

The International Comparative Legal Guide to: Merger Control 2010

A practical insight to cross-border merger control issues



Published by Global Legal Group with contributions from:

Allende & Brea

Ashurst LLP

Attorney Office "Udova Oxana"

Benzakour Law Firm

Brasil, Pereira Neto, Galdino, Macedo Advogados

Bullard, Falla & Ezcurra Abogados

Davis Polk & Wardwell LLP

DLA Piper

ELIG, Attorneys-at-Law

Elvinger, Hoss & Prussen

Esguerra Barrera Arriaga Asesores Jurídicos

Estudio Bergstein

Gide Loyrette Nouel: Warsaw

Homburger

Hunton & Williams

Jones Day

Jonsson & Hall Law Firm

Kallel & Associates

Lang Michener LLP

Lee & Ko

Liedekerke Wolters Waelbroeck Kirkpatrick

Matheson Ormsby Prentice

Michael Shine, Tamir & Co.

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Nagashima Ohno & Tsunematsu

Nassar Abogados (Centro América) S.A.

Nielsen Nørager

Olivares & Cia., S.C.

Pirola Pennuto Zei & Associati

PRA Law Offices

Punuka Attorneys & Solicitors

Schoenherr

Setterwalls

SJ Berwin LLP

Tamme & Otsmann

Van Doorne

Vasil Kisić & Partners

Waselius & Wist

Webber Wentzel

White & Case LLP

Wiersholm, Mellbye & Bech, advokatfirma AS

Žurić i Partneri

Colombia

Alfonso Miranda Londoño



Andres Jaramillo Hoyos



Esguerra Barrera Arriaga Asesores Jurídicos

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

There has been an important change in Colombian Competition Law. On July 24th, 2009, Congress issued Law 1340. Article 6 establishes that the Superintendence of Industry and Commerce (hereinafter, the SIC) is now the National Competition Authority in Colombia and, therefore, the main merger control enforcer. However, pursuant to article 2 of Law 1340, the SIC is not competent to review mergers between: (i) Financial institutions; these operations are reviewed by the Superintendence of Finance with a previous opinion of SIC in regard to the correct remedies in order to preserve effective competition in the market. (ii) Conventions between “aircraft exploiters” (undertakings registered as owners of an aircraft in the Colombian Aeronautic Registry), that imply collaboration agreements, integration or joint exploitation, connection, services consolidation or fusion, use of aircrafts due to affreightment, exchange and blocking of space in aircrafts or that by any means tend to regularise or limit competition or air traffic. Such conventions will be reviewed by the Aeronautic Authority.

1.2 What is the merger legislation?

Merger control legislation in Colombia is set forth mainly in Law 155 of 1959, Decree 1302 of 1964, Decree 2153 of 1992 and Law 1340 of 2009. According to article 4 of Law 1340 these laws constitute the General Competition Protection Regime enforceable on every economic sector and economic activity. It must be noted that Law 1340, 2009 orders the SIC to issue merger guidelines. This should happen within the following months.

1.3 Is there any other relevant legislation for foreign mergers?

Colombia applies the effects theory, which means that the SIC will review transactions entered into abroad when they produce an effect in a Colombian market. Foreign mergers are subject to the same legislation as local or domestic mergers. According to the SIC’s doctrine foreign mergers require clearance in Colombia when both parties to the merger sell their products in the Colombian territory, directly or through another company.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There are special rules for certain sectors or activities, the latter

shall prevail exclusively on the specific topic. The following are sector-specific rules on merger review:

- Aeronautic sector: Code of Commerce, article 1866 and article 3.6.3.7.3 of the Colombian Aeronautic Regulation.
- Financial and insurance services: Decree 633 of 1993.
- Health services: Law 1122 of 2007, article 15.
- Domiciliary public services: Law 142 of 1992, articles 73.25 and 74.1.
- Television sector: Law 680 of 2001, article 2.

As previously mentioned, the SIC is the main merger enforcer. Only the Superintendence of Finance and the Aeronautic Authority apply the specific regulations in their respective sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of “control” defined?

Article 9 of Law 1340 of 2009 states that companies engaged in the same activity or involved in the same value chain that meet the threshold, must inform the SIC their projected operations for purposes of merger, consolidation, acquisition of control, or whatever the legal form the proposed transaction takes.

