

Colombia

Esguerra Barrera Arriaga Miranda
Piquero González y Jaramillo S.A.

Alfonso Miranda Londoño



1 Relevant Authorities and Legislation

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

The general Competition Authority in Colombia, the Superintendence of Industry and Commerce (SIC), is also the main authority for merger control. The SIC is an administrative entity controlled by the government. The Superintendent can be freely appointed and removed from office by the President of Colombia.

SIC has been granted the power to review mergers in all sectors of the economy that are not subject to a specific authority. However, there are several exceptions to the general merger control exercised by SIC: mergers in the financial and insurance sector are reviewed by the Superintendence of Banks; mergers between television operators are reviewed by the National Television Commission - CNTV; and mergers between airlines are reviewed by the Aviation Authority.

It is important to point out that the Law has also given SIC other powers and responsibilities:

- It is the general and residual competition authority with powers to investigate and sanction anticompetitive practices in all sectors of the economy that are not subject to specific laws and authorities, as happens with banks, insurance companies, public utilities and airlines, which are subject to special competition rules and authorities.
- SIC applies consumer protection law, an area in which it exercises administrative and jurisdictional powers, that allow it to impose sanctions for violation of the law and provide for indemnification of damages to consumers.
- SIC is the trademark and patent authority. It maintains the industrial property registry.
- In 1998 SIC was given administrative and judicial functions to decide unfair trade cases.

1.2 What is the merger legislation?

The general merger control legislation in Colombia is set forth mainly in Law 155, 1959, Decree 1302, 1964, Decree 2153, 1992 and Circular No. 10 of the Superintendence of Industry and Commerce. Merger regulation for specific sectors is contained in other statutes, as described in the answer to question 1.4 of this document.

1.3 Is there any other relevant legislation for foreign mergers?

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

According to the former doctrine of SIC, clearance was not necessary for foreign mergers when the products of one or both of the merging parties were sold in Colombia by independent companies that assumed the risk and took the decisions associated to the import and sale of the products. Nevertheless, after the SABMiller - Bavaria merger, this doctrine can be considered overruled. In this case SIC requested an antitrust filing, even though the products and brands of SABMiller were sold by independent importers and not under the control of the company.

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

Mergers in the financial and insurance sector are governed by the Organic Statute for the Financial System (Decree 663, 1993). 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. Mergers between television operators are governed by Law 182, 1995.

2 Transactions Caught by Merger Control Legislation

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

According to Law 155, 1959, all transactions that consist of acquisitions, mergers, consolidations or integrations (whatever the legal form of the transaction) between companies dedicated to the same activities, which assets individually or jointly meet merger control thresholds as explained below, require authorisation from SIC. Recently, SIC has interpreted broadly the requirement that the

companies are dedicated to the same activities, and has therefore concluded that merger control also refers to vertical transactions.

The interpretation of SIC is that a transaction amounts to an entrepreneurial concentration that needs authorisation from the competition authority, when the companies involved (two or more) cease to participate independently in the market and are therefore permanently controlled by the same management or decision center, whatever the legal structure designed for that purpose.

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 in a broader way to undertakings. According to the broader definition, control is the possibility of influencing directly or indirectly the business policy of a company or undertaking, the initiation or termination of the activities of the company, 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.

The definition of corporate control includes both internal and external control. Pursuant to article 261 of the Code of Commerce, internal control shall be considered to exist 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. 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.

2.2 Are joint ventures subject to merger control?

SIC has not issued any particular doctrine on the subject; however, as pointed out above, the interpretation of SIC is that there is an entrepreneurial concentration when control over two companies or undertakings that were participating independently in the market is acquired permanently by the same management or decision center, whatever the legal structure designed for that purpose. In this sense, only joint ventures that create a sort of permanent undertaking should be subject to merger control.

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

According to Law 155, 1959, all merger transactions between companies that together or separately own assets worth more than USD\$8,700 require authorisation from SIC. Certainly, this threshold would be nowadays inapplicable, since this would mean that almost all transactions should have to request clearance.

Considering such problem, SIC decided to establish a general authorisation system and a particular authorisation system. Merger transactions in which the companies' last year sales or assets combined are worth less than USD\$17,500,000, fall into the General Authorization System and are not required to file for clearance before SIC. They are considered as generally authorised, and only need to leave a note in the minutes of their board of directors stating that the transaction falls within the General Authorization System.

Transactions that surpass the abovementioned threshold, on the other hand, are subject to the Particular Authorization System, which means that the companies must request clearance from SIC and obtain it before the merger produces effects in the Colombian market.

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

As described before, merger control applies to transactions between companies dedicated to the same activities. SIC has construed this requirement in a broad way in order to request review of both horizontal and vertical transactions. However, it is considered that the companies should participate in the same general market or industry, even if they are not direct competitors but operate in different levels of the production-distribution-commercialisation chain.

