Competition Law in Latin America

A Practical Guide

Second Edition

EDITED BY
JULIÁN PEÑA & MARCELO CALLIARI

Wolters Kluwer

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Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
E-mail: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-3695-8

e-Book: ISBN 978-94-035-3700-9
web-PDF: ISBN 978-94-035-3701-6

Printed in the United Kingdom.

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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 constitutional reform of 1936. Such intervention has permitted the exercise of economic freedom within the *"Social Market Economy"* established by the 1991 Political Constitution.[1]

Colombia, like other countries in Latin America, issued its first antitrust legislation at the end of the fifties, following the example of the United States (US) and the European Union (EU). 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 was at odds with a truly competitive environment.[2]

Evolution of Colombia's Antitrust Laws can be divided into two main periods. The first period began with the expedition of Law 155 of 1959 (Law 155), which

1. The Constitutional Court has issued rulings such as decisions C-074/1993 and C-040/1993 reinforcing economic freedom within the "Social Market Economy".
2. 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.

contained the first comprehensive regulation of Antitrust Law in Colombia and ended with Special 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, some of which are:

- 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.
- Special mechanisms for state intervention in the agricultural sector. Eventually, these mechanisms may be used to exclude conduct and situations from the scope of application of competition laws.

Anti-competitive practices are analysed under the general prohibition contained in Article 1 of Law 155, read together with Article 46 of Decree 2153, and the

prohibitions against specific actions are contained in Decree 2153: Articles 47 (horizontal and vertical agreements), 48 (unilateral conducts) and 50 (Abuse of Dominant Position). The National Competition Authority, the Superintendence of Industry and Commerce (SIC) oversees enforcing these provisions.

Most recently Law 2195 of 2022 reformed two mayor aspects of Colombia's antitrust legislation; the first being its leniency program (Article 66), and the second one being the fines that the competition authority can impose (Articles 67 and 68).

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*.[3]

While the legislation specifically lists certain types of prohibited conducts, anti-competitive conducts that do not fall under these specific categories may be investigated by the SIC as an infringement of the general prohibition against anti-competitive behaviour 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 then balance the pro-competitive versus the anti-competitive effects of the conduct to establish if it results in a violation of the general prohibition.

On the other hand, the conducts 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 in most of the cases it will not accept explanations of legal or economic nature trying to demonstrate that the investigated conduct is not illegal. For example, Article 47 (6) 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.

Even though this is the general situation regarding the interpretation of the specifically defined conducts, it must be recognized that in the past decade the SIC has

3. 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 defence 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 labour 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 reconsideration plea before the authority and the judicial proceedings that followed, 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 judicial sentence 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 objectives of the law were in fact breached (in particular, consumer welfare, 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 behaviour was enough to impose sanctions.

considered in a handful of cases that vertical price fixing agreements may be considered legal, notwithstanding the fact that Article 47 (1) of Decree 2153 defines as anti-competitive all price fixing agreements, without distinction on whether they are horizontal or vertical. In these cases, the authority has shifted the burden of proof, which means that by default the vertical price fixing agreement is considered illegal unless the investigated companies are able to demonstrate the pro-competitive advantages of the conduct.

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

In the area of competition protection, some of the most significant cases especially during the nineties were related to the agricultural sector (sugar, rice, chocolate, onions, milk), and to other key economic activities, such as cement, fuel, and telecommunications. During the last decade, the authority will focus on the application of the so called *Anti-Corruption Statute,* Law 1474 of 2011 (Law 1474), which makes bid rigging in public contracting both an anti-competitive agreement and a criminal offense. It seems possible that in the immediate future, the SIC will analyse the digital markets, taking into consideration also that it has been granted functions related to the application of the competition, consumer protection, and data protection regulations.

§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. Nevertheless, Article 47 of Decree 2153 specifically prohibits horizontal and vertical agreements either "by its object or by its effect". Among other agreements, Article 47 prohibits; price fixing (horizontal and vertical), discrimination, horizontal territory and customer allocation, quota arrangements, technology or raw materials limitations, obstruction or blocking access to market distribution, tying, and bid rigging.

Article 45 (1) of Decree 2153, defines the term "agreement" for purposes of antitrust laws: An agreement is defined as a contract, convention, concerted practice of conscious parallelism. This means that the SIC will investigate both express and tacit agreements. The tacit collusion cases are considered as concerted practices and conscious parallelism. In both cases the authority will endeavour to demonstrate the so called plus factors to assert that tacit conduct amounts to an anti-competitive agreement.

[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 with the object or effect of directly or indirectly fix prices are deemed per se unlawful according to Article 47 (1) of Decree 2153. As said before, there is no distinction in the law between horizontal and vertical price fixing, both types being clearly prohibited and deemed per se illegal by the law. As mentioned, there is a handful of cases during the past decade, in which the SIC has considered that vertical price fixing agreements may be considered legal. In those cases, the authority has shifted the burden of proof and required that the accused companies demonstrate the pro-competitive effects of the vertical price fixing agreements that will otherwise be considered 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. Back in 2004, a transportation association was sanctioned 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 defences submitted relating to the per se illegality rule 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 judiciary.

[2] Horizontal Agreements to Allocate Costumers 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 SIC initiated an investigation against the cement manufacturers and their 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. The SIC sought to prove that the cement companies had portioned the country among themselves and that they also monitored the compliance of the agreement by submitting to ICPC a weekly report about locations and customers where sales took place and by receiving a report from the institute informing each company 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 (settlement) to the authority, comprising among other elements, an information protocol that did not enable them to monitor sales made by their competitors. The SIC accepted the guarantee (settlement) proposal, 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 manufacturers had portioned the sugar cane growers in a way that they could only sell the crops to the mills that had been assigned. Within the same investigation, the sugar cane manufacturers were also accused and finally sanctioned for an alleged agreement that established a price formula. However, regarding the horizontal agreement to allocate the growers and their farms, the manufacturers were able to prove that no agreement had been entered and that it was due to the technical features of the process and the potential degradation of the raw material that each mill preferred to purchase the crops from closest possible farms. The SIC accepted the argument and the manufacturers were not sanctioned for this conduct.

