anti-competitive conducts investigated by the Commission. In order for the Commission to start an investigation it is necessary that the conduct have community dimension, that is, that the conduct affects the markets of more than one member country.
- On July 4, 2007, Congress approved Law 1143 that contains the Free Trade Agreement between Colombia and the United States. Pursuant to the FTA, each party agreed to maintain a competition law and authority to apply it, with the obligation to grant the accused persons due process, right of defense and the possibility to impeach the decisions of the competition authority before an independent tribunal.

Pursuant to Article 13.3 of the Treaty, the parties agreed to cooperate with each other in the area of competition policy in order to achieve an effective application of the competition laws.

In September of 2014, the FTC and the DOJ signed a cooperation agreement with the SIC. According to the statement released by the agencies:

The new agreement contains provisions for antitrust enforcement cooperation and coordination, conflict avoidance and consultations with respect to enforcement actions, and technical cooperation. The agreement also contains confidentiality protections. The U.S. antitrust agencies and Colombia's Superintendence of Industry and Commerce, the agency that enforces Colombia's competition law, have built a strong enforcement relationship over the years, both bilaterally and under the terms of the U.S.-Colombia Trade Promotion Agreement.

- Similar provisions are contained in other Free Trade Agreements like the one signed between Colombia, Perú and the European Union.
- Colombia participates as an observer in the Competition Committee of the OCDE since 2011 and attends Competition Forums on a regular basis. It also hosted the 9th meeting of the OECD-IDB Latin American Competition Forum in 2011.
- Finally, Colombia is an active participant in the International Competition Network – ICN, with an active participation in the Cartels Subgroup.

[2] *Procedure*

The SIC can initiate a preliminary investigation officiously or following accusations from any citizen. There is no time limit for the preliminary investigation: it can last for

some months and even years, during which the file is considered as confidential. There are no investigated persons or imputation of illegal conducts in this stage.

If the authority finds a possible infraction it will initiate a formal investigation that can last between twelve and twenty-four months, but there is no other limit than the statute of limitations to impose a sanction. The investigation starts with a resolution in which the SIC makes a formal accusation against specific persons and companies.

In those cases in which the investigation is initiated following an accusation (and not officiously), the SIC will call for a settlement hearing between the investigated parties and the accusers in order to promote an agreement regarding the settlement of their private interests. If such settlement is achieved it will not affect the continuation of the investigation, for the SIC is protecting the public interest. In practice these hearings have not been very effective for that reason.

The resolution that opens the formal investigation is notified to the accused persons who will have a term of twenty working days to present and request evidence and if they decide so, to offer “*garantías*” (settlement), a procedural benefit that allows the investigated parties to request the anticipated termination of the investigation, without sanctions, by offering to the authority that they will behave in a form consistent with competition laws and the compliance with a set of obligations including a collateral in the form of a bond. The benefit of this *settlement* is that the investigation is terminated immediately without sanctions and without a definition regarding the legality or illegality of the investigated conducts.

The Superintendent can accept or not the *settlement* at his sole discretion, depending on their sufficiency to convince the Superintendent of the compliance of the investigated companies with competition law. The actual administration of the SIC considers that the authority should only accept the *settlement* in exceptional cases.

If a *settlement* is not offered or accepted, the SIC will gather the evidence in the form of administrative visits, depositions, expert opinions, interrogations, documents and the like. Once the evidence is gathered the attorneys for the investigated parties will be invited to present their case orally and following the Superintendent Delegate for Competition will file a “*Motivated Report*” with the Superintendent, assessing the evidence and recommending to impose fines or to acquit the investigated parties. The motivated report will be communicated to the companies under investigation and they will be able to present their final allegations to the Superintendent.

The Superintendent will evaluate the motivated report presented by the Delegate and the final allegations presented by the companies and after listening to his council he will issue a final decision in the form of a resolution in which he will sanction or acquit the investigated persons.

Against this decision the parties can present a reconsideration plea, which should be decided in two months. Once the Superintendent decides this plea, the case is over before the administration. The decision is final and can be enforced by the authority including the collection of the fine.

The final resolution issued by the SIC can be challenged before the administrative judges in order to obtain its annulment and the indemnification of the damages produced by the decision to the accused. Therefore the final authority of any antitrust case is the Council of State. The judicial review of the SIC's decision can last between five and eight years (meanwhile the decision is effective).

[D] Sanctions and Remedies

[1] Administrative Sanctions

As said before, the SIC can declare the violation of competition laws, order the investigated companies to stop their illegal conduct, and impose fines both to the companies and the natural persons involved.

One of the improvements of Law 1340 was the notorious increase in the capacity of the SIC to impose fines. Under Decree 2153 the maximum fine could go up to 2,000 minimum monthly wages (around USD 390,000) to the companies and 300 minimum monthly wages (around USD 58,500) for the natural persons involved; whereas now, under law 1340, the SIC can impose the companies up to 100,000 minimum monthly wages (around USD 19,500,000) or up to 150% of the profits obtained with the anti-competitive conduct; and up to 2,000 minimum monthly wages (around USD 390,000) to the natural persons involved. There is an important addition with regard to the express prohibition to the investigated companies to pay for the fines imposed to the natural persons.

It must be noted that the SIC can impose fines for anti-competitive conduct, but also for the obstruction of investigations; infringement of the merger control regulations; failure to comply with orders; failure to comply with obligations acquired pursuant to guarantees accepted for the anticipated termination of investigations or the conditions accepted for the approval of a merger transaction. There are also circumstances that allow the authority to impose harder or softer sanctions depending on different factors.

[2] Criminal Sanctions

Colombian Antitrust Law has no criminal liability tradition. Nevertheless, in 2011 Law 1474 of 2011 (Anticorruption Act) determined that bid rigging in governmental contracts carried criminal liability. This means that the conduct prohibited in Article 47(9) of Decree 2153 of 1992 has administrative, civil and criminal liability.

Article 47(9) of Decree 2153, 1992, expressly defines as anti-competitive agreements “9. *Those whose purpose is to collude in bids or contests or those whose effect is to allocate contracts' awards, distribute contests or fix the terms of proposals.*”

This prohibition refers to collusion in bids issued by private and public entities. Only bid rigging in state contracts will produce criminal liability.

[3] Private Actions and Follow-On Actions

Private Antitrust Litigation has not developed yet in Colombia. This is because there are no punitive damages in the Colombian system; thus, people can only sue for real damages.

Antitrust cases are generally dealt with in administrative proceedings initiated officiously by the authority. In the majority of antitrust investigations there is no accusation from a victim or third-party in general.

The damages caused by anti-competitive conducts cannot be claimed within the administrative proceedings carried out by the SIC, and as a matter of fact the authority has no power to award such damages because that can only be done by the judge. This does not mean that parties affected by the conduct cannot claim for damages. The parties affected can either file a civil action in order to obtain the damages caused by the conduct, or if there is a specific group affected, a class action can be filed. The recently issued General Procedure Code of Colombia lowered the requirements that must be fulfilled to present class actions.

As said before, the SIC cannot refer to damages arising of the antitrust conducts it investigates. Nevertheless a fine imposed by the SIC serves as a very solid evidentiary support on which to base a civil or class action.