A transaction will amount to an economic integration if after the operation (whatever its legal structure) two or more undertakings that previously acted independently in the same market (horizontally or vertically defined), result under a sole decision centre or are controlled jointly.

Article 45, numeral 4, of the Decree 2153 of 1992 defines control as the possibility of influencing directly or indirectly a company’s business policy, the initiation or termination of the company’s activities, the variation of the activities to which the company is dedicated, or the use or disposal of the essential assets needed for the activities of the company.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

The acquisition of a minority shareholding could amount to an acquisition of control exceptionally in addition to other corporate related conditions. If control is acquired the transaction will be a merger, provided the other elements are present.

2.3 Are joint ventures subject to merger control?

Joint ventures are subject to merger control whenever the agreement has as an effect that the previously independent parties act as one economic agent under a common direction regarding commercial policies, the initiation or termination of activities, the variation of the activities, or the use or disposal of the essential assets needed for the activities of the companies.

2.4 What are the jurisdictional thresholds for application of merger control?

Pursuant to article 9 of Law 1340, 2009, the merger transactions that require previous authorisation from the SIC in Colombia, are those that meet the following cumulative requirements:

- (i) Are entered into by companies that are dedicated to the same activities, or participate in the same vertical value chain.
- (ii) Together or separately, made operational revenue or own assets in Colombia, in the year previous to the transaction, in an amount that meet the thresholds that the SIC has established. Currently the notification thresholds are defined in Resolution 22195, 2006, in an amount in monthly minimum wages, equivalent to USD \$27,000,000. It is expected that the SIC will increase the thresholds in order to review only the bigger operations.
- (iii) Have an individual or joint participation in the relevant market of 20% or more.

Mergers that do not meet the first two thresholds do not need to come before the authority or do anything in regard to the operation. If they meet the first two thresholds but not the third one, they need to notify the authority about the operation, but the merger is considered authorised and they do not need to wait for a response from the authority. If they meet all three thresholds, then they have to inform the transaction and wait for the authorisation of the SIC before the merger produces effects in the Colombian market.

2.5 Does merger control apply in the absence of a substantive overlap?

If an operation meets the thresholds, it is mandatory to submit a merger filing before the SIC. Again, if as a result of the transaction there is a market concentration of less than 20% (threshold number iii), the transaction shall be considered authorised. Still, interested companies must notify the SIC of the operation but do not need to wait for authorisation before it enters into effect.

2.6 In what circumstances is it likely that transactions between parties outside Colombia ("foreign to foreign" transactions) would be caught by your merger control legislation?

Transactions between parties outside the country must be informed to the competition authority when: i) the operation produces an effect in a Colombian market; ii) when it amounts to an economic integration; and iii) when the thresholds are met.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Article 9, paragraph 3, of Law 1340 of 2009, states that the merger operations in which the participants demonstrate that they are part of the same corporate group under the terms of Article 28 of Law

222 of 1995, whatever the legal form they take, are exempt from the mandatory previous notification obligation before the SIC.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Filing must be previous to the moment in which the operation has the effect of an economic integration. This happens when the undertakings start to respond to the same control or decision centre. This means that the operation must not have any effects in the Colombian market before it has been cleared by the SIC. Agreements may be executed, but they must declare that they will only be performed once the SIC grants clearance to the transaction.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

When a projected economic integration meets the thresholds, informing the authority is compulsory. There is no time limit for notification. The merger can be notified at any moment by the economic agents, provided that the submission takes place before the operation generates its effects in the Colombian market.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

As mentioned in the answer to question 2.7, Article 9, paragraph 3, of Law 1340, 2009, establishes that the merger operations, in which the participants demonstrate that they are part of the same corporate group, are exempt from the mandatory previous notification obligation before the SIC.

As mentioned in question 2.5, if as a result of the transaction there is a market concentration of less than 20% (threshold number iii), the transaction shall be considered authorised. Still, interested companies must notify the SIC of the operation but do not need to wait for authorisation before it enters into effect.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The breach of the duty to report a merger, under Article 4 of Law 155 of 1959, modified by article 9 of the new Law 1340, 2009, may result in a *gun jumping* investigation, sanctions and even in an order to reverse the operation that was not informed.

It is important to point out that Law 1340 of 2009 dramatically increased the fines for the infringement of competition laws to a maximum penalty of USD \$27 million or up to 150% of the revenues derived from the illegal conduct, whichever is bigger.