There is 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, but they can always be investigated pursuant to 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 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 pursuant to 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 accepted the settlement (guarantees) proposal and terminated the investigation with no sanctions. It also accepted the price imposed on the distributors and the logistics related vertical market allocation.

There is 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 if they are reasonable, limited in time, and have a meritorious object (e.g., in a merger deal to avoid confusion or unfair trade practices).

Apart from these two main forms of restrictive agreements, there are other restrictive agreements that are specifically prohibited and are considered as per se illegal:

- Agreements entered 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 with the purpose or effects of limiting technical developments are considered per se illegal under Article 47 (6) of Decree 2153.
- Agreements entered with the purpose or effects of conditioning the supply of a product to the acceptance of additional obligations that by their nature did not belong to the objective of the transaction, are considered per se illegal under Article 47 (7) of Decree 2153.
- Agreements entered 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.
- Bid rigging agreements aimed at tampering with public bids distribute contracts or fixing the terms of the proposals are considered per se illegal under Article 47 (9) of Decree 2153.
- Agreements entered with the purpose or effect of obstructing access of other economic agents to the market or the distribution channels, are considered per se illegal under Article 47 (10) 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.

About 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 free competition in the Colombian markets. In these multijurisdictional cases, the SIC may face several challenges including among others: (i) procedural problems related to service of process, (ii) collection of fines, (iii) the exchange of information due to confidentiality laws, (iv) gathering of evidence, and (v) incentivise leniency program cooperation.

Regardless of the challenges that the effects theory may present, it is imperative to recognize that the SIC along with other jurisdictions and Competition Authorities in Latin America, have implemented an important number of Cooperation Agreements in diverse areas of antitrust enforcement, the most representative being the leniency programs.

[C] Investigations

Violation of competition law in Colombia is subject to administrative investigations aimed to protect the constitutional principle of free competition in favour 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 law 1340 is the appointment of the SIC as the National Competition Authority. Law 1340 grants the SIC the sole power to apply competition laws in all areas, including specialized sectors such as public utilities, banks and insurance, health, transportation, and ports, etc.

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

Pursuant of Chapter III of Law 1340, modified by Law 2195 of 2022 and Decree 4886 of 2011, modified by Decree 092 of 2022, the SIC has been given, among other functions, 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 and aeronautic sectors. In the first case, as described later in this chapter, the superintendence of banks is in charge of studying the transactions, whereas in the second case, the aeronautic authority—"Aerocivil", is in charge.
- 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 statute.

Pursuant to the issuance of Law 2195 of 2022 which made some modifications to the leniency program and the system of fines, on January 24, 2022, the government issued Decree 092, which represents the most recent reform in the structure and functions of the Competition Authority. In addition, the decree seeks to strengthen the application of the rules related to the competition, consumer, and data protection rules; and creates a new set of functions related to competition compliance.

Another important modification is that since January 1, 2022, the SIC will not be the superior of the chambers of commerce and therefore will not decide the appeals presented against their decisions. This modification is consistent with the provisions contained in Law 2068 of 2020, which awarded those functions to the superintendence of corporations.

In order to strengthen data protection, the decree created the *Office of Habeas Data* within the office of the superintendent delegate for data protection and modified the functions of the superintendent delegate in order to enhance the protection of personal data.

Some of the most significant functions of the *Office of Habeas Data* are, among others, the following:

– Ensure the processing of personal data.
– Manage the National Registry of Databases.
– Advance the inquiries, investigations, procedures, and administrative actions related to the violations of the data protection Laws.

The decree also reinforced competition protection and enforcement; but most importantly it made a big step in the implementation of the Competition Compliance Policy, by creating a *Compliance Office* as part of the office of the superintendent delegate for competition protection. Some of the most significant functions of the *Compliance Office* are, among others, the following:

– Follow-up on the obligations created to the investigated parties, of the guarantees (settlements) accepted by the superintendent of industry and commerce, for the anticipated termination of the administrative investigations initiated for the breach of the antitrust and unfair competition regulation.
– Monitoring of the conditions established by the superintendent of industry and commerce in the face of requests for consolidation, integration, merger, and obtaining control of supervised companies.
– Instruct the procedures on the breach of the obligations; (i) arising from the anticipated termination of investigations pursuant to the acceptance of guarantees (settlements), (ii) from reporting a business integration, and (iii) arising from the acceptance of a business integration under conditioning.
– Monitor the effective adoption of compliance programs.

[a] Policy, Politics, and Institutions

Like in most Latin American countries, in Colombia public enforcement of the Competition Laws is the general rule, which means that the main weight in the application of the law 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 respectively imposed.

The SIC has no capacity to order indemnification of damages to third persons affected by the anti-competitive behaviour. It is also important to convey that except for bid rigging in state contracts, the infringements of competition laws such as price fixing and quota arrangements are not considered criminal offenses, and that as an administrative authority the SIC has no jurisdiction over these crimes, which are investigated by the attorney general's office and decided by the criminal judges.

[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 of 2012 (Decree 019) and Law 1474, which *inter alia* have allowed the authority to marshal important resources for the application of Competition Laws. Since then, the SIC has been strengthened in aspects such as (i) bigger budget, (ii) more prepared personnel, (iii) increase in the capacity to impose bigger fines, (iv) internal structure, and others

While in 2009 the SIC had a budget of 16 million USD (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. Currently the budget assigned for the year 2021 is approximately 64 million USD (with 35 million destined to investment), which reflects the progressive increase in the economic capacity of the competition authority.