[E] Leniency

Decree 1523 of 2015 regulates the leniency program introduced by Article 14 of Law 1340.³ The article states that SIC could grant benefits to the participants of a conduct that breached antitrust laws. The article also establishes that the degree of the benefit, which could be the total or partial exoneration of the sanctions, is subject to the usefulness and quality of the information provided. Collaboration with the authority is also rated by the efficiency of the information and evidence adduced to reach a decision and the stage of the process in which the information is provided to the authority. Finally the law states that neither the instigators nor the promoters of the conduct are eligible to apply for the leniency program benefits.

The decree further regulates the leniency program and provides the parameters for total exoneration, partial exoneration, procedure for application to the benefits, the rules for reduction of the fines, the stages of the process in which the application is valid, the secrecy of the applicant's personal information and the term of the secrecy of this information.

The objective of the program is to create mechanisms of collaboration with the authority that can facilitate the prosecution of antitrust conducts. In Latin America there is a growing tendency to implement this kind of programs as an additional tool for the competition agencies. In many countries these programs have proved to be effective in the fight against "hard core" cartels. Given this facts and the increase in the

3. Decree 1523 of 2015 modified Decree 1074 of 2015, which in turn derogated Decree 2896 of 2010.

amount of the fines that can be imposed, the authority anticipates that the application of this program in Colombia is going to be very effective.

The SIC recently started several investigations based on the leniency program (notably the Diapers Case, the Soft Paper Case and the Notebooks Case) that are currently in the evidence phase. The leniency program has not been easily implemented due to the lack of regulation on several matters that are vital for the companies that are deciding to come forward.

For instance, there have been issues regarding (i) the confidentiality both of the identity of the leniency applicant and of the information contained in the leniency file; (ii) the reputational costs that companies face even when they have cooperated with the SIC; (iii) the transfer of evidence presented during the administrative investigation in private or class action lawsuits seeking to recover damages and the right of defense of the leniency applicant; (iv) the requisites to qualify as the promoter or instigator of the anti-competitive agreements.

Finally, there are some anti-competitive conducts that may have consequences other than administrative fines. As mentioned above, since 2011, bid rigging has been considered a crime in Colombia. A hypothetical leniency applicant wishing to admit a bid rigging conduct may still face criminal charges as the program was not conceived to cover criminal liability.⁴

[F] Appeal

As said before, against the final decision of the SIC there is no appeal before a superior authority. The parties can present a reconsideration plea before the Superintendent, which should be decided in two months. Once the Superintendent decides this plea, the case is over before the administration. The decision is final and can be enforced by the authority including the collection of the fine.

As also described before, the final resolution issued by the SIC can be challenged before the administrative judges in order to obtain its annulment and the indemnification of the damages produced by the decision to the accused.

[G] Precedent Cases

It must be said, that to this date, horizontal price-fixing agreements remain as the main cause for antitrust investigations in Colombia. There have been price fixing investigations in many economic sectors, but it seems important to highlight the investigations related to the agricultural sector, where the SIC has developed cases against the industries that acquire the crops from the producers:

4. In addition, the Colombian Penal Code brings the “agiotaje” crime which is intended to criminalize conducts of individuals trying to alter prices of “first-necessity” products, raw materials, or services subject to public procurement. However, up to now, in Colombia there hasn’t been criminal punishment for individuals involved in collusory practices. If a leniency applicant is hypothetically prosecuted for “agiotaje,” the leniency agreement wouldn’t give her protection against criminal liability.

- Investigation against the rice mills for an agreement to fix the price of the green *paddy* rice (*Case 22065/05 – Rice Mills*).
- Investigation against the Chocolate companies for an agreement to fix the price of the cocoa beans (*Case 52202/09 – Chocolate Manufacturers*).
- *Investigation against the sugar manufacturers for an agreement to fix the price of the sugar cane (Case 6839/07 and 42411/2010 – Sugar Cane Mills)*.

[1] Case 6839/2010-Sugar Cane Mills

In Case 6839/2010 Sugar Cane Mills, the SIC claimed that some sugar manufacturers set the price of sugar cane through a formula that used the sugar sale final price. The SIC questioned the application of different formulas and why they never resulted in the sugar cane producers sharing more than 50% of the revenues from the sale of sugar. In the end, the Authority deemed such as an indirect agreement entered into in order to fix the prices of sugar cane.

[2] Case 51694/2008: Cement

The SIC imposed fines on four cement manufacturers: Cementos Argos, Holcim Colombia, Cemex Colombia and Cementos Andino (Case 51694/2008-Cement) for having entered into a price fixing agreement. In the opinion of the SIC, no economic rationale existed that could justify such pricing, being therefore a very high probability that such companies had subscribed an agreement to fix prices.

[3] Case 27762/1999: Milk

Derilac and Colanta (Case 27762/1999 – Milk), two dairy products manufacturers were the subjects of an investigation initiated by the SIC on the grounds of price fixing. This investigation was decided back in 2009. The SIC concluded that an agreement existed from the fact that the same retail price was shown in the milk bags throughout 1997, 1998 and 1999 and that the price increases were also the same. In this case, the SIC stated that no explicit oral or written agreement had to be executed in order for a parallel practice to exist: the conduct itself proved the price-fixing agreement. In the end, the SIC sanctioned the companies and the Council of State upheld its decision.

[4] Case 08732/2002: Gas Stations

Case 08732/2002-Gas Stations comprised an investigation that was decided on the basis of a price fixing agreement that resulted in prices increases of four – star gasoil. One of the gas stations, called “La Pedregosa,” owned by Rafael Ortiz Mantilla was included in the investigation. This case highlighted that price increases were introduced at the same time. In the end, the Council of State upheld the decision.

§14.03 UNILATERAL CONDUCT**[A] Relevant Legislation**

In Colombia, the legal framework underlying unilateral action is contained in the following legal rules: (i) Article 1 of Law 155 along with Article 46 of Decree 2153 that set forth the general prohibition; (ii) Article 48 of Decree 2153 that governs unilateral conducts or anti-competitive acts and (iii) Article 50 which prohibits dominant position abuse.

The dominant position of any investigated company has to be duly demonstrated and as per Article 45(4) of Decree 2153, a dominant position takes place when an entity has the power to directly or indirectly affecting the market conditions.

The three types of anti-competitive acts set out in Article 48 of Decree 2153 of 1992 are the following ones: (i) consumer protection laws advertisement regulations violations; (ii) influencing companies into increasing prices or refraining from reducing prices and (iii) unilateral refusal to deal or discrimination against a company as a form of retaliation resulting from its pricing policies.

And there are six types of behaviors of dominance abuse set out in Article 50 of Decree 2153 of 1992, to wit: (i) predatory pricing; (ii) vertical discrimination or exploitative abuses; (iii) tying; (iv) horizontal discrimination or anti-competitive abuses; (v) regional predatory pricing or leveraging and (vi) obstruction or blocking access to markets or distribution channels.