Under article 13 of Law 1340, 2009 the authority may also order the reversal of a merger in the following cases: (i) when it was not informed; (ii) when the transaction has been prohibited; and (iii) when there is a breach of the conditions under which the transaction was authorised.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

It is possible to include carve out provisions for Colombia in order to avoid delaying a global transaction. The carve out provisions must guarantee that the merger will produce no effect in the Colombian territory before obtaining clearance with the SIC.

3.5 At what stage in the transaction timetable can the notification be filed?

As explained in the answer to question 2.8, there is no time limit for filing the transaction with the SIC. However, when the thresholds are met, the companies must file and obtain the authorisation of the Authority, before the operation enters into effect.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Article 10 of Law 1340 of 2009 establishes the proceedings the authority must follow in merger control.

Once the petitioners file a pre-evaluation petition, together with a succinct description of the transaction, within the following 3 days, the SIC will evaluate if the transaction needs to be reviewed. In case it decides the transaction does not need review it will end the proceedings.

If the transaction needs review, within the 3-day period the SIC will order a publication in a newspaper of ample circulation, so that any interested parties can file the information they deem relevant for the analysis of the transaction.

The petitioners can request the SIC to abstain from the publication, for reasons of public order, and the SIC may accept the petition and keep the transaction and the procedure confidential.

The SIC has 30 working days to study the transaction and decide whether the transaction poses no risk to competition, in which case it will approve it; or if the review proceedings must continue to a second stage.

If the procedure continues into the second stage, the SIC will inform the regulation and the control agencies in the special sectors involved in the merger transaction. Those entities will have the opportunity to offer the SIC their technical advice in regard to the transaction under study, within 10 working days of the notification, and can also participate in the proceedings at any point. Their opinion is not binding for the SIC, but if the SIC is going to depart from that opinion, it must justify that decision.

Within 15 days of the continuation of the proceedings, the authorities and other interested parties must file with the SIC any information they deem relevant for the decision. They can also propose conditions and other measures that can help to mitigate the competitive effects of the transaction.

The SIC can request the authorities and interested parties to add, explain or clarify the information they have filed.

Within this 15-day period, the petitioners can know the information filed by the authorities and third parties, and contest it.

Within the 3 months following the date when the parties have filed all the information requested, the SIC will have to make one of three possible decisions: simple authorisation; conditioned authorisation (clearance with remedies); or objection.

According to Colombian Law, in case the SIC surpasses this 3-month deadline the transaction is considered automatically

approved (positive administrative silence) and the Authority loses competence over the case. However, it must be pointed out that there have been only a couple of such cases in 20 years, which means it is most unlikely to occur.

Any time within the proceedings, if the intervening companies remain inactive for two (2) months or more, the authority will consider that the petition for authorisation of the transaction has been desisted.

It is important to note that the SIC can abstain from considering the merger until the required information is complete, which is the main reason for the suspension of the terms.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Mergers carried out without previous clearance from the SIC are considered an infraction of antitrust laws and the companies and their managers are subject to fines. Fines are expressed in minimum monthly wages. The maximum fine that the SIC may enforce amounts to USD \$27,000,000 for the companies and USD \$460,000 for the managers. In addition to that, in case the 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 is important to point out that for merger purposes the SIC is not a judicial authority. Such a declaration has to be obtained through an ordinary process before the general jurisdiction.

3.8 Where notification is required, is there a prescribed format?

There is no prescribed format to request authorisation from the SIC. However, Decree 1302 of 1964, points out specific information that the merging parties must provide to the SIC. This list of information has been expanded and detailed by the SIC through its general or unified regulation (Circular Letter No. 10). It includes information concerning the transaction itself, the companies involved, market conditions, other competitors, consumers, barriers to entry, and other information that may aid the SIC to properly evaluate the effects of the transaction. It is important to note that the SIC can abstain from considering the merger until the information is complete. It must be noted that Law 1340, 2009 orders the SIC to issue merger guidelines. This should happen within the following months.

3.9 Is there a short form or accelerated procedure for any types of mergers?

No, there is no short form or accelerated procedure for any type of mergers.

3.10 Who is responsible for making the notification and are there any filing fees?

Both parties are responsible for making the notification and presenting all relevant information before the SIC. There are no filing fees.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

Pursuant to article 11 of Law 1340, 2009, the SIC must prohibit or object to mergers that tend to produce an undue restriction to competition. Since every merger restricts competition to a certain degree, the challenge is to find out which mergers will tend to produce an undue restriction to competition.