In 2006, the SIC had 390 public officials and by 2013 the entity was already 673 strong and remains to this date approximately in that range, but the difference is that apart from the almost 700 public officials the SIC hires nearly 2.000 independent contractors that help in the different areas of work. But even more significant is the increase in the fines: In 2010 the SIC imposed 13 million USD in fines and in 2013 the fines amounted to 108 million USD, while between 2018 and July 2021 the SIC has collected approximately 69 million USD. There is no doubt that thanks to its increased capacity and strength the SIC can face new challenges and protect competition in a more technical and effective way.

As said before, in the area of competition protection some of the most significant cases in the nineties were related to the agricultural sector (sugar, rice, chocolate,

onions, and milk) and to other key economic activities, such as cement, fuel and telecommunications.

Even though bid rigging agreements are forbidden since 1992 with the issuance of Decree 2153, and the SIC carried on investigations such as the one in Case 21822/2004, this conduct acquired its real importance with the introduction of the so called *Anti-Corruption Statute* (Law 1474), which makes bid rigging in public contracting both an anti-competitive agreement and a criminal offense.

As a result of the criminalization of bid rigging, the SIC was authorized to create the so called *Elite Anti-Collusion Group* with additional personnel and budget, that allowed it to investigate 358 cases in 2015 and 149 cases in 2016, which shows the importance that the SIC has given to the fight against collusion in public contracting.

The first time in which bid rigging was investigated and sanctioned both as an anti-competitive agreement and a criminal offense was in Case 12992/2019 related to the public contracts of the National Learning Service (SENA) in which the SIC conducted the administrative investigation and imposed sanctions of approximately 1.1 million USD; whereas the office of the attorney general conducted the criminal investigation as a result of which the instigator of the conduct was sentenced to forty-eight months in jail, and the other persons involved in the criminal conduct were sentenced to thirty-six months.

The SIC and the attorney general's office also conducted competition and criminal investigations related to the *Lava Jato* case in Colombia (Ruta del Sol II). It can be expected that in the following years the SIC will focus on bid rigging and in the competition cases related to the digital markets and digital platforms, especially since the SIC is the competition, consumer protection, and data protection authority.

[c] Inter-agency Cooperation (International)

As National Competition Authority, the SIC develops important interaction and cooperation with other competition authorities. A selection of those interactions is described here:

- Pursuant to Article 14 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. For the Commission to start an investigation, it is necessary that the conduct has 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 US. Pursuant to the FTA, each party agreed to maintain a competition law and as well as an authority to apply it, with the obligation to grant the accused persons due process, right of defence 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 to achieve an effective application of the competition laws.

- In September 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 Colombian Authority has been able to forge a strong enforcement relationship with the U.S. Antitrust Agencies 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 EU.
- 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 ninth meeting of the OECD-IDB Latin American Competition Forum in 2011 and was accepted in 2020 as member number 37 at the OECD, where the superintendent has a seat at the Competition Commission.
- The SIC also participates in the International Consumer Network—ICPEN, where Colombia has already occupied the presidency.
- Finally, Colombia is an active participant in the International Competition Network—ICN, with an active participation in several groups: currently as chair of the Competition Advocacy Group.

During the past decade, the SIC has celebrated an important number of cooperation agreements with other jurisdictions and competition authorities to strengthen the antitrust enforcement and free competition in the Colombian markets.

[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, in some cases, even years. During this period the file of the preliminary investigation is kept confidential. It is also important to keep in mind that during this stage neither there are investigated parties, nor are there any charges brought forward for the allegedly commission of any presumptive anti-competitive conduct or action.

If during the preliminary investigation, the Competition Authority finds compelling evidence that an anti-competitive infraction was committed, it will then initiate a formal investigation by means of a public resolution, directed towards specific persons and/or corporations. The formal investigation can last between twelve and twenty-four months (approximately), but there is no limit to the time it can last, other than the statute of limitations for imposing a fine, which is of five years from the date of the conduct or the last event of the conduct if it is continued in time.

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 to promote an agreement regarding the settlement of their private interests. If such settlement is achieved, then 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, because the continuation of the investigation disincentivize the investigated parties to reach a settlement. It is important to note that in this type of administrative investigation the SIC has no judicial powers to adjudicate damages to the victims of the anti-competitive conducts. The damages will have to be pursued using judicial or class actions before the judiciary.

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/her sole discretion, depending on their sufficiency to convince the superintendent of the compliance of the investigated companies with competition law. Since the introduction of the leniency program in Colombia, the SIC has accepted this kind of settlement in very few occasions.

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 imposing 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/her council, he/she will issue a final decision in the form of a resolution in which he/she will sanction or acquit the investigated persons.

Against this decision the parties can present a reconsideration plea, which should be decided in two months, unless new evidence is requested by the accused and ordered by the SIC. 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 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 twelve 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 to the natural persons involved.

One of the changes of Law 2195 of 2022 is the notorious increase in the capacity of the SIC to impose fines as we explain in this section. It is important to consider that previously, under Decree 2153, Article 4 (15) and Article (16) stipulated that the maximum fine could go up to 2,000 minimum monthly wages at the moment of the sanction (in 2022 approximately USD 507.356) to the companies and 300 minimum monthly wages (in 2022 approximately USD 76.103) for the natural persons involved; whereas, under law 1340 Articles 25 and 26, the SIC could impose to the companies up to 100,000 minimum monthly wages (in 2022 approximately 25.3 million USD) or up to 150% of the profits obtained with the anti-competitive conduct; and up to 2,000 minimum monthly wages (in 2022 approximately USD 507.356) to the natural persons involved. There is an important addition about the paragraph of article 26—Law 1340 which contained an express prohibition to the investigated companies to pay or ensure the fines imposed to the natural persons. This rule is maintained in the new law.