The Authority has focused its efforts rather than on unilateral conduct, on repressing cartels and horizontal agreements in general. Nonetheless, there've been several investigations regarding predatory pricing and undue influences for purposes of price increases. In particular, household gas appliances and the role of gas distribution companies has been the object of attention in the most recent times.

[B] Assessment of Dominance

As per Article 45(5) of Decree 2153, the dominant position of a company is established when it has the chance of directly or indirectly affecting market conditions. The SIC determines whether there is dominant position by defining a relevant market based on the product, geography and temporal standpoint and utilizing tools such as the SSNIP test. Upon defining the relevant market, the SIC proceeds to examine the market concentration assisted by concentration indexes such as HHI, NEE, CR4 as well as others and finally entry barriers and market contestability in case that the company in fact has a dominant position.

The Legal Framework for Competition in Colombia has no law, regulation, jurisprudence or theory enabling the presumption of dominance when there's a certain percentage of market concentration. Nonetheless, Article 14(13) of Law 142 of 1994 (Public Utilities Law), a public utility company with a market share equal to or above 25% in the corresponding market is deemed a dominant company. This rule is only applicable to public utilities.

[C] Abuse of a Dominant Position**[1] Predatory Pricing**

Article 50(1) of Decree 2153 prohibits predatory pricing which purports to set prices below costs and aims at eliminating competitors or deterring from accessing markets or expanding their operations. However only dominant undertakings are taken into account when assessing whether there is a violation of the legal rule contained in Article 50(1) or not. As mentioned above, Article 45(5) of Decree 2153 of 1992, a company has a dominant position when it can effectively affect directly or indirectly the market conditions.

An assessment of pricing versus total average costs (not variable costs) is made at the time of investigation (Case 30835/2004 – Mushrooms⁵) but there's no legal requirement to do so. As to the “*intenti*” requirement in order to eliminate a market competitor or preventing market access or business expansion, the SIC has considered that the behavior of the agent and the economic rationale shall be taken into consideration to deduce the intention. In the Mushroom case, the SIC determined that the company's behavior was a reasonable one as the price reduction did not take place for a long period of time or was unreasonable considering the context of the market.

This type of conduct could also be analyzed under the general prohibition of the unfair trade law, contained in Article 7 of Law 256, 1996 (Law 256). In this case, the authorities that can have jurisdiction over this type of cases, meaning the SIC or the civil circuit judge, would consider if such a conduct is against the principle of good faith and honest commerce practice, and whether it can affect the decisions of consumers and the general operation of the market.

Finally, it must be said that there have not been many investigations related to predatory pricing during the previous years.

[2] Price Discrimination

The Constitution of Colombia sets the standard as to price discrimination and the Constitutional Court has taken into account Aristotle's concept of distributive justice to interpret the rule (“equality for the equals.”)

Article 47(2) of Decree 2153 prohibits any agreement setting sales or marketing conditions that discriminate third parties. In turn, Article 50(2) prohibits vertical discrimination (exploitative abuses), which entails applying differential conditions to equivalent transactions putting providers or consumers in a position of disadvantage when compared with other suppliers or consumers in similar conditions. Article 50(4) prohibits horizontal discrimination (anti-competitive abuses) which entails imposing different purchasing conditions on different consumers in order to eliminate or reduce competition.

5. The investigated company was the biggest producer of Mushrooms in Colombia, *Setas Colombianas S.A.*

Article 50(5) of Decree 2153 of 1992 prohibits regional predatory pricing which would enable a dominant firm to conduct a predatory campaign under monopolistic prices that it charges in other areas of the country. When discrimination as abusive unilateral conduct is carried out, it can only be punished if the business has a dominant position. On the contrary, if objective factors such as volume discounts, transportation costs or other circumstances explain the price differences, no violation takes place (e.g., Case 19444/2001 Celumovil-Comcel where mobile phone companies charged higher prices to customers for calls from landlines to mobiles than for calls from mobiles to landlines). The mobile phone carriers offered some guarantees and the investigation ended with no sanctions.

[3] Tying

In Colombia, tying (agreement or abusive conduct aimed at subordinating the supply of a product to accepting additional obligations or undertakings that are not part of the business transaction) is prohibited as agreement and as a unilateral conduct and is therefore deemed abuse of dominance that is only unlawful when carried out by a company enjoying a dominant position.

Article 47(7) of Decree 2153 deems per se illegal entering into agreements with the purpose or effect of subordinating the supply of a product to accepting additional obligations or undertakings that aren't a natural part of the business transaction. Article 50(3) of Decree 2153 states that if a company enjoys a dominant position, Tying is deemed abuse.

Loyalty discounts have also been examined in the past and they are deemed illegal if they are found to be equivalent to Tying.

[4] Horizontal Discrimination Anti Competitive Abuses

Pursuant to Article 50(4) of Decree 2153, it is considered that when a company enjoys a dominant position, it will incur in an abuse of dominance if it sells to a buyer in different conditions than the ones offered to another buyer, when this is done with the intention of diminishing or eliminating competition in the market.

In 1995 PROQUIMHUL filed an accusation against its competitor in the production of aluminum sulfide, PRODUCTOS QUÍMICOS PANAMERICANOS – PQP. PROQUIMHUL claimed that PQP caused the manufacturer of sulfuric acid, the main raw material for the production of aluminum sulfide, to apply discriminatory conditions favoring PQP and putting PROQUIMHUL at a disadvantage in the market for aluminum sulfide in the southern part of Colombia.

The SIC did not find evidence of the alleged discrimination and PQP and FOSFADER were acquitted.

[5] Regional Predatory Pricing/Leveraging

There is a specific prohibition against *regional predatory pricing*, as a conduct of abuse of dominance, in Article 50(5) of Decree 2153. A company will be accused of regional

predatory pricing when it sells its products at different prices in different regions with the intention or the effect of diminishing or eliminating its competitors in that region. Here, the SIC is not concerned with pricing below costs, but with pricing differentials not based on the costs of the transactions in different regions. This conduct can therefore be seen as a form of price discrimination.

Whilst Article 50(5) of Decree 2153 requires dominance before an infringement can be found, non-dominant companies may be caught by the general prohibition under Law 155. In this case, the authority will analyze the conduct using an approach similar to the *rule of reason*, considering all aspects of the conduct and weighing its pro-competitive and anti-competitive effects. The only case related to this infraction is Case 15653/2001 – Ice cream cones – Induga.

[6] Obstruction or Blocking Access to Market or Distribution Channels

Under Colombian Law the conduct of obstruction or blocking access to market or to distribution channels can evidently be investigated under the general prohibition contained in Article 1 of Law 155, considered together with Article 46 of Decree 2153. It can also be investigated as an agreement or abusive conduct aimed to impede the participation of a *Small or Middle Size Undertaking* (PYME by its initial in Spanish) in the market or distribution channels.

In Colombia this obstructive conduct is prohibited both as an agreement and as a unilateral conduct, case in which it is considered as an abuse of dominance that is only illegal when committed by a company that enjoys a dominant position.

Pursuant to Article 47(10) of Decree 2153 it is considered as per se illegal to enter into agreements with the purpose or effect of blocking access to the market or the distribution channels to PYMEs.

