

Recent developments and prospective changes in Colombian competition law

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There have been Competition Laws in Colombia since 1959. However, like in most Latin American countries, these laws were not applied initially, mainly due to the economic protectionist model, which did not favour a competition environment.

At the beginning of the 1990s, Colombia issued a new Constitution (which included a Free Competition Principle) changed its development model, and like most countries in the region, started to open its markets to foreign competition. The free trade development model required of the application of new competition laws, which were issued and have been applied ever since.

Currently Competition Law in Colombia includes: 1) prohibition of anti-competitive practices; 2) merger control; 3) prohibition of unfair trade practices; and 4) consumer protection. Unfortunately these laws and regulations are not applied by one competition authority, which leads to uncertainty and lack of uniformity.

There is a General Competition Authority, the Superintendence of Industry and Commerce (SIC), which applies the general Competition Laws to companies or cases that are not subject to a Special Competition Regime and authority. SIC applies an administrative procedure to investigate anti-competitive practices, consumer protection cases and to perform merger control. Even though it is an administrative authority, in 1998 SIC was also granted judicial functions to act as a judge in unfair competition cases.

There are also several Special Competition Regimes applied by specialised authorities: 1) The Financial Superintendence; 2) The Superintendence of Public Utilities; 3) The Aeronautic Authority; 4) The National Television Commission; and 5) The Superintendence of Ports and Transportation.

Recent developments in merger review

Despite the existence of many competition authorities and regimes, it must be recognised that so far it has been the General and Residual Competition Authority – SIC, who has produced the main developments in Colombian Competition Law.

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

In the past few years SIC had intense activity in all fronts, but the most notorious cases have been related to mergers and anticompetitive practices.

Among many other transactions SIC cleared several big acquisitions. Some of the more recent important mergers are: The sale of the sole beer manufacturer – ‘Bavaria’, to SabMiller; the sale of the national telecommunications company – ‘Telecom’, to the Spanish operator – ‘Telefonica’; the sale of the supermarket chain – ‘Carulla’, to the French controlled chain – ‘Éxito’; the sale of the main national newspaper ‘El Tiempo’, to the Spanish ‘Planeta Group’; the sale of the national steel producer – ‘Acerías Paz del Río’, to the Brazilian conglomerate ‘Grupo Votorantim’; the sale of the only PVC resin producer – ‘Petco’ to the Mexican manufacturer – ‘Mexichem’, and the subsequent sale of the main PVC tube manufacturer – ‘Amanco’, also to ‘Mexichem’; etc.

However, not all the important transactions were cleared. SIC objected to the Procter & Gamble – Colgate transaction related mainly to the Fab brand; the Postobón – Quaker transaction related to the Gatorade brand; the sale of a concrete company to the cement manufacturer ‘Argos’; and the international transaction BOC – Linde. In all of these cases the main debate between SIC and the petitioners were related to the definition of the relevant market.

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

- In August 2006, SIC issued a new merger

regulation that raised the thresholds for notification of mergers. It is now mandatory to inform those operations in which the value of the assets or sales of the merging companies in Colombia (individually or jointly considered) are equal or superior to US\$20m. The application of these thresholds has reduced the number of informed transactions in 40%.

- Since the Pavco – Ralco transaction SIC started to impose structural as well as behavioural conditions in order to subdue restrictions on competition and authorise complex concentration operations. Structural conditions require divestiture of brands, installed capacity, etc. Behavioural conditions, on the other hand, require the elimination of exclusivity, etc. Nowadays SIC applies all kinds of conditions but prefers the structural ones.
- The ‘Cementos Andino’ – ‘Cementos Argos’ transaction was authorised by SIC based in the ‘Failing Industry Doctrine’. Even though this kind of defense had been considered before, it was only until the cement merger that SIC laid down the characteristics and requisites for application of the ‘Failing Industry Doctrine’.
- SIC developed a doctrine for review of vertical concentrations. It also concluded that operations such as the sale of a brand or the creation of a new company by two previous competitors amount to an economic concentration that needs authorisation from SIC.
- During the past two years SIC has claimed jurisdiction over mergers between public utilities companies. It has also disputed the review of mergers between Cable TV companies.

Recent developments in anti-competitive practices

SIC has also issued important decisions in the front of anti-competitive practices. In some important cases like the investigations against the cement industry, the supermarket chains and the credit card networks SIC accepted a settlement and moved to the anticipated termination of the investigations.

But not all investigations have ended in settlement. SIC imposed the maximum fine to the rice grinders, who were found guilty of establishing a cartel in order to buy rice at low cost to the farmers. The highest possible fine was also imposed to Cadbury Adams for predatory pricing.

In two opportunities SIC has declared that the investigated parties that entered into a settlement with the authority were in default of their compromises and tried to collect on the insurance bonds they put up as guarantee of the fulfilment of their obligations. These decisions have raised doubts

in regard to the respect of the defense and due process rights of the investigated companies. The decisions have been brought to the administrative jurisdiction, which will finally decide on the legality of the procedures.

SIC has recently launched important investigations for alleged anti-competitive conduct in agricultural industries. So far SIC has initiated investigations against the industrials for supposed price fixing agreements in the purchase of crops like rice, sugar cane and cacao. The investigations are under way.

In all recent investigations economic analysis has become a key point both for the authority and the investigated companies, who are now introducing economic evidence in the form of technical studies and expert witnesses in order to prove their respective positions. This will certainly result in better and more sophisticated decisions that will take Colombian Competition Law to the next level.

Prospective changes

Congress has announced again the study of a reform to Competition Laws. If approved, the project will introduce the following important changes:

- It will grant SIC, the sole power to apply Competition Laws, including specialised sectors such as Public Utilities, Banks and Insurance, Transportation and Ports, etc.
- It will increase the fines that SIC can impose to companies that breach Competition Laws. Currently the fines can go up to US\$30m for the companies and US\$45,000 for the administrators. According to the law project, the sanction for the companies could go up to US\$300,000.
- It will expand from three to six years the statute of limitations for antitrust investigations. This will allow SIC to investigate antitrust practices performed during larger periods of time, without the danger of caducity.
- It will set a time limit to preliminary investigations which actually can run for years without being closed or formally opened.
- It will require that in case the investigated party decides to offer SIC a settlement, it will only have the opportunity to propose it during the first stages of the procedure, so that SIC does not have to go through the whole process only to have to analyse a settlement proposition at the end.
- It grants SIC judicial functions for the indemnification of damages caused to private parties by the anti-competitive practices.

The described changes will foster the increasingly active role that Competition Law has nowadays in Colombian economy.

It would be also desirable that the new law would

consider the inclusion of a leniency programme, which would help SIC in its fight against hard core cartels and other anti-competitive practices.

Notes:

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