The original Article 25 of Law 1340 gave the SIC some criteria for the application of the fines to companies: (i) the impact that the conduct has on the market; (ii) the size of the affected market; (iii) the benefit obtained by the offender with the conduct; (iv) the degree of participation of the accused; (v) the procedural conduct of the investigated parties; (vi) the market share of the infringing undertaking, as well as the part of its assets and/or sales involved in the infringement; and (vii) the patrimony of the infringer.

With these criteria, in several cases the fine has been aggravated without exceeding the maximum legal limit.

The original Article 26 of Law 1340 gave the SIC some criteria for the application of the fines to natural persons: (i) persistence in the conduct, (ii) the impact that the conduct has on the market, (iii) reiteration of the prohibited conduct, (iv) the procedural conduct of the investigated parties, and (v) the degree of participation of the accused.

As explained before, recently Law 2195 of 2022 reformed the sanctions previously established first in Decree 2153 and then in Law 1340 of 2009, and specifically modified Articles 25 and 26 of Law 1340. In that regard, Article 67 of Law 2195 allows the SIC to apply to both natural and legal persons one of the following systems of fines, whichever yields the higher cap for the calculation of the sanction, pursuant to the applicable criteria specified in the law. So, for the violation of the competition laws, the SIC may impose the fine to the investigated parties, based on the following criteria:

- The operating income of the offender in the fiscal year immediately preceding that of the imposition of the fine. In this event, the fine may not exceed 20% of such income.
- The patrimony of the offender in the fiscal year immediately preceding the year in which the sanction is imposed. In this event, the penalty may not exceed 20% of the value of the patrimony of the offender.
- In those cases, in which the anti-competitive practice is related to a contract, the fine will be calculated in minimum legal monthly wages. In this event, the fine may not exceed 30% of the value of the contract.
- In those cases in which it is possible to quantify the profits that the offender derived from the conduct, the Superintendence of Industry and Commerce may impose as a penalty, up to 300% of the value of those profits, provided that this percentage is higher than the greater of the limits established in the criteria previously explained.

The graduation of the fine must always be made based on the following criteria as long as it is applicable: (i) The suitability of the conduct to affect the market or the affectation to it; (ii) The nature of the goods or services involved. (iii) The degree of participation of the person involved. (iv) The duration of the conduct. (v) The market participation of the infringer in the market in which he/she participates.

Once the criteria for the calculation of the fine has been chosen according to the previously established rules, and taking into account that the superintendence has to use the rules that allows for the highest penalty cap, the authority will apply the criteria for aggravation and mitigation of the fine in order to graduate the sanction to be applied to the instant case. Article 67 provides as grounds for aggravation of the sanctions the following hypotheses: (i) The infringer acted as leader, instigator or in any way promoter of the conduct. (ii) The continuation of the infringing conduct after the investigation has been initiated. (iii) The recidivism or existence of precedents in relation to infractions of the competition laws, or to the breach of commitments acquired with or of the orders issued by the Competition Authority. (iv) The procedural conduct of the infringer tending to obstruct or delay the procedure, including the presentation of applications that are obviously inappropriate.

For each of the aggravating circumstances previously described, the superintendent may increase the fine to be imposed up to 10%, without exceeding, in any case, the sanctioning limits provided for in the law and described above.

The superintendent may also reduce the applicable fine in case that the infringer accepts the charges presented to him/her in the opening resolution, provided however that the investigated person has not been recognized as a collaborator (or leniency applicant) within the leniency program, because in those cases the conditions and reductions of the leniency program are the ones that apply.

In addition to the sanctions applicable to the economic agents (whether they are legal entities or natural persons), Article 68 of Law 2195 modifies the sanctions applicable to the facilitators of the conduct. For that purpose, the law defines the "facilitators" as natural or legal persons that collaborate, authorize, promote, foster, execute, or tolerate anti-competitive conducts.

The superintendence may impose to the facilitators that incur in the above mentioned conducts in regard to anti-competitive practices, a fine of up to 2,000 minimum monthly wages (in 2022 approximately USD 507.356).

To determine the actual fine, the SIC must take into consideration the following criteria for its graduation: (i) the degree of involvement of the facilitator in the conduct of the market agent, (ii) the recidivism or existence of a precedent in regard to the violation of the competition laws or to the breach of commitments acquired with or orders issued by the Competition Authority, and (iii) the patrimony of the facilitator.

Without prejudice to the criteria for the application of the sanctions to be imposed to the facilitators and the criteria considered to graduate the fine, the law also provides aggravating circumstances. (i) Continue to facilitate the infringing conduct once the investigation has begun. (ii) The recidivism or existence of a precedent in regard to the violation of the competition laws or to the breach of commitments acquired with or orders issued by the Competition Authority. (iii) The procedural conduct of the facilitator tending to obstruct or delay the processing of the process, including the presentation of applications that are obviously inappropriate.

The impact on the fine for incurring in any of the grounds for aggravation will be up to 10% of the amount of the fine to be imposed, without exceeding in any case the sanctioning limits provided for in the law for each cause. The fine will be aggravated in this way for each cause of aggravation in which it is incurred.

As said before, there is an important addition in paragraph two of Article 68 of the new law, which contains an express prohibition to the investigated companies, their parent companies, their subsidiaries, or any corporation belonging to the same business group, to pay for or insure the fines imposed to the facilitators. Infringement of that prohibition in itself constitutes an anti-competitive practice.

It must be noted that the SIC can impose fines not only 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 (settlement) accepted for the anticipated termination of investigations or the conditions accepted for the approval of a merger transaction.