According to Article 50(6) of Decree 2153, when a company enjoys a dominant position, it is considered as an abuse to enter into a blocking conduct such as the one described immediately above against PYMEs.

[D] Investigation (Authorities, Procedure, Powers, Burden of Proof, Appeal)

All anti-competitive conducts are subject to the same type of investigation, performed by the same authority, the SIC, under the same administrative procedure and the same systems of analysis. In all cases the final decision of the SIC is subject only to a reconsideration plea before the Superintendent. These decisions cannot be appealed to a higher authority. As said before, the final resolution issued by the SIC can be challenged before the administrative jurisdiction in order to obtain its annulment and the indemnification of the damages produced by the decision to the accused; meanwhile the decision is effective.

The conducts of abuse of a dominant position have a higher standard of proof because the authority will have to demonstrate that the investigated companies enjoy

a dominant position, which requires a careful definition of the relevant market, and as said before, an exercise regarding market concentration and barriers to entry.

[E] Sanctions and Remedies

All anti-competitive conducts are subject to the same type of investigation, performed by the same authority, the SIC, under the same administrative procedure, the same systems of analysis.

[F] Precedent Cases

[1] Case 22624/2005: Adams Chewing Gum

Case 22624/2005 – Adams chewing gum, was decided by SIC against Cadbury Adams, a company with a dominant position in the market of mint flavored gum. The product –Chiclets Adams was presented to the public with a price of USD 200. Upon the entry of Confiteca to the market featuring “Tumix” (also, mint flavored gum) at a price of USD 100, Cadbury Adams responded with “Chiclets Clarks” at a price of USD 50. The SIC considered that this amounted to predatory pricing.

[2] Case 33361/2011-Beer-Bavaria

Case 33361/2011 – Beer – Bavaria was decided by SIC in 2001. Heineken accused Bavaria of abuse of dominance with respect to the launch of Peroni beer and also of tying that forced high-end bars and restaurants to exclusive advertise in favor of Bavaria as a condition to sell Bavaria products. Bavaria was able to demonstrate that the Sponsor Contracts to promote Peroni were temporary and that no sales exclusivity, but rather advertisement exclusivity was what was required in few bars and restaurants. No sanctions were imposed on Bavaria.

[3] Case 15653/2001: Ice Cream Cones-Induga

Case 15653/2001 – Ice cream cones – Induga was decided by SIC in 2001. Induga S.A., a powerful company with advanced technology and a dominant position, based in Medellin, introduced lower prices in the Atlantic Coast and in Medellin once a competitor accessed the market. The SIC determined that it was not reasonable that the price of the cones was higher in Medellin than in the coast. The decision was challenged and examined by the Council of State which issued its ruling in May of 2013. The Council of State determined that Induga had no dominant position based on a relevant market analysis and also that Induga did not sell its products below the prices at which it sold the same products in other regions of the country.

The decision was challenged before the administrative jurisdiction; the Council of States issued its judgment on May 23, 2013. This High Court considered that *Induga* did

not have a dominant position in the ice cream cones market. It established that, when defining the relevant market, the SIC did not consider other products with which consumers tend to replace ice cream cones, such as plastic recipients; the SIC did not take into account that there was another competitor in the market with a share of 23% either. If these aspects had been included in this analysis, it would have been concluded that *Induga* did not have a dominant position.

The Council of State established that, even if *Induga* did have a dominant position, it was proven that this company did not sell its products in the Atlantic coast at a lower price than the one applied nation-wide; it was only proven that the prices at which *Induga* sold its products in Antioquia were lower than the prices at which it sold its products in Atlántico. Hence, there was no infraction of any Colombian competition law.

[4] *Case 53403/2013: Mobile Calling Services – Comcel*

Article 50(6) of Decree 2153 expressly forbids firms with dominant positions from performing any unilateral conduct aimed to impede or deter entry of third parties to the markets and/or distribution channels. The SIC recently sanctioned *Comunicación Celular S.A. Comcel* for incurring in this anti-competitive conduct (*Case 53403/2013 – Mobile Calling Services-Comcel*).

Allegedly, *Comcel* incurred a series of anti-competitive conducts in the process of Mobile Number Portability⁶ (henceforward, MNP); this process allows users from different cellular companies to switch providers without changing their cellphone numbers. The MNP fosters free competition between the mobile calling services providers, since it encourages them to create strategies that encourage users to look for the best supplier.

Comcel was sanctioned for entering into two main conducts:

- *Locking cell phones that the company operated:*⁷ *Comcel* prevented users from connecting their phones with other providers, since their phones could only be unlocked when they fulfilled certain requirements. Consequently, this company influenced its consumers' decisions, so that they would not switch providers. It was not proven that the conduct had a considerable effect, since only a few complaints about locked phones were brought forward in the process. The SIC, however, argued that the mere possibility of a harmful effect suffices for the conduct to be significant, and, hence, for this authority to penalize it. In this particular case, it was considered that locking the cell phones that the company operated had a great potency for affecting the market.

6. Proceso de Portabilidad Numérica.

7. Bloqueo de las bandas de los teléfonos operados por Comcel.

- *Bulging MNP results*.⁸ *Comcel* gave its distributors great incentives to increase their portability outcomes. This led to the carrying of unreal procedures: Users that did not have the intention of performing a MNP process, had their cell phone lines transferred from other operators to *Comcel*. Although *Comcel* did not execute this deed directly, this company was accused of being aware of this conduct. The SIC considered that the company used a fraudulent strategy to alter MNP results, so that it appeared to be the operator with the greatest amount of transfers. The latter falsely affected the position of the company in the market, regarding users' decisions, especially because the results were broadly exposed. Additionally, *Comcel's* competitors lost some of the numbers they had been assigned. This conduct violated Article 1 of Law 155, which contains the general prohibition of anti-competitive practices.

The SIC imposed the company the highest fine so far imposed in Colombian Competition Law, around USD 40 million. *Comcel* has challenged the decision in the administrative jurisdiction.

[5] Case 3694/2013: Electric Meters-EBSA

Recently, SIC has decided an investigation against *Energía de Boyaca S.A.* EBSA, the only provider of the energy service for the department of Boyacá in Colombia (*Case 3694/2013-electric meters-EBSA*) for abuse of dominance in the form of tying. The energy supply requires, among others, the usage of electric meters, which must be calibrated in different laboratories to properly perform its services.

The electric meter market, although complimentary to the energy market, is completely independent. There is a laboratory fully owned by EBSA where they perform electric meter calibration. Unlike the energy market, there are several laboratories not owned by EBSA that also provide calibration services.

On November 2010, EBSA issued an internal ordinance which required that electric meters calibrated on laboratories different from EBSA's had to pay a *homologating fee*. Such charge did not have to be assumed whenever they decided to calibrate the electric meter with EBSA.

The SIC determined that because the calibration of electric meters was a complimentary service associated to the energy supply, EBSA could determine market conditions in both markets and therefore could be liable of abuse of dominance in any of these markets. Such situation also showed the almost nonexistent power of negotiation held by EBSA's competitors in that market. Additionally, SIC found that there were other associated costs charged to third parties (such as a registration fee) that already covered any cost incurred by EBSA for the homologation process.