This means that merger control does not apply to mergers where there is no overlap. Such transactions are considered as conglomerate mergers and do not raise competition concerns.

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

As explained in the answer to question 1.3, foreign transactions are only caught by Colombian merger control regulation when they have effects in the Colombian territory.

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

According to Resolution 2.2195, 2006, merger transactions that take place within a corporate group must not be notified to SIC, since they do not have as a consequence increased market concentration.

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?

Transactions where thresholds are met must be notified to SIC **before** they produce effects in the Colombian market. Although agreements and other documents may be signed, the deal itself may not be carried out until SIC has granted clearance.

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

Clearance is not required when the transaction is carried out between companies that belong to the same corporate group.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

Integrations carried out without previous clearance from SIC are considered an infraction of antitrust laws and the companies and their administrators are subject to fines. The maximum fine that SIC may enforce amounts to USD\$250,000.00 for the companies and USD\$40,000.00 for the administrators. 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 is important to point out that SIC is not a judicial authority. Such a declaration has to be obtained through an ordinary process before the general jurisdiction.

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

SIC's jurisdiction is limited to the Colombian territory. So far, the entity has never claimed to have jurisdiction regarding the effects that an international transaction might have outside Colombian jurisdiction. However, SIC will certainly endeavour to impede any effects that an unauthorised transaction might have within the country. It is therefore important, that the foreign merger has no effect in the Colombian territory until it has been approved by SIC. There is not yet a clear doctrine in regards to the closing of the foreign transaction before obtaining clearance with SIC, with a carve out provision for Colombia. However, it is advisable to have such a clause and any other elements that help to assure SIC that the transaction will not have effects in Colombia before it has been cleared by SIC.

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

Colombian merger control requires **previous** notification of merger operations. This means that the operation **must not enter into effect in Colombia**, before it has been cleared by the SIC. Agreements may be executed, but they must declare that they will only be performed if SIC grants clearance to the transaction.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

SIC has 30 working days (45 calendar days in most cases) to study the transaction and take one of three possible decisions: simple authorisation; conditioned authorisation (clearance with remedies); or objection. According to Colombian Law, in case SIC surpasses this 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 has been only one such case in 20 years, which means it is most unlikely to occur.

However, this time limit may be interrupted in case SIC issues a Request for Additional Information (RAI). In that case, the 30-day review period will only start to run once the

requested information is filed by the companies. It is important to point out that if the RAI is not answered by the parties within the following 2 months, SIC will consider the companies have desisted of the authorisation request. It must be taken into account that in complex transactions SIC customarily issues these kinds of requests.

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

As stated above, it is mandatory for merging parties to request authorisation (when required) and obtain authorisation or clearance from the Authority, before the merger operation produces its effects in the Colombian market. This means that it is possible to negotiate and sign the contracts and documents that carry out the transaction, if such documents and contracts include as a condition precedent to their effectiveness, the antitrust clearance. There is no compulsory waiting period.

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

There is not a prescribed format to request authorisation from SIC. However, Decree 1302, 1964 points out specific information that the merging parties must provide to SIC. This list of information has been expanded and detailed by SIC through its general or unified regulation (Circular Letter No. 10). It is important to note that SIC can abstain from considering the merger until the information is complete. The list includes information concerning the transaction itself, the companies involved, market conditions, other competitors, consumers, barriers to entry, and other information that may aid SIC to properly evaluate the effects of the transaction.

3.9 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 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 Paragraph 1 of article 4 of Law 155, 1959, SIC must prohibit or object to mergers that tend to produce an undue restriction to competition. Since every merger restricts competition in some way, 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".

Apart from that it should be considered that according to article 51 of Decree 2153, 1992, SIC cannot object or prohibit those mergers in which the interested parties demonstrate to the authority that the operation will produce substantive efficiencies that will be translated into reduced costs that cannot be achieved by other means, and that there will not be a reduction in supply. This is called the efficiency exemption and is designed to justify authorisation of mergers that create a great concentration of the market but create efficiencies that will be shared with the consumers. It is important to point out that to this date SIC has never recognised or accepted that this exemption has been demonstrated in a merger.

It is also important to mention that SIC has accepted and applied, in at least in two cases, the so-called "*failing industry defence*". In those cases 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 SIC will use in merger cases, and the authority has not issued guidelines to that effect. However, it is possible to identify some general points in the analysis:

- SIC defines the general market based in the product market and the geographic market. The product market will be defined narrowly using the hypothetical monopolist test, 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.
- 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.
- 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.
- 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 prior divestment of part of the business.
- In definite 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.
- 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.
- Having said that, it is important to note that in its

whole history, SIC has prohibited less than 1% of the informed mergers.

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

There is no doubt that during the past few years 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 SIC or any of the other authorities is going to apply in the review of mergers.