[2] Criminal Sanctions

Colombian Antitrust Law has no criminal liability tradition. Nevertheless, in 2011, Law 1474 (*Anticorruption Statute*) 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, that introduces Article 410A of the criminal code, expressly defines as a criminal offence anti-competitive agreement in the following terms: "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, being one of the challenges for antitrust legislation in this jurisdiction.

In addition, it also introduces a new incentive for the prosecution of bid rigging. The paragraph of Article 410A provides for leniency program collaborators a penalty adjustment that reduces their sentence in one third, exonerate them of a 40% fine product of the criminal investigation, and reduces their inability to subscribe state contracts from eight to five years. It is important to note that the introduction of the criminal sanctions, even with the mentioned reductions for the leniency applicant, act as a deterrent for the use of the leniency program, because it is not possible for the SIC to grant immunity to the first leniency applicant and the partial reductions that the *Anticorruption Statute* offer must be approved by the criminal authorities and not by the SIC.

In this regard it must also be mentioned that there are some other criminal offences in the criminal code that can indirectly protect Free Competition like: Article 304—Damage to raw materials, agricultural, or industrial products; Article 301—*"Agiotaje"*; and Article 298—Speculation.

[3] Private Actions and Follow-On Actions

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

Antitrust cases are generally dealt with in administrative proceedings initiated officiously by the authority. In most 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, it only means that there is less incentive to do so. The parties affected can either file a civil action to obtain the damages caused by the conduct, or if there is a specific group affected, a class action can be filed. The 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.

Currently, as a direct consequence of the prosecution of different cartels (cement, sugar, diapers, soft tissue, and notebooks, among others), some class and group actions that look to obtain damages caused by the conduct have been brought forward. Nevertheless, there has been no significant precedent that properly develops Private Antitrust Litigation.

[E] Leniency

The leniency program was introduced in Colombia by Article 14 of Law 1340,[4] which states that the SIC can grant benefits to the participants of a conduct that breached antitrust laws when they collaborate with the competition authority by facilitating information and evidence regarding the existence of an anti-competitive conduct and the identification of the other participants. The law provides the following rules for the operation of the leniency program: 1) neither the instigators nor the promoters of the conduct are eligible to apply for the benefits of the program, 2) The degree of the benefits may be the total or partial exoneration of the sanctions, depending on the usefulness and quality of the information and evidence provided by the collaborator, and 3) The 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.

Decree 253 of 2022[5] further regulates the leniency program as follows:

- The procedure for application to the benefits, including the order of precedence for the applications (*marker*); the maximum number of applications allowed; the opportunity to present the application referring to the stages of the investigation procedure in which an application can be validly presented; and the requirements of the application, among other things.
- The rules for signing a collaboration agreement with the authority.
- The rules for reduction of the fines, including the parameters for total and partial exoneration of the fine.
- The rules for the additional benefit that the collaborators may obtain.
- The rules of confidentiality of the program including the secrecy of the applicant's identity, and the term for the confidential treatment of the information and evidence that the applicant brings to the authority.

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. In Colombia, there have been some initial successful cases, but the leniency program also faces challenges as explained below. The Colombian leniency program does not offer monetary rewards to the leniency applicants like in other jurisdictions.

According to the reports published by the SIC, between 2009 and 2018, thirty-one applications for the program were received from which five investigations were initiated, and in three of these five investigations sanctions were imposed. Some of the most representative cases where leniency was crucial for the investigation are:

4. Article 14 of Law 1340 of 2009 was modified by Article 66 of Law 2195 of 2022.
5. Decree 253 of 2022 modified Decree 1523 of 2015 which previously modified Decree 1074 of 2015, which in turn derogated Decree 2896 of 2010.

Case 43218/2016. Diapers Cartel: In case 43218/2016 the SIC investigated and sanctioned the corporations; Kimberly, Tecnoquímicas, Productos Familia, Tecnosur, Drypers Andina, and the natural persons involved in the facts of the case, for the violation of the general prohibition, and for celebrating an anti-competitive agreement to fix prices.

During the preliminary investigation, Kimberly successfully collaborated with the antitrust agency and obtained total exoneration of the sanction, of approximately 23 million USD then for the corporation and approximately 80 thousand USD then for each Natural Person, for being the first application and successfully collaborating during the investigation. Productos Familia also collaborated with the SIC and obtained a reduction of 50% in the applicable fine.

For the other corporations and natural persons involved, the SIC imposed the maximum possible legal sanction.

The leniency application of Kimberly in the Diapers Cartel allowed the SIC to open another two investigations related to the same facts: the Soft Paper and Notebooks Cartel Investigations explained below.

Case 31739/2017. Soft Tissue Cartel: In case 31739 the SIC investigated Kimberly, Productos Familia, Papeles Nacionales, Cartones y Papeles del Risaralda, and Drypers Andina, for price fixing. Kimberly was the first collaborator, Productos Familia S.A. was the second, and Cartones y Papeles del Risaralda was the third collaborator. The SIC determined that the first and third collaborators met all requirements needed to obtain the leniency program benefits, nevertheless the second collaborator breached the leniency agreement and therefore did not receive its respective benefit.

Notebook Cartel Case 54403/2016: In case 54403 the SIC investigated Kimberly, Scribe, and Carvajal for price fixing. Kimberly and Scribe presented an application to the leniency program. Since Kimberly had sold its Notebook business to Scribe in 2011, they were both successfully admitted by the SIC as first collaborators due to the "predecessor—successor" doctrine, and therefore received the total exoneration of the fine.

Lava Jato Case—"Ruta del Sol II": In Case 82510 the SIC imposed sanctions of approximately 76 million USD to Odebrecht and its partners in the Ruta del Sol II project. During the course of the investigation Gabriel Ignacio García Morales, Vice Secretary of Transportation and Acting Director of INCO and INVIAS, collaborated with the authority, admitted to having received a USD 6.5 million dollars fine from Odebrecht and received the total exoneration of the fine, but had to face a prison sentence.