8. Abultamiento de las cifras sobre los resultados de los procesos de portabilidad numérica entre operadores.

In the instant case, SIC affirmed that charging that fee constituted an illegal competitive advantage that caused the effect of imposing an undue burden to competing laboratories. The authority ordered *EBSA* to refrain from charging the *homologating fee* and imposed a fine to the company.

§14.04 MERGER REVIEW

[A] Relevant Legislation

Merger control legislation in Colombia is set forth mainly in Law 155, Decree 2153, Law 1340, 2009, Circular No. 10,⁹ and Resolution 10930, 2015 (Resolution 10930) which contains the procedure and the guidelines related to merger control. Merger regulation for specific sectors is contained in other statutes.

The Organic Statute for the Financial System, Decree 663, 1993 (Decree 663) governs mergers in the financial and insurance sectors.¹⁰ Legislation for mergers between airlines is basically contained in Article 1866 of the Commerce Code and Article 3.6.3.7.3 of the Colombian Aeronautic Regulation (RAC).¹¹

On August of 2009 a citizen filed a complaint requesting that the articles of law 1340, 2009 dealing with merger control be declared unconstitutional. According to the complaint, the mentioned articles of the law did not comply with the constitutional parameters for State intervention in the economy and violated the rights to free enterprise, private initiative and free economic competition.

The Constitutional Court decided to uphold the law on the grounds that it is an obligation of the State to prevent anti-competitive conducts and for that reason it concluded that it is possible to establish a merger control system according to the Colombian Constitution.

The complaint also argued that the thresholds for merger review had to be established by law and could not be set by the SIC. The Court ruled that as far as the law gave the authority to the SIC, to establish the thresholds, the intervention of the State in the economy was correctly exercised at the level of the law, and not at the level of the regulation.

Finally, the complaint argued that the fee imposed by the new law for the verification of conditioned mergers violated the Constitutional principle of “*no taxation without representation*” and the Colombian tax law. The Court considered that the mentioned fees are not taxes and therefore its imposition is constitutional.

[B] Authorities

The SIC is the main authority for merger control in Colombia. As mentioned before, the SIC is an administrative entity controlled by the government. The President of

9. External Bulletin No. 10 from the SIC.

10. Decree 663 of 1993.

11. Commerce Code, Article 1866.

Colombia is free to appoint and remove the Superintendent from office at his discretion.

Pursuant to Article 2 of Law 1340, SIC has the power to review mergers in all sectors of the economy, with two exceptions: (i) merger transactions in the financial sector are reviewed by the Superintendence of Finance (SF), which must hear the opinion of SIC and must apply the conditions that SIC recommends, if any; and (ii) operational agreements between airlines, which are reviewed by the Aeronautic Authority (Aerocivil).

As said before, the SIC is the National Competition Authority in charge of the application of the competition, unfair trade, consumer protection, data protection, intellectual property and data protection legislations.

[C] Triggering Events and Thresholds

According to Article 9 of Law 1340, all transactions that consist of acquisitions, mergers, consolidations, or integrations (whatever the legal form of the transaction) between companies dedicated to the same activities or participating in the same vertical value chain, whose assets and sales individually or jointly meet the economic thresholds, and have a 20% or more market participation, require authorization.

The economic thresholds refer to combined local assets or local operational income equal or in excess of 100,000 minimum monthly wages, around USD 19,500,000. However, if one or more undertakings haven't established a local business in Colombia, the economic threshold calculation must take into account the worldwide assets or worldwide operational income of the undertaking located abroad. If the economic threshold is not met, then the transaction is considered *de minimis* and the companies do not need to do anything.

If the economic thresholds are met, and the companies do not meet the market participation threshold, they can file a *short form notification (no waiting period)* and proceed to the transaction immediately. The notification must be filed before the transaction enters into effect in Colombia.

The market participation threshold is met when the companies, individually or jointly have a market participation equal or superior to 20% in any of the relevant markets affected by the transaction. If the transaction is vertical the market participation is measured in each market.

If the companies meet all the above requisites including the economic plus the market participation thresholds, they must file a *long form information (waiting period)* and must wait until the transaction is cleared by the competition authority in order to proceed with the transaction. There must be no commercial contact, share of information or joint decision making between the companies until the transaction is cleared.

For the case of global transactions already cleared in other jurisdictions, Resolution 10930 expressly establishes the "carve out" option intended to keep the effects of the transaction without effects in Colombia.

Failure to comply with the merger control regulation is considered an antitrust infraction and the companies can be subject to a *gun jumping* investigation and fines that can go up to USD 19,500,000 for the company and USD 390,000 for the natural persons involved.

Law 1340 has made it totally clear that SIC will review both horizontal and vertical transactions. Currently, there is a discussion as to whether merger control applies to conglomerate mergers in which there is no market overlap. It seems that this is not the case, however, since the 2009 law did not refer to those cases.

SIC's position is that a merger transaction amounts to an entrepreneurial concentration requiring authorization from the competition authority when the companies involved cease to participate independently in the market and are, therefore, *permanently* controlled by the same management or decision center, whatever the legal structure. SIC has not issued any particular doctrine on when joint ventures are caught. Given SIC's interpretation, however, it seems that only joint ventures that create a sort of permanent undertaking should be subject to merger control.

Colombian law offers two definitions of control: one is found in the Commerce Code and applies to corporations; the other is in the competition law and refers to undertakings in a broader way. According to the broader definition, control is the possibility of influencing, directly or indirectly, the business policy of a company or undertaking; the initiation, variation, or termination of the activities of the company; or the use of assets essential to the company's operations.

The definition of corporate control includes both internal and external control. Pursuant to Article 261 of the Commerce Code, internal control exists when a company, directly or through other subsidiaries, owns more than 50% of the capital stock of another company, or owns or commands enough voting stock to appoint the majority of its directors.¹² External control, on the other hand, exists when, by way of a contract or other relationship different from the ownership of stock, one person or company can exercise a dominant influence over a corporation.

As mentioned before, transactions that do not imply the acquisition of control are not caught by the merger antitrust legislation.

Colombia adheres to the effects theory, meaning that foreign transactions that produce effects in the Colombian market are subject to the review of the SIC. The same legislation governs both domestic and foreign mergers. SIC's doctrine requires authorization of foreign mergers where both parties to the merger market their products, directly or indirectly, in Colombia. Under the former doctrine of SIC, clearance was not necessary for foreign mergers when the products of one or both of the merging parties were sold in Colombia by independent companies that assumed the risk and made the decisions associated with the import and sale of the products. Nevertheless, one can consider this doctrine overruled after the *SABMiller – Bavaria* merger. In this case, SIC requested an antitrust filing, even though independent importers sold the products and brands of *SABMiller*.

12. Commerce Code, Article 261. Decree 410 de 1971. D. O. No. 33.339 del(June 16/1971).

[D] Exemptions

According to the current laws on merger review, the SIC only objects mergers generating an undue restriction on competition and most transactions should be approved. However, there are cases that although producing a big restriction on competition, can be authorized by the SIC based in an exception.