According to article 5 of Decree 1302, 1964, it is presumed that a merger will produce an undue restriction to competition in the following cases:

- When the transaction is preceded by anticompetitive practices between the merging parties.
- When the transaction will give the merged entity the power to impose “unfair prices”.

Furthermore, article 12 of Law 1340, 2009, and Decree 2153, 1992, establishes an efficiency exception according to which the SIC cannot object or prohibit those mergers in which the interested parties demonstrate with studies based in methodologies of recognised technical value, that the positive effects that the transaction will produce exceed the negative impact of the operation for the consumers, and that the positive effects cannot be achieved in any other way.

It is important to point out that to this date the SIC has never recognised or accepted that this exemption has been demonstrated in a merger.

It is also important to mention that the SIC has accepted and applied, in at least in two cases, the so-called “*failing industry defence*”. In those cases the SIC has authorised the mergers as a mechanism to save companies that were going bankrupt.

There is no explanation in the law of the reasoning and analysis that the SIC will use in merger cases, and the authority has not yet issued guidelines to that effect. However, it is possible to identify some general points in the analysis:

1. The SIC defines the general market based on the product market and the geographic market. The product market will be defined narrowly using the hypothetical monopolist test (SSNIP test), in order to isolate the group of products (goods or services) that behave as perfect or imperfect substitutes of the product affected from the merger.
2. The 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.
3. The SIC will calculate the participation of the merging companies in the relevant market and apply concentration indexes like HHI and CR4 in order to evaluate the effect of the merger.
4. The 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.
5. If the parties have proposed conditions to the transaction the SIC will evaluate them and discuss them with the merging parties. In some cases the SIC will modify substantially the conditions offered by the parties and in general will prefer structural to behavioral remedies. Most likely, the SIC will require divestment of part of the business.
6. It is not very clear what particular set of circumstances will

trigger an objection or a conditioned approval; but most likely it will be a negative mixture of the above elements.

7. This means that a merger that increases concentration in the relevant market to a high degree, with no perfect or even imperfect substitutes of the product, no potential competition in sight, high barriers to entry, scarce contestability and no possible structural remedies will probably be prohibited.
8. Having said that, it is important to note that in its whole history, the SIC has prohibited less than 1% of the informed mergers.

There is no doubt that during the past few years the SIC has gone a long way in the study and control of mergers, as recent cases indicate. However, there is a great deal of uncertainty as to what kind of analysis the SIC or any of the other authorities is going to apply in the review of mergers.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties have not been admitted to participate in merger review proceedings, therefore, they have not been allowed to review information revealed by the merging parties, they are not notified of the decisions and are unable to file a reconsideration plea. Although third parties may submit documents, the SIC is not compelled to take them into account. However, if considered necessary, the SIC may ask third parties to render testimony or to disclose information that might prove useful in order to review the transaction.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The SIC has been bestowed with ample powers to gather information regarding merger transactions. First, Decree 1302 of 1964, points out specific information that the merging parties must provide to the SIC. Additionally, article 10 of Law 1340 of 2009 establishes other sources, different from the parties, to obtain the information such as the technical concept emitted by the regulatory, surveillance and control agencies which belong to the jurisdiction related to the sector or sectors involved in the merger, which is not binding, as well as documentation and opinions provided by third parties.

The SIC may ask third parties to render testimony or to disclose information that might prove useful in order to review the transaction, as well as formal and informal information from other authorities.

The authority may also pay unannounced visits to the companies’ premises -dawn raids- in order to check their computers, documents and ledgers.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Article 19 of Law 57 of 1985 states as a general rule that the administrative investigations or disciplinary proceedings are not subject to reservation. However, the same disposition recognises that some documents must be reserved due to their nature. If that is the case, the secrecy applies only to the specific document and not to other parts of the respective record or business. Colombia, as a member of the Andean Community of Nations - CAN, is subject to the application of the Decision 486 of 2000, which establishes in its article 260 that commercially sensitive information are business secrets, hence the duty of reservation applies to them, as an exception to the general principle. In conclusion, commercially sensitive information that is submitted in the merger filing will be protected.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Merger analysis ends with one of the SIC's three possible decisions: simple authorisation; conditioned authorisation (clearance with remedies); or objection of the transaction. Transactions are objected when they tend to produce undue anticompetitive effects, as described previously. Authorisation, on the other hand, is given to transactions that do not threaten competition at all. Authorisation subject to conditions or remedies is awarded to those mergers that the SIC considers will produce anticompetitive effects to some extent, but believes competition conditions can be restored provided certain remedies are undertaken.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Pursuant to article 9 of Law 1340, 2009, remedies applied by the SIC to a merger transaction must identify and isolate or eliminate the anticompetitive effect that would be produced if the operation takes place and implement the structural remedies in respect to that integration.