Some of the main challenges regarding leniency program incentive and applications are: (i) the confidentiality both of the identity of the leniency applicant and of the information contained in the leniency file, a problem that has been recently addressed by article 66 of law 2195 of 2022, which introduced two new paragraphs to Article 14 of law 1340 of 2009, strengthening the confidentiality rules of the leniency program and partially solving this challenge, although it is yet to be seen how it is implemented; (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 defence of the leniency applicant; (iv) the possibility of being labelled as the promoter or instigator of the anti-competitive agreements that would lead to losing the benefits; (v) the criminalization of competition law; and (vi) the supranational application of Andean Decision 608 of 2005, among others.

Finally, there are some anti-competitive conducts that may have consequences other than administrative fines. As mentioned earlier, 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, a circumstance that disincentivises applicants of collaborating with the competition authority due to the criminal liability that they might face.[6]

Recently, Article 14 of Law 1340 of 2009 underwent a major modification. Article 66 of Law 2195 of 2022 incorporated three paragraphs, two of them related to confidentiality rules in the leniency program, one of them related to the responsibility of the collaborator of a leniency program.

Regarding the rules of confidentiality, the first paragraph of Article 66 of the new Law 2195 of 2022 protects with confidentiality the identity of the collaborators or leniency applicants within a leniency program, as well as the evidence that they provide in the context of the investigation. In addition, the second paragraph of Article 66 protects with confidentiality the negotiations that may lead to the leniency agreement between the SIC and the leniency applicant.

Without prejudice to this new rule of confidentiality, law 1340 of 2009 and decree 1523 of 2015 (modified by decree 253 of 2022) already had rules related to the confidentiality of the identity of the whistleblower and confidentiality of the information provided by the whistleblower, as per Article 2.2.2.29.4.3. of Decree 1523 of 2015 the identity of the whistleblower is considered confidential. Likewise, Article 2.2.2.29.4.4. of Decree 1523 of 2015 provides that the leniency program application, negotiation, and files are separate from that of the investigation, and consequently all the evidence and information contained therein is reserved, a rule that agrees with the provision of the recent reform.

In addition to these two provisions on confidentiality, the third paragraph of Article 66 of the new law incorporates an exception to the regime of joint liability for damages caused by an anti-competitive agreement. Consistent with the measures that have been adopted in the EU to protect the leniency program and at the same time foster the indemnification of damages to the victims, the new Law 2195 of 2022 provides that the leniency applicant will only respond in proportion to its participation in the causation of damages to third parties by virtue of anti-competitive agreement.

Recently, the leniency program underwent a major modification: decree 253 of 2022 modified decree 1523 of 2015 which regulated the leniency program in Colombia. Its two main innovations where (i) modification of the leniency program criteria to

6. In addition, the Colombian Criminal Code includes other conducts such as "agiotaje", which makes it a criminal offense to alter prices of "first-necessity" products, raw materials, or services subject to public procurement. If a leniency applicant is hypothetically prosecuted for "agiotaje," then the leniency agreement would not give him or her protection against criminal liability.

graduate the benefits, which from now on will depend on the moment when the application is presented, and (ii) It limits the number of applications to three. Other reforms are:

- It specifies the definition of the instigator or promotor of the conduct, which is the person that forces others to participate in an anti-competitive conduct where two or more agents of the market participate in a joint way.
- It expands the definition of the facilitator of anti-competitive conducts to include those persons that promote or impulse the anti-competitive conduct.
- It eliminates the presumption that the applicant to the program is not the promotor or instigator of the anti-competitive conduct.
- It establishes to new conditions to grant the leniency program benefits: (i) it expressly forbids the authority to grant the benefits to the promoter or instigator of the anti-competitive conduct, and (ii) it forbids the authority to grant the benefits of the leniency program to more than three applicants.
- It modifies the application of the leniency benefits depending on whether the application was presented before or after a formal investigation was initiated: (i) If the application is presented before the authority has initiated a formal investigation the first applicant could be totally exonerated of the fine to be imposed, the second applicant can receive a partial exoneration between thirty and fifty percent of the fine to be imposed, and the third and last applicant may receive a partial exoneration of up to 25 percent of the fine to be imposed; (ii) If the application is presented after the authority has initiated a formal investigation, the first applicant could receive a partial exoneration of up to 30 percent of the fine to be imposed, the second applicant can receive a partial exoneration of up to 25 percent of the fine to be imposed, and the third and last applicant may receive a partial exoneration of up to 15 percent of the fine to be imposed.
- It also modifies the application of the additional benefits to the leniency program (*Leniency plus*) depending on whether the application was presented before or after a formal investigation was initiated: (i) If the application for the additional benefits is presented before the authority has initiated a formal investigation, the applicant can obtain an additional reduction of 20% of the fine to be imposed; (ii) If the application for the additional benefits is presented after the authority has initiated a formal investigation, the applicant can obtain an additional reduction of 10% of the fine to be imposed.
- It eliminates the presumption that that leniency program application meets all the legal requirements when the authority keeps silent within the next five days from the filing of the application.
- It modifies the treatment that the law gives to the evidence that the applicant provides to the authority as a result of its collaboration in case he/she desists of the leniency application or rejects the application. In this case once the decision to reject the application is notified, the authority can only incorporate into the investigation proceedings the evidence provided by the applicant with his/her irrevocable consent.

[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 within two months unless new evidence is requested by the investigated parties and ordered by the SIC. Once the superintendent decides this plea, the case is over before the administration. The decision is final and must therefore 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 to obtain its annulment and the indemnification of the damages produced by the decision to the accused. The judicial proceedings may last between 5 and 12 years. Meanwhile the decision from the SIC stands effective including the collection of the fine.