In Colombia there are two types of exemptions to the merger control performed by the SIC. First, there are transactions that despite producing an undue restriction to competition, the efficiencies obtained with the merger exceed the negative impact of the transaction. Second, there is a defense where one of the merging parties will imminently exit the market. There are also exceptions to the merger control conducted by the SIC that will be further explained below.

[1] Efficiencies

According to Article 12 of Law 1340, 2009, the SIC may¹³ not object a merger transaction in cases where benefits for the consumers exceed the possible negative effects on competition and such benefits are unlikely to be achieved by other means.¹⁴

As seen above, reductions in price can be considered as efficiencies, but they are not the only ones. The law only requires that “benefits” exceed the negative impact of the merger. This can also be accomplished through innovation, better quality of the products, increased production, etc.

Due to the intrinsically speculative exercise that measuring the efficiency involves, the SIC only would analyze efficiency claims based on “*studies based on widely recognized methodologies*” and the merging parties must undertake to pass the benefits through to the final consumer. In that sense, vague and unfounded projections of efficiencies are not likely to be accepted by the SIC. In addition, the parties must show how the benefit will be transferred to the final consumers.

In addition, it is important to note that mergers approved under the efficiency clause are understood as “conditioned”¹⁵ and therefore the SIC will review the actions undertaken by the merging parties and also may request a collateral from the parties to assure their compliance with the conditions imposed.

A landmark case where the efficiency exemption was discussed was the ports merger (*Case 255/2010 Tecsa, Maritrans, Granportuaria, Elequip – Nautiservicios*). These companies provided logistic services at SPRBUN, a Port located in Buenaventura.¹⁶ SPRBUN was a port with several logistic companies that usually ranked far below other ports in Colombia like Cartagena, in terms of efficiency. The port had

13. The verb used in the rule is “may not” rather than “will not” object.

14. In this point the rule resembles section 12 of the US Horizontal Guidelines imposing the “other means” requirement.

15. In US antitrust argot, the efficiency claim will be deemed as a conduct remedy that will be closely reviewed by the SIC.

16. Resolution 255 of Jan. 14, 2010.

problems like deficit of stevedores, lack of space, inefficiencies in handling reach-stackers, most of them due to the multiplicity of agents. In order to make the port efficient it was necessary that TECSA would take over the majority of the logistic operations, thereby reducing operation times, enhancing traceability of the containers and increasing security and surveillance. Despite the high increase in market participation of TECSA (from 66% to more than 90%) in SPRBUN, the SIC concluded that the positive effects of the transaction would exceed the negative impact of the transaction, due to the creation of efficiencies and competitiveness in the national infrastructure. However, the SIC remembered that TECSA would have market power and compelled the company to comply with competition laws.

[2] *Failing Industry Defense*

The merging parties may argue this exemption when one of the companies is in an imminent state of failure. That means that although operating, the company is likely to disappear in the short term.

In Colombia, the failing industry defense is not expressly stated in the law, however the SIC has considered the experience of other jurisdictions in order to develop the exemption. It is important to note that the SIC will enhance scrutiny in order to determine whether this exemption applies to the particular case and therefore its usage is rather limited.

In that sense, the SIC has developed a test with three conditions that must be concurrently met by the companies arguing this defense:

- The failing company is likely to exit the market in the short term. Usually the term must be inferior to one year and the reasons for exiting the market must be financially supported.
- The anti-competitive effects of saving the company from disappearing are not bigger than those created if the company actually exits the market. The SIC evaluates the existence of another buyer or other less critical solutions.
- Customers are not worse off after the merger than they would have been with the disappearance of the failing company. The SIC evaluates the market participation of companies after the company fails and will compare it with post merger participation.

The landmark case regarding this defense is related to the cement and ready-mix industries (*Case 13544/2006 – Argos – Andino*). *Argos* wanted to acquire an important share participation in *Andino*. Both *Argos* and *Andino* were competitors in the production and commercialization of Cement and ready mix in several regions of Colombia. In that case *Andino* could prove that absent the merger, the company would have been unable to meet its financial obligations due to the high level of indebtedness. Officers of *Andino* considered different investors before approaching *Argos* without success and due to the imminent exit of *Andino* the post-merger scenario was very similar to the market without ANDINO.

[E] Pre-merger Control Regime or Post-merger Control Regime

In Colombia, merger control is performed *Ex Ante* both for the *long form information (waiting period)* or the *short form notification (no waiting period)*. Companies are strongly discouraged from performing merging activities (e.g., transfer of assets, employees, know how, closing of contracts, etc.) before obtaining authorization. Breach of merger control rules (i.e., merging before obtaining SIC's authorization) may lead to a gun jumping investigation. If the SIC finds that the companies merged before obtaining approval, it may impose fines for breaching antitrust laws and also can order the reversion of the merger transaction.¹⁷ Failure to file will be explained in further detail below.

[F] Closing the Transaction during the Waiting Period

Resolution 10930 brings the possibility of closing the transaction abroad during the waiting period. For instance, the SIC must be assured that such closing will not affect the independency of the companies in Colombia. In order to accept a “carve out” for Colombia, intervening parties must present the following warranties:

- There won't be change of control in Colombia. Intervening parties' businesses must keep independence in Colombia.
- The acquiring company must refrain from influencing the competitive strategy, shareholders decisions, board of directors' decisions and/or other government bodies of the target company.
- Intervening parties must refrain from exchanging information deemed commercially sensitive and/or confidential for conducting their business.
- The provisions must be intended to be permanent. Temporary measures will be discarded by the SIC.

Resolution 10930 provides a short procedure to inform the SIC of the closing and the projected carve out provisions. Accordingly, intervening parties must present the SIC with the proposed structure of the projected carve out provisions and the mechanisms intended to keep the businesses permanently separated. The SIC will have five business days to analyze the provisions and decide whether they are proper to keep the businesses separated. If the SIC is not satisfied with the proposed provisions, it will require the parties to modify and present the project again (the term will be defined by the authority). The SIC will have another five business days to issue a decision on the second proposal. Companies must refrain from closing everywhere, before the SIC issues a positive decision.

17. As of July 2015, the SIC has not used the “reversion of the merger” prerogative stated in Article 13 of Law 1340, 2009.

[G] Intra-group Transactions

Intra-group transactions are exempted from merger control in accordance with number 4 of Resolution 12193 issued by the SIC. There are two types of intra-group transactions that will be explained below:

[1] Company Group

Companies that belong to the same group are exempted from merger review. Article 28 of Law 222, 1995 (Law 222) defines a *Group of Companies* as a set of companies under the same control and the same unity of purpose and direction. These conditions are explained in the following lines:

- Same Control: The same shareholder directly or indirectly controls two or more companies.
- Unity of purpose and direction: When the existence and the activities of all the controlled entities seek a common purpose defined by the parent company due to the direction it exercises over the controlled entities, notwithstanding the development of the individual object or activity of each of the companies in the group.

A relevant case to illustrate the legal institution of the *Group of Companies* is *GRUPO AVAL*, composed by four banks (*Banco de Bogota*, *AV Villas*, *Banco Popular* and *Banco de Occidente*) that share the same control and have a unity of purpose and direction.