5.3 At what stage in the process can the negotiation of remedies be commenced?

Law 1340 of 2009 opens the possibility for the parties to propose remedies to the transaction in order to get approval from the authority. There is no time limit in the law for the submission of the proposal and therefore the parties should present it before the final decision is made.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The SIC does not have a particular standard approach to the terms and conditions to be applied in case of divestment.

5.5 Can the parties complete the merger before the remedies have been complied with?

It depends on the conditions of the imposed remedies. Some require compliance before the merger takes effect and others may be completed after the merger is completed. So far structural remedies such as divestment have been required after the merger is completed.

5.6 How are any negotiated remedies enforced?

Once remedies are set, the SIC makes periodic controls to supervise remedy compliance. The controls vary for each remedy, but include in many cases periodic disclosure of information.

5.7 Will a clearance decision cover ancillary restrictions?

Even though the SIC has not given its opinion on this particular matter, a clearance decision may also cover ancillary restrictions.

5.8 Can a decision on merger clearance be appealed?

Decisions issued by superintendents, as is the case of the SIC, are not subject to appeal, but only to a reconsideration plea before the same public official. The final decision issued by the the SIC, can be challenged by means of a judicial action before the Administrative Jurisdiction.

5.9 Is there a time limit for enforcement of merger control legislation?

In application of article 27 of Law 1340 of 2009, merger control authorities are able to impose a sanction for violation of competition laws within a period of five (5) years counted from the moment at which the conduct took place.

6 Miscellaneous

6.1 To what extent does the merger authority in Colombia liaise with those in other jurisdictions?

The SIC has close ties with many competition authorities, especially in Latin America, Europe and the United States.

6.2 Please identify the date as at which your answers are up to date.

November 2009.

**Alfonso Miranda Londoño**

Esguerra Barrera Arriaga Asesores Jurídicos
Calle 72 No. 6-30 Piso 12
Bogotá D.C.
Colombia

Tel: +57 1 312 2900
Fax: +57 1 310 4715
Email: amiranda@esguerrabarrera.com
URL: www.esguerrabarrera.com

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

**Andrés Jaramillo Hoyos**

Esguerra Barrera Arriaga Asesores Jurídicos
Calle 72 No. 6-30 Piso 12
Bogotá D.C.
Colombia

Tel: +57 1 312 2900
Fax: +57 1 310 4715
Email: ajaramillo@esguerrabarrera.com
URL: www.esguerrabarrera.com

Andrés Jaramillo Hoyos graduated from Universidad Javeriana, later earning specialist degrees in Business Law at Universidad Externado de Colombia and in Administrative Law at Pontificia Universidad Javeriana. He has dedicated his practice to providing consulting in areas of business law and administrative contracts. He is also dedicated to litigation, mainly related to unfair competition, anti-competitive practices, mergers, commercial issues, government contracts and arbitration. He works closely with Alfonso Miranda in the Competition Law Practice at Esguerra Barrera Arriaga.

Esguerra Barrera Arriaga

Asesores Jurídicos

Esguerra, Barrera, Arriaga is the result of the integration of two prestigious and renowned law firms founded in 1977 and 1990. Its partners possess vast consulting, litigation and academic experience, and several of them have occupied high positions in the Colombian government.

The firm is both multidisciplinary and specialized, with proven ability to handle complex matters in a great number of areas, including competition, constitutional, administrative, civil, labour, commercial and financial law, and a long trajectory in national and international arbitration.

The firm's performance is in accordance with the strictest professional ethics, based in the professional experience and excellence of its members and the infrastructure and technological resources that allow it to provide legal services of great quality and reliability.

Esguerra, Barrera, Arriaga is prepared to meet clients' needs at national and international level, directly or through alliances developed with law firms in different parts of the world.