[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:

- Investigation against the rice mills for an agreement to fix the price of the green paddy rice (Case 22065/2005: Rice Mills).
- Investigation against the Chocolate companies for an agreement to fix the price of the cocoa beans (Case 52202/2009: Chocolate Manufacturers).
- Investigation against the sugar manufacturers for an agreement to fix the price of the sugar cane (Case 6839/2007 and 42411/2010: Sugar Cane Mills).

There have been important cases related to horizontal agreements in other sectors of the economy. Some of these cases are summarized below.

[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 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 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 1999. 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 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 based on 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 must be duly demonstrated and as per Article 45 (4) of Decree 2153, it is considered that a company enjoys a dominant position when it 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.

There are six types of behaviours that amount to dominance abuse set out in Article 50 of Decree 2153: (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 have been several investigations regarding predatory pricing and undue influences for purposes of price increases.

[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 is 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 more than 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, a conduct aimed at setting prices below costs and eliminating competitors or deterring other companies from accessing markets or expanding their operations. However only dominant undertakings are considered when assessing whether there is a violation of the legal rule contained in Article 50 (1) or not. As mentioned above, pursuant to Article 45 (5) of Decree 2153, a company has a dominant position when it can effectively affect directly or indirectly the conditions in a market.

An assessment of pricing versus total average costs (not variable costs) is made at the time of investigation (Case 30835/2004: Mushrooms[7]) but there is no legal requirement to do so. As to the "*intenti*" requirement to eliminate a market competitor or preventing market access or business expansion, the SIC has considered that the behaviour 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 behaviour 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 analysed 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 (using its judicial functions) or the civil circuit judge, would consider if such a conduct is against the principle of good faith and honest commerce practices, 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. The most important cases are Case 30835/2004: Mushrooms and Case 22624/2005: Adams Chewing Gum, explained below.

[2] Price Discrimination

The Constitution of Colombia sets the standard as to price discrimination and the constitutional court has considered 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 suppliers 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 to eliminate or reduce competition.

Article 50 (5) of Decree 2153 prohibits regional predatory pricing which would enable a dominant firm to conduct a predatory campaign by financing it with the 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

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

from mobiles to landlines). The mobile phone carriers offered guarantees (settlement) to the SIC, 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 conditions that are not part of the business transaction) is prohibited as agreement and as a unilateral conduct. When the conduct is investigated as an abuse of dominance it is only considered 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 conditions that are not 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 aluminium sulphide, PRODUCTOS QUÍMICOS PANAMERICANOS—PQP. PROQUIMHUL claimed that PQP caused the manufacturer of sulphuric acid, the main raw material to produce aluminium sulphide, to apply discriminatory conditions favouring PQP and putting PROQUIMHUL at a disadvantage in the market for aluminium sulphide 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 a demonstration of 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 analyse the conduct using an approach like 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 initials 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 a blocking conduct such as the one described immediately above against PYMEs.

Also, under Article 19 of Law 256 of 1996 (Law 256, Unfair Competition Law), manufacturers and distributors can be investigated because of exclusivity clauses agreed on between them which can be deemed in some cases as an unfair trade practice. In fact, entering exclusive dealing clauses in supply contracts to or with the effect of impeding access of competitors to the market or monopolizing distribution channels is considered an unfair competition conduct.

[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 to obtain its annulment and the indemnification of the damages produced by the decision to the accused; meanwhile the decision is effective.

The competition authority has no judicial power to order the indemnification of the damages caused by the anti-competitive conducts. The persons affected by said

conducts will have to seek indemnification before the civil judges using a civil action, a class action, or eventually an unfair competition action.

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 flavoured gum. The product—Chiclet's Adams was presented to the public with a price of USD 200. Upon the entry of Confiteca to the market featuring "Tumix" (also, mint flavoured gum) at a price of USD 100, Cadbury Adams responded with "Chiclet's 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 of tying that forced high-end bars and restaurants to exclusive advertise in favour 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 they did not include 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 2013. The Council of State determined that Induga had no dominant position based on a

relevant market analysis and 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 State 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 consider 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 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 Portability[8] (henceforward, MNP); this process allows users from different cellular companies to switch providers without changing their cell phone 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 two main conducts:

- *Locking cell phones that the company operated:*[9] According to the SIC, *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 case, it was considered that

8. Proceso de Portabilidad Numérica.
9. Bloqueo de las bandas de los teléfonos operados por Comcel.

locking the cell phones that the company operated had a great potential for affecting the market.

– *Bulging MNP results*:[10] According to the SIC, *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 number of transfers. The latter falsely affected the position of the company in the market, regarding users' decisions, especially because the results were broadly exposed. In addition, *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, approximately USD 40 million. *Comcel* has challenged the decision in the administrative jurisdiction.

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

The SIC 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 it 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 non-existent power of negotiation held by *EBSA's* competitors in that market. In addition, 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.

10. 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,[11] and Resolution 2751, 2021 (Resolution 2751)[12] 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.[13] 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).[14]

In August 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.

11. External Bulletin No. 10 from the SIC.
12. Resolution 2751 of 2021 replaced the previous regulation contained in Resolution 10930 of 2015.
13. Decree 663 of 1993.
14. Commerce Code, Article 1866.

[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 Colombia is free to appoint and remove the superintendent from office at his or her discretion.

Pursuant to Article 2 of Law 1340, the 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, are subject to merger control in Colombia.

The economic thresholds refer to combined local assets or local operational income equal to or more than 60,000 minimum monthly wages, approximately USD 13.7 million. However, if one or more undertakings have not established a local business in Colombia, the economic threshold calculation must consider the world-wide 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 (20%), 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 effect in Colombia.