[2] Shared control

As said before, companies that respond to the same control, even if that control is shared, are exempted from merger review.

In order to define control it is important to cite Article 260 of the Colombian Commerce Code defining a situation of control as the case where the decisional power of a company (controlled) is completely bestowed upon another (controlling), either directly or indirectly.

Colombian regulations presume a situation of control based in capital participation, vote power and power to influence corporate decisions of the controlled company.¹⁸ In that sense, even a share participation below 50% may be deemed as control depending on the power to influence company's decisions.

18. See Article 27 Law 222, 1995.

[H] Substantive Test for Assessing Mergers

Pursuant to Article 11 of Law 1340, SIC must prohibit or object to mergers that will generate an undue restriction on competition. Of course, all mergers tend to restrict competition. As such, the SIC's objective is to determine whether those mergers will produce an *undue* restriction on competition.

Under Article 5 of Decree 1302, 1964, mergers exhibiting the following characteristics are presumed to produce an undue restriction on competition:

- where the merging parties engaged in anti-competitive activity prior to the transaction; and
- where the merged entity would acquire the capacity to impose unfair prices on consumers through the transaction.

Also there are special sectors subject to regulation that impedes one company to acquire a certain percentage of the market and there are other regulatory constraints that may force the SIC to block the transaction, not for competition reasons but due to regulatory constraints. In these cases the authority does not advance a competition analysis.

One should consider that, according to Article 12 of Law 1340 and Decree 2153, SIC cannot object to mergers in which the parties can demonstrate, the *Efficiency Exception* as described above. Also the SIC will apply the *Failing Industry Defense* if its thresholds are demonstrated as explained above.

If the merger transaction is not one of those that have to be prohibited and if the exceptions just described do not apply, then the SIC will apply its substantive test. It is important to convey that the law does not explain the procedures or rationale that the SIC should use during its evaluation, and the guidelines issued by the SIC are not very specific in that respect. One can, however, identify some of the general elements in SIC's analytic process:

- SIC defines the general market based in the product market and the geographic market. The product market will be defined narrowly using the hypothetical monopolist test (*SSNIP Test*), in order to isolate the group of products (goods or services) that behave as perfect or imperfect substitutes of the product affected from the merger.

In the supermarket cases: *Éxito – Carulla*; *Éxito – Cafam* and *Éxito/Cafam – Olímpica* the SIC used the *Isochronal Test* in order to define the relevant geographic market of the different supermarket chains within the large cities. The isochronal was rated at ten (10) minutes time of transportation.

- SIC will consider and evaluate the competitive pressure that arises from perfect and imperfect substitutes, as well as from potential competition coming from national or international players. In 2011 the SIC authorized the *Caterpillar – Bucyrus* transaction, in which the authority considered competitive pressures from a relevant market larger than Colombia, which comprised a substantial part of Latin America.

- SIC will calculate the participation of the merging companies in the relevant market and apply concentration indexes like HHI and CR4 in order to evaluate the effect of the merger. In markets that present a *leader – follower* structure, the SIC has also used the *Stackelberg Model* in order to assess market power before and after the merger takes place.
- SIC will then evaluate the different kinds of barriers for entering the market including import tariffs and duties, transportation costs, excess capacity, cost of building a plant in the country, etc., in an effort to evaluate the contestability of the market or the likelihood of entry of new competitors.
- If the parties have proposed conditions to the transaction SIC will evaluate them and discuss them with the merging parties. In some cases SIC will modify substantially the conditions offered by the parties and in general will prefer structural to behavioral remedies. Most likely, SIC will require divestment of part of the business.
- It is not very clear what particular set of circumstances will trigger an objection or a conditioned approval; but most likely it will be a negative mixture of the above elements.
- For instance, SIC would probably reject a merger that significantly increases market concentration, faces no perfect or even imperfect produce substitutes, does not have to cope with competition, enjoys high barriers to market entrance and limited contestability, and no possible structural remedies.
- Having said that, it is important to remember that in its whole history SIC has prohibited less than 1 % of the informed mergers.

As said before, for some years now SIC has been applying reasoning and analysis similar to those developed both in the European Union and the United States. There is much debate as to the use of economic tools, such as the concentration indexes, which were prepared for developed economies, without adjustment to the size and specific characteristics of the Colombian economy. It has to be considered that most markets in a developing economy are small and already concentrated, but this circumstance does not mean that there is no competition or that it will become impossible for new competitors to enter the market.

From the lines of merger cases that have been objected or conditioned it is possible to deduct that SIC has moved from the “*Market Dominance Test*” it used initially, into a more comprehensive “*Substantially Lessening of Competition Test*.” It is now clear under the new 2009 law that SIC has the capacity to review vertical mergers. There is much debate with regard to the possibility of the authority to review conglomerate mergers.

Non-competition issues, such convenience, political considerations, loss labor, etc., are not relevant in the merger review process and will not be considered or discussed by SIC.

[I] Notification Procedure and Timetable

As mentioned before, Colombian merger control requires the previous *short form notification (no waiting period)* when the economic thresholds are met but the market threshold is not; or *long form information (waiting period)* when both thresholds are met. Regarding merger whereby the assessment of the market threshold is complex, Resolution 10930 allows the intervening parties to file a *short form notification*. If the SIC is not satisfied with the market participation calculated by the parties, it has ten business days to request the parties to file the *long form information* instead. It is important to note that despite the fact that *short form notification* does not require a waiting period, in case of complex mergers it is advisable to refrain from closing for the next ten business days in order to mitigate any risk associated with the SIC not agreeing with the calculation of the combined market participation of the intervening parties.

In any case, the requisites either of these two systems must be complied with before the transaction takes effect in Colombia. Parties may execute agreements, but must declare that performance is dependent on SIC clearance. Both parties are responsible for making the notification and presenting all relevant information to SIC.

[1] Mergers Carried without Previous Clearance

Mergers executed without previous clearance from SIC are infractions of antitrust laws. The companies and their administrators are subject to *gun jumping* investigations and fines that are explained below.

It is, therefore, important that foreign mergers have no effect in Colombian territory until it has been approved by SIC. There is not yet a clear doctrine regarding the closing of foreign transactions before obtaining clearance with SIC, with a *carve out* or *hold separate* provisions for Colombia. However, it is advisable to include such a clause, as well as any other elements that help to assure SIC that the transaction will not have effects in Colombia before it has been cleared.

[2] Process and Timing

The chronology of the procedure works in two (2) stages and goes like this:

Stage I:

- The petitioners file a pre-evaluation petition with a succinct description of the transaction.
- Within the following three days, SIC must determine whether it needs to review the transaction. SIC will end the proceedings if it decides the transaction does not require review.
- Within the three-day period, if SIC finds that review is necessary, it will order the parties to make a publication in a newspaper of sufficient circulation to

enable interested parties to file any information pertinent to the analysis of the transaction, which should be done within ten working days of the publication.

- The petitioners can request that the SIC refrain from publication to preserve public order, in which case SIC can accept the petition while maintaining the confidentiality of the transaction and procedures.
- SIC has thirty working days (forty-five calendar days in most cases)¹⁹ during which it studies the transaction to determine whether the merger poses a risk to competition, case in which the procedure should continue into Stage II; or if by the contrary, the merger does not affect competition, in which case SIC will approve it without conditions.