The truth is that the legal statutes are very general and old, and the authority has not provided so far guidelines or instructions that can help companies to foresee its opinion about a particular merger.

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 the merger review process, that is, they are not 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 could present documents or express their opinions, SIC is not compelled to take them into account.

However, if considered necessary, 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?

SIC has been bestowed with ample powers to gather information regarding merger transactions. The entity has the power to request the parties for all the information they have in their files in regard to the transaction and the market, and can force disclosure. SIC may also ask third parties to render testimony, deliver documents and submit the studies available in regard to the transaction. The Authority may also, at any time, visit the companies' premises and check their documents and ledgers. ("Administrative Visit").

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

Pursuant to paragraph 3 of article 4, of Law 155, 1959, all the information included in the antitrust filing by the parties is strictly confidential. The public official who discloses any information regarding the procedure, shall be removed from office and criminally prosecuted.

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

5.1 How does the regulatory process end?

Merger analysis ends with one of three possible decisions: plain authorisation; authorisation subject to conditions or remedies; and objection or prohibition 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. An authorisation subject to conditions or remedies is given to those mergers that SIC considers will produce anticompetitive effects to some extent, but believes competition conditions can be restored provided certain remedies are undertaken. As said before, SIC will nowadays prefer structural to behavioural remedies.

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

It is important for the merging companies to identify early in the review process if the transaction should be subject to remedies in order to offer them, 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 authorise the merger provided certain remedies are undertaken.

Such conditions or remedies 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 proven to prefer structural remedies, such as divestments, over conduct or behavioural remedies.

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

There is no clear doctrine in this subject. SIC has indicated informally, that conditions or remedies should be proposed by the merging parties together with the initial filing. However, in practice, conditions have been proposed and negotiated at various moments during the merger review process. It seems also that conditions or remedies have to be proposed or offered by the merging parties. In some cases SIC has negotiated the conditions and has finally imposed remedies that are different from those initially presented by the merging parties.

5.4 How are any negotiated remedies enforced?

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

5.5 Will a clearance decision cover ancillary restrictions?

Even though SIC has not given his opinion on this particular matter, it could be considered that reasonable ancillary restrictions may be permitted by the merger control authority.

5.6 Can a decision on merger clearance be appealed?

Decisions issued by superintendents, as is the case of the Superintendent of Industry and Commerce, are not subject to appeal, but only to a reconsideration plea before the same public official. The reconsideration plea has to be filed within five (5) working days after notification of the decision, and the Superintendent has to decide it within the following two (2) months, but this period can be extended because of the need to gather additional evidence.

The final decision issued by the SIC, can be challenged by means of a judicial action before the Administrative Jurisdiction. However this alternative is not very attractive to the parties, because of the length of the procedure (5 to 8 years).

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

Merger control authorities have a 3-year statute of limitations to investigate and penalise unauthorised transactions.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

Although there aren't any formal agreements on the matter, SIC does contact other national and international authorities on several academic topics. However, practical issues, such as specific mergers, are not usually consulted with other entities.

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

October 2006.

**Alfonso Miranda Londoño**

Esguerra, Barrera, Arriaga, Miranda, Piquero,
González y Jaramillo S.A.
Calle 72 No. 6-30 Piso 12
Bogotá
Colombia

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

Alfonso Miranda Londoño is an attorney and specialist in socioeconomic sciences of the Pontificia Universidad Javeriana (1985), and specialist in Banking Law from Los Andes University (1986). Recipient of the Fullbright Scholarship (1986 - 1987). Obtained an LL.M. degree from Cornell Law School (1987). Professor of Competition Law at different undergraduate and graduate programmes. Currently Director of the Law and Economics Department at the Javeriana University Law School in Bogotá and Director of the Competition Law Study Centre - CEDEC. Alfonso Miranda Londoño is a partner of the firm Esguerra, Barrera, Arriaga, Miranda, Piquero, González y Jaramillo. Director of the Section on Competition Law. Also part of the Section on Mergers and Acquisitions.

Esguerra Barrera Arriaga Miranda Piquero González y Jaramillo

Asesores Jurídicos

Esguerra, Barrera, Arriaga, Miranda, Piquero, González y Jaramillo S.A. is a highly qualified firm due to the experience of its partners and their ability to deal with complex issues involving numerous Areas of Practice. The firm works within the most strict ethics parameters and the highest professional standards. It possesses the experience, structure and technology needed to provide reliable and qualified legal counsel. Thanks to the alliances it has developed with law firms in other parts of the world, the firm is prepared to offer its services on international affairs.

Fields of practice: Constitutional Law, Administrative Law, Government Contracts, Litigation and Arbitration, Labour and Employment Law, Antitrust Law, Mergers & Acquisitions, Project Finance, Entertainment Law, Banking and Securities Law, Corporate Law, Communications, International Trade, Insurance Law, Tort Law.