It is possible that the authority does not agree with the relevant market presented by the merging parties or with their market participation, which entails a risk of *gun jumping* if the parties file a *short form notification* and proceed immediately to make the transaction effective. However, nowadays this risk is mitigated by the new regulation, according to which, the parties can present the *short form notification* and wait for ten days. If the SIC does not challenge the market participations presented by the parties below 20%, then they may proceed with certainty, provided of course that the information they have used is real.

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, then they must file a *long form information (waiting period)* and must wait until the transaction is cleared by the competition authority 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 2751 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 24 million for the company and USD 470,000 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 Law 1340 issued in 2009 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 centre, whatever the legal structure. SIC has not issued any 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.[15] 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.

The authority has also defined *"positive control"* as the possibility to take the decisions of the company and *"negative control"* as the possibility to veto the decisions of the company. It is important to report that the authority expects a company that has *"negative control"* to file for authorization if it attempts to acquire "*positive control*".

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

Also, the authority distinguishes between *"sole control"* acquired or exercised by one company, and *"joint control"* when it is acquired or exercised by two or more companies.

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 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.*

[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 is the so called *efficiency exception,* which refers to transactions that despite producing an undue restriction to competition generate efficiencies that exceed their negative impact on the market. Second, there is the so called *failing industry defence,* 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 may[16] recognize the so called *efficiency exception and* decide not to 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.[17]

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

16. The verb used in the rule is "may not" rather than "will not" object.
17. In this point, the rule resembles section 12 of the US Horizontal Guidelines imposing the "other means" requirement.

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 analyse 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 exception* are understood as "conditioned"[18] and therefore the SIC will review the actions undertaken by the merging parties and 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.[19] *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 problems like deficit of stevedores, lack of space, inefficiencies in handling reach-stackers, most of them due to the multiplicity of agents. To make the port efficient it was necessary that TECSA would take over most 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 Defence

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 defence is not expressly stated in the law, however the SIC has considered the experience of other jurisdictions to develop the exemption. It is important to note that the SIC will enhance scrutiny to determine whether this exemption applies to the 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 defence:

18. In US antitrust argot, the efficiency claim will be deemed as a conduct remedy that will be closely reviewed by the SIC.
19. Resolution 255 of January 14, 2010.

- 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 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 defence 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.

The *failing industry defence* has been successfully used a couple of times after the initial Case 13544/2006: *Argos-Andino,* in transactions related to the aeronautic industry: Case 30853/2015: Terpel-Quinter Rueda Family; Case 90622/2015: Terpel-Aviacom; and more recently case 9159: Aviatur-Chicó Tours.

[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, sensitive information, 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, then it may impose fines for breaching antitrust laws and can order the reversion of the merger transaction.[20] Failure to file is explained in further detail below.

[F] Closing the Transaction During the Waiting Period

Resolution 2751 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

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

the independence of the companies in Colombia. To accept a "*carve out*" for Colombia, intervening parties must present the following warranties:

- There will not 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 2751 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 analyse the provisions and decide whether they are proper to keep the businesses separated. If the SIC is not satisfied with the proposed provisions, then 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.

[G] Intra-group Transactions

Intra-group transactions are exempted from merger control in accordance with number 4 of Article 1 of Resolution 2751 issued by the SIC. There are two types of intra-group transactions that are 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.

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.[21] In that sense, even participation less than 50% of the shares may be deemed as control depending on the power to influence company's decisions (negative control).

[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 (Decree 1302), 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 Defence* if its thresholds are demonstrated as explained above.

21. *See* Article 27 Law 222, 1995.

If the merger transaction is not one of those that must 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 hypothetic monopolist test (*SSNIP Test*), 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* to define the relevant geographic market of the different supermarket chains within the large cities. The isochronal was rated at ten 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 such as HHI and CR4 to evaluate the effect of the merger. In markets that present a *leader—follower* structure, the SIC has also used the *Stackelberg Model* 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 behavioural remedies. Most likely, SIC will require divestment of part of the business.
- It is not very clear what 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 like those developed both in the EU and the US. 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 must 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 that under Law 1340, issued in 2009, SIC has the capacity to review vertical mergers. There is much debate about the possibility of the authority to review conglomerate mergers.

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

[I] Notification Procedure and Timetable

It is important to convey that pursuant to Law 2010, 2019 (Law 2010), the parties that present a merger to the Colombian Competition Authority must pay a fee that is proportional to the size of the companies and the transaction. As mentioned before, Colombian merger control requires the previously described *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 2751 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 even though *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 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 stages and goes like this:

Stage I:

- The petitioners file a pre-evaluation petition with a succinct description of the transaction and a demonstration of the payment of the fee.
- 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)[22] 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

22. 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.

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 2751. 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 assessing 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 unlikely given that there have been only a couple of such instances in the past thirty 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 23 million for the companies and 2,000 minimum monthly wages, the equivalent to USD 470,000 for the administrators or natural persons that carry out the transaction.[23]

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

23. Law 1340, 2009, Article 25.

is not a judicial authority. Such a declaration must 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, 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, labour, securities, and special-sector requirements that one must check about with local councils before entering a transaction.

[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 behavioural remedies.

SIC customarily requires that the parties comply with structural remedies within a certain time limit (generally, less than one year). Compliance with behavioural remedies is usually required for a limited period (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 such as the non-competition clause for a limited period.

[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 23 million for the companies and 2,000 minimum monthly wages, the equivalent to USD 470,000 for the administrators or natural persons that carry out the transaction.[24]

[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 plea must be filed within ten working days after notification of the decision. The superintendent must decide 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 twelve 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 are explained in the following lines:

[1] Aeronautic Industry

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

24. Law 1340, 2009, Article 25.

[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 is important to note that, Article 9 of Law 1340, 2009 provides that all 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.

In these cases, the SF must request an opinion from the SIC, and if there are conditions to the transaction, those conditions must be defined by SIC.