Stage II:

- If the procedure continues into Stage II, SIC must inform about it to the regulatory and control agencies in the sectors relevant to the transaction, so that they have the opportunity to present their technical advice regarding the transaction to the SIC, and to participate in the proceedings, which they can do at any point. While the agencies' views are not binding for the SIC, it must justify a decision to depart from those opinions.
- The interested parties must file the information requested for Stage II within fifteen days of the decision to continue the proceedings. They are free to propose conditions and other measures that might reduce the anti-competitive effects associated with the transaction.
- SIC can request that the authorities and interested parties explain or supplement any information they have filed regarding the proceedings.
- Within this fifteen-day period, the petitioners can access the information filed by the authorities and third parties, and attempt to rebut it.
- Within three months following the final filing date, SIC must make one of three possible decisions: simple authorization; conditioned authorization (i.e., clearance predicated on the application of suitable remedies); or objection. The list of information that the interested parties must provide to the SIC is contained in Resolution 10930. The list is very detailed. It includes information concerning the terms of the transaction, the merging companies, competitors, consumers, market participation and conditions, barriers to entering the market, and any other information that may allow SIC to assess the effects of the transaction properly. One should note that SIC is free to delay its review until the information-gathering process is complete.
- Under Colombian law, if SIC exceeds the deadline, the transaction is automatically approved and SIC surrenders its authority over the case. This is known as positive administrative silence. However, one should note that this scenario is

19. According to Article 62 of Law 4, 1913, when laws and official acts refer to terms of days, they are understood as working days, unless explicitly stated otherwise.

unlikely given that there have been only a couple of such instances in twenty years.

- If the parties to the merger remain inactive for two months at any point during the proceedings, SIC will consider the petition for authorization of the transaction abandoned.

[J] Consequences of a Failure to File

Mergers carried out without previous clearance from SIC are considered an infraction of antitrust laws and the companies and their administrators are subject to *gun jumping* investigations and fines. Fines are expressed in minimum monthly wages. The maximum fine that SIC may enforce amounts to 100,000 monthly wages, the equivalent to USD 19,500,000 for the companies and two thousand (2,000) minimum monthly wages, the equivalent to USD 390,000 for the administrators or natural persons that carry out the transaction.²⁰

In addition to that, in case SIC considers that the transaction produces an undue restriction on competition and must be prohibited, it could order to reverse the operation. Finally, it must be considered that an operation carried out in violation of competition laws can be declared by a judge absolutely null and void, which can have important economic repercussions. It must be pointed out that for merger purposes SIC is not a judicial authority. Such a declaration has to be obtained through an ordinary process before the general jurisdiction.

[K] Third Party Involvement in Notification Process

SIC has not admitted third parties to fully participate in the merger review process, The authority will not grant them access to information submitted by the merging parties, notify third parties of its determinations, or permit them to file a reconsideration plea. Though third parties are free to present documents or express their opinions to SIC, the authority is not required to consider them. At its discretion, SIC may seek third-party testimony or information that might assist the authority in the review process.

Pursuant to paragraph 3 of Article 4, of Law 155, 1959, all the information the parties include in the antitrust filing is strictly confidential. Any public official who discloses any information regarding the procedure faces removal from office and criminal prosecution.

The Colombian economy is open to foreign investment. However, there are exchange, tax, labor, securities, and special-sector requirements that one must check about with local councils before entering into a transaction.

20. Law 1340, 2009, Article 25.

[L] Remedies

Early in the review process, it is important for the merging companies to identify if the transaction should be subject to remedies, at least in a general way, so that the authority is aware of the intention or willingness of the parties to discuss them. In those cases, when SIC finds that the proposed transaction may pose undue restrictions to competition but believes there are options to correct such distortion, it will authorize the merger provided the parties undertake certain remedies.

Such conditions have ranged from elimination of exclusivity for distributors to the obligation of producing for a competitor at variable cost, allowing a competitor to use a percentage of installed capacity, and even the obligation to divest part of the business. SIC has shown a preference for structural remedies, such as divestments, over conduct or behavioral remedies.

SIC customarily requires that the parties comply with structural remedies within a certain time limit (generally, less than one year). Compliance with behavioral remedies is usually required for a limited period of time (generally, no more than three years), but there are cases in which an obligation has been imposed with no time limit. Pursuant to Article 11 of Law 1340, 2009, SIC must periodically review whether the parties have complied with the conditions and obligations imposed. Traditionally, SIC requires that an external auditor verifies the full compliance of the remedies and presents reports to the authority from time to time. Finally, SIC requests that the merging parties put in place a bank or insurance bond to guarantee full compliance with the remedies.

SIC has not made distinctions regarding the imposition of remedies in foreign-to-foreign mergers.

Even though SIC has not rendered an opinion on this issue, one could assume that the merger control authority would permit reasonable ancillary restrictions.

[M] Penalties

As described above, mergers carried out without previous clearance from SIC are considered an infraction of antitrust laws and the companies and their administrators are subject to *gun jumping* investigations and fines.

Fines are expressed in minimum monthly wages. The maximum fine that SIC may enforce amounts to 100,000 monthly wages, the equivalent to USD 19,500,000 for the companies and 2,000 minimum monthly wages, the equivalent to USD 390,000 for the administrators or natural persons that carry out the transaction.²¹

[N] Appeal

Decisions issued by SIC are not subject to appeal. Rather, a disgruntled party or parties can seek a reconsideration plea before the same public official. The reconsideration

21. Law 1340, 2009, Article 25.

plea must be filed within ten working days after notification of the decision. The Superintendent has to make a decision within the following two months, though the Superintendent can extend this period if there is a need to gather additional evidence.

A party may challenge the final decision issued by SIC by means of a judicial action before the Administrative Jurisdiction. The party must file this action within the four months following the decision to object or prohibit the merger. However, this alternative is not very attractive to the parties because of the length of the procedure (five to eight years).

[O] Specific Industries

There are industries exempted from merger control review undertaken by SIC, however, these industries must inform the relevant agency about the merger transaction. These industries are the financial and aeronautic industries and will be explained in the following lines:

[1] *Aeronautic Industry*

According to paragraph of Article 8 of Law 1340, 2009 the Civil Aeronautic Authority – *Aerocivil* is in charge of reviewing specific transactions between airplanes operators. For instance, this agency deals among others, with share code agreements, joint commercial aviation operations, airfreight services, etc.

[2] *Financial and Insurance Industries*

The Superintendence of Finance – SF, is the governmental agency that controls and supervises financial institutions, banks, leasing companies, trading companies, etc. In that regard, Article 9 of Law 1340, 2009 states that merger transactions between companies under control of the SF are evaluated and authorized by such Superintendence.

It's important to note that, Article 9 of Law 1340, 2009 provides that all of the intervening companies must be under control of the SF for this entity to acquire jurisdiction over the merger. If one of the merging companies is not supervised by that Superintendence, then the merger review is made by the SIC.

